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]

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[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]

[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

[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

[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

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[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

[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

[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

[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.

[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.

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ATTACHMENT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE WISCONSIN ASSEMBLY DEMOCRATIC CAMPAIGN COMMITTEE,

Plaintiff,

v.

Case No. 3:18-CV-00763

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 DISMISS

INTRODUCTION

The First Amendment does not guarantee that speech will be successful. The First Amendment does not require that government pass only those laws that will not dispirit this group or that from engaging in associational activities. And the First Amendment certainly does not require the legislature to pass laws that provide power associational groups (or give them more likely access to power) so that their members will be incentivized by that carrot to engage in associational activities.

What the First Amendment governs (though does not necessarily prevent), is when the government: prohibits expressive activity; punishes expressive activity; imposes pecuniary or non-pecuniary costs on expressive activity; or conditions a government benefit on expressive activity.

2011 Wisconsin Act 43 does none of those things, and plaintiff does not allege it does any of those things. The law merely defines the geographic boundaries of legislative districts.

Plaintiff fails to state a claim for which relief may be granted, and this action should be dismissed.

I. FACTUAL AND LEGAL BACKGROUND: ALLEGATIONS AND CLAIMS ASSERTED IN THE COMPLAINT

Under Wisconsin's Constitution, the legislature must apportion the state into legislative districts after every federal census.[1] 2011 Wisconsin Act 43 fulfilled that obligation for the current decennial. The Act divides the state into 99 Assembly districts and 33 Senate Districts.[2] The Assembly districts comprised by Act 43 are what plaintiff refers to as the "Current Plan." (*Compl.*, ¶ 1).

Plaintiff, the Wisconsin Assembly Democratic Campaign Committee ("ADCC"), is "a legislative campaign committee" under state law that includes as its membership "thirty-five sitting Democratic representatives in the Wisconsin State Assembly." (*Id.* at ¶ 9).

According to the Complaint, ADCC "work[s] to elect Democrats to the State Assembly." (*Id.*). To that end, they engage in numerous activities relating to elections. These include (1) soliciting campaign contributions, (2) recruiting

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[1] Wis. Const. Art. IV, § 3.

[2] 2011 Wisconsin Act 43, §§ 1, 7; *codified at* Wis. Stat. §§ 4.001 & 4.01-4.99.

Democratic candidates for office; (3) providing candidates with campaign advice on strategy, messaging, and related matters; and (4) cooperating with like-minded organizations." (*Id.*). Their ultimate goal is "to translate electoral success into enacted policies that reflect Democratic values and benefit all Wisconsinites." (*Id.*).

ADCC alleges that "one purpose of Act 43 was to secure the Republican Party's control over the State Legislature." (*Id.* at 11). ADCC alleges that "the Current Plan creates an "intentional, large, durable, and unjustified pro-Republican asymmetry," that "severely burdened the Assembly Democrats' associational rights." (*Id.* at ¶ 26.) In "cracked" districts—those legislative districts ADCC allege are drawn to "ensure Republican victories"— ADDC's "ability to perform their associational functions is impaired by the reality that no matter what they do, Democratic defeat is highly probable." (*Id.*). In "packed" districts—those alleged to "guarantee Democratic candidates' victories by enormous margins"—ADCC has "a reduced incentive to conduct their associational activities" since these activities are unnecessary to win elections. (*Id.*). And in all districts, ADCC alleges that their "associational activity" is "hamstrung" by the fact the Current Plan "prevents them from obtaining a legislative majority (absent a pro-Democratic wave of unprecedented size)." (*Id.*).

ADCC further alleges that (1) their candidates have been outraised by Republican competitors; (2) party volunteer participation is down; (3) they have had more difficulty attracting independent voters; (4) they have had difficulty attracting candidates; and (5) they have had difficulty accomplishing their policy objectives. (*Id.*

at ¶¶ 27-31). The complaint alleges that the Current Plan is the cause of each of these phenomena. (*Id.*).

ADCC's complaint claims Act 43 violates ADCC's associational rights guaranteed by the First Amendment.[3] (*Id.* at ¶1). It seeks a declaration that Act 43 is unconstitutional, an injunction preventing any further elections from being conducted that use the districts drawn by Act 43, and judicial reapportionment, should a new remedial law not be enacted in a timely manner. (*Id.* at ¶ 40-42).

These are the material allegations relevant to this motion.

II. Pleading Standards For Analyzing Motions To Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'"[4] Allegations that are pure legal conclusions or legal conclusions couched as a factual allegations, however, are not accepted as true.[5] Although "detailed factual allegations" are not required, the complaint must contain more than "'naked assertions' devoid of 'further factual enhancement.'"[6] "[B]are and conclusory allegations … are insufficient to state a claim."[7]

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[3] Compl., ¶ 1.

[4] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[5] *Id.*

[6] *Id.* (quoting *Twombly*, 550 U.S. at 555).

[7] *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, (7th Cir. 2016).

Thus, to determine the sufficiency of a complaint, courts "first identif[y] the well-pleaded factual allegations by discarding the pleadings that are 'no more than conclusions'" and "then determine whether the remaining well-pleaded factual allegations" "plausibly suggest a claim…."[8]

ADCC claims the Current "Plan imposes severe burdens" on ADCC associational rights,[9] but this is the definition of a conclusory allegation. The Court must instead look to the well-pleaded factual allegations to determine whether any of them describe the type of burden that implicates a First Amendment interest. As explained below, they do not.

III. Plaintiffs Have Failed To Allege A "Burden" That Implicates The Possible Impairment Of A First Amendment Right

Plaintiffs' "Burden on Association" claim fails for a simple reason: because what Plaintiffs call a "burden" is nothing more than an allegation that their expressive associational activity is now less successful and therefore they have less incentive to engage in it.[10] This is not a "burden" that implicates a First Amendment interest.

Act 43 does not bear any of the hallmarks of burdening expressive activity. It does not prohibit any expressive activity; does not impose costs on the exercise of any expressive activity; does not regulate the internal affairs of the Democratic party, its

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[8] *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 679).

[9] *See, e.g.,* Compl., ¶ 1.

[10] *See, e.g.,* Compl., ¶26-32.

relationship with supporters, or its supporters' relationship with one another; does not chill the exercise of any associational right by raising the specter of fine, penalty, or, arbitrary enforcement; and does not require Plaintiffs to forego a right or tangible benefit in order to associate. The Court should dismiss Plaintiffs' claim that the First Amendment guarantees associations a static level of popularity.

The Supreme Court has explained that the right to associate, outside the context of intimate relationships (not applicable here), involves the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion," also known as "expressive association."[11]

The first step in analyzing an association claim, then, is whether there is an allegation of associational expressive activity. Here, we concede that some (though not all) of the underlying associational activities mentioned in the Amended Complaint involve expressive activity that may fall within the ambit of First Amendment protection.[12] But merely because an associational expressive activity is

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[11] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984).

[12] For example, ADCC is engaged in campaign fundraising. Compl., ¶¶ 9, 27. Donating and raising campaign funds is expressive activity protected (though not absolutely) by the First Amendment. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 248 (2006). But ADCC also claims its ultimate aim is to "translate electoral success into enacted policies…." *Compl.,* ¶ 9. No judicial decision, to our knowledge, would extend the First Amendment to policy implementation as opposed to advocacy for a policy position. The opposite is true. "Although the First Amendment protects political speech …, it does not protect the right to make law, by initiative or otherwise…." *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006).

alleged to be *effected* by a law does not mean a complaint has alleged a *burden* necessary to state a plausible First Amendment claim.

The paradigm expressive association infringement, of course, is when political speech is banned. As the Court explained in *Citizens United*, "If the First Amendment has any force, it prohibits Congress for fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[13] Act 43 does not ban or impose any sanction on engaging in speech, whether by Democrats, Republicans, or otherwise, and voter-plaintiffs do not contend that it does.

Expressive activity is "burdened" when laws or regulations impose a requirement or duty on a speaker or association when they speak. Campaign disclosure and disclaimer regulations are one example. As the Court stated in *Citizens United*, "disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking."[14] For this reason, disclaimer and disclosure requirements are subject to "exacting scrutiny,"[15] something closer to intermediate scrutiny than strict scrutiny.

Describing the burden at issue in *Citizens United* and the "burden" claimed here helps illustrates that Plaintiffs are not claiming a state-imposed burden at all.

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[13] *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 349 (2010).

[14] *Citizens United*, 558 U.S. at 366 (cleaned up to remove internal quotations and citations).

[15] *Id.* at 366-67.

The burdening (though upheld) law at issue in *Citizens United* required speakers to identify in their televised political-speech advertisements the person or group responsible for the ad's content. Specifically, the law compelled speakers to devote valuable airtime to audio of the disclaimer and valuable screen space to displaying the disclaimer—40% of time of some of the law's challengers' promotional ads.[16] In essence, the law required speakers to *do something* in exchange for the right to engage in expressive activity. That "something" was the burden.

Here, Act 43 does not require voter-plaintiffs to *do anything* in exchange for the ability to speak. Instead, the government-imposed "cost" of speech is the same today as it was before Act 43 passed.

And plaintiffs' "burden" is not of a kind with other burdens held by the Supreme Court to be First Amendment violations.[17] For example, Act 43 does not disqualify Voter-Plaintiffs from public benefits or privileges as a result of their associations,[18] does not compel plaintiffs to associate with others to whom they do not wish to associate as a condition of engaging in First Amendment activity,[19] and does

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[16] *Id.* at 366.

[17] *See Clingman v. Beaver*, 544 U.S. 581, 587 (2005) (listing cases and holdings of Supreme Court decisions finding infringements of expressive associational rights).

[18] *See, e.g., Elrod v. Burns*, 427 U.S. 347, 351, 372-73 (1976) (sheriff's deputies may not be discharged solely because they did not support Democratic Party); *Keyishan v. Board of Regents*, 385 U.S. 589, 595-96, 604 (1967) (public employment may not be conditioned on loyalty oaths requiring non-affiliation with Communist Party).

[19] *California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000).

not prevent new persons from affiliating with the voter-plaintiffs and democrats after a given date.[20]

In fact, Act 43 does not impose any restriction, impairment, or regulation of voter-plaintiffs' speech. It is not the fear of fine, sanction, or cost affecting Plaintiffs' expressive association activities. It is their fear that their speech will fail at achieving their ultimate ends. In short, what they call a "burden on association" is simply a claim that their associational activities are less likely to be successful.

That is not a cognizable First Amendment burden. The Tenth Circuit case of *Initiative and Referendum Institute v. Walker*[21] neatly captures the problems with Plaintiffs' burden on association theory. In that case, Utah amended its constitution to require a super-majority to pass certain laws relating to taking wildlife.[22] The plaintiffs argued that this made it very difficult to secure passage of a wildlife initiative, and that this in turn "dispirited" their organizational activities and caused them to feel "marginalized" and "silenced." In a nutshell, plaintiffs in that case alleged analogous burdens to those alleged here.

The Tenth Circuit rejected the claim. Citing United States Supreme Court decisions, the court explained, "there is a crucial difference between a law that has the 'inevitable effect' of reducing speech because it restricts or regulates speech, and

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[20] *See Tashijan v. Republican Party of Conn.*, 479 U.S. 208, 210-11, 217-25 (1986).

[21] 450 F.3d 1082 (10th Cir. 2006).

[22] *Id.* at 1086.

a law that has the 'inevitable effect; of reducing speech because it makes particular speech less likely to succeed."[23] The Tenth Circuit concluded by noting that plaintiff's "constitutional claim begins … from a basic misunderstanding. The First Amendment ensures that all points of view ay be heard; it does not ensure that all points of view are equally likely to prevail."[24]

Given the Complaint's insistence on assessing the legislature's intent in enacting the current plan,[25] it is possible that ADCC is asserting a species of a retaliation claim. (Otherwise, it is not clear why intent matters; the First Amendment is concerned with infringement). A retaliation claim may lie where government penalizes a citizen or deprives him of a benefit *because of his protected speech activities.*[26] ADCC has not alleged that the Current Plan was to harm them (or their supporters) for engaging in expressive conduct such as contributing funds or volunteering or generally participating in the political process or advocacy. Retaliation claims are "but-for" cause claims;[27] if the legislature possessed a motive other than retaliation for passing the law, there is no retaliation claim. Here, ADCC

[23] *Id.* at 1100 (citing *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc*., 487 U.S. 781, 790 n. 5 (1988) (stressing the difference between "a statute regulating how a speaker may speak" and a statute with a "completely incidental impact" on speech, which does not implicate the First Amendment); *Cohen v. Cowles Media Co*., 501 U.S. 663, 671–72 (1991) (rejecting a challenge to a state court's application of promissory estoppel to a newspaper's promise of anonymity to a confidential source, in part because any effect on First Amendment freedoms was "self-imposed," "no more than incidental, and constitutionally insignificant").

[24] *Id.* at 1101.

[25] *See, e.g.,* Compl., ¶¶ 11-17.

[26] *See, e.g., Hartman v. Moore*, 547 U.S. 250, 266 (2006); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

[27] *Hartman*, 547 U.S at 260 ("retaliatory animus" must be the "cause of the injury.")

affirmatively alleges another motivation: "to secure the Republican Party's control of the state legislature."[28] Control of the legislature is not a protected associational activity.[29]

And even if ADCC could get past this requirement that they allege a but-for cause relating to punishing expression, they still must show that the Act would "deter a person of ordinary firmness from exercising their First Amendment Rights."[30] It fails *Iqbal's* plausibility standard to conclude that likely minority-party status would cause a political organization of ordinary firmness to stop advocating for its policies and participating in political speech. The existence of third parties proves the point. At any rate, ADCC has not alleged that they are no longer exercising their First Amendment Rights, but that they do so less.

Moreover, the implications of ADCC's theory that *any* law that has the intent and effect of making one political group more attractive to its members and potential members than another political group are gigantic. It would make countless legislation a First Amendment violation. Consider a broadly popular election-year tax-cut passed on party lines by a Republican-controlled legislature that is solely motivated by the fact it will make the Republicans attractive to voters in November, and in fact makes it extremely unlikely Democrats will win a majority. Or an

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[28] Compl., ¶ 11.

[29] *Initiative and Referendum Institute*, 450 F.3d at 1100 (10th Cir. 2006) ("Although the First Amendment protects political speech …, it does not protect the right to make law, by initiative or otherwise….")

[30] *See, e.g., Bridges v. Gilbert*, 557 F.3d 541, 552 (7th Cir. 2009).

election-year college loan forgiveness act passed by Democrats on party lines, known by Democrats to have significant consequences to public fisc, but is so broadly popular that it will virtually secure their majority. Legislative majorities pass laws to make them attractive to voters. That is not a bug in the system; but one of the core features of representative democracy.

Last, the cases ADCC cites in its complaint are easily distinguishable. *Anderson v. Celebrezze* and *Burdick v. Takushi*, cited as legal support for Plaintiffs theory,[31] do not help Plaintiffs to overcome the obvious hurdle that Act 43 imposes no costs, conditions, or restrictions on expressive association. *Anderson* and *Burdick* were variations of ballot-access cases. *Anderson* involved a state law (held to be unconstitutional) that *prevented* Independent candidates from appearing on a general election ballot if signatures were not gathered by mid-March of the election year while *allowing* the major party nomination process to continue for another five months.[32] The burden imposed by the law was that Independents had a compressed timeline to engage in pre-nomination activities as compared with Democrats or Republicans. Put differently, Independents were *prevented* from engaging in pre-nomination associational activity during spring and early summer while the Democrats and Republicans were able to do so. And most obviously, Independent

[31] Compl., ¶ 36. Plaintiffs also cite *Crawford v. Marion County*, 553 U.S. 181 (2008) Compl., ¶ 38. *Crawford* did not have a majority opinion, and Justice Stevens' lead opinion was joined by only two other Justices. At any rate, *Crawford* still involved an alleged burden to an underlying right.

[32] *Anderson v. Celebrezze*, 460 U.S. 780, 790-91 (1983).

voters could not check a box to select their candidate on their ballots whereas Democrats and Republicans could.

Burdick involved a state law (held to be constitutional) that prevented write-in voting,[33] and thus prevented a form of speech at the ballot box and implicitly burdened at least a portion of those wishing to vote for a candidate to engage in the activities (expressive and otherwise) necessary to place a candidate on the ballot if that candidate were to receive a vote.

Act 43 does not impose any legal requirements that would treat ADCC or its voter-supporters differently than other group with respect to ballot access or the ability to engage in political activity. Nor does it prevent ADCC's members' supporters from casting a ballot for the candidate of their choice. Act 43 is completely silent on these matters.

Plaintiff's citations to Justice Kagan's concurring opinion in *Gill* or the three-judge district court's recent decision in *Rucho* persuasive. Justice Kagan's concurring opinion involved, in the opinion of the Court, "speculative and advisory conclusions" about a case not before the Court that involved "allegedly different burdens."[34] And in offering the concurring opinion, Justice Kagan did not cite a single majority opinion that supports the idea that a government-imposed "burden" may exist without

[33] *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

[34] *Gill*, 138 S.Ct. at 1931.

government-imposed restriction, limitation, or condition on expressive associational activity.

As for *Rucho*, district court opinions are not authoritative, and the case is being appealed.[35] Many other district courts have rejected First Amendment claims in far more persuasive opinions. In fact, the Supreme Court has summarily affirmed district court decisions rejecting First Amendment political gerrymandering claims similar to the claim presented here, and summary affirmances have precedential value.[36] We provide three examples.

1. In *Badham v. March Fong Eu*, a group of Republican congressional representatives and Republican voters challenged California's congressional districting law as a Democrat gerrymander that "diluted the strength of Republican voters."[37] In rejecting plaintiffs' First Amendment claim that they were being penalized for their affiliations and chilled in public debate about issues of public importance, the Court distinguished *Anderson* on the basis that the voters could still vote for the party and candidate they wished and found their "chilled speech"

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[35] *See Common Cause v. Rucho*, Nos. 1:16-cv-1026; 1:16-cv-1164 at 3 (M.D.N.C., Sept. 4, 2018) (acknowledging defendants had filed a notice of appeal) (available in publicly accessible electronic database in PACER, Dkt & 150).

[36] *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting Second Circuit with approval, stating "lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not") (cleaned up); *but see Mandel v. Bradley*, 432 U.S. 173, 176 (stating that "a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below" and is to be given "appropriate, but not necessarily conclusive, weight").

[37] *Badham v. March Fon Eu*, 694 F. Supp. 664, 667 (N.D. Cal. 1988), *sum. aff'd*, 488 U.S. 1024 (1989).

assertion to be "wholly without merit": "While plaintiffs may be discouraged by their lack of electoral success, they cannot claim [the districting law] regulates their speech or subjects them to any criminal or civil penalties for engaging in expression."[38]

2. In *League of Women Voters v. Quinn*, the district court rejected the notion that a districting plan could constitute an impairment of expressive rights because "it brushes aside a critical first step to bringing a content-based First Amendment challenge: the challenged law must actually restrict some form of protected expression. It seems a rather obvious point."[39]

3. In *Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws*, the district court dispatched with plaintiffs' First Amendment claim because "nothing about [the districting law] affects in any proscribed way plaintiffs' ability to participate in political debate.... They are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives."[40]

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[38] *Id.* at 675.

[39] Case No. 1:11-cv-5569, slip op. at 4 (N.D. Ill. Oct. 28, 2011) (available in publicly accessible database on PACER, Dkt #34) (dismissing First Amendment political gerrymandering claim), *sum. aff'd*, 566 U.S. 1007.

[40] 781 F. Supp. 394, 401 (D. Md. 1991), *sum. aff'd* 504 U.S. 938 (1992).

These summarily affirmed decisions are precedential and should be applied here. Plaintiff has not alleged a First Amendment claim for which relief may be granted.

CONCLUSION

There is an irony in ADCC's claim. Plaintiffs claim that the Current Plan contains too many districts with majorities who vote for ADCC's rivals, dispiriting ADCC's supporters and quelling their desire to participate in associational expressive conduct. The First Amendment does not provide *protection* from that condition; it embodies the theory that contains the *solution* to ADCC's grievance. Advocate, convince other voters to change their mind, double down efforts to attract independents, participate in the marketplace of ideas. Unless citizens are inflexible and immutable partisans – a description that defeats the entire justification for the Constitution's broad commitment to protecting political speech – then a convincing message can win.

Moreover, political speech is a two-way street. Candidates and parties must listen to their constituencies, however lines are drawn, and find platforms, policies, and messages that address their concerns. The First Amendment does not protect ADCC, or any other political organization, from this dialogue.

For the foregoing reasons, plaintiffs fail to state a claim for which relief can be granted and this action should be dismissed.

Respectfully submitted this 5th day of October, 2018.

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ATTACHMENT 3

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.

WISCONSIN STATE ASSEMBLY'S ANSWER TO COMPLAINT

Intervenor-Defendant Wisconsin State Assembly, through its counsel, respond as follows as their Answer to the Complaint (Dkt #1):

Pursuant to Fed. R. Civ. P. 10(c), Wisconsin State Assembly adopts by reference "Defendants' Answer To Complaint," filed October 5, 2018 (Dkt # 7). This adoption-by-reference includes all responses contained in the numbered paragraphs, all responses to the "Relief Requested," and all "Defenses" stated therein.

Intervenor-Defendants reserve the right to supplement in this Answer and its Affirmative Defenses should further information become known to Intervenor and as permitted by the Court.

Respectfully submitted this 5th day of October, 2018.

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0194p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF MICHIGAN; ROGER J. BRDAK; FREDERICK C. DURHAL, JR.; JACK E. ELLIS; DONNA E. FARRIS; WILLIAM "BILL" J. GRASHA; ROSA L. HOLLIDAY; DIANA L. KETOLA; JON "JACK" G. LASALLE; RICHARD "DICK" W. LONG; LORENZO RIVERA; RASHIDA H. TLIAB,

Plaintiffs-Appellees,

v.

RUTH JOHNSON, in her official capacity as Michigan Secretary of State,

Defendant,

JACK BERGMAN; BILL HUIZENGA; JOHN MOOLENAAR; FRED UPTON; TIM WALBERG; MIKE BISHOP; PAUL MITCHELL; DAVID TROTT, Republican Congressional Delegation,

Proposed Intervenors-Appellants.

No. 18-1437

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

No. 2:17-cv-14148—Eric L. Clay, Circuit Judge; Denise Page Hood, Chief District Judge; and Gordon J. Quist, District Judge.*

Argued: August 1, 2018

Decided and Filed: August 30, 2018

Before: SILER, MOORE, and GRIFFIN, Circuit Judges.

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*Pursuant to 28 U.S.C. § 2284, the United States Court of Appeals for the Sixth Circuit designated Judge Eric L. Clay and Judge Gordon J. Quist to serve with Chief Judge Denise Page Hood in this matter.

COUNSEL

ARGUED: Jason Brett Torchinsky, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY, Warrenton, Virginia, for Appellants. Ryan M. Hurley, FAEGRE BAKER DANIELS LLP, Indianapolis, Indiana, for Appellees. **ON BRIEF:** Jason Brett Torchinsky, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY, Warrenton, Virginia, Brian D. Shekell, CLARK HILL, Detroit, Michigan, for Appellants. Joseph H. Yeager, Harmony Mappes, Jeffrey P. Justman, Matthew K. Giffin, FAEGRE BAKER DANIELS LLP, Indianapolis, Indiana, Mark Brewer, GOODMAN ACKER P.C., Southfield, Michigan, for Appellees.

SILER J., delivered the opinion of the court in which GRIFFIN, J., joined. MOORE, J. (pp. 11–15), delivered a separate dissenting opinion.

OPINION

SILER, Circuit Judge. In this suit, Democratic voters from Michigan and a nonpartisan voting-rights organization allege that the state's congressional and legislative districts are unconstitutionally gerrymandered in favor of Republicans. Eight Republican Congressmen from Michigan moved to intervene, seeking to defend the lawfulness of the state's apportionment schemes. The three-judge district court panel denied the Congressmen's motion, finding they were not entitled to intervene as a matter of right (under Rule 24(a)) or with the court's permission (under Rule 24(b)). Because the district court abused its discretion by denying permissive intervention, we REVERSE and REMAND.

I.

Following the 2010 census, Michigan's Republican-controlled government created and enacted new legislative and congressional districting plans. Plaintiffs allege the district maps violate the Equal Protection Clause by diluting the voting power of Democratic voters in Michigan. Specifically, they claim the district lines "pack" some Democratic voters "into a few supermajority districts" and "crack[]" other Democratic voters "into a large number of districts where [Republicans] can command a safe but more modest majority of the vote." The result, Plaintiffs say, is a scheme that "destroys fair and effective representation, minimizing

[Democratic] voters' ability to influence elections and to have a fair chance to affect the political process." Plaintiffs also claim the apportionment plan "violates the First Amendment because it intentionally diminishes and marginalizes the votes of [Democrats] . . . based on party affiliation." If left unchanged, the current maps will remain in effect through 2020.

Plaintiffs brought suit in December 2017 against the Michigan Secretary of State, Ruth Johnson, "the 'chief election officer' . . . responsible for the conduct of Michigan elections." They ask the three-judge district court to declare the current district maps unconstitutional and to enjoin Johnson from allowing any state or federal representatives to be elected or nominated based on those maps in the 2020 election cycle.

In January 2018, Johnson moved to dismiss the suit for lack of standing. She also asked the district court to stay the case pending the Supreme Court's decision in two then-pending redistricting cases, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

In February, while the district court's decision on Johnson's motion was pending, eight Republican Congressional representatives from Michigan moved to intervene. The Congressmen pursued both intervention of right under Federal Rule of Civil Procedure 24(a) and permissive intervention under Rule 24(b). They argued that they stood "to be irrevocably harmed by any redrawing of congressional districts" and asserted that none of the original parties to the action adequately represented their interests. Attached to the Congressmen's motion to intervene were two proposed motions, one to dismiss and one to stay. Johnson supported the Congressmen's motion to intervene, but Plaintiffs did not.

In March, while the Congressmen's motion to intervene was being briefed, the district court denied Johnson's motion to stay. Recognizing that "[v]oting rights litigation is notoriously protracted" and that a remedial plan would have to be in place by March 2020 if Plaintiffs succeeded, the court found there was "a fair possibility that a stay would prejudice Plaintiffs as well as the public interest."

In April, the district court denied the Congressmen's motion to intervene. As to intervention of right, the district court found that the Congressmen's asserted interests—

protecting their relationships with constituents and avoiding spending money to learn about new districts—were "not materially distinguishable from the generalized interest shared by all citizens." The court held that the Congressmen's "legitimate, generalized interest in this litigation will be adequately represented by [Johnson's] interest in protecting the current apportionment plan and other governmental actions from charges of unconstitutionality." As to permissive intervention, the court 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." This interlocutory appeal followed.

II.

As a threshold matter, we have jurisdiction to entertain the Congressmen's appeal. Ordinarily, "an order completely denying intervention is immediately reviewable by way of an interlocutory appeal." *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). Of course, this is no ordinary case; because Plaintiffs' action "challeng[es] the constitutionality of the apportionment of congressional districts," this appeal comes to us from a three-judge district court panel. 28 U.S.C. § 2284(a). In such cases, the parties "may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction." 28 U.S.C. § 1253. The Supreme Court interprets § 1253 to extend to orders that have "the 'practical effect' of granting or denying an injunction." *Abbot v. Perez*, 138 S. Ct. 2305, 2319 (2018).

The order from which the Congressmen appeal does not have such an effect. The district court barred the Congressmen from defending Michigan's current apportionment plans; it did not rule upon the Plaintiffs' constitutional challenge to the merits of those plans. That challenge is still ongoing below, and Plaintiffs' request for injunctive relief remains pending. Therefore, § 1253 does not deprive us of jurisdiction. *Cf. Hays v. Louisiana*, 18 F.3d 1319, 1321 (5th Cir. 1994) (appeal of three-judge district court's denial of intervention "very likely was properly before" the Fifth Circuit before the court ruled on the merits).

III.

Here, as below, the Congressmen claim they are entitled to both intervention of right and permissive intervention. Because the Congressmen are entitled to permissive intervention, we address only those arguments.

Federal Rule of Civil Procedure 24(b)(1) provides that, "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." In deciding whether to allow a party to intervene, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). "So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

The parties agree the Congressmen's motion to intervene was timely. Further, the Congressmen's motion made clear that they intended to raise common questions of law and fact. In their proposed motion to dismiss, the Congressmen argued (among other things) that Plaintiffs lacked standing to challenge Michigan's districting plans. This was the same argument that Johnson had previously raised in her own motion to dismiss. So the only remaining question is whether the district court abused its discretion in finding that the Congressmen's intervention "could create a significant likelihood of undue delay and prejudice to the original parties."

It did. At the outset, "[t]hough the district court operates within a 'zone of discretion' when deciding whether to allow intervention under Rule 24(b), the district court nevertheless 'must, except where the basis for the decision is obvious in light of the record, provide enough of an explanation for its decision to enable [us] to conduct meaningful review.'" *Kirsch v. Dean*, 733 F. App'x 268, 279 (6th Cir. 2018) (quoting *Miller*, 103 F.3d at 1248). Here, with respect to permissive intervention, the district court observed only that there was a risk of delay and prejudice in light of three factors: "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 in this litigation." But the court did not explain how the "complex issues" would delay the case or prejudice Plaintiffs. It did not explain how allowing the Congressmen to intervene would frustrate an expeditious resolution. And it did not explain how the shared interests of the Congressmen and the citizens of Michigan were relevant to the delay-and-prejudice calculus. Thus, it is a challenge for us to conduct meaningful review on the permissive intervention issue based upon the district court's bare-bones order.

More to the point, though, none of the three factors cited by the district court actually weigh against permissive intervention. First, at the time the district court denied the Congressmen's motion, the legal issues in the case were not particularly novel or complex. Johnson had moved to stay the case pending the Supreme Court's decisions in *Gill* and *Benisek* and had moved to dismiss based upon Plaintiffs' alleged lack of standing. To that, the Congressmen proposed to add three issues: the justiciability of Plaintiffs' claims, the legitimate state interests justifying Michigan's current districting maps, and the doctrine of laches. While these issues do not arise in every case, they are common in redistricting cases. *See, e.g.*, *Raleigh Wake Citizen's Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 348 & n.9 (4th Cir. 2016) (justiciability); *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307-10 (2016) (state interest); *Sanders v. Dooly Cty.*, 245 F.3d 1289, 1291 (11th Cir. 2001) (per curiam) (laches).

Indeed, once the district court worked through the standing issue—which it eventually did, holding that Plaintiffs had standing to challenge Michigan's apportionment plan on a district-by-district, but not statewide, basis—the next natural question was whether Plaintiffs' partisan gerrymandering claims were in fact justiciable. The Supreme Court has never definitively answered this question, and specifically avoided it in *Gill*, opting instead to remand for further consideration of the plaintiffs' standing. 138 S. Ct. at 1929, 1934. And, had the district court found Plaintiffs' claims justiciable, it would have almost certainly had to address Michigan's interest in maintaining its districting scheme, and may have also had to address the laches defense. Thus, the new issues that would have arisen had the Congressmen been allowed to intervene would likely have arisen anyway during the natural course of the litigation.

Second, there was little risk that allowing the Congressmen to intervene would have interfered with the court's ability to reach an expeditious resolution. Because many of the

Congressmen's defenses overlapped with Johnson's, adding the Congressmen would not have placed any unnecessary or unexpected burden upon the district court. The court could have disposed of both motions to dismiss in the same opinion. The same logic applies to Plaintiffs—because the issues were identical, Plaintiffs' responsive arguments to Johnson and the Congressmen would likely have been identical as well.

On this point, Plaintiffs' main objection is that injecting the Congressmen (and their attorney) into the case "will almost surely lead to more discovery fights, more evidentiary issues, longer trial testimony, and other case complexities that are lacking with just one defendant." They correctly point out that, if allowed to intervene, the Congressmen intend to re-litigate the standing issue already decided by the district court in light of *Gill*.

This argument misapprehends the nature of the question before us. We are not called to decide whether it would be an abuse of discretion for the district court to deny permissive intervention as the case currently stands. Rather, our question is whether it was an abuse of discretion for the district court to deny permissive intervention as the case stood in February 2018, when the Congressmen moved to intervene. At that time, no scheduling order was in place and discovery had not yet begun. The district court had not ruled on Johnson's motion to stay or her motion to dismiss. Put simply, the case was in its infancy. If the Congressmen had been allowed to intervene from the outset, they would have been allowed input into scheduling matters, and duplicative discovery and motion practice would have been unnecessary. Any delay attributable to the Congressmen's presence in the case would have been minimal at best, especially since they are all represented by the same attorney.

We fully recognize that allowing the Congressmen to intervene at this stage will require the district court to adjust the discovery and dispositive motion deadlines currently in place. And perhaps the trial, currently set for February 2019, will have to be pushed back as well. But again, this delay would not have occurred if the district court had allowed the Congressmen to intervene when they asked. And, even if the trial must be delayed, we are confident that the parties and the court can resolve this case before the March 2020 deadline.

Third, the Congressmen's interest in this litigation is different than that of Michigan's citizenry at large or its Secretary of State. This question is more pertinent to intervention of right. *See* Fed. R. Civ. P. 24(a)(2). Still, we have recognized that identity of interest is one of several "relevant criteria" under Rule 24(b), *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007), and "[t]he fact that [a proposed intervenor's] position is being represented counsels against granting permissive intervention," *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. 2018).

Here, the Congressmen identify several interests they seek to protect by intervening, chief among them "the relationship between constituent and representative." We need not decide whether these interests amount to "substantial legal interest[s]" to entitle them to intervention of right, *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005); it is enough to say, contrary to the district court's assertion, that the Congressmen's interests differ from those of Johnson and the citizens of Michigan.

Johnson, according to the district court, seeks to "provid[e] fair and smooth administration of elections" and "protect[] the current apportionment plan and other governmental actions from charges of unconstitutionality." The contours of Michigan's district maps do not affect Johnson directly—she just ensures the maps are administered fairly and accurately. In contrast, the contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent in the legislature.

The district court also found that the "citizens of Michigan share a generalized interest in this litigation insofar as they have the right to vote, run for office, and otherwise participate in the 2020 election." In the Court's view, the Congressmen's interest in this litigation is "not materially distinguishable from the generalized interest shared by all citizens." Not so. As elected representatives, the Congressmen "[s]erv[e] constituents and support[] legislation that will benefit the district and individuals and groups therein." *McCormick v. United States*, 500 U.S. 257, 272 (1991). The citizens of Michigan do not share this representative interest.

Nor is it enough to say that, even though the Congressmen's interests differ from those of Johnson and the citizens of Michigan, their interests are still adequately protected by Johnson's participation in the case. As noted earlier, Johnson raised only Plaintiffs' alleged lack of standing in her initial motion to dismiss. In the Congressmen's proposed motion to dismiss, they added several defenses not mentioned by Johnson. This should have signaled to the district court that the Congressmen intended to make sure all available defenses to the apportionment plans were raised. True enough, Johnson eventually filed an answer in which she pleaded essentially the same defenses urged by the Congressmen. But her answer did not come until after the district court had denied the Congressmen's motion to intervene. Therefore, Johnson's answer could not have played a part in the district court's decision, and the court could not have known that Johnson's defenses would be the same as the Congressmen's.

We also note that the upcoming elections will bring about change in Michigan's state government. Johnson, having served two terms as Secretary of State, is not eligible to run for re-election. If the new Secretary takes office in January 2019 and decides not to further pursue the state's defense of its apportionment schemes, the district court will have to appoint someone to take the Secretary's place. And if that occurs, the Congressmen's case for intervention would be even stronger, since no other party in the case would be seeking to uphold the district maps.

We do not suggest that the uncertainty surrounding the upcoming election for Michigan Secretary of State, standing alone, entitles the Congressmen to intervene now, since we do not typically allow intervention based upon "what will transpire in the future." *Michigan*, 424 F.3d at 444 (emphasis removed). We merely point out that any delay attributable to allowing the Congressmen to intervene now is surely less than the delay that will occur if the Congressman must intervene in January 2019. Under these unique circumstances, where timeliness is a particularly weighty concern, allowing intervention now may very well prove more efficient for all involved.

Finally, we decline to affirm on the independent ground that the Congressmen failed to satisfy Rule 24(c) because they did not attach to their motion "a pleading that sets out the claim or defense for which intervention is sought." We "take[] a lenient approach to the requirements of Rule 24(c)," and Plaintiffs identify no "prejudice [that] would result from granting the motion to intervene despite the failure to attach a pleading." *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 314 (6th Cir. 2005).

IV.

When a motion for permissive intervention under Rule 24(b) is timely, the decision is left to the discretion of the district court. *Miller*, 103 F.3d at 1248. But "[t]he existence of a zone of discretion does not mean that the whim of the district court governs." *Id.* Here, the district court provided only a cursory explanation of its reasons for denying permissive intervention, and what little justification it did provide is unsupported by the record. This amounts to an abuse of discretion, requiring us to REVERSE and REMAND to the district court for further proceedings.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. The "abuse of discretion standard of review is highly deferential." *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 267 (6th Cir. 2001). "It is more than the substitution of the judgment of one tribunal for that of another." *NLRB v. Guernsey-Muskingum Elec. Co-op., Inc.*, 285 F.2d 8, 11 (6th Cir. 1960). To reverse a district court under this standard of review, we must conclude that the district court "relie[d] on clearly erroneous findings of fact, applie[d] the wrong legal standard, misapplie[d] the correct legal standard when reaching a conclusion, or ma[d]e a clear error of judgment." *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006). None of those errors occurred here. Instead, the district court reasonably concluded that the Congressmen's efforts to intervene in this case could unduly interfere with plaintiffs' efforts to litigate their claims and denied the Congressmen's motion for permissive intervention on that ground. As this decision was not an abuse of discretion, I would affirm.

As the majority acknowledges, a district court "operates within a 'zone of discretion' when deciding whether to allow intervention under Rule 24(b)." *Kirsch v. Dean*, 733 F. App'x 268, 279 (6th Cir. 2018) (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997)). "So long as the motion for intervention is timely and there is at least one common question of law or fact," the district court has significant leeway in balancing considerations "of undue delay, prejudice to the original parties, and any other relevant factors." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). Though we generally require district courts to explain the reasoning behind their discretionary decisions, we have also made clear that prolonged discussion is not necessary "where the basis for the decision is obvious in light of the record." *Id.*

Here, the record contains ample support for the district court's denial of the Congressmen's motion to intervene. As the district court explained in an earlier order denying Johnson's motion to stay the case, "[v]oting rights litigation is notoriously protracted," and it was critical that this case move quickly. R. 35 (Order at 2) (Page ID #613). If plaintiffs prevail on the merits, both parties agree that a remedial plan would need to be established by March 2020 to be effective for the November 2020 election. *Id.* Yet, as the district court recognized, there exists a real risk that this case cannot be resolved by that time even if it proceeds along its regular course. *Id.* at 2–3 (Page ID #613–14). Despite the district court's airing of these concerns, the Congressmen nevertheless refused to "agree to not file duplicative briefs" or to "confer with Defendants' [sic] prior to filing any briefs." R. 39 (Reply Br. in Support of Mot. to Intervene at 7) (Page ID #653). Although the Congressmen offered "to abide by the discovery plan now in effect," *id.*, this overture rings hollow, as no discovery schedule was in place at that time. R. 53 (Case Mgmt. Order No. 1 at 1) (Page ID #939). Given the district court's concerns and the Congressmen's representations—which are "obvious in light of the record," *see Miller*, 103 F.3d at 1248—the district court had ample reason to conclude that intervention would undercut "the need for expeditious resolution of the case." *See* R. 47 (Order at 2) (Page ID #903). Eight more defendants would mean more discovery, more motions, and more time. Indeed, the district court's decision seems prescient now, as the Congressmen have informed this court that they plan to relitigate issues already decided by the district court if they are permitted to intervene, *see* D.E. 24 (Letter dated June 18, 2016))—a maneuver that would surely slow down the district-court proceedings. As district courts do not abuse their discretion by denying intervention that "would unduly delay the adjudication of the original parties' rights," *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 760 (6th Cir. 2013), the district court's decision was well within the proper bounds.

Plainly, if the majority were reviewing the Congressmen's motion in the first instance, it would have reached a different conclusion. "[T]here was little risk that allowing the Congressmen to intervene would have interfered with the court's ability to reach an expeditious resolution," the majority asserts, because "many of the Congressmen's defenses overlapped with Johnson's." Maj. Op. at 6–7. As a purely factual matter, there was less overlap between the Congressmen's proposed pre-trial motions and Johnson's than the majority suggests—a point the Congressmen have taken pains to stress before this court. *See* Reply Br. at 23–24. But more importantly, I do not see how the district court abused its discretion simply because it weighed the potential overlap in defenses less heavily than the majority would have done. We usually require a "definite and firm conviction that the trial court committed a clear error of judgment" before we reverse a district court for abuse of discretion. *See Amernational Indus., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991) (quoting *Davis by Davis v. Jellico Cmty. Hosp. Inc.*, 912 F.2d 129, 133 (6th Cir. 1990)). Here, the majority requires only that it disagrees.

For the same reason, I reject the Congressmen's suggestion that a recent order granting different Congressmen's motion for permissive intervention in a different gerrymandering case before a different district court in a different jurisdiction ought to govern our review here. *See* D.E. 33 (Rule 28(j) Letter, Appendix A) (citing Order, *Ohio A. Philip Randolph Institute v. Smith*, No. 18-cv-357 (S.D. Ohio Aug. 16, 2018)). The core premise of abuse-of-discretion review is that one court may exercise its discretion differently than another. "[J]ust because some district courts have allowed [certain conduct] does not mean that it was an abuse of discretion for the district court in this case not to follow suit." *United States v. One 2011 Porsche Panamera*, 684 F. App'x 501, 508 (6th Cir. 2017).

Even apart from our deferential standard of review, the factual distinctions between *Smith* and this case render the Congressmen's reliance on *Smith* misplaced. In *Smith*, the proposed intervenors repeatedly represented that they would not "delay the[] proceedings" or "disrupt the case schedule," and that they would "not need any prolonged discovery" and would "comply with the discovery deadline." Order, *Ohio A. Philip Randolph Institute v. Smith*, No. 18-cv-357 (S.D. Ohio Aug. 16, 2018), at 8 n.1 (citation omitted). Here, by contrast, the Congressmen have made clear that they intend to reopen issues that have already been resolved, raise issues that they believe have not yet been adequately addressed, and limit their cooperation and coordination with Johnson. *See* D.E. 24 (Letter dated June 18, 2016)); Reply Br. at 23–24; R. 39 (Reply Br. in Support of Mot. to Intervene at 7) (Page ID #653). Absent the sort of assurances from the proposed intervenors that the district court received in *Smith*, it was entirely reasonable for the district court here to anticipate that the Congressmen's entrance into this case "could create a significant likelihood of undue delay and prejudice to the original parties" and to deny the Congressmen's motion on that ground. *See* R. 47 (Order at 2) (Page ID #903).

Other aspects of the majority's opinion are similarly overreaching. For instance, there is no need to consider whether the "upcoming elections" may "bring about change in Michigan's state government." *See* Maj. Op. at 9. The majority believes that Johnson's defense *may* prove insufficient because she *may* be replaced by a new Secretary from the Democratic Party in the 2018 election who *may* decline to defend the current districting maps. But we have cautioned against such speculative musings before. *See United States v. Michigan*, 424 F.3d 438, 444 (6th Cir. 2005) ("Rather than identifying any weakness in the state's representation in the current phase of the proceedings, the proposed intervenors seem more concerned about what will transpire *in the future* . . . . While the proposed intervenors may be legitimately concerned about these future issues, they are not now, and possibly never will be, before the district court."). The majority nevertheless insists that "allowing intervention now may very well prove more efficient for all involved," as a future change in Michigan's government may entitle the Congressmen to intervene of right. Maj. Op. at 9. What would be far more efficient, of course, is to realize that the district court has not abused its ample discretion in denying the Congressmen an opportunity to intervene now and to allow the case to proceed as planned. The majority hamstrings the district court's smooth administration of this case and then offers, in consolation, that it could have been worse.

By the same token, the majority errs in suggesting that the Congressmen's interest in this case is relevant to our review under Rule 24(b). *See* Maj. Op. at 8–9. It is intervention of right under Rule 24(a), not permissive intervention under Rule 24(b), that requires the proposed intervenor to establish "a substantial legal interest in the subject matter of the case" and to prove "a potential for inadequate representation." *Michigan*, 424 F.3d at 443 (emphasis omitted). Rule 24(b), by contrast, "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459 (1940)); *see also* 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1911 (3d ed. 1998) ("Close scrutiny of the kind of interest the intervenor is thought to have seems especially inappropriate under Rule 24[b] since it makes no mention of interest. The rule requires only that the intervenor's claim or defense share a common question of law or fact with the main action."). Rather, "Rule 24(b) grants the district court discretionary power to permit intervention if the motion is timely and if the 'applicant's claim or defense and the main action have a question of law or fact in common.'" *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (internal citation omitted) (quoting Fed. R. Civ. P.

24(b)(2)). To the extent we have intimated otherwise in dicta, *see Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007), we have erred. The majority's discussion of Rule 24(a) factors in its Rule 24(b) analysis is therefore misplaced.

Finally, the majority oversteps when it predicts that its decision "will require the district court to adjust the discovery and dispositive motion deadlines currently in place" and may require the district court to "push[] back" the trial schedule. Maj. Op. at 7. "Federal courts have the authority to apply appropriate conditions or restrictions on an intervention," and nothing in the majority's opinion should be read to cabin that authority in this case. *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 963 n.1 (6th Cir. 2009). Thus, even after reversing a district court for "denying intervention outright," we have explained that "the district court retains broad discretion in setting the precise scope of intervention" going forward. *United States v. City of Detroit*, 712 F.3d 925, 932–33 (6th Cir. 2013). "[T]he scope of intervention can be limited on a prospective basis, allowing appeal of recently issued orders and participation in new matters." *Id.* at 932. Those principles apply with equal force here, particularly given the majority's recognition that "timeliness is a particularly weighty concern" in this case. Maj. Op. at 9. The three judges overseeing this case in the district court, not we, dictate the terms of the Congressmen's intervention on remand.

All in all, the district court did not abuse its discretion in denying the Congressmen's motion to intervene under Rule 24(b). As the majority sees it differently, I respectfully dissent.