STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

SARAH STODDARD and ELECTION INTEGRITY FUND,

Plaintiffs,

v.

Case No. 20-014604-cz
Hon. Timothy M. Kenny, Chief Judge

CITY ELECTION COMMISSION of the City of Detroit, JANICE WINFREY, in her official capacity as Detroit City Clerk and chairperson of the City Election Commission, and WAYNE COUNTY BOARD OF CANVASSERS,

Defendants.

v.

DNC,

[Proposed] Intervenor Defendant.
______________________________________/

RETRIEVED FROM DEMOCRACYDOCKET.COM

Edward D. Greim (MO #54034)
GRAVES GARRETT, LLC
Attorney for Plaintiffs
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
(816) 256-3181

Ian A. Northon (P65082)
RHOADES MCKEE PC
Attorney for Plaintiffs
55 Campau Ave NW #300
Grand Rapids, MI 49503
(616) 233-5169

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendants
P.O. Box 30736
Lansing, MI 48909
(517) 335-7659

Marc E. Elias (DC #442007)*
PERKINS COIE LLP
Attorneys for Proposed Intervenor
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

Kevin J. Hamilton (WA # 15648)*
PERKINS COIE LLP
Attorney for Proposed Intervenor
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
(206) 359-8000

Scott R. Eldridge (P66452)
MILLER CANFIELD
Attorney for Proposed Intervenors
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 483-4918

Mary Ellen Gurewitz (P25724)
CUMMINGS & CUMMINGS

**Pro hac vice motion forthcoming*

Document received by the MI Wayne 3rd Circuit Court.

Attorney for Proposed Intervenors
423 N Main St Ste 200
Royal Oak, MI 48067-1884
(248) 733-3405

RETRIEVED FROM DEMOCRACYDOCKET.COM

Document received by the MI Wayne 3rd Circuit Court.

BRIEF IN SUPPORT OF MOTION OF DNC
TO INTERVENE AS DEFENDANT

INTRODUCTION

DNC moves to intervene as a defendant in this lawsuit filed by Plaintiffs Sarah Stoddard and Election Integrity Fund. Through this action, Plaintiffs baselessly seek to disrupt the lawful counting of ballots in Detroit, threatening DNC's distinct and protectable legal interests. Any interference with or disruption of the lawful tabulation process interferes with DNC's ability to ensure the electoral success of its candidates and impairs the constitutional right to vote of its members. DNC's immediate intervention to protect those interests is warranted.

BACKGROUND

RETRIEVED FROM DEMOCRACYDOCKET.COM

DNC is a national political party committee as defined in 52 U.S.C. § 30101, and intervenes on its own behalf and on behalf of its member candidates and voters. Its mission is to elect Democratic Party candidates to elected positions across the country, including in Michigan, up and down the ticket. DNC represents a diverse group of Democrats, including elected officials, candidates for elected office, state committee members, advisory caucuses, affiliate groups, grassroots activists, and voters. The requested relief threatens to deprive individual members of the right to vote and to have their votes counted; threatens the electoral prospects of DNC's candidates, whose supporters will face greater obstacles having their votes counted; and makes it more difficult for DNC and its members, candidates, and voters to associate to effectively further their shared political purposes.

ARGUMENT

DNC seeks to intervene in this action under MCR 2.209(A) or, alternatively, under MCR 2.209(B). Those rules state, in relevant part:

> (A) **Intervention of Right.** On timely application a person has a right to intervene in an action . . . (3) when the applicant claims an interest relating to the property or

Document received by the MI Wayne 3rd Circuit Court.

> transaction which is the subject of the action and is so situated that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless applicant's interest is adequately represented by existing parties.
>
> (B) **Permissive Intervention.** On timely application a person may intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

"The rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *Neal v Neal*, 219 Mich App 490, 492 (1996); *State Treasurer v Bences*, 318 Mich App 146, 150 (2016). Because DNC's participation is necessary for a full and fair adjudication and resolution of this case, the Court should allow it to intervene as a defendant.

RETRIEVED FROM DEMOCRACYDOCKET.COM

A. DNC should be granted intervention as a matter of right.

"Review of MCR 2.209(A)(3) reveals that the plainly expressed language promulgated by the Supreme Court provides that three elements are required to intervene by right: timely application, a showing that the representation of the applicant's interests by existing parties is or may be inadequate, and a determination whether disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect his interests." *Chvala v Blackmer*, unpublished opinion of the Court of Appeals, issued January 16, 2001 (Docket No. 221317), 2001 WL 789526, p *2, citing *Oliver v State Police Dep't*, 160 Mich App 107, 115 (1987).

1. This motion is timely.

Michigan Courts have not defined any particular factors to analyze the timeliness of an intervention motion. The Michigan Court of Appeals has held that a motion to intervene was timely when filed "before any proceedings or discovery had been taken." *Karrip v Twp of Cannon*, 115 Mich App 726, 731 (1982). Nevertheless, because MCR 2.209 is similar to Federal Rule of Civil Procedure 24, it is proper to look to the federal courts for guidance. *D'Agostini v Roseville*, 396

Document received by the MI Wayne 3rd Circuit Court.

Mich 185, 188 (1976); *Smith v Iosco Co Bd of Commr's*, unpublished opinion of the Court of Appeals, issued June 18, 1999 (Docket No 209634), 1999 WL 33441255, p *2. The Sixth Circuit weighs the following five factors in determining whether an intervention is timely:

> (1) the stage of the proceedings;
>
> (2) the purpose of the intervention;
>
> (3) the length of time between when the proposed intervenor knew (or should have known) about his interest and the motion;
>
> (4) the prejudice to the original parties by any delay; and
>
> (5) any unusual circumstances militating in favor of or against intervention.

Jansen v Cincinnati, 904 F2d 336, 340 (CA 6, 1990).

RETRIEVED FROM DEMOCRACYDOCKET.COM

These proceedings have just begun. Defendants have not even filed their answer. No development or discovery has taken place. DNC is therefore positioned to participate fully throughout the entire case. Moreover, as discussed throughout this motion, DNC has a compelling purpose in ensuring vigorous litigation of the disputed issues. And DNC has filed as promptly as possible upon learning about this action; it has not delayed or adopted a wait-and-see approach. Because DNC is requesting permission to participate from the very beginning, there is no possible delay or prejudice. DNC will, of course, adhere to any scheduling order or briefing schedule issued by the Court. Thus, no party can seriously contest this motion's timeliness.

2. DNC has sufficient interests that may be impaired by the disposition of this case.

"The second element required by the court rule is a showing that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." *Prestige Community Devs v Sumpter Twp*, unpublished opinion of the Court of Appeals, issued August, 26, 1997 (Docket No. 193390), 1997 WL 33344928, p *2. The requirement is not an onerous one. See

Document received by the MI Wayne 3rd Circuit Court.

Purnell v Akron, 925 F2d 941, 948 (CA 6, 1991) (holding applicant need not demonstrate "that impairment will inevitably ensue from an unfavorable disposition; the would-be intervenors need only show that the disposition may impair or impede their ability to protect their interest"). "[C]lose cases should be resolved in favor of recognizing an interest." *Grutter v Bollinger*, 188 F3d 394, 399 (CA 6, 1999) (interpreting analogous Federal Rule 24(a)).

Here, Plaintiffs seek to disrupt the tabulation of lawfully cast ballots and cast doubt on the legitimacy of the elections in Michigan, including of DNC's candidates. Courts have routinely concluded that such interference with a political party's electoral prospects constitutes a direct injury. See, e.g., *Tex Democratic Party v Benkiser*, 459 F3d 582, 586–87 (CA 5, 2006) (recognizing "harm to [] election prospects" constitutes "a concrete and particularized injury"); *Owen v Mulligan*, 640 F2d 1130, 1132 (CA 9, 1981) (holding "the potential loss of an election" is sufficient injury to confer Article III standing). Indeed, DNC has been granted intervention in several voting cases on these grounds. See, e.g., *Paher v Cegavske*, unpublished opinion of the United States District Court for the District of Nevada, issued April 28, 2020 (Case No. 3:20-cv-00243-MMD-WGC), 2020 WL 2042365, p *2 (granting DNC and other organizations intervention as of right where "Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates").

Moreover, the disruptive and potentially disenfranchising effects of Plaintiffs' action would require DNC to divert resources to safeguard the successful completion of canvassing in Detroit, thus implicating another of its protected interests. See, e.g., *Crawford v Marion Co Election Bd*, 472 F3d 949, 951 (CA 7, 2007) (concluding electoral change "injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to devote absent new law), aff'd, 553 US 181; 128 S Ct 1610; 170 L Ed 2d 574 (2008); *Democratic*

RETRIEVED FROM DEMOCRACYDOCKET.COM

Document received by the MI Wayne 3rd Circuit Court.

Nat'l Comm v Reagan, 329 F Supp 3d 824, 841 (D Ariz, 2018) (finding standing where law "require[d] Democratic organizations . . . to retool their [get-out-the-vote] strategies and divert [] resources"), rev'd on other grounds sub nom *Democratic Nat'l Comm v Hobbs*, 948 F3d 989 (CA 9, 2020) (en banc).

3. No current party adequately represents DNC's interests.

The final requirement for intervention under MCR 2.119(A)(3) is a "showing that the representation of the applicant's interests by existing parties is or may be inadequate." *Oliver*, 160 Mich App at 115. The burden of demonstrating inadequate representation is "minimal." *Karrip*, 115 Mich App at 731–732. The moving party need not "definitely establish[]" inadequate representation; mere concern suffices. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761–762 (2001). And where such "concern exists, the rules of intervention should be construed liberally in favor of intervention." *Id*. Put differently, MCR 2.209(A)(3) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *D'Agostini*, 396 Mich at 188–189, quoting *Trbovich v United Mine Workers*, 404 US 528, 538 n 10; 92 S Ct 630; 30 L Ed 2d 686 (1972).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Here, DNC cannot rely on any party to represent its interests. While Defendants have an undeniable interest in defending the actions of themselves and election officials, DNC has a different interest: protecting its voters from disenfranchisement, its candidates from threats by this baseless action, and its own resources from diversion as a result of Plaintiffs' meritless and disruptive challenge. Courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc v Norton*, 355 US App DC 268, 276; 322 F3d 728 (2003); accord *Citizens for Balanced Use v Mont Wilderness Ass'n*, 647 F3d 893, 899 (CA 9, 2011), quoting *WildEarth Guardians v US Forest Serv*, 573 F3d 992, 996 (CA 10, 2009) ("[T]he government's representation of the public interest may not be 'identical to

Document received by the MI Wayne 3rd Circuit Court.

the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'"). That is the case here. DNC has specific interests and concerns—from ensuring its electoral prospects to preventing diversion of its limited organizational resources—that neither Defendants nor any other party in this lawsuit shares. See *Northeast Ohio Coalition for Homeless v Blackwell*, 467 F3d 999, 1008 (CA 6, 2006) (granting intervention in voting rights case where intervenors' interests might "potentially diverge").

B. Alternatively, DNC should be granted permissive intervention.

Even if DNC cannot intervene as a matter of right, it should be granted permissive intervention under MCR 2.209(B)(2). That rule provides for permissive intervention where a party timely files a motion and the party's "claim or defense and the main action have a question of law or fact in common." MCR 2.209(B)(2). "[T]he trial court has a great deal of discretion in granting or denying [permissive] intervention." *Mason v Scarpuzza*, 147 Mich App 180, 187 (1985); see also *City of Holland v Dep't of Natural Resources*, unpublished opinion of the Court of Appeals, issued March 1, 2012 (Docket No. 302031), 2012 WL 676356, p *3. In exercising its broad discretion under this Rule, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. MCR 2.209(B). Here, DNC's motion it timely, and it intends to oppose Plaintiffs' claims on both the law and the facts. Because DNC has an interest in expeditious resolution of this action and a timely completion of vote tabulation, its intervention will not lead to delay.

RETRIEVED FROM DEMOCRACYDOCKET.COM

CONCLUSION

For the foregoing reasons, DNC respectfully asks this Court to grant its motion to intervene.

Document received by the MI Wayne 3rd Circuit Court.

Respectfully submitted,

Dated: November 5, 2020

s/ *Scott R. Eldridge*

Scott R. Eldridge (P66452)
MILLER CANFIELD
Attorney for Proposed Intervenors
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
(517) 483-4918

Marc E. Elias (DC #442007)*
PERKINS COIE LLP
Attorneys for Proposed Intervenor
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
(202) 654-6200

Kevin J. Hamilton (WA # 15648)*
PERKINS COIE LLP
Attorney for Proposed Intervenor
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
(206) 359-8000

Mary Ellen Gurewitz (P25724)
CUMMINGS & CUMMINGS
Attorney for Proposed Intervenors
423 N Main St Ste 200
Royal Oak, MI 48067-1884
(248) 733-3405

**Pro hac vice motion forthcoming*

RETRIEVED FROM DEMOCRACYDOCKET.COM

Document received by the MI Wayne 3rd Circuit Court.

PROOF OF SERVICE

Scott Eldridge certifies that on the 5th day of November 2020, he served a copy of the above document in this matter on all counsel of record and parties *in pro per* via email.

s/ *DRAFT*
Scott Eldridge

RETRIEVED FROM DEMOCRACYDOCKET.COM

Document received by the MI Wayne 3rd Circuit Court.