IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

Case No. 3:20-cv-249-wmc

REPLY IN SUPPORT OF MOTION TO INTERVENE BY THE REPUBLICAN NATIONAL COMMITTEE AND THE REPUBLICAN PARTY OF WISCONSIN

The global spread of COVID-19 presents unprecedented challenges for our nation—challenges to our health, our economy, our morale, our families, our elected leaders, our institutions, and more. These challenges are precisely why it is "in the public interest to allow [state officials] to perform their respective roles," rather than distracting them with burdensome federal lawsuits. Doc. 12 at 3, *Williams v. Desantis*, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020). "The national healthcare emergency is not a basis to cancel an election," *id.*, and it is not an opportunity for Plaintiffs to launch fresh attacks on reasonable election laws that they have long opposed on other grounds.

If the Democratic Party has the right to be a plaintiff in this case, then the Republican Party has the right to be a defendant. As this Court explained last week, "the obvious party to step in would be the Republican Party," as it is "the party that clearly has an interest in the election." 3/19/20 Tr. 25:20-23. Movants listened and now ask this Court to grant their motion to intervene. The parties offer no basis to deny *permissive* intervention; Movants will litigate at whatever speed they choose. And the parties' argument against intervention as of right—that a *non*partisan commission with *private* attorneys somehow represents the interests of the *Republican Party*—is unpersuasive.

ARGUMENT

I. Movants are entitled to intervene as of right.

The Court "*must* permit" intervention as of right if Movants show (1) timeliness, (2) interest, (3) impairment, and (4) inadequate representation. Fed. R. Civ. P. 24(a) (emphasis added); *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995). The parties do not contest the first three elements. While Plaintiffs refuse to "concede" these elements, P-Opp. (Doc. 52) 3 n.3, Plaintiffs do not invoke them as a basis to deny intervention, do not make arguments or cite cases explaining why they aren't satisfied, and never respond to the analysis in Movants' motion. Concession or not, the parties have "forfeited" their right to contest these elements. *Wis. Interscholastic Athletic Ass'n v. Gannett Co.*, 716 F. Supp. 2d 773, 784 (W.D. Wis. 2010) (Conley, J.); *accord Wehrs v. Wells*, 688 F.3d 886, 891 n.2 (7th Cir. 2012) (deeming an argument "waived" because "lone sentences in [the] summary of argument and conclusion sections, lacking any citation to governing law, are insufficient").[1]

The parties instead focus on the fourth element—whether Defendants "adequately represent" Movants' interests. The parties do not dispute that Movants satisfy the "liberal" "default rule" for adequate representation, *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019), because Movants have fundamentally different interests from Plaintiffs and Defendants. *See* Memo. (Doc. 42) 7-8; *cf. Planned Parenthood*, 942 F.3d at 801 (noting that it is easier for a "private party" to argue that the State's "interest does not align fully with its own"). Instead, the parties insist that Movants must show "gross negligence or bad faith" because Defendants share "the same goal" and

[1] Plaintiffs complain that some of the cases Movants "cited on pages 4-5 of [their] brief" involved Article III standing, not intervention. P-Opp. 6. But pages 4-5 of Movants' brief discuss the "interest" element of Rule 24(a)(2)—something Plaintiffs don't challenge. Standing cases are relevant to the interest element because the inquiries are similar. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998); *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997).

Plaintiffs also make several merits arguments about the proper application of *Purcell* to this case. *See* P-Opp. 6-7. Whoever has the better of this merits argument is not relevant to whether Movants have a right to intervene. *See Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999).

are "a governmental body charged by law with protecting [Movants'] interests." *Planned Parenthood*, 942 F.3d at 799. The parties are incorrect.

The Wisconsin Elections Commission is not "charged by law with protecting the interests" of the *Republican Party*. As Defendants admit, the Commission is decidedly not "partisan" or "political." D-Opp. (Doc. 51) 11. By law, the Commission must be evenly divided between Republicans and Democrats, Wis. Stat. §15.61(1)(a), (5)(a)(2); §15.06(2)(b)(1), and its employees must be "nonpartisan," §5.05(4). The notion that an entity required to be neutral and nonpartisan in election matters is charged with protecting the interests of the Republican Party in a lawsuit against the Democratic Party is self-refuting. *See Club v. Jackson*, 2012 WL 12995296, at *1 (W.D. Wis. Feb. 6, 2012) (Conley, J.) (holding that the EPA, "as a governmental agency seeking to protect the interests of [the] public" writ large, did not "adequately represent" the interests of one private party over another in a permitting dispute); *Associated Gen. Contractors of Am. v. Calif. Dep't of Transp.*, 2009 WL 5206722, at *2–3 (E.D. Cal. Dec. 23, 2009) (holding that a state agency broadly charged with "ensuring safe public roads" was an inadequate representative because it "is not charged by with advocating on behalf of" the specific "constituency" of "minority business owners").

Nor do the parties cite any provision of "law" that tasks the Commission with "protecting the interests" of political parties. *Planned Parenthood*, 942 F.3d at 799. If anything, the statutes "indicate[] that the Commission's role is to *regulate*, not to protect" the parties. *Driftless Area Land Conservancy v. Huebsch*, 2020 WL 779296, at *3 (W.D. Wis. Feb. 18, 2020) (Conley, J.). The Commission enforces the election laws against political parties and their candidates. *See* Wis. Stat. §5.05. In other words, Defendants "represent[] a government agency charged with enforcing the [election code], not with protecting the proposed intervenor's interests." *Sierra Club v. Jackson*, 2010 WL 547335, at *1 (W.D. Wis. Feb. 11, 2010).

Notably, Defendants are no longer represented by the Wisconsin Department of Justice. Yesterday, all of the attorneys for the State withdrew and were substituted with private attorneys. In *Planned Parenthood*, the Seventh Circuit presumed adequate representation because the defendant was the Attorney General, who "'has the duty *by statute* to defend the constitutionality of state statutes.'" 942 F.3d at 799 (emphasis added). When other governmental defendants are involved, courts similarly stress that "the Attorney General of Wisconsin is representing defendants, and under Wisconsin law, 'it is the attorney general's duty to defend the constitutionality of state statutes.'" *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 398-99 (W.D. Wis. 2015). Neither Defendants nor their private attorneys have this "statutory duty" (and Defendants cite no statutory duty comparable to the Attorney General's). While the private attorneys are employed by the Governor, D-Opp. 4, nothing suggests that they have a duty to defend the constitutionality of state statutes (rather than simply defending their clients). In fact, the Governor cannot appoint private attorneys "[t]o act instead of the attorney general" unless "the attorney general is … interested adversely to the state." Wis. Stat. §14.11(2)(a)(2). But if the Attorney General (who was defending the laws here) is "adverse[] to the state," what *is* the State's interest? Because Defendants provide no answers, this Court cannot presume they are bound to protect Movants' interests.

Because Defendants are not "charged by law with protecting [Movants'] interest," Movants do not need to prove "'gross negligence or bad faith.'" *Planned Parenthood*, 942 F.3d at 799. Still, Defendants argue that Movants must overcome the weaker "rebuttable presumption of adequate representation" that applies when "the prospective intervenor and the name party have 'the same goal.'" *Id.* Yet that presumption either doesn't apply here, or Movants have rebutted it.

Movants and Defendants do not share "the same goal." In their memorandum, Movants highlighted how Defendants' broader interests make them much less likely "to pursue," if necessary, "an emergency appeal to the Seventh Circuit." Memo. 8. While Defendants' opposition notably

promises that Defendants will "continue defending the [challenged] laws" in this Court, it pointedly *refuses* to say that Defendants will take an appeal. *See* D-Opp. 4-5. Defending a law and defending a law in only one forum are not the same goal. Further, the only "goal" that Defendants claim to share with Movants is "defending the constitutionality of Wisconsin's election law in the face of the Coronavirus crisis." D-Opp. 7. But Plaintiffs' amended complaint now raises not only the constitutionality of Wisconsin's laws, but also the proper interpretation of "indefinitely confined" under the election laws. *See* Am. Compl. (Doc. 55) 11-12, 19. Movants believe that Plaintiffs' interpretation of that phrase is flawed and that the proper interpretation is not for the federal courts to decide. Defendants have not indicated whether they share that view or not.

Even if Movants and Defendants shared the same goal, any presumption of adequate representation would be easily rebutted because "some conflict" exists here. *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (citing *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982)). That low bar is satisfied for at least five reasons:

1. Defendants just swapped, with no explanation, their state lawyers for private lawyers. Under the governing statute, the Governor could not appoint these private lawyers "[t]o act instead of the attorney general" unless "the attorney general is … interested adversely to the state." Wis. Stat. §14.11(2)(a)(2). But the Attorney General was *defending* the challenged laws. This change in counsel thus suggests that the State's position on this litigation has changed; at the very least, this opaque, last-minute change reveals that Defendants are not reliable representatives.
2. Defendants are *internally* conflicted on the issues in this case. They recently deadlocked, along party lines, on whether to implement much of the same relief that Plaintiffs are requesting here. *See Elections Commission Deadlocks on Dem Motion Calling for Special Session to Address Election Safety*, Wis. Politics (Mar. 19, 2020), bit.ly/33PooL8. An entity that has formed a position only by default, and that is only one vote away from veering dramatically, is not a reliable representative.
3. Defendants "oppose[] [Movants'] intervention motion—further indicating that [they] may not adequately represent [their] interests here." *Kane Cty. v. United States*, 928 F.3d 877, 895 (10th Cir. 2019). Defendants oppose, not just intervention as of right, but also *permissive* intervention. Their strong position against Movants' involvement suggests adversity, not adequate representation.

4. As explained, *see* Memo. 8, Defendants are unwilling to commit to appealing to the Seventh Circuit. *See Meridian Homes*, 683 F.2d at 205 (explaining that "potential strategic differences" is evidence of "some conflict").
5. As explained, *see* Memo. 7-8, Defendants and Movants have a "substantial divergence of interests." *Meridian Homes*, 683 F.2d at 205.

In short, Movants and Defendants have fundamentally different interests, goals that are not the same (and that seem to be rapidly changing on Defendants' side), and many flashpoints for conflict. These tensions confirm this Court's understanding that Movants are "the obvious party to step in" to protect their "clear[] … interest in the election." Tr. 25:20-23. And because Rule 24(a)(2) "is satisfied if there is a serious possibility that the representation may be inadequate, all reasonable doubts should be resolved in favor of allowing … interven[tion] so that the absentee may be heard in his own behalf." Wright & Miller, 7C Fed. Prac. & Proc. Civ. §1909 (3d ed.).

* * * *

Movants are entitled to intervene under the "liberal[]" standard of Rule 24(a)(2). *Clark v. Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953). Because Movants satisfy all the requirements for intervention, the parties' suggestion that Movants should participate only as amici fails. "[A] court *must* permit intervention when" the four requirements of Rule 24(a)(2) are met. *Driftless*, 2020 WL 779296, at *2. A movant who satisfies those requirements "is entitled to participate as a party and not merely as a friend of court"; being "relegated to the status of amicus curiae … is not an adequate substitute for participation as a party." *Nuesse v. Camp*, 385 F.2d 694, 704 & n.10 (D.C. Cir. 1967).

II. Movants are entitled to permissive intervention.

Even if Movants were not entitled to intervention as of right because Defendants adequately represented their interests, the Court should still grant permissive intervention. As the Seventh Circuit clarified in *Planned Parenthood*, "permissive intervention … does not require the [movant] to demonstrate that its interests are inadequately represented under any standard." 942 F.3d at 801 n.4; *accord id.* at 803 ("the [movant] is not required to demonstrate that the Attorney General is an

inadequate representative (under any standard) for it to intervene permissively"); *Ohio Democratic Party v. Blackwell*, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005) ("[T]he Court may permit a party to intervene … even when the intervenor's interests are completely and adequately represented by an existing party."). Indeed, this Court has granted permissive intervention to a movant even after it concluded that the movant failed the inadequate-representation requirement for intervention as of right. *E.g.*, *ABS Glob., Inc. v. Inguran, LLC*, 2015 WL 1486647, at *4-5 (W.D. Wis. Mar. 31, 2015) (Conley, J.); *see also id.* at 803 (agreeing that this Court could not have granted the Legislature intervention as of right because of adequate representation but stating that this Court "undoubtedly had the discretion to permit the Legislature's intervention").[2]

Defendants object that Movants do not have a "unique" interest or defense, D-Opp. 7, but that is far from clear in light of Plaintiffs' amended complaint, and it is not at all relevant under Rule 24(b). There is no "uniqueness" requirement for permissive intervention; every case that Defendants cite is discussing intervention *as of right*. *See* D-Opp. 7-8.[3] The word "'interest' does not appear in Rule 24(b)"; in fact, the rule requires "that the applicant have a claim or defense *in common with* a claim or defense in the suit," not a "unique" one. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*,

[2] The language that Defendants quote at the top of page 7 of their brief was rejected by the Seventh Circuit in *Planned Parenthood*. *See* 942 F.3d at 803-04. The case where that language originated "did not cite any authority for its conclusion" that a finding of adequate representation also defeats permissive intervention, "which effectively creates an additional hurdle for proposed intervenors that does not comport with the Seventh Circuit's approach to permissive intervention." *Students & Parents for Privacy v. United States Dep't of Educ.*, 2016 WL 3269001, at *3 (N.D. Ill. June 15, 2016).

[3] Even for purposes of intervention as of right, Defendants are not drawing the right lesson from the cases that discuss "uniqueness." As the Seventh Circuit clarified in *Planned Parenthood*, the cases "use[] the phrase 'unique' as a shorthand for the proposition that an intervenor's interest 'must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit.'" 942 F.3d at 798. "[I]n this context, 'unique' means an interest that is *independent of* an existing party's, not *different from* an existing party's." *Id.* at 806 (Sykes, J., concurring); *accord Citizens United v. Gessler*, 2014 WL 4549001, at *2 n.1 (D. Colo. Sept. 15, 2014) ("[Rule 24(a)(2)] does not mandate that intervenors have interests unique from the other parties in the suit, just that they have an interest that could be impaired."). Movants have explained, without any response from the parties, why they have independent interests in this case. *See* Memo. 4-5.

101 F.3d 503, 509 (7th Cir. 1996) (emphasis added); *accord SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459-60 (1940). Permissive intervention thus treats overlapping defenses as a plus, not a problem to be avoided. *See, e.g.*, *100Reporters LLC v. DOJ*, 307 F.R.D. 269, 286 (D.D.C. 2014) (granting permissive intervention because movants "'hold identical legal positions'" that are "'fully encompassed'" by the government's position and "the strength of the [government's] position will be enhanced by the assistance of [the movant]"); *Alabama v. U.S. Dep't of Commerce*, 2018 WL 6570879, at *3 (N.D. Ala. Dec. 13, 2018) (granting permissive intervention because "the defenses the Proposed Defendant-Intervenors intend to submit share *identical* questions of fact and law with the main action" and "they are entitled to a secondary voice in the action").

Both parties object that Movants' participation will "politicize" this case, *see* D-Opp. 11-12; P-Opp. 8, but this argument is no basis to deny permissive intervention either. As a factual matter, this case is already "political." Plaintiffs are not independent organizations dedicated to public health or voting rights: they are the Democratic Party, one of the two largest partisan organizations in the country. The "political" move here would be allowing one major party to litigate and negotiate the terms of the next election with a neutral defendant, while its major-party counterpart is forced to sit on the sidelines. *Cf. Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) ("[Plaintiff] wanted to play the Washington Generals and get out of town with a quick win. The district court wisely allowed a more worthy opponent to get into and onto the court."). As a legal matter, the parties cite no authority that a movant who satisfies all the normal criteria for intervention can have its motion denied because the court deems it too "political." Rule 24 does not discriminate against intervenors based on their speech or association. *See* Memo. 4-6 (collecting cases where political parties were allowed to intervene). The parties' cases about legislators intervening to defend laws they voted for are far afield. *See* D-Opp. 11 (citing *One Wis. Inst.*, 310 F.R.D. at 397; *Planned Parenthood*, 384 F. Supp. 3d at 990). The parties do not dispute that Movants have concrete interests at stake in this case.

The only cognizable argument that the parties make against permissive intervention is their assertion that Movants will cause "undue delay and prejudice." *See* D-Opp. 8-11; P-Opp. 8. While Rule 24(b) asks "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3), there is no meaningful risk of that here. The parties contend that the normal burdens of adding parties (more briefs and arguments) are unacceptable here because this case is on a fast timeline. These assertions make little sense: Plaintiffs just amended their complaint, which added a new claim, and they had no motion for relief pending before the Court, emergency or otherwise, until an hour ago. Now that Plaintiffs have filed something, the parties and the Court "will not be prejudiced" by Movants' participation because Movants will "adhere to the deadlines" that the Court establishes. *Luce v. Town of Campbell*, 2014 WL 6632341, at *1 (W.D. Wis. Nov. 21, 2014) (Conley, J.).[4]

Movants also agree to confer with Defendants and the Legislature to avoid any duplicative arguments or filings. If Movants must raise a point because no other defendant will, Defendants will not be prejudiced (they don't have to respond) and Plaintiffs will not be prejudiced (they must prove their case anyway). Regardless, the parties' concerns with duplicative briefing, extra arguments, and unnecessary "politics" are belied by their concession that Movants can participate in this case as amici. P-Opp. 7-8; D-Opp. 11; *see Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997) ("In light of the district court's decision permitting the [movant] to participate in briefing and oral argument as an amicus curiae, it is difficult to see how granting intervention would have materially increased

[4] Plaintiffs spin out an elaborate theory for why, one week ago, Movants filed a letter asking the Court to delay its decision on Plaintiffs' TRO (or to grant Movants' intervention in its decision). *See* P-Opp. 1 n.1, 8. The truth is more mundane. Movants did not secure counsel in this case until the afternoon of March 20. Recognizing that the Court could decide the TRO that same day, that Movants' intervention papers would not be ready, and that Defendants might not be willing to appeal an adverse decision, Movants filed a letter to notify the Court of its intentions and to give Movants a chance at intervention. The strategic maneuvering that Plaintiffs attribute to Movants is not remotely accurate.

either delay or prejudice."). And if necessary, Movants are willing to accept conditions on permissive intervention—for example, intervening only for the purpose of filing amicus briefs, opposing consent decrees, and taking an appeal. *Cf. Planned Parenthood*, 942 F.3d at 804.

In short, Movants are entitled to permissive intervention. Because the parties' arguments are largely irrelevant under Rule 24(b), this is likely the easiest way to resolve Movants' motion.

III. Rule 24(c) is not a basis to deny intervention.

Plaintiffs (but not Defendants) ask the Court to deny intervention under Rule 24(c) because Movants did not attach an answer to their motion. P-Opp. 8-9. Plaintiffs' demand for an answer is curious. They admit that this litigation is too "rush[ed]" for the parties to file full-throated papers. P-Opp. 3 n.3. And right after they invoked Rule 24(c), Plaintiffs *amended* their complaint, which means any answer that Movants attached to their motion would now be obsolete.

In any event, Rule 24(c) is no reason to deny intervention. Movants have attached a proposed answer to this reply, which "correct[s]" any issue. *Wis. Right to Life PAC v. Brennan*, 2011 WL 13359324, at *1 n.2 (W.D. Wis. Mar. 31, 2011) (Conley, J.). Such corrections work because, at worst, Rule 24(c) requires courts to deny intervention "without prejudice to refiling … with the required pleading." *Hecker v. Wierzba Insulation LLC*, 2013 WL 12234527, at *1 (W.D. Wis. Mar. 20, 2013) (Conley, J.). And Rule 24(c) doesn't require courts to deny the motion at all when the absence of an answer causes "no prejudice." *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987). There's no prejudice here because the complaint was just amended, Movants have now answered the complaint, Defendants and the Legislature haven't filed an answer either, and the Legislature's motion to dismiss is still pending. *See id.* (Rule 24(c) "rectified when the necessary pleading was filed shortly thereafter"); *Marshall v. Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996) ("no prejudice" when movant "has now … tendered a proposed answer" and "the named defendants are not yet required to answer").

CONCLUSION

The Court should grant Movants' motion and allow them to intervene as defendants.

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Respectfully submitted,

/s/ Patrick Strawbridge

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