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

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| LISA HUNTER; JACOB ZABEL; JENNIFER OH; JOHN PERSA; GERALDINE SCHERTZ; and KATHLEEN QUALHEIM,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | Civil Action No. 21-cv-512-jdp-ajs-eec |

**PLAINTIFFS' OPPOSITION TO CONGRESSMEN GLENN GROTHMAN, MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND SCOTT FITZGERALD'S MOTION TO INTERVENE**

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## INTRODUCTION

Under the Wisconsin Constitution, primary responsibility for drawing new legislative districts after a decennial census is assigned to the Wisconsin Legislature. *See* Dkt. 24 (citing Wis. Const., art. IV, § 3). This process is "inherently political and legislative" because it "determines the political landscape for the ensuing decade and thus public policy for years beyond." *Jensen v. Wisconsin Elections Bd.*, 249 Wis. 2d 706, 713 (2002). These wide-ranging effects will no doubt impact the Congressmen who propose to intervene in this action. However, they will also reach every other voter, municipality, candidate, business, interest group, and community that intends to participate in Wisconsin politics in the next decade. While the Congressmen should remain free, as *amici*, to propose maps that serve their political interests, they have no "legal interests" at stake that merit intervention as a party.

The Congressmen have no legally protected interest in their re-election or in the composition of their districts. The lofty language about a "strong, direct link between the Congressmen's relationship with their constituents and the lines defining the Districts," ECF No. 31 ("Br.") at 6, only serves to obscure the fact that this relationship is term limited: the Congressmen have been elected to represent their constituents for two years, and their current terms in the 117th Congress will end on January 3, 2023. *See* U.S. Const. Art. I. § 2, cl. 1. This litigation only concerns the 2022 election for the 118th Congress, and, in that context, the Congressmen's interest is merely that of a Wisconsin resident who credibly intends to participate in a political process shaped by redistricting. Not only does this interest fall well below the "legally protectable interest" required by Rule 24(a)(2), *see Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), but it is also shared by an endless list of politically active persons and entities in Wisconsin. Moreover, the Congressmen's repeated reliance on *Baldus v. Members of Wisconsin Gov't*

*Accountability Bd.* and *League of Women Voters of Michigan v. Johnson* is misplaced because, in both cases, congressional incumbents intervened to defend *existing* maps from possible change, not to attempt to influence the decennial redistricting process.

The treatment of incumbents is surely a relevant consideration in the redistricting process. However, "avoiding contests between incumbent Representatives" is only one of several "legislative policies" that may be considered; other important considerations include "making districts compact, respecting municipal boundaries, [and] preserving cores of prior districts." *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014). The balancing of these competing considerations was entrusted, in the first instance, to the Wisconsin Legislature because its members are "elected by the people to make precisely these sorts of political and policy decisions." *Jensen*, 249 Wis. 2d at 713. If this Court takes up the task of redistricting, it will be similarly charged with balancing these competing considerations, and there is no need for the Congressmen to play an outsized role in that process. Instead, the Congressmen's role here should be the same as it would be before the Legislature: proposing a redistricting plan as an outsider (or, here, as *amici*). Of course, like any politically active Wisconsinite, the Congressmen will always care more about how the redistricting process affects their own personal political prospects than the Legislature will. However, every single constituent of each of the Congressmen also has representation in the Wisconsin Legislature, and the Congressmen have not identified any basis to suggest that the Wisconsin Legislature—or Plaintiffs, three of whom are some of the Congressmen's *own* constituents—will not adequately represent them and consider the treatment of congressional incumbents in the redistricting process.[1] Rule 24(a)(2) is not so permissive as to allow intervention under those circumstances, and this Court should not be so

[1] Furthermore, two of the proposed Intervenor-Plaintiffs are constituents of Representative Gallagher: Eric O'Keefe and Ed Perkins. *See* ECF No. 21-1 at 4.

permissive unless it is prepared to parse through interventions by every unique political interest in Wisconsin thereby unnecessarily delaying and prolonging these proceedings.

## 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 Congressmen bear 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 Congressmen have not shown entitlement to intervention of right.

The Congressmen have not met their burden of satisfying the four necessary elements of intervention as of right. Plaintiffs do not dispute the timeliness of the Congressmen's motion to intervene. However, they have failed to prove each of the three remaining requirements: the Congressmen hold no unique or cognizable interest in this action; none of the interests identified would be impaired by the disposition of this case; and the Congressmen are adequately represented by several parties—Plaintiffs, proposed Intervenor-Plaintiffs, the Wisconsin Elections Commission, and the Wisconsin Legislature. Any one of these failures "requires denial" of the Congressmen's motion for intervention as of right. *Am. Nat. Bank & Tr. Co.*, 865 F.2d at 146.

**A. The Congressmen lack a unique or cognizable interest in this lawsuit.**

The Congressmen have failed to identify a "direct, significant and legally protectable interest" in this suit that belongs "to the proposed intervenor rather than to an existing party in the suit." *Keith v. Daley*, 764 F.2d at 1268. Their brief only makes vague references to the "relationship between themselves as representatives and their constituents." Br. at 6. It is unclear whether the Congressmen seek to invoke the interests of their constituents by proxy, or whether the Congressmen claim a cognizable interest in the "relationship" itself. Under either theory, the Congressmen's alleged interest is neither legally cognizable nor unique to them.

The Congressmen's interest in their relationship with constituents is wholly unrelated to this litigation. The Congressmen were elected to represent their constituents for two years. *See* U.S. Const. Art. I. § 2, cl. 1. Nothing in this litigation will affect the term of that representation, or the composition of the districts they currently represent. Instead, this suit will only affect the 2022 election; and the Congressmen's only interest in that election is their own intended candidacies. For that reason, they are no more interested than "all other Wisconsin residents who would be eligible to run for a congressional seat" in 2022. *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW, 2011 WL 5834275, at *1 (E.D. Wis. Nov. 21, 2011) (declining to grant intervention as of right to congressional incumbents because they did not "satisfy the interest requirement.").

Further, the Supreme Court has made clear that an incumbent's interest in representing their district beyond their term is not a cognizable injury. In *Virginia House of Delegates v. Bethune-Hill*, the Court emphasized that the Virginia House of Delegates was "a representative body composed of members chosen by the people. Changes to its membership brought about by the voting public thus inflict no cognizable injury on the House." *Virginia House of Delegates v.*

*Bethune-Hill*, 139 S.Ct. 1945, 1955 (2019).[2] That theory also applies to individual representatives—they have no interest in holding their offices; that is a decision made by Wisconsin voters every two years. *See Baldus*, 2011 WL 5834275 at *1 ("Plaintiffs make the obvious point that the [congressional] intervenors do not have a right to maintain their seat."). In the same way that a legislature "does not select its own members," the Congressmen have no legally protectable right to choose their own districts. *Bethune-Hill*, 139 S.Ct. at 1955. Indeed, *Bethune-Hill* specifically rejected the idea that a representative being assigned to a new district would constitute an injury—even going as far as citing decennial redistricting as an example of why such changes are inevitable.[3] *Id.*

The Congressmen's lack of interest is also illustrated by the fact that, if the political branches in Wisconsin enact a map, the Congressmen could only play the limited role of proposing a map. For example, the Congressmen would not be involved in any hearings alongside members of the legislature. This federal litigation only exists as a *substitute* for that legislative process in the event of a political impasse, and the Congressmen have not, and indeed cannot, explain why they should have a greater role in this judicial process than they would in the typical legislative process. While state legislatures may consult with congressional incumbents when engaged in the redistricting process, leave to file an amicus brief is sufficient to obtain the "benefit of [the Congressmen's] perspective." *Feehan v. Wis. Elections Comm.*, 506 F. Supp. 3d 640, 649 (E.D. Wis. Dec. 9, 2020).

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[2] 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).

[3] In discussing the distinction between legislatures and individual representatives, the Supreme Court declined to decide whether districting changes that made election campaigns "costlier or more difficult" would be an injury to individual candidates. *Bethune-Hill*, 139 S.Ct. at 1956. Similarly, this court need not assess that theory because the Congressmen have not made any claim related to potential cost or difficulty of elections as a result of this suit.

The Congressmen's lack of a concrete interest becomes even clearer when examining the two cases the Congressmen primarily rely upon to support their claim to intervention—*Baldus* and *Johnson*. In both cases, federal courts did not step in to redistrict following a decennial census. In those cases, plaintiffs were challenging a duly enacted map, and congressional incumbents intervened in defense of the *existing* map that would otherwise be used in the upcoming election. *See Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 846-47 (E.D. Wis. 2012) (assessing challenges to Wisconsin's 2010-cycle redistricting plan); *see also League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 575 (6th Cir. 2018) (assessing challenges to Michigan's 2010-cycle redistricting plan). In those cases, the involvement of congressional representatives was appropriate because the court was required to evaluate the current districting plans and decide whether to alter existing districts. Here, there is no such choice—Wisconsin's congressional districts must change. The Congressmen have expressed no intention to defend the constitutionality of the existing maps. Instead, they have only expressed an interest in "establishing the boundaries of their congressional districts"—a role in decennial redistricting that members of the U.S. Congress would not otherwise have because congressional incumbents have no legally protected right to shape the contours of their districts or to pick their constituents. Br. at 10.

Finally, to the extent that the Congressmen claim to speak on behalf of their constituents, they ignore that some of their *own constituents* are already Plaintiffs or proposed Intervenor-Plaintiffs in this matter: Plaintiff John Persa lives in Representative Fitzgerald's district and Plaintiffs Geraldine Schertz and Kathleen Qualheim live in Representative Gallagher's district.[4] Not only that, but every single constituent of the Congressmen is already represented in this suit, by proxy, through the Wisconsin Legislature. This kind of novel theory is plainly

[4] In addition, proposed Intervenor-Plaintiffs Eric O'Keefe and Ed Perkins also reside in Representative Gallagher's district.

inconsistent with the kinds of "direct" and "unique" interests that ground a party's right to intervene under Rule 24.

**B. The disposition of this lawsuit does not threaten the Congressmen's interests.**

Given the term-limited nature of the Congressmen's relationship to their constituents, it is difficult to understand how that interest would "as a practical matter" be impaired by this suit. Fed. R. Civ. P. 24(a)(2). The Congressmen were elected in 2020, and they only have an interest in representing their constituents for two years. That representation is wholly unaffected by this lawsuit. The Congressmen's brief only offers a conclusory explanation of how the Congressmen's interests are allegedly threatened by this lawsuit: "Plaintiffs' lawsuit poses a potential impairment […] since Plaintiff asks this Court to draw a new congressional district plan if the Legislature and Governor fail to do so. That puts the Congressmen's interests at stake in this case." Br. at 7 (quotations omitted). Such a barebones recitation of the legal standard cannot possibly satisfy their burden to establish this element of Rule 24(a)(2). *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. 2019). Moreover, if the Congressmen's interests are harmed simply by the creation of a new congressional district plan, that outcome is all but inevitable given the requirements of the U.S. Constitution.

It is worth reiterating that the Congressmen would ordinarily have no legal power over Wisconsin's redistricting process if the political branches were enacting a redistricting plan. At most, congressional incumbents could propose redistricting plans to the legislature. Therefore, denying their intervention and cabining the Congressmen's role to *amici* would not, in any way, diminish the Congressmen's normal role in the redistricting process.

**C. The Congressmen's alleged interests are adequately represented in this lawsuit.**

Even if the Congressmen could describe a concrete interest in this litigation, such interest is already adequately represented by several other parties. In their brief, the Congressmen identify

the Seventh Circuit's "'three-tiered methodology for evaluating the adequacy of representation under Rule 24(a)(2).'" Br. at 7 (quoting *Driftless Area Land Conservancy v. Heubsch*, 969 F.3d 742, 747 (7th Cir. 2020). However, the Congressmen overstate the requirements for applying the intermediate standard. To merit intermediate scrutiny, the proposed intervenors' interest need not be "identical" to an existing party. Br. at 8. It is enough that "the proposed intervenor[s] and named party have the same goal." *Planned Parenthood of Wis.*, 942 F.3d at 799. Here, multiple parties share the ultimate goal of the Congressmen—to ensure that Wisconsinites in each congressional district are properly represented in Congress. That goal is shared by the Plaintiffs, the proposed Intervenor-Plaintiffs, and the Wisconsin Legislature. Therefore, the Court must apply a "rebuttable presumption of adequate representation," and the Congressmen must be able to show "some conflict" between their interests. The Congressmen have failed to do so, and this provides an independent basis for this Court to deny their motion.

The only possible "conflict" identified by the Congressmen is a difference between how much the current parties and the Congressmen value incumbent protection for congressional redistricting. For example, the Congressmen express concern for a scenario in which incumbents are "paired" such that they must run against each other—and only one of them will be able to continue representing Wisconsinites. Br. at 11. They suggest that such a scenario "will be in-kind more important to the Congressmen than to any of the parties." *Id.* However, Wisconsin voters have just as much interest in being represented by a candidate of their choice. Not only are constituents of the Congressmen already parties to this action, but the Wisconsin Legislature also represents all Wisconsin voters in this suit. Indeed, if the political branches were to enact their own redistricting plan, one would expect the Legislature to avoid "pairing" congressional incumbents because that serves the interests of *their* constituents. Any interest the Congressmen invoke beyond

the general consideration of incumbents is nothing more than their own personal interests in keeping their seats—an interest that the Congressmen "obvious[ly]" have no right to. *Baldus*, 2011 WL 5834275 at *1; *see also Bethune-Hill*, 139 S.Ct. at 1955 (members of representative bodies are "chosen by the people.").

Furthermore, if one imagines the myriad of truly "legal" interests the Congressmen might have—respect for the one-person-one-vote rule, compliance with the Voting Rights Act, the timely enactment of a redistricting plan, etc.—there can be no doubt that, between the Plaintiffs, the Wisconsin Elections Commission, and the Wisconsin Legislature, the Congressmen's legal interests are adequately represented. What, perhaps, remains inadequately represented are the Congressmen's *political* interests. But the same could be said for every city, town, party, interest group, community, union, business, and voter in Wisconsin. Such interests cannot ground intervention under Rule 24(a)(2), and the fact that this Court or the parties may not be interested in drawing a map that caters to the Congressmen's personal or political interests does not mean they are inadequately represented in their legal interests.

* * *

The Congressmen have failed to meet their burden of proving that (1) they hold a unique and protectable interest in this litigation, (2) any such interest would be threatened in this litigation, or (3) the existing parties do not adequately represent such interests. As a result, the Congressmen's motion to intervene as a matter of right must be denied.

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

There is no justification for permitting the Congressmen to 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 (W.D. Wis. 2015) (quoting *Sokaogon Chippewa Cmty. v. Babbit*, 214 F.3d

941, 949 (7th Cir. 2000)). However, the Congressmen have failed to justify their presence in this case for any reason other than the pursuit of their own political interests—"infusing additional politics into an already politically-divisive area of the law and needlessly complicat[ing] this case." *Planned Parenthood of Wis.*, 942 F.3d at 803.

Here, again, the Congressmen mistakenly rely on *Baldus* and *Johnson*, where members of Congress were granted permissive intervention. The context of a challenge to a duly enacted map—as in *Baldus* and *Johnson*—is wholly different from impasse litigation like this case, which follows the 2020 Census, after which districts necessarily must be redrawn. For example, when the congressional representatives in *Johnson* invoked "the relationship between constituent and representative," not only were they intervening to defend their existing districts, but they also had every expectation that, but for the federal litigation, their districts would remain intact for the next decade. Here, the Congressmen have expressed no intention to defend their existing districts, and they were elected in 2020 with every expectation that their districts would change in the next election.

Moreover, the ultimate justification for the Congressmen's intervention is so that they may pursue their unique political interests in a way that would be unavailable to them through Wisconsin's political process. Permitting such intervention would be an invitation to all political entities to seek intervention in this case, including for example, the Democratic members of Congress from Wisconsin, state legislators eager to protect their districts, municipalities and communities wary of being split, and any number of geographically situated interest groups. The *Baldus* court confronted similar concerns about "floodgates" and dismissed them, concluding that the court need not permit intervention by similarly situated parties. *Baldus*, 2011 WL 5834275 at *2 ("given the Court's broad discretion over whether to grant such motions, the Court will not be

*required* to permit intervention by those additional parties.") (emphasis in original). However, this Court should not open the floodgates unnecessarily where the intervening parties do not have unique interests that are not adequately represented by existing parties to a suit. When courts are faced with a long list of opinionated and interested parties, liberally permitting *amicus* participation is a more appropriate way to approach decennial redistricting litigation fairly and efficiently. Permitting the Congressmen's intervention only risks delay and prejudice to the countless similarly situated parties.

## CONCLUSION

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

Dated: September 7, 2021

Respectfully submitted,

/s/ *Aria C. Branch*

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*Admitted *Pro Hac Vice*
**Motion for *Pro Hac Vice* Admission Forthcoming

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **OPPOSITION TO THE MOTION TO INTERVENE** was electronically filed with the Clerk of Court using the CM/ECF system, which automatically will send email notification and access to an electronic copy of such filing to all counsel of record.

This 7th day of September, 2021.

*/s/ Aria C. Branch*
Aria C. Branch
Counsel for Plaintiffs