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

NOTICE BY THE WISCONSIN LEGISLATURE

The Wisconsin Legislature has filed a petition for writ of mandamus or, in the alternative, writ of prohibition in the United States Supreme Court. The petition is attached as Exhibit 1, and the petition appendix is attached as Exhibit 2.

Dated: September 24, 2021

Respectfully submitted,

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Counsel for the Wisconsin Legislature

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 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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No. _____

In the
Supreme Court of the United States

IN RE WISCONSIN LEGISLATURE,

Petitioner.

PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

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September 24, 2021

Counsel for Petitioner

QUESTIONS PRESENTED

Less than 24 hours after the 2020 census data was released, plaintiffs filed redistricting litigation premised on the theory that Wisconsin is incapable of redistricting. The Legislature immediately moved to dismiss for lack of an Article III case or controversy. Before the motions could even be fully briefed, the three-judge federal district court denied the Legislature's motion. Citing a "historical pattern" of federal court involvement in Wisconsin redistricting and an "urgent requirement of prompt action," the court asserted that it "must prepare now to resolve the redistricting dispute, should the state fail to establish new maps in time for the 2022 elections." Pet.App.10. The next elections are nearly a year away, the Legislature is drawing new districts, there is no legislative impasse, and the Wisconsin Supreme Court has agreed to resolve any disputes about the new maps.

The questions presented are:

(1) Does a federal court clearly and indisputably transgress its Article III judicial power by exercising jurisdiction over a redistricting dispute challenging old districts based on new census data, when the State is actively redrawing those old districts based on that new census data as required by state law?

(2) Does a federal court clearly and indisputably transgress its Article III judicial power, as well as principles of federalism and comity, when it refuses to defer consideration of a redistricting dispute to the legislature and state supreme court on the assumption that multiple branches of state government will fail to timely redistrict?

PARTIES TO THE PROCEEDING

Petitioner is the Wisconsin Legislature. The Legislature is an Intervenor-Defendant in two consolidated reapportionment suits filed in the U.S. District Court for the Western District of Wisconsin. The Legislature seeks a writ of mandamus or a writ of prohibition that directs the federal court to dismiss the federal cases. The cases are pending before the Hon. James D. Peterson, of the U.S. District Court for the Western District of Wisconsin, the Hon. Amy J. St. Eve, of the U.S. Court of Appeals for the Seventh Circuit, and the Hon. Edmond E. Chang, of the U.S. District Court for the Northern District of Illinois.

Plaintiffs in the consolidated proceedings are Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, & Kathleen Qualheim, Black Leaders Organizing for Communities (BLOC), Voces de la Frontera, League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Helen Harris, Woodrow Wilson Cain II, Nina Cain, Tracie Y. Horton, Sean Tatum, Melody McCurtis, Barbara Toles, and Edward Wade, Jr. Intervenor-Plaintiffs are Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn. There is a pending intervention motion by Leah Dudley, Somesh Jha, Joanne Kane, Michael Switzenbaum, Jean-Luc Thiffeault, and Stephen Joseph Wright, who also wish to intervene as plaintiffs.

Defendants in the consolidated proceedings are Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., and Mark L. Thomsen, in their official capacities as members of the Wisconsin Elections Commission, as well as Meagan

Wolfe, in her official capacity as administrator of the Wisconsin Elections Commission. Intervenor-Defendants are the Legislature; Congressmen Scott Fitzgerald, Mike Gallagher, Glenn Grothman, Bryan Steil, and Tom Tiffany; and Governor Tony Evers.

CORPORATE DISCLOSURE STATEMENT

Plaintiff Black Leaders Organizing for Communities (BLOC) is a fiscally sponsored project of Tides Advocacy, a California nonprofit, with no stock and no parent corporation.

Plaintiff Voces de la Frontera is a nonprofit corporation with no stock and no parent corporation.

Plaintiff the League of Women Voters of Wisconsin is a nonprofit corporation, and League of Women Voters of the United States is its parent corporation.

All other parties are individuals, government officers, or government entities.

STATEMENT OF RELATED PROCEEDINGS

This petition arises from *Hunter, et al. v. Bostelmann, et al.*, No. 3:21-cv-00512 (W.D. Wis.) and *BLOC, et al. v. Bostelmann, et al.*, No. 3:21-cv-00534 (W.D. Wis.).

Related proceedings are pending in the Wisconsin Supreme Court. *See Johnson, et al. v. Wisconsin Elections Commission, et al.*, No. 2021AP1450-OA.

Petitioners are not aware of any other directly related cases in state or federal courts.

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INTRODUCTION

The U.S. Census Bureau delivered preliminary census data on August 12, 2021. In a clear exercise of forum shopping, plaintiffs sued the very next day on the theory that Wisconsin (including its courts) is incapable of redistricting. Another group of plaintiffs filed a second federal suit ten days later on the same theory. Plaintiffs challenge the constitutionality of existing districts that the Wisconsin Legislature is redrawing at this very moment. Plaintiffs want a three-judge federal court (with two federal judges from Illinois) to draw Wisconsin's maps instead of the elected representatives of the people of Wisconsin (or the elected members of the Wisconsin Supreme Court, which has agreed to step in if necessary).

The Legislature intervened and moved to dismiss for lack of jurisdiction. Before the motions to dismiss were even fully briefed, and without waiting to see what the Wisconsin Supreme Court would do, the district court announced that it would not be dismissing the federal suits. It has since set a March 2022 deadline for redistricting unless the Legislature enacts legislation changing pre-election deadlines. And based on the assumption that the federal court will be drawing Wisconsin's districts, the court has told the parties that it must "prepare now" to create a federal court-drawn map by that date. The parties will soon be embroiled in pretrial discovery, with a trial slated for January 2022. If the Legislature or state courts do not reapportion by the court's March deadline, the federal court has said it will.

The district court has flouted Article III's limits and longstanding rules of federalism. Its rush to rule

is an affront to Wisconsin's sovereignty. For well over a century, the U.S. Constitution and the Wisconsin Constitution have empowered "the Legislature" to redistrict. U.S. Const. art. I, §4; Wis. Const. art. IV, §3. There is not a malapportionment exception to that power. *Reynolds v. Sims* itself holds "that judicial relief" for a malapportionment claim "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." 377 U.S. 533, 586 (1964) (emphasis added). The Constitution does not require "daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation." *Id.* at 583. Likewise, in *Growe v. Emison*, involving simultaneous state and federal redistricting litigation, this Court held that 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" to the State and any state-court proceedings. 507 U.S. 25, 35 (1993).

This petition challenges the refusal of the federal court to dismiss, in violation of its limited judicial power. There is no justification for a federal court to exercise jurisdiction beginning-to-end to oversee a State's redistricting process. And there is no logical stopping point. Why not issue a structural injunction and take over Wisconsin redistricting for the next thirty years? This district court must be confined to the lawful exercise of its prescribed jurisdiction. Allowing the federal suits to proceed will have irreversible effects on Wisconsin redistricting and the State's sovereign power to reapportion.

OPINIONS BELOW

The opinion and order refusing to dismiss the federal suits is reproduced at Pet.App.1-12.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1651(a). A writ of mandamus or prohibition would be in aid of the Court's future jurisdiction over this reapportionment dispute. *Id.*; *see id.*, §1253. The relief the Legislature seeks is not available in any other court. *See, e.g.*, *Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 16-17 (1930).

Plaintiffs' have challenged "the constitutionality of the apportionment of congressional districts [and] the apportionment of … statewide legislative bod[ies]" in Wisconsin. 28 U.S.C. §2284(a). A three-judge district court has been convened. *Id.* Plaintiffs have asked for injunctive relief to enjoin the use of Wisconsin's existing congressional and legislative districts (even though there are no imminent elections) and to redraw new districts if necessary. When the three-judge court grants (or denies) an injunction, any appeal would be heard in this Court. *Id.*, §1253. Simultaneously, a related action involving the same districts is pending in the Wisconsin Supreme Court. Any appeal from the Wisconsin Supreme Court is also appealable only to this Court. *Id.*, §1257(a).

Mandamus is thus appropriate to preserve this Court's future jurisdiction in these dueling redistricting disputes. The district court has joined the plaintiffs' race to redistrict without any Article III case or controversy and in flagrant disregard of federalism. Writs of mandamus and prohibition have long been

used in such circumstances. *See Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943) ("writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction"); *In re Chicago, Rock Island & Pac. Ry. Co.*, 255 U.S. 273, 275-76 (1921).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1651(a) states,

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Art. I, §4, cl. 1 of the U.S. Constitution states in relevant part,

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof....

Art. IV, §3 of the Wisconsin Constitution states in relevant part,

> 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.

STATEMENT OF THE CASE

A. The Legislature's redistricting efforts are ongoing.

The Wisconsin Legislature is the bicameral legislative branch of the Wisconsin state government. Wis. Const. art. IV, §1. It comprises 99 state assembly districts and 33 state senate districts. Wis. Const. art. IV, §§4-5; Wis. Stat. §4.001.

The Wisconsin Constitution requires the Legislature to redistrict after every federal census. Wis. Const. art. IV, §3. The Legislature's redistricting power is distinct from its general power to legislate. *Compare id.*, *with* Wis. Const. art. IV, §1.

On August 12, 2021, the Secretary of Commerce delivered legacy census data for the 2020 census to Wisconsin state officials. Consistent with the Legislature's constitutional responsibility, the Legislature has commenced the redistricting process, reapportioning districts with new census data, and soliciting public comment.[1]

The next elections in Wisconsin are far off. Primary elections for Congress, state assembly, and state senate are scheduled for August 9, 2022. The general elections are scheduled for November 8, 2022.

B. Plaintiffs begin federal redistricting litigation on Day 1.

This petition implicates three ongoing redistricting lawsuits in Wisconsin, all filed days after census

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

data was released. One case is in the Wisconsin Supreme Court. Two additional consolidated cases are before the federal district court in the Western District of Wisconsin. The federal court has refused to dismiss for lack of jurisdiction.

1. A group of plaintiffs (the *Hunter* plaintiffs) filed the first lawsuit in federal court 24 hours after new census data was delivered to Wisconsin. *See Hunter v. Bostelmann* (W.D. Wis. No. 3:21-cv-00512). Notionally, their claims are malapportionment claims. They allege that Wisconsin's existing congressional and legislative districts, enacted in 2011, are unconstitutionally malapportioned based on new 2020 census data. Pet.App.18-41 (Compl.). They also allege that Wisconsin might (or might not) violate their First Amendment right to associate if it takes too long to redistrict. Pet.App.38-39.

The complaint seeks a declaration that the existing districts are malapportioned, an injunction forbidding election officials from using the districts in next year's elections, a redistricting schedule, and—most tellingly—new districts drawn by the federal court if Wisconsin does not comply with that schedule. Pet.App.39-40. Plaintiffs concede "there is still time" for the State to redistrict, but their complaint asks the federal court to "prepare itself to intervene" now by "assum[ing] jurisdiction" and "establish[ing] a schedule" to "enable the Court to adopt its own plans in the near-certain event that the political branches fail timely to do so." Pet.App.21, 33 (Compl. ¶¶7, 35); *see also* Pet.App.40 (asking for the "Court to adopt and implement new legislative and congressional district

plans by a date certain" should the State fail to do so "by that time").

The *Hunter* plaintiffs allege 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." Pet.App.20-21 (Compl. ¶6). The "upcoming" elections are those scheduled for August and November 2022.

2. A second group of plaintiffs (the *BLOC* plaintiffs) filed another federal lawsuit eleven days after the census data was delivered. *See BLOC v. Bostelmann* (W.D. Wis. No. 3:21-cv-00534). Their complaint similarly alleged that existing districts are malapportioned based on the 2020 census data, and they sought the same relief as the *Hunter* plaintiffs. They have since amended their complaint to add a Voting Rights Act claim. Pet.App.42-89 (Am. Compl.). They allege that six existing state assembly districts in Milwaukee violate section 2 of the Voting Rights Act and ask the federal court to "[o]rder the adoption of a valid State Assembly plan that includes a *seventh* BVAP majority district." Pet.App.44-45, 85-87 (emphasis added).

3. The Wisconsin Legislature intervened immediately in the federal cases, which have now been consolidated. Wisconsin members of Congress, the Governor, and other individual voters have also intervened. Pet.App.11.

4. A third set of individuals (the *Johnson* petitioners) filed a petition in the Wisconsin Supreme Court on the same day the *BLOC* plaintiffs filed their federal

suit. *Johnson v. Wis. Elections Comm'n* (Wis. S. Ct. No. 2021AP1450-OA). The *Johnson* petitioners asked the Wisconsin Supreme Court to exercise its original jurisdiction, declare the existing districts malapportioned, enjoin the elections commission from administering elections under the existing districts, and to rule on the constitutionality of a new plan by the Legislature or resolve any impasse should one arise. *See Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542 (Wis. 2002) (explaining that redistricting actions warrant the exercise of original jurisdiction).

On September 22, 2021, the Wisconsin Supreme Court accepted the *Johnson* petition for an original action. Pet.App.90-95. The court stated it will give the Legislature "an adequate opportunity" to redistrict before making any declarations or issuing any injunctions about the existing districts. Pet.App.92. In her concurring opinion, Justice Bradley added that it is the State's prerogative to redistrict and that federal courts are a "last resort" under this Court's precedents. Pet.App.97.

C. The federal court refuses to dismiss the premature federal suits.

1. The Wisconsin Legislature moved to dismiss the federal litigation for lack of jurisdiction. The Legislature explained that there was no Article III case or controversy in either of the federal cases. Neither the *Hunter* nor *BLOC* plaintiffs alleged that there is any real probability that the existing districts will be used again in next year's elections. And every Plaintiff acknowledged that federal courts in such circumstances can do nothing but wait for a suit to become ripe.

The congressional intervenors filed a motion to dismiss raising similar arguments. The *Johnson* petitioners, as intervenors in the federal proceedings, moved to stay the federal cases indefinitely during any state-court proceedings.

2. On September 16, 2021—when the *Johnson* petition was still pending at the Wisconsin Supreme Court and before the Legislature could file its reply brief on the motion to dismiss the federal suits—the district court denied the Legislature's motion to dismiss for lack of jurisdiction. Pet.App.8-11.[2]

Citing an "urgent requirement of prompt action," the court rejected the argument that it "should forestall from any action until the state court system hears the case." Pet.App.9-10. The primary basis for the court's refusal to do so was because federal courts had done it before—what it called a "historical pattern" that "[f]ederal panels—not state courts—have intervened in the last three redistricting cycles in which Wisconsin has had a divided government." Pet.App.9-10. Implicitly conceding there was no current impasse, Pet.App.9, the court ordered everyone to "prepare now to resolve the redistricting dispute,

[2] At the same time, the court permitted the *BLOC* plaintiffs to amend their complaint. Pet.App.11. The Legislature's standing and ripeness arguments, which it raised days after each case was filed, apply equally to both cases, even with the addition of a Voting Rights Act claim. And while the parties have until September 30, 2021, to respond to the amended complaint, Fed.R.Civ.P. 15(a)(3), the court has asked that the Legislature "not repeat the same standing arguments." Transcript of Status Conference at 41, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 78.

should the state fail to establish new maps in time for the 2022 elections," Pet.App.10.

The court's short order did not meaningfully address the Legislature's arguments that the federal plaintiffs' complaints failed to allege any Article III case or controversy. The court instead relied on cases from past redistricting cycles and concluded it would follow the same approach. In particular, the court cited favorably *Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001). Pet.App.9-10. In *Arrington*, another three-judge court concluded that a similarly early redistricting suit was ripe and decided to retain jurisdiction and set a redistricting deadline. Judge Easterbrook dissented, stating he would remove himself from the three-judge court because the majority got it so wrong. 173 F. Supp. 2d at 870. Judge Easterbrook got it right.

Even though the *Johnson* petition was pending at the Wisconsin Supreme Court, the district court stated that "there is yet no indication that the state courts will entertain redistricting in the face of an impasse"—that has not occurred—"between the legislature and the governor." Pet.App.9. The court stated it would "consider" the Wisconsin Supreme Court in setting its own schedule, but specifically rejected arguments that it should stay the federal proceedings until the state-court proceedings were complete. Pet.App.10 & n.3.

3. The district court next held a scheduling conference and issued a preliminary scheduling order. Pet.App.13-17. The order purported to "recognize[] that responsibility for drawing legislative and congressional maps falls primarily to the states."

Pet.App.15. But the court then set a redistricting deadline of March 1, 2022, which the Wisconsin Elections Commissioners had proposed. Pet.App.15. Citing a Voting Rights Act preclearance case, the court accepted that proposed March deadline even though it falls *five months* before the primary elections. Pet.App.15 (citing *Branch v. Smith*, 538 U.S. 254 (2003)). To meet that deadline, the court intends to hold a January trial and has ordered the parties "to submit a joint proposed discovery plan and pretrial schedule on the assumption that trial will be completed by January 28, 2022." Pet.App.16. The court stated it "could consider alternative trial dates" and reconsider the March deadline "if the State were to *enact legislation*" moving pre-election deadlines, but that no party was relieved "of its obligation to cooperate in preparing the plan for the January trial." Pet.App.16 (emphasis added). The court stated that it was not inevitable that it would draw Wisconsin's maps, but the State would have to meet the court's deadline to avoid it: "If the State enacts maps by March 1, 2022, the court may be able to refrain from issuing a judgment in this case." Pet.App.16.

4. After the Wisconsin Supreme Court granted the *Johnson* petition for an original action, the *Johnson* petitioners renewed their motion to stay the federal cases, while telling the federal court it could have a status conference in November to check on the ongoing state proceedings.[3] The federal court has since asked the parties to address "how the supreme court's

[3] Second Mot. to Stay, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 79.

decision should affect" the federal proceedings and to "take into account the supreme court's decision" in proposing a pretrial schedule, while saying nothing about its intended March 2022 redistricting deadline.[4] The Legislature has responded that there is not now and has never been jurisdiction to entertain the federal proceedings.[5]

REASONS FOR GRANTING THE WRIT

The three-judge district court is acting without jurisdiction in these reapportionment suits implicating one of the State's most sovereign tasks. "[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (op. of White, J.). A writ of mandamus or prohibition is appropriate in these extraordinary circumstances. There is no Article III case or controversy that could possibly empower a federal court to supervise the State's reapportionment efforts from beginning to end.

I. Writs of Mandamus or Prohibition Are Appropriate Remedies.

A writ of mandamus or prohibition is appropriate for exceptional circumstances of the kind present here. In general, the writ may issue in this Court's discretion when there is no other adequate means to attain the desired relief and when the petitioner's right

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[4] Order, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 80.

[5] Notice, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 81.

is clear and indisputable. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004); Sup. Ct. R. 20.1. "These hurdles, however demanding, are not insuperable." *Cheney*, 542 U.S. at 381. The Court has historically used these writs to "confin[e] the inferior court to a lawful exercise of its prescribed jurisdiction." *Ex parte Peru*, 318 U.S. 578, 583 (1943); *Schlagenhauf v. Holder*, 379 U.S. 104, 109-10 (1964). Other "exceptional circumstances" include those "amounting to a judicial usurpation of power," or when the writ is "the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations." *Will v. United States*, 389 U.S. 90, 95 (1967) (quotation marks omitted).

That is precisely the situation here. A three-judge federal district court has acted well outside of its jurisdiction and intruded on one of the most delicate areas of federal-state relations. *Id.*; *see Growe v. Emison*, 507 U.S. 25, 33 (1993) (federal courts must "defer consideration of disputes involving redistricting" when the State "has begun to address that highly political task itself"); *see also, e.g.*, *Maryland v. Soper*, 270 U.S. 9, 28-30 (1926) (issuing writ after removal of state criminal prosecution).

The court's refusal to dismiss these redistricting suits, despite the absence of jurisdiction and the unquestioned capacity of the state courts to act, is "more than the mere denial of [a] right" that can "be corrected by recourse to the prescribed appeal procedure." *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 204 (1945). A writ is the "only means of forestalling [this] intrusion by the federal judiciary." *Will*, 389 U.S. at 95. The district court, without any Article

III case or controversy, has set a deadline purporting to bind every branch of the Wisconsin government. Treading on Wisconsin's sovereignty and federalism, that deadline rushes the State's ongoing redistricting efforts. If the State (including the Wisconsin Supreme Court) does not beat the federal court to its redistricting "finish line," then the federal court has said it will issue a judgment redrawing Wisconsin's congressional and legislative districts.[6] *Growe*, 507 U.S. at 37; Pet.App.16. Such action has had real-world effects in Wisconsin in past redistricting cycles, causing the state supreme court to defer altogether to federal-court redistricting. *See Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 541-42 (Wis. 2002). Here again, a federal court is acting without jurisdiction as a super-legislature for "one of the most significant acts a State can perform to ensure citizen participation in

[6] In the meantime, the parties will be embroiled in discovery in anticipation of a January trial. The court *sua sponte* suggested that such discovery could involve "deposing the Legislature" during its scheduling conference (plaintiffs' counsel added they might want to depose the Governor too). Transcript of Status Conference at 24-25, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 23, 2021), ECF No. 78. The disregard for legislative privilege is typical of redistricting challenges in federal court—all the more reason to stop it now. *Cf. Tenney v. Brandhove*, 341 U.S. 367, 372-78 (1951). For example, in Wisconsin's last redistricting challenge, the same district court compelled the deposition of the Speaker of the Wisconsin Assembly because partisan gerrymandering allegations called into question "the legitimacy of the Wisconsin government." Order at 5, *Gill v. Whitford*, 3:15-cv-00421-jdp (W.D. Wis. May 3, 2019), ECF No. 275, *vac'd sub nom.*, *Whitford v. Vos*, No. 19-2066, 2019 WL 4571109 (7th Cir. July 11, 2019); *but see Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019).

republican self-governance." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (op. of Kennedy, J.).

That *ultra vires* exercise of the three-judge court's jurisdiction warrants immediate intervention, which can only be had in this Court. *See Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 15-17 (1930) (explaining that court of appeals did not have jurisdiction to entertain appeal regarding refusal to institute three-judge court and that Supreme Court may instead issue writ of mandamus); *see also U.S. Alkali Export*, 325 U.S. at 202. A writ of mandamus or prohibition would be in aid of this Court's future jurisdiction over the three-judge court, 28 U.S.C. §1253, as well as its future jurisdiction over any final judgment of the Wisconsin Supreme Court, *id.*, §1257(a). *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (mandamus jurisdiction "extends to those cases which are within its appellate jurisdiction although no appeal has been perfected."). If the suit continues below, the Court will have direct appellate jurisdiction when the three-judge court grants or denies an injunction, or issues an order with that "practical effect." *See* 28 U.S.C. § 1253; *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018). In such circumstances, mandamus relief is properly sought in this Court, not the courts of appeals. *See, e.g.*, *Stratton*, 282 U.S. at 15 ("where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus"); *Williams v. Simmons*, 355 U.S. 49, 56-57 (1957); *see also Ex parte Peru*, 318 U.S. at 584-85.

II. It Is Clear and Indisputable That There Is No Federal Jurisdiction.

A. Plaintiffs have no Article III standing.

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)). To involve the federal courts, 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 v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted); *DaimlerChrysler*, 547 U.S. at 344 (quotation marks omitted). Standing cannot rest on "[a]llegations of a possible future injury," entailing "speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 409, 414 (quotation marks omitted). Rather, plaintiffs must show "a realistic danger of sustaining a direct injury" because an allegedly unconstitutional statute will be enforced against them. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). A federal court "cannot be umpire to debates concerning harmless, empty shadows." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (op. of Frankfurter, J.).

Especially in cases implicating the "highly political task" of redistricting, *Growe*, 507 U.S at 33, establishing this bare constitutional minimum of standing is an essential "constitutional principle that prevents

courts of law from undertaking tasks assigned to the political branches." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Even if new census data shows that existing districts are malapportioned, a federal court has no judicial power to merely declare it so—let alone order court-drawn maps—without an actual case or controversy. *See Reynolds*, 377 U.S. at 586. The mere fact of a malapportioned districting plan is not enough. A plaintiff must show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *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").

Applying those rules here, Plaintiffs' complaint alleges that Wisconsin election officials will, *in the future*, violate the Constitution if the existing legislative districts are used in next year's elections. Pet.App.35-38 (Compl. ¶¶43, 49, 53); Pet.App. 82-84, 86 (Am. Compl. ¶¶95, 100, 110). Plaintiffs' injury is entirely speculative—fanciful even. No one intends to use the existing districts; they are being redrawn right now. There is thus no "certainly impending" harm or "realistic danger" that the 10-year-old districts will be used again. *Clapper*, 568 U.S. at 409; *Babbitt*, 442 U.S. at 298. Any ruling on Plaintiffs' claims would entail wading into the political thicket of reapportionment without any judicial power to do so.

The three-judge court was indisputably wrong to conclude that Plaintiffs' possible future injury was sufficient. *See Clapper*, 568 U.S. at 409; *California*, 141 S. Ct. at 2114. There is no basis to assume, as the

district court has, that there is a "realistic danger" that next year's elections will use the existing districts absent this court's involvement. *Babbitt*, 442 U.S. at 298. That baseless assumption rests entirely "on speculation about the decisions of independent actors" in the coming year. *Clapper*, 568 U.S. at 414. All agree that the Legislature has a constitutional obligation to reapportion. *See* Wis. Const. art. IV, §3. All agree that the Legislature is actively redrawing the very districts that Plaintiffs are challenging. All agree that there is no legislative impasse. And even if an impasse were to arise later, all agree that there is active litigation in the fully and equally capable Wisconsin Supreme Court to resolve it. On issues of redistricting and state law, Wisconsin's supreme court justices are indeed *more* capable (not to mention answerable to the people of Wisconsin and residents of the State themselves). *See Growe*, 507 U.S. at 33. In such circumstances, the federal court has no power to interfere or obstruct that ongoing process. *See id.* at 37 ("The District Court erred in not deferring to the state court's timely consideration of congressional reapportionment."). The only opinion a federal court could offer at this time would be purely advisory.

The three-judge court did not grapple with these arguments. It instead took cover under another three-judge court's decision in *Arrington*, from the 2001 redistricting cycle. The *Arrington* plaintiffs similarly filed a malapportionment suit before redistricting could even begin. 173 F. Supp. 2d at 858-59. *Arrington* was wrong—so wrong that dissenting Judge Frank Easterbrook stated he would remove himself from the three-judge panel. *See id.* at 870 (Easterbrook, J.,

dissenting) ("I shall take no further part in the consideration or decision" and "unless a fresh suit is filed, this has become a two-judge court, and *whatever* it does may end up being vacated by higher authority on Article III grounds."). His observation in *Arrington* applies equally here: "The best face one can put on this complaint is that plaintiffs predict that Wisconsin will fail to enact … equal-size districts. Yet a prediction that something will go wrong in the future does not give standing today." *Id.* at 869. There, as here, "Wisconsin does not propose to conduct [next year's] elections under the existing plan." *Id.* The Wisconsin constitution requires a new plan. Wis. Const. art. IV, §3; *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 744 (1892). Judge Easterbrook likened such suits, challenging old districts while the Legislature draws new ones, to "asking the judicial branch to enjoin implementation of a state pollution control plan that the EPA has canceled and that can't be enforced without the agency's cooperation." *Arrington*, 173 F. Supp. 2d at 869. In that case, as here, "no plaintiff would have standing to ask the judiciary to drive a second stake through the plan's heart. One death is enough." *Id.* Taking judicial action "would be redundant and thus advisory in the most basic sense." *Id.*

To accept that Plaintiffs have standing at this time is to accept that multiple state branches of government will fail at what they are currently doing. This Court has rejected standing theories premised on "guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413. Such "guesswork" here requires the federalism-defying assumption that, even if there were a

legislative impasse in the redistricting process, the Wisconsin courts would be unequipped to resolve it.

2. The three-judge court's refusal to dismiss Plaintiffs' suits—instead proceeding with full-fledged discovery and a trial—puts Wisconsin on the same path as *Growe v. Emison*. In *Growe*, much like here, there was simultaneous state and federal litigation over redistricting. 507 U.S. at 28-30. The concurrent actions came to a head when the federal district court refused to defer to state-court proceedings. *Id.* at 30-31. In a unanimous opinion, this Court ordered the federal court to stand down and dismissed the federal litigation. *Id.* at 42.

As *Growe* explained, reapportionment disputes are an exception to the rule that federal and state courts may exercise concurrent jurisdiction and proceed simultaneously. 507 U.S. at 32. In reapportionment disputes, important "principles of federalism and comity" require a federal court to defer to the State, including the state courts, because there can be "only one set of legislative districts." *Id.* at 32, 35. The State, with the "primary responsibility for reapportionment," goes first. *Id.* at 34; *see also White v. Weiser*, 412 U.S. 783, 795 (1973). *Growe* demands that federal courts "defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." 507 U.S. at 33. After *Growe*, a federal court cannot "obstruct state reapportionment" or "permit federal litigation to be used to impede it" unless and until it becomes "apparent" that the State's own branches of government, including its

courts, cannot redistrict before the primary elections. *Id*. at 34, 36.

Here, the federal court has refused to defer consideration while the State acts, proceeding ahead without any Article III case or controversy. The court has stated it intends to schedule a January trial, with discovery, expert reports, and all the trappings of federal litigation leading up to it. Pet.App.15-16. If that is not obstruction of the State's own redistricting process after *Growe*, it is not clear what would be.

Addressing *Growe*, the three-judge court stated that *Growe* did not limit its jurisdiction here. Pet.App.8-9 ("The *Growe* Court did not conclude that the federal case was unripe or that the plaintiffs lacked standing."). Of course, there was no occasion for this Court to address threshold issues of standing or ripeness in *Growe*. 507 U.S. at 32 (noting no party disputed jurisdiction). *Growe* came to this Court in the eleventh hour of redistricting. The complex and overlapping state and federal actions were well beyond that threshold stage. But the rule announced in *Growe* necessarily affects the jurisdictional analysis in post-*Growe* cases, including this one.

Growe prohibits a federal court from interceding in redistricting disputes unless and until the State fails to redistrict, and that includes state courts. *See Growe*, 507 U.S. at 34, 36-37. If, as *Growe* instructs, the federal court can do nothing but defer, then there is no Article III basis for the federal court to intervene before that time. *See* Part III.C, *infra*. That is especially so here, where there is no indication of any imminent failure by any of branch of government.

3. *Growe* is also relevant with respect to the redressability component of standing. *Growe* prohibits federal courts from redressing any malapportionment claim "[a]bsent evidence that th[e] state branches," including the state courts if necessary, "will fail" to reapportion. 507 U.S. at 34.

Here, the federal court acknowledged that "impeding or superseding any current state redistricting process" are "steps that might run afoul of *Growe*" and admitted it was "inclined" to impose a "limited stay" to avoid interfering (which it has not yet done). Pet.App.10. These statements speak for themselves. If the district court has no power to remedy Plaintiffs' alleged harm at this time, then there is no Article III case or controversy. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) (standing requires "an acceptable Article III remedy" that will "redress a cognizable Article III injury"); *California*, 141 S. Ct. at 2116 ("To find standing here to attack an unenforceable statutory provision would allow a federal court to issue what would amount to an advisory opinion without the possibility of any judicial relief." (quotation marks omitted)); *Franklin v. Massachusetts*, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("we cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush, and since we have no power to do that, I believe appellees' constitutional claims should be dismissed").

B. Plaintiffs' suits are not ripe.

1. Another component of Article III's case or controversy requirement is that the dispute is ripe. *See Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57

n.18 (1993). A ripe dispute is "not dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quotation marks omitted). That ripeness requirement "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quotation marks omitted); *see id.* (ripeness protects against "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way").

Just as Plaintiffs have failed to establish standing, they have failed to establish ripeness. The suits are "riddled with contingencies and speculation that impede judicial review." *Trump*, 141 S. Ct. at 535. The Wisconsin Legislature is currently redrawing the districts that plaintiffs challenge as unconstitutional, and the Wisconsin Supreme Court has asserted jurisdiction to review the legality of any redistricting plan Judicial resolution of plaintiffs' claims in a federal court is entirely premature. In spite of all this, the court has announced it intends to hold a trial on remedial maps in January.

2. The three-judge court rejected these arguments. The court said it understood the State's "primacy in redistricting." Pet.App.8-9. It also acknowledged that there was no legislative impasse at this time. Pet.App.9. But rather than dismiss the suit on either of these grounds, the court stated that it would take jurisdiction to "prepare now to resolve the redistricting dispute." Pet.App.10.

The federal court again resorted to *Arrington*, almost as if it were a decision of this Court rather than deeply unpersuasive authority that had been eviscerated by Judge Easterbrook (a clear and indisputable mistake on its own). *Arrington* began "by noting that contingent future events generally do *not* deprive courts of jurisdiction." 173 F. Supp. 2d at 863 (emphasis added). Wrong. A ripe dispute is "*not* dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump*, 141 S. Ct. at 535 (emphasis added). *Arrington* acknowledged that it was "tempted to dismiss" but refused because of the perceived "problem" of "establishing a date on which [the case] may be re-filed." 173 F. Supp. 2d at 861, 865. The court feared such a date would be "arbitrary" and so instead "retain[ed] jurisdiction, but merely stay proceedings" until the suit became ripe. *Id.* Wrong again. Under the logic of these three-judge courts, "[o]ne might as well commence a suit as soon as some legislator introduces a bill that would be unconstitutional if enacted." *Id.* at 869 (Easterbrook, J., dissenting).

There is no constitutional basis to docket a case, set a deadline purporting to bind the Wisconsin Legislature and its supreme court, and then wait for the suit to become ripe. As Judge Easterbrook put it in *Arrington*: "[R]eserving a place in line is not a proper reason to invoke the judicial power." *Id.* at 869 (Easterbrook, J., dissenting); *see also Mayfield v. Texas*, 206 F. Supp. 2d 820, 826 (E.D. Tex. 2001) (refusing to "invoke jurisdiction, set a deadline, and wait" for plaintiffs' premature malapportionment suit to become ripe); *accord Growe*, 507 U.S. at 37 (criticizing

federal court's "race to beat the Minnesota Special Redistricting Panel to the finish line").

There is no redistricting exception to the Constitution that permits a federal court to set the schedule for a State's redistricting process from beginning to end. The three-judge court here had no jurisdiction to do anything but dismiss the suits.

III. This Court's Intervention Is Warranted to Stop the Federal Reapportionment Proceedings.

A. The refusal to dismiss has irreversible effects on Wisconsin redistricting.

1. That the three-judge federal court is without jurisdiction is indisputable. And yet, there are no adequate means to stop the federal proceedings other than a writ of mandamus or prohibition. Specifically, there is no undoing the effects of the federal court's order that the parties "prepare now" to meet its redistricting deadline. As this Court observed in *Growe*, "States must often redistrict in the most exigent circumstances," 507 U.S. at 35, and the federal court's involvement from the outset of the ongoing redistricting process creates even more exigency. By assuming it must act, the federal court has left the Legislature even less time to reapportion. And by proceeding now, the federal court has left all of Wisconsin's constitutional actors under the burden and expense of a discovery schedule (and whatever other rulings may ensue), made wholly unnecessary by the Wisconsin Supreme Court's decision to exercise its original jurisdiction.

The federal court is setting an unprecedented schedule that does anything but "defer consideration" of these redistricting disputes. *Growe*, 507 U.S. at 33. To set that schedule, the federal court is apparently deferring to the unelected Wisconsin Elections Commission.[7] The commission has alleged new maps are necessary by March 1, 2022 (even though the next primary elections are not until August 2022).[8] Based on the assumption that the federal court will be drawing those maps, the court has ordered the parties to "prepare now" for redistricting failure. Pet.App.10. The court has ordered the parties to create a pretrial schedule (complete with depositions, expert reports, and more) that assumes the federal cases will be tried in January—four months from now and nearly eight months before the primaries. Pet.App.15. The court has left itself and the elections commission more time

[7] The Wisconsin Elections Commission has no redistricting power. It never objected to federal jurisdiction and instead told the Wisconsin Supreme Court to stand down. *Compare* Pet.App.91 (noting commission opposed the Wisconsin Supreme Court action by "noting that are two cases pending in federal district court that raise similar claims"), *with Jensen*, 639 N.W.2d at 542-43 ("The people of the 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."); *see also Growe*, 507 U.S. at 35 (describing "the primacy of the State" in reapportionment).

[8] Primary candidates' nomination papers are currently due in June 2022. Wis. Stat. §8.15(1). Such deadlines are movable in reapportionment cases when necessary. *See, e.g.*, *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982).

to prepare for the primary elections than it has left for the Legislature (or the Wisconsin Supreme Court).[9]

2. To justify its refusal to dismiss, the court invoked the "historical pattern" of federal court intervention in past Wisconsin redistricting cycles as a justification for intervening this time around too. Pet.App.10. Observations about "historical pattern[s]" are no substitute for a real Article III case or controversy today. Nor do serial past wrongs make it right today.

That history is at odds with *Growe*. It includes a 1980s Wisconsin redistricting dispute that was *removed* from the Wisconsin Supreme Court to a federal court. *See AFL-CIO*, 543 F. Supp. at 633. After *Growe* a Wisconsin federal court has never proceeded with such haste while state-court action is pending. *See Baumgart v. Wendelberger*, No. 02-cv-366, 2002 WL 34127471, *1 (E.D. Wis. May 30, 2002), *amended* 2002 WL 34127473 (E.D. Wis. July 11, 2002) (trial in April 2002, amended decision in July 2002). Likewise, other federal courts have waited for actual allegations that the redistricting process has failed or stalled before interceding. *See, e.g.*, *Miss. State Conf. of N.A.A.C.P. v. Barbour*, No. 3:11-cv-159, 2011 WL 1870222, at *4 (S.D. Miss. May 16, 2011) (noting legislature adjourned in April without passing a joint redistricting resolution); *Smith v. Clark*, 189 F. Supp. 2d 502, 503

[9] For the Legislature to participate in the federal proceedings, it would have to complete redistricting well ahead of the January trial date so that its maps could be addressed during pretrial expert discovery.

(S.D. Miss. 2001) (noting "many months" had passed without a state redistricting plan).

This also illustrates the irreversible effects of federal-court involvement. In the 2001 redistricting cycle, for example, the Wisconsin Supreme Court refused to entertain an original action because the *Arrington* plaintiffs commenced their federal suit so early. *See Jensen*, 639 N.W.2d at 541. At odds with *Growe*, the State's highest court found itself deferring to the federal court, even though there was "no question" the case belonged in the supreme court. *Id.* This time around, the Wisconsin Supreme Court has again had to act in response to prematurely filed federal proceedings. As a consequence of the federal plaintiffs' early actions, the Wisconsin Supreme Court has asserted its original jurisdiction just as the legislative redistricting process begins. Pet.App.93; *see also* Pet.App.118 (Dallet, J., dissenting) (arguing that the action was premature).

As *Jensen* and *Johnson* illustrate, when a federal court exceeds its jurisdiction and entertains a prematurely filed reapportionment suit—even if only to set a redistricting deadline and wait—the federal court interferes with the State's sovereign redistricting power. *See id.* at 541 (discussing the federal court's order scheduling discovery and trial days). The federal court's early intervention creates "unjustifiable duplication of effort and expense, all incurred by the taxpayers." *Id.* at 542. It rushes redistricting unnecessarily. And it takes finite time away from the very legislative and state-court proceedings for which *Growe* demands deference.

B. These premature cases are part of a broader trend that has evaded review.

The refusal to dismiss is not a one-off event. It is "not uncommon" for plaintiffs to file a reapportionment suit soon after new census data is released and then ask the federal court to set a deadline and wait. *See Arrington*, 173 F. Supp. 2d at 860 (collecting cases); *see also Smith*, 189 F. Supp. at 505-06; *Miss. State Conf. of N.A.A.C.P.*, 2011 WL 1870222, at *9 & n.6; *Vigil v. Lujan*, 191 F. Supp. 2d 1273, 1274 (D.N.M. 2001); *but see, e.g.*, *Mayfield*, 206 F. Supp. 2d at 826 (dismissing for lack of jurisdiction). When the federal court obliges, it follows *Growe* in name only. Federal courts assume jurisdiction at the very beginning of a State's redistricting process and tell the State when that process must be complete, reserving time that the State could otherwise spend redistricting so that the federal court can later bless (or alter) the new districts. But because these courts often take jurisdiction, set a deadline, and stay proceedings, that trend has evaded this Court's review.

Federal courts are not the overseers of redistricting. Quite the opposite. The States have that power. The federal court here violated the basic federalism and separation-of-powers principles that this Court has repeated time and again. States, not federal courts, have primary redistricting responsibility: "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." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *White*, 412 U.S. at 795 (collecting cases for

the rule that "state legislatures have 'primary jurisdiction' over legislative reapportionment"); *Growe*, 507 U.S. at 33 ("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.").[10]

In similarly sensitive separation-of-powers cases, the Court has been unwilling to presume a co-equal branch will fail at its job as a basis for federal jurisdiction. Doubt about future results does not authorize judicial intervention *in media res*. It would be laughable, for example, to suggest that a Court would have Article III jurisdiction to adjudicate the constitutionality of a newly introduced bill just in case that bill was later enacted. Rather, federal 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 might seem—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)); *see, e.g.*, *Trump*,

[10] The Voting Rights Act's preclearance requirement affected the ability of some States to redistrict without federal oversight. That regime can no longer justify federally imposed redistricting deadlines today. *See Shelby County v. Holder*, 570 U.S. 529, 535, 556-57 (2013). But the three-judge court here did just that, relying on *Branch v. Smith*, 538 U.S. 254 (2003), a preclearance case, to justify its early deadline. Pet.App.15.

141 S. Ct. at 535 ("Any prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time." (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)).

Here too, by asserting jurisdiction on Day 1 of redistricting, the federal court is ensuring its continued involvement in reapportionment from beginning to end. Retaining jurisdiction entrenches the federal courts as the supervisory authority over redistricting, denying the State the dignity of redistricting on its own. *See Growe*, 507 U.S. at 37; *see also Lawyer v. Dep't of Justice*, 521 U.S. 567, 589 (1997) (Scalia, J., dissenting) ("The 'opportunity to apportion' that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.").

C. Federal courts have allowed *Growe*'s exception to swallow its rule.

1. In many ways, *Growe* simplified the jurisdictional analysis in reapportionment cases going forward. *Growe* spoke in terms of "deferral, not abstention." 507 U.S. at 37; *see also id.* 32-33 & n.1.[11] But in

[11] This Court could alternatively revisit *Growe*'s distinction between "deferral" and "abstention" and clarify that federal courts must dismiss cases asking for reapportionment while state litigation is pending. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976). Reapportionment cases implicate the "weightier considerations of constitutional adjudication and state-federal relations," "duplicative litigation," and questions of "wise judicial administration." *Id.* at

doing so, *Growe* created a class of federal cases that definitionally do not meet Article III's case-or-controversy requirement. Because there can be only one set of redistricting maps, *Growe* prescribes that legislative redistricting, state redistricting litigation, and then federal redistricting litigation (if ever necessary) occur sequentially and not concurrently. *Id.* The State goes first, with the presumption that the State will ably redistrict. *Growe*, 507 U.S. at 34; *see Wise*, 437 U.S. at 539-40 (op. of White, J.); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995) (describing "the presumption of good faith that must be accorded legislative enactments" in redistricting). That is so even if the claims are different in state and federal court because the requested relief is the same: reapportionment of the State's one set of districts. *Growe*, 507 U.S. at 35. The possibility of federal-court involvement later on is a mere "prediction" that "rest[s] on speculation about the decisions of independent state actors." *Trump*, 141 S. Ct. at 536; *see also Clapper*, 568 U.S. at 414.

2. But a single line from *Growe* has emboldened federal courts to take jurisdiction over redistricting from the very beginning, set a deadline, and wait for the suit to become ripe. *Growe* states, "It would have been appropriate for the District Court to establish a deadline by which, if the [state supreme court's]

817-18. There is a century's worth of federal and state constitutional expectations that States are responsible for the "most significant" act of redistricting. *See LULAC*, 548 U.S. at 416 (op. of Kennedy, J.). And because there can be only one set of districts, it serves no one to litigate a federal case that will presumably be mooted by the legislature or the state courts in the meantime.

Special Redistricting Panel had not acted, the federal court would proceed." 507 U.S. at 36.[12]

Courts have misread this as an invitation to supervise and set deadlines for States as soon as a new redistricting cycle begins. *See, e.g.*, *Arrington*, 173 F. Supp. 2d at 865 (citing *Growe* to conclude that court's "docket-management powers" permitted it to set a future redistricting deadline even though the court doubted its current jurisdiction). But *Growe* had no occasion to consider whether an Article III case or controversy would be present at the outset of a post-*Growe* reapportionment case, where federal courts must now defer to allow the State to redistrict. And *Growe* could not, *sub silentio*, expand Article III's limitations on the judicial power for all redistricting cases going forward. *See 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

[12] The idea of a "deadline" originated with *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam). The *Germano* litigation was one of several malapportionment suits circulating in the 1960s that was then granted, vacated, and remanded after *Reynolds*. *Id.* at 408. On remand, the federal court ordered that the Illinois General Assembly submit a new senate redistricting plan that complied with *Reynolds*. *Id.* at 408. This Court vacated that order and explained that the federal court "should have stayed its hand" because the state supreme court had retained jurisdiction to oversee the senate's reapportionment. *Id.* at 408. But when the Court vacated the federal court's order, it "remanded with directions that the District Court enter an order fixing a reasonable time" for the legislature and state court to act before the next election. *Id.* at 409. Like *Growe*, *Germano* does not suggest that a federal court would have the same authority in a prematurely filed impasse suit.

federal decision, the decision does not stand for the proposition that no defect existed.").

To say *Growe* empowers a federal court to overlook the absence of a case or controversy and retain supervisory federal jurisdiction also ignores what *Growe* says about the primacy of States and state courts in redistricting. *Growe* presumes States will redistrict unless and until it becomes "apparent" that there will not be a redistricting plan in time for the primaries. 507 U.S. at 36. There is no additional requirement that there be months built in for appeals and collateral litigation. *See id*. at 35 ("We fail to see the relevance of the speed of appellate review."). Nor is there any requirement that a lower federal court build in time to bless (or alter) the new districts. That court has no power to sit as a pseudo-court of appeals over ongoing state-court proceedings. Only this Court does. 28 U.S.C. §1257(a). And once the state court acts, its judgment demands full faith and credit by every other court, and normal preclusion rules apply. *See Growe*, 507 U.S at 35-36; *see also Wise*, 437 U.S. at 540 (op. of White, J.) (explaining that, even if districts were declared unconstitutional, the legislature should be afforded a "reasonable opportunity" to adopt its own "substitute" plan, which "if forthcoming, will then be the governing law").

Every branch of the Wisconsin state government is now engaged in reapportionment. The federal court's obligation is to defer. *See Growe*, 507 U.S at 37. Proceeding now defies *Growe* and obstructs the redistricting process. Any relief would be purely advisory. The cases must be dismissed.

CONCLUSION

The absence of jurisdiction is indisputable, principles of federalism are at their zenith, and there is no other adequate means to stop federal courts, including the court below, from exceeding their jurisdiction in an area as sensitive as reapportionment. *See Cheney*, 542 U.S. at 380-81; *Ex parte Peru*, 318 U.S at 583. The Court should grant the petition for writ of mandamus or, in the alternative, a writ of prohibition to direct the federal court to dismiss for lack of jurisdiction.

Respectfully submitted,

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September 24, 2021

APPENDIX

APPENDIX

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APPENDIX A

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

Case Nos. 21-cv-512-jdp-ajs-eec &
21-cv-534-jdp-ajs-eec

[Filed: September 16, 2021]

LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, and KATHLEEN QUALHEIM,
Plaintiffs,
v.

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

and

WISCONSIN LEGISLATURE,
Intervenor-Defendant.

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, the LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, and REBECCA ALWIN,

Plaintiffs,

v.

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

Defendants.

OPINION and ORDER

This panel has been assigned two cases about the malapportionment of Wisconsin's state legislative and congressional districts following the 2020 census. Case No. 21-cv-512 is brought by a group of individuals that the court will call "the Hunter plaintiffs" because the first named plaintiff is Lisa Hunter. Case No. 21-cv-534 is brought by a number of individuals and organizations that the court will call "the BLOC

plaintiffs" because the first named plaintiff is Black Leaders Organizing for Communities. There are several motions pending in the two cases that the court will address in this opinion.

A. Motions for intervention in Case No. 21-cv-512

Three sets of proposed intervenors seek to join the '512 case: (1) other Wisconsin residents bringing malapportionment claims who have also filed a petition for original action in the Wisconsin Supreme Court (the Johnson intervenors), Dkt. 21; (2) Wisconsin members of the United States House of Representatives who say that they are probable candidates to run again in 2022 (the Congressmen), Dkt. 30; and (3) Tony Evers, the Wisconsin governor, Dkt. 50.[1] The court has already granted the Wisconsin Legislature's motion to intervene in the '512 case. Dkt. 24, at 2–3.

As the court has already discussed with regard to the Legislature, permissive intervention under Rule 24(b) is appropriate if the motion is timely and the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Rule 24(b)(1)(B). The decision whether to allow intervention is committed to the discretion of the court, *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000), but "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see also Planned Parenthood of*

[1] All docket citations are to entries in Case No. 21-cv-512 unless otherwise noted.

Wisconsin, Inc. v. Kaul, 942 F.3d 793, 803 (7th Cir. 2019).

The Johnson intervenors' proposed complaint shares questions of law and fact with the Hunter plaintiffs' complaint because they raise virtually identical claims regarding legislative and congressional malapportionment. That itself isn't dispositive because every Wisconsin voter who lives in one of the now-overpopulated districts holds the same interest as the Hunter plaintiffs. But the Johnson intervenors' motion to intervene is timely, unopposed, and they have an additional interest that militates in favor of their intervention: they've filed a petition for original action in the Wisconsin Supreme Court and they seek a stay of this federal action pending resolution by either the state legislative process or court proceedings. *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450; *see also* Dkt. 21-2 (proposed motion to stay). The Johnson intervenors pledge to work within whatever schedule the court adopts, so the court sees no disadvantage to the other parties. The court will grant the Johnson intervenors' motion to intervene.

The Congressmen's motion to intervene is also timely, but unlike the Johnson intervenors' motion, it is opposed. The Hunter plaintiffs argue that the Congressmen do not have any special entitlement to control the drawing of their districts. That's a fair point, but as the Congressmen point out, other courts have concluded that incumbents and prospective candidates have a substantial interest in the redistricting process. *See, e.g.*, *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 579 (6th Cir.

2018) (reversing denial of permissive intervention for members of Congress, stating that "the contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent in the legislature."); *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, No. 11-CV-562, 2011 WL 5834275, at *2 (E.D. Wis. Nov. 21, 2011) ("intervenors are much more likely to run for congressional election and thus have a substantial interest in establishing the boundaries of their congressional districts").

The Hunter plaintiffs attempt to distinguish *Baldus* and the Michigan case because those involved challenges to already-drawn maps as opposed to the required decennial redistricting at issue in this case. The Hunter plaintiffs say that representatives elected in 2020 would know their districts could be redrawn before the 2022 election. The court is not persuaded that this distinction is material: in each of these scenarios a legislator faces potential revisions to his or her district boundaries before the next election. And as the Hunter plaintiffs concede, redistricting courts may consider a proposed map's treatment of incumbents. *Bush v. Vera*, 517 U.S. 952, 964 (1996) ("And we have recognized incumbency protection, at least in the limited form of avoiding contests between incumbents, as a legitimate state goal." (internal quotation marks omitted)). The last time a federal panel considered congressional redistricting—following the 2000 census—the court allowed members of Congress to intervene, citing *Bush*. *Arrington v. Elections Bd.*, No. 01-CV-121, slip op. at 4 (E.D. Wis. Feb. 13, 2002).

Based on these authorities, permissive intervention is appropriate for the Congressmen.

Briefing has not been completed on Governor Evers's motion to intervene, but given the addition of the other intervenors, particularly the legislature, there is no principled reason to deny Evers's motion. Evers can make the same case for intervention as the Legislature, with whom he shares responsibility for enacting a state law establishing new districts in light of the 2020 Census.[2] The court will grant Evers's motion for intervention.

Now that that court has granted these motions to intervene, the existing parties represent the spectrum of legitimate interests in Wisconsin's decennial redistricting. This case is already complicated, especially in light of the time available to resolve it. So any further requests to intervene will require a particularly compelling showing.

B. Proposed amended complaint in Case No. 21-cv-534

The BLOC plaintiffs have filed a proposed amended complaint adding a claim under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and eight individual plaintiffs who bring that claim, alleging that they live in Wisconsin Assembly districts that have been racially

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[2] Evers has taken the initiative to establish a "People's Maps Commission," to produce district maps that he is apparently prepared to support. Executive Order No. 66, Relating to Creating the People's Maps Commission (Jan. 27, 2020), https://evers.wi.gov/Documents/EO/EO066-PeoplesMapsCommission.pdf.

gerrymandered. Dkt. 22-1 in the '534 case. They acknowledge that leave of court is required because they seek to add new plaintiffs. *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1072 n.2 (7th Cir. 1989). They note that they contacted the Elections Commission defendants (the only defendants of record at this point in that case) and that defendants do not oppose the motion. Dkt. 22 in the '534 case, at 4.

Leave to amend should be freely given when justice so requires. *Id.* at 1072; *see also* Fed. R. Civ. P. 15(a)(2). The court will grant the BLOC plaintiffs leave to amend the complaint. The amendment expands the substantive scope of the case. But their request comes early in the proceedings, and the Voting Rights Act claim involves race-based districting issues that are integral to the drawing of statewide maps. Including those claims in this case would be more efficient than entertaining them in a separate case.

C. Consolidation

The court has already expressed its inclination to consolidate the two cases, and the parties were given a chance to state their positions on consolidation. Dkt. 24, at 3. The court extended this deadline after the BLOC plaintiffs sought to amend their complaint. Dkt. 46. Even after this extension, no party opposes consolidation. The court concludes that it is appropriate to consolidate the two actions for all purposes, to provide the most efficient resolution of the related claims raised by the parties in the two cases.

The Legislature has filed a motion to intervene in the '534 case, Dkt. 10 in that case. Because the court is

consolidating the two cases, the Legislature's motion will be denied as moot, with the understanding that all the parties are now full participants in both cases.

D. Motions to dismiss

The Legislature has moved to dismiss the '512 case, contending that the lawsuit is not ripe and that the Hunter plaintiffs lack standing; it says that the Hunter plaintiffs' injuries are purely speculative because the legislative redistricting process has not yet had a chance to fail. Dkt. 9-2. In making these arguments the Legislature relies heavily on *Growe v. Emison*, a case in which the Supreme Court held that a federal three-judge panel had erred in not deferring to the Minnesota courts' redistricting efforts and by enjoining the state courts from implementing their own plans. 507 U.S. 25, 37 (1993) ("What occurred here was not a last-minute federal- court rescue of the Minnesota electoral process, but a race to beat the [state courts'] Special Redistricting Panel to the finish line."). The Congressmen filed a similar proposed motion with their motion to intervene, Dkt. 30-2, and the Johnson intervenors filed a similar motion to stay proceedings along with their motion for intervention, Dkt. 21-2.

This court understands the state government's primacy in redistricting its legislative and congressional maps. *Id.* at 34 ("'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" (quoting *Chapman v. Meier*,420 U.S. 1, 27 (1975))). But the *Growe* Court did not conclude that the federal case was

unripe or that the plaintiffs lacked standing. And this panel is not impeding or superseding any concurrent state redistricting process, steps that that might run afoul of *Growe*.

This court will follow the approach taken by the federal panel handling Wisconsin redistricting after the 2000 census, *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856 (E.D. Wis. 2001). That panel considered the same ripeness and standing concerns at issue here and concluded that the malapportionment complaint presented a case or controversy that the court should retain. *Id.* at 860–67. In particular, the panel concluded that plaintiffs properly alleged a sufficient injury by stating that their votes would be diluted by unconstitutional maps. *Id.* at 862–64. To avoid interfering with state processes, the panel concluded that it was appropriate to stay proceedings "until the appropriate state bodies have attempted—and failed—to do so on their own." *Id.* at 867.

The motions to dismiss have not been fully briefed, but the court already has three briefs advocating for dismissal or stay, by the Legislature, Dkt. 9-3, the Congressmen, Dkt. 30-3, and the Johnson intervenors, Dkt. 21-3. These parties argue that the panel should forestall from any action until the state court system hears the case. But there is yet no indication that the state courts will entertain redistricting in the face of an impasse between the legislature and the governor. Federal panels—not state courts—have intervened in the last three redistricting cycles in which Wisconsin has had a divided government. *See Baumgart v. Wendelberger*, Nos. 01-C-0121, 02-C-0366, 2002 WL

34127471 (E.D. Wis. May 30, 2002); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982). Given this historical pattern, and the urgent requirement of prompt action, the panel will deny the Legislature's motion to dismiss. The court and the parties must prepare now to resolve the redistricting dispute, should the state fail to establish new maps in time for the 2022 elections.[3]

The motions for an indefinite stay will be denied, but the issue of a more limited stay will be considered at the upcoming status conference. *See* Dkt. 58. The court is inclined to follow the *Arrington* approach by imposing a limited stay to give the legislative process, and perhaps the state courts, the first opportunity to enact new maps. But the court will set a schedule that will allow for the timely resolution of the case should the state process languish or fail. The parties' joint submission on the schedule, Dkt. 54, was unhelpful, but the court will take the parties' input on the schedule, given this general framework, at the status conference.

[3] The movants contend that the current redistricting cycle will diverge from the historical pattern because the Johnson intervenors have filed a petition for original action in the Wisconsin Supreme Court. If the Wisconsin Supreme Court grants the petition, the parties should inform the court and the court will consider the Supreme Court's action in setting the schedule.

App. 11

ORDER

IT IS ORDERED that:

1. The motion to intervene filed by Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn, Dkt. 21 in Case No. 21-cv-512, is GRANTED.

2. The motion to intervene filed by Scott Fitzgerald, Mike Gallagher, Glenn Grothman, Bryan Steil, and Tom Tiffany, Dkt. 30 in Case No. 21-cv-512, is GRANTED.

3. The motion to intervene filed by Tony Evers, Dkt. 50 in Case No. 21-cv-512, is GRANTED.

4. The BLOC plaintiffs' motion for leave to amend their complaint, Dkt. 22 in Case No. 21-cv-534, is GRANTED.

5. Case No. 21-cv-534 is CONSOLIDATED with Case No. 21-cv-512 for all purposes. Going forward, all filings for either case should be filed in Case No. 21-cv-512.

6. The Legislature's motion to intervene in Case No. 21-cv-534, Dkt. 10 in the '534 case, is DENIED as moot.

7. The Legislature's motions to dismiss, Dkt. 9-2 in Case No. 21-cv-512 and Dkt. 11-2 in Case No. 21-cv-534, are DENIED.

8. The motion to dismiss filed by Scott Fitzgerald, Mike Gallagher, Glenn Grothman, Bryan Steil, and Tom Tiffany, Dkt. 30-2 in Case No. 21-cv-512, is DENIED.

9. The motion to stay filed by Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn, Dkt. 21-2 in Case No. 21-cv-512, is DENIED.

Entered September 16, 2021.

BY THE COURT:

/s/_____
JAMES D. PETERSON
District Judge

/s/_____
AMY J. ST. EVE
Circuit Judge

/s/_____
EDMOND E. CHANG
District Judge

APPENDIX B

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

Case Nos. 21-cv-512-jdp-ajs-eec &
21-cv-534-jdp-ajs-eec

[Filed: September 21, 2021]

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

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, and RONALD ZAHN,
Intervenor-Plaintiffs,
v.

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

and

WISCONSIN LEGISLATURE,
Intervenor-Defendant,
and

CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, and SCOTT FITZGERALD,
Intervenor-Defendants,

and

GOVERNOR TONY EVERS,
Intervenor-Defendant.

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, the LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, and REBECCA ALWIN,
Plaintiffs,
v.

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

Wisconsin Elections Commission,)
Defendants.)
_____)

ORDER

The court held a video status conference on September 21, 2021, to gather information needed to set the case schedule. All the parties appeared by counsel, as did the recent proposed intervenors.

The court recognizes that responsibility for drawing legislative and congressional maps falls primarily to the states. But the time available for redistricting is unusually compressed during this decennial cycle because of the late release of the 2020 Census data, and the problem is particularly acute in Wisconsin because its primary election date has been moved up to August. So previous federal redistricting cases may not be useful scheduling prototypes. In *Branch v. Smith*, 538 U.S. 254, 260–62 (2003), the Supreme Court approved the use of the earlier candidate-qualification deadline (rather than the election date itself) to establish a deadline by which the state had to establish its maps to forestall federal adjudication. Based on information from the defendant Wisconsin Election Commission, March 1, 2022, is the date by which maps must be available to the Commission if it is to effectively administer the 2022 elections. Should it be necessary for this court to adjudicate Wisconsin's maps, a trial of the issues would have to be complete by January 28, 2022, to give the court time to consider the evidence, make the necessary factual findings, and issue a reasoned decision.

Accordingly, as ordered during the status conference, the parties have until September 28, 2021, to confer and submit a joint proposed discovery plan and pretrial schedule on the assumption that trial will be completed by January 28, 2022, with trial briefs due a week before the start of trial. The court fully expects the parties to cooperate and submit a joint proposal, but the parties may submit alternatives on points of unresolvable disagreement.

Establishing the trial-completion date and setting a corresponding pretrial schedule does not mean that this court will inevitably adjudicate Wisconsin's maps. If the State enacts maps by March 1, 2022, the court may be able to refrain from issuing a judgment in this case. And there may be other circumstances that affect the case schedule. For example, if the State were to enact legislation that moves the nomination-petition circulation deadlines, and the related deadlines, later into 2022, thus relieving some of the urgency the Commission now faces, then the Court could consider alternative trial dates. Given these contingencies, the court will allow a party to propose an alternative schedule with a different trial date if the party disagrees with the Commission's March 1 deadline. Any alternative schedule must include the reasons for the party's disagreement with the Commission's deadline. And to be clear, submitting such an alternative proposal does not relieve the party of its obligation to cooperate in preparing the plan for the January trial.

Entered September 21, 2021.

BY THE COURT:

/s/ _____
JAMES D. PETERSON
District Judge

/s/ _____
AMY J. ST. EVE
Circuit Judge

/s/ _____
EDMOND E. CHANG
District Judge

APPENDIX C

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

Civil Action No. 21-cv-512

Three-Judge Court Requested

[Filed: August 13, 2021]

LISA HUNTER; JACOB ZABEL; JENNIFER OH; JOHN PERSA; GERALDINE SCHERTZ; and KATHLEEN QUALHEIM,	)
Plaintiffs,	)
v.	)
MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission,	)
Defendants.	)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, and KATHLEEN QUAHLEIM, by and through their undersigned counsel, file this Complaint for Declaratory and Injunctive Relief against Defendants MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission, and allege as follows:

NATURE OF THE ACTION

1. This is an action challenging Wisconsin's current legislative and congressional districts, which are unconstitutionally malapportioned. Plaintiffs ask this Court to declare Wisconsin's current legislative and congressional district plans unconstitutional; enjoin Defendants from using the current district plans in any future election; and implement new legislative and congressional district plans that adhere to the constitutional requirement of one- person, one-vote should the Legislature and the Governor fail to do so.

2. On August 12, 2021, the U.S. Secretary of Commerce delivered census-block results of the 2020 Census to Wisconsin's Governor and legislative leaders. These data confirm the inevitable reality that population shifts that occurred during the last decade have rendered Wisconsin's state legislative and congressional districts unconstitutionally

malapportioned. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) (three-judge court) (explaining that "existing apportionment schemes become instantly unconstitutional upon the release of new decennial census data" (internal quotation marks omitted)).

3. Specifically, the current district configurations of Wisconsin's State Assembly and State Senate, Wis. Stat. §§ 4.01-4.99 (State Assembly districts), 4.009 (State Senate districts), violate the Fourteenth Amendment to the U.S. Constitution, and the current configuration of Wisconsin's congressional districts, Wis. Stat. §§ 3.11-3.18, violates Article I, Section 2 of the U.S. Constitution. Because they are unconstitutional, the current legislative and congressional district plans cannot be used in any upcoming election, including the 2022 election.

4. Moreover, delays in the creation of new legislative and congressional plans threaten to violate Plaintiffs' right to associate under the First and Fourteenth Amendments to the U.S. Constitution.

5. In Wisconsin, legislative and congressional district plans ordinarily are enacted through legislation, which requires the consent of both legislative chambers and the Governor (unless both legislative chambers override the Governor's veto by a two-third vote). *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 553-59, 126 N.W.2d 551, 557-59 (1964); Wis. Const. art. V, § 10(2)(a).

6. There 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. Governor Tony Evers is a Democrat, and the State Assembly and State Senate are controlled by Republicans (though they lack veto-proof majorities). In the last four decades, each time Wisconsin's political branches were split along partisan lines, federal judicial intervention was necessary to implement new state legislative plans. This history of frequent impasse led the Wisconsin Supreme Court to observe "the reality that redistricting is now almost always resolved through litigation rather than legislation." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 713, 639 N.W.2d 537, 540 (2002). If anything, in the wake of the 2018 and 2020 elections, the hyper-partisan divisions have only gotten worse, leading to a "very real possibility" that Wisconsin's political branches will fail to reach consensus on new legislative and congressional plans. *Arrington*, 173 F. Supp. 2d at 864.

7. Given the high likelihood of impasse, this Court should prepare itself to intervene to protect the constitutional rights of Plaintiffs and voters across this State. While there is still time for the Legislature and Governor to enact new plans, this Court should assume jurisdiction now and establish a schedule that will enable the Court to adopt its own plans in the near-certain event that the political branches fail timely to do so.

8. This action "challeng[es] the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). Accordingly, a three-judge district

court "shall be convened" for this case. *Id.* Plaintiffs respectfully request that this Court notify the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit of this action and request that two judges be added to this Court for the purpose of adjudicating the merits of this dispute. *Id.* § 2284(b)(1).

JURISDICTION AND VENUE

9. Plaintiffs bring this action under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the United States Constitution. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States and involve the assertion of a deprivation, under color of state law, of a right under the Constitution of the United States. This Court has the authority to enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, and authority to enter injunctive relief under Federal Rule of Civil Procedure 65.

10. This Court has personal jurisdiction over Defendants, who are sued in their official capacities and reside within this State.

11. Venue is proper in the Western District of Wisconsin because a substantial part of the events that give rise to Plaintiffs' claims have occurred and will occur in this District, 28 U.S.C. § 1391(b)(2), and because all Defendants, who are sued in their official capacities, have their office in this District, *id.* § 1391(b)(1).

12. A three-judge district court has jurisdiction to adjudicate this dispute because Plaintiffs "challeng[e] the constitutionality of the apportionment of [Wisconsin's] congressional districts or the apportionment of [Wisconsin's] statewide legislative body." 28 U.S.C. § 2284(a).

PARTIES

13. Plaintiffs are citizens of the United States and are registered to vote in Wisconsin. Plaintiffs intend to advocate and vote for Democratic candidates in the upcoming 2022 primary and general elections. Plaintiffs reside in the following congressional and legislative districts.

Plaintiff	County of Residence	Congress-ional District	State Senate District	State Assembly District
Lisa Hunter	Dane	2	26	77
Jacob Zabel	Dane	2	26	76
Jennifer Oh	Dane	2	26	78
John Persa	Waukesha	5	5	13
Geraldine Schertz	Shawano	8	2	6

Kathleen Qualheim	Shawano	8	2	6

14. As the tables provided below demonstrate, Plaintiffs reside in districts that are overpopulated relative to other districts in the state. Plaintiffs Hunter, Zabel, and Oh's congressional, State Senate, and State Assembly districts are all overpopulated. Plaintiff Persa's State Senate and State Assembly districts (but not his congressional district) are overpopulated. And Plaintiff Schertz and Qualheim's congressional and State Senate districts (but not their State Assembly district) are overpopulated. If the 2022 election is held pursuant to the maps that are currently in place, then Plaintiffs will be deprived of their right to cast an equal vote, as guaranteed to them by the U.S. Constitution.

15. Defendants Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., and Mark L. Thomsen are the six Commissioners of the Wisconsin Elections Commission ("WEC"). They are named as defendants in their official capacities only. The WEC is the governmental body that administers, enforces, and implements Wisconsin's laws "relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05(1). The WEC is responsible for implementing redistricting plans, whether enacted by Wisconsin's political branches or by a court. *See id.* §§ 3.11-3.18 (setting forth current congressional district boundaries); 4.009 (setting forth current State Senate districts); 4.01-4.99 (setting forth current State

Assembly districts); *see also Whitford v. Gill*, No. 15-cv-421-BBC, 2017 WL 383360, at *3 (W.D. Wis. Jan. 27, 2017) (three-judge court) (enjoining members of the WEC from using existing Assembly map), *vacated on other grounds by Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (ordering members of the WEC's predecessor, the Government Accountability Board ("GAB"), to implement the court's alterations to the existing State Assembly district plan); *Baumgart v. Wendelberger*, Nos. 01-C-121, 02-C-366, 2002 WL 34127471, at *8 (E.D. Wis. May 30, 2002) (enjoining members of the Wisconsin Elections Board—the GAB's predecessor—from using existing legislative plan and ordering use of court-drawn plan due to the Legislature's failure to enact new plans following the 2000 Census).

FACTUAL ALLEGATIONS

I. Wisconsin's current legislative and congressional districts were drawn using 2010 Census data.

16. On August 9, 2011, over a decade ago, Governor Scott Walker signed legislation creating new state legislative and congressional districts, which were drawn using then-recently published 2010 Census data.

17. According to the 2010 Census, Wisconsin had a population of 5,686,986. Accordingly, a decade ago, the ideal population for each of Wisconsin's eight congressional districts (*i.e.*, the State's total population

divided by the number of districts) was 710,873 persons. Similarly, the ideal population for each State Senate district was 172,333 persons, and the ideal population for each State Assembly district was 57,444 persons.

18. According to 2010 Census data, the new congressional plan had a maximum deviation (*i.e.*, the difference between the most populated district and least populated district) of exactly one person: six districts had a population of 710,873, and two districts had a population of 710,874. The new State Assembly plan had a deviation of 438 persons (.8% of the ideal district population), and the new State Senate plan had a deviation of 1,076 persons (.6% of the ideal district population).

19. In April 2012, a federal court made slight adjustments to Assembly Districts 8 and 9. *See Baldus*, 862 F. Supp. 2d at 863. Otherwise, the legislative and congressional plans passed in August 2011 have been used in every election cycle since 2012.

II. The 2020 Census is now complete.

20. In 2020, the U.S. Census Bureau conducted the decennial census required by Article I, Section 2 of the U.S. Constitution. On April 26, 2021, the U.S. Secretary of Commerce delivered the results of the 2020 Census to the President.

21. The results of the 2020 Census report that Wisconsin's resident population as of April 2020 is 5,893,718. This is a significant increase from a decade ago, when the 2010 Census reported a population of

5,686,986. Wisconsin will again be apportioned eight congressional districts for the next decade.

22. According to the 2020 Census results, the ideal population for each of Wisconsin's eight congressional districts (*i.e.*, the State's total population divided by the number of districts) is 736,715; the ideal population for Wisconsin's 99 State Assembly districts is 59,533; and the ideal population for Wisconsin's 33 State Senate districts is 178,598.

III. As a result of significant population shifts in the past decade and the publication of the 2020 Census results, Wisconsin's legislative and congressional districts are unconstitutionally malapportioned.

23. In the past decade, Wisconsin's population has shifted significantly. Because the 2020 Census has now been completed, the 2010 population data used to draw Wisconsin's current legislative and congressional districts are obsolete, and any prior justifications for the existing maps' deviations from population equality are inapplicable.

24. On August 12, 2021, the U.S. Census Bureau delivered to Wisconsin its redistricting data file in a legacy format, which the State may use to tabulate the new population of each political subdivision. These data are commonly referred to as "P.L. 94-171 data," a reference to the legislation enacting this process, and are typically delivered no later than April of the year following the Census. *See* Pub. L. No. 94-171, 89 Stat. 1023 (1975).

25. These data make clear that significant population shifts have occurred in Wisconsin since 2010, skewing the current legislative and congressional districts far from population equality.

26. The table below, generated from the P.L. 94-171 data file provided by the Census Bureau on August 12, 2021, shows how the populations of each of Wisconsin's congressional districts have shifted between 2010 and 2020. For each district, the "2010 Population" column represents the district's 2010 population according to the 2010 Census, and the "2020 Population" column indicates the district's 2020 population according to the P.L. 94-171 data. The "Shift" column represents the shift in population between 2010 and 2020. The "Deviation from Ideal 2020 Population" column shows how far the 2020 population of each district strays from the ideal 2020 congressional district population. And the "Percent Deviation" column shows that deviation as a percentage of the ideal 2020 district population.

District	2010 Population	2020 Population	Shift	Deviation from Ideal 2020 Population	Percent Deviation
1	710,874	727,452	+16,578	-9,262	-1.26%
2	710,874	789,393	+78,519	+52,679	0.0715%
3	710,873	733,584	+22,711	-3,130	-0.42%
4	710,873	695,395	-15,478	-41,319	-5.6%
5	710,873	735,571	+24,698	-1,143	-0.16%
6	710,873	727,774	+16,901	-8,940	-1.21%
7	710,873	732,582	+21,709	-4,132	-0.56%
8	710,873	751,967	+41,094	+15,253	0.0207

27. The table above indicates that population shifts since 2010 have rendered Wisconsin's First, Third, Fourth, Fifth, Sixth, and Seventh Congressional Districts underpopulated, and its Second and Eighth Congressional Districts significantly overpopulated. According to these figures, the maximum deviation among Wisconsin's congressional districts increased from 0 to nearly 13 percent between 2010 and 2020.

28. The populations of each of Wisconsin's state legislative districts have similarly shifted in the past decade. **Exhibit A** to this Complaint provides the same table showing, for each State Assembly district, the 2010 population, 2020 population, population shift between 2010 and 2020, deviation from the district's current ideal population, and percent deviation from the district's current ideal population. **Exhibit B** to this Complaint provides the same information for each State Senate district.

29. According to **Exhibit A**, the maximum deviation among State Assembly districts increased from .8 percent to 32 percent between 2010 and 2020. And according to **Exhibit B**, the maximum deviation among State Senate districts increased from .6 percent to over 22 percent between 2010 and 2020.

30. In light of these population shifts, Wisconsin's existing legislative and congressional district configurations are unconstitutionally malapportioned. If used in any future election, these district configurations would unconstitutionally dilute the strength of Plaintiffs' votes in legislative and congressional elections because Plaintiffs live in

districts with populations that are significantly larger than those in which other voters live.

IV. Wisconsin's political branches will likely fail to enact lawful legislative or congressional district maps in time for the next election.

31. In Wisconsin, legislative and congressional district plans are enacted through legislation, which must pass both chambers of the Legislature and be signed by the Governor (unless the Legislature overrides the Governor's veto). *See State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 553-59, 126 N.W.2d 551, 557-59 (1964). Currently, both chambers of Wisconsin's Legislature are controlled by Republicans, and the Governor is a Democrat. The Republican control of the Legislature is not large enough to override a gubernatorial veto. The partisan division among Wisconsin's political branches makes it extremely unlikely that they will pass lawful legislative or congressional redistricting plans in time to be implemented during the upcoming 2022 election.

32. Except for the 2010 redistricting cycle—during which Republicans held trifecta control of Wisconsin's state government—Wisconsin's redistricting process has been rife with partisan gridlock. In the last four decades, when Republicans and Democrats controlled competing political branches of Wisconsin's government, the parties have been unable to enact state legislative redistricting plans. As a result, federal courts were forced to intervene in the process of redrawing state legislative districting plans during the 1980, 1990, and 2000 redistricting cycles.

33. Once again, Wisconsin is entering a new redistricting cycle with political branches divided along partisan lines. If anything, the partisan differences among the major parties have only grown since they last attempted to reach consensus on redistricting plans. In the two years he has been in office, Governor Evers has been in nearly constant conflict with the Republican-controlled Legislature over a broad range of policies, such as the state's response to the COVID-19 pandemic, election administration, Medicaid expansion, budget measures, abortion, and professional licensing, with the Governor using his veto power on many occasions. When it became clear that Republicans had failed to obtain a veto-proof majority in the Legislature in the November 2020 election, Governor Evers pointed immediately to the fact that he would retain the "ability to veto [ ] bad district lines through redistricting."[1] Earlier that year, when Governor Evers created an independent redistricting commission meant to produce fair statewide maps, Republican legislative leadership indicated that they would ignore the commission's proposals.[2]

34. On August 10, 2021, Governor Evers vetoed a series of bills passed by the Legislature seeking to alter the rules regarding applying for, delivering, and processing of absentee ballots, further illustrating and confirming the persistent gridlock between the

[1] Mitchell Schmidt, *GOP Falls Short of Veto-Proof Majorities in Wisconsin Legislature*, Wis. State J. (Nov. 5, 2020), https://tinyurl.com/wj6m3d98.

[2] Scott Bauer, *Wisconsin Republicans Dismiss Nonpartisan Redistricting Plan*, Assoc. Press (Jan. 23, 2020), https://tinyurl.com/7vh569yb.

Legislature and Governor Evers, especially on election issues.[3]

35. Moreover, the Census Bureau's significant delays in distributing Wisconsin's population data have compressed the amount of time during which the legislative process would normally take place. This increases the already significant likelihood the political branches will reach an impasse this cycle and fail to enact new legislative and congressional district plans, leaving the existing plans in place for next year's election. To avoid such an unconstitutional outcome, this Court must prepare to intervene to ensure Plaintiffs' and other Wisconsinites' voting strength is not diluted.

36. The Wisconsin Constitution requires the Legislature to draw new legislative lines "[a]t its first session after each enumeration made by the authority of the United States." Wis. Const. art. IV, § 3. The current legislative session will terminate when the following session begins in early January 2022. *See* Wis. Stat. § 13.02(2) (calling for new annual sessions to begin "on the first Tuesday after the 8th day of January in each year"). Wisconsin law does not set a deadline by which congressional redistricting plans must be in place. Nonetheless, it is in the interests of voters, candidates, and Wisconsin's entire electoral apparatus that finalized legislative and congressional districts be put in place as soon as possible, well before candidates in those districts must begin to collect

[3] Scott Bauer, *Wisconsin Governor Vetoes GOP Bills to Restrict Absentees*, Assoc. Press (Aug. 10, 2021), https://tinyurl.com/e4he92sj.

signatures on their nomination papers. Potential candidates cannot make strategic decisions—including, most importantly, whether to run at all—without knowing the district boundaries. And voters have a variety of interests in knowing as soon as possible the districts in which they reside and will vote, and the precise contours of those districts. These interests include deciding which candidates to support and whether to encourage others to run; holding elected representatives accountable for their conduct in office; and advocating for and organizing around candidates who will share their views in Congress or the Wisconsin Legislature, including by working together with other district voters in support of favored candidates.

37. Candidates seeking to appear on the ballot for the 2022 partisan primary election will begin circulating nomination papers as early as April 15, 2022. Wis. Stat. § 8.15(1). And the deadline to file nomination papers is June 1, 2022. *Id.* It is in everyone's best interest—voters and candidates alike—that district boundaries are set well before the start of the formal nomination process. Delaying the adoption of new plans even until this deadline 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. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983) ("The [absence] of candidates also 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.").

38. If this Court is not prepared to act in the event that the Legislature and Governor fail to enact new legislative or congressional plans, then the 2022 election will be held using illegal district maps, depriving Plaintiffs of their constitutional rights.

CLAIMS FOR RELIEF

COUNT I

Violation of the Fourteenth Amendment to the U.S. Constitution
42 U.S.C. § 1983
Legislative Malapportionment

39. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

40. The Fourteenth Amendment to the U.S. Constitution prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." This provision "requires that the seats in both houses of a bicameral state legislature [ ] be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

41. In light of the significant population shifts that have occurred since the 2010 Census, and the recent publication of the results of the 2020 Census, the current configurations of Wisconsin's legislative districts—which were drawn based on 2010 Census

data—are unconstitutionally malapportioned. These districts are no longer apportioned on a "population basis." Instead, they are based on outdated population data collected more than a decade ago.

42. Wisconsin's current state legislative plan places voters into districts with significantly disparate populations, causing voters in overpopulated districts, like Plaintiffs, to experience vote dilution compared to voters in districts with comparatively smaller populations.

43. Any future use of Wisconsin's current legislative plan would violate Plaintiffs' constitutional right to cast an equal vote.

COUNT II

Violation of Article I, Section 2 of the U.S. Constitution
42 U.S.C. § 1983
Congressional Malapportionment

44. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the count below as though fully set forth herein.

45. Article I, Section 2 of the U.S. Constitution requires "that when qualified voters elect members of Congress each vote be given as much weight as any other vote." *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964). This means that congressional districts must "achieve population equality 'as nearly as is practicable.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry*, 376 U.S. at 7-8).

46. Article I, Section 2 requires an even higher standard of exact population equality among congressional districts than what the Fourteenth Amendment requires of state legislative districts. It "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher*, 462 U.S. at 730 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). *Any* variation from "absolute population equality" must be narrowly justified. *Id.* at 732-33.

47. As a result of this requirement, when Wisconsin's existing congressional plan was enacted in 2010, the deviation in population among districts was no more than *one person*. Now, the population deviation among the current congressional districts is nearly 94,000 people.

48. Given the significant population shifts that have occurred since the 2010 Census, and the recent publication of the results of the 2020 Census, Wisconsin's congressional districts—which were drawn based on 2010 Census data—are now unconstitutionally malapportioned. No justification can be offered for the deviation among the congressional districts because any existing justification would be based on outdated 2010 population data.

49. Any future use of Wisconsin's current congressional district plan would violate Plaintiffs' constitutional right to an undiluted vote.

COUNT III

Violation of the First and Fourteenth Amendments to the U.S. Constitution
42 U.S.C. § 1983
Freedom of Association

50. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

51. Among other rights, the First Amendment protects the "freedom of association" from infringement by the federal government and applies to state governments pursuant to the Fourteenth Amendment. *See Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 276-77 (1964)).

52. Impeding candidates' ability to run for political office—and, consequently, Plaintiffs' ability to assess candidate qualifications and positions, organize and advocate for preferred candidates, and associate with like-minded voters—infringes on Plaintiffs' First Amendment right to association. *See, e.g.*, *Anderson*, 460 U.S. at 787-88 & n.8.

53. Given the delay in publication of the 2020 Census data and the near-certain deadlock among the political branches in adopting new legislative and congressional district plans, it is significantly unlikely that the legislative process will timely yield new plans. This would deprive Plaintiffs of the ability to associate with others from the same lawfully apportioned legislative and congressional districts, and, therefore,

is likely to significantly, if not severely, burden Plaintiffs' First Amendment right to association.

54. Defendants can assert no legitimate, let alone compelling, interest that justifies this burden.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

a. Notify the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit of this action and request that two other judges be designated to form a three-judge district court, 28 U.S.C. § 2284(b)(1);

b. Declare that the current configurations of Wisconsin's State Assembly and State Senate districts, Wis. Stat. §§ 4.01-4.99, 4.009, violate the First and Fourteenth Amendments to the United States Constitution;

c. Declare that the current configuration of Wisconsin's congressional districts, Wis. Stat. §§ 3.11-3.18, violates Article I, Section 2 of, and the First and Fourteenth Amendments to the United States Constitution;

d. Permanently enjoin Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from implementing, enforcing, or giving any effect to Wisconsin's current legislative or congressional districting plans;

e. Establish 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 enact such plans by that time;

f. Implement a new legislative district plan that complies with the Fourteenth Amendment to the U.S. Constitution, and a new congressional district plan that complies with Article I, Section 2 of the U.S. Constitution;

g. Award Plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action, pursuant to 42 U.S.C. § 1988 and other applicable laws; and

h. Grant such other and further relief as the Court deems just and proper.

Dated: August 13, 2021

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*Motion for *Pro Hac Vice* Admission Forthcoming

[*** Exhibits A and B omitted for this Appendix***]

APPENDIX D

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

Civil Action File No. 3:21-cv-00534-jdp-ajs-eec

[Filed: September 21, 2021]

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

Plaintiffs,

v.

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

Wisconsin Elections Commission,)
MEAGAN WOLFE, in her official capacity)
as the Administrator of the)
Wisconsin Elections Commission,)
)
Defendants.)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Helen Harris, Woodrow Wilson Cain, II, Nina Cain, Tracie Y. Horton, Pastor Sean Tatum, Melody McCurtis, Barbara Toles, and Edward Wade, Jr., bring this First Amended Complaint for Declaratory and Injunctive Relief against defendants Robert F. Spindell, Jr., Mark L. Thomsen, Dean Knudson, Julie Glancey, Ann S. Jacobs, and Marge Bostelmann, in their official capacities as members of the Wisconsin Elections Commission, and against defendant Meagan Wolfe, in her official capacity as the Administrator of the Wisconsin Elections Commission, (collectively, "Defendants"), under 42 U.S.C. § 1983, 52 U.S.C. § 10301, and 28 U.S.C. § 2284(a), and state and allege as follows:

INTRODUCTION

Wisconsin's current state legislative districts were adopted by the Wisconsin State Legislature and signed by Wisconsin's Governor as 2011 Wisconsin Act 43, and later modified by a federal court in *Baldus v. Members of the Government Accountability Board*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012). The current districts are based on state population and demographic data collected by the U.S. Census Bureau in 2010. On August 12, 2021, the U.S. Census Bureau released Wisconsin's state population data (Public Law 94-171 data) from the 2020 Census. As those data reveal, Wisconsin gained 199,243 residents in the past decade, a population shift that has rendered the existing state legislative districts unequally populated, and therefore malapportioned under state and federal law. More specifically, the current state legislative districts violate the basic democratic tenet of "one person, one vote,"[1] and therefore violate Plaintiffs' rights under the Fourteenth Amendment to the U.S. Constitution.

Moreover, the Milwaukee-area State Assembly districts violate Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, by packing Black voters in six districts with Black voting age population ("BVAP") percentages well in excess of what is needed to provide an equal opportunity for Black voters to elect their preferred candidate, and simultaneously cracking other Black voters from these districts, and placing them instead in districts that feature a white bloc voting against their preferred candidates. A seventh majority-BVAP district

[1] *See Reynolds v. Sims*, 377 U.S. 533, 562–64 (1964); *See also Baker v. Carr*, 369 U.S. 186, 207-208 (1962).

can instead be drawn to provide Black voters with an equal opportunity to elect their preferred candidates, and to remedy this unlawful vote dilution.

The malapportionment became actionable in this Court with the Census Bureau's release of the 2020 Federal Census count of Wisconsin's population, and, with the Public Law 94-171 data now released, it is clear precisely where population shifts have occurred within the state. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001). Indeed, on August 13, 2021, six Wisconsin residents who intend to advocate and vote for Democratic Party of Wisconsin candidates in the coming 2022 primary and general elections filed a complaint in this Court, alleging that current Wisconsin state legislative districts are unconstitutionally malapportioned based on the 2020 Census data. *See Hunter, et al. v. Bostelmann, et al.*, No. 21-cv-00512 (W.D. Wis.).

Plaintiffs in this action include nonprofit organizations that have members and constituencies whose votes are diluted because they live in districts that are now overpopulated in violation of their constitutional rights, as well as individual voters who suffer the same harm. Plaintiffs therefore seek a declaratory judgment that the current state legislative districts violate the United States Constitution; a permanent injunction barring Defendants from holding future elections under the current scheme for Wisconsin State Senate and State Assembly districts; and an order implementing new state legislative districts that adhere to the requirements of federal and state law should the Legislature and Governor fail to

adopt such districts through the legislative process. Plaintiffs also include Black voters whose votes for Milwaukee-area State Assembly districts are diluted in violation of Section 2 of the Voting Rights Act, along with a nonprofit organization with affected constituents for whom it advocates.

The Wisconsin Constitution requires new legislative districts to be drawn in light of the U.S. Census Bureau's release of 2020 census data, the United States Constitution requires that those districts be drawn in a way that corrects the vote dilution that exists in the current State Assembly plan. The primary duty for reapportionment rests with the state legislature, with a new plan to be approved by the governor. *State ex Rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556-59, 126 N.W.2d 551 (1964). However, in every past decade since the 1980s when there has been a partisan divide among the Senate, the Assembly, and/or the Governor, there has been a legislative impasse requiring judicial intervention. *See Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wis. State AFL-CIO v. Elections Bd.,* 543 F. Supp. 630 (E.D. Wis. 1982); *Baumgart v. Wendelberger*, Nos. 01–C–0121 & 02–C–0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002). The Senate and Assembly currently have majorities of elected Republican representatives, whereas the Governor is a Democrat.

Since Governor Evers assumed office in January 2019, the Governor and the Legislature have disagreed on many significant policy issues that appear to fall along partisan political lines, such as the Governor's

Administration's orders requiring Wisconsinites to remain at home and later, use face-coverings, during the COVID-19 pandemic;[2] the appropriate use of federal aid for COVID relief;[3] limiting the authority of public health entities;[4] vaccination requirements by employers or other entities;[5] Department of Transportation policy;[6] and raffle and sweepstakes laws;[7] among others.[8] The low likelihood of the Legislature and the Governor reaching agreement on a redistricting plan for state legislative districts in the

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[2] *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, and 2021 Senate Joint Resolution 3 (terminating 2021 Executive Order #104), available at https://docs.legis.wisconsin.gov/2021/related/enrolled/sjr3.

[3] See, *e.g.*, veto messages for 2021 AB232, AB234, AB235, AB236, AB237, AB238, AB239, AB240, AB241, AB243, and SB183, available at https://docs.legis.wisconsin.gov/2021/related/veto_messages.

[4] See veto messages for 2021 AB1, available at https://docs.legis.wisconsin.gov/2021/related/veto_messages.

[5] *Id.*

[6] See veto messages for 2019 AB273 and AB284, available at https://docs.legis.wisconsin.gov/2019/related/veto_messages.

[7] See veto messages for 2019 SB292 and SB43, available at https://docs.legis.wisconsin.gov/2019/related/veto_messages.

[8] See veto messages for 2021 SB39 (sports and extracurriculars by charter school students), and 2021 SB38 (return to offices for state employees during COVID-19 pandemic), available at https://docs.legis.wisconsin.gov/2021/related/veto_messages; and veto messages for 2019 AB4 (tax policy), AB53 (student directory data definition), AB76 (training hours for nurse aids), and AB179, AB180, AB182, and AB183 (abortion care policy), available at https://docs.legis.wisconsin.gov/2019/related/veto_messages.

2020 cycle is further reflected in the current Legislature's frequent resort to the courts to challenge executive action in lieu of seeking political compromise. *See, e.g.*, *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; *Wis. Legislature v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020) (attached as Exhibit 1); *Fabick v. Evers*, 2021 WI 28 (Legislature filed a brief as *amicus curiae* in support of a challenge to the Governor's emergency powers); *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (Legislature filed a brief as *amicus curiae* in support of a challenge to the Governor's veto authority). Indeed, legislative leadership has already retained private counsel in preparation for redistricting litigation this year. *See Waity v. Vos*, No. 21-CV-589 (Dane Co. Cir. Ct. Apr. 29, 2021) (holding void *ab initio* contracts for redistricting litigation counsel signed in December 2020) (copy attached as Exhibit 2), *petition for bypass granted sub nom Waity v. LeMahieu*, No. 2021-AP-802 (Wis. July 15, 2021) (attached as Exhibit 3), *and decision stayed sub nom Waity v. LeMahieu*, No. 2021-AP-802 (attached as Exhibit 4). The pending action by Wisconsin residents who support the Democratic Party and its candidates for elected office, and the Legislature's motion to intervene in that case, as well as the Legislature's motion to intervene in this case, further diminishes the chances that the Legislature and Governor will reach a compromise on new legislative districts.

Consequently, past practice, the current partisan divide in Wisconsin's government, and the pending action by Democratic voters alleging a malapportionment in state legislative districts all

strongly indicate that legislative impasse over new state legislative districts will occur, and that once again the federal court will be required to resolve the conflict. Indeed, without this Court's intervention, the 2022 elections will proceed under plans that are not only malapportioned in violation of the U.S. Constitution, but pursuant to a State Assembly plan that violates Section 2 of the Voting Rights Act.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1357, and 2284 to hear the claims for legal and equitable relief arising under the federal constitution and the Voting Rights Act. It also has general jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, to grant the declaratory relief requested by Plaintiffs.

2. This action challenges the constitutionality of the apportionment of Wisconsin's legislative districts, found in Chapter 4 of the Wisconsin Statutes and revised as ordered by the U.S. District Court for the Eastern District of Wisconsin in *Baldus v. Members of the Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam) (three-judge panel). The current state legislative district boundaries were based on the 2010 census of the state's population, now superseded by the 2020 census. This action likewise challenges the Milwaukee-area State Assembly districts as violating Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, by diluting Black voters' ability to elect the candidates of their choice through packing and cracking of Black voters across districts.

3. 28 U.S.C. § 2284(a) requires that a district court of three judges hear redistricting cases. In 1982, 1992, and 2002, three-judge panels convened pursuant to 28 U.S.C. § 2284 resolved complaints like this one, developing redistricting plans for the state legislature in the absence of valid plans adopted by the Legislature and enacted with the Governor's approval. *See Prosser*, 793 F. Supp. 859; *AFL-CIO*, 543 F. Supp. 630; *Baumgart v. Wendelberger*, 2002 WL 3412747, *amended by* 2002 WL 34127473.

4. This Court has personal jurisdiction over all Defendants. Defendants Spindell, Thomsen, Knudson, Glancey, Jacobs, Bostelmann, and Wolfe are state officials who reside in Wisconsin and perform official duties in Madison, Wisconsin.

5. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (e). At least two of the defendants resides in the Western District of Wisconsin, and Defendants are state officials performing official duties in Madison, Wisconsin. Members of two Plaintiff organizations reside and vote in this district, and two Individual Plaintiffs, Stephenson and Alwin, also reside and vote in this district.

PARTIES

Plaintiffs

6. Plaintiffs include three nonprofit groups, each with members or constituents who are citizens, residents, and qualified voters of the United States of America and the State of Wisconsin, residing in various counties and legislative districts, including in now-overpopulated districts (the "Organizational Plaintiffs").

7. Plaintiff Black Leaders Organizing for Communities ("BLOC") is a nonprofit project established in 2017 to ensure a high quality of life and access to opportunities for members of the Black community in Milwaukee and throughout Wisconsin. BLOC is a year-round civic-engagement organization that has a robust field program to get out the vote and do civic education work door-to-door with community members and through its fellowship program. During 2018 BLOC made 227,000 door attempts in Milwaukee, targeting Black residents to exercise their right to engage in civic participation including voting. BLOC trains its constituents on the civics process and on different ways to make their voices heard, including (but not limited to) voting in each election. BLOC is regarded and used by members of the African-American community in Milwaukee as a resource and conduit through which they can become more engaged in and advocate for rights and political representation for members of their community.

8. Plaintiff Voces de la Frontera ("Voces") is a nonpartisan, nonprofit, non-stock corporation

organized under the laws of the State of Wisconsin with its principal office located at 515 S. 5th St., in the City of Milwaukee, Milwaukee County, Wisconsin. Voces, a community-based organization currently with over one thousand dues-paying members, was formed in 2001 to advocate on behalf of the rights of immigrant and low-income workers. Voces currently has chapters in Milwaukee, Racine, Waukesha, Sheboygan, Walworth County, Madison, West Bend, Manitowoc, and Green Bay. Voces is dedicated to educating and organizing its membership and community members to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. Voces has sought legal redress in multiple cases to protect the voting rights of Wisconsin's Latino voters, including challenging discriminatory legislative districts (as recently as in *Baldus* in 2011) and voter registration and photo ID requirements. Voces seeks to maximize eligible-voter participation through its voter-registration efforts and encourage civic engagement through registration and voting.

9. Plaintiff League of Women Voters of Wisconsin ("LWVWI") is a nonpartisan, nonprofit, non-stock corporation organized under the laws of the State of Wisconsin with its principal office located at 612 West Main St., Suite 200, in the City of Madison, Dane County, Wisconsin. LWVWI is an affiliate of The League of Women Voters of the United States, which has 750 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Hong Kong. LWVWI works to expand informed, active participation in state and local government, giving a voice to all Wisconsinites. LWVWI, a

nonpartisan community-based organization, was formed in 1920, immediately after the enactment of the Nineteenth Amendment granting women's suffrage. LWVWI is dedicated to encouraging its members and the people of Wisconsin to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. The mission of LWVWI is to promote political responsibility through informed and active participation in government and to act on select governmental issues. LWVWI seeks to maximize eligible-voter participation through its voter-registration efforts and encourage civic engagement through registration and voting. LWVWI works with and through 20 local Leagues in the following cities, counties, and areas throughout Wisconsin: Appleton, Ashland/Bayfield Counties, Beloit, Dane County, Door County, the Greater Chippewa Valley, Greater Green Bay, Janesville, the La Crosse area, Manitowoc County, Milwaukee County, the Northwoods, Ozaukee County, the Ripon area, Sheboygan County, the Stevens Point area, the St. Croix Valley, the Whitewater area, Winnebago County, and the Wisconsin Rapids area. These local Leagues have approximately 2,800 members, all of whom are also members of LWVWI. LWVWI has prosecuted lawsuits in state and federal courts in Wisconsin to vindicate the voting and representational rights of Wisconsin voters; this includes actions in this Court, such as *Swenson v. Bostelmann*, 20-cv-459-wmc (W.D. Wis. 2020), and *Lewis v. Knudson*, 20-cv-284 (W.D. Wis. 2020).

10. Organizational Plaintiffs' members and constituents include voters who reside in various State

Senate and Assembly districts across Wisconsin, including districts that are now overpopulated. Because they live in state legislative districts that were approximately equal in population with the other state legislative districts at the time the current districts were configured in 2011, but that are now overpopulated as a result of the state population count released by the Census Bureau on April 26, 2021, their votes are now diluted compared with voters in districts that are now underpopulated. This vote dilution constitutes a specific and personal injury to each voter in an overpopulated district that can be addressed by a federal court. *See Reynolds*, 377 U.S. at 561; *Baker*, 369 U. S. at 206.

11. Plaintiffs also include individual voters ("Individual Plaintiffs") who reside either in now-overpopulated districts or in districts that violate Section 2 of the Voting Rights Act. The residency of Individual Plaintiffs in three overpopulated districts is summarized here:

Individual Plaintiff	**State Assembly District**	**Population compared to 2020 Census ideal**	**State Senate District**	**Population compared to 2020 Census ideal**
Cindy Fallona	AD5	+13.26%	SD2	+2.77%
Lauren Stephenson	AD76	+20.41%	SD26	+13.00%
Rebecca Alwin	AD79	+17.13%	SD27	0.0947

12. Individual Plaintiff Cindy Fallona resides in Wisconsin Assembly district 5 and State Senate district

2. Fallona has lived at this residence for over three decades and is a regular voter in Wisconsin elections. Fallona intends to vote in 2022 and is registered at this residence, with no plans to register at a different address.

13. Individual Plaintiff Lauren Stephenson resides in Wisconsin Assembly district 76 and State Senate district 26. Stephenson has lived at this residence for over six years and is a regular voter in Wisconsin elections. Stephenson intends to vote in 2022 and is registered at this residence, with no plans to register at a different address.

14. Individual Plaintiff Rebecca Alwin resides in Wisconsin Assembly district 79 and State Senate district 27. Alwin has lived at this residence for over 25 years and is a regular voter in Wisconsin elections. Alwin intends to vote in 2022 and is registered at this residence, with no plans to register at a different address.

15. Individual Plaintiffs also include Black voters whose votes are diluted in violation of Section 2 of the Voting Rights Act by placing them in Milwaukee-area Assembly districts that are either packed with excessively high numbers of Black voters—well above what is necessary to afford them an equal opportunity to elect their preferred candidates—or cracked from districts containing other Black voters, where their voting power is instead overwhelmed by a white bloc voting in opposition to their candidates of choice.

16. Plaintiff Helen Harris is an African-American citizen of the United States and of the State of

Wisconsin. She is a resident and registered voter in Milwaukee County in Assembly District 22. Ms. Harris has been unable to elect candidates of her choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in her community. An additional BVAP majority district could be drawn including the Milwaukee County portion of Assembly district 22, including Ms. Harris's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Ms. Harris's voting power and affords her less opportunity than other members of the electorate to participate in the political process and to elect a representative of her choice to the Wisconsin State Assembly.

17. Plaintiff Woodrow Wilson Cain, II, is an African-American citizen of the United States and of the State of Wisconsin. He is a resident and registered voter in the Village of Brown Deer, in Milwaukee County, in Assembly District 24. Mr. Cain has been unable to elect candidates of his choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in his community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Mr. Cain's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous

and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Mr. Cain's voting power and affords him less opportunity than other members of the electorate to participate in the political process and to elect a representative of his choice to the Wisconsin State Assembly.

18. Plaintiff Nina Cain is an African-American citizen of the United States and of the State of Wisconsin. She is a resident and registered voter in the Village of Brown Deer, in Milwaukee County, in Assembly District 24. Ms. Cain has been unable to elect candidates of her choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in her community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Ms. Cain's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Ms. Cain's voting power and affords her less opportunity than other members of the electorate to participate in the political process and to elect a representative of her choice to the Wisconsin State Assembly.

19. Plaintiff Tracie Y. Horton is an African-American citizen of the United States and of the State of Wisconsin. She is a resident and registered

voter in the Village of Brown Deer, in Milwaukee County, in Assembly District 24. Ms. Horton has been unable to elect candidates of her choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in her community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Ms. Horton's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Ms. Horton's voting power and affords her less opportunity than other members of the electorate to participate in the political process and to elect a representative of her choice to the Wisconsin State Assembly.

20. Plaintiff Pastor Sean Tatum is an African-American citizen of the United States and of the State of Wisconsin. He is a resident and registered voter in the Village of Brown Deer, in Milwaukee County, in Assembly District 24. Pastor Tatum has been unable to elect candidates of his choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in his community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Pastor Tatum's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous

and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Pastor Tatum's voting power and affords him less opportunity than other members of the electorate to participate in the political process and to elect a representative of his choice to the Wisconsin State Assembly.

21. Plaintiff Melody McCurtis is an African-American citizen of the United States and the State of Wisconsin. She is a resident and registered voter in the City of Milwaukee, in Assembly District 18. Ms. McCurtis is denied an equal opportunity to vote for candidates for the Wisconsin State Assembly because she is packed in District 18, where her vote is of lesser value because African Americans are concentrated there. The apportionment of six BVAP majority districts to the sufficiently numerous and geographically compact Black population in the Milwaukee area, as opposed to seven BVAP majority districts required by the Voting Rights Act, dilutes Ms. McCurtis's voting power.

22. Plaintiff Barbara Toles is an adult African-American citizen of the United States and the State of Wisconsin. She is a resident and registered voter in the City of Milwaukee, in Assembly District 17. Ms. Toles is denied an equal opportunity to vote for candidates for the Wisconsin State Assembly because she is packed in District 17, where her vote is of lesser value because African Americans are concentrated there. The apportionment of six BVAP majority districts to the sufficiently numerous and

geographically compact Black population in the Milwaukee area, as opposed to seven BVAP majority districts required by the Voting Rights Act, dilutes Ms. Toles's voting power.

23. Plaintiff Edward Wade, Jr., is a 51-year-old African-American citizen of the United States and the State of Wisconsin. He is a resident and registered voter in the City of Milwaukee, in Assembly District 12. Mr. Wade is denied an equal opportunity to vote for candidates for the Wisconsin State Assembly because he is packed in District 12, where his vote is of lesser value because African Americans are concentrated there. The apportionment of six BVAP majority districts to the sufficiently numerous and geographically compact Black population in the Milwaukee area, as opposed to seven BVAP majority districts required by the Voting Rights Act, dilutes Mr. Wade's voting power.

Defendants

24. Defendants Robert F. Spindell, Jr., Mark L. Thomsen, Dean Knudson, Julie M. Glancey, Ann S. Jacobs, and Marge Bostelmann are sued in their official capacities as the members of the Wisconsin Elections Commission ("WEC").

25. Defendant Meagan Wolfe is sued in her official capacity as the Administrator of the WEC.

26. The WEC has the responsibility for the administration and enforcement of Wisconsin laws "relating to elections" including Chapters 5 to 10 and 12. Wis. Stat. § 5.05(1). This includes the election every two years of Wisconsin's representatives in the State

Assembly and every four years its representatives in the State Senate. The WEC provides support to local clerks in each of Wisconsin's 72 counties, in administering and preparing for the election of members of the Wisconsin Legislature.

27. Defendant Wolfe, as commission administrator, is the chief election officer of the state. Wis. Stat. § 5.05(3g).

FACTS AND CONSTITUTIONAL PROVISIONS RELATED TO MALAPPORTIONMENT

28. The U.S. Constitution requires that the members of the Wisconsin Legislature be elected on the basis of equal representation. *Arrington*, 173 F. Supp. 2d at 860 (citing U.S. Const. art. I, § 2). The State Senate and Assembly districts must therefore be reapportioned after each Federal Census to be substantially equal in population.

29. The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall … be deprived of life, liberty, or property, without due process of law."

30. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

> person within its jurisdiction the equal protection of the laws.

This provision guarantees to the citizens of each state the right to vote in state elections, and that each citizen shall have substantially equal legislative representation regardless of what part of the state they live in, giving each person's vote equal power. *Reynolds*, 377 U.S. 533, 561-68 (1964).

31. 2011 Wisconsin Act 43 divided the official state population determined by the 2010 Census into 33 Senate districts and 99 Assembly districts with relatively equal populations. The revisions ordered by the court *Baldus* in 2012 did not disturb this approximate equality, despite modifying two Assembly districts. In 2012, each Senate district contained a population of approximately 172,333 residents, and each Assembly district contained a population of approximately 57,444. A copy of Chapter 4 of the Wisconsin Statutes, embodying 2011 Wisconsin Act 43, is attached as Exhibit 5.

32. The 2012 state legislative elections, and every subsequent biennial legislative election, including the November 6, 2020 election, have been conducted under the district boundaries created by Act 43, as modified by *Baldus*. The next regular state legislative primary election is scheduled for August 9, 2022, and the next regular state legislative general election is scheduled for November 8, 2022.[9]

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[9] "Upcoming Elections," Wisconsin Elections Commission, available at: https://elections.wi.gov/elections-voting/elections.

33. The Bureau of the Census, U.S. Department of Commerce, conducted a decennial census of Wisconsin and of all the other states in 2020 under Article I, Section 2, of the U.S. Constitution.

34. Under 2 U.S.C. §§ 2a and 2c and 13 U.S.C. § 141(c), the Census Bureau on April 26, 2021 announced and certified the actual enumeration of the population of Wisconsin at 5,893,718 as of April 1, 2020, a population increase of approximately 200,000 people from the 2010 census. A copy of the Census Bureau's Apportionment Population and Number of Representatives, by state, is attached as Exhibit 6.

35. Based on the 2020 Census, the precise ideal population for each Senate district in Wisconsin is 178,598 and for each Assembly district 59,533 (each an increase compared to the same figures from 2010).

36. The 2020 Census's P.L. 94-171 data, released August 12, 2021, demonstrate that Wisconsin's population has not grown uniformly across all 33 Senate and 99 Assembly districts. The data reveal substantial population disparities, indicating which districts are now over- and underpopulated in reference to the 2020 Census's "ideal" district populations for Wisconsin's Senate and Assembly districts.

37. Because of population shifts over the past decade, the 2011 state legislative districts now give some Wisconsinites' votes more weight than others. Voters living in Assembly district 76—where the population is 20.41% greater than the ideal population based on the 2020 Census— have their votes diluted. This is particularly true compared to voters in other

districts like Assembly district 10—now 11.60% *less* populated than the ideal district population. Voters in the 37 other overpopulated districts suffer similar harm: Assembly districts 79, 5, 78, and 80 have grown overpopulated in the past decade (with populations now 17.13%, 13.26%, 12.78%, and 10.58% over the ideal district population, respectively). Other districts are now underpopulated, giving voters who reside there an outsized voice in electing their state representative. Assembly districts 18, 16, and 8, for example, now have populations 11.00%, 9.73%, and 9.30% below the ideal population of 59,533, respectively, based on the 2020 Census.

38. The same population growth imbalances affect Senate districts, with some voters suffering vote dilution and others benefitting from heightened voting efficiency. Senate district 26 has grown to exceed the current ideal district population of 178,598 by 13.00%; Senate district 27 by 9.47%; and Senate district 16 by 7.78%. Meanwhile Senate district 6 is now underpopulated by 9.25% relative to the ideal Senate district size and Senate districts 4, 3, and 22 are 8.62%, 4.43%, and 4.19% below the ideal size.

39. This facial malapportionment of state legislative districts dilutes the voting strength of Individual Plaintiffs residing in the overpopulated districts: the weight or value of each voter in a relatively overpopulated district is, by definition, less than that of any voter residing in a relatively underpopulated district.

40. Article IV, section 3, of the Wisconsin Constitution assigns the Legislature and Governor

responsibility for enacting a constitutionally valid plan for the state's legislative districts.

41. In each of the previous four decades, when control over Wisconsin's government has been divided between members of the Republican and Democratic Parties, however, the Legislature and Governor have not met that responsibility. Instead, a federal court has established district boundaries to ensure the constitutional guarantees for citizens and voters.

42. In the most recent round of decennial redistricting in 2011, the Legislature and Governor did enact a legislative district plan, but that plan, too, required judicial intervention to give Wisconsin a legally compliant legislative district map.

43. The legislature elected in November 2020 convened for the first time on January 4, 2021. Both the Senate and Assembly are controlled by Republican majorities, while the Governor is a Democrat. Each time in the past four decades that Wisconsin has had divided partisan control when redistricting was required, the political branches have failed to reach a compromise, requiring a federal court to step in and assume the constitutionally mandated reapportionment of state legislative districts. *See Prosser,* 793 F. Supp. 859; *AFL-CIO,* 543 F. Supp. 630; *Baumgart*, 2002 WL 34127471, *amended by* 2002 WL 34127473. The low likelihood of an enacted redistricting plan in the current cycle is evidenced by the Legislature's recent preference for litigation over legislation, as described in detail above.

44. The deadline for new districts to be in place is driven by the 2022 elections for state legislative seats. The date of the primary for these elections is dictated by state statute, and in 2022 will be August 9. Because there are a number of steps leading up to an election, however, new districts must be set no later than March 15, 2022. This is the statutory deadline for the WEC to notify county clerks of which offices will be voted on, and where information about district boundaries can be found. This notice informs potential candidates of district boundaries, so they can begin circulating nomination papers for signature by voters within those districts on April 15, 2022. Wis. Stat. § 8.15(1). The statutory deadline for completed nomination papers to be submitted to the WEC is June 1, 2022. *Id.* The WEC must then certify which candidates have qualified for ballot access, followed by ballot design, testing, printing, and then distribution of absentee ballots, which must begin no later than 47 days election day. *See* Wis. Stat. § 7.15. Thus, while the primary election occurs in August, new districts must be in place several months before that date for the WEC to comply with state law, and so that candidates may appear on the ballot for the election on that date.

LEGAL BACKGROUND RELATED TO VOTING RIGHTS ACT SECTION 2 CLAIM

45. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(a), prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." A violation of Section 2 is established if it is shown that "the political processes

leading to [a] nomination or election" in the jurisdiction "are not equally open to participation by [minority voters] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

46. The dilution of Black voting strength "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

47. In *Gingles*, the Supreme Court identified three necessary preconditions ("the *Gingles* preconditions") for a claim of vote dilution under Section 2 of the Voting Rights Act: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

48. After the preconditions are established, the statute directs courts to assess whether, under the totality of the circumstances, members of the racial group have less opportunity than other members of the electoral to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The Court has directed that the Senate Report on the 1982 amendments to the Voting Rights Act be consulted for its non-exhaustive factors that the court should consider in determining if, in the totality

of the circumstances in the jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2.

49. The Senate Factors include: (1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent of which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which the minority group bears the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

50. Nevertheless, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1566 n.33 (11th Cir. 1984) (quoting S. Rep. No. 97-417, at 29 (1982)); *see also id.* ("The statute explicitly calls for a 'totality-of-the-circumstances' approach and the Senate Report indicates that no particular factor is an indispensable element of a dilution claim.").

FACTUAL BACKGROUND RELATED TO SECTION 2 CLAIM

51. Wisconsin Act 43 created six Assembly districts that have a majority Black voting age population in the Milwaukee area. Those districts are heavily Black and pack the vast majority of Milwaukee's Black population in them, while at the same time leaving other Black voters, including those in Milwaukee wards 33 and 34, and the Village of Brown Deer, cracked in districts featuring white bloc voting against minority preferred candidates.

52. District 10 has a BVAP of 59.4%, and has been represented by Democratic state representative David Bowen, a Black man, since 2015. Rep. Bowen has run unopposed for his seat in every election since he won the 2014 primary for the district.

53. District 11 has a BVAP of 65.5% and has been represented by Democratic state representative Dora Drake, a Black woman, since 2021. Rep. Drake defeated her Republican opponent by a margin of 84.6% to 15.2% in the 2020 general election. From 2017 to 2021, District 11 was represented by Democratic state representative Jason Fields, a Black man, who ran unopposed in both the 2016 and 2018 general elections. From 2013 to 2017, District 11 was represented by Democratic state representative Mandela Barnes, a Black man, who ran unopposed in the both the 2012 and 2014 general elections.

54. District 12 has a BVAP of 60.6% and has been represented by Democratic state representative LaKeshia Myers, a Black woman, since 2019. Rep.

Myers defeated her Republican opponent by a margin of 81.7% to 18.1% in the 2020 general election, and ran unopposed in the 2018 general election. In the 2018 Democratic primary election, Rep. Myers defeated then-incumbent Democratic Rep. Fred Kessler, a white man, by a margin of 59.3% to 40.7%. Rep. Kessler ran unopposed in the 2012, 2014, and 2016 general elections.

55. District 16 has a BVAP of 55.6% and has been represented by Democratic state representative Kalan Haywood, a Black man, since 2019. In the 2020 general election, Rep. Haywood faced no major party opponent, defeating an independent candidate by a margin of 88.9% to 10.8%. Rep. Haywood was unopposed in the 2018 general election. Prior Democratic state representative Leon Young, a Black man, ran unopposed in the 2012, 2014, and 2016 general elections.

56. District 17 has a BVAP of 68.4% and has been represented by Democratic state representative Supreme Moore Omokunde, a Black man, since 2021. Rep. Omokunde defeated his Republican opponent by a margin of 85.9% to 13.9% in the 2020 general election. From 2017 to 2021, District 17 was represented by Democratic state representative David Crowley, a Black man, who ran unopposed in the 2018 and 2016 general elections. Prior Democratic state representative LaTonya Johnson, a Black woman, defeated her independent challengers by a margin of 87.5% to 12.5% in the 2014 general election and 84.7% to 14.9% in the 2012 general election.

57. District 18 has a BVAP of 60.7% and has been represented by Democratic state representative Evan Goyke, a white man, since 2013. Rep. Goyke ran unopposed in the 2014, 2016, 2018, and 2020 general elections. Rep. Goyke defeated his Libertarian Party challenger in the 2012 general election by a margin of 87.9% to 11.6%.

58. Wisconsin Act 43 "packs" Black voters in Districts 10, 11, 12, 16, 17, and 18, where they constitute an excessive majority, and "cracks" Black voters in other parts of the Milwaukee area, such as Milwaukee City wards 33 and 34, and the Village of Brown Deer, dispersing them in Districts 22 and 24—centered in heavily white suburban areas of Ozaukee, Washington, and Waukesha Counties—where white bloc voting prevents Black voters from having an equal opportunity to elect their candidates of choice.

59. District 22 has a white voting-age population ("WVAP") of 84.3% and a BVAP of 7.0%, and stretches from the Town of Erin and the Village of Richfield in Washington County, south to the Town of Lisbon, and the Villages of Menomonee Falls, Lannon, and Butler in Waukesha County, and into the City of Milwaukee, where it picks up two wards—Milwaukee City wards 33 and 34. The Waukesha County and Washington County portions of the district are heavily white and vote heavily Republican. The Milwaukee County portion of District 22 has a BVAP of 43.3% (35.7% in ward 33 and 52.8% in ward 34), and votes heavily Democratic. The Milwaukee County portion of District

22 borders District 12, one of the BVAP majority districts.

60. District 22 has been represented by Republican state representative Janel Brandtjen, a white woman, since 2015. Rep. Brandtjen ran unopposed in the 2020 and 2016 general elections. In the 2018 general election, Rep. Brandtjen defeated her Democratic opponent, Aaron Matteson, by a margin of 64.3% to 35.7%. Mr. Matteson carried the Milwaukee County portion of the district, however, by a margin of 70.9% to 29.1%. In the 2014 general election, Rep. Brandtjen defeated her Democratic opponent, Jessie Read, by a margin of 70.1% to 29.9%. Ms. Read carried the Milwaukee County portion of the district, however, by a margin of 65.6% to 35.4%. Prior Republican state representative Don Pridemore, a white man, was unopposed in the 2012 general election.

61. District 24 has a WVAP of 77.5% and a BVAP of 12.3%. It stretches from Washington County, where it includes the Town and Village of Germantown, into Waukesha County, where it includes part of the Village of Menomonee Falls, into Ozaukee County, where it includes portions of the City of Mequon, into Milwaukee County, where it includes the Village of Brown Deer, the Village of River Hills, and part of the City of Glendale. The Village of Brown Deer has a significantly larger BVAP than the rest of District 24, at 38.2%. The Village of Brown Deer borders BVAP majority Districts 11 and 12.

62. District 24 has been represented by Republican state representative Daniel Knodl, a white man, since 2009. In the 2020 general election, Rep.

Knodl defeated his Democratic opponent Emily Siegrist, a Latina woman, by a margin of 51.4% to 48.5%. But Siegrist carried the Village of Brown Deer, in Milwaukee County, by a margin of 71.1% to 28.9%. In the 2018 general election, Rep. Knodl defeated his Democratic opponent Emily Siegrist by a margin of 53.6% to 46.3%. But Siegrist carried the Village of Brown Deer, in Milwaukee County, by a margin of 69.8% to 30.2%. Rep. Knodl ran unopposed in the 2014 and 2016 general elections. In the 2012 general election, Rep. Knodl defeated his Democratic opponent, Shan Haqqi, by a margin of 62.4% to 37.5%. But Haqqi carried the Village of Brown Deer, in Milwaukee County, by a margin of 58.8% to 42.2%.

63. By unpacking Districts 10, 11, 12, 16, 17, and 18's Black population and combining it with Black populations in the Village of Brown Deer, other parts of Milwaukee County, and including additional population in other areas of Milwaukee and Ozaukee Counties, the Wisconsin Legislature could have drawn seven BVAP majority districts, as required by Section 2 of the Voting Rights Act. A demonstrative plan showing seven BVAP majority districts is attached as Exhibit **7**.

Racially Polarized Voting

64. Black voters in the Milwaukee area are politically cohesive and overwhelmingly support Democratic candidates.

65. The white majority, particularly in Waukesha, Ozaukee, and Washington Counties, and parts of Milwaukee County, overwhelmingly supports

Republican candidates, and votes as a bloc usually to defeat Black voters' candidates of choice.

66. For example, as the election returns for Districts 22 and 24 reported above show, the Republican incumbents carried the heavily white portions of their districts outside Milwaukee County by large margins, while losing by large margins the portions of the City of Milwaukee and the Village of Brown Deer contained in those districts, which have large Black populations.

67. Election results in homogenous precincts illustrate the racially polarized voting. Across the 37 Milwaukee City wards where BVAP exceeds 90%, Tony Evers (D) received 96.4% and Scott Walker (R) received 2.3% in the 2018 gubernatorial election. By contrast, Washington County has a WVAP of 92.4% and Scott Walker (R) received 72.2% and Tony Evers (D) received 26.5%. Waukesha County has a WVAP of 88.1%, and Scott Walker (R) received 66.1% and Tony Evers (D) received 32.5%. Ozaukee County has a WVAP of 90.8%, and Scott Walker (R) received 62.7% and Tony Evers (D) received 35.9%.

68. Democratic primary elections in Milwaukee County, as well as nonpartisan county-and city-wide elections, demonstrate racially polarized voting as well. As a result, white voters vote sufficiently as a bloc to usually defeat Black voters' candidates of choice (absent the drawing of Section 2 compliant districts).

69. For example, the 2018 Democratic primary for Governor featured one Black candidate, Mahlon Mitchell. Across the 37 Milwaukee City wards where

BVAP exceeds 90%, Mitchell received 77.5% of the vote, while Tony Evers received 11.8% of the vote in those same wards. By contrast, in the Village of Whitefish Bay, which has a WVAP of 85.9%, Mitchell received 10.5% of the vote, Evers received 46.9%, and other white candidates split the remaining votes. In Shorewood, which has a WVAP of 81.7%, Mitchell received 12.8% of the vote, Evers received 41.9% of the vote, and white candidates split the remaining votes. In Fox Point, which has a WVAP of 85.3%, Mitchell received 11.5% of the vote, Evers received 42.6% of the vote, and white candidates split the remaining votes. Mitchell lost the primary election to Evers statewide, and while he received a plurality of votes in Milwaukee County (35.2%), white candidates combined to receive 64.8% of the vote.

70. Likewise, in the 2020 election for Milwaukee City Comptroller, Aycha Sawa, a white woman, defeated Jason Fields, a Black man, by a margin of 50.4% to 49.2%. But Fields carried the 37 city wards with a BVAP of 90% or greater by a margin of 78.5% to 21.5%. Sawa, on the other hand, carried the 21 city wards with a WVAP of 80% or greater by a margin of 68.7% to 31.3%.

71. The 2016 election for Milwaukee City Comptroller also demonstrated racially polarized voting. Martin Matson, a white man, prevailed over Johnny Thomas, a Black man, by a margin of 51.3% to 47.8%. But Thomas carried the 37 city wards with a BVAP of 90% or greater by a margin of 66% to 33%, while Matson carried the 21 city wards with a WVAP of 80% or greater by a margin of 62.4% to 37.6%.

72. As another example, in the 2021 primary for State Superintendent of Education, seven candidates ran, and two white women—Jill Underly and Deborah Kerr—advanced to the general election. The primary included a Black woman, Shandowlyon Hendricks-Williams. In Milwaukee County, Underly received 31.4%, Kerr received 22.4%, and Hendricks-Williams received 20.6%. Across the 37 Milwaukee City wards with a BVAP of 90% or greater, however, Hendricks-Williams received 50.8%, Underly received 9.8%, and Kerr received 17.7%. In the 21 Milwaukee City wards with a WVAP of 80% or greater, Underly received 48.2%, Hendricks-Williams received 15.7%, Sheila Briggs (a white woman) received 14.3%, and Kerr received 12.4%. Meanwhile, in the Fox Point, which has a WVAP of 85.3%, Underly received 30.1%, Kerr received 28.8%, Sheila Briggs (a white woman) received 17.4%, and Hendricks-Williams received 13.1%. In Shorewood, which has a WVAP of 81.7%, Underly received 50.2%, Briggs received 17.4%, Hendricks-Williams received 13.9%, and Kerr received 12.2%. And in Whitefish Bay, which has a WVAP of 85.9%, Underly received 36.7%, Kerr received 21.6%, Briggs received 17.2%, and Hendricks-Williams received 17.2%.

73. These and other election results illustrate a consistent trend of racially polarized voting, with white voters voting as a bloc to usually defeat Black voters' candidates of choice absent the imposition of Section 2 remedies.

Totality of Circumstances

74. A review of the totality of circumstances reveals that Black voters have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b).

75. Wisconsin has a history of discriminatory voting practices. For example, a three-judge district court for the Western District of Wisconsin ruled in 2012 that Act 43 violated Section 2 of the Voting Rights Act with respect to its treatment of Latino voters in the State Assembly map in Milwaukee County. *See Baldus v. Members of the Government Accountability Board*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012).

76. Moreover, a 2021 report by the U.S. House Administration Committee's Subcommittee on Elections found that voter purge mailers were disproportionately sent to areas in Wisconsin home to large Black voting populations, and those mailers were twice as likely to be wrong for Black versus white voters.

77. As explained above, voting in Milwaukee County and the surrounding counties is racially polarized.

78. Milwaukee has recent experience with voting practices that enhance the opportunity for discrimination against Black voters. The vast majority of Wisconsin's Black voters reside in the City of Milwaukee—the State's largest city. In the April 2020 election, held at the height of the COVID-19 pandemic, the City of Milwaukee had just *five* in-person polling

sites (compared to the usual 180 sites), while the City of Madison—a less-populous and predominantly white city—had 66 in-person polling sites.

79. A study by the Brennan Center found that these poll closures depressed turnout in the City of Milwaukee by 8.6 percentage points (a one-third drop), with a disproportionate effect on Black voters, whose turnout was depressed by 10.2 percentage points. News reports show that voters in the City of Milwaukee—and particularly Black voters—waited in lines for hours to vote in the April 2020 election. *See* https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout (last accessed September 7, 2021).

80. A study published in 2019 found that Wisconsin's voter ID law, passed by the Legislature and signed into law by Governor Walker in 2011, and generally viewed as one of the strictest such laws in the United States, reduced turnout in Milwaukee and Dane Counties in the 2016 presidential election by up to one percentage point, deterring or preventing thousands of voters from casting their ballot. The study further found that African-American voters are more likely to have been deterred or prevented from voting by Wisconsin's strict voter ID law than white voters. *See* Michael G. DeCrescenzo & Kenneth R. Mayer, *Voter Identification and Nonvoting in Wisconsin – Evidence from the 2016 Election*, 18 ELECTION L.J. 342 (2019).

81. Black voters in Milwaukee also bear the effects of discrimination in employment, education, and health, which hinders their ability to participate effectively in the political process.

82. A 2020 Zippia study ranked Wisconsin the worst state in the nation for racial disparities, reporting a 48% home ownership gap, a 37% income gap, and a 16.7% education gap between Black and white residents of Wisconsin.

83. A 2019 report by the Center on Wisconsin Strategy, a UW-Madison based think tank, found that Wisconsin had the fourth worst disparity in the nation between Black and white infant mortality, the fourth worse disparity for child poverty, the worst disparity for 8th grade math scores, the second worst disparity for out-of-school suspensions, the worst disparity for bachelor's degrees, the second worst disparity for incarceration, the worst disparity for unemployment, the worst disparity for employment, the third worst disparity for income, and the eighth worst disparity for home ownership.

84. For the 2018-19 school year, Wisconsin reported a 23-percentage-point gap between high school graduation rates for Black students (71%) and white students (94%)—the largest gap of any state in the nation, and second only to the District of Columbia. A 2020 study by the financial firm WalletHub ranked Wisconsin last in the nation for educational equality, citing the graduation rate gap, the standardized test score gap, the college entrance exam score gap, and the college degree gap between white and minority populations.

85. The 2018 American Community Survey data showed that the unemployment rate among Black residents of Wisconsin was nearly three times that of white residents.

86. According to the Prison Policy Initiative, Black people account for 38% of all persons in Wisconsin jails and prisons, but just 6% of the State's population. Wisconsin's incarceration rate of Black people is one of the highest in the nation.

87. Wisconsin has severe health disparities between Black and white residents. Ozaukee County, which is predominantly white and has the second-highest median income in the states, ranked first for overall health of its residents in a 2019 report on health disparities by the Wisconsin Collaborative for Healthcare Quality. Milwaukee County, which has the vast majority of Wisconsin's Black population and has the highest rate of poverty in the state, ranked second to last among Wisconsin counties for the overall health of its residents. One measure showed that someone living in Milwaukee County was almost twice as likely to die before age 75 than someone living in Ozaukee County.

88. These disparities are reflected at the ballot box. The 2019 Center for Wisconsin Strategy study showed that while 74 percent of eligible white Wisconsin voters participated in the 2016 election, just 47% of Black voters did—the third largest gap in the country, behind only North and South Dakota.

89. Campaigns in the Milwaukee area and statewide have also featured overt and subtle racial appeals. For example, in the 2020 campaign for Assembly District 24, the Republican Party of Wisconsin sent voters a mailer attacking Democratic candidate Emily Siegrist, a Latina woman, for attending a Black Lives Matter protest over the police

shooting of Jacob Blake in Kenosha. The mailer attacks Siegrist for taking her children to the protest, and describes in detail an alleged assault committed by Blake. The mailer shows a doctored photo showing Siegrist holding up a made-up sign saying "Today I'm protesting to support abusers. Tomorrow? Who knows!!" It concluded by saying "Serial Protestor Emily Siegrist now supports men who abuse women."

90. In the 2020 election for President, Donald Trump aired an ad in Wisconsin accusing Joe Biden of "taking a knee"—a reference to peaceful protests of racial injustice started by football player Colin Kaepernick—in response to protests over the police shooting of Jacob Blake in Kenosha. The ad falsely accused Joe Biden of calling to defund the police. While showing the image of blond, white girl in pink, the narrator says that Trump will protect Wisconsin's families, not criminals.

91. On the day Deborah Kerr, a white woman, placed second in the February 2021 primary for State Superintendent of Schools—advancing to the general election—she tweeted that she had been called an n-word while in high school because "my lips were bigger than most." Kerr was widely seen as seeking votes from conservative Wisconsinites.

92. Although some Black candidates have had success in winning office in the Milwaukee area, most positions (outside of BVAP majority districts) are not held by Black people, and the number of Black officeholders has been far below number proportional to the Black population in recent and past history. For example, only two of out the eight current county

government officials elected county-wide are Black. David Crowley, the current County Executive (elected in 2020), is the first Black person to ever elected to that office. The City of Milwaukee has only ever had one Black mayor: Marvin Pratt became acting mayor in 2004 upon the resignation of Mayor Norquist. He did not become mayor by election, however, and when he ran for a full term he was defeated in the 2004 general election by Tom Barrett, a white man. The Milwaukee region has no Black state representatives outside of the BVAP majority districts. The city of Milwaukee currently has no Black alderpersons outside of BVAP majority districts. Milwaukee County has no Black supervisors outside of BVAP majority districts.

93. These and other factors demonstrate that the totality of circumstances show that Black voters have less opportunity than other voters to participate in the political process and elect their candidates of choice.

CLAIMS FOR RELIEF

COUNT I
Malapportionment in Violation of the Equal Protection Clause

94. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 93, above.

95. A state statute that effects district populations and boundaries that discriminate against citizens in highly populous legislative districts, by definition preferring voters in less populous legislative districts, violates the U.S. Constitution. The 2020 Census rendered the state's 2011 legislative districts unconstitutional, which harms or threatens to harm

Plaintiffs' constitutional rights unless future elections under the current districts are enjoined.

96. Shifts in population and population growth have rendered the 33 Senate districts and 99 Assembly districts created by 2011 Wisconsin Act 43 and modified by *Baldus* no longer roughly equal in population, as required by the federal constitution. The population variations between and among the districts are substantial.

97. Organizational Plaintiffs' members and constituents who reside in the overpopulated 16th, 26th, and 27th Senate districts, among others, based on the existing district lines, are particularly underrepresented in comparison with the residents of other districts.

98. Organizational Plaintiffs' members and constituents who reside in the overpopulated 5th, 46th, 48th, 56th, 76th, 78th, 79th, and 80th Assembly districts, among others, based on the existing district lines, are particularly underrepresented in comparison with the residents of other districts.

99. Multiple Individual Plaintiffs reside in State Senate and Assembly districts that are overpopulated, and therefore their votes are diluted compared to Wisconsin residents in districts that are now underpopulated.

100. If not otherwise enjoined or directed, the WEC will have no choice but to carry out its statutory responsibilities for administering the upcoming 2022 legislative elections based on the now unconstitutional

Senate and Assembly districts adopted in 2011 Wisconsin Act 43.

101. The boundaries and the populations they define, unless modified, violate the principle of "one person, one vote" and do not guarantee that the vote and representation in the Wisconsin legislature for every citizen is equivalent to the vote and representation of every other citizen.

102. Plaintiffs and their members and constituents are also harmed because, until valid redistricting occurs, they cannot know in which Senate and Assembly district individuals will reside and vote. Therefore, they cannot effectively hold their representatives accountable for their conduct and policy positions advocated in office. Plaintiffs engage in accountability and voter-education efforts that are hindered by the lack of a valid redistricting plan because:

a. Their members and constituents who desire to influence the views of members of the Wisconsin Legislature or candidates for the Senate and Assembly are not able to communicate their concerns effectively because members of the legislature or legislative candidates may not be held accountable to those citizens as voters in the next election;

b. Potential candidates for the legislature will not be able to come forward, and be supported or opposed by Plaintiffs or their members, until potential candidates know the borders of the

districts in which they, as residents of the district, could seek office; and,

c. Plaintiffs' members and constituents who desire to communicate with and contribute financially to candidates for the legislature who may or will represent them, a right guaranteed by the First Amendment, are hindered from doing so until districts are correctly reapportioned;

103. Plaintiffs' members and constituents' rights are compromised because of the inability of candidates to campaign effectively and provide a meaningful election choice.

COUNT 2

Act 43 violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301

104. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 103.

105. Section 2 of the Voting Rights Act prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that results in the denial or abridgement of the right of any U.S. citizen to vote on account of race, color, or membership in a language minority group. 52 U.S.C. § 10301(a).

106. The current district boundaries of Assembly Districts 10, 11, 12, 16, 17, and 18 "pack" Black voters, while other Black voters, including those in Assembly Districts 22 and 24, are "cracked," resulting in dilution

of the strength of the area's Black residents, in violation of Section 2 of the Voting Rights Act.

107. Under Section 2 of the Voting Rights Act, the Wisconsin Legislature was required to create a seventh majority BVAP district in which Black voters have the opportunity to elect their candidates of choice.

108. Black voters in the Milwaukee area are politically cohesive, and the elections in the area illustrate a pattern of racially polarized voting that allows the bloc of white voters usually to defeat Black voters' preferred candidates.

109. The totality of circumstances how that the current State Assembly plan has the effect of denying Black voters an equal opportunity to participate in the political process and to elect their candidates of choice, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

110. Absent relief from this Court, Defendants will continue to engage in the denial of Plaintiffs' Section 2 rights.

RELIEF SOUGHT

WHEREFORE, Plaintiffs ask that the Court:

A. Declare that the current configuration of Wisconsin's 33 Senate districts and 99 Assembly districts, established by 2011 Wisconsin Act 43 and modified by *Baldus*, based on the 2010 Census, is unconstitutional and invalid and the maintenance of those districts for the August 2022 primary election and November 8, 2022 general election violates Plaintiffs' federal constitutional rights;

B. Declare that Act 43 violates Section 2 of the Voting Rights Act

C. Enjoin Defendants and the WEC's employees and agents, including the county clerks in each of Wisconsin's 72 counties and Wisconsin's 1,850 municipal clerks and election commissions, from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the Wisconsin Legislature from the unconstitutional Senate districts and unconstitutional Assembly districts that now exist in Wisconsin for the August 2022 primary election and November 2022 general election;

D. Establish a schedule that will enable the Court, in the absence of a constitutional state law, adopted by the Wisconsin Legislature and signed by the Governor in a timely fashion, to adopt and implement new State Senate and Assembly district plans with districts substantially equal in population and that otherwise meet the requirements of the U.S. Constitution and statutes and the Wisconsin Constitution and statutes;

E. Order the adoption of a valid State Assembly plan that includes a seventh BVAP majority district;

F. Award Plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action, pursuant to 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e); and,

G. Grant such other relief as the Court deems proper.

Dated: September 7, 2021.

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*Application for general admission in the Western District of Wisconsin currently pending

APPENDIX E

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September 22, 2021

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*Address list continued on page 19.

You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA
Johnson v. Wisconsin Elections Commission

On August 23, 2021, petitioners Billie Johnson, et al., four Wisconsin voters who claim that the results of the 2020 census show that Wisconsin's congressional and state legislative districts——including the voters' districts——are malapportioned and no longer meet the requirements of the Wisconsin Constitution, filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, together with a supporting memorandum. The petitioners ask, inter alia, that we assume original jurisdiction, then "stay this matter until the Legislature has adopted a new apportionment plan" or if the legislative process fails, that this court adopt a new apportionment plan.

On September 3, 2021, the named respondents, Wisconsin Elections Commission, et al., filed a response, opposing the petition, arguing primarily that existing original jurisdiction procedures cannot accommodate the fact-finding intensive requirements of this case and noting that there are two cases pending in federal district court that raise similar claims.[1]

On September 7, 2021, the court received motions for leave to file a non-party brief/amicus curiae from: (1) the Wisconsin Legislature; (2) Congressmen Glenn Grothman, Mike Gallagher, Brian Steil, Tom Tiffany,

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[1] Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021) and Black Leaders Organizing for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021).

and Scott Fitzgerald; (3) Attorney Daniel R. Suhr; (4) Lisa Hunter, et al. (plaintiffs in Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021)); and (5) Black Leaders Organizing for Communities, et al. (plaintiffs in Black Leaders Organizing for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021)). By order dated September 8, 2021, the court granted each of these motions. The non-party briefs and their appendices, if any, were accepted for filing.

This court has long deemed redistricting challenges a proper subject for the court's exercise of its original jurisdiction. See, e.g., Jensen v. Wisconsin Elections Board, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (2002) ("there is no question" that redistricting actions warrant "this court's original jurisdiction; any reapportionment or redistricting case is, by definition, *publici juris*, implicating the sovereign rights of the people of this state."); State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 557, 126 N.W.2d 551 (1964) (observing that reapportionment "is vital to the functioning of our government").

We are mindful that judicial relief becomes appropriate in reapportionment cases *only* when a legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so. See e.g., Zimmerman, 22 Wis. 2d at 570. We cannot emphasize strongly enough that our Constitution places primary responsibility for the apportionment of Wisconsin legislative districts on the legislature. See Wis. Const. art. IV §§ 3, 4. Redistricting plans must be approved by

a majority of both the Senate and Assembly, and are subject to gubernatorial veto. Id.; Wis. Const., art. V, § 10; Zimmerman, 22 Wis. 2d at 558 (recognizing that the legislature must present redistricting legislation to the governor for approval or veto under the Wisconsin Constitution's Presentment Clause; both the governor and the legislature are indispensable parts of the legislative process).

As the respondents observed, the petitioners do not say how long this court should give the Legislature and the Governor to accomplish their constitutional responsibilities before the court would need to embark on the task the petitioners have asked of us in order to ensure its timely completion. We would benefit from the parties' input on this issue, and we would benefit from the input of amici and prospective intervenors on the issue as well. Accordingly,

IT IS ORDERED that the petition for leave to commence an original action is granted;

IT IS FURTHER ORDERED that any prospective intervenor must file a motion to intervene together with a supporting memorandum addressing the requirements of Wis. Stat. § (Rule) 809.09 no later than 4:00 p.m. on October 6, 2021;

IT IS FURTHER ORDERED that the parties, amici, and proposed intervenors may each file a single response to the collective motions to intervene no later than 12:00 p.m. on October 13, 2021, provided that amici who seek to intervene may file only a single response to the proposed intervention motions, which shall be filed in their capacity as amici. Each response

shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that the parties and prospective intervenors are each directed to submit simultaneous letter briefs no later than 4:00 p.m. on October 6, 2021, addressing the following question:

> When (identify a specific date) must a new redistricting plan be in place, and what key factors were considered to identify this date?

Amici may, but are not required to file a response to this question. The simultaneous letter briefs shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that the parties, each amicus, and each proposed intervenor may file a single response to the letter briefs addressing timing, which shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used, by no later than 12:00 p.m. on October 13, 2021;

IT IS FURTHER ORDERED that if the court determines that additional briefing or a reply will assist the court, it will request additional briefing; given the time sensitive nature of this action, unsolicited briefing and requests for briefing extensions will be disfavored;

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.14, 809.80, and 809.81. A paper original and 10 copies of each filed document must be received

by the clerk of this court by 4:00 p.m. of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email."

We deem the petitioners' other requests to be premature. We decline to formally declare, at the onset, that a new apportionment plan is needed. While the parties and amici generally concur that this is true, we have, as yet, an inadequate record before us upon which to make such a pronouncement. We also decline to stay this action at this time and we deny the petitioners' request that we enjoin the respondents "from administering any election for Congressional, State or Assembly seats" until a new plan is in place. To the extent this order does not address other requests for relief contained in the petition, we take no action on those requests at this time.

REBECCA GRASSL BRADLEY, J. (*concurring).* Nearly 150 years ago, shortly after statehood, this court declared, "the purpose of the constitution was: 'To make this court indeed a supreme judicial tribunal over the whole state; . . . a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'" Petition of Heil, 230 Wis. 428, 436, 284 N.W. 42 (1938) (per curiam) (quoting Attorney Gen. v. Chicago & N.W. Ry., 35 Wis. 425, 518 (1874)) (emphasis added). More recently, in 2002, we unanimously declared in Jensen v. WEC, "[i]t is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal

prerogatives." 2002 WI 13, ¶5, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (denying petition for leave to commence an original action) (citations omitted) (emphasis added). The United States Supreme Court agrees: "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Growe v. Emison, 507 U.S. 25, 34 (1993) (citing U.S. Const. art. I, § 2)).

Consistent with the Constitution, "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; see also id. at 34 (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court."). "Absent evidence that these state branches will fail to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." Id. at 34; see also Scott v. Germano, 381 U.S. 407, 409 (1965) (internal citations omitted) ("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. The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois,

including its Supreme Court, may validly redistrict the Illinois State Senate[.]").

Spurning this longstanding precedent, including the United States Supreme Court's clear directive that states are primarily responsible for redistricting, with federal courts standing by only as a last resort, Growe, 507 U.S. at 33, Justice Rebecca Frank Dallet insists this case belongs in federal court. It doesn't. The petitioners are Wisconsin voters who allege they live in malapportioned districts. Following our unequivocal statement in Jensen that "congressional reapportionment and state legislative redistricting are primarily state, not federal prerogatives," they filed this case against the Wisconsin Elections Commission (WEC) and its commissioners in their official capacity, expressly relying on Article IV of the Wisconsin Constitution. It is primarily the duty of this court, not any federal court, to resolve such redistricting disputes.

Although this court has punted its responsibilities to the federal courts in the past, we have previously exercised our original jurisdiction to hear redistricting cases, and we have implemented a judicially-created redistricting plan when the political branches have reached an impasse. State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606, 128 N.W.2d 16 (1964) (per curiam). See generally Michael Gallagher, Joseph Kreye & Staci Duros, Redistricting in Wisconsin 2020, at 20 (2020), https://docs.legis.wisconsin.gov/misc/lrb/ /wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf ("Prior to the 1960s, redistricting disputes in Wisconsin were typically filed with the state supreme court under that court's original

jurisdiction. . . . [I]n pre-1960s redistricting cycles, the Wisconsin Supreme Court would entertain challenges to existing redistricting laws, and occasionally invalidate redistricting plans it found unconstitutional."). Justice Dallet must misunderstand the gist of our decision in Jensen if she actually believes it stands for the proposition that this court should abandon Wisconsin's sovereign prerogative to implement redistricting plans to federal courts. As Justice Ann Walsh Bradley characterized Jensen during a2009 administrative conference concerning whether this court should establish rules to handle redistricting petitions: "I start with [what] the unanimous court said, in the Jensen case, noting the established constitutional principle that redistricting is primarily a state, not federal prerogative. That's what a unanimous court said. . . . I think that was correct then, and I think it is correct now. . . . I see this as a matter of doing your job."[2]

While in Jensen we denied a petition for original action requesting this court to consider redistricting claims, our decision was driven by the timing of the petition, which was filed on January 7, 2002. Jensen, 249 Wis. 2d 709, ¶1. By the time we denied the petition, analogous federal litigation had been ongoing for more than a year. Id., ¶13. The federal litigation was "well along[.]" Id. We were concerned about disrupting Wisconsin's upcoming elections but reaffirmed the long-established principle that this

[2] Supreme Court Open Administrative Conference, at 39:36 (Jan. 22, 2009) (statement of Ann Walsh Bradley, J.) (emphasis added), https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/.

court should decide any disputes related to redistricting:

> There is no question but that this matter warrants this court's original jurisdiction; any reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign rights of the people of this state. See Petition of Heil, 230 Wis. 428, 443, 284 N.W. 42 (1939). The 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. Growe unequivocally reaffirmed that the principles of federalism and comity establish the institutions of state government—legislative and judicial—as primary in matters of reapportionment and redistricting. Had our jurisdiction been invoked earlier, the public interest might well have been served by our hearing and deciding this case. As it stands, it is not.

Id., ¶17 (emphasis added). Justice Dallet does not acknowledge this key factual distinction between this petition and the one in Jensen. As then-Chief Justice Shirley Abrahamson explained: "[I]n Jensen, we said 'no' for the reasons set forth, but it wasn't a jurisdictional matter. It was a discretionary matter based on the facts and circumstances."[3] None of the facts or circumstances inducing denial of the Jensen petition warrant leaving our responsibilities to the federal courts this time. The two federal cases were

[3] Id. at 1:03:03 (statement of Shirley S. Abrahamson, C.J.).

filed just a few weeks ago, and they are far from "well along."

Justice Dallet criticizes the petitioners for bringing this dispute "prematurely" and "inject[ing] the court into the political process[.]" By contrast, in rejecting an original action filed against the WEC last year, she—along with a majority of this court—faulted the petitioner for nothing more than a negligible delay, speculating it would disrupt the election. Hawkins v. WEC, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam) (denying petition for leave to commence an original action) ("Although we do not render any decision on whether the respondents have proven that the doctrine of laches applies under these circumstances, having considered all of the parties' filings, we conclude the petitioners delayed in seeking relief in a situation with a very short deadline and that under the circumstances, including the fact that the fall 2020 general election has essentially begun, it is too late to grant petitioners any form of relief that would be feasible and not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot."); id., ¶86 (Rebecca Grassl Bradley, J., dissenting from denial of petition for leave to commence an original action) ("The majority pretends the court lacks 'sufficient time to complete our review and award any effective relief.' What nonsense. Wisconsin law unquestionably requires that Mr. Hawkins and Ms. Walker appear on the ballot.").

A federal court just rejected the argument that Justice Dallet embraces in this case. Two similar lawsuits were filed in federal court and recently consolidated.[4] Just last week, the federal court denied a motion by the Wisconsin Legislature to dismiss the case for lack of ripeness. It wrote:

> The Legislature . . . says that the . . . plaintiffs' injuries are purely speculative because the legislative redistricting process has not yet had a chance to fail. Dkt. 9-2. In making these arguments the Legislature relies heavily on Growe v. Emison, a case in which the [United States] Supreme Court held that a federal three-judge panel had erred in not deferring to the Minnesota courts' redistricting efforts and by enjoining the state courts from implementing their own plans. 507 U.S. 25, 37 (1993) ("What occurred here was not a last-minute federal court rescue of the Minnesota electoral process, but a race to beat the [state courts'] Special Redistricting Panel to the finish line."). . . .
>
> This court understands the state government's primacy in redistricting its legislative and congressional maps. . . . But the Growe Court did not conclude that the federal case was unripe . . . . And this panel is not impeding or superseding any concurrent state redistricting process, steps that that [sic] might run afoul of Growe.

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[4] Black Leaders Organization for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021); Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021).

> . . . .
>
> These parties argue that the panel should forestall from any action until the state court system hears the case. But there is yet no indication that the state courts will entertain redistricting in the face of an impasse between the legislature and governor. . . . The court and the parties must prepare now to resolve the redistricting dispute, should the state fail to establish new maps in time for the 2022 election.

Hunter v. Bostelmann, Nos. 21-CV-512 & 21-CV-534, slip op., at 6–8 (W.D. Wis. Sept. 16, 2021). By granting this petition, we now inform the federal court that we "will entertain redistricting in the face of an impasse between the legislature and governor[,]" recognizing, as the federal court does, that both this "court and the parties must prepare now to resolve the redistricting dispute" in order to ensure resolution "in time for the 2022 election." If instead we chose to sit idly by, the federal courts would logically interpret our inaction as a sign that we would not act should the political

branches reach an impasse.[5] As a matter of comity,[6] we owe the federal courts an answer on how we plan to proceed, and we furnish that answer by granting this petition.

Justice Dallet argues federal courts have "done this [redistricting] three times" but since 1964, "we have never done it." This court, however, resolved redistricting challenges on numerous occasions before 1964.[7] Even if we had not, Justice Dallet's rationale

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[5] Justice Dallet asserts "by granting the petition now, the court fails to give space for the legislature to fulfill its constitutional duties." The legislature itself apparently disagrees, having filed an amicus brief in support of the petition. It contends the plaintiffs in the federal cases "raced to the federal courthouse. . . . These [federal] cases threaten to usurp the State's primacy in redistricting. . . . To protect the State's constitutional prerogative in redistricting and to prevent federal interference, the Court should exercise original jurisdiction over this action." Legislature's Amicus Br. at 6–7.

[6] Comity, Garner's Dictionary of Legal Usage (3d ed. 2011) ("comity = courtesy among political entities (as nations or courts of different jurisdictions)[.]").

[7] Michael Gallagher, Joseph Kreye & Staci Duros, Redistricting in Wisconsin 2020, at 40–54 (2020), https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/redistricting_wisconsin_2020_1_2.pdf (discussing several redistricting cases in which this court exercised its original jurisdiction: (1) State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892); (2) State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1892); (3) State ex rel. Bowman v. Dammann, 209 Wis. 21, 243 N.W. 481 (1932); (4) State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 52 N.W.2d 903 (1952); (5) State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964); (6) State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606, 128 N.W.2d 16 (1964) (per curiam)); see also Supreme Court Open Administrative Conference, supra note 1, at 41:56 (statement of Ann Walsh

offers flimsy support for her conclusion to deny this petition—it is a self-fulfilling prophecy. We should not abrogate our duty now just because we have done so in the past.

Justice Dallet is convinced the issues presented in the petition will require substantial factual development. Perhaps, although she seems to be making some assumptions about ultimate remedies, which is putting "the cart before the horse[.]" Wis. Voter Alliance v. WEC, No. 2020AP1930-OA, unpublished dispositional order, at 4 (Roggensack, C.J., dissenting from denial of petition for leave to commence an original action). "We grant petitions to exercise our jurisdiction based on whether the legal issues presented are of state wide concern, not based on the remedies requested." Id. (citing Heil, 230 Wis. 428). The respondents suggest that if we decide to implement a judicially-created redistricting plan, we will have to start from scratch—a position Justice Dallet seems to

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Bradley, J.) ("I look at our history since 1920, and in 1920 the districts were reapportioned by the legislature. In the 1930s, it went into state court. [Bowman]. In the 1940s, it again went into state court. [Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610 (1946) (denying petition for leave to commence original action)] . . . . In the 50s, it went into state court in [Broughton], and a couple of other cases in the 50s. In the 60s, it went into both the federal and state court in [Wisconsin v. Zimmerman, 205 F. Supp. 673 (W.D. Wis. 1962)] and [Reynolds]. In the 70s, after the 1970 census, the reapportionment legislation was not challenged. 1971 law, chapter 304. 1980s it went into the federal court in [AFL-CIO v. Elections Board, 543 F. Supp. 630 (1982)] . . . . In the 90s it went into the federal court, and again we know [Jensen v. WEC, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (denying petition for leave to commence an original action)] in the 2000s it went into . . . federal court and state court.").

accept. While that may be one option, federal courts often start with the existing plan and use it "as a template[.]" Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471, at *7 (E.D. Wis. May 30, 2002); see also Hippert v. Ritchie, 813 N.W.2d 374, 380 (Minn. Spec. Redistricting Panel 2012) (quoting LaComb v. Growe, 541 F. Supp. 145, 151 (D. Minn. 1982)) ("Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible.").

Justice Dallet may be confusing a one person, one vote claim with a partisan gerrymandering claim, which the United States Supreme Court has declared nonjusticiable in the federal courts. "[T]he one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly." Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019). For this reason, among others, the United States Supreme Court has

> concluded that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by

> standard, by rule," and must be "principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements."

Id. at 2506–07 (quoting Vieth v. Jubelirer, 541 U.S. 267, 278, 279 (2004) (plurality opinion)).

Nevertheless, the court may use existing mechanisms should Justice Dallet's concern become reality. See State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶148, 334 Wis. 2d 70, 798 N.W.2d 436 (Crooks, J., concurring/dissenting) (quotations omitted) ("There are mechanisms which have been utilized, such as appointment of a special master, perhaps a reserve judge, to conduct fact-finding under the continued jurisdiction/supervision of this court."). "[W]hen the legal issue that we wish to address requires it, we have taken cases that do require factual development, referring any necessary factual determinations to a referee or to a circuit court." Wis. Voter Alliance, No. 2020AP1930-OA, at 4 (Roggensack, C.J., dissenting from denial of petition for leave to commence an original action) (citations omitted). Justice Dallet does not explain why these mechanisms do not present viable options, should the need arise for fact-finding.

Next, Justice Dallet misinterprets our statutes by asserting we are "circumvent[ing] the statutory process for addressing redistricting challenges." Wisconsin Stat. § 801.50(4m) (2019–20) provides:

> Venue of an action to challenge the apportionment of any congressional or state

> legislative district shall be as provided in s. 751.035. Not more than 5 days after an action to challenge the apportionment of a congressional or state legislative district is filed, the clerk of courts for the county where the action is filed shall notify the clerk of the supreme court of the filing.

(Emphasis added). This statute governs only a case filed in the circuit court, not an original action filed in this court. Wisconsin Stat. § 751.035 provides:

> Upon receiving notice under s. 801.50 (4m), the supreme court shall appoint a panel consisting of 3 circuit court judges to hear the matter. The supreme court shall choose one judge from each of 3 circuits and shall assign one of the circuits as the venue for all hearings and filings in the matter.

Collectively, these statutes prevent a single judge in a single county from deciding—at least in the first instance—important redistricting questions of statewide importance. They have no bearing on the present petition.

More fundamentally, Justice Dallet misunderstands the nature of our original jurisdiction. She inaccurately asserts "the legislature has established a specific process for resolving redistricting claims, and we should not allow the parties to ignore it" while also acknowledging "nothing necessarily prevent[s] us from granting" this petition. The Wisconsin Constitution establishes our original jurisdiction. Article VI, § 3(2) states, "[t]he supreme court . . . may hear original

actions and proceedings." This grant of original jurisdiction has been described as "extraordinarily broad"[8] and "practically unlimited in scope."[9] In contrast, Article VII, § 5(3), which established the court of appeals' subject matter jurisdiction, provides: "The appeals court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law[.]" (Emphasis added). The text of our constitution is clear: "No statute . . . can circumscribe the constitutional jurisdiction of the Wisconsin Supreme Court to hear this (or any) case as an original action. 'The Wisconsin Constitution IS the law—and it reigns supreme over any statute.'" Trump v. Evers, No. 2020AP1971-OA, unpublished dispositional order, at 5–6 (Wis. Dec. 3, 2020) (Rebecca Grassl Bradley, J., dissenting from denial of petition for leave to commence an original action) (quoting Wisconsin Legis. v. Palm, 2020 WI 42, ¶67 n.3, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring)); see also Skylar Reese Croy, As I See It: Examining the Supreme Court's Original Jurisdiction, Wis. Law. July-Aug. 2021, at 30, 32, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=7&ArticleID=28514 ("Several sources support the proposition that the Wisconsin Supreme

[8] Skylar Reese Croy, As I See It: Examining the Supreme Court's Original Jurisdiction, Wis. Law. July-Aug. 2021, at 30, 31, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=7&ArticleID=28514.

[9] Jay E. Grenig, 1 Wisconsin Pleading and Practice Forms § 2:34 (2020).

Court's original jurisdiction cannot be limited by statute.").

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This court remains mindful of the political nature of redistricting, the responsibility for which rests with the people's elected representatives in the legislature. In Jensen, we explained:

> [R]edistricting remains an inherently political and legislative—not judicial—task. Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role. Redistricting determines the political landscape for the ensuing decade and thus public policy for years beyond. The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.

Jensen, 249 Wis. 2d 706, ¶10. However, we have also recognized that "[t]he Wisconsin Constitution sets forth standards for redistricting" and "there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights." Id., ¶¶6, 8 (quoted source omitted). Because "this court is the final arbiter of questions arising under the Wisconsin Constitution" it must "stand ready to carry out its responsibility to faithfully adjudicate any such questions in appropriate

circumstances, should that become necessary." Id., ¶25 (citation omitted).

Since Jensen, and after this court declined in 2009 to establish procedures for resolving redistricting actions, the United States Supreme Court removed political questions—such as partisan gerrymander claims—from federal judicial review, denying federal judges any "license to reallocate political power between the two major political parties[.]" Rucho, 139 S. Ct. at 2507. This circumscription of the judicial role in redistricting challenges to the interpretation and application of law should alleviate any concerns about the courts exercising anything but judicial power in these matters.[10]

In a perfect world, the political branches—not the judiciary—would implement a redistricting plan after every decennial census. Our precedent says the legislature can enact a redistricting plan only if the

[10] Justice Dallet cites League of Women Voters v. Pennsylvania, 178 A.3d 737 (Pa. 2018) for the proposition that "claims of partisan gerrymandering are cognizable under the Pennsylvania Constitution[.]" Why this matters is unclear. Additionally, she fails to mention that the Pennsylvania Constitution contains a Free and Equal Elections Clause; no analogous provision exists in the Wisconsin Constitution. This clause states: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. In League of Women Voters, the Pennsylvania Supreme Court held partisan gerrymandering claims were justiciable under that particular provision. 178 A.3d at 813–14. The court went so far as to note that claims under the Fourteenth Amendment's Equal Protection Clause are "distinct" and "remain subject to entirely separate jurisprudential considerations." Id. at 813.

plan is subject to presentment. State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 559, 126 N.W.2d 551 (1964); see State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 407–08, 52 N.W. 93 (1952), overruled in part by Reynolds, 22 Wis. 2d 544 ("The power and duty imposed upon the legislature by the constitution to reapportion the state after each federal census can only be exercised by both the houses of the legislature passing a bill that becomes a law upon the signature of the governor, or, if the governor should veto it, upon repassage by the required vote over his veto, and publication."); see also State ex rel. Cunningham v. Attorney General, 81 Wis. 440, 506, 51 N.W. 724 (1892) (Pinney, J., concurring) ("[B]y an unbroken usage extending from the organization of the state, more than 40 years ago, . . . [the power of apportioning and redistricting] has been used and exercised as a legislative power executed in the form of a law, approved by the governor, and published in the General Laws."). In a state with a history of divided government, our precedent has created a constitutional conundrum.

Under the United States Constitution, states are effectively required to redistrict after every decennial census to comply with a principle commonly called "one person, one vote."[11] Similarly, Article IV, Section 3 of

[11] Article I, § 2 of the United States Constitution requires members of the House of Representatives to be chosen "by the People of the several states." The United States Supreme Court has construed this section to mean "that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry v. Sims, 376 U.S. 1, 7–8 (1964). Under the Fourteenth Amendment's Equal Protection Clause, the Court has articulated

the Wisconsin Constitution states: "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." Applying our precedent to redistricting disputes arising during a time of divided government, the political branches can quickly reach an impasse if the legislature passes a redistricting plan and the governor vetoes it. Courts then face a choice: On one hand, the court can avoid the "political thicket"[12] by refusing to do anything. This course of action prevents the judiciary from exercising powers vested in the political branches but it has a remarkable drawback: It allows inequality in the political process to go unchecked. As Justice Ann Walsh Bradley has explained, "[a]lthough . . . separation of powers is a cornerstone of our democracy, so is equal

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a similar requirement for state legislative districts. Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); see also Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 674–75 (1964) (holding even state senate districts must comply with one person, one vote).

[12] Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion), abrogation recognized by Evenwel v. Abbott, 577 U.S. 937 (2016) ("Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.").

representation."[13] Alternatively, courts can enter the thicket.

Since the 1890s, this court has often chosen the latter course. In State ex rel. Attorney General v. Cunningham, we stated, while discussing restrictions on the legislature's redistricting power:

> The right of the people to make their own laws through their own representatives, so fundamental in and essential to free government, the convention sought to guard by these restrictions. That most dangerous doctrine, that these and other restrictions upon the power of the legislature are merely declaratory, and not mandatory, should not be encouraged even to the degree of discussing the question. The convention, in making a constitution, had a higher duty to perform than to give the legislature advice.

81 Wis. at 485 (majority opinion) (emphasis added). We concluded, "the restrictions on the power of the legislature to make apportionment, found in sections 3, 4, and 5 of article 4 of the constitution are mandatory and imperative, not subject to legislative discretion." Id. at 486 (emphasis added). We also emphasized "the judicial power to declare . . . [an] apportionment act unconstitutional, and to set it aside as absolutely void[.]" Id. It remains the province of the judiciary to declare, in cases presented to us, the constitutional

[13] Supreme Court Open Administrative Conference, supra note 1, at 40:50 (statement of Ann Walsh Bradley, J.).

obligations of (and limitations on) the other branches of government.

In Wisconsin's modern history, redistricting has primarily fallen to the judiciary. In Jensen we noted, "in the four decades since Baker v. Carr . . . and Reynolds v. Sims . . . the matter of redistricting has been resolved by the legislature without court involvement exactly once, in 1972." 249 Wis. 2d 706, ¶7. We have a history of letting federal courts handle these matters, perhaps because it removes us from the thicket of political conflicts. Our job, however, is not to avoid controversy but to declare the law. See State v. Hermman, 2015 WI 84, ¶156, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) (quoting John G. Roberts, Chief Justice, U.S. Supreme Court, 2011 Year–End Report on the Federal Judiciary, at 9 (Dec. 31, 2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf)). After all, "[o]ur fundamental role is to pass on the constitutionality [of laws]."[14]

"Elections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action." Trump, No. 2020AP1971-OA, at 5 (Rebecca Grassl Bradley, J., dissenting from denial of petition for leave to commence an original action) (quoted source omitted). Redistricting ensures fair elections by preserving constitutionally-guaranteed equal representation for the people. See James Wilson Lectures on Law (1791), in 2 Collected Works of James

[14] Id. at 45:32 (statement of Ann Walsh Bradley, J.).

Wilson 837 (2007) ("[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of representatives and of constituents will remain invariably the same."). It is beyond question that "the court has the power to declare a legislative plan constitutional or unconstitutional. The court has the power, . . . on a legal finding of unconstitutionality, to draw lines and exercise its constitutional function of equal representation."[15] Fundamentally, this court has a duty to resolve redistricting disputes; doing so does not threaten the separation of powers nor does it risk a concentration of power in the judicial branch:

> [T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed. 1961). While some may wish to "let this cup pass" this is "our job . . . . Let's do our

[15] Id. at 1:42:23 (statement of Shirley S. Abrahamson, C.J.).

job."[16]For all of these reasons, I concur with the court's decision to grant this petition.

REBECCA FRANK DALLET, J. (*dissenting*). As is often the case with original-jurisdiction petitions, the question is not whether we can grant the petition but whether we should. After the political process has an opportunity to play out, we may need to get involved in redistricting. But now is not the time and this petition is not the way. The majority's order prematurely injects the court into the political process, risks undermining the court's independence, and circumvents the statutory process for addressing redistricting challenges. The court should therefore deny the petition. I dissent.

There are good reasons for the court to avoid inserting itself into the redistricting process at all. Under the Wisconsin Constitution, it is the legislature's duty, not the court's, to pass a redistricting plan after each national census.[17] See, e.g., Wis. Const. arts. IV, VII; see also James Madison, The Federalist No. 47 (1788) (explaining the heightened threat to citizens' liberty when the judiciary acts as the legislature). Indeed, avoiding usurping the legislature's role is an important reason the court has stayed out of previous redistricting battles. See Jensen v. Wis. Elections Bd., 2002 WI 13, ¶10, 249 Wis. 2d 706, 639 N.W.2d 537

[16] Id. at 45:36 (statement of Ann Walsh Bradley, J.) (emphasis added).

[17] "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. Cont. art. IV, §3.

("Courts called upon to perform redistricting are, of course, judicially legislating, that is, writing the law rather than interpreting it, which is not their usual—and usually not their proper—role."(emphasis omitted)). As Chief Justice Ziegler and Justice Roggensack have noted, should the court take control of the redistricting process, the court would impermissibly transform itself into a "super-legislature"[18] by "insert[ing itself] into the actual lawmaking function."[19] See also, e.g., id., ¶10 ("The framers in their wisdom entrusted this decennial exercise [of redistricting] to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other.").

Redistricting is, in other words, an inherently political and partisan endeavor. Yet the court must strive to be apolitical—or at least nonpartisan. Both current and former members of the court have explained that it "would be a mistake" to "immerse[the court] in the partisan political process"[20] of redistricting because doing so "is totally inconsistent with our jobs as [a] nonpartisan judiciary."[21] Those apt observations ring even truer today given Wisconsin's hyper-partisan politics.

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[18] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/.

[19] Id.

[20] Id. (Justice Gableman).

[21] Id. (Justice Roggensack).

That said, there are times when a court must become involved in redistricting. If the legislature fails to fulfill its constitutional duty by either enacting no new district maps or enacting unconstitutional maps, then the voters may turn to the courts to vindicate the right to vote in equally populated districts that are "convenient [and] contiguous" and "as compact . . . as practicable". See Wis. Const. art. IV, §§ 2-5; Jensen, 249 Wis. 2d 706, ¶¶7–11. Here, the legislature has not even proposed, let alone enacted, new district maps. The political process has not failed; it has barely started. The majority recognizes as much, explaining that the court should involve itself in redistricting only after the legislature has had an "adequate opportunity" to act. Yet by granting the petition now, the court fails to give space for the legislature to fulfill its constitutional duties.[22] We should let this political process play out in the political branches.

Of course, if the political process fails, then courts have a role to play. Either state or federal courts may hear redistricting challenges, although there are some such challenges that only a state court can hear. For instance, while the federal courts have held that partisan gerrymandering claims are nonjusticiable under the federal constitution, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019), it is up to state courts to determine whether the same is true under

[22] The legislature made these same points in arguing for the dismissal of a redistricting action in federal court, pointing out that such litigation is "wildly premature" because the legislature's process is barely underway. See Hunter v. Bostelmann, No. 3:21-cv-512-jdp-ajs-eec (W.D. Wis. Aug. 17, 2021), ECF No. 9-3, at 6–7.

their state constitutions. See id. at 2507; see also League of Women Voters v. Pennsylvania, 178 A.3d 737, 814, 821 (Pa. 2018) (holding that claims of partisan gerrymandering are cognizable under the Pennsylvania Constitution and striking down the state's Congressional map on that basis). We have never addressed whether partisan gerrymandering may violate the Wisconsin Constitution, and, so far, no party has raised such a claim here.

For other redistricting claims, there are several reasons why it is best for the federal courts to handle them, particularly when they involve federal law. First, since the United States Supreme Court revolutionized the law on redistricting in Reynolds v. Sims, 377 U.S. 533 (1964), the federal courts have "done this [redistricting] three times."[23] See Baumgart v. Wendelberger, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002); Prosser v. Elections Bd., 793 F. Supp. 859 (E.D. Wis. 1992); Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982). Post-Reynolds, we have never done it. The last time we drew district maps was in May 1964, before Reynolds was decided. See State ex rel. Reynolds v. Zimmerman, 23 Wis. 2d 606 (1964). Second, the federal courts have experience with the unique complexities of federal Voting Rights Act claims, the resolution of which is

[23] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ (Chief Justice Ziegler). In 2008, Justice Prosser promised to vote "every time" against granting an original action related to redistricting. See https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/. Instead, he would "let [the parties] go to the federal court." Id.

"integral to the drawing of statewide maps." See, e.g., Hunter v. Bostelmann, No. 3:21-cv-00512-jdp-ajs-eec (W.D. Wis. Sept. 16, 2021), ECF No. 60, at 5. We have no such experience. Third, unlike this court, the federal courts are made up of judges serving lifetime appointments, so they are "not . . . apt to be seen as partisans when they do the job of redistricting."[24] Finally, the federal courts will likely have the last word anyway. Whatever plan the legislature or this court adopts, it will be subject to challenge in a separate action filed in federal court and appealable to the United States Supreme Court. See Jensen, 249 Wis. 2d 706, ¶16. Thus, any new district maps will be final only after the completion of both direct and collateral review in federal courts, raising the specter of further uncertainty and delay. See id. ("At best, such a scenario would delay and disrupt the [upcoming] election season . . . .").

Despite all of the reasons for preferring a federal forum, this court has chosen to step in via our original jurisdiction. But the legislature has established a specific process for resolving redistricting claims, and we should not allow the parties to ignore it. Following the last round of redistricting, the legislature enacted Wis. Stat. §§ 751.035 and 801.50(4m). See 2011 Wis. Act 39, §§ 28, 29. Under those statutes, a party may file a challenge to legislative or congressional apportionment in the circuit court. The circuit court must notify this court of that filing, at which point we are required to appoint a panel of three circuit court

[24] https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/ (Justice Roggensack).

judges to hear the case. Parties may appeal the panel's decisions to this court, but not to the court of appeals. § 751.035(3). This process mirrors the federal one, under which redistricting challenges are typically heard by a three-judge district court, whose decisions are appealable only to the United States Supreme Court. See generally 28 U.S.C. §§ 1253, 2284. The process under §§ 751.035 and 801.50(4m), like the well-tested federal process, thus ensures swift appellate review of the panel's work while delegating to trial judges traditional trial-court tasks, such as motion practice and fact finding.

There is little doubt that substantial motion practice and extensive fact finding will be necessary in a case like this one. Both federal law and the Wisconsin Constitution require that any court-ordered redistricting plans account for many competing interests, among them are:

- minimizing district changes (sometimes called "core retention");
- population equality;
- "compactness";
- maintaining traditional communities of interest;
- avoiding splitting municipal or ward boundaries;
- compliance with the federal Voting Rights Act; and
- minimizing so-called "disenfranchisement," which occurs when voters are shifted from odd- to even-numbered senate districts, thus temporarily depriving them of a vote for a state senator.

See, e.g., Baumgart, 2002 WL 34127471, at *3. The list makes clear that, while the one-person-one-vote principle maybe" relatively easy to administer as a matter of math," see Rucho, 139 S. Ct. at 2501, it gets much more complicated after that. "Population equality" is but one of the myriad fact-intensive and often countervailing factors courts must balance. Not to mention that "there is a nearly infinite set of district configurations that would generate approximate population equality across districts, and no one supposes that a court should be indifferent among all members of the set." See Prosser, 793 F. Supp. at 863. Courts must therefore balance the population-equality factor against many others, a task that requires extensive fact finding and consideration of experts' and other witnesses' testimony. Simply put, it requires a trial court, which we are "obviously not." See Jensen, 249 Wis. 2d 706, ¶20 (adding that "our current original jurisdiction procedures would have to substantially modified in order to accommodate the requirements" of redistricting litigation).

We need only look to the last court-ordered redistricting of Wisconsin to appreciate the arduous task the court likely faces. There, a three-judge district court considered sixteen plans suggested by a variety of parties. See Baumgart, 2002 WL 34127471, at *4–7. It ultimately adopted none of them because each had "unredeemable flaws." See id. at *6. The federal court had to create its own plan, which "involved some subjective choices," such as deciding "which communities to exclude from overpopulated districts and to include in underpopulated districts." Id. at *7. In doing so, the court relied on the parties' affidavits,

expert testimony, and testimony at a multi-day trial in which the parties "vigorously" disputed several factual questions. See id. at *4, *7. In the end, the court spelled out—in a discussion spanning more than twenty pages and delving down to the ward level—the precise districts across the entire state. See id. at *8–31.

Baumgart demonstrates that courts addressing redistricting challenges inevitably face myriad factual questions, questions we are ill equipped to handle as a court of last resort. See Jensen, 249 Wis. 2d 706, ¶20. This court's proper role—to resolve complex legal issues involving undisputed facts—is accounted for in Wis. Stat. §§ 751.035 and 801.50(4m), which reserve fact-finding for the circuit court and appellate review for this court. The majority offers no rationale for ignoring this workable process.

The majority's resort to Jensen fails to justify exercising our original jurisdiction here. Indeed, Jensen counsels squarely against it, seeing as there are two ongoing consolidated federal redistricting cases. Just last week, the three-judge district court declined to dismiss those cases. See Hunter, No. 3:21-cv-512-jdp-ajs-eec (W.D. Wis. Sept. 16, 2021), ECF No. 60, at 9. Moving forward, the court suggested that although it may impose a "limited stay" to let the state process run its course, it would also set a "schedule that will allow for the timely resolution of the case should the state process languish or fail." Id. at 8. Our adding this original action to the mix "put[s] this case and any redistricting map it would produce on a collision course" with the pending federal cases," risking further uncertainty for both voters and candidates in the 2022

elections. See Jensen, 249 Wis. 2d 706, ¶16. Although we acknowledged in Jensen that redistricting challenges likely meet our criteria for original jurisdiction, see id., ¶17, that was nine years before the legislature enacted Wis. Stat. §§ 751.035 and 801.50(4m). Moreover, whether this petition meets our original-jurisdiction criteria is beside the point. Again, the question is not whether we can take the case but whether we should.

We have been in this situation before. Just last term, we denied then-President Trump's original action petition challenging the recount of the presidential election results because Wis. Stat. § 9.01(11) requires candidates to file such challenges in the circuit court. See Trump v. Evers, No. 2020AP1971-OA, order (Wis. Dec. 3, 2020). As in this case, nothing necessarily prevented us from granting Trump's petition, but we rightly decided that when the legislature establishes a process for specific actions, we should follow that process. See id. (Hagedorn, J., concurring). There is no reason to chart a different course now.

The majority's order charts no course whatsoever. It drops the court into the redistricting wilderness without even a compass. The order sets forth no plan for how seven Justices with no experience in drawing district maps should go about this Herculean task while simultaneously attending to the rest of the court's docket. Although I trust my colleagues as jurists, I do not share their confidence that we can simultaneously be legislators, cartographers, and mathematicians. Acting as if we can is bad for the court and worse for the people of Wisconsin. Redistricting is

a difficult process when it involves only two branches of government. The majority now prematurely, inappropriately, and recklessly involves the third.

For all of these reasons, the court should deny the petition. I dissent.

I am authorized to state that Justices ANN WALSH BRADLEY and JILL J. KAROFSKY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

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