No. 22-3034

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL J. BOST, et al.,
Plaintiffs-Appellees,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections,
Defendants-Appellees.

APPEAL OF: DEMOCRATIC PARTY OF ILLINOIS

Appeal From the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 1:22-cv-02754
The Honorable Judge John F. Kness

BRIEF AND REQUIRED SHORT APPENDIX OF PROPOSED INTERVENOR-DEFENDANT-APPELLANT DEMOCRATIC PARTY OF ILLINOIS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 22-3034

Short Caption: Bost v. Democratic Party of Illinois

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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The Democratic Party of Illinois

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(3) If the party or amicus is a corporation:

i) Identify all of its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Elisabeth Frost Date: December 20, 2022 (new)

Attorney's Printed Name: Elisabeth Frost

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N/A

Attorney's Signature: /s/ Maya Sequeira Date: December 20, 2022 (new)

Attorney's Printed Name: Maya Sequeira

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N/A

Attorney's Signature: /s/ Richard Medina Date: December 20, 2022 (new)

Attorney's Printed Name: Richard Medina

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N/A

Attorney's Signature: /s/Abha Khanna Date: December 20, 2022 (new)

Attorney's Printed Name: Abha Khanna

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N/A

Attorney's Signature: /s/ Coral A. Negron Date: December 20, 2022 (new)

Attorney's Printed Name: Coral A. Negron

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** __ **No X**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiffs filed their Complaint for declaratory and injunctive relief on May 25, 2022, claiming jurisdiction under 28 U.S.C. § 1331 based on their constitutional and statutory claims, which are alleged under the First Amendment and the Fourteenth Amendment, 2 U.S.C. § 7, and 3 U.S.C. § 1. Dkt. 1, A34-A46.[1] Defendants and the Democratic Party of Illinois ("DPI") contend that the district court lacks Article III jurisdiction over the underlying action, because Plaintiffs do not have standing.

The district court's memorandum opinion and order denying DPI's motion to intervene was entered on October 11, 2022. Dkt. 56, A1-A18. DPI timely filed its notice of appeal on November 10, 2022, which is within 30 days of entry of the district court's October 11 Order. *See* Fed. R. App. 4(a)(1)(A).

This Court has jurisdiction under 28 U.S.C. § 1291 over this appeal from the district court's denial of DPI's motion to intervene. An order denying intervention under Federal Rule of Civil Procedure 24 is a final order appealable under § 1291. *See Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 745-46 (7th Cir. 2020) ("It is well established that 'from the perspective of a disappointed prospective intervenor, the denial of a motion to intervene is the end of the case, so an order denying intervention is a final, appealable decision under 28 U.S.C. § 1291.'" (quoting *CE Design, Ltd. v. Cy's Crab House N., Inc.*, 731 F.3d 725, 730 (7th Cir. 2013))). Plaintiffs' constitutional and statutory claims remain pending below. Defendants filed a motion to dismiss the matter in its entirety, Dkts. 25; 26; 43; 52, and Plaintiffs filed a motion for partial summary

[1] Citations to "Dkt._" are to the district court docket below, No. 1:22-cv-02754 (N.D. Ill.); citations to "A_" are to the required short appendix attached to this brief.

judgment, Dkts. 32; 33; 40; 53. *See also* Dkts. 57; 13-1; 44. Both motions currently await the district court's resolution.

STATEMENT OF THE ISSUES

(1) Whether the district court erred by denying DPI's motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2).

(2) Whether the district court abused its discretion by denying DPI's alternative request for permissive intervention under Federal Rule of Civil Procedure 24(b).

STATEMENT OF THE CASE

I. Plaintiffs seek a court order requiring Illinois to reject mail ballots delivered after election day.

The Plaintiffs who initiated this action are Republican congressman Michael Bost and two Republican voters—both former Republican presidential electors. On May 25, 2022, Plaintiffs sued the Illinois State Board of Elections (the "Board") and its executive director Bernadette Matthews in her official capacity (together, "Defendants"), alleging that the manner in which Illinois counts mail ballots violates both federal statutes and Plaintiffs' constitutional rights. Dkt. 1 at 2, 8-10, A35, A41-A43.

Specifically, Plaintiffs allege that Illinois' Ballot Receipt Deadline, 10 ILCS § 5/19-8(c), which ensures that ballots of lawful Illinois voters are counted if they are cast on or before election day and received by an election authority within 14 days after election day, runs afoul of the Federal Election Day Statutes, 2 U.S.C. §§ 1 & 7 and 3 U.S.C. § 1. Although Plaintiffs allege both statutory and constitutional claims, all are derivative of and dependent on their contention that counting any ballots received after election day—regardless of when they were voted and mailed—directly conflicts with, and is accordingly pre-empted by, the Federal Election Day Statutes. *See* Dkt. 1 at 7-10, A40-A43.

Illinois ensures that ballots received after election day are timely voted by requiring that: (1) they be postmarked on or before election day, or (2) if missing a postmark, the voter certification on the ballot return envelope—which is sworn under penalty of perjury—is dated on or before election day. 10 ILCS § 5/19-8(c); *id.* § 5/29-10.

Plaintiffs do not allege that any of the ballots that Illinois counts as a result of the Ballot Receipt Deadline are from anyone other than eligible voters. Instead, their assertion that these ballots are "unlawful" rests entirely on their contention that the Federal Election Day Statutes prohibit the counting of any ballots received after election day, even if voted by lawful, eligible voters prior to that day. *See* Dkt. 1 ¶¶ 26, 28, 40, 56, 57, A39-A41.

To remedy this perceived violation, Plaintiffs seek a permanent injunction against enforcement of the Ballot Receipt Deadline, requiring that in future elections, all mail ballots received after election day be rejected, even if the postmark or voter certification proves that the ballot was voted and mailed by election day. *See* Dkt. 1 ¶¶ 23, 26, 29, 40, 45, A39-A41. This includes ballots that were cast by—or even well before—election day but, often due to no fault of the voter, were delayed in the mail. As Plaintiffs' counsel has conceded, it also includes military voters, whose ballots often encounter serious mail delays, which can severely burden their ability to exercise their right to vote. *See also* Dkt. 47 at 9-12, A28-A31.[2]

II. Illinois is among 20 U.S. jurisdictions whose laws allow for the counting of ballots delivered to election officials after election day.

Illinois has provided for the counting of mail ballots that arrive after election day but are mailed on or before election day since 2015. *See* 2014 Ill. Leg. Serv. P.A. 98-1171 (West). Sixteen

[2] Counsel's concession was made at a December 7, 2022 oral argument on the state's motion to dismiss. DPI has requested the transcript for that argument. The court reporter has advised DPI that the transcript will be filed on the district court's docket as soon as it is available.

other states, plus the District of Columbia, the U.S. Virgin Islands, and Puerto Rico, similarly allow timely-cast mail ballots to be counted even if they arrive after election day.[3]

Plaintiffs acknowledge that the Ballot Receipt Deadline allowed potentially hundreds of thousands of Illinois voters to have their ballots counted in the November 2020 election, Dkt. 1 ¶¶ 21-22, A38-A39, despite the difficulties presented by the COVID-19 pandemic and wide-spread and severe mail delays that led to litigation stemming from delayed delivery of ballots. *See, e.g.*, Stipulation & Consent Order, *Democratic Party of Va. v. Veal*, No. 21-cv-671 (E.D. Va. Oct. 28, 2021), ECF No. 27; *NAACP v. U.S. Postal Serv.*, No. 20-cv-2295, 2020 WL 6469845 (D.D.C. Nov. 1, 2020) (ordering the U.S. Postal Service to take steps to ensure the timely delivery of mail-in ballots).

Among the many voters whose ballots have been saved from rejection because of Illinois' Ballot Receipt Deadline are members of the armed forces, who often encounter significant burdens in attempting to vote by mail. Dkt. 47 at 9-12, A28-A31. In fact, before Illinois enacted the current Ballot Receipt Deadline, the Department of Justice twice sued Illinois to ensure that military voters were not disenfranchised, in one case obtaining a court order requiring Illinois to accept military ballots after election day. *See* Dkt. 47 at 11-12, A30-A31 (citing Consent Decree, *United States v. Illinois*, No. 10cv06800 (N.D. Ill. Oct. 22, 2010); Consent Decree, *United States v. Illinois*, No. 13cv00189 (N.D. Ill. Jan. 11, 2013)).

[3] *See* Alaska Stat. § 15.20.081(e), (h); Cal. Elec. Code § 3020; Kan. Stat. Ann. § 25-1132; Md. Code Ann., Elec. Law § 9-309; Mass. Gen. Laws ch. 54, § 93; Miss. Code Ann. § 23-15-637; Nev. Rev. Stat. § 293.269921; N.J. Stat. Ann. § 19:63-22; N.Y. Elec. Law § 8-412; N.C. Gen. Stat. § 163A-1310; N.D. Cent. Code §§ 16.1-07-09; 16.1-15-25; Ohio Rev. Code § 3509.05; Or. Rev. Stat. § 253.070; Tex. Elec. Code § 86.007; Utah Code Ann. § 20A-3a-204; Va. Code § 24.2-709; Wash. Rev. Code § 29A.40.091; W. Va. Code §§ 3-3-5, 3-5-17; D.C. Code § 1-1001.05(a)(10A); P.R. Laws Ann. tit. 25. § 3146.8; V.I. Code Ann. tit. 18, § 665.

III. The Democratic Party moved to intervene to protect its own rights and the rights of Illinois' Democratic voters.

Just over three weeks after Plaintiffs filed their Complaint initiating this action—before Defendants responded—DPI moved to intervene as a defendant. *See* DPI's Mot. to Intervene, Dkt. 13 (filed June 17, 2022).[4] DPI moved to intervene as a matter of right under Federal Rule of Civil Procedure 24(a), and in the alternative for permissive intervention under Rule 24(b). In accordance with Rule 24(c), DPI attached to its motion to intervene a proposed motion to dismiss. Dkt. 13-1.

DPI sought to intervene to protect its own substantial rights as well as the voting rights of its members. Specifically, DPI explained that "Plaintiffs' challenge to the Ballot Receipt Deadline threatens to force DPI to divert significant resources to educating voters as to a crucial legal change shortly before a federal election . . . ." DPI's Mot. to Intervene at 4. In the 2020 federal election, one of every three votes in Illinois was cast via mail ballot. *Id*. at 2 n.2. If Plaintiffs are successful and obtain an injunction of the Ballot Receipt Deadline, the counting of timely-cast mail ballots in Illinois would rely upon prompt delivery by the U.S. Postal Service ("USPS"), threatening disenfranchisement of DPI's members and constituents due to no fault of their own. *Id*. at 4, 8-9.

Even ballots voted and mailed significantly before election day may not arrive by election day. In 2020, the USPS General Counsel sent letters to 46 states—including Illinois—to alert state officials that current state law deadlines for requesting, mailing, and returning mail ballots might be "incompatible" with USPS delivery standards.[5] USPS strongly recommended that voters be

[4] Defendants sought and were granted two unopposed extensions to their time to respond to the complaint. *See* Dkts. 10; 23. Defendants filed their motion to dismiss on July 12, 2022. Dkt. 25.

[5] *See* Erin Cox et al., *Postal Service Warns 46 States Their Voters Could Be Disenfranchised By Delayed Mail-In Ballots*, Wash. Post (Aug. 14, 2020), https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html; Luke Broadwater et al., *The Postal Service Warns States It May Not Meet Mail-In Ballot Deadlines*, N.Y. Times (Aug. 15, 2020),

encouraged to mail their ballots *at least one week* in advance of the state's ballot receipt deadline to ensure their arrival in time to be counted. In states with an election day ballot receipt deadline, that meant voters had to mail their ballots no later than October 27.

Defendants took no position on DPI's intervention below, *see* DPI's Mot. to Intervene, Dkt. 13 at 1-2; Plaintiffs, however, opposed. Dkt. 27. DPI and Plaintiffs submitted competing briefing schedules on the motion to intervene for the district court's approval, with DPI's proposed schedule running three weeks, and Plaintiffs' proposal running nearly five weeks. Statement Regarding Briefing Schedule, Dkt. 14. The district court approved the longer schedule. Minute Entry Regarding Briefing Schedule, Dkt. 17.

Plaintiffs conceded that the motion to intervene was timely. Pls.' Opp'n to DPI's Mot. to Intervene, Dkt. 27 at 3 n.2. Instead, they claimed that intervention should be denied because: (1) DPI lacks a significant interest in this litigation, (2) DPI's interests would not be impaired by the litigation, and (3) DPI could not overcome the "strong presumption of adequacy" that applies when "'a governmental body [is] charged by law with protecting the interests of proposed intervenors.'" *Id.* at 3-7 (quoting *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019)). DPI filed its reply in support of its motion on July 21, 2022. DPI's Reply in Support of Mot. to Intervene, Dkt. 35.

IV. The district court denied the motion to intervene as of right and declined to grant permissive intervention.

On October 11, 2022, the district court denied DPI's motion to intervene. Dkt. 56 at 1-18, A1-A18. In doing so, however, the court first found that DPI satisfied Rule 24(a)'s requirement to demonstrate an interest relating to the subject matter of the action that will potentially be impaired

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https://www.nytimes.com/2020/08/15/us/elections/the-postal-service-warns-states-it-may-not-meet-mail-in-ballot-deadlines.html.

by its disposition. Specifically, the court credited DPI's interest in the resources it would have to expend to ensure that its members are able to cast a timely ballot, if Plaintiffs succeed in their challenge. Dkt. 56 at 7-9, A7-A9. The district court also found that DPI had a protectible interest in protecting the voting rights of its members but found that this interest was insufficiently "unique" to support intervention. *Id*. at 9-10, A9-A10.

Despite recognizing DPI's interest in resource allocation as a sufficient interest that may be impaired by this action, the district court denied intervention as of right based on its holding that DPI "cannot meet its burden to show that its interests will not be adequately represented by the parties to the case." *Id*. at 1, A1. The court reached this conclusion applying the "intermediate approach that applies a rebuttable presumption of adequacy of representation" when the proposed intervenor and an existing party share the "same goal." *Id*. at 10, A10. It applied this standard because "DPI and the State Board share the same goal—namely, defending the legality of the Ballot Receipt Statute." *Id*. at 12, A12.

Second, because the district court believed that "allowing DPI to intervene would threaten to delay this time-sensitive case further," it denied DPI's alternative request for permissive intervention. *Id*. at 1, 15-17, A1, A15-A17.[6]

DPI timely filed its appeal on November 8, 2022. Dkt. 59.

[6] In the order denying the motion to intervene, the district court gave DPI the option "to designate its already-presented substantive arguments as those of an amicus curiae." Dkt. 56 at 1-2, 17-18, A1-A2, A17-A18. DPI did so, designating its proposed motion to dismiss and proposed opposition to Plaintiffs' motion for partial summary judgment as amicus briefs. *See* Dkt. 57; Dkt. 13-1; Dkt. 44. The district court subsequently granted DPI's motion for leave to participate in the oral argument held on Defendants' motion to dismiss on December 7, 2022. Dkt. 71. That motion, as well as Plaintiffs' motion for summary judgment on the two claims that it has styled as constitutional claims, Dkt. 32, remain pending as of the time of this filing.

SUMMARY OF ARGUMENT

1. The district court erred in denying DPI's motion to intervene as of right. First, in finding that DPI's associational interest in its members' voting rights is sufficient to satisfy Article III standing but insufficiently "unique" to support intervention, the district court misapplied this Court's binding precedent. In this context, "unique" merely means that the interest is possessed by the intervenor in its own right—not wholly derivative of the existing parties' interests. Here, there can be no serious dispute that DPI has a unique interest in its members' right to vote that is not wholly derivative of Defendants' interest in ensuring that Illinois' election laws—including the Ballot Receipt Deadline that Plaintiffs challenge—are followed.

2. Second, although the district court properly found that DPI has an interest sufficient to satisfy Rule 24(a) based on direct harm that this action threatens to DPI's resources, it erred in finding that DPI's interests were adequately represented by the named Defendants for two reasons. First, the district court's reasoning was based solely on the associational interest it had already rejected and not on the organizational interest it recognized as sufficient to support intervention. Second, the district court again misapplied this Court's binding precedent, which led it to apply the wrong standard to DPI's motion. Instead of carefully comparing DPI's interests with those of Defendants, the district court merely concluded that DPI and Defendants share the same generalized "goal"—dismissal of this action. But that is too high a level of abstraction. Virtually all proposed intervenors share an interest in the ultimate disposition of a case with at least one of the parties. If that shared goal were sufficient to ensure adequate representation, intervention as of right would be a very rare thing indeed.

3. The district court also abused its discretion in denying DPI's alternative request for permissive intervention. The only basis the district court identified for denying DPI's motion was

its concern that intervention would cause delay in the resolution of the case prior to the 2022 election. That election has now passed, without resolution of either the state's pending motion to dismiss or Plaintiffs' motion for partial summary judgment. Moreover, the court had no basis to assume intervention would cause delay. DPI has consistently pushed this litigation forward: it promptly filed its motion to intervene and, with it, its motion to dismiss, more than three weeks before Defendants filed their motion to dismiss. DPI also proposed a briefing schedule on the motion to intervene that was weeks shorter than Plaintiffs' preferred schedule. The district court approved the longer schedule. In this case, anticipated delay was not a reasonable basis for the district court to deny DPI's intervention. Absent a reason for denial, the district court should have granted DPI's motion under Rule 24(b).

ARGUMENT

I. The District Court erred in denying DPI intervention as of right.

A. Standard of Review

The rule governing intervention as of right "is straightforward: the court *must* permit intervention if: (1) the motion is timely; (2) the moving party has an interest relating to the property or transaction at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case." *Driftless*, 969 F.3d at 746. A proposed intervenor who makes these showings "is entitled to intervene unless existing parties adequately represent his interests." *Id.*

Here, no one disputed that the motion to intervene was timely, and the district court found that DPI has an interest that may be impaired or impeded by the disposition of this case. The district court also found that DPI has an interest in protecting the voting rights of its members and that interest would be impeded by the disposition of this case. Dkt. 56 at 8-9, A8-A9. Accordingly, the

only disputed questions are: 1) whether DPI's associational interest is "unique" enough to support intervention, and 2) whether the existing Defendants adequately represent DPI's interests.

This Court reviews both determinations de novo. *Driftless*, 969 F.3d at 746 (citing *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) ("*WEAC*")).

B. DPI has two independent protectable legal interests that entitle it to intervention as of right.

The district court properly found that DPI's organizational interest in resource allocation is a sufficient interest that may be impaired by this action. Dkt. 56 at 6-7, A6-A7. But the court erred in failing to recognize DPI's associational interest in protecting the rights of its members as an independent, sufficient interest to support intervention.

The district court's conclusion that this case threatens DPI's interest in the allocation of its resources is consistent with this Court's binding precedent. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) ("[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (holding voter-advocacy organizations had standing to challenge state voter registration law based on diversion of resources argument).

The district court should have also recognized that DPI's independent, protectable interest in defending the voting rights of its members separately gives rise to intervention as of right under Rule 24(a). Importantly, the court affirmatively found that DPI has associational standing to assert the injuries of its voters, Dkt. 56 at 9, A9 (citing *Crawford*, 472 F.3d at 951), and that the rights of its members may be impaired by the outcome of this action, *id.* But it improperly found that DPI's associational interests were not sufficiently "unique" from the interests of the Board as required to

establish a right to intervention. This was a misapplication of law based on a misunderstanding of this Court's precedent. In particular, the district court misunderstood what the term "unique" means when used to refer to a protectable interest sufficient for Rule 24(a) intervention.

This Court has explained that to support mandatory intervention, an intervenor's interest simply "must be based on a right that *belongs to the proposed intervenor rather than to an existing party in the suit*. The interest must be so direct that the applicant would have 'a right to maintain a claim for the relief sought.'" *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) (emphasis added) (citation omitted). Thus, that the interests of DPI and the Board might overlap does not defeat intervention. Contrary to the district court's analysis, there is no requirement that the intervenor's interest be "unique" in the sense that it is "different from" that of any existing party. The interest must simply be one that belongs to the proposed intervenor in its own right.

The district court's erroneous understanding relies on this Court's statement in *WEAC* that the "interest must be unique to the proposed intervenor." 705 F.3d at 658. As Judge Sykes explained in a later concurrence, the *WEAC* court relied on the above-cited passage from *Keith* as support for the "uniqueness" requirement. *Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring). Thus, "as used in this context, 'unique' means an interest that is independent of an existing party's, not different from an existing party's." *Id.* In other words, *WEAC* merely used the term "unique" as a shorthand for the long-established standard articulated in *Keith*.[7]

[7] In fact, *WEAC* was not decided on "uniqueness" grounds, at all. The Court affirmed the district court's denial of a motion to intervene, finding that the intervenors' "interest in the litigation was only 'tangential' and that the state could adequately represent their interests." *WEAC*, 705 F.3d at 645. Specifically, the Court found that the intervenors' asserted First Amendment interest in the litigation was: (1) likely foreclosed by precedent, and (2) in any event, had "*little to do with* the claims raised" in the underlying case. *Id*. at 658 (emphasis added). In other words, although the interests were sufficiently "unique" to the intervenors, in that they were not wholly derivative of the interest of an existing party, they may not have been legally protectable, and were in any event

DPI's associational interest satisfies that standard. The district court found that DPI would have standing to challenge the relief requested by Plaintiffs based on DPI's associational interests. Dkt. 56 at 9, A9. By the district court's own analysis, therefore, DPI "would have a right to maintain a claim for the relief sought," *Keith*, 764 F.2d at 1268 (quotation marks omitted), regardless of whether the Board might have a concurrent or overlapping right. And that interest arises "independent of" the Board's interest in defending the statute. *See Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring). That DPI and the Board have a "shared objective [] to defend the challenged [election] regulations" does not mean their interests are not "unique" as that term was used in *WEAC*. *Id.*

No party disputes that DPI has standing to sue on behalf of its members. *See* Pls.' Opp'n to DPI's Mot. to Intervene, Dkt. 27 at 4 (noting DPI could bring "a lawsuit on behalf of Democratic voters who were wrongfully denied the right to vote based on a state election law or procedure"). This is consistent with decades of precedent in which courts have held that, when an action threatens to disenfranchise a political party's members, the party has a cognizable interest at stake. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008); *see also Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (holding risk that some voters among their membership will be disenfranchised confers standing upon political parties and labor organizations). That the Board seeks a result in this case that would ultimately inure to the benefit of all voters does not strip DPI of that independent interest, sufficiently unique to entitle it

tangential, such that they did not sufficiently stand to be impeded or infringed by the suit to satisfy Rule 24(a). The district court below also cited *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009), for the proposition that, "[t]o satisfy Rule 24, '[t]hat interest must be unique to the proposed intervenor.'" Dkt. 56 at 4, A4. But *Flying J* does not mention uniqueness in its careful analysis of the interest required for intervention. It appears that the quoted language is instead from *WEAC*, 705 F.3d at 658.

to intervention as of right under this Court's binding precedent. The district court's conclusion to the contrary was error and should be reversed.[8]

C. DPI's interests are not adequately represented by the existing parties to this litigation.

Because the district court found that DPI had at least one legally protectable interest that stood to be impaired as a result of this litigation, it was entitled to intervene as of right unless its interests were adequately represented by the existing parties. *See Driftless*, 969 F.3d at 746. The district court's conclusion that DPI could not satisfy this requirement was reversible error because it ignored DPI's organizational interest in resource allocation when conducting its adequacy of representation analysis. And in examining whether DPI's associational interest is adequately represented, the court applied the wrong standard. Because it erroneously concluded that DPI and the Board share the "same goals," the court applied the "intermediate" standard for determining adequacy, rather than the "liberal" default standard.

This Court has established a "three-tiered methodology for evaluating adequacy of representation under Rule 24(a)(2)." *Driftless*, 969 F.3d at 747. Those tiers are: (1) the default liberal rule, which is satisfied "if the applicant shows that representation of his interest 'may be' inadequate," *id*. (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); (2) an "intermediate approach" that applies where "the interest of the [proposed intervenor] is identical to that of an existing party," *id*., and requires "a showing of some conflict to warrant intervention," *id*. (quoting *Planned Parenthood*, 942 F.3d at 799); and (3) a stricter standard that

[8] Although it is generally true that "Article III standing [] does not suffice to establish the required Rule 24(a) 'interest,'" *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 984 (7th Cir. 2011), that is because Rule 24(a) imposes additional requirements—namely, that the interest must be "independent" in the sense that it "belongs to the proposed intervenor rather than to an existing party in the suit." *Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring); *Keith*, 764 F.2d at 1268.

applies "when the representative party is a governmental body" that is specifically "charged by law with protecting the interests of the proposed intervenors," *id*. (quoting *Planned Parenthood*, 942 F.3d at 799). Under this third standard "the representative party is presumed to be an adequate representative unless there is a showing of gross negligence or bad faith." *Id*. (quoting *Planned Parenthood*, 942 F.3d at 799).

1. The liberal default standard, not the "intermediate" standard, applies.

The district court correctly found that since the Board is not charged by law with protecting DPI's interests, "[a]pplying the most stringent adequacy test to this case would thus be inappropriate." Dkt. 56 at 11-12, A11-12 (*citing Driftless*, 969 F.3d at 747; *Feehan v. Wis. Elections Comm'n*, No. 20-CV-1771, 2020 WL 7182950, at *6 (E.D. Wis. Dec. 6, 2020)). The district court erred, however, by applying the intermediate, and not the default liberal standard, to the adequacy inquiry. The intermediate standard only applies where the court can first properly find that the intervening party and an existing party to the action share "identical" interests. *Driftless*, 969 F.3d at 747. That is not the case here.

The district court arrived at its conclusion by improperly applying the analysis articulated in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). There, this Court wrote that the intermediate standard applies where "the prospective intervenor and the named party have the same goal." *Id*. (quotation marks omitted). But one year later in *Driftless*, this Court made clear that: "[t]o trigger the presumption of adequacy under the intermediate standard, it's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed." *Driftless*, 969 F.3d at 748. Instead, "Rule 24(a)(2) requires a more discriminating comparison of the absentee's interests and the interests of existing parties." *Id*. This is for good reason, as this Court explained: "Needless to say, a

prospective intervenor must intervene on one side of the 'v.' or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail. . . . That's not how the presumption works." *Id.*

a) The district court's analysis of adequacy of representation ignored DPI's organizational interest.

The district court's analysis of adequacy of representation inexplicably focused exclusively on DPI's associational interest in defending the rights of its members—despite the fact that the court found that interest insufficiently "unique" to support intervention. Dkt. 56 at 10-14, A10-A14. In contrast, although the district court found that DPI's own interest in its resources was sufficient to support intervention, *id.* at 7-9, A7-A9, it failed to discuss that interest at all in conducting the adequacy of representation inquiry. Instead, the district court's analysis of "adequacy" largely repeated its analysis regarding the "uniqueness" of DPI's associational interest. *Id.* at 12-14, A12-A14; *see also supra* at I.B. Its failure to even mention DPI's organizational interest in resource allocation in analyzing the adequacy of representation is fatal to its reasoning.

As the district court properly concluded, DPI has a distinct monetary interest in the outcome of this case that is not shared by the Board. Dkt. 56 at 7, A7. Its interests are therefore not "identical," to Defendants' and a presumption of adequate representation cannot apply. *Driftless*, 969 F.3d at 747. The impact of the district court's failure to consider DPI's organizational interest is evident in its cursory handling of *Driftless*. *See* Dkt. 56 at 14, A14. In arguing that *Driftless* does not mandate use of the default lenient standard for determining adequacy of representation, the court distinguished *Driftless* based on the fact that "[i]n that case, the electrical transmission companies seeking to intervene had a distinct interest from the governmental entity that was a party to the case . . . ." *Id.* So too does DPI. The district court erred in not applying the

default, liberal standard for assessing adequacy of representation and granting DPI's motion for intervention under Rule 24(a).

b) The district court wrongly concluded that DPI and Defendants share the "same goal."

In applying the intermediate standard, the district court did exactly what this Court warned it should not in *Driftless* when it held that "it's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed." 969 F.3d at 748. Yet, the district court held that the motion to intervene was subject to the intermediate standard, based on its finding that DPI and the Defendants share the "goal" of "defending the legality of the Ballot Receipt Statute." Dkt. 56 at 12, A12. This is indistinguishable from both parties wanting to see the complaint dismissed.

As for the district court's reasoning that DPI and the State Defendants' "interests are much closer than merely seeking the denial of Plaintiffs' proposed injunction" because both seek "to have timely-cast ballots counted for up to 14 days following Election Day," *id.*, it simply says the same thing a different way: they both want the challenge to the Ballot Receipt Statute to fail. Under this Court's binding precedent, that overlap does not establish that they have the "same goals" so as to displace the default liberal standard ordinarily applicable to motions to intervene. *Driftless*, 969 F.3d at 748.

Other courts have recognized, in similar contexts, that a political party's "goals" in a case such as this are sufficiently distinct from those of state election administrator defendants to avoid the presumption of inadequacy. *See Issa v. Newsom*, No. 20-cv-01044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) ("Although Defendants and the Proposed Intervenors fall on the same side of the dispute, Defendants' interests in the implementation of the Executive Order differ from those of the Proposed Intervenors. While Defendants' arguments turn on their inherent authority

as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent can vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures."); *Meek v. Metro. Dade Cnty.*, 985 F.2d 1471, 1478 (11th Cir. 1993), *abrogated on other grounds by Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007) (finding inadequate representation where intervenors "sought to advance their own interests in achieving the greatest possible participation in the political process" while governmental entities "had to consider the overall fairness of the election system to be employed in the future, the expense of litigation to defend the existing system, and the social and political divisiveness of the election issue").

The Supreme Court's decision in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), is also illustrative. There, the Secretary of Labor sued to set aside a union election and a union member moved to intervene. *Id.* at 529-30. Although "[a]t a high level of abstraction, the union member's interest and the Secretary's might have seemed closely aligned," the Supreme Court emphasized that their interests were not "identical." *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2203-04 (2022) (discussing *Trbovich*). That was because "the union member sought relief against his union, full stop; meanwhile, the Secretary also had to bear in mind broader public-policy implications." *Id.* at 2204. Thus, while both the Secretary and the union member sought the same result—setting aside the results of the union election—they had different interests. In that circumstance, the Court rejected a "presumption of adequacy"—rebuttable or otherwise—and held that the movant's burden in such circumstances "should be treated as minimal." *Id.* (quoting *Trbovich*, 404 U.S. at 538, n.10).

The same is true here. The Board's ultimate objective in this action may be to defend the Ballot Receipt Statute, but it "also ha[s] to bear in mind broader public-policy implications." *Id.* Indeed, its interest in defending the statute is that it is charged to administer it under Illinois law. *See* 10 ILCS § 5/1A-1. DPI's interests, on the other hand, include ensuring that the Democratic Party's candidates are not unfairly disadvantaged, ensuring that its members' lawfully cast ballots are counted, and protecting its resources so that they may be used for mission-critical efforts such as voter persuasion and not diverted to ameliorate the harms that would follow from a newly-imposed election day receipt deadline. *See Paher v. Cegavske*, No. 20-cv-00243, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020) (finding Democratic Party intervenors had "sufficiently shown that they maintain significant protectable interests which would be impaired by [the p]laintiffs' challenge to the Plan's all-mail election provisions" given that "[the p]laintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates"); *Issa*, 2020 WL 3074351, at *3 (finding Democratic Party committee's interests in "advancing [its candidates'] overall electoral prospects," and preventing "diversion of [its] limited resources to educate" Democratic voters "are routinely found to constitute significant protectable interests"); *N.C. Green Party v. N.C. State Bd. of Elections*, No. 22-CV-276, 2022 WL 3142606, at *10 (E.D.N.C. Aug. 5, 2022) (finding intervenors' interests in a competitive playing field for their candidates and conserving party resources fall within the rubric of "competitive standing," and are protectable interests for purposes of intervention). Indeed, the district court correctly recognized that, "[a]lthough the State Board is undeniably charged with administering Illinois election law, it is not charged by law with protecting the interests of political parties." Dkt. 56 at 12, A12. Nor is the Board charged with protecting the interests of individual voters. The Board's ultimate objective is simply ensuring that

Illinois' election laws are properly administered and enforced. For the reasons recognized in *Issa* and in *Meek*, these are not identical interests for purposes of adequate representation under Rule 24(a).

The district court relied on *Feehan v. Wisconsin Elections Commission*, which it described as "analogous," for its conclusion that DPI and Defendants share the "same goal." Dkt. 56 at 13, A13. But *Feehan* was not analogous to this case. It was a post-election challenge to Wisconsin's certification of the 2020 election results. The *Feehan* court explained that the Wisconsin Elections Commission's ("WEC") goal was to defend the certification of the 2020 election. This "mission," the court said, "appear[s] to include ensuring that the valid ballot of every voter—Democratic, Republican or other—is counted." 2020 WL 7182950 at *6. Relying on Judge Sykes's concurrence in *Planned Parenthood*, the court concluded that the proposed intervenor, DNC, did not have "a right, independent of the defendants, to defend the certification of the 2020 election results." *Id.* at *7. In *Feehan*, the WEC had already counted all ballots cast, and it sought to defend that count. The count necessarily included the Democratic ballots that the DNC sought to protect. Thus, though the WEC and the DNC had "different reasons for defending the certification," they both had the same goal: defending the certification of the 2020 results, which were favorable to the DNC's candidate. There was no indication in *Feehan* that the WEC represented the rights or interests of Democratic voters.

This case is not about the counting of already-cast ballots. It is about a rule of election administration that threatens to disenfranchise DPI's voters going forward, and to force DPI to expend additional limited resources. DPI has an interest in protecting its own voters and conserving its own resources. These interests are not "identical" to the Board's interest in administering Illinois' elections.

In short, the district court failed to engage in a "more discriminating comparison of the absentee's interests and the interests of existing parties," improperly generalizing DPI's interests in such a way that the presumption of adequate representation would apply to any party who might seek to intervene as a defendant. *Driftless*, 969 F.3d at 748. If it were true that any proposed intervenor seeking to defend a challenged law must rebut a presumption of adequacy of representation, it would turn the liberal standard into the exception rather than the rule. The Supreme Court has rejected that approach. *See Berger*, 142 S. Ct. at 2204 (discussing *Trbovich*, 404 U.S. at 538-39). As Defendants neither share "identical" interests with DPI nor are "charged by law with representing [DPI's] interest[s]," *Driftless*, 969 F.3d at 747, "the presumption of adequate representation does not apply," *id.* at 749.

2. DPI satisfies the "lenient default standard."

The district court should have applied the "lenient default standard," which requires only that DPI show that Defendants' representation "'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.* at 747 (quoting *Trbovich*, 404 U.S. at 538 n.10); *see Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (citing *Conservation L. Found. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992), and *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)) (finding that where an original party to the suit is a government entity, whose position is "necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it," the burden of establishing inadequacy of representation by existing parties is "comparatively light").

DPI clears that minimal hurdle. DPI has specific interests and concerns—from its overall electoral prospects to the most efficient use of its limited resources to promote get-out-the-vote-efforts—that neither Defendants nor any other party in this lawsuit share. There is, therefore, no reason to believe that these interests will be adequately represented by Defendants. *See Issa*, 2020

WL 3074351, at *3 (finding inadequate representation and granting intervention as of right where "the parties' interests are neither 'identical' nor 'the same'"). DPI has thus satisfied the four requirements for intervention as of right under Rule 24(a)(2).

II. Alternatively, DPI should have been granted permissive intervention.

A. Standard of Review

Under Rule 24(b), a federal court may, "[o]n timely motion, . . . 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 deciding whether to allow permissive intervention, the court must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* R. 24(b)(3); *City of Chicago*, 660 F.3d at 986 (reversing denial of permissive intervention where the district court did not base its decision on those grounds).

This Court reviews denial of permissive intervention for abuse of discretion. *See Vollmer v. Publishers Clearing House*, 248 F.3d 698, 707 (7th Cir. 2001).

B. There was no justifiable basis for the Court to conclude that allowing permissive intervention here would delay the proceedings.

While intervention under Rule 24(b) is left to the discretion of the district court, "'[t]he existence of a zone of discretion does not mean that the whim of the district court governs.'" *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 580 (6th Cir. 2018) (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997)). Where a district court provides "only a cursory explanation of its reasons for denying permissive intervention, and what little justification it did provide is unsupported by the record," it is an abuse of discretion requiring reversal. *Id.* at 580.

Here, the district court based its denial of permissive intervention on its concern that "intervention would likely further impede the timely resolution of the action." Dkt. 56 at 16, A16.

But there was no basis for this finding. The district court did not (and could not) point to any delay caused by DPI. Indeed, DPI filed its motion to intervene together with its motion to dismiss shortly after this case was initiated and three and a half weeks *before* the named Defendants answered. *See* DPI's Mot. to Intervene, Dkt. 13 (filed June 17, 2022); Exhibit 1 to DPI's Mot. to Intervene, Dkt. 13-1; Minute Entry Granting Defs.' Req. for Extension of Time to Respond, Dkt. 10; Minute Entry Granting Defs.' Second Req. for Extension of Time to Respond, Dkt. 23; Defs.' Mot. to Dismiss, Dkt. 25 (filed July 12, 2022). DPI argued for a briefing schedule under which intervention would be fully briefed two weeks faster than under Plaintiffs' proposal. Statement Regarding Briefing Schedule, Dkt. 14. The district court approved the longer schedule proposed by the *Plaintiffs*. Minute Entry Regarding Briefing Schedule, Dkt. 17. DPI emphasized that it had a strong interest in the prompt resolution of this matter to protect its and its members' rights, and to that end submitted with its motion to intervene a motion to dismiss. *See* DPI's Mot. to Intervene at 12.

Although the district court emphasized that "this is an election-year case about an election law," and "it is important to resolve the matter quickly so that the 2022 Illinois elections can be administered with certainty," Dkt. 56 at 16, A16, at no point did Plaintiffs move for expedited or preliminary relief in advance of that election. *See* Dkt. 1 at 11, A44; Pls.' Mot. for Partial Summ. J., Dkt. 32. And the election about which the district court was concerned has now come and gone. All delays in the prompt resolution of this matter have been the result of the *existing parties'* requests for extensions of time. *See* Defs.' Unopposed Mot. for Extension of Time, Dkt. 9 (requesting an additional 21 days to respond to the Complaint); Defs.' Unopposed Second Mot. for Extension of Time, Dkt. 22 (requesting an additional four days to respond to the Complaint); Unopposed Mot. for Extension of Time, Dkt. 48 (in which Defendants and Plaintiffs each requested an additional seven days for their replies in support of the motion to dismiss and motion

for partial summary judgment, respectively). At no point did DPI request any accommodations. From the outset, it has made clear that it stands ready to promptly and quickly litigate this case.

In support of its reasoning, the district court also noted that adjudication of the motion to intervene required the court to "divert resources away from the substantive arguments of the parties." Dkt. 56 at 16, A16. But by this standard, the court would never grant permissive intervention. It cannot be that any time intervention is contested the district court will not permit it under Rule 24(b).

Finally, while recognizing that it "may not deny permissive intervention solely because a proposed intervenor failed to meet the requirements for intervention as of right under Rule 24(a)," the district court cited the factors for intervention under Rule 24(a) as "instructive" in its decision to deny intervention under Rule 24(b). Dkt. 56 at 16, A16. But the only 24(a) factor the district court considered appears to be related to its flawed analysis of DPI's associational interest. *Id.* ("DPI's interest in the litigation is categorically the same as Defendants' interest."). As explained above, this analysis fails to consider DPI's organizational interest and misapplies this Court's binding precedent.

In sum, the district court failed to offer sufficient justification for its denial of permissive intervention. As a result, it abused its discretion and this Court should reverse.

CONCLUSION

This Court should reverse and remand to the district court with directions to grant DPI's motion to intervene as of right under Rule 24(a), or alternatively to grant permissive intervention under Rule 24(b).

Dated: December 20, 2022

Respectfully submitted,

/s/ Elisabeth C. Frost

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(c) because, according to the word count function of Microsoft Office Word 365, this brief contains 7,660 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 12 point Times New Roman for the main text and footnotes.

Dated: December 20, 2022

/s/ Elisabeth C. Frost
Elisabeth C. Frost

CERTIFICATE RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30(d), I, Elisabeth C. Frost, an attorney, certify that all materials required by Circuit Rule 30(a) and 30(b) are included in Proposed Intervenor-Defendant-Appellant's Required Short Appendix.

Dated: December 20, 2022

/s/Elisabeth C. Frost
Elisabeth C. Frost

CERTIFICATE OF SERVICE

I, Elisabeth C. Frost, an attorney, hereby certify that on December 20, 2022, I caused the **Brief And Required Short Appendix Of Proposed Intervenor-Defendant-Appellant Democratic Party of Illinois** to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I will cause fifteen copies of the above cited brief to be transmitted to the Court via UPS overnight delivery, delivery charge prepaid within seven days of that notice date.

/s/ Elisabeth C. Frost
Elisabeth C. Frost

Attorney for the Proposed Intervenor-Defendant- Appellant Democratic Party of Illinois

INDEX OF REQUIRED SHORT APPENDIX

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MICHAEL J. BOST, *et al.*, Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS, *et al.*, Defendants.	No. 22-cv-02754 Judge John F. Kness

MEMORANDUM OPINION & ORDER

This case involves a challenge to an Illinois election statute that governs the time for counting ballots received after the date of an election. Presently before the Court is a motion by the Democratic Party of Illinois ("DPI") to intervene as a party. DPI contends that, because it possesses unique interests that are at risk, DPI is entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure. DPI also contends, in the alternative, that it should be permitted to intervene under Rule 24(b).

As explained below, DPI cannot meet its burden to show that its interests will not be adequately represented by the parties to the case. As a result, DPI is not entitled to intervene as of right. Separately, because allowing DPI to intervene would threaten to delay this time-sensitive case further, the Court, in its discretion, denies DPI's motion seeking permission to intervene as a party under Rule 24(b). Accordingly, the Court denies DPI's motion in its entirety. But although the Court

will not permit DPI to join the case as a party, the Court will permit DPI the option to designate its already-presented substantive arguments as those of an amicus curiae.

I. BACKGROUND

In this election-related suit, Plaintiffs allege that the Illinois ballot receipt deadline statute (10 Ill. Comp. Stat. Ann. § 5/19-8(c)) (the "Ballot Receipt Statute"), which allows ballots to be received and counted up to 14 days after Election Day, violates both the United States Constitution and federal statutory law. 2 U.S.C. § 1; 2 U.S.C. § 7; and 3 U.S.C. § 1. (Dkt. 1.) Plaintiffs ask the Court to declare the Ballot Receipt Statute unlawful and to enjoin Illinois from receiving and counting ballots after Election Day. (Dkt. 1 at 2.)

Plaintiffs sued the Illinois State Board of Elections ("State Board") and its Executive Director, Bernadette Matthews, in her official capacity. Plaintiffs named the State Board and Ms. Matthews as defendants because the State Board is responsible for supervising the administration of election laws in Illinois. (Dkt. 1 at 4.)

DPI seeks to intervene as a party-defendant. (Dkt. 13.) DPI seeks intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and, in the alternative, permissive intervention under Rule 24(b). (Dkt. 13 at 4.) DPI contends that intervention is appropriate because Plaintiffs' challenge to the Ballot Receipt Deadline affects its voter education resource allocation and threatens to disenfranchise DPI's members. DPI states that these interests are sufficient to grant

permissive intervention as well. DPI also argues that permissive intervention would be appropriate because it will result in "neither prejudice nor undue delay." (Dkt. 13 at 12.)

Plaintiffs oppose DPI's intervention. (Dkt. 27.) Plaintiffs argue that DPI lacks a substantial interest that would be impaired by the litigation and that DPI's marginal interests are adequately represented by Defendants. (Dkt. 27 at 3–11.) Plaintiffs also argue that because DPI does not have a claim or defense that shares a common question of law or fact with the main action, permissive intervention should be denied. (Dkt. 27 at 12.)

Defendants, who are represented by the Attorney General of Illinois, take no position on DPI's motion to intervene. (Dkt. 13 at 2; Dkt. 39 at 19).

II. STANDARD OF REVIEW

A. Intervention as of Right

To intervene as of right, a proposed intervenor must satisfy four requirements under Rule 24(a): (1) the motion must be timely; (2) the applicant must claim an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the existing parties must not be adequate representatives of the applicant's interest. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945–46 (7th Cir. 2000) (citing Fed. R. Civ. P. 24(a)). A proposed intervenor must satisfy all four requirements, *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir. 2001), and the

intervenor's failure to meet its burden as to even one of the necessary elements requires the court to deny intervention as of right. *See id.*

Intervention as of right requires a "direct, significant[,] and legally protectable" interest in the question at issue in the lawsuit. *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (quoting *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)). In general, something "more than the minimum Article III interest" is required for intervention as of right. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009). To satisfy Rule 24, "[t]hat interest must be unique to the proposed intervenor." *Id.* Moreover, the question of "[w]hether 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." *Id.*

A unique interest alone is not sufficient for intervention: the proposed intervenor must also show that the interest will be "impaired or impeded" by the litigation. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). Whether an interest is impaired depends on "whether the decision of a legal question involved in the action would, as a practical matter, foreclose the rights of the proposed intervenors in a subsequent proceeding" as judged by the general standards of *stare decisis*. *Id.*

Even if a proposed intervenor has a sufficient interest that would be impaired by the action, the intervenor still must show that the existing parties are not adequate representatives of that interest. As the Seventh Circuit has explained, there are three standards for determining the adequacy of representation, and the facts

and context of each case determine which standard applies. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). The default rule is liberal and finds that a proposed intervenor has satisfied the adequacy element if she shows that the representation of her interest *may* be inadequate. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (emphasis added). If, however, the proposed intervenor and the named party share the same goal, there is a rebuttable presumption of adequate representation, and the proposed intervenor must show "some conflict" to intervene. *Planned Parenthood*, 942 F.3d at 799. Finally, when the representative party is a "governmental body charged by law with protecting the interests of the proposed intervenors," the representation is presumed to be adequate absent a showing of "gross negligence or bad faith." *Ligas*, 478 F.3d at 799.

B. Permissive Intervention

Under Rule 24(b)(1), a district 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." *Planned Parenthood*, 942 F.3d at 803. District courts have discretion to grant or deny permissive intervention in the interest of "managing the litigation before it." *Id.* Although the district court may not "deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right," it may consider "the elements of intervention as of right as discretionary factors" in weighing permissive intervention. *Id.* at 804.

III. DISCUSSION

A. Intervention as of Right

To intervene under Rule 24(a), DPI must establish that (1) the motion is timely; (2) DPI has an interest relating to the subject of the litigation; (3) the disposition of the action may impair or impede DPI's interest; and (4) Defendants are not adequate representatives of DPI's interest. Plaintiffs concede that DPI's motion to intervene is timely. (Dkt. 27 at 3.) At issue, therefore, is whether DPI has a sufficient interest in the litigation that may be impaired by the action and whether Defendants are adequate representatives of that interest.

1. Interest/Impairment

To intervene as of right under Rule 24(a), DPI must allege an interest relating to the subject matter of the action that will potentially be impaired by the disposition of the action. *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019). In determining whether a party has an interest sufficient for intervention as of right, the Article III standing inquiry is instructive. *Flying J, Inc.*, 578 F.3d at 571.

DPI states that it has two interests in the litigation. First, if an injunction is granted, DPI would have to expend significant resources to educate the public about the change in law, thus diverting DPI's resources away from other causes. (Dkt. 13 at 7.) Second, an injunction barring Illinois from counting ballots received after Election Day could threaten to harm "DPI's members and constituents." (*Id.* at 8.)

a. DPI's interest in its resource allocation is a sufficient interest that may be impaired by this action.

That an injunction would have an effect on DPI's resource allocation is a sufficient interest for the purpose of Rule 24(a). If the Court were to enjoin application of the Ballot Receipt Statute, DPI would have to educate its members to ensure that they were aware of the change and could cast a timely ballot in the 2022 election. Doing so would require DPI to expend some of its limited resources that it could otherwise spend elsewhere, giving DPI a monetary interest in Plaintiffs' litigation against Defendants. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

Forced resource allocation thus satisfies the interest element of Rule 24(a). Although mandatory intervention is governed by Rule 24(a), the Seventh Circuit has explained that the Article III standing analysis is helpful in determining whether an interest is sufficient to allow intervention. *Planned Parenthood*, 942 F.3d at 798. Where the case involves a political party seeking to challenge or defend a voting law, the potential effect on resource allocation is sufficient to confer Article III standing. In *Common Cause Indiana v. Lawson*, for example, the Seventh Circuit held that the Democratic Party had standing to challenge a new Indiana voter registration law because the law would require it to "devote resources to combatting the effects of that law that are harmful to [its] mission." 937 F.3d 944, 950 (7th Cir. 2019) (cleaned up). Similarly, in *Crawford v. Marion County*, the Seventh Circuit concluded that the forced resource allocation was sufficient to give the Democratic Party standing to challenge an Indiana voter identification law. 472 F.3d at 951 ("[T]he new law injures

the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote.").

Plaintiffs contend that, because intervention is a highly fact-specific determination, previous cases in which courts allowed intervention do not compel intervention here. (Dkt. 27 at 4.) It is a truism that the intervention analysis is highly fact specific; but because the injuries alleged in *Common Cause* and *Crawford* are similar to DPI's alleged interest, those precedents are nonetheless instructive. As did the political parties there, DPI here has finite resources and, if Plaintiffs' suit succeeds, DPI will have to educate its voters on the change in the ballot deadline law to ensure that their votes are cast and counted. Moreover, the effect on DPI's resources is a unique interest that belongs to DPI and no other existing party in the suit. *See Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) ("The interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit."). DPI's resource allocation interest is thus sufficient for Rule 24(a).

But merely possessing a unique interest in the action is not, standing alone, sufficient to establish a right to intervene. Among other requirements, DPI must also show that its identified interest may be impaired by the disposition of the action. *Meridian Homes Corp.*, 683 F.2d at 203. DPI has made that showing: if the injunction Plaintiffs seek were granted, DPI's efforts to challenge it could be impaired by the decision in this action. Put another way, DPI's challenge to the injunction (if imposed) could possibly be decided based on issue preclusion, thus hampering DPI's efforts to

have the preliminary injunction overturned. Under principles of *stare decisis*, then, DPI's interest in preserving its resources would be impaired; this is sufficient to meet the impairment element of Rule 24(a).

b. DPI's interest in protecting its members' interests is not sufficient for mandatory intervention.

DPI also states that it has an interest in Plaintiffs' action because the requested injunction could potentially threaten the rights of its members and constituents by preventing ballots received after Election Day from being counted. (Dkt. 13 at 8.) Although the Seventh Circuit has recognized the associational rights of political parties in the standing context, *see, e.g.*, *Crawford*, 472 F.3d at 951, a proposed intervenor's interest must also be unique to the proposed intervenor. *Keith*, 764 F.2d at 1268. In this respect, the Article III standing analysis is useful for determining whether a proposed intervenor has sufficient interest in an action, but the uniqueness requirement precludes finding that Rule 24(a) is met merely by a showing that the proposed intervenor possesses standing to assert a claim.

DPI's interest in the interests of its members and constituents, although enough for Article III standing, is not enough for mandatory intervention under Rule 24(a). *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013). As the entity charged with overseeing and administering election laws, the State Board is equally interested in preserving the Ballot Receipt Statute for the voters in Illinois, whether they be Democrats, Republicans, members of third parties, or independent voters. DPI attempts to distinguish those interests by specifying its narrow interest in protecting its own members. (Dkt. 35 at 5.) But the State Board's interest in the

current action subsumes DPI's narrower interest: by defending the Illinois law that allows election officials to count ballots received after Election Day, the State Board's interest is in preserving the law for *all* Illinois voters, DPI members and constituents included. Because this interest is not unique to DPI, it is not sufficient for mandatory intervention.

2. Adequacy of Representation

a. The intermediate standard is appropriate.

Along with meeting all other requirements, a party that seeks to intervene in a case by right under Rule 24(a) must also show that the existing parties are not adequate representatives of the intervenor's interest in the litigation. Courts faced with this inquiry must apply a three-tiered approach that gauges the level of scrutiny based upon the specific circumstances of each case. *Planned Parenthood*, 942 F.3d at 798. Under this approach, assessing the adequacy of representation will require either: (1) a default liberal approach; (2) an intermediate approach that applies a rebuttable presumption of adequacy of representation; or (3) a strict approach that applies a flat presumption of adequacy absent a showing of gross negligence or bad faith.

Under the default liberal approach, a court should find that a proposed intervenor has satisfied the adequacy element if the intervenor shows that the representation of its interest *may* be inadequate. *Ligas*, 478 F.3d at 774 (cleaned up and emphasis added). If the proposed intervenor and the named party share the same goal, however, a rebuttable presumption of adequate representation arises, and the

proposed intervenor must show "some conflict" to intervene. *Planned Parenthood*, 942 F.3d at 799. Finally, when the representative party is a "governmental body charged by law with protecting the interests of the proposed intervenors," the representation is presumed to be adequate absent a showing of "gross negligence or bad faith." *Ligas*, 478 F.3d at 799. Before determining if the parties to this action adequately represent DPI's interest, the Court must first determine which adequacy test applies.

Plaintiffs contend that the most rigorous standard, which requires a showing of gross negligence or bad faith, should apply. (Dkt. 27 at 7.) In contrast, DPI contends that, because the parties do not adequately represent its interests, the lenient default standard should apply. (Dkt. 35 at 7.) In the Court's view, however, neither party is correct: the intermediate standard, which requires the proposed intervenor to show "some conflict," provides the appropriate metric.

Plaintiffs assert that the most rigorous standard applies because "[o]ne of the named Defendants, the Illinois State Board of Elections, is the sole statewide governmental agency in charge of administering Illinois state election law . . . ." (Dkt. 27 at 8.). That argument goes too far. As the Seventh Circuit has explained, the mere presence of a governmental entity as a named party does not automatically require the Court to apply the most stringent standard for assessing adequacy of representation. On the contrary, it is only when a governmental entity is charged by law with a legal duty to represent the interests of absentee parties that the most stringent standard applies.. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 747 (7th Cir. 2020); *see also Wisconsin Educ. Ass'n Council*, 705 F.3d at 658–59

("The state is not charged by law with protecting the interests of the Employees so this standard [requiring gross negligence or bad faith] does not apply."). Although the State Board is undeniably charged with administering Illinois election law, it is not charged by law with protecting the interests of political parties. Applying the most stringent adequacy test to this case would thus be inappropriate. *See Feehan v. Wisconsin Elections Commission,* 2020 WL 7630419 (E.D. Wis.) (Order Denying Motion to Intervene) ("The Wisconsin Elections Commission 'administers and enforces Wisconsin elections law.' It appears that neither the WEC nor its members are charged with protecting the interests of a party or candidate.") (cleaned up).

But because DPI and the State Board share the same goal—namely, defending the legality of the Ballot Receipt Statute—the default standard urged by DPI is also not the correct approach. *See Wis. Educ. Ass'n Council*, 705 F.3d at 659. Instead, the alignment of interests between DPI and the State Board strongly suggests that the intermediate adequacy test applies. *Id.* DPI resists this conclusion and contends that, because DPI has a more focused interest in protecting its own members and their votes, DPI and the State Board do not share the same goal. (Dkt. 35 at 7.)

Although DPI is correct that the intermediate standard does not apply merely when a proposed intervenor and a party to the action share the same approximate goal, *Driftless*, 969 F.3d at 748, DPI and the State Board's interests are much closer than merely seeking the denial of Plaintiffs' proposed injunction. Both DPI and the State Board seek, consistent with the Ballot Counting Statute, to have timely-cast ballots counted for up to 14 days following Election Day. And, as explained above, the

mere fact that DPI's interest is narrower—limited to *its* members only—does not mean its interests are materially distinct from the State Board's. Put another way, the State Board's broader interest in the rights of all voters includes DPI's narrower interest in the rights of its members, and the State Board's effort to defend the Ballot Receipt Statute will inevitably include defending the ability of DPI's members to have their ballots counted after Election Day.

A decision of the Seventh Circuit in an analogous case supports the conclusion that DPI and the State Board share the same goal such that the intermediate adequacy standard should apply. In 2020, a district court in Wisconsin found that a state entity charged with defending a state election law is, by default, defending the narrower interests of partisan voters. If the governmental entity's mission "include[s] ensuring that the valid ballot of every voter—Democratic, Republican or other—is counted," then the governmental entity has the same goal as a political party seeking to intervene. *Feehan*, 2020 WL 7630419 at 12–13. Based on this conclusion, the Wisconsin district court applied the intermediate standard for determining adequacy of representation. *Id.* at 14.

DPI cites several cases in support of its argument that the lenient default standard applies, but that authority is distinguishable. In *Berger v. North Carolina State Conference of the NAACP*, for example, the entity seeking to intervene was the state legislature, another governmental entity authorized by state law to intervene in the litigation. 142 S. Ct. 2191, 2202 (2022) ("North Carolina has expressly authorized the legislative leaders to defend the State's practical interests in litigation

of this sort."). But DPI is not a state entity, of course, and no Illinois statute expressly grants DPI authority to intervene in litigation of this sort.

Driftless is also distinguishable. In that case, the electrical transmission companies seeking to intervene had a distinct interest from the governmental entity that was a party to the case: namely, the transmission companies owned and maintained the facility at issue, and because two of the counts in the case affected the transmission company alone, the company's interests could not be adequately defended by the relevant governmental entity. 969 F.3d at 748. In contrast, DPI does not have a property interest in votes cast after Election Day, and Plaintiff asserts no counts against DPI alone. *Driftless* does not, therefore, mandate a more lenient standard for assessing whether DPI has a right to intervene in this case.

DPI and the State Board share the same goal in this case: to defend the lawfulness of the Ballot Receipt Statute. A finding that the Ballot Receipt Statute is lawful would preserve for *all* voters—including DPI's voters—the voting-and-counting process supported by DPI. Accordingly, because DPI and the State Board share the same goal, the Court finds that the intermediate standard for determining the adequacy of representation governs DPI's motion to intervene as of right.

b. DPI fails to show under the intermediate standard that Defendants' representation is inadequate.

Under the intermediate standard for determining adequacy of representation, a rebuttable presumption of adequate representation applies and requires that a proposed intervenor show "some conflict" to intervene. *Planned Parenthood*, 942 F.3d at 799. DPI fails to make that showing. In its written submissions, DPI explains

neither how its interest in the action nor its litigation strategy is at odds with the State Board. DPI argues that, because their interests are not fully aligned, it is "irrelevant that that DPI and Defendants make similar arguments in their motions to dismiss." (Dkt. 35 at 8.) But DPI's interests *are* effectively aligned with the State Board's: DPI's interests are merely narrower than the State Board's. It is thus significant–and dispositive—that DPI's arguments on the motion to dismiss are practically identical to those made by Defendants.

Because DPI fails to point to any conflict with Defendants, and because DPI's smaller circle of interests is concentric with Defendants' larger one, DPI fails to meet the requirements of the intermediate standard for resolving motions to intervene. *See Mi Familia Vota v. Hobbs*, No. CV-22-00509-PHX-SRB (D. Ariz. June 23, 2022) ("Movants fail to grapple with binding precedent imposing a strong presumption of adequacy under the instant circumstances . . . . Movants ignore that at this juncture, Defendants and Movants seek the same 'ultimate objective.' "). Because Defendants' representation of DPI's interest is adequate, DPI's motion to intervene as of right under Rule 24(a) is denied.

B. Permissive Intervention

DPI also seeks permission to intervene under Rule 24(b). Permissive intervention may be granted to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Whether to allow permissive intervention is within the sound discretion of the district court. *Planned Parenthood*, 942 F.3d at 803. To that end, district courts may consider a wide variety of factors,

including interests of case management and the effect of intervention on the timely resolution of the action. And although courts may not deny permissive intervention solely because a proposed intervenor failed to meet the requirements for intervention as of right under Rule 24(a), the factors for intervention as of right may be considered in when considering a request to intervene by permission. *Id.* at 804.

Even if DPI has a common claim or defense, equitable considerations weigh against granting the motion for permissive intervention. Allowing permissive intervention would likely further impede the timely resolution of the action; indeed, the contested motion to intervene has already required the Court to divert resources away from the substantive arguments of the parties. Given that this is an election-year case about an election law, it is important to resolve the matter quickly so that the 2022 Illinois elections can be administered with certainty. Although DPI filed its motion to intervene promptly, to be sure, the timing of DPI's efforts does not change the fact that this case needs to be resolved promptly and that adding another party would hinder that goal.

Additional support for denying permissive intervention can be drawn from the factors for mandatory intervention under Rule 24(a), which, although not controlling, are nonetheless instructive. DPI's interest in the litigation is categorically the same as Defendants' interest. If anything, DPI's narrower interest in defending the ballot receipt statute on behalf of Democratic voters make it a less ideal candidate to defend the statute than the State Board, which is bound to consider the interests of all voters. Moreover, DPI, by its own admission, makes functionally the same legal arguments

as Defendants in its proposed motion to dismiss. Because DPI is interested only in a subset of Illinois voters yet makes functionally the same argument as Defendants in time-sensitive litigation, the Court finds that the interest of moving this case forward expeditiously is better served by avoiding the burdens inherent in adding a party at this stage. Accordingly, the Court denies DPI's motion for permissive intervention under Rule 24(b).

C. DPI May Proceed as an Amicus Curiae

Although the Court denies DPI's motion to intervene as a party, the Court will entertain DPI's arguments in support of Defendants' motion to dismiss if DPI wishes to proceed as an amicus curiae. Although the Federal Rules of Civil Procedure do not explicitly allow amicus curiae briefs in the district court, they also do not explicitly prohibit the practice, and some district courts have held that they can entertain arguments from an amicus. *See, e.g., Recht v. Justice*, No. 5:20 CV-90, 2020 WL 6109426, at *1 (N.D. W. Va. June 9, 2020); *Bounty Minerals, LLC v. Chesapeake Exploration, LLC*, No. 5:17cv1695, 2019 WL 7048981, at *10 (N.D. Ohio Dec. 23, 2019); *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); *NGV Gaming, Ltd. v. Upstream Point Molate*, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005).

In *Feehan v. Wis. Elec. Comm'n*, a case in which the district court, as here, denied a political party's motion to intervene, the court allowed the political party to make its arguments opposing injunctive relief by way of an amicus brief. 2020 WL 7630419 (E.D. Wis.) (Order Denying Motion to Intervene). Because the court's

approach in *Feehan* reasonably sought to achieve a balance between the sound application of procedural rules and affording a political party the opportunity to be heard on a matter of public concern, the Court will follow suit here. If DPI seeks to have the Court consider the arguments it has already proposed (see Dkt. 44, 45) relating to Defendants' motion for partial summary judgment, DPI may inform the Court of its preference by way of a statement filed as a separate docket entry.

IV. CONCLUSION

DPI's motion to intervene under Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure is denied. If DPI so chooses, the Court will instead consider DPI's arguments in favor of the motion to dismiss as an amicus brief.

SO ORDERED in No. 22-cv-02754.

Date: October 11, 2022

JOHN F. KNESS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL J. BOST; LAURA POLLASTRINI; and SUSAN SWEENEY,

Plaintiffs,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS; and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections

Defendants.

Civil Action No. 1:22-cv-02754

STATEMENT OF INTEREST OF THE UNITED STATES

I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517 which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." This case presents an important question relating to enforcement of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), 52 U.S.C. §§ 20301 to 20311, as amended by the Military and Overseas Voter Empowerment Act of 2009, Pub L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) ("MOVE Act").[1]

The Attorney General is charged with the responsibility of enforcing UOCAVA, 52 U.S.C. § 20307. The United States submits this statement of interest to address legal questions regarding the post-election counting of ballots cast in person or by mail on or before election day. Permitting the counting of otherwise valid ballots cast by election day even though they are received thereafter does not violate federal statutes setting the day for federal elections. This practice not only complies with federal law but can be vital in ensuring that military and overseas voters are able to exercise their right to vote. The United States expresses no view on any issues other than those set forth in this brief.

II. PROCEDURAL BACKGROUND

The Illinois election code authorizes voting by mail and provides that vote-by-mail ballots received "after the polls close on election day" and before "the close of the [fourteen-day] period for counting provisional ballots" shall be counted. 10 Ill. Comp. Stat. (ILCS) § 5/19-8(c) (2022); *id.* § 5/18A-15(a). The Illinois statute also requires that such ballots be "postmarked no later than election day." *Id.* Alternatively, if the ballot has no postmark or trackable bar code, it

[1] The provisions of UOCAVA were originally codified at 42 U.S.C. § 1973ff *et seq.*

must have a certification date, which is provided by the voter at the time of completing the ballot, on election day or earlier.[2] *Id.*

On May 25, 2022, plaintiffs Michael J. Bost, Laura Pollastrini, and Susan Sweeney filed a complaint against the Illinois State Board of Elections and its Executive Director, Bernadette Matthews, challenging Illinois's law that provides for counting ballots cast by election day and received within the fourteen-day period following election day. Compl., *Bost v. Ill. Bd. of Elections*, No. 1:22-cv-02754 (N.D. III. May 25, 2022), ECF No. 1. Plaintiffs seek a judgment declaring Illinois's ballot receipt deadline to be unlawful and an injunction prohibiting counting any ballots received after election day, regardless of their postmark date.

Defendants Illinois State Board of Elections and its Executive Director moved to dismiss Plaintiffs' complaint on July 12. Def. Mot. Dismiss Pls.' Compl., ECF No. 25. On July 15, Plaintiffs moved for partial summary judgment on Counts I and II, requesting a declaration that 10 ILCS § 5/19-8(c) violates 2 U.S.C. § 7, the federal statute setting a uniform date for Congressional elections.[3] Pls.' Mot. Summ. J., ECF No. 32. The Court set a consolidated briefing schedule for Defendants' Motion to Dismiss and Plaintiffs' Motion for Partial Summary Judgment, with responses to both motions due on August 22, and replies due on September 7.

[2] The certification requirement in Illinois law serves as an indicia that the ballot has been voted, executed, and sent by the close of polls on election day only in those instances where no postmark is evident.

[3] Counts I and II of Plaintiffs' Complaint allege a violation of the rights to vote and stand for office, under 42 U.S.C. § 1983. Compl., ECF No. 1. Despite Plaintiffs' Motion for Partial Summary Judgment being directed toward Counts I and II, the motion does not discuss alleged violations of 42 U.S.C. § 1983. *See generally* Pls.' Mem. Supp. Mot. Summ. J., ECF No. 33. The United States understands Plaintiffs' motion to seek relief as to the alleged violation of 2 U.S.C. § 7, which is labeled Count III in Plaintiffs' Complaint.

III. LEGAL STANDARD

In assessing a motion to dismiss, courts "accept all of the well-pleaded factual allegations in the plaintiff's complaint as true and draw all reasonable inferences in favor of the plaintiff." *Help At Home Inc. v. Medical Capital LLC*, 260 F.3d 748, 752 (7th Cir. 2001). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Tobey v. Chibucos*, 890 F.3d 634, 639 (7th Cir. 2018) (internal quotation marks omitted).

Where the facts are not in dispute, summary judgment may be granted prior to the parties engaging in discovery. *See Spierer v. Rossman*, 798 F.3d 502, 506 (7th Cir. 2015). Summary judgment is appropriate only where the moving party demonstrates that based on the evidence, viewed in the light most favorable to the nonmoving party, "there is no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

IV. STATUTORY BACKGROUND

UOCAVA guarantees members of the uniformed services absent from their place of residence due to service on active duty (and their spouses and dependents who are also absent due to that active service) and United States citizens residing overseas the right "to vote by absentee ballot in general, special, primary, and runoff elections for federal office." 52 U.S.C. § 20302(a)(1). UOCAVA reflects Congress's determination that participation in federal elections by military and overseas voters is a vital national interest. *See Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000) ("[Voting is] a sacred element of the democratic process. For our citizens overseas, voting by absentee ballot may be the only practical means to exercise that right. For the members of our military, the absentee

ballot is a cherished mechanism to voice their political opinion. . . . [It] should be provided no matter what their location.").

The MOVE Act reaffirmed Congress's commitment to ensuring that UOCAVA voters have sufficient time to receive, mark, and return their ballots in time to be counted. *See* MOVE Act, 156 Cong. Rec. S4513, S4518 (daily ed. May 27, 2010). To provide sufficient time for these voters to exercise their right to vote, the MOVE Act amended UOCAVA to require that states transmit validly requested ballots to UOCAVA voters at least 45 days before an election for federal office when the request is received by that date. 52 U.S.C. § 20302(a)(8) ("Each state shall . . . transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election."); 52 U.S.C. § 20302(g)(1)(A) ("the purpose [of the 45-day requirement] is to allow absent uniformed services voters and overseas voters enough time to vote"); *see also* 156 Cong. Rec. at S4518 (discussing development of 45-day deadline based upon evidence before Congress). Despite the adoption of the MOVE Act's 45-day advance-transmission requirement for UOCAVA ballots, military and overseas voters continue to face difficulties having sufficient time to receive, mark, and return their ballots.[4] Illinois's vote-by-mail ballot receipt deadline helps to ensure that otherwise valid ballots cast by the state's military and overseas voters, among other citizens, on or before election day are

[4] According to the Federal Voting Assistance Project's 2020 Report to Congress concerning the most recent general election, "there were 1,249,601 UOCAVA ballots transmitted to voters from election officials. Election officials received 913,734 voted ballots issued by states, and 33,027 [Federal Write-In Absentee Ballots]." *2020 Report to Congress*, FED. VOTING ASSISTANCE PROGRAM 55, https://perma.cc/CVH4-X97K. The median return rate as a percentage of UOCAVA ballots transmitted among the various states was 82.3 percent. *Id.* at 57. The Report notes that "[m]issing the deadline was the most common reason for rejection [of returned ballots] among both [groups of UOCAVA voters,] at rates of 44.7 percent for Uniformed Service members and 41.3 percent for overseas civilians." *Id.*

received in time to be counted, notwithstanding the logistical challenges that can often result from transporting ballots from overseas or distant locations across the country.

V. ARGUMENT

A. Counting ballots mailed on or before election day does not violate the Federal Election Day Statutes.

"The Elections Clause of the Constitution, Art. 1, § 4, cl. 1 . . . is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (citation omitted). "[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject." *Voting Integrity Project v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000); *Foster*, 522 U.S. at 68. By enacting 2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1 ("Federal Election Day Statutes"), Congress exercised its power under the Elections Clause to set federal election day as the first Tuesday after the first Monday in November. In Illinois, vote-by-mail ballots are counted if postmarked on or before election day and received during the fourteen calendar days following the election. 10 ILCS § 5/19-8; *id.* § 5/18A-15(a). Provisional ballots in Illinois are also examined and tallied (if valid) during this fourteen-day period, a practice Plaintiffs do not challenge. *Id.* § 5/18A-15(a). The text of the Federal Election Day Statutes does not preempt the acceptance of ballots postmarked or certified on or before election day and received within the fourteen-day period for counting ballots provided by state law.[5]

[5] Numerous other states aside from Illinois have adopted ballot receipt deadlines that extend for some period of time after election day, either for voters by mail generally or for some or all UOCAVA voters in particular. *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. OF STATE LEGISLATURES (July 12, 2022), https://perma.cc/Z6DV-SRPL

The Supreme Court has embraced a narrow view of what state laws the Federal Election Day Statutes preempt, imposing only the limitation that an election may not conclude prior to election day. *Foster*, 522 U.S. at 71, 72 n.4. Plaintiffs argue by implication first that *Foster*'s holding applies equally to *post*-election day ministerial actions related to the transmission, processing, and counting of mail-in ballots, and second that tallying ballots cast by mail on or before election day constitutes prohibited post-election day voting. Both of these assertions are incorrect.

In *Foster*, the Supreme Court considered Louisiana's practice of holding in October of federal election years an "open primary," which "provide[d] an opportunity to fill" Congressional offices "without any action to be taken on federal election day." *Id.* at 68-69. A candidate who received a majority of the votes in the open primary was "elected" *Id.* at 70. As a practical matter, a candidate was elected in over 80 percent of Louisiana's open primaries. *Id.* The Court, finding that Louisiana's practice violated 2 U.S.C. § 7, wrote: "[I]t is enough to

(noting states with extended ballot receipt deadlines that apply generally and are not targeted specifically at UOCAVA voters); *see also Voting Assistance Guide*, FED. VOTING ASSISTANCE PROGRAM, https://perma.cc/78G5-VSXK (compiling information on ballot receipt deadlines for each state, including those that apply specifically to UOCAVA voters, such as Florida's 10-day extension to receive ballots after election day that only applies to UOCAVA voters who are overseas and only if their ballots returned by mail are postmarked/dated by election day for certain elections, and Pennsylvania's seven-day extension after election day to receive ballots from UOCAVA voters that are signed as having been mailed by the day before election day). In addition, the Uniform Military and Overseas Voters Act (UMOVA), a model statute drafted by the Uniform Law Commission, suggests that states adopt various measures to protect UOCAVA voters, not dissimilar to some of those adopted here by Illinois. UMOVA suggests an extended post-election day ballot receipt deadline, *e.g.*, as the "latest deadline for completing the county canvass or other local tabulation used to determine the official results." *See* UMOVA § 12. UMOVA also suggests that timeliness of voting a UOCAVA ballot can be proven in several ways, *e.g.*, evidence such as a postmark or certification by the voter under penalty of perjury. *See* UMOVA §§ 10, 12. The Uniform Law Commission indicates that UMOVA has been adopted by sixteen states. *See Military and Overseas Voters Act*, UNIF. L. COMM'N, https://perma.cc/5AVP-QP7X.

resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day" violates the Federal Election Day Statutes. *Id.* at 72. So long as there remains under state law an "act in law or in fact to take place on" election day, *id.*, *Foster* does not support the preemption of that state law. *See id.* at 71 (noting the legality of holding a run-off election after federal election day); 2 U.S.C. § 8 (allowing states to prescribe procedures for holding elections for vacancies "caused by a failure to elect at the time prescribed by law"). In Illinois, that act is the requirement for the casting of ballots by election day, including the certification and transmission of absentee ballots to election officials, as established by the postmark or certification date. And thus, *Foster* does not support preemption of Illinois's ballot receipt deadline.

By necessity, *calculating* voters' final selection often can stretch into the days following election day, and courts repeatedly have rejected the argument that post-election ballot tallying violates the Federal Election Day Statutes. As the court observed in *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317 (N.D. Fla. 2000), "while it is possible for everyone to vote on election day, it is highly unlikely that every precinct will be able to guarantee that its votes would be counted by midnight on election day. This has been the case for years, yet votes are not routinely being thrown out because they could not be counted on election day." *Harris*, 122 F. Supp. at 1324-25, *aff'd sub nom. Harris v. Fla. Elections Comm'n*, 235 F.3d 578 (11th Cir. 2000) ("Routinely, in every election, hundreds of thousands of votes are cast on election day but are not counted until the next day or beyond."); *see also Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020) ("New Jersey's law permitting the canvassing of ballots lacking a postmark if they are received within forty-eight hours of the closing of the polls

is not preempted by the Federal Election Day Statutes because the Federal Election Day Statutes are silent on methods of determining the timeliness of ballots.").

Plaintiffs concede that casting a ballot is distinct from counting a ballot, and that the Federal Election Day Statutes permit post-election day counting. Mem. Supp. Mot. Summ. J. at 13, ECF No. 33. Yet in the same breath, Plaintiffs contend that Illinois's decision to count absentee ballots that were timely cast violates the Federal Election Day Statutes. *Id.* Plaintiffs' position hinges on the Federal Election Statutes prohibiting Illinois from defining the casting of a ballot to include putting it in the mail. But "[p]roviding various options for the time and place of depositing a completed ballot does not change the day for the election." *Millsaps v. Thompson*, 259 F.3d 535, 545 (6th Cir. 2001) (internal quotation marks omitted). Illinois law establishes a mailbox rule for absentee ballots, considering the placement of a marked ballot in the post for delivery to election officials as an act of voting. 10 ILCS § 5/19-8. And Congress has "decline[d] to preempt state legislative choices" such as "methods of determining the timeliness of mail-in ballots." *Way*, 492 F. Supp. 3d 354, 372 (D.N.J. 2020) (quoting *Foster*, 522 U.S. at 69).[6] The plain text of the Federal Election Day Statutes does not preclude state law procedures designating particular times or places for casting, receiving, processing, and counting ballots—in this case, Illinois's statute allowing for the counting of ballots cast by mail on or before election day, provided they are received by officials within fourteen days after election day.

[6] Plaintiffs cite a 1944 case from the Montana Supreme Court stating that "[n]othing short of the delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot." Pls.' Mem. Supp. Mot. Summ. J. at 5, ECF No. 33 (quoting *Maddox v. Bd. of State Canvassers*, 149 P.2d 112, 115 (Mont. 1944)). This was true under Montana state law in 1944—the law that court was interpreting. The court premised its holding on the fact that "the state law provides for voting by ballots deposited with the election officials." *Maddox*, 149 P.2d at 115. By contrast, in this case, Illinois law provides for voting by ballots deposited with election officials or deposited in the mail. 10 ILCS § 5/19-8.

The Illinois statute at issue in this case clearly does not permit voters to cast votes after election day is over. Illinois law requires that voters must vote and mail in their ballots on or before election day, before any election results are publicized. This system ensures that there is a level playing field for all voters and that no voters have access to cumulative vote tallies before casting their vote. Federal law does not preclude Illinois's decision to *count* ballots validly cast by mail on or before election day but received and tallied in the following fourteen days. As such, 10 ILCS § 5/19-8 does not conflict with the Federal Election Day Statutes, which set a uniform date for federal general elections. As described more fully herein, Illinois law includes standard measures commonly used in other state laws and in model legislation, and in the United States' own UOCAVA consent decrees, to ensure that mail-in voters have timely voted their ballots and transmitted them back to elections officials by election day and to avoid voters actually casting votes after election day.

B. Illinois's ballot receipt deadline protects the voting rights of military and overseas voters.

Absentee voting laws generally are the only means by which U.S. citizens who are deployed in the uniformed services or otherwise living overseas can exercise their right to vote. Despite Congress's repeated efforts, many military and overseas voters have continued to face difficulties exercising their franchise. *See, e.g., Bush*, 123 F. Supp. 2d at 1310. Prior to the adoption of UOCAVA, the "single largest reason for disenfranchisement of military and overseas voters [was] State failure to provide adequate ballot transit time." H.R. Rep. No. 99-765, at 10 (1986). After problems with delayed UOCAVA ballots persisted, Congress enacted the MOVE Act in an attempt to address the issue further. *See* H. Rep. No 111-288, at 744 (2009) (noting that the MOVE Act would "require States to transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter at least 45 days before an election for

federal office"); *see also* Cong. Rec. S4518 (daily ed. May 27, 2010) (Statement of Sen. Schumer) (describing Congress's adoption of the 45-day requirement as an effort to provide sufficient time for UOCAVA voters to request, receive, and cast their ballots in time for them to be counted). This history of Congressional action reflects a strong commitment to ensuring military service members and overseas citizens have access to the ballot box comparable to that enjoyed by domestic civilians.

As noted above, the Attorney General is charged with the responsibility of enforcing UOCAVA, 52 U.S.C. § 20307. Since UOCAVA's enactment, the United States repeatedly has found it necessary to take action against states that transmitted ballots late, in order to prevent military and overseas voters from being disenfranchised in particular federal elections. *See., e.g., United States v. Alabama*, 857 F. Supp. 2d.1236, 1242 (M.D. Ala. 2012) (finding that "[t]he State denies its legal obligation to ensure UOCAVA compliance; the State has violated [UOCAVA] in two consecutive elections, the extent of these violations has been widespread, systemic, and worsening; and the State has failed to establish mechanisms to avoid UOCAVA voter disenfranchisement."); *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at *1 (N.D.N.Y. 2012) (observing "[h]aving had ample opportunity to correct the [UOCAVA] problem, [the state] ha[d] failed to do so"). In most of these UOCAVA cases, the remedy has involved extending the deadline after election day for receiving military and overseas voters' absentee ballots cast by election day. For example, just since the year 2000, UOCAVA ballot receipt deadlines were extended by court-ordered consent decree, court order, or settlement agreement, allowing validly-cast ballots to be received and counted after election day, in 29 of the United States' cases and agreements. Indeed, the use of such ballot receipt extensions as remedies for late transmission of UOCAVA ballots stretches back to the earliest of the United

States' cases brought to enforce UOCAVA after that federal statute was enacted in 1986. *See Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, DEP'T OF JUST., (Mar. 24, 2022), https://perma.cc/7LZE-7Q7H. Many of the agreements or court orders addressing UOCAVA violations based on late ballot transmissions have extended ballot receipt deadlines for UOCAVA voters for the number of days after election day commensurate with the number of days that UOCAVA ballots were transmitted after the federal law deadline, in order to protect the right to vote of military and overseas voters who did not receive ballots in time due to late transmission by election officials.[7] In Illinois alone, the United States has sued the State for late ballot transmissions to UOCAVA voters twice in the last twelve years. The remedies in those cases have included an extension of Illinois's existing ballot receipt deadline and other changes to election calendars to ensure UOCAVA voters have sufficient time to receive, mark, and return their ballots. Consent Decree, *United States v. Illinois*, No. 1:10cv06800 (N.D. Ill. Oct. 22, 2010); Consent Decree, *United States v. Illinois*, No. 1:13cv00189 (N.D. Ill. Jan. 11,

[7] *See, e.g.*, *United States v. West Virginia*, No. 2:14-cv-27456 (S.D. W.Va. Nov. 3, 2014) (extending ballot receipt deadline by 7 days); *United States v. Wisconsin*, No. 3:12-cv-00197 (W.D. Wis. Mar. 23, 2012) (extending deadline by number of days of late transmission); *United States v. New York*, No. 1:09-cv-00335 (N.D.N.Y. Mar. 26, 2009) (extending deadline by 6 days); *United States v. Michigan*, No. L 88-208 CA5 (W.D. Mich. July 29, 1988) (extending deadline by 10 days); *United States v. Idaho*, No. 88-1187 (D. Idaho May 21, 1988; entered May 23, 1988) (extending deadline by 10 days); *United States v. Oklahoma*, No. CIV-88-1444 P (W.D. Okla. Aug. 22, 1988) (extending deadline by 10 days); *United States v. New Jersey*, No. 3:90-cv-02357 (D.N.J. June 5, 1990) (extending deadline by 10 days); *United States v. Colorado*, No. 1:90-cv-01419 (D. Colo. Aug. 10, 1990) (extending deadline by 10 days); *United States v. New Jersey*, No. 3:92-cv-2403 (D.N.J. June 2, 1992) (extending deadline by 14 days); *United States v. Michigan*, No. 1:92-cv-00529 (W.D. Mich. Aug. 3, 1992) (extending deadline by 20 days); *United States v. Georgia*, No. 1:04-cv-02040 (N.D. Ga. July 16, 2004) (extending deadline by 3 business days). Many UOCAVA cases are collected at the Department of Justice's website. *See Voting Section Litigation*, DEP'T OF JUST. (Aug. 30, 2022), https://perma.cc/T27P-C33C.

2013).[8] And like the Illinois law at issue here, the relief sought by the United States in UOCAVA cases is designed not only to provide an adequate opportunity for voters to return their ballots, through the extension of the receipt deadline, but also to avoid the risk of votes being cast after election day, by providing that ballots must be executed and sent by election day.

The Illinois statute at issue here provides a prophylactic protection for UOCAVA voters (and other mail-in voters) to ensure that they have time to receive, vote, and return their ballots in time for them to be counted. This Illinois law is not dissimilar to the statutes adopted by other states and the remedies proposed and ordered in UOCAVA cases brought by the United States.

VI. CONCLUSION

For the foregoing reasons, the United States submits that Illinois's post-election day ballot receipt deadline is consistent with the Federal Election Day Statutes, 2 U.S.C. §§ 1 and 7 and 3 U.S.C. § 1. Such post-election day ballot receipt deadlines are a common remedial measure that the United States has sought and obtained in UOCAVA cases to ensure UOCAVA voters have sufficient time to receive, mark, and return their ballots in time for them to be counted, and are also a common prophylactic measure that states have adopted by legislation or rule to protect the right to vote of UOCAVA voters and other mail-in voters.

[8] Contrary to Plaintiffs' assertion, Pls.' Resp. Opp'n Defs.' Mot. Dismiss 2, ECF No. 43, Michigan does not require all ballots to be received by election day. In 2012, Michigan enacted legislation extending the "ballot receipt deadline for any [UOCAVA] absentee voter ballots . . . that were not transmitted" by UOCAVA's 45-day deadline, by "the total number of days beyond the deadline [that they were] transmitted. . . ." MICH. COMP. LAWS § 168.759a (16); 2012 Mich. Legis. Serv. P.A. 523 (S.B. 810) (effective March 28, 2013). Such "ballots received during the extension time [are] counted and tabulated for the final results of the election provided that the absentee voter ballots are executed and sent by the close of the polls on election day . . . ." *Id*. This Michigan legislation effectively adopts the post-election day ballot receipt extension remedy entered by stipulated order in earlier litigation brought by the United States to enforce UOCAVA. *United States v. Michigan*, No. 1:12-cv-00788 (W.D. Mich. Aug. 6, 2012), https://perma.cc/ESJ6-8SK8.

August 31, 2022

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CERTIFICATE OF SERVICE

I certify that on August 31, 2022, I filed the foregoing via the CM/ECF system, which sends notice to counsel of record.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

MICHAEL J. BOST; LAURA POLLASTRINI; and SUSAN SWEENEY,

Plaintiffs,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS; and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections

Defendants.

Civil Action No. _____

COMPLAINT

Plaintiffs Congressman Michael J. Bost, Laura Pollastrini, and Susan Sweeney ("Plaintiffs"), by and through counsel, file this Complaint against the Illinois State Board of Elections and its Executive Director Bernadette Matthews, and allege as follows:

1. Plaintiffs are former and prospective federal candidates and registered Illinois voters, all of whom seek declaratory and injunctive relief to enjoin parts of the Illinois election code.

2. The United States Congress is authorized under Art. I, § 4 cl. 1 and Art. II, § 1 cl. 4 to establish the Time for conducting federal elections. Congress exercised this authority in 1845

when it enacted the first of a trio of statutes that established a uniform national election day for all federal elections.

3. Under federal law, the first Tuesday after the first Monday in November of every even-numbered year is election day ("Election Day") for federal elections. *See* 2 U.S.C. § 1; 2 U.S.C. § 7; and 3 U.S.C. § 1.

4. Despite Congress' clear statement regarding a single national Election Day, Illinois has expanded Election Day by extending by 14 days the date for receipt and counting of vote-by-mail ballots. *See* 10 Ill. Comp. Stat. Ann. §§ 5/18A-15(a) & 5/19-8(c).

5. Plaintiffs allege that Illinois' extension of Election Day violates federal law and their rights.

6. Plaintiffs seek a judgment declaring Illinois' extension of Election Day to be unlawful and seek an injunction enjoining the extension.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 2201, because the matters in controversy arise under the Constitution and laws of the United States, because they concern the deprivation, under color of State law, of rights secured to Plaintiffs by the Constitution of the United States and by Acts of Congress, and because they are proper subjects for a declaratory judgment.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because one or more Defendants resides in this district and all Defendants are residents of Illinois, and because a substantial part of the events and omissions giving rise to the claims herein occurred in this district; or, in the alternative, because one or more Defendants is subject to the Court's personal jurisdiction in this district with respect to this action.

PARTIES

9. Plaintiff Michael J. Bost is a resident of Jackson County, Illinois and a registered Illinois voter who voted in the 2020 congressional and presidential elections. He intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. He also is a multi-term member of the United States House of Representatives and represents Illinois' 12th Congressional District. Congressman Bost successfully ran for re-election in the November 3, 2020 federal election and currently is a candidate for United States Representative for Illinois' 12th Congressional District during the November 8, 2022 federal election.

10. Plaintiff Laura Pollastrini is a resident of Kane County, Illinois, and a registered Illinois voter who voted in the 2020 congressional and presidential elections. She intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. Ms. Pollastrini is currently the Illinois Republican State Central Committeeperson for the 14th Congressional District. Ms. Pollastrini was appointed by the Illinois State Republican Chairman both as Chairwoman for the Illinois Republican's Presidential Electors Committee and as Republican presidential and vice-presidential elector at-large for Illinois during the 2020 presidential election. As the Illinois Republican State Central Committeeperson for the 14th Congressional District during the 2020 general election, Ms. Pollastrini herself appointed a Republican presidential and vice-presidential elector for the 14th Congressional District. Following redistricting, Ms. Pollastrini intends to seek election as the Illinois Republican State Central Committeeperson for the new 11th Congressional District. Ms. Pollastrini also intends to seek reappointment as the Chairwoman for the Illinois Republican's Presidential Electors Committee in 2024. Ms. Pollastrini further intends to seek reappointment as an at-large presidential and vice-presidential elector for the November 5, 2024, presidential election.

11. Plaintiff Susan Sweeney is a resident of Cook County, Illinois, and a registered Illinois voter who voted in the 2020 congressional and presidential elections. She intends to vote in the 2022 congressional election as well as the 2024 presidential and congressional elections. Ms. Sweeney was a Republican presidential elector during the 2020 presidential election. Ms. Sweeney intends to seek reappointment as an Illinois presidential elector for the November 5, 2024, presidential election.

12. Defendant Illinois State Board of Elections (the "State Board") is an independent state agency created under the laws of the State of Illinois. Defendant State Board is responsible for supervising the administration of election laws throughout Illinois.

13. Defendant Bernadette Matthews is the Executive Director of the Illinois State Board of Elections and the Chief State Election Official of the State of Illinois. 26 Ill. Adm. Code § 216.100(b)-(c); 52 U.S.C. § 20509. She is sued in her official capacity.

FACTS

14. The Illinois election code authorizes voting by mail and further provides that vote-by-mail ballots received "after the polls close on election day" but before "the close of the period for counting provisional ballots" shall be counted as if cast and received on or before Election Day. *See* 10 Ill. Comp. Stat. Ann. § 5/19-8(c).

15. In Illinois, election officials shall complete "the validation and counting of provisional ballots within 14 calendar days of the day of the election." 10 Ill. Comp. Stat. Ann. § 5/18A-15(a).

16. Read together, these two provisions mean that vote-by-mail ballots received up to 14 calendar days after the day of the election shall be counted as if cast and received on or before Election Day.

17. Even vote-by-mail ballots without postmarks shall be counted if received up to 14 calendar days after Election Day if the ballots are dated on or before election day. *See* 10 Ill. Comp. Stat. Ann. § 5/19-8(c).

18. For example, although Election Day for the 2020 federal elections was November 3, 2020, Illinois law authorized the counting of vote-by-mail ballots received on or before November 17, 2020, even if those ballots were not postmarked by Election Day.

19. On November 2, 2020, the State Board of Elections issued a media advisory stating it had received approximately 1,759,245 mailed ballots prior to Election Day.[1] The Board further advised that the number of ballots received after Election Day through November 17, 2020, could materially affect the unofficial election results. Specifically, the State Board explained:

> As mail ballots arrive in the days after Nov. 3, it is likely that close races may see leads change as results are reported. Reporters should check with local election authorities for updated vote counts and make readers, viewers and listeners aware of why these numbers are changing.

Id.

20. In its December 4, 2020, press release announcing certified results from the November 3, 2020 election, the State Board announced that there had been a total of 6,098,729 votes in the 2020 election, of which 2,025,662 were vote-by-mail ballots.[2]

21. Read together, the November 2nd and December 4th press releases indicate that Illinois received 266,417 vote-by-mail ballots statewide during the period from November 3rd through November 17th.

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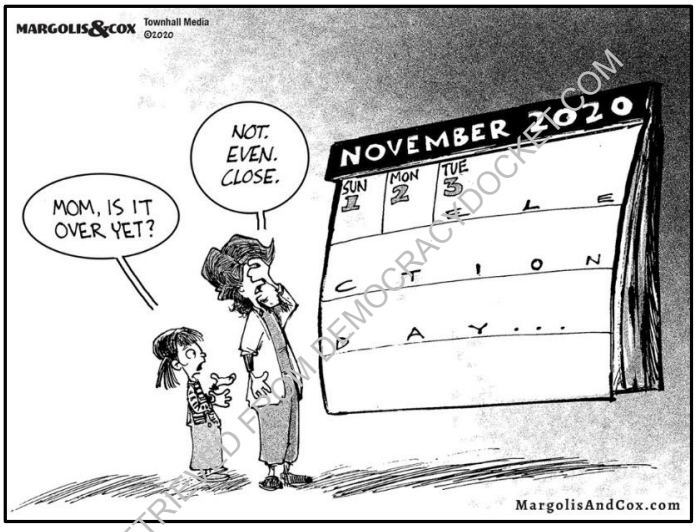
[1] "*Media Advisory: Heavy Mail Voting Could Affect Unofficial Elections Results*," Illinois State Board of Elections, Nov. 2, 2020, https://bit.ly/3y9qCWU, (last visited May 24, 2022).

[2] "*Record Number of Votes Cast, Turnout tops 2016 as Board of Elections Certifies 2020 General Election Results*," Illinois State Board of Elections, Dec. 4, 2020, https://bit.ly/3y9tumE (last visited May 24,2022).

22. Upon information and belief, most of the 266,417 vote-by-mail ballots were received after Election Day, which would mean that as many as 4.4% of votes cast in 2020 were received *after* Election Day.

23. Illinois is not allowed to hold open voting for congressional and presidential beyond the single Election Day.

24. One editorialist recently satirized the abandonment of a single national Election Day as follows:



25. The next federal election in Illinois will be held on Tuesday, November 8, 2022, at which time Illinois will elect a new Congressional delegation. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 22, 2022.

26. Accordingly, Illinois will illegally hold voting open beyond Election Day on November 8, 2022.

27. Another federal election will be held in Illinois on Tuesday, November 5, 2024, at which time Illinois will elect its next slate of presidential and vice-presidential electors as well as a new Congressional delegation. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 19, 2024.

28. Accordingly, Illinois will hold voting open beyond Election Day on November 5, 2024.

29. Counting ballots received after Election Day harms Plaintiffs.

30. Among other harms, Plaintiffs votes will be diluted by illegal ballots received in violation of the federal Election Day statutes.

31. All Plaintiffs intend to vote and conduct their prospective campaigns in accordance with federal law.

32. Plaintiffs are entitled to have their elections results certified with votes received in compliance with the federal Election Day statutes.

33. Plaintiffs rely on provisions of federal and state law in conducting their campaigns including, in particular, resources allocated to the post-election certification process.

34. Counting untimely votes and those received in violation of federal law substantially increases the pool of total votes cast and dilutes the weight of Plaintiffs' votes. More votes will be counted than the law allows to be counted, resulting in dilution.

35. Likewise, untimely votes will be counted after the federal Election Day deadline, defined as "the combined actions of voters and officials meant to make a final selection of an officeholder."

36. Plaintiffs will be subject to harms beyond even these above-stated harms.

37. These harms are severe and irreparable.

COUNT I
Violation of the Right to Vote (42 U.S.C. § 1983)

38. Plaintiffs incorporate all their prior allegations.

39. 10 Ill. Comp. Stat. Ann. § 5/19-8 requires counties to hold open voting and count ballots received after Election Day, in violation of 2 U.S.C. § 7 and 3 U.S.C. § 1.

40. Because counting ballots received after Election Day violates 2 U.S.C. § 7 and 3 U.S.C. § 1, any such ballots are untimely and therefore illegal under 2 U.S.C. § 7 and 3 U.S.C. § 1.

41. Untimely and illegal ballots received and counted after Election Day pursuant to 10 Ill. Comp. Stat. Ann. § 5/19-8 dilute the value of timely ballots cast and received on or before Election Day, including Plaintiffs' timely cast and received ballots.

42. By counting untimely and illegal ballots received after Election Day and diluting Plaintiffs' timely cast and received ballots, Defendants, acting under color of Illinois law, have deprived and are depriving Plaintiffs of rights protected under the First Amendment and 14th Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983.

43. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing 10 Ill. Comp. Stat. Ann. § 5/19-8.

COUNT II

Violation of the Right to Stand for Office (42 U.S.C. § 1983)

44. Plaintiffs incorporate all their prior allegations.

45. 10 Ill. Comp. Stat. Ann. § 5/19-8 requires counties to hold open voting and count ballots received after Election Day, including those without postmarks.

46. Defendants, acting under color of Illinois law, have deprived and are depriving Plaintiffs of rights protected under the First and Fourteenth Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983 by, inter alia, forcing Plaintiffs to spend money, devote time, and otherwise injuriously rely on unlawful provisions of state law in organizing, funding, and running their campaigns.

47. Defendants, acting under color of Illinois law, have deprived and are depriving Plaintiffs of rights protected under the First Amendment and 14th Amendment to the U.S. Constitution in violation of 42 U.S.C. § 1983.

48. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing 10 Ill. Comp. Stat. Ann. § 5/19-8.

COUNT III
Violation of 2 U.S.C. § 7 and 3 U.S.C. §1

49. Plaintiffs incorporate all their prior allegations.

50. 2 U.S.C. §7 provides that "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter."

51. 3 U.S.C. §1 provides that "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

52. By its terms 2 U.S.C. § 7 requires that the 2022 general election for Representatives to the Congress be consummated on Election Day, November 8, 2022 and Election Day, November 5, 2024.

53. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 22, 2022, in violation of 2 U.S.C. § 7's Election Day mandate.

54. By its terms 3 U.S.C. § 1 requires that the 2024 general election for Presidential electors be consummated on Election Day, November 5, 2024.

55. Under Illinois law's extended ballot receipt deadline, vote-by-mail ballots shall be counted if received on or before November 19, 2024, in violation of 3 U.S.C. § 1's Election Day mandate.

56. Illinois law permitting vote-by-mail ballots, including those without postmarks, to be counted if they are received fourteen days after Election Day violates 2 U.S.C. § 7 and 3 U.S.C. § 1.

57. A qualified ballot for federal office is not a legal vote unless it is received by Election Day.

58. State law or practice that holds open voting 14 after Election Day is invalid and void as superseded under 2 U.S.C. § 7 and 3 U.S.C. § 1.

59. Defendants have acted and will continue to act under color of state law to violate 2 U.S.C. § 7 and 3 U.S.C. § 1.

60. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing 10 Ill. Comp. Stat. Ann. § 5/19-8.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for entry of a judgment granting:

a. A declaratory judgment that the relevant parts of 10 Ill. Comp. Stat. Ann. § 5/19-8 identified herein deprive Plaintiffs, under color of State law, of rights secured by the Constitution of the United States and by Acts of Congress;

b. A permanent injunction prohibiting Defendants from enforcing the relevant parts of Illinois law, including 10 Ill. Comp. Stat. Ann. § 5/19-8, as identified herein;

c. Plaintiffs' reasonable costs and expenses, including attorneys' fees; and

d. All other relief that Plaintiffs are entitled to, and that the Court deems just and proper.

May 25, 2022

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* *Application for admission pro hac vice forthcoming*

ILND 44 (Rev. 09/20)

CIVIL COVER SHEET

The ILND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(See instructions on next page of this form.)*

I. (a) PLAINTIFFS

MICHAEL J. BOST, LAURA POLLASTRINI, AND SUSAN SWEENEY

(b) County of Residence of First Listed Plaintiff Jackson County
(Except in U.S. plaintiff cases)

(c) Attorneys *(firm name, address, and telephone number)*

See attached Addendum

DEFENDANTS

THE ILLINOIS STATE BOARD OF ELECTIONS AND BERNADETTE MATTHEWS, in her capacity as Executive Director of the ISBE

County of Residence of First Listed Defendant Cook
(In U.S. plaintiff cases only)
Note: In land condemnation cases, use the location of the tract of land involved.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Check one box, only.)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government not a party.)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate citizenship of parties in Item III.)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(For Diversity Cases Only.)*

(Check one box, only for plaintiff and one box for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Check one box, only.)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loan (Excludes Veterans)
- ☐ 153 Recovery of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 530 General
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Habeas Corpus:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

PROPERTY RIGHTS
- ☐ 820 Copyright
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016 (DTSA)

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729 (a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act (TCPA)
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Arts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☒ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/Accommodations
- ☐ 445 Amer. w/ Disabilities-Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus – Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAXES
- ☐ 870 Taxes (U.S. Plaintiff or Defendant
- ☐ 871 IRS—Third Party 26 USC 7609

V. ORIGIN *(Check one box, only.)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

(Enter U.S. Civil Statute under which you are filing and write a brief statement of cause.)

See attached Addendum

VII. PREVIOUS BANKRUPTCY MATTERS

(For nature of suit 422 and 423, enter the case number and judge for any associated bankruptcy matter previously adjudicated by a judge of this Court. Use a separate attachment if necessary.)

VIII. REQUESTED IN COMPLAINT:

☐ Check if this is a **class action** under Rule 23, F.R.CV.P.

Demand $

CHECK Yes only if demanded in complaint:
Jury Demand: ☐ Yes ☒ No

IX. RELATED CASE(S) IF ANY *(See instructions):*

Judge Case Number

X. Is this a previously dismissed or remanded case?

☐ Yes ☒ No If yes, Case # Name of Judge

Date: May 25, 2012

Signature of Attorney of Record /s/ A. Christine Svenson

ADDENDUM TO CIVIL COVER SHEET
BOST ET AL V ILLINOIS STATE BOARD OF ELECTIONS

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* *Application for admission pro hac vice forthcoming*

VI. Cause of Action

Violation of the Right to Vote (42 U.S.C. § 1983)
Violation of the Right to Stand for Office (42 U.S.C. § 1983)
Violation of 2 U.S.C. § 7 and 3 U.S.C. §1