

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

Common Cause Florida, et al.,

Plaintiffs,

Michael Arteaga, et al.,

Intervenor-Plaintiffs,

Case No. 4:22-cv-109-AW/MAF

v.

Laurel M. Lee, in her official capacity
as Florida Secretary of State,

Defendant.

**DEFENDANT SECRETARY OF STATE LAUREL LEE’S REPLY IN
SUPPORT OF HER MOTION TO STAY**

The Plaintiffs, ECF No. [67], and Plaintiff-Intervenors, ECF No. [68], have responded to the Secretary’s motion to stay, ECF No. [62]. The Secretary now provides her reply and memorandum. For the reasons expressed in her memorandum, she asks this Court to grant her motion to stay.

Bradley R. McVay (FBN 79034)
brad.mcvay@dos.myflorida.com
Ashley Davis (FBN 48032)
ashley.davis@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399
(850) 245-6536

April 8, 2022

Respectfully submitted,

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)
mjazil@holtzmanvogel.com
Gary V. Perko (FBN 855898)
gperko@holtzmanvogel.com
Michael Beato (FBN 1017715)
mbeato@holtzmanvogel.com
zbennington@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK
119 S. Monroe St. Suite 500
Tallahassee, FL 32301
(850) 270-5938

Jason Torchinsky (Va. BN 47481)
(D.C. BN 976033)
jtorchinsky@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK
15405 John Marshall Hwy Haymarket,
Prince William, VA 20169
(540) 341-8808

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2022, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
Mohammad O. Jazil.

MEMORANDUM

The Plaintiffs and Plaintiff-Intervenors oppose the Secretary’s motion to stay because, in their estimation, a stay will prevent a congressional map from being implemented by either May 13, 2022, May 27, 2022, or “mid-May 2022.” Not true. The Secretary expects the Florida Legislature’s special session to result in a map on or before April 22, 2022. *See* ECF No. [62] at 4-5. In the unlikely event that there is no map at the end of the special session, the Secretary maintains that the *Arteaga* state court is best positioned to expeditiously impose a remedial map for the 2022 congressional elections. *Id.* at 6-8. Absent “evidence that the[] state branches will fail timely to perform” their reapportionment “duty,” this Court should stay its hand. *Grove v. Emison*, 507 U.S. 25, 34 (1993). That is what the Secretary asks from this Court. But she remains mindful of the many tasks that the supervisors of elections must undertake in preparation for any election and respectfully submits that her proposed schedule in the joint status report allows for a court-mandated map to be in place by the middle or end of May. *See* ECF No. [61] at 4.

I.

For their part, the Plaintiffs and Plaintiff-Intervenors stress that time is of the essence. ECF No. [67] at 2 (“Time is of the essence.”); ECF No. [68] at 3 (“[E]lection dates are fast approaching.”). Yet, they cannot agree on a specific deadline by which congressional district maps must be implemented. The Plaintiff-

Intervenors merely suggest a deadline of “mid-May 2022.” ECF No. [68] at 11. The Plaintiffs seemingly propose two contradictory deadlines: May 13 and May 27. *See* ECF No. [67] at 7.

The Plaintiffs obtained the May 13 and May 27 dates from the declarations of two supervisors of elections. *Id.* at 7. The supervisors, in turn, landed on these dates by considering how long it will take them to complete certain tasks—such as assigning voter precincts and creating and printing ballots—before the July 9, 2022 deadline to mail overseas vote-by-mail ballots. *Id.* Ex. 1 & Ex. 2; *see also* Fla. Stat. § 101.62(4)(a); 52 U.S.C. § 20302(a)(8)(A)

The Secretary has no reason to doubt that these two supervisors have much work to do between now and July 9, 2022. That said, some of the tasks—such as creating and printing ballots—can only take place *after* the qualification deadline of June 17, 2022, because it is only *after* the deadline has passed that the supervisors know the names of those who have qualified for the ballot. Of the remaining tasks, there is no differentiation between what must be done before May 27 (or thereabouts) from what can already be done. For example, the Plaintiffs fail to disentangle from the declarations the time needed to use geographic information system software to program new district boundaries for congressional races from the programming of all other races—for the Florida Legislature, and innumerable local government positions. Notably, only the congressional boundaries remain unknown.

Of course, the deadlines the two supervisors seemingly support differ from the Secretary’s proposed deadline of June 13, 2022, the start of the congressional candidate qualification period.¹ *See* ECF No. [62] at 8-9. The Secretary chose this deadline because it remains tethered to the Florida Statutes and past practice by a federal court tasked with considering Florida’s congressional districts. *Id.* Indeed, even the cases cited in the Plaintiffs’ and Plaintiff-Intervenors’ responses acknowledge that the candidate qualification deadline is the proper deadline. *See Smith v. Clark*, 189 F. Supp. 2d 503, 507 (S.D. Miss. 2002) (three-judge court) (noting that the deadline is “the March 1, 2002 deadline for candidates to qualify for the 2002 congressional election”); *Favors v. Cuomo*, 866 F. Supp. 2d 176, 185 (E.D.N.Y. 2012) (three-judge court) (noting that the deadline was “March 20, 2012, the day the qualification period begins”).

But, even if the May 13, May 27, or “mid-May” deadlines are correct, a stay would still allow the branches of the Florida government to implement a new congressional district map by those deadlines—which is the outcome the Plaintiffs and Plaintiff-Intervenors seek.

¹ During the April 4, 2022 status conference, this Court expressed concern that a June 13 deadline might discourage candidates from running for Congress. As of this morning, over 140 candidates have filed for congressional office in the 2022 election. Candidates Listed for 2022 General Election, Fla. Dep’t of State, <https://bit.ly/3LNKkev> (last viewed April 7, 2022).

At the latest, the Florida Legislature will produce a new congressional district map by April 22, 2022. If the Governor approves of the map, he will sign the corresponding legislation into law shortly thereafter. In such a scenario, a congressional district map will be in place around the end of April—well before the Plaintiffs’ and Plaintiff-Intervenors’ deadlines.

If, in the unlikely event, the political branches reach an impasse, the *Arteaga* state court stands ready to address reapportionment. Both the Plaintiff-Intervenors (who are the plaintiffs in the state case) and the Secretary will propose briefing schedules to the state court early next week. If the state court agrees with the Plaintiff-Intervenors’ schedule, the state court will select a congressional district map by “mid-May.” ECF No. [68] at 11. If the state court agrees with the Secretary’s schedule, the state court will select a congressional district map sometime after May 13, 2022. ECF No. [61] at 4. In these scenarios, a congressional district map will be in place around mid-May or late-May—exactly around the time of the Plaintiffs’ and Plaintiff-Intervenors’ deadlines.

Whether the political branches of the State government resolve reapportionment, or whether the *Arteaga* state court resolves reapportionment, the Plaintiffs and Plaintiff-Intervenors will get exactly what they want: the “adopt[ion of] a constitutional plan within ample time to be utilized in the upcoming election.”

Grove, 507 U.S. at 35 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)) (cleaned up). As *Grove* counsels, this Court should not interfere.²

II.

In her motion, the Secretary argued that if this Court intervenes and sidesteps the state court and implements a new congressional district map, a *Pennhurst* issue is created. ECF No. [62] at 7. Neither the Plaintiffs nor the Plaintiff-Intervenors responded to her argument. But it bears noting that if this Court implements a new congressional district map, a map that complies both with federal law and article III, section 20 of the Florida Constitution, this Court will order the Secretary to abide by its interpretation of the state constitution. “[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.” *Pennhurst State*

² The Plaintiffs reference several cases for the proposition that this Court should deny the Secretary’s motion to stay. These cases, however, are distinguishable. See *Brown v. Kentucky*, No. 13-cv-68, No. 13-cv-25, 2013 U.S. Dist. LEXIS 90401, at * (E.D. Ky June 27, 2013) (three-judge court) (no parallel state court litigation); *Covington v. North Carolina*, No. 1:15-cv-399, 2015 U.S. Dist. LEXIS 196293, at *7 (M.D.N.C. Nov. 25, 2015) (three-judge court) (the state court action greatly differed from the federal court action, which weighed against granting a stay); *Smith*, 189 F. Supp. 2d at 509-10 (federal court concerned whether congressional district map would receive preclearance under § 5 of the Voting Rights Act before deadline); *Favors*, 866 F. Supp. 2d at 183, 185 (federal court concerned whether congressional district map would receive preclearance before deadline; legislative redistricting plan was not “forthcoming soon”).

Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). Deferring to the state court, a tribunal that can apply both federal and state law, defuses this issue.³

III.

If this Court denies the motion to stay, the Secretary asks this Court to adopt her briefing schedule. ECF No. [61] at 4. The Plaintiff-Intervenors would have opening briefs due April 15, 2022 and responsive briefs due April 22, 2022. ECF No. [68] at 11. The Plaintiffs' schedule would have opening briefs due April 11, 2022, responsive briefs due April 18, 2022, and reply briefs due April 25, 2022. ECF No. [61] at 3-4. Both schedules would put the Secretary in an untenable position. The deadlines for the opening and responsive briefs would occur before and during the special session of the Florida Legislature. The schedule would force the Secretary, as a representative of the executive branch, to create and defend a congressional district map in federal court before the Florida Legislature—the entity in which article I, section 4 of the U.S. Constitution vests the power to create congressional district maps in the first instance—even begins its special session. Ironically, an accelerated briefing schedule, like the one the Plaintiffs and Plaintiff-Intervenors propose, would do the very thing for which they criticized the Governor:

³ If this Court stays its hands and defers to the state court, in the event of an impasse, the Secretary would agree to having shared discovery in the state and federal cases. The Secretary would also file notices with this Court, to keep it informed of the state action.

ill-timed executive-branch interference in the redistricting process. ECF No. [1] ¶ 3 (“But Governor DeSantis,” by proposing his own congressional district map, “abruptly intervened” in the redistricting process, “overstepping his Executive powers,” “which veered the Legislature off its course and cast the congressional redistricting process into uncertainty.”); Complaint ¶ 5, *Arteaga v. Lee*, 2022-CA-000398 (Fla. 2d Cir. Ct. 2022) (describing the “baseless” concerns of the Governor when he asked the Florida Supreme Court for an advisory opinion).

As explained above, the Secretary’s schedule properly shows deference to the political branches of the State government. And mindful of the supervisors’ concerns, the Secretary notes that her schedule should allow for a map to be in place by the end of May, giving officials throughout the State time to complete the myriad of tasks that precede any election.

IV.

Therefore, the Secretary asks this Court to grant her motion to stay.

Bradley R. McVay (FBN 79034)
brad.mcvay@dos.myflorida.com
Ashley Davis (FBN 48032)
ashley.davis@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399
(850) 245-6536

April 8, 2022

Respectfully submitted,

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)
mjazil@holtzmanvogel.com
Gary V. Perko (FBN 855898)
gperko@holtzmanvogel.com
Michael Beato (FBN 1017715)
mbeato@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK
119 S. Monroe St. Suite 500
Tallahassee, FL 32301
(850) 270-5938

Jason Torchinsky (Va. BN 47481)
(D.C. BN 976033)
jtorchinsky@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK
15405 John Marshall Hwy Haymarket,
Prince William, VA 20169
(540) 341-8808

LOCAL RULE 7.1(F) CERTIFICATION

The undersigned certifies that this memorandum contains 1,671 words, excluding the case style and certifications.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2022, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
Mohammad O. Jazil