

No. 2021AP1450-OA

IN THE SUPREME COURT OF WISCONSIN

BILLIE JOHNSON, ERIC O'KEEFE,
ED PERKINS AND RONALD ZAHN,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN,
JULIE GLANCEY, ANN JACOBS, DEAN KNUDSON,
ROBERT SPINDELL, AND MARK THOMSEN,
in their official capacities as members of
the Wisconsin Election Commission,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO INTERVENE BY THE WISCONSIN LEGISLATURE**

BELL GIFTOS ST. JOHN LLC

KEVIN M. ST. JOHN, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718
608.216.7995
kstjohn@bellgiftos.com

LAWFAIR LLC

ADAM K. MORTARA, SBN 1038391
125 South Wacker, Suite 300
Chicago, IL 60606
773.750.7154
mortara@lawfairllc.com

CONSOVOY MCCARTHY PLLC

JEFFREY M. HARRIS*
TAYLOR A.R. MEEHAN*
JAMES P. MCGLONE*
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
703.243.9423
jeff@consovoymccarthy.com

* *Pro hac vice motions forthcoming.*

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INTRODUCTION

This case challenges the constitutionality of existing congressional and legislative districts established by law. Whenever a party challenges the constitutionality of state law, the Wisconsin Legislature may intervene as of right. *See* Wis. Stat. §803.09(2m). What’s more, this case implicates the Legislature’s unique institutional interests as the body primarily responsible for redistricting. *See* U.S. Const. art. I, §4, cl. 1; Wis. Const. art. IV, §3. Accordingly, the Legislature respectfully requests that the Court grant its motion to intervene as a defendant in this case.

BACKGROUND

1. This case concerns Wisconsin’s electoral districts, which the Legislature is currently redrawing based on the recently released 2020 census results. Petitioners, four Wisconsin voters, ask the Court to declare the State’s existing maps malapportioned, enjoin their future use, and approve new electoral maps if the Legislature fails to do so. Pet. ¶36.

This Court granted the petition for an original action. Order (Sept. 22, 2021), *as amended* (Sept. 24, 2021). The Court’s order stressed that “[the State’s] Constitution places primary responsibility for the

apportionment of Wisconsin legislative districts on the legislature.” *Id.* at 2 (citing Wis. Const. art. IV, §§3, 4).

As part of its order, the Court asked all prospective intervenors to file motions to intervene with supporting memoranda of law analyzing the standards of Wis. Stat. §803.09. The Court further instructed parties and prospective intervenors to address in a separate letter brief the question of when a new redistricting plan must be put in place. *See Order* at 3.

2. Meanwhile, two groups of federal plaintiffs have filed federal suits. *See Hunter v. Bostelmann*, No. 21-CV-512 (W.D. Wis.); *Black Leaders Organizing for Communities (BLOC) v. Bostelmann*, No. 21-CV-534 (W.D. Wis.). Like the *Johnson* petitioners, the federal plaintiffs allege that the existing maps are malapportioned, and the *BLOC* plaintiffs allege that existing maps also violate the Voting Rights Act.

The Legislature has intervened as a defendant in the federal cases. It has asked the federal court to dismiss the federal suits for lack of Article III jurisdiction in light of the State’s ongoing redistricting efforts, including the ongoing legislative process and this Court’s involvement. The federal court has not dismissed, and the Legislature has petitioned to the U.S. Supreme Court for a writ of mandamus or prohibition,

requesting that the Court direct dismissal of the federal suits. *See In re Wis. Legislature*, No. 21-474 (U.S. Sept. 24, 2021).

The Legislature now requests intervenor status in this action.

ARGUMENT

Wisconsin law permits the Legislature to intervene as of right in any suit challenging the constitutionality of state law, including this one. *See* Wis. Stat. §803.09(2m). Further, this suit implicates the Legislature's unique constitutional role in redistricting. Based on its statutory intervention right and this unique institutional interest, intervention is appropriate.

I. The Legislature may intervene as of right.

Wisconsin law permits the Legislature to intervene in any action challenging the validity of state law. Wis. Stat. §803.09(2m); *see also* Wis. Stat. §13.365.¹ As this Court has explained, section 803.09(2m) “gives the Legislature a statutory right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws.” *Democratic Nat'l Comm. v.*

¹ Pursuant to section 13.365(3), the Legislature's Joint Committee on Legislative Organization approved the Legislature's intervention in this suit on September 29, 2021.

Bostelmann, 2020 WI 80, ¶13, 394 Wis. 2d. 33, 949 N.W.2d 423. Where a party challenges a state law as unconstitutional or otherwise invalid—such as Petitioners’ malapportionment challenge to the existing redistricting maps codified in Acts 43 and 44—the Legislature enjoys the “same power to defend the validity of state law” as the Attorney General. *Id.* ¶13. Challenges to laws relating to state elections are no exception to this rule. *Id.* ¶2.

Here, the statutory criteria are met. Petitioners challenge the State’s existing electoral map, a creature of statute, as unconstitutionally malapportioned. Pet. ¶¶1-2, 30-32. They have asked the Court to declare the old maps malapportioned and draw new maps if the Legislature is unable to enact a new redistricting plan. *Id.* ¶36. That should end the analysis with respect to the Legislature’s intervention: a “party to [this] action” is challenging “the constitutionality of a statute.” Wis. Stat. §803.09(2m); *see also Bostelmann*, 2020 WI 80, ¶13.²

² Generally, proposed intervenors including those with a statutory right to intervene must submit a separate pleading with their intervention motion. Wis. Stat. §803.09(3). But in original actions, pleadings are required only when ordered by the Court. *See* Wis. Stat. §809.70(3). Additionally, this Court already granted the only pleading (the Petition for an Original Action) and asked only for a motion to intervene and a memorandum of law assessing the standards contained in Wis. Stat. §803.09. The Legislature does not interpret the Court’s Order to require a separate pleading to be attached to its

II. This suit implicates the Legislature’s unique institutional interest in redistricting.

Even setting aside its statutory right to intervene under section 803.09(2m), the Legislature would also readily meet the intervention criteria given its unique institutional power to redistrict. The Legislature’s motion is timely, filed on the date prescribed by the Court’s order. *See* Order at 3; Wis. Stat. §803.09(1). Described below, the Legislature has a unique and indisputable interest in this malapportionment suit. Wis. Stat. §803.09(1); *see* Wis. Const. art. IV, §3. Adjudicating this action without the Legislature would impair that interest, and the Legislature is not adequately represented by the existing parties—none of whom shares the Legislature’s constitutionally assigned reapportionment power. Wis. Stat. §803.09(1).

The Legislature’s power to redistrict is distinct from its lawmaking power. *Compare* Wis. Const. art. IV, §3, *with id.* §1. As this Court acknowledged in *SEIU, Local 1 v. Vos*, where such “institutional interests are implicated,” intervention is appropriate. 2020 WI 67, ¶72, 393 Wis. 2d 38, 946 N.W.2d 35.

intervention motion. But should the Court order further pleadings, the Legislature will file an answer without delay.

It is undisputed that this action implicates the Legislature's unique institutional interest in redistricting. It is the Legislature's role to redraw the electoral maps. U.S. Const. art. I, §4, cl. 1; Wis. Const. art. IV, §3; *see also Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶17, 249 Wis. 2d 706, 639 N.W.2d 537 (redistricting is “ideally and most properly” a task for the Legislature). As this Court stated in its order granting the petition for review, “We cannot emphasize strongly enough that our Constitution places primary responsibility for the apportionment of Wisconsin legislative districts on the legislature.” Order at 2. That institutional interest is sufficient for the Legislature's intervention. *See Vos*, 2020 WI 67, ¶72.

This case, moreover, could affect the Legislature's institutional interests in other ways, too. The case is inextricably intertwined with the Legislature's ongoing redistricting efforts. The Petitioners have asked that this Court not only review the Legislature's maps, but also resolve any future impasse and take over redistricting by a date certain if necessary. Pet. ¶35. More immediately, the Court has asked parties and prospective intervenors “how long this court should give the Legislature and the Governor to accomplish their constitutional responsibilities.” Order at 2. The Legislature has a strong interest in providing that sort

of input as a full participant in this case, given that it is the entity currently engaged in redistricting. Additionally, redistricting will alter the Legislature's own composition. That too is an interest that the Supreme Court recognized as sufficient for legislative intervention in *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (legislative body was a "substantially interested party ... because it would be directly affected by the decree of this court" (citation omitted)).

In light of these unique institutional interests, courts have regularly allowed intervention in cases like this one. In redistricting disputes before the adoption of section 803.09(2m), legislative leaders participated in redistricting litigation as intervenors or parties in this Court. *See, e.g., Jensen*, 2002 WI 13, ¶1 (legislative officials as original parties and intervenors); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 548, 126 N.W.2d 551, 554 (1964) (intervention granted to assembly speaker and senate president).

The same has been true in federal redistricting disputes, too.³ The Legislature, represented by its members or one of its constituent houses,

³ The standards for mandatory and permissive intervention under the Wisconsin and Federal Rules of Civil Procedure are similar. *Compare* Fed. R. Civ. P. 24(a)(2), (b), *with* Wis. Stat. §803.09(1)-(2); *see also Helgeland v. Wis.*

has been involved in the last four decades of redistricting disputes in federal courts. *See, e.g.*, Order Granting Mot. to Intervene at 2, *Whitford v. Gill*, No. 3:15-CV-421 (W.D. Wis. Nov. 13, 2018), ECF No. 223; *Baumgart v. Wendelberger*, Nos. 01-C-121, 02-C-366, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982). Here again, the Legislature has intervened in the ongoing federal litigation. *See* Order at 1-2, *Hunter*, No. 21-CV-512 (W.D. Wis. Aug. 27, 2021), ECF No. 24; Order at 6, *BLOC*, No. 21-CV-534 (W.D. Wis. Sept. 16, 2021), ECF No. 30 (consolidating case with *Hunter* “with the understanding that all the parties are now full participants in both cases”).

CONCLUSION

The Legislature has not only a right to defend against Petitioners’ challenge to state law but also a strong, unique interest in doing so here in light of the relief Petitioners seek—reapportionment of districts. The

Municipalities, 2008 WI 9, ¶37, 307 Wis. 2d 1, 745 N.W.2d 1 (“interpretation and application of the federal rule provide guidance” as to the state rule).

Legislature respectfully requests that this Court grant the Legislature's motion to intervene.

Dated this 6th day of October, 2021.

Respectfully submitted,

Electronically Signed By
Kevin M. St. John

CONSOVOY MCCARTHY PLLC
Jeffrey M. Harris*
Taylor A.R. Meehan**
James P. McGlone***
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
jeff@consovoymccarthy.com
taylor@consovoymccarthy.com
jim@consovoymccarthy.com

* *Pro hac vice forthcoming*

** *Pro hac vice forthcoming;*
licensed to practice in Ill. & D.C.

*** *Pro hac vice forthcoming;*
licensed to practice in Mass.

BELL GIFTOS ST. JOHN LLC
Kevin M. St. John, SBN 1054815
5325 Wall Street, Suite 2200
Madison, Wisconsin 53718
608.216.7990
kstjohn@bellgiftos.com

LAWFAIR LLC
Adam K. Mortara, SBN 1038391
125 South Wacker, Suite 300
Chicago, Illinois 60606
773.750.7154
mortara@lawfairllc.com

*Attorneys for Proposed Intervenor-Defendant,
The Wisconsin Legislature*

CERTIFICATIONS

Certifications as Required By Wis. Stat. § 809.19(8g)

I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), (c) relating to the form of briefs. This brief uses a proportionally spaced serif font, is produced with margins equal to or greater than those specified by rule, and includes page numbers as specified by the rules. Excluding the caption, table of contents, table of authorities, signatures, and these certifications, the length of this brief is 1,619 words as calculated by Microsoft Word.

Certificate of Filing and Service Pursuant to this Court's Order of September 22, 2021 (as amended September 24, 2021)

I certify that I caused the Motion by the Wisconsin Legislature to Intervene as Defendant and this Memorandum of Law in support of that motion to be filed with the Court as attachments to an email dated this day and directed to clerk@wicourts.gov. I further certify that I will cause 10 copies of these materials with a notation that "This document was previously filed by email" to be filed with the clerk no later than 4 p.m. on Thursday, October 7, 2021.

I further certify that on this day, I caused service copies of what was emailed to the Clerk to be sent to counsel of record for Petitioners and Respondents by U.S. mail and email. Additionally, I caused courtesy copies of these documents to be sent by email to all counsel noticed by the Court's Order dated September 22, 2021.

Dated this 6th day of October, 2021.

Respectfully submitted,

Electronically Signed by

Kevin M. St. John

BELL GIFTOS ST. JOHN LLC

KEVIN M. ST. JOHN, SBN 1054815

5325 Wall Street, Suite 2200

Madison, Wisconsin 53718

608.216.7990

kstjohn@bellgiftos.com

Attorney for the Wisconsin Legislature