**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

**MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE BY THE WISCONSIN LEGISLATURE**

The Wisconsin Legislature respectfully requests leave to file a proposed reply brief (Attachment 1 to this motion) in support of its Motion to Intervene as a Defendant in this action. The Legislature filed its motion to intervene on August 17, 2021, days after this suit was filed. *See* Dkt. 8, Mot. to Intervene; Dkt. 9, Brief in Support of Mot. to Intervene. Plaintiffs filed their opposition to the Legislature's motion the evening of August 24, 2021. *See* Dkt. 17. The Legislature hereby requests to file a reply two days later. The Legislature's reply does not unnecessarily repeat arguments that the Legislature already raised and instead responds to Plaintiffs' arguments in their opposition brief, including arguments about the nature of this dispute, particular cases, and the adequacy requirement.

The Legislature therefore respectfully requests that this Court grant this motion for leave to file the attached reply brief and to accept the same for docketing.

Dated: August 26, 2021

Respectfully submitted,

*/s/ Kevin St. John*

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*Counsel for Proposed-Intervenor, Wisconsin Legislature*

## CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2021, 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.

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No. 3:21-cv-00512-jdp

**REPLY BRIEF IN SUPPORT OF**
**MOTION TO INTERVENE BY THE WISCONSIN LEGISLATURE**

The Wisconsin Legislature respectfully submits this reply brief in support of its Motion to Intervene as a Defendant in this action pursuant to Federal Rule of Civil Procedure 24(a)(2) or 24(b)(1). *See* Dkt. 8, Mot. to Intervene; Dkt. 9, Brief in Support of Mot. to Intervene ("Opening Br.").

## INTRODUCTION

Plaintiffs filed this lawsuit alleging a "near-certain" redistricting impasse one day after new census data was released. Dkt. 1, Compl. ¶7. Not to be outdone by that surprise, Plaintiffs now *oppose* the Wisconsin Legislature's motion to intervene in their lawsuit over the Legislature's ongoing redistricting responsibilities. Dkt. 17, Opp'n to Mot. to Intervene ("Opp'n"). Plaintiffs say that

"nothing about this suit impacts or even questions the State's primary role in this [redistricting] process." *Id.* at 1; *see also id.* at 5, 13. Nothing could be further from the truth. In Plaintiffs' own words: "While there is still time for the Legislature and Governor to enact new plans, this Court should assume jurisdiction now and establish a schedule that will enable the Court to adopt its own plans in the near-certain event that the political branches fail timely to do so." Compl. ¶7.

Contrary to Plaintiffs' arguments, the Legislature readily meets the requirements for intervention. Plaintiffs' suggestion that the Legislature should just ask permission to file an *amicus* brief is laughable. Opp'n 2, 11, 15-16. Legislative bodies have been permitted to intervene in myriad redistricting disputes similar to this one. Excluding the Legislature here would contravene the Federal Rules, as well as the practice of this Court, the Seventh Circuit, and the Supreme Court.

## ARGUMENT

The Legislature meets the requirements for intervention as-of-right for the reasons stated in its brief filed in support of its intervention motion and will not rehash those reasons here. Plaintiffs do not dispute that the Legislature's intervention motion was timely. Opp'n 2. But they dispute that the Legislature has met the other requirements to intervene as of right. *Id.* at 3-14. And they even oppose permissive intervention by the Legislature, despite that this Court and others have permitted permissive intervention in materially the same circumstances. *Id.* at 14-16.

### I. The Legislature Has Sufficient Interests in Plaintiffs' Suit, and those Interests Will Be Impaired If the Court Grants Plaintiffs' Requested Relief.

Plaintiffs deny the Legislature's interests in this suit and the potential impairment of the Legislature's undisputed redistricting role. In doing so, Plaintiffs (1) obfuscate the nature of this litigation; (2) disregard state law; and (3) oversell *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

**A. Plaintiffs' lawsuit is a direct challenge to ongoing redistricting in Wisconsin.**

Most of Plaintiffs' opposition rests on the false premise that their case is a malapportionment dispute about existing legislative districts and nothing more. *See, e.g.*, Opp'n 4 ("the WEC already holds an interest in defending the validity of Wisconsin's election laws"). Plaintiffs implausibly assert that their "claims do not impact, or even question, the State's primary role in the process of redrawing its congressional and legislative districts" and that "this suit involves only what happens when the Legislature and Governor *fail* to redraw those districts." *Id.* at 5. They say that "this case will have *no impact* on Wisconsin's redistricting efforts because…such action would occur only *after* it is clear the Legislature and Governor are unable to enact new plans in time for the 2022 elections." *Id.* at 9 (emphasis added). If all that were true, then Plaintiffs should be willing to voluntarily dismiss their suit and re-file only once it becomes apparent that the State's branches of government have actually failed.

But Plaintiffs will not voluntarily dismiss their premature suit because they do in fact want the Court to act now—not only with respect to the existing districts but also with respect to the ongoing redistricting efforts in Wisconsin. In particular, Plaintiffs ask this Court to "assume jurisdiction now and establish a schedule that will enable the Court to adopt its own plans in the near-certain event that the political branches fail timely to do so." Compl. ¶7; *see also* Opp'n 7 (contending that "the schedule Plaintiffs ask the Court to adopt will mean that this Court does not impact Wisconsin's future redistricting efforts *unless it needs to intervene* to protect Plaintiffs' constitutional rights" (emphasis added)).[1] If the Court imposes Plaintiffs' requested "schedule," the Legislature would not be

[1] Plaintiffs rely on *Arrington v. Elections Board*, 173 F. Supp. 2d 856, 866-67 (E.D. Wis. 2001), and its discussion of the "well-established" practice in impasse litigation to invoke jurisdiction, set a deadline, and then wait for a suit to become ripe. As Judge Easterbrook explained in his dissent in *Arrington*, that practice is unconstitutional in cases where, as here, there is no Article III case or controversy. *See id.* at 868-70; *see also Mayfield v. Texas*, 206 F. Supp. 2d 820 (E.D. Tex. 2001). Before a Court can "assume jurisdiction" (Compl. ¶7) and impose a redistricting deadline on every branch of the Wisconsin state government, there must be some Article III basis for exercising that jurisdiction.

voluntarily "ce[ding] its redistricting authority" later on. Opp'n 1. It would be facing a federal-court takeover of its redistricting authority based on a schedule it had no part in making (if Plaintiffs have their way). Plaintiffs' own allegations and requested relief belie their assertions that this suit has nothing to do with the Legislature's ongoing redistricting efforts.

As federal courts have routinely recognized, legislatures may intervene in redistricting cases, including cases alleging impasse, either as of right or permissively. *See*, *e.g.*, *Bethune-Hill*, 139 S. Ct. at 1950 (noting House of Delegates intervened in racial gerrymandering challenge); *Growe v. Emison*, 507 U.S. 25, 29 (1993) (noting Minnesota Senate and House intervened in redistricting litigation); *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 190, 194 (1972) (per curiam) (explaining Minnesota senate intervened as a matter of right in reapportionment dispute); *Arrington*, 173 F. Supp. 2d at 867-68 (granting motions to intervene by State Senators, Speaker of the Wisconsin Assembly, and Minority Leader of the Wisconsin Assembly in impasse litigation); *Miss. State Conf. of N.A.A.C.P. v. Barbour*, No. 3:11-cv-159, 2011 WL 1870222, *5-6 (S.D. Miss. May 16, 2011) (noting House committee intervened in impasse litigation); Dkt. 223, Order Granting Mot. to Intervene, *Gill v. Whitford*, No. 3:15-cv-421 (W.D. Wis. Nov. 13, 2018) (granting Wisconsin Assembly's motion to permissively intervene in partisan gerrymandering challenge); *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018) (similar).

### B. The Legislature unquestionably has a distinct interest in this redistricting challenge.

**1.** Plaintiffs argue that the interest in redistricting is not unique to the Legislature. Opp'n 7. They admit that the Legislature "undoubtedly plays a crucial role" but that, "just as with any other legislation, Wisconsin's interest in its ability to enact new redistricting plans lies with the State generally, not just the Legislature." *Id.* That argument ignores the Legislature's institutional interest in redistricting, confirmed by the state constitution. It also ignores the Legislature's interest in defending

against constitutional challenges like this one, an interest expressly recognized by Wisconsin law and confirmed by the state supreme court.

**1.** Redistricting in Wisconsin and elsewhere is not "just…any other legislation." *Id.* The Legislature has a constitutional mandate to redistrict after each census. Wis. Const. art. IV, §3. The Legislature's redistricting authority is distinct from the Legislature's general "legislative" powers. *Compare id.*, *with* Wis. Const. art. IV, §1; *see also Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542 (Wis. 2002) ("The 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."); *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (collecting cases for rule that "state legislatures have 'primary jurisdiction' over legislative reapportionment"). That independent interest in *how* districts will be drawn and *who* will draw them is sufficient for Rule 24(a)(2). Plaintiffs' suit will undoubtedly impede that interest. Plaintiffs have asked this Court to issue a timeline for the Legislature's exercise of that authority and to "assume jurisdiction" over redistricting from beginning to end. Part I.A, *supra*. That distinguishes this case from *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019), where the Legislature sought to intervene solely to defend existing abortion laws.

Even if other branches also have their own role in redistricting (Opp'n 7),[2] that is not a basis for rejecting the Legislature's intervention motion. The state constitution specifically vests the Legislature with the power of reapportionment, and that is sufficient. *See Planned Parenthood*, 942 F.3d at 806 (Sykes, C.J., concurring) ("'Unique' is a suitable word to describe the nature of the required interest, but as used in this context, 'unique' means an interest that is *independent* of an existing party's, not *different from* an existing party's."); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S.

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[2] For example, another set of plaintiffs have filed a petition asking the state supreme court to resolve an impasse if one were to occur. *See Johnson v. Wis. Elections Comm'n*, No. 2021AP01450 (Wis. S. Ct.) (petition and accompanying brief filed Aug. 23, 2021).

787, 800 (2015) (deciding for standing purposes that "[a]lthough we conclude that the Arizona Legislature does not have the exclusive, constitutionally guarded role it asserts [over redistricting]," the Legislature had a sufficient redistricting role for standing purposes).

**2.** Plaintiffs also give the back of the hand to Wisconsin state law, with respect to the Legislature's other institutional interest of defending against Plaintiffs' constitutional challenge. They observe that "there can be no question that §803.09(2m) does not give the Legislature the right to intervene in federal litigation." Opp'n 5. (As Plaintiffs acknowledge, the Legislature hasn't made that argument. *Id.*; *see* Opening Br. 7-8.) The Legislature has argued that this state law necessarily *informs* what the Legislature's interests are and how they might be impeded for purposes of Rule 24(a)(2). *Cf. Democratic Nat'l Comm. v. Bostelmann*, 976 F.3d 764, 767-68 (7th Cir. 2020) ("Capacity to sue or be sued is a matter of state law."), *vac'd on reconsideration*, 977 F.3d 639, 641 (allowing Wisconsin Legislature's appeal after certifying question of Legislature's interest to the Wisconsin Supreme Court). Relevant here, Wisconsin's high court has already answered the question of "what interests does the Legislature have?"—a question upon which it has the "final word." *Democratic Natl Comm. v. Bostelmann*, 949 N.W.2d 423, 425-26 (Wis. 2020). The court explained that state law recognizes "a set of litigation interests" when a party challenges the constitutionality of a statute, in addition to "its interests as a legislative body":

> By enacting §803.09(2m), Wisconsin has adopted a public policy that gives the Legislature a set of litigation interests, namely when a party "[1] challenges in state or federal court the constitutionality of a statute, facially or as applied, [2] challenges a statute as violating or preempted by federal law, or [3] otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense." §803.09(2m). The Legislature is therefore empowered to defend not just its interests as a legislative body, but these specific interests itemized by statute.

*Id.* at 426; *see also Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 946 N.W.2d 35, 56 (Wis. 2020) (confirming state law permits Legislature to intervene "where its institutional interests are implicated").[3]

Plaintiffs contend that state law is largely irrelevant because the Legislature "has *no intention* of defending the constitutionality of the plans that Plaintiffs challenge in this case." Opp'n 4-5.[4] To the contrary, the Legislature seeks to intervene to dismiss Plaintiffs' suit and has filed a proposed Answer denying Plaintiffs' claims. While the Legislature has acknowledged that it will be creating new districts in light of new census data, the mere fact of malapportionment is not enough to create a federal case or controversy. That is doubly true in this suit filed just one day after the release of new census data. *See Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("judicial relief" for malapportionment "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"); *see also California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (Plaintiffs must "assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future."); *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.) (federal courts "cannot be umpire to debates concerning harmless, empty shadows"). Those justiciability arguments fall comfortably within the Legislature's authority to defend the State against constitutional attacks to its existing laws. *See* Wis. Stat. §803.09(2m); *Bostelmann*, 949 N.W.2d at 426; *see also Planned Parenthood*, 942 F.3d at 806 (Sykes, C.J., concurring) ("section 803.09(2m)

[3] Section 803.09(2m) recognizes that one of the Legislature's institutional interests is defending against constitutional challenges like Plaintiff's. As *Bostelmann* and *Vos* make clear, that does not negate the Legislature's other institutional interests, including the Legislature's power to reapportion, as recognized by the Wisconsin Constitution for well more than a century.

[4] Plaintiffs also repeat that "any interest in Wisconsin's 'future redistricting efforts' is not at issue in this suit," Opp'n 4-5, which is demonstrably false. They ask the Court to assume jurisdiction and order a schedule to govern ongoing redistricting efforts. Part I.A, *supra.* Plaintiffs also forget the third count of their own complaint, which alleges First Amendment harms related to future redistricting delays, separate from Plaintiffs' malapportionment claims regarding the existing districts. Compl. ¶¶50-54.

plainly gives the Legislature a direct and independent right to defend state laws in court, and this right is neither derivative of nor subordinate to the Attorney General's").

### C. *Bethune-Hill* poses no obstacle to intervention.

Plaintiffs repeatedly invoke the Supreme Court's decision in *Bethune-Hill* as a reason for denying intervention. Opp'n 3, 8, 13-14. If anything, *Bethune-Hill* helps illustrate why intervention is appropriate here. *Bethune-Hill* involved a challenge to existing legislative districts. 139 S. Ct. at 1949. After districts were drawn, plaintiffs sued alleging that certain districts were racially gerrymandered. *Id.* at 1949-50. The three-judge district court agreed. *Id.* at 1950. When the Attorney General refused to appeal the adverse ruling against the State, the Virginia House of Delegates appealed. *Id.* (The House had successfully intervened earlier in the dispute, carried the "laboring oar" at trial, and even participated in a previous appeal. *Id.* at 1949-51.) The Attorney General then moved to dismiss the House's appeal for lack of standing. *Id.* The Supreme Court granted the motion to dismiss, concluding that the House alone could not invoke the Court's appellate jurisdiction. *Id.* at 1951.

Plaintiffs' arguments likening *Bethune-Hill* to the circumstances here are flat wrong. *Bethune-Hill* does not "directly foreclose[]" any of the Legislature's arguments. Opp'n 13. It supports them.

*First*, Plaintiffs have rewritten *Bethune-Hill*. They have misappropriated the decision's holding—which turns on the fact that "a single House of bicameral legislature" appealed—for the circumstances here, which involve the Legislature acting as a whole. 139 S. Ct. 1953-54. For example, Plaintiffs cite *Bethune-Hill* for the proposition that "[o]nce a state legislature's bill becomes law, *the legislature* holds no independent interest in defending its constitutionality." Opp'n 3 (citing *Bethune-Hill*, 139 S. Ct. at 1953) (emphasis added). Similarly, Plaintiffs argue that *Bethune-Hill* "made clear" that "*a Legislature*" has standing "only in cases that threaten 'the *manner* in which it goes about its business[.]'" Opp'n 8 (quoting *Bethune-Hill*, 139 S. Ct. at 1955 n.6) (emphasis added). *Bethune-Hill* says no such thing about "the legislature" or "a Legislature" (Opp'n 3, 8). Just the opposite—these portions of *Bethune-*

*Hill* specifically address the fact that only the Virginia House of Delegates had appealed, and not the legislature as a whole. The Court explained, "[A] *single* House of a bicameral legislature lacks capacity to assert interests belonging to the *legislature as a whole*." 139 S. Ct. at 1953-54 (emphasis added); *see also id.* at 1954 ("a single House of a bicameral legislature generally lacks standing to appeal in cases of this order," involving the "constitutionality of a concededly enacted redistricting plan"). The Court repeatedly distinguished suits brought by "a single House" from suits (like this one) involving both houses of the Legislature "*acting together*" or "the legislature as a whole." *Id.* at 1953-54; *see also Ariz. State Legislature*, 576 U.S. at 802 ("The Arizona Legislature, in contrast, is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers."). Plaintiffs all but ignore the distinction, even though it was dispositive in *Bethune-Hill*.

Relatedly, Plaintiffs contend that the Legislature's acting as a whole here is distinguishable from the Legislature's acting as a whole in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. *See* Opp'n 13. But *Bethune-Hill*'s discussion of *Arizona Legislature* actually illustrates the similarities between *Arizona Legislature* and the Legislature's interest here. *Arizona Legislature* involved both houses "*acting together*" to challenge a referendum that took away the legislature's redistricting authority. 139 S. Ct. at 1953. In *Arizona Legislature* "there was *no mismatch* between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority." *Id.* (emphasis added).[5] Here too—there is "no mismatch" between the Wisconsin Legislature as the proposed intervenor and the express delegation of redistricting authority

[5] In *Arizona Legislature*, the legislature argued that the referendum to establish a redistricting commission ran afoul of the U.S. Constitution's Election Clause, which states in relevant part that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof…." U.S. Const. art. I, §4 (emphasis added); *see Arizona Legislature*, 576 U.S. at 792-93.

to "the Legislature" in the Wisconsin Constitution. Wis. Const. art. IV, §3.[6] The same legislative interest in the redistricting function is implicated whether it is a redistricting commission drawing the maps or a court. In both cases, a legislature has an interest in ensuring that the exercise of power, judicial or otherwise, does not bleed into the exercise of its reserved powers. The Wisconsin Legislature can assert that interest here only if it is allowed to participate.

*Second*, Plaintiffs contend that *Bethune-Hill* forecloses the Legislature's reliance on *Sixty-Seventh Minnesota State Senate v. Beens*. Opp'n 13. As an initial matter, *Bethune-Hill* does not overrule *Beens*. 139 S. Ct. at 1955 (assuming "*Beens* was, and remains, binding precedent on standing"). As for the application of *Beens* to the Legislature's intervention motion, *Bethune-Hill* says *Beens* applies. *Bethune-Hill* distinguishes what law *Beens* established "on the question of standing, *as distinct from intervention*." *Id.* (emphasis added). Finally—and as Plaintiffs fail to point out—what motivated *Bethune-Hill* to discuss *Beens* was that *Beens* also involved an appeal by a single house of a state legislature, not the legislature as a whole. *See* Opp'n 7 (misdescribing *Beens* as deciding that "*a legislature* had standing to appeal" (emphasis added)). It was in that context, involving a single house of a bicameral legislature, that the Supreme Court said that even "the House has an obvious institutional interest in the *manner* in which it goes about its business." *Bethune-Hill*, 139 S. Ct. at 1955 n.6.[7]

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[6] Plaintiffs argue that the legislature in *Arizona Legislature* had standing because the challenged referendum in that case "'permanently deprived'" it of its redistricting role. Opp'n 13. To be sure, that was one reason given in *Bethune-Hill* for distinguishing *Arizona Legislature*. 139 S. Ct. at 1953. But it wasn't the only reason, nor even the first reason. *See id.* at 1953 (first discussing "no mismatch" between legislature as plaintiff and Legislature's power under the Elections Clause). *Bethune-Hill* also does not say that "permanently depriving" a legislature of power was a *necessary* (versus *sufficient*) requirement of standing, let alone intervention.

[7] Plaintiffs misdescribe this portion of *Bethune-Hill* too. The Supreme Court did not say that *Beens* confers standing "only in cases" threatening the manner in which a Legislature goes about its business. Opp'n 8. The Supreme Court said that "the House" would have such an interest, though not its "only" conceivable interest. *Bethune Hill*, 139 S. Ct. at 1955 n.6. In any event, Plaintiffs' request for relief indisputably affects "the manner in which" the Legislature as a whole will "go[] about its business" when it comes to the ongoing redistricting efforts. *Id.*; *see* Compl. ¶7.

*Third*, although Plaintiffs attempt to diminish the importance of Virginia state law to the holding in *Bethune-Hill* (Opp'n 13), state law was the first reason that the Supreme Court gave for dismissing the appeal by the Virginia House of Delegates. *See Bethune-Hill*, 139 S. Ct. at 1951-52. Because the State refused to appeal, the Court considered whether the House "could stand in for the State." *Id.* at 1951. Examining Virginia law, the Court observed that "the House has not identified any legal basis for its claimed authority to litigate on the State's behalf" and concluded that such responsibility "rest[ed] exclusively with the State's Attorney General" under state law. *Id.* Unlike Wisconsin, "Virginia has…chosen to speak as a sovereign entity with a single voice." *Id.* at 1952.

The Supreme Court recognized that Virginia could have made a different choice and that "[s]ome States have done just that." *Id.* Wisconsin is one of those States. *See* Part I.B, *supra.* The Supreme Court of Wisconsin has confirmed twice that the Wisconsin Attorney General's litigation authority is "not exclusive." *Bostelmann*, 949 N.W. 2d at 428; *see Vos*, 946 N.W.2d at 54. The Legislature also has litigation authority in cases involving its "institutional interests," which include but are not limited to defending the validity of state laws and which certainly include its ongoing redistricting efforts. *Bostelmann*, 949 N.W.2d at 426; Wis. Const. art. IV, §3. *Bethune-Hill* itself anticipates that legislatures like Wisconsin's stand on different footing than the Virginia House of Delegates *vis-à-vis* the Virginia Attorney General. 139 S. Ct. at 1952.[8]

*Fourth*, Plaintiffs contend that *Bethune-Hill* forecloses an argument that the Legislature "is entitled to intervene because the contours of the maps that the Court ultimately enacts will impact its

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[8] Likewise, the Seventh Circuit found state law important enough to the question of the Legislature's standing to appeal in the *Bostelmann* elections-law litigation that the court certified the question to the Supreme Court of Wisconsin and reversed its earlier decision relying on *Bethune-Hill*. *See Bostelmann*, 977 F.3d at 641. And earlier in that litigation, the Seventh Circuit ordered that the Legislature be allowed to intervene. *Bostelmann*, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020) (citing *Bethune-Hill*, 139 S. Ct. 1945 and *Planned Parenthood*, 942 F.3d 783). Contrary to Plaintiffs' assertion (Opp'n 14 n.4), it necessarily informs the analysis here that the Seventh Circuit previously permitted the Legislature to fully participate in that elections-related dispute.

composition." Opp'n 14. That of course was a vigorously debated point in *Bethune-Hill* with respect to the House's standing to appeal. *Compare Bethune-Hill*, 139 S. Ct. at 1955 ("although redrawing district lines indeed may affect the membership of the chamber, the House as an institution has no cognizable interest in the identity of its members"), *with id.* at 1957 (Alito, J., dissenting) ("Really? It seems obvious that any group consisting of members who must work together to achieve the group's aims has a keen interest in the identity of its members, and it follows that the group also has a strong interest in how its members are selected."). But here, the particular question is whether the Legislature may intervene, and *Bethune-Hill* does not disturb the holding in *Beens* that mandatory intervention is appropriate. *See Bethune-Hill*, 139 S. Ct. at 1955; *Beens*, 406 U.S. at 194. And here, the nature of the litigation—a complaint alleging an impasse that asks this Court to retain jurisdiction, set a schedule for the Legislature's ongoing redistricting, and ultimately create court-drawn maps (Compl. ¶¶7, 33, 36)—implicates interests beyond the Legislature's membership. It implicates *how* districts will be drawn and *who* will draw them. *See* Opening Br. 5-6. That is indisputably the Legislature's interest, confirmed by the Wisconsin constitution and its reservation of the redistricting function for the Legislature, Wis. Const. art. IV, §3, distinct from its general lawmaking power, Wis. Const. art. IV, §1.

Finally, *Bethune-Hill* addresses intervention, but not in a way that is helpful to Plaintiffs. *Bethune-Hill* observed without opprobrium that the House intervened and actively participated in the case. *See Bethune-Hill*, 139 S. Ct. at 1949-51. And *Bethune-Hill* expressly distinguished between intervention and standing in its discussion of *Beens* and *INS v. Chadha*, 469 U.S. 919 (1983). *See Bethune-Hill*, 139 S. Ct. at 1954 n.5, 1955.[9]

[9] For their part, Plaintiffs acknowledge that *Bethune-Hill* is a standing case, not an intervention case, but quote *Planned Parenthood*'s statement that "a party without standing cannot intervene as of right." Opp'n 3 (quoting *Planned Parenthood*, 942 F.3d at 798). It is difficult to square that statement with *Bethune-Hill*, but the Court need not do so here. The Seventh Circuit necessarily found that the Legislature had standing when it permitted the Legislature to appeal as an intervenor in *Democratic*

To the extent *Bethune-Hill* has relevance here, it confirms that the Wisconsin Legislature's intervention motion in this prematurely filed impasse case raises entirely different considerations than an appeal by a single House of a bicameral legislature in Virginia.

## II. The Legislature's Redistricting Interests Are Not Adequately Represented.

The named Defendants are commissioners of the Wisconsin Elections Commission. The commissioners have nothing to do with redistricting. There is no reason to presume that Defendants (or the Attorney General representing them) are adequate to represent the Legislature's redistricting interests in this impasse suit.

This dispute is not just like "any other legislation" where the executive ordinarily can defend existing state law. Opp'n 7. It implicates the Legislature's ongoing redistricting efforts. Part I.A, *supra*. In such cases, it makes little sense to apply a presumption that the state agency tasked with *administering* elections will be a sufficiently adequate representative for the Legislature, tasked with doing the actual redistricting. *See* Opening Br. 10. Plaintiffs' only response to this argument is a non-sequitur: "As the entity responsible for administering Wisconsin's elections according to Wisconsin law, the [Elections Commission] is well-positioned to raise arguments concerning federal judicial interference with the State's redistricting role." Opp'n 10 (citations omitted). Why? The Legislature is the entity tasked with redistricting (not the Elections Commission). The Legislature will be bound by any "schedule" ordered by this Court (not the Elections Commission). And the Legislature will be losing its constitutionally prescribed redistricting authority if it fails to abide by that schedule (not the Elections Commission). Indeed, it makes no difference to the Elections Commission *who* is drawing redistricting maps in Wisconsin so long as there are redistricting maps. Their election-related duties will be the same whether district lines are the result of legislative action or this Court's intervention. There is no basis

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*National Committee v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020). It follows that the Legislature's interests here likewise easily satisfy Article III's minimum requirements.

for Plaintiffs' leap-in-logic that the agency administering elections will be "well-positioned" to raise arguments about the Legislature's ongoing redistricting efforts.

Plaintiffs next argue that the Legislature has failed to allege "some conflict" between the Elections Commission and the Legislature. Opp'n 10 (citing *Planned Parenthood*, 942 F.3d at 799); *see also id.* at 805, 807-10 (Sykes, C.J., concurring) (explaining why "gross-negligence/bad-faith standard" was "deeply flawed"). The Elections Commission will be represented by the Attorney General, who is part of Wisconsin's executive branch. Plaintiffs have no meaningful response to the Legislature's arguments that the legislative and executive branches do not have "the same goal" with respect to ongoing redistricting efforts. Opening Br. 11. Plaintiffs merely obfuscate the nature of this case (again)—contending that it is only about the constitutionality of existing law (Opp'n 10-11), when Plaintiffs themselves have asked this Court to assume jurisdiction over ongoing redistricting efforts (Compl. ¶7). When the very theory underlying Plaintiffs' complaint is that the legislative and executive branches will be unable to reach agreement in these ongoing redistricting efforts, it is hard to take seriously the argument that the executive can adequately represent the legislature here.

Plaintiffs' other arguments also put the lie to its assertions about adequacy. For example, Plaintiffs assert that the Elections Commission's expertise is what this Court needs to set a timeline for the Legislature's ongoing redistricting efforts. Opp'n 2, 7. Plaintiffs argue that the Elections Commission "has all the specialized knowledge necessary to ensure that the Court intervenes only when it becomes necessary to do so." Opp'n 7. And Plaintiffs suggest that the Legislature can ask permission to file an *amicus* brief if it disagrees with the Elections Commission's advice. Opp'n 11, 15 ("The best role for the Legislature to play in this case is as *amicus*."). These arguments presume that this Court may assume jurisdiction and put the Legislature on a "schedule" for redistricting. The primary reason the Legislature seeks to intervene is to avoid that premature and unwarranted

interference. Article III requires dismissal of this action, not deadline-setting in the absence of a justiciable case or controversy.

Finally, Plaintiffs argue that "quibbles" with the Elections Commission's "litigation strategy" are insufficient to show inadequate representation. Opp'n 13 (quoting *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013)). Whether the Elections Commission agrees with the Legislature about this Court's jurisdiction is far more than quibbling with litigation strategy. Certainly, the Legislature would welcome the Elections Commission to join the Legislature's efforts to dismiss this suit so that the Legislature can get on with redistricting without federal interference. But again, that interest is entirely the Legislature's.

## III. Permissive Intervention Would Also Be Appropriate.

Just as permissive intervention was granted by this Court in *Gill* and the Sixth Circuit in *Johnson*, permissive intervention would be appropriate here too. *See* Opening Br. 8, 14. Both *Gill* and *Johnson* concluded that the intervenors had met the requirements for permissive intervention and so had no need to reach whether they were entitled to intervene as-of-right. *See* Dkt. 223 at 2, Order Granting Mot. to Intervene, *Gill v. Whitford*, No. 3:15-cv-421 (W.D. Wis. Nov. 13, 2018); *Johnson*, 902 F.3d at 577. The Court could do the same here.

Plaintiffs attempt to distinguish *Gill* and *Johnson* on the ground that those intervention decisions predated *Bethune-Hill*. Opp'n 8 n.2. As discussed, *Bethune-Hill* does not support Plaintiffs' intervention arguments here for myriad reasons.

Similarly, Plaintiffs attempt to distinguish *Gill* and *Johnson* on the ground that the "central issue" in those partisan gerrymandering claims was "intent," whereas "legislative intent is irrelevant to Plaintiffs' claims" here. Opp'n 8 n.2. The central issue in the spate of partisan gerrymandering cases was not intent; it was whether they were justiciable. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). In any event, while "legislative intent" might be irrelevant here, the Legislature's actual and ongoing

redistricting efforts are surely relevant to whether the Plaintiffs have asserted justiciable claims (they have not) or whether the Legislature later must "cede" its redistricting authority (Opp'n 13).

Finally, Plaintiffs conclude that the Legislature "provides no persuasive reason why it should be granted intervention in this case." Opp'n 16. But as the Legislature has argued all along, Plaintiffs' suit has the potential to impose a schedule on the Legislature's ongoing redistricting efforts, to take away the Legislature's power to redistrict if the Legislature doesn't abide by the schedule, and ultimately to alter the Legislature's very make-up. And now, Plaintiffs say that they want to litigate that suit without the Legislature. Tellingly, Plaintiffs have identified no analogous case excluding legislatures from such redistricting disputes. Excluding a legislature from a case alleging a redistricting impasse would create particularly perverse incentives for a State's ongoing redistricting efforts. It has the potential to make Plaintiffs' claims of impasse a self-fulfilling prophecy. The Legislature should be permitted to intervene so that it has the opportunity to argue for dismissal and, failing dismissal, participate in an action purporting to regulate its redistricting role.

## CONCLUSION

For the foregoing reasons and those in the Legislature's brief in support of its motion to intervene, the Legislature respectfully requests that this Court grant this motion and allow the Legislature to intervene as of right under Rule 24(a)(2) or alternatively to permissively intervene under Rule 24(b)(1).

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2021, 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.

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