STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 WAUKESHA COUNTY

RICK TEIGEN, et al.,

Plaintiffs,

v.

WISCONSIN ELECTION COMMISSION,

Defendant.

Case No. 21-CV-958
Case Code: 30701
Case Type: Declaratory Judgment

BRIEF IN OPPOSITION TO DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, AND THE LEAGUE OF WOMEN VOTERS' MOTION TO INTERVENE

Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and the League of Women Voters (the "Interest Groups") seek to intervene in this litigation essentially to argue that drop boxes are a good idea as a policy matter. Reasonable people can debate this issue, and the place for that debate is the Legislature.

This case does not concern whether drop boxes are a good idea or a bad idea, and this case is not (as the Interest Groups pejoratively allege) an effort to rehash the results of the 2020 general election. This case raises one narrowly defined, purely legal issue: whether WEC's 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. The Interest Groups and Defendant Wisconsin Elections Commission ("WEC") are united in their belief that it was. They are also in lockstep in their belief that these methods of returning ballots are a good idea and

should be promoted. Because the Interest Groups do not assert any interest that is not already adequately represented by Defendant's counsel, and because the Interest Groups likewise do not meet the remaining criteria for intervention either as of right or by permission, their motion should be denied.

I. The Interest Groups do not meet the standard for intervention as of right.

When evaluating a motion to intervene as of right, the court "attempts to strike a balance" between two competing interests: 1) the ability of the original parties to a lawsuit to conduct and conclude their own proceedings; and 2) persons should be allowed to join a lawsuit "in the interest of the speed and economical resolution of controversies." *Helgeland*, 2008 WI 9, ¶ 40. Whether to allow intervention is a question of law, and one which "usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb" absent clear error. *Id.*, ¶ 41 (quoting citation omitted). The Interest Groups correctly identify the four criteria under Wisconsin state law for intervention as of right, but then proceed to misapply most of those criteria.

A. The Interest Groups' motion is timely.

Plaintiffs do not dispute that the Interest Groups' motion is timely and therefore meets the first criterion for intervention as of right.

B. However, the Interest Groups do not have an interest sufficiently related to the subject of the action to merit intervention as of right.

The Interest Groups assert that their interests in educating and motivating their members to vote and "ensuring that the methods of voting available to eligible voters are as convenient and accommodating as possible" justify their intervention.

They outline the funds and the time they spend on various voter education programs and allege they are sufficient to trigger intervention as of right. But the question is whether the Interest Groups have a sufficiently direct and immediate interest in the outcome of this litigation that they win or lose by direct operation of a judgment. Under prevailing Wisconsin case law, the answer is no.

In *Helgeland v. Wis. Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, eight Wisconsin municipalities asked to intervene as of right in a challenge to Wisconsin's definition of "dependent" for purposes of state employee health insurance eligibility. The municipalities argued that they would be required to pay increased premiums on behalf of employees enrolled in certain state health or dental plans if Helgeland prevailed and that their participation in the state's deferred compensation program (administered by the state) would be adversely affected by any judgment. In other words, the municipalities claimed that a ruling not to their liking would directly result in higher costs to them. The Court disagreed that this interest was sufficient to invoke intervention as of right, finding that while a relationship existed between the municipalities and the state for the purposes of these plans, that relationship was "too remote and speculative to support a right of intervention." *Id.*, ¶ 53.

This 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. *See Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 474, 516 N.W.2d 357 (1994) (subject of public record had unique interest warranting intervention to enjoin its release because her right to privacy was separately

enshrined in Wisconsin statutes); *In re Commitment of McGee*, 2017 WI App 39, ¶ 24, 376 Wis. 2d 413, 899 N.W.2d 396 (where statute conferred independent right of notice to proposed intervenors concerning placement of sexually violent offender in community, intervention as of right was warranted).

The Interest Groups do not have such an interest here. They argue that their unique, special interest is that a ruling against WEC will require it to divert its resources to inform Wisconsin voters about the unavailability of drop boxes and to educate them how to vote their absentee ballots properly. This interest is more attenuated than the direct financial impact the municipalities claimed would result from a judgment adverse to the state in *Helgeland*, and it does not implicate independent statutory rights as in *Armada Broadcasting* or *McGee*.

II. Disposition of the action in the Interest Groups' absence would not impair their ability to protect their interests.

The Interest Groups allege that if Plaintiffs prevail in this lawsuit, their ability to protect their interests may be impaired because their investments in get-out-the-vote programs that encourage voters to use drop boxes "or [a] trusted third party" will be lost, and they will be required to change their social media postings, websites, and other public-facing sources of information to account for the change. But this argument is really just another way of arguing that they will not like the outcome if Plaintiffs prevail, or that the Interest Groups' members *should* be able to use drop boxes or ballot harvesting as a policy matter. Once again, that is not the question in this litigation. The question is whether the action that WEC undisputedly took—

issuing the memoranda setting out ways to return absentee ballots that are contrary to the two methods of return enacted by the Legislature—was legal or not.

Wisconsin law confirms that this prong of the inquiry "is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest." *Helgeland*, 2008 WI 9, ¶ 79. As noted above, the Interest Groups have not identified an interest sufficient to warrant intervention under Wisconsin law, but even assuming for argument's sake that they have, their involvement in this case as a party is unnecessary because the Interest Groups and WEC both seek the same outcome: a ruling that WEC's action in issuing memoranda authorizing drop boxes and ballot harvesting is legal.

III. The law presumes that Defendant and its counsel will adequately represent the Interest Groups' shared goals in this litigation, and the Interest Groups have not met the standard to overcome that presumption.

Finally, the Interest Groups assert that Defendant's counsel will not adequately protect their interests in this lawsuit. In support of this assertion, they point to the fact that these same groups have sued WEC on other occasions and that the WEC has an institutional interest in defending its own conduct rather than ensuring "expansive access to convenient, secure, and accessible methods of voting." The first argument does not matter. The proper inquiry is not whether the proposed intervenor and the existing party have ever disagreed about anything at any point in time. Rather, the question is whether the Interest Groups and WEC have the same goal in *this litigation*, and they undoubtedly do: both seek a ruling that drop boxes and ballot harvesting by third parties are legal under existing law. The fact that WEC

has an institutional interest in defending its own decisions (the same decisions which the Interest Groups support) *in addition* to supporting that decision as a policy matter does not negate the fact that the Interest Groups are in complete lock step with WEC's position. The Interest Groups "claim no objective that [WEC] does not also share." *Helgeland*, 2008 WI 9, ¶ 90.

What is most telling about the Interest Groups' analysis of this last factor is what is not included: any mention of the legal presumption, enshrined in both state and federal intervention law, that government counsel will adequately defend the law or a government actor's actions when they are at issue. The Interest Groups' brief does not even acknowledge, much less attempt to rebut, this well-established legal principle, or attempt to explain how that presumption is overcome in this case. "[W]hen 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." *Helgeland*, 2008 WI 9, ¶ 91 (citing *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996)). In fact, federal courts have held that where the representative party is a governmental body, that presumption of adequate representation will be upheld "unless there is a showing of gross negligence or bad faith." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (citing *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)).

The Interest Groups cannot simply assume that WEC will not defend its interests (even as the agency seeks precisely the same outcome that they do), and

taking this position ignores numerous state and federal cases on this issue. *See Helgeland*, 2008 WI 9, ¶ 86; *Planned Parenthood*, 942 F.3d at 801 (Legislature had the "unenviable task of convincing a court that the Attorney General inadequately represented" the State "despite his statutory duty" to do so); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 640, 646-47 (E.D. Wis. 2020) (while proposed intervenor may have different *reasons* for taking some position as defendant in elections case, intervention is not warranted where positions otherwise align and government represents the party with the aligned interest absent an actual conflict); *One Wis. Institute, Inc. v. Nichol*, 310 F.R.D. 394, 398-99 (W.D. Wis. 2015) (intervention denied to groups seeking to intervene in challenge to voter ID law in light of presumption of adequate representation by Attorney General); *Dem. Nat'l Comm. v. Bostelmann*, 20-cv-249-wmc, 2020 WL 1505640 at **3-4 (W.D. Wis. Mar. 28,2020) (intervention of right denied to political committee where it failed to identify a "concrete, substantive conflict" with counsel taking the same side). Courts have specifically applied this standard where groups representing the disabled are involved. *Ligas ex rel. Foster v. Maram,* 478 F.3d 771, 774 (7th Cir. 2017) (disability rights group failed to demonstrate "gross negligence or bad faith" required to overcome presumption of adequate representation by government counsel).

The Interest Groups also quote the Wisconsin Supreme Court's decision in *Helgeland* out of context to argue that the threshold for defeating the presumption of adequate representation is "minimal." But the Court in that case was quick to state that the word "minimal" does not write the presumption out of the rule. Indeed, the

Court explicitly pointed out that "[i]f a movant's interest is identical to that of one of the parties, or if a party is charged by law with representing the movant's interest, a *compelling* showing should be required to demonstrate that the representation is not adequate." *Helgeland*, 2008 WI 9, ¶ 86 (emphasis added). The similarity of interests weighs against the potential intervenor where the interests at issue are "substantially similar." *Id.* The Interest Groups do not just seek to vindicate similar interests here—they are identical. Both want to argue that drop boxes and ballot harvesting should be legal and that WEC therefore acted lawfully in issuing the memoranda at issue. The objectives of the Interest Groups are wholly contained within WEC's defense of this suit. Intervention as of right is therefore unwarranted here.

The *Helgeland* case is particularly instructive on the question of adequate representation. In that case, the municipalities expressed concern that the Attorney General originally charged with defending the action, a Democrat, would not oppose Helgeland's position on the definition of "dependent" for insurance purposes because the Attorney General had conflicting loyalties: she agreed with Helgeland's position that the definition should include same-sex spouses as a matter of policy, and openly supported Helgeland's position by making public statements to that effect and appearing at rallies where the plaintiffs in that case also spoke. *Id.*, ¶ 93. In 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. The *Helgeland* court found this evidence insufficient to

render the Department of Justice's representation inadequate, making special note of DOJ's obligation to defend the statute "regardless of whether they have diverse constituencies with diverse views" and that DOJ in particular is "composed of professionals" who will presumably fulfill their statutory duty to do so. *Id.*, ¶ 108.

The case for inadequate representation of the Interest Groups' aims is supported by far less evidence here than in *Helgeland*. In the earlier case, the Attorney General publicly took policy positions that actively undermined the statutory interpretation she was charged with defending in court. Even under those circumstances, the presumption of inadequate representation could not be overcome. Here, the Interest Groups' claim that WEC has an institutional interest in defending its actions rather than a desire to serve their particular constituents is completely unfounded. There is no reason to believe that DOJ will not defend the decisions at issue in this litigation. To the contrary, Attorney General Josh Kaul has made no statements supporting the plaintiffs in this case, and his public statements deride anyone who so much as questions the integrity of Wisconsin's elections as a "Jim Crow" supporter.[1]

The fact that the Interest Groups and WEC may differ in their strategies concerning *how* to defend WEC's decisions does not merit intervention either. *Helgeland*, 2008 WI 9, ¶¶ 106, 112 (argument that Attorney General's strategy in defending the statute by moving for early dismissal was a strategic blunder was

[1] *See* AG Kaul Issues Statement on Completion of Partial Recount in Wisconsin, https://www.doj.state.wi.us/news-releases/ag-kaul-issues-statement-completion-partial-recount-wisconsin (last viewed August 30, 2021).

"baseless," and "disagreements over trial strategy" are insufficient to demonstrate inadequate representation). There "will always be potential movants that disagree at some level with decisions made by state agency defendants or their counsel," but this is not the test for inadequate representation. *Id.*, ¶ 116.

This Court should deny the Interest Groups' motion to intervene as of right.

IV. The Interest Groups do not meet the standard for permissive intervention.

Alternatively, the Interest Groups ask that this Court grant them permissive intervention, citing their interest in expending resources on get-out-the-vote and voter education campaigns. (Dkt. 24 at 14.) The Interest Groups assert that their involvement in this litigation will not "unduly delay or prejudice the adjudication of the rights of the original parties," as is the standard for permissive intervention. Wis. Stat. § 803.09(2). However, the record in this litigation thus far is to the contrary. The intervention motions have already pushed the disposition on the merits out several months in a case in which time is of the essence. Additionally, as noted above, the Interest Groups seek to make extralegal arguments that do not belong in this Court. The issue to be decided is not whether drop boxes and ballot harvesting are good or bad, but whether WEC abided by state law or not when unilaterally declaring they were available methods of returning an absentee ballot. And furthermore, despite the limitation of the claims to a purely legal dispute—namely, whether WEC acted within its authority—the Interest Groups' counsel has suggested that they wish to take discovery in this matter on matters that aren't even pertinent to the complaint. *See* Transcript of Aug. 19, 2021 Status Conference (forthcoming). The

Interest Groups have no right to expand the claims in this case, or to recast them as challenges to past elections, with the effect of delaying the Court's consideration of the only question essential to the judgment.

Timeliness and prejudice to the existing parties are the only factors that the statute mandates the Court to consider on a motion for permissive intervention. 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."). Because the Interest Groups are adequately represented by WEC's counsel in their desire to defend the agency's actions that are subject to this lawsuit, this Court would be well within its discretion to deny the request for permissive intervention. The Interest Groups' arguments are a variation on the same theme that drop boxes and ballot harvesting should be permitted. WEC has these interests covered, and permitting intervention where that intervention is likely to lead to further delays without the benefit of an additional, distinct legal position is inconsistent with the aim of permitting the original parties to a dispute to conduct their own lawsuit.

CONCLUSION

For the foregoing reasons, this Court should deny the Interest Groups' motion to intervene in this litigation either as of right or on a permissive basis.

Dated this 15th day of September, 2021.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

/s/ *Electronically signed by Katherine D. Spitz*

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CERTIFICATE OF SERVICE

I have served a copy of the foregoing, via email and first-class mail, on all counsel for both sets of proposed intervenors, as set forth below. The parties have been served via CCAP and email.

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