

SUPREME COURT OF WISCONSIN
No. 2020AP1958-OA

DEAN W. MUELLER,
Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION COMMISSIONERS
ANN. S. JACOBS, *et al.*,
Respondents.

Original Action in the Wisconsin Supreme Court
**MOTION TO INTERVENE OF PROPOSED
RESPONDENT-INTERVENOR DEMOCRATIC NATIONAL
COMMITTEE**

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**Pro hac vice applications
forthcoming*

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INTRODUCTION

The proposed Intervenor-Respondent, the Democratic National Committee (“DNC”), respectfully seeks leave to intervene in these proceedings pursuant to Wis. Stat. § 803.09(1)–(2) to oppose the Emergency Petition for Original Action (“Petition”) filed by Dean W. Mueller (“Petitioner”). The DNC has conferred with Petitioner, who confirmed that he does not object to the DNC’s intervention.

Petitioner is trying to take away Wisconsin’s ten electoral votes that were won by the DNC’s candidates for President and Vice President, Joseph R. Biden, Jr. and Kamala D. Harris. The DNC requests this Court to deny the Petition. If, on the other hand, this Court accepts this matter as an original action, the DNC requests to be permitted to participate fully in all subsequent proceedings in this Court. In compliance with Wis. Stat. § 803.09(3), the DNC is filing with this motion its Opposition to the Emergency Petition for

Original Action, which establishes that Petitioner does not meet the requirements for the Court to exercise its limited original jurisdiction.

In part, Petitioner asks this Court for an injunction to prevent the certification of the election's results, a declaratory judgment that the "interests of justice" require nullification of the election's results and that the legislature must either "arrange for another election" or appoint the electors. Pet. at 20. Granting this relief would be unprecedented and would silence the voices of more than 3.2 million Wisconsin voters who voted lawfully.

Wisconsin law allows for intervention as of right and for permissive intervention under this Court's broad discretion to allow intervention by parties with cognizable interests in a matter. Wis. Stat. § 803.09 (1)–(2). Petitioner's request to set aside the results of the election would dramatically affect the DNC's interests. Petitioner's requested

relief would disenfranchise every single one of the DNC’s members, constituents, and supporters who voted for President in the recent election in Wisconsin. Intervention is necessary for the DNC to protect the most fundamental constitutional right of its members—the right to vote and to have their votes counted.¹

ARGUMENT

I. The proposed Intervenor-Respondent is entitled to intervene as a matter of right.

A party has the right to intervene under Wis. Stat. § 803.09(1) if four conditions are met: (1) the motion to intervene is timely; (2) the movant claims an interest sufficiently related to the subject of the action; (3) the movant

¹ The DNC has moved to intervene in two other cases pending before this Court, *Wisconsin Voters Alliance v. Wisconsin Elections Commission*, No. 2020AP1930-OA, and *Donald J. Trump v. Evers*, No. 2020AP001971. For the reasons detailed in this motion, the grounds for the DNC’s intervention in this case substantially overlaps with the grounds for the DNC’s intervention in those cases.

is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interests; and (4) the movant's interests are not adequately represented by the existing parties. Wis. Stat. § 803.09 (1); *see also Helgeland v. Wis. Muns.*, 2008 WI 9, ¶¶ 37–38, 307 Wis. 2d 1, 745 N.W.2d 1. The DNC meets each of these factors and is entitled to intervene as a matter of right.

A. The DNC's Motion to Intervene is timely.

First, the Motion to Intervene is timely. The DNC is seeking intervention just five days after Petitioner filed his Petition and within the time period that the Court requested Respondents to file their responses to the Petition. Further, this Court has not yet decided whether to accept original jurisdiction.

Intervention by the DNC also will neither delay the resolution of this matter nor prejudice any party. There are no

motions pending in the case and thus no plausible claim that intervention would cause any delay. Under these circumstances, the motion is timely. *See State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 550, 334 N.W. 2d 252 (1983) (“The critical factor is whether in view of all of the circumstances the proposed intervenor acted promptly.”).

B. The DNC has compelling interests at stake in this action.

The DNC has compelling interests in the issues addressed in the Petition. The DNC’s interests lie in protecting the voting rights of the DNC’s members and constituents and ensuring that the DNC’s presidential and vice-presidential candidates—President-Elect Biden and Vice President-Elect Harris—are not stripped of their electoral victory in Wisconsin. *Cf. Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (Texas Democratic Party had direct standing based on “harm to its election prospects”).

The DNC thus satisfies this Court’s “broader, pragmatic approach” to intervening as a matter of right, in which the interests test serves “primarily [as] a practical guide to disposing 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).

Courts have repeatedly granted motions to intervene in similar post-election contexts. *See, e.g.*, Order, *Donald J. Trump for President Inc. v. Boockvar*, No. 4:20-cv-02078 (M.D. Pa. Nov. 12, 2020), ECF No. 72 (granting DNC’s motion to intervene in litigation seeking to block certification of presidential election in Pennsylvania).² And, in analogous

² “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).” *Helgeland*, 2009 WI 9, ¶ 37.

circumstances, courts have repeatedly held that when proposed relief carried with it the prospect of disenfranchising the Democratic Party's members, the Democratic Party had a legally cognizable interest at stake. *See Donald J. Trump for President, Inc. v. Cegavkse*, No. 2:20-cv-1445, 2020 WL 5229116, at *1 (D. Nev. Aug. 21, 2020) (DNC allowed to intervene in challenge to voting laws); Order, *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 1171 C.D. 2020 (Pa. Nov. 19, 2020) (DNC participated as intervenor in case concerning validity of mail ballots).

The DNC and its candidates will be directly injured if their victory is declared null and void. And the DNC's members and supporters in Wisconsin who voted for the Biden-Harris ticket will be disenfranchised if Petitioner's relief is granted. Because the DNC's injury is direct and

significant, the balance weighs strongly in favor of allowing it to intervene.

C. Denial of the Motion to Intervene would impair the DNC's ability to protect its interests.

Denial of the Motion to Intervene would interfere with the DNC's ability to protect its interests. As to this element of the test for intervention, this Court has similarly emphasized "a pragmatic approach" and a "focus on the facts of each case and the policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶ 79 (citing Moore's Fed. Prac. § 24.03[3][a], at 24–42). The Court has identified two potential 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. Intervention is more warranted when a novel holding is at

stake because its *stare decisis* effect is “more significant when a court decides a question of first impression.” *Id.* ¶ 81.

Here, an adverse ruling would severely impair the DNC’s ability to protect its interests. This is especially true where, as here, the Petitioner is asking this Court for the extraordinary and unprecedented relief of nullifying the election results. Pet. at 20; *see also Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020) (“This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated.”).

Notably, when a proposed intervenor has a protectible interests in the outcome of litigation, 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). Intervention is especially

warranted if the proposed remedy threatens to harm intervenors. *See, e.g., Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (granting intervention when proposed intervenors “would be directly rather than remotely harmed by the invalidation” of challenged statute). Courts routinely allow political parties to intervene in such circumstances. *See, e.g., Paher v. Cegavske*, No. 3:20-cv-00243, 2020 WL 2042365, at *4 (D. Nev. Apr. 28, 2020) (granting DNC intervention in election case brought by conservative interest group); *Donald J. Trump for President, Inc. v. Murphy*, No. 3:20-cv-10753, 2020 WL 5229209, at *1 (D.N.J. Sept. 1, 2020) (granting DCCC intervention in lawsuit by Republican candidate and party entities).

D. The DNC’s interests are not adequately represented by the current parties.

Finally, the DNC’s interests are not adequately represented by the existing parties. The burden to satisfy this

factor is “minimal.” *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). When there is a realistic possibility that the existing parties’ representation of the proposed intervenor’s interests will 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* § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

The named government Respondents do not adequately represent the DNC’s interests. The DNC has “special, personal [and] unique interest[s]” that are distinct from the Respondents’ interests. *Helgeland*, 2008 WI 9, ¶ 116. Government entities 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

described, the DNC faces severe injuries in the form of massive disenfranchisement of its members and constituents and having its presidential and vice-presidential candidates stripped of their electoral votes. By contrast, the Respondents' interests are defined by their statutory duties to conduct elections and their responsibilities to their constituents as a whole. *See, e.g., id.; see also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001) (“[T]he government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [political candidate] merely because both entities occupy the same posture in the litigation.”).

Because government entities, and political parties and candidates have fundamentally different interests and objectives, courts routinely permit political parties to intervene in actions where election officials are named as defendants. *See, e.g., Issa v. Newsom*, No. 2:20-cv-01044-

MCE-CKD, 2020 WL 3074351, at *3 (E.D. Ca. June 10, 2020) (“While Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the proposed Intervenor are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures.”); *Murphy*, 2020 WL 5229209, at *1.

E. “Blending and balancing” the intervention requirements confirms the right of proposed Intervenor-Respondent to intervene.

That the DNC is entitled to intervene as a matter of right is further supported by this Court’s guidance that “the criteria need not be analyzed in isolation from one another, and a movant’s strong showing with respect to one requirement may contribute to the movant’s ability to meet

other requirements as well.” *Helgeland*, 2008 WI 9, ¶ 39. The “interplay” between the intervention factors “must be blended and balanced.” *Id.*

Here, the interplay strongly confirms the DNC’s right to intervene in this proposed original action. Not only is the DNC’s request to intervene timely, the DNC has unique rights at stake that would be impaired by Petitioner’s requested relief. Further, no other party can adequately defend these rights—preventing the disenfranchisement of the Wisconsinites who voted for the DNC’s presidential and vice-presidential candidates and preserving the electoral votes won by those candidates. Therefore, under Wis. Stat. § 803.09(1), the DNC is entitled as a matter of right to intervene.

II. In the alternative, the Court should exercise its discretion under Wis. Stat. § 803.09(2) to permit the DNC to intervene.

In the alternative, this Court should permit the DNC to intervene under Wis. Stat. § 803.09(2). This Court can

exercise its broad discretion to permit a party to intervene when the “movant’s claim or defense and the main action have a question of law and 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. Even when courts deny intervention as of right, they often find that permissive intervention is appropriate. *See, e.g., City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986 (7th Cir. 2011).

The DNC meets the criteria for permissive intervention. The motion to intervene is timely and, given that this litigation is at an early stage, intervention will not unduly delay or prejudice the adjudication of the original parties’ rights. Moreover, the DNC will inevitably raise common questions of law and fact, including the threshold issue of whether an original action is appropriate in the circumstances

of this case. The DNC is prepared to proceed in accordance with the schedule this Court determines, and its intervention will contribute to the complete development of the factual and legal issues before this Court.

CONCLUSION

For the reasons stated above, this Court should grant the DNC's motion to intervene as a matter of right. In the alternative, this Court should exercise its direction and grant the DNC permissive intervention.

Dated: December 2, 2020.

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CERTIFICATE OF SERVICE

I certify that on December 2, 2020, I caused a copy of this brief to be served upon counsel of record for all parties via e-mail.

Dated: December 2, 2020.

A handwritten signature in blue ink, appearing to read "Charles G. Curtis, Jr.", is positioned above a horizontal line.

Charles G. Curtis, Jr.