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

DEMOCRATIC NATIONAL COMMITTEE and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v. Case No. 20-CV-00249

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as Wisconsin Elections Commissioners,

Defendants.

DEFENDANTS' RESPONSE TO MOTIONS TO INTERVENE BY THE WISCONSIN STATE LEGISLATURE AND REPUBLICAN NATIONAL COMMITTEE AND THE REPUBLICAN PARTY OF WISCONSIN

Defendants Marge Bostlemann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr. and Mark L. Thomsen oppose the motions to intervene filed by the Wisconsin State Legislature, [Dkt. Nos. 21, 23], and the Republican National Committee (RNC) and the Republican Party of Wisconsin (RPW), [Dkt. Nos. 41–42]. Neither proposed intervenor is entitled to intervene as of right because the Defendants' defense of the challenged laws adequately represents their interests under *Planned Parenthood of Wisconsin, Inc. v. Kaul*. 942 F.3d 793, 801 (7th Cir. 2019). The Court should exercise its discretion to deny permissive intervention when, as here, the interventions would cause unneeded distraction and

delay in fast-moving litigation. Instead, the Court's procedure of allowing proposed intervenors to participate as amici sufficiently protects them by allowing them to advance their legal arguments.

FACTS

The Plaintiffs, the Democratic National Committee and Democratic Party of Wisconsin (hereinafter, "DNC"), filed suit seeking declaratory and injunctive relief on March 18, 2020. [Dkt. No. 1]. Along with their Complaint, the DNC filed an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction ("TRO Motion"). [Dkt. No. 2].

On March 19, Proposed Intervenors, the Wisconsin State Legislature (the "Legislature"), submitted a letter to the Court stating its intent to move to intervene in the case and requesting that the Court stay consideration of the TRO Motion and refrain from entering any emergency orders. [Dkt. No. 8]. That afternoon, the Court held a telephonic conference with the parties, and the Legislature, to hear argument and set deadlines. [Dkt. No. 10].

The Legislature filed its Motion to Intervene, along with a Proposed Motion to Dismiss and supporting documents on March 20. [Dkt. Nos. 20-23, 25]. That same day, the Defendants responded to the DNC's TRO Motion. [Dkt. No. 27]. Late that afternoon, the Republican National Committee and the Republican Party of Wisconsin (hereinafter collectively "RNC") filed a notice with the Court indicating their intent to move to intervene and the RNC's general opposition to the relief sought in the Complaint. [Dkt. No. 34]. The DNC responded by letter, opposing the RNC's

forthcoming Motion to Intervene and request for the Court to delay deciding the TRO Motion. [Dkt. No. 36]. The DNC also responded to the Legislature's Motion to Intervene. [Dkt. No. 27].

The Court then issued its Decision and Order on the TRO Motion, granting the DNC's request to extend the deadline for an individual to register to vote electronically to March 30. The Court denied the TRO Motion in all other respects but reserved the DNC's request for an extension of the deadline by which absentee ballots must be received to be counted for further motion and hearing. [Dkt. No. 37]. The Court noted that, in considering the TRO Motion, it considered the Legislature's arguments at the hearing and in the Legislature's Proposed Motion to Dismiss and Opposition to the TRO Motion. [Dkt. No. 37, p. 2 n 1]. The Court also declined a request from the RNC to delay a decision so those entities could move to intervene. [Dkt. No. 37, p. 2 n 2].

ARGUMENT

I. The proposed intervenors are not entitled to intervene as of right.

The proposed intervenors have not met the standard for intervention as of right recently announced in *Planned Parenthood*. The proposed intervenors have accurately stated that they must meet four elements for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure: "(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." *Illinois*

v. City of Chicago, 912 F.3d 979, 984 (7th Cir. 2019). Neither the Legislature nor the RNC can meet the fourth element - lack of adequate representation by Defendants.

Recently, the Governor appointed special counsel to represent the defendants in this case substituting for the Attorney General. Pursuant to Wis. Stats., § 14.11(2)(a), the Governor, not the Legislature, appoints special counsel to represent the state, either assisting the Attorney General or in the Attorney General's stead. The analysis of this court, affirmed in *Planned Parenthood*, remains valid and controlling. That is because the state continues to be represented by parties charged with defending its laws and those parties are represented by counsel duly appointed by the public official who has authority to appoint legal counsel to represent the state and its officials.

In *Planned Parenthood*, the Seventh Circuit addressed intervention as of right when state officials are defending state laws. In order to show inadequacy of representation, the Legislature, like any private party, must make "a concrete showing of the Attorney General's bad faith or gross negligence before permitting intervention." *Planned Parenthood, 942 F.3d at 801*. Given that Defendants are defending all of the laws being challenged, [Dkt. Nos. 24, 26], the proposed intervenors cannot make that showing.

The Legislature recognizes the governing standard and thus only sought to intervene, "if the Attorney General declines to defend fully any of the laws at issue." [Dkt. No. 21, p. 2]. The Legislature's motion to intervene as of right should be denied even under the Legislature's own terms because Defendants have defended and

continue defending the laws. [Dkt. No. 26]. The Legislature also specifically requested intervention for the specific purpose of appealing "any order impacting Wisconsin's photo ID and proof-of-residency requirements." [Dkt. No. 21, p. 3 (emphasis omitted)]. Given that the Court did not alter those requirements, this argument is moot.

The RNC, on the other hand, did not even acknowledge the legal standard governing their intervention motion. *Planned Parenthood* reiterates that when the party to the case is "'is a governmental body charged by law with protecting the interests of the proposed intervenors' . . . the representative party is presumed to be an adequate representative 'unless there is a showing of gross negligence or bad faith.'" 942 F.3d at 799 (*quoting Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)). The RNC did not try to show gross negligence or bad faith, instead relying on cases from other circuits. Having not even attempted to meet the governing standard, their motion should also be denied.

Even if the court should decide that because the attorney general has been replaced as counsel pursuant to Wis. Stats., § 14.11(2)(a), the proposed intervenors must meet a lower standard, the court should still find they have failed to meet their burden. When the proposed intervenor and the named party have the same goal, a "presumption [exists] that the representation in the suit is adequate." *Wisconsin Educ. Association Council v. Walker* (*"WEAC"*), 705 F.3d 640, 659 (7th Cir. 2015). The prospective intervenor has the burden of rebutting that presumption and showing that a conflict exists. *Id.* (*citing Meridian Homes Corp. v. Nicholas W. Prasses & Co.,* 683 F.2d 201, 205 (7th Cir. 1982)).

In this case, defendants and prospective intervenors share the same goal, protecting the Wisconsin election laws and procedures from challenge. This is a goal which the defendants have pursued vigorously and largely successfully in this litigation. [Dkt. Nos. 26, 37]. Proposed intervenors offer no evidence of any slackening of that defense.

II. This Court Should Not Permit the Legislature and RNC Intervene Under Rule 24(b)(1).

Under Federal Rule of Civil Procedure 24(b)(1) a district court, "may permit anyone to intervene who ... 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). As with intervention as a matter of right, the application to intervene must be timely. *Sokaogon Chippewa Comm. V. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000). "Permissive intervention under Rule 24(b) is wholly discretionary." *Id., citing Keith v. Daley*, 764 F.2d 1265, 1272 (7th Cir. 1985). Rule 24(b) requires the Court to determine, "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3). Because the decision is discretionary with the district court, courts may refuse intervention even when there is a common question of law or fact, or where the requirements of the are otherwise met. *See Roberts v. Carrier Corp.*, 117 F.R.D. 426, 428 (N.D. Ind. 1987); *South Dakota ex rel. Barnett v. U.S. Dept of Interior*, 317 F.3d 783, 787 (8th Cir. 2003); 7C Wright, Miller & Kane, Federal Practice and Procedure § 1913, at 376–77.

This Court has held, "when 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." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 384 F. Supp. 3d 982, 990 (W.D. Wis. 2019), aff'd, 942 F.3d 793 (7th Cir. 2019), *citing Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996); *see also One Wis. Institute, Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015).

a. Neither the Legislature Nor the RNC Has A Unique Claim or Defense.

Neither the Legislature nor the RNC meet the threshold requirement of Rule 24(b) because neither possesses a unique interest. The intervenor's interest, "must be unique to the proposed intervenor." *WEAC*, 705 F.3d at 658; *see also Planned Parenthood*, 384 F. Supp. 3d at 986. While the Legislature explains how its defenses share common questions of fact and law, it does not attempt to address how it its interest in those questions is unique or apart from that of the Defendants, who are responsible for administering and enforcing Wisconsin's elections laws. Wis. Stat. § 5.05 (1). In *Planned Parenthood*, the Court of Appeals assumed without deciding that the Legislature had standing as an agent of Wisconsin. 942 F.3d at 799. There is nothing in this case to indicate that the Legislature has a separate cognizable interest from the Defendants in defending the constitutionality of Wisconsin's election law in the face of the Coronavirus crisis. "[A] legislator's personal support does not give him or her an interest sufficient to support intervention." *One Wisconsin Inst., Inc.*, 310

F.R.D. at 397 (W.D. Wis. 2015). While Rule 24 does not require that a state speak with a single voice, it prefers that arrangement. *Planned Parenthood*, 942 F.3d at 795. Because the Legislature does not have a unique claim or defense to pursue in this case, it does not meet the standard of Rule 24(b) for permissive intervention.

Similarly, the RNC defines its interests as an interest in "how Wisconsin elections are run." [Dkt. No. 42, p. 2]. However, their stated interest in, "contending that Wisconsin's longstanding laws are constitutional" is not unique to the RNC. It is the same interest and position as that of the existing Defendants. [Dkt No. 26]. Like the Legislature, the RNC does not explain how its defenses are unique and, therefore, why they should be considered for permissive intervention under Rule 24(b).

Neither proposed intervenor has identified an interest, claim or defense apart from the general defense of Wisconsin's election law. Neither has demonstrated how their intervention would permit the Court to "address important issues in this case once, with fairness and finality." *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). While it is certainly within the Court's discretion to permit intervention under such circumstances, this weighs heavily against permitting the Legislature or the RNC from intervening.

b. Intervention Would Result in Undue Delay and Prejudice

Permitting the Legislature or the RNC to intervene would result in undue delay during an ongoing emergency. This Court has already noted the fast-moving nature of the crisis and the disease, as well as the emergent nature of the response. [Dkt. No. 37, pp. 4-5]. In this litigation, the existing crisis is compounded by the short

period before Wisconsin's scheduled Spring Election on April 7. In the span of a week, the parties, the proposed intervenors and amici have already filed five individual motions, along with accompanying memoranda and declarations.

"Rule 24(b) is just about economy in litigation." *City of Chicago v. FEMA*, 660 F.3d 980, 987 (7th Cir. 2011). This Court regularly denies permissive intervention where, "adding the proposed intervenors could unnecessarily complicate and delay all stages of this case: discovery, dispositive motions, and trial." *Driftless Area Land Conservancy v. Huebsch*, No. 19-cv-1007-wmc, 2020 WL 779296 (W.D. Wis. Feb. 18, 2020) (*quoting City of Chicago v. FEMA*, 660 F.3d at 987). Adding another defendant, "would simply complicate the litigation." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009). Given the time restraints of this case, and the ability of the current parties to fully litigate the issues, permitting either the Legislature or the RNC to intervene would only hinder the Court's ability to promptly adjudicate this dispute.

The RNC's arguments on this point are unpersuasive. The RNC first indicates that their participation will, "add no delay beyond the norm for multiparty litigation." [Dkt. No. 42, p. 9]. The normal delay required for multiparty litigation is already not feasible in this case. Tellingly, the notices filed by the Legislature and the RNC both included requests that this Court defer its decision on the TRO Motion. [Dkt. Nos. 8 & 34]. Noting the "pressing circumstances" of the case, this Court denied those requests. [Dkt. No. 37, p. 2 n 2]. The intervenors will inevitably slow down the pace of the litigation, as they have already sought to do. Both the Court and the parties

will have to consider and respond to motions, briefs and arguments raised by the intervenors. This will be true even if the intervenors' arguments are entirely duplicative. These types of delays would be enormously burdensome and provide no benefit to the litigation, as both the Legislature and the RNC occupy the same position as the named Defendants. The RNC's concerns about the delay that would result from a potential interlocutory appeal are misplaced. Such an appeal would not hinder this Court's ability to continue the case while the RNC (or the Legislature) pursued its appeal, absent an order to stay under Rule 8 of the Federal Rules of Appellate Procedure. Fed. R. App. P. 8 (a). Similarly, given the time-restricted posture of this case, the Court need not consider the possibility of recurring litigation. *Cf. City of Chicago v. FEMA*, 660 F.3d at 986.

The Legislature's arguments in support of permissive intervention largely restates their adequate representation argument. [Dkt. No. 21, p. 10 "Here, the Legislature's intervention may well be necessary for the Court to receive a full adversarial briefing…"]. Those arguments are equally unavailing under Rule 24(b). As discussed, the Legislature's interest in the integrity of Wisconsin's election process is adequately represented by the individuals and organization in which it has vested that authority – the Wisconsin Elections Commission.

Finally, the Legislature attempts to avoid the practical issues caused by multiple parties intervening in sensitive, emergent litigation during a crisis by requesting conditions on its participation. "[E]ven minor delays to the court's resolution of this case could jeopardize the parties' ability to obtain a final judgment

(and appellate review of that judgment) in time for the election." *One Wisconsin Inst.* 310 F.R.D. at 399. It is unclear how the Legislature's proposed limitations – that it be permitted to file a memorandum and appeal an adverse ruling – would separate it from the Defendants in this case. In any event, "'minimize' does not mean 'eliminate,' and the nature of this case requires a higher-than-usual commitment to a swift resolution." *Id.* The practical solution is to deny the motion. *Id.* The Legislature may still seek to file an amicus brief. *Planned Parenthood*, 384 F. Supp. 3d at 990.

c. Permitting the Legislature and the RNC to Intervene Would Infuse Additional Political Conflict Into This Critical 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." *One Wisconsin Inst.*, 310 F.R.D. at 397. "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. This Court has previously noted the Legislature's political role as a reason to deny permissive intervention. *Planned Parenthood*, 384 F. Supp. 3d at 990. The same logic applies to the RNC, which is unquestionably a political actor. [Dkt. No. 42, p. 2 "Movants are political committees that support Republicans in Wisconsin"]. Conversely, the Defendants are members of Wisconsin's bipartisan elections commission, which employs nonpartisan staff. Wis. Stat. §§ 15.61, 5.05 (4). Permitting additional political actors to intervene would not only cause unneeded delay and complication. It would also result in the undue politicization of this case.

Given how important this case is to the fair administration of Wisconsin's Spring Election, the nearly unprecedented nature of the current emergency, and the extremely limited timeframe in which these issues must be decided, this Court should deny the requests from the Legislature and the RNC to intervene under Rule 24 (b).

CONCLUSION

For the reasons stated herein, this Court should DENY the Motions to Intervene from both the Wisconsin State Legislature and The Republican National Committee and The Republican Party of Wisconsin.

Respectfully submitted this 26th day of March, 2020

/s/ Dixon R. Gahnz

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