**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

# REPLY BRIEF OF PROPOSED INTERVENOR-DEFENDANT-APPELLANT DEMOCRATIC PARTY OF ILLINOIS

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## SUMMARY OF ARGUMENT

The district court erred in denying the motion to intervene by the Democratic Party of Illinois ("DPI") as of right and abused its discretion in denying DPI permissive intervention. Nothing in Plaintiffs' response brief provides reason to find otherwise.

DPI has two distinct, protectable interests that entitle it to intervene in this litigation as of right under Federal Rule of Civil Procedure 24(a)(2). First, DPI has a direct interest as an organization because of the substantial diversion of resources that it would be forced to undertake should Plaintiffs succeed in this litigation. Second, DPI has an "associational" interest in protecting the voting rights of its members. The district court found—and Plaintiffs no longer dispute—that DPI's organizational interest satisfies the "basic criteria" for intervention. *See Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 746 (7th Cir. 2020). DPI is therefore "*entitled* to intervene *unless* existing parties adequately represent [that] interest." *Id.*; Fed. R. Civ. P. 24(a)(2). In analyzing adequacy of representation, however, the district court erred in applying the intermediate standard, which presumes adequacy of representation and imposes a heightened burden on intervenors. Instead, the court should have applied the default standard, which asks only whether the intervenor can make the "minimal" showing that representation of its interests "may be" inadequate. Under a proper application of the law, DPI was entitled to intervene based on its undisputed organizational interest in its own resource allocation. Because DPI easily makes the minimal showing that Defendants' representation of this interest "may be" inadequate, reversal is required on that basis alone.

The district court also erred in finding that DPI's associational interest is not sufficiently "unique" to satisfy the "basic criteria" for intervention, misapprehending what "unique" means here. In this context, it simply means an interest that the intervenor has "independent" of any

existing party to the case. It does not mean no one else has a similar interest. And the district court's conclusion that this associational interest is adequately represented was similarly based on its erroneous application of the intermediate standard.

Finally, the district court abused its discretion by denying permissive intervention under Rule 24(b)(1)(B). Plaintiffs do not defend the district court's primary reasoning—that DPI's involvement would cause undue delay. They instead rely on the "equitable" factors considered by the court. These "equitable" factors, however, merely repeat the district court's erroneous analysis under Rule 24(a)(2), which cannot be the sole basis for denying permissive intervention.

Plaintiffs' arguments in opposition make the same critical errors that the district court made, repeatedly taking positions that are contrary to and foreclosed by the binding precedent of this Court and the U.S. Supreme Court. And Plaintiffs' remaining arguments are either wholly inapposite or insufficiently developed and therefore waived. For the reasons set forth in DPI's opening brief and below, this Court should reverse and remand with instructions to grant DPI's motion to intervene.



## ARGUMENT

### I. The district court should be reversed on its treatment of DPI's diversion of resources interest alone, which entitles it to intervention as of right.

Plaintiffs do not dispute that DPI has at least one sufficiently unique, protectable interest that satisfies the "basic criteria" for intervention: its interest in its own resource allocation, which the district court found "would be impaired" if Plaintiffs succeed. A8-A9. That is enough to satisfy the first step of this Circuit's mandatory intervention analysis. Having made that determination, the only remaining question for the district court was whether *this* interest was adequately represented by the existing parties. But the district court never analyzed that question. Instead, its adequacy analysis focused exclusively on DPI's associational interest in its members' voting

rights, despite having concluded that the associational interest was insufficiently unique to satisfy Rule 24(a)(2). *See* Opening Br. at 15-16; *see also* A7-A9. This mixing and matching of interests also meant that the district court never asked whether DPI's interest in its own resources was "identical" to the interests of the named Defendants, leading it to misapply the intermediate, rather than default, standard to its adequacy analysis. *See Driftless*, 969 F.3d at 747; *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). As a result, the district court's finding that DPI's interests are adequately represented by Defendants is erroneous and should be reversed.

The default standard for determining adequate representation is called that because it is *the default* that applies, *unless* one of two narrow exceptions are present: (1) when the interest of the intervenor is truly *identical* to that of an existing party, in which case the intermediate standard applies, or (2) when a governmental party is *charged by law* with representing the intervenors' interest, which triggers the highest standard. *Driftless*, 969 F.3d at 747; *see also Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022) (explaining "[w]here the absentee's interest is similar to, but not identical with, that of one of the parties," that normally is not enough to trigger a presumption of adequate representation (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909 (3d ed. Supp. 2022)). No one argues that the highest standard applies here. And the district court did not find—and Plaintiffs wisely do not argue—that DPI's interest in its own resource allocation is "identical" to the interests of the named Defendants.

Instead, Plaintiffs attempt to defend the district court's approach by contending that there is no requirement that the district court compare the *interests* that get DPI in the door at step one

of the Rule 24(a)(2) analysis to the *interests* of the existing Defendants. *See* Bost Br. at 14-16.[1] According to Plaintiffs, "the interests of the organization are only relevant insofar as there is some material conflict of the overall goals between the proposed intervenor and the representative party." *Id.* at 16. But Plaintiffs do not cite any authority that allows a court to pick and choose among interests to cobble together a path to trigger the more demanding intermediate standard. Indeed, Plaintiffs' argument is contrary to both the plain language of Rule 24(a)(2) and this Court's precedent.

Rule 24(a)(2) expressly confers a right to intervene when a proposed intervenor "claims an *interest* relating to . . . the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect *that interest*, *unless* existing parties adequately represent *that interest*." Fed. R. Civ. P. 24(a)(2) (emphases added). And in *Driftless*, this Court expressly rejected the argument that the intermediate standard is triggered when "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; *see also* Opening Br. at 14-15. While it is true that in this context, courts have sometimes used the term "goals" instead of "interests," *see Planned Parenthood*, 942 F.3d at 799, Plaintiffs read too much into those discussions. *See, e.g.*, *id.* at 806 (Sykes, J. concurring) (parties share the "same goals" when "their *interests* align" (emphasis added)). Most notably, Plaintiffs do not cite any case that holds that courts may ignore the protectable interest that satisfies the first part of the mandatory intervention inquiry when conducting the "adequacy" analysis. And, indeed, this Court has held the opposite. *See Driftless*, 969 F.3d at 747 ("The most important factor in determining adequacy of representation is how the



[1] Citations to "Bost Br." are to Plaintiffs-Appellees' brief in this appeal, App. Dkt. 32. Defendants-Appellees Illinois State Board of Election and Bernadette Matthews notified this Court that they will not be participating in this appeal. *See* App. Dkts. 24, 25.

*interest* of the absentee compares with the *interests* of the present parties." (emphasis added) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909 (3d ed. 2007))).

Finally, Plaintiffs argue that DPI "never identifies a material argument that the State Board should have, but did not make, or one that is contrary to DPI's interests." Bost Br. at 17. But that argument confuses the first step of the adequacy analysis (determining which standard to apply by comparing the parties' *interests*) with the second step (applying the appropriate standard). Again, to trigger the intermediate standard, the parties' *interests* must be identical—not their arguments. And only *if* that hurdle is cleared should the court consider whether the intervenor has identified "some conflict" with the arguments made by the existing defendants. *Planned Parenthood*, 942 F.3d at 799. Here, the parties' interests are not identical, so the court need not find "some conflict" to hold that DPI's interests are adequately represented. Rather, because the default standard, not the intermediate standard, applies, there is no requirement that the court compare legal arguments, and DPI need only show that the Defendants' representation of its organizational interest "may be" inadequate. *Cf. Nat'l Fire Ins. Co. of Hartford v. Tri-State Hose & Fitting*, No. 06 C 5256, 2007 WL 9814578, at *7 (N.D. Ill. June 21, 2007) (granting intervention and holding that interests of defendant and party seeking intervention were not identical where they both sought a "similar disposition" and "their litigation strategies *might* diverge" (emphasis added)).

Plaintiffs do not meaningfully dispute that DPI satisfies the default standard. In a footnote, they dismiss the possibility of inadequate representation based on DPI's "specific interests and concerns," Bost Br. at 20 n.6, but that argument is inadequately developed and therefore waived. *Bradley v. Vill. of Univ. Park*, No. 22-19003, --- F.4th ----, 2023 WL 1488351, at *6 (7th Cir. Feb. 3, 2023) (holding an appellee may "waive arguments . . . by failing to offer a coherent, supported

argument"). In any event, DPI's more specific interests and concerns create a real possibility that its litigation strategy will diverge from that of the Defendants, who must reconcile broader, competing interests. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 529 (1972); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508-09 (7th Cir. 1996) (recognizing "representation of the would-be intervenors' interest . . . could well be thought inadequate" where original party decides not to appeal); *see also Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990) (agreeing "with the District of Columbia Circuit that a decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest" (citing *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969))).

Ultimately, this Court need not speculate whether the State Board's representation of DPI's interests is adequate. Under the default standard, DPI "should be treated as the best judge of whether the existing parties adequately represent [its] interests, and any doubt regarding adequacy of representation should be resolved in favor of the proposed intervenor[]." *Miami Tribe of Okla. v. Walden*, 206 F.R.D. 238, 243 (S.D. Ill. 2001) (quoting 6 James W. Moore *et al.*, Moore's Federal Practice § 24.03[4][a] (3d ed. 2008)); *see also* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909 (3d ed. 2007) ("[T]here is good reason in most cases to suppose that the applicant is the best judge of the representation of the applicant's own interests and to be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties.").

For these reasons alone, the district court's decision denying DPI's motion to intervene as of right should be reversed.

## II. The district court also erred in finding DPI's associational interest did not require intervention as of right.

DPI also has an independent interest in protecting the voting rights of its individual members. Plaintiffs, like the district court, argue that DPI's associational interest is subsumed by the State Board's interest in protecting all voters, and therefore is not "unique" to DPI. *See* Bost Br. at 11; A9-A10. In addition, Plaintiffs argue that DPI's "more narrow interests in protecting Democratic voters are not materially distinct from the State Board's interests of protecting all voters so as to warrant the more lenient standard of adequacy." Bost Br. at 17. But these arguments misunderstand this Court's precedent regarding: (A) what is meant by the requirement that an interest must be "unique" to be protectable under Rule 24(a)(2), and (B) whether an overlap of interests renders those interests "identical," triggering the presumption of adequacy. Under a proper application of this Court's precedent, DPI's associational interest independently entitled it to intervention as of right.



### A. The district court erred in finding that DPI's associational interest is not sufficiently "unique" to support intervention as of right.

First, like the district court, Plaintiffs misapprehend the meaning of the term "unique" in the intervention context. Plaintiffs largely repeat the district court's reasoning that DPI's interest and Defendants' interest in this respect are concentric circles—that is, the State Board has an interest in protecting the rights of *all* voters, but DPI is only interested in protecting the rights of *some* voters. *See* Bost Br. at 5, 10-12. But the fact that Defendants might share an interest in protecting voters generally does not mean that DPI's interest in protecting Democratic voters is not "unique" as that term is understood in this context.

For an interest to be "unique," the intervenor must hold the interest in its own right, "*independent of* an existing party's" interests, but it need "not [be] *different from* an existing

party's" interests. *Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring); *see also Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985); Opening Br. at 11-12. For example, the Wisconsin Legislature's interest in *Planned Parenthood* was insufficiently "unique" because it sought to intervene "only as an agent of the State," which was already represented by the Wisconsin Attorney General. 942 F.3d at 798. And, in fact, at oral argument, the Legislature confirmed this, conceding that in that case, it sought only to "champion[] the *State's* interests" and not its "'own unique institutional interests' as a legislature." *Id.* (emphasis added).[2] Similarly, this Court has recognized that an intervenor's interest may not be "independent" from an existing party's interest if the intervenor is interested in the case merely because it is a creditor of the existing party. *See Flying J., Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009).

Here, in contrast, DPI has never argued that it seeks to intervene to champion the state's interests, nor does it seek to intervene to protect an interest that is derivative of its relationship with Defendants (like the creditor-debtor situation in *Flying J.*). Instead, DPI seeks to intervene to protect its own interests and the interests of its members. Indeed, the district court found, and Plaintiffs conceded, that DPI would have Article III standing to maintain a claim on behalf of its voters based on a threat to their voting rights. *See* A9; Bost Br. at 12 n.4; Dkt. 27 at 4-5 & n.4. That right "belongs to" DPI. *Keith*, 764 F.2d at 1268. It is in no way "based on," dependent upon, or derivative of any right that belongs to the named Defendants. *Id.* It is therefore "independent



[2] Plaintiffs point out that Judge Sykes's concurrence is not the majority opinion of the Court. Bost Br. at 11 n.2. That is true, but the majority in *Planned Parenthood* similarly observed that "unique" is merely "a shorthand for the proposition that an intervenor's interest 'must be based on a right that belongs to the proposed intervenor rather than to an existing party.'" *Planned Parenthood*, 942 F.3d at 798 (quoting *Keith*, 764 F.2d at 1268). Judge Sykes's concurrence merely explains in greater detail why this understanding of "uniqueness" is consistent with the long-established standard from *Keith*.

of" any interest that those Defendants might have in protecting all voters. Plaintiffs, in their cursory repetition of the district court's erroneous reasoning, fail to show otherwise.

**B. The district court also erred in finding that DPI's associational interest is effectively "identical" to Defendants' interests, triggering the presumption of adequacy of representation.**

Although the district court found DPI's associational interest insufficient to satisfy Rule 24(a)(2)'s threshold inquiry, A9-A10, it nevertheless considered only that interest in determining adequacy of representation, A12-A15. For reasons already discussed, this mixing and matching was itself reversible error. But the district court also erred in its analysis of the adequacy of representation as to this associational interest. In their response brief, Plaintiffs double down on the district court's errors, insisting that the intermediate standard applies because "DPI's more narrow interests in protecting Democratic voters are not materially distinct from the State Board's interest of protecting all voters so as to warrant the more lenient standard of adequacy." Bost Br. at 17; *see also* A12-A13. But the intermediate standard applies only when the intervenor's interests are "identical" to those of an existing party. *Driftless*, 969 F.3d at 747. And this Court and the Supreme Court have explained that overlapping interests are not identical.



The Supreme Court squarely rejected Plaintiffs' view of adequacy in *Trbovich v. United Mine Workers of America*, where a union member attempted to intervene on the side of the Secretary of Labor, both of whom sought "to set aside an election of officers of the United Mine Workers of America." 404 U.S. at 529. In arguing that the union member did not have a right to intervene because the Secretary adequately represented his interests, the Secretary argued that the union member's "only legally cognizable interest is the interest of all union members in democratic elections," and "that interest is identical with the interest represented by the Secretary in Title IV litigation." *Id.* at 538. The Court disagreed, emphasizing that the Secretary served *multiple*

interests, including "in effect becom[ing] the union member's lawyer for purposes of enforcing" rights against the union, while *also* protecting "the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Id.* at 539 (internal quotation marks omitted). The Supreme Court later succinctly summarized this ruling in *Berger* as recognizing that while "the Secretary's and the union member's interests were 'related,' . . . the interests were not 'identical'—the union member sought relief against his union, full stop; meanwhile, the Secretary also had to bear in mind broader public-policy implications." 142 S. Ct. at 2204 (quoting *Trbovich*, 404 U.S. at 538-39).[3]

Here, too, Defendants' interests extend far beyond protecting the voting rights of Democratic voters. The State Board and its Executive Director are charged with administering Illinois' election code for all voters and must "bear in mind broader public-policy implications" in developing their litigation strategy. *Id.* That DPI's interest in this case partially overlaps with that of the Defendants does not render its interest "identical." *See id.* (a presumption of adequacy may apply "*only when interests fully overlap*" (emphasis added) (quotation marks and alteration omitted)); *Driftless*, 969 F.3d at 748 (declining to apply the intermediate standard because the parties' "interests and objectives overlap in certain respects but are importantly different"). This is because when the overlap of interests is anything less than fully coextensive, the party with broader interests may find itself pulled in different directions by competing goals and interests, potentially leading to different approaches to the conduct of the litigation. *Trbovich*, 404 U.S. at 539; *see also*



[3] Plaintiffs observe that *Berger* involved legislative intervenors and did "not decide whether a presumption of adequate representation *might sometimes* be appropriate when a private litigant seeks to defend a law alongside the government." Bost Br. at 23 (quoting *Berger*, 142 S. Ct. at 2204) (emphasis added). That is correct. But *Berger* did make clear that, at a *minimum*, a presumption of adequacy cannot apply unless the intervenors' interests are "identical" to those of government defendants. 142 S. Ct. at 2204.

*Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (reversing denial of intervention, finding intervenors' protectable interests inadequately represented, and explaining that "the government's representation of the public interest may not be identical to the individual parochial interest of a particular group just because both entities occupy the same posture in the litigation" (citation and internal quotation marks omitted)). It is no coincidence that so many of these cases involve a governmental entity as the original party and a private party as the intervenor whose interests may be similar but are not identical to those of the governmental entity. As courts have recognized, where an original party to the suit is a government entity, its 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." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998). Under such circumstances, the burden of establishing inadequacy of representation by existing parties is "comparatively light." *Id.*



Plaintiffs' reliance on *Feehan*—a district court decision not binding on this Court—is misplaced. *See Feehan v. Wis. Elections Comm'n*, No. 20-cv-1771, 2020 WL 7182950 (E.D. Wis. Dec. 6, 2020). That case involved a challenge to the certification of the 2020 presidential election after all votes had been counted and Democratic candidate Joe Biden was declared the winner. *See id.* at *4. The DNC attempted to intervene to defend the Wisconsin Election Commission's ("WEC") certification of that election alongside the WEC. The district court properly noted that the mere fact that the DNC and the WEC shared the "same goal" of "defend[ing] the results of the Wisconsin 2020 Presidential general election . . . may not necessarily give rise to the presumption of adequate representation." *Id.* at *6. Nevertheless, the district court determined, after consideration of the record before it, that in that case the DNC did "not have a right, independent

of the defendants, to defend the certification of the 2020 election results," and that a presumption of adequacy therefore applied. *Id.* at *7.

*Feehan* offers no help to Plaintiffs. First, it confuses the first stage of the mandatory intervention analysis—where the court considers whether a proposed intervenor has a sufficiently "unique" or "independent" cognizable interest to trigger Rule 24(a)(2) at all—with the second stage, where, having found that the intervenor has a sufficiently unique interest to intervene as of right, the court then asks whether existing parties adequately represent that interest. *See generally* Fed. R. Civ. P. 24(a)(2). At the adequacy stage, the question becomes whether the intervenor's interest is *identical* to that of an original party, or if an original party is required by law to protect the intervenor's interest. *See, e.g.*, *Driftless*, 969 F.3d at 747; *Berger*, 142 S. Ct. at 2204. The *Feehan* court improperly applied the "uniqueness" or "independence" test at this second stage. And in doing so, it failed to explain *why* the DNC's right to defend the certification of the 2020 election in favor of its candidates was not "independent" from the right of the WEC. *See Feehan*, 2020 WL 7182950, at *7. It is therefore difficult to discern the exact bases for the *Feehan* court's denial of intervention as of right.[4]



In any event, the circumstances in *Feehan* are distinguishable. There, all the voting was done, all the ballots had been cast and counted, and the DNC had no role in certification. The WEC

[4] It is also worth noting that the *Feehan* court had precious little time to consider these questions. The case was decided under highly unusual circumstances, when courts around the country were contending with unprecedented attacks against the outcome of the 2020 election and the *Feehan* court had to decide these matters on an exceedingly compressed timetable. All told, the case was before the district court for a total of nine days. WEC certified the election on November 30, 2020. *See Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 600-01 (E.D. Wis. 2020). The plaintiffs filed the complaint the very next day. *Id.* at 601. There was then a flurry of briefing, with the court issuing an order dismissing the matter on December 9, 2020. *Id.* at 620. The DNC moved to intervene on the fourth day of those proceedings, and the district court denied its motion on the sixth day. *Id.* at 603; *Feehan*, 2020 WL 7182950, at *9.

was the body tasked with certifying the election, *and it had in fact already certified the election* by the time plaintiffs filed suit. *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 601 (E.D. Wis. 2020). In contrast, as the district court recognized, Plaintiffs here seek to change the rules of whose ballots may be counted in future elections that have yet to take place. And, if successful, the relief that Plaintiffs seek would both fundamentally change DPI's operations—requiring substantial diversion of its resources—and result in its voters being disenfranchised in future elections. Both of these interests arise regardless of whether Defendants also seek to defend the ballot receipt deadline or any other interests that they have independently in this litigation. *See Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring); *Driftless*, 969 F.3d at 748; *see also supra* § II.A.

Decisions from courts across the country underscore this very point. In *Issa v. Newsom*, for example, the court recognized that the interests of the state defendants were not "identical," "the same," or "congruent" with the interests of an intervening political party organization where the state defendants' arguments "turn[ed] on their inherent authority as state executives and their responsibility to properly administer election laws," while the intervenors were "concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures." No. 20-cv-01044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020). Similarly, in *Paher v. Cegavske*, the court recognized that "Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates." No. 20-cv-00243, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2010). And in *Meek v. Metropolitan Dade County*, the Eleventh Circuit recognized that the proposed intervenors "sought to advance their own interests in

achieving the greatest possible participation in the political process," while the governmental defendants "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." 985 F.2d 1471, 1478 (11th Cir. 1993).

Plaintiffs attempt to distinguish these cases by arguing that neither the Ninth nor the Eleventh Circuits "apply the same exacting standard for adequacy that the Seventh Circuit has adopted." Bost Br. at 17-18. But this argument ignores what that "exacting standard" actually is. Both this Court and the Supreme Court have held that a presumption of adequacy can *only* apply where the interests of a proposed intervenor are "identical" to those of an existing party. *Driftless*, 969 F.3d at 747; *Berger*, 142 S. Ct. at 2204. And these cases illustrate why the interests of an intervening political party such as DPI are simply not "identical" to the State Defendants' interests in a case such as this.

In short, DPI's associational interest in protecting the rights of Democratic voters is not "identical" to the State Board's interests, and under this Court's precedent, the presumption of adequate representation cannot apply. To succeed in its motion to intervene, DPI need only show under the "lenient default standard" that the State Board's representation of its interest "may be" inadequate. *Driftless*, 969 F.3d at 747-48. As described above, DPI satisfies that minimal burden. Thus, if the Court reaches the question of whether the district court erred in evaluating DPI's motion to intervene based on its associational interest, reversal on those grounds is also required.



## III. Alternatively, the district court abused its discretion in denying DPI permissive intervention.

The district court denied permissive intervention principally based on its speculation that DPI's participation would cause delay. *See* A16. But the 2022 election has come and gone, and this case has not yet been decided. Moreover, nothing in the record suggests that DPI caused any

delay. In response, Plaintiffs do not even try to defend the district court's decision on these grounds, effectively conceding that the court's primary rationale for denying intervention falls short. *See* Bost Br. at 24-25. Instead, Plaintiffs rely on cursory references to other "equitable considerations" discussed by the district court. *Id.* at 25 (citing Dkt. 56 at 16-17). None of those considerations justifies the district court's decision in this case.

First, Plaintiffs claim that DPI's interests are "categorically the same" as those of the existing Defendants, and that DPI is "a less ideal candidate" to defend all voters' interests. Bost Br. at 25. Those arguments again fail to acknowledge that DPI has its *own organizational interest*, which existing defendants do not and cannot represent. Second, Plaintiffs claim that DPI "makes functionally the same legal arguments" as the existing Defendants. *Id.*. As demonstrated at oral argument on the State Board's motion to dismiss, as a political party committee with extensive experience in the application of election laws, DPI is able to provide important context and answer important questions that the State Defendants are not as well situated to address.[5]



More fundamentally, neither Plaintiffs nor the district court cited any authority for the proposition that permissive intervention may be denied on these grounds. In fact, each of these "equitable" considerations merely echoes Plaintiffs'—and the district court's—arguments against mandatory intervention. While courts may consider the mandatory intervention factors among other "discretionary" factors in analyzing permissive intervention, they may not "deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right." *Planned Parenthood*, 942 F.3d at 804. Stripped of the district court's concerns about

[5] *Compare* Dkt. 74, Tr. of Proceedings at 6-8, *Bost v. Ill. State Bd. of Elections*, No. 22 CV 02754 (N.D. Ill. Dec. 7, 2022), *with id.* at 16-19 (discussing whether any hypothetical plaintiff could have standing); *compare id.* at 9-10, *with id.* at 15-16 (discussing why *Foster v. Love* is not controlling on standing); *compare id.* at 13-14, *with id.* at 21-22 (discussing whether there are any limits on a state's ability to count mail-in ballots received after Election Day).

"delay"—which Plaintiffs have abandoned—the argument against permissive intervention is merely a watered-down version of the district court's mandatory intervention analysis.

The cases that Plaintiffs cite offer them no help. *Ligas ex rel. Foster v. Maram*, considered only whether the intervenor had a claim or defense that shared with the main action a common question of law or fact. 478 F.3d 771, 775-76 (7th Cir. 2007); *see* Fed. R. Civ. P. 25(b)(2). Because the intervenor did not have such a claim or defense, the Court did not address any of the "equitable" factors upon which the district court here relied. *Id. Arney v. Finney* was a class action where the court was faced with a motion to intervene by a class member who had withdrawn as a class representative but then apparently had a change of heart and sought to intervene as a class representative again. 967 F.2d 418, 421-22 (10th Cir. 1992). In denying that (procedurally unique) motion, the court found that the class member in question was "similarly situated with other members of the class," and allowing intervention as a class representative at that point would "only clutter the action unnecessarily." *Id.* And in *Bethune Plaza v. Lumpkin*, the intervening trade association had no concrete interest of its own in the matter, and the Court found that it sought intervention for the sole purpose of attempting to "frustrate, delay, and prejudice" an existing party's attempted settlement, to avoid the stare decisis effect of an unfavorable district court opinion. 863 F.2d 525, 533 (7th Cir. 1988).



Nothing here resembles these scenarios. DPI has its own, independent interest in protecting its resources and its voters, and it has no interest in causing frustration or delay. And DPI has consistently sought to move this action along. All delays have been the result of requests by the existing parties. *See* Opening Br. at 21-23.

## IV. Plaintiffs' other arguments against intervention should be rejected.

Finally, Plaintiffs reach far beyond the Rule 24 legal standard in search of additional arguments against intervention, none of which has merit.

First, Plaintiffs contend that, "as initiators of the complaint," Plaintiffs "control its scope and named parties, subject only to the rules of joinder." Bost Br. at 12. Plaintiffs cite no authority to support this remarkable position, which would rewrite the rules of intervention, effectively foreclosing intervention except when consented to by the plaintiffs.[6] Rule 24 is clear that a party has a right to intervene when its requirements are met. *See* Fed. R. Civ. P. 24; *see also Driftless*, 969 F.3d at 749. None of those requirements give plaintiffs veto power over the intervention of parties who meet Rule 24's criteria—either as of right or where a court concludes that permissive intervention is appropriate.

Next, Plaintiffs argue in a single conclusory sentence and in a footnote that DPI cannot intervene as a defendant in this action because it is brought under 42 U.S.C. § 1983 against state defendants. *See* Bost Br. at 4 n.1; *id.* at 13 ("Rule 24 does not allow private political organizations to intervene as of right to defend state laws they have no role in enforcing."). As a threshold matter, this argument is waived. *See, e.g.*, *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018) (argument raised "succinctly" in footnote by appellee was waived) (citing *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989)); *McCottrell v. White*, 933 F.3d 651, 670 n.12 (7th Cir. 2019) (appellees' argument waived where it encompassed a single "sentence of their brief on appeal"); *Bradley*, 2023 WL 1488351, at *6. The argument is also wrong. Courts routinely grant intervention

[6] Plaintiffs' reliance on *Lincoln Property Co. v. Roche*, 546 U.S. 81, 84, 88 (2005), is entirely misplaced. That case addressed joinder of non-diverse parties under Federal Rule of Civil Procedure 19 and its effect on the court's subject matter jurisdiction. It has no relevance to intervention under Rule 24.

to non-state actors on the side of state actor defendants, including in suits brought under § 1983. *See, e.g.*, *Driftless*, 969 F.3d at 748-49 (reversing and remanding with instructions to grant intervention to private transmission companies as defendants in § 1983 action); *Trump v. Wis. Elections Comm'n*, No. 20-cv-1785, 2020 WL 7230960 (E.D. Wis. Dec. 8, 2020) (granting permissive intervention as defendants to nonprofit organization and political committee in case brought against Wisconsin Elections Commission); *Gaylor v. Lew*, No. 16-cv-215, 2017 WL 222550 (W.D. Wis. Jan. 19, 2017) (granting mandatory intervention as defendants to religious organizations in suit brought against Treasury Department officials).

Plaintiffs cite *Michigan v. U.S. Army Corps of Engineers*, No. 10-CV-4457, 2010 WL 3324698 (N.D. Ill. Aug. 20, 2010), apparently for the proposition that DPI, as a private entity not entrusted with enforcement of election laws, "cannot succeed in its case under any set of facts which could be proved under the complaint." Bost Br. at 4 n.1 (citing *Michigan*, 2010 WL 3324698, at *2). But *Michigan* did not involve § 1983 at all. And in that case, the district court held that private plaintiffs including a trade association and a sightseeing company were *entitled to intervene as of right* on the side of the government defendants. 2010 WL 3324698, at *3.[7]



Finally, Plaintiffs suggest that *amicus* status is an adequate substitute for intervention. *See* Bost Br. at 4, n.1. Again, this argument is inadequately developed and therefore waived. *See Cross*,

[7] The short excerpt of the *Michigan* case quoted by Plaintiffs is also misleading. It cites to *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995). The full quote from *Reich* is: "A motion to intervene as a matter of right, moreover, *should not be dismissed unless it appears to a certainty that* the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Id.* at 321 (emphasis added). That case in turn quoted *Lake Investors Development Group, Inc. v. Egidi Development Group*, which, in the immediately preceding sentence, explained: "In evaluating the motion to intervene, the district court must accept as true the non-conclusory allegations of *the motion and cross-complaint*." 715 F.2d 1256, 1258 (7th Cir. 1983) (emphasis added). In other words, the *Lake Investors* court—and consequently the *Michigan* and *Reich* courts—referred to the *intervenors'* allegations, not the plaintiffs'.

892 F.3d at 294. But the fact that the district court has permitted DPI to participate as *amicus curiae* does not negate its right to intervene as a party under Rule 24. *See, e.g.*, *Bruggeman v. Ryan*, 318 F.3d 716, 718 (7th Cir. 2003) (allowing the United States to participate as an intervenor under 28 U.S.C. § 2403(a) even though it had already filed an *amicus* brief). And participating as *amicus* is no substitute for the rights conferred by party status—including the right to initiate an appeal. *See Bethune Plaza*, 863 F.2d at 531 ("An intervenor is not an *amicus curiae*."). As this Court has emphasized repeatedly, "the court *must* permit intervention" when Rule 24(a)(2) is satisfied, and Rule 24 says nothing about participation as *amicus*. *Driftless*, 969 F.3d at 746.

## CONCLUSION

DPI respectfully requests that this Court 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: February 23, 2023

Respectfully submitted,

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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 6,307 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: February 23, 2023

/s/ Elisabeth C. Frost
Elisabeth C. Frost

## CERTIFICATE OF SERVICE

I, Elisabeth C. Frost, an attorney, hereby certify that on February 23, 2023, I caused the **Reply Brief 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 (i)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that 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.



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