

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

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

Proposed Intervenor-Plaintiffs,

v.

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

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

Defendants,

The Wisconsin Legislature,

Intervenor-Defendant,

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

Proposed Intervenor-Defendants.

CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN
STEIL, TOM TIFFANY, AND SCOTT FITZGERALD’S REPLY IN SUPPORT
OF THEIR MOTION TO INTERVENE

INTRODUCTION

Plaintiffs oppose intervention by Proposed Intervenor-Defendants
Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott
Fitzgerald (hereinafter “the Congressmen”), but they are unable to cite any decision
that has denied a motion to intervene filed by members of Congress in a case

impacting congressional districts.* Although the Congressmen strongly believe that they are entitled to intervention as a matter of right, the most straightforward course would be for this Court to grant them permissive intervention, just as the courts did in *Baldus v. Members of Wisconsin Government Accountability Board*, No. 11-CV-562 JPS-DPW-RMD, 2011 WL 5834275 (E.D. Wis. Nov. 21, 2011), and *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572 (6th Cir. 2018), and just as this Court did for the Wisconsin Legislature in the present case, Dkt.24 at 1–2.

ARGUMENT

I. This Court Should Grant Permissive Intervention To The Congressmen, Just Like Courts Have Done In Multiple Cases, Including *Baldus* And *Johnson*

As the Congressmen explained, they should be granted permissive intervention status, just as courts granted members of Congress permissive intervention in cases such as *Baldus* and *Johnson*. The Congressmen satisfy the only two requirements for permissive intervention: timeliness and raising “a claim or defense that shares with the main action a common question of law or fact,” Fed. R. Civ. P. 24(b)(1)(B); see Dkt.31 at 11, and their participation is otherwise justified under the permissive-intervention factors for the same reasons that many courts—including those in *Baldus* and *Johnson*—have explained in detail, Dkt.31 at 11–13.

In their opposition, Plaintiffs do not dispute that the Congressmen satisfy the only two required elements for permissive intervention, see Dkt.42 at 9–11, and do

* The district court’s decision at issue in *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572 (6th Cir. 2018), denied a motion for intervention filed by congressmen, but the Sixth Circuit overturned that decision on appeal.

not cite any decision denying permissive intervention to members of Congress in a redistricting case impacting congressional districts. Instead, Plaintiffs make only two arguments for denying permissive intervention, which are both unpersuasive.

Plaintiffs first attempt to distinguish *Baldus* and *Johnson* by pointing out that this case involves a challenge to allegedly malapportioned congressional districts, rather than a challenge to equally populous districts. Dkt.42 at 10; *see also* Dkt.42 at 6. Not a word in *Baldus* or *Johnson* turns on this distinction. *See Johnson*, 902 F.3d at 579 (Congressmen have an interest in the “contours of the maps” of their districts); *Baldus*, 2011 WL 5834275, at *2 (members of Congress “have a substantial interest in establishing the boundaries of their congressional districts,” at least when they are “likely to run” for reelection). Regardless of whether a case involves a federal constitutional challenge to congressional districts that a legislature enacted less than a year before, as in *Baldus*, six years before, as in *Johnson*, or ten years ago, as in this case, the basis for the members’ interest is *identical*: the “contours of the maps” of the congressional districts at issue “determin[e] which constituents the Congressmen must court for votes and represent in the legislature.” *Johnson*, 902 F.3d at 579; *Baldus*, 2011 WL 5834275, at *2; *accord Ohio A. Philip Randolph Inst. v. Smith*, No. 1:18CV357, 2018 WL 8805953, at *1 (S.D. Ohio Aug. 16, 2018). Here, as in *Baldus* and *Johnson*, the Congressmen have invested substantial time and resources developing a “relationship between” themselves as “representative[s]” and their “constituent[s],” *Johnson*, 902 F.3d at 579 (citation omitted); Dkt.32 at ¶ 3 (Grothman Decl.); Dkt.33 at ¶ 3 (Gallagher Decl.); Dkt.34 at ¶ 3 (Steil Decl.); Dkt.35 at ¶ 3

(Tiffany Decl.); Dkt.36 at ¶ 3 (Fitzgerald Decl.), which relationship this case threatens to undermine. As if to underscore this point, Plaintiffs represent to this Court that they will *not* merely seek “new maps that make the least number of changes to the existing maps,” Dkt.43 at 1 n.1—which would permit the Congressmen to retain as much of their current “constituent[s]” as is constitutionally permissible, *Johnson*, 902 F.3d at 579—but will, instead, seek more significant changes to Wisconsin’s congressional districts, *see* Dkt.43 at 1–2 n.1, imposing grave harm on the Congressmen and their relationship with their constituents.

Plaintiffs’ only other argument against this Court granting permissive intervention is that such intervention would “open the floodgates” to a host of other intervenors. Dkt.42 at 10–11. *Baldus* squarely and correctly rejected an *identical* argument. *Baldus*, 2011 WL 5834275, at *2–3. Plaintiffs do not attempt to explain where the *Baldus* court’s reasoning was incorrect, or dispute that the *Baldus* court correctly predicted that no flood of intervention motions would come. Indeed, given the high-profile, widely reported nature of Plaintiffs’ challenge in the present case, as well as the speed with which this Court suggested it would act, if it decides not to dismiss this case, *see* Dkt.24 at 1, it is unclear whether *any* further intervention motions will be filed by any party. And if any single such motion is ever filed, that motion can be considered on its own merits, including as to its timeliness, as well as the specific interests asserted by the hypothetical, proposed intervenor. *See Baldus*, 2011 WL 5834275, at *2–3.

II. The Congressmen Are Also Entitled To Intervene As Of Right

As the Congressmen explained, they satisfy all four elements for intervention as of right. Dkt.31 at 4; *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. 2019). First, the Congressmen’s motion is timely. Dkt.31 at 5. Second, the Congressmen have a direct and substantial interest in this case because, as the Sixth Circuit explained in *Johnson*, the “contours” of the Congressmen’s districts “determin[e] which constituents the Congressmen must court for votes and represent in the legislature.” 902 F.3d at 579; Dkt.31 at 5–7. Third, Plaintiffs’ case potentially impairs this interest because Plaintiffs seek a substantial change in the districts that the Congressmen represent. Dkt.31 at 7. Finally, the existing parties do not adequately represent the Congressmen’s interests, as none of the other parties will forward the Congressmen’s “representative interest,” *Johnson*, 902 F.3d at 579, as elected Representatives who intend to run for reelection in 2022, Dkt.31 at 7–11.

Plaintiffs concede by silence that the Congressmen’s Motion For Intervention is timely, and the arguments that they do make are unavailing.

Plaintiffs first argue that the Congressmen lack an interest in the composition of the districts that they represent because their terms expire in 2022, thereby asking this Court to reject the Sixth Circuit’s core reasoning in *Johnson*. Dkt.42 at 4–7.† But none of the authorities that Plaintiffs cite support their claim, as the Sixth Circuit was correct when it held that sitting Congressmen have a “representative

† Plaintiffs’ efforts to distinguish their arguments from the ones that the Sixth Circuit specifically rejected in *Johnson* on the basis that this case involves a challenge to an allegedly malapportioned map, Dkt.42 at 6, fail for the reasons discussed above, *see supra* pp. 3–4.

interest” in maintaining “constituents [who] the Congressmen must court for votes and represent in the legislature.” *Johnson*, 902 F.3d at 579. Plaintiffs’ lead authority is *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), which dealt with whether public interest lobbyists could intervene to defend an abortion-related law. Dkt.42 at 4. Their next authority is—ironically enough—the Eastern District’s decision *granting* congressional intervention in *Baldus*, falsely claiming that the Eastern District held that congressional incumbents failed to satisfy Rule 24(a)’s interest requirement. Dkt.42 at 4. In fact, what the Eastern District concluded in *Baldus* was only that it was “ultimately unsure” whether the members of Congress had met Rule 24(a)’s interest requirement, so the court granted them permissive intervention. 2011 WL 5834275, at *2. Plaintiffs then include a discussion of *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), Dkt.42 at 4–5, but *Bethune Hill* did not address the Rule 24(a) interest of members of Congress, dealing only with the Article III standing of a single *legislative body*, 139 S. Ct. at 1954–56.

Plaintiffs next argue that the Congressmen lack an interest in this case because they play only a limited role in the legislative redistricting process. Dkt.42 at 5, 7. This is a red herring, as the Legislature’s adoption of rules for its legislative proceedings have no bearing on the meaning of Rule 24, for purposes of litigation in federal court. In any event, this point would be self-defeating for Plaintiffs, as Plaintiffs themselves would likewise be limited in their participation before the Legislature and the Governor during the legislative redistricting process. Indeed, if

Plaintiffs' argument on this score is to be taken seriously, then the only proper parties before this Court would be the Governor and the Legislature.

Turning to whether Plaintiffs' lawsuit threatens the Congressmen's interests, Plaintiffs fail to grapple with the danger that their lawsuit poses to the Congressmen's interests. The Congressmen have a "representative interest" in maintaining "constituents [who] the Congressmen must court for votes and represent in the legislature." *Johnson*, 902 F.3d at 579. Plaintiffs' lawsuit *admittedly* seeks to change substantially the districts that the Congressmen represent more than would be simply necessary to adjust for population deviations, *see* Dkt.43 at 1–2 n.1, and thus seeks to disrupt the Congressmen's relationship with their constituents.

With respect to the adequacy element, Plaintiffs argue that a higher standard applies, since the Congressmen purportedly have the same "goal" as other parties here. Dkt.42 at 8. However, *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742 (7th Cir. 2020), makes clear that this takes a far too general approach to the adequacy element. *Id.* at 748. Rule 24(a) "requires a more discriminating comparison of the absentee's interests and the interests of existing parties," such as to whom the parties are obligated and for whom they must ultimately advocate. *Id.* at 748–49.

Turning to which current parties supposedly represent the Congressmen's interests, Plaintiffs claim that the Congressmen's goal is somehow "shared by the Plaintiffs, the proposed Intervenor-Plaintiffs, and the Wisconsin Legislature." Dkt.42 at 8. But that is wrong. As noted above, the Congressmen's goal is a "*representative* interest" in maintaining "constituents the Congressmen must court for votes and

represent in the legislature,” *Johnson*, 902 F.3d at 579 (emphasis added), which is not a goal that “Plaintiffs, the proposed Intervenor-Plaintiffs, [or] the Wisconsin Legislature” advance (or, logically, could possibly advance, given that it is only the Congressmen that represent their constituents in Congress). One important way that the Congressmen seek to protect that interest is to avoid being paired with each other, as such a pairing likely ensures that at least some of the Congressmen will lose a *majority* of their current constituent relationships. *See League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014) (“avoiding [of] contests between incumbent Representatives” is a traditional redistricting criteria (citations omitted)). Plaintiffs cannot cogently explain what other party in this case would share the Congressmen’s uniquely powerful interest against such a pairing. Further, Plaintiffs have now made clear, Dkt.43 at 1–2 n.1, their attempt to disrupt “the cores of [the Congressmen’s] prior districts,” *League of Women Voters of Chicago*, 757 F.3d at 726 (citations omitted), further showing the inadequacy of their representation.

CONCLUSION

This Court should grant the Congressmen’s Motion To Intervene.

Dated: September 9, 2021

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2021, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

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