UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.

Plaintiffs,

Case No. 3:15-CV-00421-jdp

v.

BEVERLY R. GILL, et al.,

Defendants.

BRIEF IN SUPPORT OF WISCONSIN STATE ASSEMBLY'S MOTION TO INTERVENE PURSUANT TO FRCP 24(A) & (B)

INTRODUCTION

In *Sixty-Seventh Minnesota State Senate v. Beens,* the Supreme Court held that a state legislative body was a proper mandatory intervenor in an apportionment lawsuit even though there was another State defendant present in the action. The Court's rationale was straightforward and unassailable: a legislative body is directly affected by the decree in a case involving the validity of its legislative districts, and thus has a substantial interest in the outcome.

Here, plaintiffs' lawsuit challenges the validity of all 99 Assembly districts. A decree from this court will directly affect the Wisconsin State Assembly. *Beens* instructs that state legislative bodies are proper intervenors under these circumstances.

Moreover, this motion is filed before any scheduling order has been entered or any discovery has taken place in this second phase of this litigation. It is thus timely.

Respectfully, the Wisconsin State Assembly requests the Court grant it defendant-intervenor status.

ABOUT PROPOSED-INTERVENORS

The Wisconsin State Assembly is one of the two bodies comprising Wisconsin's bicameral legislative branch.[1] The members of the Wisconsin State Assembly are "chosen biennially, by single districts, … by the qualified electors…."[2] Today, there are 99 Assembly districts, and thus, 99 representatives of the Assembly.[3]

The Wisconsin Constitution expressly charges the legislature with the responsibility of creating new legislative districts after each federal census.[4] The legislature fulfilled this responsibility for the current decennial when it enacted 2011 Wisconsin Act 43. Plaintiffs challenge the constitutionality of Act 43's Assembly district lines.[5]

ARGUMENT

I. Proposed-Intevenors Are Entitled To Intervene As A Right

Federal Rule of Civil Procedure 24(a) entitles a person to intervene when the proposed-intervenor:

- Files a timely motion;
- Has an interest in the subject of the action;

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[1] Wis. Const. Art. IV, § 1.
[2] Wis. Const. Art. IV, § 4.
[3] Wis. Stat. § 4.001.
[4] Wis. Const. Art. IV, § 3.
[5] *See* Amend. Compl. (Dkt. # 201), ¶¶ 179-82 (Relief Requested).

- Is situated such that disposing of the matter may impair or impede proposed-intervenor's ability to protect its interest; and
- Does not have its interests adequately represented by an existing party.[6]

These elements are met here.

A. Proposed-Intevernors Motion Is Timely

Whether a motion to intervene is timely is a question "committed to the sound discretion of the district court"[7] and depends on an evaluation of multiple factors. These may include (1) the length of time the intervenor knew or should have known of its interest in the case; (2) prejudice to the parties caused by any delay; (3) the resulting prejudice to intervenors if the motion is denied; and (4) any other unusual circumstances.[8]

To be sure, Proposed-Intervenors concede they became aware of this action at or around the time the case was filed in this Court in July of 2015. Nevertheless, the legislature has been significantly involved in this litigation. Legislative employees responded to third-party discovery and testified at the May 2016 trial.[9] Thus, the parties have already had the benefit of discovery from legislative employees. Additionally, the United States Supreme Court permitted the Wisconsin State Assembly and Senate, as amici, to present oral argument.[10]

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[6] Fed. R. Civ. P. 24(a)(2); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (cleaned up to remove internal quotations an alterations).

[7] *Shea v. Angulo*, 19 F.3d 343, 348 (7th Cir. 1994).

[8] *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985).

[9] *See, e.g.,* Dkt ## 113, 118, 147-48.

[10] *Gill v. Whitford*, 138 S.Ct. 52 (2017) (order granting divided argument to Wisconsin State Senate and Wisconsin State Assembly).

Moreover, while this case is three years old, it is also brand new. This Court lacked subject-matter jurisdiction over the first phase of the case.[11] As a result, the initial trial proceedings have no preclusive effect that would foreclose the opportunity of any party (whether new or existing) from asserting claims and defenses.[12] Nor does the doctrine of law of the case apply.[13] Further, the amended complaint adds numerous parties, revises the "vote dilution" claim,[14] and contains a brand new claim[15]—one which has not been the subject of discovery or any adversarial proceedings. Similarly, while the Supreme Court's decision did not rule on significant merits questions, the attached brief in support of the Wisconsin State Assembly's

[11] *Gill v. Whitford,* -- U.S. --, 138 S.Ct. 1916, 1934 (2018). The *Gill* Court acknowledged that it was uncommon to remand the case back to the district court instead of dismissing it outright. *Id.* at 1933-34. Were the usual course to have been followed, this would have been a brand new case in every respect.

[12] *Cf. Montana v. United States*, 440 U.S. 147, 153 (1979) ("A fundamental precept … embodied in the related doctrines of collateral estoppel and res judicata is that a right, question or fact distinctly put in issue and directly determined by a court of *competent jurisdiction* … cannot be disputed in a subsequent suit between the same parties or their privies.") (emphasis added; internal quotation deleted).

[13] The law of the case doctrine does not apply where an issue that was decided by a lower court was appealed. *Cf., Schering Corp. v. Illinois Antibiotics Co.*, 89 F. 3d 357, 358 (7th Cir. 1996) (law of the case doctrine applies where issue decided by lower court could have been appealed but was not). Here, the justiciability of political gerrymandering claims was a subject of the appeal. *Gill*, 138 S.Ct. at 1929 (noting justiciability issue was raised but would not be decided).

[14] Plaintiffs now attempt to plead district-specific harms, *see* Amend. Compl., ¶¶ 18-104 (containing new allegations not in Complaint at Dkt #1), and limit their "Vote Dilution" claim to district-specific remedies. *Compare* Amend. Comp., ¶ 180 (seeking a declaration that 29 districts in which there are plaintiffs with standing are invalid and violate plaintiffs' rights "not to be subjected to intentional vote dilution") *with* Dkt #1 "Relief Requested" (containing no parallel district-specific allegation).

[15] *Compare* Amend. Compl., ¶¶ 173-178 ("Burden on Right To Association") *with* Compl., ¶¶ 90-96 ("First Amendment Violation").

motion to dismiss argues that the decision undermines the statewide gerrymander theory on which plaintiffs constructed their trial and appear set on advancing again.[16]

Effectively, then, this matter has the essential elements of a new case – new parties and new claims yet to be subjected to the adversarial process, and other existing-but-not-determined claims whose analysis is affected by an intervening Supreme Court decision. In this second phase, as of this filing, there is no scheduling order, no dispositive motions have been filed, and plaintiffs have indicated their intention to embark on new expert discovery.[17]

Intervention now would thus allow Proposed-Intervenors to participate in all aspects of this litigation on remand. Recently, the Sixth Circuit found an intervention motion timely in a redistricting case where, at the time the proposed-intervenors moved, a dispositive motion was pending, "no scheduling order … [was] in place and discovery had not yet begun."[18]

Last, the existing parties would not be prejudiced by the Wisconsin State Assembly's intervention at the dawn of the second phase of this case. To the extent that discovery is sought from legislative employees, it was provided in the first phase. And since matters between the parties have not been adjudicated (and thus the state

[16] *See, e.g.,* Attachment 2 at 1-2, 28, 36-39, 48 ("Brief In Support of Wisconsin State Assembly's Motion To Dismiss").

[17] Dkt # 198 at 2.

[18] *League of Women Voters of Michigan v. Johnson*, --- F.3d ---, No. 18-1437, slip op. at 5, 7 (6th Cir. Aug. 30, 2018) (slip. op. available on Sixth Circuit's website at http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0194p-06.pdf) (also attached as Attachment 4).

defendants retain any right a litigant would have at the start of a case), all issues remain on the table and no delay ensues from Proposed-Intervenors' participation.

In addition, plaintiffs and defendants have conceded that they would not be prejudiced by starting over. Plaintiffs have consented to the consolidation of this matter with a brand new matter filed on September 14, 2018.[19] Defendants do not oppose that consolidation.[20]

Intervention in this second phase of this case is thus timely, would not cause delay, and would not prejudice the existing parties.

B. The Wisconsin State Assembly Has An Interest In This Matter

"Intervention as of right requires a direct, significant, and legally protectable interest in the question at issue in the lawsuit."[21]

The Wisconsin State Assembly (and its members) has several distinct and substantial interests at stake in this litigation. We assert three here. First, the relief plaintiff seeks would require changing Assembly districts, changing the composition of district constituencies, and likely affecting the composition of the bodies. Second, legislative bodies always have an interest in defending their laws, duties, and powers. And third, individual legislators have an interest in the continuity of their relationships with their constituents.

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[19] *See Wisconsin Assembly Democratic Campaign Committee v. Gill*, No. 18-cv-763, Dkt # 2 (Motion to consolidate) (representing that "Plaintiffs in *Whitford v. Gill*, No. 15-cv-421-jdp … consent to the cases' consolidation").

[20] *Id.* (representing that "Defendants have authorized counsel for [plaintiffs] to indicate to the Court that they do not oppose this motion to consolidate").

[21] *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (cleaned up to remove internal quotations an alterations).

Any of these interests satisfy Rule 24's interest requirement. Indeed, it is not too much to say that the Wisconsin State Assembly is the real party in interest in this case.

1. It Is Settled Law That A Legislative Body Has An Interest In Lawsuits Affecting Their Composition

This case seeks to declare the Assembly districts created by Act 43 unconstitutional and replace them with new districts.[22] The Assembly, of course, is comprised of one member from each district.[23] That member must reside in the district he or she represents.[24] If declared unconstitutional, new districts will need to be created, thus changing not only which group of electors will select a representative from any changed electoral district, but also changing the pool of eligible electors who may also serve as a member for any particular district. Moreover, current members will likely be "paired."

The Supreme Court has recognized a state legislature's interest in its composition as a sufficient for mandatory intervention.[25] In *Sixty-Seventh Minnesota Senate v. Beens*, Plaintiffs sued the Minnesota Secretary of State, claiming that the state legislative districts drawn in 1966 were malapportioned after the 1970 Census.[26] The Minnesota State Senate intervened pursuant to Fed. R. Civ. P. 24(a).[27] After trial, they appealed the District Court's orders that declared the existing maps

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[22] *Amend. Compl.*, ¶¶ 179, 180, 182.
[23] Wis. Const. Art. IV, § 4.
[24] Wis. Const. Art. IV, § 6.
[25] *See, e.g., Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194, (1972).
[26] *Id.* at 190.
[27] *Id.* at 191.

unconstitutional, enjoined future elections on those maps, reduced the number of Senate seats, and adopted a new map.[28]

In the Supreme Court, the plaintiffs sought to dismiss the appeal, claiming the Minnesota State Senate was not a proper intervenor. The Supreme Court disagreed:

> [C]ertainly the senate is directly affected by the District Court's orders. That the senate is an appropriate legal entity for the purpose of intervention and, as a consequence, of an appeal in a case of this kind is settled by our affirmance of *Silver v. Jordan*, … where it was said: "The California State Senate's motion to intervene as a substantially interested party was granted because it would be directly affected by the decree of this court."[29]

Here, as in *Beens* and the summarily affirmed *Silver*, the Wisconsin State Assembly would be directly affected the Court's orders regarding the constitutionality of Act 43's district lines. The Wisconsin State Assembly has the same right to intervene as the Minnesota State Senate had in *Beens* to protect the equivalent interest.

While *Beens* applies and dispositively answers the question as to whether the Wisconsin State Assembly has a protectable interest at stake in this litigation, we offer two additional substantial interests below.

2. Legislative Bodies Have An Interest In Defending The Validity of Their Acts And Defending Their Institutional Powers And Duties

[28] *Id.* at 191-93.

[29] *Id.* at 194 (quoting *Silver v. Jordan*, 241 F.Supp. 576 (S.D.Cal.1964), *aff'd*, 381 U.S. 415, 85 S.Ct. 1572 (1965)). *Silver* was another malapportionment case in which the state senate was allowed mandatory intervention while the Secretary of State was the defendant.

The Wisconsin State Assembly also has an interest in defending the effectiveness its enactments. In *Coleman v. Miller*,[30] the Supreme Court concluded that state legislators suing in sufficient numbers such that their votes would only be vindicated if they succeeded with their legal theory "have a plain, direct and adequate interest in maintaining the effectiveness of their votes."[31] As the Court would explain in *Raines v. Byrd*, "our holding in *Coleman* stands … for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[32]

Coleman's holding as it relates to blocs of legislators has been extended to state legislatures, and in the districting context. In *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, the Court held that the Arizona Legislature had standing to challenge the validity of Proposition 106, Arizona's constitutional amendment that reassigned districting responsibilities to an independent districting commission.[33] The Arizona legislature asserted that the U.S. Constitution (the Elections Clause) and federal law (2 U.S.C. § 2a(c)) bestowed redistricting prerogatives upon it that could not be displaced by state law.

The Court concluded that *Coleman* applied and the legislature had standing because "Proposition 106, together with the Arizona Constitution's ban on efforts to

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[30] 307 U.S. 433 (1939).

[31] *Id.* at 438.

[32] *Raines v. Byrd*, 521 U.S. 811, 823 (1997).

[33] -- U.S. --, 135 S.Ct. 2652, 2663-66 (2015).

undermine the purposes of the initiative, 'would completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan."[34]

A party opposing this motion might argue that *Coleman* and *Arizona Redistricting Comm'n* require not just that a legislative act could be invalidated, but that a legislative *power* will be undermined. While we acknowledge this argument might have some purchase in a standing analysis, the type of interest sufficient to constitute intervention does not need to be the same interest that is required for standing.[35] Where the only question is whether there is an interest sufficient for Rule 24, courts have found that even a single individual legislator's interest in the validity of a law enacted by the legislature satisfies Rule 24's interest requirement.[36]

But more importantly, there *are* core legislative powers at issue in this case that would satisfy Article III's standing requirement (and, *a fortiori*, Rule 24's "interest" requirement).[37] First, the Wisconsin legislature is vested with the mandatory duty to pass districting laws.[38] And Proposed-Intervenors are arguing

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[34] *Id.* at 2665 (quoting *Raines*, 521 U.S. at 823-24.)

[35] *United States v. Bd. of Sch. Comm'rs*, 466 F.2d 573, 577 (7th Cir. 1972) ("The requirements for intervention … should generally be more liberal than those for standing to being suit."); *Cf. Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017) (An "intervenor of right must have Article III standing *in order to pursue relief that is different* from that which is sought from a party") (emphasis added);

[36] *See, e.g., Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 101 (E.D.N.Y. 1996) (speaker of New York Assembly has a sufficient-for-intervention interest in upholding the constitutionality of state's consumer protection law aimed at addressing fraud in kosher foods industry).

[37] *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C.Cir. 2015) (stating that if a party "has constitutional standing, it *a fortiori* has an interest [sufficient for intervention] relating to the property or transaction which is the subject of the action.")

[38] Wis. Const. Art. IV, § 3.

that plaintiffs' political gerrymandering claim is always nonjusticiable.[39] Put simply, if Proposed-Intervenors prevail, their constitutional power (and obligation) to district will be final and not subject to judicial review, at least insofar as political gerrymandering claims are concerned. That makes it like the Arizona legislature's interests that were at stake in *Arizona Redistricting Comm'n.*

Second, the legislature has a "duties and powers" interest in ensuring that it, and not a federal court, has the opportunity to pass a remedial map should this Court declare Act 43 unconstitutional. This flows from the fact that "legislative apportionment is 'primarily a matter for legislative consideration and determination.'"[40] Normally, when courts find laws unconstitutional, they do not rewrite the law.[41] They declare offending laws unconstitutional and possibly enjoin their enforcement, but then it is up to the legislature to decide whether to enact new legislation.

But districting laws, unlike other laws, are not discretionary. The state constitution not only mandates that the Legislature district,[42] but *any* district-based elected representative body requires there to be districts in place to provide constituents representation and to conduct elections. This is why the Supreme Court has countenanced judicial apportionment plans since the initial one-person, one-vote

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[39] Attachment 2 at 8-73.

[40] *Connor v. Finch,* 431 U.S. 407, 414 (1977) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964))

[41] *U.S. v. Stevens*, 559 U.S. 460, 481 (2010) ("We will not rewrite a law to conform it to constitutional requirements for doing so would constitution a serious invasion of the legislative domain[.]") (cleaned up to remove internal alterations, citations, and quotations).

[42] *See* Wis. Const. Art. IV, § 3.

cases.[43] The Wisconsin State Assembly's participation in this case will protect its ability to exercise its core legislative power to district in the event that the Court finds Act 43 unconstitutional.[44]

Third, should the state-defendants fall short in their defense of Act 43's maps—a distinct possibility in the context of any districting litigation[45] and all the more likely in an apparently partisan-motivated lawsuit[46] to address an allegedly partisan districting law[47]—then the Supreme Court has acknowledged that one house of the legislature possesses an interest in defending its laws sufficient for Article III standing. As the Court explained in *U.S. v. Windsor*, such circumstances "pose grave

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[43] *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964).

[44] Plaintiffs, to their credit, appear to acknowledge that the legislature should have the opportunity to enact a new districting plan should Act 43 be declared unconstitutional. Amend. Compl. ¶ 182. But only if it is "timely." The question of what constitutes timeliness would likely be the subject of litigation.

[45] In *Beens*, for example, it was the Minnesota State Senate alone who appealed (and successfully). 406 U.S. at 192-93, 200.

[46] Plaintiffs have brought this case because they are supporters of democrats and they wish to see more democrats elected. *See, e.g.,* Amend. Compl., ¶¶ 45 (plaintiff Donohue is a "supporter of Democratic candidates and policies"); 146 (under plaintiffs' demonstration map, Plaintiff Donohue's district would have elected a Democrat and not a Republican); 172 (current plan entrenches rival political party in power).

[47] For a recent example, *see Common Cause v. Rucho*, No. 1:16-CV-1026 (M.D.N.C., Sept. 12, 2018) (order conditionally staying pending appeal court's enjoinment of North Carolina's districting plan found to be an unconstitutional gerrymander; noting that only the legislative defendants sought a stay, and that the Executive did not) (available on PACER). The Court may take judicial notice that the legislative defendants in that case are Republicans and that the North Carolina Governor (a party) and the Attorney General (the executive's attorney) are democrats. *See* FRE 201. North Carolina's State Board of Elections & Ethics Enforcement posts election results on its webpage, and the 2016 statewide office election results, which list candidates' political affiliations, are available at https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=COS&contest=0). The Court may take judicial notice of the 2016 Presidential Elections results, tabulated by county, and as reported by a government body. These are facts that "can be accurately and readily determined from [a] source[] whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2); *Menominee Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (it is proper to take judicial notice of the reports of administrative bodies).

challenges to the separation of powers," particularly the "legislative power" when the legislature "has passed a statute and [the Executive] has signed it" but later the "Executive at a particular moment" "nullifies [the legislative] enactment solely on its own initiative and without any determination from the Court" by "fail[ing] to defend the constitutionality of an Act … based on a constitutional theory not yet established in judicial decisions."[48] Certainly, this case involves an unestablished legal theory.[49]

In sum, the Wisconsin Assembly has an interest in defending both the validity of its laws and protecting its legislative power to enact districting legislation without judicial interference on the basis of political gerrymandering or First Amendment claims.

3. Individual Legislator Members Of The Wisconsin State Assembly Have An Interest In Maintaining Constituent-Legislator Relationships

Not only does the Wisconsin State Assembly have an interest in this litigation, so, too, does the Assembly's constituent members. Associational standing exists when (a) an organization's members have standing; (b) the interests the association seeks to protect are germane to the organization's purpose; and (c) neither the claim

[48] *U.S. v. Windsor*, 570 U.S. 744, 762 (2013) (House of Representatives, though power delegated to Bipartisan Legal Advisory Group of the United States House of Representatives, had standing to defend constitutionality of the Defense of Marriage Act).

[49] *Gill*, 138 S.Ct. at 1926-29 (2018) (surveying political gerrymandering decision, recognizing a lack of settled doctrine, and noting that "[o]ur previous attempts at an answer" to "what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters on partisan lines" "have left few clear landmarks for addressing the question" and "generated conflicting views both of how to conceive of the injury … and of the appropriate role for the Federal Judiciary in remedying that injury").

asserted or the defense requires the participation of individual members in the lawsuit.[50] Those conditions exist here.

Courts have repeatedly held that legislators have interests in their office sufficient for standing when their district is being challenged.[51] And while plaintiffs could object that this is a "personal" interest and not an interest of the Assembly (i.e., an interest germane to the Assembly's purpose), there is no question that the work of a legislator-as-legislator is also affected by plaintiffs' action. The job of a legislator contains many facets; "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator."[52] As the Eastern District of New York observed, "[t]he modern role of legislators centers less on the formal aspects of representing—e.g., legislating and policymaking—and more on maintaining the relationship between legislators and their constituents."[53] Whether or not constituent service is more important than policymaking is not a question this Court needs to resolve; suffice it to say that

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[50] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). While *Hunt* involves standing to intervene as a plaintiff, the associational interest test applies to intervention motions. *See, e.g., Wiggins v. Martin*, 150 F.3d 671, 675 (7th Cir. 1998) (applying *Hunt* test to proposed-intervenor asserting associational interest); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 821-22 & n.3 (9th Cir. 2001) (same).

[51] *See, e.g., League of United Latin Am. Citizens, Council No. 44343 v. Clements,* 884 F.2d 185, 188 (5th Cir. 1989); *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995); Williams v. State Bd. of Elections, 696 F. Supp. 1563, 1569-73 (N.D. Ill. 1988).

[52] *McCormick v. United States*, 500 U.S. 257, 272 (1991).

[53] *Gordon v. Griffith*, 88 F. Supp.2d 38, 47 (E.D.N.Y. 2000) (attributing increasing significance of legislator-constituent relationship to voter-demand for assistance in navigating modern state bureaucracies) (citing Malcolm E. Jewell, *Representation in State Legislatures* at 10-18 (1982).

constituent service and passing legislation are organizational goals of any legislative body.

Members of the Wisconsin State Assembly have developed relationships with their constituencies since they were elected. If Plaintiffs' action requires new boundaries to be drawn, these bonds will be broken. Constituents will be required to develop new relationships with different members and existing members will need to cultivate new relationships with new constituents.

Finally, it is clear that the defenses Proposed-Intervenors intend to assert do not depend on the individual participation of its members. The critical questions in this case are not individual-legislator-dependent, whether those issues are of fact or law.

In sum, the Wisconsin State Assembly has an interest in this litigation, as a body, and as a representative of its members.

C. Denying Intervention Would Impair Or Impede The Wisconsin State Assembly's Ability To Protect Its Interest

Proposed-Intervenors' interest is in preserving the district maps that the legislature created in Act 43. Should plaintiffs prevail in this litigation with or without Proposed-Intervenors' participation as a party, Act 43 will be enjoined, new lines will be drawn (potentially by the Court), elections will be held using different districts,[54] there will be no collateral mechanism to reestablish those district lines, and Proposed-Intervenors' interest will be extinguished.

[54] Amend. Compl., ¶ 182.

D. The Wisconsin State Assembly Is Not Adequately Represented By The Existing Parties

The Supreme Court explained in *Trbovich v. United Mine Workers of America* that only a minimal showing of inadequate representation is required to satisfy Rule 24(a)'s inadequate representation prong.[55] Nevertheless, Proposed-Intervenors acknowledge, as we must, that the law of this circuit is that "when a prospective-intervenor and a named party have the same goal," a rebuttable "presumption exists that the representation in the suit is adequate."[56] In addition, adequacy "can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interest of the proposed intervenor." We further also acknowledge that mere quibbling about litigation strategy is insufficient to rebut this presumption.[57]

But unlike most cases involving a state defendant who may be presumed to share an interest in defending the law, the Supreme Court has already concluded mandatory intervention is appropriate for state legislative bodies seeking to intervene in redistricting cases. They did so in *Beens*, where the Court expressly held the Minnesota State Senate was a proper mandatory intervenor.[58] And they did so when they affirmed the mandatory-intervention ruling in *Silver*.[59]

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[55] *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972).

[56] *Wisconsin Educ. Ass'n Council*, 705 F.3d at 659 (cleaned up to remove internal quotations and alterations); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985).

[57] *Id.*

[58] *Beens,* 406 at 194.

[59] *Silver v. Jordan*, 241 F.Supp. 576 (S.D.Cal.1964), *aff'd*, 381 U.S. 415, 85 S.Ct. 1572 (1965).

In these cases, the legislative intervenors are the true party in interest, for it is their body that risks being altered as a result of this litigation and their members' constituent relationships that risk being irrevocably changed. And while *Beens* Court did not expressly discuss adequacy of representation, its conclusion that the district court's Rule 24(a) determination was appropriate affirms this holding, as Rule 24(a) then, as now, included a condition requiring adequacy of representation.[60]

Even if *Beens* did not apply, the Wisconsin State Assembly contends there is inadequate representation. First, the state-defendants have not moved to dismiss the Amendment Complaint. Proposed-Intervenors believe that this matter can and should be resolved without the need to engage in costly and timely expert or other discovery. While the state-defendants assert an affirmative defense on the basis of non-justiciability and failure to state a claim—the main arguments in the attached Motion to Dismiss brief—state-defendants' pleading does not demonstrate a commitment to make all the various arguments contained within the brief. Some of these arguments speak directly to legislative powers and prerogatives.[61] Whether and to what degree the legislature is subject to court oversight should not be determined exclusively by the arguments that disinterested election officials *might* (but have not yet) set forth.

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[60] *See* Fed. R. Civ. P. 24(a)(2)(1971)(intervention as a right requires that "the representation of an applicant's interest is or may be inadequate"). Since *Beens* Rule 24(a)'s language changed into its current form (in relevant part) by a 1987 amendment. But the Advisory Committee notes indicate that the changes were technical and that "no substantive change is intended." *See* Fed. R. Civ. P. 24 (Advisory Committee Notes, 1987 Amendment).

[61] *See, e.g.,* Attachment 2 at 66-73.

Second, the Supreme Court of the United States permitted divided argument to allow the Wisconsin State Assembly and Senate (as amicus) to provide oral argument.[62] This is indicative of the Court's understanding that the legislature's participation was not a simple "me too."[63]

Third, there is a considerable likelihood that the state-defendants will not "have the same goal" throughout the course of this litigation. The Commissioners are represented by the Attorney General, who ultimately controls this litigation and the decision to appeal an adverse judgment.[64] The Attorney General is an elected position, and is up for election this fall on a partisan ballot. While the incumbent has, to date, defended Act 43, a new Attorney General may change course. One major party candidate favors taking redistricting out of the hands of the legislature[65] and

[62] *Gill v. Whitford*, 138 S.Ct. 52 (2017).

[63] The Wisconsin State Assembly advanced related-but-different arguments in their Supreme Court amicus brief than those advanced by the state-defendants. For example, the Wisconsin State Assembly and Senate argued that plaintiffs' legal theories rested on a distorted view of representative democracy. The State Assembly and Senate argued that candidates matter, that voters elect individual candidates not party delegations, that voters supporting losing candidates are not deprived of representation, and that significant split balloting occurs in Wisconsin demonstrating that partisan affiliation is not immutable. *See* Br. for Amici Curiae Wisconsin State Senate and Wisconsin State Assembly at 17-31, *Gill v. Whitford*, No. 16-1161 (Sup. Ct.). Those arguments are reformulated in a separate context in the attached Brief In Support Of Motion To Dismiss. *See, e.g.,* Attachment 2 at 28-36. If the Wisconsin State Assembly is permitted to intervene and plaintiffs' claims survive a motion to dismiss, then the Wisconsin State Assembly could produce expert or fact testimony on voter behavior that was largely absent from the first trial but is highly relevant.

[64] *See* Wis. Stat. § 165.25(6) (attorney general, not agency, has power to compromise actions in which he has been asked to represent state defendant); *see also Koschkee v. Evers*, 2018 WI 82, ¶ 50 & n.18, 382 Wis.2d 666 (attorney general controls decision to appeal) (Grassl Bradley, J., concurring in part and dissenting in part).

[65] Ken Krall, "Josh Kaul Stops In Rhinelander As Part of AG Campaign," WXPR (April 24, 2018) (available at http://www.wxpr.org/post/josh-kaul-stops-rhinelander-part-ag-campaign)

intends to downsize the Solicitor General's office,[66] which represented the state-defendants on appeal in this matter.[67]

In a typical litigation, state-defendants and Attorneys General may be presumed to defend the law adequately. But make no mistake, this is not a typical litigation.[68] This is a case about politics and partisanship and whether the Constitution authorizes the judiciary to regulate how much politics and partisanship may influence legislation. Partisan elected executive officers have a history of failing to vigorously defend the law and not appeal or take every effort to preserve a map.[69] We cannot represent that this *will* happen here; only that this is precisely the kind of case where it has happened before and is likely to happen again.

Proposed-intervenors have a right to intervene.

II. Permissive Intervention Is Appropriate

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[66] Katelyn Ferral, "Democratic Attorney General candidate Josh Kaul says if elected he would reduce Solicitor General's office, go after environmental polluters," The Capitol Times (Sept. 6, 2018) (available at https://madison.com/ct/news/local/govt-and-politics/democratic-attorney-general-candidate-josh-kaul-says-if-elected-he/article_54003498-ad48-5e2b-8fd1-2d7de2d117b3.html_).

[67] *See* Br. for Appellants, *Gill v. Whitford*, No. 16-1161 (S.Ct.) (filed June 28, 2017) (filed by the Solicitor General, Chief Deputy Solicitor General Walsh, Deputy Solicitor General LeRoy, Assistant Solicitor General Miller, and Assistant Attorney General Keenan) (available at http://www.scotusblog.com/wp-content/uploads/2017/08/16-1161-ts.pdf).

[68] *Gill*, 138 S. Ct. at 1933-34 (concluding this is not the "usual case" as a justification from the normal rules that cases should be dismissed outright where jurisdiction is not established at trial).

[69] *See, e.g., Beens*, 406 U.S. at 192-93 (state defendant not appealing apportionment decision, leaving intervening legislative body as only party); *see Common Cause v. Rucho*, No. 1:16-CV-1026 (M.D.N.C., Sept. 12, 2018) (order conditionally staying pending appeal court's enjoinment of North Carolina's districting plan found to be an unconstitutional gerrymander; noting that only the legislative defendants sought a stay, and that the executive did not) (available on PACER) & n.47, *supra.*

In the alternative, or if the court concludes the standards for mandatory intervention have not been met, permissive intervention is appropriate. Under Fed. R. Civ. P. 24(b), permissive intervention is appropriate where a proposed-intervenor files a timely motion and asserts a "claim or defense that shares with the main action a common question of law or fact."[70] "In exercising its discretion" to allow permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[71]

For the reasons stated above, this motion is timely. And there exists a common question of law or fact.[72]

The recent Sixth Circuit decision in *League of Women Voters of Michigan v. Johnson* is particularly instructive to the question of permissive intervention. *League of Women Voters of Michigan* involved a political "packing and cracking" claim that is similar to the "vote dilution" claim in the instant case.[73] It also presented a First Amendment claim.[74] The named defendant was the Michigan Secretary of State, who, like the defendants in this matter, is responsible for the conduct of the state's elections.[75]

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[70] Fed. R. Civ. P. 24(b).

[71] Fed. R. Civ. P. 24(b)(3).

[72] *See, e.g.,* Dkt # 207 (state-defendants answer to amended complaint, raising non-justiciability as affirmative defense) *with* Attachment 2 at 8-73 (arguing amended complaint fails to state a justiciable claim) *and* Attachment 3 (incorporating affirmative defenses by reference).

[73] *League of Women Voters of Michigan*, slip op at 2, 3.

[74] *Id.* at 3.

[75] *Id.*

A couple of months after the lawsuit was filed, Members of Congress whose districts were being challenged sought intervention.[76] The district court denied intervention as a right, reasoning that the Congressional intervenors' constituent-legislator relationship interest was a generalized interest and that this interest would be adequately protected by the Secretary of State.[77]

The district court also denied permissive intervention. It found that "the complex issues raised by the parties, the need for expeditious resolution of the case, and the massive number of citizens who share the [Congressmen's] interest" weighed against intervention because "granting the [Congressmen's] motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties."[78]

The Sixth Circuit reversed, holding that the district court had erroneously denied the Congressmen permissive intervention.[79] Not only did the district court fail to articulate how its findings matched with its conclusion that intervention posed a substantial likelihood of delay and prejudice, but the Sixth Circuit held those findings were erroneous and intervention would not cause undue prejudice or delay.[80] The *League of Women Voters of Michigan* Court explained that the issues raised in the litigation by the parties and the proposed-intervenors were common to

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[76] *Id.* at 3.

[77] *Id.* at 4.

[78] *Id.* at 4.

[79] Because the Sixth Circuit rules that permissive intervention was appropriate, it did not address the Congressional-Intervenors the intervention as a right. *Id.* at 5.

[80] *Id.* at 5-8.

redistricting litigation.[81] It further found that participation by intervenors would be unlikely to delay an expeditious resolution of the case because the case was "in its infancy" when the intervention motion was filed: the defendants' motion to dismiss had not been ruled on, no scheduling order was in place, and discovery had not begun.[82]

Further, the court found there were facets about congressional-intervenors that weighed in favor on permissive intervention. These included (1) that the congressional-intervenors had a direct interest in the outcome of the litigation, whereas the Secretary of State's interest was passive; (2) that the intervenors' interest was different than that held by the citizens-at-large; and (3) that permitting intervention now may well prove more efficient in the long run given the delay that would occur should a newly elected Secretary of State change litigation posture and necessitate intervention closer to the trial.[83]

Each of the factors observed by the Sixth Circuit in Michigan's redistricting case is present here. This case, too, is in its infancy. To be sure, this case has been pending since 2015.[84] But as explained above, no issues have been preclusively determined and so the existing parties retain the right to assert any claims or

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[81] *Id.* at 6.

[82] *Id.* at 6-7.

[83] *Id.* at 8-9. The court explained that while mandatory intervention factors such as "substantial interest" and

[84] The fact that this case is the "same" case as opposed to one filed for the first time is the result of the Supreme Court's unusual decision to not simply dismiss the action after plaintiffs failed to prove jurisdiction at trial. *See Gill*, 138 S.Ct. 1933-34; *see id.* at 1942 (Thomas, J., concurring).

defenses they asserted previously, no scheduling order is in place, no "phase II" discovery has taken place, and no dispositive motions have been determined. Undue prejudice and delay will not result from the Wisconsin State Assembly's participation; plaintiffs concede as much by consenting to allowing their litigation *allies* to procedurally join this matter in a brand new case.[85] To be sure, because the state-defendants have not filed a motion to dismiss, more legal work might initially be required by the parties and the Court if this motion is granted, but this work will not delay the resolution of the case and, if successful, it will reduce the time and costs associated with achieving a full resolution of the matter.

And as much or even more than in *League of Women Voters of Michigan*, Proposed-Intervenors have a direct and unique interest at stake that is different than the state defendants. The interest here is not personal, as might be a Congressman's office; it is one that speaks to both Proposed-Intervenor's organization and Proposed-Intervenor's ability to freely exercise its legislative function.

Finally, if the Court doubts whether the Wisconsin State Assembly's interests are adequately represented at this moment, like in the Michigan case, there exists the prospect that an election may alter the adequacy of representation before this case is concluded. Where the attorney general fails to defend a state law or appeal a judgment declaring that law unconstitutional, the law of this circuit leaves no doubt

[85] *See Wisconsin Assembly Democratic Campaign Committee v. Gill*, No. 18-cv-763, Dkt # 2 (Motion to consolidate) (representing that "Plaintiffs in *Whitford v. Gill*, No. 15-cv-421-jdp … consent to the cases' consolidation").

that the Wisconsin State Assembly would be permitted to intervene.[86] Permissive intervention now would reduce the risk of significant delay that would be occasioned by the state defendants' potential pre-trial abandonment of some or all of its legal defenses. And were the state defendants to defend-but-not-appeal an adverse decision, permitting intervention now would allow the Proposed-Intervenors to appeal the case on a record it helped to develop as opposed to one developed by a party who abandoned a case with that involved an unsettled legal theory.

For these reasons, permissive intervention is appropriate.

CONCLUSION

For the foregoing reasons and those contained in the accompanying motion, intervention should be granted.

Respectfully submitted this 4th day of October, 2018.

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[86] *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571-74 (7th Cir. 2009) (trade association permitted to intervene after trial and judgment where Wisconsin attorney general declined to bring appeal).