IN THE SUPREME COURT OF WISCONSIN

No. 2023AP1399-OA

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE (DEE) SWEET, AND GABRIELLE YOUNG,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, AND JOSEPH J. CZARNEZKI, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS THE ADMINISTRATOR OF THE WISCONSIN ELECTIONS COMMISSION; SENATOR ANDRÉ JACQUE, SENATOR TIM CARPENTER, SENATOR ROB HUTTON, SENATOR CHRIS LARSON, SENATOR DEVIN LEMAHIEU, SENATOR STEPHEN L. NASS, SENATOR JOHN JAGLER, SENATOR MARK SPREITZER, SENATOR HOWARD L. MARKLEIN, SENATOR RACHAEL CABRAL-GUEVARA, SENATOR VAN H. WANGGAARD, SENATOR JESSE L. JAMES, SENATOR ROMAINE ROBERT QUINN, SENATOR DIANNE H. HESSELBEIN, SENATOR CORY TOMCZYK, SENATOR JEFF SMITH, AND SENATOR CHRIS KAPENGA, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SENATE,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY NATHAN ATKINSON, STEPHEN JOSEPH WRIGHT, GARY KRENZ, SARAH J. HAMILTON, JEAN-LUC THIFFEAULT, SOMESH JHA, JOANNE KANE, AND LEAH DUDLEY

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**PHV application forthcoming*

Nathan Atkinson, Stephen Joseph Wright, Gary Krenz, Sarah J. Hamilton, Jean-Luc Thiffeault, Somesh Jha, Joanne Kane, and Leah Dudley (collectively, "Proposed Intervenors") submit this memorandum in support of their Motion to Intervene and Petition in Intervention pursuant to this Court's October 6, 2023 Order ("October 6 Order") and Wis. Stat. § 803.09.

INTRODUCTION

Proposed Intervenors are Wisconsin voters who reside in senate and assembly districts that violate the Wisconsin Constitution's redistricting requirements and separation-of-powers principles.[1] Proposed Intervenors' interests in voting in districts that comply with the Wisconsin Constitution are not adequately represented by the existing parties because each Proposed Intervenor resides in an assembly district where no current

[1] On August 4, Proposed Intervenors Wright, Krenz, Hamilton, Thiffeault, Jha, Kane, and Dudley (but not Proposed Intervenor Atkinson) filed a Petition to Commence an Original Action in this Court raising five counts, each of which alleged that the existing state-legislative maps adopted in *Johnson* constituted "unlawful partisan gerrymandering" in violation of the Wisconsin Constitution. *See* Pet. to Commence Original Action, Case No. 2023AP1412-OA (Aug. 4, 2023). On October 6, this Court denied that Petition. In its Order of that same day granting the *Clarke* Petitioners' original action but limiting it to Issues 4 and 5 (contiguity and separation-of-powers), the Court explained that although issues of partisan gerrymandering "raise important and unresolved questions of statewide significance, the need for extensive fact-finding (if not a full-scale trial) counsels against addressing them at this time." October 6 Order at 2. Proposed Intervenors Wright, Krenz, Hamilton, Thiffeault, Jha, Kane, and Dudley continue to have an interest in voting in districts that comply with the Wisconsin Constitution, including its separation-of-powers and contiguity requirements. And that interest is shared by Proposed Intervenor Atkinson, who was not a party to the August 4 *Wright* Petition and therefore has had no previous opportunity to present his claims about the constitutionality of the current maps, including the senate and assembly districts where he lives and votes.

Petitioner resides, and each Proposed Intervenor resides in a legislative district that either is non-contiguous or borders one or more non-contiguous districts.

In the event this Court finds (as it should) that the existing maps adopted in *Johnson* violate the Wisconsin Constitution, and in the event the Legislature and Governor are unable to enact new, lawful redistricting maps, Proposed Intervenors also have an interest in ensuring this Court has available to it the most technologically sophisticated means to produce remedial maps designed to optimally comply with the Wisconsin Constitution and federal law. Aided by specialized experts in the new field of "computational redistricting," Proposed Intervenors can produce such maps for the Court.

Proposed Intervenors satisfy the criteria for mandatory intervention. ***First***, their Motion is timely under this Court's October 6 Order. ***Second***, as Wisconsin voters who live in unconstitutional districts, Proposed Intervenors, like Petitioners, have an interest in residing and voting under a lawful map. ***Third***, this litigation's disposition may impair or impede Proposed Intervenors' interests because this litigation will result either in drawing new districts or in maintaining the existing districts where Proposed Intervenors live and vote, including non-contiguous districts and districts bordering non-contiguous districts. ***Fourth***, Proposed Intervenors' interests are not adequately represented by the existing parties. For one, because they live and vote in districts where no Petitioner lives or votes, Proposed Intervenors would bring different, district-specific perspectives to the case. For another, in the event the Court finds that remedial districts are needed, Proposed Intervenors alone stand ready to use computational-redistricting to present new senate and assembly maps designed to

optimally comply with ***all*** the mandatory criteria under Article IV of the Wisconsin Constitution—including contiguity—as well as the requirements of federal law, while also ensuring that the new maps are scrupulously neutral and unbiased.

STANDARDS FOR INTERVENTION

As this Court previously held with respect to redistricting, "Wisconsin courts view intervention favorably as a tool for 'disposing of lawsuits by involving as many concerned persons as is compatible with efficiency and due process.'" *Johnson v. Wis. Elections Comm'n*, Case No. 2021AP1450-OA, Order at 2 (Oct. 14, 2021) ("*Johnson* Intervention Order") (quoting *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1; *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 548–49, 334 N.W.2d 252 (1983)). Indeed in 2021, this Court in *Johnson* granted every intervention motion that was timely filed. *See id.*

This Court's approach in *Johnson* followed a long line of cases liberally allowing parties and voters from different districts to intervene in redistricting litigation in Wisconsin. *See, e.g.*, *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992) (permitting intervention by state legislators, associations, other groups, and multiple individual voters); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) (granting all seven timely motions to intervene). The Court's approach in *Johnson* also accords with accepted judicial practice nationally in redistricting cases. *See* Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 900 (2001) (discussing courts' "permissive approach to intervention" in redistricting cases).

As explained below, the Court should grant Proposed Intervenors' Motion to Intervene as of right under Wis. Stat. § 803.09(1) because:

(A) their Motion is timely;

(B) they claim an interest sufficiently related to the subject of this action;

(C) disposition of this action may as a practical matter impair or impede their ability to protect that interest; and

(D) the existing parties do not adequately represent that interest.

See Johnson Intervention Order at 2; *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 477, 516 N.W.2d 357 (1994) (reversing denial of motion to intervene).

In the alternative, this Court should grant permissive intervention. Proposed Intervenors share "a question of law or fact in common" with this action, and their intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2).

ARGUMENT

I. Proposed Intervenors Meet the Test for Mandatory Intervention Under Wis. Stat. § 803.09(1).

A. This Motion is Timely.

This Court directed that "any additional party wishing to intervene in this case must file a motion to intervene, together with a supporting memorandum … , by October 10, 2023." October 6 Order at 2. Proposed Intervenors' Motion, Petition, and Memorandum are being timely filed on October 10, 2023.

B. Proposed Intervenors Have an Interest Directly Related to This Action.

Proposed Intervenors have a direct interest in this action. They join Petitioners in alleging that (a) the existing state-legislative maps violate the contiguity requirements contained in Article IV, Sections 4 and 5 of the Wisconsin Constitution; and (b) the adoption of the existing state-legislative

maps violates the Wisconsin Constitution's separation of powers. Pet. in Intervention ¶¶ 9–19.

As to the contiguity claim, each of the Proposed Intervenors resides in a district that is either non-contiguous or borders at least one non-contiguous district. *Id.* ¶¶ 1–8 (describing the districts where each Proposed Intervenor lives). In addition to having an interest in ensuring that the entire map complies with the contiguity requirements in Article IV, Sections 4 and 5 of the Wisconsin Constitution, each of the Proposed Intervenors also has "district specific" concerns about the "boundaries of the particular district in which he [or she] resides." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). This includes interests in how different communities are combined in each district.

As to the separation-of-powers claim, all Proposed Intervenors (like Petitioners) live in districts imposed pursuant to a process that violated the Wisconsin Constitution's separation of powers, and all have an interest as strong as Petitioners' in seeing that constitutional defect remedied. *See* Pet. in Intervention ¶¶ 1–8, 16–19.

Moreover, in the event the Court determines that the existing maps violate the Wisconsin Constitution, and the Legislature and the Governor fail to enact lawful replacement maps, each Proposed Intervenor likewise has "district specific" concerns about what may be "necessary to reshape the voter's district," to cure the constitutional defects and achieve lawful maps. *Gill*, 138 S. Ct. at 1930–31. Proposed Intervenors have an interest, as well, in ensuring that any replacement maps that determine their districts

reflect the technological advancements of computational redistricting, as well as the neutrality it ensures, as discussed below. *See infra* Part I-D.

C. The Disposition of This Action May Impair Proposed Intervenors' Interests.

Proposed Intervenors' interests may be impaired by this action. Proposed Intervenors allege that Wisconsin's current senate and assembly maps implicate their individual rights under the Wisconsin Constitution and must be replaced by new maps, so that they can live and vote in new legislative districts that are constitutionally sound. If the Court ultimately rules against Petitioners, Proposed Intervenors' interests in living and voting in new senate and assembly districts that comply with the Wisconsin Constitution will remain unfulfilled. Proposed Intervenors also have an interest in ensuring that any remedial map places their residences in districts that appropriately protect their rights under the Wisconsin Constitution, including by using the most technologically sophisticated and unbiased methods available to draw and evaluate districts designed to optimally comply with the law.

The dissents to the Court's October 6 Order may be read to suggest that the five Proposed Intervenors who participated in the *Johnson* litigation (Proposed Intervenors Wright, Krenz, Hamilton, Thiffeault, and Jha) cannot have their interests impaired here because their claims are precluded. That is incorrect.

As an initial matter, ***no*** party could have brought the current separation-of-powers claim in *Johnson*, because the claim did not actually arise until the Court, in its final *Johnson* decision in April 2022, adopted and ordered into effect the very redistricting maps that the Governor had vetoed, with no legislative override. But in any event, only five of the Proposed Intervenors were parties to the *Johnson* litigation. Thus, were

the Court to find that a party's prior participation in *Johnson* counsels against participation in this action (though it does not), the Court nonetheless should grant intervention as to Professor Atkinson, Dr. Kane, and Ms. Dudley, none of whom participated in that litigation.[2] They are Wisconsin citizens who live and vote in legislative districts where no Petitioner lives or votes, and their claims are no more barred by non-participation in the *Johnson* litigation than are Petitioners' claims.

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

The existing parties to this action do not adequately represent Proposed Intervenors' interests. "[T]he showing required for providing inadequate representation 'should be treated as minimal.'" *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 85, 307 Wis. 2d 1, 745 N.W.2d 1 (quoting *Armada Broad.*, 183 Wis. 2d at 476). Requiring only a minimal showing of inadequacy effectuates Wisconsin's policy favoring intervention "as a tool for 'disposing of lawsuits by involving as many concerned persons as is compatible with efficiency and due process.'" *Johnson* Intervention Order at 2 (citations omitted). Under this lenient inquiry, no party to this action adequately represents Proposed Intervenors' interests.

First, no party adequately represents Proposed Intervenors' interests in the constitutionality of the specific districts where they reside and exercise their franchise under the existing maps or any proposed remedial maps that the Court might consider in this action. *See Berry v.*

[2] As noted, although Dr. Kane and Ms. Dudley were parties to the August 4 *Wright* Petition to Commence an Original Action, Professor Atkinson has not been a party in any redistricting litigation before this or any other Court and has therefore had no opportunity to present his current claims. *See supra* note 1.

Ashcroft, No. 22-CV-00465, 2022 WL 1540287, at *3 (E.D. Mo. May 16, 2022) ("Proposed Intervenors are voters from various congressional districts … and voters from different districts may have competing interests in this litigation."). As citizens who live and vote in specific districts, Proposed Intervenors are particularly concerned about how those districts are drawn or redrawn, and whether their specific districts fully comply with the law. *See Gill*, 138 S. Ct. at 1930–31.

Absent their participation in this case, Proposed Intervenors' rights and interests as residents of and voters in Assembly Districts 20, 23, 77, and 79 and Senate Districts 7 and 26 would go unrepresented in this litigation. *See* Petition in Intervention ¶¶ 1–8. No present Petitioner lives or votes in any of these districts. Proposed Intervenors are therefore geographically distinct and will add perspectives to this litigation that the Court might otherwise not hear or consider.

Second, no party adequately represents Proposed Intervenors' interest in ensuring that any new maps, including maps that determine Proposed Intervenors' own districts, benefit from the technological advancements of computational redistricting. Among the parties, Proposed Intervenors alone will be able produce maps that are algorithmically optimized using computational redistricting to ensure compliance with the mandatory criteria set forth in Article IV of the Wisconsin Constitution and federal law.

To illustrate, while it may sound straightforward to order that districts must be contiguous, there are trillions of trillions of ways that Wisconsin can be divided into 33 contiguous senate districts and 99 contiguous assembly districts. And contiguity is not the only requirement state-legislative districts must meet. Under Article IV of the Wisconsin

Constitution, districts must be apportioned to avoid excessive deviations in their "number of inhabitants." Wis. Const. art. IV, § 3. In addition to "consist[ing] of contiguous territory," assembly districts must "be bounded by county, precinct, town or ward lines" and "be in as compact form as practicable." *Id.* § 4. Likewise, not only must senate districts be comprised of "convenient contiguous territory," but also "no assembly district shall be divided in the formation of a senate district." *Id.* § 5. Federal law, too, imposes myriad requirements under the Voting Rights Act and the Federal Constitution. *See Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1247–51 (2022) (per curiam).

As compliance with any of these criteria—contiguity, other Article IV rules, and federal requirements—improves, inevitably tensions with the other criteria arise. Satisfying them all at once—or, rather, maximizing the degree to which they can be harmoniously satisfied—is challenging for courts and litigants alike. And that is where computational redistricting shines. Specifically, computational redistricting facilitates systematic, objective evaluation of compliance with the various criteria and illuminates the point at which compliance with one criterion requires tradeoffs against other criteria. Curing scores of violations of Article IV's contiguity requirements necessarily will impact districts' shapes (and therefore compliance with the compactness criterion) as well as districts' numbers of inhabitants (and therefore compliance with equal-population requirements). Only computational redistricting can drive the mapmaking process toward the optimum districting plan that best complies with ***all*** of these and other criteria simultaneously—all in the context of a neutral map.

Other courts have relied on the benefits of computational redistricting to allow for easy comparison among remedial maps, *see, e.g.*,

Carter v. Chapman, 270 A.3d 444, 462–63 (Pa.) (noting that in adopting a remedial congressional map, the Pennsylvania Supreme Court "rel[ied] upon the analyses performed by [computational-redistricting expert] Dr. Daryl DeFord, which evaluate all of the submitted plans using the same methods and data sets"), *cert. denied*, 143 S. Ct. 102 (2022), as well as to show that it is possible to achieve better compliance with traditional redistricting criteria in a politically neutral way, *see, e.g.*, *Harper v. Hall*, 868 S.E.2d 499, 516–21, 553–58 (N.C. 2022) (describing court's extensive reliance on computational redistricting's algorithmic techniques), *overruled on other grounds*, 886 S.E.2d 393 (N.C. 2023), *aff'd sub nom. Moore v. Harper*, 143 S. Ct. 2065 (2023). Proposed Intervenors, who include some of Wisconsin's leading professors of mathematics and computer science, believe strongly in applying neutral scientific principles to redistricting and have an interest in ensuring that the districts where they live and vote are informed by these same benefits of computational redistricting.

II. Alternatively, This Court Should Grant Permissive Intervention.

Proposed Intervenors also meet the test for permissive intervention. As residents of and voters in districts at issue in this litigation but not otherwise represented, their claims "relate[]" to the claims at issue in this action, yet represent a distinct perspective. Wis. Stat. § 803.09(2).

Intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* There will be no delay because Proposed Intervenors have timely filed their Motion to Intervene pursuant to this Court's October 6 Order, and in their accompanying Petition in Intervention have adopted all of the relevant allegations and prayer for relief directly from the *Clarke* Petition. Moreover, Proposed Intervenors

are prepared to proceed consistent with the briefing schedule established by that Order and by any subsequent orders of the Court regarding timing.

CONCLUSION

For the foregoing reasons, this Court should grant Proposed Intervenors' Motion to Intervene.

Dated: October 10, 2023

Respectfully submitted,

Electronically signed by Sarah A. Zylstra
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