STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 6

NANCY KORMANIK, Plaintiff, vs. WISCONSIN ELECTIONS COMMISSION, Defendant.	Case No. 2022CV1395 Case Code: 30701 Hon. Brad Schimel

BRIEF IN SUPPORT OF PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL COMMITTEE'S MOTION TO INTERVENE

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I. INTRODUCTION

This brief is submitted in support of the proposed Intervenor-Defendant Democratic National Committee ("DNC")'s motion to intervene in this proceeding pursuant to Wis. Stat. § 803.09(1)-(2). As required by Section 803.09(3), a responsive pleading setting forth the defenses for which intervention is sought accompanies DNC's motion. *See* Proposed Answer and Affirmative Defenses attached as Ex. A to DNC's motion.

Wisconsin law allows for intervention as of right and for permissive intervention under the broad discretion the Court has to allow intervention by parties with cognizable interests in the matter. Wis. Stat. § 803.09(1)-(2). DNC is a "national committee" as defined by 52 U.S.C. § 30101(14), with the mission of electing Democratic candidates to federal and state offices, including in Wisconsin. Affidavit of Ramsey Reid in Support of Motion to Intervene of DNC ("Reid Aff."), ¶ 2. DNC works to accomplish its mission by making expenditures for and

contributions to Democratic candidates and assisting state parties throughout the country in voter education and turnout efforts, among other things. *Id*. at ¶ 4. DNC represents a diverse group of Democrats, including elected officials, candidates, constituents, and voters. The extraordinary relief Plaintiff requests would undermine DNC's mission by depriving DNC's members and constituents of their rights to have their votes counted, undermine the electoral prospects of DNC's candidates, and force DNC to divert its resources. The DNC's intervention in this lawsuit is necessary to avoid this harm and to protect its interests in Wisconsin's electoral process. With election day only a month away and Plaintiff seeking expedited relief, immediate intervention is vital to protecting DNC's interests.

Plaintiff's litigation is the latest in a series of relentless attacks in Wisconsin, all undertaken with the aim of making it harder for Wisconsin voters to successfully cast ballots in the state's elections. Plaintiff seeks—after absentee voting has already begun—to make changes to how absentee voting occurs, particularly as it relates to how voters are able to correct or avoid mistakes in the process. There is no evidence that the practices in question have ever led to voter fraud, miscast votes, or any other improper result. Elimination of this practice would erect new, unjustifiable, and unanticipated last-minute burdens to voting in advance of the critical upcoming November elections.

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DNC has a strong cognizable interest in defending against this attack both to help ensure that voters are not impeded by this cynical effort when they attempt to vote in November and because the invalidation of the guidance fom the Wisconsin Elections Commission ("WEC") regarding spoiling ballots would require DNC to divert valuable resources to educate voters about this change in order to avoid the potential disenfranchisement of voters across the state. The potential harm to DNC and its members is particularly acute given that Plaintiff is requesting the

Court to enjoin this guidance in the middle of the election and while thousands of voters across Wisconsin are currently engaged in absentee voting. Moreover, in an election, injuries to political committees like DNC caused by diversion of resources are particularly harmful, because money that is not available in the cycle for voter persuasion is forever lost; once the election occurs, the window for persuasion and outreach has forever passed. *Id*. at ¶ 9.

In these circumstances, DNC readily satisfies the standard for intervention as of right. The motion is clearly timely; DNC has an interest directly related to the subject matter of the action; disposition of the action may, as a practical matter, affect DNC's interest; and the WEC, as a state agency, does not adequately represent DNC's interests. In the alternative, this Court should exercise its broad discretion and grant DNC permissive intervention under Wis. Stat. § 803.09(2).

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II. BACKGROUND

Plaintiff, a purported registered voter in Waukesha County, filed this action claiming that WEC has erroneously informed municipal clerks they are permitted to engage in certain actions in contravention of Wis. Stat. §§ 6.84, 6.86(5), and 6.86(6). Compl. ¶ 2, 6, 8, 9. Plaintiff challenges WEC guidance related to the return and spoilage of previously completed and submitted absentee ballots, and seeks declaratory relief related to the interpretation of these statutes. Compl. at 10. Plaintiff, an individual voter, does not allege any particularized harm, but rather the Complaint alleges that Plaintiff "is harmed as a voter because she is uncertain as to the lawful method to cast absentee ballots in the future and the risk that an individual may fraudulently spoil their previously completed and submitted absentee ballot;" "is harmed by the unequal administration of our election system in the event that local election officials and municipal clerks may comply with WEC's incorrect guidance, while other local election officials and municipal clerks may comply with the express requirements of Wisconsin statutes;" and "is harmed by the counting of votes that

violate Wisconsin statutes, which dilutes or otherwise diminishes the value of her vote and/or other lawful votes." Compl. ¶ 26.

Defendant WEC is the Wisconsin state agency responsible for administering elections. It has, among other duties, "the responsibility for the administration of [Chapters] 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05(1). As described, proposed Intervenor-Defendant DNC is a "national committee" as defined by 52 U.S.C. § 30101(14), with the mission of electing Democratic candidates to federal and state offices, including in Wisconsin. Its ability to elect Democratic candidates in Wisconsin is directly affected by Plaintiff's calculated attempt to strip voters of their ability to spoil their ballots in accordance with established WEC guidance. Democratic voters who rely on absentee voting will find it more difficult to participate in the election and have their votes counted if Plaintiff is successful. And DNC will have to divert resources to public education efforts, especially *reeducation* efforts *during an ongoing election* targeted at the many thousands of voters who rely on absentee voting and other turnout efforts in a highly contested election year where every dollar diverted means less money available for critical voter persuasion and get-out-the-vote efforts. Reid Aff. ¶¶ 6-8. Thus, DNC has a strong interest in this litigation both on its own behalf, and on behalf of its voters whose voting rights are threatened.

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III. LEGAL STANDARD

There is "no precise formula for determining whether a potential intervenor meets the requirements of § 803.09(1)"; "[t]he analysis is holistic, flexible, and highly fact-specific." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 40, 307 Wis. 2d 1, 745 N.W.2d 1. "A court must look at the facts and circumstances of each case against the background of the policies underlying the

intervention rule." *Id.* (internal quotation marks omitted). 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, 307 Wis. 2d 1, ¶ 38. "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)." *Id.* ¶ 37. 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.").

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The standard for permissive intervention, which DNC seeks in the alternative, is set forth in Section 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. DNC is entitled to intervention as of right.

1. DNC's motion is timely.

The timeliness requirement for intervention as of right is measured by the diligence of the applicant and the impact the motion will have on the existing litigants. 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. Delavan Twp.*, 112 Wis. 2d 539, 550, 334

N.W.2d 252 (1983) (application for intervention timely as court had not approved a stipulation to settle case). 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.

DNC readily satisfies the timeliness requirement. It is filing its motion promptly after Plaintiffs filed their lawsuit. Second, intervention would not prejudice any of the parties. The WEC has not yet even responded to Plaintiffs' Complaint, and the litigation has not progressed in any material way. *See State ex rel. Bilder*, 112 Wis. 2d at 550 ("The critical factor is whether in view of all the circumstances the proposed intervenor acted promptly."). Granted, Plaintiff has moved for a Temporary Injunction, and a hearing on the motion is set for October 5th. However, WEC has not filed a responsive pleading or responded to the Motion for a Temporary Injunction. DNC intends to respond without delaying the October 5th hearing.

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

Consistent with the "broader, pragmatic approach" of Wisconsin courts to intervening as a matter of right, the "interests" factor 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*, 307 Wis. 2d 1, ¶¶ 43–44 (quoting *Bilder*, 112 Wis. 2d at 548–49).

As outlined above, DNC has significant and protected interests in the subject matter of this litigation. This case involves nothing less than a request to erect a potentially serious obstacle to Wisconsin voters being able to successfully exercise their right to vote absentee—an obstacle that would interfere with DNC's core mission of supporting the election of Democratic candidates to federal and state offices.

Moreover, as discussed above, the changes sought will require DNC to divert its resources to inform Wisconsin voters about the unavailability of prior remedies. This will impose a significant burden on its efforts to support Democratic candidates in the November election. Although the interest requirement for intervention is less demanding than the Article III standing requirement, it is noteworthy that courts have regularly found this type of diversion of resources by political committees, including DNC, to be adequate to confer Article III standing. *See*, *e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding challenged law "injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to devote absent new law), *aff'd*, 553 U.S. 181 (2008); *Issa v. Newsom*, No. 20-cv-1044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (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 after discovery that expenditures to get-out-the-vote gave organizations standing to challenge recently adopted voter ID laws).

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

DNC also easily satisfies the minimal burden required to meet the third element of intervention as of right, that disposition of this case may impair its ability to protect its interest. 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*, 307 Wis. 2d 1, ¶ 79 & n.70 (citing 6 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 24.03[3][a], at 24–42 (3d ed. 2002). The Wisconsin Supreme Court has identified two particular factors to weigh in considering this prong: (1) "the extent to which an adverse holding in the action would apply to the movant's particular circumstances"; and (2) "the extent to which the action into which the movant seeks to intervene will result in a novel holding of law." *Id.* ¶¶ 80–81.

Intervention is more warranted when a novel holding is at stake because its stare decisis effect is "more significant when a court decides a question of first impression." *Id*. ¶ 81.

Here, for the reasons discussed above, an adverse ruling would seriously impair DNC's ability to protect its interests. When a proposed intervenor has protectible interests in the outcome of litigation, as DNC 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). Intervention is especially warranted if the proposed remedy *directly* threatens to harm intervenors. *See, e.g.*, *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (granting intervention when proposed intervenors "would be directly rather than remotely harmed by the invalidation" of challenged statute). Courts routinely allow political parties and committees to intervene in these circumstances. *See, e.g.*, Order, *Donald J. Trump for President v. Bullock*, No. 20-cv-00066 (D. Mont. Sept. 8, 2020), ECF No. 35 (granting DCCC, DSCC, and Montana Democratic Party intervention in lawsuit by four Republican party entities); Order, *Stringer v. Hughs*, 20-CV-00046 (W.D. Texas Jan 21, 2020), ECF No. 27 (granting DSCC both as of right and permissive intervention); *Wood v. Raffensperger*, No. 20-CV-5155, 2020 WL 7706833, at *1 (N.D. Ga. Dec. 28, 2020) (DSCC permitted to intervene in election challenge), *appeal filed*, No. 20-14813 (9th Cir. Dec. 29, 2020); Text Order, *Parnell v. Allegheny Cnty. Bd. of Elections*, No. 20-cv-01570 (W.D. Pa. Oct. 22, 2020), ECF No. 34 (granting intervention DSCC's congressional counterpart the DCCC in lawsuit regarding processing of ballots); *Paher v. Cegavske*, No. 20-cv-00243, 2020 WL 2042365, at *4 (D. Nev. Apr. 28, 2020) (granting DNC intervention in election case brought by conservative interest group); *Donald J. Trump for President, Inc. v. Murphy*, No. 20-cv-10753, 2020 WL 5229209, at *1 (D.N.J. Sept. 1, 2020) (granting DCCC intervention in lawsuit by

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Republican candidate and party entities); *Issa*, 2020 WL 3074351, at *3 (granting DCCC and California Democratic Party intervention in lawsuit by Republican congressional candidate).

DNC's request to intervene also is supported by the fact that Plaintiff's Complaint is seeking a *prospective* and novel ruling that Wisconsin law does not permit curing of absentee ballots as set forth in WEC's guidance. Plaintiff's complaint thus clearly seeks "a novel holding of law" that, if decided in her favor, would have far-reaching *stare decis* effects on DNC's mission of supporting the election of Democrats. The only way for DNC to guard against this harm is to intervene in this matter.

4. No existing party adequately represents DNC's interest.

No existing party adequately represents Intervenor's interest. The burden to satisfy this factor is "minimal." *Armada Broad., Inc.*, 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. *See Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W. 2d 301 (Ct. App. 1999). The fact that the WEC and DNC may share a "mutually desired outcome" and 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 may 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, WIS. CIVIL PROCEDURE BEFORE TRIAL § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

The WEC does not adequately represent DNC's interests. Indeed, DNC has "special, personal [and] unique interest[s]" that are distinct from the WEC's interests. *Helgeland*, 307 Wis. 2d 1, ¶ 116–17. This Court has recognized that government entities cannot be expected to litigate "with the vehemence of someone who is directly affected" by the litigation's outcome. *Armada*

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Broad., 183 Wis. 2d at 476. As described, DNC faces significant harm to its core mission of electing Democratic candidates. By contrast, the WEC's interests in this litigation are defined by its statutory duties to conduct elections and to administer Wisconsin's election laws. *See, e.g.*, *id.*; *see also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001) ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [political candidate] merely because both entities occupy the same posture in the litigation."); *Clark v. Putnam Cnty.*, 168 F.3d 458, 461–62 (11th Cir. 1999) (Black voters granted intervention in challenge to court-ordered voting plan defended by county commissioners because commissioners represented all county citizens, including people adverse to proposed intervenors' interests); *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (government defendants necessarily represent "the public interest" rather than the proposed intervenors' "particular interest[s]" in protecting their resources and the rights of their candidates and voters.); *Armada Broad.*, 183 Wis. 2d at 476 (noting that government entities cannot be expected to litigate "with the vehemence of someone who is directly affected" by the litigation's outcome).

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Moreover, the WEC is comprised of three Republican and three Democratic commissioners, which regulary results in 3-3 votes and partisan gridlock on election issues.[1] And even where Commissioners are not tied, they often reach bipartisan consensus only by compromising on partisan issues rather than robustly representing them. This political reality of how the WEC functions further establishes that the WEC cannot be expected to litigate with the

[1] *See* Vanessa Swales, *Partisan Gridlock At Wisconsin Elections Commission Frustrates Voters, Local Officials*, WISCONSIN PUBLIC RADIO (Oct. 26, 2020), available at: https://www.wpr.org/partisan-gridlock-wisconsin-elections-commission-frustrates-voters-local-officials.

same "vehemence" as DNC and cannot reasonably be expected to adequately represent DNC's interests.

As one court explained in granting intervention under similar circumstances,

> Although Defendants and the Proposed Intervenors fall on the same side of the dispute, Defendants' interests in the implementation of the [challenged law] 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 have the opportunity to vote in the upcoming federal election . . . and allocating their limited resources to inform voters about the election procedures. As a result, the parties' interests are neither "identical" nor "the same."

Issa, 2020 WL 3074351, at *3 (citation omitted); *see also Murphy*, 2020 WL 5229209, at *1; *Donald J. Trump for President, Inc.*, 2020 WL 5229116, at *1; *Paher*, 2020 WL 2042365, at *2. Political party entities, including Republican entities, are regularly granted intervention in cases where the state is defending against challenges to voting laws. *See, e.g.*, *Black Voters Matter Fund v. Raffensperger*, 1:20-cv-4869, ECF No. 42 (N.D. Ga. Dec. 9, 2020) (granting intervention to RNC and Georgia Republican Party); *Nielsen v. DeSantis*, 4:20-cv-236-RH-MJF, ECF No. 216 (N.D. Fla. June 10, 2020) (granting intervention to RNC, NRCC, and Republican Party of Florida); *Democratic Nat'l Comm. v. Bostelmann*, 20-cv-249, ECF No. 85, (W.D. Wis. Mar. 28, 2020) (granting intervention to RNC and Republican Party of Wisconsin).

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Because DNC cannot rely on the WEC or anyone else in the litigation to protect its distinct interests, it satisfies the fourth requirement and is entitled to intervention as of right. *Issa*, 2020 WL 3074351, at *4.

B. DNC is entitled to permissive intervention.

In addition to granting intervention as a matter of right, a court can exercise its broad discretion to permit a party to intervene when the "movant's claim or defense and the main action have a question of law 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*, 307 Wis. 2d 1, ¶¶ 119–20; *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) ("Permissive intervention under Rule 24(b) is wholly discretionary."). Even when courts deny intervention as of right, they often find that permissive intervention is appropriate. *See, e.g.*, *City of Chi. v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986 (7th Cir. 2011); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996); Opinion and Order at 10-11, *Bostelmann*, 20-cv-249 (W.D. Wis. Mar. 28, 2020), ECF No. 85.

DNC meets the criteria for permissive intervention. The motion to intervene is timely and, given that this litigation is at a very early stage, intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Moreover, DNC will inevitably raise common questions of law and fact, including the core issue of whether WEC's guidance, which DNC has followed, is unlawful. DNC is also prepared to proceed in accordance with the schedule this Court determines, and its intervention will only serve to contribute to the complete development of the factual and legal issues before this Court.

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V. CONCLUSION

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

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Respectfully Submitted,

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