

No. 2021AP1450

In the Supreme Court of Wisconsin

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS,
and RONALD ZAHN,
PETITIONERS,

v.

WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN *in her official capacity as a member of the Wisconsin Elections Commission*, JULIE GLANCEY *in her official capacity as a member of the Wisconsin Elections Commission*, ANN JACOBS *in her official capacity as a member of the Wisconsin Elections Commission*, DEAN KNUDSON *in his official capacity as a member of the Wisconsin Elections Commission*, ROBERT SPINDELL, JR. *in his official capacity as a member of the Wisconsin Elections Commission* and MARK THOMSEN *in his official capacity as a member of the Wisconsin Elections Commission*,
RESPONDENTS.

On Petition To The Supreme Court To
Take Jurisdiction Of An Original Action

**MEMORANDUM OF CONGRESSMEN GLENN GROTHMAN,
MIKE GALLAGHER, BRYAN STEIL, TOM TIFFANY, AND
SCOTT FITZGERALD IN SUPPORT OF THEIR MOTION TO
INTERVENE AS PETITIONERS**

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

*Counsel for Congressmen Glenn
Grothman, Mike Gallagher, Bryan Steil,
Tom Tiffany, and Scott Fitzgerald*

TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION | 1 |
| STATEMENT OF INTEREST | 1 |
| ARGUMENT | 3 |
| I. This Court Should Grant the Congressmen Intervention As Of Right Under Rule 803.09(1)..... | 5 |
| II. Alternatively, This Court Should Permit The Congressmen To Intervene Under Rule 803.09(2) | 15 |
| CONCLUSION..... | 19 |

INTRODUCTION

Congressmen Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott Fitzgerald (hereinafter “the Congressmen”) respectfully move to intervene as Petitioners. The Congressmen have a direct interest in the contours of Wisconsin’s congressional districts given their status as elected representatives who all intend to run for reelection in 2022. Accordingly, this Court should grant the Congressmen intervention as of right or, at minimum, permissive intervention, as members of Congress are regularly permitted to intervene in redistricting challenges.

Counsel for the Congressmen conferred with counsel for Petitioners and Respondents: Petitioners do not oppose the Congressmen’s motion, and Respondents take no position.

STATEMENT OF INTEREST

The Congressmen are the duly elected Representatives to the U.S. House of Representatives from five of Wisconsin’s eight congressional districts, who all intend to be candidates for reelection in 2022. And each Congressman also resides within his district. Appendix to Congressmen’s Intervention

Memorandum (“App.”) at 1–27. The Congressmen all have the solemn duty to “promote and protect their [constituents] interests,” which duty requires them to kindle “close relations” and “common feeling[s] and interests” with the citizens of the districts from which they were elected. *State ex rel. Att’y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892); accord *McCormick v. United States*, 500 U.S. 257, 272 (1991). Accordingly, each Congressman has invested substantial time and resources to understand the needs of the constituents in the districts that they represent. App. 1–27.

The Congressmen’s solemn relationship with their constituents and their intent to run for reelection in 2022 give them a substantial interest in the ongoing redistricting process for Wisconsin’s congressional districts. This is because the “contours of the maps” for Wisconsin’s congressional districts “determin[e] which constituents the Congressmen must court for votes and represent in the legislature,” so any change to those contours “affect[s] the Congressmen directly and substantially.” *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 579 (6th Cir.

2018); App. 1–27. For these reasons, federal courts regularly permit members of Congress to intervene in redistricting actions related to their maps. *See, e.g., Johnson*, 902 F.3d at 579; Order, *Hunter v. Bostelmann*, Nos. 3:21cv512-jdp-ajs-eeec, *et al.*, Dkt.60 at 3–4, (W.D. Wis. Sept. 16, 2021) (hereinafter “*Hunter Order*”); *Baldus v. Members of Wis. Gov’t Accountability Bd.*, No. 2:11cv562-JPS-DPW-RMD, 2011 WL 5834275, at *2 (E.D. Wis. Nov. 21, 2011); *Ohio A. Philip Randolph Inst. v. Smith*, No. 1:18cv357, 2018 WL 8805953, at *1 (S.D. Ohio Aug. 16, 2018). And, analogously, this Court in *Jensen v. Wisconsin Elections Board*, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), permitted leaders of the minority party in the Assembly and Senate to intervene in support of the interests of “Senate and Assembly Democrats,” in a case involving “state legislative redistricting.” *Id.* ¶ 1.

ARGUMENT

Rule 803.09 governs intervention, including in a case before this Court in its original jurisdiction. *See* Amended Order Granting Petition at 3, *Johnson v. Wis. Elections Comm’n*, No.2021AP1450-OA (Wis. Sept. 24, 2021)

(hereinafter “*Johnson* Order”) (instructing proposed intervenors to “address[] the requirements of Wis. Stat. § (Rule) 803.09”). As relevant here, Rule 803.09 recognizes two forms of intervention: intervention as of right, Wis. Stat. § (Rule) 803.09(1), and permissive intervention, Wis. Stat. § (Rule) 803.09(2); see *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶¶ 35, 119, 307 Wis. 2d 1, 745 N.W.2d 1. For intervention as of right, Rule 803.09(1) provides that “[u]pon timely motion anyone shall be permitted to intervene in an action when 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. § (Rule) 803.09(1). For permissive intervention, in turn, Rule 803.09(2) states that “[u]pon timely motion 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”—and “[i]n exercising its discretion the court shall

consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § (Rule) 803.09(2); *see generally* Wis. Stat. § (Rule) 803.09(3) (requiring submission of proposed “pleading setting forth the claim or defense for which intervention is sought”). This Court has held that Rules 803.09(1) and 803.09(2) are “based on” Federal Rule of Civil Procedure 24, and that cases interpreting the federal rule thus “provide guidance” to this Court “in interpreting and applying” Rule 803.09. *Helgeland*, 2008 WI 9, ¶¶ 37, 119.

Here, the Congressmen satisfy the requirements of Rule 803.09(1), thus this Court should grant them intervention as of right. *Infra* Part I. Alternatively, the Congressmen meet the requirements for Rule 803.09(2), so this Court should grant them permissive intervention. *Infra* Part II.

I. This Court Should Grant the Congressmen Intervention As Of Right Under Rule 803.09(1)

“A movant must satisfy four requirements to intervene as a matter of right under Wis. Stat. § 803.09(1).” *Helgeland*, 2008 WI 9, ¶ 38. First, “the movant’s motion to intervene

[must be] timely.” *Id.* Second, the movant must “claim[] an interest sufficiently related to the subject of the action.” *Id.* Third, the movant must show that “disposition of the action may as a practical matter impair or impede the movant’s ability to protect that interest.” *Id.* And fourth, the movant must demonstrate that “the existing parties do not adequately represent the movant’s interest.” *Id.* Although satisfaction of each element is required, this Court conducts a “holistic, flexible, and highly fact-specific” review to determine whether a movant satisfies Rule 803.09(1). *Id.* ¶¶ 39–40. Further, “the criteria need not be analyzed in isolation from one another, and a movant’s strong showing with respect to one requirement may contribute to the movant’s ability to meet other requirements as well.” *Id.* ¶ 39. Whether a movant satisfies Rule 803.09(1) “is a question of law.” *Id.* ¶ 41.

The Congressmen satisfy the Rule 803.09(1) elements.

1. *The Congressmen’s Motion is timely.* Whether a motion to intervene is timely “is left to the discretion of the [] court.” *Id.* ¶ 42. Here, this Court ordered all prospective intervenors to file their intervention motions by Wednesday,

October 6, 2021. *Johnson* Order at 3. Since the Congressmen have met this deadline, their Motion To Intervene is timely.

2. *The Congressmen have a substantial interest that is closely related to this action.* To determine whether a movant's interest is sufficient to support intervention as of right, this Court "employ[s] a broad[] pragmatic approach" that rejects "precise test[s]" and "technical[]" requirements. *Helgeland*, 2008 WI 9, ¶ 43 (citations omitted); *accord Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 472–75, 516 N.W.2d 357 (1994). Thus, this Court "treat[s] the interest test as primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Helgeland*, 2008 WI 9, ¶ 44 (citation omitted). So, to satisfy this requirement, the movant need only show that he "will either gain or lose by the direct operation of the judgment" and that his claimed interests are not simply "remotely related to the subject of the action." *Id.* ¶ 45 (citations omitted).

The Congressmen have a direct and substantial interest in this case, and they "will either gain or lose" should

this Court render a “judgment” adopting new congressional district maps for the State. *Id.* As elected representatives, the Congressmen are duty-bound to “promote and protect their [constituents’] interests” by representing them in the U.S. House of Representatives, *Cunningham*, 51 N.W. at 730; accord *McCormick*, 500 U.S. at 272, and they all intend to run for reelection in 2022 to continue to represent their constituents’ interests, *supra* p. 2. Further, and relatedly, the Congressmen have invested substantial time and resources developing the “relationship between” themselves as “representative[s]” and their “constituent[s]” so that they may more effectively serve them in the House. *Johnson*, 902 F.3d at 579 (citation omitted); *supra* p. 2. It is the “contours of the maps” of the districts that the Congressmen represent that directly “determin[e] which constituents the Congressmen must court for votes and represent in the legislature” in this manner. *Johnson*, 902 F.3d at 579. Therefore, the Congressmen stand to “gain or lose” directly from any “judgment” from this Court adopting new congressional maps, *Helgeland*, 2008 WI 9, ¶ 45 (citations omitted), to the extent

that judgment either preserves or disregards the existing lines of Wisconsin's congressional districts, *see Johnson*, 902 F.3d at 579 (holding that changing the "contours" of district lines will "directly and substantially" affect members of Congress); *supra* pp. 2–3; *accord Jensen*, 2002 WI 13, ¶ 1.

The clear tie between the Congressmen's relationship with their constituents and the contours of the districts is why federal courts regularly grant members of Congress intervention to protect their interest in redistricting litigation. *See Helgeland*, 2008 WI 9, ¶ 37 (federal intervention cases "provide guidance" to this Court). The Sixth Circuit's opinion in *Johnson*, 902 F.3d 572, is the leading federal case on this issue. There, the Sixth Circuit ordered the grant of intervention in a redistricting challenge to members of Congress because of "the relationship between constituent and representative" and the understanding that "the contours of the maps affect the Congressmen directly and substantially by determining which constituents the Congressmen must court for votes and represent." *Id.* at 579 (citation omitted). Other federal courts are in accord. *See*,

e.g., *Hunter* Order at 3 (granting intervention to the Congressmen since they are “incumbents and prospective candidates” who have “a substantial interest in the redistricting process”); *Baldus*, 2011 WL 5834275, at *2 (granting intervention to Wisconsin’s Republican and Democratic Congressmembers); *Smith*, 2018 WL 8805953, at *1 (similar, as to Congressmembers from Ohio). While these federal courts granted permissive intervention, *see infra* Part II, the Congressmen respectfully submit that the “close relations” and the strength of the “common feeling[s] and interests” that they have with their constituents, as well as their intent to run for reelection suffice for intervention as of right, *Cunningham*, 51 N.W. at 730—especially under the “broad[] pragmatic approach” that this Court employs as a matter of Wisconsin law, *Helgeland*, 2008 WI 9, ¶ 43 (citations omitted).

3. *This case may impair the Congressmen’s core, direct interests in the contours of the districts.* As the Congressmen just explained, they have a core interest in their relationship with their constituents that is closely tied to the “contours of

the maps.” *Johnson*, 902 F.3d at 579; accord *Jensen*, 2002 WI 13, ¶ 1. The case here “may, as a practical matter, impair or impede” that interest, *Helgeland*, 2008 WI 9, ¶ 75, since Petitioners have asked this Court to “adopt a new [congressional] apportionment plan” if the “legislature fails to reapportion according to constitutional requisites in a timely fashion after having had an adequate opportunity to do so,” *Johnson* Order at 1–2 (citation omitted). Therefore, Petitioners’ claim puts the Congressmen’s interests directly at stake in this case. See *Helgeland*, 2008 WI 9, ¶ 75.

4. *The existing parties do not adequately represent the Congressmen’s interests.* Finally, a proposed intervenor must show that no other party adequately represents its interests, which requires only a “minimal” showing—although the necessary showing may be higher “[i]f a movant’s interest is identical to that of one of the parties, or if a party is charged by law with representing the movant’s interest.” *Helgeland*, 2008 WI 9, ¶¶ 85–86 (citations omitted).

Here, none of the existing parties represent the Congressmen's significant interest in the redistricting of Wisconsin's congressional districts. *Id.* ¶¶ 90–91.

Petitioners brought their Petition to defend their own individual interests as “Wisconsin voters,” and therefore, they cannot possibly represent the Congressmen's interest here. Pet. at 5–6. “[T]he Congressmen's interest” “differ[s] from” Petitioners' individual interests. *Johnson*, 902 F.3d at 579. The Congressmen are elected representatives to the House who intend to seek reelection in 2022, and so they have a distinct “representative interest” in this litigation that Petitioners do not share. *Id.*

Respondents (collectively, the “Commission”) do not represent the Congressmen's interest either. The Commission's interest is in implementing the final redistricting maps as it carries out its duty to administer elections under Wisconsin law. *See* Wis. Stat. chs. 5–10, 12; *accord Johnson*, 902 F.3d at 579 (“provid[ing] fair and smooth administration of elections”). The Congressmen's interest is different, as they *do* have a specific, representative interest in

“the contours of the maps,” *Johnson*, 902 F.3d at 579, and thus “will either gain or lose” in proportion to how this Court reapportions the congressional districts, *Helgeland*, 2008 WI 9, ¶ 45 (citations omitted).

The interests of other potential intervenors are not relevant here, as potential intervenors are not “*existing* parties.” *Helgeland*, 2008 WI 9, ¶ 85 (emphasis added); accord *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶ 24, 296 Wis. 2d 880, 724 N.W.2d 208, *aff’d*, 2008 WI 9. In any event, no potential intervenors could adequately represent the Congressmen, since they would not share the Congressmen’s “representative interest” as current officeholders who intend to run for reelection. *Johnson*, 902 F.3d at 579

The Congressmen plainly make the “minimal” showing that the other parties’ representation may be inadequate, and, indeed, would satisfy any higher standard, if such a higher standard were held to be applicable. *Helgeland*, 2008 WI 9, ¶ 85 (citations omitted). Petitioners’ request for this Court to draw a new congressional map, should the

Legislature and Governor fail to do so, most clearly shows this inadequacy. *See* Pet. at 1; *accord Johnson* Order at 1. To draw Wisconsin's congressional maps, a map drawer must follow the "standards for redistricting" that are "set[] forth" in the U.S. Constitution, federal law, the Wisconsin Constitution and Wisconsin law. *See Jensen*, 2002 WI 13, ¶¶ 4, 6, 11 & nn.1 & 3. Further, a map drawer may then take account of other "traditional redistricting criteria," such as "preserving the cores of prior districts" and "avoiding contests between incumbent Representatives." *League of Women Voters of Chicago ("LWV") v. City of Chicago*, 757 F.3d 722, 726 (7th Cir. 2014) (citations omitted). Given the significant differences among the interests of Petitioners, the Commission, and the Congressmen, they all may well differently "rank the relative importance of those traditional criteria and [differently] weigh how much deviation from each to allow." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). To take a particularly obvious example, it is reasonable to conclude that "avoiding contests between incumbent Representatives" will be more important, in-kind,

to the Congressmen than to the Petitioners and the Commission, as only the Congressmen would be the prospective candidates potentially being paired against each other. *LWV*, 757 F.3d at 726 (citations omitted).

II. Alternatively, This Court Should Permit The Congressmen To Intervene Under Rule 803.09(2)

If this Court does not conclude that the Congressmen have satisfied Rule 803.09(1)'s requirements for intervention as of right, then the Congressmen respectfully request that it grant them permissive intervention under Rule 803.09(2). Permissive intervention under Rule 803.09(2) requires only that the movant "timely" move to intervene and that he has a "claim or defense" that has "a question of law or fact in common" with "the main action." Wis. Stat. § (Rule) 803.09(2); *Helgeland*, 2008 WI 9, ¶ 119. Then, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," Wis. Stat. § (Rule) 803.09(2), along with other relevant factors, *Helgeland*, 2008 WI 9, ¶¶ 120–27; see generally *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶ 11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94.

Here, the Congressmen satisfy the only two required elements for permissive intervention under Rule 803.09(2).

The Congressmen's Motion To Intervene is timely, as already described above. *Supra* pp. 6–7.

Further, the Congressmen have simultaneously filed a proposed Petition that raises a “claim” sharing “a question of law or fact in common” with Petitioners’ Petition. Wis. Stat. § (Rule) 803.09(2); *Helgeland*, 2008 WI 9, ¶ 119. Specifically, the proposed Petition raises the common question of whether Wisconsin’s existing congressional districts violate the equal-population principle found in the Wisconsin Constitution, including, without limitation, Article I, Section 1 and Article IV. *See* Proposed Pet. at 8; Pet. at 1. That is consistent with the scope of this Court’s Order granting the Petition, which covers all provisions “of the Wisconsin Constitution” relevant to whether the state and congressional districts are unconstitutionally “malapportioned.” *Johnson* Order at 1. Article IV, for example, provides that the Legislature must “apportion” the state legislative districts “according to the number of inhabitants,” Wis. Const. art. IV, § 3, thereby

requiring the “one person, one vote” rule, which is logically applicable to all apportionment by the Legislature, including as to congressional districts, *see State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1964). As for Article I, Section 1, this provision offers “essentially the same” protection as does the U.S. Constitution’s Equal Protection Clause, *see County of Kenosha v. C. & S. Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999), thereby clearly including the “one-person, one-vote” rule for all districts, including congressional districts, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016), and thus prohibiting “malapportioned” districts, in the words of this Court’s Order granting the Petition here, *Johnson* Order at 1.

As for other relevant factors supporting permissive intervention, the Congressmen’s interest here is substantial and direct. The Congressmen serve their constituents as elected Representatives, and they intend to run for reelection. *Supra* p. 2. So, since the “contours of the maps” of the districts “determin[e] which constituents the Congressmen must court for votes and represent in the legislature,” the

Congressmen are “directly and substantially” affected by this case. *Johnson*, 902 F.3d at 579.

Granting the Congressmen intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § (Rule) 803.09(2). This Court has already recognized that it would “benefit from the input of . . . prospective intervenors” on certain issues in this case. *Johnson* Order at 2–3. Further, the Congressmen’s presence could *facilitate* this Court’s timely consideration of the constitutional issues here by eliminating unnecessary and entirely meritless motion-to-dismiss practice from the *Hunter* Plaintiffs with regard to the congressional districts. In the parallel federal proceedings, the *Hunter* Plaintiffs sought to forward their cynical forum-shopping agenda of keeping redistricting away from this Court, *see* Nonparty Br. of the Congressmen at 6, No. 2021AP1450 (Wis. Sept. 8, 2021), by arguing that Petitioners’ equal-population claim for the congressional districts was somehow not properly before this Court, because Petitioners cited only Article IV, not Article I, Section 1, to support that claim. Pls.’ Resp. To Second Mot.

To Stay, *Hunter*, Nos. 3:21cv512, Dkt. 93 at 5–6, Nos.21-cv-512 (W.D. Wis. Oct. 1, 2021). Granting the Congressmen’s Motion would eliminate any need for this Court to trouble itself with such meritless arguments, as the Congressmen’s proposed Petition explicitly cites to both Article IV *and* Article I, Section 1 to support the same equal-population claim against the congressional districts on which this Court has already granted Petitioners’ Petition in this case. Proposed Pet. at 8.

CONCLUSION

This Court should grant the Congressmen’s Motion To Intervene.

Dated: October 6, 2021.

Respectfully submitted,



MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

*Counsel for Congressmen Glenn
Grothman, Mike Gallagher, Bryan Steil,
Tom Tiffany, and Scott Fitzgerald*