IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT; ANNA HAAS; ANNA POI; and ANASTASIA FERIN KNIGHT,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION; DON M. MILLIS, ROBERT F. SPINDELL, MARGE BOSTELMANN, ANN S. JACOBS, MARK L. THOMSEN, and JOSEPH J. CZARNEZKI, *in their official capacities as commissioners of the Wisconsin Elections Commission*; MEAGAN WOLFE, *in her official capacity as administrator of the Wisconsin Elections Commission*; MICHELLE LUEDTKE, *in her official capacity as city clerk for the City of Brookfield*; MARIBETH WITZEL-BEHL, *in her official capacity as city clerk for the City of Madison*; and LORENA RAE STOTTLER, *in her official capacity as city clerk for the City of Janesville*,

Defendants.

Case No. 3:23-cv-00672

REPLY IN SUPPORT OF MOTION TO INTERVENE

Earlier this year, plaintiffs filed a case nearly identical to this one in the Northern District of Florida, arguing that Florida's original signature requirement violated the materiality provision of the Civil Rights Act. *See Vote.org v. Byrd*, Doc. 1, No. 4:23-cv-111 (N.D. Fla. May 26, 2023). As in this case, the RNC and local Republican Party moved to intervene. The court granted permissive intervention. *Id.*, Doc. 85. The RNC then moved to dismiss the complaint, raising several arguments against the materiality-provision claim that the Commission failed to raise in this case. *Id.*, Doc. 111. Last week, the court granted the motion and dismissed the complaint. *Id.*, Doc. 140.

As *Vote.org* demonstrates, Movants will make important arguments that the Commission has failed to raise. Some of those arguments are discussed in this brief. *See infra* pp. 11-13. *Vote.org* also demonstrates that permissive intervention is the easiest path to resolving this motion. Nearly all courts grant Movants' intervention under circumstances like these, as the footnote in Movants' brief proves. *See* Doc. 9 at 1 n.1. Recognizing the national expertise and substantial interests Movants have in election issues, most of those courts grant permissive intervention without deciding intervention as of right. That's the most efficient route, because "[w]here a court finds that a movant has met the standard for permissive intervention, the court 'need not reach the question of intervention as of right.'" *True Return Sys. LLC v. Compound Protocol*, 2023 WL 6211815, at *2 (S.D.N.Y. Sept. 25, 2023) (citation omitted). Regardless, intervention is proper under both rules.

ARGUMENT

I. Movants are entitled to intervene as of right.

No one disputes that the motion is timely. The parties argue that Movants don't have an interest in this case, and that the State will inadequately represent those interests. They primarily rely on the Seventh Circuit's recent decision in *Bost v. Illinois State Board of Elections*, 75 F.4th 682 (7th Cir. 2023), but that case only proves that intervention is appropriate here.

A. The parties misunderstand Movants' interests.

Bost directly supports Movants' financial interests. In that case, the Seventh Circuit held that political parties have interests in cases that will require them to "expend additional resources … should [State] election law change." *Id.* at 687. "Well-settled

standing precedent" supports those interests. *Id.* at 687 n.1 (citing *Common Cause Ind. v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019)). Movants—and many courts—have explained how political parties' finances are affected by court orders changing election laws. If Plaintiffs prevail in their lawsuit, "Proposed Intervenors would have to devote their limited resources to educating their members on [Wisconsin]'s current voting-by-mail system," and why a federal court changed it. *Issa v. Newsom*, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020).

The State brushes aside Movants' financial interests in a single citation-less sentence, claiming that Movants' finances have "nothing to do with the issues in the lawsuit." Doc. 23 at 5. That ignores logic and precedent. When federal courts enjoin democratically enacted state laws, it sows confusion and distrust among voters, which results in "consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). And that means the Republican Party will need "to devote resources to getting to the polls those of its supporters who would otherwise be discouraged" by a single district court changing the rules for Wisconsin's next election. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

Plaintiffs miss the point by arguing that "*Purcell* had nothing to do with intervention." Doc. 24 at 6. In *Purcell*, the Supreme Court recognized that "Court orders affecting elections, *especially* conflicting orders, can *themselves* result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5 (emphasis added). The parties do not dispute that Movants have an interest in turning out voters and preventing voter confusion. *Purcell* holds that those interests are at risk right now—and "[a]s an election draws closer, that risk will increase." *Id.* Put simply,

Purcell requires the Court to acknowledge that granting Plaintiffs relief could discourage and confuse Republican voters. Those affects self-evidently harm Movants' financial and electoral interests. Movants are the only party informing the Court of those risks, which will increase as the elections draw closer.

Bost recognizes that the money Movants must devote to combat confusion and discouragement among their voters is a sufficient interest. But even if preventing those harms cost Movants nothing, it would still be an interest justifying intervention. Preventing courts from enjoining election safeguards "promotes confidence in our electoral system—assuring voters that all will play by the same, *legislatively enacted* rules." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) (emphasis added). Although the State shares a similar interest in ensuring election integrity, Movants' interest is "independent of" the State's because it directly affects Movants' members and electoral chances. *Bost*, 75 F.4th at 687 (cleaned up). Indeed, the integrity of mail-in voting is especially important to Republican voters, who tend to be more skeptical of the security of absentee and mail-in voting than their Democratic counterparts.[1]

The Commission argues that "a would-be intervenor needs an interest that is 'unique' to the proposed intervenor." Doc. 23 at 5. But the Seventh Circuit has "never required a right that belongs only to the proposed intervenor, or even a right that belongs to the proposed intervenor and not to the existing party." *Bost*, 75 F.4th at 687. To the extent courts "used the shorthand 'unique,'" they meant "only that an interest belong to the would-be intervenor in its own right, rather than derived from the rights

[1] Pew Research Center, *Two Years After Election Turmoil, GOP Voters Remain Skeptical on Elections, Vote Counts* 5-6 (Oct. 31, 2022), https://perma.cc/QY5E-666P.

of an existing party." *Id.* at 686-87 (citation omitted). In other words, "'unique' means an interest that is *independent of* an existing party's, not *different from* an existing party's." *Id.* at 687 n.2 (citation omitted). Movants' electoral interest in election integrity "is not dependent on the" State's sovereign interest in election integrity. *Id.* at 687. Those interests are thus valid under Rule 24(a).

The parties can't rebut Movants' interest, so they try to turn it into an Article III standing question. But "an intervenor of right must demonstrate Article III standing when it seeks *additional relief* beyond that which the [existing parties] request[]." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) (emphasis added). Intervening defendants thus rarely need to show standing, as they usually seek the same relief as the other defendants: dismissing the complaint. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003) ("It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's."), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Because Movants don't seek additional relief beyond what the Commission has requested, this Court would err by inquiring into their standing. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 (2020) (holding that the Third Circuit "erred by inquiring into the [intervening defendant's] independent Article III standing" when "the Federal Government clearly had standing" and the intervening defendants did not "pursue[] relief that is broader than or different from the party invoking [the] court's jurisdiction").

Plaintiffs rely on *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020), and other cases in which political parties did not have standing as

plaintiffs to challenge laws based on "generalized election integrity interests." Doc. 24 at 4. But Movants are intervening as defendants, not as plaintiffs. Filing a lawsuit requires a plaintiff to show an injury traceable to the law. But because intervening defendants seek to defend the law, they don't need to show an injury traceable to the law. They need to show only that resolving the lawsuit in Plaintiffs' favor "may as a practical matter impair" their interests. Fed. R. Civ. P. 24(a)(2). That's why in *Donald J. Trump for President v. Boockvar*, "[t]he Court granted all intervention motions" of the political organizations intervening as defendants, including the "Pennsylvania State Democratic Party." *Donald J. Trump for President*, 493 F. Supp. 3d at 376.

The parties try to impose plaintiff-side standing requirements on intervening defendants. *Bost* puts those arguments to rest: Movants have direct, independent interests in their finances, electoral chances, organizational goals, voter turnout, and election integrity. Those interests satisfy the Rule 24(a) requirement, which must "be broadly construed" in favor of intervention. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982).

B. Movants' interests will be impaired.

The Commission doesn't dispute the third element. That is, assuming that Movants have valid interests, the Commission doesn't dispute that Plaintiffs' lawsuit "may as a practical matter impair" those interests. Fed. R. Civ. P. 24(a)(2). Plaintiffs' arguments demonstrate why the Commission conceded this element.

Plaintiffs make the backwards argument that their lawsuit will "vindicate" Movants' interests in election integrity, electoral confidence, and voter turnout. Doc. 24 at 7. That's not true. The Supreme Court has repeatedly stayed court orders affecting

elections, explaining how "second-guessing by an 'unelected federal judiciary'" risks harming the electoral process. *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurral). That is especially true when federal courts remove safeguards against fraud, because election fraud "drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell*, 549 U.S. at 4; *see also Crawford*, 553 U.S. at 196 (plurality op.). For that reason, federal courts, more so even than state courts, should be hesitant "to enjoin enforcement of a State's laws" governing the next election. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (Roberts, C.J., concurral). "As an election draws closer," the risks of confusion and distrust "will increase," *Purcell*, 549 U.S. at 5, but the risk does not categorically disappear when an election is further away.

And this case is already in the *Purcell* window. Plaintiffs argue that Movants' interests aren't implicated "until nearly a year from now," but they overlook the primary elections that are just around the corner. Doc. 24 at 6. Wisconsin's presidential preference primary will be held on April 2, 2024. Movants have particularly strong interests in how those elections are conducted, given that they determine the 2024 Republican presidential candidate. County clerks will begin preparing ballots for that election on January 31—just over two months away.[2] The Supreme Court applied *Purcell* to an election that was "about four months" away in *Merrill v. Milligan*. 142 S. Ct. 879, 888 (2022) (Kagan, J., dissental). Other courts have found that four months "easily falls within" *Purcell*'s reach. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th

[2] Wis. Elections Comm., *2023-2024 Calendar of Election Events* (Oct. 9, 2023), https://perma.cc/Z5XL-887S.

1363, 1371 n.6 (11th Cir. 2022); *see also Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (applying *Purcell* six months before an election).

In any event, the Court can't assume Plaintiffs' lawsuit will promote election integrity. When ruling on a motion to intervene, the Court cannot "assume … that Plaintiffs will ultimately prevail on the merits" or prejudge "the ultimate merits of the [defenses] which the intervenor wishes to assert." *Pavek v. Simon*, 2020 WL 3960252, at *3 (D. Minn. July 12, 2020). The question is whether Movants have an *interest* in preserving a valid law that increases voter confidence and promotes voting, not whether Movants will prevail in "the merits of their defense." *Clark v. Putnam Cty.*, 168 F.3d 458, 462 (11th Cir. 1999). Thus, in deciding the intervention motion, the Court can't accept Plaintiffs' empty claims that "enjoining the Witness Requirement will simply eliminate a burden" or that it "would benefit" Movants' political goals. Doc. 24 at 8-9. Under that logic, only organizations seeking to dismantle election security measures would have interests sufficient for intervention. Those seeking to preserve those measures—such as Movants—would have no judicial recourse. That's not the law, which is why the Commission concedes the impairment element.

C. The Commission's filings demonstrate that it will not adequately defend Movants' interests.

The parties have shown they can't articulate Movants' interests, let alone adequately represent them. The parties discuss three different standards that apply to the adequate-representation element, but *Bost* held that the more lenient rule applies when political organizations intervene to protect their financial interests. *Bost*, 75 F.4th at 688-89. The strictest standard applies only when a party is "legally required to

represent the interests of the would-be intervenor." *Id.* at 688. And "neither the [Commission] nor its members are charged with protecting the interests of individual voters," let alone political parties. *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 640, 647 (E.D. Wis. 2020). As a bipartisan government entity led by an administrator who is "required by law to be nonpartisan," as a matter of law the commission cannot defend the financial, partisan, and electoral interests of the Republican Party. Wis. Elections Comm'n, *About the WEC*, https://perma.cc/QLW7-RHXG.

The "intermediate standard" also doesn't apply. Courts apply this standard only "if 'the prospective intervenor and the named party have the same goal.'" *Bost*, 75 F.4th at 688 (citation omitted). Parties "have 'the same goal' only where the interests are genuinely 'identical.'" *Id.* (citation omitted). As *Bost* held, the State cannot represent the financial interests of political organizations, even if they both want the case dismissed. *Id.* The same is true of Movants' partisan and electoral interests. And to the extent their "interests and objectives" in election integrity and voter confusion "overlap in certain respects," they "are importantly different" in that Movants' interests relate to Republican turnout, not sovereign responsibilities. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020). Although the State "regulates" political parties, "it does not advocate for them or represent their interests." *Id.* The "lenient default rule" applies. *Bost*, 75 F.4th at 688.

That lenient standard "is satisfied when the named party fails to make an argument before the trial court that would further the intervenor's interests." *Id.* at 690. The Commission has already failed to make several important arguments:

- Plaintiffs have no private right of action to sue under the materiality provision. Section 10101 provides that "the Attorney General" may sue under the statute. 52 U.S.C. §10101(C). As the Sixth Circuit has recognized, that grant of specific enforcement authority implies that individuals may not bring a civil action to enforce the materiality provision. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (2016). There is a circuit split on this issue, and the Seventh Circuit has not yet weighed in. *E.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1294-96 (11th Cir. 2003).
- The materiality provision applies to "the requirements that must be met in order to register (and thus be 'qualified') to vote," not to "the requirements that must be met in order to cast a ballot that will be counted." *Ritter v. Migliori*, 142 S. Ct. at 1825 (Alito, J., dissental). Plaintiffs challenge voting requirements, not registration requirements, so their claim under the materiality provision fails.
- The materiality provision does not preempt state law. The statute asks whether an error or omission is material "under State law." 52 U.S.C. §10101(a)(2)(B). The text does not reach errors or omissions that state law says are material—it covers only ad hoc executive actions that go beyond state law.
- The materiality provision requires a showing of racial discrimination. Congress enacted 52 U.S.C. §10101 as part of the Civil Rights Act of 1964 "under the authority of the Fifteenth Amendment to enforce that Amendment's guarantee." *United States v. Mississippi*, 380 U.S. 128, 138 (1965). As even Plaintiffs recognize in the first paragraph of their complaint, "When Congress enacted the Voting Rights Act in 1965, it took aim 'at the subtle as well as the obvious,' discriminatory state voting regulations." Doc. 1 at 2 (quoting *Allen v. State Bd. of*

Elections, 393 U.S. 544, 565 (1969)). Congress did not take aim at ordinary, nondiscriminatory voting procedures.[3]

Movants and others are litigating these arguments in courts across the country, but the Commission traded them in favor of "sovereign immunity" arguments. Doc. 20 at 20-25. But resolving this case "on sovereign-immunity … grounds" would undermine Movants' strong interests in resolving this case on the merits of their arguments and preserving those issues for appellate review. *La Union*, 29 F.4th at 308. Movants' arguments have national importance, but the Commission's arguments defend only Wisconsin's narrow sovereign interests. The Commission is entitled to defend those interests, and Movants are entitled to defend theirs.

The Seventh Circuit upheld the denial of intervention in *Bost* for one reason: the intervenors did not propose to raise any arguments that the defendants had not made. *Bost*, 75 F.4th at 690. Movants will raise different arguments, so *Bost* requires granting intervention. Even if this Court thinks that Movants and the Commission share "genuinely 'identical'" interests, *id.* at 688, Movants satisfy the intermediate standard, too. Under that standard, Movants need only point "to 'some conflict'" between them and the Commission. *Id.* Besides the forfeited arguments that Movants have pointed out, the Commission claims that "[t]he absentee voting process in Wisconsin" is overly "complex" and "favor[s] the technologically savvy." Wisconsin Elections Commission, *Absentee Voting Report* (May 15, 2020), https://perma.cc/D4ZA-HHLA. Movants disagree—they believe that absentee-voting protections promote election integrity,

[3] The Commission makes this argument with regard to the Voting Rights Act claim, 52 U.S.C. §10501(b), but it failed to raise it against the materiality provision. *See* Doc. 20 at 8-9.

transparency, and accountability. This fundamental difference in the efficacy and benefits of absentee voting requirements—such as the one Plaintiffs challenge here—is a disagreement that goes to the heart of this case. It is, at a minimum, "some conflict" that shows the Commission cannot adequately represent Movants' interests. *Bost*, 75 F.4th at 690.

II. Alternatively, Movants should be granted permissive intervention.

Permissive intervention is the easiest path to resolve this motion. The parties don't dispute that Movants meet the requirements for permissive intervention: Movants have "a claim or defense that shares" a "common question" with this lawsuit, so permissive intervention is appropriate. Fed. R. Civ. P. 24(b). The parties acknowledge that this Court has granted permissive intervention to these Movants, even when intervention as of right is denied. *See Bostelmann*, 2020 WL 1505640, at *5. And the Commission does not claim that Movants' participation will prejudice its rights. It fears only delay and partisanship. But those fears are unfounded for at least four reasons.

First, the parties ignore Movants' promises to minimize duplicative briefing and arguments, and to abide by whatever schedule the Court imposes. When an intervenor "represents that there will be no need to change the existing schedule in [a] case," the parties have little reason to fear delay. *Emerson Hall Assocs., L.P. v. Travelers Cas. Ins. Co. of Am.*, 2016 WL 223794, at *2 (W.D. Wis. Jan. 19, 2016). And although "any introduction of an intervener … will inevitably cause some 'delay,'" that kind of delay is irrelevant. *Appleton v. Comm'r*, 430 F. App'x 135, 138 (3d Cir. 2011). Rule 24(b) is concerned with "undu[e] delay or prejudice," and "'[u]ndue' means not normal or

appropriate." *Id.* The parties have provided no basis for the Court to rule that any *de minimis* delay would be "undue."

Second, the Commission claims that Movants' involvement "potentially injects unnecessary partisan debates into what should be non-partisan litigation." Doc. 23 at 12. That confuses Movants' arguments with their interests. Movants raise *legal* arguments to preserve their *partisan* interests. They will not "inject[] partisan debates" into this case. In the dozens of cases in which Movants have intervened, the parties can point to no example where that's occurred.

Third, the Commission wrongly suggests that its participation warrants denying permissive intervention. Even if intervention as of right is denied, "permissive intervention provides a superior path" for an intervenor to litigate beside the State and "does not require the [intervenor] to demonstrate that its interests are inadequately represented *under any standard*." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 801 n.4 (7th Cir. 2019) (emphasis added). To the extent earlier district court cases ruled otherwise, the Seventh Circuit has now foreclosed that argument. *Cf. One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015). Whether the Commission will adequately represent Movants' interests—indeed, whether it shares interests at all—is irrelevant to permissive intervention.

Finally, *Bost* again demonstrates that permissive intervention is appropriate. The panel in *Bost* affirmed the denial of permissive intervention because the intervening party's "arguments varied very little from those made by the [other parties]." *Bost*, 75 F.4th at 691. As Movants have shown, they will make significantly different arguments than the Commission has made. Movants have significant experience litigating these

issues that no party shares, which they can "bring to bear on the briefing" to provide a "perspective will be unique, personal, and highly relevant." *Bldg. & Realty Inst. of Westchester & Putnam Ctys., Inc. v. State of New York*, 2020 WL 5658703, at *11 (S.D.N.Y. Sept. 23, 2020) (cleaned up). The court should thus grant permissive intervention.

CONCLUSION

The Court should grant the motion to intervene.

Dated: November 6, 2023

Respectfully submitted,

/s/ Thomas McCarthy

Thomas R. McCarthy
Conor D. Woodfin
Gabe Anderson*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
tom@consovoymccarthy.com
conor@consovoymccarthy.com
gabe@consovoymccarthy.com

Counsel for Proposed Intervenor-Defendants Republican National Committee and Republican Party of Wisconsin

* admission pending