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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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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