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 REPLY IN SUPPORT OF JOINT MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL DISCLOSURES

Plaintiffs contend that their last-minute disclosures are permissible because the Wisconsin Elections Commission Defendants and the Wisconsin State Assembly (collectively, "Defendants") have known about these four witnesses all along. According to Plaintiffs, these witnesses should come as no surprise to Defendants because their names surfaced during discovery (along with droves of other Wisconsin politicians). That is not how Rule 26's disclosure obligations work. No reasonable litigant would expect that every person mentioned during discovery must then be subpoenaed and deposed just

in case the disclosing party later decides to rely on them as witnesses at trial. And there is nothing in this record revealing what Plaintiffs have now belatedly disclosed: that Plaintiffs intend to call these witnesses to testify about nearly every aspect of their claim—"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." *See* Pls.' Am. Disclosures at 4, ECF No. 284-1.

Discovery did not relieve Plaintiffs of their obligation to identify these individuals in their initial disclosures. The Court ordered the parties to serve updated disclosures in September 2018. *See* Order at 1, ECF No. 199. But Plaintiffs have yet to explain why they did not disclose these names then, before discovery began anew, and instead waited until the eve of trial.

Nor have Plaintiffs established that these last-minute additions were harmless. Instead, Plaintiffs fall back on their argument that Defendants should have known. Again, there was no reason to anticipate that Plaintiffs would rely on Democratic politicians to establish that Plaintiffs have a "personal stake" in this redistricting suit, distinct from generalized grievances about Wisconsin politics. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923, 1933 (2018) (quotation marks omitted). Accordingly, Defendants respectfully request that Plaintiffs be precluded from relying on these witnesses at trial.

I. The Federal Rules required Plaintiffs to timely disclose the new witnesses, and Plaintiffs' failure to do so is not substantially justified.

According to Plaintiffs, "they had no obligation even to provide" supplemental disclosures because some Plaintiffs' interrogatories and depositions identified that they voted for, or made contributions to, or talked to these four new witnesses. Pls.' Opp'n to Defs.' Mot. to Strike ("Opp'n") at 2-6, ECF No. 294. Based on this discovery, Plaintiffs insist that Defendants have long known that these former Democratic officeholders and candidates might "possess information relevant to this case." *Id*. at 3.

Discovery was no substitute for Plaintiffs' obligation to disclose who they will rely upon at trial to prove *Plaintiffs*' particular claims. *See* Defs.' Mot. to Strike ("Mot.") at 9, ECF No. 282. These four individuals were among the many dozens (if not hundreds) of Democratic candidates and Assembly members whose names appeared in interrogatory responses or during depositions. Plaintiffs cannot seriously suggest that it was up to Defendants to depose and seek documents from every one of these Wisconsin politicians mentioned during discovery, as preparation for the then-seemingly unlikely event that Plaintiffs would rely on politicians instead of Plaintiffs (and their experts) to make their case at trial. Instead, the burden is on Plaintiffs to identify the persons who they may use to support their claims and the subjects of information each disclosed person possesses so that Defendants may "make informed decisions about the discovery necessary" and to prepare for trial. Fed.

R. Civ. P. 26(a)(1)(A); *Estate of McDermed v. Ford Motor Co.*, No. 14-CV-2430-CM-TJJ, 2016 WL 1298096, at *3 (D. Kan. Apr. 1, 2016).

Given the Supreme Court's instructions to Plaintiffs' regarding their principal task on remand, it is hardly "preposterous" that the Defendants were caught off guard by Plaintiffs' last-minute disclosures revealing Democratic politicians as likely trial witnesses. *See* Opp'n at 1. The Supreme Court made clear that Plaintiffs' case is no longer about "vindicating generalized partisan preferences" and must instead focus on "the individual rights" of Plaintiffs and their "personal stake" in the litigation. *Gill*, 138 S. Ct. at 1923, 1933. Defendants therefore had no reason to think Plaintiffs would be making their case about their individual harms through the former minority leader for Assembly Democrats, two former Democratic Assembly members, and a single Democratic candidate. But apparently that is what Plaintiffs intend to do. With only four days allotted for trial, it appears Plaintiffs plan to call these four Democratic politicians instead of presenting the live testimony from Plaintiffs themselves—the individuals whose alleged injuries are actually at issue in this case.

As Defendants already acknowledged, the identities of these Democratic politicians were not unknown. *See* Mot. at 9. But what was unknown—and remained unknown until Plaintiffs served their belated disclosures—is that Plaintiffs intended to rely on these Democratic politicians (or that they possessed discoverable evidence) to prove virtually every aspect of Plaintiffs'

particular claims. *See id*. For example, Plaintiffs describe interrogatory responses that Plaintiffs Stevning-Roe and Dieterich "consistently voted for Ms. Vruwink" as proof that Defendants were on notice that Ms. Vruwink was a potential witness. Opp'n at 3 n.1 But interrogatory responses or deposition testimony disclosing whom Plaintiffs voted for or contributed to does not suggest that the candidate herself knows anything about Plaintiffs' amorphous First Amendment allegations. *See id*. Some of the selected Plaintiffs' deposition testimony also reveals they voted for Barack Obama or Hillary Clinton—are Defendants to infer that they know something about those Plaintiffs' supposed First Amendment injuries? *See*, *e.g.*, Dieterich Dep. 8:13-9:17, ECF No. 288; Switzenbaum Dep. 26:1-6, ECF No. 291. Similarly, deposition testimony about "a conversation" between Ms. Pasch and a single plaintiff, Opp'n at 4-5, is hardly notice that Plaintiffs will rely on Ms. Pasch to prove her former constituents' Equal Protection or First Amendment claims. Nor does deposition testimony speculating why these politicians lost their elections sufficiently put Defendants on notice. *Id.* at 5, 6 n.3. And if Mr. Barca (as minority leader) was so central to Plaintiffs' alleged associational injuries, Opp'n at 6, then that only re-raises the question why Plaintiffs did not list him on their initial disclosures in September 2018, as ordered by the Court, or after the Wisconsin Assembly Democratic Campaign Committee voluntarily dismissed their suit in January. *See* Order, ECF No. 199; Mot. at 5-6.

To be sure, these four witnesses might have discoverable information regarding Democrats' "collective representation in the legislature" or "influencing the legislature's overall composition and policymaking," but this is no longer a case about that. *Gill*, 138 S. Ct. at 1931 (quotation marks omitted). This is a case about the individual harms Plaintiffs have allegedly suffered. And if Plaintiffs believed that they would rely on these Democratic politicians to prove those individual harms, then Rule 26 required them to disclose that information "in a timely manner." Fed. R. Civ. P. 26(e). Plaintiffs failed to do so, and the witnesses should be excluded. Fed. R. Civ. P. 37(c)(1).

II. Defendants are prejudiced by Plaintiffs' untimely disclosure.

Plaintiffs have little response to Defendants' argument that they are prejudiced by Plaintiffs' untimely disclosures. The parties are out of time to depose or collect documents from the many other former Assembly members and candidates identified throughout this case and whom Plaintiffs now say are relevant; indeed, there is very little time remaining to conduct discovery even from Plaintiffs' four cherry-picked witnesses. *See* Mot. at 8, 10-11. Plaintiffs do not deny that the parties are out of time. They instead respond that it is Defendants' fault for "not prepar[ing] for the possibility that witnesses identified in discovery might actually testify at trial." Opp'n at 8. That merely assumes the answer to the question presented—whether these individuals were sufficiently disclosed as witnesses during discovery. They were not, and Plaintiffs' failure has prejudiced the Defendants' ability to defend against Plaintiffs' claims.

Finally, Plaintiffs attempt to lay blame on the Assembly for having "done its best to entirely stymie preparation for trial at nearly every turn." Opp'n at 9. To be clear, the Assembly is absolutely trying to avoid costly, unnecessary, and potentially irrelevant discovery for all parties until there is a decision from the Supreme Court in *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726. Until then, the parties cannot be sure that Plaintiffs' partisan gerrymandering claims are justiciable, let alone what the rules are. The Seventh Circuit has likewise delayed costly and potentially unnecessary discovery until the Supreme Court decides *Rucho* and *Lamone*. *See* Order, *In re Speaker Robin J. Vos*, No. 19-1910 (7th Cir. June 4, 2019), ECF No. 19.

But Plaintiffs, for their part, are doing their level best to engage in cumulative, costly, and potentially irrelevant discovery. They have used the postponement of trial as an opportunity to attempt to drag the Speaker of the Wisconsin State Assembly into discovery. They have subpoenaed additional documents from legislative aides and the Assembly. They have deposed (or will soon depose) those Wisconsin legislative aides, marking the *fifth* time each has been deposed in redistricting-related litigation. And they have served 316 requests for admissions and related interrogatories, which both the Elections Commissions Defendants and the Wisconsin State Assembly must separately answer by the end of this week. And now, if Defendants' motion is denied, there will be four new witnesses to depose on the eve of trial, all because of

Plaintiffs' last-minute disclosure that they have discoverable information. That last-minute disclosure has added to the cost of already protracted discovery and prejudices Defendants' ability to mount a defense.

CONCLUSION

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

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Respectfully submitted,

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