

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.

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**LEAGUE OF WOMEN VOTERS OF WISCONSIN'S BRIEF IN SUPPORT OF ITS  
MOTION TO INTERVENE**

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**INTRODUCTION AND SUMMARY**

Proposed Intervenor-Defendant League of Women Voters of Wisconsin (“the League”) respectfully moves this Court to intervene in the above-captioned matter because its interests in maximizing voter participation through registration and protecting registered voters’ rights are directly implicated by this action, and its interests and arguments against the Complaint are not adequately represented and asserted by the current Defendants.

This case, filed just last week, seeks the removal—within a mere 30 days of a notice’s mailing—of over 234,000 registered voters from Wisconsin’s rolls solely based on the fact that the Wisconsin Elections Commission (“WEC” or “the Commission”) has obtained information from the Electronic Registration Information Center (“ERIC”) that these voters have listed an address in the course of a government transaction, such as with the Wisconsin Department of

Motor Vehicles (“DMV”), that is different from the residential address where they are currently registered to vote. The WEC’s internal memoranda prepared to analyze this situation, and the Complaint itself, demonstrate that the ERIC “movers” list relies on flawed, undifferentiated address data from the Wisconsin DMV. Based on prior experience and WEC and DMV’s failure to identify any new procedures to differentiate address data, the 2019-2020 ERIC “movers” list likely once again contains a substantial amount of unreliable and demonstrably inaccurate information that does not reflect a true residential address change that would necessitate a change in a Wisconsin voter’s registration, but rather an address that has no applicability to voter registration, such as a commercial address. Because the Wisconsin DMV data and consequently, the ERIC “movers” list, contain a substantial percentage of unreliable information, Wisconsin Statute Section 6.50(3) – the statute on which Plaintiffs’ claims turn – and its 30-day removal requirement do not apply. To date, the WEC has not argued in any of the memoranda, letters, or public statements placed before this Court by Plaintiffs’ Complaint that Section 6.50(3) does not apply because the ERIC “movers” list contains a sizable amount of unreliable information that cannot be identified and segregated. Instead, the Commission and the individual Defendant Commissioners (collectively, “Defendants”) are trying to thread the needle and have it both ways, arguing that they may continue to use the ERIC “movers” list data and invoke Section 6.50(3) to initiate some kind of voter roll maintenance process but may nevertheless set a different timeline for removal of noticed voters.

The state legislature has surely put the Commission in a difficult, uncomfortable spot by failing to modify Section 6.50(3) to exempt ERIC data or set a different timeline for removal of voters flagged on the ERIC “movers” list. Section 6.50(3) was enacted decades before the creation of a multi-state matching system for computerized government transaction records and databases

and, unsurprisingly, has proven ill-suited for implementing the results of the ERIC database-matching process to maximize voter roll accuracy. It has fallen to the Commission to work out the competing demands of different statutes, which command participation in a system that ingests and commingles unreliable data and the fast removal of any voter with a non-matching address in a government transaction record. This is not a well-considered, coherent legislative choice, but rather the accidental and disastrous combination of two laws enacted decades apart. ERIC's reliance on unreliable Wisconsin DMV data has not worked out well for many of the more than 575,000 registered voters flagged as "movers" and has burdened groups that engage in voter registration drive efforts. As one of the major voter registration groups in Wisconsin, the League seeks to defend its interests in maximizing voter participation through registration drives and protecting the rights of registered voters to maintain registration status against a threatened, unlawful purge and ultimately to vote.

Defendants' interests, by contrast, point in more directions, some in tension with each other and some plainly adverse to zealous advocacy on behalf of the League's interests and arguments in opposition to this Complaint. In seeking to strike a balance, Defendants have sought to continue using this partially-compromised, flawed list that has true residential addresses commingled with commercial and other inapplicable addresses that have nothing to do with voter registration. Defendants want to preserve their ability to use the ERIC list, which is compromised by flawed DMV data, to clean up the rolls, while providing some safeguards for voters to prevent erroneous removal, such as a longer waiting period than a mere 30 days. But this is incompatible with making an unqualified argument that the ERIC data is compromised and unreliable within the meaning of Section 6.50(3), and, as a consequence, not once have Defendants argued in their memoranda or letters that this statutory section is inapplicable due to the information's

unreliability. Furthermore, Defendants will surely seek to defend their quality control procedures, which failed to prevent a 7 percent error rate in the notices that were mailed out in 2017-2018<sup>1</sup> and, absent evidence of significant, systemic changes in the capability of differentiating address changes in 2019, have likely again failed to detect a substantial amount of unreliable information. Defendants 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.<sup>2</sup> In short, Defendants' positions are compromised and adverse to the League's interest because of these competing concerns.

Absent the League's intervention, no Defendant in the action will make a full-throated argument that the ERIC "movers" list contains a sizable amount of unreliable information and, therefore, cannot provide the basis or trigger for a 30-day notice immediately followed by removal under Wis. Stat. § 6.50(3). The issue of reliability will necessarily be decided in this case. If denied intervention here, the League may well be compelled to bring affirmative litigation *against the current Defendants* to prevent or redress the unlawful removal of registered voters. That reality, combined with the risk of collateral estoppel against the League in any future affirmative case, compel the conclusion that the League's interests in this action may be irrevocably compromised, absent intervention.

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<sup>1</sup> Proposed Intervenor-Defendant the League do not concede and would dispute the accuracy of that figure, but it is not necessary to resolve that dispute to resolve this Motion to Intervene or the attached Motion to Dismiss. For purposes of the Motion to Dismiss, that calculation is taken as true.

<sup>2</sup> Affidavit of Douglas M. Poland, November 22, 2019 ("Poland Aff."), Ex. B, Excerpt from Wisconsin Elections Commission September 24, 2019 Agenda Documents (Sept. 24, 2019), at 3. This document is from an official government source, and its existence and contents are not subject to reasonable dispute. Wis. Stat. § 902.01(2). The contents of the 2019 ERIC notice letter are "capable of accurate and ready determination by resort to [a] source[ ] whose accuracy cannot reasonably be questioned." *Id.* § 902.01(2)(b). The League respectfully requests that this Court take judicial notice of the 2019 ERIC notice Letter.

For these reasons and those that follow, proposed Intervenor-Defendant respectfully requests that this Court grant this Motion for Leave to Intervene.

### LEGAL ARGUMENT

- I. Wisconsin law mandates intervention in this case because Plaintiffs' claims and requested relief directly implicate the League's interests; and Defendants do not adequately represent those interests, will not raise the same defense as the League, and, in some ways, are adversely positioned.**

The League has a right to intervene under Wisconsin law, which provides that:

[u]pon 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). There are four factors that must be considered. “[A]n outsider has a right to intervene when four conditions are met: (1) the potential intervenor makes a timely motion to intervene; (2) the potential intervenor claims an interest in the property or transaction that is the subject of the suit; (3) the disposition of the suit may, as a practical matter, impair or impede the potential intervenor's ability to protect that interest; and (4) the potential intervenor's interest is not adequately represented by one or more parties to the suit.” *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 741-42, 601 N.W.2d 301 (Ct. App. 1999). When weighing motions to intervene as of right, Wisconsin courts take a “pragmatic approach, one that is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶ 15, 258 Wis. 2d 210, 224 (quoting *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 472, 516 N.W.2d 357 (1994)) (internal quotation marks omitted).

Here, the League satisfies the statutory requirements for intervention. First, its Motion to Intervene was filed within seven business days of the Complaint's filing. Second, this case directly

implicates and threatens to burden its continuous, year-round voter registration activities in Wisconsin, as well as its organizational interests in promoting voter engagement, by requiring the League to expend resources to re-register unlawfully deactivated voters, and threatens to burden, if not deny, the right to vote to 234,000 registered voters, some of whom, now or in the future, will likely be members of the League. Third, the current Defendants cannot adequately represent the League's interests because they have demonstrated they will not attack the reliability of the information in the ERIC list, which is drawn in large part from the Wisconsin DMV; will not zealously defend the League's interests in voter registration and civic engagement; and will seek to protect their own interests and defend their own conduct, including inadequate quality control, which now threatens to result in the removal of a substantial percentage of over 234,000 Wisconsin voters from the state's voter registration list based upon unreliable information. And finally, the relief sought by Plaintiffs would, if granted, impair the League's ability to protect its interests in this litigation and likely have collateral estoppel effects in future affirmative cases over the same issue that the League could and would, if necessary, bring against the current Defendants. Weighing these factors compels the conclusion that Wisconsin law requires that the League be permitted to intervene. *Armada Broad.*, 183 Wis. 2d at 471, 516 N.W.2d 357.

**A. The League's motion is timely because it has been filed the week after this action was initiated.**

Whether a motion to intervene is timely remains subject to the court's discretion. *State ex. rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). As part of its assessment, the court considers whether (i) the proposed intervenor acted promptly, and (ii) the intervention will prejudice the initial parties. *Id.* The first consideration is the "critical factor." *Id.*

Here, Plaintiffs filed their complaint on November 13, 2019. The League filed this Motion to Intervene seven business days later. *See Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 472,

516 N.W. 2d 357 (1994) (holding that motion to intervene was timely where movant filed his request before the first hearing in the action he sought to join); *see also C.L. v. Edson*, 140 Wis. 2d 168, 178-79, 409 N.W.2d 417 (Ct. App. 1987) (holding that a movant’s action four months after learning of their interests, and four months after judgment had been issued, was timely); *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 167-69, 400 N.W.2d 1 (Ct. App. 1986) (finding no clear error in ruling that motion to intervene filed seven months after action commenced, with no explanation for the delay, was not timely).

Nor will its intervention prejudice the parties. Although Wisconsin Statute Section 802.06 requires a stay of discovery upon the filing of a motion to dismiss, which the League has filed in conjunction with this Motion, the court may permit discovery to proceed if it “finds good cause upon the motion of any party that particularized discovery is necessary.” Wis. Stat. § 802.06(1)(b). The League preemptively will state that it agrees that the parties have an interest in a quick, efficient resolution of this action, and that this urgency constitutes good cause to permit any discovery requested by the parties to move forward.

For these reasons, the League’s motion is timely.

**B. This case directly implicates the League’s interest in maximizing voter participation and civic engagement by conducting voter registration drives statewide and by defending all voters’ rights, including its members’ rights.**

The League has a “direct and immediate” interest in this case. *Helgeland v. Wisc. Municipalities*, 2008 WI 9, ¶ 45, 307 Wis. 2d 1, 25, 745 N.W.2d 1 (quoting *City of Madison v. Wis. Emp’t Rel. Comm’n*, 2000 WI 39, ¶ 11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94); *see also id.* (quoting *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 744, 601 N.W.2d 301 (Ct. App. 1999)) (noting that proposed intervenor’s interest in case need not be judicially enforceable in independent lawsuit). The precedent instructs courts to operate “practically,” with an “eye toward” involving

as many apparently concerned persons possible while preserving due process. *Wolff*, 229 Wis. 2d at 742, 601 N.W.2d 301.

The League has several, interconnected interests in this case. First, the League’s mission is to maximize eligible voter participation and facilitate civic engagement through registration and voting, and to create a democratic system open to all eligible voters. *See* Affidavit of Erin Grunze, November 22, 2019 (“Grunze Aff.”) ¶ 1 (“LWVWI works to expand informed, active participation in state and local government, giving a voice to all Wisconsinites.”); ¶ 2 (“The LWVWI is dedicated to encouraging its members and the people of Wisconsin to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. The mission of LWVWI is to promote political responsibility through informed and active participation in government . . . . The League seeks to maximize eligible voter participation through its voter registration efforts and encourage civic engagement through registration and voting.”). To further these objectives, the League makes significant, year-round investments of resources, staff and volunteer time, and money in voter registration efforts. *See id.* ¶ 2 (“Individual League members invest substantial time and effort in voter training and civic engagement activities, including voter registration and get-out-the-vote (‘GOTV’) efforts.”).

In 2017, 2018, and 2019, to fulfill its mission to foster civic engagement and encourage voter participation, LWVWI made substantial investments in voter registration activities statewide. In each of these years, LWVWI has incurred expenses to finance voter registration activities, and it has already incurred expenses for the 2020 election cycle. *Id.* ¶ 3. In 2017, LWVWI spent an estimated total of \$9,739, comprised of voter registration training (\$1,960), voter information cards (\$279), creating a MyVote training presentation (\$1500), and additional staff (\$6,000). *Id.* ¶ 4. In 2018, a year with midterm elections and statewide races like the Governor

and Attorney General elections, approximately \$12,276 was spent on voter registration activities, including voter registration training for Access to Independence (\$49), voter registration training for a voter registration mobile app (\$588), the voter registration mobile app training (\$392), voter registration mobile app training material creation (\$980), voter registration social media-related activities (\$784), voter registration information upgrade to the LWVWI.org website (\$196), travel for voter registration activities (\$273), voter registration-related postage (\$23), GOTV website (\$85), local League voter registration support (\$980), print materials for local Leagues (\$2,951), voter registration-related travel (\$190), National Voter Registration Day (\$784), and additional staff (\$4,000). *Id.* ¶ 5. In 2019, LWVWI spent approximately \$10,385 on voter registration activities statewide, including work on registration form revision (\$980), voter registration social media (\$294), National Voter Registration Day (\$588), Disability voter registration week (\$196), voter registration trainings (\$980), print materials for local Leagues (\$4,326), mailing tablets to local Leagues (\$21), and additional staff (\$3,000). *Id.* ¶ 7. For 2020, LWVWI has already made some expenditures for voter registration activity and intends to make more. The budget provides for the following estimated costs: voter registration day (\$980), Disability Voter Registration Week (\$588), voter registration trainings (\$1,568), print materials for local Leagues (\$4,000), voter registration social media (\$784), and additional estimated expenses (\$6,000). The total will be \$13,920. *Id.* ¶ 8.

These investments yield significant results. In 2018, the last statewide general election year, LWVWI collectively hosted a total of 1,057 election-related events, including voter registration drives and candidate events. LWVWI estimated that it collectively registered or updated the registration for 12,582 voters total. Eighteen of LWVWI's 20 local Leagues noted they do voter registration and education at area community colleges, tech schools, or universities.

All 20 local Leagues noted that they do voter registration and education at their area high schools. Additionally, in 2018, 949 of LWVWI's members and volunteers participated in election activities, and 6,580 hours of volunteer time were spent on election activities. LWVWI's local Leagues direct voters to use MyVote.wi.gov to register to vote, assist with changes of address and navigating MyVote and the DMV's website, direct voters to Vote411.org to find candidate information, and ensure voters have a valid form of photo ID to obtain and cast their ballots. If anything, these figures are undercounted or under-reported. *Id.* ¶ 6.

Plaintiffs' claims present a direct and immediate threat to the League's organizational interests and activities. A ruling in Plaintiffs' favor will kick over 234,00 people off the rolls a mere 30 days after their notices of non-matching addresses were mailed. This will not just occur in 2019-2020 but for every year going forward that Wisconsin participates in ERIC. This would unravel the League's extensive work conducting voter registration drives throughout the state and add to the League's burden by forcing them to re-register eligible voters who were removed from the rolls in error based on unreliable information. Every cycle, the League will register thousands, if not tens of thousands, of voters, and every cycle unreliable information in the Wisconsin DMV data and therefore also in the ERIC "movers" list will result in thousands, if not tens of thousands, being erroneously removed from the rolls within just 30 days of a notice's mailing. This will force the League to re-register these individuals and educate them on how to re-register through late in-person registration at a municipal clerk's office or on Election Day at the polls. This is especially true, given the extremely short timeline between notice and removal under Section 6.50(3). This would require the recruitment of volunteers, as well as additional staff, the expenditures of staff and volunteer time, money, and other resources. It will also compel the League to do extensive public education around the ERIC list and the availability of late in-person registration and

Election Day registration as a means to re-register and the need to bring documentary proof of residence to early voting sites and the polls. Wis. Stat. § 6.34.

The League has a significant interest in avoiding increased burdens on its interests and efforts in maximizing voter participation and civic engagement through voter registration drives. Grunze Aff. ¶ 13. An endless cycle of partially-erroneous and very fast registration cancellations would clearly burden the League’s efforts to increase voter participation by adding eligible voters to the rolls and keeping them there. As Executive Director Erin Grunze says in her affidavit:

A court order permitting error-prone and fast deactivations of registered voters will inevitably add to LWVWI’s work by requiring the organization to expend time, money, and other resources re-registering voters who were removed in error. LWVWI is also committed to protecting all eligible Wisconsin voters’ rights, including the League’s members, and that includes preventing unlawful removal from the voter rolls. Voters removed in error will have to wait in lines to register at polling places in upcoming elections in 2020 and present proof of residence. Given the expected high turnout in all of next year’s elections, that is a recipe for long delays and chaos.

*Id.* Should Plaintiffs prevail, 234,000 registered voters—some seven percent of Wisconsin’s registered voters<sup>3</sup>—will have their registrations cancelled. That many of these voters may be able to re-register without incident is irrelevant, because burdening voters with the need to re-register per se violates the First and Fourteenth Amendments to the U.S. Constitution when their removal was erroneous and unlawful.<sup>4</sup> Still other voters may lack the necessary proof of residence to re-register, Wis. Stat. § 6.34, and would face higher burdens in restoring their registration.

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<sup>3</sup> WIS. ELECTIONS COMM’N, *August 1, 2019 Voter Registration Statistics* (Aug. 1, 2019), <https://elections.wi.gov/node/6549>.

<sup>4</sup> Under the First and Fourteenth Amendments to the U.S. Constitution, any burden on the right to vote must be balanced against a state’s interest in that requirement. The Supreme Court has set forth the following test:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling

Finally, the Wisconsin Supreme Court has recognized a party's interest in an action not only when the party has a "unique and significant interest" in the matter, but also when Wisconsin law generally provides protection for the type of interest alleged by the proposed intervenor. *See, e.g., Armada Broad.*, 183 Wis. 2d at 474, 516 N.W. 2d 357 (holding that proposed intervenor had an interest warranting intervention where he had a personal interest in the matter and Wisconsin law generally provided protections for privacy and confidentiality). Here, there is no doubt that Wisconsin law protects associational rights. The Wisconsin Constitution explicitly states, "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged." Wis. Const. art. I, § 4. The First Amendment of the U.S. Constitution, which applies to Wisconsin through the Fourteenth Amendment, guarantees Wisconsinites "a constitutional right to organize with others in pursuit of a variety of political, educational, religious, or cultural ends." *Madison Teachers, Inc. v. Walker*, 358 Wis. 2d 1, 42, 851 N.W. 2d 337 (2014). That is precisely the interest the League seeks to defend in this action.

Accordingly, the League has a significant interest in maximizing voter participation and civic engagement through voter registration efforts, efforts which would be hindered and made more burdensome by a ruling in Plaintiffs' favor. It also has a significant interest in protecting

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importance." *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S., at 788, 103 S.Ct., at 1569–1570; *see also id.*, at 788–789, n. 9, 103 S.Ct., at 1569–1570, n. 9.

*Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

voters' rights, and specifically in this case, maintaining voters' status as registered in the face of a list maintenance process that is using unreliable information.

**C. The current Defendants do not adequately represent the League's interests because they (1) represent the state's interests, rather than the organizational interests asserted by the League; (2) to date, have not argued that the ERIC "movers" list contains a sizable amount of unreliable information; and (3) have an interest in defending their conduct as to the ERIC "movers" list which threatens many voters with removal from the rolls and potential disenfranchisement.**

The showing required to demonstrate that the existing parties inadequately represent a proposed intervenor's interests is "minimal." *Helgeland*, 2008 WI 9, ¶ 85, 307 Wis. 2d 1, 745 N.W.2d 1. "Ordinarily a party's representation is deemed adequate to protect the proposed intervenor's interest if there is no showing of collusion between the representative and the opposing party; if the representative does not represent an interest adverse to that of the movant; and if the representative does not fail in the fulfillment of its duty." *Id.* at ¶ 87 n.79 (quoting *Sewerage Comm'n of City of Milwaukee v. St. Dep't of Nat. Res.*, 104 Wis. 2d 182, 189, 311 N.W.2d 677 (Ct. App. 1981)).

In this case, the current Defendants do not share and have no legal duty to represent the League's interests. Rather, they represent the State and, by extension, local election officials charged with administering elections in accordance with state law. Defendants' interests in this matter are not well-aligned with the League's and are, in some cases, adverse. Their ultimate interest in the outcome of this suit is a determination of what Wis. Stat. § 6.50(3) requires of election officials—not the potential impact of an adverse determination on the interests of the League, similarly-situated civic engagement organizations, and voters. As such, Defendants will not adequately or zealously represent the League's interests. Furthermore, although granting the

Plaintiffs' requested relief would cause the Defendants to alter their conduct and potentially incur costs to comply with a court order, such an order would not impact the Defendants in the same manner as it would the League. It would have no effect on the Defendants' individual rights under the First and Fourteenth Amendments, as it will for voters, and mass removal of seven percent of Wisconsin's registered voters will require the League to expend time and resources to conduct outreach to affected voters and re-register them and expend that much more of their resources and staff or volunteer time on broad registration initiatives. As representatives of the State, Defendants do not—and legally cannot—represent the League in defending these interests.

Once again, *Armada Broadcasting* is instructive on this point. There, a broadcasting company sought access under Wisconsin's Open Records Law to a report prepared for a school district that accused some teachers of sexual harassment and made recommendations for discipline. When the school district produced portions of the report, the company filed for a writ of mandamus requiring the district to release the remainder of the report. One teacher implicated in the report filed a motion to intervene, which the trial court denied. On appeal, the Wisconsin Supreme Court reversed and granted intervention. It held that the school district could not provide adequate representation to the proposed intervenor's interests. The court noted that the proposed intervenor had filed a grievance action against the district pursuant to his collective bargaining agreement, thereby rendering the district an adverse party. Furthermore, the court observed, "we cannot expect the District to defend the mandamus action with the vehemence of someone who is directly affected by public disclosure of the report. The personal nature of the interests at stake in the [sexual harassment] report make [the proposed intervenor] the best person to protect those interests." *Armada Broad.*, 183 Wis. 2d at 476, 516 N.W. 2d at 362. Similarly, the Commission's interests and the League's are not similar or aligned enough to defer to their participation in the

case. The interests asserted by the League are personal to its mission and are not shared by the Commission, a government entity with its own set of concerns and legal duties. As such, only the League can adequately defend its interests.

Emblematic of this divergence between Defendants' and the League's interests is the fact that 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. The Commission's memoranda on ERIC, as well as their letter to Plaintiffs' counsel, contain detailed accounts of what went wrong with the 2017-2018 ERIC list maintenance process and the procedural details of the Commission's own unsuccessful or incomplete efforts at quality control, but there is no contention that the information at the center of this voter roll maintenance process is unreliable, in whole or in part. *See* Compl., Exs. A, B, C, E. The Commission has actually repeatedly stated the opposite in its memoranda. In its March 2019 memo, it stated: (1) "[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.*"; and (2) "Given 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, staff believes this approach is *a reasonable method of ensuring proper maintenance of the voter registration list* under Wis. Stat. § 5.05(15)." Compl., Ex. B, at 81 (emphasis added). The League's whole basis for seeking intervention is to attack the accuracy and reliability of information in the ERIC list—information that the Commission has defended as "reliable," "largely accurate," and "reasonable."

Additionally, Defendants posit that other sections of the Wisconsin Election Code, namely Wis. Stat. § 5.05(15), authorize them to devise a longer period for the flagged voter on the ERIC “movers” list to respond and confirm or update their registration, or engage in voter activity: “Wis. Stat. § 5.05(15) provides a broader source of authority [than Wis. Stat. § 6.50(3)] to the Commission for ensuring the integrity and maintenance of the statewide voter registration list, which supports the process recommended by staff.” Wis. Stat. § 5.05(15); *see also* Compl., Ex. C, at 13 (“For purposes of this process, staff is relying on Wis. Stat. § 6.361(ae) compelling adherence to the ERIC membership agreement, *Wis. Stat. § 6.50(3) which authorizes changes to voter registration status based on reliable information*, and Wis. Stat. § 5.05(15) which makes WEC responsible for voter list maintenance.”) (emphasis added). Instead of just saying Wis. Stat. § 6.50(3) is inapplicable because the information is not reliable, the WEC has deflected by pointing to other statutes as purported sources of authority for avoiding the 30-day requirement in Wis. Stat. § 6.50(3). Time and again, the Commission has repeatedly failed to make the argument that the proposed Intervenor-Defendant League of Women Voters of Wisconsin would make here—that Wis. Stat. § 6.50(3) simply does not apply because the ERIC “movers” list contains far too much unreliable information. Because Defendants will not make that argument, they cannot adequately represent the League’s interests and arguments in opposition to Plaintiffs’ Complaint.

Unwilling to label the ERIC data unreliable,<sup>5</sup> Defendants want to have it both ways—on the one hand, deeming the data “reliable” so they can continue to use the ERIC “movers” list for list maintenance purposes in some fashion and continue to mail out notices pursuant to Wis. Stat. § 6.50(3); and on the other, tacitly acknowledging that the list is *unreliable* by setting a longer 12-

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<sup>5</sup> Again, the ERIC “movers” list contains unreliable information because the Wisconsin DMV data contains unreliable information and is not limited to true residential address changes. This is not ERIC’s responsibility or fault; it must rely on the states to provide it with accurate data.

to-24-month notice-and-removal process. This unreliable information, with a 7 percent error rate in the 2017-2018 according to Plaintiffs' Complaint, clearly cannot support the removal of registered voters within a mere 30 days after notice is mailed. But Defendants are unwilling to say that.

Furthermore, Defendants' interests also diverge from the League's because they will surely seek to defend their quality control procedures, which failed to prevent a 7 percent error rate in the notices that were mailed out in 2017-2018 and, absent evidence of significant, systemic changes in the capability of differentiating address changes in 2019, have likely again failed to detect a substantial amount of unreliable information. Defendants 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. *See infra* n.2. The WEC's failure to adequately inform voters of the risks of failing to take action on the ERIC notice letter is a manifest due process problem, one that the WEC's counsel cannot raise and attack. That obvious conflict of interest over the clearly deficient notice also militates in favor of finding a divergence of interests between Defendants and the League.

Maintaining the voter rolls' accuracy is of course a worthy goal; indeed, it is legally required under both federal and state law, albeit in different ways. But this goal is counterbalanced by safeguards and protections to ensure voters are not unlawfully removed based on unreliable or fraudulent information. Voter registration groups and registered Wisconsin voters, who have been or may be ensnared by the Commission's reliance on unreliable DMV data ingested by ERIC, need an advocate in the case that is fighting zealously to protect their interests. These interests include the League's interests in maximizing voter participation through registration efforts, as well as protecting registered voters' status to ensure they will not need to re-register at the polls on Election

Day, scramble to present a valid proof of residence document, and wait in a long line during a presidential election to re-register. A ruling in Plaintiffs' favor will of course cause requests for Election Day registration to increase severely, and during a high-turnout presidential election, that can lead to long lines at polling places and chaos for poll workers and election officials alike. Accordingly, the current Defendants' interests and arguments in opposition are not well-aligned with the League's, and they will fail to adequately protect the League's interests in the resolution of this action.

**D. Because the current Defendants do not adequately represent the League's interests or raise the same argument, the League's ability to protect their interests in this case will be impaired or impeded, unless intervention is granted.**

In assessing whether a potential intervenor's interests would be impaired by rejecting intervention, courts must take a flexible approach, "focusing on the facts and circumstances of the particular case before [them] as well as the stated interest in intervention and analyzing these factors against the policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶ 44, 307 Wis. 2d 1, 745 N.W.2d 1 (quoting *State ex. rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983)). One such policy is efficiency. *Dairyland Greyhound Park*, 258 Wis. 2d at 224 (quoting *Armada Broad.*, 183 Wis. 2d 463, 472, 516 N.W.2d 357 (1994)). In *Armada Broadcasting*, the Supreme Court of Wisconsin considered a lawsuit to unseal portions of a sexual harassment report prepared for a public school district and concluded that denying intervention by a teacher named in the report would impair his interests. 183 Wis. 2d at 474, 516 N.W.2d 357. Similarly, granting intervention here can preserve the League's ability to protect its interest in maximizing voter participation through voter registration efforts and its corresponding interest in ensuring that registered voters are not denied their rights by being unlawfully removed from the

rolls. Absent intervention, the League would be impaired or impeded from defending these interests.

As noted above and as reflected in the League's proposed Motion to Dismiss—accompanied with this Motion as Exhibit A to the Affidavit of Douglas M. Poland—the League plans to raise legal arguments not asserted by the Defendants, principally that a substantial amount of information that is included in the ERIC data constitutes unreliable information and, therefore, Wis. Stat. § 6.50(3)'s requirement to remove a noticed registered voter after 30 days is wholly inapplicable. As previously noted, in none of their memoranda have Defendants Wisconsin Elections Commission and the Commissioners argued this. *See* Compl., Exs. A-F.

If the Court were to deny the League's Motion to Intervene, the League could and would seek to enjoin the Defendants from implementing the Court's order and assert these arguments in a separate simultaneous or future action. If denied intervention here, the League may well be compelled to bring affirmative litigation *against the current Defendants* to prevent or redress the unlawful removal of registered voters. *Cf. Armada Broad.*, 183 Wis. 2d at 475 (holding that intervention was appropriate, in part because it would provide finality to the plaintiffs in the immediate action instead of in “later litigation”). The case presently before this Court will necessarily decide issue of reliability, so there would be a risk that Defendants or Intervenor-Defendants could successfully assert collateral estoppel pursuant to Wis. Stat. § 802.02(3) against the League in any future affirmative case. This compels the conclusion that the League's interests in this action may be irrevocably impaired or impeded, absent intervention.

Forcing the League to bring a separate action would not be a pragmatic or efficient use of this Court's scarce time and resources. It would duplicate this Court's efforts, when the League only seeks to contest the threshold issue of reliability that triggers the application of Section

6.50(3). Granting the League’s request for intervention thus benefits not only the League, but the other parties as well. It will settle the question presented, provide finality to the Defendants so that they and county election officials can administer elections in conformity with the law, and head off any future litigation between the League and the Defendants.

**II. Should the Court find that the League is not entitled to intervention as of right, the League’s interest in this case warrants permissive intervention.**

Even if the Court were to find intervention is not required, permissive intervention would nonetheless be warranted. Wis. Stat. § 803.09(2) provides for permissive intervention:

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.

Wis. Stat. § 803.09(2). Here, the League has a stake in the answer to the legal question posed in this case: Whether Wis. Stat. § 6.50 requires the removal of the 234,000 voters identified by the Plaintiffs. As discussed above, granting the League’s Motion to Intervene would not unduly delay or prejudice the Plaintiffs or Defendants. Should the Court find that it does not meet the standards for intervention as of right, the League therefore respectfully requests that it grant permissive intervention.

**III. It is proper for the League to attach a Motion to Dismiss to this Motion to Intervene.**

Under Wis. Stat. § 802.06(2), a motion to dismiss for failure to state a claim must be made before an answer is filed, so it is appropriate to attach a motion to dismiss in lieu of an answer to this Motion to Intervene to satisfy the requirement of Wisconsin Statute Section 803.09(3) that the the League’s Motion to Intervene “be accompanied by a pleading setting forth the claim or defense for which intervention is sought.” A recent Supreme Court of Wisconsin case confirms that a claim may be dismissed at the request of an intervenor-defendant that moves to dismiss in

conjunction with moving to intervene. *See League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶¶ 2 n.4, 11, 387 Wis. 2d 511, 929 N.W.2d 209 (ordering circuit court to dismiss claims on remand where Wisconsin State Legislature submitted a motion to intervene accompanied by a motion to dismiss).

### **CONCLUSION**

For the foregoing reasons, Proposed Intervenor-Defendant the League respectfully requests that this Court grant this Motion for Leave to Intervene.

Dated: November 22, 2019

Respectfully submitted,

By: *Electronically signed by Atty. Douglas M. Poland*

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*\*Motions for Pro Hac Vice Admission to be Filed*