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

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

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.

Civil Action No. 3:21-cv-00512

**PLAINTIFFS' OPPOSITION TO THE WISCONSIN LEGISLATURE'S MOTION TO INTERVENE**

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## INTRODUCTION

Plaintiffs brought this suit to protect themselves against the reality that they will be forced to cast votes in unconstitutional districts if the Wisconsin Legislature and Governor are unable to enact new congressional and legislative plans based on the results of the 2020 Census. Plaintiffs ask the Court to prepare itself to draw new maps and implement them if Wisconsin's political branches fail to reach agreement in time for new maps to be implemented prior to the 2022 elections. The Wisconsin Legislature has moved to intervene in this suit to protect its "past and future redistricting efforts." Mem. of Law in Support of Mot. to Intervene by the Wis. Legis. ("Mem."), ECF No. 9 at 5. But these interests are not uniquely held by the Legislature; are not at stake in this litigation; and are adequately protected by the existing defendants in this case, the members of the Wisconsin Elections Commission (together, the "WEC").



Contrary to its claim that it wishes to protect Wisconsin's "past" redistricting efforts, the Legislature's motion disavows any intention to defend the existing congressional and legislative plans that Plaintiffs challenge in this suit. Mem. at 5-6. And as for any "future" redistricting efforts, nothing about this suit impacts or even questions the State's primary role in this process. That is why Plaintiffs ask the Court to adopt new plans *only* when Wisconsin's political branches prove themselves unable to do so in time for the 2022 primary elections. Once that occurs, Wisconsin will have ceded its redistricting authority, leaving this Court as the only entity able to protect Plaintiffs against impending vote-dilution harms. Because Plaintiffs do not dispute that this Court must give Wisconsin a full opportunity to enact new plans, the Legislature's claim that this "suit is a direct attack on the Legislature's constitutionally delegated responsibility of redistricting" rings entirely hollow. Mem. at 2. The same is true for the Legislature's repeated suggestions that this suit was somehow brought prematurely, *e.g.*, *id.* at 6, given that directly applicable case law says the opposite. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 859-68 (E.D. Wis. 2001)

(three-judge court) (rejecting identical argument in denying motion to dismiss impasse lawsuit filed *prior* to Census Bureau's release of data necessary to begin redistricting process).

As the entity that administers Wisconsin's elections, the WEC is best positioned to explain to the Court just how long the State's electoral structures can wait to receive new redistricting plans without disrupting the 2022 election cycle. To the extent the Legislature ultimately disagrees with the WEC's assessment of when that date is, the Legislature can offer an *amicus* brief explaining its views. Otherwise, nothing in the Legislature's motion indicates that its participation here is warranted, let alone necessary. The Legislature's motion should be denied.

## LEGAL STANDARD

To be entitled to intervention of right under Federal Rule of Civil Procedure 24(a)(2), the Legislature must satisfy four separate elements: "(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." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 203 (7th Cir. 1982). The Legislature bears the burden of proving each element, and the "lack of even one element requires denial of the motion." *Am. Nat. Bank & Tr. Co. of Chi. v. City of Chi.*, 865 F.2d 144, 146 (7th Cir. 1989). The Court separately has discretion to permit or deny the intervention of a party that files a timely motion and "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).



## ARGUMENT

### I. The Legislature has not demonstrated entitlement to intervention of right.

The Legislature has failed to meet its burden of satisfying the four elements necessary to show entitlement to intervention as of right. While Plaintiffs do not contest the timeliness of the motion to intervene, the Legislature has failed to prove each of Rule 24(a)(2)'s remaining three

requirements: it holds no unique and cognizable interest related to this action; none of the interests the Legislature identifies in its motion would be impaired by the disposition of this case; and, in any event, the purported interests identified by the Legislature are already adequately represented by the WEC. Because the "lack of even one element requires denial," *Am. Nat. Bank & Tr. Co.*, 865 F.2d at 146, the Legislature's motion for intervention of right fails.

**A. The Legislature lacks a unique and cognizable interest related to this lawsuit.**

The Legislature's motion fails to identify any "'direct, significant and legally protectable' interest" relating to this suit. *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (quoting *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)). Such an "interest must be unique to the proposed intervenor," *id.*, and not held by "an existing party in the suit," *Keith*, 764 F.2d 1268. According to the Legislature, it seeks intervention to protect its "past and future redistricting efforts." Mem. at 5. Neither of these interests meets Rule 24(a)'s requirements.

*First*, the Legislature holds no unique and protectable interest in defending the "past . . . redistricting efforts" that produced the existing congressional and legislative plans challenged in this suit. *Id.*; *see also id.* at 6 (claiming an interest in "litigation that challenges the constitutionality of its laws"). Once a state legislature's bill becomes law, the legislature holds no independent interest in defending its constitutionality. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (holding the Virginia House of Delegates lacked standing to appeal invalidation of redistricting plan because an individual "organ of government" that helped enact a law is not independently injured by the law's invalidation).[1] Instead, that interest belongs to the State as a whole. Thus, "the Wisconsin legislature's interest -- defending the constitutionality of

[1] While *Bethune-Hill* involved the question of standing to pursue an appeal, "[a] party without standing cannot intervene as of right." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019).

the [redistricting plans Plaintiffs challenge here] -- is the *same* as that of the defendants," and is therefore not unique. *Planned Parenthood of Wis., Inc. v. Kaul*, 384 F. Supp. 3d 982, 985-86 (W.D. Wis.) (denying the Legislature's request for intervention), *aff'd*, 942 F.3d 793 (7th Cir. 2019). Because the WEC already holds an interest in defending the validity of Wisconsin's election laws, *see* Wis. Stat. §§ 5.05(1), 5.05(2w), 5.05(9), this interest cannot satisfy Rule 24(a).

In asserting otherwise, the Legislature offers, *verbatim*, an argument that has already been rejected in this district. Precisely as it did in *Planned Parenthood of Wisconsin*, the Legislature claims that Rule 24(a)(2)'s interest element is satisfied here because "[i]t 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." Mem. at 7 (citing *Karcher v. May*, 484 U.S. 72, 82 (1987), and *INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983)); *see Planned Parenthood of Wis., Inc. v. Kaul*, No. 3:19-cv-00038-WMC, 2019 WL 11594363 (W.D. Wis. Mar. 28, 2019) (same, verbatim). As the court in *Planned Parenthood of Wisconsin* explained in rejecting this argument, *Karcher* and *Chadha* addressed only "whether a legislative body has standing to represent the state's interest" when no other state entity seeks "to defend the challenged statute." 384 F. Supp. 3d at 985-86 (emphasis added). "As the Seventh Circuit has explained," "establishing standing is not a sufficient basis to seek intervention as of right," and "[n]othing in the earlier decisions by the United States Supreme Court cited by the [Legislature] suggests otherwise." *Id.*



But even if one accepted the dubious proposition that the Legislature has a unique and cognizable interest in defending the constitutionality of Wisconsin law for purposes of Rule 24(a)(2), the Legislature has made it clear that it has *no intention* of defending the constitutionality of the plans that Plaintiffs challenge in this case. Its motion explains that "[*e*]*veryone* agrees that new districts are needed with the arrival of new census data." Mem. at 6 (emphasis added). Thus,

in one breath, the Legislature has both claimed and expressly disavowed an interest in defending the constitutionality of the laws challenged in this suit.

The Legislature's disavowal of any intent to defend the existing plans challenged in this suit makes its reliance on Wis. Stat. § 803.09(2m) particularly misguided. *See id.* at 7-8 & n.2. As an initial matter, there can be no question that § 803.09(2m) does not give the Legislature the right to intervene in federal litigation. *See Planned Parenthood*, 942 F.3d at 797 (explaining that because "[t]he right to intervene 'is a purely procedural right,'" it is "the Federal Rules of Civil Procedure rather than state law that dictate the procedures, including who may intervene, to be followed" (quoting *Williams v. Katz*, 23 F.3d 190, 192 (7th Cir. 1994))). But even to the extent this provision "inform[s]" the question of the Legislature's interest, *id.*, the Legislature's motion makes clear that § 803.09(2m) has no application in this suit. As the Wisconsin Supreme Court has explained, section 803.09(2m) "grants the Legislature an interest in *defending the validity of state law* when challenged in court." *Democratic Nat'l Comm. v. Bostelmann*, 949 N.W.2d 423, 426 (Wis. 2020) (emphasis added). Because the Legislature has made clear it is *not* interested in defending the validity of the plans actually challenged in this suit, whatever help § 803.09(2m) could provide to the Legislature's request to intervene does not apply here.



*Second*, any interest in Wisconsin's "future redistricting efforts" is not at issue in this suit. Mem. at 5. Plaintiffs' claims do not impact, or even question, the State's primary role in the process of redrawing its congressional and legislative districts. Instead, this suit involves only what happens when the Legislature and Governor *fail* to redraw those districts. The very first paragraph of Plaintiffs' complaint makes this clear, requesting that the Court provide relief *only* in the event "the Legislature and the Governor fail" to enact new plans. Compl., ECF No. 1, ¶ 1. If the Legislature does not want this Court to implement new congressional and legislative plans, the

Legislature should draw and implement new congressional and legislative plans. The only governmental entity standing in the way of the Legislature's ability to do so is the Governor; to the extent the Governor's veto power frustrates the Legislature's ability to enact its preferred plans into law, the Legislature's complaints lie with the Wisconsin Constitution, not this Court. *See State ex rel. Reynolds v. Zimmerman*, 22 Wis.2d 544, 557, 126 N.W.2d 551, 559 (1964) (holding that the Wisconsin Constitution subjects redistricting plans proposed by the Legislature to gubernatorial review).

The mere fact that Plaintiffs ask this Court to "[e]stablish a schedule that will enable the Court to adopt and implement" new congressional and legislative plans should the Legislature and Governor fail to do so, Compl. at 16, does not alter this analysis. *See* Mem. at 5-6. If anything, this request ensures that the Court will *not* impede on the State's "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Given the State's primary redistricting authority, this Court's power to "adopt[] its own plan[s]" protecting voters from malapportionment-generated vote dilution arises only when it becomes "apparent" that the State will "not develop [new] redistricting plan[s] in time for the primaries." *Id.* at 36, 37. Plaintiffs ask the Court to set a schedule in this case that will give the Legislature and Governor the opportunity to act first and to only intervene when it is clear they will not be able to enact new plans in time for the 2022 elections. *See Arrington*, 173 F. Supp. 2d at 866-67 (identifying and following the "well-established" practice in impasse litigation of courts asserting jurisdiction "but enter[ing] stays so the state legislatures could act"). Once such inaction occurs, the Legislature and Governor will have ceded their primary redistricting authority, leaving the Court as the only entity that can protect Plaintiffs from voting in unconstitutional districts in which their voting power will be diluted. Thus, contrary to the Legislature's unsupported concerns,

the schedule Plaintiffs ask the Court to adopt will mean that this Court does not impact Wisconsin's future redistricting efforts unless it needs to intervene to protect Plaintiffs' constitutional rights.

Separately, Wisconsin's interest in its future redistricting efforts is not "unique[ly]" held by the Legislature. *Wisc. Educ. Ass'n Council*, 507 F.3d at 658. Though the Legislature undoubtedly plays a crucial role in the State's redistricting process, it is not the only actor in that process. As already noted, the Wisconsin Constitution gives the Governor the power to veto redistricting plans proposed by the Legislature. *Compare Reynolds*, 22 Wis.2d 544, 557, 126 N.W.2d at 559; *with* N.C. Const. art. II, § 22(5) (exempting bills containing congressional and legislative districting plans from gubernatorial review). As a result, just as with any other legislation, Wisconsin's interest in its ability to enact new redistricting plans lies with the State generally, not just the Legislature. *Cf. Planned Parenthood of Wis.*, 942 F.3d at 801 (describing a state as a "corporate body" containing multiple "constituencies"). The Legislature's own brief confirms this conclusion, explaining that the "Federal Constitution vests *States* with" primary redistricting responsibilities. Mem. at 5 (emphasis added). While the Legislature attempts to carve out a unique interest by claiming specialized insight into the redistricting process, Mem. at 10, this kind of "particular expertise" is insufficient for purposes of Rule 24(a); "[i]f it were, every potential expert witness would meet the interest requirement." *Am. Nat. Bank & Tr. Co. of Chi.*, 865 F.2d at 147. In any event, as explained in more detail below, *see* Section I.C, *infra*, the WEC has all the specialized knowledge necessary to ensure that the Court intervenes only when it becomes necessary to do so.

The Legislature's repeated invocation of *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), is both misleading and misplaced. *See, e.g.*, Mem. at 5, 6, 12, and 13. There, a legislature had standing to appeal a district court's implementation of new legislative redistricting

plans because the plans *halved* the Legislature's size. As the Supreme Court has since made clear, *Beens* confers a Legislature with standing only in cases that threaten "the *manner* in which it goes about its business," such as a drastic reduction in the number of seats in a chamber, which "would necessarily alter its day-to-day operations" by, for example, requiring "alteration" of "leadership selection, committee structures, and voting rules." *Bethune-Hill*, 139 S. Ct. at 1955 n.6. That simply does not apply in routine redistricting litigation, like this, which threatens at most to "affect [the Legislature's] membership," to which the Legislature "as an institution has no cognizable interest." *Id.* at 1955. And to be sure, Plaintiffs here do not, and will not, ask the Court to change the size of the Wisconsin Legislature. The number of seats in Wisconsin's Senate and House are fixed by statutory provisions, which Plaintiffs do not challenge. Wis. Stat. § 4.001 ("This state is divided into 33 senate districts, each composed of 3 assembly districts.").[2]



**B. This lawsuit does not threaten to impair the Legislature's purported interests.**

Even if the interests discussed above were uniquely held by the Legislature and related to this suit (which they are not), the Legislature fails to explain how adjudication of this suit would "as a practical matter impair or impede" the interests it identifies. Fed. R. Civ. P. 24(a)(2). In this context, "[*i*]*mpair* refers to a diminution in strength, value, quality, or quantity," and "[*i*]*mpede* means to obstruct or block." 6 Moore's Civil Fed. Prac. § 24.03(3)(a).

There is no risk that this suit would impair or impede the interests that the Legislature identifies in its motion. At issue in this suit are two issues: (1) the constitutionality of Wisconsin's

[2] For the same reasons, the Legislature's reliance on *Gill v. Whitford*, No. 3:15-cv-421 (W.D. Wis. Nov. 13, 2018), and *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572 (6th Cir. 2018), is misplaced. *See* Mem. at 8. First, those decisions predate the U.S. Supreme Court's decision in *Bethune-Hill*, which clarified that a Legislature lacks a unique and cognizable interest in litigation simply because it has the potential to affect its membership. Second, those cases involved permissive intervention, not intervention as of right. And third, the central issue in those cases was the intent of the legislators who drew the map that the plaintiffs were challenging. Here, legislative intent is irrelevant to Plaintiffs' claims.

current congressional and legislative plans, and (2) what should happen if the Legislature and Governor fail to enact new plans in time for use during the 2022 elections. With respect to the former, the Legislature offers no argument that adjudication of the current plans' constitutionality would impact any interest held by the Legislature. *See* Mem. at 8-9. This is unsurprising, given that the Legislature has disavowed any intent to defend those plans' validity. *See* Section I.A, *supra*.

With respect to the latter, any action by the Court in this case will have no impact on Wisconsin's redistricting efforts because, as already explained, such action would occur only *after* it is clear the Legislature and Governor are unable to enact new plans in time for the 2022 elections. As a result, the Legislature's assertion that "[t]his action targets the Legislature's ongoing redistricting efforts" is entirely incorrect. Mem. at 8. This suit simply ensures that, in the event the Legislature and Governor *fail* in such redistricting efforts, the millions of Wisconsin voters living in overpopulated districts are not forced to vote in unconstitutional districts in which their votes will be diluted.



**C. The WEC adequately represents the interests that the Legislature seeks to protect.**

The Legislature is not entitled to intervention as of right because whatever interests it seeks to protect here are already adequately protected by the WEC. The Legislature's motion obfuscates the standard governing this element. As the Seventh Circuit has explained, one of three standards apply to the adequacy-of-representation element depending on the circumstances of the case. First, a default rule asks whether the existing defendants' "representation of [the putative intervenor's] interest may be inadequate." *Planned Parenthood of Wis.*, 942 F.3d at 799 (internal quotation marks omitted). Second, "[w]here the prospective intervenor and named party have the same goal," a "rebuttable presumption of adequate representation" applies, and the putative intervenor must

show "some conflict" between their interests. *Id.* (internal quotation marks omitted). And third, where, as here, the defendant "is a governmental body charged by law with protecting the interests of the proposed intervenors," the presumption of adequacy is even stronger, and the putative intervenor must show the existing defendants have engaged in "gross negligence or bad faith." *Id.*

In addition to muddying the standards applicable to this element, the Legislature "complicate[s] [the] analysis" by "switch[ing] freely between championing the State's interests and insisting on its 'unique institutional interests' as a legislature." *Planned Parenthood of Wis.*, 942 F.3d at 798 (criticizing the Wisconsin Legislature for the engaging in the same conflation). When considering such interests independently—as is required, *see id.*—it becomes clear that the Legislature has not proven that the WEC inadequately represents any relevant interests at stake in this suit.



*First*, to the extent the Legislature claims the WEC is not adequately representing the *State*'s interest in defending its primary redistricting authority, it has entirely failed to satisfy its burden. As the entity responsible for administering Wisconsin's elections according to Wisconsin law, *see* Wis. Stat. §§ 5.05(1), 5.05(2w), 5.05(9), the WEC is well-positioned to raise arguments concerning federal judicial interference with the State's redistricting role. The Legislature therefore must show that the WEC has engaged in "gross negligence or bad faith," or, at the very least, "some conflict" between the WEC and the State's redistricting authority. *Planned Parenthood of Wis.*, 942 F.3d at 799.

The Legislature does not come close to making either showing. It first asserts that the "Commission has no constitutional authority to redistrict." Mem. at 10. But that fact is irrelevant to the question of whether the WEC will adequately *defend* Wisconsin's redistricting authority. If a lack of lawmaking power determined the outcome of this inquiry, absurd results would occur:

The Attorney General, for example, could never adequately represent the State in litigation challenging the constitutionality of Wisconsin law because he does not have constitutional authority to enact state laws. Of course, that is not the case. *Planned Parenthood of Wis.*, 942 F.3d at 802-03 (holding Wisconsin Attorney General adequately represented the State's interest and affirming denial of Legislature's intervention).

The Legislature's assertion that the WEC lacks the "insight" necessary to protect the State's redistricting authority from federal court intrusion is also demonstrably incorrect. Mem. at 10. As explained above, the schedule that Plaintiffs ask this Court to establish is meant to ensure that, in accordance with constitutional requirements, the Court does not intervene in Wisconsin's redistricting process until it is clear that the State will "not develop [new] redistricting plan[s] in time for the primaries." *Growe*, 507 U.S. at 36-7. To craft such a schedule, the Court need answer just one question: what is the latest date that new redistricting plans can be implemented without disrupting Wisconsin's elections? As the authority responsible for administering Wisconsin's elections, Wis. Stat. § 5.05(1), the WEC is the *best* entity to answer that question. And if the Legislature ultimately disagrees with the date that the WEC's recommends to the Court, the Legislature can submit an *amicus* brief explaining why it takes that position. *See Feehan v. Wis. Elections Comm.*, 506 F. Supp. 3d 640, 649 (E.D. Wis. Dec. 9, 2020) (explaining *amicus* briefing, not intervention, is the appropriate vehicle for ensuring a court is aware of other parties' "perspective[s]").

*Second*, the Legislature's assertion that the WEC will not adequately represent the *Legislature*'s role in Wisconsin's redistricting process is premised entirely on a false assertion that the WEC is somehow controlled by the Governor. The Legislature argues that the WEC will not represent the Legislature's interests because the *Governor* signed an executive order criticizing the

existing congressional and legislative plans and creating an advisory redistricting commission, Mem. at 11, and the *Governor* is likely to disagree with the plans that the Legislature proposes in the coming months, *id.* at 12. But the Governor has *no* control over the WEC's actions.[3] Indeed, when the Legislature created the WEC in 2015, a primary motivation for doing so was to make the WEC more independent from gubernatorial influence than its predecessor, the Government Accountability Board. *See, e.g.*, Wisconsin Legis. Council, *Wisconsin Legislative Council Information Memorandum: Elections Commission and Ethics Commission* (2015), available at https://docs.legis.wisconsin.gov/misc/lc/information_memos/2015/im_2015_15 (explaining that, unlike the GAB, to which the Governor appointed all six members, the Governor appoints only two members of the six-member WEC, with the Legislature appointing the remaining four members). The fact that the *Governor*'s interests diverge from the Legislature's in the redistricting process (and that these diverging interests are likely to produce an impasse requiring this Court's intervention) is entirely irrelevant to the question of the WEC's ability and willingness to adequately represent the Legislature's interests in this suit.



The Legislature also appears to suggest that it should be permitted to intervene because the WEC might not move to dismiss Plaintiffs' complaint or use the arguments the Legislature wishes it to make. Mem. at 13. This is entirely conjectural; the WEC has not yet even appeared in this case. Because the Legislature has the burden to *prove* inadequate representation, *Planned Parenthood of Wis.*, 942 F.3d at 797, its guesses about the WEC's future actions are inadequate.

[3] To the contrary, it is the *Legislature* that holds the primary oversight powers over the WEC. Wisconsin law requires that all WEC policies and procedures be submitted in a report to the Legislature only; mandates that the WEC's "State election administration plan" be approved by the Legislature's joint committee on finance; and declares that the Legislature's joint committee on legislative organization "shall be advisory to the commission on all matters relating to operation of the commission." Wis. Stat. § 5.05(5f), (10), (16).

In any event, even if the Legislature ultimately develops "quibbles with [the WEC's] litigation strategy" in the future, that is insufficient to demonstrate inadequate representation. *Wis. Educ. Ass'n Council*, 705 F.3d at 659.

Having no relevant or persuasive argument, the Legislature falls back on the same mischaracterizations of case law discussed above. Its assertion that *Beens* "concluded that mandatory intervention is appropriate for state legislative bodies seeking to intervene in redistricting cases," Mem. at 12, is directly foreclosed by the Supreme Court's decision in *Bethune-Hill*. *See* Section I.A, *supra*. The Legislature's attempt to distinguish *Bethune-Hill* also fails. *See id.* at 12 n.6. There, the Court held that a chamber of a state legislature has no cognizable interest in challenging a court's invalidation of the chamber's district map. *Bethune-Hill*, 139 S. Ct. at 1956. The mere fact that *Bethune-Hill* involved one chamber of a bicameral legislature, and this motion is brought by the Wisconsin Legislature as a whole, does not change that result or make this suit analogous to *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). *See* Mem. at 12 n.6. As the *Bethune-Hill* Court explained, the Legislature in *Arizona State Legislature* had standing to sue because it was challenging a referendum that "*permanently* deprived the legislative plaintiffs of their role in the redistricting process." 139 S. Ct. at 1954 (emphasis in original). As already explained, this suit will not involve any potential deprivation of the Legislature's redistricting authority because the Court will intervene only after the Legislature and Governor cede their redistricting authority by failing to timely enact new plans.

The Legislature's attempt to distinguish *Bethune-Hill* on the ground that "it implicated distinguishable state law" also lacks merit. *See* Mem. at 12 n.6 (citing Wis. Stat. § 803.09(2m)). This argument again conflates the Legislature's redistricting interest with that of the State. *Planned Parenthood of Wis.*, 942 F.3d at 798. Section 803.09(2m) pertains *only* to the Legislature's ability

to represent the *State* in litigation. As explained above, the WEC adequately represents the State's redistricting interests in this suit.

Finally, to the extent the Legislature suggests it is entitled to intervene because the contours of the maps that the Court ultimately enacts will impact its composition, *Bethune-Hill* says the exact opposite. 139 S. Ct. at 1955 (explaining a legislature has no interest in the identity of its members because it is "a representative body composed of members chosen by the people").[4]

* * *

The Legislature has failed to meet its burden of proving that (1) it holds a unique and protectable interest related to this litigation, (2) any such interest would be threatened in this litigation, and (3) the WEC does not adequately represent such interests. As a result, the Legislature is not entitled to intervene.



## II. The Legislature should not be allowed to intervene permissively.

There is no reason to permit the Legislature to permissively intervene in this suit. Permissive intervention under Rule 24(b) is "wholly discretionary." *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (2015) (quoting *Sokaogon Chippewa Cmty. v. Babbit*, 214 F.3d 941, 949 (7th Cir. 2000)). But when, as here, "intervention of right is [unwarranted due to] the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *Planned Parenthood of Wis.*, 384 F. Supp. 3d at 990 (quoting *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis.

[4] The Seventh Circuit order reversing the district court's denial of intervention in *Democratic National Committee v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1505640 (W.D. Wis. 28, 2020), does not inform this analysis because it was entirely unexplained. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 & 20-1546, 2020 WL 3619499 at *2 (7th Cir. Apr. 3, 2020). Moreover, the Legislature's request for intervention in that case was premised on its interest in defending the constitutionality of the laws that the plaintiffs had challenged. As already explained, the Legislature has disavowed any intent to defend the constitutionality of the laws Plaintiffs challenge here. Section I.A, *supra*.

1996)).

In attempting to prove that permissive intervention is appropriate here, the Legislature relies exclusively on the same misguided intervention-of-right arguments. Mem. at 14 (arguing for permissive intervention "[f]or all the foregoing reasons"). Plaintiffs have already explained why those arguments are unavailing. *See* Section I, *supra*. Because it is proper to deny intervention based on the same considerations that leads a court to conclude "the proposed intervenor failed to demonstrate a right to intervene," *Planned Parenthood of Wis.*, 942 F.3d at 803, the discussion in the section above provides more than enough reason to deny permissive intervention.

Moreover, because the WEC itself can raise appropriate arguments about federal court intervention in Wisconsin's redistricting process, adding the Legislature to the mix would simply result in duplication of briefing and arguments. *One Wis. Inst.*, 310 F.R.D. at 399. And to the extent the Legislature's litigation strategy would diverge from the WEC's, resolving those issues would become complicated because the State would be represented by two entities, making it impossible to determine "the true position of the State of Wisconsin." *Planned Parenthood of Wis.*, 942 F.3d at 801-02. In the end, the only contribution that adding the Legislature to this suit would make would be "infus[ing] additional politics into an already politically-divisive area of the law and needlessly complicat[ing] this case." *Id.* at 803.[5]



The best role for the Legislature to play in this case is as *amicus*. The Legislature wishes to provide this Court with its views on how long the Court should wait before intervening in the redistricting process. It can easily accomplish that goal by "seek[ing] leave to file amicus curiae

[5] The Sixth Circuit's decision in *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018), provides no reason to conclude otherwise. *See* Mem. at 14. That decision was based primarily on the district court's failure to explain its denial of intervention. *See League of Women Voters of Mich.*, 902 F.3d. at 577-78.

briefs." *Planned Parenthood of Wis.*, 384 F. Supp. 3d at 990; *see also Menominee Indian Tribe of Wis.*, 164 F.R.D. at 678 (noting that denial of intervention "will not affect the proposed intervenors adversely" because the option of *amicus* briefing allows the Court to take party's views "into consideration"). If at some point in the future the WEC demonstrates an unwillingness to defend the interests identified in the Legislature's motion, the Legislature can "renew its motion" for intervention. *Planned Parenthood of Wis.*, 384 F. Supp. 3d at 990. But at this stage—at which the WEC has not even appeared in the case let alone begun defending the suit—the Legislature has not shown intervention is warranted, nor could it.

## CONCLUSION

The Legislature's motion fails to prove the elements of Rule 24(a)(2) and provides no persuasive reason why it should be granted intervention in this case. Its request for intervention should be denied.

Dated: August 24, 2021

Respectfully submitted,

/s/ Aria C. Branch

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 24, 2021, I served the foregoing document with the Clerk of the Court using the Court's CM/ECF system, thereby serving all counsel who have appeared in this case. I further certify that, on the same date, I sent a paper and electronic copy of the foregoing document to counsel for the named Defendants, who have not yet appeared in this case. *See* Fed. R. Civ. P. 5(b).

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