

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 12

DANE COUNTY

PRIORITIES, USA, et al.,

Plaintiffs,

v.

Case No. 23-CV-1900

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE
ON BEHALF OF PROPOSED INTERVORS RICHARD TEIGEN, RICHARD
THOM, AND THE ASSOCIATION OF MATURE AMERICAN CITIZENS, INC.**

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INTRODUCTION

In this action, Plaintiffs bring constitutional challenges to various statutory requirements related to absentee ballots that are designed to protect the integrity of Wisconsin's elections, promoting confidence in the process and results: the "Absentee Ballot Witness Requirement," the "Election-Day Cure Deadline," what Plaintiffs call the "Drop Box Prohibition" (really just the requirement that absentee ballots must be returned in person or via the mail), and the statutory distinction Wis. Stat. § 6.84 draws between the right to vote at the polling place and the privilege of voting by absentee ballot. Compl. ¶¶ 27–60. With respect to returning absentee ballots, Plaintiffs' lawsuit is a frontal assault on the Wisconsin Supreme Court's recent decision in *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519—Plaintiffs openly state that they will ask the Court to "revisit its decision." Compl. ¶ 96. Movants Teigen and Thom were the plaintiffs in that case, and seek to intervene to defend their hard-won judgment. They are also Wisconsin voters with an interest in elections being conducted in accordance with state law, as the Court held in *Teigen*. Likewise, Movant Association of Mature American Citizens, Inc. ("AMAC") is a membership-based association representing thousands of Wisconsin voters with the same interest in a secure election process in accordance with the rules prescribed by the Legislature. AMAC is also the mirror image of Plaintiff Wisconsin Alliance for Retired Americans, in that it represents the interests of thousands of older Wisconsin voters, many of whose top concern is election integrity. Movants seek to intervene to protect these interests.

BACKGROUND

The Wisconsin Elections Commission (“WEC”) is the government agency responsible for administering Wisconsin’s elections under Chapters 5 through 10 and 12 of the Wisconsin Statutes. WEC must comply with Wisconsin law when performing its duties. *See* Wis. Stats. §§ 5.05(1), 5.05(2w), 5.06(1); *Teigen*, 2022 WI 64, ¶ 72.

Plaintiffs contend that Wisconsin’s statutory requirements related to the “Absentee Ballot Witness Requirement,” the “Election-Day Cure Deadline,” the so-called “Drop Box Prohibition,” and the statutory distinction Wis. Stat. § 6.84 draws between the right to vote at the polling place and the privilege of voting by absentee ballot impermissibly burden the right to vote and should be declared unconstitutional. Compl. ¶¶ 77, 82, 85, 95–96, 100, 106, 110–112.

However, the State has an interest in “running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.” *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Rational restrictions on the methods of voting, like Voter ID requirements, have historically been upheld because “detering and detecting voter fraud” is a legitimate state interest and rational voting restrictions “protect[] the integrity and reliability of the electoral process.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008). Moreover, “[t]he legislature has the constitutional power to say how, when, and where” elections shall be conducted,” which includes requiring a prospective voter to “furnish such proof as it deems requisite[] that he is a qualified elector.” *League of Women Voters of Wisconsin*

Educ. Network, Inc. v. Walker, 2014 WI 97, ¶ 24, 357 Wis. 2d 360, 851 N.W.2d 302 (citations omitted).

A finding for Plaintiffs will radically change the administration of Wisconsin elections by permitting a form of absentee voting that has never been legal in Wisconsin and will simultaneously remove critical election integrity measures. Against this backdrop, Movants seek to defend the challenged rules to protect their right to vote in free, fair, and honest Wisconsin elections and to make sure their legally cast votes are not diluted by unlawfully cast votes.

Movant Richard Teigen is one of the successful plaintiffs in *Teigen v. WEC*, and is currently a registered Wisconsin voter residing in Delafield, WI. *Teigen Aff.* ¶¶ 2–3. Mr. Teigen wants to defend the *Teigen* outcome and is concerned about the effect that a ruling for Plaintiffs will have on his right to vote in free, fair, and honest elections and the potential dilution of his vote. *Id.* ¶¶ 4–5.

Movant Richard Thom is one of the successful plaintiffs in *Teigen v. WEC*, and is currently a registered Wisconsin voter residing in Menomonee Falls, WI. *Thom Aff.* ¶¶ 2–3. Mr. Thom wants to defend the *Teigen* outcome and is concerned about the effect that a ruling for Plaintiffs will have on his right to vote in free, fair, and honest elections and the potential dilution of his vote. *Id.* ¶¶ 4–5.

Movant Association of Mature American Citizens, Inc. (“AMAC”), is a membership-based, non-partisan organization representing nearly 50,000 members in the State of Wisconsin and over two million members nationwide. *Carlstrom Aff.* ¶ 4. AMAC provides unwavering support for the rights and freedoms guaranteed by

the U.S. Constitution and promotes accountability at all levels of government. *Id.* ¶ 6. AMAC, through its affiliate, “AMAC Action,” empowers its members to become politically active in their communities through grassroots advocacy initiatives. *Id.* ¶ 9.

AMAC’s membership primarily consists of individuals over the age of 50 who wish to have their views on important issues meaningfully represented. *Id.* ¶ 5. The particular issues AMAC advocates through AMAC Action are member-driven and prioritized based on direct member input. *Id.* ¶ 7. AMAC regularly polls its members for the issues that matter most to them, and the top issue its members are currently concerned about is election integrity. *Id.* ¶ 8. AMAC recently helped sponsor a series of statewide Election Integrity Summits around the country, one of which took place in Wisconsin. *Id.* ¶ 10. AMAC members comprised 33.3-50% of the Wisconsin Summit attendees, and “understanding absentee voting” was one of the topics discussed. *Id.* AMAC, through AMAC Action, also contacts its members through “calls to action,” which include “get out the vote” efforts in Wisconsin. *Id.* ¶ 9. In its calls to action, AMAC notifies its members of upcoming elections and requests participation in Wisconsin elections through either election-day voting, absentee voting, or participation as poll workers or election observers. *Id.*

AMAC believes that free, fair, and honest elections are critical to the democratic process and preserving public trust in election outcomes. *Id.* ¶ 11. AMAC is concerned about the effect that a ruling for Plaintiffs in this case will have on election integrity and public trust in how Wisconsin’s elections are administered. *Id.* ¶ 12. AMAC, on

behalf of its members, wants to advocate in this case that Wisconsin's current absentee voting requirements are rational and promote election integrity. *Id.* ¶ 13. AMAC, on behalf of its members, is concerned that without Wisconsin's current absentee voting statutes, its members' votes will be diluted and there will be confusion over how to lawfully cast absentee ballots. *Id.* ¶ 14.

ARGUMENT

This Court should grant Movants' motion to intervene, either as of right or permissively. Wis. Stat. §§ 803.09(1), (2). Movants satisfy the requirements for both forms of intervention, and the Court may grant this motion on either basis.

I. Movants Are Entitled to Intervene as of Right.

Movants satisfy all four requirements to intervene as of right: (a) their motion is timely; (b) they have an interest sufficiently related to the subject of the action; (c) disposition of the action may, as a practical matter, impair or impede their ability to protect that interest; and (d) the existing parties do not adequately represent Movants' interests. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1 (footnotes omitted); Wis. Stat. § 803.09(1). Both Wisconsin and federal case law may be used to apply these four factors because § 803.09(1) is modeled after Federal Rule of Civil Procedure 24(a)(2). *Helgeland*, 2008 WI 9, ¶ 37.

A. This Motion Is Timely.

This motion is timely. A motion is timely if it is filed before the first substantive hearing in the case. *Armada Broadcasting, Inc., v. Stirn*, 183 Wis. 2d 463, 472, 516

N.W.2d 357 (1994). Plaintiffs filed their complaint on July 20, 2023, and there have been no substantive hearings in the case as of the date of this filing.

This Court has scheduled a hearing on October 31 to consider two other pending motions to intervene. The timing of this motion allows a similar briefing schedule, such that this Court could consider Movants' motion at that same hearing, in conjunction with the other motions to intervene.

Movants' involvement in this case will not prejudice any party, because no substantive litigation has yet commenced. *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550–51, 334 N.W.2d 252, 255 (1983). Movants will comply with any scheduling orders from this Court in the case. Therefore, this motion is timely.

B. Movants Have Multiple Interests in this Action.

Movants have multiple interests related to the subject of this action. Wisconsin courts assess whether a movant's interests are "sufficiently related" by employing a "pragmatic, policy-based approach" that views the asserted interest[s] "practically, rather than technically." *Bilder*, 112 Wis. 2d at 547–48. In other words, judicial efficiency matters, and a movant's asserted interests function "primarily as a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with due process." *Id.* at 548–549 (citation omitted). While there 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*, 2008 WI 9, ¶ 45, the movant's interest does not have to be "judicially enforceable' in a separate proceeding." *Wolff v. Town of Jamestown*, 229

Wis. 2d 738, 744, 601 N.W.2d 301 (Ct. App. 1999). Additionally, an interest that is “special, personal, or unique” weighs in favor of intervention. *Helgeland*, 2008 WI 9, ¶¶ 116, 71.

Movants assert multiple, sufficiently related interests in this action: (1) Teigen, Thom, and AMAC, on behalf of its Wisconsin members, as voters, have an interest in preserving the rules that facilitate free, fair, and honest Wisconsin elections and making sure that their legally cast ballots are not diluted or polluted by illegally cast ballots, and (2) Teigen and Thom, specifically, have an interest in defending the judgment in their prior litigation.

Teigen and Thom, as registered Wisconsin voters, and AMAC,¹ as a membership-based organization representing thousands of Wisconsin voters, have an interest in the integrity of Wisconsin elections—in ensuring that they are conducted fairly and in accordance with the rules adopted by the Legislature. In *Teigen v. WEC*, 2022 WI 64, a majority of the Justices agreed that Teigen and Thom—plaintiffs there and movants here—had standing, as voters, to challenge WEC guidance that conflicted with state law. While the plurality and concurrence disagreed on the rationale, they agreed on the bottom-line point that voters have a legally protectable interest in ensuring that elections are conducted in accordance with the law. *Compare id.* ¶ 24 (“The Wisconsin voters, and all lawful voters, are injured when the institution

¹ As a membership-based organization, AMAC has standing to represent the interests of its Wisconsin members. *Wisconsin Hosp. Ass'n v. Nat. Res. Bd.*, 156 Wis. 2d 688, 702–703, 457 N.W.2d 879 (Ct. App. 1990).

charged with administering Wisconsin elections does not follow the law”) (plurality op.) *with id.* ¶ 165 (“Teigen has a legal right protected by Wis. Stat. § 5.06 to have local election officials in his area comply with the law.”) (Hagedorn, J. concurring). Since there was agreement on the ultimate holding that Teigen and Thom had standing as voters, that holding is binding here. *See Vincent v. Voight*, 2000 WI 93, ¶ 46, 236 Wis. 2d 588, 614 N.W.2d 388 (summarizing points on which “[t]he plurality and concurrence [] agreed” in a prior case and characterizing those as holdings); *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995). In the same way that they had standing in Teigen, Movants have an interest in this case, and in ensuring that elections are conducted in accordance with the rules set by the Legislature, which Plaintiffs’ lawsuit seeks to upend.

Teigen, Thom, and AMAC’s Wisconsin members also have an interest in ensuring that their votes are not diluted or polluted by votes unlawfully cast, the risk of which increases substantially if Plaintiffs were to succeed in their goal of eliminating reasonable election-integrity measures. “The right to vote presupposes the rule of law governs elections,” and the integrity of election results is “polluted” when the opportunity for tampering is present. *Teigen*, 2022 WI 64, ¶ 25 (plurality op.). Additionally, “[c]ourt orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (emphasis added). A ruling for Plaintiffs in this case would reverse *Teigen*, decided just one year ago, and remove meaningful safeguards from the absentee voting process, ranging from no verification

that the person named on the ballot is actually voting, to an unnecessary and unsupervised method of ballot return, and finally, to no definite end of an election through the unlimited curing and counting of absentee ballots after election day. This will inevitably result in voter confusion and cast doubt on the validity of the results, harming voters' interest in having confidence in the process.

Second, Movants Teigen and Thom have an interest in defending the outcome in *Teigen v. WEC*, a recent case in which they prevailed as plaintiffs. Plaintiffs' lawsuit is a direct attempt to undo *Teigen*. They argue that case was "incorrectly decided," stating openly that they will ask the Wisconsin Supreme Court to "revisit its decision." Compl. ¶¶ 92–96. When an action threatens the "functional result" of a movant's prior litigation, that movant has a sufficient interest in the matter. *See Rise, Inc. v. Wisconsin Elections Comm'n*, 2023 WL 4399022, ¶¶ 22–26 (Wis. Ct. App. 2023). Here, Plaintiffs challenge the *direct* result in *Teigen*.

Other courts have allowed the prevailing parties in prior litigation to intervene to defend their judgment from a collateral attack in a subsequent case. *McQuilken v. A & R Dev. Corp.*, 510 F. Supp. 797, 803 (E.D. Pa. 1981) (holding that the plaintiff in a prior case could intervene to "protect their legal interest in obtaining full compliance with the judgment" they won in prior litigation). In a similar vein, multiple courts have held that a party who played an instrumental role in achieving some policy measure has an interest in intervening to defend that result from subsequent collateral attack. *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene

in an action challenging the legality of a measure it has supported.”); *Mausolf v. Babbit*, 85 F.3d 1295, 1296, 1302 (8th Cir. 1996) (granting intervention as of right to conservation groups that had consistently engaged in prior proceedings to defend challenged snowmobile restrictions at a national park).

Teigen and Thom spent significant time and energy litigating the legality of absentee ballot drop boxes all the way to the Wisconsin Supreme Court. Plaintiffs now seek to undo that ruling. Teigen and Thom have a substantial interest in defending the judgment they won in their prior litigation, and that interest is unique because no other movant can claim such an interest. *See Helgeland*, 2008 WI 9, ¶ 71.

C. Disposition of the Action May, as a Practical Matter, Impair or Impede Movants’ Ability to Protect Their Interests.

Disposition of this action in favor of Plaintiffs will, as a practical matter, impede Movants’ ability to protect their stated interests. As with the interest component, Wisconsin courts assess this factor by taking a “pragmatic approach” that “focus[es] on the facts of [the] case and the policies underlying the intervention statute.” *Helgeland*, 2008 WI 9, ¶ 79. In addition, two particular factors are considered: (1) “the extent to which an adverse holding in the action would apply to the movant’s particular circumstances” and (2) “the extent to which the action into which the movant seeks to intervene will result in a novel holding of law.” *Id.* ¶¶ 80–81.

A decision for Plaintiffs in this case will impede Movants’ ability to protect their interests because the decision will alter the absentee voting rules for all future Wisconsin elections, causing distrust of Wisconsin’s electoral system by removing

meaningful rules and safeguards from the absentee voting process. “Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised,” and the “right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Purcell*, 549 U.S. 1, 4 (citation omitted).

Moreover, a decision for Plaintiffs in this case will result in a novel holding of law by overturning the *Teigen* decision and permitting absentee voting in a manner that has never been legal in Wisconsin. Indeed, the precedential effect of a ruling for Plaintiffs will impede Movants’ ability to assert their interests in other actions by foreclosing future attempts at defending the challenged rules. *Helgeland*, 2008 WI 9, ¶ 81 (“The effect of stare decisis is more significant when a court decides a question of first impression.”). Similarly, if *Teigen* and *Thom* are not given an opportunity to defend their victory in *Teigen* in this case, they will not have another opportunity to do so in a separate proceeding. *See Wolff*, 229 Wis. 2d 738, 747 (the court granted intervention because the movant’s prior victory was being attacked and another opportunity to address the issue in the same forum was unlikely). In sum, disposition of this action in favor of Plaintiffs will, as a practical matter, impede Movants’ ability to protect their interests.

D. Existing Parties Do Not Adequately Represent Movants’ Interests

The existing parties in this case do not adequately represent Movants’ interests. While adequate representation is presumed when a “movant and an existing party have the same ultimate objective” or when “the putative representative is a

governmental body or officer charged by law with representing the interests of the absentee,” these presumptions are rebuttable. *Helgeland*, 2008 WI 9, ¶¶ 90–91. Here, the presumption is easily rebutted for multiple reasons.

First, WEC is being called upon to defend the position it directly opposed in *Teigen*. WEC and the Movants (Teigen and Thom) were opponents in the *Teigen* case that was litigated all the way to the Wisconsin Supreme Court. WEC’s position throughout that case was that drop boxes were legal, and Teigen’s and Thom’s position, which ultimately prevailed, was that they were not. Plaintiffs now ask the courts to overrule that case and hold that absentee ballot drop boxes are not only legal, but constitutionally required. Given WEC’s position in *Teigen*, Movants have a legitimate concern that WEC will not adequately defend the very interpretation of state law that it directly opposed in that case.² Courts have recognized that one party’s incentive to settle or litigate less vigorously than the proposed intervenor weighs in favor of intervention. *See e.g., Wolff*, 229 Wis. 2d 738, at 748–50; *Clark v. Putnam County*, 168 F. 3d 458, 462 (11th Cir. 1999). And, WEC cannot be expected to litigate with the same “vehemence” that Movants will because WEC is a prior adversary that will not have its voting rights “directly affected” by the outcome of this case. *Armada Broadcasting, Inc.*, 183 Wis. 2d 463, at 476.

² In its motion to dismiss, filed yesterday, WEC acknowledges that it “argued in *Teigen* that the statute does not prohibit the use of absentee ballot drop boxes.” WEC Mot. Dismiss Br. at 18 n.2. Notably, WEC does not indicate that it will take a different position if this case goes before the Wisconsin Supreme Court. Instead, it simply points out that “[t]his Court ... cannot reverse a decision of the supreme court.” *Id.* Thus, if this case comes before the Wisconsin Supreme Court, it is likely that WEC will agree with Plaintiff that the Court should “revisit its decision” in *Teigen*. Compl. ¶ 96.

Movants also have unique interests as voters that are not represented by any of the existing parties. As the Supreme Court emphasized in *Purcell*, “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” 549 U.S. 1 at 4. WEC does not have a right to vote. It does not cast a ballot. It does not suffer the same loss of confidence in the process and results when election-integrity measures, like those challenged here, are eliminated. It also does not have any risk that its ballot may not be counted. Movants have an independent interest in protecting their right to vote by defending the validity of the challenged statutes. *See Teigen*, 2022 WI 64, ¶¶ 21–25, 29–30 (plurality op.); *id.* ¶¶ 164–167 (Hagedorn, J., concurring). *See also Feehan v. Wisconsin Elections Comm’n*, 506 F. Supp. 3d 640, 647–48 (E.D. Wis. 2020) (Even if a movant and the named defendant share the same goal, the presumption of adequate representation does not apply if the intervenor’s interest is based on a right that is direct and independent of the defendants). WEC and Movants do not share the same interests, so the presumption of adequate representation due to shared objectives does not apply.

Movants also have a unique interest, as voters (and as a membership-based association that represents voters), in avoiding the confusion that will result from a court order invalidating the challenged provisions. For example, if this Court says that a prohibition on ballot drop boxes is unconstitutional, that does not change the

lack of any statutory authorization for them. Thus, nothing in the statutes sets forth any rules for their use. How many can there be? Where can they be located? What security measures must be taken? All of this will be extremely confusing for voters, and as noted in *Purcell*, “[c]ourt orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (emphasis added).

II. Alternatively, Movants Should Be Granted Permissive Intervention.

Alternatively, this Court should grant Movants’ motion on a permissive basis. Permissive intervention may be granted if Movants satisfy three elements: (1) filing a timely motion (2) asserting a claim or defense that has a question of law or fact in common with the main action and (3) Movants’ involvement will not “unduly delay or prejudice the adjudication of the rights of the original parties.” *Rise*, 2023 WL 4399022, ¶¶ 47–48 (citations omitted); Wis. Stat. § 803.09(2). Movants satisfy all three elements.

As explained above, Movants’ motion is timely because it is filed before any substantive hearings in the case. *Armada Broadcasting, Inc.*, 183 Wis. 2d 463, at 472. Additionally, Movants assert defenses that have questions of law and fact in common with the main action. Specifically, Movants seek to defend the constitutionality of the challenged statutes in order to protect Wisconsin’s longstanding rules that safeguard election integrity and their right to vote in free, fair, and honest elections; by contrast, Plaintiffs seek to invalidate the challenged statutes. Compl. ¶¶ 27–60. These directly conflicting claims have questions of law and fact in common, and courts have

recognized that such competing views on the constitutionality of election laws have questions of law or fact in common. See *Edwards v. Vos*, No. 20-CV-340-WMC, 2020 WL 6741325, at *1 (W.D. Wis. June 23, 2020).

Additionally, Movants' intervention will not "unduly delay or prejudice" adjudication of the main action. Movants' commitment to preventing undue delay and prejudice weighs in favor of permissive intervention, and this commitment can be enforced by the court. *Id*; see also *Trump v. WEC*, No. 20-CV-1785-BHL, 2020 WL 7230960, at *3 (E.D. Wis. Dec. 8, 2020) ("The court emphasizes that its decision to grant permissive intervention is premised on the proposed intervenors' assurances that they will work to ensure that judicial economies are maintained and will not be a burden on further proceedings."). If this motion is granted, Movants commit to abiding by whatever schedule this Court sets for the original parties. Additionally, Movants will work with the parties to efficiently litigate this matter. Therefore, Movants' involvement in this case will not cause delay or prejudice any of the parties.

In this action, a finding for Plaintiffs will significantly alter Wisconsin's rules on absentee voting. Movants should be permitted to intervene so that all views on this important matter can be fairly and efficiently litigated.

CONCLUSION

Movants Richard Teigen, Richard Thom, and the Association of Mature American Citizens, Inc. respectfully ask this Court to grant their motion to intervene.

Dated: September 8, 2023

Respectfully Submitted,

*Electronically signed by Luke N.
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