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CIRCUIT COURT  
DANE COUNTY, WI  
2022CV002446

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 10	DANE COUNTY
RISE, INC. and JASON RIVERA,	Plaintiffs,	Case No. 2022-CV-002446
v.		Case Code: 30701
WISCONSIN ELECTIONS COMMISSION and MARIBETH WITZEL-BEHL,	Defendants,	Declaratory Judgment
MICHAEL WHITE and EVA WHITE,		
Proposed Intervenor Defendants.		

## MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

### INTRODUCTION

Plaintiffs filed this lawsuit to collaterally attack the ruling of another Wisconsin court. In *White v. Wisconsin Elections Commission*, 2022-CV-001008 (Wis. Cir. Ct. Sept. 7, 2022), a Waukesha County Circuit Court issued a temporary injunction against the Wisconsin Elections Commission (WEC), one of the Defendants here.<sup>1</sup> Plaintiffs still have not moved to intervene in *White*, even as other groups have successfully intervened on both sides. Instead, Plaintiffs waited until the Waukesha County Circuit Court issued its injunction, and then came to *this* court asking for “functional” relief from that injunction. Doc. 1 at 9.

<sup>1</sup> On October 3, 2022, the court converted the temporary injunction into a permanent injunction. See *White v. Wis. Elections Comm'n*, 2022-CV-001008, Doc. 188 (Wis. Cir. Ct. Oct. 3, 2022).

Plaintiffs do not hide their objective to undermine the *White* injunction. Indeed, the injunction is the heart of their complaint. *See* Doc. 1 at 6-9. Plaintiffs claim the injunction will result in voter confusion, which they say injures them and warrants relief from this Court. Doc. 1 at 7-9. Not so. The *White* injunction resolved confusion by putting a stop to WEC's contradictory interpretation of Wisconsin election law. And the Waukesha County Circuit Court continues to clarify the scope of its injunction. The Waukesha County Circuit Court is thus the proper forum for Plaintiffs' claims. But Plaintiffs instead ask this Court to issue a competing injunction, sowing even greater confusion. Regardless, Movants have an interest in preserving the relief they obtained in court, and they respectfully request that this Court allow them to intervene in this case so they may protect that interest.

### **BACKGROUND**

Under Wisconsin law, an elector who submits an absentee ballot to a municipal clerk must sign a certification in the presence of "one witness who is an adult U.S. citizen." Wis. Stat. § 6.87(4)(b). The municipal clerk must provide voters with a return envelope that includes the required witness certificate. *Id.* § 6.87(2). The certificate provides a space for the elector to certify eligibility to vote and for the absentee ballot witness to certify that she witnessed the lawful marking of the ballot and completion of the certification by the voter. *Id.*

In addition to signing the certificate, the witness must provide her address. The certificate contains a space to list the address. "If a certificate is missing the address of a witness, the ballot may not be counted." *Id.* § 6.87(6d). Wisconsin law details procedures for defective witness certifications:

If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub.

*Id.* § 6.87(9). The Wisconsin legislature instructed that sections 6.87(3) to (7) “shall be construed as mandatory.” *Id.* § 6.84(2). And mandatory election statutes “require[] strict compliance.” *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 16, 394 Wis. 2d 602, 613, 951 N.W.2d 556, 561. Thus, “[b]allots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.” *Id.*

Despite these requirements, WEC instructed municipal clerks and local election officials to “rehabilitat[e] an absentee certificate that does not contain the street number and street name (or P.O. Box) and the municipality of the witness address.” *White*, 2022-CV-001008, Doc. 12, Ex. D (Aug. 2, 2022) (quoting now-removed guidance on WEC’s website). WEC instructed clerks to accept ballots with incomplete witness addresses if:

- The voter has provided his or her complete address and the clerk has personal knowledge that the witness resides at the same address as the voter.
- The clerk has personal knowledge of the witness and knows her address.
- The voter’s complete address appears on the address label, and the witness indicates the same street address as the voter.
- The clerk is able to use lists or databases to determine the witness’s address.
- The clerk can “remedy the address insufficiency from extrinsic sources.”

*Id.*

On July 12, 2022, Michael White, Eva White, Edward Winiecke, and the Republican Party of Waukesha County—Movants here—filed a lawsuit in the Waukesha County Circuit Court. *See White*, 2022-CV-001008, Doc. 1 (July 12, 2022). They argued that WEC’s guidance violated Wisconsin’s requirements in sections 6.87(2), 6.87(4)(b)(1), 6.87(6d), and 6.87(9). On August 2, they moved for a temporary injunction to prevent WEC from issuing guidance that directly

conflicts with state law. They argued that “WEC does not have the power to set aside the laws and policy decisions of the Wisconsin Legislature.” *White*, 2022-CV-001008, Doc. 12 at 6-7 (Aug. 2, 2022).

The Waukesha County Circuit Court agreed. After receiving briefing from the parties and intervenors, the court held a hearing and then granted the motion for temporary injunctive relief. *White*, 2022-CV-001008, Doc. 167 (Sept. 7, 2022). The court’s injunction prohibits WEC from instructing municipal clerks and local elections officials that they have the duty or ability to modify or add information to incomplete absentee ballot certifications. *Id.* at 2-3. The court also required WEC to notify municipal clerks and local election officials by September 14 of the court’s declaration that WEC’s guidance is invalid and contrary to law. *Id.* at 3. WEC followed through by publishing guidance on September 14 regarding the injunction. *See Temp. Inj. on WEC Guidance re Missing Absentee Witness Address (White v. WEC, 22-CV-1008)*, WEC (Sept. 14, 2022), <https://bit.ly/3y4Prm0>. On October 3, the court converted the temporary injunction into a permanent injunction. *See White*, 2022-CV-001008, Doc. 188 (Oct. 3, 2022).

Weeks later, Plaintiffs filed this lawsuit. They complain that the *White* injunction removed guidance on how to determine whether a witness address is sufficient. Doc. 1 at 7. But the court held a hearing and clarified that it had not restricted WEC’s existing definition of “address.” *See Temp. Inj. on WEC Guidance, supra*. WEC’s September 14 guidance also clarified that a complete address still includes a street number, street name, and name of municipality. *Id.* Plaintiffs argue that the court did not require a particular definition of “address” in its injunction, but that is beside the point. The court took briefing on the meaning of “address” and heard various arguments on what makes an address complete. It can be fairly said to have confronted the issue. More importantly, WEC’s current guidance on what constitutes a complete address is the product of the

*White* injunction. This Court cannot address the issue without running squarely into the considered judgment of the Waukesha County Circuit Court and WEC's revised guidance.

The *White* injunction is the object of Plaintiffs' complaint, and their arguments are best heard in that court, not this one. In any event, Movants have an interest in intervening in this lawsuit to defend the temporary injunction that Plaintiffs target.

### LEGAL STANDARD

To intervene as of right, a proposed intervenor must satisfy the four criteria in Wis. Stat. § 803.09(1):

- (A) the proposed intervenor's motion must be timely;
- (B) the proposed intervenor must claim an interest in the subject of the action;
- (C) the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest; and
- (D) the existing parties do not adequately represent the proposed intervenor's interest.

*City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶ 11, 234 Wis. 2d 550, 557–58, 610 N.W.2d 94, 98. If the proposed intervenor “meets each of the requirements listed above, [the court] must allow him to intervene.” *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357, 360 (1994).

In the alternative, a proposed intervenor may seek permissive intervention “[u]pon timely motion,” when the proposed intervenor's “claim or defense and the main action have a question of law or fact in common.” Wis. Stat. § 803.09(2).

### ARGUMENT

#### I. Movants are entitled to intervene as of right.

All four elements of intervention under section 803.09(1) are satisfied: (1) Movants filed this motion just six days after this lawsuit began; (2) Plaintiffs claim they are injured by the very

injunction that Movants obtained in the *White* case; (3) granting Plaintiffs' requested relief to "restore the functional result of the 2016 guidance" would undermine the Waukesha County Circuit Court's judgment and impair Movants' interests; and (4) WEC does not adequately represent Movants' interests.

**A. Movants timely filed their motion.**

Movants filed their motion quickly. "The question of timeliness is left to the discretion of the circuit court." *Armada Broad.*, 183 Wis. 2d at 471. Though "there is no precise formula" to determining timeliness, courts generally consider two factors. *Olivarez v. Unitrin Prop. & Cas. Ins.*, 2006 WI App 189, ¶ 14, 296 Wis. 2d 337, 348, 723 N.W.2d 131, 136. "The 'critical factor' is whether, under the circumstances, the proposed intervenor acted promptly." *Id.* (citation omitted). The second factor is "whether the intervention will prejudice the original parties to the lawsuit." *Id.*

Movants' intervention is prompt. Plaintiffs filed their complaint six days ago. They moved for a temporary injunction five days ago, and the Court has scheduled a motions hearing for October 7, 2022. Defendants have not filed responsive pleadings or responded to Plaintiffs' motion for temporary injunction. Movants' intervention is timely under these circumstances. *See Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶¶ 17-18, 247 Wis. 2d 708, 721-22, 634 N.W.2d 882, 887 (intervention timely where party sought to intervene two weeks after plaintiffs filed the complaint and before defendants filed an answer).

Movants' intervention also will not prejudice the original parties. Movants will promptly respond and will not disrupt the Court's scheduled hearing. The parties have reached no settlement, and the Court has issued no substantive orders. *See State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 551, 334 N.W.2d 252, 258 (1983). Movants' prompt intervention in this new, quickly developing case will not prejudice any party.

**B. Movants have an interest closely related to the subject of the action.**

Movants have several interests that are “sufficiently related to” Plaintiffs’ suit. Wis. Stat. § 803.09(1). To satisfy the interest element of section 803.09(1), the proposed intervenor must have an “interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.” *City of Madison*, 2000 WI 39, ¶ 11 n.9 (citation and internal quotation marks omitted). “[C]ourts employ a ‘broader, pragmatic approach to intervention as of right,’ viewing ‘the interest sufficient to allow the intervention practically rather than technically.’” *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 43, 307 Wis. 2d 1, 24, 745 N.W.2d 1, 12 (citation omitted). This pragmatic approach weighs the facts and circumstances of the case, the stated interest in intervention, and the speedy and economical resolution of controversies. *Id.* Courts view “the interest test as ‘primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’” *Bilder*, 112 Wis. 2d at 548–49.

*First*, Movants have an interest in preserving the relief they obtained in court. That interest is protected by the “rule prohibiting collateral attacks upon court judgments.” *Sinnott v. Porter*, 57 Wis. 2d 462, 466, 204 N.W.2d 449, 451 (1973). Yet Plaintiffs directly target Movants’ legally protected interest in the relief they have obtained. Plaintiffs’ entire theory of injury is that the *White* injunction will produce voter confusion. And the express purpose of their lawsuit is to “restore the functional result of the 2016 guidance”—the same guidance the court enjoined in *White*. Doc. 1 at 9. “A movant may intervene as of right when the movant needs ‘to protect a right that would not otherwise be protected in the litigation.’” *Helgeland*, 2008 WI 9, ¶ 45. Movants successfully obtained and defended the injunction in *White*. But they cannot defend that judgment from collateral attacks in this court without being permitted to intervene.

*Second*, Movants have an interest in an election not diluted by unlawful votes. Even assuming Plaintiffs had standing, filed in the proper court, brought ripe claims, and sought appropriate relief, their interpretation of the statute is contrary to law. Plaintiffs propose the broadest possible definition of the word “address.” They ask the Court to declare that a witness certificate is complete if it contains “information necessary to reasonably discern the location where the witness may be communicated with.” Doc. 1 at 8-9. That, of course, could be anywhere: a workplace, the post office, or even a phone number. The statutory context does not permit such a broad definition. *See* Wis. Stat. § 6.87. Even WEC’s 2016 guidance that Plaintiffs want to “restore” required the street number, street name, and name of municipality. *See Temp. Inj. on WEC Guidance, supra*. Plaintiffs’ new, unbounded definition of “address” directly conflicts with the statute, past WEC guidance, and existing WEC guidance. If Plaintiffs obtain their requested relief, Movants’ votes will be diluted by votes that the Wisconsin Legislature has said should not be counted. *See* Wis. Stat. § 6.84(2). The Waukesha County Circuit Court found that injury was irreparable. *See White, 2022-CV-001008, Doc. 167*. This Court should find that, at a minimum, it is an interest Movants are entitled to defend.

**C. A ruling in Plaintiffs’ favor would impair Movants’ interests.**

If Plaintiffs obtain their requested relief, Movants will effectively lose the judgment they obtained in the Waukesha County Circuit Court. Courts take a “pragmatic” approach to considering impairment of interests, weighing two factors. *Helgeland, 2008 WI 9, ¶ 79*. “First, a court considers the extent to which an adverse holding in the action would apply to the movant’s particular circumstances.” *Id.* at ¶ 80. “Second, a court considers the extent to which the action into which the movant seeks to intervene will result in a novel holding of law.” *Id.* at ¶ 81.

*First*, this action will directly affect Movants. Plaintiffs seek to alter the rules of the election and “restore the functional result of the 2016 guidance.” Doc. 1 at 9. Plaintiffs filed this lawsuit

*because* Movants obtained an injunction requiring WEC to follow Wisconsin law. Plaintiffs' success would directly undermine that judgment and Movants' efforts to secure a lawful election. And that election cannot be repeated. Once defective absentee ballots are illegally counted, Movants have no remedy to cure the vote dilution.

*Second*, Plaintiffs urge a novel interpretation of section 6.87. Plaintiffs cite no authority adopting their construction of the statute. *See* Doc. 8 at 12-16. Plaintiffs' argument raises a first-impression issue that will have statewide effects and likely extend beyond this case. Disposition of this case therefore "may as a practical matter impair or impede" Movants' ability to protect their interests. Wis. Stat. § 803.09(1).

**D. No party adequately represents Movants' interests.**

All parties in this case are adverse to Movants. The burden to satisfy this final element is "minimal." *Armada Broad.*, 183 Wis. 2d at 476. "When determining whether a party's representation is deemed adequate," courts consider whether "the representative's interest is adverse to that of the proposed intervenor." *Id.* That is true here. Movants and WEC are adverse parties in *White*, which Plaintiffs claim as the cause of this suit. At the very least, Movants, who are the plaintiffs in *White*, are "in a better position" than WEC "to provide full ventilation of the legal and factual context" of that dispute. *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 748, 601 N.W.2d 301, 306 (Ct. App. 1999). Movants satisfy the minimal requirement to show inadequacy of representation.

**II. At a minimum, Movants should be granted permissive intervention.**

If the Court declines to grant intervention as a matter of right, it should at least grant Movants permissive intervention as an exercise of the Court's discretion. Under section 803.09(2), "[u]pon 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).

“While intervention as a matter of right requires a person to be necessary to the adjudication of the action, permissive intervention requires a person to be merely a proper party.” *City of Madison*, 2000 WI 39 ¶ 11 n.11. In exercising its discretion, a court should consider whether intervention will “prejudice the parties” by, for example, “making the lawsuit complex or unending.” *C.L. v. Edson*, 140 Wis. 2d 168, 177, 409 N.W.2d 417, 420 (Ct. App. 1987).

Permissive intervention is warranted here. Movants timely filed their motion. Plaintiffs’ complaint directly references Movants’ interests in this case. And Movants’ intervention will help clarify the issues this lawsuit presents, not make it more complex. At bottom, Plaintiffs’ complaint raises the same legal and factual questions that the Waukesha County Circuit Court addressed in *White*. For these reasons, Movants should be permitted to intervene.

### CONCLUSION

Plaintiffs expressly attack the relief that Movants obtained in another proceeding. This Court should allow Movants to intervene in this case to defend the order entered in their favor.

Dated: October 3, 2022

Respectfully submitted,

Electronically signed by Bryant M. Dorsey  
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