

**FRIEBERT, FINERTY & ST. JOHN, S.C.**
ATTORNEYS AT LAWTwo Plaza East - Suite 1250 • 330 East Kilbourn Ave. • Milwaukee, Wisconsin 53202
Phone 414-271-0130 • Fax 414-272-8191 • www.ffsj.com

November 30, 2011

VIA MESSENGERClerk of Court
Wisconsin Court of Appeals/Supreme Court
110 East Main Street - Suite 215
P. O. Box 1688
Madison, WI 53701-1688Re: *Clinard et al., v. Brennan et al.*, Case No. 2011AP00267 - OA

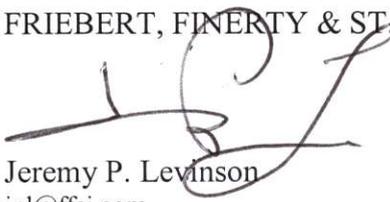
Dear Clerk:

We represent The Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal in connection with the above referenced proceeding.

We submit for filing therein (1) A motion to intervene; (2) a brief in support of the motion to intervene; and (3) a motion to dismiss the petition (with a request for a briefing schedule). Within one or two days we will be submitting the affidavits of Mr. Brandt, Mr. Kidd, Ms. Stencil, and Ms. Pachal in support of the papers submitted today.

Very truly yours,

FRIEBERT, FINERTY & ST. JOHN, S.C.


Jeremy P. Levinson
jpl@ffsj.comJPL/ier
Enclosurescc Maria S. Lazar, Esq. (w/encls.) – Via E-mail & U.S. Mail
Eric M. McLeod, Esq. (w/encls.) – Via E-mail & U.S. Mail**RECEIVED**

NOV 30 2011

CLERK OF SUPREME COURT
OF WISCONSINROBERT H. FRIEBERT
JOHN D. FINERTY
THOMAS W. ST. JOHN
WILLIAM B. GUISE
S. TODD FARRIS
TED A. WARPINSKI
SHANNON A. ALLEN
JEREMY P. LEVINSON
LAWRENCE J. GLUSMAN
BRIAN C. RANDALL
CHRISTOPHER M. MEULER
M. ANDREW SKWIERAWSKI
JOSEPH M. PELTZ

FILED

NOV 30 2011

CLERK OF SUPREME COURT
OF WISCONSINSTATE OF WISCONSIN
SUPREME COURT

DENNIS CLINARD, ERIN M. DECKER,
LUONNE A. DUMAK, DAVID A. FOSS,
LaVONNE J. DERKSEN, PAMELA S. TRAVIS,
JAMES L. WEINER, JEFF L. WAKSMAN, and
KEVIN CRONIN,

Petitioners,

and

Case No. 2011AP002677 OA

ALVIN BALDUS; CINDY BARBERA; CARLENE
BECHEN; ELVIRA BUMPUS; RONALD BIENDSEIL;
LESLIE W. DAVIS III; BRETT ECKSTEIN; GLORIA
ROGERS; RICHARD KRESBACH; ROCHELLE
MOORE; AMY RISSEEUW; JUDY ROBSON; JEANNE
SANCHEZ-BELL; CECELIA SCHLIEPP; TRAVIS
THYSSEN;

Involuntary Petitioners,

v.

MICHAEL BRENNAN, DAVID DEININGER, GERALD
NICHOL, THOMAS CANE, THOMAS BARLAND and
TIMOTHY VOCKE each in his official capacity as a member
of the WISCONSIN GOVERNMENT ACCOUNTABILITY
BOARD; and KEVIN KENNEDY, Director and General
Counsel for the Wisconsin Government Accountability Board;

Respondents.

**MOTION TO INTERVENE BY THE COMMITTEE TO RECALL WANGGAARD,
RANDOLPH BRANDT, THE COMMITTEE TO RECALL MOULTON, JOHN KIDD,
THE COMMITTEE TO RECALL SENATOR PAM GALLOWAY, NANCY STENCIL,
AND RITA PACHAL**

Pursuant to § (Rule) 809.13 and § 803.09, Wis. Stats., The Committee to Recall
Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to

Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal ("Proposed Intervenors), by their counsel Jeremy. P. Levinson, hereby move for intervention into the above-captioned action. The Motion is supported by the Brief in Support of Motion to Intervene, filed herewith, and the Affidavits of Randolph Brandt, John Kidd, Nancy Stencil, and Rita Pachal. Proposed Intervenors also file herewith a motion to dismiss the Petition. If they are permitted to intervene, they request a briefing schedule in connection with their motion.

Dated this 30th day of November, 2011.

FRIEBERT, FINERTY & ST. JOHN, S.C.

By:


Jeremy P. Levinson
State Bar No. 1026359
Joseph M. Peltz
State Bar No. 1061442

Attorneys for The Committee to Recall Wanggaard,
Randolph Brandt, The Committee to Recall Moulton, John
Kidd, The Committee to Recall Senator Pam Galloway,
Nancy Stencil, and Rita Pachal

P.O. ADDRESS:

330 East Kilbourn Avenue
Two Plaza East, Suite 1250
Milwaukee, Wisconsin 53202
Phone: (414) 271-0130

STATE OF WISCONSIN
SUPREME COURT

FILED

NOV 30 2011

CLERK OF SUPREME COURT
OF WISCONSIN

DENNIS CLINARD, ERIN M. DECKER,
LUONNE A. DUMAK, DAVID A. FOSS,
LaVONNE J. DERKSEN, PAMELA S. TRAVIS,
JAMES L. WEINER, JEFF L. WAKSMAN, and
KEVIN CRONIN,

Petitioners,

and

Case No. 2011AP002677- OA

ALVIN BALDUS; CINDY BARBERA; CARLENE
BECHEN; ELVIRA BUMPUS; RONALD BIENDSEIL;
LESLIE W. DAVIS III; BRETT ECKSTEIN; GLORIA
ROGERS; RICHARD KRESBACH; ROCHELLE
MOORE; AMY RISSEEUW; JUDY ROBSON; JEANNE
SANCHEZ-BELL; CECELIA SCHLIEPP; TRAVIS
THYSSEN;

Involuntary Petitioners,

v.

MICHAEL BRENNAN, DAVID DEININGER, GERALD
NICHOL, THOMAS CANE, THOMAS BARLAND and
TIMOTHY VOCKE each in his official capacity as a member
of the WISCONSIN GOVERNMENT ACCOUNTABILITY
BOARD; and KEVIN KENNEDY, Director and General
Counsel for the Wisconsin Government Accountability Board;

Respondents.

**BRIEF IN SUPPORT OF MOTION TO INTERVENE BY THE COMMITTEE TO
RECALL WANGGAARD, RANDOLPH BRANDT, THE COMMITTEE TO RECALL
MOULTON, JOHN KIDD, THE COMMITTEE TO RECALL SENATOR PAM
GALLOWAY, NANCY STENCIL, AND RITA PACHAL**

The Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall
Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita

Pachal (“Proposed Intervenors”), by their Attorney Jeremy P. Levinson, submit this brief in support of their Motion to Intervene in the above-captioned matter and their request for an Order establishing a briefing schedule for Proposed Intervenors’ motion to dismiss, filed herewith. Proposed Intervenors should be allowed to intervene as of right, pursuant to § 803.09(1), Wis. Stats., under the analysis set forth in *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. Alternatively, permissive intervention should be granted, pursuant to § 803.09(2), Wis. Stats., if intervention as of right is not allowed.

INTRODUCTION

Proposed Intervenors are Committees and affiliated Wisconsin residents that have duly registered with the Wisconsin Government Accountability Board (“the GAB”) to circulate recall petitions in an effort to bring three Republican State Senators before their constituents in recall elections pursuant to Art. XIII, § 12 of the Wisconsin Constitution. Since November 15, 2011, the Proposed Intervenors have been collecting, and are continuing to collect, the signatures required to trigger recall elections. These profound and constitutionally protected activities involve detailed planning, substantial resources, and the massive volunteer efforts of many hundreds, if not thousands of Wisconsin residents.

The Petition asks this Court to provide what is perceived to be a more advantageous forum for a challenge to the Legislature’s 2011 Redistricting Plan that has been proceeding for many months in federal court. It also asks the Court to rewrite the Redistricting Plan for the sole purpose of shielding the Republican Senators from the ongoing recall efforts. The Petition seeks to change the rules during Proposed Intervenors’ ongoing recall efforts to rob those efforts of any effects. The Petition’s attempt to completely undermine Proposed Intervenors’ recall efforts

warrants intervention. If permitted to intervene, Proposed Intervenors request leave to respond to the Petition and an Order setting a time-frame for doing so.

BACKGROUND

Petitioners assert that they are nine Wisconsin residents who claim a right to (1) a declaration that the Wisconsin Legislature's "2011 Redistricting Plan" is constitutional; and (2) an Order that effectively changes 2011 Wisconsin Acts 43 and 44 so that the legislative districts they create and make effective in November 2012 become effective sooner on the basis that the existing districts are unconstitutional and with the effect of blocking ongoing efforts to recall several Republican State Senators. Petitioners ask the Court to appoint a panel of three circuit court judges, purportedly pursuant to §§ 751.035 and 801.50(4m). Alternatively, Petitioners request leave to commence an Original Action before this Court.

The Petition names as respondents the members of the GAB and its Director and General Counsel. The GAB is the state administrative agency charged with, *inter alia*, the regulation and oversight of elections, campaign finance, and related matters. The Petition asks the Court to undo the GAB's conclusion that § 10 of 2011 Act 43 should be applied as written:

SECTION 10. Initial applicability.

- (1) This act first applies, with respect to regular elections, to offices filled at the 2012 general election.
- (2) This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election.

Specifically, Petitioners ask the Court to change the fact that currently ongoing recall efforts are underway in, and any ensuing recall elections will take place in, the existing districts because they will occur prior to the 2012 general election. Petitioners ask this Court to rewrite

the law¹ to terminate ongoing recall efforts and to protect several Republican Senators from having to face their constituents in recall elections.

To create the illusion of a genuine and legally meaningful dispute, the Petition names as “Involuntary Petitioners” the plaintiffs in a federal lawsuit, Civil Action No. 2011-CV-0562 (E.D. Wis.). That lawsuit, filed almost six months ago, challenges the Redistricting Plan as unconstitutional and in violation of federal law.² The Petition requests, at this late date, that this Court reach out and take over a legal dispute well on its way to resolution in the federal court, trying to render the work of the parties and the court in that case a nullity and giving Petitioners and their allies what they see as an advantageous playing field – this Court.

The Proposed Intervenors are recall committees duly registered with the GAB and the treasurers and recall petitioners affiliated with those committees. It is their ongoing efforts that the Petition seeks to block.

The Committee to Recall Wanggaard is in the process of gathering signatures necessary to trigger a recall election for Van Wanggaard, currently the State Senator from Wisconsin’s 21st Senate District. Randolph Brandt is the committee’s treasurer and the petitioner who signed the Statement of Intent to Circulate Recall Petition and Campaign Registration Statement (GAB-1) that, pursuant to § 9.10(2)(d), Wis. Stats., triggers the recall effort.

The Committee to Recall Moulton is in the process of gathering signatures necessary to trigger a recall election for Terry Moulton, currently the State Senator from Wisconsin’s 23rd

¹ On October 31, 2011, Republican State Senator Mary Lazich introduced a bill providing that Act 43 would first apply “with respect to special and recall elections for the office of senator held on or after November 9, 2011. The bill also provides that Act 43 first applies, with respect to petitions for the recall of senators, to petitions filed on or after November 9, 2011.” 2011 Senate Bill 268 *available at* <https://docs.legis.wisconsin.gov/2011/proposals/sb268>. This proposed legislation lacked requisite support and failed to make it out of Committee. *Id.*

² The federal lawsuit has been the subject of extensive proceedings, discovery is underway, and a trial is scheduled to be held “no later than Tuesday, February 21, 2012.” See *Baldus et al. v. Brennan et al.*, 11-CV-00562, JPS-DPW-RMD (E.D. Wis.) (*Dkt.* 35) (Scheduling Order).

Senate District. John Kidd is the committee's treasurer and the petitioner who signed the Statement of Intent to Circulate Recall Petition and Campaign Registration Statement (GAB-1).

The Committee to Recall Galloway is in the process of gathering signatures necessary to trigger a recall election for Pam Galloway, currently the State Senator from Wisconsin's 29th Senate District. Rita Pachal is the committee's treasurer who signed the Campaign Registration Statement (GAB-1). Nancy Stencil is the committee's petitioner who signed the Statement of Intent to Circulate Recall Petition.

The process of collecting signatures on recall petitions has been vigorously underway by Proposed Intervenors since November 15, 2011. The process of planning, organizing, and preparing for such efforts has been underway far longer.

DISCUSSION

I. INTERVENTION AS OF RIGHT IS WARRANTED.

Section 803.09(1), Wis. Stats., (made applicable to this proceeding by § 809.84, Wis. Stats.), provides, in relevant part, as follows:

[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.

As set forth in *Helgeland*, the party moving to intervene in an action must satisfy four requirements to satisfy the statutory standard:

- (1) The motion to intervene is timely;
- (2) The movant claims an interest sufficiently related to the subject of the action;

- (3) The disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
- (4) The existing parties do not adequately represent the movant's interests.

307 Wis. 2d at 20-21, ¶ 38. The four criteria are analyzed together, and a strong showing with respect to one requirement will “contribute to the movant's ability to meet other requirements as well.” *Id.* at 21-22, ¶ 39. The Court will “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.’” *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 742-43, 601 N.W.2d 301 (Ct. App. 1999) (quoting *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)).

A. Proposed Intervenors' Motion is Timely.

This proceeding was initiated by the filing of the Petition on November 21, 2011. Proposed Intervenors' motion promptly followed. Beyond the filing of the Petition and related papers, no activities or proceedings have occurred in this matter.

B. Proposed Intervenors' Interests are Directly and Inextricably Tied to the Subject of the Petition.

As this Court has instructed, the “interests” requirement is not subject to any precise test, but is viewed through a “pragmatic” lens focusing on the specific facts and circumstances of the case at issue, and attempts to “strike a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing persons to join a lawsuit in the interests of the speedy and economical resolution of controversies without rendering the lawsuit fruitlessly complex or unending.” *Helgeland*, 307 Wis. 2d at 24-25, ¶¶ 43-44. The interest claimed must be more than “remotely related to the subject of the action,” however, and the

movant should demonstrate an interest “of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.” *Id.* at 25, ¶ 45 (citation omitted).

Here, the analysis is straightforward. The Petition seeks to change the law governing the recall efforts Proposed Intervenors are currently pursuing such that those efforts would be divested of any effect. The Petition seeks an Order that would invalidate the recall efforts, despite the fact that those efforts would be valid under the law as it existed when they began. Petitioners, if successful, will negate the efforts in the currently existing districts because they will have managed to change the district map for the purposes of these recalls, establishing a map with different boundaries and sets of electors than existed at the outset. The recall petitions gathered through these efforts would presumably be invalid. At best, Proposed Intervenors or others would be left to regroup and begin anew in suddenly changed districts that are evidently more favorable to the incumbents who the Proposed Intervenors seek to recall. While there may be many with an interest in this subject, it is difficult to conceive of any party with a stronger and more direct interest than Proposed Intervenors.

It is as though Petitioners have filed a proceeding to enjoin a particular person’s conduct but have not made that person a party to the proceeding. Efficiency, fairness, concepts of due process, and the benefit of the Court having the fullest array of perspectives represented support intervention. This is especially true because Art. XIII, § 12 of the Wisconsin Constitution establishes Proposed Intervenors’ recall efforts as constitutionally protected conduct. And finally, on a concrete level, the Petition seeks to render the Proposed Intervenors’ (and many others’) profound efforts and resources a complete nullity. In each of these ways, Proposed Intervenors’ interests are such that they should be permitted to intervene and be heard.

C. **The Disposition of the Petition Will Necessarily Extinguish Proposed Intervenors' Ability to Protect Their Interests.**

Petitioners ask Wisconsin's court of last resort to make rulings of law that would effectively negate Proposed Intervenors' current recall efforts. In any case, absent intervention, relief on the Petition would deny Proposed Intervenors' any possibility of protecting their interests. This is especially true given that the fast-moving mechanics of the recall process are well underway, with a deadline of January 17, 2012 for offering to file recall petitions with the GAB.

D. **The Existing Parties Do Not Adequately Represent Proposed Intervenors' Interests.**

This Court noted this factor "should be treated as minimal," but not "so minimal as to write the requirement completely out of the rule." *Helgeland*, 307 Wis. 2d at 44, ¶ 85 (citations omitted). "If a movant's interest is identical to that of one of the parties, or if the party is charged by law with representing the movant's interest, a compelling showing should be required to demonstrate that the representation is not adequate." *Id.* at 44, ¶ 86.

No current party to this matter has an interest "identical" to that of the Proposed Intervenors. By definition, Petitioners' interests are directly adverse to those of Proposed Intervenors. And the interests of the members and Director and General Counsel of the GAB are fundamentally different from those of Proposed Intervenors. The GAB's interest is in overseeing, regulating, and administering elections and election-related matters such as the recall process. While it presumably has an interest in doing so correctly, it has no interest in how the law it administers is shaped or changed or the substantive content thereof.

While the Petition attacks an understanding of points of law as discerned and articulated by the GAB, and its staff, and its General Counsel, if past practice holds, its members and

Director will be represented in this proceeding by the Wisconsin Department of Justice. And recent history shows that under such circumstances, the GAB may ultimately decline to defend its actions or its previously articulated understanding of points of law. *See Wisconsin Prosperity Network, Inc., et al. v. Myse et al.*, S. Ct. Case No. 2010AP1937-OA (the GAB, represented by the Wisconsin Department of Justice, declining to defend the lawfulness of an administrative rule it had recently promulgated).

Finally, the parties dubbed “Involuntary Petitioners” by the Petition, i.e., the plaintiffs in the established federal lawsuit challenging the 2011 Redistricting Plan, cannot be said to represent the interests of the Proposed Intervenors. First, as alleged in the Petition, and as confirmed by the exhibits thereto, the “Involuntary Petitioners” have no interest in the recall efforts presently underway; their interests are limited to the constitutionality and lawfulness of the 2011 Redistricting Plan. Second, given that they have vigorously litigated the constitutionality of the Redistricting Plan in federal court and a trial in that case approaches no later than February 21, 2011, it is unclear they will perceive themselves to have *any* interest in this proceeding. Third, it is likewise unclear whether the law recognizes the concept of “Involuntary Petitioner” as fancifully conjured up in this proceeding. Finally, the Petition alleges that the federal Plaintiffs/Involuntary Petitioners have conceded the “unconstitutionality” of the existing legislative districts. They have not; nor need they do so to prevail on their claims in federal court. *See, e.g., Mississippi State Conference of the NAACP v. Barbour*, 2011 WL 1870222, at *2, 6-7, slip op. (S.D. Miss. May 16, 2011) (holding that where a state statute provides for reapportionment after a decennial census, a court may not impose an interim remedy to address subsequent population changes that allegedly render the reapportionment invalid; the only interim legal challenges that can be addressed are to the constitutionality of the

reapportionment statute itself), *summarily aff'd*, *Mississippi State Conf. of the NAACP v. Barbour*, 2011 WL 5118830 No. 11-82 (____ S. Ct. _____ Oct. 31, 2011).

The federal Plaintiffs'/Involuntary Petitioners' challenge is to the constitutionality of Acts 43 and 44, which purport to replace the existing districts. The same cannot be alleged of Proposed Intervenors and, if this issue were deemed material to any appropriately presented issue, they would not be bound by any purported concession.

It is manifest that no party, "involuntary" or otherwise, can or will represent the interests of Proposed Intervenors. In sum, Proposed Intervenors amply satisfy each factor for intervention as of right.

II. IF INTERVENTION AS OF RIGHT IS DENIED, PROPOSED INTERVENORS SHOULD BE ALLOWED TO PERMISSIVELY INTERVENE.

Section 803.09(2), Wis. Stats., provides in relevant part:

[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.

This provision has been interpreted to require a showing that the proposed intervener has the type of claim or defense that could be litigated independently. *See, e.g., Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, ¶¶ 41-42, 296 Wis. 2d 880, 920-21, 724 N.W. 2d 208. As the court of appeals therein recognized, "the primary purpose of the Rule is to allow persons to become parties in order to litigate their claims or defenses on the merits." *Id.* at 921, ¶ 42.

The relief the Petition seeks would directly and specifically invalidate the Proposed Intervenors' effort to have recall elections called for certain State Senators, efforts begun

consistent with guidance provided by the GAB, the specialized government agency charged with applying the law at issue. The Petition represents a direct attack on these efforts and, absent intervention as of right, Proposed Intervenors should be permitted to defend them through permissive intervention.

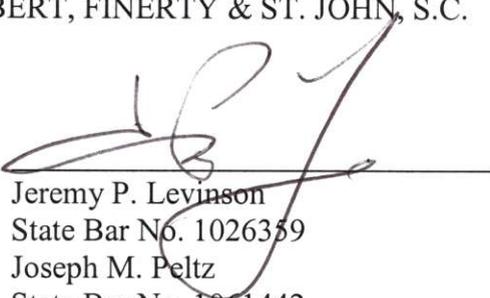
CONCLUSION

For the foregoing reasons, Proposed Intervenors request that they be permitted to intervene as a matter of right, pursuant to § 803.09(1), Wis. Stats., and that the Court enter an Order establishing a briefing schedule for Proposed Intervenors' motion to dismiss, filed herewith. Alternatively, if intervention as of right is not allowed, permissive intervention should be granted, pursuant to § 803.09(2), Wis. Stats.

Dated this 30th day of November, 2011.

FRIEBERT, FINERTY & ST. JOHN, S.C.

By:



Jeremy P. Levinson
State Bar No. 1026359
Joseph M. Peltz
State Bar No. 1061442

Attorneys for the Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal

P.O. ADDRESS:

330 East Kilbourn Avenue
Two Plaza East, Suite 1250
Milwaukee, Wisconsin 53202
Phone: (414) 271-0130