UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LEAGUE OF WOMEN VOTERS OF WISCONSIN, PATRICIA ANN VILLARREAL, SASHA ALBRECHT,

Plaintiffs,

v. Civil Action No. 19-cv-1029

DEAN KNUDSON, JULIE M. GLANCEY, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, in their official capacity as members of the Wisconsin Elections Commission, MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendants.

PROPOSED INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

On December 17, 2019, the Court in *Zignego v. Wisconsin Elections Commission* issued a writ of mandamus (the "Writ") ordering that, pursuant to Wis. Stat. § 6.50(3), Defendants[1] must immediately deactivate 234,039 individuals from the Wisconsin voter registration rolls. *See* Compl., Ex. F, Zignego v. WEC – Writ of Mandamus, ECF No. 1-6. The Court rejected Defendants' contention that they could wait 12 to 24 months before deactivating the ineligible voters. Later that same day, the League of Women Voters of Wisconsin and two of its members filed this action to prevent Defendants from complying with the Writ, which, they contend, will

[1] Defendants Marge Bostelmann, Dean Knudson, Ann Jacobs, and Julie Glancey are also defendants in *Zignego*, as is the Wisconsin Elections Commission (the "WEC"). As described below, they are currently appealing the award of the Writ, and seeking a stay of their obligation to perform on the Writ, in Wisconsin's Court of Appeals and Supreme Court.

violate procedural due process requirements of the United States Constitution's 14th Amendment and 42 U.S.C. § 1983. *See generally* Compl., ECF No. 1. Specifically, Plaintiffs assert that Defendants have deprived and will continue to deprive them and their members of the right 1) "to be afforded adequate notice and an opportunity to be heard prior to the deactivation of their registration," *Id.* at 25; and (2) "to be free from election law changes upon which voters rely to their detriment," *Id*. at 28. Plaintiffs effectively seek collateral review by the federal court of the state court's earlier denial of a stay,[2] asking a federal court to stay a state court's order to follow state law.

Proposed Intervenors-Defendants (the "*Zignego* Plaintiffs") filed *Zignego*, and are residents of Wisconsin who are properly-registered to vote. They now seek to intervene to protect their state court judgment from federal court interference. It is hard to imagine a stronger case for intervention. Having been denied an opportunity to intervene in *Zignego,* and dissatisfied with the result there, Plaintiffs here gin up a false controversy, suing the government agency that opposed that result and asking a federal court to order the agency not to do what it does not wish to do in the first place. For reasons set forth in the *Zignego* Plaintiffs' Memorandum of Law in Support of Motion to Dismiss (or in the Alternative Stay) Based on Pullman Abstention and Response to Plaintiff's Motion for a Preliminary Injunction, this type of end run around a state court proceeding is inappropriate, and certainly should not occur without providing the *Zignego* Plaintiffs – who won in state court – an opportunity to be heard on collateral review of the judgment they obtained.

Were there any doubt that the Plaintiffs here seek to undo the state court's decision in *Zignego*, it is belied by the breadth of the relief that they seek. The gist of Plaintiffs' argument is that unless WEC provides clear notice to voters whose registration it is required by Section 6.50(3)

[2] Plaintiffs moved to intervene on the side of WEC in *Zignego*, but their motion was denied at the same time that the Court awarded the Writ on December 17.

to deactivate (which requirement was confirmed by the *Zignego* Court), WEC will violate their due process rights. Assuming, *arguendo*, that Plaintiffs' argument is correct, the obvious remedy is simply to order WEC to send a new notice to all the voters it is deactivating.[3] That notice would tell any voters who believe their registration is being deactivated in error to remedy the problem by re-registering – something that can be done online, by mail, at the local clerk's office, or even at the polls on election day. Such persons would not merely have a right to be heard on deactivation of their registration: they would have the ability to reverse it themselves. As they said in *Zignego* itself, the *Zignego* Plaintiffs do not object to such a notice.

But this isn't enough for the Plaintiffs here. They hope to use the new notice as a means to block compliance with Section 6.50(3) by insisting that due process mandates that deactivation cannot occur until **after** the notice has gone out. This would allow WEC to, again, decide the timing of deactivation, notwithstanding the requirements of Section 6.50(3) and the Writ. The federal injunction sought by Plaintiffs would give Defendants an excuse for delaying compliance with the Writ. Like they did in *Zignego*, Defendants could argue that factors like the burden on WEC staff prevent WEC from sending out a new notice, and therefore from deactivating the registrations in compliance with the Writ, before the February 18, 2020 election. Given that in *Zignego*, Defendants had argued (and continue to argue on appeal) that Section 6.50(3) allows them to wait 12 to 24 months to deactivate such voters, the *Zignego* Plaintiffs' concern is entirely justified.

[3] The *Zignego* Plaintiffs do not concede that Plaintiffs' due process rights have been or will be violated, as they allege in their Complaint. A due process claim cannot be premised on an agency's misstatement of the law, like WEC's mistaken assertion that Section 6.50(3) notwithstanding, it could wait 12-24 months to deactivate voters; that is, the Writ did not change the rules for elections in Wisconsin, as Plaintiffs' contend, but rather, it corrected WEC's misinterpretation of Wisconsin law. Relatedly, resolution of the state law claims in the pending *Zignego* litigation will dispose of the issue of whether or not WEC's interpretation was correct. And finally, even assuming some deprivation occurred, the issue of what process is due Plaintiffs (*e.g.,* when any second notice should go out and what should be its contents) remains to be determined.

Their concern is further bolstered by the fact that Plaintiffs argue that, given the need for the notice sought here, compliance with Section 6.50(3) must be deferred until after the next two elections. For unexplained reasons, Plaintiffs contend that it is not enough that voters who have registrations that are being deactivated but who have not moved be given an opportunity to fix their registrations. Instead, they argue that, as a matter of federal constitutional law, deactivations must be further delayed. Why is unclear. Wisconsin permits online and mail registration until 20 days before an election, or in person at the municipal clerk's office until 5 p.m. on the Friday before an election. Any voter who does not so register before an election may still register when they show up to vote on the day of an election. *See VOTER REGISTRATION: Information Provided by the Wisconsin Elections Commission*, available at https://elections.wi.gov/sites/elections.wi.gov/files/2019-01/25%20Voter%20Registration_0.pdf. A notice sent now would inform any voters deactivated mistakenly that they will have to re-register before the election, or that they could do so on election day. This case is not simply about notice; it is about delaying compliance with the law.

If this Court concludes that Plaintiffs are entitled to the remedy they seek, the *Zignego* Plaintiffs will suffer significant injuries as detailed below. Consequently, they timely seek to intervene in order to protect their interests (including in the Writ), which are not adequately represented by any of the existing parties. If allowed to intervene,[4] the *Zignego* Plaintiffs will seek to have this Court abstain from taking any action that might interfere with performance of the Writ by Defendants, and to otherwise refrain from allowing this case to go forward while *Zignego*

[4] Pursuant to Fed. R. Civ. P. 24(c), the *Zignego* Plaintiffs file with this motion their Memorandum of Law in Support of Motion to Dismiss (or in the Alternative Stay) Based on Pullman Abstention and Response to Plaintiff's Motion for a Preliminary Injunction, which forth the arguments they will make if this motion is granted.

remains pending in the Wisconsin courts. In addition, the *Zignego* Plaintiffs will argue that this Court should deny Plaintiffs' preliminary injunction motion, which they filed on December 21.

This Court should grant the *Zignego* Plaintiffs' motion to intervene, which meets the requirements for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Alternatively, permissive intervention is appropriate under Rule 24(b).

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background.

Under 52 U.S.C. § 21083[5], each state must keep and maintain a voter registration list at the state level that contains the name and registration information of every legally registered voter in the state. Under Section 21083(4), each state must also "**ensure that voter registration records in the State are accurate and are updated regularly**." (Emphasis added.) Wisconsin's Legislature has delegated to WEC the duty under federal law to keep and update Wisconsin's voter registration list. *See* Wis. Stat. §§ 5.05(15) and 6.36. To assist in carrying out its duty, Wisconsin participates in the Electronic Registration Information Center ("ERIC"). *See* Wis. Stat. § 6.36(1)(ae). ERIC is a multi-state consortium formed to improve the accuracy of voter registration data. Poland Decl., Ex. A, Mar. 11, 2019 WEC Memo, ECF No. 11-1 at 2.

As part of ERIC, Wisconsin receives reports regarding Wisconsin residents who have reported an address different from their voter registration address in an official government transaction. ECF No. 11- 1 at 3–4. Such residents are referred to as "Movers." ECF No. 11-1 at 3. After receiving the report from ERIC, WEC undertakes an independent review of the Movers' information to ensure its accuracy and reliability. Poland Decl, Ex. F, Zignego v. WEC Complaint (Ozaukee County Circuit Court), ECF No. 11-6 at 41. While some of these persons may not have

[5] 52 U.S.C. is part of the Help America Vote Act ("HAVA"). HAVA, unlike the National Voters Right Act ("NVRA") applies in Wisconsin. Wisconsin is exempt from the NVRA because the state allows same day registration.

moved, WEC has stated that the Movers report is "largely accurate," ECF No. 11-1 at 11, and, as the *Zignego* Plaintiffs argued, it may be that approximately 95% of these 234,000 registrations are of persons who have moved and who are no longer eligible to vote at their registration address.

After WEC reviews the information from ERIC and as required by Wisconsin law, WEC then sends a notice to those voters at the address on their voter registration and asks them to affirm whether they still live at that address. ECF No. 11-1 at 3. According to at March 11th Staff Report from WEC itself, the

> process involves sending the voter a notice in the mail asking the voter if they would like to continue their registration at their current address. If so, the voter signs and returns a continuation form. If the voter does not respond requesting continuation within 30 days or does not complete a new registration at a different address, the voter's registration is marked as inactive and the voter must register again before voting.

Id.

The process as described by WEC in its March 11th Staff Report, is consistent with Wisconsin law. Specifically, Wis. Stat. § 6.50(3) provides:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, the municipal clerk or board of election commissioners shall notify the elector by mailing a notice by 1st class mail to the elector's registration address stating the source of the information. All municipal departments and agencies receiving information that a registered elector has changed his or her residence shall notify the clerk or board of election commissioners**. If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, the clerk or board of election commissioners shall change the elector's registration from eligible to ineligible status.** Upon receipt of reliable information that a registered elector has changed his or her residence within the municipality, the municipal clerk or board of election commissioners shall change the elector's registration and mail the elector a notice of the change. This subsection does not restrict the right of an elector to challenge any registration under s. 6.325, 6.48, 6.925, 6.93, or 7.52 (5).

(Emphasis added).

It should be noted that all of these voters may re-register at the registration address with proof of residence either online, by mail prior to election day, or at the polls on election day. *See* VOTER REGISTRATION: Information Provided by the Wisconsin Elections Commission*, supra*.

Despite being aware of the statute and acknowledging the appropriate process, WEC decided that "instead of deactivating their voter registrations within approximately 30 days under Wis. Stat. § 6.50(3), deactivation would take place between 12 months and 24 months, giving the Movers a chance to vote in both the General Election and following Spring Election." Poland Decl., Ex. B, June 11, 2019 WEC Memo, ECF No. 11-2 at 4. Thus, WEC is enabling voters who have actually moved to vote in at least two elections improperly at the old address, and potentially for a candidate in a district where the voter no longer resides.

WEC received a new ERIC Movers report in 2019. WEC staff reviewed and vetted the information contained in the report before taking any action on it. ECF No. 11-6 at 41. After confirming its accuracy, WEC staff relied on the ERIC report to send notices to approximately 234,000 Wisconsin voters between October 7 and October 11, 2019 (the "October 2019 Notices"). ECF No. 11-6 at 50.

However, WEC refused to comply with Section 6.50(3) with respect to the October 2019 Notices and refused to change the registration status of voters who did not respond to the Notice after 30 days. Instead, WEC decided not to change the registration status of such voters even if they do not respond to the October 2019 Notice for a period of at least 12 and as many as 24 months, depending upon the timing of the next two elections. ECF No. 11-2 at 4. Plaintiffs complain here that the October 2019 Notice did not inform voters that registrations at the apparently now "old" registration addresses would be deactivated if they did not request that it be continued. Although nothing in the Section 6.50(3) requires such notice, and deactivation does

not prevent a voter from re-registering and casting a ballot, Plaintiffs maintain that this constitutes a denial of due process. They argue that due process for those voters who were erroneously identified as Movers requires not only an opportunity to be told that they need to continue their registration and how this is to be done, but also requires that deactivation of these apparently outdated registrations be delayed past the next two elections in Wisconsin.

B. Procedural Background.

The *Zignego* Plaintiffs filed their action in Ozaukee County Circuit Court on November 13, 2019 after WEC had denied their request that it comply with Section 6.50(3) by immediately changing the registration status of voters who did not respond to the October 2019 Notice within 30 days (the "nonresponsive Movers"). On October 16, 2019, the *Zignego* Plaintiffs had asked that WEC take this action in advance of the Spring Primary Election scheduled for February 18, 2020. On October 25, WEC dismissed their complaint without addressing it on the merits, in part citing potential "prejudice" to Commission staff. Compl., Ex. C, Zignego v. WEC 12-13-10 Hearing Transcript, ECF No. 1-3 at 13.

In the Ozaukee County action, the *Zignego* Plaintiffs asked for a preliminary injunction or, in the alternative, a writ of mandamus. ECF No. 11-6. On December 14, the Circuit Court concluded that WEC had a "plain and positive duty" under Section 6.50(3) to deactivate the registration of non-responsive Movers. ECF No. 1-6. The Court declined WEC's request for a stay of the decision, noting the "very tight time frame" and the "importan[ce] that the Commission" begin complying with the law. ECF No. 1-3 at 80. The Court also entertained, and denied, a motion to intervene in that lawsuit by the Plaintiffs in this action. ECF No. 1-3 at 35-36. The Court signed its order issuing the Writ on December 17. ECF No. 1-6.

The same day, the Defendants filed a notice of appeal, designating venue in District IV and asking that Court of Appeals to stay the Circuit Court's decision. On December 18, the District IV Court of Appeals ordered the *Zignego* Plaintiffs to respond by December 23 to the motion for a stay pending appeal. Poland Decl., Ex. L, WI COA Order, ECF No. 11-12.

On December 20, however, the *Zignego* Plaintiffs filed a Petition for Bypass with the Wisconsin Supreme Court. Under Wis. Stat. § 809.60(3), the filing of that petition "stays the court of appeals from taking under submission the appeal or other proceeding," including the present motion for a stay pending appeal. Consequently, the appeal is stayed while the Supreme Court considers whether to take the case. *See State v. Holmes*, 106 Wis. 2d 31, 37, 315 N.W.2d 703, 706 (1982) (filing of petition to bypass stayed court of appeals from taking under submission petition for supervisory writ). On December 20, the Wisconsin Supreme Court ordered that any responses to the Petition to Bypass be filed on by January 3, 2020. Poland Decl., Ex. N, December 20, 2019 WI Supreme Court Order, ECF No. 11-14. As of the time of this motion to intervene, the Petition is still pending.

In the meantime, Plaintiffs filed this federal lawsuit, asserting that deactivation of non-responsive Movers would violate the 14th Amendment's due process clause. As of the time of this filing, Defendants have not responded in any way.

ARGUMENT

Federal Rule of Civil Procedure 24 offers two avenues for intervening in a federal action: intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). Fed R. Civ. P. 24(a)-(b). The *Zignego* Plaintiffs meet the requirements of both provisions and should be allowed to intervene. *See Service Employees Internat'l Union v. Husted*, 515 Fed. Appx. 539, 542-43 (6th Cir. 2013) (acknowledging that courts routinely allow voters to intervene in election

law cases); *Kasper v. Hayes,* 651 F. Supp. 1311, 1313 (N.D. Ill. 1987)("[I]n litigation involving an issue so sensitive and central to the democratic process as the eligibility of voters, the active participation of all interested parties is essential.").

I. THE *ZIGNEGO* PLAINTIFFS MAY INTERVENE AS OF RIGHT UNDER RULE 24(a).

Rule 24(a) provides, "On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). This rule may be restated as a four-factor test, pursuant to which a proposed intervenor must

> (1) make a timely application, (2) have an interest relating to the subject matter of the action, (3) be at risk that that interest will be impaired by the action's disposition and (4) demonstrate a lack of adequate representation of the interest by the existing parties.

Vollmer v. Publishers Clearing House, 248 F.3d 698, 705 (7th Cir. 2001). Each of these requirements are met here.[6]

A. The Motion to Intervene Is Timely.

Rule 24(a)(2) requires that a motion to intervene be "timely." "The timeliness requirement forces interested non-parties to seek to intervene promptly so as not to upset the progress made toward resolving a dispute." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785,

[6] Also required for intervention as of right is Article III standing, *Bond v. Utreras*, 585 F.3d 1061, 1069 (7th Cir. 2009), at least where "the intervenor wishes to pursue relief not requested by a plaintiff." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S. Ct. 1645, 1648 (2017). Because the Seventh Circuit has concluded that a Rule 24(a) interest "is sufficient to satisfy the Article III standing requirement" and, as argued herein, the *Zignego* Plaintiffs have a clear Rule 24(a) interest, they do not discuss the requirement further in this section. *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997).

797 (7th Cir. 2013). Four factors determine whether a motion to intervene is timely: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Id.* at 797-98 (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000)) (internal quotation marks omitted). The "most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (quoting 7C Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 1916 (1986)) (internal quotation marks omitted). The timeliness inquiry is made with "reference to the totality of the circumstances." *Shea v. Angulo*, 19 F.3d 343, 348 (7th Cir. 1994).

The *Zignego* Plaintiffs' motion is timely. WEC appealed from the December 17 order in *Zignego* later that same day, seeking an *ex parte* stay of the Writ on or before December 23. The Court of Appeals ordered the *Zignego* Plaintiffs to respond by that day but, as noted above, they filed a Petition to Bypass on December 20. The Writ has not been stayed, and this intervention motion is being filed within one week of the intervening Christmas holiday. The *Zignego* Plaintiffs are seeking to intervene before the briefing of Plaintiffs' motion is complete or Defendants have even appeared; per this Court's order, Defendants are to respond to Plaintiffs' motion by January 3, and Plaintiffs' reply is due by January 10. As a result, the *Zignego* Plaintiffs' motion will cause no delay in the case, and there is and can be no prejudice to any party based on its timing.

B. The *Zignego* Plaintiffs' Have an Interest Relating To The Subject Matter Of This Action.

Rule 24(a) requires that a proposed intervenor have a "direct, significant, legally protectable" interest, *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003) (quoting

Sec. Ins. Co. of Hartford v. Schipporeit, Inc., 69 F.3d 1377, 1380 (7th Cir. 1995)) (internal quotation marks omitted), that is "related to the subject matter" of the action, *id.*; *see also Security Insurance*, 69 F.3d at 1380 (the interest must be a "significantly protectable interest" (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971) (internal quotation marks omitted)). The asserted interest must "be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit," *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), and the claimed injury must not be too remote. *See City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 985 (7th Cir. 2011). "Whether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Security Insurance*, 69 F.3d at 1381.

The *Zignego* Plaintiffs satisfy this requirement. They do not merely hold some generalized interest that is identical to the interest of every other properly-registered voter in Wisconsin. Defendants' failure to comply with Section 6.50(3) forced the *Zignego* Plaintiffs to seek and obtain the Writ, and the Writ is the very thing that impelled Plaintiffs to file this lawsuit. With this suit, Plaintiffs attempt to either deny the *Zignego* Plaintiffs the relief that they successfully obtained in the Circuit Court or, at the least, delay such relief past the next two elections. This lawsuit is a collateral attack on the judgment obtained by the *Zignego* Plaintiffs, and they have a direct, significant, legally-protectable interest in ensuring that Defendants perform as required by the Writ. *See United States v. Curry*, 2011 WL 13315500, at **2-3 (D. N.M. 2011) (interest of party in appeal pending before state court that could be adversely affected by federal litigation constitutes interest supporting intervention in federal case).

The existing parties do not share the *Zignego* Plaintiffs' interest. There can be little doubt that Plaintiffs filed this action in response to the award of the Writ, and there is a real probability

that the relief requested by Plaintiffs may result in undermining the Writ by allowing Defendants to continue to delay deactivation. In other words, the Plaintiffs here seek to permit the Defendants to do – at least for awhile - precisely what they wanted to do and what the *Zignego* Plaintiffs sought to prevent. There is no reason to expect Defendants to resist anything that Plaintiffs want; in fact, both Plaintiffs and Defendants are currently pursuing reversal of the Writ in the Wisconsin appellate courts.

In addition to their interest in protecting the Writ, the *Zignego* Plaintiffs are harmed as voters if others are enabled by WEC to vote when, or at a location where, they are not legally eligible to vote. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196, 128 S. Ct. 1610, 1619, 170 L. Ed. 2d 574 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters"); *Day v. Robinwood West Community Improvement Dist.,* 2009 WL 1161655, at *2 (E.D. Mo. 2009) (finding irreparable harm because "the right to vote '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'"); *Miller v. Blackwell*, 348 F. Supp.2d 916, 918 n.3 (S.D. Ohio 2004) (voters whose pre-election eligibility challenges under Ohio law were to be heard by county elections board had "substantial legal interest" justifying intervention in federal action seeking to enjoin such hearing). The *Zignego* Plaintiffs are also harmed if Defendants fail to administer elections in a manner that is consistent with the law. *Crawford,* 554 U.S. at 196 (substantial interest also exists in the "orderly administration and accurate recordkeeping" for elections). And the Supreme Court has pointed out that while "the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id*.[7]

[7] As Wisconsin taxpayers, the *Zignego* Plaintiffs each have the right under state law to challenge the illegal expenditure of taxpayer money. *See S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177

Finally, discussing the "interest" authorizing intervention as a matter of right, the Seventh Circuit has indicated that where a law is "intended to protect" or "intended to . . . benefit[]" a class of individuals such that members of the class are the "statute's direct beneficiaries," a sufficient interest is present where a member of the class seeks to preserve the existing statutory scheme. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009). That is clearly the case here, where a primary purpose of both Section 6.50(3) and HAVA is to ensure that the votes cast by properly-registered individuals like the *Zignego* Plaintiffs are not diluted by illegal votes.

C. Disposition of This Action Risks Impairing the *Zignego* Plaintiffs' Interest.

"[D]isposi[tion] of the [present] action may as a practical matter impair or impede . . . [the *Zignego* Plaintiffs'] ability to protect [their] interest[s]." *See* Fed R. Civ. P. 24(a)(2). "The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding," *Am. Nat. Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 147-48 (7th Cir. 1989) (quoting *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982)) (internal quotation marks omitted), with "the possibility of foreclosure . . . measured by the standards of *stare decisis*." *Id.* at 148. At the same time, "*stare decisis* effects may satisfy the standard of Rule 24(a)(2) only when the putative intervenor's position so depends on facts specific to the case at hand that participation as *amicus curiae* is inadequate to convey essential arguments to the tribunal." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988).

(1961)(taxpayers have standing to challenge any unlawful action by government entity that results in expenditure of public funds). Here, WEC spent substantial staff time and resources to develop the illegal policy that was adopted by the WEC Commissioners to replace the requirements of § 6.50(3). That can be seen by the amount of staff time needed to create the staff reports, memos, and training materials. *See, e.g.,* ECF Nos. 11-1, 11-2 and 11-4. The *Zignego* Plaintiffs have a clear legal right to challenge this illegal expenditure of taxpayer money. While taxpayer standing is not generally recognized in federal court, that is not the point here. The *Zignego* Plaintiffs have obtained relief under state law and to deprive them of that relief without the opportunity to be heard would itself be a due process violation. Moreover, state law also gives voters the same right to challenge unlawful election processes as federal courts have recognized.

Plaintiffs seek a declaration from this Court that deactivation by Defendants of ineligible voters before a second notice that is acceptable to Plaintiffs has been sent out will violate due process. Obviously, such a legal finding by this Court would torpedo the interest of the *Zignego* Plaintiffs in immediate deactivation of such voters – or at least deactivation before the next elections - as compelled by the Writ. *See Freedom From Religion Foundation v. Koskinen,* 298 F.R.D. 385, 386-87 (W.D. Wis. 2014)(intervention under Rule 24(a) appropriate where existing party "will advance legal arguments that if accepted would impair or impede the movants' interests"). Furthermore, in their unsuccessful effort to intervene in *Zignego*, Plaintiffs only mentioned in passing any due process issues relating to deactivation, stating that their "whole basis for seeking intervention is to attack the accuracy and reliability of information in the ERIC list." ECF Nos. 11-11:15-17, 11-7:25. Thus, denying the *Zignego* Plaintiffs' motion to intervene in this action will leave them unable to respond to Plaintiffs' constitutional assertions and to protect their interest in prompt performance of the Writ.

Finally, proceedings in this federal action will necessarily interfere with and likely delay the state court litigation. The *Zignego* Plaintiffs are interested in a prompt resolution of the issues surrounding Section 6.50(3) in light of the impending February primary and April general elections, which also favors allowing them to intervene and argue that the state litigation should go forward unimpeded. *See Northeast Ohio Coalition for the Homeless v. Blackwell,* 467 F.3d 999, 1008 (6th Cir. 2006)("the time-sensitive nature of a case may be a factor in [a court's] intervention analysis").

D. Neither Plaintiffs nor Defendants Will Adequately Represent the *Zignego* Plaintiffs' Interest.

Finally, a potential intervenor wishing to intervene as of right must "lack adequate representation of the [asserted] interest by the existing parties." *Nissei Sangyo*, 31 F.3d at 438.

"A party seeking intervention as of right must only make a showing that the representation 'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972)).

The state court proceedings have highlighted the divergent interests of the Plaintiffs and Defendants, on the one hand, and the *Zignego* Plaintiffs, on the other. Obviously, the *Zignego* Plaintiffs are not adequately represented by Plaintiffs, who seek to delay (or block entirely) compliance with the Writ by Defendants. *See Kasper,* 651 F. Supp. at 1313 (intervention allowed where "plaintiffs' principal interest is in ensuring that **no ineligible** voters are allowed to vote, while intervenors' principal interest is in ensuring that **all eligible** voters are allowed to vote")(emphasis original).

Similarly, the state court litigation that spawned this suit arose out of Defendants' refusal to comply with Section 6.50(3). Again, before the Writ issued, Defendants' position regarding the timing of deactivation was closer to that of Plaintiffs than of the *Zignego* Plaintiffs, and they continue to resist compliance through their appeal from, and request for a stay of, the Writ. Thus, it is entirely reasonable for the *Zignego* Plaintiffs to be concerned that in this action, Defendants will not vigorously or adequately protect their interest in the Writ.

Any presumption that Defendants adequately represent the interests of the *Zignego* Plaintiffs, *see One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394, 398 (W.D. Wis. 2015) (adequate representation presumed "when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors"), does not apply here, *see Menominee Indian Tribe of Wisconsin v. Thompson,* 164 F.R.D. 672, 676-77 (W.D. Wis. 1996) (presumption overcome where "government representative indicates a disinclination to represent

the particularized interests of a proposed intervenor" or "state's interest and that of proposed intervenor do not align exactly"). Notably, Defendants have said that they do not believe they are required to follow Section 6.50(3)'s requirements. *See, e.g.,* ECF No. 1-3 at 49-50 (Attorney for Defendants stating: "…At this point, the most important thing is that this statute, 6.50 sub 3, does not apply to the Wisconsin Elections Commission.") The very purpose of Section 6.50(3) was to balance the competing interests of voters who had moved and those who hadn't and, until the Writ was issued, Defendants threatened to upend that balance. *See Miller*, 348 F. Supp.2d at 918 n.3 (recognizing divergent interests between state election officials, who "seek an efficient and accurate electoral process revolving around Ohio election laws," and intervenors, who "are concerned primarily with maintaining a process by which to challenge the eligibility of registered voters prior to the election in order to prevent possible dilution of their own votes").

It is true that Defendants have an obligation to comply – if not an "interest" in compliance - with the Writ. They are challenging that obligation, however, and can hardly be counted on to vigorously defend it here.[8] It is beyond dispute that the *Zignego* Plaintiffs will "pursue their favored result with greater zeal than" Defendants, which favors intervention. *Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999)(allowing intervention by voters to defend against challenge to court-ordered voting plan).

II. ALTERNATIVELY, THE COURT SHOULD PERMIT INTERVENTION UNDER RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Assuming, *arguendo*, that the *Zignego* Plaintiffs are not entitled to intervene as of right, this Court should permit them to intervene under Rule 24(b), which states that "[o]n timely motion,

[8] Even as of the time of this brief – three weeks after the Writ first issued -- WEC has taken no action to comply with it. *See* "Statement regarding today's WEC meeting about the voter list case**,"** Wisconsin Election Comm'n (Dec. 30, 2019)(https://elections.wi.gov/index.php/node/6651).

the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). This brief has already discussed timeliness, prejudice, and delay, and none of these factors suggest that intervention is inappropriate.

Further, the arguments that the *Zignego* Plaintiffs will make regarding the content and timing of the notice to be given deactivated voters go to the heart of this action. And while Defendants' current position regarding the meaning of Section 6.50(3) is compelled by the Writ, they will presumably revert to their pre-Writ position if they are successful in the state appellate courts.

Among the wide variety of factors a court can consider under Rule 24(b) are "the needs of federal-state comity." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019). The *Zignego* Plaintiffs should be allowed to explain that resolution of this dispute properly belongs in state court, and that the Writ should not be subjected to collateral attack in this Court. "It is largely the responsibility of the states to set up and operate the machinery necessary for voting. Article I, section 4, clause 1, of the federal Constitution allows state legislatures to prescribe the 'Times, Places and Manner' of holding elections for U.S. senators and representatives." *Common Cause Indiana v. Lawson*, 937 F.3d 944, 747 (7th Cir. 2019); *see also Hoffman v. Maryland*, 928 F.2d 646, 649 (4th Cir. 1991)(removing ineligible voters from rolls furthers "important state interest" in "keeping accurate, reliable and up-to-date voter registration lists"); *Democratic Party of Virginia v Virginia State Bd. of Elections,* 2013 WL 5741486, at *1 ("There exists a valid state interest in preventing voter fraud, and '[i]t is well established that purge

statutes are a legitimate means by which the State can attempt to prevent voter fraud.'"). As the *Zignego* Plaintiffs will show if intervention is granted, Wisconsin has executed its constitutional responsibility through, *inter alia*, enactment of Section 6.50(3).

In determining whether to grant permissive intervention, this Court should also consider the symmetry that the *Zignego* Plaintiffs will bring to this case, which will contribute to the adversarial process and benefit the Court in its study of the issues. Again, only the *Zignego* Plaintiffs have consistently argued that deactivation must be immediate under Section 6.50(3), and none of the existing parties will be forced to respond to and develop this argument unless the *Zigenego* Plaintiffs are allowed to make it. Permitting intervention will ensure that the issues receive a fully adversarial presentation and analysis.

For these reasons, this Court should exercise its discretion to permit the *Zignego* Plaintiffs to intervene.[9]

CONCLUSION

Proposed Intervenor-Defendants the *Zignego* Plaintiffs request that this Court grant their motion to intervene, either by intervention as of right under Fed. R. Civ. P. 24(a)(2), or, in the alternative, by permissive intervention under Fed. R. Civ. P. 24(b).

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Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Proposed Intervenor-Defendants

/s/ signed electronicall by Richard M. Esenberg
Richard M. Esenberg, WI Bar No. 1005622 (cont'd)

[9] It has not been definitively established in this circuit whether Article III standing is generally required for permissive intervention. *See Bond*, 585 F.3d at 1068-1070. However, given that Article III standing "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision," *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013), even if standing is a prerequisite here, the *Zignego* Plaintiffs meet it for the reasons discussed *supra*. *See also Transamerica*, 125 F.3d at 396 n.4 (interest required to intervene as of right "satisf[ies] the Article III standing requirement").

414-727-6367; rick@will-law.org
Brian McGrath, WI Bar No. 1016840
414-727-7412; brian@will-law.org
Lucas Vebber, WI Bar No. 1067543
414-727-7415; lucas@will-law.org
Anthony LoCoco, WI Bar No. 1101773
414-727-7419; alococo@will-law.org
Wisconsin Institute for Law & Liberty
330 East Kilbourn Ave., Suite 725
Milwaukee, WI 53202
414-727-9455; FAX: 414-727-6385