

STATE OF WISCONSIN

CIRCUIT COURT

MARINETTE COUNTY

THOMAS OLDENBURG,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

Marge Bostelmann, Carrie Riepl,

Ann S. Jacobs, Donald Millis,

Robert F. Spindell, Jr.,

Mark L. Thomsen, Commissioners,

Case No. 24-CV-43

Case Code: 30701

and

MEAGAN WOLFE,

as Administrator of the

Wisconsin Elections Commission,

Defendants.

BRIEF IN SUPPORT OF MOTION TO INTERVENE BY DISABILITY RIGHTS WISCONSIN AND THE LEAGUE OF WOMEN VOTERS OF WISCONSIN

INTRODUCTION

Voters have been able to request absentee ballots in Wisconsin through the MyVote.WI.gov (“My Vote”) website since 2017. This case seeks to upend this current

secure, practical, and effective system¹ by creating unneeded, burdensome, and unwarranted new requirements.

Plaintiff Thomas Oldenburg seeks declaratory relief that would preclude the use of the recently updated EL-122 Official Absentee Ballot Certificate and Application. Oldenburg also claims that, for the ballot to be counted, Defendants must print and mail a copy of the ballot request—which voters submit online—with the ballot itself, to be signed by the voter and returned with the ballot. (Dkt. 3, Compl., pp. 21–22.) This convoluted procedure would be in addition to the numerous steps a voter must already take to vote absentee, as well as the existing safeguards that ensure that only the voter can return their absentee ballot. And should Oldenburg prevail, a mistake during any step in this complex chain could lead to a ballot being set aside, denying a Wisconsin voter their constitutional right.

Proposed Intervenors, Disability Rights Wisconsin (“DRW”) and the League of Women Voters of Wisconsin (the “League”) (collectively, “Proposed Intervenors”) seek to intervene to prevent Oldenburg’s preferred interpretation from impeding, or denying outright, the right to vote of all Wisconsin voters, in particular voters with disabilities who rely upon the safety, security, and accessibility of absentee ballot access through the MyVoteWI.gov website.

¹ Scott Bauer, *Wisconsin audit finds elections are ‘safe and secure’*, AP (October 22, 2021) <https://apnews.com/article/joe-biden-wisconsin-presidential-elections-state-elections-madison-9a2f172dd8074668ded26bd5b0b41fbb>.

STATEMENT OF INTERESTS

DRW is a statewide nonpartisan, nonprofit organization organized and located in Wisconsin. DRW's mission is to empower all persons with disabilities to exercise and enjoy the full extent of their rights and to pursue the greatest possible quality of life. A primary aspect of this mission is to ensure that persons with disabilities can exercise their constitutional right to vote. DRW is designated by the Governor the State of Wisconsin to act as the congressionally mandated protection and advocacy agency for Wisconsin citizens with mental illness, developmental disabilities, and other physical impairments, pursuant to Wis. Stat. § 51.62, 29 U.S.C. § 794e, 42 U.S.C. §§ 15041 *et. seq.*, and 42 U.S.C. §§ 10801 *et. seq.* (Declaration of Kristin Kerschensteiner (“Kerschensteiner Dec.”), ¶¶2–7.)

DRW promotes legal rights around voting issues in Wisconsin. This includes advocacy to ensure that people with disabilities have equal access to the polls; educating people with disabilities, service providers, and families about voting laws; working with election officials on both the state and local levels to ensure that people with disabilities have access to the polls; and, working one-on-one with clients to resolve individual problems with the voting process. (*Id.*, ¶9.) DRW educates its constituents and the public about voting issues and regularly advocates for policies and laws to advance civil rights and voting access for people with disabilities. (*Id.*, ¶¶7–12.) Because some voters with disabilities are able to vote only via absentee ballot, DRW has a particular interest in protecting access to the franchise via absentee voting. (*Id.*, ¶¶10–12, 14.)

DRW has engaged in other litigation to protect voting rights, including *City of Green Bay v. Bostelmann*, No. 20-cv-479, 2020 WL 1492975 (E.D. Wis. Mar. 27, 2020); *Democratic Nat'l Committee v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis. Sep. 21, 2020), *stay denied*, 976 F.3d 764 (7th Cir. Sept. 27, 2020), *question certified on reconsideration*, 973 F.3d 764 (7th Cir. Sept. 29, 2020), *certified question answered*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, *stay granted after certified answer*, 977 F.3d 639 (7th Cir. Oct. 8, 2020), *motion to vacate denied*, 141 S. Ct. 644 (U.S. Oct. 26, 2020); *Jefferson v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556; *Fabick v. Wisconsin Elections Comm'n*, 2022 WI 88, __ Wis. 2d __, 989 N.W.2d 764 (Table); *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied* 2022 WI 104; *Archambault v. Wisconsin Elections Comm'n*, Waukesha Cnty. Cir. Ct. No. 2021CV1620 (filed Nov. 9, 2021). (Kerschensteiner Dec., ¶12.)

The League is a nonpartisan, nonprofit, non-stock corporation organized under the laws of the State of Wisconsin with its principal office located at 612 West Main St., Suite 200, in the City of Madison, Dane County, Wisconsin. The League is an affiliate of The League of Women Voters of the United States, which has 700 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The League works to expand informed, active participation in state and local government, giving a voice to all Wisconsinites. (Declaration of Eileen Newcomer (“Newcomer Dec.”), ¶2.)

The League began as an organization focused on the needs of women and training women voters. (*Id.*, ¶3.) It has evolved into an organization concerned with educating, advocating for, and empowering all Wisconsinites. (*Id.*, ¶4.) With members throughout the State, local Leagues are engaged in numerous activities, including hosting public forums and open discussions on issues of importance to the community. (*Id.*, ¶5.) Individual League members invest substantial time and effort in voter training and civic engagement activities, including voter registration and get-out-the-vote (“GOTV”) efforts. (*Id.*) The League has developed the statewide Election Observation Program and the Vote411 voter guide. (*Id.*) The League also devotes substantial time and effort to ensuring that government works as effectively and fairly as possible at every level. (*Id.*) This work involves continual attention to and advocacy concerning issues of voting access, transparency, a strong and diverse judiciary, fair and equal nonpartisan redistricting, and appropriate government oversight. (*Id.*)

The League distributes voter information in the form of flyers, information cards, guides, and stickers. (*Id.*, ¶7.) The League engages hundreds of thousands of individuals through its website and social media platforms. In 2020 alone, the League made over 1 million contacts regarding absentee voting via text banking, informational postcards, social media ads, including on Facebook and Google, its website, and, specifically, its webpage providing the public with the location of early voting and drop box locations. (*Id.*) Moreover, the League invested hundreds of thousands of dollars in its voter outreach activities relating to the Fall 2020 and

Spring 2021 elections. (*Id.*, ¶8.) Similarly in 2022, the League engaged voters through the “Resolve to be a Voter” campaign, which expressly encouraged voters to request their absentee ballots for the calendar year and ran a “ballot chase” program which ensured voters properly returned the ballots they requested. (*Id.*, ¶11.) These efforts contributed to high voter engagement and turnout in these elections and were fundamental to LWVWI electoral operations. For the April 2023 and February and April 2024 elections, LWVWI has continued its work to support and protect voting, including absentee voting, in Wisconsin, including by engaging in nonpartisan GOTV efforts, running absentee ballot chase campaigns, sending youth voter registration birthday cards, text banking, phone banking, reaching out to municipal and county clerks, sending postcards, assisting with poll worker recruitment, and running paid and earned media campaigns to encourage voting, in addition to many of the same efforts described above. LWVWI anticipates continuing to engage in these efforts through the 2024 general election in November. (*Id.*, ¶13.)

LWVWI has also engaged in extensive litigation in state and federal courts to protect voting rights, in cases including *Gear, et al. v. Bostelmann, et al.*, No. 20-cv-278-wmc (W.D. Wis.), which concerned restrictions on accessing and casting an absentee ballot by mail, *Lewis, et al. v. Bostelmann, et al.*, No. 20-cv-284-wmc (W.D. Wis.), *League of Women Voters v. Millis*, No. 21-cv-805-jdp (W.D. Wis.), *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, and *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*, No. 24AP165 (Ct. App. filed Jan. 30, 2024), which also involves requirements around absentee voting. (*Id.*, ¶6.)

Beyond education, outreach and litigation, the League was critical to the development and promotion of the redesigned absentee ballot envelope. (*Id.*, ¶18.) The League was one of the few advocacy organizations that participated in the 2021 audit that precipitated the redesign of form EL-122. (*Id.*) Since 2021, the League has been particularly engaged in the redesign process by not only monitoring public WEC meetings concerning redesign and providing direct feedback, but also directly meeting with WEC officials to provide feedback through that channel, as well. Because of their knowledge and investment, WEC asked that the League help find voters to participate in usability tests for the redesign. (*Id.*) After the redesign was completed, the League educated other organizations and voters on the redesigned envelopes. (*Id.*) The League has been particularly active on the issue of absentee balloting in Wisconsin. Because of this, the disposition of the case would have a substantial impact on their electoral activities. (*Id.*, ¶19.)

STANDARD FOR INTERVENTION

Wisconsin Statutes section 803.09 gives this Court the authority to grant intervention as a matter of right or permit Proposed Intervenors to intervene. Wis. Stat. § 803.09.

To intervene as a matter of right under Wis. Stat. § 803.09(1) Proposed Intervenors must show: (a) its 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 or fully represent Proposed Intervenors' interests. See *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1.

Courts should take a “flexible and pragmatic approach to intervention as of right.” *Id.*, ¶40 n.30. Courts recognize that “[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 if they brought the action themselves. *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 Wis. Stat. § 803.09(2), the court “shall consider whether the invention will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* Section 803.09(2) makes clear that allowing Proposed Intervenors to intervene here is within the Court’s discretion as long as Proposes Intervenors’ position and the main action share a common question of law or fact. *Helgeland*, 2008 WI 9, ¶120.

ARGUMENT

Proposed Intervenors meet the criteria for both mandatory and permissive intervention. Regardless of which avenue the Court follows, intervention is appropriate here. Accordingly, the Motion should be granted.

I. Proposed Intervenors meet Wisconsin’s standard for mandatory intervention.

Proposed Intervenors meet each of the criteria for intervention as a matter of right. Wisconsin courts favorably view intervention 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 (quoting *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)). To that end, the Wisconsin Supreme Court has established a “holistic, flexible” analysis. *Id.*, ¶40 (footnote omitted). The four requirements must be “blended and balanced to determine whether [a party has] the right to intervene.” *Id.*, ¶39 (footnote omitted).

A. Proposed Intervenor’s motion to intervene is timely and does not prejudice any party.

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.” *Bilder*, 112 Wis. 2d at 550. 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 also should consider whether intervention will prejudice the original parties. *Bilder*, 112 Wis. 2d at 550.

Here, the Proposed Intervenor acted promptly. The Wisconsin Elections Commission, its commissioners, and administrator (“WEC”) filed their Answer and Affirmative Defenses less than 60 days ago, and this Court held a scheduling conference less than two weeks ago. The only proceeding pending before the Court on which Proposed Intervenor expects to be heard is the Plaintiff’s Motion for Judgment on the Pleadings. Should the Court grant intervention, Proposed Intervenor intends to file a response on May 31, 2024, the date on which WEC’s response is also due and

in accordance with this Court's local rules.² Finally, Proposed Intervenors are filing this Motion either before or contemporaneous with any other requests to intervene. Granting the intervention will therefore not prejudice the existing parties.

B. Proposed Intervenors' interests relate directly to this case.

The interests of Proposed Intervenors relate directly to the issue at stake in this case: the state of voting by absentee ballot. There is no specific test for determining whether interests are sufficient to warrant intervention. Instead, a court must analyze the facts and circumstances in light of the "policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶¶43-44 (footnotes omitted). To grant intervention, the court must find a "direct and immediate character" such that "the [proposed] intervenor will either gain or lose by the direct operation of the judgment." *Id.*, ¶45 (quoting *City of Madison*, 2000 WI 39, ¶11 n.9). An interest that is "too remote and speculative" will not "support a **right** of intervention." *Id.*, ¶53 (emphasis added).

Oldenburg's claims in this suit bear directly on the Proposed Intervenors' interests as described in the Statement of Interests, *supra*. The Complaint challenges long-standing election practices in Wisconsin, as well as a lawful form WEC promulgated almost a year ago and after a lengthy development process. Both Proposed Intervenors have deep and abiding interests in the effective operation of Wisconsin's absentee ballot system, both for their members and constituents and for all Wisconsin voters.

² Should the Court wish to decide any motion to intervene before moving to the merits, or order briefing on this motion, Proposed Intervenors will abide by any schedule the Court sets.

DRW promotes legal rights involving voting in Wisconsin. This includes advocacy to ensure that people with disabilities have equal access to the polls; educating people with disabilities, service providers, and families about voting laws; working with election officials on both the state and local levels to ensure that people with disabilities have access to the polls; and, working one-on-one with clients to resolve individual problems with the voting process. (Kerschensteiner Dec., ¶¶9–10.) DRW educates its constituents and the public about voting issues and regularly engages in policy and legal advocacy to advance civil rights and election access for people with disabilities. (*Id.*, ¶¶4, 9-11.) Because some voters with disabilities can vote only via absentee ballot, DRW has a particular interest in protecting access to the franchise via absentee voting. (*Id.*, ¶14.)

The League engages in extensive and sustained efforts to promote voter awareness, education, and participation, and to encourage civic engagement. (Newcomer Dec. ¶¶4–5.) The League invests time and resources in educating their members, constituencies, and the public about elections and how and when to cast a ballot, and provide resources to assist their members, constituents, and other Wisconsin voters to exercise their right to vote. (*Id.*, ¶¶7–15.) The League has engaged in a wide range of activities to educate and assist mail-in absentee voters. (*Id.*, ¶¶11–13, 15.) Any threat to the ability of Wisconsinites to cast a ballot is a threat to the League's mission and work.

The change in Wisconsin election procedures that this lawsuit threatens would change the requirements for voting by mail. The League and DRW would have to

engage in significant public education efforts to inform voters of a court order that changes the status quo and invalidates ballots with that do not comply with Oldenburg's improper reading of the statutes.

C. Proposed Intervenors' ability to protect their interest may be impaired by the disposition of this case.

The outcome of this litigation “may . . . impair or impede [the proposed intervenor's] 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 generally,” analyzing a motion to intervene is done with 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 its stare decisis effect is “more significant when a court decides a question of first impression.” *Helgeland*, 307 Wis. 2d 1, ¶¶80-81. For the same reasons that the Proposed Intervenors' interests relate directly to the issues in the case, so too would their ability to protect those interests be impaired by a judgment in Oldenburg's favor. Such a judgment would not only impair the right to vote of the members and constituents the Proposed Intervenors represent, it would also require the Proposed Intervenors to divert and spend considerable resources responding to the changes in election law that would be caused, interfering with their other programming and activities.

D. Proposed Intervenor interests are not fully represented by any party in this case.

The current parties do not fully represent the interests of Proposed Intervenors. The burden to meet this factor is relatively low—proving inadequate representation “should be treated as minimal.” *Armada Broad., Inc. v. Stirn.*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994) (internal citation omitted). “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.

WEC does not share, and has no duty to fully represent, Proposed Intervenors’ interests. WEC, the commissioners, and Administrator Wolfe are state actors and, as the Wisconsin Supreme Court acknowledges, a governmental party may not litigate “with the [same] vehemence of someone who is directly affected.” *Armada Broad., Inc. v. Stirn.*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994). Moreover, Proposed Intervenors need only show that “representation of [their] interest[s] ‘may be’ inadequate” in this case. *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich*, 404 U.S. at 538 n.10). While WEC may also oppose Oldenburg’s extraordinary request, it does so from the point of view of the government, whereas Proposed Intervenors represent voters whose rights would be impacted by the requested relief. This includes not only their members and constituents, but the rights of Wisconsin citizens more generally, including those with disabilities who may face additional barriers to voting.

Furthermore, WEC and its attorneys at the Wisconsin Department of Justice have a legal obligation to defend not only their actions, but also the validity and application of Wisconsin law. Wis. Stat. §§ 165.25(1), (2); *State v. City of Oak Creek*, 2000 WI 9, ¶34, 232 Wis. 2d 612, 605 N.W.2d 526. WEC attorneys may be precluded from arguing, for example, that portions of Wis. Stat. §§ 6.84, 6.86 and 6.87 must be construed considering, or are preempted by, the Wisconsin Constitution's guarantees of the right to vote.

Because Proposed Intervenors meet all four elements of the governing test, they are entitled to intervene as a matter of right under Wis. Stat. § 803.09(1). *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994).

II. Proposed Intervenors meet the standard for permissive intervention.

Proposed Intervenors meet the standard for permissive intervention under Wis. Stat. § 803.09(1). “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.

Proposed Intervenors' Motion to Intervene does not prejudice any party. As this case is still in its early stages, the arguments made by Proposed Intervenors will help to ensure the case is fully litigated providing greater durability in the outcome.

As seen in the Complaint, and further attested to in Proposed Intervenor's Answer, Oldenburg fails to fully contemplate the harm that could be done to Wisconsin voters, especially to voters with disabilities, if his interpretation of law is adopted. By allowing intervention the Court ensures these and other issues are fully litigated.

Furthermore, the Court should use its discretion to grant intervention because of the risk posed to their interest by the disposition of this case. Proposed Intervenor's seek intervention in the current proceedings because of the risk of harm to their constituents' interests in the midst of an election. Proposed Intervenor's aim to ensure that their constituents have voices and say in their government. Moreover, they seek to reduce the burdens that voters face to ensure those voices may be heard adequately and equitably. This case seeks to erect a new barrier and create additional risk in the process of voting. For this reason, and those above, Proposed Intervenor's should be permitted to intervene pursuant to Wis. Stat. § 809.03(2).

CONCLUSION

For the foregoing reasons, Proposed Intervenor's-Defendants Disability Rights Wisconsin and The League of Women Voters of Wisconsin, respectfully request that the Court grant this Motion to Intervene and accept the attached Answer and Affirmative Defenses for filing.

Dated this 28th day of May 2024.

By: *Electronically signed by Daniel S. Lenz*

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