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

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

Plaintiffs,

v.

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

Defendants,

THE WISCONSIN LEGISLATURE,

Proposed Intervenor-Defendant.

No. 3:21-cv-00512-jdp

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS BY THE WISCONSIN LEGISLATURE

The Wisconsin Legislature respectfully submits this Memorandum of Law in support of its Motion to Dismiss Plaintiffs' complaint in its entirety. *See* Fed. R. Civ. P. 12(b).

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

STANDARD OF REVIEW 4

ARGUMENT 5

I. *Growe*'s Rule Compels Dismissal of Plaintiffs' Prematurely Filed Complaint. 5

A. *Growe* does not permit a federal court to oversee redistricting from beginning to end. 6

B. Plaintiffs have not sufficiently alleged a failure of the State's redistricting process. 8

C. Plaintiffs' prematurely filed suit must be dismissed. 11

II. There Is No Article III Case or Controversy for this Federal Court to Decide. 15

III. Plaintiffs Fail to State a Claim for Violation of Any Associational Rights. 17

CONCLUSION 20

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Cases

Adams v. City of Indianapolis, 742 F.3d 720 (7th Cir. 2014) 4

Agre v. Wolf, 284 F. Supp. 3d 591 (E.D. Pa. 2018) 11

Anderson v. Celebrezze, 460 U.S. 780 (1983) 18, 19

Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election L., 781 F. Supp. 394 (D. Md. 1991) 20

Arrington v. Elections Bd., 173 F. Supp. 2d 856 (E.D. Wis. 2001) 8, 12, 15

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 4, 10

Babbitt v. Farm Workers, 442 U.S. 289 (1979) 16

Badham v. March Fong Eu, 694 F. Supp. 664 (1988) 20

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 4

California Democratic Party v. Jones, 530 U.S. 567 (2000) 18

California v. Texas, 141 S. Ct. 2104 (2021) 16

Clapper v. Amnesty Int'l, 568 U.S. 398 (2013) 10, 15, 16, 17

Comm. on Judiciary of U.S. House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020) 10

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 15

Democratic Nat'l Comm. v. Bostelmann, 949 N.W.2d 423 (Wis. 2020) 4

Flateau v. Anderson, 537 F. Supp. 257 (S.D.N.Y. 1982) 13

Growe v. Emison, 507 U.S. 25 (1993) .... passim

In re Petition for Proposed Rule to Amend Wis. Stat. 809.70 (Relating to Redistricting) (Wis. 2021) 6

Jensen v. Wisconsin Elections Bd., 639 N.W.2d 537 (Wis. 2002) 6, 12, 16

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4

Mac Govern v. Connolly, 637 F. Supp. 111 (D. Mass. 1986) 15

Massachusetts v. Mellon, 262 U.S. 447 (1923) 15

Mayfield v. Texas, 206 F. Supp. 2d 820 (E.D. Tex. 2001) 8, 12, 13, 14

Mississippi State Conf. of N.A.A.C.P. v. Barbour, No. 3:11-cv-159, 2011 WL 1870222 (S.D. Miss. May 16, 2011) 8, 13

Poe v. Ullman, 367 U.S. 497 (1961) 16

Political Action Conf. of Ill. v. Daley, 976 F.2d 335 (7th Cir. 1992) 15

Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 2 F.4th 1002 (7th Cir. 2021) 4, 16, 17

Reynolds v. Sims, 377 U.S. 533 (1964) 6, 15, 16, 20

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 18

Rucho v. Common Cause, 139 S. Ct. 2484 (2019) 18, 19, 20

Scott v. Germano, 381 U.S. 407 (1965) 7

Smith v. Clark, 189 F. Supp. 2d 502 (S.D. Miss. 2001) 12, 13

Steel Co. v. Citizens for Better Env't, 523 U.S. 83 (1998) 13

Texas v. United States, 523 U.S. 296 (1998) 14

Tripp v. Scholz, 872 F.3d 857 (7th Cir. 2017) 19

Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020) 11

Trump v. New York, 141 S. Ct. 530 (2020) (*per curiam*) 10, 20

Valley Forge Christian College v. Amer. United for Separation of Church & State, 454 U.S. 464 (1982) 17

Vigil v. Lujan, 191 F. Supp. 2d 1273 (D.N.M. 2001) 8

Voinovich v. Quilter, 507 U.S. 146 (1993) 6

White v. Weiser, 412 U.S. 783 (1973) 6

Constitutional Provisions

Wis. Const. art. IV, §1 1

Wis. Const. art. IV, §3 .... 2, 6, 7

Wis. Const. art. IV, §4 .... 1, 2

Wis. Const. art. IV, §5 1

Statutes

Wis. Stat. §803.09(2m) 4

INTRODUCTION

Plaintiffs proclaim "[t]here is no reasonable prospect" that Wisconsin will successfully reapportion the State's legislative and congressional districts. Dkt. 1, Compl. ¶6. Plaintiffs tell this Court that it "should prepare itself to intervene" and draw its own maps in place of the State. *Id.* ¶7. That is quite a pronouncement given that the State received census data just days ago. *Id.* ¶24. Plaintiffs waited one day to bring this action after that census data was delivered. Plaintiffs' complaint declared Wisconsin's redistricting to be a "near-certain" failure—on Day 1 of redistricting. *See id.* ¶¶7, 53.

Plaintiffs' complaint should be dismissed in its entirety. Plaintiffs' suit is a direct attack on the Legislature's constitutionally delegated responsibility of redistricting. It is a poorly disguised "race to beat" everyone else "to the finish line" of redistricting. *Growe v. Emison*, 507 U.S. 25, 37 (1993). Plaintiffs assert malapportionment claims against districts that the Legislature is actively working to redraw. Those federal claims are nothing more than an attempt to "affirmatively obstruct" and "impede" the Legislature's newly commenced redistricting process now that the census data has arrived. *Id.* at 34. And Plaintiffs' associational claim has even less merit. Redistricting delays (that may or may not transpire) do not keep Plaintiffs from associating with anyone.

Nearly 30 years ago, the Supreme Court emphatically rejected a federal-court takeover of redistricting in *Growe*. This Court should follow suit, dismiss Plaintiffs' complaint, and leave redistricting in the able hands of the Wisconsin government.

BACKGROUND

1. The Wisconsin Legislature is the bicameral legislative branch of the Wisconsin state government. Wis. Const. art. IV, §1. Members in the Assembly's 99 districts are elected every two years. Wis. Const. art. IV, §4. And members in the Senate's 33 districts are elected every four. Wis. Const. art. IV, §5.

The Wisconsin Constitution requires the Legislature to reapportion districts after every federal census: "At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, §3. Consistent with this responsibility, the Legislature has commenced the redistricting process now that the federal government has delivered long-awaited census data. The Legislature has launched a webpage inviting Wisconsin residents to provide input on the 2021 redistricting process.[1] And in the coming months, the Legislature will be hard at work reapportioning in accordance with the new census data and other traditional redistricting criteria. *See, e.g.*, Wis. Const. art. IV, §4 ("such districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable").

2. On August 12, 2021, the Secretary of Commerce delivered legacy census data to Wisconsin state officials. *See* Compl. ¶2. As anyone would expect, the just-released census data shows that Wisconsin's population has shifted since the federal government last delivered census data to Wisconsin more than 10 years ago. *Id.*

3. Not even a full day later, Plaintiffs filed a complaint against the Wisconsin Elections Commission on August 13, 2021. The complaint alleges that the existing congressional districts, State Assembly districts, and State Senate districts—drawn based on the census data delivered last decade—are unconstitutionally malapportioned. Compl. ¶¶3, 26-30, 39-49. Plaintiffs' complaint acknowledges that "Wisconsin is entering a new redistricting cycle," *id.* ¶33, and that the "Wisconsin Constitution requires the Legislature to draw new legislative lines" after the census, *id.* ¶36. Plaintiffs acknowledge that the Legislature was able to complete redistricting last redistricting cycle without an impasse. *Id.*

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

¶32. And Plaintiffs acknowledge that the next election deadline is not until June 1, 2022, when candidates must file nomination papers for primary elections. *Id.* ¶37.

Even so, Plaintiffs declare that the Legislature is doomed to fail. Plaintiffs assert 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." Compl. ¶6. They say there will be "near-certain deadlock" between the legislative and executive branches. *Id.* ¶53. They allege that "partisan division among Wisconsin's political branches makes it extremely unlikely" that new redistricting plans will pass "in time to be implemented during the upcoming 2022 election." *Id.* ¶31. They assert that "Governor Evers has been in nearly constant conflict with the Republican-controlled Legislature over a broad range of policies." *Id.* ¶33. And they also blame the census delays for "increas[ing] the already significant likelihood [that] the political branches will reach an impasse." *Id.* ¶35.

Plaintiffs' complaint comprises three counts: (1) violation of the Fourteenth Amendment for the alleged malapportionment of the State's legislative districts, Compl. ¶¶39-43; (2) violation of Article I, section 2 of the U.S. Constitution for the alleged malapportionment of the congressional districts, *id.* ¶¶44-49; and (3) violation of Plaintiffs' First Amendment right to associate because Plaintiffs might not be able "to associate with others from the same lawfully apportioned legislative and congressional districts," *id.* ¶¶50-54.

Plaintiffs' complaint ends with sweeping requests for relief. Plaintiffs seek a declaration that the existing districts are unconstitutional and an injunction forbidding the Wisconsin Elections Commission and anyone "acting in concert" with the Commission "from implementing, enforcing, or giving any effect" to the old districts. Compl., pp. 15-16. Plaintiffs also want this Court to "[e]stablish a schedule that will enable the Court to adopt and implement new legislative and congressional district plans" itself, "should the political branches fail to enact such plans by that time."

Id. at 16. Plaintiffs ask this Court to adopt its own redistricting maps. *Id.* And they ask for statutory attorneys' fees and costs available by virtue of their filing this §1983 action. *Id.*

4. The Wisconsin Legislature moved to intervene days later. On August 17, 2021, the Legislature's Joint Committee on Legislative Organization approved the Legislature's intervention. Wis. Stat. §803.09(2m); *see Democratic Nat'l Comm. v. Bostelmann*, 949 N.W.2d 423, 428 (Wis. 2020). Counsel for the Legislature then immediately filed a motion to intervene, attaching the present motion to dismiss.

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must also allege facts sufficient to establish the Court's subject-matter jurisdiction. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008 (7th Cir. 2021) (employing "the familiar 'plausibility' requirement" to assess sufficiency of standing allegations); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs' complaint must include "factual content" that will support a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiff must do more than plead facts that are "merely consistent with a defendant's liability," because such pleadings "[stop] short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (quotation marks omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" *Id.* And while Plaintiffs' well-pled "[f]actual allegations are accepted as true," "allegations in the form of legal conclusions are insufficient to survive a Rule 12(b)(6) motion." *Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir. 2014).

ARGUMENT

Plaintiffs' complaint fails for three reasons. First, Plaintiffs' suit is not justiciable at this time. Flouting our constitutional structure, Plaintiffs invite this Court to oversee the state redistricting process beginning on Day 1 of redistricting. Their suit is not ripe and should be dismissed. Second, and for related reasons, there is no Article III case or controversy for this Court to decide. Finally, with respect to Count III of Plaintiffs' complaint, Plaintiffs have not stated a claim for violation of the First Amendment.

I. *Growe*'s Rule Compels Dismissal of Plaintiffs' Prematurely Filed Complaint.

Nearly 30 years ago, the Supreme Court said in no uncertain terms that the power to redistrict lies with the States, not the federal courts. *See Growe*, 507 U.S. 25, 35 (1993). In *Growe*, two groups of Minnesota plaintiffs filed federal lawsuits challenging ongoing reapportionment efforts in the state legislature and state supreme court. *Id.* at 28-29. The federal litigation tied the State's hands, repeatedly. *Id.* at 30-31. On appeal at the Supreme Court, the Court sided with the State: "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." *Id.* at 33. The Court concluded that it was clear error for the federal district court to stop the State from creating its own redistricting plan. *Id. Growe* left open only the following exception to its general rule that federal courts may not interfere in ongoing redistricting efforts: federal judicial intervention is permitted only when there is "evidence" making it "apparent" that the State (including the state courts) will fail to "develop a redistricting plan in time for the primaries." *Id.* at 34, 36.

Presumably Plaintiffs seek to take advantage of *Growe*'s exception here, while ignoring the *Growe*'s general rule. Plaintiffs' suit is not ripe. State policymakers (and the state courts if necessary)

must be permitted to finish their constitutionally delegated task of redistricting before Plaintiffs can run to federal court.[2] The Court should dismiss Plaintiffs' complaint.

A. *Growe* does not permit a federal court to oversee redistricting from beginning to end.

1. *Growe* requires this Court to permit the State of Wisconsin to commence and continue redistricting without interference. The Constitution vests States with the "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe*, 507 U.S. at 34; *see also* Wis. Const. art IV, §3. And "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.*; *see Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[R]eapportionment is primarily a matter for legislative consideration and determination, and that judicial relief 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."); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("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."); *White v. Weiser*, 412 U.S. 783, 795 (1973) (collecting cases for rule that "state legislatures have 'primary jurisdiction' over legislative reapportionment"). Applied here—with census data released only days ago and the legislative redistricting process

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[2] Notably, in May the Wisconsin Supreme Court reaffirmed that redistricting challenges "often merit…exercise of its original jurisdiction." *In re Petition for Proposed Rule to Amend Wis. Stat. 809.70 (Relating to Redistricting)*, https://bit.ly/3CJWvW9. The court declined to create a procedure *ex ante* for redistricting actions without disturbing the "well-settled" rule that redistricting often warrants the court's original jurisdiction. *Id.* The court has been unequivocal that "[t]he people of this state have a strong interest in a redistricting map drawn by an institution of state government—ideally and most properly, the legislature, secondarily, this court." *Jensen v. Wisconsin Elections Bd.*, 639 N.W.2d 537, 542 (Wis. 2002).

underway—the Court should "sta[y] its hand" and dismiss this wildly premature litigation. *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*); Part I.C, *infra*.

Even *if* the Legislature were to fail at its redistricting task, the next stop would be the Wisconsin courts, not the federal courts. In *Growe*, for example, the Supreme Court chided the federal court for enjoining ongoing state judicial proceedings. 507 U.S. at 34; *see also Germano*, 381 U.S. at 409 ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."). *Growe* rejected the "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." 507 U.S. at 34. Any federal suit involving the "reapportionment of election districts," therefore, must wait for any state litigation that is initiated during the redistricting process too. *Id.* at 35. The 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." *Id.*

2. This is not a close case. Indeed, Plaintiffs' suit is so premature it must be dismissed. As Plaintiffs allege, the release of new census data kicks off redistricting in the Legislature, as required by the state constitution. Compl. ¶¶33, 36; Wis. Const. art. IV, §3. The federal government released census data last Thursday. Plaintiffs waited only one day to file their suit. So on Day 1 of redistricting, Plaintiffs declared an impasse "near-certain" and asked this Court to step in as the federal supervisor of the State's redistricting efforts. *See* Compl. ¶7, pp. 15-16. Plaintiffs' "race to beat" everyone to the redistricting "finish line" is exactly what *Growe* says not to do. 507 U.S. at 37.

Growe makes explicit what is implicit (and intrinsic) in our constitutional structure: States must go first in redistricting. Plaintiffs' complaint does not allege facts sufficient to circumvent that rule. The Court should therefore dismiss Plaintiffs' complaint. There is no case or controversy here, and

Plaintiffs' conclusory allegations about an impasse are not yet ripe. *See Mayfield v. Texas*, 206 F. Supp. 2d 820, 824 (E.D. Tex. 2001).[3]

B. Plaintiffs have not sufficiently alleged a failure of the State's redistricting process.

1. Plaintiffs do not come close to alleging that this case comes within *Growe*'s exception for cases in which it is sufficiently certain that the "state branches will fail timely to perform" their redistricting duties. 507 U.S. at 34. Plaintiffs present no legally sufficient allegations the State will fail to redistrict, either through the political branches or the state judiciary. Plaintiffs filed their complaint a day after brand-new census data arrived. The Legislature will now begin redistricting. Compl. ¶¶33, 36. And the Governor is also working on his own maps to submit to the legislature. *Id.* ¶33; Wis. Executive Order No. 66 (Jan. 27, 2020).[4] There is no threat of *imminent* failure. By Plaintiffs' own allegations, the State has roughly eight months for the political branches, along with the state courts if necessary, to establish maps before primary candidates can even begin circulating nominating papers. *Id.* ¶37. It is in no way "apparent" that the State government will "not develop a redistricting plan in time for the primaries." *Growe*, 507 U.S. at 36.

[3] Some courts have simultaneously retained jurisdiction while acknowledging *Growe* precluded further federal involvement until state redistricting ran its course. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 867 (E.D. Wis. 2001); *Mississippi State Conf. of N.A.A.C.P. v. Barbour*, No. 3:11-cv-159, 2011 WL 1870222, at *9 (S.D. Miss. May 16, 2011) (noting federal court's "duty to act will arise only if" the redistrict process set out by State constitution "fails"), *aff'd*, 565 U.S. 972 (2011); *Vigil v. Lujan*, 191 F. Supp. 2d 1273, 1274-75 (D.N.M. 2001) (retaining jurisdiction while noting "the record does not appear to support a conclusion that the state legislature or judiciary is either unwilling or unable to adopt a redistricting plan in a timely manner"). Retaining jurisdiction in such circumstances is wrong. Where, as here, a suit is not ripe and Plaintiffs do not have standing, a court has no basis to hold onto a case. *See Arrington*, 173 F. Supp. 2d at 869 (Easterbrook, J., dissenting) (announcing refusal to participate in further proceedings of the three-judge court given the absence of a justiciable case or controversy). If there is no case or controversy, a court's only option is to dismiss.

[4] Plaintiffs allege that "Republic legislative leadership indicated that they would ignore the [Governor's] commission's proposals" and cite an AP story as support. Compl. ¶33. The news article quotes the Assembly Speaker as saying "we're going to follow the constitution," not that the Legislature will "ignore" anything. Scott Bauer, *Wisconsin Republicans dismiss nonpartisan redistricting plan*, AP (Jan. 23, 2020), https://apnews.com/article/86670cf694caeffb440433abb2b8fed5.

At its core, Plaintiffs' complaint asks for a federal decree that Wisconsin is incapable of fulfilling its redistricting responsibilities and thus should not be given more than a day to try. None of Plaintiffs allegations warrants such intervention. Plaintiffs allege that Wisconsin's past redistricting cycles have "been rife with partisan gridlock" and make observations about the current partisan divide between the executive and legislative branches. Compl. ¶¶7, 32. But Plaintiffs acknowledge, as they must, that the most recent redistricting cycle did not end in impasse. *Id.* Plaintiffs allege that was because "Republicans held trifecta control of Wisconsin's state government" unlike the political landscape in Wisconsin today. *Id.* ¶¶32-33. These allegations cannot justify a federal court's interference in the state redistricting process, especially a redistricting process that is just beginning. Surely it would come as quite a surprise to *Growe*'s federalism-minded author that *Growe*'s exception has now become the rule in every State with divided government—as Plaintiffs would have it, in any such State, a federal court may set a redistricting schedule for the State's executive, legislative, and judicial branches on Day 1 of redistricting.

2. At best, Plaintiffs' allegations are that there will be "near-certain deadlock" between the political branches sometime in the future, while acknowledging that Wisconsin's first filing deadline for primary candidates isn't until June 2022. Compl. ¶¶37, 53. *Growe* has no such "near-certain deadlock" exception that could permit a federal court to oversee a State's redistricting efforts from beginning to end. The Legislature gets the first at-bat when it comes to redistricting, regardless of the State's past inability or present partisan composition. Then the state judiciary is on deck, with the next opportunity to resolve any redistricting dispute. *See Growe*, 507 U.S. at 33-34 ("[T]he doctrine of *Germano* prefers *both* state branches to federal courts as agents of apportionment.").

A federal court cannot insert itself into that process (before the State even has a chance to start) based on nothing more than a prediction about the State's political branches. Such predictions are not "evidence" that every branch of the Wisconsin government "will fail timely to perform th[eir]

duty." *Growe*, 507 U.S. at 34. And mere speculation about a *future* redistricting impasse is not enough for a federal court to nullify Wisconsin's constitutional prerogative to produce its own maps. *See Trump v. New York*, 141 S. Ct. 530, 536 (2020) (*per curiam*) ("making any prediction about future injury [is] just that—a prediction"); *see also Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 (2013) ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."). If it were sufficient, any cynical Plaintiff could dream up reasons why a political process may break down and plead their way around *Growe*'s constitutionally mandated restraint on the federal judiciary's meddling in the reserved powers of the States.

3. *Growe*'s exception is narrower. To warrant federal judicial intervention, there must be "evidence" making it "apparent" that the State—both the legislature *and* state courts—"would not develop a redistricting plan in time for the primaries." 507 U.S. at 34, 36. Applied here, Plaintiffs' prediction that Wisconsin's political branches will eventually run out of time is insufficient to justify federal-court takeover of the redistricting process now. Plaintiffs' allegations are just "[t]hreadbare recitals" of "near-certain" failure by the political branches. *Iqbal*, 556 U.S. at 678; *see, e.g.*, Compl. ¶¶6, 7, 53. Even had Plaintiffs plausibly alleged that an impasse between the political branches would occur sometime in the future, that would not be enough. The complaint is silent on the ability of the state courts to resolve any such impasse. And in all events, some *future* impasse is not a *current* impasse necessitating this Court's intervention now. *See Growe*, 507 U.S. at 36.

In related contexts, courts consistently refuse to declare an impasse absent an actual stalemate between the branches. *See, e.g.*, *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 772 (D.C. Cir. 2020) (en banc) (stalemate giving rise to judicial intervention exists only "where there is an impasse contrary to traditional norms [and] no practicable alternative to litigation exists"). The same deference is constitutionally required here given the State's constitutionally prescribed role in redistricting. 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." *Growe*, 507 U.S. at 35. Doubt about whether political process will produce future results does not authorize judicial intervention in the midst of that process—much less before the process can even begin in earnest. Rather, 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 seems—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)). Plaintiffs' prediction that the political process is sure to fail are little different than allegations "that the political process is hopelessly broken." *Agre v. Wolf*, 284 F. Supp. 3d 591, 628 (E.D. Pa. 2018). Predictions alone are insufficient to justify federal judicial interference in the State's efforts to redistrict using its own branches of government.

In sum, Plaintiffs have failed to adequately allege that Wisconsin will fail to timely complete redistricting. Plaintiffs' allegations do not trigger *Growe*'s narrow exception for redistricting that has failed in both the state legislature and the state courts on the eve of a primary election. 507 U.S. at 33-34, 36. Plaintiffs did not even give the State more than a day to respond to new census data.

C. Plaintiffs' prematurely filed suit must be dismissed.

Plaintiffs' challenge is an attempt to defy the Constitution's allocation of redistricting responsibility to the State of Wisconsin. Worse, Plaintiffs' suit is based only on a prediction about events that have not yet transpired. There is no live case or controversy for the Court to decide at this time. Retaining jurisdiction despite the absence of a case or controversy would be an affront both to the Article III limits on the federal "judicial Power" as well as the reserved powers of the State of Wisconsin, including its primacy over redistricting. At this time, with the facts as Plaintiffs have alleged, only dismissal is appropriate for at least the following three reasons.

1. First, Plaintiffs waited only a day to file suit after the census data was released. This is the consummation of a troubling trend in malapportionment litigation—filing suits when they are not yet ripe, asking federal courts to exercise jurisdiction of state redistricting, set a schedule, and then wait. *See, e.g., Arrington*, 173 F. Supp. 2d at 858; *Smith v. Clark*, 189 F. Supp. 2d 502, 503 (S.D. Miss. 2001). For example, Texas plaintiffs filed suit on the day the 2000 census figures were released and asked the court to set a deadline for State authorities to act in *Mayfield v. Texas*, 206 F. Supp. 2d 820 (E.D. Tex. 2001). The three-judge district court made the unremarkable observation that "the Texas Legislature ha[d] not been given the opportunity to act" before dismissing plaintiffs' suit. *Id.* at 824. Such premature suits have serious Article III failings and are a direct threat to our federalist structure. There is no constitutional basis to docket a case and then wait for it to become ripe. *But see, e.g.*, *Arrington*, 173 F. Supp. 2d at 865 (simultaneously concluding that the court should retain jurisdiction and that the suit was not yet ripe). As Judge Easterbrook put it in his dissenting opinion in *Arrington*: "[R]eserving a place in line is not a proper reason to invoke the judicial power." *Id.* at 869; *accord Growe*, 507 U.S. at 37 ("What occurred here was not a last-minute federal-court rescue of the Minnesota electoral process, but a race to beat the Minnesota Special Redistricting Panel to the finish line. That would have been wrong, even if the Panel had not been tripped earlier in the course.").

Plaintiffs have joined the first-to-file fray. Retaining jurisdiction over Plaintiffs' case rather than dismissing it outright fuels the race to the courthouse, tempting litigants to file as soon as census data is released to ensure their place in line should actual federal litigation become ripe many months down the road. That "race" to abandon the State process is precisely what *Growe* instructed the federal courts to stop. 507 U.S. at 37. It puts state redistricting efforts (including any state court resolution of a future impasse between the state political branches) on a "collision course" with a prematurely filed federal suit. Jensen, 639 N.W.2d at 542.

2. Second, the timing of Plaintiffs' case distinguishes it from others in which district courts have retained jurisdiction (and then waited for something to happen). Plaintiffs have not allowed the State any time whatsoever to even respond to the census data. By contrast, other cases in which federal courts have been willing to retain jurisdiction generally involved actual allegations of a failure at the state level or clear signs that the process had halted. *See, e.g.*, *Mississippi Conf. of NAACP*, 2011 WL 1870222, at *4 ("[T]he Legislature adjourned on April 7, without passing a joint resolution containing the plans proposed by the House and Senate."); *Smith*, 189 F. Supp. 2d at 502 (noting "many months" had passed); *see also Flateau v. Anderson*, 537 F. Supp. 257, 259, 262-63 (S.D.N.Y. 1982) (rejecting State's argument that it could wait years after census release to redistrict, while holding elections under old districting plans). As Plaintiffs allege, redistricting has just now begun in Wisconsin with the delivery of the census data. Compl. ¶36. Plaintiffs admit there are months before the Wisconsin legislature adjourns and many more months until the first primary deadline in June of next year. *Id.* ¶¶36-37. If the wheels come off that would be one thing—but Plaintiffs have not even given the State-level proceedings time to get off the ground. In these circumstances, dismissal is warranted. Such suits, filed immediately upon the release of the census data without giving a chance for state redistricting to run its course, must be dismissed for failure to seek "an acceptable Article III remedy." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998); see *Mayfield*, 206 F. Supp. 2d at 824.

3. Third and relatedly, the filing deadlines for the next primary election are well in the future as compared to other cases in which federal courts have retained jurisdiction over ongoing redistricting. *Cf. Mississippi Conf. of NAACP*, 2011 WL 1870222, at *4 (suit filed March 17, 2011, legislature adjourned without plan April 7, 2011, candidate qualification deadline June 1, 2011); *Smith*, 189 F. Supp. 2d at 502. Here, candidates are not even allowed to begin circulating nominating papers until April 15, 2022, eight months from now, and the deadline is not until June 1, 2022, nine and a half months from now. Compl. ¶37. Plaintiffs will have ample time to re-file should it become

"apparent" sometime in the future that both the political branches and the Wisconsin courts cannot redistrict in time for next year's deadlines. *Growe*, 507 U.S. at 36. In the meantime, there is no constitutional basis for Plaintiffs to demand that a federal court impose a redistricting "schedule" upon every branch of the Wisconsin state government. Compl., p. 16.

* * *

Plaintiffs ask this Court to "invoke jurisdiction, set a deadline, and wait." *Mayfield*, 206 F. Supp. 2d at 826. That is at odds with the limited judicial power of the federal courts and at war with the primacy of the State in redistricting. Plaintiffs will say that their file-wait-and-see approach is what the Supreme Court anticipated in *Growe*. That makes no sense. *Growe*—a case directing federal courts to stay their hand while States redistrict—is not a vehicle for enlisting federal supervision from the moment the redistricting process begins. *See Mayfield*, 206 F. Supp. 2d at 825 ("[W]e think it inconsistent with the precepts of *Growe* to say that the decision is an endorsement of a federal court's invocation of jurisdiction in a suit brought with no election pending and before the state's legislature has even had an opportunity to act. Instead, *Growe* appears to teach us that, first and foremost, it is the state's responsibility to apportion its own federal congressional and state legislative districts."). Only a dismissal of Plaintiffs' premature federal litigation can stop the continuing race to federal courthouses that *Growe* criticized decades ago. Retaining jurisdiction will only further entrench the federal courts in the State's redistricting process from the day the process begins, rather than give the State branches the dignity to allow redistricting to play out.

Plaintiffs have merely predicted that the political branches will eventually fail. But they have not alleged that every branch of the Wisconsin government (including its courts) have failed or will fail imminently. Plaintiffs' claims are thus "not ripe for adjudication" since they "res[t] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation marks omitted). Plaintiffs' suit should be dismissed.

II. There Is No Article III Case or Controversy for this Federal Court to Decide.

The Court should also dismiss Plaintiffs' suit because Plaintiffs have no Article III standing. Their alleged voter dilution injury and associational injury are entirely speculative. They have failed to adequately allege that Wisconsin will not be able to timely establish reapportioned districts as it plans to do so. Any ruling on Plaintiffs' claims would be impermissibly advisory.

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)). 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*, 568 U.S. at 409 (quotation marks omitted); *DaimlerChrysler*, 547 U.S. at 344 (quotation marks omitted). "Allegations of a *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (quotation marks omitted).

Applying Article III's familiar standing rules here, Plaintiffs' alleged voter dilution injury is too conjectural and hypothetical. Even if new census data shows that old legislate districts are malapportioned, that "does not necessarily mean a federal court should step in to rewrite" the current districting plans. *Arrington*, 173 F. Supp. 2d at 860; *see also Reynolds*, 377 U.S. at 586 ("judicial relief" for malapportionment "becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in timely fashion after having had an opportunity to do so"). The mere fact of malapportionment is not enough.[5] *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (party

[5] Indeed, malapportionment complaints have been dismissed for failure to state a claim even in instances when malapportionment is conceded. *See, e.g.*, *Political Action Conf. of Ill. v. Daley*, 976 F.2d 335, 341 (7th Cir. 1992); *Mac Govern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986). That is because *Reynolds* does not require "daily, monthly, annual or biennial reapportionment, so long as a state has a

must show "not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement"). Plaintiffs must "assert an injury that is the result of the statute's actual or threatened *enforcement*, whether today or in the future." *California v. Texas*, 141 S. Ct. 2104, 2114 (2021); *see also Poe v. Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.) (federal courts "cannot be umpire to debates concerning harmless, empty shadows"). Here, they have not. Plaintiffs have not plausibly alleged that the existing districts will actually be used again, such that their votes could be unconstitutionally diluted. *See Prairie Rivers Network*, 2 F.4th at 1008.

Plaintiffs' conclusory allegations predicting that Wisconsin's political branches face "near-certain" failure are insufficient. For starters, Plaintiffs have not also alleged "near-certain" failure by the state courts, which would be the next stop for redistricting before old districts would ever be used again. *See Jensen*, 639 N.W.2d at 542; *see also Growe*, 507 U.S. at 33-34. Additionally, Plaintiffs' other allegations contradict any notion that Plaintiffs face "certainly impending" harm. *Clapper*, 568 U.S. at 409. Plaintiffs admit that "Wisconsin is entering a new redistricting cycle." Compl. ¶33. Plaintiffs admit that "[t]he Wisconsin Constitution *requires* the Legislature to draw new legislative lines" after the census. *Id.* ¶36 (emphasis added). And Plaintiffs admit that the next election deadline is not until June 1, 2022, *id.* ¶37, when candidates must file nomination papers for primary elections that will not take place until next August.

Plaintiffs have not come close to alleging "a realistic danger" that the old districts will be used again. *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979); *see also Clapper*, 568 U.S. at 413 (expressing "reluctan[ce] to endorse standing theories that require guesswork as to how independent

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reasonably conceived plan for periodic readjustment of legislative representation." *Reynolds*, 377 U.S. at 583-84.

decisionmakers will exercise their judgment"). Plaintiffs therefore have no Article III injury, and Counts I and II for unconstitutional malapportionment should be dismissed.

2. Likewise, Plaintiffs' alleged First Amendment injury is pure conjecture. Plaintiffs allege "delays…threaten to violate" their First Amendment rights. Compl. ¶4. They assert that it is "significantly unlikely" that redistricting will be on time and that a delay "is likely" to burden their First Amendment rights, without further explanation. *Id.* ¶53. For all of the foregoing reasons—chief among them that Plaintiffs filed suit on Day 1 of redistricting—Plaintiffs' allegations about future redistricting delays have failed to cross over from the possible to the plausible. *See Prairie Rivers Network*, 2 F.4th at 1008. The alleged First Amendment injury is nebulous, not "palpable," and is too far off in the future for Article III purposes. *Valley Forge Christian College v. Amer. United for Separation of Church & State*, 454 U.S. 464, 475 (1982); *see Clapper*, 568 U.S. at 414. Accordingly, Count III should also be dismissed for lack of standing.

III. Plaintiffs Fail to State a Claim for Violation of Any Associational Rights.

Count III of Plaintiffs' complaint should also be dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Plaintiffs allege that redistricting delays "threaten to violate Plaintiffs' right to associate under the First and Fourteenth Amendments to the U.S. Constitution." Compl. ¶4. If redistricting comes too close to the June 2022 filing deadline, according to Plaintiffs, it "will substantially interfere with Plaintiffs' ability to associate with like-minded citizens, educate themselves on the positions of their would-be representatives, and advocate for the candidates they prefer." Compl. ¶37; *see id.* ¶52 (alleging that "[i]mpeding candidates' ability to run for political office" also impedes "Plaintiffs' ability to assess candidate qualifications and positions, organize and advocate for preferred candidates, and associate with like-minded voters"). In particular, Plaintiffs fear their alleged right "to associate with others from the same lawfully apportioned legislative and congressional districts" will be unconstitutionally burdened. *Id.* ¶53.

The First Amendment's protection of an "individual's freedom to speak, to worship, and to petition the government for the redress of grievances" includes the "correlative freedom to engage in group effort toward those ends"—the right to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). In the political arena, the First Amendment protects the right of citizens "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Burdens on that right to associate "can take a number of forms" (but none bearing any resemblance to Plaintiffs' claims here). *Roberts*, 468 U.S. at 622. For example, the government might burden associational rights by regulating a political party's internal processes or by compelling unwanted association with outsiders or by requiring disclosure of membership in an anonymous group. *See Jones*, 530 U.S. at 573, 577; *Roberts*, 468, U.S. at 622-23.

Here, Plaintiffs' allegations that redistricting may (or may not) burden their right to associate do not pass the smell test. For any one of the following reasons, the claim should be dismissed.

First, Plaintiffs' complaint fails to articulate what possible burden redistricting places on Plaintiffs' right "to associate with like-minded citizens" or "educate themselves" or "advocate" for candidates. Compl. ¶37. Redistricting plans place "no restrictions on speech, association, or any other First Amendment activities." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). Rejecting plaintiffs' First Amendment claim in *Rucho*, the Supreme Court explained that "plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Id. Rucho* forecloses any associational claim here too. Redistricting maps, either those existing or forthcoming, do not stop Plaintiffs from associating with anyone.

Second, Plaintiffs' complaint cites *Anderson v. Celebrezze* for the inapposite proposition that the "exclusion of candidates…burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." 460 U.S. 780, 787-88 (1983); *see* Compl. ¶37. *Anderson* is a

ballot-access case involving discriminatory treatment of Independent candidates. 460 U.S. at 782-83. It has nothing to do with redistricting. *Anderson* itself disclaims that every election law "imposes constitutionally-suspect burdens on voters' rights to associate or to choose among candidates," even though such laws "inevitably affec[t]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id.* at 788. To the extent anything can be gleaned from *Anderson*, it is that "there must be substantial regulation of elections" and "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* Applied here, the reapportionment process is not even a restriction on the right to associate, let alone a "constitutionally-suspect" one. *Id.*; *Rucho*, 139 S. Ct. at 2504. The effects of redistricting affect everyone, every decade, and are "a necessary side effect of an electoral scheme that must evolve to fit the ever-changing footprint of the nation's citizenry." *Tripp v. Scholz*, 872 F.3d 857, 872 (7th Cir. 2017). *Anderson* lends no support to Plaintiffs' meritless associational claim.

Third, Plaintiffs' alleged right to associate with "others from the same lawfully apportioned legislative and congressional districts" makes little sense. Compl. ¶53. Legislative districts are not akin to political parties or charitable organizations. Plaintiffs have no associational right to be in one district or another—or at least no right that is justiciable. For example, a voter's claim that her right to associate with like-minded Democrats is burdened because a redistricting plan places her in a more Republican district is non-justiciable. *See Rucho*, 139 S. Ct. at 2504-05. Similarly here, it stretches the imagination that Plaintiffs could articulate any justiciable claim that they have a right to associate with an unknown group of future fellow constituents, which has been burdened somehow by the redistricting process.

Finally, Plaintiffs have not alleged that this unrecognizable First Amendment right is presently violated, or that it will be imminently violated. At most, Plaintiffs have alleged that their rights might (or might not) be affected at some uncertain point in the future—that redistricting delays might

"threaten" their alleged First Amendment rights later. Compl. ¶4, *see also id.* ¶¶37, 52. Discussed above, Plaintiffs' allegations about redistricting delays are mere predictions. Part I.B, *supra*. Primary elections are a year away; there are no allegations that redistricting has stalled; and even if it were to stall, the Wisconsin courts are fully capable of resolving an impasse. Resting only on a prediction, Plaintiffs' associational claim should be dismissed. *See Trump*, 141 S. Ct. at 536.

* * *

The First Amendment does not have a yet-undiscovered redistricting deadline. Neither existing redistricting plans nor forthcoming redistricting plans will infringe Plaintiffs' right to associate with whomever they choose. *See Rucho*, 139 S. Ct. at 2504; *see also Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election L.*, 781 F. Supp. 394, 401 (D. Md. 1991) (noting plaintiffs "are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives"), *aff'd*, 504 U.S. 938 (1992); *Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (1988) (rejecting claim that redistricting "regulates [voters'] speech or subjects them to any criminal or civil penalties for engaging in protected expression"), *aff'd*, 488 U.S. 1024 (1989). The State of Wisconsin has a "reasonably conceived plan for periodic readjustment of legislative representation." *Reynolds*, 377 U.S. at 583. And of all the allegations in Plaintiffs' complaint, the Constitution's only concern at this time is that the State of Wisconsin be allowed to carry on with that plan unencumbered by the federal courts.

CONCLUSION

For the foregoing reasons, the Legislature respectfully requests that this Court dismiss Plaintiffs' complaint in its entirety.

Dated: August 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I served this document as part of the Legislature's motion to intervene. *See* Fed. R. Civ. P. 24(c). I certify that I electronically filed the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case. I further certify that I mailed the foregoing document to counsel for the named Defendants, who have not yet appeared in this case. *See* Fed. R. Civ. P. 5(b).

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