UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMMON CAUSE FLORIDA, et al.,

Plaintiffs, and

MICHAEL ARTEAGA, LENI FERNANDEZ, ANDREA HERSHORIN, JEAN ROBERT LOUIS, MELVA BENTLEY ROSS, DENNY TRONCOSO, BRANDON NELSON, GERALDINE WARE, and NINA WOLFSON,

Intervenor-Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State,

Defendant.

Case No. 4:22-cv-00109-AW-MAF

INTERVENOR-PLAINTIFFS' OPPOSITION TO DEFENDANT SECRETARY'S LEE'S MOTION TO STAY

Intervenor-Plaintiffs Michael Arteaga, Leni Fernandez, Andrea Hershorin, Jean Robert Louis, Melva Bentley Ross, Denny Troncoso, Brandon Nelson, Geraldine Ware, and Nina Wolfson ("Arteaga Intervenors") file this opposition to the Defendant Secretary Lee's ("Secretary") Motion to Stay these proceedings (ECF No. 62).

INTRODUCTION

As of this filing, Florida is one of only three states in the country without a congressional redistricting plan in place. Nevertheless, the Secretary asks this Court to wait three weeks before taking any action to see whether the Legislature and Governor DeSantis ("Governor") can compromise on a redistricting plan. Should the special session fail to produce a congressional plan, the Secretary further asks this Court to wait several more weeks before taking action to see if a state court can timely remedy the impasse.

The Secretary's proposal is untenable. Were this Court to wait to move forward until both the political branches *and* state court system had failed to implement new constitutional maps in time for the 2022 elections, there is a good chance there would not be time for this Court to undertake the complicated work of crafting the necessary remedy without moving election deadlines. While the Secretary appears willing to take that risk, this Court should not. The citizens of Florida should not be subjected to such a gamble.

Ample precedent supports this Court asserting jurisdiction and proceeding with this case while the state continues to attempt to resolve the impasse itself. While *Growe v. Emison*, 507 U.S. 25 (1993), instructs that federal courts should give states the opportunity to timely redistrict, *Growe* and other federal precedent hold that this Court may establish a deadline by which it will adopt a plan if the state has not acted.

And because election dates are fast approaching, the path that will best protect the rights of Florida voters is to implement a scheduling order, hear from the parties on proposed remedial plans, and prepare to adopt a congressional plan should the state fail to do so.

BACKGROUND

I. Status of Congressional Impasse

Approximately three weeks ago, at the commencement of this action, the Plaintiffs and the Arteaga Intervenors alleged that the Florida Legislature and Governor were likely to reach an impasse over congressional redistricting. *See* ECF No. 1, 10-1. After that filing, the Legislature waited several weeks to send its congressional plan to the Governor for his signature. When the plan did finally reach the Governor, he vetoed it within hours, announcing at a press conference that he believed the plan to be unconstitutional for its inclusion of a Black opportunity district in North Florida.[1] While a special legislative session is scheduled for April 19-22, that provides little assurance that a map will be adopted. Indeed, throughout the first session, Florida's legislative leaders explicitly rejected the Governor's proposed map, as the two political branches failed to reach agreement upon the

[1] *See* PBS, *Florida Gov. DeSantis vetoes Republican-drawn congressional maps* (Mar. 29, 2022), available at: https://www.pbs.org/newshour/politics/florida-gov-desantis-vetoes-republican-drawn-congressional-maps.

inclusion of a Black opportunity district in North Florida.[2] The Arteaga Intervenors are aware of no public statements by Florida's legislative leaders indicating that they intend to ignore the requirements of the Florida Constitution's Fair District Amendments in the special session, as the Governor's preferred map would require.

II. Status of State Court Action

The Arteaga Intervenors filed their state court complaint on March 11, 2022. Counsel for the Secretary and Attorney General Moody refused to accept service. On April 1, three weeks after the case was filed, and shortly after the parties conducted their meet-and-confer in this case, counsel for the Secretary appeared and answered the complaint. In her Answer, the Secretary asserted it would be improper for the state court to take any action unless and until the special session fails to produce a map. **Ex. 1** (Secretary's Answer).

As of this filing, counsel for Attorney General Moody still has not appeared, still has not answered the complaint, and still has not indicated whether she will answer before the date she is required to do so, which is April 20, 2022. There is no case schedule in place, and there has not yet been a case management conference. The first such conference is scheduled for Tuesday, April 12.

[2] *See, e.g.*, Memo from Chair Rodrigues Regarding an Update on State Legislative and Congressional Redistricting (Feb. 28, 2022) (explaining the importance of ensuring "non-diminishment in the ability of racial and language minorities in that district to elect representatives of their choice"), available at: https://www.floridaredistricting.gov/pages/senate-committee.

III. Congressional Primary Deadlines

Florida's congressional primary is August 23, 2022. Federal law requires states to mail military and overseas ballots 45 days in advance of an election, *see* 52 U.S.C. § 20302 (8), which means that primary ballots must be sent to those voters no later than July 9, 2022. Before ballots can be mailed, they must also be printed and assembled to be sent to the correct voter, and election officials must engage in geocoding to assign voters to the correct districts.

Aspiring congressional candidates in Florida may qualify for the ballot either by filing a minimum number of petition signatures or by paying a filing fee. The deadline to file petitions is May 16, 2022. *See* Fla. Stat. § 99.095. In an apportionment year, such as this one, a candidate can collect signatures from voters residing anywhere in the state. *See* **Ex. 2** at 4 (Florida Candidate Petition Handbook). In an apportionment year, the window to qualify by paying a filing fee is later than usually prescribed in non-apportionment years—this year, June 13 to June 17, 2022.[3] *See* Fla. Stat. § 99.061(9). The state may begin accepting such qualifying forms 14 days before the window opens, *id.* at § 99.061(8), which is May 30, 2022.

[3] In non-apportionment years, the qualifying window for federal candidates is 120 to 116 days before the primary, instead of 71 and 67 days before the primary, as it is this year. *See* Fla. Stat. §§ 99.061(1), (9).

ARGUMENT

I. Precedent permits this Court to establish a schedule to be prepared to remedy the impasse now.

While the Secretary boldly proclaims that *Growe v. Emison*, 507 U.S. 25 (1993), requires this Court to stay this case and sit on its hands while the state attempts to remedy the impasse, *Growe* does no such thing. If anything, *Growe* instructs that federal courts should be prepared and ready to remedy impasse when called to do so.

It is true that *Growe* imposes limits on the timing and scope of the *remedies* that federal courts may provide in the redistricting process, but it does not handcuff courts in the way the Secretary suggests. In *Growe*, the U.S. Supreme Court explained the federal district court overstepped its bounds by "actively prevent[ing] the state court from issuing its own congressional plan," even though the state court at issue—the Minnesota Special Redistricting Panel—was prepared to timely act. 507 U.S. at 26. And that was indeed what happened. The district court at issue in *Growe* repeatedly took affirmative action that halted the state proceedings, including by: (1) *staying* the Minnesota Special Redistricting Panel's proceedings, (2) *enjoining* the parties to the state proceedings from implementing the Minnesota Panel'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.* Under those circumstances, it was not surprising that the U.S. Supreme Court held

that the district court had improperly "tied the hands" of a state that was willing and able to redistrict. *Growe* thus stands for the principle that federal courts should not proceed to actually reapportion a state's political boundaries until the state has failed to timely redistrict.

The Arteaga Intervenors are not asking this Court to do anything remotely similar to what the district court did in *Growe*. Instead, they are simply asking the Court to adopt a briefing and hearing schedule and be prepared to act if the state fails to timely redistrict, which is now a distinct possibility. Setting a briefing schedule or hearing date will not interfere with the political process or state judicial process. The Legislature and the Governor remain free to compromise and enact a new redistricting plan during the pendency of this litigation, and the state court is free to set the wheels in motion on a state judicial resolution, though it has yet to do so.

If anything, *Growe* suggests this Court should move forward now. *Growe* instructed that "[i]t would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed" to reapportion the state. 507 U.S. at 36. *Growe*'s predecessor, *Scott v. Germano*, 381 U.S. 407 (1965), similarly encouraged federal courts to take ownership of these kinds of disputes when called on to do so. In *Germano*, when it was not clear whether Illinois would produce timely redistricting plans, the U.S. Supreme Court remanded the case to the district court with explicit instructions to

(1) "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"; (2) "retain jurisdiction of the case"; and (3) "in the event a valid reapportionment plan for the State Senate is not timely adopted . . . enter such orders as it deems appropriate, including an order for a valid reapportionment plan[.]" 381 U.S. at 409-10.

And for decades, consistent with this precedent, federal courts have done precisely what is asked of the Court here: establish a schedule to resolve an impasse and be prepared to act if the state fails to timely do so itself. *See, e.g.*, *Favors v. Cuomo*, 866 F. Supp. 2d 176 (E.D.N.Y. 2012); *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. Jan. 15, 2002); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992).

While the Secretary has argued that this Court should stay its hand until both the state political and judicial processes have irreversibly failed to redistrict, the Secretary's approach would functionally preclude federal courts from remedying claims like this one, particularly because the State has asked the state court to not take any action until after the special session. Were this Court to wait to move forward until both the political branches *and* state court system had failed to implement new constitutional maps in time for the 2022 elections, there is a good chance there would not be time for this Court to undertake the complicated work of

crafting the necessary remedy. The stakes are too high for Florida voters and election administrators to take that risk. We are only two months away from the final qualifying deadline, and there is no congressional plan in sight. And as of this filing, Florida is one of only three states in the country without a congressional plan in place.[4] Should this Court need to order a new congressional plan, it will need time to do so. Redistricting plans do not spring from thin air; they take time to develop, as this Court has already recognized in requesting recommendations for a special master.

While the Secretary has compared this case to one in Wisconsin, where a federal court panel did enter a stay while a state court proceeded to remedy impasse, Wisconsin's circumstances were markedly different. The Wisconsin federal case, *Hunter v. Bostelmann*, 3:21-cv-00512 (W.D. Wis.) (three judge panel), was convened in mid-August 2021 in light of Wisconsin's anticipated impasse. But the Wisconsin federal panel did not agree to stay the matter right away, even though it was asked to do so. *See id.* at ECF No. 26, 60. It did so in mid-November only after the Wisconsin Supreme Court had (1) fully accepted jurisdiction of the state court impasse action, (2) accepted briefing from the parties on the proper criteria for a new redistricting plan, and (3) set a briefing and hearing schedule that was set to conclude

[4] *See* FiveThirtyEight, "The Latest With Redistricting," (Apr. 4, 2022) ("Only Florida, Missouri and New Hampshire have yet to approve a new map, and we could be waiting for a while: In all three states, stakeholders in the redistricting process are at odds about what kind of map to pass.").

six weeks before the date by which the Wisconsin Elections Commission had told the federal court it needed new maps.[5] *See* **Ex. 3** (Wisconsin Supreme Court ordering simultaneous exchange of proposed plans in impasse dispute). The upshot is that the Wisconsin federal court would have had a six-week buffer to develop a remedial plan if the state court process failed. This Court does not have that luxury of time here.

II. The Court should establish a schedule that will allow it to remedy the impasse without imposing chaos on Florida's election administrators.

As set out above, Florida's congressional qualifying window (by filing fee) opens June 13 and closes June 17. As the Court has already recognized, it is not practical to ask candidates to wait until that window to learn of the contours of their potential districts and then make nearly instantaneous decisions on whether to run for Congress.

Even more importantly, however, Florida's election administrators need time to prepare for the primary election. An August 23 primary requires election officials to send ballots to military and oversees voters no later than July 9. *See supra* at 5. As the Common Cause Plaintiffs describe in more detail, Florida's election administrators must send ballots to the printers no later than June 18. And to send

[5] The Wisconsin Elections Commission had previously explained it needed maps in place by March 1, 2022. *See* ECF No. 41 at 2, *Hunter v. Bostelmann*, 3:21-cv-00512 (W.D. Wis. Sept. 7, 2021). The Wisconsin Supreme Court's briefing process was set to conclude by January 4, 2022, and oral argument was to take place in mid-January. *See* **Ex. 3**.

finalized ballots to the printers, the administrators need time to assign precincts to the appropriate congressional districts and perform other administrative tasks. To give election administrators at least some cushion and to minimize the possibility of costly errors, the Arteaga Intervenors recommend this Court adopt a congressional plan by mid-May 2022 based on the following schedule:

Date	**Event**
April 15	Parties' simultaneous exchange of proposed maps, briefs in support, and supporting expert reports, if any
April 22	Parties' simultaneous responses to proposed maps
April 25-29	Discovery window for expert depositions
May 2-4	Hearing
Mid-May	Court adopts congressional plan

This schedule provides for simultaneous exchange of maps and responses to those maps. A simultaneous exchange of proposed plans puts all parties on an equal playing field; courts adjudicating impasse disputes this redistricting cycle have required simultaneous exchanges precisely for this reason. *See, e.g.*, **Ex. 3**; **Ex. 4** (Pennsylvania Supreme Court ordering simultaneous exchange of proposed plans in impasse dispute). The proposed schedule also provides a brief window for expert depositions, a hearing, and sufficient time for this Court to render a decision.

CONCLUSION

For the reasons stated above, the Court should deny the Motion to Stay and adopt the schedule set out above. Alternatively, if the Court stays this case until the

special session is over, it should order a briefing and hearing schedule that would take effect immediately after a special session fails to produce a congressional plan.

LOCAL RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that this memorandum contains 2,549 words, excluding the case style and certifications.

Dated: April 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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