

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

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

Plaintiffs,

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

Proposed Intervenor-Plaintiffs,

v.

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

Defendants,

The Wisconsin Legislature,

Intervenor-Defendant,

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

Proposed Intervenor-Defendants.

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

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

INTRODUCTION

Proposed Intervenor-Defendants Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter “the Congressmen”), who are also probable candidates for re-election to the U.S. House of Representatives in 2022, move to intervene as defendants under Federal Rule of Civil Procedure 24. As a threshold matter, the Congressmen are entitled to intervene as of right under Rule 24(a)(2), as their timely motion satisfies all four elements for

mandatory intervention, including because no other parties speak for the Congressmen's significant interest in representing their constituents in the U.S. House of Representatives and their intent to run for reelection in 2022 to continue to represent those constituents. Alternatively, and at a minimum, this Court should grant the Congressmen permissive intervention under Rule 24(b)(1)(B), just as many courts have done for members of Congress, including the Eastern District of Wisconsin 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 the Sixth Circuit in *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572 (6th Cir. 2018). The Congressmen's timely intervention is essential to allowing them to advance their interests in preserving their well-developed, broadly recognized constituent relationships, and the Congressmen will commit fully to meeting all court deadlines and avoiding unduly complicating this litigation.

INTEREST OF PROPOSED INTERVENORS

The Congressmen are duly elected Representatives to the U.S. House of Representatives from five of Wisconsin's eight congressional districts and are also probable candidates for re-election in 2022. Congressman Glenn Grothman represents Wisconsin's Sixth Congressional District. Decl. of Congressman Glenn Grothman ("Grothman Decl.") ¶ 1; Wis. Stat. § 3.16. Congressman Mike Gallagher represents Wisconsin's Eighth Congressional District. Decl. of Congressman Mike Gallagher ("Gallagher Decl.") ¶ 1; Wis. Stat. § 3.18. Congressman Bryan Steil represents Wisconsin's First Congressional District. Decl. of Congressman Bryan

Steil (“Steil Decl.”) ¶ 1; Wis. Stat. § 3.11. Congressman Tom Tiffany represents Wisconsin’s Seventh Congressional District. Decl. of Congressman Tom Tiffany (“Tiffany Decl.”) ¶ 1; Wis. Stat. § 3.17. And Congressman Scott Fitzgerald represents Wisconsin’s Fifth Congressional District. Decl. of Congressman Scott Fitzgerald (“Fitzgerald Decl.”) ¶ 1; Wis. Stat. § 3.15. Each Congressman resides within his District and intends to run for reelection in 2022. Grothman Decl. ¶¶ 2, 4; Gallagher Decl. ¶¶ 2, 4; Steil Decl. ¶¶ 2, 4; Tiffany Decl. ¶¶ 2, 4; Fitzgerald Decl. ¶¶ 2, 4.

The Congressmen “have a substantial interest in establishing the boundaries of their congressional districts,” given their current status as elected Representatives and their express intent “to run for” reelection. *Baldus*, 2011 WL 5834275, at *2; *Johnson*, 902 F.3d at 579; *see also Ohio A. Philip Randolph Institute v. Smith*, No. 1:18CV357, 2018 WL 8805953, at *1 (S.D. Ohio Aug. 16, 2018). The Congressmen each have a solemn “relationship” as “representative[s]” of their “constituent[s],” *Johnson*, 902 F.3d at 579 (citation omitted), since they serve their “constituents and support[] legislation that will benefit the[ir] district[s] and individuals and groups therein,” *McCormick v. United States*, 500 U.S. 257, 272 (1991); *accord Johnson*, 902 F.3d at 579. Further, each Congressman has invested substantial time and resources to understand the needs of the constituents in the Districts that they represent. Grothman Decl. ¶ 3; Gallagher Decl. ¶ 3; Steil Decl. ¶ 3; Tiffany Decl. ¶ 3; Fitzgerald Decl. ¶ 3. Accordingly, the “contours of the maps” for Wisconsin’s Congressional Districts “affect the Congressmen directly and substantially,” because those contours “determin[e] which constituents the Congressmen must court for votes and represent

in the legislature.” *Johnson*, 902 F.3d at 579; Grothman Decl. ¶ 4; Gallagher Decl. ¶ 4; Steil Decl. ¶ 4; Tiffany Decl. ¶ 4; Fitzgerald Decl. ¶ 4.

ARGUMENT

Rule 24(a)(2) provides for intervention as of right: “[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). Rule 24(b)(1), in turn, provides for permissive intervention: “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.” Fed. R. Civ. P. 24(b)(1)(b); *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 803–04 (7th Cir. 2019). The Congressmen satisfy Rule 24(a)(2), and thus this Court should grant them intervention as of right. *Infra* Part I. Alternatively, this Court should permit the Congressmen to intervene under Rule 24(b)(1). *Infra* Part II.

I. The Congressmen Are Entitled To Intervene As Of Right Under Rule 24(a)(2), Given Their Direct And Substantial Interests In The Districts

There are four elements for intervention as of right under Rule 24(a)(2): “(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action.” *Planned Parenthood*, 942 F.3d at 797 (citation omitted). The Congressmen satisfy each of these four elements.

1. *The Congressmen's Motion is timely.* This Court considers “four factors” when deciding “whether a motion to intervene is timely: (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; [and] (4) any other unusual circumstances.” *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 388 (7th Cir. 2019) (brackets in original; citation omitted). The “most important” timeliness consideration “is whether the delay in moving for intervention will prejudice the existing parties to the case.” *Id.* at 389–90 (citation omitted). The Congressmen’s intervention motion is clearly timely, since they filed this Motion just over two weeks after Plaintiffs filed their Complaint, and thus in more than sufficient time to participate in this case as a party without causing undue prejudice to any of the existing parties.

2. *The Congressmen have a direct and substantial interest.* An interest for intervention-as-of-right purposes must be “direct, significant, and legally protectable,” *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (brackets omitted), and the Seventh Circuit has “interpreted statements of the Supreme Court as encouraging liberality in the definition of an interest,” *Lopez-Aguilar*, 924 F.3d at 392 (citation omitted).

The Congressmen have a direct and substantial interest in this case. The Congressmen have the solemn obligation to serve their “constituents and support[] legislation that will benefit the district[s] and individuals and groups therein” as elected members of the U.S. House of Representatives, and they all intend to seek

reelection in 2022 to continue to represent their constituents in the House. *McCormick*, 500 U.S. at 272; Grothman Decl. ¶¶ 3–4; Gallagher Decl. ¶¶ 3–4; Steil Decl. ¶¶ 3–4; Tiffany Decl. ¶¶ 3–4; Fitzgerald Decl. ¶¶ 3–4. 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); Grothman Decl. ¶ 3; Gallagher Decl. ¶ 3; Steil Decl. ¶ 3; Tiffany Decl. ¶ 3; Fitzgerald Decl. ¶ 3. The “contours of the maps” of the Districts that the Congressmen represent “determin[e] which constituents the Congressmen must court for votes and represent in the legislature,” thus—given the Congressmen’s strong ties with their constituents—litigation involving the Districts’ lines “directly and substantially” affects the Congressmen. *Johnson*, 902 F.3d at 579; Grothman Decl. ¶ 4; Gallagher Decl. ¶ 4; Steil Decl. ¶ 4; Tiffany Decl. ¶ 4; Fitzgerald Decl. ¶ 4.

The strong, direct link between the Congressmen’s relationship with their constituents and the lines defining the Districts is why courts have regularly recognized that members of Congress have an interest in redistricting litigation sufficient for intervention purposes. In *Baldus*, a three-judge panel of the Eastern District of Wisconsin granted intervention to Wisconsin’s Republican and Democratic Congressmembers in a challenge to Wisconsin’s existing district maps, recognizing that these members all “have a substantial interest in establishing the boundaries of their congressional districts,” at least when they are “likely to run” for reelection. 2011 WL 5834275, at *2. In *Johnson*, the Sixth Circuit ordered that intervention be granted to members of Congress in a redistricting challenge, given “the relationship

between constituent and representative” and the recognition that “the contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent.” 902 F.3d 579; *accord Smith*, 2018 WL 8805953, at *1. And while these courts granted intervention to the members of Congress on a permissive basis, *see infra* Part II, the Congressmen respectfully submit that the strength of their relationships with their constituents and their intent to continue those relationships by running for reelection satisfy the interest requirement for intervention as of right as well, for the same reasons.

3. *Plaintiffs’ lawsuit potentially impairs the Congressmen’s direct and substantial interest.* As just explained, the Congressmen have a core interest in their relationships with their constituents, and that substantial interest is tied directly to the “contours of the maps.” *Johnson*, 902 F.3d at 579; *Baldus*, 2011 WL 5834275, at *2. Plaintiffs’ lawsuit poses a “potential impairment, as a practical matter, of that interest,” *Planned Parenthood*, 942 F.3d at 797, since Plaintiffs ask this Court to draw “a new congressional district plan,” if the Legislature and Governor fail to do so, Dkt.1 at 16. That puts the Congressmen’s interests at stake in this case. *Planned Parenthood*, 942 F.3d at 798; *accord Lopez-Aguilar*, 924 F.3d at 385.

4. *The parties do not adequately represent the Congressmen’s interests.* The Seventh Circuit uses a “three-tiered methodology for evaluating the adequacy of representation under Rule 24(a)(2).” *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 747 (7th Cir. 2020). First, under the “liberal,” “default rule,” a movant satisfies this element if he “shows that representation of his interest” by other parties

“may be inadequate,” with “the burden of making that showing . . . treated as minimal.” *Id.* (citations omitted). Second, if the interest of the movant “is identical to that of an existing party,” then “there is a rebuttable presumption of adequate representation that requires a showing of some conflict to warrant intervention.” *Id.* (citation omitted). Finally, if an “existing party is a governmental agency or official with a legal duty to represent the absentee’s interest,” then there is a “stronger” presumption of adequacy that is only rebutted upon “a showing of gross negligence or bad faith.” *Id.* (citations omitted).

Here, and as an initial matter, the liberal, default rule applies because no party’s interests are identical to the Congressmen’s interests—and, *a fortiori*, no government party has the duty to represent the Congressmen’s interests in this case.

Plaintiffs bring this lawsuit to vindicate their individual interests as voters, and thus could not possibly represent the Congressmen’s interests. Dkt.1 ¶ 13. “[T]he Congressmen’s interest” “differ from” Plaintiffs’ interests. *Johnson*, 902 F.3d at 579. The Congressmen are “elected representatives” who “serve [their] constituents,” and they all intend to run for reelection in 2022 to continue this representation. *Id.* (citations omitted; brackets omitted); *Baldus*, 2011 WL 5834275, at *2–3. As current and prospective elected Representatives, the Congressmen have a distinct “representative interest” in this litigation, including their ongoing and

intended future relationship with their constituents, *Johnson*, 902 F.3d at 579, which Plaintiffs do not share, *Baldus*, 2011 WL 5834275, at *2.*

The Commission does not represent the Congressmen's interests. The Commission's interests are merely in the implementation of Wisconsin's redistricting maps as part of its overall administration of Wisconsin's elections. *See* Wis. Stat. § 5.05(1); Dkt.1 ¶ 15. That is, the Commission's interest is in "provid[ing] fair and smooth administration of elections" in Wisconsin, *Johnson*, 902 F.3d at 579, including by enforcing the extant redistricting maps, *see Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012). The Congressmen's interests are decidedly unlike the Commission's, since the Congressmen have the specific interest in "the contours of the maps," which contours affect them "directly and substantially by determining which constituents [they] must court for votes and represent in the legislature." *Johnson*, 902 F.3d at 579.†

* Proposed-Intervenors Wisconsin voters, Dkt.21, to the extent their interests are relevant at all, *but see Planned Parenthood*, 942 F.3d at 797 (looking only to "existing parties to the action" (citations omitted)), could not adequately represent the Congressmen for the same exact reason as Plaintiffs: the Congressmen have a "representative interest," given their current statuses as the elected Representatives from the Districts and their express intent to run for reelection in 2022, *Johnson*, 902 F.3d at 579; *see supra* pp. 5–7.

† Further, in other recent cases before this Court, the Commission has taken the position that it has "no authority" to defend the constitutionality of Wisconsin's laws and, likewise, has "no authority to appeal" a judicial "decision" granting injunctive relief against such laws. Mem. of Defs. Wis. Elections Comm'n In Support Of Mot. To Dismiss at 5–6, *Edwards v. Vos*, No. 3:20-cv-340, Dkt. 15 (W.D. Wis. May 25, 2020) (capitalization altered). In the present case, the Wisconsin Department of Justice has entered an appearance on behalf of the Commission, in a Notice of Appearance that conspicuously omits the Wisconsin Attorney General, contrary to prior practice. *Compare* Dkts.25 at 2, 27 at 2, *with Whitford v. Gill*, No. 15-cv-421-jdp, Dkt.271 at 2 (W.D. Wis. Apr. 26, 2019). At this point, it is unclear what impact the (perhaps limited) participation of the Wisconsin Department of Justice will have on the Commission's recent position that it has no authority to defend Wisconsin law.

The Wisconsin Legislature also does not represent the Congressmen's interests. The Legislature's interests are in defending its own general state-constitutional power to conduct redistricting, as well as "the constitutionality of the ongoing redistricting process." Dkt.9 at 5–8; *accord* Dkt.24 at 3. The Congressmen's interests are decidedly different: they have "a substantial interest in establishing the boundaries of their congressional districts" as current and prospective elected Representatives. *Baldus*, 2011 WL 5834275, at *2; *accord Johnson*, 902 F.3d at 579.

The Congressmen thus easily clear their "minimal" burden to show that the other parties' representation "may be inadequate." *Driftless*, 969 F.3d at 747. Plaintiffs' request for this Court to itself adopt a new congressional map puts this inadequacy into stark relief. Dkt.1 at 16. To draw a congressional map for Wisconsin, a map drawer—after complying with the U.S. Constitution and federal law—will need to take into account "traditional redistricting criteria," such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts," and "avoiding contests between incumbent Representatives." *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014); *see also* Wis. Const. art. IV, §§ 4–5 (criteria for Wisconsin's State Assembly and State Senate Districts). Given the parties' and the Congressmen's starkly different interests, the other parties may well differently "rank the relative importance of those traditional criteria and [differently] weigh how much deviation from each to allow." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). To take just one obvious example, it is fair to assume that "avoiding contests between incumbent Representatives," *League*

of *Women Voters of Chicago*, 757 F.3d at 726 (citations omitted), will be in-kind more important to the Congressmen than to any of the parties, given that the Congressmen would be the ones who would potentially be paired. The Congressmen thus plainly satisfy the applicable “minimal,” “may be inadequate” standard. *Driftless*, 969 F.3d at 747. Indeed, the Congressmen’s interests are so different from those of the other parties—and so powerful—that the Congressmen would also satisfy the higher inadequate-representation standard, were it applicable. *Id.*

II. Alternatively, This Court Should Grant The Congressmen Permissive Intervention Under Rule 24(b)(1)(B)

The Congressmen, alternatively, respectfully request that this Court grant them permissive intervention under Rule 24(b)(1)(B). Permissive intervention has two elements: the intervenor must “timely” move to intervene and must have “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); *accord* Dkt. 24 at 2. Once a movant satisfies those two elements, the court may then “consider a wide variety of factors” in deciding whether to grant permissive intervention. *Planned Parenthood*, 942 F.3d at 803–04. Those factors include the strength of the interest presented by the proposed intervenors, *Baldus*, 2011 WL 5834275, at *2, and whether intervention would “overwhelm” the Court, *Planned Parenthood*, 942 F.3d at 802–04; *see Baldus*, 2011 WL 5834275, at *2.

The permissive-intervention analyses in *Baldus* and *Johnson* are particularly instructive here. In *Baldus*, a three-judge panel of the Eastern District of Wisconsin granted permissive intervention to both “the Republican Congress Members” and “the Democratic Congress Members,” concluding that they held a “substantial

interest in establishing the boundaries of their congressional districts,” since they were “much more likely to run for congressional election.” 2011 WL 5834275, at *1–2 (also finding the timeliness and common-question elements satisfied). *Baldus* held that these members’ intervention would not “open the floodgates” to other potential intervenors, including because other, would-be intervenors would not share the members’ significant interests. *See id.* at *2. In *Johnson*, 902 F.3d 572, the Sixth Circuit reversed a district court’s denial of permissive intervention to members of Congress in a redistricting challenge, including by holding that the members’ relationship with their constituents gave them a significant interest, as “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.” *Id.* at 577–79. The Sixth Circuit also concluded that intervention would not “interfere[] with the court’s ability to reach an expeditious resolution.” *Id.* at 578.

Here, the Congressmen satisfy the two required elements for permissive intervention. The Congressmen’s Motion To Intervene is timely, as already described above with respect to intervention as of right. *Supra* p. 5; *accord* Dkt.24 at 2. Further, the Congressmen have simultaneously filed a proposed Answer and a proposed Motion To Dismiss that raise defenses to the claims in Plaintiffs’ Complaint, thus the Congressmen “share[] a question of law with the main action.” *Planned Parenthood*, 942 F.3d at 803; *accord* Dkt. 24 at 2.

As for other factors supporting permissive intervention, the Congressmen have direct and substantial interests here, just like the members of Congress in *Baldus*

and *Johnson*. The Congressmen serve their constituents as elected Representatives, and they have expressed their desire to run for reelection in 2022. *Supra* p. 3. Since the “contours of the maps” of the Districts “determin[e] which constituents the Congressmen must court for votes and represent in the legislature,” the Congressmen are all “directly and substantially” affected by the litigation here. *Johnson*, 902 F.3d at 579; *Baldus*, 2011 WL 5834275, at *2; *accord Smith*, 2018 WL 8805953, at *1.

Granting the Congressmen intervention will not “open the floodgates and enable many other parties to intervene,” *Baldus*, 2011 WL 5834275, at *2–3, or “interfere[] with the court’s ability to reach an expeditious resolution,” *Johnson*, 902 F.3d at 578; *Smith*, 2018 WL 8805953, at *3–4. As *Baldus* recognized, members of Congress possess powerful interests in the Districts at issue. *See* 2011 WL 5834275, at *2–3. Since the Congressmen’s interest is not shared with those of other potential intervenors, permitting the Congressmen to intervene would not “enable many other parties to intervene.” *Id.* Finally, if granted intervention, the Congressmen commit to meeting any scheduling orders that this Court deems reasonable, *see Baldus*, 2011 WL 5834275, at *3, and avoiding “duplicative discovery” and motions practice, *Smith*, 2018 WL 8805953, at *1–4; *accord Johnson*, 902 F.3d at 579, thereby further “reduc[ing] any disruption [from intervention] to levels the court will tolerate,” *Planned Parenthood*, 942 F.3d at 804.

CONCLUSION

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

Dated: August 30, 2021

Respectfully Submitted,

/s/ Misha Tseytlin _____

MISHA TSEYTLIN

Counsel of Record

KEVIN M. LEROY

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe Street, Ste. 3900

Chicago, IL 60606

(608) 999-1240

(312) 759-1939 (fax)

misha.tseytlin@troutman.com

kevin.leroy@troutman.com

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

CERTIFICATE OF SERVICE

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

/s/ Misha Tseytlin

MISHA TSEYTLIN

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe Street

Suite 3900

Chicago, IL 60606

(608) 999-1240

(312) 759-1939 (fax)

misha.tseytlin@troutman.com