STATE OF WISCONSIN
SUPREME COURT

SCOTT R. JENSEN, personally and as Speaker of the Wisconsin Assembly and MARY E. PANZER, personally and as Minority Leader of the Wisconsin Senate,

Petitioners,

v. Case No. 02-0057-0A

WISCONSIN ELECTIONS BOARD, an independent agency of the State of Wisconsin; JERALYN WENDELBERGER, its chairman; and each of its members in his or her official capacity, DAVID HALBROOKS, R.. J. JOHNSON, JOHN P. SAVAGE, JOHN C. SCHOBER, STEVEN V. PONTO, BRENDA LEWISON, CHRISTINE WISEMAN and KEVIN J. KENNEDY, its executive director,

Respondents.

INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO INTERVENE

INTRODUCTION

Intervenors file this Memorandum of Law in Support of Their Motion to Intervene to address the preliminary issue in this case: whether the State

Supreme Court should take original jurisdiction of matters already pending in federal district court. This Memorandum and the accompanying Motion do not address the merits of whether this Court should entertain the Petition. If the Motion to Intervene is granted, Intervenors seek to file a response to the Petition, if a response is ordered by this Court, and will oppose the Petition.

PROCEDURAL HISTORY

On February 1, 2001, seventeen plaintiffs filed suit in the District Court for the Eastern District of Wisconsin against the State of Wisconsin's Elections Board as well as the individual members of that Board. (See Intervenors' App., Ex. A.) The plaintiffs are all citizens of the nine congressional districts for Wisconsin. They challenged the constitutionality of the current apportionment of Wisconsin's congressional districts. They sought both declaratory and injunctive relief requesting that a three judge panel declare the current apportionment of Wisconsin's congressional districts unconstitutional and establish a judicial plan for apportionment if the Legislature and the Governor did not act in a timely fashion.

On February 5, 2001, eighteen members of the Wisconsin State Senate filed a Motion to Intervene in the suit ("State Senators"). (See Intervenors'

App., Ex. B.) These State Senators filed a proposed Complaint with the Court seeking to place before the Court the potential redistricting of State Senate and Assembly districts. (See Intervenors' App., Ex. B.)

On February 21, 2001, the Petitioners in this action, State Assembly Majority Leader, Scott R. Jensen, and State Senate Minority Leader, Mary E. Panzer, filed a Motion to Intervene in the federal district court case. (See Intervenors' App., Ex. C.) While Representative Jensen and Senator Panzer did not ask the Court to accept jurisdiction over the state legislative districts, they did not object to the State Senators' request that the Court take jurisdiction over the legislative districts, despite a court order which allowed them to do so.[1]

On November 28, 2001, the Federal District Court issued an order granting the State Senators' Motion to Intervene and granting Representative Jensen and Senator Panzer's Motion to Intervene. (See Pet. App., Ex. A.) The three judge panel also accepted jurisdiction over the state legislative districts

[1] On February 28, 2001, the three judge panel ordered that any response to the Motions to Intervene filed by the State Senators and Representative Jensen and Senator Panzer were to be filed no later than March 7, 2001. (See Intervenors' App., Ex. D.)

and ordered the State Senators to file the proposed Complaint that they had submitted with their Motion to Intervene. The Complaint was filed on December 6, 2001.

The Court also asked the plaintiffs' counsel to discuss a proposed schedule with all parties and to respond to the Court by December 19, 2001 with a proposed scheduling order. The plaintiffs, the State Senators, and the Elections Board agreed upon a trial schedule for both the congressional and the state legislative redistricting. The plaintiffs proposed a congressional schedule beginning with the disclosure of expert witnesses on January 25 and culminating with trial on March 4-6. (See Intervenors' App., Ex. F.) The plaintiffs also proposed a schedule for determining the state legislative districts with corresponding deadlines two weeks after each congressional deadline. Accordingly, the state legislative districts were to be tried on March 18 - 20. The Petitioners in this action, Representative Jensen and Senator Panzer, objected to the scheduling order as proposed by the plaintiffs. (See Intervenors' App., Ex. G.) They submitted an alternative schedule for the state legislative districts.

On Friday, January 4, 2002, just prior to the Monday scheduling conference, Representative Jensen and Senator Panzer withdrew their objection to the congressional redistricting schedule as set out by the plaintiffs but indicated to the Court they still believed their state legislative redistricting schedule was more appropriate. (See Intervenors' App., Ex. H.)

On Monday, January 7, 2002, Representative Jensen and Senator Panzer filed this Petition for Leave to Commence an Original Action with this Court. Representative Jensen and Senator Panzer never disclosed in their Petition to this Court the existence of the federal court action or the procedural history in that case. They do mention the case on page 15 of their Memorandum in Support of their Petition for Leave to Commence an Original Action but mislead this Court in stating that the federal district court case concerns only congressional districts and not state legislative districts. Specifically, they state in their Memorandum, "the Arrington matter with limit in scope to congressional redistricting and the original Complaint does not mention state legislative districts or state constitutional standards." (Pet. Mem. at 15.) What Representative Jensen and Senator Panzer neglect to inform this Court is that the three judge panel on November 28, 2001, took jurisdiction

over the state legislative districts and that their Petition asks this Court to seek jurisdiction over the same legal issues already before the federal court.

Representative Jensen and Senator Panzer do not explain why they have waited until January 7, 2002, to file this Petition with the Supreme Court when: (1) Representative Jensen and Senator Panzer have been aware since February 2001 that the State Senators sought to have the state legislative districts apportioned by the three judge panel in federal court; (2) Representative Jensen and Senator Panzer did not object to the federal court accepting jurisdiction over the state legislative districts despite opportunities to do so; and (3) the federal court has already accepted jurisdiction over state legislative redistricting in November of last year.[2]

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[2] Representative Jensen and Senator Panzer stress in footnote 6 of their Memorandum in Support of this Petition that they have not sought jurisdiction of the federal court in any respect concerning state legislative districts. First, Representative Jensen and Senator Panzer have submitted proposed scheduling orders to the federal court outlining a schedule for the court to consider state legislative districts. Accordingly, the Intervenors disagree with their claim. Second, regardless of Representative Jensen and Senator Panzer's assertion that they have not sought jurisdiction of the federal court concerning state legislative districts, the fact remains that the federal court took jurisdiction over the Senate and Assembly redistricting in November of last year.

Petitioners also assert in their Petition that "[t]he redistricting process is at an impasse," and that election "deadlines loom," citing the initial deadline of May 14, 2002. (Pet. at ¶¶ 16, 18.) In contrast to that action here, Petitioners in the federal court action have urged the court to delay consideration of state legislative redistricting so that the legislature may take action. Specifically, the Petitioners represented to the federal court that no court activity with respect to legislative redistricting should occur prior to March 15, 2002 in order to give deference to the legislative process.[3] (See Mem. of Jensen and Panzer, 12/19/2001 at 2-3; Intervenors' App., Ex. G.) Additionally, they took issue with the federal court Plaintiffs who suggested that earlier dates were needed because of the May 14, 2002 deadline, stating:

> The Arrington plaintiffs suggest that the date on which the Elections Board is to issue certain notices concerning the fall elections, May 14, 2002, requires a much earlier schedule. This suggestion is erroneous. May 14, 2002 is merely a preliminary notice date. While the statutes specify certain dates for the Elections Board to provide notices of elections along with the circulation and filing of nomination papers for state and national offices, *see* § 10.72(1) to (3), Stats., the date to file nomination

[3] Representative Jensen and Senator Panzer focus upon this date because the state legislative calendar provides for floor periods of January 27 to February 7 and February 26 to March 14 during which time the legislature may act on proposed legislation.

> papers for those offices does not occur until July 9, 2002. § 10.72(3)(c)(1), Stats. Moreover, the July 9, 2002 date for filing nomination papers applies "unless the deadline for filing is extended." *Id.* . . .

(See Mem. of Jensen and Panzer, 12/19/2001 at 4 n.1; Intervenors' App., Ex. G.)

Thus, while Petitioners attempt to have this Court believe, incorrectly, that legislative redistricting is not before the federal court, Petitioners also assert here--in direct contradiction to representations in the federal court--that court action is imperative and the election deadlines are critical.

Senate Majority Leader Chvala and Assembly Minority Leader Black file this Motion to Intervene and request permission from this Court to file a response to the Petition for Leave to Commence an Original Action and the Memorandum in Support thereof. Senate Majority Leader Chvala and Assembly Minority Leader Black do not support the Petition and do not believe that this Court should exercise its powers of original jurisdiction, and, if this Motion is granted, will seek to file a response to the Petition. Senate Majority Leader and Assembly Minority Leader Black believe that their Motion to Intervene and this Memorandum in support thereof, establishes that

they meet the criteria for intervention under Wis. Stat. § 803.09. Accordingly, they respectfully request that this Court grant their motion.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITIONERS' MOTION TO INTERVENE PURSUANT TO WIS. STAT. § 803.09(1).

Wisconsin Stat. § 803.09 distinguishes between two kinds of intervention. Subsection (1) provides for "intervention of right" and states that an applicant "shall be permitted to intervene" if that applicant satisfies the test of that portion of the rule. Subsection (2) provides for "permissive intervention" and states the conditions under which an applicant "may be permitted to intervene" in any action. The proposed Intervenors satisfy the requirements of (1) and thus, should be permitted to intervene as of right by this Court.

Wisconsin Stat. § 803.09(1) states in relevant part that:

> Upon 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.

The courts have devised four elements for intervention as of right:

(1) a timely motion;

(2) an interest relating to the subject matter of the action;

(3) potential impairment, as a practical matter, of that interest by the disposition of the action; and

(4) lack of adequate representation of the interest by the existing parties to the action.

See City of Madison v. WERC, 2000 WI 39, ¶11, 234 Wis. 2d 550, 610 N.W.2d 94. Intervening Respondents' Motion to Intervene satisfies all four elements.

A. The Motion To Intervene Is Timely.

The first element this Court should consider in determining whether to grant intervention is whether the petition was timely filed. Whether a motion to intervene was made in a timely fashion is determined based on the totality of the circumstances. State ex rel. Bilder v. Township of Delavan, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). Both the passage of time and

whether a delay in moving for intervention will prejudice the existing parties are factors to consider. Id.

In this case, the Petition for Leave to Commence an Original Action was filed on January 7, 2002. This Motion to Intervene and Memorandum of Law in support are being filed on January 9, 2002. Thus, this Petition has been pending for only two days. Additionally, because there has been no delay in moving for intervention, the intervention will not prejudice any of the existing parties to the case. Accordingly, the Intervenors' Motion to Intervene is timely.

B. The Intervenors Claim An Interest Relating To The Transaction Which Is The Subject Of This Action.

In determining whether a movant has the requisite interest in the suit, the Wisconsin Supreme Court has admonished trial courts that:

> In deciding whether to allow a party to intervene as a matter of right, the court should view the interest sufficient to allow the intervention practically rather than technically. [citation omitted] The court measures the sufficiency of the interest by focusing on the facts and circumstances of the particular case before it as well as the stated interest in intervention and analyzes these factors against the policies underlying the intervention statute.

Bilder, 112 Wis. 2d at 548. The Court has explained that the intervention statute attempts to balance two conflicting public policies: the original parties to a lawsuit should be allowed to conduct their own lawsuit; and persons should be allowed to join lawsuits in the interest of "speedy and economical resolution of controversies." Id.

The Intervenors' interest in this case is direct, significant and legally protectable and therefore, weighs in favor of allowing intervention. First, the State Senator Majority Leader and the State Assembly Minority Leader have a direct interest in the outcome of this action in that the redistricting of State Assembly and Senatorial districts, are obligations committed by law to the Wisconsin Legislature of which the Senator Chvala and Representative Black are members. Senator Chvala and Representative Black intend to work with other members of the Legislature, including Assembly Republicans who hold the majority in the Assembly, to produce legislation redistricting Wisconsin's Senate and Assembly districts. It is only if the Legislature fails to adopt a redistricting plan that a court may do so.

In the event that legislative efforts at redistricting are not successful, Senator Chvala and Representative Black submit that judicial efficiency

requires that one court consider the factual and legal claims for all redistricting in Wisconsin. The same underlying facts that make congressional districts malapportioned under the United States and Wisconsin Constitutions also render the existing state legislative districts to be malapportioned. Further, whether these districts violate the Voting Rights Act and the United States and Wisconsin Constitutions involve similar questions of law. Currently, a three judge panel in the District Court for the Eastern District of Wisconsin has jurisdiction over congressional and state legislative redistricting. Thus, the matters set forth in the Petition filed in this Court and the action pending in federal district court have common factual and legal bases as well as similar remedies.

When a federal district court entertains an action to require redistricting of legislative districts, the court may be required to set a deadline for the state to act. See Growe v. Emison, 502 U.S. 25, 36 (1993) ("It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed"). As members of the State Legislature to whom such a deadline would apply,

Intervenors have a direct interest in whether a Court may proceed with court-ordered redistricting.

In addition, as citizens and voters, the Intervenors also have a substantial interest in the redistricting of Wisconsin's legislative districts.

C. Disposition Of The Original Action May As A Practical Matter Impair Or Impede The Intervenors' Ability To Protect That Interest.

The third element an intervenor must satisfy to intervene as of right is to show that the disposition of the original action may impair or impede the intervenor's ability to protect that interest. See City of Madison, 2001 WI 39 at ¶11. Clearly, if the Court is called upon to redistrict the State's legislative districts, such an action directly impacts the right of Intervenors as citizens and voters, and as State Legislators. It is only if the Legislature fails to adopt a redistricting plan that any Court may act. Additionally, the remedies that a Court might order may directly impact these State Legislators. For example, the Court could establish a deadline for the Legislature to adopt a redistricting plan. If that deadline was unreasonable or simply not feasible, these Legislators should have the opportunity to present an alternative deadline to the Court. Thus, because of the likelihood that a court order may apply

directly to the Legislature, members of that Legislature ought to be given the opportunity to participate and be heard in these proceedings.

D. The Intervenors Are Inadequately Represented By The Existing Parties.

Unquestionably, the Intervenors satisfy this requirement. It is the State Legislature that is obligated by law to redistrict the State Assembly and Senatorial districts. The defendants, the Elections Board and several of its members, are charged with carrying out the elections in the State of Wisconsin. The Elections Board does not have the power to reapportion these districts. Only the Wisconsin Legislature may do so, or a court if the Legislature is unable to agree. As the Majority Leader of the Senate and the Minority Leader of the Assembly, the Intervenors are in the unique position of providing the Court with crucial information such as the current status of redistricting legislation or the timetable established for enacting appropriate legislation. Additionally, while the Petitioners can speak to redistricting activities as they relate to the Republican party, the Intervenors represent Democrats in the State Legislature and thus have direct and distinct interests

from Petitioners. Accordingly, the interest of these State Legislators are not adequately represented by the existing parties.

II. THIS COURT SHOULD GRANT THE MOTION TO INTERVENE PURSUANT TO WIS. STAT. § 803.09(2).

Even if this Court determines that there is no intervention as a matter of right, this Court should allow intervention under Wis. Stat. § 803.09(2). Section 803.09(2) governs permissive interventions and provides in relevant part:

> Upon 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.

Subsection (2) also states that in exercising its discretion, the court should consider whether intervention will result in undue delay or prejudice to the rights of the original parties.

Thus, in deciding whether to grant permissive intervention under § 803.09(2), a court must consider three factors:

(1) whether the petition was timely;

(2) whether a common question of fact or law exists; and

(3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of the rights of the original parties.

Further, the Wisconsin Supreme Court has admonished that the courts should evaluate the motion to intervene practically, not technically, with an eye toward "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Bilder, 112 Wis. 2d at 548-49.

A. The Petition To Intervene Is Timely.

As noted above in Section I.A., the Motion to Intervene clearly is timely.

B. Common Questions Of Fact And Law Exist In These Claims.

The second factor the court should consider in determining whether to grant permissive intervention is whether a common question of fact or law exists between the intervenors' claims and those of the plaintiff or defendant. The underlying Petition in this action alleges that in March of 2001, the State of Wisconsin received census data from the Census Bureau enumerating the population of Wisconsin. See Pet. at ¶11. Because of shifts in Wisconsin's

population, the State Senate and Assembly Districts are malapportioned. See Pet. at ¶¶12, 20.

The enumeration of the apportionment population of Wisconsin done by the Census Bureau also affects the Congressional districts. As with the State Legislative districts, the population shifts during the last decade have generated substantial inequality among these Congressional districts. Thus, determining the apportionment for both the Congressional districts and the State Senate and Assembly districts involve common questions of law and fact.

Further, there are other common questions of law and fact. First, to establish new Congressional districts, legislation must be passed both by the State Senate and the Assembly and signed by the Governor. Similarly, legislation must be passed by both the State Senate and the Assembly and signed by the Governor in order to establish new Assembly and Senate districts. See Wis. Const. art. IV, § 3.

A Court may or may not have to actually redraw legislative districts, depending on whether legislation is passed. Following the 1990 census, the State Legislature and the Governor were unable to agree on a plan of

reapportionment, resulting in the current legislative districts being chosen by a three judge panel. See Prosser v. Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1992). The current makeup of the State Senate and the State Assembly, in which the Senate is controlled by Democrats and the Assembly by Republicans, means that the current Legislature may not be able to agree on a plan of redistricting. However, if a Court does need to redraw legislative districts, it will need to rely on the same statistical information and legally approved methods for both the Congressional districts and the State Legislative districts.

Currently, a three judge panel in the District Court for the Eastern District of Wisconsin has taken jurisdiction over the Congressional and State Legislative districts. The Petitioners in this action, the Wisconsin Elections Board and its members, as named Respondents in this action, and the Intervenors are all parties to the federal court action. The federal court action seeks the same relief as the Petitioners in this action: namely for the Court to draw the boundaries for districts if the Legislature is unable to do so.

Finally, the malapportionment of the Congressional districts and the malapportionment of State Legislative districts are alleged to violate the

requirements of the one-person/one-vote rule, section 2 of the Voting Rights Act and the State and Federal Constitutions. Given these common questions of fact and law, this petition to intervene should be granted by the Court.

C. Granting The Motion To Intervene Will Not Unduly Delay Or Prejudice The Adjudication Of The Rights Of The Original Parties.

The final factor that this Court should consider in whether to grant permissive intervention is whether granting the petition to intervene will unduly delay or prejudice the adjudication of the rights of the original parties. No such delay or prejudice will occur if the court grants the Intervenors' motion.

As stated above, the original Petition in this action was filed on January 7, 2002. This Motion to Intervene is being filed two days later. The Petition to Intervene will not delay this suit. See, e.g., Bossier Parish School Bd. v. Reno, 157 F.R.D. 133, 135 (D.C. 1994) ("[B]ecause the proposed Intervenors sought intervention early in this litigation by filing their Motion to Intervene on the same day that the Court held its first status conference, their intervention shall not cause any undue delay or prejudice to any other party").

Furthermore, because of the common questions of fact and law, judicial economy weighs in favor of grating this motion. One court will be able to examine the census population figures to determine which figures are appropriate to use for redistricting. Similarly, only one court will need to study the law relating to the claims of violations of section 2 of the Voting Rights Act and the one-person/one-vote requirement and apply it to these facts.

Finally, there will be no prejudice to the original parties. Because the Petitioners in this case have fully participated with Intervenors in the federal court case involving the same matter, the Petitioners are fully apprized of the Intervenors' interest in this suit. Accordingly, the parties can point to no prejudice or unduly delay that will occur by granting this motion to intervene.

CONCLUSION

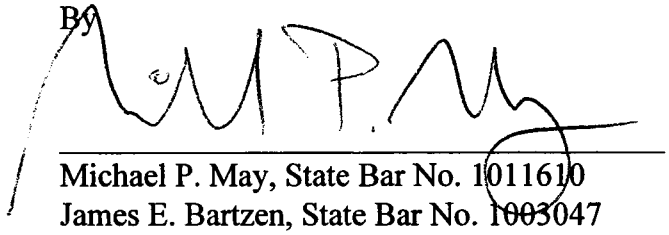
The Motion to Intervene filed on behalf of Senate Majority Leader Chvala and Assembly Minority Leader Black should be granted because it satisfies all four elements to intervene as of right: the motion is timely; the Intervenors' interest relates to the subject matter of this suit; the Intervenors' interest may be potentially impaired by disposition of this action; and the Intervenors' interest is not adequately represented by the existing parties.

Furthermore, even if this Court concludes that there is no intervention as of right, it should grant this motion because these State Legislators have fulfilled the elements for permissive intervention: the motion was timely filed; there are common questions of law and fact; and granting this motion will not unduly delay or prejudice the adjudication of the rights of the original parties. The Intervenors respectfully request that the Court grant their Motion to Intervene.

Dated this 9th day of January, 2002.

BOARDMAN, SUHR, CURRY & FIELD LLP

By



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