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.

HUNTER INTERVENORS' RESPONSE TO COLLECTIVE MOTIONS TO INTERVENE

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INTRODUCTION

On September 22, this Court granted a petition for an original action filed by Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn (the "Johnson Petitioners"). *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA, Order (Sept. 22, 2021). Pursuant to that order, prospective intervenors Lisa Hunter, Jacob Zabel, Jennifer Oh, Johns Persa, Geraldine Schertz, and Kathleen Qualheim (the "Hunter Intervenors") filed their motion to intervene on October 6, 2022.

The Hunter Intervenors are aware of six other groups that have similarly sought intervention in this original action: Black Leaders Organizing for Communities, Vocas de la Frontera, League of Women Voters of Wisconsin, Cindy Fallon, Lauren Stephenson, and Rebecca Alwin (the "BLOC Intervenors"); Gary Krentz, Sarah Hamilton, Stephen Write, Jean-Luc Thiffeault, and Somesh Jha (the "Citizen Mathematicians and Scientists"); Glenn Grothman, Mike Gallagher, Bryan Steil, Tom Tiffany, and Scott

Fitzgerald (the "Congressmen"); the State Senate Minority Leader; the Wisconsin Legislature; and Governor Tony Evers.

Pursuant to the Court's September 22 Order, the Hunter Intervenors provide this response to the collective motions to intervene. The Hunter Intervenors do not object to intervention by the BLOC Intervenors, the Citizen Mathematicians and Scientists, the State Senate Minority Leader, the Wisconsin Legislature, or the Governor. However, as the Congressmen fail to satisfy the criteria for intervention as of right or permissive intervention, the Hunter Intervenors oppose their intervention.

The Congressmen's motion suffers from a fatal defect—there is no support for a malapportionment claim brought by members of Congress. Accordingly, the Congressmen have not established a cognizable interest in this action. Moreover, it is not clear that they will be affected by the disposition of this action, since the validity of the congressional apportionment claim before this Court is similarly unsupported. Finally, the Congressmen are already adequately represented by the Johnson Petitioners, and

permitting them to intervene cannot be expected to contribute to the judicious disposition of this action.

ARGUMENT

I. The Congressmen have not shown entitlement to intervention as 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. The Congressmen must satisfy each of these requirements to be entitled to intervention. *Id.* at ¶ 39.

The Hunter Intervenors do not dispute that the Congressmen's motion is timely. However, the Congressmen have failed to satisfy any of the other three criteria under § 803.09(1):

the Congressmen hold no cognizable interest in this action, none of their alleged interests would be impaired by the disposition of this action, and their interests are adequately represented by the existing parties. Furthermore, as the Congressmen's claims do not practically have common questions of law that this Court will decide, permitting their intervention under Wis. Stat. § 803.09(2) would only cause undue prejudice to the existing parties and the process.

A. The Congressmen lack an interest in this action.

The Congressmen have failed to identify an interest that is "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 (citations omitted). The Congressmen have asserted no legally cognizable interest in the contours of their districts, and they certainly do not have an interest in *challenging* their own districts as petitioners. The Congressmen only allege an interest in this litigation in their capacity as members of Congress; they do not allege that their votes have been unconstitutionally

diluted, and indeed only one of the Congressmen resides in and represents an overpopulated congressional district. Though the Congressmen bring their claims under the Wisconsin Constitution, they do not explain how the Wisconsin Constitution protects the right of federal elected officials to challenge the apportionment of their own districts.

The Congressmen's memorandum in support of their intervention describes their relevant interest as being "duty-bound to promote and protect their constituents' interests" in the House of Representatives. *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA, Congressmen's Brief in Support of Intervention at 8 (Oct. 6, 2021) ("Br.") (quotations omitted). However, the Congressmen were only elected to represent their constituents for two years. *See* U.S. Const. art. I. § 2, cl. 1. Nothing in this litigation will affect the term of that representation, or the composition of the districts they currently represent. Instead, this suit will only affect the 2022 election and beyond; and the Congressmen's only interest in that litigation is their own intended candidacies. For

that reason, they are no more interested than "all other Wisconsin residents who would be eligible to run for a congressional seat" in 2022. *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW, 2011 WL 5834275, at *1-2 (E.D. Wis. Nov. 21, 2011) (declining to grant intervention as of right to congressional incumbents because they did not "satisfy[y] the interest requirement").

Furthermore, the Congressmen are not seeking to intervene to defend the districts they've been elected to represent—they seek to *challenge* them. The Congressmen have not identified a single case where Wisconsin courts have allowed members of Congress to bring malapportionment challenges against their own districts. The Congressmen repeatedly rely on a federal case, *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572 (6th Cir. 2018), to support their intervention. Br. at 2, 3, 8, 9, 11-13, 18. However, in that case, members of Congress sought to intervene to "defend the lawfulness of the state's apportionment schemes." *Id.* at 575. Indeed, in the parallel federal litigation, the Congressmen

sought and were granted intervention as defendants. *See Hunter v. Bostelmann*, 21-CV-512, Dkt. 60, Order (W.D. Wis. Sept. 16, 2021) (granting permissive intervention to the Congressmen as intervenor-defendants).

The Congressmen's invocation of *Jensen* is also inapplicable. There, incumbent state legislators were only "permitted to intervene on the initial jurisdictional question." *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶ 1, 249 Wis. 2d 706, 708, 639 N.W.2d 537, 538. Moreover, those legislators intervened in opposition to the petition, not as intervenor-petitioners. *Id.* at ¶ 3. Simply put, the Congressmen have not identified support for the proposition that the Wisconsin Constitution empowers incumbent federal representatives to challenge their own districts.

B. The disposition of this action does not threaten the alleged interests of the Congressmen.

Even if the Congressmen did have a cognizable interest in the "contours of the maps of the districts that the Congressmen represent," it is not clear that this Court will "adopt[] new congressional maps." Br. at 8. The petition that this Court granted

alleged that Wisconsin's congressional districts "violate the one person one vote principle, contained in art. IV of the Wisconsin Constitution." *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA, Petition for an Original Action at 1 (Aug. 23, 2021). The Congressmen echo this claim in their proposed pleading. *Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA, Congressmen's Proposed Petition at 5 (Oct. 6, 2021). However, art. IV of the Wisconsin Constitution—on its face—exclusively concerns the Wisconsin Legislature and cannot ground a claim for congressional malapportionment. Therefore, the Congressmen cannot expect that this Court will have cause to alter their districts.[1]

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[1] In addition to well-established claims relating to state legislative districts, the Hunter Intervenors included a claim of congressional malapportionment under art. IV of the Wisconsin Constitution in their intervention papers. *See Johnson v. Wisconsin Elections Comm'n*, No. 2021AP1450-OA, Hunter Intervenor's Complaint at 2. (Oct. 6, 2021). As Hunter Intervenors explained therein, it is their view that art. IV does not support a claim for congressional malapportionment. *Id.* at 5 n.1. However, the claim was included to avoid any delay from amended pleadings were this Court to recognize such a claim for the first time. *Id.* If the Court does not recognize a congressional malapportionment claim under art. IV, the Hunter Intervenors still have an interest in their legislative malapportionment claims, whereas the Congressmen would be wholly unaffected by the disposition of this action.

Art. IV of the Wisconsin Constitution creates and vests the legislative power of the State of Wisconsin in the senate and assembly. *See* Wis. Const. art. IV, § 1. It also specifies that, after each Census, the legislature must reapportion districts for "members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV, § 3. It says nothing about congressional representation, and—by its very terms—the command of equal apportionment only applies to "the senate and assembly." *Id.*

Both the Johnson Petitioners and the Congressmen rely on *State ex rel. Reynolds v. Zimmerman* in support of their congressional claim. However, that case solely concerned issues relating to the reapportionment of state legislative districts. *Zimmerman*, 22 Wis.2d 544, 552, 126 N.W.2d 551 (1964). There is simply no basis to apply art. IV's equal population requirement to any body other than the Wisconsin Legislature.

The Congressmen also cite art. I, section 1 of the Wisconsin Constitution as a basis for a separate claim that Wisconsin's

congressional districts are malapportioned. Br. at 16-17. However, the Congressmen have not identified a single case where a malapportionment claim was recognized under art. I of the Wisconsin Constitution. The Congressmen argue that art. I, section 1 offers "'essentially the same protection'" as does the Fourteenth Amendment to the U.S. Constitution. Br. at 17 (citing *County of Kenosha v. C. & S. Mgmt., Inc.*, 223 Wis.2d 373, 393, 588 N.W.2d 236 (1999) (holding that the Wisconsin and U.S. Constitutions "provide identical procedural due process protections")). Even if the general equivalence between art. I of the Wisconsin Constitution and the Fourteenth Amendment includes apportionment claims, the Congressmen fail to note that the basis for requiring equal congressional districts is art. I, § 2 of the U.S. Constitution, not the Fourteenth Amendment. *See Evenwel v. Abbott*, 136 S.Ct. 1120, 1123-24 (2016) (noting that while "'[t]he Equal Protection Clause . . . requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis,'" the Court has "[r]el[ied] on Article I, § 2, of the

Constitution" to "require[] that congressional districts be drawn with equal populations") (quoting *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), and citing *Wesberry v. Sanders*, 376 U.S.1, 7-8 (1964)).

Because there is no reason to believe that art. IV of the Wisconsin Constitution imposes a one person, one vote requirement on Wisconsin's congressional districts, the Congressmen have failed to plead a cognizable claim and they are not affected, in any way, by the disposition of this action.

C. The Congressmen's interests are adequately represented in this lawsuit.

There is no basis for the Congressmen to suggest that, in their official capacity, they have an interest in challenging their own districts. To the extent the Congressmen invoke their "representative" interest, Br. at 12, only Congressman Mike Gallagher represents constituents from an overpopulated congressional district. However, two of Congressman Gallagher's constituents are already Petitioners in this case: Ed Perkins and Ronald Zahn. In that sense, existing parties already have interests that are "identical to that" of the proposed intervenors. *Helgeland*,

2008 WI 9, ¶ 86. Even if the Petitioners' views do not perfectly align with the personal and political interests of the Congressmen, because their interests are "substantially similar" to the Congressmen's interests, this factor "weigh[s] against the potential intervenor." *Id.*

II. The Congressmen should not be allowed to intervene permissively.

The Congressmen have failed to satisfy the criteria for permissive intervention under Rule 803.09(2). There is serious question whether the claims raised by the Congressmen share "a question of law or fact" with the main action. Wis. Stat. (Rule) § 803.09(2). The Congressmen only raise a novel state law malapportionment claim concerning the congressional districts, and this Court has yet to determine that there is a cognizable claim of congressional malapportionment before it. *See Johnson*, No. 2021AP1450-OA, Order at 3 ("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."). More importantly, the Congressmen have not established that they have a valid claim to

raise in the first place. Only one of the Congressmen resides in and represents an overpopulated district, and there is no basis to suggest that members of Congress can bring a claim against their own districts under the Wisconsin Constitution.

Further, this Court has every reason to expect that the Congressmen's intervention will only delay and prejudice the adjudication of this sensitive redistricting litigation. In support of their intervention, the Congressmen are already accusing other parties of pursuing a "cynical" agenda. Br. at 18. If that is the type of counsel the Congressmen intend to provide this Court, their intervention will only serve to "infuse additional politics into an already politically-divisive area of the law and needlessly complicate this case." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019) (affirming denial of permissive intervention).

CONCLUSION

For the reasons stated above, the Court should deny the Congressmen's motion to intervene.

Dated: October 13, 2021

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 2,225 words.

Dated: October 13, 2021

/s/ *Aria C. Branch*
Aria C. Branch

CERTIFICATE OF SERVICE

I certify that on this 13th 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 13, 2021

/s/ *Aria C. Branch*
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