UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA, GERALDINE SCHERTZ, and KATHLEEN QUALHEIM,

Plaintiffs,

v. Case No. 3:21-cv-00512

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.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS

The Plaintiffs in this case are Wisconsin voters who, based on the results of the 2020 census, allege that they live in malapportioned districts from a "one person, one vote" standpoint. The Proposed Intervenor-Plaintiffs (the "Intervenors"), likewise, are Wisconsin voters, each of whom resides in a malapportioned district. The Intervenors have filed a Petition for an Original Action before the Wisconsin Supreme Court alleging that their constitutional rights under the Wisconsin Constitution are being violated given the fact that they live in districts that are over-populated (again, from a "one person, one vote" standpoint). *See* Ex. D.

Although the Plaintiffs and the Intervenors each allege that the districts being challenged are malapportioned, they have substantially different and inconsistent goals in this litigation.

First, in the Intervenors' view, these matters are best resolved in state, not federal, court, and the Wisconsin original action will likely moot most or all of the claims alleged by the Plaintiffs. Conversely, this lawsuit threatens the orderly progression of the Intervenors' pending state proceedings.

Second, to avoid the Court from being mired in political questions regarding the drawing of new maps, the Intervenors contend that the Court should approve new maps under the "least change" principle. Under this principle, the Court should approve new maps that make the least number of changes to the existing maps to satisfy the "one person, one vote" requirement and to satisfy the other traditional redistricting criteria. The Plaintiffs do not argue for application of the "least change" principle.

Thus, the Intervenors seek to intervene in this case for two reasons: (1) to file a motion to stay this action in favor of allowing a Wisconsin state court to adjudicate the issues relating to redistricting after the 2020 census, *see* Exs. B-C, and (2) if this action is not stayed, the Intervenors seek to adjudicate their constitutional rights under the "one person, one vote" principle in this case given that their rights would not be protected by either the existing Plaintiffs or the Defendants.[1]

[1] The Intervenors acknowledge that while Intervenor-Defendant Wisconsin Legislature similarly believes that this issue is best resolved in a state forum, it seeks dismissal rather than a stay. Cases like *Arrington v. Elections Bd.* have facilitated the current state of affairs in which state voters like

The Intervenors meet the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. Alternatively, permissive intervention is appropriate under Rule 24(b).

FACTUAL BACKGROUND

The Intervenors

The Intervenors are Wisconsin voters who live in malapportioned districts. Each of the districts the parties live in fail the one person, one vote constitutional standard, under which population equality across districts ensures that each Wisconsinite's vote counts equally.

Intervenor Billie Johnson resides at 2313 Ravenswood Rd, Madison Wisconsin 53711, in the Second Congressional District, State Assembly District 78, and State Senate District 26.

Intervenor Eric O'Keefe resides at 5367 County Road C, Spring Green, WI 53588, in the Second Congressional District, State Assembly District 51, and State Senate District 17.

Intervenor Ed Perkins resides at 4486 N. Whitehawk Dr., Grand Chute, WI 54913, in the Eighth Congressional District, State Assembly District 56, and State Senate District 19.

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the Plaintiffs are arguably justified filing a federal complaint just one day after census data is released and before the state political branches have even attempted to reach compromise. *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) (three-judge court). While such cases might deserve reexamination, given their existence the Intervenors wish to preserve their rights in the event this Court declines to dismiss or stay this case.

Intervenor Ronald Zahn resides at 287 Royal Saint Pats Drive, Wrightstown, WI 54180, in the Eighth Congressional District, State Assembly District 2, and State Senate District 1.

As noted, because of the latest reapportionment count (which the Plaintiffs have provided), the Intervenors now live in malapportioned districts: Congressional District 2 (Johnson, O'Keefe – 789,393); Congressional District 8 (Perkins, Zahn – 751,967); State Assembly District 78 (Johnson – 67,142); State Assembly District 51 (O'Keefe – 56,878); State Assembly District 56 (Perkins – 64,544); State Assembly District 2 (Zahn – 62,564); State Senate District 26 (Johnson – 201,819); State Senate District 17 (O'Keefe – 173,532); State Senate District 19 (Perkins – 184,473); State Senate District 1 (Zahn – 184,304).

The Intervenors' Petition for an Original Action

On August 23, 2021, the Intervenors filed a Petition for an Original Action before the Wisconsin Supreme Court alleging that, due to population changes in the State of Wisconsin since the existing maps were created by the State Legislature (and approved by the Governor), the Intervenors now live in malapportioned districts and that under the "one person, one vote" standard their rights under the Wisconsin Constitution are being violated by the existing boundaries in the maps approved ten years ago. *See* Ex. D.

The Petition asks that, in the absence of the existing Legislature and Governor agreeing on new maps for the State, the Wisconsin Supreme Court create new maps in time for candidates to circulate nomination papers for the 2022 fall primaries and

general election. Thus, if the Wisconsin Supreme Court grants the Petition, this case and that case would directly conflict.[2]

But the U.S. Constitution directly endows the *States* with the primary duty to redraw their congressional districts. *See* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.") And, although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the U.S. Supreme Court has made clear that the states' role is *primary*. *Growe v. Emison,* 507 U.S. 25 (1993).

As noted in *Growe,* 507 U.S. at 34:

> "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier,* 420 U.S. 1, 27 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.

Growe specifically requires federal courts "to defer consideration of disputes involving redistricting where the State, through its legislative *or judicial branch*, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis added). *Growe* also specifies that any redistricting plan judicially "enacted" by a state court (just like one enacted by a state legislature) would be entitled to presumptive full-faith-and-credit legal effect in federal court. *Id*. at 35–36.

[2] At minimum, this Court should stay this suit until the Wisconsin Supreme Court decides whether to grant the Intervenors' petition. If that Court grants the petition, the stay should continue until that case is resolved. If that Court denies the petition, intervention is still warranted for the reasons stated herein, although a stay would of course no longer be necessary in the absence of other state proceedings relating to redistricting.

Justice Scalia, writing for a unanimous Court, explained that federal courts are required to stay their hand while either the state legislature or a state court is addressing the task of redistricting. *Id*. at 34. To request that this Court stay this case pending potential resolution in the Wisconsin Supreme Court is one of the reasons that the Intervenors seek to intervene.

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure provides two avenues by which individuals may intervene in federal litigation: intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). Fed. R. Civ. P. 24(a)-(b). The Intervenors meet the requirements of both provisions and should be allowed to intervene.

I. THE PROPOSED INTERVENORS MAY INTERVENE AS OF RIGHT UNDER RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 24(a)(2) provides that "[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). This rule may be restated as a four-factor test according to which a proposed intervenor must:

> (1) make a timely application, (2) have an interest relating to the subject matter of the action, (3) be at risk that that interest will be impaired by the action's disposition and (4) demonstrate a lack of adequate representation of the interest by the existing parties.

Vollmer v. Publishers Clearing House, 248 F.3d 698, 705 (7th Cir. 2001). Each of these four requirements is met here.

A. Timely Application

Rule 24(a)(2) requires a motion to intervene to be "timely." "The timeliness requirement forces interested non-parties to seek to intervene promptly so as not to upset the progress made toward resolving a dispute." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797 (7th Cir. 2013). The "most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (quoting 7C Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 1916 (1986)) (internal quotation marks omitted).

The Intervenors' motion is timely. The Intervenors filed their motion only two weeks after the Plaintiffs filed their complaint and just a few days after the conflicting state proceedings began. *See Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) ("[W]e do not necessarily put potential intervenors on the clock at the moment the suit is filed or even at the time they learn of its existence. Rather, we determine timeliness from the time the potential intervenors learn that their interest might be impaired.").

Second, none of the parties will be prejudiced if this Court grants this motion to intervene. Because the Intervenors have moved to intervene at this early juncture—shortly after the filing of the Plaintiffs' complaint—intervention will not

impede, complicate, or substantially delay the resolution of this case. The Intervenors' motion to intervene is timely.

B. Interest Relating to the Subject Matter of the Action

In order to intervene as of right, a proposed intervenor must have a direct, significant, legally protectable interest in the subject matter of the action. *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003); *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995). The asserted interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit, *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), and the claimed injury must not be too remote. *See City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 985 (7th Cir. 2011).

The Intervenors fulfill this requirement as well. The interests in the subject matter of this action possessed by the Intervenors are: (1) their constitutional right to an undiluted vote, (2) their right to a state court forum for the adjudication of their constitutional rights relating to redistricting, and (3) their right to the relief that they prefer, namely that whatever court resolves the matter apply the "least change" principle along with the other redistricting criteria traditionally applicable to such cases. The Intervenors will discuss each briefly.

1. *The Intervenors have the right to an undiluted vote.*

The Intervenors, like all Wisconsin voters, have the right to assert the principle of "one person, one vote" under the U.S. constitution, *Baker v. Carr*, 369 U.S. 186

(1962), and under the Wisconsin constitution. *State ex rel. Reynolds v. Zimmerman,* 22 Wis. 2d 544, 550, 126 N.W.2d 551 (1964).[3]

The Plaintiffs assert the same right under the federal constitution and although the Plaintiffs simultaneously filed their own lawsuit, that does not mean that the Intervenors should be barred from asserting these rights especially where, as shown below, they disagree with the Plaintiffs about the best forum, the criteria to be applied by the court, and the remedy.

The Intervenors note that it is common to allow intervention in redistricting cases by multiple parties who did not agree with the results sought by the original plaintiffs. For example, in the Wisconsin litigation following the 1980 census the original plaintiffs included individual voters, unions, the Democratic Party of Wisconsin and a member of the State Senate as plaintiffs. The defendants were the State Elections Board and its members in their official capacities. The Republican Party of Wisconsin, the Governor, the League of Women Voters, the City of Milwaukee and a number of individuals were allowed to intervene as plaintiffs. *See Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982).

In the litigation following the 1990 census the original plaintiffs included individual Republican legislators from both the Assembly and the Senate, and individual voters. The defendants were the State Elections Board, the State Board of Canvassers, and their individual members in their official capacities. The court allowed the intervention of a number of individuals and unions as plaintiffs and

[3] For purposes of this case, the Intervenor-Plaintiffs assert claims under the Fourteenth Amendment and Article I, Section 2 of the U.S. Constitution.

allowed the intervention of the Democratic leaders of the Wisconsin legislature, and a number of other individuals as intervening defendants. *See Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992).

In the litigation following the 2000 census, the action was started by a group of individual voters. The defendants were the Wisconsin Elections Board and its members. Two groups of legislators (one group of Democrats and one group of Republicans) were allowed to intervene along with two individual African-American legislators. *Baumgart v. Wendelberger*, No. 01-C-0121, 02–C–036, 2002 WL 34127471 (E.D. Wis. May 30, 2002) (per curiam amended memorandum opinion and order) (unpublished), *amended*, No. 01-C-0121, 02–C–0366, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (per curiam decision and order) (unpublished).

In the litigation following the 2010 census, two separate actions were started: one by a group of individual voters and one by Voces de la Frontera, Inc. The two cases were consolidated and the court permitted the three Democratic members of Wisconsin's delegation to the United States House of Representatives to intervene as plaintiffs, and it permitted the five Republican members of that delegation to intervene as defendants. *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 847 (E.D. Wis. 2012)

In the above cases, the court allowed participation as parties by multiple individuals, unions, political parties and elected officials, all of whom agreed that the maps had to be redrawn after the census based upon the principle of "one person, one vote" but who had different perspectives about what the new maps should look like.

2. *The Intervenors have the right to a state forum.*

As stated above, the U.S. Constitution directly endows the *States* with the primary duty to redraw their congressional districts. *See* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]") And, although the federal and state courts have concurrent jurisdiction to decide redistricting matters, the U.S. Supreme Court has made it clear that the states' role is primary. *Growe v. Emison,* 507 U.S. 25, 34 (1993).

The Wisconsin Supreme Court has said the same in *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶5, 249 Wis.2d 706, 639 N.W.2d 537: "It is an established constitutional principle in our federal system that congressional reapportionment and state legislative redistricting are primarily state, not federal, prerogatives."

Moreover, the right to "one person, one vote" exists under both the U.S. and Wisconsin constitutions and in *State ex rel. Reynolds v. Zimmerman,* 22 Wis.2d 544, 564, 126 N.W.2d 551 (1964), the Wisconsin Supreme Court said that "*there is no reason for Wisconsin citizens to have to rely upon the federal courts for the indirect protection of their state constitutional rights.*" (Emphasis added.)

The Intervenors have asserted their state constitutional rights in a Petition for an Original Action before the Wisconsin Supreme Court, *see* Ex. D, and they seek to vindicate those rights in that forum. They have a legally protectable interest in preserving the effectiveness of any future judgment they may receive.

3. *The Intervenors have the right to have whatever court resolves redistricting issues arising in Wisconsin after the 2020 census apply the "least change" principle in selecting a new map along with the other redistricting criteria traditionally applicable to such cases.*

If the Wisconsin Legislature and Governor are not able to agree on new maps for redistricting purposes, it will be up to a court to do so. If this Court does not stay this case, then it will be up to this Court to draw or approve new maps. The Intervenors have a right to be heard regarding any such remedy. If the Court proceeds to redraw the boundaries of the Intervenors' districts, it may draw the districts in a way that the Intervenors oppose. The Intervenors' interest in preventing that injury is direct, significant, and legally protectable. Intervenors' own districts—and thus their own constitutional rights—are at stake.

The Intervenors desire to argue for new maps that are consistent with the "least change" principle and which meet the other traditional redistricting criteria. Specifically, the Intervenors intend to argue for the following. First, drafting redistricting maps is inherently a legislative function. *See* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof"); Wis. Const. art. 4 § 3 ("the *legislature* shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.") (Emphasis added.) Moreover, legislatures have the requisite capability to best draw and implement district lines because of the inherent political nature of establishing district boundaries. *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). Thus, starting with the last map that was

promulgated by the State Legislature and approved by the Governor is a simple way to preserve the proper separation of powers in redistricting cases.

Second, and relatedly, due to the population changes that have occurred since the last maps were promulgated by the Wisconsin Legislature and approved by the Governor, those maps no longer comply with the "one person, one vote" principle. But the cure by the Court should not be to create new maps from scratch—an exercise in which political controversies necessarily inhere—but instead to make the least changes necessary to the existing maps to satisfy all constitutional requirements such as the "one person, one vote" principle and compliance with the other traditional redistricting criteria.[4] Ensuring the constitutionality of maps rather than making fundamentally political decisions about which of several constitutional maps is best is the proper business of the Courts. This approach allows the court to focus on the former rather than the latter.

Third, this "least change" approach has been used by courts in the past. For example, this is the approach that was used in Minnesota after the 2010 census. See, *Hippert v. Ritchie*, 813 N.W.2d 374, 380 (Minn. 2012) ("Because courts engaged in redistricting lack the authority to make the political decisions that the Legislature and the Governor can make through their enactment of redistricting legislation, the panel utilizes a least-change strategy where feasible.")

It is also similar to the approach that the federal three judge panel used in Wisconsin in *Baumgart v. Wendelberger*, No. 01-C-0121, 02–C–036, 2002 WL

[4] These include compactness, contiguity, respecting municipal boundaries, compliance with the Voting Rights Act, preserving the cores of existing districts and maintaining communities of interest.

34127471 (E.D. Wis. May 30, 2002) (per curiam amended memorandum opinion and order) (unpublished), *amended*, No. 01-C-0121, 02–C–0366, 2002 WL 34127473 (E.D. Wis. July 11, 2002) (per curiam decision and order) (unpublished). After receiving input and proposed maps from a variety of interested parties, the court decided instead to work off the existing map, which it described as the "most neutral way it could conceive." *Id.* at 7.[5]

Fourth, this approach also preserves the core of existing districts, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) and honors existing communities of interest in Wisconsin. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). To preserve the core of the existing districts and to maintain the existing communities of interest created by groups of Wisconsinites voting together for the last 10 years, the fewest changes should be made necessary to deal with population shifts.

C. Risk of Impairment of the Interest

Next, disposition of this action will as a practical matter impair or impede the Intervenors' ability to protect their interests. "The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Am. Nat. Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 147-48 (7th Cir. 1989) (quoting *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982)) (internal quotation marks omitted).

[5] In 2002, the existing map was one drawn by a previous panel of judges rather than the Legislature.

The Intervenors need to participate in this action to seek the stay of this action in favor of the state court forum and, if this action is not stayed, to protect their rights as described above. Once this litigation resolves it will be too late to do so. Practically speaking, only one court is going to decide the redistricting issues in Wisconsin relating to the 2020 census. At that point the maps are drawn. If it is this Court, then the Intervenors will have irrevocably lost their chance to avail themselves of a state forum, and, further, this action will become the Intervenors' one and only chance to protect their rights as described above.

D. Inadequate Representation

Finally, a potential intervenor wishing to intervene as of right must "lack adequate representation of the [asserted] interest by the existing parties." *Nissei Sangyo*, 31 F.3d at 438. "A party seeking intervention as of right must only make a showing that the representation 'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972)).

Here, the Plaintiffs seek relief in federal court whereas the Intervenors seek relief in state court. Further, they seek alternate forms of relief, as the Plaintiffs do not request the least-change approach. Nor will the Defendants protect the Intervenors' interests. The Defendants are simply the agency that administers elections in Wisconsin. The Wisconsin Elections Commission has no particular

interest as to what map is in place but only that a map be in place in time to administer the 2022 primary and general elections.[6]

The Intervenors have constitutional rights that they desire to protect and no other party herein has an interest in protecting or advancing those rights.

II. ALTERNATIVELY, THE COURT SHOULD PERMIT THE PROPOSED INTERVENOR-PLAINTIFFS TO INTERVENE UNDER RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Even if this Court determines that the Intervenors are not entitled to intervene as of right, it should permit them to intervene under Rule 24(b)(1)(B), which states that "[o]n 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." Fed R. Civ. P. 24(b)(1)(B). "In exercising its discretion, 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). This brief has already discussed timeliness, prejudice, and delay—none of these factors suggest that intervention is inappropriate. Further, the Intervenors' claims share with the main action the question of whether the existing maps are unconstitutional under the "one person, one vote" principle and if so, how new district boundaries should be drawn.

Allowing permissive intervention here would be consistent with the liberal approach to intervention adopted in past redistricting disputes, as discussed above.

[6] Although the Wisconsin Legislature has moved to intervene, Dkt. #8, it does not adequately represent the Intervenors' interests. It wants this suit dismissed, not stayed. Should the case proceed to the merits, the Legislature will undoubtedly further its own unique, statewide political interests rather than the interests of the individual Intervenors.

Participation by a set of voters arguing for the least-change approach would assist this Court in its deliberation and contribute to a just resolution.

For all these reasons, this Court should exercise its discretion to permit the Intervenors to intervene.

CONCLUSION

The Proposed Intervenor-Plaintiffs respectfully request that this Court grant their motion to intervene, either by intervention as of right under Fed R. Civ. P. 24(a)(2), or, in the alternative, by permissive intervention under Fed R. Civ. P. 24(b)(1)(B).

Dated this 26th day of August, 2021.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Proposed Intervenor-Plaintiffs

/s/ Richard M. Esenberg
Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Anthony LoCoco, WI Bar No. 1101773
414-727-7419; alococo@will-law.org
Lucas Vebber, WI Bar No. 1067543
414-727-7415; lucas@will-law.org
330 East Kilbourn Ave. Suite 725
Milwaukee, WI 53202
414-727-9455; FAX: 414-727-6385