STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

Richard Teigen and Richard Thom,

Plaintiffs,

vs.

Wisconsin Elections Commission,

Defendant.

Case No. 2021CV0958
Case Code: 30701
Hon. Michael O. Bohren

PROPOSED INTERVENOR-DEFENDANT DSCC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO INTERVENE

Plaintiffs' contention that DSCC has no direct or immediate interest in whether Wisconsin voters will be permitted to continue using carefully regulated, secure drop boxes to ensure that their voted ballots are safely returned in time to be counted is simply wrong. Plaintiffs studiously ignore the unrebutted evidence that DSCC submitted in support of its motion, which establishes that eliminating drop boxes would directly and materially harm DSCC in multiple ways, including by (1) erecting new, unjustifiable burdens to voting in the 2022 U.S. Senate election; (2) requiring DSCC to divert valuable resources to reeducate Wisconsin voters who relied on drop boxes in 2020; and (3) forcing DSCC to increase its investments in voter turn-out initiatives in Wisconsin to ameliorate the suppressive effects of eliminating drop boxes. These are direct injuries borne by DSCC itself, and easily distinguish this case from *Helgeland v. Wisconsin Municipalities*.

Nor is there any validity to Plaintiffs' argument that DSCC's and the Wisconsin Election Commission's ("WEC") interests are one and the same. As a bipartisan government agency, the

WEC has a very different mission than DSCC. The real-world effects for DSCC of eliminating secure drop boxes are immaterial to the WEC. For similar reasons, DSCC has shown that disposition of this case without its participation would impair its ability to protect its interests. As the unrebutted evidence establishes, a judgment in favor of Plaintiffs would require DSCC to reeducate voters who relied on drop boxes, and the elimination of this safe and secure means of ensuring that ballots are delivered in time to be counted will directly impair DSCC's ability to turn out voters and elect the candidates that it exists to elect. DSCC should be granted intervention as of right to protect those interests.

In the alternative, Plaintiffs have failed to establish that permissive intervention would be improper. Instead, Plaintiffs resort to creative fiction, ignoring that any delay that has occurred so far has been the result of Plaintiffs' counsel's own requests. If permitted to intervene, DSCC would comply with the scheduling order set by the Court and not impose any delay. A swift resolution is in DSCC's interests, perhaps even more so than in Plaintiffs'. Thus, whether under intervention as of right or permissive intervention, the motion should be granted.

I. DSCC HAS DIRECT AND IMMEDIATE INTERESTS IN THIS LAWSUIT.

Plaintiffs' opposition is notable for its failure to even acknowledge the evidence DSCC has presented establishing its direct and immediate interest in defending against Plaintiffs' attack on the use of secure drop boxes in Wisconsin. The unrebutted Affidavit of Andrew Piatt ("Piatt Aff.") establishes that invalidating the use of drop boxes (as Plaintiffs request) would require DSCC to divert valuable resources to reeducate voters and invest more heavily in turnout efforts to counteract the detrimental effects of eliminating a means of voting that facilitated record-setting voter turnout in Wisconsin in 2020. Piatt Aff. ¶¶ 7-8. This diversion of resources is particularly damaging in an election year because those expenditures come directly from money that would otherwise be spent on voter persuasion or other efforts to turn out voters, including in other Senate

races across the country. Once the election occurs, the loss of these resources cannot be remedied. *Id*. ¶ 9.

These real-world interests are very different from the "remote" and "speculative" interests in *Helgeland*, which were found insufficient to support a right of intervention. That case involved a challenge by several state employees and their same-sex partners against the state employee trust fund, challenging the constitutionality of statutes applicable to that fund. *Helgeland v. Wis. Muns*., 2008 WI 9, ¶¶ 3, 22, 307 Wis. 2d 1, 745 N.W.2d 1. Eight municipalities, none of which paid contributions on behalf of employees participating in the plan at issue, moved to intervene. *Id.* ¶ 45. They argued they had an interest because the resolution of the case *could potentially* end up resulting in additional costs to some of them, potentially affect their collective bargaining agreements, potentially render their plans inconsistent with the Defense of Marriage Act, and potentially have federal tax implications. *Id*. ¶¶ 48-54. The Court concluded this was really a "concern[] about the effect of stare decisis," because the judgment would not have direct effect on any of them. *Id.* ¶ 58. While "the effect of stare decisis is a consideration in determining intervention as of right, it is not determinative," and did not overcome the fact that intervenors' asserted interests were not "direct" or "immediate." *Id*. ¶¶ 58, 70-74.

In contrast, DSCC's injuries *will* flow *directly from a judgment here* should the Court find – as Plaintiffs urge – that drop boxes may not be used in the coming and future elections. Each of the harms described above and explained in the Piatt Affidavit would occur *only* because of the elimination of drop boxes. Thus, Plaintiffs' conclusion, without explanation, that "DSCC's asserted interest is far more attenuated than the direct financial impact the municipalities claimed would result from a judgment adverse to the state in *Helgeland*," is wrong. *See* Opp. at 4. In fact, Plaintiffs have not even attempted to dispute that DSCC will suffer the losses set out in detail in

its motion and the Piatt Affidavit. In contrast, the purported interests of the *Helgeland* intervenors were contested on several grounds, including that Wisconsin statutes provide that municipalities "may establish different eligibility standards for nonstate employees," and were, in any event, a mere possible, indirect consequence of a judgment in that case. *Helgeland*, ¶ 50. In marked contrast, courts regularly find that threats of precisely the same injuries that DSCC would suffer here require intervention of political entities in cases like this, where plaintiffs seek to have an election law invalidated. *See infra*, at 8-9 (discussing just a few examples of cases).

II. DENIAL OF INTERVENTION WOULD IMPAIR DSCC'S ABILITY TO PROTECT ITS INTERESTS.

Because DSCC has unique, direct interests in ensuring the continued availability of drop boxes, its ability to protect those interests will be impaired if the Court does not grant intervention. Plaintiffs assert that is not the case because no matter how the Court rules, DSCC "can continue its 'get out the vote' efforts," and "the interests DSCC seeks to vindicate are extralegal concerns that are inappropriate for this Court's consideration." Opp. at 5-6. Both arguments fail.

The question for deciding intervention is simply whether DSCC has *an* interest in preserving voting through secure drop boxes that would be impaired if it were not able to participate in this litigation. Thus, Plaintiffs' conclusory assertion that eliminating drop boxes will not prevent DSCC from continuing *other* "get out the vote" efforts in Wisconsin, Opp. at 5, misses the point. Indeed, Plaintiffs' argument is essentially that, so long as there are other lawful ways to vote, DSCC has no interest in being heard on the elimination of a form of voting that thousands of Wisconsin voters have relied upon, the elimination of which would operate to DSCC's direct detriment. That reasoning is nonsensical and, as shown by Plaintiffs' failure to cite any authority, has no support in the jurisprudence relating to intervention in voting cases. To the contrary, as

noted, courts regularly recognize the unique and specific interests political party committees have in challenges such as this one, and allow intervention.

Plaintiffs' second argument—that DSCC seeks to vindicate "extralegal concerns"—fares no better. It, too, is not relevant to the two factors that the Wisconsin Supreme Court has identified as relevant to 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." *Helgeland*, 2008 WI 9, ¶¶ 80–81. Plaintiffs do not even attempt to rebut DSCC's showing that an adverse holding in this action would apply to DSCC's particular circumstances—that DSCC would be required to divert its resources to pursue its mission of turning out voters and electing Democratic candidates. Nor do Plaintiffs attempt to contest that a ruling in this action prohibiting the use of secure drop boxes would result in a novel holding of law. *See* Opp. at 5-6. Both factors weigh in favor of intervention. *See, e.g.*, *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009).[1]

III. THE WEC DOES NOT ADEQUATELY REPRESENT DSCC'S INTERESTS.

The WEC does not adequately represent DSCC's distinct interests in ensuring that Democratic voters are able to safely and reliably access the right to vote in Wisconsin. As explained in DSCC's motion (and ignored in Plaintiffs' response), the WEC is a bipartisan agency whose interests in this litigation are defined by its statutory duties to conduct elections and to

[1]Plaintiffs' argument on this front is also inconsistent with their own position. To wit, Plaintiffs argue that this case is solely about whether Wisconsin statutes permit ballot drop boxes and not about the underlying policy considerations, characterizing DSCC's arguments as to the validity of ballot boxes as "extralegal." But Plaintiffs themselves consist of a conservative advocacy group (representing two Republican voters from one county) and they notably frame "the question here" as whether "the use of drop boxes *and ballot harvesting* are legal or illegal," Opp. at 7. "Ballot harvesting" is a heavily-loaded partisan term used purposefully by Republicans to evoke images of fraud and abuse of the electoral system. *See, e.g.*, https://republicans-cha.house.gov/threat-ballot-harvesting; https://www.forbes.com/sites/jackbrewster/2020/09/28/trump-has-turned-ballot-harvesting-into-a-rallying-cry-against-mail-in-voting-heres-what-it-is/?sh=45f98bad1de2. Plaintiffs' brief refers to "ballot harvesting" no less than six times. Opp. at 1 (twice); 3, 5, 6, and 9. Rather than keeping policy considerations out of this case, what Plaintiffs really seek to do is keep policy considerations *in favor of drop boxes* out of this case.

administer Wisconsin's election laws. The Wisconsin Supreme Court has recognized that government entities cannot be expected to litigate "with the vehemence of someone who is directly affected" by the litigation's outcome, *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357, 362 (1994), and this is particularly so in the case of an agency that, in contrast to DSCC, is deliberately structured to be bipartisan.

Plaintiffs' attempt to turn *Helgeland*'s "presumption of adequate representation" into an impenetrable barrier to intervention misstates the ruling in that case. First, *Helgeland* held that "[t]his presumption applies in the present case because" the defendants there were "charged by law with the duty to *defend the constitutionality* of [the statute at issue]". 2008 WI 9, ¶ 91 (emphasis added); *see also id*. ¶ 96. In contrast, here, there is no challenge to the constitutionality of any state statute. Rather, Plaintiffs are attempting to use the courts to *impose their policy preferences* on the WEC based on their own interpretation of Wisconsin statutes. Moreover, the presumption applies only "[i]f a movant's interest is *identical* to that of one of the parties, or if a party is *charged by law with representing the movant's interest* . …" *Id.* ¶ 86 (emphases added). As explained, DSCC's interests are materially different from those of the WEC. And the WEC in no way is charged by law with representing DSCC's partisan interest.

To the contrary, the political reality of how the WEC functions and the distinction between its interest and DSCC's interests are obvious. The WEC cannot reasonably be expected to litigate with the same "vehemence" as DSCC; nor can it reasonably be expected to adequately represent *DSCC's interests*. While Plaintiffs discount the cases cited in DSCC's opening brief out of hand as "cherry picking" from "a distant forum," they fail to explain why this Court should not similarly embrace the sound reasoning of each of those courts, which found that simply being "on the same side of the dispute" is not conclusive of whether an intervenor's interests are the same or

adequately represented by an existing party. As one court recently reasoned, "[w]hile Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election . . . and allocating their limited resources to inform voters about the election procedures. As a result, the parties' interests are neither 'identical' nor 'the same.'" *Issa v. Newsom*, No. 20-cv-1044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (citation omitted); *see also* DSCC's Mot. at 13-14 (citing cases). The same reasoning applies here.

Moreover, even where this "presumption" applies, it is overcome if an intervenor makes a compelling showing that its interest is different from that of the governmental party and will not be represented by it—a standard that DSCC has met here. Because DSCC cannot rely on the WEC or anyone else in the litigation to protect its distinct interests, it satisfies the fourth requirement and is entitled to intervention as of right. *Issa*, 2020 WL 3074351, at *4.

Adding to the strength of DSCC's arguments in support of intervention as of right is the fact 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. Wisconsin courts have recognized the "interplay" between the intervention factors; they "must be blended and balanced." *Id.* Here, the interplay strongly confirms DSCC's right to intervene. Not only is DSCC's request timely, it has unique rights at stake that no other party can adequately defend. The WEC's official role to defend its interpretation of Wisconsin election law ends there; the result of an unsuccessful attempt by WEC would be extreme harm to DSCC. And because DSCC's interests are directly at issue in this case, they easily meet the interest and impairment factors of the intervention test.

IV. IN THE ALTERNATIVE, THE COURT SHOULD EXERCISE ITS BROAD DISCRETION AND GRANT DSCC PERMISSIVE INTERVENTION.

This Court may also permit DSCC to intervene if its claims or defenses "have a question of law or fact in common" with the main action. Wis. Stats. § 803.09(2). DSCC has raised common questions of law and fact, including the core issue of whether Wisconsin's election laws allow the use of appropriately regulated secure drop boxes for voters returning absentee ballots.

Notably, the organization that orchestrated this suit and is representing the Plaintiffs, the Wisconsin Institute for Law & Liberty ("WILL"), has not disputed that it brought this case because it believes that Republican candidates will benefit from the elimination of ballot drop boxes. DSCC represents the other side of this issue, and courts regularly find that such direct counterparts of the party seeking relief "are uniquely qualified to represent the 'mirror-image' interests of the plaintiffs. *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020), *modified on reconsideration*, 451 F. Supp. 3d 952 (W.D. Wis. 2020); *see also Builders Ass'n of Greater Chi. v. Chi.*, 170 F.R.D. 435, 441 (N.D. Ill. 1996) (permissive intervention is appropriate where "applicants' interest in the litigation is the mirror-image" of an original party's interest); *see also* DSCC Mot. at 13-14.

Courts have recognized the importance of allowing intervention by parties as "direct counterparts" of the party seeking relief, particularly in litigation concerning election laws. For example, the U.S. District Court for the Western District of Wisconsin permitted the Republican National Committee and the Republican Party of Wisconsin to intervene last year in an action brought by the Democratic National Committee and Democratic Party of Wisconsin seeking to enjoin the enforcement of certain election laws. *Dem. Nat'l Comm.*, 2020 WL 1505640, at *14-15. A Minnesota state court similarly held last year that, "[c]learly, if the Plaintiffs in this case were the opposing committees for President or the Democratic National Committee in general,

there would be no doubt that the Committees would be entitled to intervention as a matter of right, as 'mirror image' parties." *NAACP Minnesota-Dakotas Area State Conf. v. Minn. Secretary of State*, No. 62-cv-20-3625, 2020 Minn. Dist. LEXIS 457, at *14 (Minn. 2d D. Aug. 3, 2020) (rejecting contention that Donald J. Trump for America Campaign is "mirror image" of NAACP). Similarly, a conservative interest group representing Republican voters should not be permitted to sue the WEC, a bipartisan government agency that has no direct stake in the outcome, while keeping any opposing interests and viewpoints from sitting at the table as parties.

DSCC will not slow this case down and will abide by any schedule set by this Court. Plaintiffs flatly misstate the facts when they complain that "the briefing and hearing involved with this motion has already pushed" consideration of the merits "out several months *over Plaintiffs' objection*." Opp. at 11 (emphasis added). DSCC moved to intervene in this litigation on July 13, 2021. That motion could have been briefed and decided long ago, but *Plaintiffs'* counsel insisted they were too busy to file their opposition brief (an opposition that ultimately was 14 pages long) prior to September 15. DSCC sought a much faster schedule, but acceded to *Plaintiffs'* request to delay briefing of this motion. The schedule for deciding this intervention motion was "pushed out" not over Plaintiffs' *objections,* but at their *request.* Affidavit of Michelle M. (Umberger) Kemp ¶¶. 2-4 and Exhibit 1 thereto.

V. PLAINTIFFS' STANDING ARGUMENT IS IMMATERIAL AND INCORRECT.

In addition to being immaterial to DSCC's intervention, Plaintiffs are also incorrect that their generalized grievances give them standing to bring this suit. Plaintiffs' asserted "injury" is at best a policy disagreement with the WEC's administration of absentee-ballot collection, not a concrete injury entitling them to any sort of standing under Wisconsin law. Plaintiffs' invocation of taxpayer standing is a red herring because their allegations are entirely premised on a disagreement with how the WEC interprets Wisconsin law. Twisting this disagreement through

their disapproval on how the WEC funds its programs does not grant Plaintiffs standing. Their complaint is, at bottom, a policy grievance that should be brought before the WEC's public processes rather than the judiciary. *See, e.g.*, Wis. Stat. § 5.05(6a) (permitting any member of the public to request advisory opinion from the WEC).[2] As Wisconsin courts have long recognized, "[c]ourts are not the proper forum for citizens to 'air generalized grievances' about the administration of a governmental agency." *Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Labor & Human Relations*, 92 Wis. 2d 53, 62, 284 N.W.2d 706, 711 (Ct. App. 1979). Instead, "[p]olicy disputes are more properly resolved in the political arena than" through the judiciary. *Fox v. Wis. Dep't of Health & Soc. Servs*., 112 Wis. 2d 514, 532, 334 N.W. 2d 532, 541 (1983). So too here. Plaintiffs' disagreement with the WEC's interpretation of a statute is just that—a policy divergence insufficient to confer Plaintiffs any type of standing.

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

Respectfully submitted this 28th day of September, 2021.

[2] Just a few months ago, the Wisconsin Supreme Court refused WILL's request to take on the issue of absentee ballot drop boxes, noting, inter alia, "procedural limitations" of Wis. Stat. § 5.06 and Wis. Stat. § 227.40. *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA (Wis. June 25 2021) (petitioner "contends that he is challenging Commission guidance, but seems to disavow that he is bound in any sense by Wis. Stat. § 227.40, the statute governing challenges to agency guidance documents.").

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