

MICHAEL WHITE, EVA WHITE,
EDWARD WINIECKE, and REPUBLICAN
PARTY OF WAUKESHA COUNTY

Plaintiffs,

v.

Case No. 22-CV-1008

Case Code No.: 30701

WISCONSIN ELECTIONS COMMISSION,

Defendants.

**BRIEF IN SUPPORT OF PROPOSED-INTERVENOR LEAGUE OF
WOMEN VOTERS OF WISCONSIN'S MOTION TO INTERVENE**

INTRODUCTION

Since 2016, the League of Women Voters of Wisconsin ("LWVWI" or "the League") has been actively invested and directly involved in advocating for the proper and lawful procedures municipal clerks in Wisconsin should follow when there is information missing from an absentee ballot witness certification—the very issue raised in the Plaintiff's Complaint. Over the past six years, the League has worked with the Wisconsin Elections Commission ("WEC"), the Legislature, and municipal clerks to ensure that Wisconsin law and procedures comport with federal constitutional and statutory requirements, and to protect absentee voters' ability to cast a ballot that will actually count.

The current Complaint and motions for preliminary relief threaten to unravel the absentee ballot certificate envelope cure policy for which the League successfully advocated in 2016. On behalf of its members, constituents, and eligible Wisconsin voters at large, LWVWI has a significant interest in the outcome of this litigation and seeing the U.S. Constitution and 1964 Civil Rights Act's mandates enforced. Therefore, pursuant to Wis. Stat. § 803.09(1), the League must be permitted to intervene in this case as an additional defendant. Alternatively, the League should be granted permissive intervention pursuant to Wis. Stat. § 803.09(2).

STATEMENT OF INTERESTS

Proposed-Intervenor LWVWI 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. LWVWI is an affiliate of The League of Women Voters of the United States, which has 750 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Hong Kong. The League works to expand informed, active participation in state and local government, giving a voice to all Wisconsinites. (Affidavit of Eileen Newcomer ("Newcomer Aff.") ¶2.)

The League, a nonpartisan community-based organization, was formed in 1920, immediately after the enactment of the Nineteenth Amendment granting women's suffrage. LWVWI is dedicated to encouraging its members and the people of Wisconsin to exercise their right to vote as protected by the U.S. Constitution and the Voting Rights Act of 1965. LWVWI's mission is to empower voters and defend

democracy. LWVWI does this by promoting political responsibility through informed and active participation in government and acting on selected governmental issues. The League seeks to maximize eligible voter participation through its voter registration and outreach efforts and to encourage civic engagement through registration and voting. (Newcomer Aff. ¶3.)

LWVWI impacts public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process. Currently LWVWI has 20 local Leagues and approximately 2,200 members. LWVWI works with and through 20 local Leagues across Wisconsin. (Newcomer Aff. ¶4.)

LWVWI began as an organization focused on the needs of women and training women voters. It has evolved into an organization concerned with educating, advocating for, and empowering all Wisconsinites. (Newcomer Aff. ¶4.) With members throughout the State, the LWVWI's local Leagues are engaged in numerous activities, including hosting public forums and open discussions on issues of importance to the community. 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. LWVWI has developed the statewide Election Observation Program and the Vote411 voter guide. LWVWI also devotes substantial time and effort to ensuring that government works as effectively and fairly as possible at every level. 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. (Newcomer Aff. ¶5.)

LWVWI is the umbrella organization for 20 local Leagues across Wisconsin and works with and through these 20 local Leagues. Members of the local Leagues are members of LWVWI, as well as the national League of Women Voters, and their efforts and work are part of local, state, and national operations and done on behalf of the state and national Leagues. LWVWI offers guidance, resources, materials, trainings, and financing in support of the local Leagues and their activities, which include efforts to educate the public on how to cast ballots in person and absentee by mail. (Newcomer Aff. ¶12.) LWVWI serves tens of thousands of voters, through in-person voter registration assistance to complete online and paper registrations. In 2020-2021, LWVWI engaged in a variety of voter service activities within Waukesha County, including: (1) sending out 1,688 GOTV postcards with absentee voting information to Waukesha County residents; (2) making 8,083 contacts sharing information about absentee voting via a texting campaign; (3) receiving 959 visits to its Vote411 voter guide, which included drop box locations within Waukesha County, leading up to the November 2020 election; and (4) volunteering as election observers. Ten League volunteers from Waukesha County served as election observers during the November 2020 election. Observers collectively monitored drop boxes, observed absentee ballot counting at central count locations throughout Waukesha County, and observed at polling places. In total, these volunteers invested about eighty (80) hours of their time. (Newcomer Aff. ¶13.)

In 2020-2021, the Waukesha County Branch of LWV Milwaukee County also engaged in a variety of voter education activities within Waukesha County, including: (1) distributing 2,425 cards with information about how to register to vote and how to request an absentee ballot, (2) conducting a training for community members on the online voter registration process, and (3) engaging 11 volunteers who invested approximately fifty-four (54) hours of their time. (Newcomer Aff. ¶14.) This year, LWVWI has engaged in a similar range of activities in Waukesha County, including sending 1,972 GOTV postcards to voters in Waukesha for the April and August elections, and making 1,466 contacts sharing information about absentee voting via texting campaigns. (Newcomer Aff. ¶15.)

LWVWI distributes voter information in the form of thousands of flyers, information cards, guides, and stickers. LWVWI engages hundreds of thousands of individuals through its website and social media platforms. These efforts contribute to high voter engagement and turnout in Wisconsin elections.

LWVWI has engaged in extensive litigation in state and federal courts to protect voting rights, 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.), and *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 976 N.W.2d 519 (motion for reconsideration pending). (Newcomer Aff. ¶6.)

STANDARD FOR INTERVENTION

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

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

- (A) its motion to intervene is timely;
- (B) it claims an interest sufficiently related to the subject of this action;
- (C) the existing parties do not adequately represent LWVWI's interest; and
- (D) disposition of this action may as a practical matter impair or impede its ability to protect that interest.

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

The test for permissive intervention is even more flexible. A court may grant permissive intervention to anyone who would be a proper party. *See, e.g., City of Madison v. Wis. Emp't Relations Comm'n*, 2000 WI 39, ¶11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94. Under Section 803.09(2), the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Section 803.09(2) makes clear that allowing LWVWI to intervene

here is within the Court's discretion because LWVWI's position and the main action share a common question of law or fact. *Helgeland*, 2008 WI 9, ¶120.

ARGUMENT

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

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

LWVWI meets each of the *Helgeland* criteria for intervention as of right. Wisconsin courts view intervention favorably as a tool for “disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Helgeland*, 2008 WI 9, ¶44 (cleaned up).¹ The four requirements must be “blended and balanced to determine whether [a party has] the right to intervene.” *Id.*, ¶39 (footnote omitted). Under the “holistic, flexible” analysis that the Wisconsin Supreme Court has prescribed, *id.* ¶40 (footnote omitted), LWVWI should be afforded the opportunity to intervene as a matter of right.

A. *Proposed Intervenor-Defendant LWVWI's Motion to Intervene is timely filed.*

LWVWI filed its Motion to Intervene in a timely manner, and its participation in the case will not prejudice the existing parties. There is “no precise formula to determine whether a motion to intervene is timely,” but the critical factor is whether

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

the proposed intervenor acted “promptly.” *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). Whether an intervenor acted promptly is determined by “when the proposed intervenor discovered its interest was at risk and how far litigation has proceeded.” *Olivarez v. Unitrin*, 296 Wis. 2d 337, 348, 723 N.W.2d 131 (Ct. App. 2006) (citing *Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 247 Wis. 2d 708, 634 N.W.2d 882 (Ct. App. 2001)). The Court should also consider whether intervention will prejudice the original parties. *Bilder*, 112 Wis. 2d at 550.

LWVWI filed its Motion to Intervene promptly, within 40 days of the date of the Complaint, and within the time for the named Defendant to answer the Complaint and before the disposition of any substantive motion. The Whites filed their Complaint on July 12, 2022, and their Motion for a Temporary Injunction on August 2, 2022. Discovery has not yet begun. The League also moved to intervene within days of other proposed intervenors, including the Legislature, and before those motions were determined.

What’s more, Proposed Intervenor-Defendant LWVWI is prepared to meet the briefing deadlines already set forth by this Court. If the Court grants this Motion, LWVWI will file any response to the Motion for a Temporary Injunction by the same deadline already given to the existing Defendants, August 23. Granting the intervention will therefore not prejudice any of the existing parties.

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

No specific test exists for determining whether interests are sufficient to warrant intervention. Instead, courts analyze the facts and circumstances in light of

the “policies underlying the intervention statute.” *Helgeland*, 2008 WI 9, ¶¶43–44 (footnotes omitted). A proposed intervenor’s interest must be of “direct and immediate character” such that “the intervenor will either gain or lose by the direct operation of the judgment.” *Id.*, ¶45 (quoting *City of Madison*, 2000 WI 39, ¶11 n.9). An interest “too remote and speculative” will not “support a right of intervention.” *Id.*, ¶53.

Plaintiffs’ claims in this suit bear directly on the League’s interests. The Complaint challenges measures required by federal law that election officials take across the state to count properly cast absentee ballots and avoid rejection of ballots due to technical, immaterial omissions or defects on the absentee ballot certificate envelope. The League engages in extensive and sustained efforts to promote voter awareness, education, and participation, and to encourage civic engagement. (Newcomer Aff. ¶¶4–5.) LWVWI 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. (Newcomer Aff. ¶¶7–15.) Just this year, LWVWI has engaged in a wide range of activities to educate and assist mail-in absentee voters. (Newcomer Aff. ¶¶11, 15.) Any threat to the ability of Wisconsin voters to cast a ballot is a threat to LWVWI’s mission and work. The change in Wisconsin election procedures that this lawsuit threatens would undermine absentee voters’ understanding of the requirements for voting by mail and require a significant public education effort to inform voters of a court order changing the

status quo to mandate rejection of ballots with immaterial omissions in the witness certification.

LWVWI has been directly involved in the issue of missing or defective absentee ballot witness information since 2016, when it provided public testimony at WEC's October 14, 2016 hearing, regarding the requirements of federal law and its implications for WEC's guidance. LWVWI advocated for the adoption of the current policy on curing technical, immaterial omissions or defects in the witness certification. (Newcomer Aff. ¶¶17, Ex. 1). This letter, and then-Executive Director Andrea Kaminski's testimony,² outlined the federal law requirements that would be violated by the WEC's proposed policy that was threatening the rejection of thousands, if not tens of thousands, of eligible Wisconsin voters' ballots, for technical, immaterial omissions including but not limited to missing municipality names. (*Id.*) As interpreted by the U.S. Supreme Court, the First and Fourteenth Amendments of the U.S. Constitution prohibit the unjustified denial of the right to vote. Where a compelling interest is not served by enforcing the state law or rule that results in vote denial, the most severe burden on the right to vote, that law must be enjoined. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

At the time of the October 14, 2016 meeting and WEC's consideration of LWVWI's arguments, LWVWI made clear that it would file a lawsuit to enforce that constitutional safeguard. Such a suit was unnecessary once WEC amended its

² Available at <https://wiseeye.org/2016/10/14/wisconsin-elections-commission-meeting-part-1-of-2/> (starting at 39:09) (subscription required).

guidance on this issue and adopted the cure guidance that remains in place to this day. (Newcomer Aff. ¶18).

In the nearly six years since, LWVWI has continued to advocate for WEC guidance and policies that avoid unnecessary and unlawful disenfranchisement of voters for immaterial omissions or defects. It has repeatedly defended the absentee ballot certificate envelope cure guidance that it successfully persuaded WEC to adopt in 2016. Recently, when the Wisconsin Legislature's Joint Committee for the Review of Administrative Rules ("JCRAR") voted in January 2022 to compel WEC to promulgate an emergency rule based on the existing absentee ballot certificate envelope cure guidance, *see* Wis. Stat. § 227.26(2)(b), LWVWI sent a letter to WEC, recapitulating the above history and restating its federal law arguments for why the cure guidance was required. (Newcomer Aff. ¶19, Ex. 2). LWVWI noted that, in addition to the U.S. Constitution, Title I of the 1964 Civil Rights Act requires the curing of immaterial omissions on absentee ballot witness certifications. That statute prohibits "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or *other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]*" 52 U.S.C. § 10101(a)(2)(B). Additionally, on July 19, 2022, the day before JCRAR's executive session where it considered and ultimately voted to suspend the emergency rule WEC had promulgated on absentee ballot certificate envelope curing (Emergency

Rule EmR2209), LWVWI submitted written testimony to the committee, making the same federal law arguments. (Newcomer Aff. ¶19, Ex. 3).

This case threatens to deny access to eligible Wisconsin voters whose interests LWVWI represents and serves. If the relief Plaintiffs seek is granted, it will require a significant expenditure of time, resources, and money for LWVWI to revise all relevant educational materials and programs, re-train volunteers, and re-educate its members, constituencies, and the Wisconsin electorate at large on the draconian and unlawful absentee ballot rejection rule Plaintiffs seek. (Newcomer Aff. ¶¶4, 7, 11, 21–22.)

Finally, if the League is not permitted to intervene in this case, it will be compelled to file a separate lawsuit against WEC, resulting in judicial inefficiency. The federal law arguments LWVWI has raised in support of WEC's absentee ballot certificate envelope cure guidance should be considered in the same litigation as the state law disputes.

C. WEC cannot adequately represent the League's interests in this litigation.

The WEC has an interest in defending its own conduct and guidance, as a government entity charged with upholding Wisconsin election laws, as interpreted by the courts. However, WEC cannot raise the federal constitutional and statutory guarantees and rights upon which LWVWI will rely in this proposed intervention. WEC can only bring its administration of state election laws into compliance with those federal limitations upon a judicial finding that a particular state statute, WEC guidance document or rule, or a particular litigant's requested relief violates the U.S.

Constitution or federal statutes. Accordingly, WEC is not positioned to zealously advocate for the interests and federally-guaranteed rights of LWVWI and its members and eligible Wisconsin voters throughout the state, who have a fundamental interest in casting a ballot that is ultimately counted. (Newcomer Aff. ¶16.)

“The showing required for providing inadequate representation should be treated as minimal.” *Helgeland*, 307 Wis. 2d 1, ¶85 (cleaned up). Indeed, it is sufficient that the League demonstrate that “representation of [their] interest ‘*may be*’ inadequate.” *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528 at 538 n.10 (1972)) (emphasis added). “If the interest of the proposed intervenor is not represented at all, or if all existing parties are adverse to the proposed intervenor, the proposed intervenor is not adequately represented.” Jay E. Grenig, 3 Wis. Prac., Civil Procedure (4th ed.) § 309.2; *see also Armada Broad., Inc., v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W. 2d 357 (1994) (“When determining whether a party's representation is deemed adequate we look to see if there is a showing of collusion between the representative and the opposing party; if the representative's interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty.”).

The current Defendant does not share and has no duty to represent the League's interests. WEC is a government entity comprised of appointed state public officials. The Wisconsin Supreme Court recognizes that, because of their specific role, governmental

parties will likely not litigate “with the vehemence of someone who is directly affected.” *Armada Broad.*, 183 Wis. 2d at 476. Governmental defendants play specific roles in the administration and conduct of Wisconsin elections. *See generally* Wis. Stat. §§ 5.05 (powers and duties of WEC), 5.05(3d) (duties of the WEC Administrator); 7.15 (municipal clerk has “charge and supervision of elections” in their municipality). Those duties are related to, but not coterminous with, the League’s interests, work, and the interests of its members. The existing Defendant is not an elector or civic engagement organization and does not, indeed *cannot*, represent the interest of electors in the same way the League does. WEC’s interest, as it should be, is solely in administering Wisconsin election laws. While WEC and the League may ultimately seek the same result in this case, the League can and will assert federal law arguments that the WEC cannot and will not. For that reason alone, LWVWI’s interests are not already adequately represented.

Furthermore, WEC and its attorneys at the Wisconsin Department of Justice have a legal obligation to defend not only their actions, but 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 is certainly ably represented by skilled attorneys, but those attorneys may be precluded from arguing, for example, that portions of Wis. Stat. §§ 6.84, 6.87(2), 6.87(4)(b)1, 6.87(6d), and 6.87(9) must be construed in light of, or are preempted by, federal statutes including Title I of the 1964 Civil Rights Act. *See* 52 U.S.C. § 10101(a)(2)(B). The League, however, can do exactly that. For example, the League, along with additional intervenors, recently pressed federal law arguments in another voting rights case in Wisconsin state court.

See Br. of Intervenors-Defendants-Appellants at 49–52, *Teigen v. Wis. Elec. Comm’n.*, Case No. 2022AP91 (filed Feb. 17, 2022) (arguing that federal law would preempt a prohibition on absentee ballot return assistance).

D. The relief sought by Plaintiffs would impair the League’s ability to protect its interests and those of its members and constituents.

Plaintiffs ask the Court to invalidate longstanding WEC guidance and decide an issue of first impression to Wisconsin courts about how absentee ballots should be counted. The novel and weighty nature of this claim highlights the need for the League to be permitted to intervene, given its extensive involvement in this issue over the last six years and significant interests in ensuring absentee voters can cast a ballot that counts.

Granting the relief sought by Plaintiffs would impair the League’s ability to protect its own interests and those of its members and constituents in this litigation. (Newcomer Aff. ¶¶21-23.) The outcome of this litigation “may, as a practical matter, impair or impede [the] ability to protect interests that may be related to the subject of [the] action.” *Helgeland*, 2008 WI 9, ¶75 (footnote omitted). Just as a court should “approach intervention as of right generally,” this inquiry is taken under a “pragmatic approach ... focus[ed] on the facts of each case and the policies underlying the intervention statute.” *Id.*, ¶79. Further, the Wisconsin Supreme Court recognized that intervention is more warranted when a “novel holding” is at stake, because “[t]he effect of stare decisis is more significant when a court decides a question of first impression.” *Helgeland*, 307 Wis. 2d 1, ¶¶81.

Were Plaintiffs to prevail here on their novel theory regarding Wis. Stat. § 6.87(6d), access to voting for LWVWI's members and constituents, as well as Wisconsin voters generally, would be restricted, and LWVWI's interests in safeguarding eligible Wisconsin voters' ability to cast a ballot that counts, encouraging them to exercise their right to vote, and advocating for accessible and secure methods to vote would be directly and significantly impaired. LWVWI's financial interests and investments in voter education programs and training would also be impacted, as the rule Plaintiffs request this Court impose on absentee voters statewide will require a massive public education effort and with very little time left before the 2022 general election. (Newcomer Aff. ¶¶21-23.)

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

II. The League also meets the criteria for permissive intervention.

Alternatively, the League meets the standard for permissive intervention under Wis. Stat. § 803.09(2). "Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Absent prejudice, intervention is within the Court's discretion if the movant's claim or defense and the main action share a common question of law or fact. *Helgeland*, 2008 WI 9, ¶120.

Granting the League's motion to intervene would not unduly delay or prejudice the adjudication of the rights of the original parties. As discussed above, the League has filed this Motion promptly and is prepared to file a response to the Motion for Temporary Injunction by the preexisting deadline. The League has no interest in delaying the resolution of this case. Prejudice to the existing parties is also not an issue this early in this case.

Finally, the League's arguments and the main action share common questions of law. The Complaint asserts that the WEC guidance on absentee ballot witness certification curing is unlawful, and seeks declaratory and injunctive relief to institute its preferred reading of Wisconsin law and prevent WEC from interpreting the statutes as it has to date. The League, on the other hand, will argue that federal law *requires* the type of ballot certificate curing at issue in this case. These closely intertwined questions must be addressed together.

CONCLUSION

Proposed Intervenor-Defendant League of Women Voters of Wisconsin respectfully requests that it grant this Motion to Intervene and accept the attached Answer and Affirmative Defenses for filing.

Dated this August 15, 2022

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**Motions for admission pro hac vice forthcoming.*