IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. 15-cv-421-jdp

BEVERLY R. GILL, et al.,

Defendants.

THE WISCONSIN ASSEMBLY DEMOCRATIC CAMPAIGN COMMITTEE,

Plaintiff,

v. 18-cv-763-jdp

BEVERLY R. GILL, et al.,

Defendants.

INDIVIDUAL PLAINTIFFS' BRIEF IN OPPOSITION TO WISCONSIN STATE ASSEMBLY'S MOTION TO INTERVENE PURSUANT TO FRCP 24(A) AND (B)

Three years after the commencement of this action, the Wisconsin State Assembly ("Proposed-Intervenor") has filed a motion to intervene in the above-captioned case pursuant to Fed. R. Civ. P. 24(a) and 24(b) (dkt. 209). With the motion to intervene, the Proposed-Intervenor also filed a motion to dismiss the individual Plaintiffs' ("Plaintiffs") amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) (dkt. 210-1), an accompanying brief in support ("MTD Brief") (dkt. 210-2), and a proposed answer (dkt. 210-3).[1] The Proposed-Intervenor's motion to intervene, whether as of right or permissively, should be denied. In the alternative, if this Court

[1] The next day, the Proposed-Intervenor also filed motions to intervene and dismiss in the related case, *Wis. Assembly Democratic Campaign Comm. v. Gill,* 3:18-cv-00763 (W.D. Wis.) (dkt. 11-13), which has been consolidated with this action for scheduling.

grants the Proposed-Intervenor's motion, the Plaintiffs respectfully request that this Court place strict limits on the Proposed-Intervenor's participation in this case.

ARGUMENT

I. Intervention as of Right Under Rule 24(a) Should Be Denied.

First, the Proposed-Intervenor does not have the right to intervene in this action under Rule 24(a). Not only is the motion untimely, coming more than two years after the trial and three years after the original complaint was filed, but the Proposed-Intervenor cannot show that the existing State-Defendants, represented by the State's chief legal officer, cannot adequately protect the Proposed-Intervenor's interest.[2] Since the beginning of this case, both the Proposed-Intervenor and the State-Defendants have shared a common goal: defending the constitutionality of Act 43. *See One Wis. Inst., Inc. v. Nichol,* 310 F.R.D. 394, 399 (W.D. Wis. 2015) ("Where a prospective intervenor has the same goal as the party to a suit, there is a presumption that the representation in the suit is adequate.") (quoting *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994)). The presumption of adequate representation by counsel for the existing State-Defendants is even stronger here, because "'when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith.' Here, the Attorney General of Wisconsin is representing defendants, and under Wisconsin law, 'it is the attorney general's duty to defend the constitutionality of state statutes.'" *Id*. at 398 (citation omitted) (quoting *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007); *State Pub. Intervenor v. Wis. Dep't of Nat. Res.*, 115 Wis.2d 28, 339 N.W.2d 324, 327 (Wis. 1983)). The Proposed-Intervenor neither makes, nor attempts to make, any showing of gross negligence or

[2] The initial complaint in this case was filed on July 8, 2015 (dkt. 1).

bad faith by the State-Defendants, and understandably so, since both share the same legal counsel: the Wisconsin Department of Justice. In the absence of any such showing, the presumption of adequate representation remains intact.

Further, the Proposed-Intervenor has known about, and indeed has participated in, this case since its inception well over *three years* ago. As the Proposed-Intervenor acknowledges in its brief in support of the motion to intervene ("MTI Brief") (dkt. 210), it "has been significantly involved in this litigation." MTI Brief at 3. The Proposed-Intervenor was served with a 30(b)(6) subpoena, and its counsel at the time—the same counsel who signed its pending motion to intervene—negotiated stipulations with the Plaintiffs' counsel before the May 2016 trial on its behalf. *Id*.; Stipulation Regarding 30(b)(6) Depositions of the Legislative Tech. Servs. Bureau & Wis. State Senate & Assembly (dkt. 96). The same counsel who now represents the Proposed-Intervenor also appeared in the underlying case in the pretrial depositions of the State-Defendants' two primary fact witnesses, Adam Foltz and Tad Ottman. *See* Deposition Transcripts for Adam Foltz (dkt. 113 at 2) and Tad Ottman (dkt. 118 at 2).[3] Counsel representing the Proposed-Intervenor was also present for at least part of the May 2016 trial in this case, where the Proposed-Intervenor's legislative employees Adam Foltz and Tad Ottman testified at trial. MTI Brief at 3.

Having been heavily involved in this action from the start, the Proposed-Intervenor could have sought leave to intervene at any time. It chose not to. The Proposed-Intervenor should not be able to derail the proceedings at this late date by seeking to go back to square one.

[3] Attorneys from the Wisconsin Department of Justice, which has represented the State-Defendants from the outset of this litigation, served as co-counsel to the Proposed-Intervenor, as well as to Adam Foltz and Tad Ottman in their depositions, in negotiating a stipulation with the Plaintiffs, and at trial. *See* Stipulation Regarding 30(b)(6) Depositions of the Legislative Tech. Servs. Bureau and Wis. State Senate & Assembly (dkt. 96); Deposition Transcripts for Adam Foltz (dkt. 113 at 2) and Tad Ottman (dkt. 118 at 2).

II. Permissive Intervention Under Rule 24(b) Is Inappropriate.

Second, the Proposed-Intervenor's motion to intervene permissively under Rule 24(b) also should be denied. This Court has discretion under Rule 24(b) to grant or deny motions to intervene permissively. *Keith v. Daley*, 764 F.2d 1265, 1272 (7th Cir. 1985) ("Permissive intervention is wholly discretionary with the district court and will be reversed on appeal only for an abuse of discretion."); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) (same). The Proposed-Intervenor does not provide a convincing explanation why its interests are not currently adequately represented by the State-Defendants and their counsel, the State's Attorney General's office, when the Proposed-Intervenor apparently felt adequately represented by them during the previous trial and preceding three years this case has been pending.[4] Nor is it clear from Proposed-Intervenor's motion how the Proposed-Intervenor's participation would contribute to a fair and efficient resolution of this lawsuit, a factor that also weighs against its permissive intervention.[5]

In fact, allowing the Proposed-Intervenor to become a party at this late date would only delay and disrupt this action, to the prejudice of Plaintiffs. By attempting to file a motion to dismiss, the Proposed-Intervenor has already sought to raise collateral issues that the State-Defendants did not. Moreover, at the Preliminary Pretrial Conference ("PPC") held just three days ago, counsel for the Proposed-Intervenor announced that they are considering filing a

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[4] Although adequate representation is only an explicit requirement for intervention of right under Fed. R. Civ. P. 24(a), "'[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears.'" *See, e.g., Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996).

[5] *See, e.g.*, *One Wis. Inst., Inc.,* 310 F.R.D. at 399 ("The considerations that guide the court's exercise of that discretion include prejudice to the original parties and the potential for slowing down the case, recognizing that 'Rule 24(b) is just about economy in litigation.'" (quoting *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 987 (7th Cir. 2011))); *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 710 (11th Cir. 1991) (finding intervention of right but remanding to the district court "to condition [ ] intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation"); *see also* Fed. R. Civ. P. 24 advisory committee's notes to 1966 amendments ("An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.").

motion to stay these proceedings if the U.S. Supreme Court notes probable jurisdiction in the North Carolina congressional partisan gerrymandering cases *Rucho v. League of Women Voters of N.C.* and *Rucho v. Common Cause*, No. 18-422 (2018) (dkt. 215 at 19:6-12). Thus, if intervention is granted, the Proposed-Intervenor has already acknowledged its intent to delay and derail this litigation, prejudicing the rights of the Plaintiffs to have these remand proceedings decided expeditiously.[6] This fact alone warrants denial of the motion for permissive intervention.

It is also noteworthy that the Proposed-Intervenor informed this Court and the parties during the PPC that if granted intervention, it would offer another expert witness (in addition to those already put forth by the existing State-Defendants) (dkt. 215 at 20:5). Plaintiffs do not yet know what issues the Proposed-Intervenor's additional expert(s) would address and whether those matters would be in addition to those raised by the existing parties to this case. Furthermore, granting intervention to the Proposed-Intervenor would give the defendants two bites at every apple, tag-teaming at depositions of the dozens of new individual Plaintiffs, among many other actions in the case. Here again, it is likely that Plaintiffs would be prejudiced by the intervention.

Denying intervention would do the Proposed-Intervenor no harm. If the Proposed-Intervenor wishes to address specific issues before the Court, it can seek leave to participate as *amicus curiae*. *See Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975) (affirming lower court's denial of motion for permissive intervention, stating that "participat[ing] in the litigation as an amicus curiae" would give the intervenor "ample opportunity to give the

[6] As this Court stated in its August 16, 2018 Order: "We are not starting a brand-new case. By October 5, the parties must submit a joint report that sets out a comprehensive plan and proposed schedule for the *expeditious resolution of this case* within the mandate of the Supreme Court." (Dkt. 199 at 1-2) (emphasis added). At the PPC, the Court also stated that "[the panel] fully intend to resolve this matter as expeditiously as we can. We're not starting over from scratch." (Dkt. 215 at 11:5-17).

court the benefit of its expertise.").[7] That is precisely what the Proposed-Intervenor did before the U.S. Supreme Court, and such participation would not result in the type or level of prejudice to Plaintiffs that intervention would produce. In addition, the Proposed-Intervenor's main interest is presumably preservation of the existing Assembly district boundaries. But that interest arises more at the remedial phase of redistricting cases, if at all, and not the liability phase.

III. If Intervention Is Allowed, the Proposed-Intervenor's Participation Should Be Limited.

If this Court ultimately decides to permit intervention, Plaintiffs respectfully urge the Court to impose strict limits on the Proposed-Intervenor's participation.[8] Such limits should include: not permitting two lawyers for Defendants to depose the forty individual Plaintiffs; precluding the Proposed-Intervenor from filing any motions to stay proceedings (unless the existing State-Defendants were to file such motions); prohibiting the Proposed-Intervenor from seeking any modification of the schedule announced by the Court (and agreed to by the parties)

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[7] *See also Stupak-Thrall v. Glickman*, 226 F.3d 467, 477, 471 (6th Cir. 2000) (holding that the "right to participate as amici curiae is both meaningful and adequate" for intervenors that have a common "ultimate goal" with a party, even if the intervenors intend to make different arguments); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987) (affirming lower court's denial of intervention under Rule 24(a) and (b) partly because "the district court has already taken steps to protect the proposed intervenors' interests by inviting [counsel] to appear as amicus curiae in the case"); *Ohio v. Envtl. Prot. Agency*, 313 F.R.D. 65, 72 (S.D. Ohio 2016).

[8] Limits may be imposed by the Court for both intervention of right under Fed. R. Civ. P. 24(a) and permissive intervention under Rule 24(b). *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) (Brennan, J. concurring) ("[R]estrictions on participation may [ ] be placed on an intervenor of right and on an original party."); *Beauregard, Inc. v. Sword Servs., LLC*, 107 F.3d. 351, 352-53 (5th Cir. 1997) ("[I]t is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right."); 7C Charles Alan Wright & Arthur R. Miller *et al.*, Federal Practice & Procedure § 1922 (3d ed. April 2018 update); Cf. *Friends of Tims Ford v. Tenn. Valley Auth*., 585 F.3d 955, 963 n.1 (6th Cir. 2009) ("Federal courts have the authority to apply appropriate conditions or restrictions on an intervention as of right."); *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.,* 974 F.2d 450, 469 (4th Cir. 1992) ("When granting an application for permissive intervention, a federal district court is able to impose almost any condition, including the limitation of discovery."); *United States v. Duke Energy Corp*., 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001) (an unconditional right to intervene "does not prevent the imposition of reasonable limitations on Applicants' participation to ensure the efficient adjudication of the litigation"); *Southern v. Plumb Tools*, 696 F.2d 1321, 1322 (11th Cir. 1983) ("Discretion under Rule 24(b) to grant or deny intervention *in toto* necessarily implies the power to condition intervention upon certain particulars."); *Armstrong v. O'Connell*, 75 F.R.D. 452, 453 (E.D. Wis. 1977) (granting conditional intervention and stating that "in exercising its discretion with respect to a motion to intervene under Rule 24(b)(2), the Court is directed to 'consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'"), *vacated and remanded mem*., 566 F.2d 1175 (7th Cir. 1977) (unpublished table decision).

at the PPC (dkt. 214); holding the Proposed-Intervenor (and all parties) to the October 1, 2019 deadline for filing a jurisdictional statement with the U.S. Supreme Court in any appeal of this case (dkt. 215 at 24:18-20); and barring the Proposed-Intervenor from raising any collateral issue or from re-litigating any issue already decided in this suit.[9]

Finally, Plaintiffs note that there is precedent for limiting additional factual development in redistricting cases on remand from the Supreme Court. For example, in a partisan gerrymandering case very similar to this action, which was vacated and remanded post-*Whitford* and which argued many of the same legal theories, *none* of the parties or the Court thought that every issue in the case could be reopened on remand. Instead, the parties and the Court focused exclusively on standing and district-specific evidence of liability, leaving earlier evidence untouched. *See, e.g.*, Order, *League of Women Voters of N.C. v. Rucho*, 1:16-cv-1164 (dkt. 135) (M.D.N.C. July 18, 2018). The schedule set by this Court at the October 16 preliminary pretrial hearing is consistent with this approach.

CONCLUSION

For the above reasons, the Proposed-Intervenor's motion to intervene, whether as of right or permissively, should be denied. In the alternative, if the Court grants the Proposed-Intervenor's motion to intervene, the Plaintiffs respectfully ask this Court to impose strict limits on the Proposed-Intervenor's participation, as outlined above.

Respectfully submitted, this 19th day of October, 2018.

By: /s/ Annabelle E. Harless
One of the Attorneys for Plaintiffs

[9] *See, e.g., United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013) ("[I]nterested parties should not be able to join at a late stage and re-litigate issues that they watched from the sidelines.").

/s/ Annabelle E. Harless
Annabelle E. Harless
Ruth M. Greenwood
CAMPAIGN LEGAL CENTER
73 W. Monroe St., Ste. 302
Chicago, IL 60603
(312) 561-5508
aharless@campaignlegalcenter.org
rgreenwood@campaignlegalcenter.org

/s/ Douglas M. Poland
Douglas M. Poland
State Bar No. 1055189
Alison E. Stites
State Bar. No. 1104819
RATHJE WOODWARD, LLC
10 East Doty St., Ste. 507
Madison, WI 53703
(608) 960-7430
dpoland@rathjewoodward.com
astites@rathjewoodward.com

/s/ J. Gerald Hebert
J. Gerald Hebert
Danielle M. Lang
CAMPAIGN LEGAL CENTER
1411 K. St. NW, Ste. 1400
Washington, DC 20005
(202) 736-2200
ghebert@campaignlegalcenter.org
dlang@campaignlegalcenter.org

/s/ Peter G. Earle
Peter G. Earle
State Bar No. 1012176
LAW OFFICE OF PETER G. EARLE, LLC
839 N. Jefferson St., Ste. 300
Milwaukee, WI 53202
(414) 276-1076
peter@earle-law.com

/s/ Nicholas O. Stephanopoulos
Nicholas O. Stephanopoulos
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th St.
Chicago, IL 60637
(773) 702-4226
nsteph@uchicago.edu

/s/ Michele L. Odorizzi
Michele L. Odorizzi
MAYER BROWN, LLP
71 S. Wacker Dr.
Chicago, IL 60606
(312) 701-7309
modorizzi@mayerbrown.com

Attorneys for Plaintiffs