NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NO. C-716690 SECTION 24

JAMES BULLMAN, *ET AL*

V.

R. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS
LOUISIANA SECRETARY OF STATE

**********CONSOLIDATED WITH**********

NO. C-716837 SECTION 25

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
LOUISIANA STATE CONFERENCE, *ET AL*

V.

R. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS
LOUISIANA SECRETARY OF STATE

MEMORANDUM IN SUPPORT OF DECLINATORY, DILATORY, AND PEREMPTORY EXCEPTIONS FILED ON BEHALF OF INTERVENTORS, LOUISIANA HOUSE OF REPRESENTATIVES SPEAKER CLAY SCHEXNAYDER AND LOUISIANA SENATE PRESIDENT PATRICK PAGE CORTEZ, TO PLAINTIFFS' PETITIONS AND MISLOVE INTERVENORS' PETITION FOR INTERVENTION

NOW INTO COURT, through undersigned counsel, come Clay Schexnayder, in his Official Capacity as Speaker of the Louisiana House of Representatives, and Patrick Page Cortez, in his Official Capacity as President of the Louisiana Senate, (collectively, the "Legislative Intervenors") who respectfully except to the Petitions for Injunctive and Declaratory Relief (collectively, the "Petitions") brought by Plaintiffs James Bullman, et al. (the "Bullman Plaintiffs") and Intervenors Michael Mislove et al. (the "Mislove Intervenors") in Suit No. C-716690,[1] and by Plaintiffs National Association for the Advancement of Colored People Louisiana State Conference et al. (the "Louisiana NAACP Plaintiffs") in Suit No. C-716837. In support of these exceptions, Legislative Intervenors respectfully state the following:

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[1] Michael Mislove, Lisa J. Fauci, Robert Lipton, and Nicholas Mattei have labeled themselves the "Math/Science Intervenors" in their filings.

INTRODUCTION

Plaintiffs' claims are not ripe or justiciable because no impasse exists. The Legislature is actively pursuing congressional redistricting through the legislative process. It will enter a veto override session tomorrow, and if that fails, the Legislature has several congressional redistricting bills to consider during its ongoing Regular Session. Time remains to allow that process to play out. Even if an impasse was declared as late as the end of May, there would still be time—by Plaintiffs' own proposed five-week schedule—for the parties to propose maps, fully brief issues related to those maps, hold a hearing on plan submissions, and propose findings of fact and conclusions of law to this Court sufficiently in advance of the candidate qualifying period which begins on July 20, 2022. Plaintiffs argue that this Court can simply conduct "parallel proceedings" to develop a "contingency plan," but the jurisdictional limitations on this Court do not permit adjudication of contingency matters. So long as the need for relief remains *contingent* on future happenings—which Plaintiffs effectively concede is the case here—the Court lacks judicial authority to decide this case. Because the Legislature is in session and actively redistricting and this Court can comfortably stay its hand—by Plaintiffs' own calculation—with sufficient time to address an impasse if one arises, the case is not ripe.

BACKGROUND

I. The Redistricting Process

Each decade, following the release of the decennial census, the states are required to draw new congressional district plans that reflect the effect of population changes within each state. *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). Some states gain seats in the U.S. House of Representatives due to an increase in population, some states lose seats due to relatively low population growth or a loss in population; most states, like Louisiana this decade, retain the same number of seats.

"Redistricting is never easy." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). Under *Wesberry v. Sanders* and its progeny, congressional districts must be as "nearly as is practicable" equal in size to ensure that one person's "vote in a congressional election is to be worth as much as another's." 376 U.S. 1, 8 (1964). Further, federal law "impose[s] complex and delicately balanced requirements regarding the consideration of race" in redistricting. *Abbott*, 138 S. Ct. at 2314, including the Equal Protection Clause's prohibition of "racial gerrymandering" and the

requirements of the Voting Rights Act, which can "pull[] in the opposite direction" and "often insists that districts be created precisely because of race." *Id.* (citation omitted). Further, redistricting authorities must make innumerable political decisions about the construction of districts, which lead to debates over "fairness" that devolve to nonjusticiable political questions. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). *See also Reid v. Brunot*, 96 So. 43, 44 (La. 1923) (recognizing political question doctrine).

Under the federal and Louisiana Constitutions, the Louisiana State Legislature—the "Legislature" of the State—is the body responsible for redistricting. *See* U.S. Const., Art. I, § 4, cl. 1 (the "Times, Places and Manner of holding Elections for Senators and Representatives [to Congress], shall be prescribed in each State by the Legislature thereof..."); La. Const. Art. III, § 1 ("The legislative power of the state is vested in a legislature"). Indeed, it is settled that the "legislative branch plays the primary role in congressional redistricting." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006).

In Louisiana, congressional redistricting takes the form of ordinary legislation, passed by the Louisiana State Legislature through the same process as any other law – through a bill introduced during a legislative session, reported by a committee after a public hearing, and passed by majority vote of each chamber. *See* La. Const. Art. III, § 15; *see Smiley v. Holm*, 285 U.S. 355, 367 (1932) ("[T]he exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments."). The prior decade's congressional districting plan is enacted in law as La. R.S. 18:1276.1.

II. The Louisiana State Legislature's 2021-2022 Redistricting Efforts To Date

Since the Census Bureau's tardy publication of the 2020 census redistricting data on August 12, 2021, the Legislature has worked diligently to undertake redistricting work. The Senate Committee on Senate and Governmental Affairs and the House Committee on House and Governmental Affairs held nine joint public meetings across the state from October 2021 to January 2022, where the Committees presented about population and demographic trends and the redistricting process and criteria, and heard public testimony and received public submissions.

The First Extraordinary Session opened on February 1, 2022 for the purpose of considering and passing redistricting plans for Congress and a host of other offices. House Bill 1 was introduced by Speaker Schexnayder on February 1, 2022 setting forth a proposed congressional

redistricting plan, and was reported favorably by the House Committee on House and Governmental Affairs on February 4, 2022. On February 10, 2022, the House passed House Bill 1 by a vote of 70 to 33. The Senate Committee on Senate and Governmental Affairs reported the bill favorably on February 15, 2022, and the Senate passed an amended version of House Bill 1 on February 18 by a vote of 27 to 10. The House concurred in the amendments the same day, by a vote of 62 to 27.

Senate Bill 5 was introduced by Senator Sharon Hewitt on February 1, 2022, and was reported favorably by the Senate Committee on Senate and Governmental Affairs on February 4, 2022. The Senate passed Senate Bill 5 on February 8, 2022, by a vote of 27 to 12. The House Committee on House and Governmental Affairs reported the bill favorably on February 15, 2022, and the House passed an amended version of Senate Bill 5 on February 18, 2022, by a vote of 64 to 31. The Senate concurred in the amendments that same day, by a vote of 26 to 9. The amendments to each bill resulted in the same new congressional redistricting plan.

Governor John Bel Edwards vetoed both House Bill 1 and Senate Bill 5 on March 9, 2022. The Louisiana State Legislature will meet in veto session to consider House Bill 1 and Senate Bill 5 beginning on March 30, 2022 and continuing until April 3, 2022. *See* La. Const. Art. III, § 18(C) ("The legislature shall meet in veto session in the state capital at noon on the fortieth day following final adjournment of the most recent session, to consider all bills vetoed by the governor."). In addition, the 2022 Regular Legislative Session convened on March 14, 2022 and may be ongoing through June 6, 2022. La. Const. Art. III, § 2(A)(3)(a).

III. The 2022 Open Congressional Primary Election Calendar

Louisiana holds its congressional *primary* election on the first Tuesday in November—November 8, 2022 this year. La. R.S. 18:1272(A). Accordingly, its election calendar is one of the latest in the nation.

The relevant dates for the 2022 Open Congressional Primary Election are as follows:

- Qualifying period for candidates: July 20 to July 22, 2022
- Deadline to register to vote in-person, by mail, or at a DMV location: October 11, 2022
- Deadline to register to vote online: October 18, 2022
- Early voting period: October 25, 2022 to November 1, 2022

- Deadline to request a mail ballot (except Military and Overseas voters): November 4, 2022
- Deadline for Registrar to receive voted mail ballot (except Military and Overseas voters): November 7, 2022
- Open Primary Election Day: November 8, 2022

La. Secretary of State, 2022 Election Dates Calendar, https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2022.pdf.

IV. Two Rounds Of Impasse Lawsuits Have Been Filed Seeking To Seize The Legislature's Authority To Redistrict

These consolidated actions mark the *second* round of lawsuits brought in the past year in which private litigants have demanded that the Louisiana Judiciary usurp the constitutional authority of the Louisiana State Legislature to redistrict the State's congressional districting plan. The first action, *English v. Ardoin,* was brought in Orleans Parish on April 26, 2021, nearly a year ago and several months before the census data was released that is needed to conduct redistricting. *See English v. Ardoin*, 2021-0739 (La.App. 4 Cir. 2/2/22), -- So. 3d --, 2022 WL 305363, *2. The *English* plaintiffs, represented by one of the law firms representing the *Bullman* Plaintiffs here, failed to sue in the correct court, leading to dismissal of the case on venue grounds. *Id.* at *4.

Very shortly after the Governor vetoed House Bill 1 and Senate Bill 5, the present Plaintiffs and the Mislove Intervenors filed petitions seeking declaratory and injunctive relief directed to the 2021 congressional elections and, ultimately, a judicially selected plan. This Court ultimately consolidated the *Bullman* and *NAACP* actions. In their Petitions, the Plaintiffs and Mislove Intervenors allege that after the publication of the 2020 census in August 2021, the state's prior congressional plan has been revealed to be not population-balanced among its six districts in the plan.

Plaintiffs have proposed a briefing schedule that spans five weeks and two days from start to finish and ends with complete findings of fact and conclusions of law submitted to this Court following complete briefing and a hearing.

ARGUMENT

I. The Petitions Should All Be Dismissed As Unripe And Nonjusticiable

Legislative Intervenors filed declinatory and dilatory exceptions to the Petitions on the grounds that the Petitions in this case present an unripe and nonjusticiable controversy. All three

Petitions hinge on the claim that the Louisiana State Legislature has reached an "impasse" with the Governor, who vetoed House Bill 5 and Senate Bill 1 earlier this month, and will not be able to redistrict the State in time for the November 8, 2022 Open Congressional Primary Election. But this concern is entirely speculative and contingent upon future events that may, or may not, occur—rendering the dispute unripe and nonjusticiable.

A. Courts only "administer justice in actual cases" and "will not act on feigned ones, even with the consent of the parties." *St. Charles Par. Sch. Bd. v. GAF Corp.*, 512 So. 2d 1165, 1173 (La. 1987), on reh'g (Aug. 7, 1987). Indeed, "the jurisprudence of this court is well settled that, courts will not render advisory opinions." *Louisiana Federation of Teachers v. State*, 2011-2226 (La. 7/2/12), 94 So. 3d 760, 763. "Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely." *Id.*, citing *Prator v. Caddo Parish*, 04-794 (La. 12/1/04), 888 So. 2d 812, 815. This is true whether the case seeks declaratory relief, *see id.*, or injunctive relief, *see Tobin v. Jindal*, 2011-0838 (La.App. 1 Cir. 2/10/12), 91 So. 3d 317, 321-322.

"[T]he ripeness doctrine is viewed as being both constitutionally required and judicially prudent." *Matherne v. Gray Ins. Co.*, 95-0975 (La. 10/16/95), 661 So. 2d 432, 435. Borrowing from federal justiciability principles, the Louisiana Supreme Court considers a constitutional challenge to a statute to be ripe if: "(1) the issues are fit for judicial decision; and (2) the parties will suffer hardship if the court withholds consideration." *Louisiana Federation of Teachers*, 94 So. 3d at 763-64 (citations omitted). *See also Matherne*, 661 So. 2d at 435 (same).

The first prong—that the issue must be "fit for judicial decision"—is a reference to justiciability. A "'justiciable controversy' connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract..." *Louisiana Federation of Teachers*, 94 So. 3d at 763., quoting *Abbott v. Parker*, 249 So. 2d 908, 918 (1971). Further, "the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Abbott*, 249 So. 2d at 918. A "court must refuse to entertain an action for a declaration of rights if the issue presented is academic, theoretical, or based on a contingency which may or may not arise." *Louisiana Federation of Teachers*, 94 So. 3d at 763, citing *American Waste & Pollution Control Co. v. St. Martin Parish Policy Jury*, 627 So.2d 158, 162 (La. 1993).

The second prong—the "hardship" inquiry—asks whether the "party will be significantly injured by a court's failure to decide an issue quickly," *Matherne*, 661 So. 2d at 435, which occurs when a "law affects a party's 'primary conduct' and is 'felt immediately by those subject to it in conducting their day-to-day affairs.'" *Louisiana Federation of Teachers*, 94 So. 3d at 764, quoting *Nat'l Park Hospitality Assn. v. Dep't of Interior*, 538 U.S. 803, 809 (2003). It is axiomatic that "a case is not ripe for review unless it raises more than a generalized, speculative fear of unconstitutional action." *Id.*, citing *State v. Rochon*, 11-0009 (La. 10/25/11), 75 So. 3d 876, 882.

B. The Petitions in this case fail both prongs of the ripeness inquiry, compelling dismissal. Here, as the predicate for their claims, Plaintiffs and the Mislove Intervenors declare that the Louisiana State Legislature and Governor have reached impasse. E.g., Bullman Petition ¶ 1 (declaring the districts "malapportioned"), 4 (describing the Governor's veto as "signaling that the process is at an impasse"); Louisiana NAACP Petition ¶ 4 (due to the Governor's veto, "the legislative process has reached an impasse"); Mislove Petition to Intervene at ¶ 4 ("There is no realistic chance that the political branches will enact new, constitutionally valid in time for the 2022 elections"). Due to this alleged impasse, Plaintiffs fear they will be forced to vote in "malapportioned" districts in the 2022 congressional elections and that their federal Equal Protection rights will be violated thereby.

Although their declarations of "impasse" are presented as irrefutable statements of fact, these claims are in truth speculative predictions about the *future*. The Governor did veto House Bill 5 and Senate Bill 1, to be sure, but his veto is not a bar to the ability to pass a congressional redistricting plan into law in sufficient time for the November 8, 2022 Open Congressional Primary Election. For one, a veto session will commence on the 40th day following adjournment of the 2022 First Extraordinary Session, which is March 30, 2022. If the Governor's veto is overridden, then Louisiana will in fact be redistricted in accordance with law and Plaintiffs and Mislove Intervenors' claims will never become ripe. Until the veto override process is exhausted, one cannot say that House Bill 5 and Senate Bill 1 cannot become law. And practically, given that the Bills passed with strong majorities in both the House and Senate, it is reasonably possible that the Governor's veto will be overridden.

Second, even if a veto override is not successful, there remains time for the Louisiana State Legislature to consider and pass a new redistricting bill in its Regular Legislative Session, which commenced March 14, 2022, and remains ongoing. Multiple bills, e.g., Senate Bill 306, House Bill 712, House Bill 823, and House Bill 608, have been introduced on the subject of congressional redistricting. *See* Mem. in Supp. of Secretary of State's Exceptions to Math/Science Petition to Intervene at 3 n.1. The Legislature worked with diligence during the First Extraordinary Session and previously, and will continue their efforts to complete redistricting. Notably, the Texas Supreme Court held that a congressional redistricting impasse case was not ripe until the expiration of its legislature's regular session following the decennial census. *Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001). That court found that impasse cases do not become ripe until it can be shown that "legislative relief is not forthcoming"—and that "the difficulties with such a showing are formidable." *Id.* at 254-55. Given the inherently speculative nature of trying to predict legislative action, *Perry* established a "bright-line rule" for determining ripeness: if a redistricting plan is not passed by the "adjournment of the Legislature's regular session." *Id.* at 256.

Third, even if a redistricting measure does not pass in the Regular Legislative Session, the Louisiana State Legislature is not left without options. It is within the power of the Louisiana State Legislature to call a second Extraordinary Session to address redistricting. La. Const. Art. III, § 2(B).

Plaintiffs' and Mislove Intervenors' claims all demand this Court assume that a redistricting bill cannot become law—and that all the foregoing legislative options will fail before they have even been tried. But where "[t]he injury...is not based on any actual facts or occurrences" but instead requires an assumption "that [the plaintiff] will suffer harm if certain hypothetical facts occur," a claim is nonjusticiable. *Soileau v. Wal-Mart Stores, Inc.*, 19-0040 (La. 6/26/19), 285 So. 3d 420, 425. Plaintiffs have not been harmed and cannot claim injury unless their guesses about a hypothetical future state of affairs come true.

C. Practically, the touchpoint for when "impasse" claims can be found to be ripe for adjudication is not when a bill is vetoed or well-funded interest groups file lawsuits, but when time runs out to conduct redistricting without disturbing candidate-qualification and other election deadlines. *See, e.g., Branch v. Smith,* 538 U.S. 254, 260, 265 (2003) (finding judicial intervention

appropriate when there was "no prospect" of a plan being pre-cleared in time for the upcoming election); *Favors v. Cuomo,* 866 F. Supp. 2d 176, 184 (E.D.N.Y. 2012) (identifying candidate qualification deadlines as "critical triggers" for determining when an impasse claim is ripe); *South Carolina State Conf. of NAACP v. McMaster*, -- F. Supp. 3d --, 2021 WL 5282843, *6 (D.S.C. Nov. 12, 2021) (staying impasse case until about 60 days before congressional candidate filing deadline). This principle flows from the notion that when legislative actors "do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation'...of the...court to devise and impose a reapportionment plan pending later legislative action." *Wise v. Lipscomb,* 437 U.S. 535, 540 (1978). *See also Growe v. Emison,* 507 U.S. 25, 36 (1993) (finding federal courts "justified" in adopting redistricting plans when it is "apparent that the state court ... would not develop a redistricting plan in time for the primaries").

Here, the only Petition to point to a specific deadline is the Mislove Petition to Intervene, which identifies the candidate qualification period for the November 8, 2022 Open Congressional Primary Elections to argue their hypothetical future injury is imminent. Mislove Petition to Intervene at ¶ 37. That period runs from July 20 to July 22, 2022—nearly four months from the time of this filing. Furthermore, the candidate qualification period could be moved back if necessary, as other states have done this cycle, without impacting voters. The election deadlines that actually impact voters do not occur until October 2022, like the deadlines for voter registration (October 11, 2022 for in-person, DMV, or by mail, and October 18, 2022 for online registration) and the early voting period (October 25 to November 1, 2022).[2] While the Legislative Intervenors prefer to complete the redistricting process as soon as possible, in truth, there remains several months on Louisiana's election calendar to complete the process.

For this reason, in *Carter v. Virginia State Board of Elections*, 2011 WL 665408 (W.D. Va. Feb. 15, 2011), a similar lawsuit was dismissed as unripe that had been filed following the release of the 2010 census. There, the plaintiffs claimed that the 2010 census data showed that Virginia's Senate districts were malapportioned. They sought functionally the same relief that Plaintiffs and Mislove Intervenors seek here: "(i) an injunction barring defendants from holding

[2] La. Secretary of State, 2022 Election Dates Calendar, https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2022.pdf.

elections under the current Senate redistricting plan, which was enacted in 2001; (ii) an order setting deadlines for the General Assembly and governor to enact a plan based on the new Census data; and, (iii) should the requested deadlines be missed, they ask the court to impose a redistricting plan." *Id.* at *1 (internal citation omitted). The court dismissed the case in February 2011, noting that it was "unaware of any official timetable for the 2011 redistricting[,]" and that "there are no scheduled Virginia Senate elections until the primary, currently planned for June 14, 2011," which was four months away. *Id.* at *2. The court therefore concluded that, "[a]s plaintiffs have alleged no immediate harm, and their claims are contingent on future uncertainties, this case is not ripe for review." *Id.*

Likewise, in *Carter v. DeGraffenreid*, No. 132MD2021, 2021 WL 4735059, 266 A.3d 1208 (Table) (Pa. Cmwlth Ct. 2021) ("*Carter I*"), a group of petitioners sought to declare an "impasse" between Pennsylvania's General Assembly and its Governor in 2021. The court dismissed the lawsuit in October 2021, finding the complaint unripe. It found that "petitioners do not allege that they have sustained a present or imminent legally cognizable injury...to permit judicial resolution at this juncture" because, like Plaintiffs claims here, "Petitioners' claims are predicated on what may happen in the event a new congressional map is not enacted before the 2022 primary election." *Id.* at *4. *See also id.* at *7. It is true that the Pennsylvania courts ultimately did intervene in late December 2021 after the *Carter I* petitioners re-filed their lawsuit. A Pennsylvania court held a trial to select a new plan on January 27-28, 2022 and, after the General Assembly failed to enact a plan by January 30, the state supreme court thereafter adopted a congressional plan on February 23, 2022, *see Carter v. Chapman*, No. 7MM2022, 2022 WL 702894, **3-5, -- A.3d -- (Pa. Feb. 23, 2022) ("*Carter II*").[3] However, in Pennsylvania, the General Assembly lacked the votes to override a gubernatorial veto and the candidate-qualification period

[3] In *Perry,* the Texas Supreme Court recognized the danger that impasse cases can warp the incentives of political actors in redistricting cases. 66 S.W.3d at 254-55. That court found that parties should not be encouraged to "enlist participants in the legislative process to show that the claims are or are not ripe," as "no person involved in the legislative process should be encouraged to take or defer action in order to give an appearance that a case is or is not ripe." *Id.* at 255. *Carter II* is an arguable example. In that case, the state's Democratic governor vetoed the Republican-majority General Assembly's proposed redistricting bill literally the day before the evidentiary hearing was set in the impasse case to select a new map. 2022 WL 702894, at **1, 4. The record did not reflect any meaningful effort by the governor to negotiate with the General Assembly in the legislative process to resolve the impasse.

for Pennsylvania's May 17, 2022 primary was to begin February 15, 2022. *Carter I*, 2021 WL 4735059, *5 & n. 16. But *Carter II* is distinguishable because Louisiana's primary falls nearly six months later than Pennsylvania's, and its schedule is more generous, and *Carter II* proves that there is no injury at this time, as the Pennsylvania judiciary had little trouble adopting a plan once impasse did, in fact, occur.

Indeed, in dismissing an earlier version of this case that *Bullman* Plaintiffs' counsel filed in the wrong court, the Fourth Circuit observed that "it appears the plaintiffs' claim is premature at this juncture regarding a cause of action and the plaintiffs' [sic] lack standing regarding a right of action." *English v. Ardoin*, 2021-0739 (La.App. 4 Cir. 2/2/22), -- So. 3d --, 2022 WL 305363, *4 n. 2. Nothing material has changed from the issuance of *English* to the filing of the Petitions in this case to change that observation.[4] The Petitions were premature then, and they remain premature now. Legislative Intervenors' exceptions on the grounds of justiciability and ripeness should therefore be sustained and the Petitions dismissed.

Plaintiffs may rely on other impasse cases in Minnesota and Wisconsin to support a finding of ripeness here. But in *Wattson v. Simon*, 970 N.W.2d 56, 57-58 (Minn. Spec. Redist. Panel 2022), while the Minnesota Supreme Court did constitute a "Special Redistricting Panel" in June 2021, the Panel did not enter a ruling until February 15, 2022—a statutory deadline to complete redistricting found nowhere in Louisiana law. *Id.* at 58. Further, the "Special Redistricting Panel" functioned akin to an independent redistricting commission, holding "nine in-person public hearings and one virtual hearing," a task that required them to "dr[i]ve around the state to hear directly from Minnesotans," received redistricting proposals, and considered expert and lay testimony. *Id.* at 60. The lead-time required for the "Special Redistricting Panel" to complete its work might have influenced the Minnesota judiciary, but it is not relevant here. And in a cautionary note, *Johnson v. Wisconsin Elections Comm'n*, 2022 WL 621082 (Wisc. Mar. 1, 2022), was summarily reversed by the United States Supreme Court as to its adoption of state-legislative plans on the grounds that the Wisconsin Supreme Court "committed legal error" in its consideration of

[4] It is true that the Governor's veto came on March 9, 2022, after *English* was decided. But the Mislove Intervenors have also alleged that Governor Edwards threatened a veto "at the outset of the redistricting process," citing a November 30, 2021 article in The Advocate. Mislove Petition to Intervene at ¶ 31 & n.1, which reveals that a veto was a distinct possibility at the time *English* was decided.

race in violation of the Fourteenth Amendment. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, No. 21A471, -- S. Ct. --, 2022 WL 851720, *1 (Mar. 23, 2022).

In this case, Plaintiffs have proposed a five-week schedule to include a complete set of briefs, a hearing, and submission of findings of fact and conclusions of law to this Court. This five-week schedule can begin as late as late-May and still afford the Legislature its opportunity to redistrict before an impasse is declared while providing this Court sufficient time and information to make any impasse decision before the July 20, 2022, candidate qualifying period begins.

II. Plaintiffs and the Mislove Intervenors Failed To State A Right of Action Because They Lack Standing

Whether a "litigant has standing to assert a claim is tested via an exception of no right of action." *Bradix v. Advance Stores Co., Inc.*, 17-0166 (La.App. 4 Cir. 8/16/17), 226 So. 3d 523, 528, citing La. C.C.P. art. 681 ("[e]xcept as otherwise provided by law, an action can only be brought by a person having a real and actual interest in what he asserts"). The "function of an exception of no right of action is a determination of whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition." *Shepherd v. Baton Rouge Cardiology Ctr.*, 2019-0802 (La.App. 1 Cir. 3/12/20), 300 So. 3d 893, 896. A "litigant who is not asserting a substantial *existing* legal right is without standing in court." *In re Matter Under Investigation*, 2007-1853 (La. 7/1/09), 15 So. 3d 972, 981 (emphasis added). Where a litigant's claim hinges on a "future possibility" of harm, the litigant lacks standing to bring the claim and peremptory exceptions should be sustained. *Haynes v. Haynes*, 2002-0535 (La.App. 1 Cir. 5/9/03), 848 So. 2d 35, 39 (finding claims grounded on contingent future events "too speculative for consideration").

As shown *supra*, Plaintiffs and the Mislove Intervenors have asserted claims grounded on hypothetical and speculative guesses about the potential of future harm should Louisiana's political branches of government fail to complete the redistricting process in time for the November 8, 2022 Open Congressional Primary Election. Those claims are unripe for the reasons stated, but under Louisiana law, it also means Plaintiffs and the Mislove Intervenors lack standing to bring them. The exceptions should therefore be sustained and the Petitions dismissed.

III. The Petitions Fail To State A Cause of Action

A peremptory exception of no cause of action tests "whether the law provides a remedy to anyone assuming that the facts plead in the petition will be proven at trial." *Farmco, Inc. v. W. Baton Rouge Par. Governing Council*, 01-1086 (La. 6/15/01), 789 So. 2d 568, 569. "An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief." *New Jax Condominium Ass'n, Inc. v. Vanderbilt New Orleans, LLC*, 16-0643 (La.App. 4 Cir. 4/26/17), 219 So. 3d 471, 479. *See also Industrial Cos., Inc. v. Durbin*, 2002-0665 (La. 1/28/03), 837 So. 2d 1207, 1213 (same, and acknowledging that "[t]he exception is triable on the face of the petition").

Here, the Petitions each allege a violation of the one-person, one-vote principle of *Reynolds.* Bullman Petition at Count I; Mislove Petition to Intervene, Count I; Louisiana NAACP Petition at Count I. Two of the Petitions also allege a violation of the right to free association under the Louisiana Constitution. Bullman Petition at Count II ("Violation of Article I, Sections 7 and 9 of the Louisiana Constitution, Freedom of Association"); Mislove Petition to Intervene, Count II (same). But neither claim is viable and the Petitions should all be dismissed.

A. The "Malapportionment" Claims Fail To State A Claim.

Count I of the respective Petitions claim that Plaintiffs and the Mislove Intervenors' equal protection rights will be violated by vote-dilution if the 2022 congressional elections are conducted using the prior decade's redistricting plan, as the effect of the 2020 census is to confirm that those the prior decade's districts have become unequal in population. But as a matter of federal law, Plaintiffs are wrong to claim that they have suffered a cognizable equal protection injury even if the 2022 congressional elections are conducted using the prior decade's plan.[5]

Equal Protection does *not* demand a constant, minute-by-minute revision of district lines to ensure precisely equal populations. Rather, the "one-person, one-vote" standard is process-driven, requiring States to have only "a rational approach to readjustment of legislative representation" or, stated differently, a "reasonable plan for periodic revision." *Reynolds v. Sims*, 377 U.S. 533, 583 (1964). This process-driven standard recognizes that "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the

[5] Legislative Intervenors view this as the option of last resort.

organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years *leads to some imbalance in the population of districts toward the end of the decennial period.*" *Id.* (emphasis added).

None of the Petitions allege that Louisiana lacks a rational approach to congressional redistricting. Rather, they simply allege the current districts are malapportioned following the release of the 2020 census. *See, e.g.,* Bullman Petition at ¶ 1; Mislove Petition to Intervene at 1; Louisiana NAACP Petition ¶¶ 1-2. But these allegations merely describe the "imbalance...toward the end of the decennial period" that *Reynolds* deemed to be non-invidious. Following *Reynolds*, "courts have recognized that no constitutional violation exists when an outdated legislative map is used, so long as the defendants comply with a reasonably conceived plan for periodic reapportionment." *Garcia v. 2011 Legislative Reapportionment Comm'n*, 938 F. Supp. 2d 542, 550 (E.D. Pa. 2013), aff'd on other grounds, 559 F. App'x 128 (3d Cir. 2014); *see also, e.g., Pol. Action Conf. of Illinois v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *Graves v. City of Montgomery*, 807 F. Supp. 2d 1096, 1109 (M.D. Ala. 2011); *French v. Boner*, 940 F.2d 659 (6th Cir. 1991) (unpublished); *Mac Govern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986); *Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 842 (N.D. Cal. 1992); *Clark v. Marx*, No. 11-2149, 2012 WL 41926, *9-10 (W.D. La. Jan. 9, 2012).

Given the four-and-a-half month delay in the release of the 2020 Census redistricting data, *see, e.g.,* Bullman Petition ¶ 2 (recognizing publication of redistricting data on Aug. 12, 2021), delays in the redistricting process this cycle should not be a basis for this Court to seize control of the State's redistricting process. *See French v. Boner*, 1991 WL 151016, *1, 940 F.2d 659 (6th Cir. 1991) (table case) (affirming district court refusal to enjoin upcoming elections under *Reynolds* because the "lateness of the census" that year meant the "Metropolitan government did not have an adequate opportunity to reapportion for the August 1, 1991 elections").

Legislative Intervenors' exceptions to Count I of all the Petitions should be sustained.

B. The Freedom of Association Claim Fails As A Matter Of Law.

Bullman Plaintiffs and the Mislove Intervenors also assert that any potential continued use of the 2011 congressional plan would violate their freedom of association under Article I, Sections 7 and 9 of the Louisiana Constitution by "impairing the exercise of their duties as citizens to assess candidate qualifications and policy positions; to organize and advocate for their preferred candidates; and to associate with like-minded voters." Mislove Petition to Intervene at ¶ 47-48. *See also* Bullman Petition at ¶¶ 40-41 (same). These parties claim that the freedom of association protected by those Sections is also protected by the First Amendment to the U.S. Constitution. *Id.*

But, as the U.S. Supreme Court has held, "there are no restrictions on speech, association, or any other [expressive or petitioning] activities in the districting plans at issue. The [Petitioners] are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). There is no authority to support the suggestion that the rights of petitioning and association include the concept of electoral convenience, or perhaps the convenience of knowing months before certain filing deadlines where congressional lines will fall.

But Louisiana has a compelling interest in limiting "the frequency of reapportionment," including its "need for stability and continuity in the organization of the legislative system." *Reynolds*, 377 U.S. at 583. And Louisiana has paramount interests in seeing its legislative actors afforded a reasonable opportunity to redistrict, given that the primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature. "[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality," whereas a court "possess[es] no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor v. Finch*, 431 U.S. 407, 414–15 (1977). Even if the legislative process does not produce the instantaneous results that these Plaintiffs demand, the State has a paramount interest in letting that process run its course before seeing a court draw the congressional lines.

In short, the current redistricting plan does not place any burden on the right to petition and it serves paramount state interests. The associational claims fail to state a cause of action and the exceptions thereto should be sustained.

CONCLUSION

WHEREFORE, for the foregoing reasons, these consolidated actions present premature (i.e., unripe) and nonjusticiable controversies for adjudication; they are brought by plaintiffs who lack standing and thus a right of action; and they fail to state a cause of action. Legislative Intervenors therefore pray and respectfully request that this Court sustain their exceptions and dismiss the Plaintiffs' and the Mislove Intervenors' demands, all at their respective cost.

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing Memorandum has been served upon counsel of record via e-mail pursuant to La. C.C.P. art. 1313 on March 29, 2022.

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* *Pro hac vice motions to be filed*