UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE WISCONSIN ASSEMBLY DEMOCRATIC
CAMPAIGN COMMITTEE,

Plaintiff,

Case No. 3:18-CV-00763

v.

BEVERLY R. GILL, JULIE M. GLANCEY,
ANN S. JACOBS, JODI JENSEN, DEAN KNUDSON,
and MARK L. THOMSEN,

Defendants.

BRIEF IN SUPPORT OF WISCONSIN STATE ASSEMBLY'S MOTION TO INTERVENE

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, while not a traditional apportionment lawsuit, plaintiffs nonetheless challenge the ongoing validity of all 99 Assembly districts. Plaintiffs seek a declaration that the maintenance of those current districts is unconstitutional, seek to enjoin conducting elections in those districts, and seeks judicial apportionment if

the legislature is "untimely" in enacting a remedial districting plan.[1] A decree from this court will directly affect the Wisconsin State Assembly. *Beens* instructs that state legislative bodies are proper intervenors under these circumstances.

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.[2] The members of the Wisconsin State Assembly are "chosen biennially, by single districts, … by the qualified electors…."[3] Today, there are 99 Assembly districts, and thus, 99 representatives of the Assembly.[4]

The Wisconsin Constitution expressly charges the legislature with the responsibility of creating new legislative districts after each federal census.[5] 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.[6]

[1] Compl., ¶¶ 40-42. (Dkt. #1).

[2] Wis. Const. Art. IV, § 1.

[3] Wis. Const. Art. IV, § 4.

[4] Wis. Stat. § 4.001.

[5] Wis. Const. Art. IV, § 3.

[6] *See* Amend. Compl. (Dkt. # 201), ¶¶ 179-82 (Relief Requested).

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;
- 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.[7]

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"[8] 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.[9]

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[7] 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).

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

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

This case is in its infancy. Just today, the defendants filed their answer.[10] No dispositive motions have been filed, no discovery has taken place, and no scheduling order is in place. Surely, this motion is timely.

Intervention now would 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."[11]

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."[12]

The Wisconsin State Assembly (and its members) has several distinct and substantial interests at stake in this litigation. We assert two 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.

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[10] Dkt #7.

[11] *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).

[12] *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.[13] The Assembly, of course, is comprised of one member from each district.[14] That member must reside in the district he or she represents.[15] 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.[16] 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.[17] The Minnesota State Senate intervened pursuant to Fed. R. Civ. P. 24(a).[18] After trial, they appealed the District Court's orders that declared the existing maps

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[13] Compl., ¶¶ 40-42.

[14] Wis. Const. Art. IV, § 4.

[15] Wis. Const. Art. IV, § 6.

[16] *See, e.g., Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194, (1972).

[17] *Id.* at 190.

[18] *Id.* at 191.

unconstitutional, enjoined future elections on those maps, reduced the number of Senate seats, and adopted a new map.[19]

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."[20]

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.

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

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 an additional substantial interest: The Wisconsin State Assembly has an interest in defending the effectiveness its enactments. In *Coleman v. Miller*,[21] the

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

[20] *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.

[21] 307 U.S. 433 (1939).

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."[22] 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."[23]

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.[24] 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

[22] *Id.* at 438.

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

[24] -- 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."[25]

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.[26] 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.[27]

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).[28] 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 2011 Wisconsin Act 43 unconstitutional. This flows from

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

[26] *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);

[27] *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).

[28] *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.")

the fact that "legislative apportionment is 'primarily a matter for legislative consideration and determination.'"[29] Normally, when courts find laws unconstitutional, they do not rewrite the law.[30] 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,[31] 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 cases.[32] 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.[33]

In addition, should the state-defendants fall short in their defense of Act 43's maps—a distinct possibility in the context of any districting litigation[34] and all the

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

[30] *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).

[31] *See* Wis. Const. Art. IV, § 3.

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

[33] 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. Compl., ¶ 42. But only if it is "timely." The question of what constitutes timeliness would likely be the subject of litigation.

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

more likely in a partisan-motivated lawsuit[35] to address an allegedly partisan districting law[36]—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 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."[37] Certainly, this case involves an unestablished legal theory.[38]

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[35] Plaintiffs are "thirty-five sitting Democratic representatives" who are organized to achieve "electoral success" allege that Act 43 makes "Democratic defeat highly probable." Compl., ¶¶ 7, 8, 26.

[36] 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).

[37] *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).

[38] Plaintiffs claim is that their associational interests are "burdened" by likelihood they will not obtain electoral success because there is a "reduced incentive" to engage in associational activity. *See, e.g.,* Compl., ¶ 26. This legal theory was hinted at by Justice Kagan in her concurring opinion in *Gill v. Whitford*, 138 S.Ct. at 1916, 1937-40 (2018) (Kagan, J.,

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 a First Amendment claim, that if adopted, would render all redistricting legislation subject to challenge if a map was believed to favor one party over others.

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,[39] there will be no collateral mechanism to reestablish those district lines, and Proposed-Intervenors' interest will be extinguished.

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.[40] Nevertheless, we acknowledge, as we must, that the law of this circuit is that "when a prospective-intervenor and a named

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concurring), but Justice Kagan's analysis relied almost entirely on a single concurring opinion and was identified as "speculative and advisory" in the Court's opinion. *Id.* at 1931. The Wisconsin State Assembly's attached Brief In Support of Motion To Dismiss explains the novelty of this claim further. *See* Attachment 2.

[39] Compl., ¶¶ 40-42.

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

party have the same goal," a rebuttable "presumption exists that the representation in the suit is adequate."[41] 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.[42]

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 cases involving the validity of their districts. The Court did so in *Beens*, where the Court expressly held the Minnesota State Senate was a proper mandatory intervenor.[43] And the Court did so when they affirmed the mandatory-intervention ruling in *Silver*.[44]

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

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[41] *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).

[42] *Id*.

[43] *Beens,* 406 at 194.

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

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.[45]

Even if *Beens* did not apply, the Wisconsin State Assembly contends there is inadequate representation. First, we note the state-defendants have not moved to dismiss the Amendment Complaint. Proposed-Intervenors believe that this matter can and should be dismissed as a matter of law 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 latter of which is addressed in the attached brief in support of motion to dismiss[46] and both of which the Wisconsin State Assembly assert in its proposed Answer[47]—the state-defendants' pleading does not demonstrate a commitment to make the various arguments contained within the Wisconsin State Assembly's proposed brief. 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.

Second, there is a considerable likelihood that the state-defendants will not "have the same goal" throughout the course of this litigation. The Commissioners are by the Attorney General, who ultimately controls this litigation and the decision to

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[45] *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).

[46] *See* Attachment 2.

[47] *See* Attachment 3.

appeal an adverse judgment.[48] 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[49] and intends to downsize the Solicitor General's office,[50] which represented the state-defendants on appeal of the related matter in which Plaintiffs seek consolidation.[51]

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. This is a case about politics and partisanship and whether the Constitution is violated every time a map may exhibit a partisan inequality and the party who is slighted feels associationally dispirited. This theory, if adopted, would end legislative districting for all intents and purposes because even the most competitive maps yield outcomes that could favor one party over another or one local set of voters over another. [52]

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[48] *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).

[49] 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)

[50] 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_).

[51] *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).

[52] *Davis v. Bandemer*, 478 U.S. at 109, 130 (plurality op.).

Unfortunately, partisan elected executive officers have a history of failing to vigorously defend redistricting law and not appeal or take every effort to preserve a districting map.[53] 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

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."[54] "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."[55]

For the reasons stated above, this motion is timely. And there exists a common question of law – whether Plaintiffs' claim fails to state a "burden on right to association" claim, whether the claim is justiciable.[56]

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[53] *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*.

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

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

[56] *Compare* Dkt # 7 at p. 8 ("Defenses") *with* Attachment #3.

The recent Sixth Circuit decision in *League of Women Voters of Michigan v. Johnson* is particularly instructive to the question of permissive intervention where constitutionality of legislative district lines was at issue. In that case, the Sixth Circuit reversed a district court's denial of permissive intervention to Members of Congress because the core standards for permissive intervention were met and 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.[57]

Each of the factors observed by the Sixth Circuit in Michigan's redistricting case is present here. 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.

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[57] *League of Women Voters of Michigan v. Johnson*, --- F.3d ---, No. 18-1437, slip op. at 8-9. Because the Sixth Circuit ruled that permissive intervention was appropriate, it did not address the Congressional-Intervenors the intervention as a right. *Id.* at 5. But it explained the factors that go into mandatory intervention are relevant to the consideration of permissive intervention. *Id.* at 8.

Moreover, 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 that the Wisconsin State Assembly would be permitted to intervene.[58] 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.

We add one additional reason to allow permissive intervention: comity for one half of Wisconsin's legislative branch. The Supreme Court exhibited comity when it made the uncommon decision to permit divided argument to a non-party other than the United States and let the Wisconsin State Assembly (and Senate) to present oral argument as *amici*.[59] The District Court may do the same here.

For these reasons, permissive intervention is appropriate.

CONCLUSION

[58] *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).

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

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

Respectfully submitted this 5th day of October, 2018.

BELL GIFTOS ST. JOHN LLC

/s/ Kevin St. John
Kevin St. John, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718-7980
Ph. 608-216-7990
Fax 608-216-7999
Email: kstjohn@bellgiftos.com

Attorneys for Wisconsin State Assembly