

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,

BILLIE JOHNSON, ERIC O'KEEFE,
ED PERKINS, RONALD ZAHN,

Intervenor-Plaintiffs,

LEAH DUDLEY, SOMESH JHA, JOANNE
KANE, MICHAEL SWITZENBAUM, JEAN-
LUC THIFFEAULT, STEPHEN JOSEPH
WRIGHT,

Proposed Intervenor-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,

Intervenor-Defendant,

CONGRESSMEN SCOTT FITZGERALD,
MIKE GALLAGHER, GLENN GROTHAM,
BRYAN STEIL, TOM TIFFANY,

Intervenor-Defendant,

GOVERNOR TONY EVERS,

Intervenor-Defendant.

No. 3:21-cv-00512-jdp-ajs-eec

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, & REBECCA ALWIN, MELODY McCURTIS, HELEN HARRIS, EDWARD WADE, JR., BARBARA TOLES, SEAN TATUM, WOODROW WILSON CAIN, II, TRACIE Y. HORTON, NINA CAIN,

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, MEGAN WOLFE, in her official capacity as the administrator of the Wisconsin Elections Commission,

Defendants.

No. 3:21-cv-00534-jdp-ajs-eec

**MOTION TO DISMISS *BLOC* PLAINTIFFS' AMENDED COMPLAINT
BY THE WISCONSIN LEGISLATURE**

The *BLOC* plaintiffs have filed an amended complaint challenging Wisconsin's legislative districts on two grounds. *See* Dkt. 74, *BLOC* Am. Compl. They allege that the existing districts are unconstitutionally malapportioned. *Id.* at ¶¶94-103. They also allege that existing Assembly districts in Milwaukee violate section 2 of the Voting Rights Act. *Id.* at ¶¶104-110. And they seek a court order that new Assembly districts include a *seventh* district with a majority Black Voting Age Population (or BVAP) in Milwaukee, where there are currently six such districts. *Id.* at p. 35.

For all the reasons explained in the Legislature's other motions to dismiss, the complaint should be dismissed for lack of jurisdiction. Fed. R. Civ. P. 12(b)(1). Plaintiffs concede that the Legislature is currently redrawing the districts that they are challenging. Am. Compl. at p. 3; *see* Wis. Const. art. IV, §3. And now, the Wisconsin Supreme Court is also exercising its original jurisdiction to review any redistricting disputes and new redistricting plans. *See* Dkt. 80, Order; Dkt. 81, Notice.

There is thus no “realistic danger” that the existing districts will be used again in next year’s elections. *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979); *see also California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (standing requires “an injury that is the result of the statute’s actual or threatened enforcement, whether today or in the future”). Plaintiffs’ claims about those existing districts are entirely “dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all” in Wisconsin. *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quotation marks omitted).

Adding a Voting Rights Act claim cannot revive the *BLOC* plaintiffs’ complaint. Just as there is no jurisdiction to adjudicate a malapportionment claim now, there is no jurisdiction to adjudicate any Voting Rights Act claims regarding existing districts that the Legislature is redrawing and that the Wisconsin Supreme Court will later review. *See Babbitt*, 442 U.S. at 298; *California*, 141 S. Ct. at 2114; *Trump*, 141 S. Ct. at 535.

Ignoring these jurisdictional flaws and adjudicating that Voting Rights Act claim now would raise serious constitutional questions. The *BLOC* plaintiffs have invoked the Voting Rights Act as a basis for this Court to “[o]rder the adoption of a valid State Assembly plan that includes a seventh BVAP majority district” in Milwaukee as part of a new districting plan. Am. Compl. at p. 35.¹ In a

¹ In support of their requested relief, the *BLOC* plaintiffs have submitted a “demonstration plan” that draws seven purportedly BVAP districts—all seven of which are underpopulated and with razor-thin BVAP majorities:

DEMONSTRATIVE PLAN DATA

District	Total Population	Population Deviation	Black Voting Age Population (BVAP)
7	58,764	-1.3%	52.4%
10	59,284	-0.4%	51.1%
11	59,139	-0.7%	50.3%
12	58,790	-1.2%	50.4%
16	58,647	-1.5%	50.7%
17	58,768	-1.3%	50.4%
18	58,668	-1.5%	50.6%

Dkt. 74-7 at 2.

brief filed in the related Wisconsin Supreme Court proceedings, the *BLOC* plaintiffs argued that this Court should decide that Voting Rights Act claim before any districts are redrawn:

“[T]he VRA claim should be resolved *before* any districts are redrawn to correct for malapportionment. The district lines drawn to remedy the VRA violation in the Milwaukee-area Assembly districts will not only dictate precisely how those districts must have their populations reapportioned, but will necessarily have a cascading effect on how the remaining districts throughout the state are redrawn.”

Br. of *Amici Curiae* Black Leaders Organizing for Communities, et al. at 16, *Johnson v. Wis. Elections Comm’n*, No. 2021AP1450-OA (emphasis added).

Adjudicating that claim now would contravene elementary principles of federalism and comity. *See Growe v. Emison*, 507 U.S. 25 (1993). Because the State “has begun to address that highly political task” of redistricting, this Court must “defer consideration” of this redistricting dispute. *Id.* at 33. That deference is required even if the federal and state complaints are not identical. *Id.* at 34-35. *Growe* itself involved federal litigation containing a Voting Rights Act claim and state litigation that did not. *Id.* Because “the nature of the relief requested” is the same—“reapportionment of election districts”—the State still must go first. *Id.* at 35. Stepping in now to “dictate precisely how [Milwaukee] districts must have their populations reapportioned” is the very sort of interference that *Growe* prohibits. *See* Br. of *Amici Curiae* Black Leaders Organizing for Communities at 16, *supra*.

Adjudicating that claim now would also raise serious questions about the constitutionality of Section 2 of the Voting Rights Act if it could be read to apply here and now. Plaintiffs ask this Court for race-based redistricting now to greenlight seven BVAP districts in Milwaukee, before the Legislature (and the state supreme court if necessary) have even finalized a redistricting plan. *See* Br. of *Amici Curiae* Black Leaders Organizing for Communities at 16, *supra*; Am. Compl. at p. 35. That requested relief looks more like a request for judicial preclearance for future districts, not a section 2 claim. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 544 (2013).

Section 2 of the Voting Rights Act requires that the political processes are “equally open to participation” for all citizens. 52 U.S.C. §10301(b); see *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2337-38. It does not give *carte blanche* authority to redistrict based on race. See *Cooper v. Harris*, 137 S. Ct. 1455, 1469-70 (2017). There must be a compelling reason for doing so, and any use of race in a reapportionment plan must be narrowly tailored to that end. See *id.* But here, the *BLOC* plaintiffs ask that race predominate in redistricting from the very beginning. They concede that the relief they seek with respect to Milwaukee districts will “necessarily have a *cascading effect* on how the remaining districts throughout the state are drawn.” Br. of *Amici Curiae* Black Leaders Organizing for Communities at 16 (emphasis added). Such race-based redistricting “reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.” *Shaw v. Reno*, 509 U.S. 630, 647 (1993). It sends an “equally pernicious” message to elected representatives in those districts that “their primary obligation is to represent only the members of that group, rather than their constituency as a whole.” *Id.* at 648.

Rather than enter that constitutional quagmire, this Court should dismiss the amended complaint in its entirety. The malapportionment and Voting Rights Act claims are based on conjecture and speculation that the existing districts will be used again. There is no Article III case or controversy at this time, and the complaint should be dismissed for lack of jurisdiction.

Dated: September 30, 2021

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.*

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

Counsel for the Wisconsin Legislature

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2021, I served the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case.

/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