

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP1450-OA

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.

**MEMORANDUM IN SUPPORT OF MOTION TO
INTERVENE BY GOVERNOR TONY EVERS**

Wisconsin Governor Tony Evers, in his official capacity, respectfully moves the Court for intervention as a defendant in this original action. As this Court has recognized, the Governor and Legislature are joint participants in Wisconsin's reapportionment process. Further, the Governor

has affirmatively taken steps to participate in that process by creating the People's Maps Commission, which will produce maps for consideration by the Governor and Legislature. For these reasons, 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 parallel federal litigation.

First, 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. That should remain true here.

Second, the Governor has ongoing involvement with the redistricting process. That is embodied in the Governor's Executive Order #66 that created the nonpartisan People's Maps Commission, which is tasked with seeking input and drawing impartial maps for the Legislature and Governor to consider. The Commission, and the relevance its plan would have to the remedy stage of a redistricting lawsuit, provides a second reason for the Governor's intervention.

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). Further, "[w]hen a party to an action relies . . . upon any . . . executive order . . . administered by a . . . governmental officer, . . . the officer . . . may be permitted to intervene in the action." *Id.* "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 and his creation of the People's Maps Commission.

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 now, where the Governor has created a Commission that is actively working on proposed maps.

Consistent with *Reynolds* 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, this 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.

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 the new maps. Further, this action also relates to an "executive order . . . administered by" the Governor—namely, Executive Order #66, which created the People's Maps Commission. 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 joint interest in the reapportionment process. 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 a joint 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 jointly responsible for the reapportionment process. Wis. Stat. § 803.09(1). Further, other potential intervenors would not represent his interests. The Legislature, for example, has represented in federal court filings that it does “not have the same goal” as the Governor. Memo in Supp. of Mot. to Intervene at 11, *Hunter v. Bostelmann*, No. 21-cv-512 (W.D. Wis. Aug. 17, 2021), Dkt. 9.

Consistent with *Reynolds*, 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 (E.D. Wis. 1982), concerned Wisconsin’s redistricting after the 1980 census. *Wisconsin State AFL-CIO*, 543 F. Supp. at 632. Then, like now, 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 as a defendant).

Regarding the present redistricting process, a federal panel recently granted the Governor intervention as a defendant in *Hunter v. Bostelmann*, W.D. Wis. 21CV512, Dkt. 60:4, explaining that he “can make the same case for intervention as the Legislature.” He currently is a party to that redistricting litigation and also should be for any action before this Court.

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

B. The Governor’s intervention also is warranted given the work of the People’s Maps Commission.

While the Governor’s institutional role alone justifies intervention, he also is involved in the redistricting process as a matter of fact. In Executive Order #66, issued January 27, 2020, the Governor created the People’s Maps Commission. See Wis. Stat. § 14.019 (providing statutory authority to create gubernatorial advisory committees).² Executive Order #66 created a nonpartisan redistricting commission tasked with discerning the salient circumstances of Wisconsin’s apportionment and then applying the legally-required, neutral criteria to draw fair maps. The Commission has, for example, conducted public hearings throughout Wisconsin in fall 2020.³ And that is only a small portion of the many hours the Commission has spent gathering information relevant to drawing new maps. It now is working to prepare maps using

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.”).

² Wis. Governor Tony Evers, *EXECUTIVE ORDER #66*, Relating to Creating the People’s Maps Commission (Jan 27, 2020), <https://evers.wi.gov/Documents/EO/EO066-PeoplesMapsCommission.pdf>.

³ The People’s Maps Commission, *Hearings & Meetings*, <https://govstatus.egov.com/peoplesmaps/hearings-meetings> (last updated Sept. 30, 2021).

established redistricting criteria, and those maps then will be presented to the Legislature.

The Commission's maps would be highly relevant to a court's task in a reapportionment action. The legal and factual considerations used by the Commission when drawing its maps will parallel the considerations before a court when addressing redistricting. And, more generally, the Commission makes concrete the Governor's central role in the redistricting process in Wisconsin, well before the Legislature sends him a bill. The Commission is the Governor's way of providing a neutral recommendation to the Legislature, which this Court recognizes as one of the Governor's roles in redistricting. *State ex rel. Reynolds*, 22 Wis. 2d at 557. It is another reason that the Governor should be granted intervention.

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 focus his participation on providing this Court with a fuller picture of what maps are possible and proper under the redistricting criteria as applied to Wisconsin, thereby aiding the Court if it were to reach the remedy stage of drawing maps.

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* and federal cases.

CONCLUSION

The Governor respectfully requests that the Court grant his motion to intervene as a defendant.⁴

Dated this 6th day of October 2021.

Respectfully submitted,

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⁴ Consistent with his status in federal litigation, the Governor moves for intervention as a defendant. However, if this Court believes he is more properly designated a plaintiff, then the Governor alternatively moves for intervention in that capacity.