

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY
BRANCH 4

KENNETH BROWN

Plaintiff,

v.

Case No. 22-CV-1324
Case Code No.: 30701

WISCONSIN ELECTIONS COMMISSION,

and

TARA MCMENAMIN,

Defendants.

**BRIEF IN SUPPORT OF PROPOSED INTERVENOR-DEFENDANT
BLACK LEADERS ORGANIZING FOR COMMUNITIES’ MOTION TO
INTERVENE**

INTRODUCTION

Ever since Black Leaders Organizing for Communities (“BLOC”) was founded in 2017, it has been a champion for Black civic participation in Milwaukee, Southeast Wisconsin and throughout the state. Because voting is the cornerstone of civic life and political empowerment, BLOC has engaged in voter education and turnout efforts in every election since its founding. The organization supports all eligible voters’ right to vote in the manner most accessible to them and has always promoted in-person absentee voting (“IPAV”) as a safe, easy way for its core constituency, Black voters, to cast their ballots.

This lawsuit seeks to severely limit local election officials' ability to administer IPAV to make voting safe and accessible for all voters, particularly those voters who have historically faced barriers at the ballot box, including Black Wisconsinites. Specifically, Plaintiff advocates an untenably narrow reading of Wis. Stat. § 6.855 that would upend election administration in municipalities throughout Wisconsin. This lawsuit further threatens to hamstring the vital work of the Wisconsin Elections Commission ("WEC" or "the Commission") through the spurious invocation of the long-discredited non-delegation doctrine, arguing that the Commission may not follow Administrative Rule EL 20.04(10) and lawfully adopted internal procedures that allow it to efficiently process complaints.

BLOC believes Wisconsin should be removing barriers to voting and strengthening our election administration system—not reducing access to safe and secure methods of voting and introducing dysfunction. On behalf of its members, constituents, and eligible Wisconsin voters, BLOC has a significant interest in the outcome of this litigation and in seeing voters' access to the ballot protected. Therefore, pursuant to Wis. Stat. § 803.09(1), BLOC should be permitted to intervene in this case as an additional defendant. Alternatively, BLOC should be granted permissive intervention pursuant to Wis. Stat. § 803.09(2).

STATEMENT OF INTERESTS

BLOC is a nonprofit organization organized under the laws of the state of Wisconsin with its principal office located in Milwaukee, Wisconsin, and a field office in Racine. [Lang Aff. ¶3.] Since its founding in Milwaukee in 2017, BLOC has expanded

its operations and is now active in Racine and Kenosha, as well as participating in statewide conversations about access to voting and other issues central to BLOC's mission, which is to improve the quality of life for Black Wisconsinites through political advocacy, education, and training. [*Id.* ¶¶2–7.] BLOC has one full-time staff member and four part-time ambassadors based in Racine. [*Id.* ¶4.] BLOC's ambassadors maintain relational contacts throughout the City. [*Id.*] During the 2021–22 election cycle, BLOC made upwards of 20,000 door attempts in Racine, encouraging Black residents to “exercise their right to engage in civic participation including voting.” [*Id.* ¶5.]

BLOC engages in extensive and sustained efforts to promote voter awareness, education, and participation, and to encourage civic engagement in Black communities throughout Wisconsin, including in Racine. [Lang Aff. ¶¶2, 5.] BLOC conducts its civic engagement efforts year-round, increasing its outreach in the lead-up to elections. [*Id.* ¶¶5–6.] The organization invests time and financial resources in educating its members, constituencies, and the public about elections and how and when to cast a ballot, and provides resources to assist its members, constituents, and other Wisconsin voters to exercise their right to vote, including IPAV. [*Id.* ¶¶6–7.] Many of the voters BLOC serves and supports rely on IPAV to cast their ballots. [*Id.* ¶9.] BLOC routinely encourages IPAV as the most accessible method of voting for many people. [*Id.* ¶¶10–11.]

BLOC has also consistently opposed efforts to erect barriers to voting, or to discount the votes of its constituents, including by participating in litigation. [Lang

Aff. ¶14.] BLOC participated in the redistricting litigation that followed the 2020 census, first filing suit in federal court, then intervening in state court litigation, to advocate on behalf of fair maps that would adequately represent Black voters. [*Id.*] See *Johnson v. Wisconsin Elections Commission*, 2022 WI 19, 401 Wis.2d 198, 972 N.W.2d; *Black Leaders Organizing for Communities et al. v. Spindell et al*, No. 21-cv-534 (W.D. Wis. 2021). BLOC was also a plaintiff in *League of Women Voters of Wisconsin v. Evers*, a challenge to a series of bills and appointments passed during the 2018 “extraordinary session” of the Wisconsin Legislature. 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209. [*Id.*]

BLOC advocates and works for access to the political process and the successful conduct of free and fair elections in Wisconsin. These core democratic principles are threatened both by Plaintiff’s myopic reading of Wis. Stat. § 6.855 and his challenge to long-standing WEC practices regarding the resolution of certain complaints.

STANDARD FOR INTERVENTION

Section 803.09 of the Wisconsin Statutes outlines this Court’s authority to grant intervention as a matter of right or to permit BLOC to intervene in this action based on the organization’s showing that it meets certain criteria for discretionary intervention. The statute provides two avenues for intervention: mandatory intervention under subdivision (1) or permissive intervention under subdivision (2).

To intervene as a matter of right under Section 803.09(1), BLOC must show:

- (A) its motion to intervene is timely;
- (B) it claims an interest sufficiently related to the subject of this action;

- (C) the existing parties do not adequately represent BLOC’s interest; and
- (D) disposition of this action may as a practical matter impair or impede its ability to protect that interest.

See Helgeland v. Wis. Municipalities, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. Courts take a “flexible and pragmatic approach to intervention as of right.” *Id.*, ¶40 n.30. “[T]here is interplay between the requirements,” which “must be blended and balanced to determine whether [Intervenors] have a right to intervene.” *Id.*, ¶39 (footnote omitted). “The analysis is holistic, flexible, and highly fact-specific.” *Id.*, ¶40.

The test for permissive intervention is even more flexible. A court may grant permissive intervention to anyone who would be a proper party. *See, e.g., City of Madison v. Wis. Emp’t Relations Comm’n*, 2000 WI 39, ¶11, n.11, 234 Wis. 2d 550, 610 N.W.2d 94. Under Section 803.09(2), the court “shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* Section 803.09(2) makes clear that allowing BLOC to intervene here is within the Court’s discretion because BLOC’s position and the main action share a common question of law or fact. *Helgeland*, 2008 WI 9, ¶120.

ARGUMENT

BLOC meets the criteria for both mandatory and permissive intervention. Regardless of which avenue the Court follows, intervention is appropriate here.

I. BLOC meets the criteria for intervention as of right.

BLOC meets each of the *Helgeland* criteria for intervention as of right. Wisconsin courts view intervention favorably as a tool for “disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and

due process.” *Helgeland*, 2008 WI 9, ¶44 (cleaned up).¹ The four requirements must be “blended and balanced to determine whether [a party has] the right to intervene.” *Id.* ¶39 (footnote omitted). Under the “holistic, flexible” analysis that the Wisconsin Supreme Court has prescribed, *id.* ¶40 (footnote omitted), BLOC should be afforded the opportunity to intervene as a matter of right.

A. BLOC’s Motion to Intervene is timely.

BLOC filed its Motion to Intervene in a timely manner, and its participation in the case will not prejudice the existing parties. There is “no precise formula to determine whether a motion to intervene is timely,” but the critical factor is whether the proposed intervenor acted “promptly.” *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). Whether an intervenor acted promptly is determined by “when the proposed intervenor discovered its interest was at risk and how far litigation has proceeded.” *Olivarez v. Unitrin*, 296 Wis. 2d 337, 348, 723 N.W.2d 131 (Ct. App. 2006) (citing *Roth v. LaFarge Sch. Dist. Bd. Of Canvassers*, 247 Wis. 2d 708, 634 N.W.2d 882 (Ct. App. 2001)). The Court should also consider whether intervention will prejudice the original parties. *Bilder*, 112 Wis. 2d at 550.

BLOC filed its Motion to Intervene promptly, within 90 days of the date of the Complaint, and before the disposition of any substantive motion. Brown filed his Complaint on December 1, 2022. Discovery in this case has not yet begun and proceedings are currently stayed pending resolution of Defendant Tara McMenamín’s

¹ This brief uses the signal “cleaned up” when internal quotation marks, ellipses, and other metadata have been omitted from a quotation to improve its readability without altering its meaning. See Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017), <https://lawrepository.ualr.edu/appellatepracticeprocess/vol18/iss2/3>.

Motion to Dismiss. Wis. Stat. § 802.06(1)(b). The Democratic National Committee and the Wisconsin Alliance for Retired Americans both filed their own motions to intervene, neither of which has been decided. A hearing is scheduled for March 15, 2023, two weeks from today, at which the pending intervention motions will be decided, along with Defendant Clerk McMenamín’s motion to dismiss. Two weeks is ample time for the existing parties in the case to brief any objections they may have to BLOC’s intervention, particularly as they have already addressed similar motions by the other proposed intervenors. There are no other pending motions, hearings, or trial dates that would be disrupted by BLOC’s intervention.

In addition, BLOC will abide by the current scheduling order and has no intention of slowing down this litigation. Should any party file a brief in opposition to this motion to intervene on or before March 8, BLOC will reply by the existing deadline of March 10 for proposed intervenors’ reply briefs. BLOC’s counsel intends to attend the March 15 hearing, and does not intend to file a brief regarding Clerk McMenamín’s motion to dismiss. Finally, BLOC is filing its proposed Answer simultaneously with its motion to intervene in accordance with Wis. Stat. 803.09(3). Granting the intervention will therefore not prejudice any of the existing parties or delay any pending proceeding.

B. BLOC’s interests are sufficiently related to the issues raised by Plaintiffs.

No specific test exists for determining whether interests are sufficient to warrant intervention. Instead, courts analyze the facts and circumstances in light of the “policies underlying the intervention statute.” *Helgeland*, 2008 WI 9, ¶¶43–44

(footnotes omitted). A proposed intervenor’s interest must be of “direct and immediate character” such that “the intervenor will either gain or lose by the direct operation of the judgment.” *Id.*, ¶45 (cleaned up). An interest “too remote and speculative” will not “support a right of intervention.” *Id.*, ¶53.

Plaintiffs’ claims in this suit bear directly on BLOC’s core interests and those of its members. This case threatens to erect barriers to voting for eligible Wisconsin voters whose interests BLOC represents and serves by eliminating or disrupting IPAV in the City of Racine, with potential impacts statewide. BLOC has worked and continues to work to educate communities about civic engagement with a significant emphasis on voting, including IPAV. [Lang Aff. ¶¶5–6.] The organization has invested considerable resources in promoting IPAV in the City of Racine as part of its commitment to political engagement. [*Id.* ¶6.] In the lead-up to the April 4 Spring Election, BLOC has communicated with community members through door canvassing, phone calls, and over 85,000 text messages. [*Id.*] It will continue to work on these issues as the election draws closer, expending considerable time and resources in encouraging using IPAV including in the City of Racine. [*Id.* ¶¶5–6.]

Plaintiff’s first claim seeks to drastically limit IPAV opportunities and reduce local election officials’ ability to run elections smoothly for their communities. And Plaintiff’s second claim would hamstring the Wisconsin Elections Commission from conducting its statutorily mandated functions. If Plaintiff obtains the relief he seeks, BLOC and the communities it serves will face new barriers to voting and civic engagement. [Lang Aff. ¶¶10–11, 15.] Furthermore, BLOC will need to adjust its

educational materials and outreach strategies to help voters deal with the new electoral landscape. [Lang Aff. ¶13.] BLOC has a clearly established, robust interest in the continuing availability of the City of Racine’s IPAV program.

C. WEC and Clerk McMenamain cannot adequately represent BLOC’s interests in this litigation.

“The showing required for providing inadequate representation should be treated as minimal.” *Helgeland*, 307 Wis. 2d 1, ¶85 (cleaned up). Indeed, it is sufficient that BLOC demonstrate that “representation of [their] interest ‘*may be*’ inadequate.” *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528 at 538 n.10 (1972)) (emphasis added). “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; *see also Armada Broad., Inc., v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W. 2d 357 (1994) (“When determining whether a party’s representation is deemed adequate we look to see if there is a showing of collusion between the representative and the opposing party; if the representative’s interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty.”).

The WEC and Clerk McMenamain are government actors with interests in defending their own conduct and determinations. The WEC has an interest in defending its own conduct and guidance, as a government entity charged with upholding Wisconsin election laws, as interpreted by the courts. WEC has the general responsibility for the administration of Wisconsin’s election laws. Wis. Stat. § 5.05(1). Clerk

McMenamin has, among other responsibilities as a city clerk, “charge and supervision of elections and registration” in the City of Racine. Wis. Stat. § 7.15(1). Unlike BLOC, neither Defendant represents or advocates on behalf of citizens and voters.

The current Defendants do not share and have no duty to represent BLOC’s interests, or the interests of the communities BLOC serves.² WEC is a government entity comprised of appointed state public officials. The Wisconsin Supreme Court recognizes that, because of their specific role, governmental parties will likely not litigate “with the vehemence of someone who is directly affected.” *Armada Broad.*, 183 Wis. 2d at 476. Governmental defendants play specific roles in the administration and conduct of Wisconsin elections. *See generally* Wis. Stat. §§ 5.05 (powers and duties of WEC), 5.05(3d) (duties of the WEC Administrator); 7.15 (municipal clerk has “charge and supervision of elections” in their municipality). Those duties are related to, but not coterminous with, BLOC’s interests, work, and the interests of its members. The existing Defendants are not voters or civic engagement organizations and do not, indeed *cannot*, represent the interest of voters in the same way BLOC does. WEC’s interest, as it should be, is in administering Wisconsin election laws. Clerk McMenamin’s interest is in administering elections for the City of Racine. While WEC, Clerk McMenamin, and BLOC may ultimately seek the same result in this case, BLOC has a unique perspective regarding the impact this case will have on Wisconsin’s Black communities. For that reason alone, BLOC’s interests are not

² The additional Proposed Intervenor-Defendants’ interests in this litigation are still not equivalent. The Democratic National Committee’s interest is partisan and statewide and is not focused on the interests of Black voters and communities. The Wisconsin Alliance for Retired Americans works on behalf of retired union members—although some of these individuals doubtless overlap with BLOC’s constituency, again, the Alliance does not share BLOC’s focus on or expertise in civic engagement for Wisconsin’s Black communities.

already adequately represented. Finally, depending on how the case develops, BLOC may also need to raise legal arguments distinct from those of the current defendants.

D. The relief Plaintiff seeks would impair BLOC's ability to protect its interests and those of its members and constituents.

Plaintiff asks the Court to dramatically remake the landscape for IPAV in the City of Racine and potentially throughout Wisconsin, and invalidate Wisconsin Administrative Code EL 20.04(10), which would unlawfully and unnecessarily hinder the Wisconsin Elections Commission from carrying out its responsibilities under law. This challenge to the Administrative Code invokes the long-defunct “non-delegation doctrine,” a legal theory so out-of-date that its application to modern law and election administration is a matter of first impression for Wisconsin courts.³ The novel and weighty nature of Plaintiff’s claims highlights the need for BLOC to intervene, given its extensive involvement in voting issues and significant interests in ensuring all voters have access to the ballot and to a functional election administration system.

The relief Plaintiff seeks would impair BLOC’s ability to protect its own interests and those of its members and constituents in this litigation, particularly by impeding access to IPAV, on which BLOC’s members rely and which the organization has long promoted. [Lang Aff. ¶¶8–11, 13, 15–16.] The outcome of this litigation therefore “may, as a practical matter, impair or impede [the] ability to protect interests that may be related to the subject of [the] action.” *Helgeland*, 2008 WI 9, ¶75 (footnote omitted). Just as a court should “approach intervention as of right

³ The “non-delegation doctrine” was put to rest nearly a century ago. *See State v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928).

generally,” this inquiry is taken under a “pragmatic approach ... focus[ed] on the facts of each case and the policies underlying the intervention statute.” *Id.*, ¶79. The Wisconsin Supreme Court recognized that intervention is more warranted when a “novel holding” is at stake, because “[t]he effect of stare decisis is more significant when a court decides a question of first impression.” *Helgeland*, 307 Wis. 2d 1, ¶81.

Were Plaintiff to prevail here on his novel and misplaced theories regarding Wis. Stat. § 6.855 and Wisconsin Administrative Code EL 20.04(1), access to voting for BLOC’s members and constituents, as well as Wisconsin voters generally, would be restricted, and BLOC’s interests in safeguarding eligible Wisconsin voters’ ability to cast a ballot that counts, encouraging them to exercise their right to vote, and advocating for accessible and secure methods to vote would be directly and significantly impaired. [Lang Aff. ¶15.] BLOC’s financial interests and investments in voter education programs and training would also be impacted, as limitations on IPAV options would require BLOC to adjust its educational materials and outreach strategy to account for this change. [Lang Aff. ¶13.] BLOC’s interests would thereby be substantially impaired by a judgment for the Plaintiff in this case, and it meets the fourth element of the test for intervention under Wis. Stat. § 803.09(1).

In sum, because BLOC meets all four elements, it is entitled to intervene as a matter of right under Wis. Stat. § 803.09(1). *Armada Broad.*, 183 Wis. 2d at 471.

II. BLOC also meets the criteria for permissive intervention.

Alternatively, BLOC meets the standard for permissive intervention under Wis. Stat. § 803.09(2). “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." Wis. Stat. § 803.09(2). "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Absent prejudice, intervention is within the Court's discretion if the movant's claim or defense and the main action share a common question of law or fact. *Helgeland*, 2008 WI 9, ¶120.

Granting BLOC's motion to intervene would not unduly delay or prejudice the adjudication of the rights of the original parties. As discussed above, BLOC has filed this Motion promptly and is prepared to abide by the current scheduling order as well as any other deadlines the Court may set. BLOC has no interest in delaying the resolution of this case. Prejudice to the existing parties is also not an issue this early in this case.

BLOC's arguments and the main action share common questions of law. The Complaint asserts that Wis. Stat. § 6.855 severely limits local election officials' ability to provide IPAV to voters, and that Administrative Code EL 20.04(10) impermissibly allows WEC to delegate authority to the Administrator. Consequently, Plaintiff seeks declaratory and injunctive relief to institute its preferred reading of Wisconsin law. BLOC will argue that Wisconsin law allows WEC and the Racine City Clerk to take the actions they have taken to ensure that voters can cast their ballots in Wisconsin's elections and that IPAV remains available, including to the constituents BLOC serves. As set forth above, BLOC has a long and established interest in the

availability of IPAV and in successful election administration in Wisconsin. These interests should be resolved in the same suit.

CONCLUSION

Proposed Intervenor-Defendant Black Leaders Organizing for Communities respectfully requests that it grant this Motion to Intervene and accept the attached Answer and Affirmative Defenses for filing.

Dated this 1st day of March, 2023.

/s/Daniel S. Lenz

Scott B. Thompson, SBN 1098161

Daniel S. Lenz, SBN 1082058

LAW FORWARD

222 W. Washington Ave., Ste. 250

Madison, WI 53703

dlenz@lawforward.org

sthompson@lawforward.org

608.556.9120

*Attorneys for Proposed Intervenor-Defendant Black
Leaders Organizing for Communities*