

CITY OF MILWAUKEE ELECTION
COMMISSION,

Plaintiff,

DEBORAH KOCONIS, LOIS SMITH,
and THE LEAGUE OF WOMEN VOTERS OF
MILWAUKEE COUNTY,

Proposed Intervenors-Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant, and

SUSAN TROJAN,

Proposed Intervenor-Defendant.

Case No. 24CV3558

**BRIEF IN SUPPORT OF PROPOSED
INTERVENORS-PLAINTIFFS' MOTION TO INTERVENE**

INTRODUCTION

Wisconsin law permits municipalities to designate one or more alternate locations for in-person absentee voting (“IPAV”). Wis. Stat. § 6.855. The statute contains multiple rules that municipalities must follow when designating IPAV sites, including: “If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk

or board of election commissioners.” *Id.*, (1). In 2022, Susan Trojan filed a complaint under Wis. Stat. § 5.06 against the City of Milwaukee Election Commission (“MEC”) and its then-Executive Director, Claire Woodall-Vogg,¹ challenging Milwaukee’s program on several bases. The Wisconsin Elections Commission (“WEC”) issued its Decision and Order on April 1, 2024 (“the Decision”). While WEC largely rejected Trojan’s claims regarding the selection and use of IPAV sites, the location of IPAV sites, IPAV by appointment,² and political-party advantage, the WEC found in favor of Trojan, at least in part, on issues involving notice and voting functions during the period when alternate sites have been designated.

MEC filed this appeal challenging WEC’s decision regarding voting functions during the period that alternate sites have been designated.³ (Dkt. 2.) Trojan has moved to intervene. (Dkt. 6.) On September 3, MEC filed an amended complaint. WEC has yet to file an answer or other responsive pleading, and this Court has set a scheduling conference for November 8, 2024.

Proposed Intervenors-Plaintiffs are two Milwaukee voters and the League of Women Voters of Milwaukee County (“Milwaukee League”). They seek to intervene to protect their rights—and the Milwaukee League’s members’ rights—to return their absentee ballots to MEC’s office and to register at MEC’s office if necessary, during

¹ Since the date of the WEC Decision, Paulina Gutierrez has succeeded Claire Woodall-Vogg as Executive Director. The Executive Director is not a party to this appeal.

² WEC did require at least 24 hours’ notice for by-appointment IPAV voting.

³ MEC refers to these functions as “simultaneous uses.”

the period that alternate sites have been designated in Milwaukee. WEC's interpretation of Wis. Stat. § 6.855(1) impairs those rights, contrary to Wisconsin law.

STATEMENT OF INTERESTS

Proposed Intervenors-Plaintiffs Deborah Koconis and Lois Smith are registered Wisconsin voters and City of Milwaukee residents. (Koconis Decl., ¶¶4–5; Smith Decl., ¶¶4–5.) Ms. Koconis is 68 years old, and Ms. Smith is 83 years old. (Koconis Decl., ¶5; Smith Decl., ¶5.) Voting is important to them, and they have tried to vote in most elections since becoming eligible to do so. (Koconis Decl., ¶6; Smith Decl., ¶¶6–7.) They both vote absentee because absentee voting is more accessible and, as older adults, they are more likely to face an unexpected health or mobility issue that could keep them from the polls on election day. (Koconis Decl., ¶¶7–8; Smith Decl., ¶¶7–8.) Ms. Koconis recently struggled with mobility issues, underwent major surgery, and depended on absentee voting as a result. (Koconis Decl., ¶10.) Ms. Smith has also depended on absentee voting at times. (Smith Decl., ¶10.) They both plan to vote absentee for the upcoming November election. (Koconis Decl., ¶11; Smith Decl., ¶11.) It is important to them to have as many options as possible to vote, including the option to return their absentee ballots to MEC when IPAV sites are not open. (Koconis Decl., ¶12; Smith Decl., ¶12.)

Proposed Intervenor-Plaintiff the Milwaukee League is a 501(c)(3) nonprofit, nonpartisan organization and one of the preeminent local organizations dedicated to expanding informed, active participation in government, working to increase understanding of major public policy issues and influences public policy through education and advocacy. (Maloney Decl., ¶3.) It was formed in 1989 as a merger of

three other area chapters of the League of Women Voters, which had been active for many years prior. (*Id.*, ¶6.)

Members of the Milwaukee League are also members of the statewide League of Women Voters of Wisconsin (“State League”) and the nationwide League of Women Voters of the United States (“National League”), both of which are nonpartisan, nonprofit organizations formed in 1920, immediately after enactment of the Nineteenth Amendment granting women’s suffrage. (*Id.*, ¶¶7–8.) The National and State Leagues began as organizations focused on the needs of women and training women voters. (*Id.*, ¶9.) They evolved into organizations concerned with educating, advocating for, and empowering all Wisconsinites. (*Id.*) Members of the State League, the Milwaukee League, and other local Leagues engage in numerous activities, including hosting public forums and open discussions on issues of importance to the community. (Newcomer Decl., ¶9; Maloney Decl., ¶13.)

The Milwaukee League is a small-budget, big-impact, high-value community organization. (Maloney Decl., ¶15.) Its accomplishments are due to the efforts of its 460 dedicated volunteers and one employee, a part-time administrative support coordinator. (*Id.*) The Milwaukee League affects public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process. (*Id.*, ¶12.) Its members invest substantial time and effort in voter training and civic-engagement activities, including voter-registration and get-out-the-vote (“GOTV”) efforts. (*Id.*, ¶13.)

Nine Milwaukee League voter-services teams operate continuously in response to specific identified community needs. (*Id.*, ¶17.) Six of these teams conduct voter-

registration events, where trained volunteers assist people in registering to vote. (*Id.*) Teams work in the Milwaukee County Jail and the Community Reintegration Center, where the challenges are immense, not only getting interested residents registered to vote but then assisting them in requesting absentee ballots. (*Id.*) The Community Outreach team works with over 45 community organizations, providing voter-registration events and printed information. (*Id.*) The Milwaukee League’s Library Team, in collaboration with the Milwaukee Public Library system, distributes election materials through all the main libraries and branches. (*Id.*) The Milwaukee League also often hosts voter-registration events at these critical institutions. (*Id.*) In the first seven months of 2024, the Milwaukee League had 177 events, registered 1,992 voters, requested 318 absentee ballots, and educated 7,848 people. Volunteers filled 900 individual volunteer slots for 2,650 volunteer hours. (*Id.*, ¶16.)

Registering voters is central to the Milwaukee League’s mission. In 2015, the Milwaukee League began a partnership with Milwaukee Public Schools (“MPS”) and MEC to conduct student-led voter-registration events in all MPS high schools. (*Id.*, ¶19.) The Milwaukee League has conducted successful voter-registration events at MPS high schools for the past decade. (*Id.*) The Milwaukee League trains students to set up and run the event and to develop a plan to attract eligible seniors. (*Id.*) The Milwaukee League trains interested students to lead their peers through the voter-registration process. (*Id.*) The Milwaukee League provides printed materials, promotional swag, and expertise to answer questions about voter-registration. (*Id.*)

During the 2023–2024 school year, more than 900 students were registered to vote through this Milwaukee League program. (*Id.*)

The Milwaukee League also partners with U.S. Citizenship & Immigration Services and is the only civic organization invited to register new citizens to vote at the federal courthouse and the USCIS district office in Milwaukee. (*Id.*, ¶20.) On average, the Milwaukee League registers 1,000 new citizens annually at naturalization ceremonies. (*Id.*) The Milwaukee League has credibility with government officials and the public alike because it has been doing this work for over 50 years in the Milwaukee community. (*Id.*)

The Milwaukee League also has voter-services teams that are not directly involved in voter registration but provide other valuable services to the community. (*Id.*, ¶18.) The Milwaukee League Candidate Forums Team encourages political responsibility through informed, active participation in government. (*Id.*) The Milwaukee League will continue to provide candidates for elective office with opportunities to present their views publicly and will continue to seek ways to make these opportunities available to all candidates. (*Id.*) The Community Training Team works behind the scenes to train Milwaukee League members and other community volunteers in how to complete the online voter-registration application correctly so that those individuals can assist others. (*Id.*)

The Milwaukee League focuses its work in communities that historically have had low voter turnout. (*Id.*, ¶21.) For example, Milwaukee’s near Southside wards in Aldermanic Districts 8 and 12 have had low voter registration and turnout compared

to most wards in the City of Milwaukee. (*Id.*, ¶22.) Socio-demographic factors on the Southside, such as lower incomes, a disproportionately large number of Latinos, immigrants, non-English speaking or limited-English speaking residents, and transient residents, compared to other City of Milwaukee wards, contribute to lower registration rates and lower voter turnout. (*Id.*, ¶23.) Social, economic, and political forces continue to disproportionately harm marginalized communities such as Aldermanic Districts 8 and 12. (*Id.*, ¶23.) Multiple legislative changes regarding how people can vote, as well as various court rulings, have limited the ways eligible residents can vote in Wisconsin. The previous exclusion of drop boxes, the existing voter I.D. requirement, and restrictions on access to and completion of absentee ballots, such as the requirement to have a witness signature and the prohibition on having one person return another person's absentee ballot, unless the voter has a disability, have caused uncertainty as to how one votes, at minimum, and, at worst, reduce the ability for people to vote. (*Id.*, ¶24.)

The Milwaukee League's Comité team offers in-person resources to the community through a trained volunteer force in Milwaukee. (*Id.*, ¶25.) The Milwaukee League's presence at hundreds of events each year, hosted by a variety of community institutions, adds value to these outreach efforts. (*Id.*) Using nonpartisan voter-education materials that have been researched, vetted, and reproduced saves the host organizations from needing to build this technical capacity. (*Id.*) In addition to advocating for voters' rights, one of the most important roles the Milwaukee League and its members play in central City communities, like the near Southside,

is to increase, strengthen, and maintain a coordinated neighborhood network of trusted community institutions that supports the dissemination of accurate information and engagement opportunities with their constituencies to support informed voters. (*Id.*, ¶26.)

During recent general elections, the State League has invested hundreds of thousands of dollars and significant amounts of time into voter education and get-out-the-vote activities, which are core to its mission and provide essential support to the Milwaukee League. (*See* Newcomer Decl., ¶¶12–19, 21.) Through texts, information postcards, social media ads, and its website, the State League provides information to millions of Wisconsin voters. (*Id.*, ¶12.) The Milwaukee League benefits directly from the State League’s efforts and coordinates closely with the State League for its work in Milwaukee County.

The State League has regularly engaged in extensive litigation in state and federal courts to protect voting rights. (*Id.*, ¶11.) Cases including *Gear, et al. v. Bostelmann, et al.*, No. 20-cv-278-wmc (W.D. Wis.), *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), challenged restrictions on accessing and casting an absentee ballot by mail and involved efforts to ensure that absentee voting remains a widely available and effective tool for all voters. In pending cases *Disability Rights Wisconsin, et al. v. Wisconsin Elections Commission*, No. 24AP1347 (Ct. App. filed

July 9, 2024), and *Oldenburg v. Wisconsin Elections Commission*, Marinette Cnty. Case No. 24CV43 (filed Feb. 15, 2024), the State League continues to fight for expanded and accessible absentee voting. (Newcomer Decl., ¶11.) As an affiliate, the Milwaukee League has benefitted greatly from the State League’s advocacy in court and now comes before this Court seeking to advocate specifically for Milwaukee voters.

STANDARD FOR INTERVENTION

The Wisconsin Statutes establish two paths for private parties to intervene in ongoing litigation—intervention as of right and permissive intervention. Wis. Stat. § 803.09(1)–(2). To intervene as a matter of right under Wis. Stat. § 803.09(1), Proposed Intervenors-Plaintiffs must show: (a) their motion to intervene is timely; (b) they claim an interest sufficiently related to the subject of this action; (c) the 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. *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,” recognizing that “there is interplay between the requirements,” which “must be blended and balanced to determine whether [Intervenors] have the right to intervene.” *Id.*, ¶¶39–40 & n.30. “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.*

ARGUMENT

Proposed Intervenors-Plaintiffs meet the criteria for both intervention as a matter of right under Wis. Stat. § 803.09(1) and permissive intervention under Wis. Stat. § 803.09(2). Intervention is appropriate under both analyses.

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

Proposed Intervenors-Plaintiffs meet 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). Where, as here, all four factors are met, Proposed Intervenors-Plaintiffs have a right to intervene. Wis. Stat. § 803.09(1).

A. Proposed Intervenors-Plaintiffs’ motion to intervene is timely and does not prejudice any party.

This Motion was filed timely, before Defendants filed an Answer and before this Court has ruled on any motion. It follows that granting intervention would 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 should also consider whether intervention will prejudice the original parties. *Bilder*, 112 Wis. 2d at 550.

Here, Proposed Intervenors-Plaintiffs acted promptly. MEC filed its Amended Complaint on September 3, 2024. WEC has yet to file an answer or other responsive pleading, and the Court has not yet held any hearing or conference in this matter. Moreover, Proposed Intervenors-Plaintiffs have filed their Motion before the Court has addressed Trojan’s Motion to Intervene.⁴ There are no other motions pending before the Court, nor has a trial been scheduled. Granting intervention will therefore not prejudice any existing parties.

B. Proposed Intervenors-Plaintiffs’ interests relate directly to this case.

The interests of Proposed Intervenors-Plaintiffs relate directly to the issue at stake in this case: the rules surrounding absentee voting and the ongoing ability of MEC to administer elections in accordance with Wisconsin law and consistent with the rights of voters. There is no specific test for determining whether interests are sufficient to warrant intervention. *Helgeland*, 2008 WI 9, ¶43. Instead, a court must

⁴ Proposed Intervenors-Plaintiffs do not object to Trojan’s Motion to Intervene.

analyze the facts and circumstances in light of the “policies underlying the intervention statute.” *Id.*, ¶44 (quoting *Bilder*, 112 Wis. 2d at 548). To grant intervention, a 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).

The validity of WEC’s decision limiting voting functions that can occur at MEC’s office (or the office of the municipal clerk in another municipality) is valid will directly affect the Proposed Intervenors-Plaintiffs’ interests. WEC’s decision restricting the ability of absentee voters to return their ballots and restricting *all* eligible voters’ ability to register or re-register at MEC’s office for significant parts of the year bears directly on these interests.

The Milwaukee League’s interests relate directly and substantially to this case. The Milwaukee League has made significant investments in registering voters and expanding the use of absentee voting in general as part of its mission to expand civic participation and protect the rights of voters to exercise their rights through these safe and reliable means of voting. The many ways in which the Milwaukee League—and the State and National Leagues of which it is a part—further this mission are described in the Statement of Interests, *supra*.

If WEC’s Decision were upheld, the Milwaukee League would need to revise a substantial amount of its voter-education materials specific to absentee voting and voter registration and affirmatively reach out to voters to inform them that the

practices in Milwaukee have changed. Since, under WEC's Decision, the MEC Office would be unavailable for several months of the year for voter registration, the League may also need to supplement their voter-registration efforts. As a small, mostly volunteer-run organization—one that focuses heavily on voter registration and absentee voting—the WEC Decision will significantly change the Milwaukee League's priorities and operations.

Proposed Intervenor-Plaintiffs Koconis and Smith are among the voters who rely on absentee voting to exercise their constitutional rights. (Koconis Decl., ¶9; Smith Decl., ¶9.) As their experiences demonstrate, for any number of reasons, absentee voting may be the only way a voter can exercise their rights. *See, e.g., Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1027 (W.D. Wis. 2022). If WEC's interpretation of Wis. Stat. § 6.855 is permitted to stand, absentee voters like Koconis and Smith may not be able to perform certain election-related functions, including re-registering, should that become necessary, or returning absentee ballots in person at MEC's office for any period in which Milwaukee has designated IPAV sites.

The ability to access these functions, and the full range of voting methods permitted by Wisconsin law, is particularly important for Koconis and Smith, as they rely on absentee voting. In even-numbered years, when Wisconsin holds elections in both spring and fall, IPAV sites are designated for a considerable portion of the year. *See Wis. Stat. § 6.855(1)* (municipalities must designate alternate sites at least 14 days before absentee ballots are available for the primary election, and those

designations remain in effect until the day after the general election).⁵ The artificial and atextual limitation imposed by WEC will impede the ability of absentee voters to exercise their rights.

C. Proposed Intervenors-Plaintiffs’ 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 intervenors’] ability to protect interests ... related to the subject of [the] action.” *Helgeland*, 2008 WI 9, ¶75 (footnote omitted). The analysis of this element must be undertaken 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 has 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-Plaintiffs’ interests relate directly to the issues in the case, so too would their ability to protect those interests be impaired by a judgment in WEC’s favor. For Koconis and Smith, such a judgment

⁵ As one example, consider the designation period for the 2024 elections. For the 2024 spring elections, the City of Milwaukee designated IPAV sites on December 12, 2023. That designation lasted through April 3. Milwaukee Common Council, minutes of December 12, 2023, Meeting, available at <https://milwaukee.legistar.com/MeetingDetail.aspx?ID=1004424&GUID=303AD328-7D20-4D7B-9D98-3F0D0DCA147B&Search=>. For the fall elections, the City of Milwaukee designated IPAV sites on May 21, 2024, and that designation will remain in place through November 6. Milwaukee Common Council, Minutes of May 21, 2024, Meeting, available at <https://milwaukee.legistar.com/MeetingDetail.aspx?ID=1145577&GUID=55769C8E-C587-4CFE-9E9F-1F575A5AF5CA&Options=ID|Attachments|&Search=232046>. As a result, Milwaukee has such designations in effect for 284 days in a 12-month period—more than 77% of the year.

would impair their right to vote by limiting their ability to re-register if necessary at MEC's office and foreclosing their ability to return their absentee ballots there.

The judgment would similarly limit the rights of the Milwaukee League's members, be contrary to the organization's interests in promoting and expanding all methods to vote, including absentee and IPAV, and cause the organization to divert and spend considerable resources responding to the changed interpretation in election law that the judgment includes, interfering with their other programming and activities. Like both MEC and Trojan, the Milwaukee League previously understood that the "simultaneous uses" rule applied only during the period IPAV occurred such that voters could continue to register in the MEC office because registration is required for all non-military voters. Should it stand, the WEC Decision would upend both understandings and require the Milwaukee League to review and revise its existing voter-education materials for voters in the City of Milwaukee and divert resources to ensure voters know of these changes. Nearly all the Milwaukee League's voter-education work in the City of Milwaukee, as explained above, could be affected by WEC's Decision.

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

The current parties do not fully represent the interests of Proposed Intervenor-Plaintiffs. "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. 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). Proposed Intervenor-Plaintiffs 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 v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

Courts *may* make two presumptions to determine whether the representation of proposed intervenors’ interest is adequate. **First**, if the proposed intervenors have the “same ultimate objective in the action,” as an existing party, “courts typically presume adequate representation.” *Braun v. Vote.org*, 2024 WI App 42, ¶26, --- Wis. 2d ---, --- N.W.3d --- (cleaned up). **Second**, when the existing party is “a governmental body or officer charged by law with representing the interests of the absentee,” and the proposed intervenor is “a citizen or subdivision of the governmental entity,” courts also presume adequate representation. *Id.*

Neither presumption applies in this case. **First**, Proposed Intervenor-Plaintiffs do *not* completely share MEC’s objective. Proposed Intervenor-Plaintiffs agree with MEC that portions of WEC’s Decision were wrongly decided and warrant reversal. (Proposed-Intervenor-Plaintiffs’ Compl., ¶¶42–43.) Consistent with their interests as voters and advocates with a vested interest in ensuring that all eligible voters are afforded their opportunities under the law to register to vote and return absentee ballots, however, Proposed Intervenor-Plaintiffs go a step beyond MEC and request that, should this Court affirm the relevant portion of the Decision, this Court modify

the Order to require MEC to maintain, operate, and staff the designated IPAV location at the Zeidler Municipal Building (or the designated IPAV location nearest to the MEC office for future elections), during the entire designation period for purposes of in-person voter registration and absentee-ballot return. To do otherwise would deny voters like Koconis, Smith, and the voters of Milwaukee County, on whose behalf the Milwaukee League advocates, their ability to register in-person or return their absentee ballot from now until October 22, and on November 4—the parts of the designation period in which IPAV is not permitted but either registration⁶ or absentee-ballot return⁷ may occur. To avoid this unlawful outcome, Proposed Intervenor-Plaintiffs seek additional alternative relief that would require MEC to continue to operate the designated location most proximate to the MEC office to ensure voters can conveniently continue to register and return ballots until the relevant deadlines for the November 2024 election.

This relief not only differs from that which MEC seeks but also creates potential adversity between MEC and the Proposed Intervenor-Plaintiffs.⁸ Should the Court decide to affirm WEC, Proposed Intervenor-Plaintiffs will be in the position of seeking an order against MEC, which can hardly be expected to represent

⁶ The final deadline for in-person registration is November 1, 2024 at 5:00 p.m. Wis. Stat. § 6.29(2)(a).

⁷ Absentee ballots must be returned no later than 8:00 p.m. on Election Day. Wis. Stat. § 6.87(6). On Election Day, however, voters return their absentee ballots directly to central count.

⁸ Proposed Intervenor-Plaintiffs' request for this alternative relief is nonetheless not styled as a cross-claim because Wis. Stat. § 5.06(8) authorizes this Court to modify WEC's order.

such an interest. Should the Court deny intervention, Proposed Intervenors-Plaintiffs may have to pursue such relief in separate litigation.

Second, not all Proposed Intervenors-Plaintiffs would be considered citizens of MEC. The Milwaukee League is an advocacy organization, not an individual citizen, and its interests exceed those of MEC. As discussed above, the Milwaukee League has worked for decades to educate and register eligible voters, expand access to voting—especially absentee voting—increase governmental transparency and accountability, and otherwise promote democratic and civic participation. In contrast, MEC’s interests are limited to administering elections consistent with the law. MEC is neither an outside advocacy group pushing for reform nor a governmental watchdog. The Milwaukee League’s private interests are different in *kind* from the public interests of a governmental agency or official.

Federal courts of appeal have repeatedly affirmed that private organizations and individuals may intervene, even when they fall on the same side of the dispute as a governmental entity, because their interests in the fate of a challenged law are not identical to the public interest that the government represents. *See e.g. La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 309 (5th Cir. 2022); *see also Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001); *Clark v. Putnam Cnty.*, 168 F.3d 458, 461–62 (11th Cir. 1999); *Coal. of Ariz./N.M. Cntys. For Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 845 (10th Cir. 1996). Therefore, the presumption that MEC adequately represents the Milwaukee League’s interests, simply because it is a governmental body, should not apply.

MEC does not share, and has no duty to fully represent, Proposed Intervenor-Plaintiffs' interests. MEC is a governmental entity and, as the Wisconsin Supreme Court acknowledges, a governmental entity may not litigate "with the [same] vehemence of someone who is directly affected." *Armada Broad., Inc.*, 183 Wis. 2d at 476. Although MEC may also disagree with WEC's Decision, it does so from the point of view of the government, whereas Proposed Intervenor-Plaintiffs are either voters or represent voters whose rights will be impaired if the WEC Decision were affirmed. This includes not only themselves and their members, but also the rights of Wisconsin citizens more generally, including older adults who may face additional barriers to voting.

Koconis and Smith, like all eligible voters in Wisconsin, have a constitutional right to vote. *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1046 (1910). The framers "[placed] the right of suffrage upon the high plane of removal from the field of mere legislative material impairment." *Id.* This right "may not under our Constitution and laws be destroyed or even unreasonably restricted." *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922). This is also true of every voter on whose behalf the Milwaukee League advocates. Whereas MEC is a governmental body and thus has no such right to vote at stake.

Moreover, if this Court affirms WEC's Decision such that MEC must permanently refuse to register voters at its office during the entire period that alternate sites have been designated and must stop accepting the return of absentee ballots when alternate sites are not even operating, the rights of the Proposed Intervenor-Plaintiffs and the individuals on whose behalf the Milwaukee League

advocates will find themselves adverse to MEC when they try to exercise their right to vote under Wisconsin law, as methods of registering and returning absentee ballots will be foreclosed for large portions of each election year. *See* n.6, *supra*.

* * *

Because Proposed Intervenors-Plaintiffs 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.*, 183 Wis. 2d at 471.

II. Proposed Intervenors-Plaintiffs meet the standard for permissive intervention.

Proposed Intervenors-Plaintiffs also meet 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, so long as the movant’s claim or defense and the main action share a common question of law or fact, intervention is within the Court’s discretion. *Helgeland*, 2008 WI 9, ¶120.

Proposed Intervenors-Plaintiffs’ Motion does not prejudice any party. As this case is still in its early stages, the arguments made by Proposed Intervenors-Plaintiffs will complement those of the existing parties and help the Court ensure the case is fully litigated, thereby contributing to a more complete understanding of the issues and greater durability in the outcome. As seen in the WEC Decision and Order,

and further attested to in Proposed Intervenor-Plaintiffs' Complaint, WEC has failed to fully comprehend the harm that its interpretation of Wis. Stat. § 6.855(1) will have on Wisconsin voters, especially absentee voters. By allowing intervention, the Court ensures these issues are fully litigated.

Furthermore, intervention is appropriate because of the risk posed to Proposed Intervenor-Plaintiffs' interests by the disposition of this case. Proposed Intervenor-Plaintiffs seek to participate here because the outcome of this case may perpetuate harm to their interests and the interests of their members in the midst of an election. Moreover, they seek to reduce the burdens that voters face to ensure those voices may be heard adequately and equitably. The WEC Decision erects a new barrier and creates additional risk in the process of voting with a never-before-seen interpretation of the limitations on a clerk during the period alternate sites have been designated. For this reason, and those above, Proposed Intervenor-Plaintiffs should be permitted to intervene under Wis. Stat. § 809.03(2).

Finally, Proposed Intervenor-Plaintiffs' Motion should be granted in light of Trojan's corresponding Motion to Intervene. Proposed Intervenor-Plaintiffs do not object, and do not intend to object, to Trojan's intervention. Trojan seeks to have this Court deny MEC the relief sought and for the Complaint⁹ to be dismissed, the same relief WEC will likely pursue. Proposed Intervenor-Plaintiffs, in contrast, seek additional alternative relief as set forth in their Complaint, which no other party

⁹ Trojan filed a Proposed Answer along with her motion to intervene. Wis. Stat. § 803.09(3). This occurred before MEC filed its Amended Complaint on September 3.

seeks, but nonetheless involves the same questions of fact and law surrounding how municipalities may operate their IPAV sites during the designation period. Should the Court grant Trojan’s intervention motion, however, it becomes even more critical to allow the intervention of Proposed Intervenors-Plaintiffs—Milwaukee voters and an advocacy organization with a different perspective regarding the construction of Wis. Stat. § 6.855.

CONCLUSION

For the foregoing reasons, Proposed Intervenors-Plaintiffs Deborah Koconis, Lois Smith, and the League of Women Voters of Milwaukee County, respectfully request that the Court grant their Motion to Intervene and accept the attached Complaint for filing.

Dated this 20th day of September 2024.

Electronically signed by Christine Donahoe
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