UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

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

Proposed Intervenor-Plaintiffs

v.

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

Defendants,

The Wisconsin Legislature,

Intervenor-Defendant,

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

Proposed Intervenor-Defendants.

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

CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD'S MOTION TO INTERVENE

Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald, who are also probable candidates for re-election to the U.S. House of Representatives in 2022 (hereinafter "the Congressmen"), respectfully move to intervene as Defendants in this action, either as of right under Federal Rule of Civil Procedure 24(a)(2) or, alternatively, on a permissive basis under Rule 24(b)(1). The Congressmen have also simultaneously filed a Proposed Answer and Proposed Motion To Dismiss The Complaint. Further,

the Congressmen provide the grounds for this Motion To Intervene in their simultaneously filed Memorandum. For the reasons stated in that Memorandum, the Congressmen respectfully request that this Court grant their Motion.

Dated: August 30, 2021

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

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

/s/ Misha Tseytlin

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Defendants,

The Wisconsin Legislature,

Intervenor-Defendant,

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

Proposed Intervenor-Defendants.

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

CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD'S PROPOSED ANSWER TO PLAINTIFFS' COMPLAINT

INTRODUCTION

Per Federal Rule of Civil Procedure 24(c)'s requirement that the intervention motion of Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald, probable candidates for re-election to the U.S. House of Representatives in 2022 (hereinafter, collectively, "the Congressmen"), be accompanied by a "pleading that sets out the . . . defense[s] for which intervention is sought," the Congressmen hereby submit this proposed Answer.

Fed. R. Civ. P. 24(c). The Congressmen have also simultaneously filed a proposed Motion To Dismiss Plaintiffs' Complaint along with this proposed Answer. The Congressmen do not waive any of their defenses, privileges, or immunities in this meritless suit, nor do they waive their right to amend this proposed Answer, should this Court postpone or deny in whole or in part their Motion To Dismiss. *See* Fed. R. Civ. P. 12(a)(4)(A); *see also* Fed. R. Civ. P. 15(a).

NATURE OF THE ACTION

1. The Congressmen admit that this is an action challenging the constitutionality of Wisconsin's existing congressional and legislative districts and that Plaintiffs' Complaint requests various forms of relief, as pleaded in the Complaint. Further, to the extent Paragraph 1 asserts legal conclusions, no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts. Finally, the Congressmen deny all other allegations in Paragraph 1.

2. The Congressmen admit, upon information and belief, that on August 12, 2021, legacy census data was delivered to Wisconsin state officials. Paragraph 2 cites census data and case law, which speaks for itself. The Congressmen deny the allegations to the extent that they are inconsistent with those sources. Finally, the remaining allegations in Paragraph 2 set forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that

redistricting is the primary duty and responsibility of the State, which includes the state courts.

3. Paragraph 3 cites a federal constitutional provision and an amendment, as well as state statutes, which speak for themselves. The Congressmen deny the allegations to the extent that they are inconsistent with those sources. Further, Paragraph 3 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

4. Paragraph 4 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny all allegations in Paragraph 4.

5. Paragraph 5 cites a Wisconsin constitutional provision and case law, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with these sources. That said, the Congressmen admit that the Wisconsin Constitution vests the Wisconsin Legislature ("Legislature") with redistricting responsibility. Wis. Const. art. IV, § 3. Finally, the remaining allegations in Paragraph 5 set forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny the remaining allegations in Paragraph 5.

6. The Congressmen admit that the Governor is a Democrat, that the current Speaker of the State Assembly is a Republican, and that the current Majority

Leader of the State Senate is a Republican. The Congressmen further admit that federal courts have adjudicated certain of Wisconsin's redistricting maps in the past. Further, Paragraph 6 cites case law, which speaks for itself. The Congressmen deny the allegations regarding that case law, to the extent that those allegations are inconsistent with that case law. Finally, the Congressmen deny all other allegations in Paragraph 6 and, in particular, state that Wisconsin has previously enacted bipartisan redistricting plans. *See Reapportionment Bill Becomes Law*, Wis. State J., Nov. 16, 1971, § 1, at 4;[*] *see generally Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 843 (E.D. Wis. 2012) (discussing 1972 redistricting effort).

7. The Congressmen deny all allegations in Paragraph 7.

8. The Congressmen admit that Plaintiffs' action challenges the constitutionality of Wisconsin's existing congressional and legislative districts and that Plaintiffs' Complaint seeks various forms of relief, as pleaded in the Complaint. Paragraph 8 cites federal statutes, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those federal statutes. Finally, the remaining allegations in Paragraph 8 set forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny the remaining allegations in Paragraph 8 to the extent that they are inconsistent with 28 U.S.C. § 2284(a) and (b)(1).

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

JURISDICTION AND VENUE

9. The Congressmen deny that this Court has subject-matter jurisdiction. Paragraph 9 cites federal statutes and a federal rule, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those federal statutes and rule. Finally, the allegations in Paragraph 9 set forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny the allegations in Paragraph 9.

10. The Congressmen lack knowledge or information to form a belief about the allegations in Paragraph 10 with respect to where Defendants reside. The remaining allegations in Paragraph 10 set forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny the allegations in Paragraph 10.

11. Paragraph 11 cites federal statutes, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those federal statutes. The Congressmen admit, upon information and belief, that all Defendants have their official offices in the Western District of Wisconsin. Further, the remaining allegations in Paragraph 11 set forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny the allegations in Paragraph 11.

12. The Congressmen deny that this Court has subject-matter jurisdiction for the reasons stated in the Congressmen's contemporaneously filed Motion To Dismiss. Further, Paragraph 12 cites a federal statute, which speaks for itself. The

Congressmen deny the allegations to the extent they are inconsistent with that federal statute.

PARTIES

13. The Congressmen lack knowledge or information to form a belief about the allegations in Paragraph 13.

14. The Congressmen lack knowledge or information to form a belief about the allegations in Paragraph 14. Additionally, Paragraph 14 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

15. Paragraph 15 cites state statutes and case law, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those sources. Further, the Congressmen, upon information and belief, admit that Defendants are Commissioners of the Wisconsin Elections Commission and are named in their official capacities only. Finally, the Congressmen deny all other allegations in Paragraph 15.

FACTUAL ALLEGATIONS

16. The Congressmen admit the allegations in Paragraph 16.

17. Paragraph 17 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent that they are inconsistent with that data.

18. Paragraph 18 cites census data and legislation, which speak for themselves. The Congressmen deny the allegations to the extent that they are inconsistent with that data and legislation.

19. Paragraph 19 cites case law, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that case law. The Congressmen admit the remaining allegations in Paragraph 19.

20. Paragraph 20 cites a federal constitutional provision, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that federal constitutional provision. Further, the Congressmen lack knowledge or information to form a belief about the allegations in Paragraph 20.

21. The Congressmen admit that Wisconsin will have eight congressional districts. Further, Paragraph 21 cites census reports, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those reports. Finally, the Congressmen deny all other allegations in Paragraph 21.

22. The Congressmen admit that there are 99 State Assembly Districts and 33 State Senate Districts in Wisconsin, under current law. Further, Paragraph 22 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data.

23. The Congressmen admit that Wisconsin's population has changed in the past decade. However, Paragraph 23 also sets forth legal conclusions for which no response is required; but, if a response is required, the Congressmen deny these additional allegations in Paragraph 23.

24. The Congressmen admit, upon information and belief, that on August 12, 2021, legacy census data was delivered to Wisconsin state officials. However, the Congressmen lack knowledge or information to form a belief about the remaining allegations in Paragraph 24. Further, Paragraph 24 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data.

25. The Congressmen admit that Wisconsin's population has changed in the past decade. Further, Paragraph 25 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data. Finally, the Congressmen deny all other allegations in Paragraph 25.

26. Paragraph 26 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data.

27. Paragraph 27 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data. Further, to the extent that Paragraph 27 intends to allege a legal conclusion, no response is required; however, if a response is required, the Congressmen deny the allegations. Finally, the Congressmen deny all other allegations in Paragraph 27.

28. Paragraph 28 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data.

29. Paragraph 29 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data.

30. Paragraph 30 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

31. Paragraph 31 cites case law, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that case law. Further, the Congressmen admit that the Wisconsin Constitution vests the Legislature with redistricting responsibility. Wis. Const. art. IV, § 3. Additionally, the Congressmen admit that Governor Tony Evers is a Democrat, that the current Speaker of the State Assembly is a Republican, and that the current Majority Leader of the State Senate is a Republican. Finally, the Congressmen deny all other allegations in Paragraph 31.

32. The Congressmen admit that federal courts have adjudicated certain of Wisconsin's redistricting maps in the past. Further, the Congressmen admit that when redistricting legislation was last passed in 2011, the Governor was a Republican and Republicans held a majority of the seats in the State Assembly and State Senate. Finally, the Congressmen deny all other allegations in Paragraph 32.

33. The Congressmen admit that Wisconsin has entered a new decennial redistricting cycle. Wis. Const. art. IV, § 3. Upon information and belief, the Congressmen state that the Legislature's redistricting efforts have begun, consistent with the Wisconsin Constitution's vesting of the Legislature with redistricting

responsibility. *Id.* Further, the Congressmen admit that Governor Evers has, at times, vetoed legislation passed by the Legislature, although the Congressmen deny the allegations in Paragraph 33 relating to those vetoes to the extent that those allegations are inconsistent with the nature of that vetoed legislation. Additionally, upon information and belief, the Congressmen state that Governor Evers signed state budget legislation for the two-year budget passed in 2019 and the two-year budget passed in 2021. Next, the Congressmen admit that a gubernatorial executive order purports to establish an independent redistricting commission. Wis. Executive Order No. 66 (Jan. 27, 2020). Further, the Congressmen lack knowledge or information to form a belief about the remaining allegations regarding Governor Evers in Paragraph 33, and therefore deny them. However, the Congressmen state that, as evidence by the Governor's creation of an independent redistricting commission, the Governor intends to participate in the adoption of redistricting maps. Additionally, Paragraph 33 cites a news article, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that news article. Finally, the Congressmen deny all other allegations in Paragraph 33.

34. Paragraph 34 cites a news article, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that news article. Further, the Congressmen deny the allegations in Paragraph 34 regarding the nature of the vetoed legislation to the extent that the allegations are inconsistent with the nature of that legislation. Finally, the Congressmen deny all other allegations in Paragraph 34.

35. The Congressmen deny all allegations in Paragraph 35.

36. Paragraph 36 cites a Wisconsin constitutional provision and a Wisconsin statute, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those sources. Further, the Congressmen lack knowledge or information to form a belief about the remaining allegations in Paragraph 36 and therefore deny them.

37. Paragraph 37 cites a Wisconsin statute and federal case law, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those sources. Further, the remaining allegations in Paragraph 37 set forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny the remaining allegations in Paragraph 37.

38. Paragraph 38 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

COUNT I

39. The Congressmen reallege and reincorporate by reference all prior answers to all prior Paragraphs as though fully set forth herein.

40. Paragraph 40 cites a federal constitutional amendment and case law, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those sources.

41. Paragraph 41 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

42. Paragraph 42 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

43. Paragraph 43 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

COUNT II

44. The Congressmen reallege and reincorporate by reference all prior answers to all prior Paragraphs as though fully set forth herein.

45. Paragraph 45 cites a federal constitutional provision and case law, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those sources.

46. Paragraph 46 cites a federal constitutional provision and case law, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those sources.

47. Paragraph 47 cites census data, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that data.

48. Paragraph 48 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

49. Paragraph 49 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny that Plaintiffs have any cognizable harm that is redressable by a federal court, given that redistricting is the primary duty and responsibility of the State, which includes the state courts.

COUNT III

50. The Congressmen reallege and reincorporate by reference all prior answers to all prior Paragraphs as though fully set forth herein.

51. Paragraph 51 cites a federal constitutional amendment and case law, which speak for themselves. The Congressmen deny the allegations to the extent they are inconsistent with those sources.

52. Paragraph 52 cites case law, which speaks for itself. The Congressmen deny the allegations to the extent they are inconsistent with that case law. Further, Paragraph 52 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny Paragraph 52.

53. The second sentence of Paragraph 53 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny Paragraph 53. Further, the Congressmen deny all other allegations in Paragraph 53.

54. Paragraph 54 sets forth legal conclusions for which no response is required; however, if a response is required, the Congressmen deny Paragraph 54.

RELIEF REQUESTED

55. The Congressmen deny that Plaintiffs are entitled to any of the relief that they claim on pages 15 and 16 of their Complaint.

56. The Congressmen deny any allegations not otherwise answered in the prior paragraphs, including any allegations in headings, to the extent such denials are consistent with the Congressmen's prior answers.

AFFIRMATIVE DEFENSES

In addition to the defenses explained in the Congressmen's simultaneously filed Motion To Dismiss, the Congressmen assert as follows:

1. Plaintiffs' claims are unripe, meaning that their Complaint does not present a case or controversy as required by Article III of the U.S. Constitution for this Court to exercise jurisdiction.

2. Plaintiffs lack standing to bring their claims, meaning that their Complaint does not present a case or controversy as required by Article III of the U.S. Constitution for this Court to exercise jurisdiction.

3. Plaintiffs' Complaint does not seek "an acceptable Article III remedy." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998).

4. Plaintiffs' claims in their Complaint are otherwise not justiciable.

5. Plaintiffs' Complaint fails to state a claim for which relief can be granted.

6. This Court should dismiss Plaintiffs' Complaint under *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *E & E Hauling v. Forest Preserve District of DuPage Cty.*, 821 F.2d 433 (7th Cir. 1987).

7. The Congressmen reserve the right to identify additional affirmative defenses should this Court postpone or deny in whole or in part the Congressmen's Motion To Dismiss.

WHEREFORE, the Congressmen request that this Court dismiss this action in its entirety and grant the Congressmen such other relief as this Court deems just and proper.

Dated: August 30, 2021

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

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

/s/ Misha Tseytlin

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

CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD'S PROPOSED MOTION TO DISMISS

Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald, who are also probable candidates for re-election to the U.S. House of Representatives in 2022 (hereinafter "the Congressmen"), respectfully move to dismiss Plaintiffs' Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Congressmen provide the grounds for this Motion in their simultaneously filed Memorandum. For the reasons stated

in that Memorandum, the Congressmen respectfully request that this Court grant their Motion.

Dated: August 30, 2021

Respectfully Submitted,

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

CERTIFICATE OF SERVICE

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

/s/ Misha Tseytlin

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

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

INTRODUCTION

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

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

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

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

ARGUMENT

The Congressmen agree with and join the core argument raised by the Legislature in its Motion To Dismiss. Dkt.9-3. In particular, as the Legislature explains, *Growe* requires dismissal because "federal judges [must] defer consideration of disputes involving redistricting where the State, through its legislative or judicial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: August 30, 2021

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

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

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