

Richard Braun,

Plaintiff,

v.

Wisconsin Elections Commission,

Defendant.

Case No. 2022CV1336

Case Code: 30701

Declaratory Judgment

VOTE.ORG’S REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

Proposed Intervenor-Defendant Vote.org has more than satisfied the relevant prerequisites to intervene as of right. Vote.org is a national voter registration organization focused on supporting low-propensity voters, including racial and ethnic minorities and younger voters. And critically to this Court’s analysis, it has a unique interest in Wisconsin’s continued use of the National Mail Voter Registration Form (the “National Form”), which Vote.org currently uses to simplify voter registration in Wisconsin and across the country. Plaintiff’s requested relief would bar the Wisconsin Election Commission (“WEC”) from accepting the National Form, thereby forcing Vote.org to devote significant resources to developing new, Wisconsin-specific voter registration software. Vote.org has submitted a sworn affidavit from its Chief Executive Officer testifying to these potential burdens, which is all that is required at this stage. Vote.org therefore has a significant and unique interest in this suit that WEC does not adequately represent—an interest that far exceeds Plaintiff’s narrow interest as a single Wisconsin taxpayer—warranting intervention as of right.

Even if the Court held otherwise as to intervention as of right, Vote.org easily meets the low bar for permissive intervention. Plaintiff does not dispute that Vote.org raises claims and defenses that share common questions of law and fact with the underlying suit—the permissive intervention statute’s only requirement. Only direct participation in this lawsuit would allow Vote.org to fully defend the continued use of the National Form under Wisconsin law, and thereby serve the efficient administration of justice by preventing duplicative future litigation.

ARGUMENT

I. Vote.org is entitled to intervene as a matter of right.

Vote.org, as a national voter registration organization, is entitled to intervene because it has shown a unique and direct interest in this litigation that WEC cannot adequately represent. Although Vote.org must demonstrate all four factors to be entitled to intervene as a right, no one factor is dispositive. *See* Mem. in Supp. of Mot. to Intervene, Doc. 12 at 3-4 (discussing these four factors). Rather, “the requirements must be blended and balanced to determine whether [proposed intervenors] have the right to intervene.” *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶39, 307 Wis. 2d 1, 745 N.W.2d 1. Nor should the criteria “be analyzed in isolation from one another.” *Id.* ¶ 39. “For example, the nature of the interest claimed by a movant may be important to the question whether an existing party can adequately represent that interest.” *Id.* ¶ 39 n.25 (citing *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471-76, 516 N.W.2d 357 (1994)). Plaintiff does not contest that Vote.org’s motion is timely. *See* Pl.’s Br. in Opp’n to Vote.org’s Mot. to Intervene (“Opp.”), Doc. 47 at 3. Nor could he. The remaining factors also counsel in favor of intervention, as Vote.org has a significant and unique interest in the disposition of this suit that WEC cannot adequately represent.

A. Disposition of this suit may impair Vote.org’s ability to protect its interests related to this action.

Vote.org is a nonprofit, nonpartisan voter registration platform that uses the National Form—which Plaintiff seeks to eliminate—to “register voters in Wisconsin and across the country.” Hailey Aff., Doc. 11 at ¶¶ 2, 21. Vote.org uses technology to simplify political engagement, Doc. 11 at ¶ 12, and relies on widespread use of the National Form “to standardize its provision of mail-in voter registration forms across all 50 states.” Doc. 11 at ¶ 22. If this Court were to grant Plaintiff’s requested relief and prohibit WEC from using the National Form, “Vote.org would have to divert significant resources toward modifying its procedures for registering Wisconsin voters.” Doc. 11 at ¶ 24. Specifically, “Vote.org would either have to develop software specific to Wisconsin’s state voter registration form in order to assist users with pre-populating the Wisconsin-specific form, or it would need to eliminate altogether the option for Wisconsin-based users to download pre-populated voter registration forms.” Doc. 11 at ¶ 24.

Plaintiff therefore is wrong to state that Vote.org does not have a clear interest in this case because it could “simply” send the Wisconsin-specific EL-131 form to prospective voters. Opp., Doc. 47 at 4. Vote.org does not merely send users blank voter registration forms. Instead, it collects information from users via an accessible and dynamic online portal and then e-mails users pre-populated forms that they can print out, complete, and mail. *See* Hailey Aff., Doc. 11 ¶¶ 7-14. If WEC were no longer permitted to accept the National Form, then Vote.org would have to develop new software specific to the EL-131 form. And creating that “Wisconsin-specific pre-populated form option would require Vote.org to expend significant staff and financial resources.” *Id.* ¶ 25. The Court should therefore grant intervention because Vote.org’s “interest is ‘of such direct and immediate character that [Vote.org] will either gain or lose by the direct operation of the

judgment.” *Helgeland*, 2008 WI 9, ¶ 45 (quoting *City of Madison v. Wis. Emp. Rels. Com’n*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94).

Plaintiff also overlooks the ample evidence that Vote.org has provided to show the burden it would incur if it were forced to create these new custom procedures for Wisconsin users. Vote.org’s Chief Executive Officer Andrea Hailey submitted an affidavit explaining that the organization has already “invested significant resources in developing and launching [a] web application” that uses the National Form. Hailey Aff., Doc. 11 at ¶ 6.¹ And its use of this single platform to pre-populate the National Form has allowed it to “standardize its provision of mail-in voter registration forms across all 50 states,” creating significant efficiencies. Doc. 11 at ¶ 22. Vote.org would incur considerable expense if it had to “develop software specific to Wisconsin’s state voter registration form” to continue to help register Wisconsin-based users. Doc. 11 at ¶¶ 24, 11-14. This expense is sufficient to constitute a “substantial interest” in the outcome of this suit. See *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 746, 601 N.W.3d 301 (Wis. App. 1999). This sworn testimony is more than sufficient for Vote.org to establish why intervention as of right is appropriate here.

Nevertheless, Plaintiff complains that Vote.org’s interest does not relate to the lawsuit in a sufficiently “direct and immediate fashion.” Opp., Doc. 47 at 6 (quoting *Helgeland*, 2008 WI 9, ¶¶7, 71). Plaintiff is wrong. The Supreme Court has held that a proposed intervenor’s interest is sufficiently direct where “the intervenor will either gain or lose by the direct operation of the judgment.” *Helgeland*, 2008 WI 9, ¶45 (quoting *City of Madison*, 2000 WI 39, ¶11 n.9). Vote.org

¹ Hailey’s sworn affidavit is not “mere speculation,” see Opp., Doc. 47 at 5; it is the informed testimony of the head of Vote.org. Hailey explains that she made her affidavit “on personal knowledge of the facts and circumstances.” Hailey Aff., Doc. 11 at ¶ 1. Wisconsin courts regard affidavits to “set forth such evidentiary facts as would be admissible in evidence.” See Wis. Stat. § 802.08(3) (discussing affidavits in the summary judgment context).

has more than established that it would lose by the direct operation of a judgment granting Plaintiff's requested relief—the full-sale elimination of the National Form in Wisconsin—because Vote.org would be required to expend resources to customize its online platform for Wisconsin users.²

B. WEC cannot adequately represent Vote.org's interests in this litigation.

Defendant WEC—a government entity with a narrow mission—cannot possibly represent Vote.org's much broader interests in this case. Vote.org is a nonprofit advocacy group that aims to register voters, especially young people and voters of color, across the country. *Hailey Aff.*, Doc. 11 at ¶ 2. Wisconsin statutes provide that WEC simply administers state election law. *See* Wis. Stat. § 5.05. Because WEC is not a civic engagement organization, its duties and objectives are distinct from Vote.org's interests. WEC's anticipated defense of the National Form to this point does not change the fact that Vote.org has satisfied its burden of showing inadequate representation, particularly given the strength of its interest in this litigation. *See Helgeland*, 2008 WI 9, ¶39 (explaining that the factors for intervention as of right “need not be analyzed in isolation from one another, and a movant's strong showing with respect to one requirement may contribute to the movant's ability to meet other requirements as well”).

Plaintiff misplaces its reliance on *Helgeland* for its suggestion that the Court should presume WEC adequately represents Vote.org's interests. *Helgeland* concerned Wisconsin municipalities' attempt to intervene in a suit against the state Department of Employee Trust Funds. The Wisconsin Supreme Court held the municipalities were adequately represented by the Department and the Attorney General because the government parties sought the same ultimate

² Vote.org does not need to show that it has “entitlement to use one form versus another,” *Opp.*, Doc. 47 at 6, as “[t]here is no requirement that the potential intervenor's interest be ‘judicially enforceable’ in a separate proceeding.” *Wolff*, 229 Wis. 2d at 744, 601 N.W.2d at 301.

objective in litigation, and because “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.” *Helgeland*, 2008 WI 9, ¶91.

Neither presumption dictates the outcome of Vote.org’s motion to intervene here, for two reasons. *First*, Vote.org has different ultimate objectives than WEC. Vote.org is focused on “support[ing] low propensity voters, including racial and ethnic minorities and younger voters who tend to have lower voter-turnout rates.” Hailey Aff., Doc. 11 at ¶ 2. “Providing underserved and underrepresented voters with simple and accessible registration efforts is critical to Vote.org’s mission and efforts to help register those populations.” Doc. 11 at ¶ 21. In contrast, WEC does not advocate for one group of prospective voters over another. And although Vote.org and WEC both oppose Plaintiff’s requested relief, later in the litigation, the different underlying interests of each entity could plausibly lead to divergence of their positions on significant questions like whether to stipulate to certain facts, whether to settle and on what terms, or whether to appeal. *See Wolff*, 229 Wis. 2d at 748-49 (concluding that defendant county would not adequately represent putative intervenor town’s interests, where town argued county had “an incentive to settle the suit on [different terms] than the Town would accept”).

Second, WEC is not charged by law with representing Vote.org’s interests. *See La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 309 (5th Cir. 2022) (explaining that putative intervenors’ “private interests are different in kind from the public interests of the State or its officials” and “[n]either the State nor its officials can vindicate such an interest while acting in good faith”). Unlike in *Helgeland*, where the Department and the Attorney General were “charged by law with the duty to defend” the same statute that the municipalities defended, *Helgeland*, 2008 WI 9, ¶ 91,

here WEC has not indicated that it is charged by Wisconsin law to take a particular position as to the outcome of this case.

For all of these reasons, the presumptions laid out in *Helgeland* are inapplicable to this case. But even if they did apply, they are rebutted in this case. *Wolff v. Town of Jamestown* is instructive. In *Wolff*, the Court of Appeals reversed the circuit court's denial of intervention as of right where a putative intervenor town and defendant county "ostensibly [sought] the same outcome" and were likely to "offer similar arguments in support," because the putative intervenor "was in a better position to provide full ventilation of the legal and factual context of the dispute." 229 Wis. 2d at 748 (also emphasizing that the movant's "burden on this point is minimal"). The Court of Appeals explained that the putative intervenor "*may* be in a position to defend the [defendant]'s decision more vigorously than the [defendant] itself," because the defendant might have a greater incentive to settle. *Id.* at 749 (emphasis added). In addition, the Court held that the putative intervenor "may have more at stake" in the event of an unfavorable outcome, and therefore had "made the minimal showing required" for the adequate representation prong. *Id.*

Just like the putative intervenor in *Wolff*, Vote.org may be in a position to defend use of the National Form more vigorously than WEC, and also may have more at stake if Wisconsin is prohibited from using the National Form. It is not clear what incentive WEC has to defend use of the National Form. In contrast, Vote.org has provided evidence that it would be required "to expend significant staff and financial resources" to "develop software specific to Wisconsin's state voter registration form" if WEC were prohibited from accepting the National Form. Hailey Aff., Doc. 11 at ¶¶ 24-25. WEC's jurisdiction—and litigation priorities—end at Wisconsin's border. Vote.org, in contrast, is a national organization that operates in all 50 states. Because Vote.org has a unique interest in maintaining a nationwide voter registration operation, Vote.org's interest in

ensuring the viability of the National Form at the national level differs markedly from WEC's narrow goal of defending the legality of its current policy. *See Berger v. N.C. State Chapter of the NAACP*, 142 S. Ct. 2191, 2203-04 (2022) (describing prior case in which government party did not adequately represent private individual because the entities' interests were "related" but not "identical" (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972)); *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001) ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [party] merely because both entities occupy the same posture in the litigation."); *Clark v. Putnam Cnty.*, 168 F.3d 458, 461-62 (11th Cir. 1999) (voters granted intervention in challenge to court-ordered voting plan defended by county commissioners because commissioners represented all county citizens, including people adverse to proposed intervenors' interests); *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (government defendants necessarily represented "the public interest" rather than proposed intervenor's "particular interest[s]" in protecting an owl species). Because WEC does not adequately represent Vote.org's specific interests in this litigation, Vote.org is entitled to intervene as of right.

II. Alternatively, the Court should grant Vote.org permissive intervention.

Even if Vote.org was not entitled to intervene as of right, permissive intervention is warranted under Wis. Stat. § 803.09(2). The Court has broad discretion to grant a motion for permissive intervention. *See Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers' Educ. Ass'n*, 143 Wis. 2d 591, 422 N.W.2d 149 (Ct. App. 1988). Plaintiff does not contest that Vote.org's claims and defenses have "a question of law and fact in common" with the main action here. Because that is the only statutory requirement for permissive intervention under Wis. Stat. § 803.09(2), as long

as the proposed intervention will not unduly delay or prejudice the parties, Plaintiff all but concedes that Vote.org's permission intervention is appropriate.

Instead of addressing what the statute requires, Plaintiff says only that permissive intervention is not warranted because "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*." Opp., Doc. 47 at 10. This additional hurdle is foreign to both the statute and Wisconsin caselaw, which instead stresses that "permissive intervention requires a person to be merely a proper party." *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39 ¶11, 234 Wis. 2d 550, 559, n.11.

This Court should grant permissive intervention because it will aid in the resolution of the issues presented by this case and prevent duplicative litigation. Vote.org, which regularly uses the National Form to help register Wisconsin voters and to help streamline its operations across all 50 states, has a substantial, direct interest in the legal question presented by this case. It believes that Wisconsin law permits the use of the National Form and intends to litigate to that effect. Vote.org's intervention in this case therefore serves the principles of judicial economy that underly the intervention statute. *See Wolff*, 229 Wis. 2d at 742-3 (evaluating motion to intervene "with an eye toward 'disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'"). Involving Vote.org—which has a specific private interest in using the National Form across the country, instead of WEC's generalized interest in defending Wisconsin law—aids in the efficient and considered resolution of this litigation. The Court therefore should exercise its discretion to grant intervention.

CONCLUSION

For the reasons stated above, the Court should grant Vote.org's motion to intervene as a matter of right. In the alternative, the Court should exercise its direction to grant Vote.org permissive intervention.

Dated: November 23, 2022

Electronically signed by Diane M. Welsh

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