No. 21 - 474

In The
Supreme Court of the United States

IN RE WISCONSIN LEGISLATURE,

Petitioner

On Petition for Writ of Mandamus and Writ of Prohibition to the United States District Court for the Western District of Wisconsin

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BRIEF IN OPPOSITION TO WISCONSIN LEGISLATURE'S PETITION BY LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, and KATHLEEN QUALHEIM

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INTRODUCTION

The Wisconsin Legislature's only role in the redistricting process is to enact new legislative and congressional maps in cooperation with the Governor. Because it has no realistic hope of reaching the compromise necessary to make that happen, the Legislature is focused instead on pressing an argument about which court will bear responsibility in the first instance to rectify this failure. But there is no argument to be had.

All parties—including Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (the "Hunter Plaintiffs")—and the three-judge federal panel assigned to the Hunter Plaintiffs' redistricting claims—agree: any efforts by the Wisconsin Supreme Court to resolve impasse litigation should be sequenced before the federal panel's adjudication of parallel claims. Demonstrating the cautious deference counseled by this Court's precedents, the federal panel accepted the Wisconsin Election Commission's recommended March 1, 2022, deadline by which new maps must be enacted, and, working backwards from that date, calculated that its expedited consideration of any unresolved redistricting issues would require a trial on those issues to begin no later than the end of January. All other federal court proceedings have been stayed at least until November, ensuring an ample window for the Legislature to do its job and—if it can—enact lawful

districting maps.[1] The state judiciary, in turn, can reserve for its own redistricting work at least as much time before the federal trial as the federal panel has indicated it would need to adopt final plans.

Lacking any coherent argument that the federal panel is impeding state legislative or judicial redistricting efforts, the Legislature is left with little else. It suggests (in a footnote) that this Court "revisit" and effectively overturn its landmark precedent in this area. It disfigures traditional standing and ripeness principles beyond recognition (in direct tension with arguments it made before the state tribunal). And it quibbles with the federal panel's selected deadlines (without suggesting a clear and indisputable right to any alternative). Because none of these arguments warrants an extraordinary writ, the petition should be denied.

STATEMENT OF THE CASE

Wisconsin's political branches routinely default on their obligation to redraw legislative and congressional districts after the decennial census, leaving the courts scrambling to do so themselves before looming election-related deadlines. *See Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (adopting redistricting plan

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[1] *See* Prospective-Intervenor Wisconsin Leg.'s Letter Br. Regarding Timing of New Redistricting Plan at 2, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Oct. 6, 2021) ("Leg. Letter Br. Regarding Timing"), (representing that a redistricting vote will be held in November).

after legislative impasse); *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) (same); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982) (same); *State ex rel. Reynolds v. Zimmerman*, 128 N.W.2d 16 (Wis. 1964) (same). In fact, in every redistricting cycle in the last forty years, when there was a divide of power between the Wisconsin Legislature and the governorship, Wisconsin has failed to enact a full slate of new maps using the legislative process. This cycle Wisconsin voters have once again elected a divided government, and no one realistically expects a map to be enacted by the Legislature in time for the 2022 elections.

After census data released on August 12, 2021 confirmed that the Hunter Plaintiffs reside in legislative and congressional districts that are overpopulated relative to what the federal Constitution permits, they filed federal malapportionment and freedom of association claims in the Western District of Wisconsin. *See* Compl., *Hunter v. Bostelmann*, 3:21-cv-00512, (W.D. Wis. Aug. 13, 2021), ECF No. 1. The complaint requests declaratory and injunctive relief preventing any further use of the current malapportioned districts; a clear 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"; and, if the state's failure to redistrict continues past the court's deadline, judicial implementation of new legislative and congressional districts that comply

with the federal Constitution. *Id.* at 15-16. A three-judge panel was promptly convened, and the Legislature and other interested parties moved to intervene. *See* (Leg.'s Mot. to Intervene), *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Aug. 17, 2021), ECF No. 8, (Johnson Pls.' Mot. to Intervene), (Aug. 26, 2021) ECF No. 21 (Republican Congressmen's Mot. to Intervene), (Aug. 30, 2021), ECF No. 30, (Governor Evers's Mot. to Intervene), (Sept. 13, 2021), ECF No. 50.

Recognizing time constraints imposed by the approaching 2022 midterm elections, the panel directed the parties to confer and submit a joint proposed case schedule. *See* Order at 3, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Aug. 27, 2021), ECF No. 24. The commissioners of the Wisconsin Election Commission (collectively, the "WEC"), as named defendants, explained that final maps must be in place by March 1, 2022, in order for the WEC to fulfill all pre-election responsibilities that the Legislature has imposed on it by statute. *See* Joint Proposal Regarding Scheduling at 8-9, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 13, 2021), ECF No. 54. The Hunter Plaintiffs accepted this recommended deadline and submitted a condensed litigation schedule working backwards from that date and proposing a trial at the end of January. *See id.* at 2-4. The Legislature objected to the court's jurisdiction, but, analogizing from previous redistricting cycles when primary elections were scheduled for later than this cycle's primary elections, proposed that any trial could

be held in April with judgment issued "in June and July." *Id.* at 10.

On September 16, the panel granted the Legislature's motion to intervene but denied its accompanying motion to dismiss, which turned on similar arguments that the Legislature repeats here. Pet. App. 8. While explicitly acknowledging "the state government's primacy in redistricting its legislative and congressional maps," the panel emphasized that this fact did not undermine Plaintiffs' standing or the ripeness of their suit, and it further noted that "this panel is not impeding or superseding any concurrent state redistricting process." *Id.* at 8-9. The panel gave the Legislature and state courts "the first opportunity to enact new maps," while resolving to "set a schedule that will allow for the timely resolution of the case should the state process languish or fail." *Id.* at 10.

After holding a status conference on the matter, the panel again invited the parties to propose discovery and pretrial deadlines consistent with the following framework:

> 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.

Id. at 15. In response, Plaintiffs proposed regrouping for a status conference after the last day of this year's regular legislative session in November, with abbreviated discovery commencing in December. Joint Proposed Disc. Plan & Pretrial Schedule at 20-21, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Oct. 1, 2021) ECF No. 98. This time, the Legislature proposed that any trial could be held at the end of March. *Id.* at 24.

Meanwhile, ten days after the Hunter Plaintiffs filed their federal court complaint, another group of voters (the "Johnson Petitioners") petitioned the Wisconsin Supreme Court to exercise its original jurisdiction to hear redistricting impasse claims arising under article IV of the Wisconsin Constitution. Pet., *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Aug. 23, 2021). The Legislature filed a nonparty brief in support of the Johnson Petition. Rather than question any Petitioner's standing or challenge the ripeness of impasse litigation, the Legislature emphasized that the action was appropriate because "[t]here was no delay in seeking [the Wisconsin Supreme Court's] jurisdiction, and the Court has maximum time to remedy an impasse should one arise." Br. of Wis. Leg. in Supp. of Pet. to Sup. Ct. to Take Jurisdiction of Original Action at 18, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Sept. 7, 2021) ("Leg. OA Br.").

On September 22, by a 4-3 vote, the state court granted the petition for leave to commence an original action and, without committing to any eventual relief, ordered further briefing on a potential litigation timeline. Pet. App. 91-95. Two days later—before the federal panel could even respond—the Legislature raced to this Court seeking extraordinary writs of mandamus and prohibition.

The Legislature's manufactured emergency has since been entirely disassembled. Exactly as it had indicated it would, the federal panel entered a temporary stay on October 6 so that it would not impede any efforts by the Legislature or Wisconsin Supreme Court to resolve in the first instance the need for new district maps. Order, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Oct. 6, 2021), ECF No. 103 ("Oct. 6 Order"). The panel recognized "that responsibility for redistricting falls first to the states, and that this court should minimize any interference with the state's own redistricting efforts." *Id.* at 3. It also correctly noted, however, that, "the Wisconsin Supreme Court did not commit to drawing new legislative or congressional maps, and has not yet set a schedule to do so, or even to decide whether it will do so." *Id.* Because "[f]ederal rights are at stake," the panel affirmed its responsibility to "stand by to draw the maps—should it become necessary." *Id.*

The panel again considered the appropriate deadline by which final redistricting maps must be in place, carefully sifting through each party's

arguments and proposals, and again determined that date to be March 1, 2022. *Id.* at 4. To ensure it could meet that deadline, if necessary, the panel reserved five days for trial, beginning January 31, 2022 (one week later than it had previously scheduled). *Id.* All discovery and proceedings other than further briefing on the Legislature's outstanding motions to dismiss other plaintiffs' claims are stayed until November 5, 2021. *Id.* at 7.

LEGAL STANDARD

To justify the granting of any extraordinary writ, such as a writ of mandamus and a writ of prohibition, "the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.1.

"The preemptory common-law writs are among the most potent weapons in the judicial arsenal. 'As extraordinary remedies, they are reserved for really extraordinary causes.'" *Will v. United States*, 389 U.S. 90, 107 (1967) (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)). The party seeking a writ of mandamus has "'the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Id.* at 96 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

REASONS TO DENY THE PETITION

I. *Growe* confirms that federal courts must stand ready to resolve federal redistricting claims.

In 1993, this Court drew a clear boundary between what federal courts may and may not do in the course of adjudicating redistricting impasse litigation when parallel claims are pending before a state tribunal. *Growe v. Emison*, 507 U.S. 25 (1993). The district court panel reversed by *Growe* had veered off the appropriate path with aggressive actions that have never been proposed or even contemplated here.

Growe involved parallel impasse suits filed by different groups of Minnesota voters in state and federal court. The federal panel set a January 20, 1992, deadline for the state legislature to complete its redistricting work and appointed special masters to develop contingency plans in the event the legislature failed at its task. *Id.* at 29. The state court, meanwhile, issued its own preliminary legislative redistricting plan and ordered that its plan would take effect on January 21, 1992, if the legislature had not acted by then. *Id.*

But the federal court then co-opted entirely the state redistricting process. The panel stayed all proceedings in the state court case and enjoined parties to that case from attempting to enforce or implement the state court's legislative plan. *Id.* at 30. The federal court then ordered the adoption of its own legislative

and congressional districting plans and permanently enjoined any interference with the implementation of those plans. *Id.* at 31. That was too much. "Absent evidence that these state branches will fail timely to perform that [redistricting] duty," this Court held, "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34.

What the district court should have done, *Growe* explained, was "establish a deadline by which, if the [state court] had not acted, the federal court would proceed." *Id.* at 36. The problem was that the federal court's deadline "was explicitly directed *solely at the legislature*." *Id.* This Court made clear that the district court was not required to dismiss the action before it; it simply should have applied the same remedial deadline to the state judiciary that it had imposed on the legislature and deferred to any maps that the state court was able to implement in advance of that deadline.

The federal proceedings here have been entirely consistent with these instructions.

A. *Growe* requires deferral, not abstention.

As the Legislature admits, *Growe* never questioned the district court's *jurisdiction* to adjudicate redistricting cases. Pet. 31. In fact, the Court explicitly resolved that dispute in favor of jurisdiction, but with comity to the state branches: the settled rule, it confirmed, "requires deferral, not abstention." *Growe*,

507 U.S. at 37. To prevent any confusion, *Growe* carefully spelled out the difference between these concepts. Where abstention is required, the court must "dismiss the case before it." *Id.* at 32. But where the rule is deferral, the court need only "withhold action until the state proceedings have concluded." *Id.* This Court left no doubt which approach applies here: "In the reapportionment context, the Court has required federal judges to *defer* consideration of disputes involving redistricting" where the state has taken up that task itself. *Id.* at 33 (emphasis added). Accordingly, dismissal would be inappropriate.

The Legislature protests this holding and suggests in a footnote that this Court "could" perhaps "revisit" the distinction between abstention and deferral and "clarify" that federal courts must dismiss reapportionment claims whenever similar state litigation is pending, even though *Growe* held just the opposite. Pet. 31 n.11. But there is no need to clarify what is already perfectly clear: "*Of course* the District Court would have been justified in adopting its own plan," the Court explained in *Growe*, "if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries." 507 U.S. at 36 (emphasis added).

The problem in *Growe* was that the state court "was never given a time by which it should decide on reapportionment, legislative *or* congressional, if it wished to avoid federal intervention." *Id.* What the

district court must do in these situations, as this Court has underscored again and again, is exercise its jurisdiction to prescribe the deadline by which the legislature and state courts must conclude their efforts to ensure new maps are in place in time to prepare for the next primary elections. *See id.* ("It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed."); *Scott v. Germano*, 381 U.S. 407, 409-10 (1965) (remanding "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").

The rule that federal courts maintain jurisdiction to hear federal law claims, including reapportionment claims, was not a careless slip of the judicial pen. It is clear and settled law, proving easily administrable for courts, respectful of all relevant federalism and comity interests, and essential to ensuring that constitutional voting rights will be vindicated by some court before it is too late. The Legislature's invitation to upend all of this should be rejected.

B. The federal panel has not obstructed or impeded any state proceedings.

In addition to attacking *Growe*'s legal rule, the Legislature also misapplies its facts. All the federal panel has done here is stay proceedings until

November and reserve the first week of February for any trial that may be necessary. Oct. 6 Order at 4-5. "If that is not obstruction of the State's own redistricting process after *Growe*," the Legislature wonders, "it is not clear what would be." Pet. 21. *Growe* itself supplies the answer. Unnecessary obstruction occurs when a federal court reaches out to affirmatively *stay* proceedings before a state tribunal, *enjoin* the parties to the state proceeding from implementing the state court's remedial redistricting plan, and *adopt* its own districting plans—even when the state court is otherwise ready to timely do so itself. *Growe*, 507 U.S. at 35-37. The Hunter Plaintiffs have never requested any comparable intrusion, and the federal panel here has never indicated that such actions might be forthcoming, or even under consideration.

Instead, the Hunter Plaintiffs have urged, and the federal panel has ordered, the very state-first deference that *Growe* requires. The trial dates penciled in for January 31 to February 4 reserve a tight three-week window for the federal court to redraw 99 state assembly seats, 33 state senate seats, and eight congressional seats before the March 1 deadline *should it become necessary for it to do so*. This expedited timeframe was chosen to maximize the time available to the Legislature (and state judiciary, if it so chooses) to adopt or draw new maps in the first instance. The state judiciary has 18-and-a-half weeks from the date it accepted jurisdiction of the Johnson Petitioners' original action to conclude its own proceedings before

any federal trial might even begin. Thus, far from staying or enjoining any state proceedings, the federal court has carved out additional room for them.

The Legislature's fears about discovery and other litigation burdens are also overdone. It complains, for example, that "the federal court has left all of Wisconsin's constitutional actors under the burden and expense of a discovery schedule." Pet. 25; *see also id.* at 14 n.6 (complaining "the parties will be embroiled in discovery in anticipation of a January trial"); *id.* at 20 (complaining the federal court is "proceeding with full-fledged discovery"). Nonsense. The federal panel has made clear that it "will *not* open discovery immediately" to avoid burdening the parties and interfering with the state redistricting process. Oct. 6 Order at 4 (emphasis added). Indeed, the court recognized that "the proceeding in the Wisconsin Supreme Court will, presumably, provide some fact-development process through which the parties can develop much of the evidence they would need should the federal case proceed to trial." *Id.* The federal court's procedures model precisely how this litigation should be conducted. If this is not careful and considered deference by the federal judiciary, to rephrase the Legislature's concern, it is not clear what would be. *Cf.* Pet. 21.

II. The usual justiciability requirements are easily satisfied.

Short of overturning *Growe*, the Legislature seeks interlocutory review of the federal panel's denial of the Legislature's motion to dismiss the Hunter

Plaintiffs' complaint. The writs sought by the Legislature are not justified on this basis. *See, e.g.*, *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (denying mandamus because "[a] litigant is free to seek review of the propriety of [a contested lower court] order on direct appeal after a final judgment has been entered"); *Bankers Life & Ca. Co. v. Holland*, 346 U.S. 379, 382-83 (1953) (denying mandamus where contested order "is reviewable upon appeal after final judgment," because otherwise "every interlocutory order which is [allegedly] wrong might be reviewed under the All Writs Act").

The federal panel rejected the Legislature's arguments that the Hunter Plaintiffs lack standing and that their action is otherwise unripe, noting that *Growe* explicitly blessed the approach of accepting jurisdiction and sequencing further action after state institutions exhaust their own efforts. *See* Order at 6-7, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 16, 2021), ECF No. 60. That was plainly correct, and no more is needed to dispose of the Legislature's petition.

Further indulging this line of argument merely reveals further reasons for rejection. The Legislature's own position on the justiciability of this litigation has been starkly inconsistent across the parallel *Hunter* and *Johnson* cases. But between its contradictory views, the Legislature's arguments in favor of standing and ripeness in the *Johnson* litigation should carry the day here as well.

A. The Legislature has already argued in favor of the present timeliness of impasse litigation.

The Legislature's purported conviction about the untimeliness of impasse litigation is belied by its own efforts in support of the Johnson Petitioners' parallel state court action. The core theory in the Hunter Plaintiffs' federal court complaint and the Johnson Petitioners' state court petition is the same: continued use of Wisconsin's malapportioned political districts will violate constitutionally secured voting rights; partisan gridlock will prevent the political branches from enacting new district maps on their own; and so the judiciary must prepare to adopt lawful redistricting plans instead. *Compare* Hunter Complaint, *with* Johnson Petition. In its brief in support of the Johnson Petition, the Legislature blessed precisely this approach.

Rather than suggesting, as it has here, that "[t]he mere fact of a malapportioned districting plan is not enough," Pet. at 17, or that impasse-related injuries are "entirely speculative—fanciful even" because districts "are being redrawn right now," *id.*, the Legislature urged the Wisconsin Supreme Court to accept jurisdiction and prepare for impasse. "The current circumstances are 'favorable to an orderly and efficient resolution of the case,'" the Legislature argued in state court. Leg. OA Br. at 8. The court must take jurisdiction "to ensure that redistricting is timely," the Legislature continued. *Id.* at 12. Instead of disputing

ripeness, the Legislature argued that the Johnson Petitioners' early filing *favored* jurisdiction: "There was no delay in seeking this Court's jurisdiction," the Legislature commended, "and the Court has maximum time to remedy an impasse should one arise." *Id.* at 18.

The gamesmanship of a litigant offering directly contradictory arguments in two simultaneous cases should not be rewarded with an extraordinary writ.[2]

B. When the Legislature argued in favor of justiciability, it was right.

The Legislature's standing and ripeness arguments to the Wisconsin Supreme Court were correct on the merits: the present impasse litigation is timely.[3] Contrary to the Legislature's more recent insinuations, an injury is not unripe merely because it is prospective. Rather, as the Legislature also has acknowledged, plaintiffs must show only "'a realistic danger of sustaining a direct injury' because an allegedly unconstitutional statute will be enforced against them." Pet. at 16 (quoting *Babbitt v. United Farm*

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[2] Inconsistencies in the Legislature's arguments cannot be attributed to inconsistencies between state and federal law. The Wisconsin Supreme Court has recognized that "[r]ipeness, as a component of justiciability, is a threshold jurisdictional question." *Olson v. Town of Cottage Grove*, 749 N.W.2d 211, 219 (Wis. 2008); *see also Streff v. Town of Delafield*, 526 N.W.2d 822, 825 (Wis. App. 1994) (adopting federal ripeness principles).

[3] Because the Legislature's standing and ripeness arguments both go to the timeliness of impasse litigation, the Hunter Plaintiffs address them together here.

Workers Nat'l Union, 442 U.S. 289, 298 (1979)). That test is satisfied here.

First, official census data confirms that Wisconsin's state legislative districts are malapportioned in violation of the Fourteenth Amendment and its congressional districts are malapportioned in violation of Article I, section 2. *See* Compl., ¶ 3, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Aug. 13, 2021), ECF No. 1. Accordingly, the Wisconsin statutes that create and require these districts—Wis. Stat. §§ 4.01–4.99 (state assembly districts); *id.* § 4.009 (state senate districts); and *id.* §§ 3.11–3.18 (congressional districts)—are themselves unconstitutional and may no longer supply the basis for any election, including the regularly scheduled primary and general elections approaching in 2022. *See* Compl., ¶ 3, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Aug. 13, 2021), ECF No. 1.

Second, absent some intervening change in law, these statutes will be enforced—their language is mandatory. *See* Wis. Stat. § 4.001 ("Each senate district *shall be entitled* to elect one member of the senate. Each assembly district *shall be entitled* to elect one representative to the assembly.") (emphases added); *id.* at § 3.001 ("Each congressional district *shall be entitled* to elect one representative in the congress of the United States.") (emphasis added); *cf. State v. Cox*, 913 N.W.2d 780, 783 (Wis. 2018) ("Whenever we encounter a dispute over the meaning of 'shall,' we presume it is introducing a mandate.").

Failing to recognize the irony, the Legislature analogizes the Hunter Plaintiffs' claims to requests "to adjudicate the constitutionality of a newly introduced bill just in case that bill was later enacted." Pet. at 30. The Hunter Plaintiffs, of course, are challenging enacted statutes; it is the Legislature that is urging the dismissal of these claims based on the hypothetical introduction and entirely speculative enactment of some potential future legislation. If this were the law, constitutional challenges to statutes would never be ripe because a legislature could always reserve the possibility of remedying the violation itself. That, of course, is not how justiciability is determined in federal courts.[4]

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[4] The Legislature also repeats an analogy from a lower court dissent, suggesting impasse suits are akin 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." Pet. 19 (quoting *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 869 (E.D. Wis. 2001) (Easterbrook, J., dissenting)). This analogy is not well founded. First, Wisconsin's redistricting plans have not been "cancelled." The *Arrington* dissent turned on the fact that Wisconsin had gained a congressional seat in the recent reapportionment, and so "Wisconsin *could not* conduct the elections under the existing plan even if it tried." 173 F. Supp. 2d at 869 (emphasis added). This cycle, in contrast, Wisconsin has not gained or lost any seats, and—until the Hunter Plaintiffs filed their complaint—nothing would prevent the current districts from being used again. Second, no constitutional violation ordinarily results if a state proceeds for some time without a particular pollution control plan. Precisely such a violation would result if a state heads into election season without lawful districts.

Third, the court must act now to prevent grave injury. Voting rights cases require prospective relief—once an unconstitutional election has come and gone, the Hunter Plaintiffs' injuries cannot be "undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote [] constitutes irreparable injury."). And to ensure relief is timely, a federal court cannot wait to take up this litigation until the eve of election deadlines.

This Court underscored the exigency of redistricting litigation five decades ago:

> While a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy . . . , individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief against the alleged malapportionment, which the individual voters seek, might be achieved.

Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736 (1964). Nothing has changed the force of this insight. Perhaps the Legislature, or perhaps Wisconsin's judiciary, will adopt lawful redistricting plans sufficiently in advance of next year's elections. But no source of law requires voters to gamble their federal constitutional rights on the punctuality of state actors. This is especially so when Wisconsin's

political branches remain gripped by the same partisan divisions that have spoiled legislative redistricting efforts in three of the last four cycles. In these circumstances, the federal judiciary must not sleep on Plaintiffs' claims. "The right to vote is too important in our free society to be stripped of judicial protection." *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) (affirming justiciability of redistricting dispute).

Conspicuously, the Legislature never proposes when impasse litigation would ripen for a federal court's review. "Impasse," after all, is not necessarily a singular event that can be marked on a calendar; it is a *status* of gridlock that persists indefinitely, subject to an iterative political process. And the glib suggestion that a federal court could simply refuse jurisdiction until the state judiciary concludes its own redistricting efforts ignores the possibility that state court proceedings may languish or fail, which would prevent federal court intervention precisely when such intervention is most needed.[5]

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[5] The Legislature's insistence that there is no "requirement that a lower federal court build in time to bless (or alter) the new districts," Pet. 34, suggests that the Legislature fundamentally misunderstands the nature of the federal panel's work. *See also* Pet. 27, n.9 (fretting that, "[f]or 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"). The Hunter Plaintiffs have not invoked the federal panel's jurisdiction to *review* the Legislature's or the Wisconsin Supreme Court's timely adoption of final redistricting plans; to the contrary, their claims are

The necessary alternative does not resemble any of the Legislature's hyperbole about a federal "takeover" by "overseers" who "supervise" state proceedings and "set the schedule for a State's redistricting process from beginning to end." Pet. 2, 12, 25; *see also* Pet. 29. Instead, all that federal courts need to do in this situation is what the panel has done here: calculate the minimum window of time needed to resolve all claims and publicize that calculation so that state institutions can exercise their prerogative to act first. *See Growe*, 507 U.S. at 36; *Germano*, 381 U.S. at 409-10. Rather than undermining state efforts, this deadline is entirely for their benefit—it guarantees the period during which the state may act free from federal duplication or interference. And the federal court can only provide that guidance, of course, if it accepts jurisdiction of impasse litigation when it is filed.[6]

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based on the necessity to protect their federal constitutional rights should the state institutions *fail* to timely adopt final redistricting plans.

[6] The Legislature's rhetorical confusion about the "logical stopping point"—wondering "[w]hy not issue a structural injunction and take over Wisconsin redistricting for the next thirty years?"—fails to engage with how impasse cases have been litigated for decades. Pet. 2. Plaintiffs challenge contemporaneous malapportionment where impasse is likely. Obviously, which districts will become malapportioned cannot be known decades in advance. And litigants have not identified any cause to file impasse litigation when impasse is unlikely. The prevailing rules have been a success.

III. The federal panel's scheduling deadlines are well considered.

The Legislature's remaining criticisms of the federal panel's March 1, 2022, deadline for final maps to be in place are unpersuasive on the merits and several steps removed from any justification for the requested writs.

The Legislature has enjoyed many opportunities to share its views with the federal panel about when redistricting must be complete. *See, e.g.*, Parties First Joint Proposal Regarding Scheduling, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. Sept. 13, 2021), ECF No. 54; Status Conference, (Sept. 21, 2021), ECF No. 76; Second Joint Proposal Regarding Scheduling, (Oct. 1, 2021), ECF No. 98. The Legislature has tended to ask for later deadlines than other parties have proposed, requesting litigation schedules that purport to correspond with previous cycles when Wisconsin's primary elections were scheduled for later in the fall than they are now. The Legislature has never suggested that later deadlines are necessary to ensure it has sufficient time for its own redistricting work; in fact, the Legislature has represented its intention to vote on redistricting plans as early as next month (November 2021). Leg. Letter Br. Regarding Timing at 2. Because the Legislature has no special expertise in election administration, its preferred deadlines appear simply to reflect a litigation strategy to secure some undisclosed advantage.

The federal panel has wisely chosen to reject the Legislature's requested schedule and to defer instead to the WEC's rationale for a March 1 deadline. The Legislature created the WEC in 2015 and charged it with "the responsibility for the administration of . . . laws relating to elections and election campaigns." 2015 Wis. Act 118, § 4(1). These laws include Wis. Stat. § 10.06(1)(f), which requires the WEC to distribute notices related to district boundaries by March 15. And they include Wis. Stat. § 8.15, which provides that candidates may begin collecting signatures to support their candidacies on April 15. The WEC has determined that final district boundaries must be set by March 1 in order for it to complete its duties according to the schedule that the Legislature has imposed. *See, e.g.*, Second Joint Proposal Regarding Scheduling at 3-4, *Hunter v. Bostelmann*, No. 3:21-cv-00512 (W.D. Wis. (Oct. 1, 2021),ECF No. 98.

As the federal panel summarized, "The Legislature apparently assumes, without providing any explanation why, that the redistricting process can cut into the commission's preparation time or the candidates' six-week window to circulate nomination papers." Oct. 6 Order at 4. Because that assumption was entirely unsupported, the panel's deference to the WEC's proposed March 1 deadline was appropriate. To the extent the Legislature would like to adjust any of these election-related dates to later in the year to allow more time for redistricting, it has the special power to negotiate such an extension with the

Governor. And to the extent the Legislature is pessimistic about its ability to reach consensus with the Governor on these election-related issues—well, that precisely illustrates why the Hunter Plaintiffs' action was properly filed in the first place.

A larger issue remains. The Legislature never quite spells out why the federal panel's selection of deadlines a few weeks or months ahead of what the Legislature prefers should affect the federal court's jurisdiction. And the Legislature certainly does not explain how this dispute possibly could support writs of mandamus or prohibition. Whether federal proceedings should advance a little more quickly or a little more slowly is not an "exceptional circumstance[]" warranting the exercise of this Court's discretionary powers. Sup. Ct. R. 20.1. Likewise, the Legislature's right to debate redistricting legislation in session, or litigate in state court without any federal backstop—or, perhaps, with the backstop slightly adjusted in one direction or the other—is not "clear and indisputable," as this posture requires. *Will*, 389 U.S. at 96. Indeed, such a "right" is lacking altogether.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus and writ of prohibition should be denied.

Respectfully submitted,

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