IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., & MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission,

Defendants,

THE WISCONSIN LEGISLATURE,

Proposed Intervenor-Defendant.

No. 3:21-cv-00512-jdp

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE BY THE WISCONSIN LEGISLATURE

The Wisconsin Legislature respectfully submits this Memorandum of Law in support of its Motion to Intervene as a Defendant in this action pursuant to Federal Rule of Civil Procedure 24(a)(2) or 24(b)(1).

INTRODUCTION

The U.S. Census Bureau delivered new census data last Thursday. Not even one day passed before Plaintiffs brought this action alleging "[t]here is no reasonable prospect" that the Legislature will successfully reapportion the legislative and congressional districts. Dkt. 1, Compl. ¶6. Plaintiffs warn that "this Court should prepare itself to intervene" and prepare "to adopt its own plans" for new

congressional and legislative districts "in the near-certain event that the political branches fail to timely do so." *Id.* ¶7.

Plaintiffs' suit names members of the Wisconsin Elections Commission as Defendants, but the suit is a direct attack on the Legislature's constitutionally delegated responsibility of redistricting. The Legislature therefore respectfully requests that this Court grant its motion to intervene. The Legislature satisfies all the conditions for mandatory intervention or, alternatively, permissive intervention. Decades ago, the Supreme Court held that state legislative bodies may intervene as a matter of right in such circumstances. *See Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972). Here too, the Legislature is "certainly…substantially interested" and would be "directly affected" by this lawsuit, *id.*, which asks this Court to supervise (and ultimately take over) the Legislature's redistricting responsibility in Wisconsin.

INTEREST OF PROPOSED INTERVENORS

The Wisconsin Legislature is the bicameral legislative branch of the Wisconsin state government. Wis. Const. art. IV, §1. The Legislature's Assembly comprises 99 districts, with Members elected every two years. And the Legislature's Senate comprises 33 districts, with Members elected every four years. The Wisconsin Constitution charges the Legislature with creating new legislative districts after each federal census. Wis. Const. art. IV, §3. The federal government delivered new census data late last week, and the Legislature has begun its constitutionally delegated task of redistricting.[1]

Additionally, Wisconsin law permits the Legislature to intervene "at any time" and "as a matter of right" when a party challenges the constitutionality of a statute. Wis. Stat. § 803.09(2m); *Democratic*

[1] For example, last week the Legislature launched a webpage inviting Wisconsin residents to provide input on the 2021 redistricting process. *See* "Draw Your District Wisconsin," https://drawyourdistrict.legis.wisconsin.gov/.

Nat'l Comm. v. Bostelmann, 949 N.W.2d 423, 428 (Wis. 2020) ("Wis. Stat. § 803.09(2m) gives the Legislature a statutory right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws"); *see also, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (granting Legislature's motion, filed as an intervenor, to stay injunction of election laws). In Wisconsin, the Attorney General's power to litigate on behalf of the State is not "exclusive." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 946 N.W.2d 35, 54 (Wis. 2020). The Legislature shares that power "in cases that implicate an institutional interest of the legislature," *id.*—chief among them, redistricting. Here, pursuant to state law, the Legislature's Joint Committee on Legislative Organization approved the Legislature's intervention in this suit on August 17, 2021, and the Legislature immediately filed this motion and the attached motion to dismiss Plaintiffs' complaint.

ARGUMENT

The Legislature satisfies all the criteria to intervene as of right. *See* Fed. R. Civ. P. 24(a)(2). Alternatively, the Legislature meets the criteria for permissive intervention. Fed. R. Civ. P. 24(b).

I. The Legislature May Intervene as a Matter of Right.

The Federal Rules require that parties meeting Rule 24(a)'s criteria for intervention be permitted to intervene. The four criteria for intervention as of right are: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (quotation marks omitted); *see* Fed. R. Civ. P. 24(a)(2). The intervention rule "should be liberally construed with all doubts resolved in favor of the proposed intervenor." *South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003); *accord Wilderness Soc. v. U.S. Forest Service*, 630

F.3d 1173, 1179 (9th Cir. 2011); *Clark v. Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953). Applied here, the Legislature readily meets all four elements for intervention in this dispute over legislative redistricting.

A. The Legislature's immediately filed motion to intervene is timely.

The test for timeliness is "reasonableness." *Reich*, 64 F.3d at 321. So long as potential-intervenors are "reasonably diligent in learning of a suit that might affect their rights" and "act reasonably promptly," the motion is timely. *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438-39 (7th Cir. 1994). Factors relevant to timeliness include "(1) the length of time the intervenor knew or should have known of her interest in the case, (2) the prejudice caused to the original parties by the delay, (3) the prejudice to the intervenor if the motion is denied, and (4) any other unusual circumstances." *Reid L. v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1018 (7th Cir. 2002) (rejecting intervention motion filed years into litigation).

Here, Plaintiffs filed their complaint last Friday. The Legislature acted right away. Upon learning of the suit, the Legislature immediately took procedural steps to intervene in this case, including obtaining approval for the Legislature's intervention from the Joint Committee on Legislative Organization on August 17, 2021. The Legislature then promptly filed this motion, as well as the attached proposed motion to dismiss, an accompanying memorandum of law, and a proposed answer. *See* Fed. R. Civ. P. 24(c).

The lawsuit has barely begun. A three-judge court has not even been empaneled. There is thus no prejudice to the parties. *See, e.g.*, *Nissei Sangyo*, 31 F.3d at 439 (granting motion to intervene filed three months after intervenor learned of suit); *Reich*, 64 F.3d at 321 (granting motion to intervene filed nineteen months after hearing about potential litigation and one month after learning of motion for default judgment against defendant); *Richardson v. Helgerson*, No. 15-cv-141-wmc, 2015 WL 3397623, *1 (W.D. Wis. May 26, 2015) (no prejudice when intervention sought at an "early stage" of the case one month after complaint was filed).

On the other side of the ledger, the prejudice to the Legislature would be significant should its motion to intervene not be granted. If denied intervention, the Legislature will be precluded from moving to dismiss and otherwise participating in this action, which is exclusively focused on the Legislature's task of redistricting.

B. The Legislature has distinct and substantial interests in this redistricting dispute.

"Intervention as of right requires a direct, significant, and legally protectable interest in the question at issue in the lawsuit." *See Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (quotation marks and alterations omitted). Here, the lawsuit directly attacks the Legislature's past and future redistricting efforts. Plaintiffs seek federal-court oversight of the ongoing legislative redistricting process in Wisconsin. The Legislature, far more than the Wisconsin Elections Commission, is effectively the real party in interest in this case. For the following reasons, the Legislature's interest in this redistricting dispute is overwhelming.

1. The Legislature has a substantial interest in *who* will carry out the task of redistricting. While Plaintiffs ask this court to prepare itself to make its own redistricting plan, redistricting is the Legislature's responsibility. The Wisconsin Constitution expressly vests the Legislature with the power to redistrict. Wis. Const. art. IV, §3. Likewise, the Supreme Court has been unequivocal that the Federal Constitution vests States with the "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). The State "can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer." *Id.* at 35.

2. Relatedly, the Legislature has a significant interest given the relief Plaintiffs seek. Plaintiffs seek a judicially decreed schedule for redistricting and a judicially created redistricting plan if the Legislature fails to comply with that schedule. Compl., p. 16. For the reasons discussed below, the Legislature has a unique and substantial interest in intervening given that Plaintiffs have asked this

Court to put the Legislature specifically on a time clock, with the threat of taking the Legislature's redistricting authority away should time run out. Part I.C., *infra*.

3. The Legislature also has a substantial interest in *how* districts will ultimately be reapportioned. In *Beens*, for example, Plaintiffs sued the Minnesota Secretary of State and claimed that the state legislative districts were malapportioned based on newly released census results. 406 U.S. at 190. The Minnesota State Senate intervened under Rule 24(a) to defend the districts. *Id.* The district court ruled against the Senate and the Senate appealed. Plaintiffs sought to dismiss the appeal, claiming that the Senate did not have sufficient interest to appeal. *Id.* at 193. The Supreme Court disagreed in no uncertain terms: "[C]ertainly" the Senate was "directly affected" by the lower court's orders. *Beens*, 406 U.S. at 194. Those orders—similar to the relief Plaintiffs seek here—declared the existing maps unconstitutional, enjoined future elections on those maps, reduced the number of Senate seats, and adopted a new map. *Id.* at 191-93. There, as here, the senate was "an appropriate legal entity for the purpose of legal intervention" given its interest in the legislative districts. *Id.* at 194; *see also, e.g.*, *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964), *aff'd*, 381 U.S. 415 (1965) (allowing intervention by state senate in California reapportionment dispute).

4. Finally, the Legislature has a substantial interest in litigation that challenges the constitutionality of its laws and, more broadly, the constitutionality of the ongoing redistricting process. Applied here, Plaintiffs seek a declaration that the current congressional and legislative districts are unconstitutionally malapportioned and an injunction stopping "all persons" acting in concert with the Wisconsin Elections Commission "from implementing, enforcing, or giving any effect" to the current districts. Compl., pp. 15-16. Good thing for Plaintiffs, then, that no one is proposing to do any such thing. Everyone agrees that new districts are needed with the arrival of new census data. *See* Wis. Const. art. IV, §3. The Legislature intends to provide them. For the reasons stated in the attached motion to dismiss, there is thus no basis for a federal court to declare the current

districts unconstitutional. As is the case throughout the country every 10 years, with new census data comes new districts. Plaintiffs' meritless constitutional claims are a poor disguise for their premature attempt to beat everyone to the courthouse, thereby impeding ongoing state reapportionment efforts. *Growe*, 507 U.S. at 34, 37. And the Legislature has an undeniable interest in raising such defenses in this action so that those ongoing efforts can continue unobstructed. *See id.*; *see Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[R]eapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.").

The Legislature's interest in defending the constitutionality of its redistricting plans and its ongoing redistricting efforts is confirmed by state law. It is well established that state legislatures (and legislators) have an interest in defending the constitutionality of legislative enactments when state law authorizes them to do so. *See, e.g.*, *Karcher v. May,* 484 U.S. 72, 82 (1987) ("Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant."); *cf. INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983) (noting Congress was proper party to defend one-house legislative veto where both houses, by resolution, had authorized intervention in the litigation). Here, Wisconsin law expressly anticipates the Legislature's intervention. As the Wisconsin Supreme Court has twice confirmed, Wisconsin law gives the Legislature shared authority with the Attorney General when it comes to defending the constitutionality of state laws. *See SEIU*, 946 N.W. 2d at 54; *Bostelmann*, 949 N.W.2d at 428. The Legislature may intervene as a matter of right in any action that challenges the constitutionality of a statute, facially or as applied. Wis. Stat.

§ 803.09(2m).[2] The Legislature's authority under state law to participate in this suit in defense of the challenged statutes is further confirmation of its substantial interest in this case. *See, e.g.*, *Bostelmann*, 977 F.3d at 641.

This Circuit, moreover, has already recognized the Legislature's interest in defending the constitutionality of election-related laws, including redistricting. This Court permitted the Wisconsin Assembly to permissively intervene in the *Gill v. Whitford* litigation, which also raised constitutional challenges to the legislative districts enacted in the last redistricting cycle. *See* Dkt. 223, Order Granting Mot. to Intervene, *Gill v. Whitford*, No. 3:15-cv-421 (W.D. Wis. Nov. 13, 2018). Likewise, the Seventh Circuit permitted the Wisconsin Legislature to defend the constitutionality of Wisconsin's election laws as an intervenor in *Bostelmann*, 977 F.3d at 641. Similarly, the Sixth Circuit permitted Michigan congressmen to permissively intervene to defend the constitutionality of a redistricting plan in *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018).

C. Deciding this case in the Legislature's absence will impair and impede the Legislator's ability to protect its redistricting role.

The Legislature "is so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). This element is unquestionably met here.

1. This action targets the Legislature's ongoing redistricting efforts. Noted above, Plaintiffs seek a judicially ordered schedule that tells the Legislature when it must complete redistricting. Compl., p. 16 (requesting the Court "[e]stablish a schedule that will enable the Court to adopt and implement new legislative and congressional district plans by a date certain should the political branches fail to

[2] Wisconsin's intervention statute states, "When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied … the assembly, the senate, and the legislature may intervene as set forth under § 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in § 801.14." Wis. Stat. § 803.09(2m). Here, the Joint Committee on Legislative Organization approved the Legislature's intervention in this suit on August 17, 2021, *see id.* § 13.365(3), and the Legislature filed this motion immediately thereafter.

enact such plans by that time"). If the Legislature fails to abide by that schedule, then Plaintiffs demand that this federal Court—in place of the Legislature—adopt redistricting plans for the State of Wisconsin. *Id.* The Legislature must have the opportunity to intervene so that it can move for the dismissal of Plaintiffs' request for a judicially decreed "schedule," purporting to override the Assembly's and Senate's legislative authority to set its own rules. At the very least, even failing a motion to dismiss, the Legislature must be permitted to intervene so that it has some say in a schedule purporting to bind the Legislature specifically (while having little to no effect on the named Defendants). *See, e.g.*, *Reich*, 64 F.3d at 323 (finding potential change in employment relationship, where proposed intervenors "would be deprived of critical leverage in negotiating their conditions of employment," was sufficient).

2. Relatedly, there can be "only one set" of districts in Wisconsin. *Growe*, 507 U.S. at 35. If this Court ultimately enacts a redistricting plan as Plaintiffs wish, there would be nothing left for the Legislature to do. Its redistricting responsibility will have been completely extinguished. In short, this action has the potential to have preclusive effect not just in the legal sense, but also the political sense. *See Jensen v. Wisconsin Elections Bd.*, 639 N.W.2d 537, 542 (2002) (noting federal litigation would be on a "collision course" with state litigation); *Stone v. First Union Corp.*, 371 F.3d 1305, 1309-10 (11th Cir. 2004) (emphasizing "the practical impairment" of a decision on proposed-intervenor); *compare Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) (noting decision "would not have any preclusive effect" on proposed-intervenors), *with Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) (noting *stare decisis* effect). The threat of such real-world preclusion—whereby this Court enacts Wisconsin's districts instead of the Legislature—is also a sufficient basis for intervention.

D. The Legislature's interests are not adequately represented.

A party seeking to intervene under Rule 24(a)(2) need only show that the "representation of [its] interest '*may be*' inadequate." *Lake Invest. Dev. Grp. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1261 (7th Cir. 1983) (quoting *Trbovich v. United Mine Workers of Amer.*, 404 U.S. 528, 538 n.10 (1972)) (emphasis added); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (intervention appropriate if parties "do not have sufficiently congruent interests"). "The burden of making that showing" of inadequacy "should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10. And while the Seventh Circuit has said there is "presumption" that representation is adequate when a governmental body is already a defendant, *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985), that presumption is inapplicable or easily rebutted here.

1. No current party to this litigation adequately represents the Legislature's unique institutional interest in redistricting. Defendants, members of the Wisconsin Elections Commission, administer and enforce Wisconsin elections law. *See, e.g.*, Wis. Stat. §7.08.[3] The Commission has no constitutional authority to redistrict. Only the Legislature does. Wis. Const. art. IV, §3. The Commission will not be bound by the deadline Plaintiffs seek to impose on redistricting. And it will not suffer the obliteration of its constitutional authority to complete redistricting (because it has none) if it fails to abide by Plaintiffs' desired "schedule." Nor does the Commission have any insight into the ongoing redistricting process within the Legislature. That is sufficient to make the "minimal" showing that the Legislature's interests—in particular its interest in setting its own redistricting schedule in compliance with local and federal law—"may be" inadequately represented. *Trbovich*, 404 U.S. at 538 n.10.

If there were any doubt, the Governor's own actions reveal that the Legislature cannot be adequately represented by the executive branch here. In January 2020, the Governor signed an

[3] The Commission has been represented by the Attorney General in past redistricting litigation, and the Attorney General could likewise control the Commission's participation in this litigation. *See* Wis. Stat. § 165.25(1m) (attorney general empowered to represent agencies).

Executive Order declaring the Legislature's redistricting maps from the last redistricting cycle (the very maps that the Plaintiffs now challenge as malapportioned here) as "some of the most gerrymandered, extreme maps in the United States" with "approximately 50 times more voters … moved to new districts than were necessary."[4] As for the redistricting process that has just commenced, the Governor's Executive Order creates "the People's Maps Commission," a redistricting commission that the order deems superior to the traditional legislative process.[5] The very existence of the executive branch's redistricting commission is overwhelming proof that the legislative and executive branches do not "have the same goal" now and will not have the same goals throughout this redistricting dispute. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019); *see also Keith*, 764 F.2d at 1270. That is more than sufficient to show that the Legislature's interest "may be" inadequately represented here. *Lake Invest. Dev. Grp.*, 715 F.2d at 1261; *see, e.g.*, Dkt. 223, Order Granting Mot. to Intervene 3, *Gill v. Whitford*, No. 3:15-cv-421 (W.D. Wis. Nov. 13, 2018) (noting "the recent election in Wisconsin for Attorney General introduces potential uncertainty into defendants' future litigation strategy" given the change in party); *N.E. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (finding inadequacy sufficiently alleged because "the Secretary [of State]'s primary interest is in ensuring the smooth administration of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced").

Indeed, even Plaintiffs must concede that they do not believe Legislature's interests will be adequately represented by Wisconsin's executive branch. The very basis of Plaintiffs' complaint is that an alleged impasse between the legislative and executive branches is a foregone conclusion. Compl.

[4] Wis. Executive Order No. 66 (Jan. 27, 2020), https://evers.wi.gov/Documents/EO/EO066-PeoplesMapsCommission.pdf.

[5] *Id.*

¶6. Plaintiffs believe that "[t]here is no reasonable prospect that Wisconsin's political branches will reach consensus" given the political differences between the two branches. *Id.* Plaintiffs cannot simultaneously believe that the legislative and executive branches face "near-certain" failure to reach redistricting consensus, Compl. ¶7, but that the executive branch through the Attorney General is adequate to represent the Legislature in this redistricting dispute here.

3. Finally, the redistricting-specific nature of this case makes it unlike others in which the courts have disallowed intervention on adequacy grounds. For example, the Seventh Circuit often "presumes" adequacy when the named defendant is a governmental entity. *See Keith*, 764 F.2d at 1270; *see, e.g.*, *Planned Parenthood*, 942 F.3d at 799 (concluding Democratic Attorney General was an adequate representative, for the time being, for the Legislature in an abortion law dispute). But that presumption is either inapplicable here, or it is easily rebutted.

The Supreme Court has already concluded that mandatory intervention is appropriate for state legislative bodies seeking to intervene in redistricting cases. *See Beens*, 406 U.S. at 194; *see also, e.g.*, *Growe*, 507 U.S. at 29 (noting Minnesota Senate and House intervened in redistricting dispute).[6] That is because in such cases, legislature-intervenors are the true parties in interest. It is their bodies that risk being altered by federal decree, and it is their redistricting processes that are being interrupted by the same. In redistricting disputes, there should be no concern that two State entities will be "trying to speak on behalf of the State *at the same time*." *Planned Parenthood*, 942 F.3d at 800. In redistricting, the

[6] The Supreme Court's decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), is not to the contrary. *Bethune-Hill* involved materially distinguishable facts—an appeal "by one House of a bicameral legislature, resting solely on its role in the legislative process" in already-enacted redistricting. *Compare id.* at 1953, *with Arizona State Legislature v. Arizona Ind. Redistricting Comm'n*, 576 U.S. 787, 802-03 (2015). And it implicated distinguishable state law. *Compare Bethune-Hill*, 139 S. Ct. at 1952 ("Virginia has thus chosen to speak as a sovereign entity with a single voice."), *with Bostelmann*, 949 N.W.2d at 428 ("Wis. Stat. § 803.09(2m) gives the Legislature a statutory right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws.").

Legislature and the Executive are serving two different roles. For example, the Legislature seeks to intervene and then move to dismiss Plaintiffs' complaint so that the Legislature can carry on with its constitutionally mandated task of reapportionment—a task unique to the Legislature. Wis. Const. art. IV, §3. The executive branch will surely have other views about how this litigation should go.[7] Regardless, it cannot purport to speak on behalf of the Legislature and its newly launched redistricting efforts. *See* Wisconsin Const. art. IV, §3. The Legislature and its members, moreover, are "directly affected" by that state reapportionment in a way that the executive branch is not. *Beens*, 406 U.S. at 194. There is no reason to presume that the Legislature's unique institutional role in redistricting is adequately represented by another branch of government here.

This case well illustrates the potential for divergence between the legislative and executive branches—indeed it is the very theory underlying Plaintiffs' complaint. Plaintiffs' complaint invited this federal Court to enter the fray on Day 1 of what is likely to be a politically charged dispute between Wisconsin's political branches as the Legislature draws new maps to govern the next decade. There is more than enough reason to find that the Legislature has satisfied its "minimal" burden of showing inadequacy of representation if the Legislature were to be excluded from this redistricting dispute. *Trbovich*, 404 U.S. at 538 n.10. Nothing more is required to justify intervention under Rule 24(a)(2).

II. Alternatively, Permissive Intervention Is Appropriate.

In the event the Court concludes that the standard for mandatory intervention is not met, permissive intervention is appropriate. A proposed-intervenor may permissively intervene after filing a timely motion and asserting a "claim or defense that shares with the main action a common question

[7] For example, the Legislature would be hard pressed to imagine the executive branch moving to dismiss Plaintiffs' request to declare the last cycle's districts unconstitutional when the Governor's Executive Order targets those districts as some of the most "extreme maps" in the country. Wis. Executive Order No. 66 (Jan. 27, 2020), https://evers.wi.gov/Documents/EO/EO066-PeoplesMapsCommission.pdf.

of law or fact." Fed. R. Civ. P. 24(b)(3). Permissive intervention under Rule 24(b) is to be granted liberally. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1904 (3d ed. 2007) (collecting cases). For all of the foregoing reasons, the Legislature meets these criteria. The Legislature's motion to intervene is timely, there will be no prejudice to the adjudication of the parties' rights, and there exists common questions of law and fact. The Legislature's defenses in its proffered pleading and motion to dismiss are based on the same underlying legal and factual issues being litigated by the parties—that is, the constitutionality of last cycle's redistricting and the alleged impasse in the forthcoming redistricting cycle.

A particularly instructive example of permissive intervention is the Sixth Circuit's decision permitting Michigan congressmen to intervene to defend congressional districts in *Johnson*, 902 F.3d at 580. Alleging redistricting had diluted plaintiffs' votes, Plaintiffs named the Michigan Secretary of State as a defendant. *Id.* at 576. Like Defendants here, the secretary was responsible for conducting state elections. *Id.* The district court denied the congressmen's motion for permissive intervention, fearing it "could create a significant likelihood of undue delay and prejudice to the original parties." *Id.* The Sixth Circuit reversed. The court of appeals faulted the district court for failing to articulate any basis for believing intervention would delay the proceedings or prejudice the parties. *Id.* at 577-78. The court emphasized that "no scheduling order was in place and discovery had not yet begun," and no motions to stay or dismiss had been ruled on. *Id.* at 579. "Put simply, the case was in its infancy." *Id.* The court concluded that "where timeliness is a particularly weighty concern, allowing intervention now may very well prove more efficient for all involved." *Id.* at 580.

So too here. This case is in its infancy. The Legislature has a unique and substantial interest in the resolution of this redistricting dispute. Part I.B, *supra*. And Plaintiffs seek to hamstring the Legislature's redistricting efforts with a "schedule" decreed by this Court. Part I.C, *supra*. There is every reason to allow the Legislature to permissively intervene here.

CONCLUSION

What is "occurr[ing] here" is "a race to beat" the Legislature "to the finish line" in redistricting. *Growe*, 507 U.S. at 37. In sorting out what to do with Plaintiffs' complaint and Plaintiffs' far-reaching requested relief, the Legislature should not be left on the sidelines. The Legislature respectfully requests that this Court grant this motion and allow the Legislature to intervene as of right under Rule 24(a)(2) or alternatively to permissively intervene under Rule 24(b)(1).

Dated: August 17, 2021

Respectfully submitted,

/s/ *Kevin St. John*

Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Adam K. Mortara, SBN 1038391
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Jeffery M. Harris
Taylor A.R. Meehan*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com

** Licensed in Illinois & D.C.; supervised by principals of the firm licensed in Virginia while Virginia bar application is pending.*

Counsel for Proposed-Intervenor, Wisconsin Legislature

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I served this document as part of the Legislature's motion to intervene. *See* Fed. R. Civ. P. 24(c). I certify that I electronically filed the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case. I further certify that I mailed the foregoing document to counsel for the named Defendants, who have not yet appeared in this case. *See* Fed. R. Civ. P. 5(b).

/s/ *Kevin St. John*
Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7990
kstjohn@bellgiftos.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., & MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission,

Defendants,

THE WISCONSIN LEGISLATURE,

Proposed Intervenor-Defendant.

No. 3:21-cv-00512-jdp

PROPOSED ANSWER BY THE WISCONSIN LEGISLATURE

The Wisconsin Legislature submits this Answer as part of its Motion to Intervene as a Defendant. *See* Fed. R. Civ. P. 24(c) (motion must "be accompanied by a pleading"); Fed. R. Civ. P. 7(a)(2). Simultaneously, the Legislature files a Motion to Dismiss Plaintiffs' complaint. As described in that motion and the accompanying memorandum of law, Plaintiffs' suit is wildly premature. It contravenes Supreme Court precedent condemning the "race to beat" everyone else "to the finish line" in redistricting disputes, *Growe v. Emison*, 507 U.S. 25, 37 (1993)—here, before there is even a case or controversy. Plaintiffs' allegations do not bring this dispute within the limited "judicial Power" of the federal courts. U.S. Const. art. III, §2. In submitting this proposed Answer, the Legislature does

so only to comply with the Federal Rules' requirement that the Legislature's intervention motion be accompanied by a "pleading that sets out the…defense[s] for which intervention is sought." Fed. R. Civ. P. 24(c). The Legislature's defenses are more fully described in the Legislature's motion to dismiss. The Legislature does not waive any of its defenses, privileges, or immunities in this meritless suit, nor does it waive its right to amend this Answer should the Court postpone or deny in whole or in part the Legislature's motion to dismiss. *See* Fed. R. Civ. P. 12(a)(4)(A); *see also* Fed. R. Civ. P. 15(a).

NATURE OF THE ACTION

1. Intervenor admits that this action challenges Wisconsin's existing congressional and legislative districts as unconstitutional and that Plaintiffs' complaint seeks various forms of relief as pled in the complaint. Intervenor denies all other allegations in paragraph 1.

2. Upon information and belief, Intervenor admits that on August 12, 2021, legacy census data was delivered to Wisconsin state officials. The remaining allegations in paragraph 2 set forth legal conclusions that require no response; if a response is required, Intervenor denies the remaining allegations in paragraph 2.

3. Paragraph 3 sets forth legal conclusions that require no response; if a response is required, Intervenor denies all allegations paragraph 3.

4. Paragraph 4 sets forth legal conclusions that require no response; if a response is required, Intervenor denies all allegations in paragraph 4.

5. Intervenor admits that the Wisconsin Constitution vests it with redistricting responsibility. Wis. Const. art. IV, §3. The remaining allegations in paragraph 5 sets forth legal conclusions that require no response; if a response is required, Intervenor denies the remaining allegations in paragraph 5.

6. Intervenor admits that the Governor Tony Evers is a Democrat, that the current Speaker of the State Assembly is a Republican, and that the current Majority Leader of the State Senate

is a Republican. Intervenor admits that federal courts have intervened in Wisconsin's redistricting process in past redistricting cycles. Intervenor denies allegations regarding the cases referred to in paragraph 6 to the extent those allegations mischaracterize, vary from, or are otherwise inconsistent with those cases. Intervenor denies all other allegations in paragraph 6.

7. Denied.

8. Intervenor admits that this action challenges Wisconsin's existing congressional and legislative districts as unconstitutional and that Plaintiffs' complaint seeks various forms of relief as pled in the complaint. The remaining allegations in paragraph 8 set forth legal conclusions that require no response; if a response is required, Intervenor denies the allegations regarding the remaining allegations in paragraph 8 to the extent they mischaracterize, vary from, or are otherwise inconsistent with 28 U.S.C. § 2284(a) and (b)(1).

JURISDICTION AND VENUE

9. Intervenor denies that this Court has subject-matter jurisdiction for the reasons stated in Intervenor's Motion to Dismiss. The allegations in paragraph 9 set forth legal conclusions that require no response; if a response is required, Intervenor denies the allegations in paragraph 9 to the extent they mischaracterize, vary from, or are otherwise inconsistent with 28 U.S.C. §§ 1331, 1343, 2201, 2202 as applied in this case.

10. Intervenor lacks knowledge or information to form a belief about the allegations in paragraph 10 with respect to where Defendants personally reside. Intervenor denies that this Court has subject-matter jurisdiction for the reasons stated in Intervenor's Motion to Dismiss and accordingly denies that this Court may exercise personal jurisdiction over Defendants other than for purposes of dismissing this action. The allegations in paragraph 10 set forth legal conclusions that require no response; if a response is required, Intervenor denies the allegations in paragraph 10 to the

extent they mischaracterize, vary from, or are otherwise inconsistent with personal jurisdiction rules as applied in this case.

11. Intervenor denies that this Court has subject-matter jurisdiction for the reasons stated in Intervenor's simultaneously field Motion to Dismiss and accordingly denies that venue is proper other than for purposes of dismissing this action. The allegations in paragraph 11 set forth legal conclusions that require no response; if a response is required, Intervenor denies the allegations in paragraph 11 to the extent they mischaracterize, vary from, or are otherwise inconsistent with 28 U.S.C. § 1391 as applied in this case.

12. Intervenor denies that this Court has subject-matter jurisdiction for the reasons stated in Intervenor's Motion to Dismiss. The allegations in paragraph 12 set forth legal conclusions that require no response; if a response is required, Intervenor denies the allegations in paragraph 12 to the extent they mischaracterize, vary from, or are otherwise inconsistent with 28 U.S.C. § 2284(a) as applied in this case.

PARTIES

13. Intervenor lacks knowledge or information to form a belief about the allegations in paragraph 13.

14. Intervenor lacks knowledge or information to form a belief about the allegations in paragraph 14.

15. Upon information and belief, Intervenor admits that Defendants are Commissioners of the Wisconsin Elections Commission. Intervenor denies the allegations regarding the statutes and cases referred to in paragraph 15 to the extent they mischaracterize, vary from, or are otherwise inconsistent with those statutes and cases. Intervenor denies all other allegations in paragraph 15.

FACTUAL ALLEGATIONS

16. Admitted.

17. Intervenor denies the allegations regarding the census data referred to in paragraph 17 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the census data.

18. Intervenor denies the allegations regarding the census data and legislation referred to in paragraph 18 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with that census data and legislation.

19. Intervenor denies the allegations regarding the *Baldus* litigation referred to in the first sentence of paragraph 19 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the orders issued in that litigation. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860 (E.D. Wis. 2012). Intervenor admits legislative and congressional districting plans passed in August 2011, as adjusted by the orders issued regarding Assembly Districts 8 and 9 in the *Baldus* litigation, were used in every election of a member of Congress, State Senator, or Representative of the State Assembly since 2012. Intervenor denies all other allegations in paragraph 19.

20. Intervenor lacks knowledge or information to form a belief about the allegations in paragraph 20.

21. Intervenor admits Wisconsin will have eight congressional districts. Intervenor denies the allegations regarding the census data referred to in paragraph 21 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the census data. Intervenor denies all other allegations in paragraph 21.

22. Intervenor admits that there are 99 State Assembly districts and 33 State Senate districts under current law. Intervenor denies the allegations regarding the census data referred to in paragraph 22 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the census data.

23. Intervenor admits that Wisconsin's population has changed in the past decade. Intervenor denies all other allegations in paragraph 23.

24. Upon information and belief, Intervenor admits that on August 12, 2021, legacy census data was delivered to Wisconsin state officials. Intervenor lacks knowledge or information to form a belief about the remaining allegations in paragraph 24.

25. Intervenor admits Wisconsin's population has changed in the past decade. Intervenor denies all other allegations in paragraph 25.

26. Intervenor denies the allegations regarding the census data referred to in paragraph 26 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the census data.

27. Intervenor denies the allegations regarding the census data referred to in paragraph 27 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the census data. To the extent paragraph 27 intends to an allege a legal conclusion, no response is required. Intervenor denies all other allegations in paragraph 27.

28. Intervenor denies the allegations regarding the census data referred to in paragraph 28, Exhibit A, and Exhibit B to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the census data.

29. Intervenor denies the allegations regarding the census data referred to in paragraph 29, Exhibit A, and Exhibit B to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the census data.

30. Paragraph 30 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 30.

31. Intervenor admits that the Wisconsin Constitution vests it with redistricting responsibility. Wis. Const. art. IV, §3. Intervenor admits that Governor Tony Evers is a Democrat,

that the current Speaker of the State Assembly is a Republican, and that the current Majority Leader of the State Senate is a Republican. Intervenor denies all other allegations in paragraph 31.

32. Intervenor admits that federal courts have intervened in Wisconsin's redistricting process in past redistricting cycles. Intervenor admits that when redistricting legislation was last passed in 2011, the Governor was a Republican and Republicans held a majority of the seats in the State Assembly and State Senate. Intervenor denies all other allegations in paragraph 32.

33. Intervenor admits that Wisconsin has entered a new redistricting cycle. Wis. Const. art. IV, §3. Intervenor avers that the Legislature's redistricting efforts have begun, consistent with the Wisconsin Constitution's vesting the Legislature with redistricting responsibility. *Id.* Intervenor admits that Governor Evers has, at times, vetoed legislation, though denies the allegations in paragraph 33 relating to those vetoes to the extent those allegations mischaracterize, vary from, or are otherwise inconsistent with the nature of that vetoed legislation. Intervenor avers that Governor Evers signed state budget legislation for the two-year budget passed in 2019 and the two-year budget passed in 2021. Intervenor admits that a gubernatorial executive order purports to establish "the People's Map's Commission." Wis. Executive Order No. 66 (Jan. 27, 2021). Intervenor lacks knowledge or information to form a belief about the remaining allegations regarding Governor Evers in paragraph 33, and therefore denies them. Intervenor denies all other allegations in paragraph 33.

34. Intervenor denies the allegations in paragraph 34 regarding the nature of the vetoed legislation to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the nature of that legislation. Intervenor denies all other allegations in paragraph 34.

35. Denied.

36. Intervenor denies the allegations regarding the constitutional and statutory provisions referred to in paragraph 36 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with those constitutional and statutory provisions. Intervenor lacks knowledge or

information to form a belief about the remaining allegations in paragraph 36, and therefore denies them.

37. Intervenor denies the allegations regarding the statutory provisions referred to in paragraph 37 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with those statutory provisions. The remaining allegations in paragraph 37 sets forth legal conclusions that require no response; if a response is required, Intervenor denies the remaining allegations in paragraph 37.

38. Paragraph 38 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 38.

COUNT I

39. Intervenor incorporates by reference all prior answers as though fully set forth herein.

40. Intervenor denies the allegations regarding the Fourteenth Amendment and apportionment caselaw referred to in paragraph 40 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with that constitutional provision and caselaw.

41. Paragraph 41 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 41.

42. Paragraph 42 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 42.

43. Paragraph 43 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 43.

COUNT II

44. Intervenor incorporates by reference all prior answers as though fully set forth herein.

45. Intervenor denies the allegations regarding Article I and apportionment caselaw referred to in paragraph 45 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with that constitutional provision and caselaw.

46. Paragraph 46 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 46 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with the constitutional provision and caselaw referred to in paragraph 46.

47. Intervenor denies the allegations regarding the congressional plan and census data in paragraph 47 to the extent those allegations mischaracterize, vary from, or are otherwise inconsistent with the congressional plan and census data. Intervenor denies all other allegations in paragraph 47.

48. Paragraph 48 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 48.

49. Paragraph 49 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 49.

COUNT III

50. Intervenor incorporates by reference all prior answers as though fully set forth herein.

51. Intervenor denies the allegations regarding the First Amendment and caselaw referred to in paragraph 51 to the extent the allegations mischaracterize, vary from, or are otherwise inconsistent with that constitutional provision and caselaw.

52. Paragraph 52 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 52.

53. The second sentence of Paragraph 53 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 53. Intervenor denies all other allegations in paragraph 53.

54. Paragraph 54 sets forth legal conclusions that require no response; if a response is required, Intervenor denies paragraph 54.

RELIEF REQUESTED

Intervenor denies that Plaintiffs are entitled to any of the relief requested on pages 15 and 16 of Plaintiffs' complaint.

AFFIRMATIVE DEFENSES

Including for the reasons explained in Intervenor's simultaneously filed Motion to Dismiss and accompanying Memorandum of Law:

1. Plaintiffs' claims are unripe, such that there is not yet a case or controversy required by Article III of the U.S. Constitution.

2. Plaintiffs lack standing to bring their claims, rendering Plaintiffs' complaint beyond the scope of the federal judicial power under Article III of the U.S. Constitution.

3. Plaintiffs' complaint does not seek "an acceptable Article III remedy." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998).

4. Plaintiffs' claims are otherwise not justiciable.

5. Plaintiffs fail to state a claim for which relief can be granted.

6. Intervenor reserves the right to identify additional affirmative defenses should the Court postpone or deny in whole or in part Intervenor's Motion to Dismiss.

WHEREFORE, Intervenor requests dismissal of this action in its entirety, together with such other relief as the Court deems equitable and just.

Dated: August 17, 2021

Respectfully submitted,

/s/ *Kevin St. John*

Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Adam K. Mortara, SBN 1038391
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Jeffery M. Harris
Taylor A.R. Meehan*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com

** Licensed in Illinois & D.C.; supervised by principals of the firm licensed in Virginia while Virginia bar application is pending.*

Counsel for Proposed-Intervenor, Wisconsin Legislature

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I served this document as part of the Legislature's motion to intervene. *See* Fed. R. Civ. P. 24(c). I certify that I electronically filed the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case. I further certify that I mailed the foregoing document to counsel for the named Defendants, who have not yet appeared in this case. *See* Fed. R. Civ. P. 5(b).

/s/ Kevin St. John
Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7990
kstjohn@bellgiftos.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., & MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission,

Defendants,

THE WISCONSIN LEGISLATURE,

Proposed Intervenor-Defendant.

No. 3:21-cv-00512-jdp

MOTION TO DISMISS BY THE WISCONSIN LEGISLATURE

The Wisconsin Legislature, through its counsel, hereby moves the Court to dismiss Plaintiffs' complaint. Fed. R. Civ. P. 12(b)(1), (b)(6). Plaintiffs waited all of one day after new census data was released to file their complaint announcing redistricting failure was "near-certain." Dkt. 1, Compl. ¶¶7, 53. Plaintiffs' complaint is wildly premature, there is no case or controversy, and Plaintiffs have failed to state a claim for which relief can be granted. The grounds for the Legislature's motion are fully set forth in the accompanying brief.

WHEREFORE, the Wisconsin Legislature requests that this Court enter an order dismissing Plaintiffs' complaint in its entirety.

Dated: August 17, 2021

Respectfully submitted,

/s/ Kevin St. John

Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Adam K. Mortara, SBN 1038391
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Jeffery M. Harris
Taylor A.R. Meehan*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com

** Licensed in Illinois & D.C.; supervised by principals of the firm licensed in Virginia while Virginia bar application is pending.*

Counsel for Proposed-Intervenor, Wisconsin Legislature

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I served this document as part of the Legislature's motion to intervene. *See* Fed. R. Civ. P. 24(c). I certify that I electronically filed the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case. I further certify that I mailed the foregoing document to counsel for the named Defendants, who have not yet appeared in this case. *See* Fed. R. Civ. P. 5(b).

/s/ *Kevin St. John*
Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7990
kstjohn@bellgiftos.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., & MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission,

Defendants,

THE WISCONSIN LEGISLATURE,

Proposed Intervenor-Defendant.

No. 3:21-cv-00512-jdp

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS BY THE WISCONSIN LEGISLATURE

The Wisconsin Legislature respectfully submits this Memorandum of Law in support of its Motion to Dismiss Plaintiffs' complaint in its entirety. *See* Fed. R. Civ. P. 12(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

INTRODUCTION

Plaintiffs proclaim "[t]here is no reasonable prospect" that Wisconsin will successfully reapportion the State's legislative and congressional districts. Dkt. 1, Compl. ¶6. Plaintiffs tell this Court that it "should prepare itself to intervene" and draw its own maps in place of the State. *Id.* ¶7. That is quite a pronouncement given that the State received census data just days ago. *Id.* ¶24. Plaintiffs waited one day to bring this action after that census data was delivered. Plaintiffs' complaint declared Wisconsin's redistricting to be a "near-certain" failure—on Day 1 of redistricting. *See id.* ¶¶7, 53.

Plaintiffs' complaint should be dismissed in its entirety. Plaintiffs' suit is a direct attack on the Legislature's constitutionally delegated responsibility of redistricting. It is a poorly disguised "race to beat" everyone else "to the finish line" of redistricting. *Growe v. Emison*, 507 U.S. 25, 37 (1993). Plaintiffs assert malapportionment claims against districts that the Legislature is actively working to redraw. Those federal claims are nothing more than an attempt to "affirmatively obstruct" and "impede" the Legislature's newly commenced redistricting process now that the census data has arrived. *Id.* at 34. And Plaintiffs' associational claim has even less merit. Redistricting delays (that may or may not transpire) do not keep Plaintiffs from associating with anyone.

Nearly 30 years ago, the Supreme Court emphatically rejected a federal-court takeover of redistricting in *Growe*. This Court should follow suit, dismiss Plaintiffs' complaint, and leave redistricting in the able hands of the Wisconsin government.

BACKGROUND

1. The Wisconsin Legislature is the bicameral legislative branch of the Wisconsin state government. Wis. Const. art. IV, §1. Members in the Assembly's 99 districts are elected every two years. Wis. Const. art. IV, §4. And members in the Senate's 33 districts are elected every four. Wis. Const. art. IV, §5.

The Wisconsin Constitution requires the Legislature to reapportion districts after every federal census: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, §3. Consistent with this responsibility, the Legislature has commenced the redistricting process now that the federal government has delivered long-awaited census data. The Legislature has launched a webpage inviting Wisconsin residents to provide input on the 2021 redistricting process.[1] And in the coming months, the Legislature will be hard at work reapportioning in accordance with the new census data and other traditional redistricting criteria. *See, e.g.*, Wis. Const. art. IV, §4 ("such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable").

2. On August 12, 2021, the Secretary of Commerce delivered legacy census data to Wisconsin state officials. *See* Compl. ¶2. As anyone would expect, the just-released census data shows that Wisconsin's population has shifted since the federal government last delivered census data to Wisconsin more than 10 years ago. *Id.*

3. Not even a full day later, Plaintiffs filed a complaint against the Wisconsin Elections Commission on August 13, 2021. The complaint alleges that the existing congressional districts, State Assembly districts, and State Senate districts—drawn based on the census data delivered last decade—are unconstitutionally malapportioned. Compl. ¶¶3, 26-30, 39-49. Plaintiffs' complaint acknowledges that "Wisconsin is entering a new redistricting cycle," *id.* ¶33, and that the "Wisconsin Constitution requires the Legislature to draw new legislative lines" after the census, *id.* ¶36. Plaintiffs acknowledge that the Legislature was able to complete redistricting last redistricting cycle without an impasse. *Id.*

[1] *See* "Draw Your District Wisconsin," https://drawyourdistrict.legis.wisconsin.gov/.

¶32. And Plaintiffs acknowledge that the next election deadline is not until June 1, 2022, when candidates must file nomination papers for primary elections. *Id.* ¶37.

Even so, Plaintiffs declare that the Legislature is doomed to fail. Plaintiffs assert that "[t]here is no reasonable prospect that Wisconsin's political branches will reach consensus to enact lawful legislative and congressional district plans in time to be used in the upcoming 2022 election." Compl. ¶6. They say there will be "near-certain deadlock" between the legislative and executive branches. *Id.* ¶53. They allege that "partisan division among Wisconsin's political branches makes it extremely unlikely" that new redistricting plans will pass "in time to be implemented during the upcoming 2022 election." *Id.* ¶31. They assert that "Governor Evers has been in nearly constant conflict with the Republican-controlled Legislature over a broad range of policies." *Id.* ¶33. And they also blame the census delays for "increas[ing] the already significant likelihood [that] the political branches will reach an impasse." *Id.* ¶35.

Plaintiffs' complaint comprises three counts: (1) violation of the Fourteenth Amendment for the alleged malapportionment of the State's legislative districts, Compl. ¶¶39-43; (2) violation of Article I, section 2 of the U.S. Constitution for the alleged malapportionment of the congressional districts, *id.* ¶¶44-49; and (3) violation of Plaintiffs' First Amendment right to associate because Plaintiffs might not be able "to associate with others from the same lawfully apportioned legislative and congressional districts," *id.* ¶¶50-54.

Plaintiffs' complaint ends with sweeping requests for relief. Plaintiffs seek a declaration that the existing districts are unconstitutional and an injunction forbidding the Wisconsin Elections Commission and anyone "acting in concert" with the Commission "from implementing, enforcing, or giving any effect" to the old districts. Compl., pp. 15-16. Plaintiffs also want this Court to "[e]stablish a schedule that will enable the Court to adopt and implement new legislative and congressional district plans" itself, "should the political branches fail to enact such plans by that time."

Id. at 16. Plaintiffs ask this Court to adopt its own redistricting maps. *Id.* And they ask for statutory attorneys' fees and costs available by virtue of their filing this §1983 action. *Id.*

4. The Wisconsin Legislature moved to intervene days later. On August 17, 2021, the Legislature's Joint Committee on Legislative Organization approved the Legislature's intervention. Wis. Stat. §803.09(2m); *see Democratic Nat'l Comm. v. Bostelmann*, 949 N.W.2d 423, 428 (Wis. 2020). Counsel for the Legislature then immediately filed a motion to intervene, attaching the present motion to dismiss.

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must also allege facts sufficient to establish the Court's subject-matter jurisdiction. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008 (7th Cir. 2021) (employing "the familiar 'plausibility' requirement" to assess sufficiency of standing allegations); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs' complaint must include "factual content" that will support a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiff must do more than plead facts that are "merely consistent with a defendant's liability," because such pleadings "[stop] short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (quotation marks omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" *Id.* And while Plaintiffs' well-pled "[f]actual allegations are accepted as true," "allegations in the form of legal conclusions are insufficient to survive a Rule 12(b)(6) motion." *Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir. 2014).

ARGUMENT

Plaintiffs' complaint fails for three reasons. First, Plaintiffs' suit is not justiciable at this time. Flouting our constitutional structure, Plaintiffs invite this Court to oversee the state redistricting process beginning on Day 1 of redistricting. Their suit is not ripe and should be dismissed. Second, and for related reasons, there is no Article III case or controversy for this Court to decide. Finally, with respect to Count III of Plaintiffs' complaint, Plaintiffs have not stated a claim for violation of the First Amendment.

I. *Growe*'s Rule Compels Dismissal of Plaintiffs' Prematurely Filed Complaint.

Nearly 30 years ago, the Supreme Court said in no uncertain terms that the power to redistrict lies with the States, not the federal courts. *See Growe*, 507 U.S. 25, 35 (1993). In *Growe*, two groups of Minnesota plaintiffs filed federal lawsuits challenging ongoing reapportionment efforts in the state legislature and state supreme court. *Id.* at 28-29. The federal litigation tied the State's hands, repeatedly. *Id.* at 30-31. On appeal at the Supreme Court, the Court sided with the State: "In the reapportionment context, the 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." *Id.* at 33. The Court concluded that it was clear error for the federal district court to stop the State from creating its own redistricting plan. *Id. Growe* left open only the following exception to its general rule that federal courts may not interfere in ongoing redistricting efforts: federal judicial intervention is permitted only when there is "evidence" making it "apparent" that the State (including the state courts) will fail to "develop a redistricting plan in time for the primaries." *Id.* at 34, 36.

Presumably Plaintiffs seek to take advantage of *Growe*'s exception here, while ignoring the *Growe*'s general rule. Plaintiffs' suit is not ripe. State policymakers (and the state courts if necessary)

must be permitted to finish their constitutionally delegated task of redistricting before Plaintiffs can run to federal court.[2] The Court should dismiss Plaintiffs' complaint.

A. *Growe* does not permit a federal court to oversee redistricting from beginning to end.

1. *Growe* requires this Court to permit the State of Wisconsin to commence and continue redistricting without interference. The Constitution vests States with the "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe*, 507 U.S. at 34; *see also* Wis. Const. art IV, §3. And "[a]bsent 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." *Id.*; *see Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[R]eapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place."); *White v. Weiser*, 412 U.S. 783, 795 (1973) (collecting cases for rule that "state legislatures have 'primary jurisdiction' over legislative reapportionment"). Applied here—with census data released only days ago and the legislative redistricting process

[2] Notably, in May the Wisconsin Supreme Court reaffirmed that redistricting challenges "often merit…exercise of its original jurisdiction." *In re Petition for Proposed Rule to Amend Wis. Stat. 809.70 (Relating to Redistricting)*, https://bit.ly/3CJWvW9. The court declined to create a procedure *ex ante* for redistricting actions without disturbing the "well-settled" rule that redistricting often warrants the court's original jurisdiction. *Id.* The court has been unequivocal that "[t]he people of this state 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.*, 639 N.W.2d 537, 542 (Wis. 2002).

underway—the Court should "sta[y] its hand" and dismiss this wildly premature litigation. *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*); Part I.C, *infra*.

Even *if* the Legislature were to fail at its redistricting task, the next stop would be the Wisconsin courts, not the federal courts. In *Growe*, for example, the Supreme Court chided the federal court for enjoining ongoing state judicial proceedings. 507 U.S. at 34; *see also Germano*, 381 U.S. at 409 ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."). *Growe* rejected the "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." 507 U.S. at 34. Any federal suit involving the "reapportionment of election districts," therefore, must wait for any state litigation that is initiated during the redistricting process too. *Id.* at 35. The State "can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer." *Id.*

2. This is not a close case. Indeed, Plaintiffs' suit is so premature it must be dismissed. As Plaintiffs allege, the release of new census data kicks off redistricting in the Legislature, as required by the state constitution. Compl. ¶¶33, 36; Wis. Const. art. IV, §3. The federal government released census data last Thursday. Plaintiffs waited only one day to file their suit. So on Day 1 of redistricting, Plaintiffs declared an impasse "near-certain" and asked this Court to step in as the federal supervisor of the State's redistricting efforts. *See* Compl. ¶7, pp. 15-16. Plaintiffs' "race to beat" everyone to the redistricting "finish line" is exactly what *Growe* says not to do. 507 U.S. at 37.

Growe makes explicit what is implicit (and intrinsic) in our constitutional structure: States must go first in redistricting. Plaintiffs' complaint does not allege facts sufficient to circumvent that rule. The Court should therefore dismiss Plaintiffs' complaint. There is no case or controversy here, and

Plaintiffs' conclusory allegations about an impasse are not yet ripe. *See Mayfield v. Texas*, 206 F. Supp. 2d 820, 824 (E.D. Tex. 2001).[3]

B. Plaintiffs have not sufficiently alleged a failure of the State's redistricting process.

1. Plaintiffs do not come close to alleging that this case comes within *Growe*'s exception for cases in which it is sufficiently certain that the "state branches will fail timely to perform" their redistricting duties. 507 U.S. at 34. Plaintiffs present no legally sufficient allegations the State will fail to redistrict, either through the political branches or the state judiciary. Plaintiffs filed their complaint a day after brand-new census data arrived. The Legislature will now begin redistricting. Compl. ¶¶33, 36. And the Governor is also working on his own maps to submit to the legislature. *Id.* ¶33; Wis. Executive Order No. 66 (Jan. 27, 2020).[4] There is no threat of *imminent* failure. By Plaintiffs' own allegations, the State has roughly eight months for the political branches, along with the state courts if necessary, to establish maps before primary candidates can even begin circulating nominating papers. *Id.* ¶37. It is in no way "apparent" that the State government will "not develop a redistricting plan in time for the primaries." *Growe*, 507 U.S. at 36.

---

[3] Some courts have simultaneously retained jurisdiction while acknowledging *Growe* precluded further federal involvement until state redistricting ran its course. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 867 (E.D. Wis. 2001); *Mississippi State Conf. of N.A.A.C.P. v. Barbour*, No. 3:11-cv-159, 2011 WL 1870222, at *9 (S.D. Miss. May 16, 2011) (noting federal court's "duty to act will arise only if" the redistrict process set out by State constitution "fails"), *aff'd*, 565 U.S. 972 (2011); *Vigil v. Lujan*, 191 F. Supp. 2d 1273, 1274-75 (D.N.M. 2001) (retaining jurisdiction while noting "the record does not appear to support a conclusion that the state legislature or judiciary is either unwilling or unable to adopt a redistricting plan in a timely manner"). Retaining jurisdiction in such circumstances is wrong. Where, as here, a suit is not ripe and Plaintiffs do not have standing, a court has no basis to hold onto a case. *See Arrington*, 173 F. Supp. 2d at 869 (Easterbrook, J., dissenting) (announcing refusal to participate in further proceedings of the three-judge court given the absence of a justiciable case or controversy). If there is no case or controversy, a court's only option is to dismiss.

[4] Plaintiffs allege that "Republic legislative leadership indicated that they would ignore the [Governor's] commission's proposals" and cite an AP story as support. Compl. ¶33. The news article quotes the Assembly Speaker as saying "we're going to follow the constitution," not that the Legislature will "ignore" anything. Scott Bauer, *Wisconsin Republicans dismiss nonpartisan redistricting plan*, AP (Jan. 23, 2020), https://apnews.com/article/86670cf694caeffb440433abb2b8fed5.

At its core, Plaintiffs' complaint asks for a federal decree that Wisconsin is incapable of fulfilling its redistricting responsibilities and thus should not be given more than a day to try. None of Plaintiffs allegations warrants such intervention. Plaintiffs allege that Wisconsin's past redistricting cycles have "been rife with partisan gridlock" and make observations about the current partisan divide between the executive and legislative branches. Compl. ¶¶7, 32. But Plaintiffs acknowledge, as they must, that the most recent redistricting cycle did not end in impasse. *Id.* Plaintiffs allege that was because "Republicans held trifecta control of Wisconsin's state government" unlike the political landscape in Wisconsin today. *Id.* ¶¶32-33. These allegations cannot justify a federal court's interference in the state redistricting process, especially a redistricting process that is just beginning. Surely it would come as quite a surprise to *Growe*'s federalism-minded author that *Growe*'s exception has now become the rule in every State with divided government—as Plaintiffs would have it, in any such State, a federal court may set a redistricting schedule for the State's executive, legislative, and judicial branches on Day 1 of redistricting.

2. At best, Plaintiffs' allegations are that there will be "near-certain deadlock" between the political branches sometime in the future, while acknowledging that Wisconsin's first filing deadline for primary candidates isn't until June 2022. Compl. ¶¶37, 53. *Growe* has no such "near-certain deadlock" exception that could permit a federal court to oversee a State's redistricting efforts from beginning to end. The Legislature gets the first at-bat when it comes to redistricting, regardless of the State's past inability or present partisan composition. Then the state judiciary is on deck, with the next opportunity to resolve any redistricting dispute. *See Growe*, 507 U.S. at 33-34 ("[T]he doctrine of *Germano* prefers *both* state branches to federal courts as agents of apportionment.").

A federal court cannot insert itself into that process (before the State even has a chance to start) based on nothing more than a prediction about the State's political branches. Such predictions are not "evidence" that every branch of the Wisconsin government "will fail timely to perform th[eir]

duty." *Growe*, 507 U.S. at 34. And mere speculation about a *future* redistricting impasse is not enough for a federal court to nullify Wisconsin's constitutional prerogative to produce its own maps. *See Trump v. New York*, 141 S. Ct. 530, 536 (2020) (*per curiam*) ("making any prediction about future injury [is] just that—a prediction"); *see also Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 (2013) ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."). If it were sufficient, any cynical Plaintiff could dream up reasons why a political process may break down and plead their way around *Growe*'s constitutionally mandated restraint on the federal judiciary's meddling in the reserved powers of the States.

3. *Growe*'s exception is narrower. To warrant federal judicial intervention, there must be "evidence" making it "apparent" that the State—both the legislature *and* state courts—"would not develop a redistricting plan in time for the primaries." 507 U.S. at 34, 36. Applied here, Plaintiffs' prediction that Wisconsin's political branches will eventually run out of time is insufficient to justify federal-court takeover of the redistricting process now. Plaintiffs' allegations are just "[t]hreadbare recitals" of "near-certain" failure by the political branches. *Iqbal*, 556 U.S. at 678; *see, e.g.*, Compl. ¶¶6, 7, 53. Even had Plaintiffs plausibly alleged that an impasse between the political branches would occur sometime in the future, that would not be enough. The complaint is silent on the ability of the state courts to resolve any such impasse. And in all events, some *future* impasse is not a *current* impasse necessitating this Court's intervention now. *See Growe*, 507 U.S. at 36.

In related contexts, courts consistently refuse to declare an impasse absent an actual stalemate between the branches. *See, e.g.*, *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 772 (D.C. Cir. 2020) (en banc) (stalemate giving rise to judicial intervention exists only "where there is an impasse contrary to traditional norms [and] no practicable alternative to litigation exists"). The same deference is constitutionally required here given the State's constitutionally prescribed role in redistricting. A State "can have only one set of legislative districts, and the primacy of the State in

designing those districts compels a federal court to defer." *Growe*, 507 U.S. at 35. Doubt about whether political process will produce future results does not authorize judicial intervention in the midst of that process—much less before the process can even begin in earnest. Rather, courts must allow issues to be "hashed out in the 'hurly-burly, the give-and-take of the political process'"—no matter how hopeless such a process seems—before declaring a true impasse and intervening. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020) (quoting Hearings on S. 2170 et al. before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., 87 (1975) (statement of A. Scalia, Assistant Attorney General, Office of Legal Counsel)). Plaintiffs' prediction that the political process is sure to fail are little different than allegations "that the political process is hopelessly broken." *Agre v. Wolf*, 284 F. Supp. 3d 591, 628 (E.D. Pa. 2018). Predictions alone are insufficient to justify federal judicial interference in the State's efforts to redistrict using its own branches of government.

In sum, Plaintiffs have failed to adequately allege that Wisconsin will fail to timely complete redistricting. Plaintiffs' allegations do not trigger *Growe*'s narrow exception for redistricting that has failed in both the state legislature and the state courts on the eve of a primary election. 507 U.S. at 33-34, 36. Plaintiffs did not even give the State more than a day to respond to new census data.

C. Plaintiffs' prematurely filed suit must be dismissed.

Plaintiffs' challenge is an attempt to defy the Constitution's allocation of redistricting responsibility to the State of Wisconsin. Worse, Plaintiffs' suit is based only on a prediction about events that have not yet transpired. There is no live case or controversy for the Court to decide at this time. Retaining jurisdiction despite the absence of a case or controversy would be an affront both to the Article III limits on the federal "judicial Power" as well as the reserved powers of the State of Wisconsin, including its primacy over redistricting. At this time, with the facts as Plaintiffs have alleged, only dismissal is appropriate for at least the following three reasons.

1. First, Plaintiffs waited only a day to file suit after the census data was released. This is the consummation of a troubling trend in malapportionment litigation—filing suits when they are not yet ripe, asking federal courts to exercise jurisdiction of state redistricting, set a schedule, and then wait. *See, e.g., Arrington*, 173 F. Supp. 2d at 858; *Smith v. Clark*, 189 F. Supp. 2d 502, 503 (S.D. Miss. 2001). For example, Texas plaintiffs filed suit on the day the 2000 census figures were released and asked the court to set a deadline for State authorities to act in *Mayfield v. Texas*, 206 F. Supp. 2d 820 (E.D. Tex. 2001). The three-judge district court made the unremarkable observation that "the Texas Legislature ha[d] not been given the opportunity to act" before dismissing plaintiffs' suit. *Id.* at 824. Such premature suits have serious Article III failings and are a direct threat to our federalist structure. There is no constitutional basis to docket a case and then wait for it to become ripe. *But see, e.g.*, *Arrington*, 173 F. Supp. 2d at 865 (simultaneously concluding that the court should retain jurisdiction and that the suit was not yet ripe). As Judge Easterbrook put it in his dissenting opinion in *Arrington*: "[R]eserving a place in line is not a proper reason to invoke the judicial power." *Id.* at 869; *accord Growe*, 507 U.S. at 37 ("What occurred here was not a last-minute federal-court rescue of the Minnesota electoral process, but a race to beat the Minnesota Special Redistricting Panel to the finish line. That would have been wrong, even if the Panel had not been tripped earlier in the course.").

Plaintiffs have joined the first-to-file fray. Retaining jurisdiction over Plaintiffs' case rather than dismissing it outright fuels the race to the courthouse, tempting litigants to file as soon as census data is released to ensure their place in line should actual federal litigation become ripe many months down the road. That "race" to abandon the State process is precisely what *Growe* instructed the federal courts to stop. 507 U.S. at 37. It puts state redistricting efforts (including any state court resolution of a future impasse between the state political branches) on a "collision course" with a prematurely filed federal suit. Jensen, 639 N.W.2d at 542.

2. Second, the timing of Plaintiffs' case distinguishes it from others in which district courts have retained jurisdiction (and then waited for something to happen). Plaintiffs have not allowed the State any time whatsoever to even respond to the census data. By contrast, other cases in which federal courts have been willing to retain jurisdiction generally involved actual allegations of a failure at the state level or clear signs that the process had halted. *See, e.g.*, *Mississippi Conf. of NAACP*, 2011 WL 1870222, at *4 ("[T]he Legislature adjourned on April 7, without passing a joint resolution containing the plans proposed by the House and Senate."); *Smith*, 189 F. Supp. 2d at 502 (noting "many months" had passed); *see also Flateau v. Anderson*, 537 F. Supp. 257, 259, 262-63 (S.D.N.Y. 1982) (rejecting State's argument that it could wait years after census release to redistrict, while holding elections under old districting plans). As Plaintiffs allege, redistricting has just now begun in Wisconsin with the delivery of the census data. Compl. ¶36. Plaintiffs admit there are months before the Wisconsin legislature adjourns and many more months until the first primary deadline in June of next year. *Id.* ¶¶36-37. If the wheels come off that would be one thing—but Plaintiffs have not even given the State-level proceedings time to get off the ground. In these circumstances, dismissal is warranted. Such suits, filed immediately upon the release of the census data without giving a chance for state redistricting to run its course, must be dismissed for failure to seek "an acceptable Article III remedy." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998); see *Mayfield*, 206 F. Supp. 2d at 824.

3. Third and relatedly, the filing deadlines for the next primary election are well in the future as compared to other cases in which federal courts have retained jurisdiction over ongoing redistricting. *Cf. Mississippi Conf. of NAACP*, 2011 WL 1870222, at *4 (suit filed March 17, 2011, legislature adjourned without plan April 7, 2011, candidate qualification deadline June 1, 2011); *Smith*, 189 F. Supp. 2d at 502. Here, candidates are not even allowed to begin circulating nominating papers until April 15, 2022, eight months from now, and the deadline is not until June 1, 2022, nine and a half months from now. Compl. ¶37. Plaintiffs will have ample time to re-file should it become

"apparent" sometime in the future that both the political branches and the Wisconsin courts cannot redistrict in time for next year's deadlines. *Growe*, 507 U.S. at 36. In the meantime, there is no constitutional basis for Plaintiffs to demand that a federal court impose a redistricting "schedule" upon every branch of the Wisconsin state government. Compl., p. 16.

* * *

Plaintiffs ask this Court to "invoke jurisdiction, set a deadline, and wait." *Mayfield*, 206 F. Supp. 2d at 826. That is at odds with the limited judicial power of the federal courts and at war with the primacy of the State in redistricting. Plaintiffs will say that their file-wait-and-see approach is what the Supreme Court anticipated in *Growe*. That makes no sense. *Growe*—a case directing federal courts to stay their hand while States redistrict—is not a vehicle for enlisting federal supervision from the moment the redistricting process begins. *See Mayfield*, 206 F. Supp. 2d at 825 ("[W]e think it inconsistent with the precepts of *Growe* to say that the decision is an endorsement of a federal court's invocation of jurisdiction in a suit brought with no election pending and before the state's legislature has even had an opportunity to act. Instead, *Growe* appears to teach us that, first and foremost, it is the state's responsibility to apportion its own federal congressional and state legislative districts."). Only a dismissal of Plaintiffs' premature federal litigation can stop the continuing race to federal courthouses that *Growe* criticized decades ago. Retaining jurisdiction will only further entrench the federal courts in the State's redistricting process from the day the process begins, rather than give the State branches the dignity to allow redistricting to play out.

Plaintiffs have merely predicted that the political branches will eventually fail. But they have not alleged that every branch of the Wisconsin government (including its courts) have failed or will fail imminently. Plaintiffs' claims are thus "not ripe for adjudication" since they "res[t] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation marks omitted). Plaintiffs' suit should be dismissed.

II. There Is No Article III Case or Controversy for this Federal Court to Decide.

The Court should also dismiss Plaintiffs' suit because Plaintiffs have no Article III standing. Their alleged voter dilution injury and associational injury are entirely speculative. They have failed to adequately allege that Wisconsin will not be able to timely establish reapportioned districts as it plans to do so. Any ruling on Plaintiffs' claims would be impermissibly advisory.

1. Any federal case requires plaintiffs to show that there is "a 'case' or 'controversy' that is, in James Madison's words, of a 'Judiciary Nature.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (Farrand 1966)). Plaintiffs must allege a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* (quotation marks omitted). Their injury must be "certainly impending" and "actual or imminent," not merely "conjectural or hypothetical." *Clapper*, 568 U.S. at 409 (quotation marks omitted); *DaimlerChrysler*, 547 U.S. at 344 (quotation marks omitted). "Allegations of a *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (quotation marks omitted).

Applying Article III's familiar standing rules here, Plaintiffs' alleged voter dilution injury is too conjectural and hypothetical. Even if new census data shows that old legislate districts are malapportioned, that "does not necessarily mean a federal court should step in to rewrite" the current districting plans. *Arrington*, 173 F. Supp. 2d at 860; *see also Reynolds*, 377 U.S. at 586 ("judicial relief" for malapportionment "becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in timely fashion after having had an opportunity to do so"). The mere fact of malapportionment is not enough.[5] *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (party

[5] Indeed, malapportionment complaints have been dismissed for failure to state a claim even in instances when malapportionment is conceded. *See, e.g.*, *Political Action Conf. of Ill. v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *Mac Govern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986). That is because *Reynolds* does not require "daily, monthly, annual or biennial reapportionment, so long as a state has a

must show "not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement"). Plaintiffs must "assert an injury that is the result of the statute's actual or threatened *enforcement*, whether today or in the future." *California v. Texas*, 141 S. Ct. 2104, 2114 (2021); *see also Poe v. Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.) (federal courts "cannot be umpire to debates concerning harmless, empty shadows"). Here, they have not. Plaintiffs have not plausibly alleged that the existing districts will actually be used again, such that their votes could be unconstitutionally diluted. *See Prairie Rivers Network*, 2 F.4th at 1008.

Plaintiffs' conclusory allegations predicting that Wisconsin's political branches face "near-certain" failure are insufficient. For starters, Plaintiffs have not also alleged "near-certain" failure by the state courts, which would be the next stop for redistricting before old districts would ever be used again. *See Jensen*, 639 N.W.2d at 542; *see also Growe*, 507 U.S. at 33-34. Additionally, Plaintiffs' other allegations contradict any notion that Plaintiffs face "certainly impending" harm. *Clapper*, 568 U.S. at 409. Plaintiffs admit that "Wisconsin is entering a new redistricting cycle." Compl. ¶33. Plaintiffs admit that "[t]he Wisconsin Constitution *requires* the Legislature to draw new legislative lines" after the census. *Id.* ¶36 (emphasis added). And Plaintiffs admit that the next election deadline is not until June 1, 2022, *id.* ¶37, when candidates must file nomination papers for primary elections that will not take place until next August.

Plaintiffs have not come close to alleging "a realistic danger" that the old districts will be used again. *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979); *see also Clapper*, 568 U.S. at 413 (expressing "reluctan[ce] to endorse standing theories that require guesswork as to how independent

---

reasonably conceived plan for periodic readjustment of legislative representation." *Reynolds*, 377 U.S. at 583-84.

decisionmakers will exercise their judgment"). Plaintiffs therefore have no Article III injury, and Counts I and II for unconstitutional malapportionment should be dismissed.

2. Likewise, Plaintiffs' alleged First Amendment injury is pure conjecture. Plaintiffs allege "delays…threaten to violate" their First Amendment rights. Compl. ¶4. They assert that it is "significantly unlikely" that redistricting will be on time and that a delay "is likely" to burden their First Amendment rights, without further explanation. *Id.* ¶53. For all of the foregoing reasons—chief among them that Plaintiffs filed suit on Day 1 of redistricting—Plaintiffs' allegations about future redistricting delays have failed to cross over from the possible to the plausible. *See Prairie Rivers Network*, 2 F.4th at 1008. The alleged First Amendment injury is nebulous, not "palpable," and is too far off in the future for Article III purposes. *Valley Forge Christian College v. Amer. United for Separation of Church & State*, 454 U.S. 464, 475 (1982); *see Clapper*, 568 U.S. at 414. Accordingly, Count III should also be dismissed for lack of standing.

III. Plaintiffs Fail to State a Claim for Violation of Any Associational Rights.

Count III of Plaintiffs' complaint should also be dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Plaintiffs allege that redistricting delays "threaten to violate Plaintiffs' right to associate under the First and Fourteenth Amendments to the U.S. Constitution." Compl. ¶4. If redistricting comes too close to the June 2022 filing deadline, according to Plaintiffs, it "will substantially interfere with Plaintiffs' ability to associate with like-minded citizens, educate themselves on the positions of their would-be representatives, and advocate for the candidates they prefer." Compl. ¶37; *see id.* ¶52 (alleging that "[i]mpeding candidates' ability to run for political office" also impedes "Plaintiffs' ability to assess candidate qualifications and positions, organize and advocate for preferred candidates, and associate with like-minded voters"). In particular, Plaintiffs fear their alleged right "to associate with others from the same lawfully apportioned legislative and congressional districts" will be unconstitutionally burdened. *Id.* ¶53.

The First Amendment's protection of an "individual's freedom to speak, to worship, and to petition the government for the redress of grievances" includes the "correlative freedom to engage in group effort toward those ends"—the right to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). In the political arena, the First Amendment protects the right of citizens "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Burdens on that right to associate "can take a number of forms" (but none bearing any resemblance to Plaintiffs' claims here). *Roberts*, 468 U.S. at 622. For example, the government might burden associational rights by regulating a political party's internal processes or by compelling unwanted association with outsiders or by requiring disclosure of membership in an anonymous group. *See Jones*, 530 U.S. at 573, 577; *Roberts*, 468, U.S. at 622-23.

Here, Plaintiffs' allegations that redistricting may (or may not) burden their right to associate do not pass the smell test. For any one of the following reasons, the claim should be dismissed.

First, Plaintiffs' complaint fails to articulate what possible burden redistricting places on Plaintiffs' right "to associate with like-minded citizens" or "educate themselves" or "advocate" for candidates. Compl. ¶37. Redistricting plans place "no restrictions on speech, association, or any other First Amendment activities." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). Rejecting plaintiffs' First Amendment claim in *Rucho*, the Supreme Court explained that "plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Id. Rucho* forecloses any associational claim here too. Redistricting maps, either those existing or forthcoming, do not stop Plaintiffs from associating with anyone.

Second, Plaintiffs' complaint cites *Anderson v. Celebrezze* for the inapposite proposition that the "exclusion of candidates…burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." 460 U.S. 780, 787-88 (1983); *see* Compl. ¶37. *Anderson* is a

ballot-access case involving discriminatory treatment of Independent candidates. 460 U.S. at 782-83. It has nothing to do with redistricting. *Anderson* itself disclaims that every election law "imposes constitutionally-suspect burdens on voters' rights to associate or to choose among candidates," even though such laws "inevitably affec[t]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id.* at 788. To the extent anything can be gleaned from *Anderson*, it is that "there must be substantial regulation of elections" and "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* Applied here, the reapportionment process is not even a restriction on the right to associate, let alone a "constitutionally-suspect" one. *Id.*; *Rucho*, 139 S. Ct. at 2504. The effects of redistricting affect everyone, every decade, and are "a necessary side effect of an electoral scheme that must evolve to fit the ever-changing footprint of the nation's citizenry." *Tripp v. Scholz*, 872 F.3d 857, 872 (7th Cir. 2017). *Anderson* lends no support to Plaintiffs' meritless associational claim.

Third, Plaintiffs' alleged right to associate with "others from the same lawfully apportioned legislative and congressional districts" makes little sense. Compl. ¶53. Legislative districts are not akin to political parties or charitable organizations. Plaintiffs have no associational right to be in one district or another—or at least no right that is justiciable. For example, a voter's claim that her right to associate with like-minded Democrats is burdened because a redistricting plan places her in a more Republican district is non-justiciable. *See Rucho*, 139 S. Ct. at 2504-05. Similarly here, it stretches the imagination that Plaintiffs could articulate any justiciable claim that they have a right to associate with an unknown group of future fellow constituents, which has been burdened somehow by the redistricting process.

Finally, Plaintiffs have not alleged that this unrecognizable First Amendment right is presently violated, or that it will be imminently violated. At most, Plaintiffs have alleged that their rights might (or might not) be affected at some uncertain point in the future—that redistricting delays might

"threaten" their alleged First Amendment rights later. Compl. ¶4, *see also id.* ¶¶37, 52. Discussed above, Plaintiffs' allegations about redistricting delays are mere predictions. Part I.B, *supra*. Primary elections are a year away; there are no allegations that redistricting has stalled; and even if it were to stall, the Wisconsin courts are fully capable of resolving an impasse. Resting only on a prediction, Plaintiffs' associational claim should be dismissed. *See Trump*, 141 S. Ct. at 536.

* * *

The First Amendment does not have a yet-undiscovered redistricting deadline. Neither existing redistricting plans nor forthcoming redistricting plans will infringe Plaintiffs' right to associate with whomever they choose. *See Rucho*, 139 S. Ct. at 2504; *see also Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election L.*, 781 F. Supp. 394, 401 (D. Md. 1991) (noting plaintiffs "are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives"), *aff'd*, 504 U.S. 938 (1992); *Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (1988) (rejecting claim that redistricting "regulates [voters'] speech or subjects them to any criminal or civil penalties for engaging in protected expression"), *aff'd*, 488 U.S. 1024 (1989). The State of Wisconsin has a "reasonably conceived plan for periodic readjustment of legislative representation." *Reynolds*, 377 U.S. at 583. And of all the allegations in Plaintiffs' complaint, the Constitution's only concern at this time is that the State of Wisconsin be allowed to carry on with that plan unencumbered by the federal courts.

CONCLUSION

For the foregoing reasons, the Legislature respectfully requests that this Court dismiss Plaintiffs' complaint in its entirety.

Dated: August 17, 2021

Respectfully submitted,

/s/ *Kevin St. John*

Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Adam K. Mortara, SBN 1038391
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Jeffery M. Harris
Taylor A.R. Meehan*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com

** Licensed in Illinois & D.C.; supervised by principals of the firm licensed in Virginia while Virginia bar application is pending.*

Counsel for Proposed-Intervenor, Wisconsin Legislature

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I served this document as part of the Legislature's motion to intervene. *See* Fed. R. Civ. P. 24(c). I certify that I electronically filed the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case. I further certify that I mailed the foregoing document to counsel for the named Defendants, who have not yet appeared in this case. *See* Fed. R. Civ. P. 5(b).

/s/ *Kevin St. John*
Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7990
kstjohn@bellgiftos.com