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.	No. 1:22-cv-02754 Hon. John F. Kness

DEMOCRATIC PARTY OF ILLINOIS' REPLY IN SUPPORT OF ITS MOTION TO INTERVENE AS DEFENDANT

Plaintiffs seek an order that would require Defendants to reject all mail ballots that arrive after election day, regardless of when they were voted, mailed, or postmarked. Plaintiffs themselves allege that, in the November 2020 election, *most* of the 266,417 mail ballots that the Board of Elections received arrived after election day. Doc. 1 at 6. It is therefore *certain* that, if Plaintiffs succeed, members of the Democratic Party of Illinois (DPI) would have their ballots rejected as a result. Plaintiffs' attempt to write off this inevitable harm as "speculative" or "generalized" is not credible, and is inconsistent with long-standing case law, including *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which the state Democratic Party proceeded based on the inevitable harm that would befall some of its members as a result of the implementation of Indiana's voter identification law. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

Separate and apart from the associational harm its members will suffer, DPI will be *directly* injured if Plaintiffs succeed, because it will need to divert critical resources from get-out-the-vote efforts to voter education to attempt to minimize the breadth of the harm that its members would otherwise suffer. Courts in this Circuit have held that this injury is sufficient to confer Article III standing on political party intervenors and satisfies the second and third requirements for intervention as of right under Rule 24(a). This distinct interest cannot be adequately represented by the State Defendants. Thus, based upon this injury alone—which Plaintiffs do not address, much less dispute—DPI is entitled to intervene in this action as of right.

At the very least, DPI has more than satisfied the standard for permissive intervention under Rule 24(b). DPI has asserted claims or defenses in common with the issues in this case, and has shown time and again, even at this early stage of litigation, that no delay or prejudice will result from DPI's participation in this matter. The motion to intervene should be granted.

ARGUMENT

Plaintiffs concede the intervention motion was timely filed. Doc. 27 at 3. They focus only on whether DPI has an interest relating to the case's subject matter that could be impaired, and whether DPI's interests are adequately represented by existing parties. *See Zurich Cap. Markets Inc. v. Coglianese*, 236 F.R.D. 379, 383 (N.D. Ill. 2006) (discussing requirements for intervention as of right under Rule 24(a)). DPI satisfies each of these requirements.

I. DPI has significant, protectable interests that are threatened by this litigation.

In arguing that DPI "[l]acks a [s]ignificant [i]nterest in this [l]itigation," Doc. 27 at 3, Plaintiffs fail to even address one of the interests that DPI clearly asserts in its motion to intervene. Plaintiffs focus entirely on DPI's associational interests—based on the right of its members to have their ballots counted, Doc. 13 at 8-9—ignoring that DPI also has its *own* interest based on the *direct* harm it would suffer in the form of diversion of resources if Plaintiffs succeed, *see id*. at

7-8. Each of these interests is "direct, significant, and legally protectable." *Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 391 (7th Cir. 2019) (quoting *Solid Waste Agency of N. Cook Cty. v. U. S. Army Corps of Eng'rs*, 101 F.3d 503, 506 (7th Cir. 1996)).

By failing to address it, Plaintiffs waived any argument that DPI's diversion of resources injury is insufficient to support intervention as of right. *See, e.g.*, *Mart v. Forest River, Inc.*, 854 F. Supp. 2d 577, 592 (N.D. Ind. 2012) (finding plaintiff waived opposition to argument in motion to dismiss by failing to address it in opposition brief); *Norhurst, Inc. v. Acclaim Sys., Inc.*, No. 11-C-7222, 2012 WL 473135, at *2 (N.D. Ill. Feb. 9, 2012) (same). In any event, DPI's interest in avoiding such an injury is not reasonably disputable. If the Court grants relief, DPI will have to divert resources to educate its voters that—unlike in prior years—their ballots *will not be counted* if they do not reach the Board of Elections by election day. As a result, DPI will have fewer resources to devote to its standard (and mission-critical) election year activities, including voter persuasion efforts. It is indisputable—and undisputed here—that this would "substantially affect[]" DPI "in a practical sense." *Michigan v. U.S. Army Corps of Eng'rs*, No. 10-CV-4457, 2010 WL 3324698, at *3 (N.D. Ill. August 20, 2010).

As for DPI's interest based on the harm threatened to its members, Plaintiffs do not dispute that DPI has associational standing to assert the injuries of its voters. Doc 27 at 4 & n.3. Instead, Plaintiffs contend that DPI's interest in its members having their ballots counted is not "unique" enough to support intervention, because Illinois voters who vote by mail and "every other political party" have a similar interest in protecting against the disenfranchisement that would follow if Plaintiffs succeed. Doc. 27 at 5. Plaintiffs' argument is at odds with decades of precedent in which courts have repeatedly held that when an action threatens to disenfranchise a political party's members, the party has a cognizable interest at stake and may intervene to protect that interest.

See, e.g., *Crawford*, 553 U.S. at 189 n.7; *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). Consistent with this precedent, the DNC was granted intervention in *Bognet v. Secretary Commonwealth of Pennsylvania*, a very similar challenge brought by Republican voters to Pennsylvania's ballot receipt deadline based on alleged conflict with the federal election day statutes just two years ago. 980 F.3d 336 (3d Cir. 2020), *cert. granted, judgment vacated sub nom*. *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).[1]

Those same cases—and the nature of the relief sought by Plaintiffs in this case—also require rejection of Plaintiffs' argument that the harm to DPI's associational interest is speculative. Plaintiffs ask this Court to issue an order that would require Defendants to reject all vote-by-mail ballots received after election day, even if the ballot was timely voted and mailed. *See* Doc. 1 at 11. If the Court were to grant Plaintiffs' requested relief, there is no question that a significant number of ballots cast by lawful voters who are members of DPI will be received after election day and therefore invalidated, often by no fault of the voter. As a result, DPI's associational interests are directly threatened by this litigation. Plaintiffs provide no basis for the Court to find otherwise.[2]

[1] This does not mean that political parties are always entitled to intervene wherever an election rule is challenged. In *Mi Familia Vota v. Hobbs*, No. 2:22-cv-509-SRB (D. Ariz. 2022), cited by Plaintiffs, Republican party organizations sought to intervene in defense of a statute that threatened to disenfranchise Arizona voters. The interest cited by the proposed intervenors in that case, "preventing a federal court from enjoining a valid law," like the injury alleged by Plaintiffs here, was both too generalized to support standing and insufficiently separate from the state defendants' interests. Opp. Ex. 1 at 3.

[2] The direct and concrete harm that would befall DPI's members whose ballots would be rejected if Plaintiffs are successful stands in stark contrast to Plaintiffs' purported basis for standing, which contends that the power of their votes may be "diluted" if ballots received after election day are

Plaintiffs also seem to misunderstand what a proposed intervenor must show to satisfy the protectable interest element of Rule 24(a). The law, however, is clear: intervenors need not assert an interest distinct from anyone else in the world—just from anyone else in the litigation. *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*.") (emphasis added); *Planned Parenthood of Wisc., Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) ("In [*Walker*] we used the phrase 'unique' as 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 in the suit") (quotation marks omitted). Plaintiffs do not dispute that DPI's interests are different from Defendants' interest in defending state law. The fact that other potential intervenors might also possess an interest in the litigation does not negate DPI's significant, protectable interest in protecting their voters' right to vote by ensuring that their lawfully-cast mail ballots are accepted.

Finally, Plaintiffs' argument that DPI cannot show that its associational interest is impaired because it can sue *after* one of its members is disenfranchised ignores the realities of elections and the likelihood of irreparable harm to DPI's members' voting rights. In *Feehan v. Wisconsin Elections Commission*, No. 20-CV-1771-PP, 2020 WL 7182950, at *5 (E.D. Wis. Dec. 6, 2020), for example the court found that—"as a practical matter"—the DNC's interests, including its interest in protecting against the disenfranchisement of its members, would be impaired by decertifying the results of the 2020 election, finding that the DNC could not wait to seek relief. *Id.* Similarly, if the Court grants Plaintiffs' requested relief, DPI will likely have no realistic chance of remedy for the inevitable disenfranchisement of untold numbers of its members. *See League of*

counted. As discussed in DPI's proposed motion to dismiss, courts have uniformly rejected that theory of standing. Doc. 13-1 at 5-6 (citing cases).

Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress."); *see also Jones v. McGuffage*, 921 F. Supp. 2d 888, 901 (N.D. Ill. 2013) ("It is self-evident that an otherwise qualified candidate would suffer irreparable harm if wrongfully deprived of the opportunity to appear on an election ballot; so would the citizens who would have voted for him."). The ability to bring a separate lawsuit *after* voters are disenfranchised is no substitute for intervention now to protect against that injury—which by its nature would be irreparable—occurring in the first place. *See* Doc. 27 at 7. For the same reasons, a later suit could not effectively avoid the independent harm that Plaintiffs' requested relief threatens to DPI's electoral prospects.

In sum, DPI has identified distinct and significant interests—one undisputed by Plaintiffs—and demonstrated that they are threatened by this action. This more than satisfies Rule 24(a)'s "liberal[] . . . definition of an interest." *Lopez-Aguilar*, 924 F.3d at 392. Multiple other courts have come to this conclusion in analogous situations. Plaintiffs provide no reason to find otherwise here. *See, e.g.*, *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 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 Plaintiffs' challenge to the Plan's all-mail election provisions" given that "Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates"); *Issa v. Newsom*, No. 220-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (finding Democratic Party committee's interests in "advancing [its candidates'] overall electoral prospects," and preventing the "diversion of [its] limited resources to educate" Democratic voters "are routinely found to constitute significant protectable interests").

II. DPI's interests are not adequately represented by Defendants.

Defendants neither share "identical" interests with DPI nor are "charged by law with representing [DPI's] interest[s]." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 747 (7th Cir. 2020) (quotation marks omitted). As a result, "the presumption of adequate representation does not apply." *Id.* at 749. Instead, the Court should apply 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 v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)); *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").

"To 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*, at 748. Otherwise, the presumption would apply to *any* party who seeks to intervene as a defendant. Instead, "[t]he rule calls for a contextual, case-specific analysis, and resolving questions about the adequacy of existing representation requires a discerning comparison of interests." *Id.*; *see also Trump v. Wisc. Elections Comm'n*, No. 20-CV-1785-BHL, 2020 WL 7230960, at *2 (E.D. Wis. Dec. 8, 2020); *Paher*, 2020 WL 2042365, at *3.

A comparison of Defendants' and DPI's interests establishes that they are materially different. Defendants' interest in "administering" elections, Doc. 27 at 8, is not only far narrower than DPI's interest in ensuring that valid Democratic votes are counted, but also entirely

independent of DPI's interest in preventing the diversion of its resources. Defendants' ultimate objective is ensuring that Illinois's election laws are properly administered and enforced. DPI's ultimate objectives include ensuring that the Democratic Party's candidates are not unfairly disadvantaged and ensuring that each of its members has an opportunity to have their lawfully-cast ballots counted. It is irrelevant that DPI and Defendants make similar arguments in their motions to dismiss. Adequacy of representation refers to the extent to which the parties' *interests* are fully aligned, not the extent to which their litigation strategies align. *See Berger v. N. C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022). That Defendants and DPI recognize similar legal deficiencies in Plaintiffs' Complaint says nothing about the comparative interests they seek to protect in this litigation. *See 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"). Because DPI and Defendants do *not* share identical interests, the presumption of adequate representation does not apply.

Finally, the authority Plaintiff cites for applying the presumption of adequacy is distinguishable. In *Feehan*, the context was entirely different: it was a post-election challenge to the state's certification of the 2020 election results, which the court found that DNC "does not have a right, independent of the defendants, to defend." 2020 WL 7182950, at *7. But Plaintiffs concede that this situation is different when they argue that, should any of DPI's members be disenfranchised, DPI *may sue on their behalf*. *See* Opp. at 7. Although DPI and the Defendants

share the same "goal" of dismissing this lawsuit, "sharing the same goal as an existing party doesn't defeat 'uniqueness,' properly understood." *Feehan*, 2020 WL 7182950, at *7 (quoting *Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring)).

The remainder of the cases Plaintiffs cite are distinguishable either because the proposed intervenors did not have a sufficient interest in the matter to support intervention or because the defendants were charged by law with representing the interests of intervenors. As explained, neither is the case here. *See, e.g.*, *Keith*, 764 F.2d at 1270; *Common Cause Ind. v. Lawson*, No. 1:17-cv-03936-TWP-MPB, 2018 WL 1070472, at *5 (S.D. Ind. Feb. 27, 2018); *United States v. S. Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir. 1982); *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 775 (7th Cir. 2007).

III. In the alternative, the Court should grant DPI permissive intervention.

DPI easily satisfies the requirements for permissive intervention under Rule 24(b), which are much "less demanding." *Trump*, 2020 WL 7230960, at *2. The only relevant questions are whether (1) the applicant has a claim or defense in common with one in the suit, and (2) intervention will unduly delay or prejudice the adjudication of the original parties' rights. *Id.* DPI has demonstrated both that it shares common defenses with the State Defendants and that its intervention will not cause delay. Doc 13 at 12-13.

Plaintiffs' main objection to permissive intervention is that DPI "can offer no defense to the action except for rehashing the existing Defendants' arguments." Doc. 27 at 12. But 24(b) does not require a proposed intervenor assert different claims or defenses. In fact, the existence of overlapping defenses demonstrates that DPI shares a common question of law or fact. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009); *see also Paher*, 2020 WL 2042365, at *3. Similarly, Plaintiffs' argument that DPI should not be granted intervention because Plaintiffs cannot assert a § 1983 claim against DPI is of no moment. This would be true whenever a private

party seeks to intervene as defendant in an action against the government, and courts regularly grant intervention in those cases. *See, e.g.*, *Trump*, 2020 WL 7230960, at *2; *Democratic Party of Va. v. Brink*, No. 3:21-cv-756-HEH, 2022 WL 330183, at *2 (E.D. Va. Feb. 3, 2022).

Plaintiffs next rehash their argument on adequacy of representation in contending that permissive intervention should be denied. Doc. 27 at 12. But, as Plaintiffs themselves note, "a district court may not deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right[.]" *Id*. (quotation marks omitted). In *Trump v. Wisconsin Elections Commission*, for example, the district court avoided the "legal quagmire surrounding" adequacy of representation under Rule 24(a) and granted the DNC permissive intervention under Rule 24(b) to defend the certification of the 2020 election, finding that doing so would protect important rights. 2020 WL 7230960, at *2-3.[3]

CONCLUSION

DPI's intervention in this case will help facilitate—and not hinder—the expeditious resolution of this litigation and will provide the court a unique perspective on the election laws being challenged and how those laws affect DPI as an organization, along with its candidates and voters. Accordingly, DPI respectfully requests that the Court grant its motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit it to intervene under Rule 24(b).

[3] Plaintiffs make a half-hearted argument in a footnote that the addition of more defendants "is reasonably likely to delay resolution at the trial level and any subsequent appeal." Doc. 27 at 3, n.2. This projection is belied by the record. DPI has consistently pushed this litigation forward: it swiftly filed its Motion to Intervene and, with it, its Motion to Dismiss—three weeks *before* the deadline for Defendants' response to the complaint. *See* Docs. 13 and 13-1. DPI proposed a briefing schedule on the Motion to Intervene that was *weeks shorter* than Plaintiffs' preferred schedule. There is no basis to Plaintiffs' suggestion that DPI's participation may operate to delay its resolution.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Coral A. Negron, certify that on July 21, 2022 I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

I certify under penalty of perjury that the foregoing is true and correct.

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