

Michael White, Eva White, Edward
Winiecke, and Republican Party of
Waukesha County,

Plaintiffs,

v.

Wisconsin Elections Commission,

Defendant.

Case No. 2022CV001008

Case Code: 30701

**BRIEF IN SUPPORT OF WAUKESHA COUNTY DEMOCRATIC
PARTY’S MOTION TO INTERVENE**

I. INTRODUCTION

This brief is submitted in support of the motion to intervene filed by Proposed Intervenor-Defendant Waukesha County Democratic Party (“WCDP”) in this proceeding pursuant to Wis. Stat. § 803.09(1)–(2). WCDP has a significant interest in this litigation, in which the Republican Party of Waukesha County (“RPWC”) and three individual voters (collectively, “Plaintiffs”) seek to make absentee voting more difficult by prohibiting local election clerks from correcting minor omissions on returned absentee ballot envelopes—and thus requiring voters to cure their ballots on compressed timeframes. Plaintiffs’ attempt to impose new barriers to absentee voting directly threatens the fundamental right to vote of WCDP’s members and constituents and the electoral prospects of WCDP’s candidates. Plaintiffs’ requested relief would also require WCDP to expend significant resources reaching out to and assisting voters in curing minor issues on their ballots, diverting limited resources from other mission-critical efforts.

For these reasons and those set forth below, WCDP is entitled to intervene in this case as a matter of right under Wis. Stat. § 803.09(1). Such intervention is needed to protect WCDP's substantial and distinct legal interests, which will otherwise be inadequately represented in this litigation. In the alternative, the Court should allow WCDP to permissively intervene pursuant to Wis. Stat. § 803.09(2). As required by Wis. Stat. § 803.09(3), a responsive pleading setting forth the defenses for which intervention is sought accompanies WCDP's motion. (*See* Ex. 1 to WCDP's motion)

II. BACKGROUND

Wisconsin Stat. § 6.87(2) states that an absentee ballot envelope shall include the certification of a witness, including the witness's address. "If a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d). The Wisconsin Elections Commission ("WEC"), the nonpartisan Wisconsin state agency responsible for administering the statute, *see id.* § 5.05(1), has mandated that a complete address include a street number, street name, and municipality name—but has also provided guidance that if local clerks are "reasonably able to discern any missing information from outside sources," then they are "not required to contact the voter before making that correction directly to the absentee certificate envelope." (Compl. Ex. 2) Plaintiffs allege that WEC's guidance allowing clerks to correct absentee ballot envelopes diminishes both the value of their votes and voter confidence in the electoral process. (*Id.* ¶¶38–40)

Proposed Intervenor-Defendant WCDP is the Democratic Party county unit dedicated to helping Democratic voters and candidates in Waukesha County. (Aff. of Matthew Mareno in Supp. of Mot. to Intervene of WCDP ("Mareno Aff.") ¶2) WCDP will be directly impacted by Plaintiffs' attempt to disenfranchise absentee voters. (*Id.* ¶¶7–9) Entirely lawful and eligible Democratic Party voters who intend to vote by absentee ballot might have their ballots improperly rejected and

their right to vote denied if Plaintiffs are successful. (*Id.* ¶¶7–8) And even for those voters who are able to address the issue in time, Plaintiffs’ requested remedy imposes an undue burden on the right to vote, forcing lawful voters to jump through unnecessary hoops when there is no legitimate question as to their eligibility to vote. WCDP will also be directly harmed if Plaintiffs are successful in their suit because it will be forced to divert resources that it would otherwise use for mission-critical efforts in order to educate voters about the change in the law and help voters correct minor errors—efforts that will be needed to mitigate the likely disenfranchisement of absentee voters caused by Plaintiffs’ lawsuit. (*Id.* ¶8) As such, WCDP has a strong interest in this litigation both on its own behalf and on behalf of Democratic voters whose rights are threatened.

III. LEGAL STANDARD

To intervene as of right, a proposed intervenor must satisfy the four criteria specified in Wis. Stat. § 803.09(1):

- (A) its motion to intervene must be timely;
- (B) it must claim an interest sufficiently related to the subject of the action;
- (C) it must show that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and
- (D) it must demonstrate that the existing parties do not adequately represent its interest.

Helgeland v. Wis. Muns., 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. Intervention must be granted if these elements are satisfied. *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994) (“If [movant] meets each of the requirements [in Wis. Stat. § 803.09], we must allow him to intervene.”). “Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1).” *Helgeland*, 2008 WI 9, ¶37.

The standard for permissive intervention, which WCDP seeks in the alternative, is set forth in Wis. Stat. § 803.09(2): “Upon timely motion anyone may be permitted to intervene in an action when a movant’s claim or defense and the main action have a question of law or fact in common.”

IV. ARGUMENT

A. WCDP is entitled to intervene as of right.

WCDP satisfies the necessary elements for intervention as of right: It has filed this motion before WEC has even filed a responsive pleading, it has significant and unique interests at stake in the action, the disposition of the case could impair those interests, and the existing parties to the action do not represent WCDP’s interests.

1. WCDP’s motion is timely.

WCDP’s motion for intervention readily satisfies the timeliness requirement. Two factors guide a court in deciding whether an application for intervention is timely: (1) whether, in light of all the circumstances, the proposed intervenor acted promptly; and (2) whether the intervention will prejudice the original parties. *State ex. rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). The “promptness” element focuses on when the proposed intervenor discovered its interest was at risk and how far the litigation has proceeded at the time of the motion to intervene. *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶¶16–17, 247 Wis. 2d 708, 634 N.W.2d 882. Prejudice has been found where intervention “would significantly delay trial” or other stages of the proceedings. *Town of East Troy v. Village of Mukwonago*, 2002 WI App 165, ¶7, 256 Wis. 2d 696, 647 N.W.2d 469.

Here, Plaintiffs filed their complaint on July 12, 2022, and filed a motion for a preliminary injunction just one week ago. No proceedings took place in the intervening month, and WEC has not yet filed an answer or substantive response. *See Roth*, 2001 WI App 221, ¶¶17–18 (holding intervention timely in election matter where party sought to intervene two weeks after complaint

and before defendants filed answer or any proceedings occurred). Intervention will not prejudice the existing parties—it will require no delay of these proceedings, and the Court has not made any substantive rulings. *See Bilder*, 112 Wis. 2d at 550–51 (finding no prejudice to original parties where stipulation of settlement had yet to be considered or approved by court). WCDP thus satisfies the first requirement for intervention as of right.

2. WCDP has an interest sufficiently related to the subject of the action.

WCDP has multiple significant interests related to this litigation. Consistent with the “broader, pragmatic approach” of Wisconsin courts to intervening as a matter of right, the “interests” requirement for intervention serves “primarily [as] a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Helgeland*, 2008 WI 9, ¶43 (quoting *Bilder*, 112 Wis. 2d at 548–49).

Here, WCDP has at least three unique, significant interests in this litigation.

First, the lawsuit interferes with WCDP’s mission of supporting its party members in their right to vote by seeking to revoke election officials’ ability to correct minor address errors and count valid ballots. (Mareno Aff. ¶7) Plaintiffs’ claim seeks to stir confusion and erect a potentially serious obstacle to Wisconsin voters being able to successfully exercise their right to vote absentee. Political parties are routinely granted intervention as of right in similar circumstances. *See, e.g., Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1505640, at *2–5 (W.D. Wis. Mar. 28, 2020), *modified on reconsideration*, 451 F. Supp. 3d 952 (W.D. Wis. 2020) (Republican National Committee and Republican Party of Wisconsin allowed to intervene in case seeking to enjoin enforcement of Wisconsin election laws); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 585 (6th Cir. 2012) (Ohio Democratic Party allowed to intervene in case

where challenged practice would lead to disenfranchisement of its voters);¹ *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, slip op. at 2 (N.D. Ga. Nov. 19, 2020), Dkt. No. 52 (granting intervention to national and state Democratic Party committees in action seeking to invalidate election in Georgia); *cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (plurality opinion) (agreeing with unanimous view of Seventh Circuit that Democratic Party had standing to challenge voter identification law that risked disenfranchising its members).

Second, the lawsuit threatens WCDP's competitive prospects. Plaintiffs allege that RPWC has an interest in this litigation specifically related to supporting Republican candidates. (Compl. ¶6) Plaintiffs thus brought this suit in part because they believe that WEC's guidance creates a competitive disadvantage for the Republican candidates they support. In a similar vein, WCDP would be disadvantaged if it were not allowed to intervene to protect its interests in supporting the election of Democratic candidates. (Mareno Aff. ¶9) This too is an interest that has been found adequate to support intervention in similar circumstances. *See, e.g., Teigen v. Wis. Elections Comm'n*, No. 2021CV000958, slip op. at 1–2 (Waukesha Cnty. Cir. Ct. Oct. 15, 2021), Dkt. No. 58 (granting intervention to national Democratic committee in challenge to drop boxes where Plaintiffs' requested relief would interfere with intervenor's mission of supporting election of Democratic candidates); *Issa v. Newsom*, No. 20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting intervention of state party where "Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates" (quoting *Paher v. Cegavske*, No. 20-cv-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020))).

¹ In accordance with Waukesha County Civil Court Division Local Rule 3.3, WCDP submits with its brief copies of non-Wisconsin authorities. (See Aff. of Douglas M. Poland Exs. 1–14)

Third, revoking election officials' ability to correct minor errors will require WCDP to divert its resources to inform Wisconsin voters about the new scrutiny surrounding absentee ballots and to educate them on what qualifies as a valid absentee certificate. (Mareno Aff. ¶8) It will also require WCDP to devote resources it would not otherwise have expended to contact and help voters cure ballots with minor address errors. (*Id.*) This will impose a significant burden on its efforts to support Democratic candidates on the ballot in the November 2022 election. (*Id.* ¶9) Courts have regularly found this type of diversion of resources by political committees to be adequate to confer Article III standing, an even more demanding standard than that required for intervention. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding that challenged law "injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to absent new law), *aff'd*, 553 U.S. 181 (2008) (plurality opinion); *Issa*, 2020 WL 3074351, at *3 (granting intervention and citing this interest); *League of United Latin Am. Citizens (LULAC) of Wis. v. Deininger*, No. 12-C-0185, 2013 WL 5230795, at *1 (E.D. Wis. Sept. 17, 2013) (finding that organizations had standing to challenge recently adopted voter identification laws based on get-out-the-vote expenditures); *see also Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶17, 402 Wis. 2d 587, 977 N.W.2d 342 (noting that Wisconsin has largely embraced federal standing requirements and Wisconsin courts "look to federal case law as persuasive authority regarding standing questions").

For all of these reasons, WCDP has a significant interest in this litigation.

3. Disposition of the action in WCDP's absence would impair its ability to protect its interests.

WCDP also easily satisfies the minimal burden required to meet the third element of intervention as of right because disposition of this case might impair its ability to protect its interests. As with the other elements, Wisconsin courts take "a pragmatic approach" to this prong

and “focus on the facts of each case and the policies underlying the intervention statute.” *Helgeland*, 2008 WI 9, ¶79. The Wisconsin Supreme Court has identified two factors to weigh in considering this prong: (1) “the extent to which an adverse holding in the action would apply to the movant’s particular circumstances”; and (2) “the extent to which the action into which the movant seeks to intervene will result in a novel holding of law.” *Id.*, ¶80. Intervention is more warranted when a novel holding is at stake because its stare decisis effect is “more significant when a court decides a question of first impression.” *Id.*, ¶81.

Here, an adverse ruling would seriously and directly impair WCDP’s ability to protect its interests. When a proposed intervenor has protectible interests in the outcome of litigation, as WCDP does here, courts have “little difficulty concluding” that its interests will be impaired. *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011) (cleaned up); *see also Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (granting intervention where intervening town had interest in outcome of litigation because any decision would impact town’s residents and property and town “may not again have the opportunity in another forum to offer reasons” why their position was correct). WCDP offers three separate interests that would be directly impacted by this litigation: A ruling in Plaintiffs’ favor would threaten to disenfranchise WCDP members and constituents, create a competitive disadvantage for WCDP candidates, and require WCDP to divert resources to mitigate these harms. *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (granting intervention where proposed intervenors “would be directly rather than remotely harmed by the invalidation” of challenged statute).

This case also has the potential to result in a novel holding of law. In *Trump v. Biden*, the Wisconsin Supreme Court expressly declined to address the question of whether local officials

may add missing portions of witness addresses because the challenge to this practice was not brought until after the 2020 general election. *See* 2020 WI 91, ¶26, 394 Wis. 2d 629, 951 N.W.2d 568 (noting that any changes that would result in rejecting ballots after election had occurred would be “highly prejudicial”), *cert. denied*, 141 S. Ct. 1387 (2021). The Court noted that “the statute is silent as to what portion of an address the witness must provide,” *id.* ¶17, while Justice Hagedorn’s concurrence highlighted the unsettled nature of this issue, *id.* ¶¶47–52 (Hagedorn, J., concurring). This case thus raises a substantive issue the Wisconsin Supreme Court has admitted is unsettled. Both factors for impairment of interest are therefore satisfied here.

4. No existing party adequately represents WCDP’s interests.

WCDP has interests distinct from those represented by any party to this litigation. The burden to satisfy this factor is “minimal.” *Armada Broad.*, 183 Wis. 2d at 476 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Because the future course of litigation is difficult to predict, the test is whether representation “*may be*” inadequate, not whether it *will be* inadequate. *Wolff*, 229 Wis. 2d at 747 (emphasis added). The fact that WEC and WCDP share a “mutually desired outcome” and might make “similar arguments” does not bar intervention. *Id.* at 748. When there is a realistic possibility that the existing parties’ representation of the proposed intervenor’s interests might be inadequate, “all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf.” 1 Jean W. Di Motto, *Wisconsin Civil Procedure Before Trial* § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

WEC does not adequately represent WCDP’s interests. WCDP has “special, personal [and] unique interest[s]” that are distinct from WEC’s interests, *Helgeland*, 2008 WI 9, ¶116, and government entities cannot be expected to litigate “with the vehemence of someone who is directly affected” by the litigation’s outcome, *Armada Broad.*, 183 Wis. 2d at 476. As described above,

WCDP faces significant harm to its core mission of electing Democratic candidates as a result of Plaintiffs' lawsuit. By contrast, WEC's interests in this litigation are defined by its statutory duties to conduct elections and to administer Wisconsin's election laws. Courts have routinely found that government defendants do not adequately represent political parties' interests under similar circumstances. *See, e.g., id.* (“[W]e cannot expect the [government body] to defend the mandamus action with the vehemence of someone who is directly affected[.]”); *Issa*, 2020 WL 3074351, at *3 (finding that state defendants’ “interests in the implementation of the [challenged law] differ from those of the Proposed Intervenor” in “ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election . . . and allocating their limited resources to inform voters about the election procedures”); *Utah Ass’n of Cnty. v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001) (“[T]he government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [political candidate] merely because both entities occupy the same posture in the litigation.”); *Clark v. Putnam County*, 168 F.3d 458, 461–62 (11th Cir. 1999) (voters granted intervention in challenge to court-ordered voting plan defended by county commissioners because commissioners represented all county citizens, including people adverse to proposed intervenors’ interests); *Coal. of Ariz./N.M. Cnty. for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (government defendants necessarily represented “the public interest” rather than proposed intervenors’ “particular interest[s]” in protecting their resources and rights of their candidates and voters).

Moreover, WEC is comprised of three Republican and three Democratic commissioners, which regularly results in 3-3 votes and partisan gridlock on election issues (including more than

19 times in 2020).² For example, WEC recently voted along partisan lines in deciding whether to issue guidance following the Supreme Court's *Teigen* decision. (Poland Aff. Ex. 14, at 2–4) This political reality further establishes that WEC cannot reasonably be expected to adequately represent WCDP's interests.

Because WCDP cannot rely on WEC or anyone else in the litigation to protect its distinct interests, it satisfies the fourth requirement and is entitled to intervene as of right.

B. Alternatively, WCDP should be granted permissive intervention.

Even if this Court were to find WCDP ineligible for intervention as of right, WCDP easily satisfies the requirements for permissive intervention under Wis. Stat. § 803.09(2). A court can exercise its broad discretion to permit a party to intervene where the “movant’s claim or defense and the main action have a question of law or fact in common,” intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties,” and the motion is timely. Wis. Stat. § 803.09(2); *see also Helgeland*, 2008 WI 9, ¶120.

WCDP satisfies the criteria for permissive intervention. The motion to intervene is timely and, given that this litigation is at a very early stage, intervention will not unduly delay or prejudice the adjudication of the original parties’ rights. Moreover, WCDP will inevitably raise common questions of law and fact, including the core issue of whether Wisconsin’s election laws allow clerks to correct minor witness address errors on absentee certificates to ensure that otherwise-valid absentee ballots are counted. WCDP is also prepared to proceed in accordance with the schedule this Court sets, and its intervention will serve to efficiently resolve the factual and legal issues before the Court.

² See Vanessa Swales, *Partisan Gridlock at Wisconsin Elections Commission Frustrates Voters, Local Officials*, Wis. Pub. Radio (Oct. 26, 2020), <https://www.wpr.org/partisan-gridlock-wisconsin-elections-commission-frustrates-voters-local-officials>.

V. CONCLUSION

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

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By: Electronically signed by Jeffrey A. Mandell

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