FILED
10-10-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP1399-OA

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE SWEET, and GABRIELLE YOUNG,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, JOSEPH J. CZARNEZKI, in their official capacities as Members of the Wisconsin Election Commission; MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission; ANDRE JACQUE, TIM CARPENTER, ROB HUTTON, CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER, HOWARD MARKLEIN, RACHAEL CABRAL-GUEVARA, VAN H. WANGGAARD, JESSE L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY TOMCZYK, JEFF SMITH and CHRIS KAPENGA, in their official capacities as Members of the Wisconsin Senate.

Respondents,

WISCONSIN LEGISLATURE,

Intervenor-Respondent.

GOVERNOR TONY EVERS' MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Wisconsin Governor Tony Evers, in his official capacity, respectfully moves the Court for intervention in this original action. As this Court has recognized, the Governor and Legislature are joint participants in Wisconsin's reapportionment process. The Governor is squarely involved in the legal and factual issues raised by this action and should be allowed to intervene, consistent with the Court's precedent and actions by federal panels in federal redistricting litigation.

This Court's precedent recognizes a joint role for the Governor with the Legislature in redistricting: "the framers of the [Wisconsin] constitution intended to require [the Governor's] participation in all decisions relating to legislative reapportionment." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 557, 126 N.W.2d 551 (1964). In turn, this Court held in *Reynolds* that the Governor is a proper party in a redistricting action before this Court. Consistent with that, the Governor intervened in the most recent redistricting litigation before the Court. *See Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469. That should remain true here.

Further, one of the two claims before this Court concerns the Governor's veto authority. (Pet. 43.) Thus, even more so than in other redistricting matters, the Governor's powers and interests are squarely at issue in this case.

This Court therefore should grant the Governor's motion to intervene under Wis. Stat. § 803.09(1) or (2).

INTERVENTION STANDARDS

Under the intervention as of right provision, a party shall be allowed to intervene "[u]pon timely motion," and if "the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties." Wis. Stat. § 803.09(1).

Under the permissive intervention provision, "anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

ARGUMENT

I. The Governor's intervention is warranted under either section 803.09(1) or (2) given his joint role in redistricting.

In *Reynolds*, this Court held that the Governor is a proper party in a reapportionment matter given his role in Wisconsin's process. That remains the case and, if anything, is even more true here, where a claim before the Court concerns the alleged usurping of the Governor's veto powers.

Consistent with *Reynolds*, *Johnson*, and federal litigation, the Court should grant the Governor status as a party-intervenor.

A. The Court's reasoning in *Reynolds* applies equally here to support intervention.

Wisconsin law has long recognized that redistricting is not only a legislative task but also squarely involves the Governor. Given that, the Court in *Reynolds* explained that the Governor is a proper party in a redistricting matter. This case is no different.

The Court explained that the Governor's involvement is especially justified given apportionment's effect vis-à-vis the state's population, as he is "the one institution guaranteed to represent the majority of the voting inhabitants of the state." *Reynolds*, 22 Wis. 2d at 556–57. His role is "indispensable" both when choosing to sign a bill and when deciding to call a special session and provide recommendations to the Legislature. *Id.* at 557. Given how "vital" apportionment is to Wisconsin government, the court concluded that it was very much a "joint effort" requiring "joint action" of the Legislature and the Governor: "the framers of the constitution intended to require his participation in all decisions relating to legislative reapportionment." *Id.* at 557–58. That meant the Governor could act as the relator in a redistricting matter. *Id.* at 557. This Court also granted the Governor's motion to intervene in the most recent litigation in *Johnson*.

It necessarily follows that the Governor is a proper intervenor here. Under the permissive intervention standard, the Governor's interests and "the main action have a question of law or fact in common"—namely, what factual and legal considerations should go into analyzing the existing maps and any new maps and whether the Governor's veto authority was usurped. And the Governor will not "delay or prejudice the adjudication of the rights of the original parties," as this motion is being filed at the beginning of the case by the deadline set by the Court. Wis. Stat. § 803.09(2). Thus, the Court should grant permissive intervention.

Although the Court need not address as-of-right intervention, it also would be satisfied in the special circumstances of reapportionment. The Governor "claims an interest relating to the property or transaction which is the subject of the action"—namely, his interest in the reapportionment process and his interest in veto authority. And "the disposition of the action may as a practical matter impair . . . that interest" because this action may result in a map over which the Governor has an interest, and participation will allow him to advocate for application of the appropriate redistricting principles. Finally, his interest is not "adequately represented by existing parties," as no existing party is an executive officer jointly responsible for the reapportionment process and no existing party has constitutional veto power. Wis. Stat. § 803.09(1). Likewise, other potential intervenors would not represent his interests.

Consistent with *Reynolds* and *Johnson*, federal redistricting panels have recognized that the Governor is a proper intervenor. For example, *Wisconsin State AFL-CIO v. Elections Board*, 543 F. Supp. 630, 632 (E.D. Wis. 1982), concerned Wisconsin's redistricting after the 1980 census. The Legislature and Governorship were held by different parties; there, then-Governor Dreyfus vetoed the redistricting bill sent to him. *Id.* at 632. The federal panel declared Wisconsin's maps unconstitutional and prepared for the submission of proposed plans. *Id.* After rendering that decision, the court granted Governor Dreyfus' motion to intervene as a party defendant. *Id.* The court, in turn, considered input offered by him. *See id.* at App. to Decision; *see also*, *e.g.*, *Gaona v. Anderson*, 989 F.2d 299, 301 n.2 (9th Cir. 1993) (reapportionment case noting the governor's intervention).

In sum, the Governor is a proper party to a redistricting suit, as this Court previously has recognized. The Court therefore should grant intervention under either the as-of-right or permissive standard.[1]

B. The separation of powers claim squarely involves the Governor's powers.

Not only would the Governor be a proper party in any redistricting matter but, here, one of the claims before the Court squarely concerns the Governor's own powers and interests. Specifically, that claim alleges that the *Johnson* decision "usurped" the "Governor's power to veto legislation," which is a "core power" of the Governor. (Pet. 43.)

Thus, even more so than in other redistricting matters, this matter doubly involves the Governor's interests. Where the Governor's veto powers are at issue, he is of course a proper party. *See*, *e.g.*, *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (original action involving Governor's veto powers).

II. The Governor's intervention will cause no delay but rather will contribute to the proceedings.

As this Court's order implicitly recognizes, the Governor's intervention at this early date will cause no delay and will result in no prejudice to the parties. The Governor intends to provide this Court with briefing according to the schedule stated in its order.

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[1] Of note, a 2020 petition requesting that this Court promulgate rules for redistricting recognized that the Governor should be able to intervene as of right. *In Re: Petition for Proposed Rule to Amend Wis. Stat. § 809.70*, Memorandum in Support at 7, https://www.wicourts.gov/supreme/docs/2003memo.pdf ("[A]s a practical matter, the Governor and the Legislature (along with individual voters) have been the real protagonists to such litigation in this State in the past.").

Because the considerations under either Wis. Stat. § 803.09(1) or (2) are met, this Court should grant intervention to the Governor, consistent with *Reynolds*, *Johnson*, and federal cases.

CONCLUSION

The Governor respectfully requests that the Court grant his motion to intervene.[2]

Dated this 10th day of October 2023.

Respectfully submitted,

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[2] This Court may wish to simply designate the Governor as an "intervenor." However, if the Court wishes to further designate the Governor, he would most appropriately be designed as an "intervenor-petitioner."

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this *Governor Evers' Memorandum in Support of Motion to Intervene* with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of October 2023.

Electronically signed by:

Anthony D. Russomanno
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