

Supreme Court of Wisconsin

NO. 2021AP001450 - OA

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

Petitioners,

LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN
PERSA, GERALDINE SCHERTZ, AND KATHLEEN
QUALHEIM,

Proposed Intervenor-Petitioners,

vs.

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.

**BRIEF IN SUPPORT OF MOTION TO INTERVENE OF
PROPOSED INTERVENOR-PETITIONERS LISA
HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA,
GERALDINE SCHERTZ, AND KATHLEEN QUALHEIM**

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INTRODUCTION

On August 12, 2021, the Census Bureau released detailed population data that confirmed what everyone expected—Wisconsin’s congressional and state legislative districts are malapportioned. The very next day, Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (“Proposed Intervenors”), filed suit in federal court, requesting declaratory and injunctive relief to ensure lawful maps are adopted—either by the Legislature or by the court—in advance of the 2022 elections. *See Complaint, Hunter v. Bostelmann*, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021). Ten days later, Petitioners filed a similar state law petition in this Court. At the outset, Petitioners expressed their intent to preempt Proposed Intervenors’ federal claims proceeding in a trial court. Pet. at 4-5. Indeed, Petitioners have now filed multiple motions to stay that federal action. *See Hunter v. Bostelmann*, 21-CV-512, Dkt. Nos. 21.2, 79 (W.D. Wis.). Not only does this action threaten to halt litigation Proposed Intervenors are already pursuing in another

forum, but Petitioners purport to advance unfounded redistricting criteria that would be inconsistent with Wisconsin's constitutional protections. Therefore, Proposed Intervenors move to join this action and introduce their own malapportionment claims against Wisconsin's redistricting maps.

The four prerequisites for intervention as of right are easily satisfied. First, this timely motion is filed mere days after the Petition was granted and according to the schedule this Court has ordered. Second, Proposed Intervenors—each of whom resides in a congressional and/or legislative district that recent census data confirm to be significantly overpopulated—have a compelling interest in ensuring new districts are drawn according to constitutional requirements. Third, denial of the motion would impair Proposed Intervenors' ability to protect their interests because the face of the Petition makes clear Petitioners' intent to foreclose Proposed Intervenors' federal action. If Proposed Intervenors' federal action is stayed and they are not permitted to

intervene here, then they will be precluded from protecting their own constitutional rights.

And fourth, Petitioners do not adequately represent Proposed Intervenors' interests. Petitioners do not reside in all of the same overpopulated districts as Proposed Intervenors, and so Proposed Intervenors alone have an interest in ensuring each of their districts is drawn correctly. Further, Petitioners did not bring an associational rights claim; only Proposed Intervenors are interested in advising this Court on how art. I, sections 3 and 4 of the Wisconsin Constitution implicate redistricting litigation. Finally, Petitioners ask the Court to adopt and prioritize redistricting criteria that are not found anywhere in state or federal law—namely, that any Court-drawn map move the fewest number of voters between districts. Because Proposed Intervenors have an interest in districts that are drawn fairly and lawfully according to statutory and constitutional criteria—which may or may not closely mirror districts as drawn in the previous cycle—Proposed Intervenors cannot rely on Petitioners for adequate

representation. Nor can Proposed Intervenors rely on Respondents for adequate representation, as the WEC is merely an administrative body—with no power to change the maps nor any interest in protecting Proposed Intervenors' rights with respect to those maps.

Accordingly, Proposed Intervenors are entitled to intervene under Wis. Stat. § 803.09(1) to ensure their interests are fully heard. In the alternative, this Court should exercise its discretion to permit intervention under Wis. Stat. § 803.09(2) to promote the efficient and effective resolution of this action. Consistent with Wis. Stat. § 803.09(3), Proposed Intervenors' motion is accompanied by their Complaint in Intervention. This Court should take jurisdiction over and resolve the Proposed Intervenors' claims along with the Johnson Petition.

ARGUMENT

I. Proposed Intervenors are entitled to intervene as a matter of right.

A party has the right to intervene under Wis. Stat. § 803.09(1) if four conditions are met: (1) the motion to intervene

is timely; (2) the movant claims an interest sufficiently related to the subject of the action; (3) 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 its interests; and (4) the movant's interests are not adequately represented by the existing parties. Wis. Stat. § 803.09(1); *see also Helgeland v. Wis. Muns.*, 2008 WI 9, ¶¶ 37–38, 307 Wis. 2d 1, 745 N.W.2d 1. Proposed Intervenors easily meet each of these conditions and are entitled to intervene as a matter of right.

A. Proposed Intervenors' Motion to Intervene is timely.

First, the Motion to Intervene is timely. Proposed Intervenors participated at the outset of this action as non-parties and are now seeking intervention at the earliest possible stage of this action—pursuant to this Court's request for intervention motions by October 6, 2021. And given that Petitioners request the Court "accept jurisdiction of this case and stay it," Pet. at 12, there is no risk of any delay to the subsequent consideration of the merits. In light of "all the circumstances," it is clear that Proposed

Intervenors have “acted promptly.” *State ex rel. Bilder v. Delavan Twp.*, 112 Wis.2d 539, 550–51, (1983) (holding that moving to intervene within “nine days after the action was filed” was timely, even though a proposed settlement was already before the court).

B. Proposed Intervenors have compelling interests at stake in this action.

Proposed Intervenors clearly have compelling interests in the issues addressed in the Petition. Proposed Intervenors are registered Wisconsin voters who live in congressional, State Senate, and/or State Assembly districts that are overpopulated. Proposed Intervenors’ right to an equal vote will be denied absent the implementation of new redistricting plans. Proposed Intervenors share Petitioners’ view that, “given the delay in census results and the fact that Wisconsin currently has divided government,” it is unlikely the political branches will be able to implement new maps in time for the 2022 election. Pet. at 16-17. Thus, absent court action, Proposed Intervenors’ “right to vote [will] simply not [be] the same right to vote as that of those living in a favored part of the State.” *Reynolds v. Sims*, 377 U.S. 533, 563

(1964). Specifically, Proposed Intervenors have a compelling interest in ensuring that any redistricting plan is adopted in a timely manner to protect their right to associate with like-minded individuals in advance of the 2022 election. Under these circumstances, Proposed Intervenors' interest is squarely "of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *Helgeland*, 2008 WI 9 at ¶ 45.

C. Denial of the Motion to Intervene would impair Proposed Intervenors' ability to protect their interests.

Denial of Proposed Intervenors' Motion would leave their critical interests unprotected. With respect to this element of the test for intervention, as with others, this Court has emphasized "a pragmatic approach" and a "focus on the facts of each case and the policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶ 79 (citing Moore's Fed. Prac. § 24.03(3)(a), at 24–42).

Here, Proposed Intervenors are intimately affected by the outcome of this litigation—both as voters and litigants. As voters,

Proposed Intervenors are interested in how the districts where they reside are drawn and how their constitutional rights are protected—all issues that this Court has been asked to resolve in the first instance. And as litigants, Proposed Intervenors are uniquely affected by the Court’s handling of this suit. Proposed Intervenors have already filed a similar action in federal court to vindicate their constitutional rights. *See Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis. Aug. 13, 2021). Petitioners have expressly requested that this Court take up the matter and assume responsibility of Wisconsin’s redistricting maps over the federal court. Pet. at 4 (citing *Jensen v. Wis. Elections Bd.*, 249 Wis. 2d 706, 717 (2002)). Petitioners have since intervened in that concurrent federal suit and filed multiple motions to stay. *See Hunter v. Bostelmann*, 21-CV-512, Dkt. Nos. 21.2, 79 (W.D. Wis.). If the federal suit is stayed pending judgment from this Court—as Petitioners have requested—then Proposed Intervenors’ ability to vindicate their rights will be directly implicated and possibly foreclosed by this proceeding.

Of particular note, Petitioners' attempts to stay the Proposed Intervenors' federal litigation have also extended to the issue of Wisconsin's congressional maps. They do so despite having, in their Petition before this Court, expressly disavowed any federal claims, Pet. at 2, and only raising a challenge to congressional districts under the "one person one vote principle, contained in art. IV of the Wisconsin Constitution." Pet. at 1. By its plain terms, art. IV creates Wisconsin's legislative branch and only applies to senate and assembly districts. Thus, Proposed Intervenors have argued, both to this Court and the federal court, that the Petition does not state a cognizable claim as it relates to Wisconsin's congressional districts. *See Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, Amicus Brief at 13-15 (Sept. 7, 2021); *Hunter v. Bostelmann*, 21-CV-512, Dkt. No. 93, Opposition at 5-6 (W.D. Wis. Oct. 1 2021). Indeed, the lone case that Petitioners cited as a basis for their congressional claim, *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551

(1964), exclusively concerns reapportioning Wisconsin's state legislative districts.

This Court has not yet reached the question of whether Petitioners' claim as to Wisconsin's congressional districts is properly raised in this original action, *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA, Order at 3 (Sept. 22, 2021) ("To the extent this order does not address other requests for relief contained in the petition, we take no action on those requests at this time."), but given the interconnectedness of this action and the parallel federal litigation, Proposed Intervenor are intensely interested in discerning whether this Court will interpret art. IV of the Wisconsin Constitution to impose a one person, one vote requirement on congressional districts, as well as state legislative districts. If this Court determines that art. IV does impose requirements on congressional districts, Proposed Intervenor are

prepared to assist the Court in applying that rule to Wisconsin's existing map.¹

D. Proposed Intervenors' interests are not adequately represented by the current parties.

Finally, Proposed Intervenors' interests are not adequately represented by the existing parties. The burden to satisfy this factor is "minimal." *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357, 361-62 (1994) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). When there is a realistic possibility that the existing parties' representation of the proposed intervenor's interests will be inadequate, "all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf." 1 Jean W. Di Motto, *Wisconsin Civil Procedure Before Trial* § 4.61, at 41 (2d ed. 2002)

¹ In the accompanying pleading, Proposed Intervenors plead a claim for congressional malapportionment under art. IV of the Wisconsin Constitution out of an abundance of caution and to ensure that, if this Court recognizes such a claim, Proposed Intervenors are able to fully participate in this Court's adjudication of the congressional plan. However, Proposed Intervenors' position is that, by its terms, art. IV applies only to state legislative districts and cannot support a congressional malapportionment claim.

(citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

Neither Petitioners nor Respondents adequately represent Proposed Intervenors' interests.

First and foremost, only Proposed Intervenors are seeking to protect the associational rights of Wisconsin voters. Delays and uncertainty have already been introduced by the impending impasse between the Governor and the Legislature. Wisconsin voters have a right to timely know what districts they reside in, which candidates they can vote for, and where their associational activities should be directed. No other party adequately represents those interests because no other party has introduced those interests to this Court. Moreover, the other parties' omission of these issues is likely to produce disagreements over what timeline this Court must operate under—a critical question immediately before the Court.

Second, Proposed Intervenors and Petitioners bring claims on behalf of distinct malapportioned districts in Wisconsin. Petitioners reside in only four overpopulated state legislative

districts: Senate Districts 26 and 19, and Assembly Districts 78 and 56. In contrast, Proposed Intervenors include voters from five additional overpopulated districts: Senate Districts 2 and 5, and Assembly Districts 13, 76, and 77. Proposed Intervenors' connection to districts that are unrepresented in Petitioners' action is particularly important given Petitioners' misguided suggestions about how this Court should approach redistricting. For example, Petitioners' request that this court follow a "least changes approach," Pet. at 12, would subordinate other traditional redistricting criteria that may better vindicate Proposed Intervenors' rights and interests.

Finally, Proposed Intervenors similarly cannot rely on the Wisconsin Elections Commission (WEC) to represent their interests. Though the WEC is entrusted with administering elections, *see* Wis. Stat. § 5.05, it has no power to alter Wisconsin's district maps and it has no interest in ensuring that the maps preserve any of Proposed Intervenors' rights or interests. In fact, in the Proposed Intervenors' federal suit, the WEC has stated that

it has “no authority to draw district maps and, accordingly, takes no position in this consolidated action as to the particulars of any maps.” *Hunter v. Bostelmann*, 21-CV-512, Dkt. No. 98, Joint Discovery Plan at 3 (W.D. Wis. Oct. 1, 2021). Only Proposed Intervenors can adequately represent their constitutional rights in this action.

II. In the alternative, the Court should exercise its discretion under Wis. Stat. § 803.09(2) to permit Proposed Intervenors to intervene.

In the alternative, this Court should permit intervention under Wis. Stat. § 803.09(2). This Court can exercise its broad discretion to permit a party to intervene any time (1) the “movant’s claim or defense and the main action have a question of law and fact in common,” (2) intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties,” and (3) the motion is timely. Wis. Stat. § 803.09(2); *see also Helgeland*, 2008 WI 9, ¶¶ 119–20. Even when courts deny intervention as of right, they often find that permissive intervention is appropriate.

See, e.g., City of Chicago v. Fed. Emergency Mgmt. Agency, 660 F.3d 980, 986 (7th Cir. 2011).

Here, Proposed Intervenors meet the criteria for permissive intervention. The timeliness of this motion remains beyond dispute. Especially given Petitioners' request that the Court immediately stay this action, there is no prospect for undue delay or prejudice to the original parties' rights. And Proposed Intervenors' parallel claims necessarily raise common questions of law and fact, including the appropriate schedule for court intervention and the necessity of properly apportioned districts. Proposed Intervenors are prepared to contribute to the complete development of the factual and legal issues before this Court to permit a resolution of this suit in advance of the 2022 election.

CONCLUSION

For the reasons stated above, this Court should grant Proposed Intervenors' motion to intervene as of right. In the alternative, this Court should exercise its discretion and grant the Proposed Intervenors permissive intervention.

Dated: October 6, 2021

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Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,478 words.

Dated: October 6, 2021

/s/ Aria C. Branch
Aria C. Branch

CERTIFICATE OF SERVICE

I certify that on this 6th day of October, 2021, I caused a copy of this brief to be served upon counsel for each of the parties via e-mail and Federal Express.

Dated: October 6, 2021

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