

STATE OF WISCONSIN      CIRCUIT COURT      WAUKESHA COUNTY

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RICHARD BRAUN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

Declaratory Judgment

Case Code: 30701

Case No. 22-CV-1336

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**PLAINTIFF'S BRIEF IN OPPOSITION TO  
VOTE.ORG'S MOTION TO INTERVENE**

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Unlike many election law actions, this is not a particularly complicated or fact-intensive case. Wisconsin is currently using a voter registration form, the National Mail Voter Registration Form ("the Form"), that the Plaintiff alleges does not comply with statute. A court's involvement is needed to interpret the relevant statutory language and then declare what the law requires, settling the uncertainty. The Wisconsin agency with the duty of designing and approving Wisconsin's voter registration forms is a party Defendant and will competently defend the use of the Form. Proceeding to the merits should therefore be straightforward and to the extent that other parties wish to have a say as to whether the Form is lawful, they are free to file *amicus curiae* briefs setting forth their personal interpretations of the law.

In that context, this Court must decide whether to approve Vote.org's motion to intervene as a full party. Why isn't WEC's defense of the Form's legality sufficient to protect the interests of those who want to see the Form retained? What does

Vote.org wish to accomplish by being a party in this statutory interpretation dispute that it could not accomplish in a friend-of-the-court brief (which the Plaintiff would not oppose)? Vote.org cannot, and does not, answer these questions. Its motion should be denied.

### **BRIEF STATEMENT OF THE CASE**

This is an action against the Wisconsin Elections Commission (“WEC”) seeking a declaratory judgment regarding the legality of use of the National Mail Voter Registration Form in Wisconsin. *See* Dkt. 2 at ¶1; Dkt. 34 at ¶1. The Form is made available by the United States Election Assistance Commission at [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Federal\\_Voter\\_Registration\\_ENG.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf). *See id.* The Plaintiff, Rick Braun, is a registered Wisconsin voter and taxpayer. *See* Dkt. 2 at ¶13; Dkt. 34 at ¶13. He alleges that the Form violates: (1) Wis. Stat. § 6.33(1) setting forth the required content of voter registration application forms in Wisconsin; and (2) Wis. Stat. § 227.10 imposing rulemaking requirements on Defendant WEC. *See* Dkt. 2:8–11.

This lawsuit was filed on September 15, 2022. *See* Dkt. 1-2. On September 28, 2022, Proposed-Intervenor Vote.org filed a Notice of Motion and Motion to Intervene. Dkt. 13. WEC filed its answer on November 4, 2022. Dkt. 34. This Court thereafter set Vote.org’s motion for a December 2, 2022 hearing and ordered the Plaintiff to file a response, if any, by November 17, 2022. Dkt. 35, 39. This response follows.

## I. VOTE.ORG IS NOT ENTITLED TO INTERVENE AS OF RIGHT

The general standard for intervention as of right in Wisconsin is well-established. Wisconsin Stat. § 803.09(1) provides:

Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

Wisconsin courts interpret this statute to impose four requirements:

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

*Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1 (footnotes omitted). The Plaintiffs do not contest that Vote.org's motion is timely, but none of the other factors are met.

- A. Vote.org has not shown that disposition of this action may as a practical matter impair or impede its ability to protect any interest sufficiently related to the subject of this action.**

Vote.org argues that it possesses three interests that are at risk in this lawsuit: (1) it uses the Form to register Wisconsinites to vote; (2) the Form is simple and accessible; and (3) Vote.org would have to expend resources to use an alternative to the Form.

This Court can easily dispense with the first two interests. First, with respect to Vote.org's ability to register voters, as Vote.org itself indicates, the Form is not the only means by which Wisconsinites can register to vote—not by a long shot. Voters can register in-person (including on election day), online, or by mail using WEC's EL-131 Form (which is not challenged here). See Wis. Stat. §§ 6.30(1), (4), (5), 6.55; see also LoCoco Aff. Ex. A. So there is no potential outcome of this suit in which Vote.org will be prevented from continuing to help Wisconsinites register to vote. It would simply have to send the proposed registrant WEC's EL-131 Form (which complies with Wisconsin law), instead of the Form in dispute herein (which does not).

Second, while it characterizes the Form as simple and accessible, Vote.org obviously has no cognizable interest merely in ensuring that Wisconsin uses Vote.org's preferred form. Such a generalized interest would require any person be permitted to intervene any time any Wisconsin governmental entity makes any choice with respect to any legal requirement. Litigation involving governmental action would become impossible. *Helgeland*, 307 Wis. 2d 1, ¶71 (interest of proposed intervenor should be "unique or special"). More importantly, however, Vote.org does not allege—much less prove—that Wisconsin's EL-131 Form is any less simple or accessible than the national Form. The EL-131 form is available online, is no longer than the Form itself, and is designed to comply with the same requirements that Vote.org argues the Form meets. See LoCoco Aff. ¶2 and Exhibit A. And again, resolution of this case will not eliminate Vote.org's ability to use the EL-131.

Vote.org's real complaint appears to be, then, that it will allegedly have to expend resources to switch to a new method of registering voter in Wisconsin if it can no longer use the Form—it will have to switch from the Form to the EL-131. But there are multiple problems with this argument as well.

First, what cost is there to switching forms? Vote.org simply needs to replace one form with another, much as it would have to do if the Election Assistance Commission ever updated the Form itself. Vote.org provides no information as to how or why it would be particularly difficult for it to replace the Form on its website with Wisconsin's EL-131 form. Instead, Vote.org simply alleges that it would require a "significant" expenditure, based on the statement of Vote.org's CEO to the same effect. But this statement is conclusory and completely unsupported. Vote.org's affiant does not even explain the basis for her allegation. Such unsupported statements are insufficient. *See, e.g.*, Wis. Stat. § 906.02 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Grunwald v. Halron*, 33 Wis. 2d 433, 441, 147 N.W.2d 543 (1967) ("mere speculation" is not admissible).<sup>1</sup> What Vote.org's affiant *does* make clear, however, is that Vote.org model *already* involves substantial state-specific tailoring, undercutting its claim that it uses a one-size-fits-all approach. *See, e.g.*, Dkt. 11:7 ("Wisconsin-based users are provided information about state-specific requirements at multiple points during this process.").

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<sup>1</sup> Vote.org's claim that the result of this case "may . . . reverberate beyond Wisconsin" is likewise wholly unsupported. Dkt. 12:9. This case involves the requirements of a Wisconsin statute.

Second, under Vote.org’s reasoning, any time that the Department of Revenue makes a change to a tax form, any person or group that provides tax services—or indeed who files taxes—has a right to intervene in a lawsuit about the form because of the extra expenditure of resources in adjusting to the new approach. Allowing intervention in that context would contravene Wisconsin case law providing that an interest requiring intervention must relate to the lawsuit in a “direct and immediate fashion.” *Helgeland*, 307 Wis. 2d 1, ¶¶7, 71. It is not Vote.org’s rights that are being litigated here: it has shown no entitlement to use one form versus another.

At bottom, then, Vote.org’s interest is “only remotely related to the subject of [this] action.” *Helgeland*, 307 Wis. 2d 1, ¶45. Its interest has nothing to do with whether the Form actually complies with Wisconsin law—the reason for this case—but instead rests on an unsubstantiated complaint that it will have to adjust to any change in the law. That interest will exist for thousands or hundreds of thousands in most governmental litigation. It does not rise to the level of requiring intervention as of right.

The many non-binding federal cases cited by Vote.org are not to the contrary because the interests of the intervenors in those cases was much more direct than Vote.org’s interest here. *See, e.g., Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (retailer intervenors were “direct beneficiaries” of challenged statute regulating pricing as shown by fact that statute provided them with cause of action; additionally, retailers risked losing “much or even all of their business” depending on outcome); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (car insurance company could intervene in challenge to compulsory car insurance law limiting

ability of injured parties to recover because its premiums were set in reliance on those limitations and governing law forbade it from recouping losses by increasing premiums); *N.Y. Pub. Int. Rsch. Grp, Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350 (2d Cir. 1975) (pharmacists could intervene in consumer action in defense of challenged law prohibiting advertising the price of prescription drugs).<sup>2</sup>

**B. Vote.org has not shown that WEC and the Wisconsin Department of Justice fail to adequately represent its interest.**

Given Vote.org's poor showing on the previous factors, it is required to make a "strong showing" with respect to inadequate representation. *Helgeland*, 307 Wis. 2d 1, ¶74. Further, Vote.org must overcome *two* presumptions of adequate representation that arise because it and WEC have the "same ultimate objective in the action"—preservation of the Form—and because WEC is a governmental body charged with ensuring that Wisconsinites can register to vote (the same interest as asserted by Vote.org). *Id.* at ¶¶90–91.

Vote.org not only does not address these presumptions, but incorrectly characterizes its burden under this factor as "minimal." *See* Dkt. 12:9. But that is the *default* standard. Where either of the above presumptions apply, the movant must make a "*compelling showing*" that representation will be inadequate. *Helgeland*, 307 Wis. 2d 1, ¶86 (emphasis added).

In any event, Vote.org fails under any standard. This case involves two narrow questions of state statutory interpretation: whether the Form complies with Wis.

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<sup>2</sup> *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008), was a standing case, not an intervention case.

Stat. § 6.33(1) and whether the Form complies with Wis. Stat. § 227.10. WEC's Answer demonstrates that it believes the Form is compliant with these laws and that it intends to defend it—Vote.org's exact position and goal. *See, e.g.*, Dkt. 34 at ¶¶7, 50. Thus, any potential differences between Vote.org's desired approach and WEC's desired approach would amount to nothing more than disagreement over potential litigation strategy (and Vote.org does not even point out such an actual disagreement on strategy)—which is not sufficient to establish inadequacy of representation. *Helgeland*, 307 Wis. 2d 1, ¶111–12.

Not only does Vote.org not even try to allege that it would litigate this case differently, it does not attempt to establish any of the other common markers for inadequate representation, like collusion between WEC and the Plaintiff, adversity of interests between Vote.org and WEC, or a failure on WEC's part to fulfill its duty. *See id.* at ¶87. That is because none of those markers exist in this case.

Instead, the most that Vote.org can muster to meet its burden is to argue that WEC might not be as “vehemen[t]” in its defense of the Form as Vote.org because it is not “directly affected” by the outcome of the case, quoting *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994).

*Armada* is not on point. In that case a broadcasting corporation sued a school district to obtain personnel files related to alleged sexual harassment by a district employee. *Armada*, 183 Wis. 2d at 467–69. That employee, *after filing a grievance against the district for disciplining him*, sought to intervene to prevent disclosure of his files. *Id.* at 468–69. The Supreme Court of Wisconsin made the common-sense



judgment—uncontested by the district in that suit—that the employee could not be forced to “rely on an adverse party to protect his privacy interests,” noting in support that the district could not be expected to mount a defense “with the vehemence of someone who is directly affected by public disclosure of the report” given “[t]he personal nature of the interests at stake.” *Id.* at 476.

The differences between this case and *Armada* could not be more apparent. Most importantly, WEC and Vote.org are not adverse. Additionally, this case does not involve the same type of sensitive reputational interests at issue that clearly called for the involvement of the individual whose reputation was at stake. This is a legal dispute about the requirements of a state form. A special interest group like Vote.org is therefore not more “directly affected” by the outcome of this lawsuit than is WEC, the entity explicitly charged by the statute at issue with the maintenance of voter registration forms.

In all, Vote.org has not come close to showing that Wisconsin’s state elections agency, represented by the Attorney General and lawyers at the Wisconsin Department of Justice, are somehow going to put forth such an inadequate defense of the Form that Vote.org must be allowed to participate as a party.<sup>3</sup>

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<sup>3</sup> Vote.org cites three cases that it says support its inadequate representation argument. Dkt. 10-11. The first is an unreported, non-binding California district court case, and one in which the Court was applying the “minimal” standard not relevant here. The other two are non-binding, unpublished circuit court orders not provided by Vote.org. Vote.org does not discuss the specifics of these latter two cases in any way. The Plaintiff cannot respond to this undeveloped argument.

## II. THIS COURT SHOULD NOT PERMIT VOTE.ORG TO INTERVENE PERMISSIVELY

Alternately, Vote.org requests that this Court allow it to intervene permissively pursuant to Wis. Stat. § 803.09(2) which states:

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. . . . 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.

Permissive intervention is not appropriate here. Especially viewed in light of the fact that Vote.org is adequately represented by WEC and that its interest in the case is weak, it is noteworthy that Vote.org has not made *any* attempt to explain what it hopes to achieve as a full party that it could not achieve as an *amicus curiae*. The Plaintiff would have no objection to the submission of a non-party brief by Vote.org in which it would be free to provide its legal arguments on the narrow statutory questions at issue.

### CONCLUSION

One of the public policies that the intervention statute attempts to balance is that “[t]he original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit.” *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 548, 334 N.W.2d 252 (1983). Certainly, a case should not be permitted to proceed when an essential party has been left out of the loop, but that is not this case.

For the foregoing reasons, the Plaintiff respectfully requests that this Court deny Vote.org's motion to intervene.

Dated this 17th day of November, 2022.

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

*Electronically signed by Anthony F. LoCoco*

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