UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, *and* Kathleen Qualheim,

Plaintiffs,

Billie Johnson, Eric O'Keefe, Ed Perkins, *and* Ronald Zahn,

Proposed Intervenor-Plaintiffs,

v.

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

Defendants,

The Wisconsin Legislature,

Intervenor-Defendant,

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, *and* Scott Fitzgerald,

Proposed Intervenor-Defendants.

Case No. 3:21-cv-512-jdp-ajs-eec

CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD'S MEMORANDUM IN SUPPORT OF THEIR PROPOSED MOTION TO DISMISS

INTRODUCTION

Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald, who are also probable candidates for re-election to the U.S. House of Representatives in 2022 (hereinafter "the Congressmen"), join the core argument for dismissal raised by Intervenor-Defendant the Wisconsin Legislature (hereinafter "the Legislature"): under *Growe v. Emison*, 507 U.S. 25 (1993), this Court lacks authority to adjudicate Plaintiffs'

lawsuit until the Legislature *and* the Wisconsin courts have had the opportunity to complete the crucial task of redistricting themselves. So, even if the Legislature and the Governor do not settle upon an equally populous congressional map, "the next stop would be the Wisconsin courts, not the federal courts." Dkt.9-3 at 7.

The Congressmen file this motion to invoke an additional doctrine that requires dismissal here, for much the same reasons: *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *E & E Hauling, Inc. v. Forest Preserve Dist. of DuPage Cty.*, 821 F.2d 433 (7th Cir. 1987). The Wisconsin state courts are fully available to adjudicate the equal-population-based, congressional-redistricting claim that Plaintiffs raise here—under analogous federal and state-law equal-population requirements—should a deadlock between the Governor and the Legislature occur, and thus this Court should dismiss this case under the *Burford* abstention doctrine. Any other approach would reward Plaintiffs for their unabashed efforts to forum-shop their way around the Wisconsin Supreme Court, in particular, contrary to *Growe*'s and the *Burford* abstention doctrine's core principles of federalism and comity.

This Court should dismiss Plaintiffs' Complaint, allowing the Wisconsin state courts to adjudicate this redistricting dispute, should a deadlock occur.

ARGUMENT

The Congressmen agree with and join the core argument raised by the Legislature in its Motion To Dismiss. Dkt.9-3. In particular, as the Legislature explains, *Growe* requires dismissal because "federal judges [must] 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 33–34 (emphasis omitted); Dkt.9-3 at 5. So, even if the Legislature and the Governor fail to adopt an equal-population congressional map—which is uncertain, given that the redistricting process only began days ago, the Governor has indicated his intent to participate with the formation of a redistricting commission, Dkt.1 ¶ 33, and Wisconsin has previously adopted bipartisan congressional maps, *Reapportionment Bill Becomes Law*, Wis. State J., Nov. 16, 1971, § 1, at 4*—Plaintiffs' case would still be fatally premature since "the next stop would be the Wisconsin courts, not the federal courts," Dkt.9-3 at 7 (citing *Growe*, 507 U.S. at 34, and *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)). Thus, *Growe* requires this Court to "stay[ ] its hand" and dismiss Plaintiffs' premature federal Complaint. *Growe*, 507 U.S. at 33 (citation omitted); Dkt.9-3 at 5–14. The Legislature's remaining motion-to-dismiss arguments are similarly meritorious. Dkt.9-3 at 15–17 (Plaintiffs lack standing for similar reasons); Dkt.9-3 at 17–20 (Plaintiffs' third count fails to state a freedom-of-association claim).

To avoid duplicating the Legislature's briefing, the Congressmen add only that the *Burford* abstention doctrine provides an additional reason for dismissing Plaintiffs' Complaint.

Under *Burford* abstention, a federal court should abstain from exercising jurisdiction and dismiss a suit "[w]here timely and adequate state-court review is available" and where one of two general bases are present: the case involves "difficult

* Available at https://bit.ly/38o8WZF (last accessed Aug. 30, 2021) (all websites last accessed Aug. 30, 2021).

questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," *or* the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial concern." *New Orleans Pub. Serv., Inc. ("NOPSI") v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (citation omitted); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996); *accord Nelson v. Murphy*, 44 F.3d 497, 500–01 (7th Cir. 1995) (clarifying that agency proceedings are not necessary to the application of *Burford*). The Supreme Court's case law does not "provide a formulaic test for determining when dismissal under *Burford* is appropriate," *Quackenbush*, 517 U.S. at 727–28, since "the various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," *NOPSI*, 491 U.S. at 359–60 (citation omitted). Rather, abstention under *Burford* is appropriate whenever deference to timely and adequate state-court review would promote "'principles of federalism and comity,'" even if *Burford*'s two general bases are not strictly satisfied. *See Quackenbush*, 517 U.S. at 727–28 (quoting *Growe*, 507 U.S. at 32); *accord SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 677 (7th Cir. 2010). "Ultimately, what is at stake is a federal court's decision . . . that the State's interests are paramount and that a dispute would be best adjudicated in a state forum." *Quackenbush*, 517 U.S. at 728.

Here, this Court should abstain under *Burford* and dismiss this case, since the Wisconsin state courts are fully available to provide timely and adequate review of Plaintiffs' redistricting claims resulting from changes in Wisconsin's population.

As an initial matter, the Wisconsin state courts are fully "available" to provide "timely and adequate state-court review" to the equal-population claims that Plaintiffs bring here, *NOPSI*, 491 U.S. at 361, which claims are of "paramount" importance to the core sovereign interests of the State under *Burford*, *Quackenbush*, 517 U.S. at 728; *accord Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542–43 (Wis. 2002) (per curiam) ("critical legal and political issues that surround redistricting").

Currently pending before the Wisconsin Supreme Court is *Johnson v. Wisconsin Elections Commission*, No.202AP1450-OA (Wis. *pet. filed* Aug. 23, 2021), a petition for original action brought by a group of Wisconsin voters raising analogous equal-population claims as Plaintiffs, under the Wisconsin Constitution. *Compare* Dkt.21-4 at 1, *with* Dkt.1 at 15–16. The Wisconsin Supreme Court in the past has indicated its willingness to grant original-action petitions raising redistricting claims like those of the *Johnson* Petitioners, at least where its review would not produce "an unjustifiable duplication of effort and expense" in light of a *more-developed* federal action. *Jensen*, 639 N.W.2d at 541–43; Order, *In re Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Related to Redistricting)*, Rule Pet. No. 20-03 (Wis. May 14, 2021) (hereinafter "Rule Pet. No. 20-03 Order").† As the Wisconsin Supreme Court has explained, "[t]here is no question" that redistricting lawsuits "warrant[ ] th[e] court's original jurisdiction," since "any reapportionment or redistricting case is, by definition, publici juris, implicating the sovereign rights of the people of th[e] state."

† Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=368630.

Jensen, 639 N.W.2d at 542; Rule Pet. No. 20-03 Order at 5 (reaffirming that redistricting challenges "often merit th[e] court's exercise of its original jurisdiction"). The redistricting process raises "critical legal and political issues" for the State, and "[t]he people . . . have a strong interest in a redistricting map drawn by an institution of *state* government—ideally and most properly, the legislature, secondarily, th[e] court." *Jensen*, 639 N.W.2d at 542 (emphasis added).

Even if the Wisconsin Supreme Court declines the original-action petition in *Johnson*, the Wisconsin state courts would still be available to complete "timely and adequate state-court review" of the redistricting claims raised by Plaintiffs here. *NOPSI*, 491 U.S. at 361. Specifically, under 2011 Wisconsin Act 39, enacted in 2011, Wisconsin adopted specialized redistricting procedures for plaintiffs to bring redistricting disputes to the state courts as of right. Under Act 39, Wisconsin law authorizes a three-judge panel of Wisconsin judges to hear redistricting challenges and enables litigants to petition the Wisconsin Supreme Court directly to review orders of that panel. 2011 Wis. Act 39, §§ 28–29 (creating Wis. Stat. §§ 751.035 & 801.50(4m)). Thus, Section 801.50(4m) provides that "[v]enue of an action to challenge the apportionment of any congressional or state legislative district shall be as provided in [Wis. Stat.] s. 751.035." Wis. Stat. § 801.50(4m). Section 751.035, in turn, states that "the supreme court shall appoint a panel consisting of 3 circuit court judges to hear" any action challenging apportionment under Section 801.50(4m), with "one judge from each of 3 circuits." Wis. Stat. § 751.035(1). And Section 751.035 also provides that "[a]n appeal from any order or decision issued by the [three-judge] panel

. . . may be heard by the supreme court and may not be heard by a court of appeals for any district." Wis. Stat. § 751.035(3). Should the Wisconsin Supreme Court reject the *Johnson* petition, there is little doubt that Wisconsin voters would bring identical redistricting claims to a three-judge panel under Act 39, as of right.

Given that the Wisconsin state courts are available to adjudicate timely and adequately Plaintiffs' equal-population-based redistricting concerns, this Court should abstain under *Burford* and dismiss this case because Plaintiffs' claims satisfy both general bases supporting *Burford* abstention. And even if neither of *Burford*'s general bases applied, abstention would still be appropriate because it would further principles of comity and federalism. Therefore, there are three independent reasons for this Court to apply *Burford* abstention and dismiss this case, leaving Plaintiffs free to pursue their redistricting claims in the Wisconsin state courts.

First, this case satisfies *Burford*'s first general basis for dismissal, since Plaintiffs' redistricting claims raise "difficult questions of state law" that involve "policy problems of substantial public import whose importance transcends" any individual case. *NOPSI*, 491 U.S. at 361 (citation omitted). Plaintiffs' request that this Court adopt a new congressional redistricting map, after invalidating the prior map due to changes in Wisconsin populations, necessarily raises difficult and "critical legal and political issues" of state law, *Jensen*, 639 N.W.2d at 542, including how to balance the competing "traditional redistricting criteria"—such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts," and "avoiding contests between incumbent Representatives"—after population

equality has been achieved, *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014); *see also* Wis. Const. art. IV, §§ 4–5 (criteria for Wisconsin's State Assembly and State Senate Districts). The Wisconsin Supreme Court has not given robust guidance on these difficult state-law issues, in terms of how to balance these state-law traditional criteria. *See Jensen*, 639 N.W.2d at 539. Finally, there is no question that these state-law redistricting issues are of "substantial public import" that transcend this single case, *NOPSI*, 491 U.S. at 361 (citation omitted), since "[r]edistricting determines the political landscape for the ensuing decade and thus public policy for years beyond," *Jensen*, 639 N.W.2d at 540.

Second, this case also satisfies *Burford*'s second general basis for dismissal, since "the exercise of federal review" in this case and others "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361 (citation omitted). Wisconsin "can have only one set of [congressional] districts," so if this Court were to adopt redistricting maps in accord with Plaintiffs' request, this would disrupt the Wisconsin state courts' efforts to establish such maps in an analogous state-court action. *Growe*, 507 U.S. at 35. And, again, there is no doubt that redistricting is "a matter of substantial concern," *NOPSI*, 491 U.S. at 361 (citation omitted), since, as explained above, redistricting "determines the political landscape [in the state] for the ensuing decade and thus public policy for years beyond," *Jensen*, 639 N.W.2d at 540.

Finally, "'principles of federalism and comity'" independently counsel in favor of *Burford* abstention here, even if this Court concludes that this case does not satisfy

either of *Burford*'s two general bases, discussed above. *Quackenbush*, 517 U.S. at 727–28 (quoting *Growe*, 507 U.S. at 32); *accord SKS*, 619 F.3d at 677. "[R]eapportionment is primarily the duty and responsibility of the *State* through its legislature or other body, rather than of a *federal court*," *Growe*, 507 U.S. at 34 (citation omitted; emphases added); *accord Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *Rucho*, 139 S. Ct. at 2507–08, thus this Court abstaining under *Burford* directly furthers the vital principles of federalism and comity. Indeed, this Court deferring to the state courts is the only way to protect the "strong interest" of "[t]he people of [Wisconsin]" in having "a redistricting map drawn by an institution of *state* government—ideally and most properly, the legislature, secondarily, [the state supreme] court." *Jensen*, 639 N.W.2d at 542 (emphasis added).

Burford's principles of comity and federalism compel abstention for the additional reasons that Plaintiffs have attempted to forum-shop their way around the Wisconsin Supreme Court, contrary to *Growe*'s unambiguous holding. *Growe*, 507 U.S. at 34; *see Quackenbush*, 517 U.S. at 727–28; *accord SKS*, 619 F.3d at 677. *Growe* bars Plaintiffs from "rac[ing] to beat" the Wisconsin state courts to the redistricting "finish line" by preemptively filing a federal redistricting challenge before the state courts have the opportunity to consider such claims. *Growe*, 507 U.S. at 37. Such a strategy harms federalism and comity. *Id.* at 34 (citation omitted). Yet, that is the strategy that Plaintiffs have adopted here, without even attempting to plead "evidence" that the Wisconsin state courts "will fail timely to perform [their redistricting] duty." *Id.* at 33–34. As if to underscore the point, Plaintiffs' lead

counsel has already filed multiple other redistricting challenges in state courts this year, demonstrating that Plaintiffs simply do not wish to litigate this challenge in the *Wisconsin* state courts—subject to the final review of the Wisconsin Supreme Court, in particular—as a matter of cynical forum-shopping, despite *Growe*'s clear holding. *See* Declaration of Kevin M. LeRoy Decl. Ex. 1 (Compl., *Pennsylvania, Carter v. Degraffenreid*, No. 132 MD 2021 (Pa. Commw. Ct., filed Apr. 26, 2021)); Ex. 2 (Compl., *Louisiana, English v. Ardoin*, No. 2021-03538-C § 10 (La. Civ. Dist. Ct., filed Apr. 26, 2021); Ex. 3 (Compl., *Minnesota, Sachs v. Simon*, No. 62-CV-21-2213 (Minn. Dist. Ct., filed Apr. 26, 2021)).

CONCLUSION

This Court should grant the Congressmen's Motion To Dismiss.

Dated: August 30, 2021

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2021, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

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