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

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

Plaintiffs,

v.

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

Defendants,

and

THE WISCONSIN LEGISLATURE,

Intervenor-Defendants.

Case No.: 3:21-cv-00512

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE WISCONSIN LEGISLATURE'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (the *Hunter* Plaintiffs) ask this Court to undertake a familiar task that federal courts in Wisconsin have done for decades: guarantee that political districts satisfy the federal Constitution's one person, one vote requirement after each decennial census, and prepare to draw new district maps in the likely event that partisan gridlock prevents Wisconsin's political branches from doing so themselves.

This suit is not novel. It is also far from "a direct attack on the Legislature's constitutionally delegated responsibility of redistricting," as the Legislature decries. Mem. in Support of Mot. to Dismiss ("Mem."), ECF No. 9-3 at 1. Even as this suit proceeds, the Legislature remains entirely free to redistrict and compromise with Governor Evers to enact new, lawful maps this cycle. As history demonstrates, however—and as Plaintiffs have alleged—there is no reasonable prospect at this point that Wisconsin's political branches will be able to do so in time for the 2022 elections. As a result, this litigation is also ripe.

Wisconsin voters are not required to wait around indefinitely for that reality to become even clearer. Filing deadlines and 2022 primary elections get closer by the day, and the Constitution's requirements are unforgiving: equally apportioned districts ***must*** be drawn following each decennial census and ***must*** be in place well in advance of the coming elections. Given this constitutional mandate and the fact that Plaintiffs' alleged injuries can be remedied only prospectively, it is imperative that this Court prepare for its anticipated involvement in the map-drawing process.

That is all that Plaintiffs' suit presently requires; it does *not* ask this Court to implement new maps before the state itself has a chance to act. As a result, this litigation is entirely consistent

with *Growe v. Emison*. The Legislature's contention that *Growe* created a silent jurisdictional rule requiring federal courts to dismiss impasse cases is entirely unsupported by both *Growe* itself and the cases that have followed in the decades since. To accept the Legislature's position would be to adopt novel and dangerous standards for impasse suits, under which courts would decline to exercise jurisdiction over these cases until the political branches have utterly failed to redistrict and the state court has similarly failed to break the impasse. These principles are not only inconsistent with precedent but would also functionally preclude federal courts from protecting the citizenry's federal constitutional rights by crafting remedial maps that meet the Constitution's one-person, one-vote standard in time for elections should the state fail to timely redistrict.

As decades of redistricting precedent confirms, now is the time for impasse redistricting litigation in Wisconsin. Plaintiffs have standing to sue. And their case is ripe. While the work of implementing Wisconsin's new political boundaries may be a time-intensive task, resolving this motion is not. This Court should swiftly deny it, accept jurisdiction, and prepare to implement new, constitutional maps for Wisconsin, as Wisconsin's federal courts have done in previous redistricting cycles, without delay.

BACKGROUND

Ten years ago, Wisconsin's political branches—then under unified Republican-control—implemented new congressional and legislative boundaries using then-recently published 2010 Census data. *See* Compl. ¶ 16. Ten years later, after a decade of population shifts, the 2020 Census confirmed that Wisconsin's congressional and legislative districts are now unconstitutionally malapportioned. *Id.* ¶ 23. Wisconsin's congressional districts, for instance, now show a population deviation of nearly 100,000 persons. *Id.* ¶ 26. This malapportionment requires Wisconsin's political boundaries to be redrawn.

Unlike the 2010 redistricting cycle, however, Wisconsin's political branches are no longer controlled by a single political party. This change is meaningful: Wisconsin requires the consent of both the Legislature and the Governor to enact redistricting plans, unless both legislative chambers override the Governor's veto by a two-thirds vote.[1] *Id.* ¶ 5 (citing *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 553-59, 126 N.W.2d 551, 557-59 (1964)). Consequently, the redistricting needed to alleviate the constitutional injury of malapportionment faces a significant obstacle: partisan deadlock. As Plaintiffs have alleged, "[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.

Wisconsin's redistricting impasses are traditionally resolved by federal courts. In the last four redistricting cycles, Wisconsin's political branches were split among partisan lines three times, and each of those times federal judicial intervention was necessary to break the impasse and implement redistricting plans. This included the matters of *Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001) (three-judge panel accepting jurisdiction of Wisconsin redistricting impasse suit); *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (three-judge panel ordering new reapportionment plans for Wisconsin in light of the 2000 Census when Wisconsin's divided political branches reached an impasse); *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992) (three-judge panel ordering new reapportionment plans for Wisconsin in light of the 1990 Census when Wisconsin's divided political branches reached an impasse); and *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982) (three-judge panel ordering new reapportionment plans for Wisconsin

[1] As Plaintiffs have alleged, the Republican-controlled Legislature lacks sufficient majorities to override a veto from Governor Evers. *See* Compl. ¶ 6.

in light of the 1980 Census when Wisconsin's divided political branches reached an impasse).

The *Hunter* Plaintiffs, just like the *Arrington* Plaintiffs who came before them, are registered Wisconsin voters who reside in now-overpopulated congressional and legislative districts and are consequently deprived of the right to cast an equal vote, as guaranteed to them by the U.S. Constitution. *See* Compl. ¶¶ 39-49. The present malapportionment and likelihood of impasse additionally infringes Plaintiffs' rights to associate with fellow voters and engage in the First Amendment-protected activities of assessing, supporting, and electing their representatives. *Id.* ¶¶ 50-54. Just as in *Arrington*, Plaintiffs ask the Court "to declare Wisconsin's current legislative and congressional district plans unconstitutional; enjoin Defendants from using the current district plans in any future election; and implement new legislative and congressional district plans that adhere to the constitutional requirement of one-person, one-vote should the Legislature and the Governor fail to do so." *Id.* ¶ 1.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 8(a)(2), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted). In the context of a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must "take all well-pleaded allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 934 (7th Cir. 2012) (cleaned up). So long as the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," a motion to dismiss should be denied. *Id.*

Similarly, in a facial challenge to the Court's jurisdiction under Rule 12(b)(1), as the

Wisconsin Legislature brings here, the Court considers whether the plaintiffs' allegations are sufficient to establish injury-in-fact. *See Apex Digital, Inc. v. Sears, Roebuck & Co*., 572 F.3d 440, 443–44 (7th Cir. 2009). "In reviewing a facial challenge, the court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Silha v. ACT, Inc*., 807 F.3d 169, 173 (7th Cir. 2015).

ARGUMENT

The Legislature cites two related doctrines—standing and ripeness—to suggest that the Complaint is not justiciable, but neither prevents this Court from hearing this case. There is no dispute that Wisconsin's current congressional and legislative districts, adopted by the Legislature ten years ago based on 2010 population data, are now unconstitutionally malapportioned. That the Legislature and Governor *might* compromise in an effort to yield new maps—a possibility that Plaintiffs allege is highly unlikely due to entrenched political divisions—does not erase the fact that Plaintiffs are currently living in overpopulated districts and face both imminent and ongoing constitutional injuries in light of this malapportionment.

Longstanding precedent establishes that this Court need not wait for Wisconsin's political branches to deadlock indefinitely before taking jurisdiction of this case. In fact, were this Court to wait to take jurisdiction until both the political branches *and* state court system had failed to implement new constitutional maps in time for the 2022 elections, as the Legislature urges, there would not be time for this Court to undertake the complicated work of crafting the necessary remedy. That is precisely why every federal court to take jurisdiction of Wisconsin's anticipated redistricting impasses in modern history did so well in advance of upcoming elections and candidate filing deadlines. This Court should do the same here.

The prerogatives of Wisconsin's state institutions will not be threatened by the Court's

exercise of its jurisdiction over this action. The Wisconsin Legislature and the Governor remain free to compromise and pass new redistricting plans during the pendency of this litigation. And Wisconsin's state courts will have the right to exercise jurisdiction over any parallel litigation (although those courts have historically chosen to defer to federal court proceedings). Moreover, while this Court should accept jurisdiction and *prepare* for the likely impasse, it need only *order* new plans when Wisconsin's state branches fail to do so. Notably, every time in the last four decades that Wisconsin's political branches have been divided as they are now, they have failed to come to an agreement and adopt constitutional maps in time, necessitating federal court intervention. There is no reason to believe that this cycle will culminate in a different result. Thus, accepting jurisdiction and preparing for that inevitability now is not only proper, but prudent. And doing so will not impede that political process in any way. It will simply ensure that *if* Wisconsin fails to timely redistrict, this Court will be able to avoid an otherwise certain severe and irreparable impairment of Plaintiffs' constitutional rights.

I. Plaintiffs' claims are familiar to Wisconsin's federal courts.

While the Legislature begins and ends its motion with a broadside attack against federal court involvement in Wisconsin's redistricting process, for decades federal courts have done precisely what is asked of this Court in this litigation as Supreme Court precedent compels it to do. Most importantly, the Legislature far overreads *Growe v. Emison*, 507 U.S. 25 (1993), which would apply (if at all) only once this Court reaches the remedial phase of this proceeding. *Growe* in no way compels "dismissal" of this case, as the Legislature urges. Mem. at 5-11. To the contrary, *Growe* supports concurrent jurisdiction of redistricting suits. In Wisconsin, in particular, federal

courts have a well-established role in the redistricting process.[2]

A. Wisconsin's federal courts have regularly heard and resolved malapportionment suits.

While the Legislature pretends it would be entirely novel and inappropriate for a federal court to hear an impasse claim such as this one, federal courts have taken the lead in resolving impasse disputes in Wisconsin's recent history. Indeed, three times in the past four decades—each time Wisconsin's political branches have been sharply divided—Wisconsin's federal courts have accepted jurisdiction of malapportionment claims that mirror the claims brought by Plaintiffs in this case.

Forty years ago, after the 1980 Census, plaintiffs filed a federal suit months before the close of the legislative session, anticipating impasse among Wisconsin's divided political branches. *See Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982). While that legislative session was still underway, the court readily accepted jurisdiction, declared the then-current apportionment scheme unconstitutional, enjoined the State Elections Board from giving any effect to the current districts, accepted proposals for new redistricting plans, and ultimately implemented new plans when Wisconsin's political branches failed to redistrict. *See id.*

Thirty years ago, after the 1990 Census, plaintiffs again filed a federal suit months before the close of the legislative session, anticipating impasse among Wisconsin's still-divided political branches. *See Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992). That court similarly assumed jurisdiction, expedited the case, and implemented new redistricting plans when

[2] Plaintiffs note that the Legislature filed a Motion to Dismiss, not a Motion to Stay Proceedings. Accordingly, the only issues before the Court are whether the Complaint presents a justiciable controversy and states a claim for relief. Should a Motion to Stay be filed, Plaintiffs anticipate expanding upon the arguments in this section, which are presented to provide the Court with relevant historical context.

Wisconsin's political branches failed to redistrict. *See id.*

Twenty years ago, post-*Growe*, and before the official 2000 Census data had even been released, plaintiffs again filed lawsuits in federal court, anticipating impasse among Wisconsin's still-divided political branches. *See Arrington*, 173 F. Supp. 2d at 856; *see also Baumgart*, 2002 WL 34127471 at *1. The court took jurisdiction, held the current districts unconstitutional, enjoined the defendants from using the political boundaries then in place, and later held a trial and implemented new redistricting plans when Wisconsin's political branches failed to redistrict. *See Arrington*, 173 F. Supp. 2d at 867; *Baumgart*, 2002 WL 34127471 at *8. Recognizing the federal trial court's advanced proceedings and comparative advantage in judicial factfinding, the Wisconsin Supreme Court explicitly chose to defer to the federal court altogether in that redistricting cycle. *See Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537 (Wis. 2002).

In light of this history, the Wisconsin Supreme Court in *Jensen* went so far as to note that, "the reality [is] that redistricting is now almost always resolved through litigation rather than legislation." *Id.* at 713. Moreover, the *Jensen* Court noted that Wisconsin's redistricting litigation was almost always of a federal nature, observing that the last time Wisconsin's state courts were involved in redistricting was in 1964. *See id.* at 711. While the *Jensen* Court did not write off the possibility of exercising jurisdiction over redistricting matters in the future, it recognized the important and historical role that federal courts play in the process, stating, "federal and state courts have concurrent jurisdiction to decide the federal and state constitutional and statutory issues presented by redistricting litigation." *Id.* at 710.[3]

[3] A petition for original jurisdiction is currently pending before the Wisconsin Supreme Court but has not yet been accepted. *See Johnson v. Wisconsin Election Commission*, No. 2021AP001450 (Wis. 2021).

That role has not changed in the years since *Jensen* and *Arrington*. While Wisconsin's federal courts did not need to break an impasse in the last redistricting cycle (the first in forty years in which Wisconsin's political branches were under unified political control, *see* Compl. ¶ 32), federal courts in other jurisdictions have continued to decide these kinds of cases post-*Growe*, breaking impasses where necessary to protect voters' constitutional rights. *See, e.g.*, *Favors v. Cuomo*, 866 F. Supp. 2d 176 (E.D.N.Y. 2012); *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. Jan. 15, 2002); *Colleton County Council v. McConnell*, No. 3:01-cv-3581, 201 F. Supp.2d 618 (D. S.C. Mar. 20, 2002). Now that Wisconsin has returned to sharply divided government, and the likelihood of impasse is high, *see* Compl. ¶ 33, this Court must prepare to act again to ensure that Wisconsin citizens will have a constitutional map in time for the 2022 elections.

B. *Growe* supports this Court's jurisdiction of impasse claims.

Ignoring the history and precedent described in Section I-A, the Legislature boldly proclaims that *Growe v. Emison*, 507 U.S. 25 (1993), requires this Court to dismiss this case. *Growe* does no such thing.

Plaintiffs readily concede that *Growe* does impose limits on the timing and scope of the *remedies* that federal courts may provide in the redistricting process. In *Growe*, the district court overstepped its bounds by "actively prevent[ing] the state court from issuing its own congressional plan," even though the state court at issue—the Minnesota Special Redistricting Panel—was prepared to act. 507 U.S. at 26. *Growe* thus stands for the principle that federal courts should not proceed to actually reapportion a state's political boundaries until the state has failed to timely redistrict. But the Legislature is wrong to suggest that *Growe* held that the federal court "tie[d] the State's hands" by simply *hearing* the case. Mem. at 5. Instead, the opinion is clear that the problem arose because the federal panel did much, much more than simply hear the case. In fact, the district

court at issue in *Growe* repeatedly took affirmative action that very clearly and effectively *halted* the state proceedings, including by: (1) *staying* the Minnesota Special Redistricting Panel's proceedings, (2) *enjoining* the parties to the state proceedings from implementing the Minnesota Panel's remedial redistricting plan, and (3) proceeding to *adopt* its own districting plans even when the state court was otherwise ready to timely implement a plan. 507 U.S. at 26. Under those circumstances, it was not surprising that the Supreme Court held that the district court *had* improperly "tied the hands" of a state that was willing and able to redistrict.

But *Growe* plainly does not stand for the principle that federal courts *lack jurisdiction* over redistricting impasse suits. To the contrary, *Growe* supports concurrent jurisdiction among state and federal courts in hearing redistricting suits. As *Growe*'s author instructed in explaining what *should* have happened in that case, "[i]t would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed." 507 U.S. at 36.[4] Of course, the district court could not have established such a deadline if it did not have jurisdiction in the case, and in fact no party in *Growe* contested the federal court's "jurisdiction to consider the complaints before [it]." *Id.* at 32. For that reason, among others, it is not plausible that *Growe* established a "rule" precluding federal court jurisdiction of these suits, as the Legislature repeatedly implies. Mem. at 5-7.

These same passages in *Growe* directly refute the Legislature's argument that "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." Mem. at 14. As demonstrated, that is

[4] As Justice Scalia similarly explained, it would also have been appropriate for the district court to "adopt[] its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries." *Growe*, 507 U.S. at 36.

precisely what *Growe* (and its predecessor, *Scott v. Germano*, 381 U.S. 407 (1965)), permit federal courts to do. In *Germano*, when it was not clear whether Illinois would produce timely redistricting plans, the Supreme Court remanded the case to the district court with explicit instructions to (1) "enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate"; (2) "retain jurisdiction of the case"; and (3) "in the event a valid reapportionment plan for the State Senate is not timely adopted . . . enter such orders as it deems appropriate, including an order for a valid reapportionment plan[.]"381 U.S. at 409-10. As discussed, *Growe* similarly instructed future federal courts "to establish a deadline by which, if the [state court does not act], the federal court would proceed." 507 U.S. at 36. If anything, communicating such a deadline shows deference to state courts, providing them with the first opportunity to act, only after which will a federal court implement a remedy of its own.

The upshot is that *Growe* has limited applicability to the present motion to dismiss. Had Plaintiffs sought a preliminary injunction and asked this Court to implement redistricting plans before Wisconsin's political branches had a chance to act, the Legislature's repeated invocation of *Growe* would make sense. But that is not what Plaintiffs have asked this Court to do. Instead, respecting *Growe*'s holding, and consistent with four decades of Wisconsin redistricting precedent, Plaintiffs simply ask that this Court accept jurisdiction, find that Wisconsin's current districts are presently unconstitutionally malapportioned, enjoin the Defendants from giving effect to the *existing* unconstitutional maps, and establish a schedule that will permit this Court to implement new, constitutional maps "*should the political branches fail to enact plans*" in time for the 2022 elections. Compl. Prayer for Relief (emphasis added). Plaintiffs' requests are entirely consistent with *Growe*.

II. The malapportionment claims are justiciable.

A. Plaintiffs have alleged substantial risk of impasse and injury to their constitutional rights.

The Legislature does not contest that violations of the fundamental "one person, one vote" principle, otherwise known as malapportionment, create a judicially cognizable injury. Nor could it credibly do so. Article I, Section 2 of the federal Constitution requires congressional districts to be as equivalent in population as possible "to prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). And the Fourteenth Amendment requires state legislative districts to be apportioned on an equal population basis after the decennial census to ensure a state's citizens have a right to an undiluted vote in the election of their state representatives. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

As longstanding malapportionment precedent (and specifically, malapportionment impasse precedent) confirms, Plaintiffs have adequately alleged the now well-established building blocks of standing for such a claim.[5] They are voters who live in overpopulated congressional and legislative districts and who have plausibly alleged a high likelihood of impasse among the political branches. Compl. ¶¶ 14, 31. Their claims are accordingly ripe, and they have standing to bring this action at this time. The Legislature is wrong to suggest that Plaintiffs must wait until their injury is fully sustained before filing suit.

It has long been understood that "a plaintiff who challenges a statute must demonstrate" only "a *realistic danger* of sustaining a direct injury as a result of the statute's operation or

[5] While the Legislature repeatedly cites "impasse" precedent outside of the redistricting context, *see* Mem. at 10-11 (citing *Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755, 772 (D.C. Cir. 2020), and *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029 (2020)), such cases are wholly inapplicable to the question of standing in a *redistricting* impasse suit, which concerns impeding injuries to voters' constitutional rights. *McGahn* and *Mazars*, by contrast, raise questions about the scope of the separation of powers.

enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added). Applying this principle, courts have found that, in this specific kind of suit, challenges to districting laws may be brought "upon the release of new decennial census data," and, most importantly, "before reapportionment occurs." *Arrington*, 173 F. Supp. 2d at 860 (quotation marks and citation omitted). Courts are routinely called upon to act in situations like this one, and the U.S. Supreme Court has repeatedly recognized that they must act in these circumstances. As the Supreme Court explained decades ago:

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

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964). So too here. Whatever possibility exists in the Legislature's imagination that Wisconsin's divided political branches might come to an agreement and enact a new plan, that prospect does not change the fact that the existing plan is malapportioned and that Plaintiffs will suffer constitutional injury should that impasse occur, as expected and alleged.[6]

Arrington, a nearly identical case to this one, is instructive. In *Arrington*, voters residing in districts predicted to be overpopulated based on population estimates filed a federal suit alleging malapportionment on February 1, 2001—more than a month before the Census Bureau sent Wisconsin its official 2000 census data (that is, well before the comparative point that Plaintiffs filed their case)—and before Wisconsin's divided political branches had begun to attempt to

[6] That Wisconsin successfully redistricted itself in 2011, when it was under unified Republican control, as the Legislature repeatedly reminds this Court, Mem. at 9, is both unsurprising and irrelevant to this case.

redistrict. *See* Compl., *Arrington v. Wis. Election Bd.*, No. 2:01-cv-121, ECF No. 1 (E.D. Wis. Feb. 1, 2001). Like the *Hunter* Plaintiffs, the *Arrington* plaintiffs specifically alleged (1) that certain districts were overpopulated, causing the plaintiffs to experience underrepresentation, and (2) that there was "no reasonable prospect" that Wisconsin's branches would compromise to pass timely redistricting plans. *See id.*

Several months later, in November 2001, but still well before the Legislature had "failed" to redistrict, the panel found that the plaintiffs had standing to assert their impasse claims and that their claims were ripe. *Arrington*, 173 F. Supp. 2d at 860-64. The majority explained that plaintiffs had identified a specific injury (*i.e.*, underrepresentation as a result of malapportionment), and that if the elections that were scheduled occurred as planned, those districts would cause them injury. *Id.* at 859-60. The court declined to "dismiss the plaintiffs' complaint and wait to see if the legislature enacts its own districting plan in a timely fashion," *id.* at 865, as the Legislature urges here. Instead, it found "that the complaint as filed does present a justiciable case or controversy," recognizing that challenges to district lines may be brought "upon the release of new decennial census data"—"that is to say, before reapportionment occurs," *id.* at 860 (quotation omitted), just as Plaintiffs have done here.

The *Arrington* court further acknowledged that, under *Growe*, it was required to give the Legislature and the state courts an opportunity to redraw the district lines in the first place before implementing a remedy. *Id.* at 860. But that fact did not deprive the panel of subject-matter jurisdiction. To the contrary, as the court explained, the plaintiffs had demonstrated a realistic threat to their voting rights by showing that "as the law stands today, their voting rights will be diluted in the 2002 congressional elections," and the then-current "partisan division between the state senate and state assembly" made it such that "there is no reasonable prospect that the state

legislature will be able to create a valid plan of apportionment before the Elections Board is required to prepare for the 2002 elections." *Id.* at 862. Similarly, the court found that the claims were ripe because the Elections Board was required under state law to hold elections under whatever existing districting plan was in place at the time. *Id.* at 864-65. The chance that the State would successfully implement its own redistricting plan warranted a pause before the court would implement relief, but it did not support dismissal. *Id.* at 865-66.

The Legislature offers no attempt to distinguish *Arrington* other than to emphasize that one member of the panel dissented from the majority's jurisdictional ruling. *See* Mem. at 8, 12. But not only did Judge Easterbrook's dissent not carry the day, it is an outlier among four decades of Wisconsin authority, as Wisconsin's federal panels before *Arrington* have agreed with *Arrington*'s majority that a state's political branches' failure to redistrict need not continue indefinitely before a court can take jurisdiction of an impasse claim. *See, e.g.*, *Wisconsin State AFL-CIO*, 543 F. Supp. at 630 (Wisconsin federal panel accepted jurisdiction, entered an order declaring the then-current reapportionment scheme unconstitutional, and enjoined the State Elections Board from preparing for or administering any elections using the old Senate and Assembly districts months before the Wisconsin legislative session ended); *Prosser*, 793 F. Supp. at 862 (Wisconsin federal panel took jurisdiction and expedited proceedings while legislative proceedings were still ongoing). And even if the dissent were persuasive authority, which it is not, it was motivated in large part by the fact that Wisconsin had lost a congressional district in the 2000 apportionment, and thus, in the dissent's view, it was not possible for Wisconsin to retain the same, malapportioned map as it had in the prior decade. *See id.* at 869 (explaining "Wisconsin could not conduct the elections under the existing plan even if it tried, because the current plan provides for nine representatives while the new apportionment allows only eight. . . . Because electing nine representatives is

inconceivable no matter what the court does, injury is missing and no decision of the court could (or is required to) redress the problem") (Easterbrook, J., dissenting). Those circumstances are not present here: Wisconsin had eight congressional districts this past decade, and it will have eight this coming decade. And Wisconsin has statutes on the books apportioning those congressional districts according to 2010 Census data, *see* Wis. Stat. §§ 3.11-3.18, that will remain in force until the political branches pass new apportionment statutes or a court enjoins their enforcement.

While the Legislature cites impasse cases in which it suggests the legislative process was further along than Wisconsin's process is today, *see* Mem. at 13, none of those cases stand for the principle that the political branches must have already failed to redistrict before the Court can take jurisdiction. In *Mississippi State Conference of N.A.A.C.P. v. Barbour*, for example, the court specifically held that the plaintiffs had "allege[d] an injury with a federal remedy sufficient to invoke our Article III jurisdiction" in May 2011, even though the court acknowledged that the "Mississippi Constitution allows the State until the end of the 2012 legislative session to complete redistricting of the Legislature"—that is, one year in the future from when the court accepted jurisdiction in that case. No. 3:11-cv-159, 2011 WL 1870222, at *5 (S.D. Miss. May 16, 2011) (three-judge panel), *aff'd*, 565 U.S. 972 (2011), and *aff'd sub nom. Mississippi State Conf. of N.A.A.C.P. v. Bryant*, 569 U.S. 991 (2013).[7] Similarly, while the Legislature invokes *Mayfield v. Texas*, 206 F. Supp. 2d 820 (E.D. Tex. 2001), for the proposition that the Legislature must be given an opportunity to act before this Court can take jurisdiction, *see* Mem. at 8, 12-14, it ignores that in *Mayfield*, the court found that the plaintiffs did not have standing in large part "because there is

[7] Notably, here, the Defendant Members of the Wisconsin Elections Commission have said that new congressional and state legislative district plans should be in place no later than March 1, 2022, less than six months from today. *See Answer of Defendants Marge Bostelmann, et al*. at ¶ 1, ECF No. 41 (Sept. 7, 2021).

no reason to believe that the Texas Legislature will fail to [redistrict]." 206 F. Supp. 2d at 824 (emphasis added). In contrast, Plaintiffs have specifically alleged that there is "no reasonable prospect that Wisconsin's political branches will reach consensus," and have supported that allegation with a detailed history of Wisconsin's repeated redistricting impasses, Governor Evers' promise to veto "bad" maps passed by the Legislature, the Legislature's structural inability to override Governor Evers' veto, and evidence of the growing hyper-competitive partisan environment in Wisconsin that will lead again to impasse. *See* Compl. ¶¶ 6, 31-38.[8]

These allegations are not cynical, as the Legislature implies. They are realistic and grounded in indisputable facts, and Wisconsin's federal courts have regularly found such allegations sufficient to invoke jurisdiction based on the likelihood of impasse. *See, e.g.*, *Prosser*, 793 F. Supp. at 862 (acknowledging "[b]oth houses of the Wisconsin legislature have a Democratic majority, but not a large enough one to override vetoes by the state's Republican governor"); *Arrington*, 173 F. Supp. 2d at 862 ("[Plaintiffs] allege that because of partisan division between the state senate and state assembly (and, presumably, the unusually political nature of redistricting), there is no reasonable prospect that the state legislature will be able to create a valid plan of apportionment . . . These are not unrealistic allegations."). And that is all that Plaintiffs must show—a "realistic danger" of impasse and constitutional violation, *Babbitt*, 442 U.S. at 298—which comprises a "relatively modest" burden at the pleading stage. *See Arrington*, 173 F. Supp. 2d at 862 (citing *Bennett v. Spear*, 520 U.S. 154, 171 (1997)). Plaintiffs have more than

[8] The *Mayfield* court also noted that the plaintiffs there had "concede[d] that they were not challenging the constitutionality of the existing districts." 206 F. Supp 2d at 823 n.4. In contrast, Plaintiffs are challenging the constitutionality of Wisconsin's existing districts, and seek both a declaration that the current districts are unconstitutional and an injunction precluding their use in the 2022 elections. *See* Compl. Prayer for Relief. This, too, meaningfully distinguishes *Mayfield* from the present case.

carried that burden.

B. Federal courts need not wait for state courts to fail before taking jurisdiction of impasse suits.

Contrary to the Legislature's suggestion, *see* Mem. at 14, there is simply no requirement for Plaintiffs to allege that the state court system has failed to break an impasse before the federal court can take jurisdiction of the case. The Legislature cites no binding authority finding such a requirement, and Plaintiffs are aware of none. Requiring federal plaintiffs to wait to file their case until a state court (in addition to the state's political branches) have failed to break an impasse would be inconsistent with existing redistricting precedent. More importantly, holding that federal courts do not have jurisdiction over impasse suits until state courts had failed would, in almost every circumstance, ensure that federal courts would not have enough time to act to protect Plaintiffs' constitutional rights from severe and irreparable harm before the election, should the state fail to enact a constitutional map in time.

As Plaintiffs have already described, *see supra* at 10-11, U.S. Supreme Court precedent demonstrates that federal and state courts can exercise concurrent jurisdiction over impasse suits. In both *Growe* and *Germano*, the Supreme Court explicitly instructed that, before any impasse occurs, federal courts may retain jurisdiction over redistricting suits, establish a deadline by which the state's branches (including the state court) must act, and adopt a plan if the state misses that deadline. *Growe*, 507 U.S. at 36; *Germano*, 381 U.S. at 409-10. The Court could have held that federal courts have no jurisdiction over these suits until the state courts fail to break an impasse; it did not do so. It held only that, where there are concurrent state and federal cases, federal courts lack the ability to offer full *remedial relief* until the state courts fail to redistrict by the previously set deadline. *See supra* at 9-11.

Wisconsin's federal courts, both pre- and post-*Growe*, have also explicitly refused to delay

hearing a redistricting case simply because a state court might also take jurisdiction of a related case. In *Wisconsin State AFL-CIO*, for example, the federal panel rejected an invitation to hold off hearing the case simply because the Governor had filed an original petition for jurisdiction in the Wisconsin Supreme Court. *See* 543 F. Supp. at 632. And just last redistricting cycle, in *Baldus v. Brennan*, the federal panel refused to decline jurisdiction of a redistricting suit simply because the Wisconsin Legislature had passed Act 39, which required that any challenge to Wisconsin's redistricting be brought to a panel of Wisconsin's circuit courts. *See* No. 11-CV-562, 2011 WL 5040666, at *2 (E.D. Wis. Oct. 21, 2011) (per curiam). As that federal panel explained, "a state may not define the contours of the jurisdiction of the federal courts," because "[t]he laws of the United States provide litigants with the right to bring a suit in federal court seeking redress for the violation of their civil rights under the United States Constitution." *Id.* at *3. Similarly, Plaintiffs have brought federal claims to a federal court seeking redress of their constitutional rights. The actions of Wisconsin's state courts cannot deprive this Court of its jurisdiction to hear Plaintiffs' case.

Perhaps most importantly, adopting the Legislature's novel view would functionally prohibit federal courts from taking jurisdiction of impasse cases until it is too late to offer any relief. Waiting to take jurisdiction of an impasse suit until it is apparent that a state court will not break the impasse itself would require waiting until the state's redistricting deadline has essentially come and gone. This would have serious consequences for federal courts' ability to offer plaintiffs relief for the clear and severe violation of federal constitutional rights. *See, e.g.*, *Flateau v. Anderson*, 537 F. Supp. 257, 262 (S.D.N.Y. 1982) (three-judge panel) ("If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured."). As

Flateau recognized, impasse suits, unlike most other suits that federal courts hear, cannot be fully remedied with a simple order and injunction; they require detailed remedial schemes that take time to develop. This often requires a trial. The *Baumgart* court, for example, received and considered no less than 16 proposed maps before implementing a constitutional map to break Wisconsin's impasse in 2002. *See Baumgart*, 2002 WL 34127471 at *4.

The foregoing discussion also reinforces why this case is ripe. The Seventh Circuit has explained that "ripeness determinations depend on 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Metro. Milwaukee Ass'n of Com. v. Milwaukee Cnty.*, 325 F.3d 879, 882 (7th Cir. 2003) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149, (1967)). Both considerations cut sharply in favor of Plaintiffs here. The hardship of withholding consideration of this case is severe; a delay would threaten Plaintiffs' ability to receive timely relief from this Court in the event of an impasse. At the same time, the issues presented in this case for this Court's immediate consideration are fit for judicial decision because they are primarily purely legal ones. *See Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998). No party, for instance, has seriously contested that Wisconsin's districts are malapportioned, and no party will seriously contest the one-person, one-vote standards which will apply to Wisconsin's new districts. It should thus be straightforward for this Court to accept jurisdiction of this case, declare Wisconsin's current districts malapportioned, enjoin their future use, and turn towards working on a remedial plan it would have to put into place in the likely event the state fails to timely redistrict.

These are among the many reasons that federal courts have regularly found that impasse plaintiffs have standing to pursue their claims and that their claims are ripe, well before the Legislature reaches an official impasse. The *Arrington* court, for instance, explained that

"disclaiming jurisdiction on ripeness grounds" until the state acts would put the court in tension with *Growe*. As that court reasoned, a federal court that has disclaimed jurisdiction of a case cannot set a deadline for the state to act (as *Growe* directed) because any such deadline would be "merely advisory" and, of course, "[f]ederal courts are prohibited from issuing advisory opinions." *Arrington*, 173 F. Supp. 2d at 865. Rather than engaging in the game of asking "'how long' must the court wait before allowing the plaintiffs to re-file," the *Arrington* court properly accepted jurisdiction, and, under its docket-management powers, established "a time when it would take evidence and adopt its own plan if the legislature had by then failed to act." *Id.*

The *Arrington* court's prudence on this issue is consistent with other courts' approaches from the last redistricting cycle in 2010. In *Favors v. Cuomo*, for instance, the federal panel specifically rejected the New York legislative defendants' contention that the impasse suit was not ripe until the legislative process had concluded. 866 F. Supp. 2d 176, 183-84 (E.D.N.Y. 2012). That court explained that "[t]he court must not wait to intervene until after such a disastrous scenario comes to pass." *Id.* Nor should this Court.

III. Plaintiffs' First Amendment claim is justiciable.

The Legislature's motion fundamentally misunderstands Plaintiffs' associational rights claim. Plaintiffs' claim is not that they will be injured based on which map is implemented or which district they are moved into. Instead, Plaintiffs are harmed by the *delay* in establishing a map for the 2022 election. Uncertainty and ambiguity surrounding the contours of Wisconsin's congressional and state legislative districts will substantially interfere with the kind of "orderly group activity" Plaintiffs wish to pursue to advance their political beliefs in the next election. *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). These activities are protected by the First and Fourteenth Amendments, *see id.*, and, in the absence of a timely redistricting plan, Plaintiffs will

be harmed in two key ways: their inability to (1) identify and support prospective candidates, and (2) identify and associate with like-minded voters.

In this way, Plaintiffs' First Amendment claim differs from the claim raised in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2504 (2019). What was at stake in *Rucho* (and what the Supreme Court rejected) was voters' ability to associate with others in their preferred district. What is at stake is here is Plaintiffs' ability to effectively associate *without clear districts at all*. The Legislature's motion does not engage with the harms resulting from the delay itself, and so it side-steps the question posed to this Court: Do plaintiffs alleging a burden to their ability to support candidates and associate with others in political expression state a claim under the First Amendment? Under a long line of associational rights cases, the answer is yes.

As the Seventh Circuit has recognized, the right to "form groups for the advancement of political ideas, as well as the freedom to campaign and vote for candidates" is a core associational right under the First Amendment. *Newcomb v. Brennan*, 558 F.2d 825, 828 (7th Cir. 1977). An untimely redistricting plan would pin Plaintiffs up against filing deadlines that harm their ability to organize around and campaign for candidates in the 2022 election. In Wisconsin, all congressional and state legislative candidates who wish to participate in primary elections must obtain signatures from *within* the "district which the candidate named on the paper will represent, if elected." Wis. Stat. § 8.15(3). Without a redistricting plan in place, Plaintiffs will have no way of knowing who to gather signatures from in support of their preferred candidates, which constitutes an obvious burden to their associational rights. *See Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (noting that tight registration deadlines "burden[] the signature-gathering efforts" of prospective candidates). Moreover, courts have recognized that the burdens of late-breaking redistricting plans are not distributed evenly. *See Favors*, 866 F. Supp. 2d at 185 (explaining

"insurgent candidates or political newcomers[] will be significantly prejudiced if no districting plan is in place"). Even if candidates in Plaintiffs' districts can qualify for the ballot in time, a delayed redistricting plan would restrict the window to learn about and debate the candidates' qualifications and positions, which the Supreme Court has recognized is the time for the First Amendment's "fullest and most urgent application." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("Free discussion about candidates for public office is no less critical before a primary than before a general election.").

In addition to the barriers created to supporting candidates, an untimely redistricting plan would burden Plaintiffs' "constitutional interest" in associating with "like-minded voters to gather in pursuit of common political ends." *Norman v. Reed*, 502 U.S. 279, 288 (1992). Plaintiffs' ability to connect and organize with other voters in their congressional and state legislative districts—whether to advocate for a party, candidate, or issue—requires the ability to "identify the people who constitute the association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). Delay in establishing districts, however, means that "voters who want to become fully involved in the process will not timely know in which district they are going to be, and thus will not timely know where and with whom to become involved." *Smith v. Clark*, 189 F. Supp. 2d 503, 510-11 (S.D. Miss. 2002). The Legislature argues that a delay in redistricting does not formally "stop Plaintiffs from associating with anyone." Mem. at 18. But such a delay does interfere with Plaintiffs' ability to associate within and through the political units defined by their districts—burdening their "associational opportunities at the critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power." *Tashjian*, 479 U.S. at 216.

Finally, just as Plaintiffs' malapportionment claims are ready for review, so too is

Plaintiffs' First Amendment claim. Neither standing nor ripeness doctrines require that Plaintiffs wait until their associational rights are harmed to state a claim. As discussed above, *see* Part II., *supra*, it is sufficient that Plaintiffs have alleged a "realistic danger of sustaining a direct injury." *Babbitt*, 442 U.S. at 298. This is all the more true in the elections context, where, once an election has come and gone, this Court cannot remedy Plaintiffs' injuries.

CONCLUSION

For these reasons, the Court should deny the Wisconsin Legislature's motion to dismiss.

Dated: September 13, 2021

Respectfully submitted,

/s/ *Aria C. Branch*

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*Admitted *Pro Hac Vice*
**Motion for *Pro Hac Vice* Admission Pending

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO THE WISCONSIN LEGISLATURE'S MOTION TO DISMISS** was electronically filed with the Clerk of Court using the CM/ECF system, which automatically will send email notification and access to an electronic copy of such filing to all counsel of record.

This 13th day of September, 2021.

/s/ Aria C. Branch
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