STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 4

MARGARET HONIG
and ROBERT HONIG,

*Plaintiffs*,

*vs*.

Case No. 26-CV-1463

WISCONSIN ELECTIONS COMMISSION, *et al.*

*Defendants*,

*and*

BILLIE L. JOHNSON
and KENDALL E. POST,

*Intervenor-Defendants.*

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE OF BILLIE L. JOHNSON AND KENDALL E. POST**

Proposed Intervenor-Defendants, by and through undersigned counsel, submit this Memorandum in Support of their Motion to Intervene filed contemporaneously herewith.

## INTRODUCTION

This action concerns the unlawful counting of 23 absentee ballots that were not delivered to their polling places by the 8 p.m. deadline for the April 7, 2026, Spring Election (the "Spring Election"). Despite the unambiguous, mandatory prohibition of Wis. Stat. § 6.87(6), the City of Madison Clerk and City of Madison Board of Canvassers ("City Election Officials") opened, tabulated, and counted these late-arriving ballots—with the support of the Dane County Clerk

and Dane County Board of Canvassers ("County Election Officials").[1] By a bipartisan 5-1 vote, the Wisconsin Elections Commission ("WEC") did its job: it ordered City and County Election Officials to "conform their conduct to" Wis. Stat. § 6.87(6) and directed City Election Officials to remove "the 23 unlawfully counted absentee ballots" and adjust the returns accordingly.[2] Plaintiffs claim injury as a result of WEC's Order, but they cannot prove their specific ballots were removed during the drawdown and thus not counted. From that manufactured injury, they ask this Court to rewrite Wis. Stat. § 6.87(6) by judicial decree—a remedy unmoored from any concrete personal harm and aimed at policy change, not redress.

Proposed Intervenor-Defendants BILLIE L. JOHNSON and KENDALL E. POST are Madison voters who cast their ballots lawfully and on time in the same Spring Election.[3] They have a direct and personal stake in this case that neither Plaintiffs nor the existing Defendants fully represent: the right to have the election result determined only by votes cast in compliance with Wisconsin law—without dilution by ballots that the Legislature has expressly mandated "may not be counted." Wis. Stat. §§ 6.84(2), 6.87(6).

Mr. Johnson and Mr. Post are entitled to intervention as of right under Wis. Stat. § 803.09(1). They satisfy every required element: the motion is timely; their interest is direct, concrete, and legally cognizable under the Supreme Court's vote-dilution standing doctrine; disposition of this action may practically impair their interest; and the Attorney General, representing WEC, will not and cannot adequately represent the personal franchise interest of individual lawful voters. Permissive intervention is also warranted under § 803.09(2).

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[1] Wisconsin Elections Commission Decision in Investigation No. 2026-0001 (hereinafter "WEC's Decision"), Compl. Ex. A.
[2] Wisconsin Elections Commission Order in Investigation No. 2026-0001 (hereinafter "WEC's Order"), Compl. Ex. A.
[3] Unsworn Declaration of Billie L. Johnson ("Johnson Decl.") at ¶4; Unsworn Declaration of Kendall E. Post ("Post Decl.") at ¶4.

## STATEMENT OF FACTS

On April 7, 2026, Wisconsin held its Spring Election. Proposed Intervenor-Defendants are qualified electors of the City of Madison who cast lawful, timely absentee ballots in that election.[4] They both legally and timely cast ballots in the Spring Election and upon information and belief their ballots were tabulated and counted in the Spring Election.[5]

During the canvass, election inspectors in Madison opened and counted 23 absentee ballots that had been delivered to polling places after 8 p.m. on election day.[6] Wisconsin Stat. § 6.87(6) is unambiguous: "[a]ny ballot not mailed or delivered as provided in this subsection may not be counted." Section 6.84(2) further directs that this provision "shall be construed as mandatory."

The Madison Municipal Board of Canvassers and the Dane County Board of Canvassers affirmed the unlawful counting of the late-arriving ballots.[7] By a bipartisan 5-1 vote, the Wisconsin Elections Commission ("WEC") did its job: it ordered City and County Election Officials to "conform their conduct to" Wis. Stat. § 6.87(6) and directed City Election Officials to remove "the 23 unlawfully counted absentee ballots" and adjust the returns accordingly.[8] This lawsuit followed, asking this Court to do far more than overturn WEC's Order. Plaintiffs ask for this Court to force WEC to include in its final canvass late-arriving absentee ballots in defiance of the Legislature's clear command in Wis. Stat. §§ 6.84(2) and 6.87(6) and to issue a declaratory judgment compelling every clerk in Wisconsin to do the same in future elections.

Proposed Intervenor-Defendants now timely move to intervene and protect their right to have their votes counted in the Spring Election and future Wisconsin elections without dilution.

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[4] Johnson Decl. at ¶¶ 3-4; Post Decl. at ¶¶ 3-4.
[5] *Id.*
[6] WEC's Decision at p. 1.
[7] *Id.*
[8] WEC's Order at pp. 2-3.

## LEGAL STANDARDS

Wisconsin Stat. § 803.09(1) entitles a movant to intervene as of right when: (1) the motion is timely; (2) the movant has an interest in the controversy; (3) disposition of the action may practically impair or impede that interest; and (4) the existing parties do not adequately represent the movant's interest. *City of Madison v. WERC*, 2000 WI 39, ¶ 11, 234 Wis. 2d 550, 610 N.W.2d 94. Wisconsin courts construe intervention liberally, recognizing that a "holistic" and "flexible" approach is necessary. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 40, 307 Wis. 2d 1, 745 N.W.2d 1. In fact, the Wisconsin Court of Appeals has affirmed a broad right of intervention by qualified electors who cast their ballots in the same election subject to a lawsuit. *See Roth v. LaFarge School District Board of Canvassers*, 2001 WI App 221, 247 Wis. 2d 708, 634 N.W.2d 882.

Alternatively, § 803.09(2) allows courts to grant permissive intervention in their discretion if it will not "unduly delay or prejudice" the adjudication of the rights of the existing parties. *WERC*, 2000 WI 39 at ¶ 11.

## ARGUMENT

### I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER WIS. STAT. § 803.09(1).

#### *A. This Motion Is Timely.*

Timeliness is left to the discretion of the circuit court, but assessed based on the stage of proceedings, the reason for any delay, and any prejudice to existing parties. *Armada Broadcast Group, Inc. v. Stirn*, 183 Wis. 2d 463, 471-72, 516 N.W.2d 357 (1994) (holding that intervention was timely because it was prior to the first hearing in a mandamus action). This Motion is filed just days after Plaintiffs' Complaint—before any responsive pleading, before any hearings, and

several days in advance of the state canvass deadline. There is no delay, and there is no conceivable prejudice.

### *B. Proposed Intervenor-Defendants Have a Direct, Legally Protectable Interest.*

Wisconsin's highest court has squarely held that a lawful voter has a direct, legally cognizable interest in ensuring that elections are conducted according to law and an elector casting a ballot in that election is personally harmed when they are not. In *Teigen*, the Wisconsin Supreme Court recognized that lawful voters suffer a concrete injury when unlawful ballots are cast or counted in their election, because doing so directly harms those voters and leaves the integrity of elections in question. *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶¶ 14-25, 403 Wis. 2d 607, 976 N.W.2d 519 (holding on vote-dilution standing not disturbed by *Priorities USA v. WEC*, 2024 WI 32). "If the right to vote is to have any meaning at all, elections must be conducted according to law." *Id.* at ¶ 22.

Proposed Intervenor-Defendants' interest is concrete and personal: they voted in this specific election, in this specific jurisdiction, in the same contests affected by the late-arriving ballots. If those ballots are counted, Proposed Intervenor-Defendants' lawful votes are diluted—precisely the injury *Teigen* recognized. This is not a generalized grievance; it is a direct stake in whether unlawful ballots are counted alongside theirs in a specific race and whether unlawful ballots will again dilute their votes in future elections.

This interest is closely tied to the instant action and was protected properly by WEC's bipartisan order. Some Commissioners may not have liked the outcome, but the Legislature has mandated that absentee ballots must arrive at polling places by 8 p.m. on election day or they "may not be counted" and, in 1985, the Legislature removed any doubt expressly declaring that this deadline "shall be construed as mandatory." Wis. Stat. §§ 6.84(2) and 6.87(6). The statutory

right to have election results determined only by compliant ballots is enforceable and belongs, in the most personal sense, to the lawful voters in that election.

### *C. Disposition of This Action Will Impair Proposed Intervenors' Interest.*

If this Court grants mandamus and directs that late-arriving ballots must be counted notwithstanding the law, the injury is direct and irreversible: those votes are folded into the certified result of an election Proposed Intervenor-Defendants voted in, the canvass will close, and there is no mechanism to undo that dilution.

### *D. The Existing Defendants Do Not Adequately Represent Proposed Intervenor-Defendants' Interest.*

The adequacy-of-representation inquiry is "minimal." The movant needs to only show that representation "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); accord *Helgeland*, 2008 WI 9, ¶ 52 (affirming a minimal standard from the Federal Rules, but not so much as to nullify the requirement). Proposed Intervenor-Defendants clear this bar on two independent grounds.

First, WEC's institutional interest fundamentally diverges from the personal franchise interest of individual lawful voters. WEC's stake in this litigation is institutional: it defends its own authority to issue enforcement orders under Wis. Stat. § 5.06. WEC may accept relief that vindicates its procedural authority while still resulting in the late-arriving ballots being counted on remand, or it may prioritize its relationship with local officials over the rights of lawful voters. It may settle on terms that resolve its institutional dispute without protecting Proposed Intervenors' personal interest in a clean election result.

Proposed Intervenor-Defendants' interest is categorically different: it is binary, personal, and non-negotiable. Their votes are either diluted by unlawful ballots or they are not. No agency with an institutional stake in its own rulemaking authority can fully represent that individual

franchise interest. As the Wisconsin Supreme Court recognized in Teigen, the injury from unlawful ballot counting belongs to the voters—not to the Commission.

Second, the Attorney General's institutional posture is averse to vigorous defense, and the recent professional alignment between his office and Plaintiffs' counsel deepens the concern. Before taking office, Attorney General Kaul served as lead counsel for plaintiffs challenging Wisconsin's voter identification requirements and other election regulations. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016). Since taking office, his DOJ has urged the same expansive view. Plaintiffs in this very action are represented by "Law Forward" and Jeffrey Mandell—the same attorney who served as lead counsel in the litigation defending the institutional authority of Mr. Kaul's office against the 2018 legislative restrictions. *See League of Women Voters of Wis. v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209. Adequacy fails when existing counsel's sympathies and recent professional alignments converge with the opposing party. These alignments do not establish bad faith, but they confirm what *Trbovich* requires: a real possibility of inadequate representation. That is enough.

This case is materially different from cases where the Legislature had already intervened and was mounting a vigorous statutory defense. No comparable third-party defense of Wis. Stat. §§ 6.84(2) and 6.87(6) appears in this action.

## II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS WARRANTED UNDER WIS. STAT. § 803.09(2).

The standard for permissive intervention is also met. Section 803.09(2) authorizes the Court to permit intervention when a movant's defense and the main action share a common question of law or fact. That standard is plainly satisfied: Proposed Intervenor-Defendants' defense—that the late-arriving ballots are mandatorily excluded under §§ 6.84(2) and 6.87(6)—is the central question.

Once the common question of law or fact is met, courts typically grant permissive intervention unless it would "unduly delay or prejudice" existing parties. In this case it will not. Proposed Intervenor-Defendants have appeared early, will adhere to whatever schedule the Court establishes, and will not expand the scope of litigation.

## CONCLUSION

For all the foregoing reasons, Proposed Intervenor-Defendants respectfully request that this Court enter an order granting their intervention as a matter of right pursuant to Wis. Stat. § 803.09(1), or in the alternative, permitting their intervention pursuant to Wis. Stat. § 803.09(2), and accept for filing the Proposed Answer and Affirmative Defenses in Intervention filed herewith.

Respectfully submitted this 11th day of May 2026.

**NJB LAW & CONSULTING LLC**

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