

NANCY KORMANIK,  
Plaintiff,

v.

WISCONSIN ELECTIONS  
COMMISSION,  
Defendant.

Case No. 2022-CV-1395  
Case Code: 30701  
Declaratory Judgment

**MEMORANDUM IN SUPPORT OF RISE, INC.'S  
MOTION TO INTERVENE**

**INTRODUCTION**

Proposed Intervenor-Defendant Rise, Inc. submits this memorandum in support of its motion to intervene in this proceeding pursuant to Wis. Stat. § 803.09(1)–(2). Rise, Inc. is a student-led 501(c)(4) nonprofit public benefit corporation that operates nationwide and state-specific campaigns, including in Wisconsin. Rise’s mission is to empower college students to advocate for policies that broaden access to higher education. The success of this mission hinges on Rise’s ability to build political power within the student population, which is why Rise is conducting an extensive get-out-the-vote (GOTV) campaign in Wisconsin in advance of this November’s general election. Rise therefore has a significant interest in this litigation, in which Plaintiff seeks—just weeks from the upcoming election and after absentee voting has already begun—to limit voters’ ability to cure absentee ballots. Plaintiff’s suit threatens Rise’s ability to help mobilize prospective Wisconsin voters who could now be wrongly disenfranchised by Plaintiff’s requested relief. If Plaintiff’s suit succeeds, Rise would have no choice but to divert resources from its other mobilization efforts to prioritize implementation of an entirely new GOTV

strategy for the upcoming election. Its present strategy was built around the assumption that absentee voting in Wisconsin would proceed as it did for the partisan primary that was conducted just last month.

For these reasons and those set forth below, Rise is entitled to intervene in this case as a matter of right under Wis. Stat. § 803.09(1). Such intervention is needed to protect Rise's substantial and distinct legal interests, which will otherwise be inadequately represented in this litigation. Courts in Wisconsin and elsewhere routinely find such interests sufficient for intervention as of right, including in similar challenges to absentee ballot guidance. In the alternative, the Court should allow Rise 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 Rise's motion. (*See* Ex. 1 to Rise's motion.)

### **BACKGROUND**

Wisconsin law provides that “[a]ny elector who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot.” Wis. Stat. § 6.80(2)(c). Wisconsin law also provides that a municipal clerk shall return an absentee ballot to an elector “[w]henver an elector returns a spoiled or damaged absentee ballot to the municipal clerk,” *id.* § 6.86(5), and may do so if the clerk “receives an absentee ballot with an improperly completed certificate or with no certificate,” *id.* § 6.87(9).

Against that statutory backdrop, the Wisconsin Elections Commission (“WEC”) issued guidance clarifying that a voter who has been issued an absentee ballot at the clerk’s office or by mail “can request to spoil that ballot and receive a new one in the event the voter makes a mistake or changes their mind.” *Spoiling Absentee Guidance for the 2022 Partisan Primary*, Wisconsin Elections Commission (Aug. 1, 2022), available at <https://elections.wi.gov/memo/spoiling-absentee-guidance-2022-partisan-primary> (“Spoiling Absentee Guidance”). WEC further

explained that “voters can request to have their returned absentee ballot spoiled and instead vote in person, either during the in-person absentee period or at their polling place on election day, but they must request their ballot be spoiled by the appropriate deadlines.” *Id.* “Once that deadline has passed, a returned absentee ballot cannot be changed, and the voter cannot be issued another ballot on Election Day.” *Id.*; see also *Rules about ‘Spoiling’ Your Ballot*, Wisconsin Elections Commission (Aug. 2, 2022), available at <https://elections.wi.gov/news/rules-about-spoiling-your-ballot-0>.

Absentee voting is underway in Wisconsin. Clerks were required to send absentee ballots by September 22, 2022 to all electors with valid requests on file for the upcoming election, see Wis. Stat. §§ 7.10(3), 7.15(1)(c), (cm), and by September 24, 2022 to all military and overseas voters with active requests on file, 52 U.S.C. § 20302(a)(8). Electors may continue to request absentee ballots by mail (until November 3, 2022) and in person (until November 6, 2022). Wis. Stat. § 6.86(1)(b).

Proposed Intervenor-Defendant Rise, Inc. is a student-led 501(c)(4) nonprofit public benefit corporation. See Affidavit of Maxwell Lubin (“Lubin Aff.”) ¶2. Rise’s efforts to empower and mobilize students as participants in the political process, including as organizers and voters, are critical to its mission to expand access to higher education. *Id.* ¶3. Rise operates both nationwide and through state-specific campaigns (including in Wisconsin) designed to build student political power. Rise employs a Wisconsin State Director, two Deputy Directors, and sixteen paid organizing fellows in Wisconsin. *Id.* ¶5.

Plaintiff’s suit threatens Rise’s efforts to reach and mobilize prospective Wisconsin voters. *Id.* ¶¶6–7. Rise’s Wisconsin campaign is conducting an extensive relational GOTV campaign in Wisconsin in advance of the upcoming general election. As of September 23, 2022, Rise organizers

have contacted as many as 15,000 young voters in Wisconsin and have helped nearly 4,000 make a “plan to vote”—a common GOTV strategy. *Id.* ¶6. Rise believes that many of the Wisconsin voters Rise has targeted in these efforts currently plan to vote absentee in the 2022 general election. Rise’s records indicate that 1,446 of the nearly 4,000 voters in Rise’s GOTV universe in Wisconsin have voted absentee in a past election, and that 1,246 of them voted absentee in the 2020 general election. *Id.* ¶7. Plaintiff’s suit threatens to undermine Rise’s meticulously planned GOTV efforts to reach prospective Wisconsin voters. Absentee voters have the right under Wisconsin law to spoil a ballot and cast a new one, and depriving Rise’s target voters of that right will harm Rise’s organizational goals. The sudden and significant confusion that Plaintiff’s requested relief would cause if it were granted at this late date—just weeks before the upcoming election and with absentee voting already underway—will force Rise to divert significant resources toward educating voters about any changes to the absentee ballot cure process, retool how it helps mobilize voters, and shift its efforts toward getting as many voters as possible to vote in person. *Id.* ¶¶12–14.

### 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. Wis. Muns.*, 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 Rise 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. Rise is entitled to intervene as a matter of right.

Rise satisfies each prerequisite to intervention as of right: (1) it is filing this motion before WEC has filed a responsive pleading; (2) its current operations and ability to register Wisconsin voters are not only sufficiently related to the subject of this action, but stand to be severely impeded by the relief that Plaintiff requests; (3) disposition of the case could impair those interests; and (4) neither Plaintiff nor WEC adequately represents Rise’s interests.

#### A. Rise’s motion is timely.

Rise’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 suit. *Bilder*, 112 Wis. 2d at 550.

Plaintiff filed her complaint less than one week ago. And while Plaintiff has now moved for a Temporary Injunction, this Court will not hold a hearing on the motion until October 5. WEC

has not yet filed a responsive pleading or responded to Plaintiff's Motion for a Temporary Injunction. Rise intends to promptly respond, without delaying the Court's scheduled hearing. Rise's intervention will involve no prejudice or delay for either party or for the Court. *See Bilder*, 112 Wis. 2d at 550–51. The motion to intervene 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. Rise has an interest closely related to the subject of the action.**

Rise's interests are also "sufficiently related to" Plaintiff's suit. Wis. Stat. § 803.09(1). Plaintiff's attempt to restrict Wisconsin voters' avenues for curing absentee ballots threatens to impede Rise's direct operations and inhibit its efforts to help mobilize Wisconsin voters. If successful, it would also require Rise to divert resources from its other mobilization efforts in order to (1) significantly revise its GOTV strategy for the present election cycle, which was built around the assumption that absentee voting in Wisconsin would proceed as it did for the partisan primary held just last month, and (2) educate Wisconsin voters about any changes to the aforementioned guidance issued by WEC. Lubin Aff. ¶13.

Rise's 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. Wis. Emp. Rels. Comm’n*, 2000 WI 39, ¶11 n.9, 234 Wis.2d 550, 610 N.W.2d 94). Rise has at least three key interests that will be directly impacted by an injunction or judgment in this litigation.

*First*, as described above, Rise’s efforts to build political power among students, including through its Wisconsin campaign, are critical to its mission. Rise’s GOTV campaign in Wisconsin has been extensive. Rise organizers have contacted as many as 15,000 young voters and have helped 3,826 of them make a “plan to vote.” Lubin Aff. ¶6. Rise’s records indicate that 1,446 of the nearly 4,000 voters in Rise’s GOTV universe in Wisconsin have voted absentee in a past election, and that 1,246 of them voted absentee in the 2020 general election. Rise is best able to accomplish its GOTV and organizing goals when balloting procedures are straightforward, simple, and settled. The student voters whom Rise engages are often first-time or lower-information voters, and so often are unfamiliar with the minutia of balloting procedures. Rise’s GOTV efforts are designed to bridge that gap. *Id.* ¶11. Rise therefore has a considerable stake in Wisconsin’s absentee balloting processes, and a direct interest in this lawsuit, which threatens, among other things, to foreclose absentee voters’ ability to spoil returned ballots in order to ensure that they may timely cast ballots that will be counted.

*Second*, Plaintiff’s requested relief would force Rise to divert mission-critical resources to continue mobilizing voters in Wisconsin. This, too, constitutes a significant interest. As previously explained, Rise built its GOTV efforts around the assumption that absentee voting in Wisconsin will proceed as it did previously, including just last month. Rise organizers have not sought to push voters towards in-person voting if those voters qualify for absentee voting and would prefer to vote absentee. The sudden confusion surrounding cure processes threatens to make it more difficult for voters who choose to vote absentee to have those ballots successfully counted. That confusion will

force Rise to divert significant resources toward getting as many voters as possible to vote in person, so as to avoid the risk that their absentee ballots are rejected without an opportunity to cure. Rise organizers will be forced to reconnect with voters who have already developed a voting plan and explain that plan in-person voting is preferred, if possible, to avoid possible disenfranchisement. This will divert critical resources away from other mission-critical programs. Rise organizers have limited time. If they are forced to divert their limited time and other resources to address the marked change in procedures that would put absentee voters' ballots at risk should Plaintiff obtain her requested relief, they will be unable to connect with as many new potential voters in their GOTV efforts. Rise's overall organizational mission will be harmed by this unforeseen reallocation of staff time and resources. Lubin Aff. ¶13. Rise will also be forced to divert both staff time and money to develop and distribute new training materials that explain the new processes for use with those voters who, due to either preference or necessity, still plan to vote absentee. *Id.* ¶14. This, too, will leave Rise with less resources to support its GOTV efforts and connect to more voters in Wisconsin.

Courts routinely hold that these types of injuries suffice 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 organization by compelling it to devote resources that it would not have needed to otherwise), *aff'd*, 553 U.S. 181 (2008) (plurality op.); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (affirming finding that organizations had standing where they would “be required to increase the time or funds (or both) spent on certain activities to alleviate potentially harmful effects of” challenged law); *League of United Latin Am. Citizens (LULAC) of Wis. v. Deininger*, No. 12-C-0185, 2013 WL 5230795, at \*1 (E.D. Wis. Sept. 17, 2013) (holding



organizations had standing to challenge recently adopted voter identification laws based on get-out-the-vote expenditures); *see also Bilder*, 112 Wis. 2d at 547–48 (looking to federal cases for guidance in interpreting Wis. Stat. § 803.09 and holding that intervention in Wisconsin is more liberal than the Article III standing standard).

For all these reasons, Rise has a significant interest in this litigation.

**C. A ruling in Plaintiff’s favor would impair Rise’s ability to protect its interests.**

Rise 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 action into which 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 Rise’s operations, both in Wisconsin and in other states. Plaintiff seeks to limit the ways in which voters can cure absentee ballots in Wisconsin, making it more difficult for Rise to advance its mission to empower and mobilize college students as participants in the political process. If Plaintiff is successful, Rise would be faced with significant expenditures on legal and technical resources to reconfigure its GOTV strategy, which was premised on Wisconsin’s absentee ballot cure process remaining unchanged from prior election cycles.

*Second*, intervention is warranted because Plaintiff’s suit raises an issue of first impression in Wisconsin state court—whether WEC’s guidance on curing absentee ballots is consistent with Wisconsin state law—and will necessarily result in a “novel holding of law.” *Id.* ¶81. The result of this case may therefore reverberate beyond Wisconsin to the other states in which Rise engages

in GOTV efforts. *See* Lubin Aff. ¶5. Because the disposition of this suit clearly implicates Rise’s organizational interests, intervention is appropriate.

**D. No party adequately represents Rise’s interests.**

As for the fourth and final prerequisite to intervention as of right, Rise, an organization that has committed to helping thousands of Wisconsin voters formulate a plan to vote, including by voting absentee, 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 Rise’s “mutually desired outcome” in preserving its Spoiling Absentee Guidance, *id.* at 748, Rise 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. Injunctive or declaratory relief against the Spoiling Absentee Guidance would directly harm Rise—not WEC. WEC’s interests in this litigation are defined by its statutory duties to conduct elections and to administer Wisconsin’s election laws. Those are different interests from the

interests of organizations that work affirmatively with voters to help enfranchise them. Indeed, this Court has recently and repeatedly granted intervention to voting organizations in challenges to election procedures brought against WEC. Other courts have come to similar conclusions. *See, e.g., Issa v. Newsom*, No. 20-cv-1044, 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). This suit is no different. Rise 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, Rise should be granted permissive intervention.**

Even if this Court were to find Rise ineligible for intervention as of right, Rise easily meets the requirements 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.

Rise 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, Rise inevitably will raise common questions of law and fact, including the core issue of whether the Absentee Ballot Guidance complies with Wisconsin law. Rise 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 Rise's motion to intervene as a matter of right. In the alternative, the Court should exercise its discretion to grant Rise permissive intervention.

DATED this 29th day of September, 2022.

*Electronically signed by Diane M. Welsh*

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