

SUPREME COURT OF WISCONSIN

No. 2020AP1930-OA

WISCONSIN VOTERS ALLIANCE, *et al.*,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Respondents.

Original Action in the Wisconsin Supreme Court

**CORRECTED MOTION TO INTERVENE OF
PROPOSED RESPONDENT-INTERVENOR
DEMOCRATIC NATIONAL COMMITTEE**

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INTRODUCTION

The proposed Respondent-Intervenor, the Democratic National Committee (“DNC”), respectfully seeks leave to intervene in these proceedings to oppose the Emergency Petition for Original Action (“Petition”) filed by the Wisconsin Voters Alliance (“WVA”) and the individual Petitioners (collectively, “Petitioners”) pursuant to Wis. Stat. § 803.09(1)–(2); the DNC has conferred with Petitioners, who confirmed that they do not object to the DNC’s intervention. Simply put, Petitioners are trying to take away Wisconsin’s ten electoral votes that were won fairly and squarely by the DNC’s candidates for President and Vice President, Joseph R. Biden, Jr. and Kamala D. Harris. The DNC requests this Court to deny the Petition. If, on the other hand, this Court accepts this matter as an original action, the DNC asks to be permitted to participate fully in all subsequent proceedings in this Court. In compliance with Wis. Stat. § 803.09(3), the

DNC is filing with this motion its Opposition to the Emergency Petition for Original Action, which establishes that Petitioners fall far short of meeting the requirements for the Court to exercise its limited original jurisdiction.

Petitioners ask this Court for relief that no court in American history has ever granted—a declaratory judgment stating that the results of the presidential election are null and void and an injunction to prevent the certification of the election’s results “so that the state legislature can lawfully appoint the electors.” Pet. at 42. Petitioners are asking this Court to invalidate *every single vote* cast in the 2020 Presidential election in Wisconsin. Granting this relief would, in one fell swoop, silence the voices of more than 3.2 million Wisconsin voters who voted lawfully and in reliance on longstanding rules that have governed prior elections in the State.

Wisconsin law allows for intervention as of right and for permissive intervention under the broad discretion the Court has to allow intervention by parties with cognizable interests in a matter. Wis. Stat. § 803.09(1)–(2). It is hard to imagine a request for relief that could more directly and dramatically affect the DNC’s interests than Petitioners’ request to set aside the results of the election and thereby disenfranchise every single one of the DNC’s members, constituents, and supporters who voted for President in the recent election in Wisconsin. Intervention is necessary for the DNC to protect the most fundamental constitutional right of its members—the right to vote and to have their votes counted.

ARGUMENT

I. The proposed Respondent-Intervenor is entitled to intervene as a matter of right.

A party has the right to intervene under Wis. Stat. § 803.09(1) if four conditions are met: (1) the motion to

intervene is timely; (2) the movant claims an interest sufficiently related to the subject of the action; (3) 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 its interests; and (4) the movant's interests are not adequately represented by the existing parties. Wis. Stat. § 803.09(1); *see also Helgeland v. Wis. Muns.*, 2008 WI 9, ¶¶ 37–38, 307 Wis. 2d 1, 745 N.W.2d 1. The DNC easily meets each of these factors and is entitled to intervene as a matter of right.

A. The DNC's Motion to Intervene is timely.

First, the Motion to Intervene is timely. The DNC is seeking intervention at the earliest possible stage of this action—just three days after Petitioners filed their Petition and at the same time that Respondents are filing their responses to the Petition. Indeed, the question whether this

Court will even accept original jurisdiction has not even been decided.

Intervention by the DNC also will neither delay the resolution of this matter nor prejudice any party. There are no motions pending in the case and thus no plausible claim that intervention would cause any delay. Under these circumstances, the motion is timely. *See State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 550, 334 N.W. 2d 252 (1983) (“The critical factor is whether in view of all of the circumstances the proposed intervenor acted promptly.”); *City of Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531, 534 (7th Cir. 1987) (identifying “the length of time the intervenor knew or should have known of her or his interest in the case” as one factor to consider whether motion to intervene was timely (internal quotations omitted)).¹

¹ “Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the

B. The DNC has compelling interests at stake in this action.

The DNC clearly has compelling interests in the issues addressed in the Petition. There are no interests more fundamental than protection of the voting rights of the DNC's members and constituents and ensuring that the DNC's presidential and vice-presidential candidates—President-Elect Biden and Vice President-Elect Harris—are not stripped of their clear electoral victory in Wisconsin. *See Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.”); *cf. Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (Texas Democratic Party had direct standing based on “harm to its election prospects”). The DNC thus easily

federal rule provide guidance in interpreting and applying § 803.09(1).” *Helgeland*, 2009 WI 9, ¶ 37.

satisfies this Court’s “broader, pragmatic approach” to intervening as a matter of right, in which the interests test serves “primarily [as] a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Helgeland*, 2008 WI 9, ¶¶ 43–44 (quoting *Bilder*, 112 Wis. 2d at 548–49, 334 N.W. 2d at 252).

Courts have repeatedly granted motions to intervene in similar post-election contexts. *See, e.g.*, Order, *Stein v. Cortes*, No. 2:16-cv-06287 (E.D. Pa. Dec. 6, 2016), Doc. 22 (granting Trump Campaign’s motion to intervene in recount litigation); Order, *Donald J. Trump for President Inc. v. Boockvar*, No. 4:20-cv-02078 (M.D. Pa. Nov. 12, 2020), Doc. 72 (granting DNC’s motion to intervene in litigation seeking to block certification of presidential election in Pennsylvania). And, in analogous circumstances, courts have repeatedly held that when proposed relief carried with it the

prospect of disenfranchising the Democratic Party's members, the Democratic Party had a legally cognizable interest at stake. *See Donald J. Trump for President, Inc. v. Cegavkse*, No. 2:20-cv-1445, 2020 WL 5229116, at *1 (D. Nev. Aug. 21, 2020) (DNC allowed to intervene in challenge to voting laws); Order, *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 1171 C.D. 2020 (Pa. Nov. 19, 2020) (DNC participated as intervenor in case concerning validity of mail ballots); *see also, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (agreeing with Seventh Circuit that the Indiana Democratic Party had standing to challenge voter identification law that risked disenfranchising its members); *NEOCH v. Husted*, 696 F.3d 580, 585 (6th Cir. 2012) (Ohio Democratic Party allowed to intervene in case where challenged practice would lead to disenfranchisement of its voters).

The DNC and its candidates obviously will be directly injured if their victory is declared null and void. And the DNC's members and supporters in Wisconsin who voted for the Biden-Harris ticket—more than 1.6 million of them—will be disenfranchised if Petitioners have their way, even though these voters cast ballots in reliance on longstanding rules. Because the DNC's injury is direct and significant, the balance weighs strongly in favor of allowing it to intervene.

C. Denial of the Motion to Intervene would impair the DNC's ability to protect its interests.

Denial of the Motion to Intervene would interfere with the DNC's ability to protect its interests. With respect to this element of the test for intervention, as with others, this Court has emphasized “a pragmatic approach” and a “focus on the facts of each case and the policies underlying the intervention statute.” *Helgeland*, 2008 WI 9, ¶ 79 (citing Moore's Fed. Prac. § 24.03[3][a], at 24–42). The Court has identified two

potential factors to weigh in considering this prong: (1) “the extent to which an adverse holding in the action would apply to the movant’s particular circumstances”; and (2) “the extent to which the action into which the movant seeks to intervene will result in a novel holding of law.” *Id.* ¶¶ 80–81. Intervention is more warranted when a novel holding is at stake because its *stare decisis* effect is “more significant when a court decides a question of first impression.” *Id.* ¶ 81.

Here, an adverse ruling would severely impair the DNC’s ability to protect its interests. This is especially true where, as here, Petitioners are asking this Court to nullify the 2020 election and invalidate millions of already-cast ballots. Pet. at 42. It is a gross understatement to call this extraordinary remedy “novel.” It would be unthinkable. As one federal judge summarized just days ago in rejecting a similar outlandish request for relief, “[t]his Court has been unable to find any case in which a plaintiff has sought such a

drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated.” *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020). The *stare decisis* effect of granting Petitioners’ request for relief would have extraordinary ramifications for the DNC and all other political parties, elections officials, and candidates for political office.

When a proposed intervenor has a protectible interests in the outcome of litigation, courts have “little difficulty concluding” that its interests will be impaired. *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011). Intervention is especially warranted if the proposed remedy threatens to harm intervenors. *See, e.g., Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (granting intervention when proposed intervenors “would be directly rather than remotely harmed by the

invalidation” of challenged statute). Courts routinely allow political parties to intervene in such circumstances. *See, e.g.*, Text Order, *Parnell v. Allegheny Bd. of Elections*, No. 2:20-cv-01570 (W.D. Pa. Oct. 22, 2020), Doc. 34 (granting intervention to Democratic Congressional Campaign Committee (DCCC) in lawsuit regarding processing of ballots); *Paher v. Cegavske*, No. 3:20-cv-00243, 2020 WL 2042365, at *4 (D. Nev. Apr. 28, 2020) (granting DNC intervention in election case brought by conservative interest group); *Donald J. Trump for President, Inc. v. Murphy*, No. 3:20-cv-10753, 2020 WL 5229209, at *1 (D.N.J. Sept. 1, 2020) (granting DCCC intervention in lawsuit by Republican candidate and party entities); *Issa v. Newsom*, No. 2:20-cv-1044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting DCCC and California Democratic Party intervention in lawsuit by Republican congressional candidate); Order, *Donald J. Trump for President v. Bullock*,

No. 6:20-cv-00066 (D. Mont. Sept. 8, 2020), Doc. 35 (granting DCCC, DSCC, and Montana Democratic Party intervention in lawsuit by four Republican party entities).²

D. The DNC’s interests are not adequately represented by the current parties.

Finally, the DNC’s interests are not adequately represented by the existing parties. The burden to satisfy this factor is “minimal.” *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). When

² Indeed, courts have allowed political parties and candidates to intervene on behalf of voters. *See Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (“political parties and candidates have standing to represent the rights of voters”); *see also Penn. Psychiatric Society v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 n.10 (3d Cir. 2002) (“candidates for public office may be able to assert the rights of voters”); *Walgren v. Bd. of Selectmen of Amherst*, 519 F.2d 1364, 1365 n.1 (1st Cir. 1975) (same); *Northampton Cnty. Democratic Party v. Hanover Twp.*, No. CIV.A.04-CV-00643, 2004 WL 887386, at *8 (E.D. Pa. Apr. 26, 2004) (Democratic Party had third-party standing to represent interests of the general electorate). Here, the requested remedy and harm is extreme—Petitioners seek relief that would not just burden the DNC’s voters, but would completely disenfranchise *every one of them* who cast a ballot for president.

there is a realistic possibility that the existing parties' representation of the proposed intervenor's interests will be inadequate, "all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf." 1 Jean W. Di Motto, *Wisconsin Civil Procedure Before Trial* § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

The named government Respondents do not adequately represent the DNC's interests. The DNC has "special, personal [and] unique interest[s]" that are distinct from the Respondents' interests. *Helgeland*, 2008 WI 9, ¶ 117. This Court has recognized that government entities cannot be expected to litigate "with the vehemence of someone who is directly affected" by the litigation's outcome. *Armada Broad.*, 183 Wis. 2d at 476. As described, the DNC faces severe injuries in the form of massive disenfranchisement of its members and constituents and

having its presidential and vice presidential candidates stripped of the ten electoral votes to which they are entitled. By contrast, the Respondents' interests in this litigation are defined by their statutory duties to conduct elections and their responsibilities to their constituents as a whole. *See, e.g., id.*; *see also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001) (“[T]he government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [political candidate] merely because both entities occupy the same posture in the litigation.”); *Clark v. Putnam Cnty.*, 168 F.3d 458, 461–62 (11th Cir. 1999) (Black voters granted intervention in challenge to court-ordered voting plan defended by county commissioners because commissioners represented all county citizens, including people adverse to proposed intervenors’ interests); *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. DOI*, 100 F.3d 837, 845 (10th Cir.

1996) (government defendants necessarily represent “the public interest” rather than the proposed intervenors’ “particular interest[s]” in protecting their resources and the rights of their candidates and voters.).

Because government entities, on the one hand, and political parties and candidates, on the other, have fundamentally different interests and objectives, courts routinely permit political parties to intervene in actions where election officials are named as defendants. *See, e.g., Issa*, 2020 WL 3074351, at *3 (“While Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the proposed Respondent-Intervenor is concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election

procedures.”); *Murphy*, 2020 WL 5229209, at *1; *Donald J. Trump for President, Inc.*, 2020 WL 5229116, at *1; *Paher*, 2020 WL 2042365, at *2.

E. “Blending and balancing” the intervention requirements confirms the right of the proposed Respondent-Intervenor to intervene.

Adding to the strength of the DNC’s arguments in support of intervention as of right is the fact that “the criteria need not be analyzed in isolation from one another, and a movant’s strong showing with respect to one requirement may contribute to the movant’s ability to meet other requirements as well.” *Helgeland*, 2008 WI 9, ¶ 39. This Court has thus recognized the “interplay” between the intervention factors; they “must be blended and balanced.” *Id.*

Here, the interplay strongly confirms the DNC’s right to intervene in this proposed original action. Not only is the DNC’s request to intervene timely, the DNC has unique

rights at stake that no other party can adequately defend—preventing the disenfranchisement of the more than 1.6 million Wisconsinites who voted for the DNC’s presidential and vice-presidential candidates, and preserving the electoral votes won by those candidates. The Respondents’ official role to defend state laws ends there; the result of an unsuccessful attempt by Respondents to defend Wisconsin law would be extreme electoral harm to the DNC. Moreover, because the DNC’s interests are directly at issue in this case, they meet the interest and impairment factors of the intervention test. Therefore, under Wis. Stat. § 803.09(1), the DNC is entitled as a matter of right to intervene.

II. In the alternative, the Court should exercise its discretion under Wis. Stat. § 803.09(2) to permit the DNC to intervene.

In addition to granting intervention as a matter of right, a court can exercise its broad discretion to permit a party to intervene when the “movant’s claim or defense and the main

action have a question of law and fact in common,” intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties,” and the motion is timely. Wis. Stat. § 803.09(2); *see also Helgeland*, 2008 WI 9, ¶¶ 119–20; *Sokaogon Chippewa Comm. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) (“Permissive intervention under Rule 24(b) is wholly discretionary.”). Even when courts deny intervention as of right, they often find that permissive intervention is appropriate. *See, e.g., City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986 (7th Cir. 2011); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 101 F.3d 503, 509 (7th Cir. 1996).

The DNC meets the criteria for permissive intervention. The motion to intervene is timely and, given that this litigation is at a very early stage, intervention will not unduly delay or prejudice the adjudication of the original

parties' rights. Moreover, the DNC will inevitably raise common questions of law and fact, including the threshold issue of whether an original action is appropriate in the circumstances of this case. The DNC is prepared to proceed in accordance with the schedule this Court determines, and its intervention will only serve to contribute to the complete development of the factual and legal issues before this Court.

CONCLUSION

For the reasons stated above, this Court should grant the DNC's motion to intervene as a matter of right. In the alternative, this Court should exercise its direction and grant the DNC permissive intervention.

Dated: November 27, 2020

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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: November 27, 2020



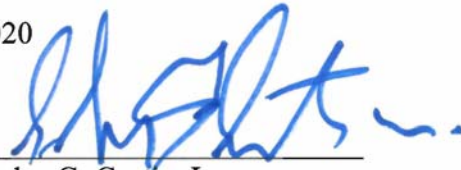
Charles G. Curtis, Jr.

CERTIFICATION

I certify that the foregoing petition conforms to the rules contained in WIS. STAT. § (Rule) 809.62(4) and § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 3,065 words, exclusive of the

caption, Table of Contents and Authorities, and the
Certificates.

Dated: November 27, 2020



Charles G. Curtis, Jr.

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CERTIFICATION OF FILING AND SERVICE

I certify that on November 27, 2020, this brief was hand delivered to the Clerk of the Supreme Court.

I certify that on November 27, 2020, I caused a copy of this brief to be emailed to counsel of record for Petitioners and the other Respondents.

Dated: November 27, 2020



Charles G. Curtis, Jr.

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