

Despite the mandatory language in the statute, the Defendants have decided that if voters do not respond to the notice, WEC will not change the voter's registration from eligible to ineligible status until sometime after the Spring Primary Election in 2021, rather than in the 30 days as required by the statute. The Plaintiffs challenged this unlawful conduct in a complaint before the Wisconsin Election Commission ("WEC"), which action was dismissed by WEC on October 25, 2019.

By law, WEC should have taken the action required by Wis. Stat. § 6.50(3) at some time during the week of November 11, 2019 (which would have been 30 days after the notices were sent during the week of October 7, 2019). If WEC followed the law that would mean that the voter registration rolls would be in compliance with the law well prior to the Spring Primary Election scheduled for February 18, 2020. But the Defendants are refusing to follow the law.

So, on November 13, 2019, the Plaintiffs filed this action in an attempt to enforce the law. On November 14th (the day after filing this action) the Plaintiffs filed a motion for a temporary injunction, or in the alternative for a writ of mandamus and secured a hearing date of December 5, 2019 from the clerk of this Court for that motion. The Plaintiffs and the actual Defendants agreed that the Defendants would file their brief and opposition materials on November 27, 2019.

On Friday, November 22, 2019, the proposed Intervenor-Defendant League of Women Voters of Wisconsin ("LWV") asked this Court to permit it to intervene in this action as of right under Wis. Stat. § 803.09(1) or in the alternate permissively under Wis. Stat. § 803.09(2). However, the argument that LWV seeks to make as an intervenor is completely redundant to the brief and arguments made by the actual Defendants in their brief in opposition to the Plaintiffs' motion.

Here is LWV's prediction¹ from page 15 of its brief as to the argument that it desires to make in this case and that it says the existing Defendants will not make:

the current Defendants have not made and clearly will not make the same argument that Proposed Intervenor-Defendant the League will make, if this Motion is granted. This is the argument that the ERIC "movers" list contains a substantial amount of unreliable information from the Wisconsin DMV and, therefore, that the 30-day period for notice and removal in Wis. Stat. § 6.50(3) does not apply.

However, if LWV had waited they would have discovered that this argument is one of the arguments actually advanced by the Defendants in their brief. *See*, Defendants' Response Brief Opposing Plaintiffs' Motion for a Temporary Injunction or in the Alternative for a Writ of Mandamus at 17-20.

Moreover, whether intended by LWV or not, given the limited time available to the Court to review all of the relevant materials, LWV's request to interpose its motion for intervention in advance of the Plaintiffs' motion for injunctive relief, obviously risks delaying Plaintiffs' ability to obtain prompt resolution of this case. If it were to become necessary for the Court to delay the substantive motion at issue – the request for injunctive relief or a writ of mandamus – to deal with LWV's procedural motion to intervene, that would cause substantial prejudice to the Plaintiffs, especially given that LWV's proffered argument is redundant to the arguments being raised by the actual Defendants.

Regardless, because LWV fails to meet the requirements for intervention as of right and fails to set forth any case for permissive intervention, Plaintiffs respectfully request that this Court deny LWV's motion.

I. LWV IS NOT ENTITLED TO INTERVENE AS OF RIGHT UNDER WIS. STAT. § 803.09(1)

¹ LWV filed its motion to intervene on November 22, 2019 which was prior to seeing the actual brief submitted by the Defendants in opposition to the Plaintiffs motion for a temporary injunction, or in the alternative, for a writ of mandamus, which was filed on November 27, 2019.

Under Wis. Stat. § 803.09(1),

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.

Wis. Stat. § 803.09(1).

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).

A proposed intervenor must meet “each of the requirements listed” to qualify for intervention as of right under Wis. Stat. § 803.09(1). *Armada Broadcasting, Inc. v. Stirn*, 183 Wis.2d 463, 471, 516 N.W.2d 357 (1994). LWV, however, cannot meet *any* of the requirements of 803.09(1), and this Court should therefore deny LWV’s request to intervene as of right.

A. LWV’S Motion to Intervene is Not Timely

Although “there is no precise formula to determine whether a motion to intervene is timely,” the two relevant factors are “whether in view of all the circumstances the proposed intervenor acted promptly” and “whether the intervention will prejudice the original parties to the lawsuit,” with the first factor being the “critical” one. *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983).

LWV argues that its motion is timely because it was filed seven “business days” after the filing of this complaint. LWV’s Br. 6. But this is misleading in that it fails to take account of the stated purpose for LWV’s motion. While seven business days could be relatively prompt and

nonprejudicial action in isolation, that ignores the fact that LWV “seeks to intervene in this action so that it may be heard at the hearing on the pending Motion for Temporary Injunction currently set for December 5, 2019.”² LWV’s Mot. to Intervene³ (emphasis added). In other words, from Plaintiffs’ point of view, LWV is attempting to interpose its motion to be heard and decided before the Plaintiffs’ previously filed motion. This has already prejudiced Plaintiffs, who in addition to preparing for the temporary injunction hearing have now had to brief this separate procedural issue and would prejudice them further if LWV’s intervention motion delays or impedes the Plaintiffs’ substantive motion for injunctive relief.

In fact, LWV asks the Court to cause the Plaintiffs the very prejudice that should doom LWV’s motion. LWV acknowledges in its motion the possibility that the Court will decline to consider its motion to intervene until after December 5 and requests in the alternate that the December 5 temporary injunction hearing be continued to a later date. *Id.* at 4.

But Plaintiffs made clear in their brief supporting their motion for a temporary injunction/writ of mandamus that, by law, WEC should have taken the actions required by Wis. Stat. § 6.50(3) at some time during the week of November 11, 2019 (which would have been 30 days after the notices were sent during the week of October 7, 2019). Pl.s’ Br. in Supp. of Mot. for Temp. Inj. 2. Time is now of the essence as it is crucial that the voter registration rolls be up to date in advance of the Spring Primary Election scheduled for February 18, 2020. Consequently, to protect their rights, Plaintiffs have moved promptly not only to obtain resolution of their complaint before WEC but to obtain a calendared hearing before this Court at the earliest possible date.

² Technically, LWV’s motion is untimely under Ozaukee County Circuit Court Rule 204.3 which requires 10 days notice. LWV acknowledges that it has violated this rule, *id.* at 3-4.

To LWV, of course, delaying the hearing to the point where this Court can no longer grant the relief Plaintiffs seek with respect to the February primary would be its own victory. But for the same reasons, LWV's actions are neither prompt nor nonprejudicial.

Nowhere in their discussion of timeliness does LWV even attempt to justify interfering with the Plaintiffs' previously filed temporary injunction motion. "Procedure is important in the law. Our judicial system values procedure because we view good procedure as tending to produce fair and sound outcomes." *Helgeland*, 307 Wis. 2d 1, ¶8. Here, as in *Helgeland*, procedure matters. LWV failed to timely file its motion, and the motion should be denied.

B. LWV Does Not Possess an Interest Sufficiently Related to the Subject of this Action

For a proposed intervenor to establish that it possesses an interest sufficiently related to the subject of the action, "[t]here must be some sense in which the interest is 'of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.'" *Helgeland*, 307 Wis. 2d 1, ¶45 (quoting *City of Madison v. Wisconsin Employment Relations Comm'n*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94). "[A] claimed interest does not support intervention if it is only remotely related to the subject of the action." *Id.*

Critically, here, LWV does not allege facts that would establish that any of its members or any voter that it had registered had mistakenly or erroneously received one of the notices at issue. Rather, LWV argues that it "has several, interconnected interests in this case," LWV Br. 8, but its discussion appears to boil down to the same single item: an interest in fulfilling its mission "to maximize eligible voter participation and facilitate civic engagement through registration and voting, and to create a democratic system open to all eligible voters," a mission for which it

expends resources. *Id.*³

While all of those activities may be beneficial they are not related to the subject of this lawsuit. LWV's mission, in its own words, is to register "*eligible*" voters. The single question in this case is whether voters who are *ineligible* to vote in their precinct must be removed from the voters rolls in 30 days, as state law requires, or, instead, within 12 to 24 months according to the unlawfully adopted WEC policy. Plaintiffs do not seek to remove from the rolls voters who are properly registered. Nor, as pointed out above, does LWV present facts that would establish that any of its members or any voters it registered had improperly received such a notice (i.e., that any such person had received a notice without a proper basis for the notice being sent).

It is thus clear that LWV's real beef is not with Plaintiffs at all but instead with the legislature. Indeed, LWV complains in its briefing that the legislature has "fail[ed] to modify Section 6.50(3) to exempt ERIC data" and has failed to "set a different timeline for removal of voters flagged on the ERIC 'movers' list." LWV Br. 3. LWV wants a different set of procedures to be enacted into law. LWV stands in the same shoes as anyone else who is a critic of the statute at issue – it opposes the statute - but that policy dispute does not give LWV a sufficient interest to intervene in this lawsuit.

Because LWV's quarrel is with the statutes themselves, and because LWV does not show that any of its members, or even any voter that it registered, improperly received one of the notices in issue, it lacks a meaningful interest *in this case* and its motion to intervene ought to be denied.

C. Disposition of This Action Would Not, as a Practical Matter, Impair or Impede LWV's Ability to Protect its Putative Interest

³ In its paragraphs summarizing its legal argument, LWV adverts to the fact that "some" of the "Movers" "now or in the future, will likely be members of the League," and attempts to bootstrap to this speculative statement an interest in preserving these voters' constitutional right to vote. LWV Br. 6. LWV never fully develops this argument (in particular its factual assertions), but for the record Plaintiff will note that obviously this type of abstract, unsupported musing does not suffice to establish the interest requisite for intervention of right.

Nor will the disposition of this action impair LWV's ability to fulfill its mission. LWV may continue every voter registration activity it desires and the Court's judgment in this case whatever it is, will not affect LWV's ability to do so. Nobody disputes that tens of thousands of voters will properly have their registrations deactivated because they have moved. If Plaintiffs prevail that will happen 30 days after the notices are sent and not responded to. If the Defendants win it will be 12 to 24 months from that date. But either way they will be deactivated because they have moved and must, under the Wisconsin statutes, reregister. If that makes LWV's job more difficult then again that is a dispute to be taken up with the legislature.

In sum, LWV remains free to lobby the legislature to change the law, regardless of the outcome of this suit, but LWV lacks an interest sufficiently related *to this suit*, to justify intervention.

D. The State Defendants Adequately Represent LWV's Putative Interest

A movant is not entitled to intervene as of right where "the movant's interest is adequately represented by existing parties." Wis. Stat. § 803.09(1). Even if this Court concludes that LWV's motion was timely and that it possesses a genuine interest imperiled by this suit, it should deny LWV's request to intervene as of right because the Defendants, represented by lawyers from the Wisconsin Department of Justice, adequately represent LWV's interest. In fact, they have made precisely the argument that LWV says that it wants to make. As a result, LWV's participation in the case would be completely redundant.

LWV anticipated that "the current Defendants ... will not make the same argument that Proposed Intervenor-Defendant the League will make," namely that the ERIC information is unreliable. But this argument is immediately a nonstarter. The Defendants have made exactly that argument (Def. Br. at 17-20.). Plaintiffs will show that the argument is invalid, but it is one of the

arguments that is queued up by the existing parties (without need of an intervenor) for this Court to decide.

Nor can LWV argue that they should be permitted to intervene because they would have made this argument somehow differently. As the Wisconsin Supreme Court has made clear, “mere disagreements over trial strategy . . . are not sufficient to demonstrate inadequacy of representation.” *Helgeland*, 307 Wis. 2d 1, ¶111 “Reasonable lawyers and litigants often disagree about trial strategy,” *id.*, and if they wish to present a particular argument in a different way is sufficient to intervene then this prong of the intervention of right analysis would always be met.

“[A]dequate representation is ordinarily *presumed*⁴ when a movant and an existing party have the same ultimate objective in the action.” *Id.* at ¶90 (emphasis added)). Such is the case here, where Defendants and LWV each seek the ultimate ruling that WEC is not now required to remove from Wisconsin’s voter rolls the “Movers” identified by ERIC who did not respond to WEC’s mailing. LWV brings nothing to the table different from the actual Defendants herein and simply complicates the litigation by raising redundant arguments to those raised by the existing Defendants.

LWV does briefly remark that the Defendants “will surely seek to defend their quality control procedures, which . . . have likely again failed to detect a substantial amount of unreliable information” and “will also seek to defend the 2019 ERIC notice letter, which does not even inform voters that they will be removed from the rolls if they do not take some action.” LWV Br. 17. The first claim is essentially a variation on the reliability argument addressed in the previous

⁴ LWV could perhaps get out from under this presumption by establishing that it and the Defendants’ interests are “adverse.” *See Helgeland*, 307 Wis. 2d 1, ¶87. But there is no adversity between LWV and the Defendants here. LWV seeks to intervene as a Defendant and to oppose the Plaintiffs’ request to deactivate the registrations of voters who received one of the October, 2019 notices under Wis. Stat. 6.50(3). There is an identity of interest on that subject and no adversity of any kind.

paragraphs, but more broadly LWV appears to misunderstand the nature of this lawsuit. If LWV wants to challenge WEC's "quality control" procedures or ERIC notice letter, it is free to file some other lawsuit as a *plaintiff* (perhaps after exhausting its administrative remedies by giving WEC a chance to review its challenges pursuant to WEC's complaint procedure, *see* Wis. Stat. 5.06(1)). But those matters are not at issue in this case – which focuses on the narrow question of WEC's duty to comply with Wis. Stat. 6.50(3) – especially not where LWV seeks to intervene as a *defendant*.⁵

LWV has not demonstrated that the Defendants will provide it with inadequate representation in this suit. For this reason, LWV's request for intervention as of right should be denied.

II. THIS COURT SHOULD NOT ALLOW LWV TO INTERVENE PERMISSIVELY UNDER WIS. STAT. § 803.09(2)

LWV requests in the alternate that it be permitted to intervene under 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.

Plaintiffs will not repeat their explanation of why LWV's intervention motion was not "timely" and why it will "unduly delay or prejudice the adjudication of the rights of the original parties." Apart from those points, there is nothing left for Plaintiffs to respond to, as LWV has set forth *no* affirmative case for why this Court should exercise its discretion to allow permissive intervention here. *See* LWV Br. 20 (setting forth a single paragraph on this question).

⁵ LWV seems to be aware of the fact that its goals are a bad fit for this lawsuit when it suggests that it may have to "bring affirmative litigation *against the current Defendants* to prevent or redress the unlawful removal of registered voters." LWV Br. 4.

LWV's silence is telling. There is simply no compelling reason to give LWV the right to participate in this case simply because it has failed to achieve its goals through the political process. On the other hand, there are compelling reasons to deny LWV's request to intervene. This suit is of a time-sensitive nature as it involves questions bearing upon elections occurring as soon as February of 2020. Adding a third set of redundant briefing and argument will simply make more difficult Plaintiffs' attempt to obtain the relief they seek with no clear benefit to the parties, the Court, or the public.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny LWV's motion to intervene.

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Respectfully submitted,

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