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

REPLY IN SUPPORT OF MOTION TO DISMISS *BLOC* PLAINTIFFS' AMENDED COMPLAINT BY THE WISCONSIN LEGISLATURE

The Legislature incorporates by reference every argument it has made about lacking subject matter jurisdiction in previously filed motions to dismiss and in its pending petition for an extraordinary writ directing that all federal complaints in these consolidated cases be dismissed. *See* Dkt. 82, Notice; Dkt. 81, Notice; Dkt. 9-3, Br. in Support of Mot. to Dismiss; Dkt. 11-3, Proposed Br. in Support of Mot. to Dismiss, *BLOC v. Bostelmann*, No. 3:21-cv-534. Even if the Court agrees with the *BLOC* plaintiffs that there was federal jurisdiction at the outset of this dispute (there was not), that does not answer whether there is federal jurisdiction now. *See* Fed. R. Civ. P. 12(h)(3); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Wisely, the *BLOC* plaintiffs do not contest that *Growe v. Emison*, 507 U.S. 25 (1993), prohibits this Court from doing what the *BLOC* plaintiffs initially suggested it ought to do—resolve their VRA

claims "before any districts are redrawn to correct for malapportionment," which would "not only dictate precisely how those districts must have their populations reapportioned" but also "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 (Sept. 9, 2021); *see* Dkt. 109, Opp'n to Mot. to Dismiss ("Opp'n") 7 (agreeing "that the Court may not obstruct or impede Wisconsin's branches of government until there is evidence they will fail to timely redistrict, imperiling Plaintiffs' federal legal rights"). Post-*Growe*, a federal court cannot "dictate precisely" to the State of Wisconsin how to draw new districts. *See Growe*, 507 U.S. at 35 (noting 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").[1]

If this Court has no power to do anything *now*—as plaintiffs now concede—then the question remains whether this Court retains jurisdiction based on speculation that it might have to intercede *later*. It does not. Article III does not permit the *BLOC* plaintiffs to hold their place in line for a future harm that has no "realistic danger" of arising. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 869-70 (E.D. Wis. 2001) (Easterbrook, J., dissenting). The Wisconsin Supreme Court is exercising its original jurisdiction over redistricting

[1] Plaintiffs repeat the argument that *Growe* does not hold "that a Court lacks jurisdiction when a state begins the redistricting process." Opp'n 2. As the Legislature has already explained, *Growe* had no occasion to consider whether an Article III case or controversy would be present at the outset of the web of Minnesota cases that *Growe* addressed, all of which were in their eleventh-hour. *Growe*, 507 U.S. at 32 (noting parties did not dispute jurisdiction); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). Plaintiffs have not grappled with *Growe*'s effect on post-*Growe* cases. The import of *Growe* is that legislative redistricting, state redistricting litigation, and then federal redistricting litigation (if ever necessary) occur sequentially and not concurrently. 507 U.S. at 32-33, 37. The State goes first, with the presumption that the State will ably redistrict. *Id.* at 34. After *Growe*, the possibility of federal-court involvement later on is thus a mere "prediction" that "rest[s] on speculation about the decisions of independent state actors." *Trump v. New York*, 141 S. Ct. 530, 536 (2020); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

claims. Ex. A (Order Granting Original Pet'n, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Sept. 22, 2021, *as amended*, Sept. 24, 2021)). It has invited any proposed intervenors to file motions to intervene and then granted intervention motions by every party who asked to intervene. *Id.* at 3; Ex. B (Order Granting Mots. to Intervene, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Oct. 14, 2021)).[2] The court has accepted briefing about *when* remedial plans must be finalized and *how* the court should go about crafting remedial plans. Ex. A at 3; Ex. C at (Order Regarding Remedial Briefs, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Oct. 14, 2021)). It beggars belief that the BLOC plaintiffs face any "certainly impending" or "actual or imminent" harm with respect to the existing districts. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). To agree that the BLOC plaintiffs have standing is to agree that the Wisconsin Supreme Court will not finish what it has already started.

Plaintiffs' invocation of *Branch v. Smith*, 538 U.S. 254 (2003), provides just as good an example of why no jurisdiction exists here. The BLOC plaintiffs believe *Branch* "underscores that a federal district court may retain subject matter jurisdiction" over this suit. Opp'n 3. Just the opposite. *Branch* involved a section 5 claim under the Voting Rights Act. That section 5 claim required the State to get "preclearance" of *forthcoming* districts the Attorney General or the federal district court for the District of Columbia before the State could use them in an election. *See Branch*, 538 U.S. at 262. Here, by contrast, the BLOC plaintiffs assert claims about *existing* districts—districts that plaintiffs concede are

[2] Without explanation, some but not all of the *BLOC* plaintiffs intervened in the state supreme court, even though all *BLOC* plaintiffs initially joined a non-party brief in that court. *See* Ex. B (Order Granting Mots. to Intervene, *supra*); Br. of Amici Curiae Black Leaders Organizing for Communities, et al., *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA. The failure of some of the *BLOC* plaintiffs to intervene in the state supreme court proceedings—even though involving the same counsel and challenging the same exact maps—is no excuse for exercising jurisdiction here. There still is no federal case or controversy. Wisconsin, moreover, can have "only one set of redistricting plans," so the Court must defer no matter the parties. *Growe*, 507 U.S. at 35. And any party in privity with the state supreme court intervenors (*e.g.*, members of the intervening organizations) will be precluded from relitigating issues decided in state court. The time to raise redistricting claims is in the state supreme court, lest a federal court always have the last word on state redistricting plans.

being redrawn. *See* Dkt. 74, *BLOC* Am. Compl. ¶¶106-07. And unlike section 5 litigation, there is no requirement under section 2 that a federal court or federal actors put their imprimatur on Wisconsin's forthcoming districts. *See Haywood v. Drown*, 556 U.S. 729, 747 (2009) ("[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." (citation omitted)).

Here, unlike in *Branch*, there will be nothing for any federal court to do once Wisconsin's own branches of government, including the state supreme court if necessary, reapportion the existing districts. *See* Opp'n 7 (agreeing that plaintiffs' claims will be adjudicated "*if* Wisconsin's legislative and judicial processes fail to timely produce new legally compliance state legislative districts" (emphasis added)). The existing districts that plaintiffs challenge in their amended complaint will be replaced with new districts. Any federal claims about the existing districts will be moot. *See Aslin v. FINRA*, 704 F.3d 475, 478 (7th Cir. 2013) (federal courts cannot order a party to "stop doing something that it is not doing, or to declare rights and obligations about a controversy that no longer exists").

Nor could plaintiffs use their complaint about the existing districts to ask this Court to bless (or alter) new districts. The U.S. Supreme Court may review any judgment by the Wisconsin Supreme Court, to the extent the judgment implicates a question of federal law. 28 U.S.C. §1257(a). But a party cannot ask this Court to sit in federal review of the state supreme court. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); D.*C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *see, e.g.*, *Kelley v. Med-1 Solutions, LLC*, 548 F.3d 600, 605-07 (7th Cir. 2008) (holding federal court could not review a federal-law claim because it was not independent of a state-court judgment regarding attorneys' fees). In this court, once the state supreme court acts, its judgment will demand full faith and credit. *See* 28 U.S.C. §1738; *Growe*, 507 U.S. at 35-36. That includes giving the state supreme court's judgment the same preclusive effect as Wisconsin courts would give it. *See, e.g.*, *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). Both the petitioners in the state court proceedings and any parties in privity with petitioners will be

precluded from raising redistricting-related claims here. *See N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 554-55, 525 N.W.2d 723 (Wis. 1995) ("[T]he number of substantive theories that may be available to the plaintiff is immaterial—if they all arise from the same factual underpinnings they must all be brought in the same action or be barred from future consideration."); *see also, e.g.*, *Froebel v. Meyer*, 217 F.3d 928, 935 (7th Cir. 2000) (concluding plaintiff could not raise Clean Water Act claim in federal proceedings having failed to raise them in earlier state proceedings).

Growe does not require deferral for deferral's sake. It requires deferral because the State "can have only one set of legislative districts." *Growe*, 507 U.S. at 35. If the State ably redistricts, the task is complete. If a federal court could then review or alter the districts, that would (perplexingly) give federal courts the last word in all state redistricting. That would be an unrecognizable use of the federal judicial power here, given the U.S. Supreme Court's repeated refrain that a State has "primary jurisdiction" over reapportionment. *See White v. Weiser*, 412 U.S. 783, 795 (1973) (collecting cases).

The districts that the *BLOC* plaintiffs challenge will soon be redrawn. There is no realistic danger that they will be used again. Plaintiffs have no Article III injury, and their suit is based on unfounded speculation that Wisconsin is incapable of redistricting itself. Plaintiffs' complaint should be dismissed.

Dated: October 27, 2021

Respectfully submitted,

/s/ *Kevin St. John*

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 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.

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