SUPREME COURT OF WISCONSIN

Appeal No. 2021AP1450–OA

BILLIE JOHNSON, et al.,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, et al.,

Respondents.

Original Action in the Supreme Court of Wisconsin

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY CITIZEN MATHEMATICIANS AND SCIENTISTS

Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha (collectively, "Proposed Intervenors" or "Citizen Mathematicians and Scientists") respectfully submit this Memorandum of Law in support of their Motion to Intervene in this action pursuant to this Court's Order of September 22, 2021 (as amended on September 24, 2021) and Wis. Stat. § (Rule) 803.09.

INTRODUCTION

Proposed Intervenors are Wisconsin voters who live in malapportioned congressional and legislative districts. They also are some of Wisconsin's leading professors and research scientists in mathematics, statistics, and computer science. These "Citizen Mathematicians and Scientists" include a past Chair of the Mathematical Optimization Society, the current Director of the Institute for Foundations of Data Science, a National Science Foundation CAREER Award winner, a Society for Industrial and Applied Mathematics prize winner, and a recipient of Marquette University's highest teaching award.

The Citizen Mathematicians and Scientists are professors who have a nonpartisan interest in seeing the redistricting process proceed fairly and transparently for all Wisconsin voters. Through a team of quantitative experts, Citizen Mathematicians and Scientist propose to assist the Court by using "computational redistricting"—a relatively recent field applying principles of mathematics, high-speed computing, and spatial geography to the redistricting process.[1] The Citizen Mathematicians and Scientists can apply their nonpartisan, scientific approach both to offer redistricting plans for this Court to adopt if it becomes necessary to do so and to analyze redistricting plans that other parties or *amici curiae* may propose.

STANDARD FOR INTERVENTION

The Citizen Mathematicians and Scientists satisfy all the criteria for mandatory intervention under Wis. Stat. § (Rule) 803.09(1), as well as the criteria for permissive intervention under § 803.09(2). As set forth below, the Citizen Mathematicians and Scientists should be permitted to intervene as of right because:

(A) their Motion to Intervene 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 their interest.

See Helgeland v. Wis. Municipalities¸ 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1.

[1] *See, e.g.*, Siobhan Roberts, *Mathematicians Are Deploying Algorithms to Stop Gerrymandering*, MIT TECHNOLOGY REVIEW (Aug. 12, 2021), *available at* https://www.technologyreview.com/2021/08/12/1031567/mathematicians-algorithms-stop-gerrymandering/; Moon Duchin, *Geometry v. Gerrymandering: Mathematicians Are Developing Forensics to Identify Political Maps that Disenfranchise Voters*, SCIENTIFIC AMERICAN, Nov. 2018, at 48–53, *available at* https://www.scientificamerican.com/article/geometry-versus-gerrymandering/; Amariah Becker, Moon Duchin, Dara Gold & Sam Hirsch, *Computational Redistricting and the Voting Rights Act*, 20 ELECTION L.J. (forthcoming 2021), *available at* mggg.org/publications/VRA-Ensembles.pdf.

In the alternative, the Citizen Mathematicians and Scientists should be allowed permissive intervention given that their claim and the main action "have a question of law or fact in common" and their intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § (Rule) 803.09(2).

ARGUMENT

Citizen Mathematicians and Scientists satisfy the standard for mandatory intervention, as well as for permissive intervention.

I. Citizen Mathematicians and Scientists meet all the criteria for mandatory intervention.

A. This Motion is timely.

"There is no precise formula to determine whether a motion to intervene is timely." *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). However, the "critical factor" is whether "the proposed intervenor acted promptly." *Id.*

Here, the Citizen Mathematicians and Scientists have acted promptly and in accordance with this Court's Order. Petitioners filed a petition for original action on August 23, 2021. On September 22, 2021, this Court granted that petition and set October 6, 2021, as the deadline to file motions to intervene. *Johnson v. Wisconsin Election Comm'n*, No. 2021AP1450–OA, Order (Wis. Sept. 22, 2021). The Citizen Mathematicians and Scientists filed this motion in accordance with the Court's deadline, and their motion is therefore timely.

B. Citizen Mathematicians and Scientists claim an interest in this action.

The Citizen Mathematicians and Scientists have a direct and immediate interest in this action. The Court has taken original jurisdiction of a petition asking the Court to find that the existing congressional, senate, and assembly districts are malapportioned. As set forth in their proposed Complaint for Declaratory and Injunctive Relief, the Citizen Mathematicians and

Scientists reside in malapportioned congressional and/or legislative districts; and because of this malapportionment, Citizen Mathematicians and Scientists' votes are not equally weighted under the one person, one vote principles of the United States and Wisconsin Constitutions. The Citizen Mathematicians and Scientists have an interest in ensuring that their congressional and legislative districts are redrawn to ensure the equal strength of their votes.

Further, the Citizen Mathematicians and Scientists have an interest in bringing a nonpartisan, science-driven approach to redistricting that will simplify the case and assist the Court. Redistricting requires adherence to multiple criteria, including population equality, contiguity, compactness, respect for county boundaries, partisan fairness, and compliance with the Voting Rights Act. Each of these criteria at some point conflicts with the others. Over the past several decades, satisfying all these principles simultaneously has been the core challenge for legislatures, courts, and litigants. In the last few years, however, mathematicians, computer scientists, and others in related fields have developed computer programs to optimize maps' compliance with these multiple, conflicting criteria. Should the Court face the unwelcome obligation of ordering new redistricting plans into effect, the Citizen Mathematicians and Scientists' team of experts can present the Court with congressional and legislative plans that approach, if not reach, "Pareto optimality," which would render it impossible to improve the plan's performance on any one traditional districting principle without sacrificing another value.

C. The disposition of this case may impair the Citizen Mathematicians and Scientists' ability to protect their interests.

Petitioners have asked the Court to take on the unwelcome obligation of ordering new redistricting plans into effect. The Citizen Mathematicians and Scientists' interests will be impaired or impeded if the Court adopts the approach Petitioners advocate for drawing new redistricting plans. Specifically, the Citizen Mathematicians and Scientists disagree with the

Petitioners' "least change" approach to remedy the malapportionment. *Johnson v. Wisconsin Election Comm'n*, No. 2021AP1450–OA, Memorandum in Support of Petition (Wis. Aug. 23, 2021). The Citizen Mathematicians and Scientists instead advocate that high-speed computers and cutting-edge algorithmic techniques can and should be used to effectuate the Court's districting principles, thwart gerrymandering, streamline and accelerate the mapmaking process, and promote fair and effective representation for all Wisconsin residents. Given that whatever redistricting plans the Court adopts could stay in place until the next Census, the Citizen Mathematicians and Scientists will be directly impacted by the outcome of this litigation.

D. No parties adequately represent the Citizen Mathematicians and Scientists' interests.

"[T]he showing required for providing inadequate representation 'should be treated as minimal.'" *Helgeland*, 2008 WI 9, ¶ 85 (quoting *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994)). "If the interest of the proposed intervenor is not represented at all, or if all existing parties are adverse to the proposed intervenor, the proposed intervenor is not adequately represented." Jay E. Grenig, 3 Wis. Prac., Civil Procedure (4th ed.) § 309.2. None of the existing parties adequately represents the Citizen Mathematicians and Scientists' interests in ensuring that their malapportionment claims are remedied using a transparent, scientific process.

II. Citizen Mathematicians and Scientists also meet all the criteria for permissive intervention.

In the alternative to intervention as of right, the Citizen Mathematicians and Scientists also meet the criteria for permissive intervention. The allegations in the Citizen Mathematicians and Scientists' Complaint for Declaratory and Injunctive Relief share common questions of law and fact with the main action. Indeed, they raise virtually identical claims regarding congressional and legislative malapportionment as the Petitioners. *Johnson v. Wisconsin Election Comm'n*, No. 2021AP1450–OA, Petition (Wis. Aug. 23, 2021). However, as discussed above, the Citizen

Mathematicians and Scientists disagree with the Petitioners' proposed "least change" remedy. Accordingly, although the Citizen Mathematicians and Scientists share claims with the Petitioners, their interests are distinct.

Intervention by the Citizen Mathematicians and Scientists will not "unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § (Rule) 803.09(2). There will be no delay because the Court has not yet entered a scheduling order in this case, and the Citizen Mathematicians and Scientists are prepared to abide by any scheduling order the Court establishes. Neither of the original parties to this action opposes intervention by the Citizen Mathematicians and Scientists.[2]

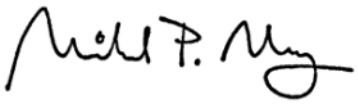
CONCLUSION

For the foregoing reasons, the Citizen Mathematicians and Scientists respectfully ask that this Court grant their unopposed Motion to Intervene and allow them to file their proposed Complaint for Declaratory and Injunctive Relief.

[2] Petitioners Billie Johnson, Eric O'Keefe, Ed Perkins, and Ronald Zahn have indicated through counsel that they do not oppose intervention by the Citizen Mathematicians and Scientists, but reserve the right to oppose any proposed pleading if it substantively expands the scope of this case. Respondents Wisconsin Elections Commission, Marge Bostelmann, Julie Glancey, Ann Jacobs, Dean Knudson, Robert Spindell, and Mark Thomsen have indicated through counsel that they take no position on intervention by the Citizen Mathematicians and Scientists.

Dated: October 6, 2021

Respectfully submitted,



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