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

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

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., & MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission,

Defendants,

THE WISCONSIN LEGISLATURE,

Proposed Intervenor-Defendant.

No. 3:21-cv-00512-jdp

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE BY THE WISCONSIN LEGISLATURE

The Wisconsin Legislature respectfully submits this Memorandum of Law in support of its Motion to Intervene as a Defendant in this action pursuant to Federal Rule of Civil Procedure 24(a)(2) or 24(b)(1).

INTRODUCTION

The U.S. Census Bureau delivered new census data last Thursday. Not even one day passed before Plaintiffs brought this action alleging "[t]here is no reasonable prospect" that the Legislature will successfully reapportion the legislative and congressional districts. Dkt. 1, Compl. ¶6. Plaintiffs warn that "this Court should prepare itself to intervene" and prepare "to adopt its own plans" for new

congressional and legislative districts "in the near-certain event that the political branches fail to timely do so." *Id.* ¶7.

Plaintiffs' suit names members of the Wisconsin Elections Commission as Defendants, but the suit is a direct attack on the Legislature's constitutionally delegated responsibility of redistricting. The Legislature therefore respectfully requests that this Court grant its motion to intervene. The Legislature satisfies all the conditions for mandatory intervention or, alternatively, permissive intervention. Decades ago, the Supreme Court held that state legislative bodies may intervene as a matter of right in such circumstances. *See Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972). Here too, the Legislature is "certainly…substantially interested" and would be "directly affected" by this lawsuit, *id.*, which asks this Court to supervise (and ultimately take over) the Legislature's redistricting responsibility in Wisconsin.

INTEREST OF PROPOSED INTERVENORS

The Wisconsin Legislature is the bicameral legislative branch of the Wisconsin state government. Wis. Const. art. IV, §1. The Legislature's Assembly comprises 99 districts, with Members elected every two years. And the Legislature's Senate comprises 33 districts, with Members elected every four years. The Wisconsin Constitution charges the Legislature with creating new legislative districts after each federal census. Wis. Const. art. IV, §3. The federal government delivered new census data late last week, and the Legislature has begun its constitutionally delegated task of redistricting.[1]

Additionally, Wisconsin law permits the Legislature to intervene "at any time" and "as a matter of right" when a party challenges the constitutionality of a statute. Wis. Stat. § 803.09(2m); *Democratic*

[1] For example, last week the Legislature launched a webpage inviting Wisconsin residents to provide input on the 2021 redistricting process. *See* "Draw Your District Wisconsin," https://drawyourdistrict.legis.wisconsin.gov/.

Nat'l Comm. v. Bostelmann, 949 N.W.2d 423, 428 (Wis. 2020) ("Wis. Stat. § 803.09(2m) gives the Legislature a statutory right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws"); *see also, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (granting Legislature's motion, filed as an intervenor, to stay injunction of election laws). In Wisconsin, the Attorney General's power to litigate on behalf of the State is not "exclusive." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 946 N.W.2d 35, 54 (Wis. 2020). The Legislature shares that power "in cases that implicate an institutional interest of the legislature," *id.*—chief among them, redistricting. Here, pursuant to state law, the Legislature's Joint Committee on Legislative Organization approved the Legislature's intervention in this suit on August 17, 2021, and the Legislature immediately filed this motion and the attached motion to dismiss Plaintiffs' complaint.

ARGUMENT

The Legislature satisfies all the criteria to intervene as of right. *See* Fed. R. Civ. P. 24(a)(2). Alternatively, the Legislature meets the criteria for permissive intervention. Fed. R. Civ. P. 24(b).

I. The Legislature May Intervene as a Matter of Right.

The Federal Rules require that parties meeting Rule 24(a)'s criteria for intervention be permitted to intervene. The four criteria for intervention as of right are: "(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." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (quotation marks omitted); *see* Fed. R. Civ. P. 24(a)(2). The intervention rule "should be liberally construed with all doubts resolved in favor of the proposed intervenor." *South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003); *accord Wilderness Soc. v. U.S. Forest Service*, 630

F.3d 1173, 1179 (9th Cir. 2011); *Clark v. Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953). Applied here, the Legislature readily meets all four elements for intervention in this dispute over legislative redistricting.

A. The Legislature's immediately filed motion to intervene is timely.

The test for timeliness is "reasonableness." *Reich*, 64 F.3d at 321. So long as potential-intervenors are "reasonably diligent in learning of a suit that might affect their rights" and "act reasonably promptly," the motion is timely. *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438-39 (7th Cir. 1994). Factors relevant to timeliness include "(1) the length of time the intervenor knew or should have known of her 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." *Reid L. v. Illinois State Bd. of Educ.*, 289 F.3d 1009, 1018 (7th Cir. 2002) (rejecting intervention motion filed years into litigation).

Here, Plaintiffs filed their complaint last Friday. The Legislature acted right away. Upon learning of the suit, the Legislature immediately took procedural steps to intervene in this case, including obtaining approval for the Legislature's intervention from the Joint Committee on Legislative Organization on August 17, 2021. The Legislature then promptly filed this motion, as well as the attached proposed motion to dismiss, an accompanying memorandum of law, and a proposed answer. *See* Fed. R. Civ. P. 24(c).

The lawsuit has barely begun. A three-judge court has not even been empaneled. There is thus no prejudice to the parties. *See, e.g.*, *Nissei Sangyo*, 31 F.3d at 439 (granting motion to intervene filed three months after intervenor learned of suit); *Reich*, 64 F.3d at 321 (granting motion to intervene filed nineteen months after hearing about potential litigation and one month after learning of motion for default judgment against defendant); *Richardson v. Helgerson*, No. 15-cv-141-wmc, 2015 WL 3397623, *1 (W.D. Wis. May 26, 2015) (no prejudice when intervention sought at an "early stage" of the case one month after complaint was filed).

On the other side of the ledger, the prejudice to the Legislature would be significant should its motion to intervene not be granted. If denied intervention, the Legislature will be precluded from moving to dismiss and otherwise participating in this action, which is exclusively focused on the Legislature's task of redistricting.

B. The Legislature has distinct and substantial interests in this redistricting dispute.

"Intervention as of right requires a direct, significant, and legally protectable interest in the question at issue in the lawsuit." *See Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (quotation marks and alterations omitted). Here, the lawsuit directly attacks the Legislature's past and future redistricting efforts. Plaintiffs seek federal-court oversight of the ongoing legislative redistricting process in Wisconsin. The Legislature, far more than the Wisconsin Elections Commission, is effectively the real party in interest in this case. For the following reasons, the Legislature's interest in this redistricting dispute is overwhelming.

1. The Legislature has a substantial interest in *who* will carry out the task of redistricting. While Plaintiffs ask this court to prepare itself to make its own redistricting plan, redistricting is the Legislature's responsibility. The Wisconsin Constitution expressly vests the Legislature with the power to redistrict. Wis. Const. art. IV, §3. Likewise, the Supreme Court has been unequivocal that the Federal Constitution vests States with the "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). The State "can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer." *Id.* at 35.

2. Relatedly, the Legislature has a significant interest given the relief Plaintiffs seek. Plaintiffs seek a judicially decreed schedule for redistricting and a judicially created redistricting plan if the Legislature fails to comply with that schedule. Compl., p. 16. For the reasons discussed below, the Legislature has a unique and substantial interest in intervening given that Plaintiffs have asked this

Court to put the Legislature specifically on a time clock, with the threat of taking the Legislature's redistricting authority away should time run out. Part I.C., *infra*.

3. The Legislature also has a substantial interest in *how* districts will ultimately be reapportioned. In *Beens*, for example, Plaintiffs sued the Minnesota Secretary of State and claimed that the state legislative districts were malapportioned based on newly released census results. 406 U.S. at 190. The Minnesota State Senate intervened under Rule 24(a) to defend the districts. *Id.* The district court ruled against the Senate and the Senate appealed. Plaintiffs sought to dismiss the appeal, claiming that the Senate did not have sufficient interest to appeal. *Id.* at 193. The Supreme Court disagreed in no uncertain terms: "[C]ertainly" the Senate was "directly affected" by the lower court's orders. *Beens*, 406 U.S. at 194. Those orders—similar to the relief Plaintiffs seek here—declared the existing maps unconstitutional, enjoined future elections on those maps, reduced the number of Senate seats, and adopted a new map. *Id.* at 191-93. There, as here, the senate was "an appropriate legal entity for the purpose of legal intervention" given its interest in the legislative districts. *Id.* at 194; *see also, e.g.*, *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964), *aff'd*, 381 U.S. 415 (1965) (allowing intervention by state senate in California reapportionment dispute).

4. Finally, the Legislature has a substantial interest in litigation that challenges the constitutionality of its laws and, more broadly, the constitutionality of the ongoing redistricting process. Applied here, Plaintiffs seek a declaration that the current congressional and legislative districts are unconstitutionally malapportioned and an injunction stopping "all persons" acting in concert with the Wisconsin Elections Commission "from implementing, enforcing, or giving any effect" to the current districts. Compl., pp. 15-16. Good thing for Plaintiffs, then, that no one is proposing to do any such thing. Everyone agrees that new districts are needed with the arrival of new census data. *See* Wis. Const. art. IV, §3. The Legislature intends to provide them. For the reasons stated in the attached motion to dismiss, there is thus no basis for a federal court to declare the current

districts unconstitutional. As is the case throughout the country every 10 years, with new census data comes new districts. Plaintiffs' meritless constitutional claims are a poor disguise for their premature attempt to beat everyone to the courthouse, thereby impeding ongoing state reapportionment efforts. *Growe*, 507 U.S. at 34, 37. And the Legislature has an undeniable interest in raising such defenses in this action so that those ongoing efforts can continue unobstructed. *See id.*; *see Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("[R]eapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.").

The Legislature's interest in defending the constitutionality of its redistricting plans and its ongoing redistricting efforts is confirmed by state law. It is well established that state legislatures (and legislators) have an interest in defending the constitutionality of legislative enactments when state law authorizes them to do so. *See, e.g.*, *Karcher v. May,* 484 U.S. 72, 82 (1987) ("Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant."); *cf. INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983) (noting Congress was proper party to defend one-house legislative veto where both houses, by resolution, had authorized intervention in the litigation). Here, Wisconsin law expressly anticipates the Legislature's intervention. As the Wisconsin Supreme Court has twice confirmed, Wisconsin law gives the Legislature shared authority with the Attorney General when it comes to defending the constitutionality of state laws. *See SEIU*, 946 N.W. 2d at 54; *Bostelmann*, 949 N.W.2d at 428. The Legislature may intervene as a matter of right in any action that challenges the constitutionality of a statute, facially or as applied. Wis. Stat.

§ 803.09(2m).[2] The Legislature's authority under state law to participate in this suit in defense of the challenged statutes is further confirmation of its substantial interest in this case. *See, e.g.*, *Bostelmann*, 977 F.3d at 641.

This Circuit, moreover, has already recognized the Legislature's interest in defending the constitutionality of election-related laws, including redistricting. This Court permitted the Wisconsin Assembly to permissively intervene in the *Gill v. Whitford* litigation, which also raised constitutional challenges to the legislative districts enacted in the last redistricting cycle. *See* Dkt. 223, Order Granting Mot. to Intervene, *Gill v. Whitford*, No. 3:15-cv-421 (W.D. Wis. Nov. 13, 2018). Likewise, the Seventh Circuit permitted the Wisconsin Legislature to defend the constitutionality of Wisconsin's election laws as an intervenor in *Bostelmann*, 977 F.3d at 641. Similarly, the Sixth Circuit permitted Michigan congressmen to permissively intervene to defend the constitutionality of a redistricting plan in *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018).

C. Deciding this case in the Legislature's absence will impair and impede the Legislator's ability to protect its redistricting role.

The Legislature "is so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). This element is unquestionably met here.

1. This action targets the Legislature's ongoing redistricting efforts. Noted above, Plaintiffs seek a judicially ordered schedule that tells the Legislature when it must complete redistricting. Compl., p. 16 (requesting the Court "[e]stablish a schedule that will enable the Court to adopt and implement new legislative and congressional district plans by a date certain should the political branches fail to

[2] Wisconsin's intervention statute states, "When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied … the assembly, the senate, and the legislature may intervene as set forth under § 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in § 801.14." Wis. Stat. § 803.09(2m). Here, the Joint Committee on Legislative Organization approved the Legislature's intervention in this suit on August 17, 2021, *see id.* § 13.365(3), and the Legislature filed this motion immediately thereafter.

enact such plans by that time"). If the Legislature fails to abide by that schedule, then Plaintiffs demand that this federal Court—in place of the Legislature—adopt redistricting plans for the State of Wisconsin. *Id.* The Legislature must have the opportunity to intervene so that it can move for the dismissal of Plaintiffs' request for a judicially decreed "schedule," purporting to override the Assembly's and Senate's legislative authority to set its own rules. At the very least, even failing a motion to dismiss, the Legislature must be permitted to intervene so that it has some say in a schedule purporting to bind the Legislature specifically (while having little to no effect on the named Defendants). *See, e.g.*, *Reich*, 64 F.3d at 323 (finding potential change in employment relationship, where proposed intervenors "would be deprived of critical leverage in negotiating their conditions of employment," was sufficient).

2. Relatedly, there can be "only one set" of districts in Wisconsin. *Growe*, 507 U.S. at 35. If this Court ultimately enacts a redistricting plan as Plaintiffs wish, there would be nothing left for the Legislature to do. Its redistricting responsibility will have been completely extinguished. In short, this action has the potential to have preclusive effect not just in the legal sense, but also the political sense. *See Jensen v. Wisconsin Elections Bd.*, 639 N.W.2d 537, 542 (2002) (noting federal litigation would be on a "collision course" with state litigation); *Stone v. First Union Corp.*, 371 F.3d 1305, 1309-10 (11th Cir. 2004) (emphasizing "the practical impairment" of a decision on proposed-intervenor); *compare Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) (noting decision "would not have any preclusive effect" on proposed-intervenors), *with Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) (noting *stare decisis* effect). The threat of such real-world preclusion—whereby this Court enacts Wisconsin's districts instead of the Legislature—is also a sufficient basis for intervention.

D. The Legislature's interests are not adequately represented.

A party seeking to intervene under Rule 24(a)(2) need only show that the "representation of [its] interest '*may be*' inadequate." *Lake Invest. Dev. Grp. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1261 (7th Cir. 1983) (quoting *Trbovich v. United Mine Workers of Amer.*, 404 U.S. 528, 538 n.10 (1972)) (emphasis added); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (intervention appropriate if parties "do not have sufficiently congruent interests"). "The burden of making that showing" of inadequacy "should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10. And while the Seventh Circuit has said there is "presumption" that representation is adequate when a governmental body is already a defendant, *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985), that presumption is inapplicable or easily rebutted here.

1. No current party to this litigation adequately represents the Legislature's unique institutional interest in redistricting. Defendants, members of the Wisconsin Elections Commission, administer and enforce Wisconsin elections law. *See, e.g.*, Wis. Stat. §7.08.[3] The Commission has no constitutional authority to redistrict. Only the Legislature does. Wis. Const. art. IV, §3. The Commission will not be bound by the deadline Plaintiffs seek to impose on redistricting. And it will not suffer the obliteration of its constitutional authority to complete redistricting (because it has none) if it fails to abide by Plaintiffs' desired "schedule." Nor does the Commission have any insight into the ongoing redistricting process within the Legislature. That is sufficient to make the "minimal" showing that the Legislature's interests—in particular its interest in setting its own redistricting schedule in compliance with local and federal law—"may be" inadequately represented. *Trbovich*, 404 U.S. at 538 n.10.

If there were any doubt, the Governor's own actions reveal that the Legislature cannot be adequately represented by the executive branch here. In January 2020, the Governor signed an

[3] The Commission has been represented by the Attorney General in past redistricting litigation, and the Attorney General could likewise control the Commission's participation in this litigation. *See* Wis. Stat. § 165.25(1m) (attorney general empowered to represent agencies).

Executive Order declaring the Legislature's redistricting maps from the last redistricting cycle (the very maps that the Plaintiffs now challenge as malapportioned here) as "some of the most gerrymandered, extreme maps in the United States" with "approximately 50 times more voters … moved to new districts than were necessary."[4] As for the redistricting process that has just commenced, the Governor's Executive Order creates "the People's Maps Commission," a redistricting commission that the order deems superior to the traditional legislative process.[5] The very existence of the executive branch's redistricting commission is overwhelming proof that the legislative and executive branches do not "have the same goal" now and will not have the same goals throughout this redistricting dispute. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019); *see also Keith*, 764 F.2d at 1270. That is more than sufficient to show that the Legislature's interest "may be" inadequately represented here. *Lake Invest. Dev. Grp.*, 715 F.2d at 1261; *see, e.g.*, Dkt. 223, Order Granting Mot. to Intervene 3, *Gill v. Whitford*, No. 3:15-cv-421 (W.D. Wis. Nov. 13, 2018) (noting "the recent election in Wisconsin for Attorney General introduces potential uncertainty into defendants' future litigation strategy" given the change in party); *N.E. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Loc. 1199 v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006) (finding inadequacy sufficiently alleged because "the Secretary [of State]'s primary interest is in ensuring the smooth administration of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced").

Indeed, even Plaintiffs must concede that they do not believe Legislature's interests will be adequately represented by Wisconsin's executive branch. The very basis of Plaintiffs' complaint is that an alleged impasse between the legislative and executive branches is a foregone conclusion. Compl.

[4] Wis. Executive Order No. 66 (Jan. 27, 2020), https://evers.wi.gov/Documents/EO/EO066-PeoplesMapsCommission.pdf.

[5] *Id.*

¶6. Plaintiffs believe that "[t]here is no reasonable prospect that Wisconsin's political branches will reach consensus" given the political differences between the two branches. *Id.* Plaintiffs cannot simultaneously believe that the legislative and executive branches face "near-certain" failure to reach redistricting consensus, Compl. ¶7, but that the executive branch through the Attorney General is adequate to represent the Legislature in this redistricting dispute here.

3. Finally, the redistricting-specific nature of this case makes it unlike others in which the courts have disallowed intervention on adequacy grounds. For example, the Seventh Circuit often "presumes" adequacy when the named defendant is a governmental entity. *See Keith*, 764 F.2d at 1270; *see, e.g.*, *Planned Parenthood*, 942 F.3d at 799 (concluding Democratic Attorney General was an adequate representative, for the time being, for the Legislature in an abortion law dispute). But that presumption is either inapplicable here, or it is easily rebutted.

The Supreme Court has already concluded that mandatory intervention is appropriate for state legislative bodies seeking to intervene in redistricting cases. *See Beens*, 406 U.S. at 194; *see also, e.g.*, *Growe*, 507 U.S. at 29 (noting Minnesota Senate and House intervened in redistricting dispute).[6] That is because in such cases, legislature-intervenors are the true parties in interest. It is their bodies that risk being altered by federal decree, and it is their redistricting processes that are being interrupted by the same. In redistricting disputes, there should be no concern that two State entities will be "trying to speak on behalf of the State *at the same time*." *Planned Parenthood*, 942 F.3d at 800. In redistricting, the

[6] The Supreme Court's decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), is not to the contrary. *Bethune-Hill* involved materially distinguishable facts—an appeal "by one House of a bicameral legislature, resting solely on its role in the legislative process" in already-enacted redistricting. *Compare id.* at 1953, *with Arizona State Legislature v. Arizona Ind. Redistricting Comm'n*, 576 U.S. 787, 802-03 (2015). And it implicated distinguishable state law. *Compare Bethune-Hill*, 139 S. Ct. at 1952 ("Virginia has thus chosen to speak as a sovereign entity with a single voice."), *with Bostelmann*, 949 N.W.2d at 428 ("Wis. Stat. § 803.09(2m) gives the Legislature a statutory right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws.").

Legislature and the Executive are serving two different roles. For example, the Legislature seeks to intervene and then move to dismiss Plaintiffs' complaint so that the Legislature can carry on with its constitutionally mandated task of reapportionment—a task unique to the Legislature. Wis. Const. art. IV, §3. The executive branch will surely have other views about how this litigation should go.[7] Regardless, it cannot purport to speak on behalf of the Legislature and its newly launched redistricting efforts. *See* Wisconsin Const. art. IV, §3. The Legislature and its members, moreover, are "directly affected" by that state reapportionment in a way that the executive branch is not. *Beens*, 406 U.S. at 194. There is no reason to presume that the Legislature's unique institutional role in redistricting is adequately represented by another branch of government here.

This case well illustrates the potential for divergence between the legislative and executive branches—indeed it is the very theory underlying Plaintiffs' complaint. Plaintiffs' complaint invited this federal Court to enter the fray on Day 1 of what is likely to be a politically charged dispute between Wisconsin's political branches as the Legislature draws new maps to govern the next decade. There is more than enough reason to find that the Legislature has satisfied its "minimal" burden of showing inadequacy of representation if the Legislature were to be excluded from this redistricting dispute. *Trbovich*, 404 U.S. at 538 n.10. Nothing more is required to justify intervention under Rule 24(a)(2).

II. Alternatively, Permissive Intervention Is Appropriate.

In the event the Court concludes that the standard for mandatory intervention is not met, permissive intervention is appropriate. A proposed-intervenor may permissively intervene after filing a timely motion and asserting a "claim or defense that shares with the main action a common question

[7] For example, the Legislature would be hard pressed to imagine the executive branch moving to dismiss Plaintiffs' request to declare the last cycle's districts unconstitutional when the Governor's Executive Order targets those districts as some of the most "extreme maps" in the country. Wis. Executive Order No. 66 (Jan. 27, 2020), https://evers.wi.gov/Documents/EO/EO066-PeoplesMapsCommission.pdf.

of law or fact." Fed. R. Civ. P. 24(b)(3). Permissive intervention under Rule 24(b) is to be granted liberally. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1904 (3d ed. 2007) (collecting cases). For all of the foregoing reasons, the Legislature meets these criteria. The Legislature's motion to intervene is timely, there will be no prejudice to the adjudication of the parties' rights, and there exists common questions of law and fact. The Legislature's defenses in its proffered pleading and motion to dismiss are based on the same underlying legal and factual issues being litigated by the parties—that is, the constitutionality of last cycle's redistricting and the alleged impasse in the forthcoming redistricting cycle.

A particularly instructive example of permissive intervention is the Sixth Circuit's decision permitting Michigan congressmen to intervene to defend congressional districts in *Johnson*, 902 F.3d at 580. Alleging redistricting had diluted plaintiffs' votes, Plaintiffs named the Michigan Secretary of State as a defendant. *Id.* at 576. Like Defendants here, the secretary was responsible for conducting state elections. *Id.* The district court denied the congressmen's motion for permissive intervention, fearing it "could create a significant likelihood of undue delay and prejudice to the original parties." *Id.* The Sixth Circuit reversed. The court of appeals faulted the district court for failing to articulate any basis for believing intervention would delay the proceedings or prejudice the parties. *Id.* at 577-78. The court emphasized that "no scheduling order was in place and discovery had not yet begun," and no motions to stay or dismiss had been ruled on. *Id.* at 579. "Put simply, the case was in its infancy." *Id.* The court concluded that "where timeliness is a particularly weighty concern, allowing intervention now may very well prove more efficient for all involved." *Id.* at 580.

So too here. This case is in its infancy. The Legislature has a unique and substantial interest in the resolution of this redistricting dispute. Part I.B, *supra*. And Plaintiffs seek to hamstring the Legislature's redistricting efforts with a "schedule" decreed by this Court. Part I.C, *supra*. There is every reason to allow the Legislature to permissively intervene here.

CONCLUSION

What is "occurr[ing] here" is "a race to beat" the Legislature "to the finish line" in redistricting. *Growe*, 507 U.S. at 37. In sorting out what to do with Plaintiffs' complaint and Plaintiffs' far-reaching requested relief, the Legislature should not be left on the sidelines. The Legislature respectfully requests that this Court grant this motion and allow the Legislature to intervene as of right under Rule 24(a)(2) or alternatively to permissively intervene under Rule 24(b)(1).

Dated: August 17, 2021

Respectfully submitted,

/s/ Kevin St. John

Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

Adam K. Mortara, SBN 1038391
LAWFAIR LLC
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

Jeffery M. Harris
Taylor A.R. Meehan*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com

** Licensed in Illinois & D.C.; supervised by principals of the firm licensed in Virginia while Virginia bar application is pending.*

Counsel for Proposed-Intervenor, Wisconsin Legislature

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2021, I served this document as part of the Legislature's motion to intervene. *See* Fed. R. Civ. P. 24(c). I certify that I electronically filed the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case. I further certify that I mailed the foregoing document to counsel for the named Defendants, who have not yet appeared in this case. *See* Fed. R. Civ. P. 5(b).

/s/ *Kevin St. John*
Kevin St. John, SBN 1054815
BELL GIFTOS ST. JOHN LLC
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7990
kstjohn@bellgiftos.com