STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 WAUKESHA COUNTY

RICK TEIGEN, et al.,

Plaintiffs,

v.

WISCONSIN ELECTION COMMISSION,

Defendant.

Case No. 21-CV-958
Case Code: 30701
Case Type: Declaratory Judgment

BRIEF IN OPPOSITION TO PROPOSED INTERVENOR DSCC'S MOTION TO INTERVENE

The Democratic Senate Congressional Committee (DSCC), according to its brief, is an arm of the Democratic National Party as defined in 52 U.S.C. § 30101(14). DSCC has moved to intervene in this action because it believes that the use of drop boxes and ballot harvesting will advance its political goal of electing a Democratic Party candidate to the Senate from Wisconsin in 2022. Plaintiffs Rick Teigen and Richard Thom oppose DSCC's intervention as both unnecessary and inappropriate under governing Wisconsin law. DSCC does not meet the criteria for either intervention as of right or permissive intervention under Wisconsin law. In particular, the existing Defendant, the Wisconsin Election Commission, adequately represents DSCC's legal position in this action (i.e., that drop boxes and ballot harvesting are legal under the existing statutes).

I. DSCC is not entitled to intervention as of right.

When evaluating an entity's motion to intervene as of right, the court "attempts to strike a balance" between two competing interests: 1) the ability of the

original parties to a lawsuit to conduct and conclude their own proceedings; and 2) the need for other persons to join a lawsuit "in the interest of the speedy and economical resolution of controversies." *Helgeland*, 2008 WI 9, ¶ 40. Whether to allow intervention is a question of law, and one which "usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb" absent clear error. *Id.*, ¶ 41 (citation omitted). DSCC correctly identifies the four requirements for intervention as of right, but satisfies only the timeliness requirement. This Court should therefore deny DSCC's motion.

A. Plaintiffs do not dispute DSCC's motion is timely.

The first requirement of intervention as of right is a timely filed motion. Plaintiffs do not contest that DSCC promptly filed the instant motion.

B. DSCC does not have an interest sufficiently related to the subject of the action.

Courts treat the interest test "as primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *State ex rel. Bilder v. T'ship of Delevan*, 112 Wis. 2d 539, 548, 334 N.W.2d 252 (1983). But the interest prong of intervention as of right is not as easy to satisfy as DSCC would have it.

In *Helgeland v. Wis. Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, eight Wisconsin municipalities asked to intervene as of right in a challenge to Wisconsin's definition of "dependent" for purposes of state employee health insurance eligibility. The municipalities argued that they would be required to pay increased premiums on behalf of employees enrolled in certain state health or dental plans if

Helgeland prevailed and that their participation in the state's deferred compensation program (administered by the state) would be directly and adversely affected by any judgment. In other words, the municipalities claimed that a ruling not to their liking would result in higher costs to them. The Court disagreed that this interest was sufficient to invoke intervention as of right, finding that while a relationship existed between the municipalities and the state for the purposes of these plans, that relationship was "too remote and speculative to support a right of intervention." *Id.*, ¶ 53.

This case is not one in which DSCC has its own legal claim separate and apart from the defense of WEC's actions that would justify intervention as of right. DSCC acknowledges that its sole practical interest in this case is trying to get a Democratic candidate in Wisconsin elected to the senate in 2022, but DSCC does not show who that candidate will be, or whether they would contend that drop boxes and ballot harvesting are legal or illegal. DSCC's legal interest is at best derivative of an unknown third party. *Lodge 78 of Int'l Ass'n of Machinists, AFL-CIO v. Nickel,* 20 Wis. 2d 42, 46, 121 N.W.2d 297, 299 (1963) ("The interest which entitles one to intervene in a suit between other parties must be an interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment. One whose interest is indirect cannot intervene as a matter of right.")

That is in stark contrast to the interests of actual third parties who have been permitted to intervene under Wisconsin law. *See, Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 474, 516 N.W.2d 357 (1994) (subject of public record had

unique interest warranting intervention to enjoin its release because her right to privacy was separately enshrined in Wisconsin statutes); *In re Commitment of McGee*, 2017 WI App 39, ¶ 24, 376 Wis. 2d 413, 899 N.W.2d 396 (where statute conferred independent right of notice to proposed intervenors concerning placement of sexually violent offender in community, intervention was warranted). DSCC has no such statutory interest here. There is nothing in Wis. Stat. § 6.87 which grants any right or protection to DSCC.

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*, and it does not implicate independent statutory rights as in *Armada Broadcasting* or *McGee*. Additionally, two of the three cases DSCC cites in support of its position do not deal with intervention at all, but are simply cases in which a political party was found to have standing to bring a lawsuit challenging an election law *in the first instance* as one of the original parties. *Crawford v. Marion Cty. Elec. Bd.*, 472 F.3d 949 (7th Cir. 2007); *League of United Latin Am. Citizens (LULAC) v. Deininger*, No. 12-C-0185, 2013 WL 5230795 (E.D. Wis. Sept. 17, 2013).

The third case DSCC cites, out of a district court in California, did permit intervention by a political party committee for the reasons DSCC asserts here (and others). But DSCC is cherry picking a case from a distant forum applying a very different standard of law to the inquiry. Wisconsin law requires a "direct" and "immediate" connection between the intervenor and the asserted interest, *Lodge 78, Int'l Ass'n of Machinists v. Nickel*, 20 Wis. 2d 42, 46, 121 N.W.2d 297 (1963), while the Ninth Circuit's governing law requires clearing only the far lower bar that

"resolution of the plaintiff's claims will affect the applicant for intervention." *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351 at *3 (E.D. Cal. June 10, 2020) (citation omitted). DSCC has not argued why this standard should apply here, but instead seems to be arguing that because DSCC was allowed to intervene in a different case challenging a different election procedure in another forum it should also be a party here. DSCC has not stated a sufficient interest under governing law and its motion should be denied.

C. Disposition of the action in DSCC's absence would not impair its ability to protect its interests.

Wisconsin courts consider the third requirement for intervention as of right (that the disposition of the action in DSCC's absence would impair its ability to protect its interests) "pragmatic[ally]." *Helgeland*, 2008 WI 9, ¶ 79. This inquiry "is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest." *Id.*

As noted above, DSCC's derivative interest is not an interest sufficient to warrant intervention, but even assuming it is, DSCC's involvement in this action is unnecessary to protect its interest. This is true both because it can continue its "get out the vote" efforts in Wisconsin no matter how this Court rules in the existing case and because DSCC and WEC seek precisely the same thing in the litigation—a ruling that WEC's action in issuing memoranda authorizing drop boxes and ballot harvesting is legal.

DSCC correctly points out that courts may consider the *stare decisis* effect of a decision on others when a novel issue of law is raised. However, this concern alone

does not justify intervention of right. As the *Helgeland* court pointed out, if the possible *stare decisis* effect of a decision were enough "without an unusually strong showing with respect to other requirements for intervention as of right, then constitutional litigation would . . . become unwieldy with parties intervening as a matter of right." *Id.*, ¶ 84. Furthermore, alleged *stare decisis* concerns do not justify intervention here where the interests DSCC seeks to vindicate are extralegal concerns that are inappropriate for this Court's consideration.

For example, DSCC argues that drop boxes are a good policy idea to facilitate voting, so Wisconsin should have them. But that argument is legally irrelevant, as it is a political question for the Legislature (and not a judicial question). As another example, DSCC attempts to lump this lawsuit in with various challenges to the results of the 2020 elections, and casts aspersions on what it (wrongly) assumes are Plaintiffs' motives by making the spurious accusation that Plaintiffs want to mount obstacles to Wisconsin voters. This lawsuit is not about who won or lost the last presidential election. It is about the far more important issue of holding government actors (particularly unelected ones) accountable to follow the laws validly passed by the Legislature. As the Legislature has said in statute:

> Voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. *The legislature finds* that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse . . . ."

Wis. Stat. § 6.84(1) (emphasis added).

Although DSCC contends that the Legislature actually wants drop boxes used in this state (DSCC Br. at 4), DSCC does not cite anything that actually constitutes

legislative intent concerning the adoption of Wis. Stat. § 6.87. Moreover, courts generally do not, and this Court should not, consider statements about alleged legislative intent made in 2020 when interpreting a statute passed in the 1980s, particularly where the text of the statute itself indicates otherwise. *Clean Wisconsin, Inc. v. Wis. Dep't of Nat. Resources*, 2021 WI 71, ¶ 44, 961 N.W.2d 346 (Dallet, J., concurring) (press releases and floor statements "say[] nothing about what the legislature's final enacted text means"); *Responsible Use of Rural & Ag. Land (RURAL) v. Pub. Serv. Comm'n*, 2000 WI 129, ¶ 39 n.20, 239 Wis. 2d 660, 619 N.W.2d 888 (newspaper articles irrelevant to legislative intent); *Labor & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 356, 344 N.W.2d 177 (1984) (*per curiam*) (it is "inappropriate" for courts to rely on statements by legislators when determining legislative intent).

There is no reason to allow DSCC to intervene in order to make arguments that this Court should not even consider. The question here is whether the use of drop boxes and ballot harvesting are legal or illegal under Wisconsin's existing statutes. There is no reason to believe that WEC, represented by the Wisconsin Department of Justice, will not make whatever legal arguments are available to defend WEC's interpretation of the statutes and there is no reason to allow DSCC to intervene to simply say that they agree with WEC.

D. WEC's counsel adequately represents DSCC's interests.

Finally, DSCC claims that the Department of Justice will not adequately protect its interest, despite its representation of WEC and the defense of the very statutory interpretation issues in question. DSCC maintains that it has "special,

personal and unique interests" that distinguish it from WEC—but does not identify what those interests are, much less why those interests are not represented by government counsel whose very function is to defend WEC.

Importantly, DSCC's brief does not even acknowledge, much less attempt to rebut, the well-established principle of law that where a governmental body is charged with defending the law at issue, adequacy of the representation of that interest is *presumed*. "[W]hen the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises whether the would-be intervenor is a citizen or subdivision of the governmental entity." *Helgeland*, 2008 WI 9, ¶ 91 (citing *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996)). In fact, federal courts have held that where the representative party is a governmental body, that presumption of adequate representation will be upheld "unless there is a showing of gross negligence or bad faith." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (citing *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)).

DSCC cannot simply assume that WEC will not defend the law with the "same vehemence" as DSCC would and thereby obtain a right to intervene in the proceedings. (Dkt. 6 at 13.) DSCC's position ignores numerous state and federal cases on this issue. *See Helgeland*, 2008 WI 9, ¶ 86; *Planned Parenthood*, 942 F.3d at 801 (Legislature had the "unenviable task of convincing a court that the Attorney General inadequately represented" the State "despite his statutory duty" to do so); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 640, 646-47 (E.D. Wis. 2020) (while proposed intervenor may have different *reasons* for taking some position as defendant in

elections case, intervention is not warranted where positions otherwise align and government represents the party with the aligned interest absent an actual conflict); *One Wis. Institute, Inc. v. Nichol*, 310 F.R.D. 394, 398-99 (W.D. Wis. 2015) (intervention denied to groups seeking to intervene in challenge to voter ID law in light of presumption of adequate representation by Attorney General); *Dem. Nat'l Comm. v. Bostelmann*, 20-cv-249-wmc, 2020 WL 1505640 at **3-4 (W.D. Wis. Mar. 28, 2020) (intervention of right denied to political committee where it failed to identify a "concrete, substantive conflict" with counsel taking the same side); *Ligas ex rel. Foster v. Maram,* 478 F.3d 771, 774 (7th Cir. 2017) (disability rights group failed to demonstrate "gross negligence or bad faith" required to overcome presumption of adequate representation by government counsel).

The interests DSCC seeks to vindicate here are not just similar to WEC's position—they are identical. Both DSCC and WEC want to argue that drop boxes and ballot harvesting should be legal and that WEC therefore acted lawfully in issuing the memoranda at issue. DSCC claims "no objective that [WEC] does not also share." *Id.*, ¶ 90. Intervention as of right is therefore unwarranted here.

The *Helgeland* case is particularly instructive on the question of adequate representation. In that case, the municipalities expressed concern that the Attorney General originally charged with defending the action, a Democrat, would not oppose Helgeland's position on the definition of "dependent" for insurance purposes because the Attorney General had conflicting loyalties: she agreed with Helgeland's position that "dependent" should include same-sex spouses as a matter of policy and openly supported Helgeland's position by making public statements to that effect and

appearing at rallies where the plaintiffs in that case also spoke. *Id.*, ¶ 93. The *Helgeland* court found this evidence insufficient to render the Department of Justice's representation inadequate, making special note of DOJ's obligation to defend the statute "regardless of whether they have diverse constituencies with diverse views" and that DOJ in particular is "composed of professionals" who will presumably fulfill their statutory duty to do so. *Id.*, ¶ 108.

The case for inadequate representation of DSCC's interests is supported by far less evidence here than in *Helgeland*. In the earlier case, the Attorney General publicly took policy positions that actively undermined the statutory interpretation she was charged with defending in court. Even under those circumstances, the presumption of inadequate representation could not be overcome. Here, DSCC's claim that the "political reality" of WEC's bipartisan nature will necessarily decrease DOJ's "zeal" to defend the litigation is both purely speculative and wholly beside the point given that Wisconsin has an Attorney General of the same political party as the proposed intervenor, the *Democratic* Senate Campaign Committee. In fact, Attorney General Kaul has not only made no statements supporting the plaintiffs in this case, his public statements deride anyone who so much as questions the integrity of Wisconsin's elections as a "Jim Crow" supporter.[1]

The fact that DSCC and WEC may differ in their preferred strategies concerning *how* to defend WEC's decisions does not merit intervention either.

[1] *See* AG Kaul Issues Statement on Completion of Partial Recount in Wisconsin, https://www.doj.state.wi.us/news-releases/ag-kaul-issues-statement-completion-partial-recount-wisconsin (last viewed August 30, 2021).

Helgeland, 2008 WI 9, ¶¶ 106, 112 (argument that Attorney General's strategy in defending the statute by moving for early dismissal was a strategic blunder was "baseless" and "disagreements over trial strategy" are insufficient to demonstrate inadequate representation). There "will always be potential movants that disagree at some level with decisions made by state agency defendants or their counsel," but this is not the test for inadequate representation. *Id.*, ¶ 116.

This Court should deny DSCC's motion to intervene as of right.

II. DSCC does not meet the standard for permissive intervention.

DSCC gives short shrift to its own permissive intervention argument, simply alleging that its involvement in this litigation is timely and will not unduly delay the adjudication of the original parties' rights. Plaintiffs do not dispute that DSCC timely filed its motion, but do dispute that DSCC's involvement will not unduly delay proceedings.

First, the briefing and hearing involved with this motion has already pushed the scheduling of briefing and arguing the merits of this matter out several months over Plaintiffs' objection and in a case that is time sensitive. Second, as noted above, DSCC seeks to make arguments that this Court should not even consider and responding to such arguments will result in delay. Third, the next statewide elections are just seven months away—DSCC has threatened to issue discovery to Plaintiffs in what all should agree is a purely legal dispute over whether WEC had the authority to issue the two memoranda it undisputedly issued. *See* Transcript of Aug.19, 2021 status conference (forthcoming).

Circuit courts have broad discretion when considering whether the factors for intervention have been satisfied. *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶¶ 15-17, 296 Wis. 2d 337, 723 N.W.2d 131. Here, time is of the essence. Every election cycle that passes without these issues resolved prejudices Plaintiffs and all voters, while allowing potentially unlawful activity to continue unabated. Plaintiffs have urged and will continue to urge this Court to do everything it can to decide this case in time for its ruling to be implemented before the next Wisconsin election, which will be held on April 5, 2022. Allowing DSCC to intervene in the lawsuit would be tantamount to an unnecessary "me too" position, and merits (at best) consideration as an *amicus*. *Helgeland*, 2003 WI 9, ¶ 32 n.20 (describing appropriate role of amicus curiae).

III. Plaintiffs have standing to pursue this lawsuit.

Although not itself a party, DSCC (ironically) asserts that Plaintiffs do not have standing to pursue their claims in this Court. Although that issue is not actually before the Court, the Plaintiffs cannot let the issue go without a response in case it might in some way affect the Court's consideration of the pending motion.

Plaintiffs are registered voters and taxpayers in Waukesha County. Complaint ¶¶ 17–18. They have standing as taxpayers and as registered voters to pursue this action. DSCC seems to misunderstand the fundamental difference between taxpayer standing in Wisconsin (which the Wisconsin courts have long recognized) and taxpayer standing in federal court (which the federal courts have not recognized).

Unlike the federal courts, which have additional Article III impediments to standing in many cases, Wisconsin courts have repeatedly recognized that a

resident's status as a taxpayer confers standing on that individual to challenge the improper or unlawful expenditure of public funds:

> Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. This is because it results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure. Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit.

SD Realty Co. v. Sewerage Comm'n of City of Milwaukee, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961) (citation omitted); *see also City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988) ("[A] taxpayer has the right to raise, on behalf of himself and other taxpayers, a constitutional issue affecting his and their individual rights.") (collecting cases); *Buse v. Smith*, 74 Wis. 2d 550, 563, 247 N.W.2d 141 (1976) (taxpayers had right to challenge school aid formula). Courts have generally permitted taxpayers to challenge illegal government action "[i]f the taxpayer shows even a slight loss." *City of Appleton*, 142 Wis. 2d at 878. Plaintiffs have done so here because even the small expenditure of public funds for an illegal purpose confers standing. DSCC cites primarily federal cases (which have nothing to do with taxpayer standing in Wisconsin) and the few Wisconsin cases that it cites at page 5 of its brief have nothing to do with taxpayer standing.

In addition, Plaintiffs are registered voters. They bring their claims in their capacity as individuals who meet the minimum constitutional and statutory criteria for casting ballots in Wisconsin elections. The Plaintiffs are harmed as voters because they are uncertain as to the lawful method to cast absentee ballots in future elections. If they cast their absentee ballot as approved by WEC, such as placing it in an

untended drop box, as opposed to placing it in the U.S. Mail or handing it in person to the municipal clerk, then their vote may be illegal and not counted. The Plaintiffs are entitled to certainty as to the lawful methods in which to cast an absentee ballot in Wisconsin.

Further, if the Plaintiffs cast their ballots as required by Wis. Stat. § 6.87, then the Plaintiffs are harmed as voters because allowing other voters to vote other than in strict compliance with the law diminishes the value of the Plaintiffs' votes. Only legally cast votes should count and counting illegally cast votes diminishes the value of those cast legally. The Plaintiffs, as voters, are entitled to have the elections in which they participate administered properly under the law. DSCC's concerns about Plaintiffs' standing do not comport with the law.

CONCLUSION

For the foregoing reasons, this Court should deny DSCC's motion to intervene.

Dated this 15th day of September, 2021.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

/s/ *Electronically signed by Katherine D. Spitz*

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CERTIFICATE OF SERVICE

I have served a copy of the foregoing, via email and first-class mail, on all counsel for both sets of proposed intervenors, as set forth below. The parties have been served via CCAP and email.

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