

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT, et al.,

Plaintiffs,

v.

Case No. 23-CV-672

WISCONSIN ELECTIONS
COMMISSION, et al.,

Defendants.

**COMMISSION DEFENDANTS' BRIEF IN OPPOSITION TO
REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY
OF WISCONSIN'S MOTION TO INTERVENE**

INTRODUCTION

This lawsuit presents a challenge to Wisconsin's absentee ballot witness requirement under the Voting Rights Act and the Civil Rights Act. Two partisan political organizations—the Republican National Committee and the Republican Party of Wisconsin—seek to intervene, asserting interests in maintaining the integrity of the election process and promoting orderly administration of elections. Movants fail to satisfy two components of the intervention-as-of-right analysis, and this Court should deny permissive intervention, as well.

On intervention as of right, Movants have no direct, significant and legally protectable interest because their interests in election integrity and avoiding the costs of a change in the law are not legally protected or unique. And their interests will be adequately represented by the Commission and its counsel from the Attorney General's office, which have a duty to defend the challenged laws and have already moved to dismiss the lawsuit.

This Court should deny permissive intervention, as well.

BACKGROUND

This suit is challenged by four Wisconsin voters to the absentee ballot witness requirement in Wis. Stat. § 6.87(2) under Section 201 of the Voting Rights Act and the materiality provision of the Civil Rights Act. (Dkt. 1:18–22.) Defendants are the Wisconsin Elections Commission—the state agency responsible for administering and enforcing Wisconsin's election laws—and its commissioners and administrator in their official capacities. (Dkt. 1:7–8.)

The proposed intervenors (Movants) are two partisan political organizations: the Republican National Committee and the Republican Party of Wisconsin. (Dkt. 9:3–4.) The Republican National Committee asserts that it “manages the Republican Party's business at the national level, supports Republican candidates, and coordinates fundraising and election strategy throughout the United States.” (Dkt. 9:4.) The Republican Party of Wisconsin asserts that it “is a recognized political party that works to promote Republican

values and assists Republican candidates in federal, state, and local races. At the national, state or local level, respectively, they assert that they are “political committees and parties who support Republicans in Wisconsin” (Dkt. 9:3). Both groups claim they “have interest—including their own and those of their members—in how Wisconsin’s elections are run. (Dkt. 9:4.)

ARGUMENT

Movants do not meet the standard for intervention as of right because their asserted interests are not protected or unique and because the Commission and its counsel will adequately defend the law. This Court should also deny Movants’ request for permissive intervention.

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

Movants fails to satisfy two of Rule 24(a)(2)’s requirements. “Rule 24(a)(2) requires the court to allow intervention if the would-be intervenor can prove: ‘(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action.’” *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 686 (7th Cir. 2023) (quoting *State v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019)); Fed. R. Civ. P. 24(a)(2). Movants have neither a protected interest nor a lack of adequate representation.

Movants bear the burden of establishing their entitlement to intervene as of right, and the failure to meet any of the elements requires denial of the motion. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

A. Movants do not have a protectable or unique interest in this litigation.

Movants say they have interests in maintaining the integrity of the election process and promoting orderly administration of elections. They also assert an interest on “[s]afeguarding Movants’ coffers from costs associated with sudden court-ordered changes in election procedure.” (Dkt. 9:6–8.) Those asserted interests do not support intervention as of right.

“Intervention as of right requires a would-be intervenor to have a ‘direct, significant and legally protectable interest in the [subject] at issue in the lawsuit.’” *Bost*, 75 F.4th at 686 (quoting *Keith*, 764 F.2d at 1268). Movants here lack two facets of this interest.

First, the would-be intervenor must have a legally protectable interest in the subject of the suit. The Seventh Circuit has viewed that concept as akin to Article III standing, and “required more than the minimum Article III interest” for intervention. *Planned Parenthood Wis. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (citation omitted). Federal courts consistently have held that generalized interests in the integrity of the election process and promoting orderly elections is not a protected interest for standing purposes. *See Hotze v.*

Hudspeth, 16 F.4th 1121, 1124 (5th Cir. 2021) (holding that an interest in the integrity of the election process is “far too generalized to warrant standing”); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (no standing based on interest in ensuring that only lawful ballots are counted); *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 339 (3d Cir. 2020) (no standing based on interest in having government administered in compliance with the Elections Clause).

Movants assert exactly the type of generalized interest that courts have held is insufficient. They do not assert that their, or their members’, votes will not be counted or that they will be unable to vote. A general interest in election integrity is not enough to satisfy the second prong of the intervention analysis. And their “financial” interest—avoiding the costs of any court-ordered changes in the law (Dkt. 9:8)—has nothing to do with the issues in the lawsuit at all. It would give a party standing to intervene in any lawsuit that might result in a change in the law.

Second, and independently, a would-be intervenor needs an interest that is “unique” to the proposed intervenor. Movants lack that, as well. Their asserted interests in maintaining the integrity of the election process and promoting orderly administration of elections are identical to the Commission’s interests. The Commission is expressly charged with administering and enforcing Wisconsin’s elections laws. *See* Wis. Stat. § 5.05(1)–(2m), (2w).

Movants do not have a unique interest justifying intervention because their asserted interests duplicate the Commission's interest in ensuring the integrity of Wisconsin elections. And willingness to expend resources is nothing more than the factual manifestation of Movants' claimed interests in election administration and integrity.

None of Movants' asserted interests are protected or unique, and so they fail the second prong of the intervention-as-of-right analysis.

B. The Commission and Attorney General adequately represent Movants' interests.

Even if Movants could establish a protected and unique interest in this litigation, they are not entitled to intervene because the Commission and its counsel will adequately represent them in defending the statute at issue and ensuring that Wisconsin elections are fair and properly administered.

The Seventh Circuit uses a tiered test for adequacy of representation because "some litigants are better suited to represent the interests of third parties than others." *Bost*, 75 F.4th at 688. The "three different standards for showing inadequacy depend[] on the relationship between the party and the intervenor" such that "the stronger the relationship between the interests of the existing party and the interest of the party attempting to intervene, the more proof of inadequacy" required before allowing intervention. *Id.*

The first standard is the “default rule, which applies when there is no notable relationship between the existing party and the applicant for intervention.” This standard is the most lenient—the movant need only show “that representation of his interest [by the existing party] ‘*may be*’ inadequate.” *Id.* (citation omitted). The second intermediate standard applies if “the prospective intervenor and the named party have ‘the same goal.’” *Id.* (quotation omitted). This standard is a “higher bar, under which the applicant can only show inadequate representation by pointing to ‘some conflict’ between itself and the existing party.” *Id.* (citation omitted). The strictest test applies “when the representative party ‘is a governmental body charged by law with protecting the interests of the proposed intervenors.’” *Id.* (citation omitted). “In those cases, because the existing party is legally required to represent the interests of the would-be intervenor,” courts presume adequate representation “unless there is a showing of gross negligence or bad faith.” *Id.* (citation omitted).

Here, the Commission and its counsel from the Attorney General’s office are legally required to defend the statutes at issue and ensure that Wisconsin elections are fair and properly administered. The Attorney General has the duty by statute to defend challenges to state statutes. *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 96, 307 Wis. 2d 1, 745 N.W.2d 1. The Wisconsin Supreme Court holds that “[t]he obligation of both the Department of Justice

and public officers charged with the enforcement of state statutes is clear: they must defend the statute regardless of whether they have diverse constituencies with diverse views.” *Id.* ¶ 108. Under Wisconsin law, the Commission and Attorney General share the goals of election integrity and defending state statutes, which are Movants’ stated goals.

And under the applicable intermediate or highest standards, Movants have identified *no* conflict between themselves and the Commission, much less gross negligence or bad faith on the part of the Commission. Movants cannot demonstrate that the Commission and its counsel would not adequately represent their interests.

Perhaps Movants believe that their interests are somewhat different because they have partisan political goals. But even if the more lenient default rule applied under that theory, Movants cannot show inadequate representation. The Seventh Circuit recently upheld the denial of intervention by the Democratic Party of Illinois, another proposed partisan intervenor, under the default rule where that movant identified no conflict between itself and the state agency defending the law at issue. *Bost*, 75 F.4th at 690.¹ Just as

¹ Defendants agree with the concurrence in *Bost* that the majority’s test there misapplied the correct standard under Rule 24(a)(2), and that the government adequately represents a party’s interests, regardless of how the would-be intervenor hopes to employ the statute at issue, as long as the government “vigorously defends the statutes.” *Bost*, 75 F.4th at 692 (Easterbrook, J., concurring). That error does not matter here, because Movants fail the fourth prong even under the more lenient default standard.

Movants argue here (Dkt. 9:11–12), 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.² *Id.*

Movants here speculate that the Commission has “clashing interests” and will not adequately represent them. (Dkt. 9:12.) This Court rejected that argument in *Democratic National Committee v. Bostelmann*, 2020 WL 1505640, *3–4 (W.D. Wis. 2020). There, this Court 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 (Dkt. 9:11–12), Movants 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 Movants 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

² 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 there asserted a harm that its members might have their ballots not counted. *Bost*, 75 F.4th 682, 687 (7th Cir. 2023). While the court found these 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.

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)).

The Court need only consult the docket to see the Commission’s course of defending this lawsuit. The Commission actively and competently opposes Plaintiffs’ challenges. It has moved to dismiss Plaintiffs’ claims for failure to state a claim and other reasons. (Dkt. 19–20.) And there is no indication that the Commission will suddenly change course as it is legally obligated to defend the election laws at issue. Movants have made no showing that the Commission’s representations of its interests will be inadequate.

Movants fail the second and fourth prongs of the intervention test are not entitled to intervene as of right.

II. This Court should also deny Movants’ request for permissive intervention.

The Court also should deny permissive intervention under Rule 24(b). The Rule provides that a court may permit intervention as a matter of discretion if (1) the motion is timely and (2) the movant “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). The court, in exercising its discretion, must consider “whether the intervention will unduly delay or prejudice the adjudication of

the original parties' rights." Fed. R. Civ. P. 24(b)(3). Thus, a court may deny permissive intervention where "adding the proposed intervenors could unnecessarily complicate and delay all stages of this case." *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015).

Here, even if Movants have a claim that shares common questions with the main action, this Court still should deny permissive intervention because adding more defendants would only complicate and delay this case. This election law case should be streamlined and decided quickly without unnecessarily using up the court's time and resources with redundant defendants. Movants' asserted interests are closely aligned with those of the Commission, such that their addition as parties would add little substance. Weighing the cost of diverting court resources against the minimal value Movants would offer as a party, permissive intervention is not warranted.

This Court has denied permissive intervention to parties seeking to join the Attorney General in defending a statute, holding that "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *Id.* at 399 (quoting *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996)). Allowing Movants to use permissive intervention would defeat the purpose of the presumption that government entities adequately represent the interests they

are charged with representing. A party would be able to sidestep that presumption merely by meeting the much less demanding standard for permissive intervention. Movants' argument for permissive intervention would allow them to intervene in every challenge to an election law, regardless of whether the Commission and Attorney General were adequately defending the law.

Further, granting intervention by partisan parties and groups potentially injects unnecessary partisan debates into what should be non-partisan litigation. This Court 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." *Id.* at 397. Movants here embrace that partisanship, arguing that they should be permitted to intervene because they are the "mirror image" of Plaintiffs. (Dkt. 9:14.) This Court addressed intervention by a "mirror image" political party in *Bostelmann*, 2020 WL 1505640, *5. But unlike that case, where this Court allowed permissive intervention in a lawsuit brought by the Democratic National Committee, reasoning that the Republic National Committee intervenors were the "mirror image" of the plaintiffs, 2020 WL 1505640, *5, no political parties are part of this case and no party is pursuing explicitly partisan interests. Plaintiffs' interests in bringing this lawsuit relate to their ability to vote absentee, not to advocating for particular election results.

This is a case about the meaning of a Wisconsin non-partisan election statute and its intersection with federal law. The Commission and its counsel are defending the law, and adding additional defendants with the same goals would only complicate the litigation. If Movants believe they have arguments that no other party will make, this Court could grant them leave to participate as an amicus.

CONCLUSION

Commission Defendants ask this Court to deny Movants' motion to intervene under Rule 24.

Dated this 30th day of October 2023.

Respectfully submitted,

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