

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1

OZAUKEE COUNTY

TIMOTHY ZIGNEGO, DAVID W. OPITZ,
and FREDERICK G. LUEHRS, III,

Plaintiffs,

v.

Case No. 2019CV000449

WISCONSIN ELECTIONS
COMMISSION, MARGE BOSTELMANN,
JULIE GLANCEY, ANN JACOBS, DEAN
KNUDSON, and MARK THOMSEN,

Code: 30701

Defendants.

**PROPOSED INTERVENOR-DEFENDANT LEAGUE OF WOMEN VOTERS OF
WISCONSIN'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO INTERVENE**

Proposed Intervenor-Defendant League of Women Voters of Wisconsin (“the League”) makes the following further points in support of its Motion to Intervene.

- I. The League has a strong interest in the outcome of this litigation, and the current Defendants do not and cannot adequately represent the League’s interest.**

Plaintiffs argue that the League does not have a sufficient interest in this case. *First*, the League’s “beef” is not with the Legislature. Pltfs.’ Br. at 6–7. Plaintiffs, Defendants, and the League all differ as to the intended meaning of the word “reliable” in Wisconsin Statute Section 6.50(3); the League believes that provision does not apply, even taking Plaintiffs’ allegations as true. As a matter of policy, it would of course have been better for the Wisconsin Elections Commission’s (“WEC” or “the Commission”) administration of elections and the minimization of disputes over election laws if the Legislature had

expressly stated that Section 6.50(3) or some other timeline applies to the use of ERIC data, but it did not. However, the League is focused on what Wisconsin law does and does not require, not any aspirational policy changes.

Second, the League has a significant interest in this case because a substantial part of its year-round work is devoted to registering voters in furtherance of its mission to maximize participation in Wisconsin elections. Affidavit of Erin Grunze, November 22, 2019 (“Grunze Aff.”) ¶¶ 2–12. An interest for intervention purposes need not rise to the level of organizational standing if a proposed intervenor were seeking to file an action in its own right. Wisconsin courts have found that “there is no requirement that the potential intervenor’s interest 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). “The relevant inquiry in Wisconsin is thus not whether a prospective party has a legal or legally protected interest in the subject of an action, but whether the person or entity has ‘an interest of such direct and immediate character that the [prospective party] will either gain or lose by the direct operation of the judgment.’” *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶ 15, 258 Wis. 2d 210, 655 N.W.2d 474, 482 (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). The League has demonstrated that its interests will be directly and immediately harmed and burdened by an order to immediately purge 234,039 registered Wisconsin voters based on the ERIC “movers” list. Grunze Aff. ¶ 13.

Third, the League is inquiring with its members and followers as to whether anyone has received the 2019 ERIC notice in error. This effort will take time but has already yielded one registered voter who received an ERIC notice in error this October. Bonnie

Moyse did move to a new municipality, but she updated her voter registration address in June of this year, four months before she received an ERIC letter at that new address, the address at which she had already registered to vote. Affidavit of Douglas M. Poland, December 5, 2019 (“12/5/19 Poland Aff.”), Ex. 1, Affidavit of Bonnie Moyse (“Moyse Aff.”) ¶¶ 2–4 & Ex. A. As can be seen from Exhibit A to the Moyse Affidavit, Bonnie and her husband both filled out the confirmation postcard and mailed it in in an abundance of caution. *Id.*, Ex. A. Current Defendants will not be presenting voters’ statements and, absent the League’s intervention, voters’ interests in this case—and information they can provide that is relevant to the disputed reliability of the 2019 ERIC “movers” list data—will not be adequately presented and represented by the current Defendants.

The current Defendants, the Commission and five of the six WEC Commissioners, cannot adequately represent the League’s and voters’ interests in this litigation. The clearest evidence of this inadequacy is the fact that, until Plaintiffs filed this lawsuit, Defendants had characterized the ERIC “movers” list’s information as “reliable” and “largely accurate.” *See* Compl., Ex. B, Mar. 11, 2019 WEC Memo, at 81 (“[T]he Commission has relied on the language and framework of Wis. Stat. § 6.50(3) to treat the movers list as *reliable information that the individuals listed have changed their voting residence.*”) (emphasis added); *id.* (noting “that the in-state movers data is *a largely accurate indicator* of someone who has moved or who provided information to the post office or DMV which make it appear that they moved”) (emphasis added). The League cannot speak to why the Commission has suddenly in its latest filing argued to the contrary, but that cannot change the fact that, as Plaintiffs have already cited to this Court, the Commission has stated that the ERIC list *is* reliable and accurate. *See, e.g.*, Pltfs.’ Mot. for

Temporary Injunction, at 8 (“Indeed, after reviewing the above data WEC staff concluded that ‘the in-state movers data is a largely accurate indicator of someone who has moved or who provided information to the post office or DMV which makes it appear that they moved.’”). Because Defendants have made these concessions in prior memoranda, severely undermining their litigating position and one of their principal defenses, they cannot adequately represent the League’s interests.

When the movant is seeking to intervene to serve as a co-party with a government entity, and that government entity is tasked by law with representing the movant’s interests, there is a presumption of adequate representation. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 91, 307 Wis. 2d 1, 745 N.W.2d 1; *Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, ¶ 21, 307 Wis. 2d 1, 724 N.W.2d 208. This presumption is, however, rebuttable. “When determining whether a party’s representation is deemed adequate we look to see if there is a showing of collusion between the representative and the opposing party; if the representative’s interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty.” *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994). “[T]here must be actual divergence between the state’s position on the primary issue and the potential intervenor’s position.” *Helgeland*, 2006 WI App 216, ¶ 21, 307 Wis. 2d 1, 724 N.W.2d 208. The interests of the existing party and the proposed intervenor “need not be wholly adverse” in order to find the existing party “would not adequately represent the interests of the [proposed intervenor].” *Wolff*, 229 Wis. 2d at 748, 601 N.W.2d 301. The showing required to demonstrate inadequate representation is “minimal.” See *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (holding that the burden is minimal under Rule 24(a)(2) of the Federal Rules of

Civil Procedure); *Armada Broad.*, 183 Wis. 2d at 476, 516 N.W.2d 357 (noting that Wis. Stat. § 803.9 was modeled after Rule 24(a)(2)).

Given the Commission's prior, contradictory statements on the issue of reliability, there is concrete, "actual divergence between the state's position on the primary issue and the potential intervenor's position" and a per se failure by the government to fulfill its representative duty. *Helgeland*, 2006 WI App 216, ¶¶ 20–21, 307 Wis. 2d 1, 724 N.W.2d 208. There is no way Defendants can zealously attack the reliability of ERIC's "movers" information and mount an effective defense with concessions like that on the record. This divergence in interests and failure to represent the League's interests are not unexpected, as Defendants and their counsel represent the state, not voters or the civic engagement groups like the League that register them to vote; their interests naturally differ.

The League has a legitimate basis to intervene in this lawsuit, as there is a risk that the Court will give weight to the Commission's recent, contradictory statements on the ERIC list's reliability. In that event, there will be no party in the lawsuit that can make a strong argument that the ERIC data, premised on flawed Wisconsin DMV data, is unreliable. Absent the League's intervention, all parties to this lawsuit will have *defended* the reliability of the ERIC "movers" list information within the last year. It makes sense that Plaintiffs want to litigate this case only against a party that has agreed with it as recently as March. Plaintiffs are trying to have it both ways by making contradictory arguments in hopes of defeating the League's motion and securing a favorable ruling on the merits. On the one hand, in their temporary injunction motion, Plaintiffs effectively say to this Court, "See, the Commission said the ERIC data was *reliable*," implicitly arguing that Defendants should not be heard to change their position and claim the ERIC

data is insufficiently reliable for Wisconsin Statute Section 6.50(3) purposes. Pltfs.' Mot. at 8. On the other hand, in their brief in opposition to the League's motion to intervene, Plaintiffs effectively say the opposite: "See, the Commission is saying the ERIC data is *unreliable*." Pltfs.' Br. at 2–3, 8–9.

Wisconsin law entitles the League to intervene under these circumstances because its interests are not adequately represented by the current Defendants. Wis. Stat. § 803.09(1). As the Commission's main defense has been hamstrung by recent, contradictory statements, the League's intervention is necessary to adequately protect its own and voters' interests in the outcome of this litigation.

Additionally, the current Defendants are still hedging in making their argument on the contested accuracy of ERIC's information, which is based on flawed Wisconsin DMV data. Defendants' argument is not "completely redundant" with the League's, Pltfs.' Response Br. at 2, as they do not unequivocally call the ERIC data "unreliable." Rather, in their opposition brief, Defendants say that the "ERIC Movers data is *not per se* 'reliable information' under Wis. Stat. § 6.50(3)."; "ERIC Movers data . . . is *not per se reliable on a case-by-case basis*."; and "[T]he 2019 ERIC Movers data, *by itself*, is not 'reliable information that a registered elector has changed his or her residence.' Wis. Stat. § 6.50(3)." Defs.' Br. at 17–18 (emphases added). The Commission's hedging and qualified language betray an actual divergence between its interests and the League's because it strongly suggests that the current Defendants have in mind a different, more minimal set of criteria for finding information on residential address changes reliable. They appear to assess the risk of removing voters in error differently from the League and, if the opportunity arises, may well seek to settle this case on terms that are far less favorable to

voters than Section 6.50(3) demands and/or that may raise independent constitutional concerns, *e.g.* that fail to address the deficiency of the mailed 2019 ERIC notices. *See Wolff*, 229 Wis. 2d at 748–49, 601 N.W.2d 301 (concluding possibility that existing defendant would “settle the suit on terms more favorable” to plaintiffs than proposed intervenor militates in favor of granting intervention as of right).

Ultimately, the Commission’s interests diverge at a basic level from the League’s because the Commission is not “charged by law” with representing the interests the League cites. *Helgeland*, 2008 WI 9, ¶ 91, 307 Wis. 2d 1, 745 N.W.2d 1 (quotation marks and citation omitted). It represents its own interests and those of local election officials. The current Defendants are trying to ensure that they can continue to use the ERIC list for some voter list maintenance activity, even though they now argue it is “not per se reliable.” Defs.’ Br. at 17–20. They appear to suggest that there could be a process that will allow them to differentiate between reliable and unreliable information in the ERIC “movers” list, *id.* at 19–20, but in the few years Wisconsin has participated in ERIC, the Commission and Wisconsin DMV have not devised or disclosed such a methodology. Significantly, Plaintiffs have not pled that the Commission, ERIC, or DMV have the ability to differentiate between reliable and unreliable information or filter out unreliable data. Plaintiffs think that the ERIC data is *per se* reliable, notwithstanding the known error rate, and Defendants appear to think that the ERIC data can be *made reliable* with further, individualized review and actions that generate additional information. There is no voice in this case to argue that the ERIC “movers” list information is inherently, systemically, and irrevocably flawed and to zealously advocate for concrete proof that it is reliable or, as a practical, operational matter, can be made so with additional review or data.

Furthermore, the League has no interest or obligation to defend the ERIC data or methodology, as the Commission does as a contractual matter. While the League believes in maintaining accurate, up-to-date rolls, using unreliable information is the surest way to guarantee inaccurate rolls. Defendants make clear that they do not want to abandon using the ERIC information for some form of voter list maintenance outside the confines of Section 6.50(3). Though they continue to angle for a future in which they can continue using ERIC information but utilize a longer time window for deactivation, Defendants must know that if the ERIC data is less than reliable, then, not only can they not remove voters within thirty days based on this information, but they likely cannot even use taxpayer dollars to mail out notices to ERIC-identified voters under Section 6.50(3). That statutory provision appears to forbid Defendants from engaging in any step of the list maintenance process based on unreliable data.

Finally, the League also has no interest or obligation to defend the ERIC data or methodology or the Commission's actions over the last few years, as the Commission and its counsel do. There are certain facts that will be relevant to the merits of this case, any settlement that might be entered into, and any relief that might be awarded, that implicate serious problems with the Commission's handling of this entire process and that the Defendants will be reluctant to admit or criticize. *See, e.g., Dairyland Greyhound Park*, 2002 WI App 259, ¶ 18, 258 Wis. 2d 210, 655 N.W.2d 474 (applying intervention factors to necessary party inquiry and finding inadequate representation, in part because "the tribes may wish to take positions which the Governor might dispute, or at the very least, be reluctant to espouse"). For instance, the October 2019 notice mailed by Defendants to registered Wisconsin voters was defective, as it did not inform voters that they would be

removed from the rolls if they failed to take action. Defendants and their counsel will not make these arguments. 12/5/19 Poland Aff., Ex. 2, Excerpt from September 24, 2019 Wisconsin Elections Commission Agenda Documents, 2019 ERIC Notice Letter, at 53.¹ Accordingly, these are additional ways in which Defendants' interests in this litigation diverge from the League's and why they do not adequately represent the League's and voters' interests.

II. Plaintiffs timely filed their Motion to Intervene within seven business days of the Complaint's filing. Defendants filed their action five months after the Commission adopted the policy they are challenging.

Plaintiffs accuse the League of moving for intervention in an untimely manner, even though its Motion was filed within seven business days of the original complaint. *Cf. Armada Broad.*, 183 Wis. 2d at 472, 516 N.W.2d 357 (finding motion to intervene timely when it was “filed and argued . . . prior to the commencement of the first hearing on the mandamus action”). Not only are Plaintiffs' arguments now moot given the rescheduling of the hearing on Plaintiffs' motion to December 13, but it is Plaintiffs who have delayed this action by filing their complaint five months after the Commission first adopted the 12-to-24-month deactivation timeline at its June 11, 2019 meeting. *See* Compl., Ex. C, June 11, 2019 WEC Memorandum, at 12–14; 12/5/19 Poland Aff., Ex. 2, Excerpt from September 24, 2019 Wisconsin Elections Commission Agenda Documents, June 11, 2019 Meeting Minutes, at 3 (noting unanimous adoption of motion to “[a]uthorize staff to flag

¹ The League respectfully requests that this Court take judicial notice of the 2019 ERIC notice letter; this is an official government document, the existence and contents of which are not subject to reasonable dispute. Wis. Stat. § 902.01(2). The document's contents are “capable of accurate and ready determination by resort to [a] source[] whose accuracy cannot reasonably be questioned.” *Id.* § 902.01(2)(b).

files of voters rather than deactivating voters who do not respond to a Movers mailing after 30 days”).² Plaintiffs’ claims were ripe in June, and they need not have delayed until after the 2019 notices were mailed out. The three Plaintiffs’ proffered injury for standing purposes, the dilution of their votes, is just as prospective today as it was back then. Moreover, this week’s revelation that Commissioner Robert Spindell supports the Plaintiffs’ claims and met with Plaintiffs’ counsel about them *before* he was appointed to the Commission in mid-October³—several weeks before this case was filed—belies any argument Plaintiffs make that the League’s intervention is the source of any delay.

III. In the alternative, the League should be granted permissive intervention.

The League raises a defense involving a question of law and/or fact in common with the instant case, and Plaintiffs will suffer no undue delay or prejudice. Wis. Stat. § 803.09(2). Principally, the League’s argument, which is not adequately represented by the current Defendants, turns on whether the information on residential address changes provided by ERIC to the Commission is “reliable” within the meaning of Section 6.50(3). This is the crux of Plaintiffs’ First Cause of Action. Therefore, in the alternative, the League respectfully requests that this Court grant it permissive intervention.

² The League respectfully requests that this Court take judicial notice of the June 2019 WEC Meeting Minutes; this is an official government document, the existence and contents of which are not subject to reasonable dispute. Wis. Stat. § 902.01(2). The document’s contents are “capable of accurate and ready determination by resort to [a] source[] whose accuracy cannot reasonably be questioned.” *Id.* § 902.01(2)(b).

³ See WEC Meeting Video (Dec. 2, 2019), at 3:35:34—3:36:23, available at <https://wiseye.org/2019/12/02/wisconsin-elections-commission-december-2019-meeting/>.

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Respectfully submitted,

By: Electronically signed by Atty. Douglas M. Poland

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**Motions for admission pro hac vice pending*