

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LISA HUNTER, et al.,

Plaintiffs,

BILLIE JOHNSON, et al.,

Proposed Intervenor-Plaintiffs

v.

Case No. 3:21-CV-512-JDP

MARGE BOSTELMANN, et al.,
IN THEIR OFFICIAL CAPACITIES AS
MEMBERS OF THE WISCONSIN
ELECTIONS COMMISSION,

Defendants,

THE WISCONSIN LEGISLATURE,

Intervenor-Defendant

CONGRESSMEN GLENN GROTHMAN, et al.,

Proposed Intervenor-Defendants

GOVERNOR TONY EVERS,

Proposed Intervenor-Defendant

**MEMORANDUM IN SUPPORT OF WISCONSIN GOVERNOR
TONY EVERS' MOTION TO INTERVENE**

INTRODUCTION

Wisconsin Governor Tony Evers, in his official capacity, respectfully moves this Court for permissive intervention as a defendant.¹ The Governor's bases for intervention parallel those stated by this Court when granting the Wisconsin Legislature's motion, with one additional basis.

First, Wisconsin law recognizes a joint role for the Governor with the Legislature in redistricting: "the framers of the [Wisconsin] constitution intended to require his 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). Thus, the primary basis for this Court's granting of the Legislature's motion holds true for the Governor: it is his shared "responsibility to draw new legislative districts after a census." (Dkt. 24:3.) And, as with the Legislature, the original parties "are not themselves involved in redistricting." (Dkt. 24:3.)

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

¹ The Governor's representation here includes Assistant Attorneys General Brian Keenan and Anthony Russomanno, together with Attorney General Joshua L. Kaul. The Wisconsin Elections Commission and its officers are separately represented by Assistant Attorneys General Karla Keckhaver, Steven Kilpatrick, and Thomas Bellavia, together with Deputy Attorney General Eric J. Wilson.

consider. The Commission, and the relevance its plan would have to the map-drawing stage of this lawsuit, provides a second reason for the Governor's intervention.

Just as the Court concluded as to the Legislature, this litigation should not proceed without input from the Governor. (Dkt. 24:3.) That participation will cause no delay or adverse impact on the existing parties. The Governor intends to focus his participation on the merits of the remedial map this Court would enter, thereby providing the Court with a useful, nonpartisan map to consider. Otherwise, the Governor does not intend to unnecessarily duplicate briefing on procedural or other preliminary matters.

This Court therefore should grant the Governor's motion to intervene under Federal Rule of Civil Procedure 24(b).

PERMISSIVE INTERVENTION STANDARD

The Court has discretion to grant permissive intervention under Federal Rule of Civil Procedure 24(b) for either of two reasons. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000). First, intervention is proper where the intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Second, a state governmental officer may intervene when a claim or defense is based on "a statute or executive order administered by the officer or agency" or an agreement issued under that order. Fed. R. Civ. P. 24(b)(2)(A) & (B).

In exercising its discretion, the Court considers whether “the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

ARGUMENT

I. The Governor’s intervention under Rule 24(b)(1)(B) is warranted given his joint role in redistricting and his creation of the People’s Maps Commission.

In its August 27, 2021, order, this Court granted the Wisconsin Legislature permissive intervention based on its role in redistricting in Wisconsin. As a matter of Wisconsin law, the Governor’s role is given equal weight: not only is he necessary for any redistricting to become law, but also he is recognized as integral to the process as a whole. It thus is unsurprising that a previous federal panel sitting in Wisconsin, in *State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630 (E.D. Wis. 1982), permitted gubernatorial intervention in circumstances mirroring the present ones. This Court should do the same.

A. The Court’s reasons for allowing the Legislature to intervene apply equally to the Governor, who exercises joint power over Wisconsin redistricting.

Wisconsin law has long recognized that redistricting is not only a legislative task, but also squarely involves the Governor. To illustrate, this Court’s order granting legislative intervention cited article IV, section 3 of the Wisconsin Constitution. (Dkt. 24:3.) In *State ex rel. Reynolds*, the Wisconsin

Supreme Court interpreted that and related constitutional provisions in concluding that the Governor's concurrence for redistricting is required and that his involvement in the process is integral.

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." *State ex rel. 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.

Here, the Court already has recognized that these interests provide the common questions of law or fact supporting intervention under Rule 24(b)(1)(B), and the result should be no different as to the Governor. For example, the Legislature cited its central role in shaping redistricting. (Dkt. 9:5–6, 9.) That also is true of the Governor. And this Court cited the plaintiffs' assertion that there is "no reasonable prospect" that new districts will result from the passage of a bill and presentment, meaning that those tasked with

drawing new legislative districts should have “input” into the legal and factual questions raised in this redistricting lawsuit. (Dkt. 24:2–3.) As *State ex rel. Reynolds* demonstrates, that reasoning holds equally true as to the Governor who has joint responsibility over Wisconsin’s redistricting.

Further, no existing party duplicates the Governor’s interests. The original state defendants are not themselves involved in redistricting, and a premise behind the Legislature’s intervention is that it and the Governor will not agree on the proper considerations for new maps. (Dkt. 9:11; Dkt. 24:3.)

A Wisconsin federal panel previously granted gubernatorial intervention in just these circumstances. That case, *Wisconsin State AFL-CIO*, 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. Subsequently, 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).

The dynamics are no different here, except that the Governor's motion is even timelier.

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

While the Governor's institutional role 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 E.O. #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 is now working to prepare maps using established redistricting criteria, and those maps then will be presented to the Legislature.

Although the Legislature asserts that the Commission's existence is "proof" that it does "not 'have the same goal'" as the Governor (Dkt. 9:11), the

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 April 16, 2021).

Commission's maps would be highly relevant to this Court's task. The legal and factual considerations used by the Commission when drawing its maps will parallel the considerations that will be before this 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 the Wisconsin Supreme 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's input is called for as an intervenor. (*See* Dkt. 24:3.)

Consistent with this Court's August 27 order, the Governor's central role in redistricting, and previous court practice, the Governor requests that the Court grant permissive intervention.

II. Alternatively, the Governor's intervention is warranted under Rule 24(b)(2).

In the alternative, this Court also may grant intervention under Rule 24(b)(2)(A) & (B). That Rule permits intervention when a claim or defense is based on a state governmental officer's "executive order" or the product of that order.

Here, the plaintiffs' claims do not challenge Governor Evers' E.O. #66. However, their claims are, in a sense, based on the product of that order. The

Commission's maps will be proposed to the Legislature, and the plaintiffs' lawsuit here is, in effect, premised on the Legislature not accepting the proposed maps or reaching any other consensus with the Governor. Further, were this case to reach the merits, the maps resulting from the executive order would be directly relevant to addressing what remedy is proper.

Thus, in the alternative, the Court may consider Rule 24(b)(2)(A) & (B) as a basis for permissive intervention.

III. The Governor's intervention will cause no delay or prejudice.

Lastly, the Governor's intervention at this early date will cause no delay and will result in no prejudice to the parties. Instead, it will result only in this Court having a fuller picture of what maps are possible and proper under the redistricting criteria as applied to Wisconsin.

The case was filed less than one month ago, and this motion is being filed prior to this Court having even set a schedule. Rather, the parties have until September 13 to propose schedules to the Court. As a proposed intervenor, the Governor does not require the opportunity to offer input into those initial scheduling proposals. His participation therefore will cause no delay, nor will it prejudice any party in proceeding with its proposal as it sees fit.

To put it in perspective, the Governor's intervention motion comes much earlier than the motion granted in *Wisconsin State AFL-CIO*, 543 F. Supp. at 632, where Governor Dreyfus moved to intervene after the panel already had

issued a merits ruling on the constitutionality of the current maps, and was proceeding to the redrawing stage. Here, the Governor has acted much more promptly in anticipation of that stage.

In addition, the Governor does not anticipate filing briefs for many procedural or preliminary matters that are not directed at the Governor, but rather primarily intends to participate on the merits of what a proper map should entail. In other words, the Governor does not intend to subject the Court to duplicative filings but rather intends to provide a unique, nonpartisan plan for the Court's consideration.

Therefore, the considerations under Rule 24(b)(3) weigh in favor of granting the Governor's motion.

CONCLUSION

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

Dated this 13th day of September 2021.

Respectfully submitted,

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Electronically signed by:

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