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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

PRIORITIES USA, WISCONSIN ALLIANCE FOR RETIRED AMERICANS, and WILLIAM FRANKS, JR.,

Plaintiffs,

v. Case No. 23-CV-1900

WISCONSIN ELECTIONS COMMISSION,

Defendant.

OPPOSITION BY DEFENDANT WISCONSIN ELECTIONS COMMISSION TO INTERVENTION BY REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF WISCONSIN, REPUBLICAN PARTY OF ROCK COUNTY, AND REPUBLICAN PARTY OF WALWORTH COUNTY

INTRODUCTION

This is a declaratory judgment action challenging the constitutionality of four statutory provisions in Wisconsin's elections code. Four partisan political organizations—one national committee and three political parties—seek to intervene, asserting interests in helping candidates of their party be elected and in seeing elections conducted fairly. This Court should deny that motion because those interests are not protected under Wisconsin's non-partisan elections law.

Defendant Wisconsin Elections Commission and its counsel, the Department of Justice, adequately represent any protected interest the movants might have because they have a duty to defend the challenged laws. This Court should also deny permissive intervention.

BACKGROUND

This is a civil action brought by two groups and a member of one of the groups seeking to declare four election statutes facially unconstitutional under the Wisconsin constitution. (Doc. 2:28–29 (Prayer for Relief).) The two organizational plaintiffs claim they have diverted resources from their mission to help voters vote generally, requiring them to expend additional resources, and that some of their members rely on absentee voting. (Doc. 2 ¶¶ 7–8, 11.)[1] Defendant Wisconsin Elections Commission is the state agency responsible for administering and enforcing Wisconsin's election laws, including by providing guidance regarding those laws. (Doc. 2 ¶¶ 15, 24.)

[1] The individual plaintiff, William Franks, Jr., asserts an interest in having the law construed correctly and engendering confidence in the election process. (Doc 2 ¶ 14.) As discussed further below, this is not a legally protected interest under Wisconsin law, and Franks does not have standing. *See Teigen v. WEC*, 2022 WI 64, ¶¶ 167, 210–215, 403 Wis. 2d 607, 976 N.W.2d 519 (four concurring and dissenting justices agreeing that election integrity is not a sufficient interest to confer standing). But because the organizational plaintiffs do have standing, the Commission will not be moving to dismiss Franks's claim. *See Rumsfeld v. F. for Acad. & Institutional Rits., Inc.*, 547 U.S. 47, 52 n.2 (2006) (where one plaintiff has standing, case may proceed with all plaintiffs).

The challenged laws are the witness requirement in Wis. Stat. § 6.87(4)(b)1 (Doc. 2 ¶¶ 75–77); the lack of drop boxes as a method for returning absentee ballots under Wis. Stat. § 6.87(4)(b)1., as interpreted by *Teigen v. Wisconsin Elections Commission,* 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 (Doc. 2 ¶ 84); the deadline to cure mistakes on absentee ballot certifications by 8 o'clock on Election Day in Wis. Stat. § 6.87(6) (Doc. 2 ¶ 98); and a general provision with a statement of policy and requirement that certain election procedures be treated as mandatory in Wis. Stat. § 6.84, (Doc. 2 ¶¶ 108, 112). Plaintiffs also challenge parallel Commission guidance giving information about some of those provisions.

The proposed intervenors (Movants) are four partisan political organizations: the Republican National Committee, the Republican Party of Wisconsin, the Republican Party of Rock County, and the Republican Party of Walworth County. At the national, state or local level, respectively, they assert that they are "political committees and parties who support Republicans in Wisconsin" (Doc. 27:3); they support Republican candidates for office; coordinate fundraising and election strategy, and engage in fundraising. (Doc. 27:3–4). They also assert that besides wanting Republican candidates to win, they want "elections to be conducted fairly" and Republican resources "to be spent wisely." (Doc. 27:7.)

In addition to the parties to the case and Movants, the Wisconsin Legislature also seeks to intervene on its own behalf. (Doc. 39–41.) Because this is a constitutional challenge to state statutes, the Legislature has a statutory right to intervene in state court on its own behalf under Wis. Stat. § 13.365. The Commission thus does not oppose the Legislature's intervention in this matter.

ARGUMENT

Movants do not meet the standard for intervention as of right because the interests they assert are not ones protected by the statutes at issue and because the Commission and DOJ will adequately defend the law. This Court should also deny their request for permissive intervention.

I. Movants do not meet the standard for intervention as of right.

Intervention as of right is governed by Wis. Stat. § 803.09(1), which states:

> [A]nyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

The supreme court has interpreted Wis. Stat. § 803.09(1) as establishing four requirements, the last three of which are relevant here: "(1) timely application for intervention; (2) an interest relating to the property or

transaction which is the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest; and (4) that the proposed intervenor's interest is not adequately represented by existing parties." *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶ 12, 296 Wis. 2d 337, 723 N.W.2d 131 (citing *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983)). With regard to the second and third requirements, the supreme court has further held that the movant's interest must be "of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *City of Madison v. WERC*, 2000 WI 39, ¶ 11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94.

"The burden is on the party seeking to intervene to show that the [statutory] factors are met." *Olivarez*, 296 Wis. 2d 337, ¶ 12. "Failure to establish one element means the motion must be denied." *Id.*

A. Movants do not have a recognized interest.

Movants assert that they have an interest in this matter, and their willingness to spend the resources as litigants reflects that factual interest. But something different is required: they must show that their interest is a concrete interest protected under the laws at issue, and this they cannot do.

The interest element corresponds with the concept of standing: it requires a direct and immediate interest relating to the statutes at issue.

Helgeland v. Wis. Muns., 2008 WI 9, ¶ 71, 307 Wis. 2d 1, 745 N.W.2d 1; *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (construing parallel requirement of Federal Rule of Civil Procedure Rule 24).

1. Movants' desire to elect Republican candidates is not a protected interest under Wisconsin's voting laws.

Movants say they have interests in electing Republican candidates to office. The Wisconsin statutes that Movants wish to defend, however, are non-partisan election statutes that do not protect the interests of any person or group in getting a particular party's candidates elected. Moreover, the Movants have not alleged any way in which the invalidation of any of those statutes in this litigation would specifically injure the electoral prospects of Republican candidates.

Movants also try to rely on other cases in which political parties were allowed to intervene, but their references are either unsupported or distinguishable.

First, they provide no case citations for their assertion that the Democratic Party was allowed to intervene in 2020 cases brought by former-President Donald Trump (Doc. 27:8). As a result, it is impossible for the Commission or this Court to examine what interests were found to support intervention, how those interests related to the issues in the litigation, how the disposition of the case would have impaired the intervenor's ability to protect

those interests, and why those interests were not adequately represented by existing parties. Absent such information, Movants' vague reference to those cases does nothing to help them meet their burden of showing that they meet all the statutory factors for intervention as of right.

Second, their citations to *Priorities USA v. Nessel*, 2020 WL 2615504, *5 (E.D. Mich. 2020), and *Arizona Democratic Party v. Hobbs*, 2020 WL 6559160 (D. Ariz. 2020), are unhelpful because those courts granted permissive intervention without considering whether the parties were entitled to intervene as of right.

Third, Movants' citation to *Donald J. Trump for President, Inc. v. Northland Television, LLC,* 2020 WL 3425133, *1 (W.D. Wis. 2020) (Doc. 27:8), is also unavailing. It is true that the movant there was allowed to intervene as of right, but that movant established precisely the kind of protected interest that the Movants here lack. *Northland* was a case about an allegedly defamatory television advertisement, and the intervenor had had a concrete, protected interest in the matter because it allegedly created the advertisement at issue. *Id.* *1.

2. Movants' desire to see elections "run fairly" is not a protected interest under Wisconsin's voting laws.

Movants also assert they have an interest in seeing elections "run fairly." That is also not a concrete, protected interest for intervention purposes.

In *Teigen v. Wisconsin Elections Commission*, three justices adopted a theory of vote pollution, under which voters may have a protected interest based on a violation of election laws alone. 403 Wis. 2d 607, ¶ 25, (lead opinion). That vote pollution theory, however, was not adopted by a majority of the supreme court and thus is not a statement of the law. Justice Hagedorn concurred in the result in *Teigen* and joined much of the lead, plurality opinion, but he specifically did not join paragraph 25 about standing by way of the polluting or diluting of votes. *See id.*, ¶¶ 149 n.1, 157–67 (Hagedorn, J., concurring). Moreover, the three dissenting justices agreed with Justice Hagedorn in rejecting the vote pollution theory, so that theory not only lacked majority support—it was affirmatively opposed by a majority of the Court. *Id.* ¶¶ 211–15 (A.W. Bradley, J., dissenting).

In *Teigen*, the vote pollution theory was deployed to support an interest in invalidating an allegedly unlawful election practice. Here, Movants seek to deploy it to support their purported interest in defending allegedly lawful election practices against a legal challenge. Either way, the theory expresses nothing more than a vague, generalized interest in having elections run

lawfully. That is not the type of concrete, protected interest that entitles someone to intervene.

B. The Commission and DOJ will adequately represent any interests the proposed intervenors claim in defending state law and ensuring that elections are fair and well administered.

The proposed intervenors are also not entitled to intervene because the Commission will "adequately represent" the general public interest in defending the constitutionality of the statutes and ensuring that Wisconsin elections are fair and properly administered.

"Adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action." *Helgeland*, 307 Wis. 2d 1, ¶ 90. Here, Movants' proposed answer prays for dismissal of the complaint and denial of the relief sought. (Doc. 33:15.) In a filing today, the Commission is moving for dismissal or judgment in favor of the defendant. It is thus presumed that the Commission will adequately represent Movants' interests.

That is especially true given the identity of the defendant. A presumption of adequate representation also arises "when the putative representative is a governmental body or officer charged by law with representing the interests of the absentee." *Helgeland*, 307 Wis. 2d 1, ¶ 91. Here, the Commission is expressly charged with administering and enforcing

Wisconsin's election laws. *See* Wis. Stat. § 5.05(1)–(2m), (2w). The Commission is thus presumed to adequately represent Movants' interest in seeing elections fairly run.

And the Department of Justice is statutorily and constitutionally responsible for defending the constitutionality of state statutes. Under Wisconsin statute, "[t]he Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes. Indeed, "Wis. Stat. § 806.04(11) recognizes that it is the duty of the attorney general to appear on behalf of the people of this state to show why [a] statute is constitutional, making service on the attorney general a jurisdictional matter in a declaratory action attacking the constitutionality of a statute. *Helgeland*, 307 Wis. 2d 1, ¶ 96 (citation omitted). And it is generally the duty of the Attorney General to defend the constitutionality of validly enacted state law. *State v. City of Oak Creek*, 2000 WI 9, ¶ 23 n.14, 232 Wis. 2d 612, 605 N.W.2d 526.[2]

The Seventh Circuit recently upheld the denial of intervention by the Democratic Party of Illinois, another proposed partisan intervenor, where that movant identified no conflict between itself and the state agency defending the

[2] The Attorney General has taken the position that he cannot defend state statutes that intrude upon the constitutional power of the executive branch as those intrude upon his own constitutional duties. *See. e.g., SEIU v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (Attorney General not defending new statutes that constrained his own powers). The case before the Court does not implicate that exception.

law at issue. *Bost v. Ill. Bd. of Elections*, 75 F.4th 682, 690 (7th Cir. 2023). Just as Movants argue here (Doc. 27:11), the Democratic Party argued that inadequacy was proven simply because the parties' specific interests diverged. The Seventh Circuit disagreed, reasoning that the parties' interests were a separate prong of the intervention analysis.[3] *Bost,* 75 F.4th at 690.

In support of arguing that the defendants cannot adequately represent their interests, Movants rely on cases that are either distinguishable or support the Commission's position.

Clark v. Putman County, 168 F. 3d 458, 461 (11th Cir. 1999), involved voters who sought a different outcome in the case from the defendants, and the court held their interests were adverse.

Movants' other cited cases on adequacy of representation— *Helgeland*, 307 Wis. 2d 1, *Democratic National Committee v. Bostelmann*, 2020 WL 1505640, *3–4 (W.D. Wis. 2020), *Feehan v. Wisconsin Elections Commission*, 506 F. Supp. 3d 640, 647 (E.D. Wis. 2020), and *Miracle v. Hobbs*, 333 F.R.D.

[3] The *Bost* court concluded that the Democratic Party did identify legally protectable interests under the second prong of the standing analysis, but the proposed intervenor relied on non-partisan interests in educational resources and promoting voting. *Bost*, 75 F.4th 682, 687 (7th Cir. 2023). While the court found these non-partisan interests were legally protectable, it still affirmed the denial of intervention because the state agency defending the case would adequately represent those interests. *Id.* at 690.

151, 155 (D. Ariz. 2019) (27:8, 11)—hold in favor of the Commission's position here, not Movants'.

Helgeland, a challenge to the constitutionality of Wisconsin's then-ban on same same-sex marriage benefits, held that Wisconsin municipalities did not satisfy the inadequacy prong based on their assertions that the Attorney General did not like the law at issue. The court pointed to the Attorney General's duty to defend the constitutionality of the law. 307 Wis. 2d 1, ¶¶ 93–96. The court also rejected the argument, also made by Movants here (Doc. 27:11), that the municipalities would defend the law with more "vehemence" than the Department of Employee Trust Funds, which merely administered the law at issue; the court held that the state defendants would defend the law regardless of their personal views. *Helgeland,* 307 Wis. 2d 1, ¶¶ 107–08.

DNC v. Bostelmann held that the proposed intervenors, the Republican National Committee and Republican Party of Wisconsin, failed to show their interests would not be adequately represented. There, just as here (Doc. 27:11), the RNC and RPW argued "that [the Wisconsin Elections Commissioners] represent the 'public interest,' and have to consider the expense of defending state laws, the social and political divisiveness of elections issues, their own desires to remain politically popular, and the interests of opposing parties," while RNC and RPW had "'particular interests,' including the election of

particular candidates, the mobilization of particular voters, and the costs of both." *Bostelmann*, 2020 WL 1505640, *4. The court rejected the argument, holding that different political considerations "are not sufficient by themselves to show inadequate representation." *Id.* *4 (citing *Am. Nat'l Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1969)).[4]

The other cases relied on by Movants are consistent. *Feehan* held that an individual voter failed to show that his interests would not be adequately represented even though he had different reasons, as a voter, why he wanted to see the 2020 election results upheld. 506 F. Supp. 3d at 647. And *Miracle* held that the leaders of the Arizona legislature failed to show inadequacy of representation where the Secretary of State and Attorney General were defending the lawsuit and had already moved to dismiss it. 333 F.R.D. at 156.

The motion to intervene should be denied for this reason alone.

* * *

For all of the above reasons, Movants are not entitled to intervene as a matter of right.

[4] As will be discussed below, the courts in some cases denied intervention as of right but granted permissive intervention. For purposes of permissive intervention, those cases had different facts from the case at bar.

II. This Court should also deny the proposed intervenors' request for permissive intervention.

A court also has discretion to permit intervention where the movant's claim or defense and the main action have a common question of law or fact. Under Wis. Stat. § 803.09(2), the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

This Court should deny Movants' request for permissive intervention here, for two reasons.

First, the addition of further defendants would only complicate and lengthen trial if this case is not decided at the briefing stage. As discussed above, the Commission does not object to the Legislature's intervention, so there already would potentially be two sets of defendants with different strategies and witnesses.

Second, granting intervention by partisan parties and groups injects unnecessary partisan debates into what should be non-partisan litigation. The district court for the Western District of Wisconsin has recognized the hazard of permitting intervention by parties who are likely to needlessly "reprise the political debate that produced the legislation in the first place." *One Wis. Inst., Inc. v. Nichol,* 310 F.R.D. 394, 397 (W.D. Wis. 2015). That court concluded that "Rule 24 is not designed to turn the courtroom into a forum for political actors

who claim ownership of the laws that they pass." *Id.* at 397. The *Miracle* court reached the same conclusion, declining to allow permissive intervention to avoid introducing unnecessary "partisan politics into an otherwise nonpartisan legal dispute." , 333 F.R.D. at 156.

This case is not like *DNC v. Bostelmann*, where the court allowed permissive intervention in a case brought by the Democratic National Committee, reasoning that the Republic National Committee intervenors were the "mirror image" of the plaintiffs. 2020 WL 1505640, *5. The DNC was already pursuing explicitly partisan interests, and so the political parties were already part of the case. Movants seek to cast Priorities as the Democratic National Committee, on the theory that the organization favors Democratic-leaning policies (Doc. 27:8), but the interests Priorities asserts in bringing this action are non-partisan interests of educating voters and helping them vote generally, not advocating for particular election results.

Movants also assert that the political parties should have a "seat at the table" in constitutional challenges to election statutes. (Doc. 27:14.) The Commission disagrees. This is a case about the meaning of Wisconsin's non-partisan election laws, not a boxing match between political interests. If Movants believe they have arguments that no other party has thought to make, including about their partisan political goals, this Court could grant them leave to participate as an amicus.

CONCLUSION

Defendant asks that Movants' request for intervention be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this *Opposition by Defendant Wisconsin Elections Commission to Intervention by Republican National Committee, Republican Party of Wisconsin, Republican Party of Rock County, and Republican Party of Walworth County* the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 7th day of September 2023.

Electronically signed by:

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