

for Wisconsin voters going forward. If Plaintiff succeeds in eliminating the National Form in Wisconsin, Vote.org would be forced to divert significant resources to modify its procedures for registering Wisconsin voters—resources otherwise critical to Vote.org’s nationwide voter registration and get-out-the-vote campaigns.

For these reasons and those set forth below, Vote.org is entitled to intervene in this case as a matter of right under Wis. Stat. § 803.09(1). Such intervention is needed to protect Vote.org’s substantial and distinct legal interests, which will otherwise be inadequately represented in this litigation. In the alternative, the Court should allow Vote.org to permissively intervene pursuant to Wis. Stat. § 803.09(2). As required by Wis. Stat. § 803.09(3), a responsive pleading setting forth the defenses for which intervention is sought accompanies Vote.org’s motion. (*See* Ex. 1 to Vote.org’s motion.)

BACKGROUND

In 1993, Congress passed the National Voter Registration Act, Pub L. No. 103–31, 107 Stat. 77, 42 U.S.C. § 1973gg–1 *et seq.* (1993), which (among other things) required the federal government to develop a national voter registration form. As outlined by 11 C.F.R. § 9428.3, “[t]he national mail voter registration form shall consist of three components: An application, which shall contain appropriate fields for the applicant to provide all of the information required or requested under 11 CFR 9428.4; general instructions for completing the application; and accompanying state-specific instructions.” The resulting National Form was first promulgated in 1994 in furtherance of the NVRA’s purpose “to establish procedures that will increase the number of eligible citizens who register to vote.” 52 U.S.C. § 20501(b)(1). It was successful. According to a 2013 review, the mail registration provisions of the NVRA consistently accounted for between one fifth and one third of all new federal voter registrations in covered states on a yearly basis.

Royce Crocker, Cong. Rsch. Serv., R40609, *The National Voter Registration Act of 1993: History, Implementation, and Effects* 13 (2013).

WEC is a nonpartisan state agency responsible for overseeing voter registration in Wisconsin. Wis. Stat. § 6.33. As outlined in WEC’s Election Administration Manual, Wisconsin accepts three types of voter registration forms: (1) the state Voter Registration Application, EL-131; (2) the Federal Post Card Application; and (3) the National Form.

Proposed Intervenor-Defendant Vote.org is a major 501(c)(3) nonprofit, nonpartisan organization and technology platform dedicated to voter registration and get-out-the-vote efforts. Part of its core mission is to reach historically underserved voters of color and underrepresented young voters. *See* Affidavit of Andrea Hailey (Sep. 28, 2022) (“Hailey Aff.”) at ¶¶2, 21. Vote.org relies on the National Form to help register voters in Wisconsin and across the country because it is a clear and approachable tool for voters to navigate voter registration. *Id.* at ¶21. Plaintiff’s suit threatens to severely impede Vote.org’s efforts to reach and help register prospective Wisconsin voters. *Id.* at ¶23-25. The National Form also enables Vote.org to standardize its activity across all 50 states, which is a major benefit to an organization that helps millions of voters register to vote every year, including 4.2 million in the 2020 election alone. *Id.* at ¶¶4, 22. Plaintiff’s requested relief would force Vote.org to retool how it helps register voters in Wisconsin at considerable expense, requiring it to divert resources from its registration and get-out-the-vote activities in Wisconsin and beyond. *Id.* at ¶25.

LEGAL STANDARD

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

- (A) its motion to intervene must be timely;
- (B) it must claim an interest sufficiently related to the subject of the action;

(C) it must show that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and

(D) it must demonstrate that the existing parties do not adequately represent its interest.

Helgeland v. Wisconsin Municipalities, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. If these elements are satisfied, the Court must grant intervention. *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994) (“If [movant] meets each of the requirements [in Wis. Stat. § 803.09], we must allow him to intervene.”).

The standard for permissive intervention, which Vote.org seeks in the alternative, is set forth in 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.”

ARGUMENT

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

Vote.org satisfies the elements for intervention as of right: (1) It has filed this motion before WEC filed a responsive pleading; (2) its current operations and ability to register Wisconsin voters are at stake in this litigation; (3) disposition of the case could impair those interests; and (4) neither Plaintiff nor WEC adequately represents Vote.org’s interests.

A. Vote.org’s motion is timely.

Vote.org’s motion is timely. Though “[t]here is no precise formula to determine whether a motion to intervene is timely,” *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983), courts consider two factors. The “critical factor” is whether the proposed intervenor acted promptly, which includes “when the proposed intervenor discovered its interest was at risk and how far litigation has proceeded.” *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006

WI App 189, ¶15, 296 Wis. 2d 337, 723 N.W.2d 131; *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶¶16–17, 247 Wis. 2d 708, 634 N.W.2d 882. The second factor is whether the intervention will prejudice the original parties to the lawsuit. *Bilder*, 112 Wis. 2d at 550.

Plaintiff filed his complaint less than two weeks ago, and it remains the only substantive filing on the docket. WEC has not yet filed a responsive pleading and has more than a month remaining to do so. Vote.org’s intervention will involve no prejudice or delay for either party or for the Court. *See Bilder*, 112 Wis. 2d at 550–51. This motion thus readily satisfies the timeliness requirement. *See Roth*, 2001 WI App 221, ¶¶17–18 (intervention timely where party sought to intervene two weeks after complaint filed and before defendants filed answer or any proceedings occurred).

B. Vote.org has an interest closely related to the subject of the action.

Vote.org’s interests are also “sufficiently related to” Plaintiff’s suit. Wis. Stat. § 803.09(1). Plaintiff’s attempt to invalidate the National Form in Wisconsin threatens to impede Vote.org’s direct operations and inhibit its efforts to help register Wisconsin voters. And, if successful, it would require Vote.org to divert resources from its other registration and get-out-the-vote activities in order to build new registration processes in Wisconsin. These interests plainly suffice for intervention. Courts interpret the interest requirement of Wis. Stat. § 803.09(1) “with the same flexibility that [they] bring to the statute as a whole.” *Helgeland*, 2008 WI 9, ¶44. This entails balancing several considerations: “the facts and circumstances of the particular case,” “the stated interest in intervention,” and “the policies underlying the intervention statute.” *Id.* These policies include “allowing persons to join . . . in the interest of the speedy and economical resolution of controversies without rendering the lawsuit fruitlessly complex or unending.” *Id.* The Court should

grant intervention if the intervenor's "interest is 'of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.'" *Id.* at ¶45 (quoting *City of Madison v. Wisconsin Emp. Rels. Com'n*, 2000 WI 39, ¶11 n.9, 234 Wis.2d 550, 610 N.W.2d 94). Vote.org has at least three key interests that will be directly impacted by a judgment (or other relief) in this litigation.

First, Vote.org relies on the National Form to help Wisconsin citizens register to vote. Hailey Aff. at ¶¶19-20. When a prospective Wisconsin voter visits Vote.org, Vote.org offers the option to (1) register to vote online, or (2) complete the National Form to mail to their local elections board. *Id.* at ¶¶7-14. But only prospective voters with a "current and valid" Wisconsin driver's license or state ID card can register to vote online in Wisconsin. Wis. Stat. § 6.30(5). Many people do not satisfy this requirement, including individuals who have recently moved and may not yet possess a Wisconsin ID with their current address—in other words, many individuals who need to register to vote in their new state or update an existing registration because of a move. Hailey Aff. at ¶11. Of course, those who face economic hardship, or those who cannot or do not drive (including both young and old Wisconsinites), may also lack the current and valid state ID needed to register online.

For voters who are not eligible to register online or otherwise choose to register by mail, Vote.org asks the voter for more information before sending a partially completed version of the National Form to the user's email address. *Id.* at ¶¶12-14. Users are then instructed to print and complete the National Form before mailing it to their local elections board. *Id.* at ¶14. Because Vote.org uses the National Form to register voters in Wisconsin and elsewhere on a regular basis, it has a direct interest in preserving it sufficient for intervention. *See, e.g., Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (granting intervention when proposed intervenors would

be harmed by invalidation of a statutory scheme); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (insurer who relied on challenged liability statute had sufficient interest to intervene where statutory challenge could impose unforeseen costs); *N.Y. Pub. Int. Rsch. Grp, Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350 (2d Cir. 1975) (pharmacists, as parties regulated by a prohibition on drug advertising, had interest sufficient to intervene in a challenge to it).¹

Second, Plaintiff's requested relief would force Vote.org to divert mission-critical resources to continue registering voters in Wisconsin. This, too, is a significant interest. As previously explained, Vote.org relies on the National Form when a Wisconsin voter—or any voter of any state, for that matter—requests to submit a registration form by mail. Hailey Aff. at ¶19. If WEC can no longer accept the National Form, Vote.org will need to develop and implement a Wisconsin-specific solution for Wisconsin voters who seek to register by mail—something it does not do in any other state. *Id.* at ¶¶24-25. This custom-made technological solution comes with a significant cost in the form of staff time and expenses, thus requiring a diversion of resources from Vote.org's registration and get-out-the-vote efforts in other states. *Id.* at ¶25.

Courts routinely hold that diversion of resources is an injury sufficient to confer *Article III standing*—a more demanding standard than that required for intervention in Wisconsin. *See, e.g., Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (finding Article III standing where the challenged law injured the organization by compelling it to devote resources that it would not have needed to otherwise), *aff'd*, 553 U.S. 181 (2008) (plurality opinion); *see also Bilder*, 112 Wis. 2d at 547-48 (looking to federal cases for guidance in interpreting Wis. Stat.

¹ The Wisconsin Supreme Court has explained that because “Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, [] interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1).” *Helgeland*, 2008 WI 9, ¶37.

§ 803.09 and holding that intervention in Wisconsin is more liberal than the Article III standing standard).

Third, Plaintiff's requested relief would significantly impact Vote.org's ability to reach and register low-propensity voters. The National Form was designed to be simple and accessible, and greatly improved the arcane election procedures it was implemented to replace. *See* J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, Demos (May 20, 2013) at 3 (noting that prior to the NVRA, which authorized the creation of the National Form, "voter registration [] required filling out a complicated form" and "was often quite confusing"). The National Form's simplicity is precisely what makes it such a powerful tool for reaching historically underserved and underrepresented voters, as is Vote.org's core mission. *Hailey Aff.* at ¶21. And providing underserved and underrepresented voters with simple and accessible registration procedures is critical to Vote.org's efforts to help register these populations to vote. *Id.*

For all of these reasons, Vote.org has a significant interest in this litigation.

C. A ruling in Plaintiff's favor would impair Vote.org's ability to protect its interests.

Vote.org also satisfies its minimal burden to establish that this case may impair its ability to protect its interests. The Wisconsin Supreme Court's approach to this prong is flexible, with two factors guiding its analysis: the extent to which (1) "an adverse holding in the action would apply to the movant's particular circumstances" and (2) "the movant seeks to intervene will result in a novel holding of law." *Helgeland*, 2008 WI 9, ¶¶80-81. Both factors weigh in favor of intervention here.

First, for the reasons discussed above, an adverse ruling would directly and seriously impair Vote.org's operations, both in Wisconsin and in other states. Plaintiff seeks to prevent

Vote.org and others from using the National Form to register voters in Wisconsin, making it more difficult for Vote.org to advance its mission to help register voters among historically underrepresented groups. If Plaintiff is successful, Vote.org would be forced to make significant expenditures on legal and technical resources to reconfigure its Wisconsin voter registration processes.

Second, intervention is warranted because Plaintiff's suit raises an issue of first impression in Wisconsin state court—whether the National Form complies with Wisconsin state law—and will necessarily result in a “novel holding of law.” *Helgeland*, 2008 WI 9, ¶ 81. Plaintiff's suit also portends future litigation that threatens Vote.org's operations beyond Wisconsin state lines. Though litigation over the National Form is nothing new in states that are required to use and accept the National Form, *see Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013), there is little litigation concerning the use of the National Form in states like Wisconsin which are exempt from the NVRA. *See* 52 U.S.C. § 20503(b). The result of this case may therefore reverberate beyond Wisconsin, implicating many of the 50 states in which Vote.org assists voter registration. *See* Hailey Aff. at ¶25. Because the disposition of this suit clearly implicates Vote.org's organizational interests, intervention is appropriate.

D. No party adequately represents Vote.org's interests.

As for the fourth and final prerequisite to intervention as of right, Vote.org, as a direct user of the National Form, has interests distinct from those represented by any party to this litigation. The burden to satisfy this factor is “minimal.” *Armada Broad.*, 183 Wis. 2d at 476 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Because the course of litigation is difficult to predict, the relevant question is whether representation “*may be*” inadequate, not whether it *will be* inadequate. *See Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.

2d 301 (Ct. App. 1999). When there is a realistic possibility that the existing parties might inadequately represent the proposed intervenor's interests, "all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf." 1 Jean W. Di Motto, *Wisconsin Civil Procedure Before Trial* § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

That is the situation here. Even if WEC (the defendant in this action) ultimately shares Vote.org's "mutually desired outcome" in preserving the National Form, *Wolff*, 229 Wis. 2d. at 748, Vote.org has "special, personal [and] unique interest[s]" that are distinct from WEC's interests, *Helgeland*, 2008 WI 9, ¶116, and government entities cannot be expected to litigate "with the vehemence of someone who is directly affected" by the litigation's outcome. *Armada Broad.*, 183 Wis. 2d at 476.² WEC's suspension of the National Form would directly harm Vote.org—not WEC. WEC's interests in this litigation are defined by its statutory duties to conduct elections and to administer Wisconsin's election laws. Courts have routinely found that government defendants do not adequately represent third party interests under similar circumstances. *See, e.g., Issa v. Newsom*, No. 20-cv-01044-MCF-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (finding that state defendants' "interests in the implementation of the [challenged law] differ from those of the Proposed Intervenors" in ensuring "voters they represent have the opportunity to vote in the upcoming federal election . . . and allocating their limited resources" to assist voters with the election process).

² It is not clear that WEC will share Vote.org's interest in maintaining the National Form. Because WEC has not yet answered the complaint and WEC did not substantively respond to Plaintiff's inquiry about its use of the National Form, *see* Compl. ¶ 20, Vote.org does not yet know whether the WEC will defend its use of the National Form.

Likely for this reason, courts in this jurisdiction have recently and repeatedly granted intervention to voting organizations in challenges to election procedures brought against WEC. *See* Order Granting Intervention, *White v. Wis. Elections Comm'n*, No. 22-CV-1008 (Sept. 2, 2022) (granting intervention to League of Women Voters of Wisconsin and Waukesha County Democratic Party in suit against WEC concerning absentee ballot guidance); Order Granting Intervention, *Teigen et al. v. Wis. Elections Comm'n*, No. 21-CV-958 (Oct. 15, 2021) (granting intervention to League of Women Voters of Wisconsin, Disability Rights Wisconsin, and Wisconsin Faith Voices for Justice in suit against WEC concerning ballot drop box accessibility). This suit is no different. Vote.org cannot rely on WEC or anyone else in the litigation to protect its distinct interests, and therefore is entitled to intervene as of right.

II. Alternatively, Vote.org should be granted permissive intervention.

Even if this Court were to find Vote.org ineligible for intervention as of right, Vote.org easily clears the minimal bar for permissive intervention under Wis. Stat. § 803.09(2). A court can exercise its broad discretion to permit a party to intervene where the “movant’s claim or defense and the main action have a question of law or fact in common,” intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties,” and the motion is timely. Wis. Stat. § 803.09(2); *see also Helgeland*, 2008 WI 9, ¶120.

Vote.org satisfies these criteria. The motion to intervene is timely and, given that this litigation is in its earliest stages, intervention will cause no undue delay or prejudice. Moreover, Vote.org inevitably will raise common questions of law and fact, including the core issue of whether the National Form complies with Wisconsin’s election laws for voter registration forms. Vote.org is also prepared to proceed in accordance with the schedule this Court sets so that its intervention may best serve to efficiently resolve the factual and legal issues before the Court.

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.

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Electronically signed by Diane M. Welsh

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