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October 13, 2021

VIA E-FILING BY EMAIL

Hon. Sheila Reiff
Clerk of the Supreme Court and Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-OA; Response Letter Brief by the Wisconsin Legislature as a Proposed-Intervenor Regarding Timing of New Redistricting Plans

Dear Ms. Reiff,

Pursuant to this Court's Order of September 22, the Legislature files this response letter regarding the Court's question of when new districting plans ought to be in place.

Date of Plan: For the reasons stated in its October 6 letter, the Legislature believes that redistricting plans should be in place no later than mid- to late-April. Other parties have advanced earlier dates based on deadlines and administrative responsibilities other than the April 2022 and June 2022 candidate deadlines. These other deadlines do not inform when a redistricting plan must be in place for the primaries; the nominations period does. For example, the proposed BLOC intervenor plaintiffs believe maps must be in place by March 15 based on a statute providing that a "notice" must go out, without explaining why that is relevant to keeping the August 2022 primary on time. BLOC Letter Br. 2-4. The federal court in 2002 issued its decision after this notice deadline had passed. *See* Wis. Stat. 10.06(1)(f) (2002) ("On or before the 2nd Tuesday in May preceding a September primary and general election the board shall send a type A notice to each county clerk"); *Baumgart v. Wendelberger*, Nos. 01-cv-121, 02-cv-366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended by* 2002 WL 34127473

(E.D. Wis. July 11, 2002). Similarly, the Wisconsin Elections Commission cites its responsibility to ensure nomination papers meet the statutory requirements for access. WEC Letter Br. 3. But these responsibilities are no different than they were when the federal court issued its decision in 2002 at the start of the nominations period. *Compare, e.g.*, Wis. Stat. §§8.30, 8.40 (2002), *with id.* §§8.30, 8.40 (2021). In these past redistricting cycles, decisions were issued around the date on which candidates could begin to circulate nomination papers, not these other deadlines.

In practice, the Legislature believes redistricting plans could be put in place earlier than April 2022. The Legislature expects that it will pass redistricting plans in November. Once that occurs, this Court can adjudicate Petitioners' claims. But for purposes of announcing a deadline when maps must be in place (which the Legislature respectfully requests that this Court do by issuing an order), it is arbitrary to set any date before April 2022.

Follow-On Litigation: Several parties' submissions contend that a schedule must build in time for follow-on litigation in the federal court. For example, the BLOC plaintiffs ask this Court to rule "before the federal trial begins, and in sufficient time for the federal court to hold an orderly trial." BLOC Letter Br. 3. They contend that "the federal court must be given time to review—and possibly alter—maps adopted by this Court." *Id.* at 9; *see* Hunter Plaintiffs Letter Br. 2-3 ("the Court should avoid any collision with federal proceedings by resolving these proceedings in advance of the federal court trial date"); Citizen Data Scientists Letter Br. 5-6 (similar).[1]

[1] Some of the intervenors' confusion appears to be based on this Court's statement in *Jensen v. Wisconsin Elections Board*, expressing concern that the state-court judgment "would be subject to collateral federal court review for compliance with federal law." 2002 WI 13, ¶16, 249 Wis. 2d 706, 639 N.W.2d 537; *see* Citizen Data Scientists Letter Br. 5-6 (citing *Jensen*). For the reasons stated herein, federalism and federal law preclude any such "collision course." *Jensen*, 2002 WI 13, ¶16. *Growe v. Emison*, 507 U.S. 25 (1993), prohibits the federal courts from interfering now, and federal law prohibits any parties or anyone in privity with those parties from relitigating this Court's judgment later.

There is no requirement that this Court build in time for collateral federal litigation. An order from this Court, approving or creating new redistricting plans, is sufficient for conducting next year's elections. The U.S. Supreme Court has rejected that any additional procedural steps, such as a direct appeal, are necessary before such districts may be used. *See Growe v. Emison*, 507 U.S. 25, 35 (1993). If building in time for an appeal is unnecessary, it necessarily follows that there is no reason to build in time for collateral litigation in a lower federal court.

The notion that there will be follow-on litigation in a lower federal court also contravenes elementary principles of federal jurisdiction and preclusion. First, once this Court resolves the claims about the existing districts, the ongoing federal litigation about those districts will be moot. Second, the federal district court will have no power to review this Court's judgment. Third, normal preclusion rules will apply once this Court issues its judgment. No party or party in privity here gets a do-over in federal court. Fourth, and relatedly, this Court can resolve any potential claims arising out of redistricting. There can be only one set of redistricting plans, so the time to raise those claims is now. A federal court does not get the last word in state redistricting.

1. The ongoing federal litigation, like this litigation, challenges the existing congressional and legislative districts. *See* Compl. at 1, *Hunter v. Bostelmann*, No. 3:21-CV-512 (W.D. Wis. Aug. 13, 2021), ECF No. 1; First Amended Compl. at 2, *BLOC v. Bostelmann*, No. 3:21-CV-534 (W.D. Wis. Sept. 21, 2021), ECF No. 44. Once this Court issues its judgment, those existing districts will be replaced with new districts either approved or created by this Court. Accordingly, any federal claims will be moot. *See Aslin v. FINRA*, 704 F.3d 475, 478 (7th Cir. 2013) (federal courts cannot order a party to "stop doing something that it is not doing, or to declare rights and obligations about a controversy that no longer exists"). There would be no Article III jurisdiction to re-try claims about districts that no longer exist.

2. The federal district court overseeing the ongoing federal litigation will have no power "to review" or "alter" the judgment of this Court, as the BLOC plaintiffs have suggested. BLOC Letter Br. 9. Once this Court orders new redistricting plans, a party could ask the U.S. Supreme Court to review any facet of that judgment implicating federal law. 28 U.S.C. §1257(a). But a party could never ask a lower federal court to do so. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Federal district courts lack subject-matter jurisdiction to sit as a court of review over a state supreme court. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (no jurisdiction to consider "cases brought by state-court losers complaining of injuries caused by state-court judgments"); *see, e.g.*, *Kelley v. Med-1 Solutions, LLC*, 548 F.3d 600, 605-06 (7th Cir. 2008) (holding federal court could not review a federal-law claim because it was not independent of a state-court judgment regarding attorneys' fees).

With respect to redistricting in particular, such follow-on litigation would frustrate federalism and comity. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). *Growe* does not require deferral for deferral's sake. It requires deferral because the State "can have only one set of legislative districts." *Growe*, 507 U.S. at 35. If the State ably redistricts, the task is complete. A federal court does not then "review" or "alter," BLOC Letter Br. 9, this Court's judgment. That would (perplexingly) give the federal court the last word in all state redistricting. Follow-on federal-court review would be an unrecognizable use of the federal judicial power here, given the U.S. Supreme Court's repeated affirmation that a State has "primary jurisdiction" over reapportionment. *See White v. Weiser*, 412 U.S. 783, 795 (1973) (collecting cases).

3. Once this Court acts, its judgment will also demand full faith and credit by every other court, including federal courts. *See* 28 U.S.C. §1738; *Growe*, 507 U.S. at 35-36. That includes giving this Court's judgment the same preclusive effect as Wisconsin courts would give it. *See, e.g.*, *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984); *see*

also, e.g., *Lance v. Dennis*, 546 U.S. 459, 468-69 (2006) (Stevens, J., dissenting) (explaining why state law precluded parties from relitigating reapportionment claims).

Here, the parties (including the proposed intervenors from the federal *Hunter* and *BLOC* suits) would be precluded from re-trying their claims in any court. All elements of Wisconsin preclusion law would be met. *See Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723, 728 (Wis. 1995). Any follow-on litigation would involve the same "parties or their privies." *Id.* Any follow-on litigation would entail relitigating claims that this Court already decided or could have decided. And the existence of a final judgment on the merits by this Court would preclude the parties from doing so. *Id.* In Wisconsin, a party cannot litigate one theory of liability in one court but then wait to litigate another in another court, if both theories of liability relate to the same "transaction." *Id.* at 554; *DePratt v. W. Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 311-12, 334 N.W.2d 883, 886 (Wis. 1983); *DSG Evergreen Family Limited Partnership v. Town of Perry*, 2020 WI 23, ¶21, 390 Wis. 2d 533, 939 N.W.2d 564 ("Typically, we expect parties to raise all claims arising out of the same 'transaction or factual situation' in the same lawsuit because they are masters of their own pleadings and are free to draft an all-encompassing pleading."). "[T]he number of substantive theories that may be available to the plaintiff is immaterial—if they all arise from the same factual underpinnings they must all be brought in the same action or be barred from future consideration." *Northern States Power*, 189 Wis. 2d at 555; *see also, e.g.*, *Froebel v. Meyer*, 217 F.3d 928, 935 (7th Cir. 2000) (concluding plaintiff could not raise Clean Water Act claim in federal proceedings having failed to raise them in earlier state proceedings). Applied here, any claims by the parties about these factual proceedings—reapportionment of Wisconsin's districts—must be brought here and now in this forum.

4. These preclusion rules extend to the BLOC plaintiffs' amended federal complaint, which added a Voting Rights Act claim.[2] The BLOC

[2] The Legislature has also moved to dismiss the amended complaint for lack of standing and ripeness. The parties will finish briefing the motion to dismiss on

plaintiffs appear to believe that because their Voting Rights Act claim is "not before this Court," the claim "might need to be addressed by the federal court *after* … this Court imposes[] a map defining state legislative districts." BLOC Letter Br. 3. Wrong. The BLOC plaintiffs' Voting Rights Act claim challenges the *existing* districts. *See* First Amended Compl. at 2, 33-34, *BLOC v. Bostelmann*, No. 3:21-CV-512 (W.D. Wis. Sept. 21, 2021), ECF No. 44. That claim will become moot once new districts are drawn, just as the malapportionment claims will.

To the extent the BLOC plaintiffs believe that the Voting Rights Act requires something of the *new* districts that this Court will soon be reviewing or creating itself, any such concerns should be raised in this Court. This Court's judgment must necessarily comply with both state and federal law. *See* U.S. Const. art. VI, cl. 2; *cf., e.g.*, *James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam); *Krueger v. Mitchell*, 112 Wis. 2d 88, 101-02, 332 N.W.2d 733 (1983). Accordingly, the Legislature (and any other party) should be expected to explain, with supporting evidence, how its map complies with all state and federal law, including the Voting Rights Act for the state legislative districts. Again, the State "can have only one set of legislative districts," *Growe*, 507 U.S. at 35, so the time to raise any such issues is now.

Indeed, this Court is uniquely situated to adjudicate *both* the state and federal issues implicated in redistricting disputes. This Court has the "final word" on issues of Wisconsin law and is competent to resolve questions of federal law, appealable only to the U.S. Supreme Court. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶3, 394 Wis. 2d. 33, 949 N.W.2d 423; *Haywood v. Drown*, 556 U.S. 729, 747 (2009) ("[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." (citation omitted)). A federal court, on the other hand, defers to this Court on issues of state law. *See, e.g.*, *Bostelmann*, 2020 WI 80, ¶3. And a federal court would have no power to order injunctive relief (such as an order revising electoral districts) against state officials on state-law grounds. *See Pennhurst State Sch. & Hosp.*

October 27, 2021. *See* Order, *BLOC v. Bostelmann*, No. 3:21-CV-534 (W.D. Wis. Oct. 6, 2021), ECF No. 71.

v. Halderman, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *see also, e.g.*, *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 34104833, at *2 n.9 (E.D. Tex. Nov. 28, 2001) ("To the extent the plaintiffs raise claims that ask that this court enforce state law against the State, they are barred by the Eleventh Amendment, and this court has no jurisdiction to hear them, whether for injunctive or for declaratory relief.").

For these reasons and surely others, there is no basis to assume that there will be follow-on federal litigation that must be complete before next year's elections.

Form of proceedings: Other parties have made suggestions about the form that the proceedings should take. *See, e.g.*, Congressmen Letter Br. 2.

At a minimum, it will be necessary in this original action for the parties to submit some evidence and create a record. For example, if parties raise arguments about features of the Legislature's redistricting plans (such as compactness or continuity of representation), the parties will need to offer evidence about those traditional redistricting criteria. Similarly, if parties wish to propose alternative district lines, they will have to support those proposals with evidence that the alternatives comply with state and federal law. Such evidence is most likely to take the form of stipulations or expert declarations or reports. And while it is possible that the evidence will be undisputed, thereby avoiding any need for a referee of facts, the facts need to be established nonetheless.

The Legislature defers to this Court about the particular form that this Court wishes the proceedings to take. Should the Court seek the parties' or proposed intervenors' additional input on the form of proceedings or a schedule, the Legislature will timely provide it.

* * *

The Legislature respectfully requests that this Court issue an order explaining that redistricting plans need to be in place by mid- to late-April. That order will further confirm that there is no basis for simultaneous litigation in a federal court. The federal court must "defer consideration" unless and until it becomes apparent that the State will not timely redistrict. *Growe*, 507 U.S. at 33. There can be no concern that the State will not timely redistrict once this Court issues an order saying it will ensure redistricting plans are in place by a date certain to ensure timely primary elections next year.

Respectfully submitted,

Electronically Signed By
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[3] I certify that the body of this letter brief uses proportional serif font and contains 2,368 words as calculated by Microsoft Word.

cc: All counsel noticed in Supreme Court's September 22 Order and all counsel for proposed intervenors (by email; parties also by mail)