STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 2

J.B. VAN HOLLEN,
In his official capacity as
Attorney General of the State of Wisconsin,

Plaintiff,

v.

Case No. 08-CV-004085

GOVERNMENT ACCOUNTABILITY BOARD, THOMAS CANE, GERALD NICHOL, MICHAEL BRENNAN, WILLIAM EICH, VICTOR MANIAN, GORDON MYSE, KEVIN J. KENNEDY and NATHANIEL E. ROBINSON,

Judge: Maryann J. Sumi

Defendants.

BRIEF IN SUPPORT OF THE REPUBLICAN PARTY OF WISCONSIN'S MOTION TO INTERVENE

The issue before the Court is not "if' Wisconsin's voter list must be verified as accurate and corrected by comparing it with Department of Transportation and Social Security records – what is commonly referred to as the "HAVA check." The only question is "when." To that end, the Government Accountability Board ("GAB") has never disputed that, beginning January 1, 2006, the State of Wisconsin had a legal, binding duty under HAVA to coordinate the new Statewide Voter Registration System ("SVRS") with the other databases. Nor has anyone credibly suggested that the verification of legitimate, non-fraudulent voter registrations cannot be run before the election. Rather, GAB's concern is that, given limited resources, the focus must be elsewhere in the voting process. Resource allocation cannot be a basis for violating the law. The integrity of the November election is at stake.

Though the future may be unknown, there are a number of virtual certainties about the November election. Key legislative races will be decided by a very few votes. In the most recent Presidential election here in Wisconsin, the two candidates were separated by the smallest percentage in the country, and recent events suggest a similarly close election in 2008. If the State of Wisconsin generates a list of non-matches by the required HAVA check before the election, the fairness and integrity of that election is assured. If the State generates that same list after the election, a chaos not unlike Florida's failure to address "hanging chads" and voting machine issues before election day is a virtual certainty.

If the State continues on its present course, and it has a bit of "luck," the chaos and litigation of post-election voter challenges will be limited to legislative races. Perhaps it will avoid the worldwide derision that would ensue if Wisconsin's votes tip the Presidency in a particular direction. Worse even than such risk of changing an election's outcome, the post-election HAVA check will provide apparent proof that the election itself was deeply flawed, and it will be too late to know what votes were legal and what votes were not.

It is unfortunate that agencies of the State of Wisconsin chose not to timely comply with the law, though they have had six (6) years to comply. (Query what a court would do to a party who could not meet a two-year deadline (2002-2004), received an extension of two years (2004-2006) and then failed to comply during the extension. Then, having failed to comply to original and extended deadlines, that party openly defied the court for several more years (2006-August 2008) by failing to comply. Then, at the last possible moment, the party asks the court to ignore those years of delay, multiple extensions and open defiance, because, after-all, it will now require some hard work, maybe even overtime, that the party says will make it too expensive to comply. No court would likely allow such behavior or consider such excuses; yet, that is what

the GAB now seeks from this Court.) Whatever difficulties there are now, they are difficulties caused by the very party (GAB) that seeks to have this Court now hold that it need not follow the law. Surely, GAB's self-made failures cannot now exonerate it from its obligations.

The required HAVA Checks can be completed before the election, and all steps must be taken to address the non-matches generated by the HAVA Check. To pursue any other course invites a disaster that will affect the integrity of the election itself.

FACTUAL BASIS FOR INTERVENTION

The Republican Party of Wisconsin ("RPW") is a recognized political party (Wis. Stat. § 5.01(16m)). It qualifies for a separate primary ballot (Wis. Stat. § 5.62(1)) and straight party voting (Wis. Stat. § 5.64). RPW candidates for state and federal offices will be described as "Republicans" on the November 4, 2008, ballot. Accordingly, the RPW has a direct interest in this matter to protect all candidates for elective office including particularly those who are associated with the RPW.

Of course, the RPW believes that the votes of all eligible voters must be counted and that it must be as difficult as practicable for ineligible voters to cheat. The ease of voting in Wisconsin is a hallmark of its elections, which include minimal identification requirements and even same day registration. It should be easy to vote, and it should be very hard to cheat. Compliance with the HAVA mandates and other Wisconsin election integrity laws is essential to the integrity of the election and is essential to RPW's members and Republican candidates.

It is critical to the RPW that there be no disenfranchisement. When voters who are not legally qualified to cast votes nonetheless find a way to avoid the system meant to assure the election's integrity, they, in effect, cancel the legitimate votes of others. Among those voters whose votes may be rendered void are RPW voters, and the candidates affected may be

Republican candidates. From this perspective, disenfranchisement is especially pernicious because not only does it cancel a legitimate vote, it leads to fundamental questions about the integrity of our elections.

The RPW now seeks to intervene as a matter or right under Wis. Stat. § 803.09(1), or, in the alternative, seeks permission to intervene pursuant to Wis. Stat. § 803.09(2). The basis for this motion is to advance the goals of the RPW by protecting the fundamental rights and interests of its candidates to have the votes of all eligible voters counted while assuring that ineligible voters are not permitted to cast votes. RPW will seek here to protect the fundamental rights of its members and the public.

ARGUMENT

RPW's motion to intervene under Wis. Stat. § 803.09(1) should be granted as a matter of right because of the direct impact this case may have on its candidates and those associated with RPW. In the alternative, the court should grant permissive intervention under Wis. Stat. § 803.09(2) because of the direct interest of RPW's candidates, members, and RPW voters.

I. RPW is Entitled to Intervention as of Right Under Wis. Stat. § 803.09(1).

Wisconsin Stat. § 803.09(1) provides:

> Upon 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.

Courts applying Wis. Stat. § 803.09(1) must "strike a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing persons to join a lawsuit in the interest of the speedy and economical resolution of controversies. . . ."

Helgeland v. Wis. Municipalities, 2008 WI 9, ¶44, 307 Wis. 2d 1, 745 N.W.2d 1. Consistent with these conflicting interests, the Wisconsin Supreme Court has recognized four requirements for intervention as of right under Wis. Stat. § 803.09(1):

(1) that the movant's motion to intervene is timely;

(2) that the movant claims an interest sufficiently related to the subject of the action;

(3) that disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and

(4) that the existing parties do not adequately represent the movant's interest.

Id., ¶38 (footnote omitted).

Applying these requirements for mandatory intervention, RPW should be made a party Plaintiff in this case.

A. The Motion is Timely.

"The critical factor is whether in view of all the circumstances the proposed intervenor acted promptly." *State ex rel. Bilder v. Tw'p of Delavan,* 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). There is no question that RPW's motion is timely. This case was commenced on September 10, 2008, and has not progressed further.

B. RPW Has a Direct Interest Relating to the Statutory Provisions at Issue.

RPW's mission, candidates, members, and those voters who wish to associate themselves with the RPW have a sufficient interest in this case to intervene because this case directly concerns the right to vote for RPW candidates.

C. Disposition of the Case May, as a Practical Matter, Impede RPW's Ability to Protect its Interests.

"'The interest which entitles one to intervene in a suit between other parties must be an interest of such direct and immediate character that the intervenor will either gain or lose by the

direct options of the judgment.'" *City of Madison v. WERC,* 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94 (2000) (*quoting Lodge 78, Int'l Ass'n of Machinists v. Nickel,* 20 Wis. 2d 42, 46, 121 N.W.2d 297 (1963)).

The decision in this case may directly impair RPW's ability to advance its mission and impede the rights of its members and RPW voters. If the Court reaches the substantive issues and determines that the position of the GAB is correct, then the voting rights of eligible voters who would vote for RPW candidates would be impaired. If RPW is not permitted to intervene, it will have no say in that determination.

D. The Attorney General Does Not Adequately Represent the Interests of RPW.

Finally, the Court must determine whether the existing parties adequately represent RPW's interests. The showing required for proving inadequate representation "should be treated as minimal." *Helgeland*, 307 Wis. 2d 1, ¶85 (citation and internal quotation marks omitted). "Indeed, this requirement is blended and balanced with the other requirements." *Id.*, ¶86.

The Attorney General appears to be seeking relief primarily directed at Wisconsin's local election officials, albeit through GAB mandate. The RPW believes this proposed compliance with the law is not the only manner to bring the state into HAVA compliance. The RPW believes that the GAB or this Court by its equitable powers could construct and implement a much more efficient approach that would: a.) complete the HAVA checks at the State level; b.) identify on the voter lists those individuals who may be ineligible, and c.) allow or require the clerks to request appropriate identification on election day or otherwise address the matter in advance of the election, as they may choose. The ultimate issue before the Court is not the HAVA check – a process that surely can be completed by merely ordering the State to complete it – it is the need for appropriate identification of the voter at the polling place. (GAB's own

professional staff, in fact, recommended this very solution in a memorandum of July 16, 2008.) The Office of the Attorney General does not adequately represent the interests of the RPW in that it has not addressed the alternative remedies available to comply with HAVA. Straightforward solutions are available, and RPW will work with the Court and the parties to propose, consider, and implement those solutions.

Accordingly, if the RPW is denied the right to intervene, its rights and the rights of its candidates, its members, and voters will be adversely affected.

II. If Mandatory Intervention is Not Available, the Court Should Exercise Its Discretion to Allow Permissive Intervention.

Wisconsin Stat. § 803.09(2) allows the court to grant 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.

"While intervention as a matter of right requires a person to be necessary to the adjudication of the action, permissive intervention requires a person to be merely a proper party." *City of Madison v. WERC,* 234 Wis. 2d at 557 n.11 (citing *White House Milk v. Thomson*, 275 Wis. 2d 243, 247, 81 N.W.2d 725 (1959)). It is within this Court's discretion to decide whether a party may permissively intervene. *Id.* In exercising its discretion to allow a permissive intervention, the Court is also to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Wis. Stat. § 809.03(2); *Armada Broadcasting,* 183 Wis. 2d at 471. Given the early stage of this lawsuit, there is no danger of undue delay or prejudice; therefore, permissive intervention of RPW is appropriate. It is critical that this matter be resolved as soon as possible, if not immediately, and RPW will comply with that schedule.

Election matters by their nature require resolution within days, and RPW and other political parties have often complied with such schedules.

CONCLUSION

For the reasons stated above, the RPW is entitled to intervene as a matter of right under Wis. Stat. § 803.09(1) to protect its interests, the interests of its candidates, members, and the interests of voters who wish to associate themselves with the RPW. In the alternative, the RPW is entitled to permissive intervention under Wis. Stat. § 803.09(2) to ensure that all proper parties are before the Court.

RPW respectfully requests it be allowed to intervene as a party Plaintiff, or in such other capacity as this Court deems appropriate.

Dated at Madison, Wisconsin, this 22nd day of September, 2008.

Respectfully submitted,

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