STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

STATE OF WISCONSIN EX REL. ARDIS CERNY, et al.

Petitioners,

ASSEMBLY COMMITTEE ON CAMPAIGNS AND ELECTIONS, et al.

Involuntary Petitioners,

vs.

WISCONSIN ELECTIONS COMMISSION, et al.

Respondents.

Case No. 24CV1353

Case Code: 30952

PETITIONERS' RESPONSE TO MOTION TO INTERVENE AND SUPPORTING MEMORANDUM OF FORWARD LATINO AND VOCES DE LA FRONTERA

RESPONSE TO MOTION

Proposed Intervenors Forward Latino and Voces de la Frontera ("Forward/Voces") set up a straw man because they lack any basis for intervening in the action that Petitioners' actually brought.

The first and second paragraphs of their motion are simply untrue. They claim:

> 1. Petitioner Ardis Cerny filed her petition on August 16, 2024, alleging that Wisconsin law requires Respondents to *purge voters from the registration rolls based on Department of Transportation records of their citizenship*.
>
> 2. Forward Latino and Voces have a significant interest in the litigation, which threatens to upend their current operations in Wisconsin and impede their future efforts in Wisconsin and beyond, and to make it difficult or impossible for many of their members and constituents—particularly those who are naturalized citizens—to register and vote. Forward Latino and Voces therefore move to intervene in this action as Respondents.

Petitioners allege and "threaten" nothing of the kind. They simply ask that WEC and DOT be required to match records as HAVA and § 85.61(1), Stats., direct.

As explained in Petitioners' original and amended Petitions and Motion for Preliminary relief, matching is only a first step. Sec. § 6.325, Stats. already provides that "The municipal clerk or

board of election commissioners may require naturalized applicants to show their naturalization certificates." Forward/Voces' argument makes no sense that naturalized citizens may be required to prove citizenship to *vote*, but may *not* be required to prove citizenship to *register* to vote in the first place.

Cutting through the smoke, Forward/Voces identify only one group of "members and constituents" that could possibly be affected by matching – citizens who have become naturalized *after* applying for a Driver's License or ID Card whose DOT records have not been updated and still indicate that they are non-citizens.

Although extremely unlikely, perhaps such a "subsequently naturalized" citizen has lost his certificate or for some reason can't get replacement papers through a simple FOIA request to U.S. Citizenship and Immigrations Services.[1] In that unlikely circumstance, as discussed in Petitioners' response to Forward/Voces' motion to dismiss, state law still requires that WEC and local officials notify the incorrectly flagged person and follow strict procedures before *anyone* may be denied the opportunity to vote – including recording a formal a protest, allowing the person to cast a provisional ballot, and thereafter proving beyond a reasonable doubt that the person is not, in fact, a citizen.

As to "upending" their "operations," Forward/Voces have not identified even one such person among their 1,200 members who would be unable to register or vote because of being incorrectly flagged by dated DOT records.

Even if they could, it does not matter whether the number of incorrectly flagged citizens is 0 or 10,000 – state law provides detailed due process protections to ensure that no citizen is wrongly

[1] https://www.uscis.gov/records/records ("Use our online FOIA system to request your own immigration record, another person's immigration record, or non-A-File information such as policies, data, or communications.")

denied the right to vote, and far from making proof of citizenship "difficult or impossible," the IDPP process alleged by Petitioners *requires* DOT to assist their "members and constituents" to obtain proof of citizenship.

As Respondent Boardman testified and Petitioners have pleaded, IDPP is the product of 10 years of litigation, rule-making, and statutory enactments. It ensures that any naturalized citizen who obtained a driver's license or general ID card *before* being naturalized can apply for a new *free ID card for the purpose of voting*, and DOT will assist her to obtain documentary proof of citizenship, which necessarily includes proof of naturalization.

In fact, Petitioners' declaratory judgment claim and prayer for relief demand that due process procedures be established protecting anyone whose registration or request to vote is flagged based on citizenship "To ensure that no eligible elector is deprived of the right to vote . . . ." Dkt. # 10 ¶ 48 *et seq.*; Dkt. 49 ¶ 48 *et seq.*

There is no question that IDPP satisfies due process requirements. What Forward/Voces are *really* arguing is that WEC and local officials can verify every other qualification of an elector – age, residence, criminal record, dementia, photo identification etc. – *but not citizenship.*

The remaining paragraphs in Forward/Voces' motion are addressed in their Memorandum in Support.

RESPONSE TO SUPPORTING MEMORANDUM

INTRODUCTION

Forward/Voces claim Petitioner Cerny seeks "unprecedented changes to Wisconsin election law" based on laws that "have never been understood to impose the requirements Cerny seeks."

The laws and issues Petitioners Cerny and Kuglitsch raise have never been previously litigated or "understood" because there has never before been a need to. What is "unprecedented" is an administration that has failed to enforce laws protecting the border – Petitioners are just two of scores of government and private litigants seeking to assurance that laws protecting the right to vote will not likewise be ignored.

Cerny does not seek "changes" to the laws, which officials cannot make on their own in any event. As discussed in their response to Forward/Voces' motion to dismiss, Petitioners ask only WEC and DOT officials be compelled to comply with the *general* data-matching requirements provided in subsec. (a)(5)(B) of 52 U.S.C. 21083 and subsec. (2) of § 85.61[2] the same as they comply with the *specific* matching requirements in subsec. (a)(5)(A) and subsec. (1). *Frank Lloyd Wright Found. v. Town of Wyoming*, 267 Wis. 599, 607–08, 66 N.W.2d 642, 647 (1954) (adopting 50 Am.Jur., Statutes, p. 371, sec. 367).

Forward/Voces continue their straw man histrionics claiming that the relief Petitioners seek would require officials to "somehow develop a system to purge voter files and bar new voter registrations based on often-outdated citizenship information" in DOT records, which would "particularly harm" their "members and constituents , who include recently naturalized citizens particularly likely to be erroneously reflected as ineligible . . . ."

Again, as discussed above and in response to Forward/Voces' motion to dismiss, there is no need at all to develop a new system to "purge" voter files or "bar" new registrations. Sec. § 6.325 already authorizes election officials to check naturalization certificates, and even if one or more of

[2] 52 U.S.C. (a)(5)(A) and (B) and § 85.61, Wis. Stats., provided in Appendix to Petitioners' Response Proposed Intervenors' Motion to Dismiss.

Forward/Voces members and constituents somehow lose their certificates and cannot obtain copies from USCIS, existing statutes and the IDPP process guarantee that DOT will assist any such citizen to obtain proof of citizenship and that *no* such citizen will *ever* be denied the right to vote. *No* "change" in law is necessary, and no citizen will ever be "barred" from registering or "purged" from WisVote List.

BACKGROUND

Forward/Voces spend a good deal of their memorandum arguing the merits of Petitioners' claims rather than the basis for intervention. They provide extensive description of the statutes prohibiting and criminalizing non-citizen voting. There are even more extensive and elaborate systems for enforcing speed limits, too, but that hardly prevents drivers from routinely violating them if they believe no police officer or radar is present to enforce them.

As to the claim that Petitioners are hoping to "disrupt Wisconsin elections," Forward/Voces themselves argue that there is only *one* instance of a non-citizen voting in Wisconsin. Dkt. # 39:4. If that is so, then matching citizenship data could not cause any disruption at all. The circumstance where matching citizenship data *might* cause "disruption" is if there are, in fact, a substantial number of non-citizens attempting to register and vote, in which case matching citizenship data is more critical than ever.

At Sec. I, Forward/Voces claim that "Cerny offers neither evidence nor allegations that any meaningful number of noncitizens have voted anywhere in the United States, much less in Wisconsin specifically." Dkt. # 38 at 4-5.

Forward/Voces simply ignore Petitioners' allegations at Dkt. # 10 ¶¶ 56, 61-66 and Dkt. # 49 ¶¶ 55-61, that even discounting self-cancellations, applying the same 10-year error rate for IDPP

where applicants *know* DMV will verify citizenship, there would still be over 10,000 erroneous still-active registrations in the WisVote over the time period, over 15,000 if inactives are included.

That indirect evidence is perfectly acceptable to establish a *prima facie* case by inference, especially at the pleading stage. *See e.g.*, *Jones v. Baecker*, 2017 WI App 3, ¶ 31, 373 Wis. 2d 235, 260, 891 N.W.2d 823, 835 ("indirect evidence creating an inference of discriminatory intent," cleaned up, citations omitted); *Jones v. Baecker*, 2017 WI App 3, ¶ 32, 373 Wis. 2d 235, 261, 891 N.W.2d 823, 835 ("evidence must be sufficiently compelling so as to give rise to a reasonable inference of racial discrimination").

Of course, alleging *direct* evidence is impossible, and Forward/Voces' cynical argument implicitly acknowledges that WEC and DOT are the only agencies in possession of direct evidence and that they refuse examine it or permit the legislature to do so – which is what this action is about to begin with.

At Sec. II, Forward/Voces argue DOT does not have accurate data. Dkt. # 38 at 5. That is more cynical hyperbole. If DMV citizenship / legal status records are unreliable at the time a person applies for a driver's license or ID card, then there's no point in having licenses or ID cards to begin with, and the nation's entire systems of traffic laws, vehicles registration, airport security, etc. should be scrapped.

Further, if post-application changes were a basis for disregarding DMV records, *then the WisVote List system should likewise be disregarded, because hundreds of thousands of registrants have address or other changes every year.* Again, as stated above, the *only* persons affected are those who become naturalized *after* applying for a license or ID card. Assuming there are such citizens (Forward/Voces have not identified even one), they can update their operating records with DMV any time, and for any who have lost naturalization certificates and can't obtain copies from

USCIS, long-standing statutory processes and IDPP are in place to assure that they are able to obtain proof of citizenship and are never denied the right to vote.

At Sec. III, Forward/Voces argue the merits of Petitioners' matching claim. Dkt. # 38 at 5-6. Again, the merits of Petitioners' claims have nothing to do with intervention, and Petitioners will respond in their response to Forward/Voces' motion to dismiss.

At Sec. IV, Forward/Voces again argue disruption - that Petitioners' "unprecedented" request will result in "chaos." Dkt. # 38 at 6. As stated above, Petitioners seek *no* change in the law, only enforcement of matching requirements that already exist. And if Forward/Voces are correct that there are a negligible number of non-citizens registered to vote or none at all, the relief Petitioners seek will have no effect whatever – certainly not "chaos."

But if there are, in fact, non-citizens already included in the WisVote List, the greater the number of non-citizen registrants, the more essential it is that WEC and DOT be required to match data to ensure election integrity, because they are the only agencies in possession of the data and capable of matching it.

At Sec. V, Forward/Voces address their interests and again misrepresents Petitioners' claims as an "effort to require election officials to purge voters based on out-of-date Department of Transportation citizenship records." Petitioners assert on that WEC has a "duty to verify *citizenship* information provided in voter registration applications, to reject *non-citizen* applications, and de-activate the WisVote record of any such *non-citizen* registrant or remove that record altogether." Dkt. # 10 ¶ 66 (subsequent heading); Dkt. # 49 ¶ 70.3

[3] *See also* Prayer for Relief, Dkt. # 10 ¶ 9: "WEC Respondents shall reject and refuse to enter or create, or delete and remove entirely as the case may be, all information or records of any person *not a citizen* of the United States." *See also* Prayer for Relief, Dkt. # 49 ¶¶ 2 - 3.

That they must misrepresent Petitioners' allegations to justify intervention is itself an admission that intervention is unwarranted. They cite Cerny's allegations at Dkt. # 10 ¶¶ 11-12, which are repeated in amended pleadings, Dkt. # 49 ¶¶ 11-12. Nowhere in those paragraphs or anywhere else do Petitioners request that WEC "purge" anyone based on outdated DOT records. Again, Petitioners pleadings exhaustively detail the protections and remedies available to any naturalized or other citizens incorrectly flagged as non-citizens by a WEC/DOT data match, and they affirmatively demand in their declaratory judgment claims and prayer for relief that WEC and DOT be required to implement all requisite due process protections "To ensure that no eligible elector is deprived of the right to vote . . . ." Dkt. # 10 ¶ 48 *et seq.*; Dkt. 49 ¶ 48 *et seq.*

Again, § 6.325 requiring naturalized citizens to present certificates has been on the books for years. Any naturalized citizens can simply present the certificates, and the only "disruption" to Forward/Voces' systems is self-inflicted from not already advising members and constituents of that statute and advising that they should bring the certificates (or obtain copies from USCIS) and present them if asked.

Forward/Voces conclude Sec. V , arguing their concern that members and constituents are "likely to be mistakenly purged from the rolls or barred from registering." Again, that grossly misrepresents Petitioners' pleadings and is, in a fact, exactly the opposite of the declaration and relief they request.

LEGAL STANDARD

Forward/Voces cite *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. The holding in that case requires peremptory denial of their motion to intervene.

In *Helgeland*, plaintiffs claimed that the Wisconsin Constitution required construing statutory eligibility and program requirements to include same-sex couples in benefits programs

administered by the Wisconsin Department of Employee Trust Funds ("DETF") and other state agencies. Eight municipalities sought intervention because they were parties to the state system and either participated in the specific benefits programs at issue or wished to preserve their right to do so without expanding the class of eligible persons and increasing the attendant costs.

The court recited the statutory criteria, (1) timeliness, (2) sufficiently related interest, (3) ability to protect the interest impaired as a practical matter, and (4) inadequacy of representation by existing parties.

The court denied intervention, holding that, although (1) intervention was timely, (2) the municipalities' interest was only speculative because they not yet opted to participate in the specific programs at issue and the outcome of litigation involving any such decision to do so was uncertain, ¶¶ 45 – 53, (3) *stare decisis* effect of a novel holding of law on some future "hypothetical case" was no different than the effect on "any" similarly situated party other than the municipalities, ¶¶ 81 – 84, and (4) DETF and other agency defendants sought the same ultimate objective as the municipalities, and the were government agencies "the very position advocated by the [proposed intervenor] municipalities," ¶¶ 89 – 91, the Attorney General's duty to provide a defense was sufficient to render her appearance at a rally supporting the plaintiffs irrelevant, ¶ 108, and mere "difference over trial strategy" does not render a defense inadequate. ¶¶ 110 – 112.

ARGUMENT

I. Forward/Voces Are Not Entitled to Intervene as of Right

A. Timeliness.

Petitioners' had already scheduled a motion for preliminary relief with Judge Bugenhagen set for September 10. Dkt. # 43. Respondents moved to substitute, and the first available date in this

Court for proceedings was the status hearing September 23. Dkt. # 44. As a practical matter, in light of the change in judge and this Court's scheduling order, Dkt. # 47, timeliness is not an issue.

B. Sufficient Interest.

Forward/Voces do not satisfy this requirement. (1) Their alleged interest is not even remotely related to the subject of this action, (2) they will not "gain or lose by the *direct* operation of the judgment," and they (3) propose no "right" that will not be "protected in the litigation." *Helgeland,* ¶ 45.

As discussed above, the only interest Forward/Voces propose is the ability of subsequently naturalized citizens to continue avoiding the requirement under § 6.325 that they present presenting naturalization certificates when registering or voting, and their own ability to avoid using resources required to advise members and constituents of that requirement.

But there can be no cognizable interest in ignoring a legal requirement. And in any event, there is no question that the rights of subsequently naturalized and all other citizens are more than adequately protected. If Petitioners prevail, *no* Wisconsin citizens will *ever* "find themselves purged from the voter rolls and unable to actually register or vote." Dkt. # 38 at 11.

C. Protecting an Interest.

Forward/Voces continue the false assertion that if Petitioners succeed, "many naturalized citizens are likely to have their registrations purged or rejected based on a comparison to Department of Transportation records that will not have been updated to reflect their new eligibility to vote."

Again, Forward/Voces simply ignore Petitioners' pleadings seeking exactly the *opposite*. At worst, matching WEC and DOT records might simply "flag" a subsequently naturalized citizen. That citizen can simply present her certificate as § 6.325 requires, and if she has lost or cannot

obtain a copy from copy from USCIS, the statutory and IDPP process provide extensive due process protections, and Petitioners themselves seek a declaration and remedy "To ensure that no eligible elector is deprived of the right to vote."

While the legislature may authorized some "privileges" like voting by absentee ballot, § 6.84(1), there is *no* "privilege" to simply ignore § 6.325 or any other requirement that a subsequently naturalized citizen provide a certificate.

D. Adequate Representation.

Citing *Helgeland*, ¶ 85, Forward/Voces cherry pick a single phrase that the showing of inadequate representation should be treated as "minimal." But they ignore *Helgeland's* explicit distinction to the contrary. Because WEC/DOT and Forward/Voces assert the same identical interests, WEC/DOT, through the Attorney General, "is charged by law with representing the movant's interest," so "a *compelling* showing should be required to demonstrate that the representation is *not* adequate." *Id.*, ¶ 86 (emphases added).

Forward/Voces likewise ignore *Helgeland's* two explicit *presumptions* to the contrary. "First, adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action." *Id.*, ¶ 90. In *Helgeland*, DETF and the municipalities shared the *ultimate* objective of upholding constitutionality of the challenged statute. Here, WEC/DOT and Forward/Voces share the *ultimate* objective of defeating they requirement that WEC and DOT match citizenship data.

"Second, '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.'" *Id.*, ¶ 91 (footnote citations omitted).

Forward/Voces do not even identify, much less address the requirement of a compelling showing or the presumptions against it.

As in *Helgeland* and *Braun*, Forward/Voces do not allege "collusion" between Petitioners and Respondents. *Braun*, ¶ 28 (*Helgeland* citations omitted). Nor have they even attempted "to show that "WEC [or DOT] 'has failed in the fulfillment of its duty' in litigating its position as to what it believes to be the correct interpretation of the statutes at issue." *Id*.

Obviously, the first presumption applies because WEC/DOT and Forward/Voces "share — even if for somewhat different reasons — the same ultimate objective in this case" – proving that current WEC/DOT practice "complies with Wisconsin law" and defeating Petitioners' claim they are required to match citizenship date. *Braun*, ¶ 29.

The second presumption likewise applies because "WEC [as well as DOT] is a governmental body represented by the Department of Justice in this matter, and both entities 'are charged by law with the duty of representing the rights of electors so that all may enjoy the benefits of the correct application of the laws governing elections.'" *Braun*, ¶ 309 (citation to *Rise* omitted).

Accordingly, even if Forward/Voces demonstrated a sufficient interest that would be directly impacted in this litigation (they do not), the adequacy of representation is so strong here where the Justice Department provide *two* separate counsel, this criterion alone is sufficient to preclude intervention. *Braun*, ¶ 35.

Thus, Forward/Voces' "proof" of inadequate representation fails completely.

II. Forward/Voces Are Not Entitled to Permissive Intervention

Consideration of the four criteria governing intervention of right warrant's declining permissive intervention as well. *Braun*, ¶ 42. The difference between WEC/DOT's procedures and

Forward/Voces' procedures that each much change if Petitioners succeeded is not sufficient to require permissive intervention either. *Id.*, ¶ 43.

CONCLUSION

For the foregoing reasons, Proposed Intervenors' Motion to Intervene must be denied.

October 7, 2024.

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