STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DENNIS EUCKE et al., Plaintiffs, v. WISCONSIN ELECTIONS COMMISSION et al., Defendants.	Case No. 2024CV007822 Case Code: 30952 Hon. Thomas J. McAdams

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

RETRIEVEDFROMDEMOCRACYDOCKET.COM

TABLE OF CONTENTS

I. Introduction and Summary of the Argument 1

II. Legal Standards 3

III. Argument 4

A. DNC is entitled to intervention as of right. 4

1. DNC's motion is timely. 4

2. DNC has interests sufficiently related to the subject of the action. 5

3. Disposition of the action in DNC's absence would impair its ability to protect its interests. 7

4. No existing party adequately represents DNC's interests 8

B. Alternatively, DNC should be granted permissive intervention. 9

IV. Conclusion 10

RETRIEVEDFROMDEMOCRACYDOCKET.COM

I. Introduction and Summary of the Argument

Plaintiffs' eleventh-hour attempt to purge Wisconsin's voter rolls contravenes at least two foundational precepts of election litigation.

First, courts at the state and federal levels have repeatedly recognized that granting relief too close in time to elections can lead to confusion, hardship (for both voters and election officials), and even disenfranchisement. *See, e.g.*, *Hawkins v. WEC*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877; *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). These concerns—and their applicability to this case—were recently reinforced by the Wisconsin Supreme Court's stay decision in *Brown v. WEC*, which invoked the federal *Purcell* principle to caution against prejudicial late-hour changes to election laws. *See* No. 2024AP232, slip op. at 5 (Wis. June 11, 2024). This admonition is consistent with the equitable doctrine of laches, which "is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party," and "has particular import in the election context." *Trump v. Biden*, 2020 WI 91, ¶¶ 10–11, 394 Wis. 2d 629, 951 N.W.2d 568 (cleaned up).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Here, Plaintiffs filed suit on September 26—less than six weeks before the November 5 general election. (Dkt. 3, Compl. for Expedited Declaratory & Injunctive Relief or, in the Alternative, for Expedited Writ of Mandamus ("Compl.")) Today, the election is not merely imminent, but underway: Absentee and UOCAVA ballots went out *last month*, and in-person absentee voting begins in less than three weeks. *See Calendar*, WEC, https://elections.wi.gov/calendar (last visited Oct. 3, 2024). Under these circumstances, equitable considerations *demand* that Plaintiffs' action (and any request for immediate relief) be stayed, if not outright dismissed. Plaintiffs might fault Defendants for not "tak[ing] action . . . prior to the 2024 election" (Compl. ¶ 2), but that is precisely the sort of prudence and caution that Wisconsin courts have repeatedly demanded of election officials and litigants alike.

Second, Plaintiffs style their action as “a lawsuit to enforce Wisconsin’s laws that protect the right to vote from dilution” (Compl. ¶ 1); indeed, this is the *only* interest or injury they cite to justify this litigation. But any relief premised on vote dilution is a nonstarter: Plaintiffs’ theory has been soundly rejected by state and federal courts across the county, including a majority of the Justices on the Wisconsin Supreme Court. *See Teigen v. WEC*, 2022 WI 64, ¶ 167, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring) (rejecting vote-dilution theory as “unpersuasive” and emphasizing that it did “not garner the support of four members of this court”); *id.* ¶ 205 n.1 (A.W. Bradley, J., dissenting) (similar); *Rise, Inc. v. WEC*, 2023 WI App 44, ¶ 27 & n.6, 2023 WL 4399022 (Jul. 7, 2023) (Blanchard, P.J.) (recognizing that vote-dilution theory of standing was squarely rejected in *Teigen* and criticizing it as “weak” and lacking any “clear legal authority”); *see also, e.g.*, *Soudelier v. Dep’t of State*, Civ. No. 22-2436, 2022 WL 17283008, at *3 (E.D. La. Nov. 29, 2022) (collecting cases and noting that “[d]istrict courts across the country have consistently dismissed complaints premised on the theory of unconstitutional vote dilution”), *aff’d*, No. 22-30809, 2023 WL 7870601 (5th Cir. Nov. 15, 2023). Plaintiffs cannot invoke a discredited theory of harm to justify judicial intervention in this case, especially where their request for “expedited” relief comes so unpardonably late.

Even setting aside the equities and their flawed reliance on vote dilution, Plaintiffs’ claims fail on the merits. As Plaintiffs themselves note, “Wisconsin is required to ‘remove the names of ineligible voters from the computerized list *in accordance with State law*.’” (Compl. ¶ 17 (emphasis added) (quoting 52 U.S.C. § 21083(a)(2)(A)(iii)) Their complaint *confirms* that, notwithstanding their cherry-picking of general obligatory language from Wisconsin’s election statutes, Defendants have indeed maintained the voter rolls “in accordance with State law.” *Compare* Compl. ¶ 28 (noting Defendants’ 2023 completion of four-year voter-record

RETRIEVEDFROMDEMOCRACYDOCKET.COM

maintenance process), *with* Wis. Stat. § 6.50 ("No later than June 15 following each general election, the commission shall examine the registration records for each municipality and identify each elector who has not voted within the previous 4 years if qualified to do so during that entire period and shall mail a notice to the elector[.]"). If Plaintiffs feel that the list-maintenance procedures prescribed by Wisconsin law are not sufficiently frequent or robust, then the proper recourse is the legislative process—not calling on a court to order novel, disruptive, and prejudicial relief on the eve of an election.

To foreclose the unjustified disruption of the ongoing election and the unwarranted disenfranchisement of Wisconsin voters, Proposed Intervenor-Defendant Democratic National Committee ("DNC") seeks to intervene in this matter. DNC is the national committee of the Democratic Party and has undeniable interests in these proceedings, and thus satisfies the standards for both intervention as of right under Wis. Stat. § 803.09(1) and permissive intervention under Wis. Stat. § 803.09(2). This motion is timely, DNC has interests in both the ability of voters to cast ballots and the electoral success of Democratic candidates—both of which would be impaired by Plaintiffs' requested relief—and neither Defendants nor any other government officials adequately represent DNC's partisan interests. Moreover, DNC regularly litigates voting- and election-related disputes in Wisconsin and can bring to these proceedings the unique perspectives of voters, candidates, and other non-government stakeholders. For these reasons and those detailed below, intervention is both required and appropriate.

In compliance with Wis. Stat. § 803.09(3), DNC has submitted a responsive pleading setting forth the defenses for which it seeks intervention as Exhibit A.

II. Legal Standards

To intervene as of right under Wis. Stat. § 803.09(1), a movant must show (1) that its motion to intervene is timely; (2) that it claims an interest sufficiently related to the subject of the

RETRIEVEDFROMDEMOCRACYDOCKET.COM

action; (3) that disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) 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).

The standard for permissive intervention is even less stringent: "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." Wis. Stat. § 803.09(2).

RETRIEVEDFROMDEMOCRACYDOCKET.COM

III. Argument

A. DNC is entitled to intervention as of right.

DNC has filed this motion in a timely manner, it has interests sufficiently related to the issues at stake in the action, the disposition of the case could impair those interests, and the existing parties do not represent DNC's unique interests.

1. DNC's motion is timely.

The timeliness requirement for intervention as of right is measured by the movant's diligence and the impact the motion will have on the existing litigants. Two factors guide the analysis: (1) whether, in light of all the circumstances, the proposed intervenor acted promptly and (2) whether the intervention will prejudice the original parties. *See Bilder*, 112 Wis. 2d at 550 (intervention motion timely where court had not approved stipulation to settle case).

Here, Plaintiffs commenced this action just one week ago. Significant substantive developments in the matter have not yet occurred, and intervention would not prejudice any party, as DNC will abide by any schedule the Court sets moving forward. Given the early stage of the litigation and the absence of prejudice, DNC satisfies the first requirement for intervention as of

right. *See id.* ("The critical factor is whether in view of all the circumstances the proposed intervenor acted promptly.").

2. DNC has interests sufficiently related to the subject of the action.

Consistent with the "broader, pragmatic approach" taken by Wisconsin courts regarding intervention, the "interests" requirement for intervention serves to efficiently "dispos[e] of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Helgeland*, 2008 WI 9, ¶¶ 43–44 (quoting *Bilder*, 112 Wis. 2d at 548–49).

Here, Plaintiffs seek relief that would disrupt the orderly administration of a high-interest presidential contest, impose new hardships on state and local officials in the middle of the election calendar, and require hasty, last-minute voter-roll "maintenance" that risks burdening and disenfranchising lawful voters. DNC therefore has several important and protected interests in the subject matter of this litigation.

RETRIEVED FROM DEMOCRACYDOCKET.COM

First, political entities like DNC have an "associational interest on behalf of [their] members" to challenge or defend laws that might affect those members' right to vote. *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 687 (7th Cir. 2023); *see also Helgeland*, 2008 WI 9, ¶ 37 ("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)."). Indeed, political parties are routinely granted intervention as of right in similar circumstances. *See, e.g.*, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5229116, at *1 (D. Nev. Aug. 21, 2020) (granting intervention to DNC based on "distinct interest in ensuring that voters of the Democratic Party can vote"). Setting aside the myriad legal and equitable shortcomings of Plaintiffs' requested relief, they ignore that even legitimate efforts to remove ineligible voters from the rolls are not free from error or abuse. The risks are especially pronounced here given that the presidential election is currently underway and

registration deadlines are fast approaching. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014) (addressing ninety-day list-maintenance cutoff under National Voter Registration Act and emphasizing that "[e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote"). Because Plaintiffs' requested relief would place new obstacles between eligible Democratic voters and the franchise (Declaration of Jake Kenswil ("Kenswil Decl.") ¶ 12), the DNC's associational interests would be impaired.

Second, by restricting Wisconsin voters' ability to successfully exercise their right to vote, Plaintiffs' requested relief would interfere with DNC's core mission of supporting the election of Democratic candidates to federal, state, and local offices—especially given the high number of Democratic voters in Milwaukee, the focus of Plaintiffs' purge efforts. (*Id.* ¶¶ 10–12, 14) Given that Wisconsin elections (especially presidential elections) are often decided by razor-thin margins, the wrongful inactivation of Democratic voters' registrations could have make-or-break consequences, thus posing a risk to DNC's competitive prospects that constitutes another cognizable basis for intervention. *See, e.g.*, *Pavek v. Simon*, No. 19-cv-3000 (SRN/DTS), 2020 WL 3960252, at *3 (D. Minn. July 12, 2020) (granting intervention to Republican committees where challenged "Ballot Order statute's ordering requirements . . . typically benefitted Republican candidates"); *Issa v. Newsom*, No. 20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting intervention to political party organizations where "Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates" (cleaned up)).

Third, if Plaintiffs succeed in this lawsuit, then the DNC would need to divert its limited resources away from its core work of persuading voters to support Democratic candidates, educating the electorate about the issues in this campaign, and implementing get-out-the-vote

RETRIEVED FROM DEMOCRACYDOCKET.COM

efforts in the immediate run-up to November 5. (Kenswil Decl. ¶ 13) Instead, some of these resources would need to be redirected toward helping Democratic voters navigate new bureaucratic hurdles and potentially disenfranchising list maintenance (*id.*)—yet another cognizable ground for intervention. *See, e.g.*, *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022) (sufficient interests for intervention include political committee's need to "expend significant resources" based on new election law that "regulates the conduct of the Committees' volunteers and poll watchers"); *Issa*, 2020 WL 3074351, at *3 (granting intervention and citing this interest).[1]

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

RETRIEVED FROM DEMOCRACYDOCKET.COM

As with the other elements, Wisconsin courts take "a pragmatic approach" to this requirement 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.* ¶¶ 80–81.

Here, DNC easily satisfies this element. As discussed above, an adverse ruling would seriously impair DNC's ability to protect its own interests and those of its supporters and constituents. When a proposed intervenor has protectible interests in the outcome of litigation, as

[1] Notably, advocacy organizations have been granted intervention in prior voter-purge lawsuits based on "an organizational interest in avoiding adverse reallocation of resources to protect the voting rights of their members, and an associational interest in protecting their members from unlawful removal from the voter rolls should Plaintiffs succeed in obtaining their requested relief'—the same bases DNC identifies here. *Jud. Watch, Inc. v. Ill. State Bd. of Elections*, No. 24 C 1867, 2024 WL 3454706, at *2–4 (N.D. Ill. July 18, 2024); *see also, e.g.*, *Bellitto v. Snipes*, No. 16-cv-61474-BLOOM/Valle, 2016 WL 5118568, at *2 (S.D. Fla. Sept. 21, 2016) (similar).

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); *see also Wolff*, 229 Wis. 2d at 747 (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 its position was correct). Above, DNC identifies three interests that would be directly impacted by this litigation: A ruling in Plaintiffs' favor would threaten to disenfranchise Democratic voters, create a competitive disadvantage for Democratic candidates, and require DNC to divert resources in response. Given these direct harms to DNC, intervention is warranted. *See, e.g.*, *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).

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

The burden to satisfy this final 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 (if not impossible) to predict, the proper test is whether representation "*may* be" inadequate, not whether it *will* be inadequate. *Wolff*, 229 Wis. 2d at 747 (emphasis added).

Here, the fact that Defendants and DNC might share a "mutually desired outcome" and make "similar arguments" does not bar intervention. *Id.* at 748. Instead, where there is a realistic possibility that the existing parties' representation of a 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* § 4.62, at 48 (7th ed. 2021) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)). Such is the case here. DNC has "special, personal [and] unique interest[s]" that are distinct from

RETRIEVED FROM DEMOCRACYDOCKET.COM

Defendants' interests as government officials, *Helgeland*, 2008 WI 9, ¶ 116, and thus Defendants 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 the Fifth Circuit has explained, a political party committee's "private interests are different in kind from the public interests of" a government agency or official because a political group "represent[s] its members to achieve favorable outcomes," whereas "[n]either the State nor its officials can vindicate such an interest while acting in good faith." *La Union del Pueblo Entero*, 29 F.4th at 309; *see also, e.g.*, *Issa*, 2020 WL 3074351, at *3 (similar). Defendants' interests in this litigation are defined by their statutory duties to conduct elections and administer Wisconsin's election laws; by contrast, DNC faces significant harm to its supporters and its core mission of electing Democratic candidates as a result of Plaintiffs' lawsuit.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The fact that DNC and Defendants approach this case from fundamentally different perspectives has a practical implication for the Court's adjudication of this matter: The parties might make distinct arguments in defending against Plaintiffs' lawsuit. For example, DNC can make arguments regarding the constitutionality and preemption of Wisconsin's list-maintenance laws (and Plaintiffs' interpretation of those laws) that Defendants and their counsel cannot necessarily make as representatives of the State. This is in addition to the unique factual vantage DNC would bring to these proceedings on behalf of voters and candidates.

B. Alternatively, DNC should be granted permissive intervention.

Permissive intervention is appropriate 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, ¶¶ 119–20. DNC meets these criteria. Its motion is timely and, given that this litigation is at its earliest stage and that DNC would proceed in

accordance with any schedule the Court sets, intervention will not unduly delay or prejudice the adjudication of the original parties' rights. As evidenced by its proposed Answer (Ex. A), DNC would raise common questions of law and fact, including the core issue of whether Defendants' list-maintenance practices are consistent with Wisconsin law. Lastly, DNC's intervention would serve to fully and efficiently resolve the issues before the Court, especially since DNC has regularly litigated election-related issues in Wisconsin state and federal courts and is uniquely positioned to offer the perspective of a political party, candidates, and voters who would be significantly harmed by Plaintiffs' requested relief.

Political parties are often allowed to permissively intervene in litigation implicating voting rights. *See, e.g.*, Order at 1, *Oldenburg v. WEC*, No. 24-CV-43 (Marinette Cnty. Cir. Ct. May 31, 2024) (granting intervention to DNC in challenge to Wisconsin's absentee-voting procedures); *DNC v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (granting federal and state political committees' motions to intervene permissively in litigation challenging application and enforcement of absentee-voting laws during COVID-19 pandemic). Additionally, advocacy organizations have been granted permissive intervention in voter-purge lawsuits where they "seek to intervene for the purpose of challenging . . . claims with a view toward ensuring that no unreasonable measures are adopted that could pose an elevated risk of removal of legitimate registrations." *Pub. Int. Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 799 (E.D. Mich. 2020); *see also, e.g.*, *Republican Nat'l Comm. v. Aguilar*, No. 2:24-cv-00518-CDS-MDC, 2024 WL 3409860, at *3. This case warrants the same result.

IV. 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 in the exercise of its discretion grant DNC permissive intervention.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Dated: October 3, 2024

Respectfully submitted,

Electronically signed by Charles G. Curtis, Jr.
Charles G. Curtis, Jr. (SBN 1013075)
ccurtis@perkinscoie.com
Will M. Conley (SBN 1104680)
wconley@perkinscoie.com
Nicholas J. Surprise (SBN 1126471)
nsurprise@perkinscoie.com
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-5411
Facsimile: (608) 663-7499

John M. Devaney*
jdevaney@perkinscoie.com
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Jonathan P. Hawley*
jhawley@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
Telephone: (206) 359-8000
Facsimile: (206) 359-9000

**Motion for Admission Pro Hac Vice forthcoming*

Stacie H. Rosenzweig (SBN 1062123)
shr@hallingcayo.com
HALLING & CAYO, S.C.
320 East Buffalo Street, Suite 700
Milwaukee, Wisconsin 53202
Telephone: (414) 271-3400
Facsimile: (414) 271-3841

Attorneys for Proposed Intervenor-Defendant Democratic National Committee

RETRIEVEDFROMDEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I certify that, in compliance with Wis. Stat. § 801.18(6), I am electronically filing this Brief in Support of Motion to Intervene of Proposed Intervenor-Defendant Democratic National Committee with 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, and by electronic and certified mail to parties who are not registered users.

Respectfully submitted this 3rd day of October, 2024.

Electronically signed by Charles G. Curtis, Jr.
Charles G. Curtis, Jr. (SBN 1013075)

RETRIEVEDFROMDEMOCRACYDOCKET.COM