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Clerk of Circuit Court
Racine County
2022CV001324

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

KENNETH BROWN,

Plaintiff,

Case No. 22-CV-1324

v.

WISCONSIN ELECTIONS COMMISSION
and TARA McMENAMIN,

Defendants.

BRIEF IN OPPOSITION TO MOTIONS TO INTERVENE BY THE DEMOCRATIC NATIONAL COMMITTEE AND WISCONSIN ALLIANCE FOR RETIRED AMERICANS

This case involves a claim that Defendant Tara McMenamin, Clerk for the City of Racine (the "Clerk"), violated Wisconsin Statute § 6.855, which regulates in-person absentee voting from sites other than the clerk's office (known as "alternate absentee voting sites"). The statute provides that a municipal clerk may set up such alternate sites for in-person absentee voting but only under the conditions specified by the Legislature in § 6.855. The Complaint alleges that the Clerk violated five different statutory requirements.

Prior to filing this case with this Court, Plaintiff was required to first file an administrative complaint with the Defendant Wisconsin Elections Commission ("WEC") under Wis. Stat. § 5.06. Plaintiff did so and WEC ruled in favor of the Clerk. Under Wis. Stat. § 5.06(8), Plaintiff was entitled to appeal WEC's decision to this Court. This case is that appeal.

The Democratic National Committee ("DNC") and the Wisconsin Alliance of Retired Americans ("WARA") have now filed separate motions to intervene (DNC and WARA will sometimes be referred to collectively herein as the "Proposed Intervenors"), but neither of the Proposed Intervenors were parties to the administrative complaint below and neither sought to become a party to that case. Pursuant to § 5.06(9), this Court does not conduct a de novo proceeding "with respect to any findings of fact or factual matters upon which the commission has made a determination, or could have made a determination if the parties had properly presented the disputed matters to the commission for its consideration." Thus, there is no opportunity for the Proposed Intervenors to submit evidence or otherwise add to or subtract from the record. At most, what they could do is submit what would amount to an *amicus* brief, but, of course, they do not need to intervene as a party to do that.

DNC and WARA do not and cannot meet the Wisconsin standards for intervention in this case. Here, the Court will need to interpret the relevant statutory language of Wis. Stat. § 6.855 and then determine whether WEC was correct that the Clerk's conduct did not violate that statute or was incorrect and her conduct was unlawful. WEC and the Clerk are both parties here and can adequately argue their side of the case. Proceeding to the merits should therefore be straightforward.

There is also a second claim in this case made by Plaintiff against WEC (but not the Clerk) based upon WEC's delegation of the underlying decision in the 5.06 complaint to the WEC Administrator as opposed to being decided by the

Commissioners themselves. WARA does not assert any interest in that claim, and DNC has no such interest because DNC is not permitted by statute to be a party to such a case.

Neither of the Proposed Intervenors have a special interest in this case that justifies intervention, their motions are too late, and any arguments they could make could be made just as easily by the Wisconsin Department of Justice representing WEC or the Racine City Attorney's office representing the Clerk. DNC's and WARA's motions should be denied.

I. NEITHER DNC NOR WARA ARE 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 (footnote omitted). All four factors must be met. *Id.* ¶ 39. DNC meets none of these factors. WARA fails to meet the first, third and fourth factors.

A. The Proposed Intervenors' motions are not timely.

As pointed out above, this case is an appeal under § 5.06 of a prior decision by WEC, and neither DNC nor WARA sought to intervene in the proceeding in front of WEC. By not intervening below, their motions to do so now are not timely.[1] Pursuant to § 5.06(9), this Court does not hold a de novo hearing in this case and, as a result, the Proposed Intervenors have no right or opportunity to submit any evidence into the record or to bring new issues into the case. But both obviously intend to do so.

With respect to WARA, its brief in support of its motion to intervene contains many proposed facts that are not in the record relating to absentee voting and alternate absentee voting sites in Madison, absentee voting and alternate absentee voting sites in Milwaukee, the number of absentee ballots cast at various times and in various places, etc. WARA Br. at 2–3. All of this is used by WARA to argue that Plaintiff's position is somehow extreme, an argument that WARA will no doubt try to repeat on the merits if it is allowed to intervene. To the extent that the Court might think that such alleged facts are relevant and admissible (and Plaintiff would not know that until the Court decides the case), the Plaintiff would have to rebut them by putting in even more new facts. For example, Plaintiff might show that while the

[1] As explained in Section I(B) below, DNC likely could not have intervened below because DNC is not eligible to be a party to a § 5.06 case.

total number of absentee votes cast is large, the numbers cast at Racine's election van were small, or that alternate absentee voting sites used in other municipalities are different than those used by Racine, etc. But the point is that those facts are not in the record, are not part of this case, and WARA cannot introduce them now or rely upon them— but it nevertheless obviously intends to do so.

With respect to DNC, its intention is less explicit but is foreshadowed by its statement at page 13 of its brief that "its intervention will serve to contribute to the *complete* development of the factual and legal issues before this Court" (emphasis added). It is apparent that DNC does not believe that the facts and legal issue presented and decided below are *complete* and must be supplemented by DNC. But again, DNC does not have the right to "complete" the facts and legal issues presented below.

In the proceedings below, Plaintiff and the Clerk both submitted evidence (by way of affidavits and exhibits attached to the administrative complaint and the affidavits). Both parties also submitted legal argument to WEC. In its decision, WEC determined that there were no disputes of fact and decided the case as a matter of law. Put simply, the actual parties to this case—the Plaintiff, the Clerk and WEC—have shaped the case through the evidence submitted, the issues raised, the arguments made and the decision rendered.

One of two things must be true of the Proposed Intervenors: either (1) the Proposed Intervenors want to change the way that the parties have positioned the case, in which case they intend to impermissibly raise issues not presented below,

see, *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224–25, 487 N.W.2d 639 (Ct. App. 1992); or (2) the Proposed Intervenors want to duplicate the arguments made by the Clerk below and WEC in its decision, in which case they are just submitting a "me too" brief which is not the purpose of intervention.

While DNC does not make it as clear as WARA does as to which of these two possibilities is true, it is readily apparent that, if allowed to intervene, both Proposed Intervenors will attempt to add facts not currently in the record and argue issues not argued below to provide an allegedly more "complete" argument for this Court. That tactic is precluded by § 5.06(9).[2] DNC's and WARA's proposed intervention is untimely to accomplish those purposes.

Of course, if that is not DNC's and WARA's intent then they will simply be arguing the same things as the Clerk and WEC and their intervention adds nothing, In fact, given that they did not intervene below and now have no opportunity to take discovery or do anything other than submit a brief; this Court can always consider requests by DNC and WARA to submit an *amicus* brief once this case gets to the merits. Intervention is unnecessary.

[2] Nor is Plaintiff's position on this point inconsistent with including allegations in its Complaint to the effect that the City Clerk conducted subsequent elections in the same manner. As noted in Plaintiff's brief in response to the Clerk's motion to dismiss, those allegations were made to establish that the Clerk's conduct was intentional, to preclude argument that this case is somehow moot, and to establish the need for prospective declaratory and injunctive relief, rather than creating any new issues of fact for this Court to decide in contravention of the statute. Plaintiff's allegations go to the appropriate relief, not the merits of the case.

B. DNC does not have an interest sufficiently related to the subject of the action.

As WARA points out, it has associational standing on behalf of its members, some of whom are Racine voters and, as a result, Plaintiff does not dispute that WARA has a sufficient interest to satisfy this factor, at least as to Claim 1 of the Complaint.[3] WARA's problems are as to the other three factors, as explained above and below.

DNC, on the other hand has no legal interest in this case sufficient to satisfy Wisconsin's test for intervention. To start with, DNC has no rights or duties under § 6.855, the underlying statute at issue in this case which regulates alternate absentee ballot sites. DNC does not administer elections under § 6.855. Nor is DNC a voter and it cannot cast an absentee ballot anywhere in Wisconsin, much less at an alternate absentee voting site.

Further, DNC has no rights under Wis. Stat. § 5.06. It is not permitted to file a complaint under § 5.06. That right is limited to Wisconsin "electors" (voters) who live in the jurisdiction where the election official is alleged to have violated the law. *See*, § 5.06(1). DNC can also never be the subject of a complaint under § 5.06—such complaints can only be filed against local "election officials" under that statute. *Id.*

[3] WARA makes no argument that it has an interest in Claim 2—the claim solely against WEC. Plaintiff disputes WARA's alternate claim of interest in Claim 1, i.e., its claim that it would have to somehow spend additional resources if the Clerk were required to comply with the statutory provisions for alternate absentee sites. But because Plaintiff agrees that WARA's voter members have a sufficient interest in Claim 1, as voters, the dispute over WARA's alternate argument is immaterial. It would also duplicate Plaintiff's response to DNC on this same issue.

Given that DNC could never be a plaintiff or a defendant in a § 5.06 action, that begs the question as to whether DNC can be an Intervenor Plaintiff or an Intervenor Defendant in such a case. DNC cites no case that says it can but, in fairness, the Plaintiff could not find a case one way or the other on that specific issue. Thus, the question must be answered solely as a matter of statutory construction.

In answering that question, three things stand out. First, the Legislature has affirmatively limited cases under § 5.06 to a class of persons that does not include DNC. DNC offers no reason why that statutory limitation should not apply here.

Second, nothing in § 5.06 says that a person or entity who is not a voter or an election official may intervene in such a case. That is noteworthy because it distinguishes administrative appeals under § 5.06 from the vast majority of administrative appeals which are covered by Chapter 227. Chapter 227 does have an express provision allowing intervention. Pursuant to Wis. Stat. § 227.53(1)(d) "[t]he court may permit other interested persons to intervene." There is no similar provision in § 5.06. The Legislature could have chosen to add such a provision but it did not do so.

Third, DNC cannot rely upon § 227.53(1)(d) because the Legislature decided that, in general, the provisions of Chapter 227 do not apply to § 5.06 cases. *See*, Wis. Stat. § 227.03(6) ("Orders of the elections commission under s. 5.06 (6) are not subject

to this chapter.").[4] Thus, the intervention provision of § 227.53(1)(d) does not apply to § 5.06 cases.

Putting the three together, it is apparent that the Legislature created § 5.06 as a relatively unique procedure for local voters to challenge unlawful conduct by local election officials, and there is no statutory basis for the Court to expand the class of individuals who may be parties to § 5.06 cases by using intervention as an end run around the limitations imposed by the Legislature. Put differently, because DNC has no rights under § 5.06 and no rights under the underlying statute, § 6.855, it has no legal interest in this case that would justify intervention.

Moreover, DNC does not even claim such a direct interest in its brief. Instead, DNC's purported interest is far more attenuated. At page 7 of its brief, DNC says that if this Court were to agree with the Plaintiff's reading of Wis. Stat. § 6.855, then DNC's purported interest would be having "to divert time and resources away from its core work of voter persuasion, education, and 'get-out-the-vote' (GOTV) efforts." That, however, is a bit of a non-sequitur. It suggests that assisting voters with absentee voting is something different from what DNC describes as its mission of getting out the vote. How they are different is never explained and how, the difference, if any, adversely affects DNC is not explained. Nor does it make any sense. The issue in this case is where absentee ballots can be cast. Presumably, DNC's get-

[4] Wis. Stat. § 5.06(1) specifically incorporates the contested case procedures under Wis. Stat. § 227.44 and § 5.06(9) incorporates the standards under Wis. Stat. § 227.57. Other than those two parts of Chapter 227 which are specifically incorporated, nothing in Chapter 227 applies to a 5.06 case, due to § 227.03(6).

out-the-vote efforts already include telling voters where they can vote absentee; a change in the location will not require anything more than updating what they tell voters.

Second, and more importantly, DNC's purported interest is simply insufficient, as a matter of law, to justify intervention. The primary case in Wisconsin establishing the test for intervention is *Helgeland v. Wis. Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. In that case, eight Wisconsin municipalities asked to intervene as of right in a challenge to Wisconsin's definition of "dependent" for purposes of state employee health insurance eligibility. The municipalities argued that they would be required to pay increased premiums on behalf of employees enrolled in certain state health or dental plans if Helgeland prevailed and that their participation in the state's deferred compensation program (administered by the state) would be directly and adversely affected by any judgment.

In other words, the municipalities claimed that a ruling not to their liking would directly result in higher costs to them. They would have to pay higher premiums if the definition of "dependent" was changed. That is a far more direct effect than what DNC argues here, but even if they were equivalent, the court in *Helgeland* disagreed that the municipalities' interest was sufficient to invoke intervention as of right, finding that while a relationship existed between the municipalities and the state for the purposes of these plans, that relationship was "too remote and speculative to support a right of intervention." *Id.* ¶ 53. Likewise, DNC's asserted

interest here—alleged higher costs in their "get-out-the-vote" efforts—is too remote and speculative to justify intervention.

DNC's legal interest is at best derivative and actually doubly so. It claims an interest on behalf of candidates who, in turn, it says have an interest in how voters cast ballots, but that is not sufficient under § 803.09. *Lodge 78 of Int'l Ass'n of Machinists, AFL-CIO v. Nickel,* 20 Wis. 2d 42, 46, 121 N.W.2d 297 (1963) ("The interest which entitles one to intervene in a suit between other parties must be an interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment. One whose interest is indirect cannot intervene as a matter of right.")

The same is even more true with respect to DNC's argument that it should be able to intervene in Plaintiff's second claim against WEC for unlawfully delegating the decision in the 5.06 case to its Administrator.[5] With respect to that claim, DNC says that it "has an interest in how elections are run statewide and the processes that WEC employs in administering those elections and dealing with election-related challenges." DNC Br. at 7–8. In this situation, DNC can only be expressing an "interest" in terms of something it is curious about as opposed to having a legal interest or right in the matter.

Given that DNC cannot file a complaint under § 5.06 or be the subject of a complaint under that statute, it has no legal interest in the process that WEC follows in ruling upon such complaints. The WEC Commissioners will never delegate the

[5] WARA does not contend that it has a legal interest in this claim.

decision in a case in which DNC is a plaintiff or a defendant. DNC's "interest" is not even attenuated here; it has none.

DNC's attenuated interest in the first claim and its lack of a legal interest in the second claim do not satisfy the standard for intervention. DNC's "interests" here are in stark contrast to the interests of actual third parties who have been permitted to intervene under Wisconsin law. *See, Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 474, 516 N.W.2d 357 (1994) (subject of public record had unique interest warranting intervention to enjoin its release because his right to privacy was separately enshrined in Wisconsin statutes); *In re Commitment of McGee*, 2017 WI App 39, ¶ 24, 376 Wis. 2d 413, 899 N.W.2d 396 (where statute conferred independent right of notice to proposed intervenors concerning placement of sexually violent offender in community, intervention was warranted). DNC has no such statutory interest here. There is nothing in Wis. Stat. §§ 5.06 or 6.855 that grants any right or protection to DNC or imposes any duty or obligation on it.

DNC's asserted interest is far more attenuated than the direct financial impact the municipalities claimed would result from a judgment adverse to the state in *Helgeland*, and it does not implicate independent statutory rights as in *Armada Broadcasting* or *McGee*. DNC relies upon three federal election-related cases at page 8 of its brief, but those cases are non-binding here (this case is governed by Wisconsin law, not federal law) and they are not even persuasive on the intervention issue presented here. As DNC, itself, points out, these are federal Article III standing cases, not Wisconsin intervention cases. DNC tries to get around this by arguing that Article

III standing is more demanding than the test for intervention as of right in Wisconsin but DNC never says why it believes this to be the case (or why this Court should believe it to be case). DNC certainly cites no Wisconsin case that says this.

Finally, DNC argues that political parties have been allowed to intervene in other cases, but the fact that a political party was allowed to intervene in a different case challenging a different election procedure does not justify intervention by DNC in this case, on these facts, under these circumstances. Notably, none of the cases DNC cites for this proposition are appeals under Wis. Stat. § 5.06. DNC has not stated a sufficient interest under Wisconsin law for intervention.

C. Neither Proposed Intervenor has 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.

Neither Proposed Intervenor explains how enforcing Wisconsin law interferes with any interest of DNC or any interest of WARA's members' interest as voters.

First, both DNC and WARA contend that this Court's decision will somehow have a major impact on absentee voting in Wisconsin, but neither Proposed Intervenor points to anything in the record in this case that supports that contention. No matter what this Court decides in this case, Wisconsin voters will continue to have easy access to voting in multiple ways.

Nothing in this case interferes in any way with the Clerk making voting easily available at multiple locations throughout the city on Election Day. If a voter does not want to vote in person on Election Day, nothing in this case interferes with the voter's opportunity to vote in person at the Clerk's office for up to two weeks before

the election (so-called early in-person absentee voting), *See* Wis Stat. § 6.86(1)(b). If the voter does not want to vote in person on Election Day or in person at the Clerk's office during the two weeks prior to the election, nothing in this case interferes with the voter's opportunity to cast an absentee ballot by mail. *See* Wis. Stat. § 6.87(4)(b)1.

If Plaintiff prevails, all that will occur is that if, in addition to all of the above, the Clerk wants to provide alternate sites for early in-person absentee voting, then the Clerk will be required to follow the requirements in Wis. Stat. § 6.855 for such sites. A win by Plaintiff will enforce an existing duty on the Clerk, but no impairment or imposition on any voter.

In that regard, the Legislature provided in Wis. Stat. § 6.84(1) that:

> The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; ….

Here, all voters, including WARA members, have the right to vote. They also have the privilege of voting by absentee ballot under the regulations set forth by the Legislature. Ensuring that the Clerk complies with those regulations does not in any way interfere with the right to vote.

Both Proposed Intervenors also argue that a ruling by this Court in favor of Plaintiff may also affect the manner in which they spend money on "get-out-the-vote" efforts. As shown above, that is not a sufficient interest, but even if this Court disagrees, that interest will not be impaired in any way by this Court's decision.

The argument appears to be that if this Court agrees with Plaintiff about what the law requires, then the Proposed Intervenors will somehow have to expend more resources on get-out-the-vote efforts because voters will have to vote absentee in buildings (instead of a van), and at locations that comply with requirements of § 6.855 (e.g., that do not provide a partisan advantage, are as close as practical to the Clerk's office, etc.). But the Proposed Intervenors do not explain how that actually affects their efforts; they are not casting votes themselves. Presumably, they already tell voters where and how they can vote absentee; the information they communicate might change, but not the cost or time to communicate it.

Moreover, even if some level of cost were sufficient to permit intervention, neither Proposed Intervenor provides any real information as to how difficult it will actually be for it to replace one form of "get-out-the-vote" effort with a different "get-out-the-vote" effort. DNC simply alleges that it would require a "significant" expenditure, based on the affidavit of Ramsey Reid, an employee of DNC. Reid's affidavit, however, does not say: (1) how much DNC currently spends on anything, including get-out-the-vote efforts or educating voters, in Racine or anywhere else; (2) how DNC's spending will change, in Racine or anywhere else, based on this Court's ruling; (3) whether its spending (in Racine or overall) will go up or down based on the Court's ruling; or (4) whether its spending will be more or less effective after the Court's ruling. Reid's affidavit is completely conclusory.

Similarly, WARA relies upon the affidavit of its Executive Director, Alexander Brower. Mr. Brower, which says that:

> To ensure that our members can make their voices heard in Wisconsin elections, the Alliance engages in get-out-the-vote (GOTV) efforts. These GOTV efforts traditionally consist of making phone calls to members and text-banking to encourage members to vote. When we contact our members in advance of an election, we encourage them to vote, and try to assist our members in navigating the voting process.

Brower Aff. par. 6. But nothing in that statement shows how the Court's ruling in this case would affect any of that. WARA can make the same calls and send the same texts to its members and simply inform them of the legal places they can vote as determined by this Court.

Mr. Brower also states at paragraph 10 of his affidavit that:

> Were Brown's suit successful, the Alliance would need to divert resources to ensuring its members who use in-person absentee voting can find alternative methods to voting, which may include arranging transportation for members who no longer have an in-person absentee voting location they can reach on their own.

But like the Reid affidavit, this is conclusory and unsupported by actual facts. It does not say how much WARA spends, what it spends it on, where it spends money or how its spending would change based on this Court's ruling. Certainly, neither affidavit explains how the Court's ruling would actually cause either organization to spend more money.

In short, both affidavits are conclusory and completely unsupported. Neither affidavit explains the basis for its allegations regarding spending or how the affiant knows the assertions to be true. 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).

Even if there is some minimal cost increase for either Proposed Intervenor, it cannot be the case that any governmental action that can be said to impose some cost on a person entitles that person to intervene to oppose the inconvenience. This contravenes case law providing that an interest requiring intervention must relate to the lawsuit in a "direct and immediate fashion." *Helgeland*, 2008 WI 9, ¶¶7, 71. Every lawsuit involving the government will impose costs in some fashion. But these are indirect, not direct, results of the litigation.

Both Proposed Intervenors remain free to spend as much or as little as they want to spend on assisting voters in casting ballots in whatever manner is legal. Neither has a legally cognizable interest here that will actually be impaired by this Court's ruling.

With respect to Plaintiffs second claim—solely against WEC, relating to the process followed by WEC in its decisions under § 5.06—as shown above, DNC has no legal interests under § 5.06 and, as a result, it has no legal interest that could be impaired by this Court's decision on that issue.

In addition, WARA makes no argument that it has a legal interest in this second issue or that whatever interest it has in this case will be impaired by this Court's ruling on that issue. As a result, WARA has no basis to intervene in that claim.

D. The Proposed Intervenors have not demonstrated that WEC and the City Attorney for Racine fail to adequately represent their interests.

Given the Proposed Intervenors' poor showing on the previous factors, they are required to make a "strong showing" with respect to inadequate representation. *Helgeland*, 2008 WI 9, ¶74. Further, they must overcome *two* presumptions of adequate representation: the first arises because they, WEC, and the Clerk all have the "same ultimate objective in the action"—defense of the Clerk's conduct—and the second because WEC and the City Attorney of Racine are both governmental bodies charged with representing the same interest in ensuring that voting occurs legally in Wisconsin. *Id.* at ¶¶90-91.

Both Proposed Intervenors incorrectly characterize their burden under this factor as "minimal." *See* DNC Br. at 10; WARA Br. at 11. But that is the *default* standard. As WARA recognizes at page 11–12 of its brief, where either of the above presumptions apply, the movant must make a "*compelling showing*" that representation will be inadequate. *Helgeland*, 2008 WI 9, ¶86 (emphasis added).

WARA attempts to argue that the presumptions do not apply. WARA first says that its interests are not "identical" to those of WEC and the Clerk (although WARA never actually says where they differ). But WARA ignores how the Supreme Court itself interpreted "identical" in this context. In the very next sentence (after it used the word "identical") the Supreme Court said that "[w]hen the potential intervenor's interests are *substantially similar* to interests already represented by an existing party, such similarity will weigh against the potential intervenor." (emphasis added) *id.* at ¶ 86, and then the Supreme Court went on to state its holding to be that

"adequate representation is ordinarily presumed when a movant and an existing party have *the same ultimate objective in the action*." *Id.* at ¶ 90 (emphasis added).

This case presents a straightforward question of statutory interpretation: whether the Clerk's conduct complies with Wis. Stat. § 6.855. WEC and the City Attorney obviously intends to defend the Clerk's conduct—the Proposed Intervenors' exact position and goal. They have "the same ultimate objective in the action." Thus, any potential differences between the Proposed Intervenors' desired approach and WEC's and the City Attorney's desired approach would amount to nothing more than disagreement over potential litigation strategy—which is not sufficient to establish inadequacy of representation. *Helgeland*, 2008 WI 9, ¶¶ 111–12. Thus, the first presumption obviously applies here and means that the standard is that the Proposed Intervenors must make a "*compelling showing*" that representation will be inadequate

WARA also argues that the second presumption does not apply because WARA contends that WEC and the Clerk are not charged by law with representing the interests of the Proposed Intervenors, but WARA again ignores what the Supreme Court said about this factor in *Helgeland*. What the Supreme Court said was:

> "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.

Both DNC and WARA claim a derivative interest here through voters, and those voters are citizens of the State of Wisconsin (and WEC is represented here by

the Wisconsin Attorney General) and citizens of Racine (and the Clerk is represented by the City Attorney of Racine). Moreover, WEC and the Clerk are charged by law, in the case of the Clerk, to lawfully administer elections, *see* Wis. Stat. § 7.15, and in the case of WEC, to administer the laws relating to elections, *see* Wis. Stat. § 5.05(1). There almost could not be a clearer case where the second presumption applies than this one, and if either presumption applies, then as stated above, the Proposed Intervenors must make a "*compelling showing*" that representation will be inadequate.

But despite the need to make a compelling showing, neither DNC nor WARA even try to allege that they would litigate this case differently than the government entities. Nor do they attempt to establish any of the other common markers for inadequate representation, like collusion between WEC or the City Attorney and the City Attorney, or a failure on WEC's or the City Attorney's part to fulfill their respective duties. *See id.* at ¶ 87.

Instead, DNC cites several federal cases, DNC Br. at 11, none of which deal with Wisconsin law as explained in *Helgeland*. The most that the Proposed Intervenors can muster to meet its Wisconsin burden is to argue that WEC or the City Attorney might not be as "vehemen[t]"[6] in its defense as DNC because they are not "directly affected" by the outcome of the case, quoting *Armada*, 183 Wis. 2d at 476. But, of course, DNC is 100% wrong about them not being directly affected—the Clerk is alleged to have acted illegally and WEC's decision is being appealed. The

[6] WARA says that they will not be as vigorous. WARA Br. at 12.

only entities *not* to be directly affected are DNC and WARA themselves. *Armada* is not on point.

In *Armada,* 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—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. WEC and the Proposed Intervenors are not adverse and the Clerk's own conduct is at issue. 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 Clerk's conduct and WEC's approval of that conduct. Special interest groups like DNC and WARA are not more "directly affected" by the outcome of this lawsuit than is WEC or the Clerk.

In all, the Proposed Intervenors have not come close to showing that Wisconsin's state elections agency, represented by lawyers at the Wisconsin Department of Justice, and the Clerk, represented by the City Attorney's office, are

somehow going to put forth such an inadequate defense of the Clerk's conduct and WEC's decision approving that conduct that DNC and WARA must be permitted to participate as a party.

II. THIS COURT SHOULD NOT PERMIT THE PROPOSED INTERVENORS TO INTERVENE PERMISSIVELY

Alternately, the Proposed Intervenors request that this Court allow them 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. First, both Proposed Intervenors propose to intervene as Defendants. But neither of them could be a defendant in a case under § 5.06. Applying the words in the statute, neither has "a defense" that has a question of law or fact in common with this action. They may have an argument that they want to make (although they have not said how it would be different than the arguments that will be made by WEC and the Clerk), but that is not sufficient to grant permissive intervention. It may be enough to justify the Court accepting an amicus brief down the road, but not for intervention.

Second, the Proposed Intervenors' position—that the Clerk's administration of the August 2022 primary election was lawful—is adequately represented by WEC and the City Attorney's office. The Proposed Intervenors have not shown that they have anything to add here that would not be argued by WEC and the Clerk, except

for the possibility that the Proposed Intervenors would attempt to go beyond the record to improperly bring new facts or arguments into this case.

That means that allowing the Proposed Intervenors to intervene will either prejudice Plaintiff by complicating and slowing this case down, or will be entirely unnecessary. If they want to do something more than submit an amicus brief, then it necessarily will slow the case down and prejudice the existing parties.

Neither Proposed Intervenor explains any further what it hopes to achieve as a full party that it could not achieve as a potential *amicus curiae*, instead each of them only dedicates only two paragraphs to its request for permissive intervention. Wisconsin courts need not consider undeveloped arguments. *Associated Bank, N.A. v. Brogli*, 2018 WI App 47, ¶¶ 27–28, 383 Wis. 2d 756, 917 N.W.2d 37.

In the end, neither Proposed Intervenor provides any meaningful argument *at all* as to why, assuming intervention as of right is not met, this Court should exercise its discretion to allow them to either attempt to change or amend the course of this lawsuit as shaped by Plaintiff and the Clerk as parties and WEC as the decider below, or to submit a "me too" brief arguing the same points as WEC and the Clerk.

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. But that is not this case. There are a great many

non-profits that operate in the area of elections. They cannot all be permitted to intervene any time a voter files a complaint about a clerk's conduct and proceeds to judicial review under Wis. Stat. § 5.06. The Plaintiff, the Clerk, and WEC should be permitted to litigate the legality of the Clerk's conduct on their own, with input from special interest groups limited to amicus support if the Court decides to accept such briefs in this case.

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