UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v.

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.

Civil Action No. 3:20-cv-249-wmc

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO INTERVENE BY REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF WISCONSIN

I. Introduction

Plaintiffs oppose the motion to intervene filed Sunday afternoon, March 22, 2020, by the Republican National Committee and the Republican Party of Wisconsin ("RNC/RPW" or "proposed intervenors"). *See* ECF Nos. 41-42. The proposed intervenors first revealed themselves to the Court at 4:19 p.m. Friday afternoon, March 20, 2020—shortly after expedited briefing on the pending TRO/preliminary injunction motion had closed—announcing their "*impending*" motion to intervene and requesting a 48-hour delay of "*any decision* in this case until our papers are on file with this Court" (emphasis added). *See Notice of Forthcoming Motion to Intervene*, ECF No. 34. As documented in Mr. Spiva's 6:59 p.m. letter to the Court that evening (ECF No. 36) and in footnote 1 below, the timing of the RNC/RPW's notice appears to have been a tactical ploy to achieve the same delay this Court already had denied the previous day.[1] The Court rejected

[1] As summarized in ECF No. 36, Plaintiffs filed this case on Wednesday afternoon, March 18, to protect federal voting rights in the upcoming April 7 election in the midst of the spiraling

this stalling tactic and issued its Order granting in part and denying in part (without prejudice) plaintiffs' motion for TRO and preliminary injunction later Friday evening, which gave the parties the weekend to review and suggest revisions to this Court's proposed "Special Notice" to Wisconsin voters.

The Court should now deny outright the RNC/RPW's motion to intervene. The RPW has alleged that plaintiffs are attempting to "hijack a national health crisis to rig an election in their favor." https://madison.com/ct/news/local/govt-and-politics/amid-pandemic-democrats-sue-to-ease-absentee-voting-rules-in/article_b36c8820-c6b9-5fa2-bbda-74e1d86bfeaf.html. The best answer to this false and offensive claim is to quote Judge Walker's words in *Florida Democratic Party v. Scott,* 215 F. Supp. 3d 1250, 1258-59 (N.D. Fla. 2016), in ordering an extension of registration and voting deadlines in the wake of Hurricane Matthew's devastation: "Poppycock. This case is about the right of aspiring eligible voters to register and to have their votes counted. Nothing could be more fundamental to our democracy."

Contrary to the RPW, this crisis is not a zero-sum partisan battle to see which party can best capitalize on the pandemic, let alone "rig an election." The pandemic is not a Red or Blue issue. It is rapidly reaching deep into every one of this State's 72 counties, from Milwaukee to

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COVID-19 global pandemic. The filing of this case was well-publicized. Indeed, the Wisconsin Legislature sought to intervene the very next morning. And multiple members of the media were aware of and joined the substantive hearing this Court held Thursday afternoon, March 19. The Court rejected during that Thursday afternoon conference requests to delay its decision until this week, emphasizing the need for expedited action given the public health emergency. ECF No. 47 at 23-24. The parties and Legislature briefed the issues on the expedited schedule ordered by the Court, and the motion for TRO/preliminary injunction was submitted to the Court for its expedited consideration at 3 p.m. Friday afternoon, March 20. Just fourteen minutes later, at 3:14 p.m., counsel for RNC/RPW first notified the parties' counsel of their intent to intervene and asked to "please let [us] know your position on that motion?" Declaration of Bruce V. Spiva in Support of Opposition to Motion to Intervene ("Spiva Mar. 26 Decl."), Ex. 1. The RNC/RPW notice followed at 4:16 p.m. ECF No. 34.

small towns to isolated rural areas, targeting voters of all political persuasions, races, ethnicities, ages, genders and gender identifications, and income levels. We all have loved ones and friends who, if they do not already have the COVID-19 virus, fall into one or more high-risk groups who must be quarantined from it. Soon, we may all know people who have been killed by the virus. We all have an interest in ensuring that eligible voters can *safely* register and vote in the midst of this catastrophe, no matter what their political beliefs or where they live.

This Court should deny intervention because "to allow intervention would likely infuse additional politics into an already politically-divisive area of the law and needlessly complicate this case"—the last thing needed in the midst of this rapidly worsening emergency. *Planned Parenthood of Wisconsin, Inc. v. Kaul,* 384 F. Supp. 2d 982, 990 (W.D. Wis.), *aff'd,* 942 F.3d 793 (7th Cir. 2019).[2]

II. Argument

The RNC/RPW's motion to intervene should be denied for many reasons.[3]

Adequacy of WEC's representation. Most fundamentally, and just like the Wisconsin Legislature's motion, the RNC/RPW motion to intervene fails to overcome the strong presumption that the Wisconsin Elections Commission ("WEC") (now represented by Lawton & Cates, S.C.,

[2] In just the 48 hours preceding this filing at mid-day Thursday, March 26, the Mayor of Milwaukee has notified the Governor and Legislature that he "now believe[s] that neither in-person absentee voting nor in-person voting on April 7 is feasible for our workers or residents," for numerous reasons detailed by Mayor Barrett; Governor Evers' statewide "Safer at Home" restrictions have gone into force; 585 Wisconsinites now have been diagnosed with the COVID-19 virus; and 6 Wisconsinites have now been killed by the virus. *See* Spiva Mar. 26 Decl., Exs. 2-4.

[3] Plaintiffs do not concede that the RNC/RPW have moved in a "timely" fashion (particularly given their gamesmanship discussed in n.1 *supra*); that these proposed intervenors have a "legally protected interest in this action"; or that the action "may impair or impede that interest." *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 700 (7th Cir. 2003). This brief, prepared in the rush of events, focuses only on the most obvious reasons to deny both intervention of right and by permission.

see ECF No. 48) can adequately defend the constitutionality of the challenged state statutes. *See, e.g., Planned Parenthood*, 384 F. Supp. 2d at 988-90; *Planned Parenthood*, 942 F.3d at 799; *Wis. Educ. Ass'n Council ("WEAC") v. Walker,* 824 F. Supp. 2d 856, 860-61 (W.D. Wis. 2012), *aff'd in relevant part,* 705 F.3d 640, 658-59 (7th Cir. 2013). The WEC and proposed intervenors share the "same goal" of defending the constitutionality of these statutes. *WEAC,* 705 F.3d at 659. The presumption of adequate representation can be overcome only by a showing of "gross negligence," "bad faith," or a "conflict rendering the state's representation inadequate." *Id.* The RNC and RPW have not even attempted to make such a showing, nor could they.[4]

The presumption of adequate representation applies with full force where the proposed intervenor is a political party or candidate, as illustrated by *Daggett v. Comm'n on Govt'l Ethics & Elec. Pracs.,* 172 F.3d 104 (1st Cir. 1999). That case involved a challenge by the Libertarian Party of Maine and other plaintiffs to the constitutionality of the Maine Clean Elections Act. Several candidates from other political parties moved to intervene in defense of the Act, claiming that the defendant state election commission would not adequately represent their interests. Affirming the district court's denial of intervention, the First Circuit emphasized that the movants had failed to rebut "two converging presumptions: (1) "that adequate representation is presumed where the goals of the applicants are the same as those of the plaintiff or defendant"; and (2) "that the government in defending the validity of the statute is presumed to be representing adequately

[4] Like the Legislature's motion to intervene, the RNC/RPW's argument for intervention is far weaker than the argument for intervention in *Planned Parenthood*. There, at least, the incumbent Attorney General had been endorsed "by the political arm of Planned Parenthood during the election," and had made certain "pro-choice" litigation decisions as Attorney General. 384 F. Supp. 3d at 989 (emphasis in original). This Court held that, "[e]ven viewed collectively, this litany fails to demonstrate (or even come close to demonstrating) either gross negligence or bad faith." *Id.* (emphasis added). Here the RNC/RPW can point to no such alleged issue conflicts in defending the constitutionality of the challenged statutes. *See also* Plaintiffs' brief in opposition to the Legislature's requested intervention, ECF No. 27 at 3.

the interests of all citizens who support the statute." *Id.* at 111. The First Circuit emphasized that the proposed candidate-intervenors and the state commission shared the common goal of defending the Act, and that there was no "actual conflict of interests" between them. The court added:

> The general notion that the Attorney General represents "broader" interests at some abstract level is not enough. The Attorney General is prepared to defend the constitutionality of the Reform Act in full, and there is no indication that he is proposing to compromise or would decline to appeal if victory were only partial. If and when there is such a compromise or refusal to appeal, the question of intervention on this ground can be revisited.

Id. at 112. In response to the proposed intervenors' concern that the Attorney General "*may hesitate*" to raise certain defenses, the court emphasized that "it would take more than speculation to show that he is likely to soft-pedal arguments" that are "clearly helpful to his cause." *Id.* (emphasis added).

Daggett is closely on point with this litigation. The proposed intervenors' arguments of inadequacy are fuzzy, speculative, and contingent on future events. If there comes a point when the defendant Commissioners do not adequately defend the challenged statutes, RNC/RPW may move to intervene at that point. *See also Gonzalez v. Brewer,* 485 F.3d 1041, 1051-52 (9th Cir. 2007) (proponent of voter initiative that enacted law requiring proof of citizenship to vote could not intervene of right or permissively to defend the legality of the new law; the proposed intervenor failed to make the required "compelling showing" that the defendants "will not adequately represent its interest"); *One Wisconsin Inst., Inc. v. Nichol,* 310 F.R.D. 394, 398-99 (W.D. Wis. 2015) (Republican officeholders and candidates could not intervene as defendants to defend Wisconsin's voter ID law, because they "shared the same goal" as the Government Accountability

Board ("GAB") in defending the voter ID law, and proposed intervenors failed to show the GAB's defense was "negligent or undertaken in bad faith") (citation omitted).[5]

Misuse of standing decisions. This Court should take note of how many *standing* decisions the RNC/RPW cite in their brief in support of *intervention.* As the Court has previously explained, a proposed intervenor may well have Article III standing yet not qualify for intervention under Fed. R. Civ. P. 24. *See, e.g., Planned Parenthood*, 384 F. Supp. 2d at 985-86 ("establishing standing is not a sufficient basis to seek intervention as of right"); *WEAC*, 824 F. Supp. 2d at 860-61 (in suit against various state officials challenging state statutes, "proposed intervening defendants" could not intervene to help defend the statutes where defendants were already doing so). Although some of the decisions cited by RNC/RPW involved potential intervention, many others had nothing to do with intervention but instead involved standing or other issues. This includes the *Crawford, One Wisconsin, Eu,* and *Shays* decisions cited on pages 4-5 of the RNC/RPW brief, none of which involved intervention to defend the constitutionality of a statute being capably defended by state authorities.

Misuse of "*Purcell* Principle." The RNC/RPW also invoke *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in complaining that Plaintiffs' requested relief would "upend[]" election procedures "just weeks before the April 7 election," which would "threaten to confuse voters and undermine confidence in the electoral process." ECF No. 42 at 5-6. Plaintiffs already have addressed *Purcell* in opposing the Wisconsin Legislature's motion to intervene. *See* ECF No. 27 at 5-6. As discussed in that opposition, the purpose of the so-called "*Purcell* Principle" is to avoid "changing the

[5] The RNC/RPW quote from an argument made by the Ohio Democratic Party 12 years ago in a completely different context. *See* ECF No. 42 at 7-8. But the movants fail to mention that the Ohio Secretary of State *agreed* in that case that the Democratic Party's interests were not being adequately represented and consented to the intervention. *See* ECF No. 153, *Ne. Ohio Coalition for the Homeless v. Brunner,* No. 2:06-cv-00896 (S.D. Ohio) (Nov. 5, 2008).

electoral *status quo* just before the election," which would cause "voter confusion and electoral chaos." Richard L. Hasen, *Reining in the Purcell Principle,* 43 Fla. St. U. L. Rev. 427, 428 (2016). Here, on the other hand, the "electoral *status quo*" *already* has been upended—not by any judicial order, but by the COVID-19 pandemic and the "voter confusion and electoral chaos" it is causing. *Purcell* was concerned that pre-election judicial orders might create a "consequent incentive to remain away from the polls." 549 U.S. at 5. Here, the "incentive to remain away from the polls" results not from federal judicial action, but from a deadly pandemic. Voter confusion and abstention from voting are "consequent" of COVID-19, not of anything this Court might do. Plaintiffs' requested relief would get more voters *to* the polls and ensure their ballots *will* be counted, rather than threatening to keep voters away. As previously discussed in our opposition to the Legislature's motion to intervene, this misreading of *Purcell* cannot be reconciled with the many decisions recognizing that natural disasters sometimes require emergency changes in state registration and voting procedures and deadlines to safeguard federally protected voting rights. *See* ECF No. 27 at 14-15. Those natural disaster decisions, not *Purcell,* provide the correct path to decision in this case.[6]

Ability to be heard as *amici*. Denying intervention will not prevent the RNC/RPW from being heard in this Court. Plaintiffs have given blanket consent to the filing of any *amicus* briefs whether in support of or opposition to Plaintiffs' requested relief. *See* ECF No. 45 at 1. The proposed intervenors' ability to fully present their views as *amici* is an important factor ameliorating any alleged need for them to intervene. *See*, *e.g.*, *WEAC,* 824 F. Supp. 2d at 861 (denying motions to intervene while allowing movants to file *amicus* briefs in support of state

[6] Like the Legislature, the RNC and RPW also fail to explain why the WEC, which already has raised and briefed the *Purcell* defense, is incapable of presenting that defense. *See* ECF No. 26 at 31-34.

defendants); *Menominee Indian Tribe of Wisconsin v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (denial of motion to intervene of right or permissively "will not affect the proposed intervenors adversely"; "[t]heir views will be taken into consideration in deciding the [case] because I intend to rely on their briefs as the briefs of amici curiae").

Permissive intervention. This Court also should deny permissive intervention because it would "unduly delay or prejudice the adjudication of the rights of the original parties." *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 701 (7th Cir. 2003). In particular, the proposed intervention by RNC/RPW would do nothing more than "infuse additional politics into an already politically-divisive area of the law and needlessly complicate this case"—the last thing needed in the midst of a global pandemic and the imperative for swift emergency action. *Planned Parenthood,* 384 F. Supp. 2d at 990.

The RNC/RPW nevertheless insist they can "serve as a vigorous and helpful supplement" to the WEC in defending the challenged statutes. ECF No. 42 at 8. But the WEC doesn't believe so and is opposing intervention. Judging by the proposed intervenors' conduct just in the past week—trying to stall this Court's initial decision through tactical delay in revealing their intent to move to intervene, while branding this suit to protect voting rights as somehow attempting to "rig" an election—the proposed intervenors have little of use to add, and nothing that cannot be said in an *amicus* filing rather than as intervening defendants doing the same work already being undertaken by the WEC and its counsel.

Failure to comply with Rule 24(c). The RNC/RPW have simply ignored the requirement of Fed. R. Civ. P. 24(c) that a motion to intervene shall be "accompanied by a pleading setting forth the claim or defense for which intervention is sought." The movants' obligation to submit a proposed pleading is "unambiguous," and intervention is properly denied out of hand where

movants "totally ignore" this obligation, as the RNC/RPW have here. *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987); *see also Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 595-96 (7th Cir. 1993); *Milwaukee Cty. v. Fed. Nat'l Mort. Ass'n*, Case No. 12–C–732, 2013 WL 12180865, at **1-2 (E.D. Wis. Jun. 26, 2013).

III. Conclusion

For these reasons, the RNC and RPW's motion to intervene should be denied.

Respectfully submitted,

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