

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 2

DANE COUNTY

J.B. VAN HOLLEN,

Plaintiff,

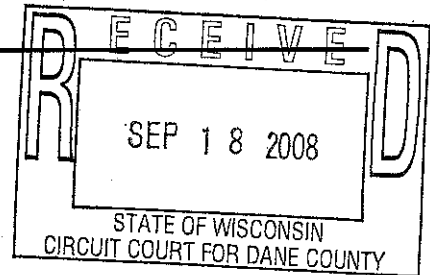
vs.

Case No. 08CV4085

Petition for Writ of Mandamus 30952

GOVERNMENT ACCOUNTABILITY  
BOARD ET AL.,

Defendant.



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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

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Madison Teachers, Inc., American Federation of Teachers-Wisconsin, and Firefighters Local 311, by their attorneys, Garvey McNeil & McGillivray, S.C., respectfully submit this memorandum in support of their motion to intervene as of right pursuant to Wis. Stat. § 809.09(1), or alternatively, to seek permissive intervention under Wis. Stat. § 809.09(2).

FACTS

Acting in his official capacity as Attorney General, John B. Van Hollen has filed suit against a state agency, the Government Accountability Board and individuals on, or employed by, that Board (collectively "GAB" or "Board"). (Compl., 9/10/08.) The suit is purportedly to force the Board to "take all steps necessary to insure that, prior to the November 4, 2008, the statewide, computerized voter registration list is brought into compliance with [the Help America Vote Act] and state law." (Compl. ¶ 46.) Mr. Van Hollen relies on an imaginative

interpretation of the Help America Vote Act and his own legal authority, but provides few specifics on what must be done to bring the allegedly deficient voter list into compliance. One concrete request is that “for individuals who registered [to vote] on or after January 1, 2006, and prior to August 6, 2008, their eligibility to vote must be verified by the same steps as applied to individuals registering on or after August 6, 2008, including HAVA checks where applicable.” (Compl. ¶ 46.) The term “HAVA check” is not defined in the Complaint but appears to principally refer to the practice of comparing the SVRS list with other statewide databases, such as drivers license records maintained by the Wisconsin Department of Transportation.

The GAB has concluded that comparing the SVRS list with other statewide databases will identify approximately twenty-two percent (22%) of all voters due to data entry problems. (Compl. ¶ 35.) Yet nobody, including Mr. Van Hollen, thinks that 22% of voters on the SVRS are ineligible to vote. In fact, Mr. Van Hollen admits that “not all of the discrepancies will lead to a determination that a voter is ineligible.” (Compl. ¶ 35.) Nevertheless, Mr. Van Hollen does not state what should occur when a discrepancy appears between the SVRS list and other state databases. Despite this admission that a “HAVA check” does not identify ineligible voters, Mr. Van Hollen nevertheless suggests that even eligible voters identified in a “HAVA check,” due to insignificant differences between databases, such as punctuation or capitalizations, must “verify certain information establishing a right to vote or, in some cases, cast a provisional ballot under state law.” (Compl. ¶ 44 (citing 42 U.S.C.

§ 15483(b)(2)(B), Wis. Stat. § 6.32<sup>1</sup>.) Thus, from the face of the Complaint, Mr. Van Hollen seeks to impose burdens on eligible voters before they are allowed to exercise their constitutional right to vote. While terming this a “minor inconvenience,” he admits that he seeks an order that will present a burden to voters. Whether such burden takes the form of presenting a photo identification at the polls, confirming registration at the clerk’s office the day after the election, casting a provisional ballot, or any number of other measures, the result is potential disenfranchisement of thousands of voters. Tellingly, Mr. Van Hollen’s attempt to burden eligible voters poses the most significant risk to voters who do not have photo identification, have recently moved, or vote in the most populated areas of the state.

Movants Madison Teachers, Inc., American Federation of Teachers-Wisconsin, and Firefighters Local 311 (collectively, “Movants”) have good cause to believe some of their members will be burdened, and likely disenfranchised as a result of Mr. Van Hollen’s lawsuit, if it is successful. Collectively, Movants are composed of over 20,000 teachers, firefighters, and other educational professionals and emergency personnel. Their members provide some of the most essential services to citizens of Wisconsin. On information and belief, some of their members have registered to vote in Mr. Van Hollen’s target period of January 1, 2006, to August 6, 2008, and would need to undergo the proposed “clarification/verification” of their registration information before their votes were counted. In other words, if Mr. Van Hollen’s lawsuit succeeds, members of MTL, AFT-W, and Firefighters could be forced through needless obstacles, or deprived of

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<sup>1</sup> Wis. Stat. § 6.32 says nothing about provisional balloting.

their right to vote. Additionally, the specter of poll workers denying voters their right to vote and requiring thousands of eligible voters through the additional steps of provisional balloting threatens to create confusion, long lines, and frustration at the polls for all voters.

Specifically, Madison Teachers, Incorporated (“MTI”) is a union representing teachers and other education professionals in and around Madison, Wisconsin. (Matthews Aff., ¶ 3.) Its mission includes promoting the interests of the teaching profession and other represented groups and encouraging its members to exercise their responsibilities as citizens. (*Id.* ¶ 4.) It has approximately 5,500 members, and encourages its members to vote in state and federal elections. (*Id.* ¶¶ 3, 5.) The vast majority of its members do. (*Id.* ¶ 5.)

American Federation of Teachers-Wisconsin (“AFT-W”) is a labor organization representing approximately 17,000 public teachers and other professionals in the State of Wisconsin. (Kennedy Aff., ¶ 3.) It is the Wisconsin branch of the American Federation of Teachers, which has endorsed Democratic Presidential candidate Barack Obama. (*Id.* ¶ 4.) Its mission includes “improving the lives of our members and their families . . . to strengthen the institutions in which we work . . . and to promote democracy, human rights and freedom in our Union, in our nation and throughout the world.” (*Id.* ¶ 5.) AFT-WI encourages its members to vote in state and federal elections, and the majority its members do. (*Id.* ¶ 6.)

Firefighters Local 311 (“Firefighters”) represents firefighters and other emergency professionals in and around the Madison area, amounting to over 5,000 individuals. (Conway Aff., ¶ 3.) Its mission includes promoting health and safety

“in our dangerous workplace and in our community,” maintaining and strengthening disability and pension laws for personal and dependent coverage, and valuing apprenticeship training and professional standards. (*Id.* ¶ 4.) Firefighters encourages its members to vote in state and federal elections, and the majority of its members do. (*Id.* ¶ 5.)

Movants should be permitted to intervene in Mr. Van Hollen’s suit against the GAB for the reasons set forth below.

### ARGUMENT

A court may grant a motion to intervene under Wis. Stat. § 803.09(1) when:

- a. The movant’s application is timely;
- b. The movant claims an interest relating to the property or transaction which is the subject of the action;
- c. 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; and
- d. The movant’s interest is not adequately represented by the existing parties.

*Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 296 Wis. 2d 337, 723 N.W.2d 131 (Ct. App. 2006). Movants show all four factors are satisfied and their motion should be granted.

First, the present motion is timely. Mr. Van Hollen’s complaint was filed one week ago (Compl., 9/10/08) and Defendants Government Accountability et al. (collectively, “GAB”) have not filed an answer. Because the litigation is still in its very early stages, the first *Olivarez* factor is satisfied.

Second, Movants claim a direct interest in the rights and issues which are the subject of the present action. This case concerns and affects the right to vote, and

Movants represent many individuals possessing the right to vote. Movants have a direct interest in protecting their members' right to vote, free of the unnecessary and potentially disenfranchising burdens Plaintiff seeks to impose. Therefore, Movants meet the second *Olivarez* factor.

Third, Movants are so situated that the disposition of the present action may impair or impede their ability to protect their interests. The right to vote is one of the most fundamental rights afforded citizens in a democracy. This right is guaranteed by the Wisconsin Constitution art. III, § 1, and by the U.S. Constitution, art. I *et seq.* As described above, Mr. Van Hollen's lawsuit, if successful, will deprive and/or burden Movants' members' right to vote, or make it unduly difficult to exercise this precious right. Movants thus satisfy the third *Olivarez* factor.

Fourth, Movants' interests are not adequately represented by the GAB. To satisfy this factor, Movants need only show the GAB's representation of their interests "may be" inadequate and "the burden of making that showing should be treated as minimal." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747 (Ct. App. 1999). GAB and individually-named defendants are not named as *voters*. Rather, they are named as a state agency and state actors with their own agendas and interests. Their interests are separate from Movants' acute interest in protecting their members' right to vote and participate in democracy without unnecessary hindrance. The GAB could decide to resolve this litigation in any number of ways that would reduce the burdens on the GAB, and its staff, which would result in the same or greater burdens and risks of disenfranchisement of Movants' members.

Because their specific interests potentially diverge, Movants' interests in challenging Mr. Van Hollen's suit will not be adequately represented by the GAB.

Movants are entitled, under Wis. Stat. § 803.09(1), to intervene in this case as a matter of right.

Alternatively, Movants satisfy the requirements for permissive intervention under Wis. Stat. § 803.09(2) and should be allowed to participate on that basis as well.

A party may be granted permissive intervention if the movant's claim has a question of law or fact in common and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Wis. Stat. § 803.09(2).

Movants' claim clearly has questions of law and fact in common with the GAB's. The GAB has not filed an answer to the Complaint, but it is expected from public statements and prior decisions of the GAB that they will defend based on arguments that Plaintiff does not have legal authority to bring this case and that this case is based on an erroneous interpretation of the applicable substantive law.

Movants intend to participate based, in part, on similar arguments of law.

Additionally, it is reasonably expected that both the GAB and Movants will defend on the same factual issues: that Plaintiff has not and cannot show that any ineligible voters will vote as a result of any alleged failure to review voter lists on the timeline that Plaintiff would prefer.

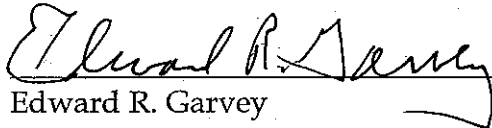
Movants' intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. The lawsuit was just recently filed and the GAB has yet to file an Answer. This motion is filed before the first status conference and

before there is any case management order in this case. Movants' participation will not unreasonably interfere with any party's rights to litigate this case, discover facts and present legal argument to the Court.

Accordingly, if the Court determines Movants are not entitled to intervene as of right under Wis. Stat. § 803.09(1), Movants should be permitted to intervene in this action under Wis. Stat. § 803.09(2).

Dated this 18th day of September, 2008.

Garvey, McNeil & McGillivray, S.C.,  
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