

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

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LISA HUNTER, JACOB ZABEL, JENNIFER OH, JOHN PERSA,  
GERALDINE SCHERTZ, and KATHLEEN QUALHEIM,

*Plaintiffs,*

and

BILLIE JOHNSON, ERIC O'KEEFE, ED PERKINS, and  
RONALD ZAHN,

*Intervenor-Plaintiffs,*

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S.  
JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and  
MARK L. THOMSEN, in their official capacities as members of the  
Wisconsin Elections Commission,

*Defendants,*

and

WISCONSIN LEGISLATURE,

*Intervenor-Defendant,*

and

GOVERNOR TONY EVERS,

*Intervenor-Defendant,*

and

CONGRESSMEN GLENN GROTHMAN,  
MIKE GALLAGHER, BRYEN STEIL, TOM TIFFANY,  
and SCOTT FITZGERALD,

*Intervenor-Defendants.*

21-cv-512-jdp-ajs-ec

Three-Judge Court

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BLACK LEADERS ORGANIZING FOR  
COMMUNITIES, VOCES DE LA FRONTERA,  
the LEAGUE OF WOMEN VOTERS OF  
WISCONSIN, CINDY FALLONA, LAUREN  
STEPHENSON, and REBECCA ALWIN,

*Plaintiffs,*

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S.  
JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and  
MARK L. THOMSEN, in their official capacities as members of the  
Wisconsin Elections Commission, and MEAGAN WOLFE, in her  
official capacity as the Administrator of the Wisconsin Elections  
Commission,

*Defendants.*

21-cv-534-jdp-ajs-ec

Three-Judge Court

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY  
PROPOSED PLAINTIFF-INTERVENORS CITIZEN DATA SCIENTISTS**

Stephen Joseph Wright, Jean-Luc Thiffeault, Somesh Jha, Joanne Kane, Michael Switzenbaum, and Leah Dudley (collectively, “Proposed Plaintiff-Intervenors” or “Citizen Data Scientists”) respectfully submit this Memorandum of Law in support of their Motion to Intervene as Plaintiffs in this action pursuant to Federal Rule of Civil Procedure 24(a)(2) or 24(b)(1).

**INTRODUCTION**

Proposed Plaintiff-Intervenors are Wisconsin voters who live in overpopulated congressional and legislative districts. They also are some of Wisconsin’s leading professors, practitioners, and research scientists in data science, computer science, mathematics, statistics, and engineering. These “Citizen Data 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, and a Society for Industrial and Applied Mathematics prize winner.

Counsel representing the Citizen Data Scientists had already been preparing to intervene in these proceedings when this Court’s order issued on Thursday afternoon, September 16, 2021, granting the then-pending motions to intervene in this action and stating “[n]ow that [the] court has granted these motions to intervene, the existing parties represent the spectrum of legitimate interests in Wisconsin’s decennial redistricting” and therefore “any further requests to intervene will require a particularly compelling showing.” Dkt. 60 at 5.<sup>1</sup>

The Citizen Data Scientists respectfully suggest that the existing parties do *not* represent the full spectrum of legitimate interests in Wisconsin’s decennial redistricting. The existing parties

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<sup>1</sup> All docket citations are to entries in Case No. 21-cv-512, unless otherwise indicated.

are either political actors who play particular roles in the redistricting process<sup>2</sup> or parties advocating particularized partisan,<sup>3</sup> parochial,<sup>4</sup> or demographic<sup>5</sup> interests. In contrast, the Citizen Data Scientists are nonpartisan scientists and mathematicians whose interest is in seeing the redistricting process proceed fairly and transparently for all Wisconsin voters.

The Citizen Data Scientists, through a team of quantitative experts, propose to simplify this “already complicated” case (Dkt. 60 at 5) by using “computational redistricting”—a relatively recent field applying principles of mathematics, high-speed computing, and spatial geography to the redistricting process.<sup>6</sup> The Citizen Data Scientists can apply their nonpartisan scientific

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<sup>2</sup> Intervenor-Defendants the Wisconsin Legislature, Wisconsin Governor, and Wisconsin Elections Commission each play a defined political role in the redistricting process, which each entity is here to protect. *See* Dkt. 9 at 2 (Wisconsin Legislature moving to intervene based on its characterization of this suit as a “direct attack on the Legislature’s constitutionally delegated responsibility of redistricting”); Dkt. 51 at 2 (Wisconsin Governor moving to intervene because “Wisconsin law recognizes a joint role for the Governor with the Legislature in redistricting”); Dkt. 41 at 7 (Wisconsin Elections Commission asserting its interest as the fact that a “new congressional and state legislative district plan needs to be in place no later than March 1, 2022, in order to enable staff of the Wisconsin Elections Commission to timely and effectively administer Wisconsin’s next scheduled congressional and state legislative election”).

<sup>3</sup> The Hunter Plaintiffs have filed their complaint because they “intend to advocate and vote for Democratic candidates in the upcoming 2022 primary and general elections.” Dkt. 1 at 4. In contrast, the Grothman Intervenor-Defendants intervened to protect their interest as incumbent Republican Members of Congress “to continue to represent th[eir] constituents.” Dkt. 31 at 2.

<sup>4</sup> The Johnson Plaintiff-Intervenors interest is “to argue for new maps that are consistent with the ‘least change’ principle,” thus “making the least amount of changes to the existing maps” possible. Dkt. 22 at 12; Dkt. 21-1 at 8.

<sup>5</sup> The BLOC Plaintiffs challenge only the state legislative districts and are focused on “Black voters whose votes for Milwaukee-area State Assembly districts are diluted in violation of Section 2 of the Voting Rights Act.” Dkt. 22-1 at 3 (Case No. 3:21-cv-00534-jdp-ajs-eec).

<sup>6</sup> *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 [maggg.org/publications/VRA-Ensembles.pdf](http://maggg.org/publications/VRA-Ensembles.pdf).

approach both to offer redistricting plans for this Court to adopt in the event that becomes necessary and to analyze redistricting plans that other parties may propose.

Because no Wisconsin residents had notice that the Court might impose a heightened burden for intervention, because nothing further has occurred in this case since the Court's September 16 Order (issued less than two business days ago), and because none of the original parties to this action opposes their intervention,<sup>7</sup> the Citizen Data Scientists respectfully request they be held only to the ordinary standards for intervention under Federal Rule of Civil Procedure 24 and should not have to make a "compelling showing" to intervene in this case. However, even if that higher standard applies, the Citizen Data Scientists satisfy it.

## ARGUMENT

### I. Permissive Intervention Is Appropriate.<sup>8</sup>

As this Court has already noted, "permissive intervention under Rule 24(b) is appropriate if the motion is timely and the proposed intervenor 'has a claim or defense that shares with the main action a common question of law or fact.'" Dkt. 60 at 2 (quoting Fed. R. Civ. P. 24(b)(1)(B)). Permissive intervention should be granted liberally. *See* 7C Charles Alan Wright & Arthur R.

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<sup>7</sup> Plaintiffs Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, and Rebecca Alwin (together, the "BLOC Plaintiffs") have indicated through counsel that they consent to the motion. Plaintiffs Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Quahleim (together, the "Hunter Plaintiffs") have indicated through counsel that they do not oppose the motion. Defendants Robert Spindell Jr., Mark Thomsen, Dean Knudson, Ann Jacobs, Julie Glancey, Marge Bostelmann, and Meagan Wolfe (together, the "Original Defendants") have indicated through counsel that they take no position on the motion.

<sup>8</sup> The Citizen Data Scientists also meet the standard for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). As explained herein, they have filed a timely motion claiming an interest in the redistricting plans that are the subject of this litigation and are situated such that disposition of this action without their participation will impair their ability to protect their interest. Moreover, as discussed *infra* in Part II, the existing parties do not adequately represent the Citizen Data Scientists' interest. While the Citizen Data Scientists believe they are entitled to intervention as of right under Rule 24(a)(2), they recognize that this Court has granted all other parties only permissive intervention under Rule 24(b). Accordingly, that is the standard this motion focuses on.

Miller, *Federal Practice and Procedure* § 1904 (3d ed. 2007) (collecting cases). 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).

**A. This motion is timely.**

This motion to intervene is timely. It comes just days after the Governor moved to intervene in these actions, thus demonstrating that the likelihood of an impasse between the Legislature and the Governor is now a near certainty. It comes barely a month after the original Complaint was filed. It directly follows this Court’s September 16 Order. And it precedes the status conference the Court has scheduled with the parties on September 21 to discuss the schedule for these proceedings. At this point, no schedule has yet been set in this case for briefing or other matters. And the two cases raising malapportionment claims were just consolidated before this panel less than two business days ago. It would be extremely inefficient to require the Citizen Data Scientists now to file their own Complaint in a new action, have a three-judge court appointed, and then request consolidation of their case with this Court.

The Seventh Circuit has routinely recognized that when a case has not progressed such that intervention would prejudice the existing parties to the case, intervention is timely. *See Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (holding that it was an abuse of discretion to deny intervention for lack of timeliness when no party was prejudiced by three-month delay in moving to intervene). Timeliness does not require intervention “at the drop of a hat.” *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006). So long as the intervention does not cause “derailment” of the case, it ought to be granted. *Id.* Here, there is no chance of “derailment” because the parties are not yet on any scheduled track and the Citizen Data Scientists pledge to follow whatever schedule this Court sets. Accordingly, their motion to intervene is timely.

**B. Citizen Data Scientists' claims share common questions of law and fact with the main action.**

The Citizen Data Scientists' proposed Complaint in Intervention "shares questions of law and fact with the Hunter plaintiffs' complaint because they raise virtually identical claims regarding legislative and congressional malapportionment." Dkt. 60 at 3. Certainly, this Court has recognized, "that itself isn't dispositive because every Wisconsin voter who lives in one of the now-overpopulated districts holds the same interest." *Id.* However, just like the Johnson Intervenors, the Citizen Data Scientists "have an additional interest that militates in favor of their intervention." *Id.*

While the Johnson Intervenors advocate that this Court adopt a "least change" approach to remedy the congressional and legislative malapportionment, Dkt. 22 at 12; Dkt. 21-1 at 8, the Citizen Data Scientists instead advocate that high-speed computers and cutting-edge algorithmic techniques can and should be used to thwart gerrymandering, streamline and accelerate the mapmaking process, and promote fair and effective representation for all Wisconsin residents. The Citizen Data Scientists thus are similarly situated to the Johnson Intervenors in terms of advocating for a specific approach to solving the malapportionment question, though they advocate for a very different approach. As the Johnson Intervenors recounted in their memorandum in support of their motion to intervene, Wisconsin federal courts in prior decades have allowed intervention by "multiple individuals, unions, political parties and elected officials, all of whom agreed that the maps had to be redrawn after the census based upon the principle of 'one person, one vote' but who had different perspectives about what the new maps should look like." Dkt. 22 at 10. The same should hold true here.

**C. Citizen Data Scientists' intervention will cause no delay or prejudice.**

Intervention by the Citizen Data Scientists will not “unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3). Indeed, none of the original parties in these consolidated actions oppose intervention by the Citizen Data Scientists. *See supra* n.7. There will be no delay because the Court has not yet entered a scheduling order in this case, and the Citizen Data Scientists are prepared to abide by any scheduling order the Court establishes.

To the extent that the Court is concerned that adding another party might further complicate a case that “is already complicated” (ECF 60 at 5), the Citizen Data Scientists believe that their apolitical, science-driven approach to redistricting actually will simplify the case and assist the Court. As the Court is aware, 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 courts, or anyone else, seeking to redistrict in the public interest. Only in the last few years, however, have mathematicians, computer scientists, and others in related fields developed computer programs to simultaneously optimize these multiple, conflicting criteria.

Should the Court face the unwelcome obligation of ordering new maps into effect, the Citizen Data Scientists’ team of experts will be able to present a congressional map and a legislative map that approach, if not reach, “Pareto optimality,” which would render it impossible to improve the map’s performance on any one traditional districting principle without worsening it on another. Having such a map in the record could obviate any need for the Court to draw its own map, or to hire a special master to draw a map, as that process would inevitably lead back to whatever map the Citizen Data Scientists already submitted.

In any event, the “prejudice” referred to in the Federal Rules of Civil Procedure is *not* prejudice that would be caused by the intervention of an additional party itself; rather it is prejudice caused by any *delay* in intervening. *Schultz v. Connery*, 863 F.2d 551, 553–54 (7th Cir. 1988) (“[T]he consideration of whether Schultz will be prejudiced by Advance’s intervention is irrelevant. The relevant determination is the prejudice to Schultz resulting from Advance’s *delay* in intervening.”). Therefore, even if intervention by an additional party would complicate the case, that fact in and of itself should not be relevant to the decision to allow intervention. Intervention by multiple parties is common in redistricting cases. That is why intervention has been freely granted in past Wisconsin redistricting cases. Given that a proposed intervenor could otherwise simply file a separate complaint and then seek to have it consolidated with an existing action, intervention is a far more efficient option.

Accordingly, because there is not yet any schedule in this case, because the original Plaintiffs and Defendants do not oppose intervention, *see supra* n.7, and because the Citizen Data Scientists will comply with any schedule set by this Court, there will be no delay or prejudice to any party in this case.

## **II. Citizen Data Scientists Have a Particularly Compelling Interest in Intervention.**

Rule 24 sets the correct standard for intervention. However, even if the Court requires the Citizen Data Scientists to put forth a “particularly compelling showing” beyond what Rule 24 requires, Dkt. 60 at 5, this motion still should be granted. Absent intervention, the Citizen Data Scientists’ interest in this litigation will go unrepresented. Each of the other parties represents a particularized interest that does not encompass (or in some cases conflicts with) the Citizen Data Scientists’ interest in a nonpartisan, data-based, science-driven process for developing redistricting plans through computational redistricting:



- The Hunter Plaintiffs have an interest in redistricting plans that will help them achieve their goal of “advocat[ing] and vot[ing] for Democratic candidates in the upcoming 2022 primary and general elections.” Dkt. 1 at 4.
- The BLOC Plaintiffs (who have challenged only the state-legislative and not the congressional districts) seek to represent the interests of Black citizens whose votes for Milwaukee-area Assembly districts are diluted in violation of the Voting Rights Act. Dkt. 22-1 at 3 (Case No. 3:21-cv-00534-jdp-ajs-ec).
- The Johnson Plaintiff-Intervenors’ stated interest is in redistricting plans that comply with the “least change” principle. Dkt. 22 at 12; Dkt. 21-1 at 8. The “least change” principle is not aligned with the Citizen Data Scientists’ position because maximizing stability “threatens the responsiveness that lies at the heart of the democratic process and is key to the very concept of self-governance through elected officials.”<sup>9</sup>
- The Grothman Republican Congressmen Defendant-Intervenors claim an interest in redistricting plans that will help them preserve their existing districts given their “intent to run for reelection in 2022” and their desire “to continue to represent [their existing] constituents.” Dkt. 31 at 2.
- The Wisconsin Legislature views this suit as a “direct attack on the Legislature’s constitutionally delegated responsibility of redistricting” and is here to protect its power over the redistricting process. Dkt. 9 at 2.

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<sup>9</sup> Robert Yablon, *Gerrylaundersing 27* (citations and internal quotation marks omitted) (Sept. 6, 2021), Univ. of Wisconsin Legal Studies Research Paper No. 1708, *available at* SSRN: <https://ssrn.com/abstract=3910061> or <http://dx.doi.org/10.2139/ssrn.3910061>. Professor Yablon teaches Civil Procedure, Federal Jurisdiction, and the Law of Democracy at the University of Wisconsin Law School.

- The Wisconsin Governor moved to intervene because “Wisconsin law recognizes a joint role for the Governor with the Legislature in redistricting” and he is here to protect his role. Dkt. 51 at 2.
- The Wisconsin Elections Commission’s interest is in having “new congressional and state legislative district plan[s] ... no later than March 1, 2022, in order to enable staff of the Wisconsin Elections Commission to timely and effectively administer Wisconsin’s next scheduled congressional and state legislative election.” Dkt. 41 at 7.

In contrast to these parties and their political, partisan, parochial, or demographic interests, the Citizen Data Scientists advocate for the use of technology to advance apolitical, fair, and effective redistricting for all Wisconsinites. No other party in this litigation shares the Citizen Data Scientists’ compelling interest in applying science and technology to the redistricting process. And no other party can provide the Court with the sophisticated tools and analysis that the Citizen Data Scientists will be able to provide through a team of the Nation’s best quantitative experts on computational redistricting. Accordingly, even if this Court requires a compelling showing for intervention, Citizen Data Scientists have met that standard.

### CONCLUSION

For the foregoing reasons, the Citizen Data Scientists respectfully ask that this Court grant their Motion to Intervene and allow them to file their proposed Complaint in Intervention.

Dated: September 20, 2021

Respectfully submitted,

/s/ Sarah A. Zylstra  
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