UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.

Plaintiffs,

v.

Case No. 3:15-CV-00421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

THE WISCONSIN ELECTIONS COMMISSION DEFENDANTS AND THE WISCONSIN STATE ASSEMBLY'S JOINT MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL DISCLOSURES

On May 15, 2019, Plaintiffs served supplemental initial disclosures adding four new individuals Plaintiffs say have discoverable information about their claims. *See* Ex. 1, Pltfs.' Amended Disclosures (May 15, 2019); Fed. R. Civ. P. 26(a)(1)(A)(i). These are not inconsequential additions. These individuals are seasoned Democratic politicians and a Democratic candidate who—judging from what Plaintiffs say these individuals know—will be the mouthpieces for Plaintiffs' individual claims at trial. Plaintiffs cannot seriously contend that they just now learned these individuals possess information relevant to all aspects of Plaintiffs' claims. Instead, it appears Plaintiffs

deliberately waited until the parties would have virtually no time to conduct discovery to counter whatever new legal theories Plaintiffs intend to inject using these newly named individuals. Plaintiffs' sandbagging threatens to turn the remaining weeks between now and trial into a chaotic race for document production and other pre-trial discovery. Accordingly, the Wisconsin Elections Commission Defendants and the Wisconsin State Assembly respectfully request that this Court strike Plaintiffs' supplemental disclosures and preclude Plaintiffs from calling these newly named individuals at trial. *See* Fed. R. Civ. P. 37(c)(1).

BACKGROUND

Plaintiffs first served their initial disclosures in October 2015. *See* Ex. 2, Pltfs.' Rule 26(a)(1) Initial Disclosures (Oct. 7, 2015). Those initial disclosures identified various Republican elected officials, but none of the newly named individuals. *Id.* at 1-3. After the Supreme Court's remand, this Court ordered Plaintiffs to supplement their initial disclosures by September 28, 2018. *See* Order at 1, ECF No. 199. Plaintiffs then supplemented their initial disclosures by adding 28 new plaintiffs, the Wisconsin Assembly Democratic Campaign Committee, and another expert witness, but none of the newly named individuals. *See* Ex. 3, Certain Pltfs.' Supp. Disclosures (Sept. 28, 2018); Ex. 4, Certain Pltfs.' Rule 26(a)(1) Initial Disclosures (Sept. 28, 2018). Only now—nearly four years into this litigation, eight months after the Court's September 2018 deadline for supplemented disclosures, after 40-plus depositions of Plaintiffs and experts, one month before pretrial disclosures are to be

exchanged, and two months from trial—Plaintiffs tacked on four new witnesses. Ex. 1. at 4.

In particular, Plaintiffs now identify the following four Democratic politicians as having discoverable information about Plaintiffs' claims and as witnesses Plaintiffs may use to support those claims:

1. Sandy Pasch, a former Democratic State Assembly Representative for Assembly District 10 and former Assembly District 22. Plaintiffs identify Pasch as having information about "partisan bias and intent regarding Act 43 and/or specific districts, the partisan effect of Act 43, associational impacts of Act 43, and communities of interest." Ex. 1 at 4.
2. Amy Sue Vruwink, former Democratic State Assembly Representative for Assembly District 70. Plaintiffs identify Vruwink as having information about "partisan bias and intent regarding Act 43 and/or specific districts, the partisan effect of Act 43, associational impacts of Act 43, and communities of interest." Ex. 1 at 4.
3. Dr. Brittany Keyes, a 2018 candidate for Assembly District 31. Plaintiffs identify Keyes as having information about "the 2018 assembly race in AD 31, the partisan effect of Act 43, associational impacts of Act 43, the configuration of AD 31, and communities of interest." Ex. 1 at 4.
4. Peter Barca, former Democratic Representative for Assembly District 64 and the former Assembly minority leader. Plaintiffs identify Barca as having information about "[p]artisan bias and intent during the drafting

and enactment process for the legislative redistricting plan adopted by the Legislature on July 20, 2011, the partisan effect of Act 43, and the associational impacts of Act 43." Ex. 1 at 4.

ARGUMENT

Plaintiffs' last-minute attempt to supplement their initial disclosures is contrary to the Federal Rules. At the outset of litigation, a party must provide the other parties with names of "each individual likely to have discoverable information that the party may use to support its claims." Fed. R. Civ. P. 26(a)(1)(A). The party must supplement initial disclosures "in a timely manner" after learning the disclosures are "incomplete." Fed. R. Civ. P. 26(e). And to "ensure compliance with these discovery requirements," Rule 37(c)(1) prohibits a party from relying on witnesses who were not disclosed in accordance with Rule 26 unless a party's noncompliance "was substantially justified or is harmless." *David v. Caterpillar, Inc.*, 324 F.3d 851, 856-57 (7th Cir. 2003) (considering "(1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date"). Applied here, there is no justification, let alone a "substantial justification," for Plaintiffs' failure to identify these individuals back in September, as ordered by this Court. And Plaintiffs' untimely supplementation is not harmless. Accordingly, Plaintiffs' supplemental disclosures should be struck. *See* Fed. R. Civ. P. 37(c)(1); *see Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998) (stating

that the "sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless").[1]

I. There is no substantial justification for Plaintiffs' untimely disclosure.

The Supreme Court remanded this case for Plaintiffs to articulate individualized claims, not claims predicated on the failures or successes of the Democratic party more generally. *See Gill v. Whitford*, 139 S. Ct. 1916, 1933 (2018) (describing "the fundamental problem with the plaintiffs' case as presented on this record" as "a case about group political interests, not individual legal rights"). This Court then ordered Plaintiffs to serve supplemental initial disclosures identifying new individuals whom Plaintiffs believed had discoverable information and whom Plaintiffs would rely on to support their amended claims. *See* Order at 1, ECF No. 199 (requiring updated initial disclosures by September 28). At that time, Plaintiffs did not add any of the four new individuals to their initial disclosures. *See* Ex. 3; Ex. 4. Nor did Plaintiffs add any of the four new individuals in January after the Wisconsin Assembly Democratic Campaign Committee dismissed their related suit, which had been consolidated with this case. *See* Order, ECF No. 246. Nor did

[1] On May 29, the parties met and conferred regarding this motion. Plaintiffs' counsel confirmed that they were unwilling to agree not to call these individuals as witnesses at trial. Counsel stated generally that they waited until May to name these individuals based on the "evolution" of this case, the expert opinions being offered in the case (without identifying which ones), and how they saw the evidence playing out. Far from being a "substantial" justification, Plaintiffs provided no justification.

Plaintiffs add any of the four new individuals when the parties spent the winter and spring deposing more than 40 witnesses.

If Plaintiffs truly believe that the newly named individuals have discoverable information relevant to Plaintiffs' individualized claims and if Plaintiffs truly intend to rely on these individuals to support those claims, then Plaintiffs would have known that months (if not years) ago. Barca was the highest-ranking Democrat in the State Assembly when Act 43 passed nearly eight years ago. Pasch and Vruwink joined an *amicus* brief filed in the *Whitford* Supreme Court appeal in September 2017. *See* Brief for *Amici Curiae* Bipartisan Group of 65 Current and Former State Legislators in Support of Appellees, *Gill v. Whitford* (S. Ct. No. 16-1161). And Keyes entered the race for State Assembly in a district home to one of the original *Whitford* Plaintiffs (Roger Anclam) in April 2018, five months before this Court ordered Plaintiffs to supplement their disclosures in September 2018.[2]

But Plaintiffs waited. Indeed, they waited until exactly 30 days before the pretrial disclosure deadline to add these individuals. Plaintiffs' delay thwarts the purpose of the Rule 26(a) initial disclosures, "intended to provide sufficient detail and clarity to permit each party to make informed decisions about the discovery necessary to address the specific claims directed against that party, and to prepare for trial." *Estate of McDermed v. Ford Motor Co.*,

[2] *See* Jake Gerard, *Beloit physical therapist Keyes will compete for 31st Assembly Seat*, WFAW AM 90 (Apr. 13, 2018), *available at* http://www.940wfaw.com/2018/04/13/beloit-physical-therapist-keyes-will-compete-for-31st-assembly-seat.

No. 14-CV-2430-CM-TJJ, 2016 WL 1298096, at *3 (D. Kan. Apr. 1, 2016) (quotation marks omitted).

Here, had Plaintiffs earlier disclosed these witnesses, discovery would have looked entirely different. The Assembly would not have sat idly by as Plaintiffs put on their case using four cherry-picked politicians. For example, evidence from these politicians could have been countered with evidence from others in closely matched races in other districts, or with Assembly candidates who significantly underperformed other Democrats running in Wisconsin.[3] But based on Plaintiffs' September 2018 disclosures—combined with the Supreme Court's instruction that Plaintiffs' case cannot be predicated on "group political interests" or "generalized partisan preferences," *Gill*, 139 S. Ct. at 1933—discovery instead proceeded with depositions and documents from Plaintiffs themselves, as well as expert testimony regarding their individual districts.

Moreover, Plaintiffs' May surprise is not simply the product of delay; it is subterfuge. Plaintiffs identified the Wisconsin Assembly Democratic Campaign Committee in their September 2018 disclosures. But these disclosures stated that the ADCC's knowledge was limited to "how Act 43 violated the *ADCC's* organizational rights to associate" or its "*individual members'* First Amendment associational rights."[4] Ex. 3 at 4 (emphasis added);

[3] *See, e.g.*, Gimpel Rep., App'x G, ECF No. 249 (identifying 18 districts carried by Democratic U.S. Senate candidate Tammy Baldwin but lost by Democratic Assembly candidates, as well as 1 district carried by Baldwin but where there was no Democratic candidate).

[4] Barca, Vruwink, and Pasch, all former Democratic Assembly members, presumably are also former ADCC members. *See* ADCC Compl. ¶ 8, *ADCC v. Gill*, No. 18-cv-763 (W.D. Wis.). Indeed Barca would have led the ADCC as the leader of Assembly Democrats between

Ex. 4 at 4 (emphasis added). Importantly, these disclosures did not state that the Democratic organization or its members possessed information about the individual Plaintiffs, let alone Act 43's alleged partisan bias, partisan intent, partisan effects, or communities of interest. *Compare* Ex. 1 at 4. Moreover, while Plaintiffs' initial disclosures have always identified Republican Assembly members or former members as possessing information about "partisan bias intent," Ex. 2 at 1-2, Plaintiffs never identified any current or former Democratic members or candidates as having that information.

This misdirection was not harmless. Once the ADCC dismissed its suit in January, its associational rights were no longer the subject of this consolidated litigation. *See* Order, ECF No. 246. Accordingly, the Assembly did not further pursue discovery against the ADCC or its members. But had the ADCC or its members been identified as possessing information about the individual Plaintiffs' claims, discovery would have certainly proceeded down this road months ago. Plaintiffs instead withheld any suggestion that they would rely on these Democratic politicians for the individual Plaintiffs' claims, and it is now too late to conduct meaningful discovery from anyone other than Plaintiffs' cherry-picked witnesses.

2011 and 2017. At the time of the September disclosures, Barca still represented Assembly District 64. He resigned in January 2019. *See* 2011 Wisconsin State Assembly Journal at 8 (January 3, 2011), *available at* https://docs.legis.wisconsin.gov/2011/related/journals/assembly/20110103.pdf (announcing election of Barca as minority leader); Jason Stein and Patrick Marley, *Peter Barca to step down as Assembly minority leader on Sept. 30*, Milwaukee Journal Sentinel (Sept. 7, 2017), *available at* https://www.jsonline.com/story/news/politics/2017/09/07/peter-barca-step-down-assembly-minority-leader-sept-30/644280001/; 2019 Wisconsin State Assembly Journal at 5 (January 7, 2019) (corrected copy), *available at* https://docs.legis.wisconsin.gov/2019/related/journals/assembly/20190107.pdf.

Plaintiffs' delay is not excused by the fact that these newly named witnesses are known Wisconsin Democrats. It is not enough that these individuals were in office during redistricting, that they previously campaigned in Plaintiffs' districts, or even that they were mentioned in interrogatories or depositions. The Federal Rules require Plaintiffs to notify all other parties that they believe these individuals have discoverable information relevant to Plaintiffs' particular claims in this particular case, and that Plaintiffs intend to try their case relying on these individuals. *See McDermed*, 2016 WL 1298096, at *5-6 ("[T]he fact the opposing party knows of an individual does not mean that party would necessarily know the other party intends to rely upon that individual as one of its witnesses likely to have discoverable information."); *Drechsel v. Liberty Mut. Ins. Co.*, No. 3:14-cv-162, 2015 WL 7067793, at *3 (N.D. Tex. Nov. 12, 2015) (noting that the fact that late-disclosed witnesses' names surfaced in discovery "only underscores that Plaintiff should have disclosed them earlier"). Only then can the Defendants and the Assembly begin to investigate how exactly these witnesses are relevant to each individual Plaintiffs' claims, and how to defend against them. *See*, *e.g.*, *Dynegy Mktg. & Trade v. Multiuit Corp.*, 648 F.3d 506, 514-15 (7th Cir. 2011) (excluding untimely declaration regarding damages calculation after the party's "dilatory and opaque behavior" made it impossible for the opposing party to "investigate and raise arguments against the claimed damages").

II. Plaintiffs' untimely disclosure is not harmless.

Plaintiffs also cannot establish that their untimely disclosure is not prejudicial, or that any prejudice can be cured. The parties must file pretrial disclosures, motions *in limine*, supplemental briefs about the scope of the mandate, and pretrial briefs over the course of the next five weeks. *See* Scheduling Order at 2, ECF No. 248. In addition to these pretrial tasks, and as a result of Plaintiffs' untimely disclosure, the Defendants and the Assembly must now begin the discovery process for four new witnesses whom Plaintiffs describe as having discoverable information about all aspects of Plaintiffs' case—"partisan bias" in enacting Act 43, Act 43's "partisan effect," its "associational effect," and "communities of interest." Ex. 1 at 4. Unless these witnesses are struck (or unless Plaintiffs disclaim their intent to rely on these witnesses at trial), then the Defendants and the Assembly have no choice but to incur the substantial cost and distraction of deposing these four new individuals after seeking their documents amidst these other deadlines.[5]

Cost and distraction from pretrial preparation are not the only concerns. Plaintiffs' late disclosure prejudices the ability to defend against Plaintiffs' claims by conducting discovery of other similarly situated witnesses. For

[5] In an abundance of caution, the Assembly intends to move ahead with discovery by requesting these witnesses' documents while this motion is pending. However, it is far from clear that this new discovery would be complete anytime soon. Some document requests might not be answerable until the Seventh Circuit rules on the legislative privilege issues raised in Speaker Robin Vos's pending mandamus petition. Similarly, if these witnesses assert the same First Amendment privilege arguments that Plaintiffs have raised in depositions or in response to document requests, then that too will delay the completion of this already last-minute discovery.

example, Plaintiffs' chosen Democratic candidate—Keyes—could have been countered with evidence from victorious candidates in District 14 (won by a Democrat in 2018), Districts 75 or 85 (won by Democrats in 2012), or District 94 (an allegedly "cracked" district won by a Democrat in every Assembly contest since Act 43's enactment), to name only a few.[6] But Plaintiffs' late disclosure necessarily limits any additional discovery on this score, and thus prejudices the ability to prepare a defense. There simply is not time for the parties to respond to Plaintiffs' eleventh-hour attempt to reframe their case as one to be told through Democratic legislators or candidates. Nor is that reframing consistent with the Supreme Court's mandate: for Plaintiffs to "prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented [in *Whitford I*]—that would tend to demonstrate a burden on *their individual votes*." *Gill*, 139 S. Ct. at 1934 (emphasis added). This is not the forum for adjudicating "group political interests." *Id.* at 1933.

CONCLUSION

For the foregoing reasons, the Wisconsin Elections Commission Defendants and the Assembly respectfully request that this Court strike Plaintiffs' supplemental disclosures and preclude Plaintiffs from relying on these newly named individuals at trial.

[6] The Wisconsin Elections Commission reports the 2012, 2014, 2016, and 2018 Assembly election results at https://elections.wi.gov/elections-voting/results-all.

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Respectfully submitted,

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