

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

RICHARD TEIGEN and RICHARD THOM,

Plaintiffs,

v.

Case No. 2021CV0958

Code: 30701

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE OF
PROPOSED INTERVENOR-DEFENDANTS DISABILITY RIGHTS WISCONSIN,
WISCONSIN FAITH VOICES FOR JUSTICE, AND THE LEAGUE OF WOMEN
VOTERS OF WISCONSIN**

INTRODUCTION

Established nonprofit, nonpartisan organizations Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and the League of Women Voters of Wisconsin (Proposed Intervenor-Defendants in this action, and collectively, “Intervenors”), which have a long history of advancing voting rights throughout this state, filed a motion to intervene in this lawsuit. In response, the two individual voters from a single county who ask this Court to decide an issue of importance to hundreds of thousands of voters statewide unfairly cast these respected organizations as purely political actors who seek intervention not to weigh in on legal disputes but only to advance their policy agendas. Plaintiffs re-frame and mischaracterize Intervenors’ positions to suit their own narrative in an unavailing effort to minimize the magnitude of the legal questions posed by this case. Cutting through Plaintiffs’ contentious rhetoric and applying the relevant legal standards, it is clear that Intervenors satisfy the criteria for both mandatory and permissive intervention.

ARGUMENT

Intervenors satisfy the criteria for both mandatory and permissive intervention. Under either test, intervention is appropriate here, and this Motion should be granted.

I. INTERVENORS SATISFY THE CRITERIA FOR MANDATORY INTERVENTION.

Before addressing Plaintiffs' arguments against mandatory intervention, it is necessary to dispel the confusion Plaintiffs have sown throughout their brief in describing this case. Plaintiffs characterize this case as focused on "one narrowly defined, purely legal issue": "whether [the Wisconsin Election Commission's ("WEC")] decision to unilaterally declare that drop boxes and ballot harvesting by third parties are permissible methods of returning absentee ballots in the face of statutory language to the contrary (and without any effort to engage in the rulemaking process) was legal." (Pls.' Br. at 1) That is far from "simple." The inquiry, as Plaintiffs define it, contains not one but several legal issues, including:

- Does WEC have the authority on its own to make a decision about whether drop boxes are compliant with state law?
- Should WEC have engaged in a rulemaking process before it made that decision?
- Does the use of drop boxes violate state statutes when a third party returns another voter's absentee ballot by drop box?
- Does the use of drop boxes violate state statutes when a voter returns their own absentee ballot by drop box?

At least some of these issues include subsidiary questions of fact. Flushing out Plaintiffs' own rendition of their "issue statement" thus illuminates the variety of legal issues, and the corresponding range of interests at play. These issues and interests make clear that Intervenors have a right to intervene here.

To intervene as a matter of right under Wis. Stat. § 803.09(1), Intervenors must show that:

1. their motion to intervene is timely;

2. they claim an interest sufficiently related to the subject of this action;
3. disposition of this action may as a practical matter impair or impede their ability to protect that interest; and
4. the existing parties do not adequately represent their interest.

Helgeland v. Wis. Muns., 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. The four criteria are not viewed in isolation from one another; instead, “there is interplay between the requirements; the requirements must be blended and balanced to determine whether [the intervenors] have the right to intervene.” *Id.*, ¶39. Plaintiffs concede the first criterion of mandatory intervention: Intervenors’ motion was timely. (Pls.’ Br. at 2) Plaintiffs dedicate a trivial amount of their response brief to the third criterion, so in addressing mandatory intervention this reply brief will focus on the second and fourth criteria.¹

A. Intervenors’ Interests Are Sufficiently Related To The Issues Raised By Plaintiffs.

As fully developed in their original brief and accompanying affidavits, Intervenors have direct and immediate interests at stake including, but not limited to, their interests in educating, informing, and motivating eligible Wisconsinites to cast a ballot, and in ensuring that the methods of voting available to eligible voters are as convenient and accommodating as possible. (*See* Intervenors’ Br. at 7-8) Wisconsinites rely upon Intervenors’ support and advocacy, especially those who have come to rely upon the convenience, reliability, accessibility, and security of drop boxes, and whose interests and rights are therefore directly implicated by the interpretation of election-related statutes that are at issue in this case. (*Id.* at 9) Intervenors have an interest in ensuring broad access to secure, convenient, and accessible voting for all eligible Wisconsin

¹ Intervenors rely upon the analysis of the third criterion in their original brief rather than repeating the same arguments here. Additionally, the *Helgeland* court noted that analyzing the third criterion is “part and parcel of analyzing the interest involved [the second criterion] and determining whether an existing party adequately represents the movant’s interest [the fourth criterion].” *Helgeland*, 2008 WI 9, ¶79.

voters, including those who are disabled or otherwise disadvantaged. (*Id.* at 8, 10) Because Plaintiffs ask this Court to narrowly construe—or outright misconstrue—the statutes at issue and severely restrict and limit voting by absentee ballot, Intervenors’ members and constituents will be directly affected by the outcome here. (*Id.* at 9-10) Intervenors’ interests are the antitheses of “too remote and speculative”; in fact, the Court would be hard-pressed to conclude that the Intervenors have “shown no special, personal, or unique interest in the present case.” *Helgeland*, 2008 WI 9, ¶¶53, 116.

Plaintiffs assert “[t]his case is not one in which the Interest Groups have their own *statutory* interests separate and apart from the defense of WEC’s actions that would justify intervention as of right.” (Pls.’ Br. at 3 (emphasis added)) There is no legal support for the proposition that Intervenors’ interests must be *statutory* for them to intervene as a matter of right. Further, Plaintiffs ignore Intervenors’ various interests outlined in their original brief and accompanying affidavits, addressing *only* Intervenors’ investments of time and money. By cherry-picking only those interests, and outright ignoring the other identified interests at stake, Plaintiffs try to liken this case to *Helgeland*, where intervention was denied because the municipalities “adduce[d] no precedent recognizing a right of intervention based on a widely shared financial interest.” 2008 WI 9, ¶72. But as is clear from the summary in the preceding paragraph and Intervenors’ submissions in full, Plaintiffs acknowledge and address only a subset of Intervenors’ interests. The issue at hand – intervention – is not a question merely of costs; it is also about the scope of voting rights, which is the heart of Intervenors’ interests. Plaintiffs argue Intervenors’ interests are insufficient, but they do so by ignoring the majority of those interests.

B. Defendant Does Not Adequately Represent Intervenors' Interests.

The focus of Plaintiffs' response brief and the lynchpin of their opposition to this Motion, is their argument that WEC adequately represents Intervenors' interests in this case because Intervenors "are in complete lock step with WEC's position." (Pls.' Br. at 6) Not only is this demonstrably wrong, but it is also an extremely premature—indeed, impossibly prescient—suggestion. The interests of WEC and those of Intervenors in this litigation are separate and distinct, as further discussed below, as they have been numerous times in the recent past.²

Intervenors and Plaintiffs agree that *Helgeland* is instructive with respect to adequate representation. Plaintiffs, however, lean too heavily on the specific facts addressed in *Helgeland*, mischaracterizing Intervenors' arguments in an attempt to shoehorn them into an inapt comparison with *Helgeland*. In discussing the fourth criterion, the *Helgeland* court identified the following two rebuttable presumptions: (1) "adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action"; (2) "when the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises whether the would-be intervenor is a citizen or subdivision of the governmental entity." *Id.*, ¶¶89-91. As to the first, the *Helgeland* court concluded that the intervenors and the defendant in that case both sought to uphold the

² As noted in the original brief, and bears repeating, Intervenors have previously taken positions distinct from those of WEC. *See, e.g., Gear, et al. v. Bostelmann, et al.*, No. 20-cv-278-wmc and *City of Green Bay v. Bostelmann*, No. 20-cv-479, 2020 WL 1492975 (E.D. Wis. Mar. 27, 2020); *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA (Wis. June 25, 2021); *Swenson v. Bostelmann* 20-cv-459-wmc, 488 F. Supp. 3d 776 (W.D. Wis. Sep. 21, 2020), *stay denied sub nom. Democratic Nat'l Cmte. v. Bostelmann*, No. 20-2835 & 20-2844, 2020 WL 5807297 (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; *Zignego v. Wis. Elections Comm'n*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208.

constitutionality of the relevant statute and the Defendant's plan. *Id.*, ¶90. As to the second, the *Helgeland* court reasoned that the presumption applied because both the defendant and the Wisconsin Department of Justice "are charged by law with the duty to defend the [statute's] constitutionality," which was "the very position advocated by the municipalities, the would-be intervenor." *Id.*, ¶91.

Neither of the two *Helgeland* presumptions applies here. Defendant WEC is a bipartisan regulatory agency established by the Legislature to administer elections in accordance with state law. Wis. Stat. § 5.05(1). While WEC has an interest in defending its own conduct and past advice it has issued, its ultimate interest in this case is construing the relevant statutory provisions, namely Wis. Stat. §§ 6.855, 6.87(4)(b), 7.30, and 12.13, and determining what they require of election officials. WEC is not charged with advocating for expansive access to convenient, secure, accessible voting methods, nor with advancing a statutory interpretation that might be sufficiently broad to cover all interests that Intervenors and their members and constituents might advance. Indeed, no party named in the Complaint is charged by law with representing the interests advanced by Intervenors.

Intervenors are concerned that WEC will *not* advocate for, or might not even be aware of, their interests implicated by this case. For example: consider a disabled Wisconsin voter who cannot vote in person, whether because of COVID-19 or because of an access issue. What if that voter wants to designate someone else to return an absentee ballot on their behalf? Would that interest be one that is adequately represented by the Attorney General? Would the Attorney General even know that could possibly be an issue? Would the Attorney General have access to the facts about how many voters might face such a scenario? Based on their expertise and experience, Intervenors seek to offer arguments like this, and many others, on behalf of hundreds

of thousands of voters statewide. Intervenor urge this Court to consider the full spectrum of the interests at stake and, by doing so, listen to the voices of voters statewide, rather than only the two individual voters from just one of Wisconsin's 72 counties who are Plaintiffs here. These are the type of objectives that WEC does not share with Intervenor, and an example of what makes Plaintiffs' assertion that Intervenor's interests are "wholly contained within WEC's defense of this suit" patently false. (Pls.' Br. at 8)

Indeed, as demonstrated by the discussion immediately above, neither WEC nor the Attorney General as its lawyer is "charged by law with representing the movant's interest," as was the case in *Helgeland*. 2008 WI 9, ¶86. There, all relevant parties were united in defending the constitutionality of a challenged statute; here, by contrast, there is a more open-ended issue of statutory interpretation, and it is simply not true that WEC is charged with taking the same position that Intervenor seek to advance. Therefore, Plaintiffs' assertion that, "[i]n short, the municipalities were concerned (as the Interest Groups apparently are here) that, as a policy matter, the Attorney General's office may not perform its statutory duty to defend the state's action" (Pls.' Br at 8), is absurd. Intervenor are *not* in the least concerned about the Attorney General's office refusing to defend WEC's actions or that WEC will not act in accordance with their legally prescribed duties. Instead, as discussed above, Intervenor advance that WEC has a very narrow duty in this case, and that their interests and objectives are fundamentally distinct.

Plaintiffs' heavy reliance on federal authority to argue that intervention is often denied when a state government entity is present in litigation also misses the mark. (Pls.' Br. at 6-7) Not only is that authority under different procedural rules (the Federal Rules of Civil Procedures as opposed to the Wisconsin Statutes that apply here), but Plaintiffs also misapply that authority. For example, Plaintiffs assert that *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799

(7th Cir. 2019), stands for the proposition that “where the representative party is a governmental body, [a] presumption of adequate representation will be upheld ‘unless there is a showing of gross negligence or bad faith.’” (Pls.’ Br. at 6) That is a tortured reading of an already inapposite decision. In *Planned Parenthood*, the Legislature sought to intervene, arguing that it—rather than the Wisconsin Department of Justice—properly represented the State’s interests. The Seventh Circuit disagreed, concluding that when the Legislature seeks to intervene in a case where the Department of Justice already has appeared and is defending state law, the State’s interests are adequately represented by the Department of Justice, such that the Legislature can intervene only if it can show that the Department of Justice is acting in bad faith, or in a grossly negligent way. 942 F.3d at 801. That rationale does not apply here.

II. INTERVENORS MEET THE CRITERIA FOR PERMISSIVE INTERVENTION.

Surprisingly, Plaintiffs dedicate only a nominal amount of their brief to addressing Intervenors’ request for permissive intervention. The Court may grant permissive intervention under Wis. Stat. § 803.09(2) 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. In considering a request for permissive intervention, courts “consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § 803.09(2).

Plaintiffs’ main argument against permissive intervention is that time is of the essence, and that Intervenors seek to interject “extralegal arguments” that do not belong before this Court. (Pls.’ Br. at 10) That is incorrect twice over.

First, any delay thus far has been caused by Plaintiffs’ refusal to consent to intervention. Plaintiffs argue that “[t]he intervention motions have already pushed disposition on the merits out

several months in a case in which time is of the essence.” (*Id.*) But at the same time, Plaintiffs concede that Intervenors timely moved to intervene (the first criterion of mandatory intervention). Any delay between the request for Plaintiffs’ counsel to consent to intervention in late August, and a ruling by this Court on the motions to intervene, was Plaintiffs’ own doing.

Second, Plaintiffs’ own rendition of the “simple” and “purely legal dispute” in this case belies their point regarding “extralegal arguments.” As discussed above, Plaintiffs’ purported “one narrowly defined, purely legal issue” is actually an amalgamation of several intertwined legal and factual issues. Plaintiffs’ own briefing demonstrates that there are questions of fact that must be addressed for a complete adjudication of the declaratory judgment they seek. For example, Plaintiffs repeatedly use the pejorative (and extra-statutory) term “ballot harvesting” in their brief (Pls.’ Br at 1, 4, 5, 8, 10), implying that people go around collecting absentee ballots for other voters, perhaps encouraging them or assisting them in a way that is untoward, or illegal, and then returning them en masse at drop boxes. That raises factual questions that Plaintiffs must prove. By attempting to prune from this case the legal and factual issues that must be resolved for the Court to declare what the statute at issue provides and how it will impact hundreds of thousands of voters throughout Wisconsin, Plaintiffs seek to lead this Court down the primrose path of committing legal error both procedurally—by denying this Motion—and substantively—by not addressing legal and factual issues necessary to a complete adjudication.

Granting Intervenors’ Motion will not unduly delay or complicate the proceedings, nor will it prejudice any party. Should the Court find that Intervenors do not meet the standards for mandatory intervention, they should be granted permissive intervention.

CONCLUSION

For the foregoing reasons, Proposed Intervenor-Defendants Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and the League of Women Voters of Wisconsin respectfully request that this Court grant their Motion to Intervene.

Dated this 28th day of September, 2021.

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