IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL J. BOST, *et al.*, Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS, *et al.*, Defendants.	No. 22-cv-02754 Judge John F. Kness

MEMORANDUM OPINION & ORDER

This case involves a challenge to an Illinois election statute that governs the time for counting ballots received after the date of an election. Presently before the Court is a motion by the Democratic Party of Illinois ("DPI") to intervene as a party. DPI contends that, because it possesses unique interests that are at risk, DPI is entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure. DPI also contends, in the alternative, that it should be permitted to intervene under Rule 24(b).

As explained below, DPI cannot meet its burden to show that its interests will not be adequately represented by the parties to the case. As a result, DPI is not entitled to intervene as of right. Separately, because allowing DPI to intervene would threaten to delay this time-sensitive case further, the Court, in its discretion, denies DPI's motion seeking permission to intervene as a party under Rule 24(b). Accordingly, the Court denies DPI's motion in its entirety. But although the Court

will not permit DPI to join the case as a party, the Court will permit DPI the option to designate its already-presented substantive arguments as those of an amicus curiae.

I. BACKGROUND

In this election-related suit, Plaintiffs allege that the Illinois ballot receipt deadline statute (10 Ill. Comp. Stat. Ann. § 5/19-8(c)) (the "Ballot Receipt Statute"), which allows ballots to be received and counted up to 14 days after Election Day, violates both the United States Constitution and federal statutory law. 2 U.S.C. § 1; 2 U.S.C. § 7; and 3 U.S.C. § 1. (Dkt. 1.) Plaintiffs ask the Court to declare the Ballot Receipt Statute unlawful and to enjoin Illinois from receiving and counting ballots after Election Day. (Dkt. 1 at 2.)

Plaintiffs sued the Illinois State Board of Elections ("State Board") and its Executive Director, Bernadette Matthews, in her official capacity. Plaintiffs named the State Board and Ms. Matthews as defendants because the State Board is responsible for supervising the administration of election laws in Illinois. (Dkt. 1 at 4.)

DPI seeks to intervene as a party-defendant. (Dkt. 13.) DPI seeks intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and, in the alternative, permissive intervention under Rule 24(b). (Dkt. 13 at 4.) DPI contends that intervention is appropriate because Plaintiffs' challenge to the Ballot Receipt Deadline affects its voter education resource allocation and threatens to disenfranchise DPI's members. DPI states that these interests are sufficient to grant

permissive intervention as well. DPI also argues that permissive intervention would be appropriate because it will result in "neither prejudice nor undue delay." (Dkt. 13 at 12.)

Plaintiffs oppose DPI's intervention. (Dkt. 27.) Plaintiffs argue that DPI lacks a substantial interest that would be impaired by the litigation and that DPI's marginal interests are adequately represented by Defendants. (Dkt. 27 at 3–11.) Plaintiffs also argue that because DPI does not have a claim or defense that shares a common question of law or fact with the main action, permissive intervention should be denied. (Dkt. 27 at 12.)

Defendants, who are represented by the Attorney General of Illinois, take no position on DPI's motion to intervene. (Dkt. 13 at 2; Dkt. 39 at 19).

II. STANDARD OF REVIEW

A. Intervention as of Right

To intervene as of right, a proposed intervenor must satisfy four requirements under Rule 24(a): (1) the motion must be timely; (2) the applicant must claim an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the existing parties must not be adequate representatives of the applicant's interest. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945–46 (7th Cir. 2000) (citing Fed. R. Civ. P. 24(a)). A proposed intervenor must satisfy all four requirements, *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir. 2001), and the

intervenor's failure to meet its burden as to even one of the necessary elements requires the court to deny intervention as of right. *See id.*

Intervention as of right requires a "direct, significant[,] and legally protectable" interest in the question at issue in the lawsuit. *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (quoting *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)). In general, something "more than the minimum Article III interest" is required for intervention as of right. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009). To satisfy Rule 24, "[t]hat interest must be unique to the proposed intervenor." *Id.* Moreover, the question of "[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Id.*

A unique interest alone is not sufficient for intervention: the proposed intervenor must also show that the interest will be "impaired or impeded" by the litigation. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). Whether an interest is impaired depends on "whether the decision of a legal question involved in the action would, as a practical matter, foreclose the rights of the proposed intervenors in a subsequent proceeding" as judged by the general standards of *stare decisis*. *Id.*

Even if a proposed intervenor has a sufficient interest that would be impaired by the action, the intervenor still must show that the existing parties are not adequate representatives of that interest. As the Seventh Circuit has explained, there are three standards for determining the adequacy of representation, and the facts

and context of each case determine which standard applies. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). The default rule is liberal and finds that a proposed intervenor has satisfied the adequacy element if she shows that the representation of her interest *may* be inadequate. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (emphasis added). If, however, the proposed intervenor and the named party share the same goal, there is a rebuttable presumption of adequate representation, and the proposed intervenor must show "some conflict" to intervene. *Planned Parenthood*, 942 F.3d at 799. Finally, when the representative party is a "governmental body charged by law with protecting the interests of the proposed intervenors," the representation is presumed to be adequate absent a showing of "gross negligence or bad faith." *Ligas*, 478 F.3d at 799.

B. Permissive Intervention

Under Rule 24(b)(1), a district court "may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." *Planned Parenthood*, 942 F.3d at 803. District courts have discretion to grant or deny permissive intervention in the interest of "managing the litigation before it." *Id.* Although the district court may not "deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right," it may consider "the elements of intervention as of right as discretionary factors" in weighing permissive intervention. *Id.* at 804.

III. DISCUSSION

A. Intervention as of Right

To intervene under Rule 24(a), DPI must establish that (1) the motion is timely; (2) DPI has an interest relating to the subject of the litigation; (3) the disposition of the action may impair or impede DPI's interest; and (4) Defendants are not adequate representatives of DPI's interest. Plaintiffs concede that DPI's motion to intervene is timely. (Dkt. 27 at 3.) At issue, therefore, is whether DPI has a sufficient interest in the litigation that may be impaired by the action and whether Defendants are adequate representatives of that interest.

1. Interest/Impairment

To intervene as of right under Rule 24(a), DPI must allege an interest relating to the subject matter of the action that will potentially be impaired by the disposition of the action. *Illinois v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019). In determining whether a party has an interest sufficient for intervention as of right, the Article III standing inquiry is instructive. *Flying J, Inc.*, 578 F.3d at 571.

DPI states that it has two interests in the litigation. First, if an injunction is granted, DPI would have to expend significant resources to educate the public about the change in law, thus diverting DPI's resources away from other causes. (Dkt. 13 at 7.) Second, an injunction barring Illinois from counting ballots received after Election Day could threaten to harm "DPI's members and constituents." (*Id.* at 8.)

a. DPI's interest in its resource allocation is a sufficient interest that may be impaired by this action.

That an injunction would have an effect on DPI's resource allocation is a sufficient interest for the purpose of Rule 24(a). If the Court were to enjoin application of the Ballot Receipt Statute, DPI would have to educate its members to ensure that they were aware of the change and could cast a timely ballot in the 2022 election. Doing so would require DPI to expend some of its limited resources that it could otherwise spend elsewhere, giving DPI a monetary interest in Plaintiffs' litigation against Defendants. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007).

Forced resource allocation thus satisfies the interest element of Rule 24(a). Although mandatory intervention is governed by Rule 24(a), the Seventh Circuit has explained that the Article III standing analysis is helpful in determining whether an interest is sufficient to allow intervention. *Planned Parenthood*, 942 F.3d at 798. Where the case involves a political party seeking to challenge or defend a voting law, the potential effect on resource allocation is sufficient to confer Article III standing. In *Common Cause Indiana v. Lawson*, for example, the Seventh Circuit held that the Democratic Party had standing to challenge a new Indiana voter registration law because the law would require it to "devote resources to combatting the effects of that law that are harmful to [its] mission." 937 F.3d 944, 950 (7th Cir. 2019) (cleaned up). Similarly, in *Crawford v. Marion County*, the Seventh Circuit concluded that the forced resource allocation was sufficient to give the Democratic Party standing to challenge an Indiana voter identification law. 472 F.3d at 951 ("[T]he new law injures

the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote.").

Plaintiffs contend that, because intervention is a highly fact-specific determination, previous cases in which courts allowed intervention do not compel intervention here. (Dkt. 27 at 4.) It is a truism that the intervention analysis is highly fact specific; but because the injuries alleged in *Common Cause* and *Crawford* are similar to DPI's alleged interest, those precedents are nonetheless instructive. As did the political parties there, DPI here has finite resources and, if Plaintiffs' suit succeeds, DPI will have to educate its voters on the change in the ballot deadline law to ensure that their votes are cast and counted. Moreover, the effect on DPI's resources is a unique interest that belongs to DPI and no other existing party in the suit. *See Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) ("The interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit."). DPI's resource allocation interest is thus sufficient for Rule 24(a).

But merely possessing a unique interest in the action is not, standing alone, sufficient to establish a right to intervene. Among other requirements, DPI must also show that its identified interest may be impaired by the disposition of the action. *Meridian Homes Corp.*, 683 F.2d at 203. DPI has made that showing: if the injunction Plaintiffs seek were granted, DPI's efforts to challenge it could be impaired by the decision in this action. Put another way, DPI's challenge to the injunction (if imposed) could possibly be decided based on issue preclusion, thus hampering DPI's efforts to

have the preliminary injunction overturned. Under principles of *stare decisis*, then, DPI's interest in preserving its resources would be impaired; this is sufficient to meet the impairment element of Rule 24(a).

b. DPI's interest in protecting its members' interests is not sufficient for mandatory intervention.

DPI also states that it has an interest in Plaintiffs' action because the requested injunction could potentially threaten the rights of its members and constituents by preventing ballots received after Election Day from being counted. (Dkt. 13 at 8.) Although the Seventh Circuit has recognized the associational rights of political parties in the standing context, *see, e.g.*, *Crawford*, 472 F.3d at 951, a proposed intervenor's interest must also be unique to the proposed intervenor. *Keith*, 764 F.2d at 1268. In this respect, the Article III standing analysis is useful for determining whether a proposed intervenor has sufficient interest in an action, but the uniqueness requirement precludes finding that Rule 24(a) is met merely by a showing that the proposed intervenor possesses standing to assert a claim.

DPI's interest in the interests of its members and constituents, although enough for Article III standing, is not enough for mandatory intervention under Rule 24(a). *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013). As the entity charged with overseeing and administering election laws, the State Board is equally interested in preserving the Ballot Receipt Statute for the voters in Illinois, whether they be Democrats, Republicans, members of third parties, or independent voters. DPI attempts to distinguish those interests by specifying its narrow interest in protecting its own members. (Dkt. 35 at 5.) But the State Board's interest in the

current action subsumes DPI's narrower interest: by defending the Illinois law that allows election officials to count ballots received after Election Day, the State Board's interest is in preserving the law for *all* Illinois voters, DPI members and constituents included. Because this interest is not unique to DPI, it is not sufficient for mandatory intervention.

2. Adequacy of Representation

a. The intermediate standard is appropriate.

Along with meeting all other requirements, a party that seeks to intervene in a case by right under Rule 24(a) must also show that the existing parties are not adequate representatives of the intervenor's interest in the litigation. Courts faced with this inquiry must apply a three-tiered approach that gauges the level of scrutiny based upon the specific circumstances of each case. *Planned Parenthood*, 942 F.3d at 798. Under this approach, assessing the adequacy of representation will require either: (1) a default liberal approach; (2) an intermediate approach that applies a rebuttable presumption of adequacy of representation; or (3) a strict approach that applies a flat presumption of adequacy absent a showing of gross negligence or bad faith.

Under the default liberal approach, a court should find that a proposed intervenor has satisfied the adequacy element if the intervenor shows that the representation of its interest *may* be inadequate. *Ligas*, 478 F.3d at 774 (cleaned up and emphasis added). If the proposed intervenor and the named party share the same goal, however, a rebuttable presumption of adequate representation arises, and the

proposed intervenor must show "some conflict" to intervene. *Planned Parenthood*, 942 F.3d at 799. Finally, when the representative party is a "governmental body charged by law with protecting the interests of the proposed intervenors," the representation is presumed to be adequate absent a showing of "gross negligence or bad faith." *Ligas*, 478 F.3d at 799. Before determining if the parties to this action adequately represent DPI's interest, the Court must first determine which adequacy test applies.

Plaintiffs contend that the most rigorous standard, which requires a showing of gross negligence or bad faith, should apply. (Dkt. 27 at 7.) In contrast, DPI contends that, because the parties do not adequately represent its interests, the lenient default standard should apply. (Dkt. 35 at 7.) In the Court's view, however, neither party is correct: the intermediate standard, which requires the proposed intervenor to show "some conflict," provides the appropriate metric.

Plaintiffs assert that the most rigorous standard applies because "[o]ne of the named Defendants, the Illinois State Board of Elections, is the sole statewide governmental agency in charge of administering Illinois state election law . . . ." (Dkt. 27 at 8.). That argument goes too far. As the Seventh Circuit has explained, the mere presence of a governmental entity as a named party does not automatically require the Court to apply the most stringent standard for assessing adequacy of representation. On the contrary, it is only when a governmental entity is charged by law with a legal duty to represent the interests of absentee parties that the most stringent standard applies.. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 747 (7th Cir. 2020); *see also Wisconsin Educ. Ass'n Council*, 705 F.3d at 658–59

("The state is not charged by law with protecting the interests of the Employees so this standard [requiring gross negligence or bad faith] does not apply."). Although the State Board is undeniably charged with administering Illinois election law, it is not charged by law with protecting the interests of political parties. Applying the most stringent adequacy test to this case would thus be inappropriate. *See Feehan v. Wisconsin Elections Commission,* 2020 WL 7630419 (E.D. Wis.) (Order Denying Motion to Intervene) ("The Wisconsin Elections Commission 'administers and enforces Wisconsin elections law.' It appears that neither the WEC nor its members are charged with protecting the interests of a party or candidate.") (cleaned up).

But because DPI and the State Board share the same goal—namely, defending the legality of the Ballot Receipt Statute—the default standard urged by DPI is also not the correct approach. *See Wis. Educ. Ass'n Council*, 705 F.3d at 659. Instead, the alignment of interests between DPI and the State Board strongly suggests that the intermediate adequacy test applies. *Id.* DPI resists this conclusion and contends that, because DPI has a more focused interest in protecting its own members and their votes, DPI and the State Board do not share the same goal. (Dkt. 35 at 7.)

Although DPI is correct that the intermediate standard does not apply merely when a proposed intervenor and a party to the action share the same approximate goal, *Driftless*, 969 F.3d at 748, DPI and the State Board's interests are much closer than merely seeking the denial of Plaintiffs' proposed injunction. Both DPI and the State Board seek, consistent with the Ballot Counting Statute, to have timely-cast ballots counted for up to 14 days following Election Day. And, as explained above, the

mere fact that DPI's interest is narrower—limited to *its* members only—does not mean its interests are materially distinct from the State Board's. Put another way, the State Board's broader interest in the rights of all voters includes DPI's narrower interest in the rights of its members, and the State Board's effort to defend the Ballot Receipt Statute will inevitably include defending the ability of DPI's members to have their ballots counted after Election Day.

A decision of the Seventh Circuit in an analogous case supports the conclusion that DPI and the State Board share the same goal such that the intermediate adequacy standard should apply. In 2020, a district court in Wisconsin found that a state entity charged with defending a state election law is, by default, defending the narrower interests of partisan voters. If the governmental entity's mission "include[s] ensuring that the valid ballot of every voter—Democratic, Republican or other—is counted," then the governmental entity has the same goal as a political party seeking to intervene. *Feehan*, 2020 WL 7630419 at 12–13. Based on this conclusion, the Wisconsin district court applied the intermediate standard for determining adequacy of representation. *Id.* at 14.

DPI cites several cases in support of its argument that the lenient default standard applies, but that authority is distinguishable. In *Berger v. North Carolina State Conference of the NAACP*, for example, the entity seeking to intervene was the state legislature, another governmental entity authorized by state law to intervene in the litigation. 142 S. Ct. 2191, 2202 (2022) ("North Carolina has expressly authorized the legislative leaders to defend the State's practical interests in litigation

of this sort."). But DPI is not a state entity, of course, and no Illinois statute expressly grants DPI authority to intervene in litigation of this sort.

Driftless is also distinguishable. In that case, the electrical transmission companies seeking to intervene had a distinct interest from the governmental entity that was a party to the case: namely, the transmission companies owned and maintained the facility at issue, and because two of the counts in the case affected the transmission company alone, the company's interests could not be adequately defended by the relevant governmental entity. 969 F.3d at 748. In contrast, DPI does not have a property interest in votes cast after Election Day, and Plaintiff asserts no counts against DPI alone. *Driftless* does not, therefore, mandate a more lenient standard for assessing whether DPI has a right to intervene in this case.

DPI and the State Board share the same goal in this case: to defend the lawfulness of the Ballot Receipt Statute. A finding that the Ballot Receipt Statute is lawful would preserve for *all* voters—including DPI's voters—the voting-and-counting process supported by DPI. Accordingly, because DPI and the State Board share the same goal, the Court finds that the intermediate standard for determining the adequacy of representation governs DPI's motion to intervene as of right.

b. DPI fails to show under the intermediate standard that Defendants' representation is inadequate.

Under the intermediate standard for determining adequacy of representation, a rebuttable presumption of adequate representation applies and requires that a proposed intervenor show "some conflict" to intervene. *Planned Parenthood*, 942 F.3d at 799. DPI fails to make that showing. In its written submissions, DPI explains

neither how its interest in the action nor its litigation strategy is at odds with the State Board. DPI argues that, because their interests are not fully aligned, it is "irrelevant that that DPI and Defendants make similar arguments in their motions to dismiss." (Dkt. 35 at 8.) But DPI's interests *are* effectively aligned with the State Board's: DPI's interests are merely narrower than the State Board's. It is thus significant–and dispositive—that DPI's arguments on the motion to dismiss are practically identical to those made by Defendants.

Because DPI fails to point to any conflict with Defendants, and because DPI's smaller circle of interests is concentric with Defendants' larger one, DPI fails to meet the requirements of the intermediate standard for resolving motions to intervene. *See Mi Familia Vota v. Hobbs*, No. CV-22-00509-PHX-SRB (D. Ariz. June 23, 2022) ("Movants fail to grapple with binding precedent imposing a strong presumption of adequacy under the instant circumstances . . . . Movants ignore that at this juncture, Defendants and Movants seek the same 'ultimate objective.' "). Because Defendants' representation of DPI's interest is adequate, DPI's motion to intervene as of right under Rule 24(a) is denied.

B. Permissive Intervention

DPI also seeks permission to intervene under Rule 24(b). Permissive intervention may be granted to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Whether to allow permissive intervention is within the sound discretion of the district court. *Planned Parenthood*, 942 F.3d at 803. To that end, district courts may consider a wide variety of factors,

including interests of case management and the effect of intervention on the timely resolution of the action. And although courts may not deny permissive intervention solely because a proposed intervenor failed to meet the requirements for intervention as of right under Rule 24(a), the factors for intervention as of right may be considered in when considering a request to intervene by permission. *Id.* at 804.

Even if DPI has a common claim or defense, equitable considerations weigh against granting the motion for permissive intervention. Allowing permissive intervention would likely further impede the timely resolution of the action; indeed, the contested motion to intervene has already required the Court to divert resources away from the substantive arguments of the parties. Given that this is an election-year case about an election law, it is important to resolve the matter quickly so that the 2022 Illinois elections can be administered with certainty. Although DPI filed its motion to intervene promptly, to be sure, the timing of DPI's efforts does not change the fact that this case needs to be resolved promptly and that adding another party would hinder that goal.

Additional support for denying permissive intervention can be drawn from the factors for mandatory intervention under Rule 24(a), which, although not controlling, are nonetheless instructive. DPI's interest in the litigation is categorically the same as Defendants' interest. If anything, DPI's narrower interest in defending the ballot receipt statute on behalf of Democratic voters make it a less ideal candidate to defend the statute than the State Board, which is bound to consider the interests of all voters. Moreover, DPI, by its own admission, makes functionally the same legal arguments

as Defendants in its proposed motion to dismiss. Because DPI is interested only in a subset of Illinois voters yet makes functionally the same argument as Defendants in time-sensitive litigation, the Court finds that the interest of moving this case forward expeditiously is better served by avoiding the burdens inherent in adding a party at this stage. Accordingly, the Court denies DPI's motion for permissive intervention under Rule 24(b).

C. DPI May Proceed as an Amicus Curiae

Although the Court denies DPI's motion to intervene as a party, the Court will entertain DPI's arguments in support of Defendants' motion to dismiss if DPI wishes to proceed as an amicus curiae. Although the Federal Rules of Civil Procedure do not explicitly allow amicus curiae briefs in the district court, they also do not explicitly prohibit the practice, and some district courts have held that they can entertain arguments from an amicus. *See, e.g., Recht v. Justice*, No. 5:20 CV-90, 2020 WL 6109426, at *1 (N.D. W. Va. June 9, 2020); *Bounty Minerals, LLC v. Chesapeake Exploration, LLC*, No. 5:17cv1695, 2019 WL 7048981, at *10 (N.D. Ohio Dec. 23, 2019); *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); *NGV Gaming, Ltd. v. Upstream Point Molate*, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005).

In *Feehan v. Wis. Elec. Comm'n*, a case in which the district court, as here, denied a political party's motion to intervene, the court allowed the political party to make its arguments opposing injunctive relief by way of an amicus brief. 2020 WL 7630419 (E.D. Wis.) (Order Denying Motion to Intervene). Because the court's

approach in *Feehan* reasonably sought to achieve a balance between the sound application of procedural rules and affording a political party the opportunity to be heard on a matter of public concern, the Court will follow suit here. If DPI seeks to have the Court consider the arguments it has already proposed (see Dkt. 44, 45) relating to Defendants' motion for partial summary judgment, DPI may inform the Court of its preference by way of a statement filed as a separate docket entry.

IV. CONCLUSION

DPI's motion to intervene under Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure is denied. If DPI so chooses, the Court will instead consider DPI's arguments in favor of the motion to dismiss as an amicus brief.

SO ORDERED in No. 22-cv-02754.

Date: October 11, 2022

JOHN F. KNESS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL J. BOST, et al., Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS, et al., Defendants.	Civil Action No. 1:22 cv 2754 Hon. John F. Kness

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEMOCRATIC PARTY OF ILLINOIS' MOTION TO INTERVENE AS DEFENDANT

Plaintiffs Michael J. Bost, Laura Pollastrini, and Susan Sweeney ("Plaintiffs") submit this memorandum in opposition to the Democratic Party of Illinois' ("Movant") motion to intervene as defendants in the above-captioned matter.

INTRODUCTION

Plaintiffs in this action are three registered voters including one congressional representative and candidate for office in Illinois' upcoming November general federal election. Plaintiffs bring suit for declaratory and injunctive relief against Defendants, the Illinois State Board of Elections and its Chief State Elections Officer, Bernadette Matthews (collectively, "Defendants"), seeking to enjoin Illinois' unconstitutional ballot receipt deadline that extends the federal Election Day well past Congress' prescribed date. The named Defendants in this action are the only statewide officials responsible for enforcing and administering state election law, including the state ballot receipt deadline at issue here. The Defendants are represented by the

State Attorney General's office, the sole state agency under Illinois law responsible for defending state election officials.

It is settled law that Plaintiffs, as initiators of the complaint, control its scope and named parties, subject only to the rules of joinder. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005). Plaintiffs did so here, bringing claims under the First and Fourteenth Amendment and 42 U.S.C. § 1983 against the two state defendants responsible for enforcing the alleged unconstitutional act. Yet, Movant—a private political party who can never be named as a defendant in a Section 1983 action and is not responsible for administering state election law—seeks to intervene as a defendant here.

As set forth below, Movant's motion to intervene fails at every step. Movant does not show that a likely court order would disenfranchise eligible voters, nor explain why it would cost Movant resources even if this happened. Movant applies the wrong standard for determining whether government Defendants would adequately represent them, and then fails to make the necessary showing to rebut that presumption. Movant's request for permissive intervention fails to identify any specific claim or defense it has, and every discretionary factor weighs against intervention. Accordingly, the Court should deny Movant's request to intervene as of right or permissively under Rule 24.[1]

ARGUMENT

I. Movant Has Not Met the Standards for Intervention as of Right.

[1] Plaintiffs advised Movant that they consent to their participation as *amicus curiae*. This would allow it to fully apprise the Court of its concerns and avoid the questions regarding how a non-government party can be a defendant on 42 U.S.C. § 1983 claims. *See Michigan v. U.S. Army Corps of Eng'rs*, No. 10-CV-4457, 2010 U.S. Dist. LEXIS 85821, at *7 (N.D. Ill. Aug. 20, 2010) (explaining that intervention should be denied if "the proposed intervenor cannot succeed in its case under any set of facts which could be proved under the complaint." (citing *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995))).

Movant first seeks to intervene as of right under Rule 24(a)(2), which permits intervention if (1) the motion is timely; (2) the movant claims an interest in the property or transaction which is the subject of the action; (3) that interest may as a practical matter be impaired by the action; and (4) that interest is not adequately represented by existing parties.[2] *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). "Intervention of right will not be allowed unless all requirements of the Rule are met." *Id.* at 946 (citing *Wade v. Goldschmidt*, 673 F.2d 182, 185 n.4 (7th Cir. 1982)). Movant has failed to meet three of the four requirements for intervention as of right.

A. Movant Lacks a Significant Interest in this Litigation.

Movant must first demonstrate a significant interest that warrants intervention. Intervention as of right requires Movant's interest "be direct, significant, and legally protectable." *Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 101 F.3d 503, 506 (7th Cir. 1996) (citations omitted). While Rule 24 does not define the interest sufficient for intervention, the "interest must be unique to the proposed intervenor." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (citation omitted). Generally, "[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) (citations omitted).

[2] Plaintiffs concede that the motion is timely. However, the prejudice that results from a delay in seeking leave is separate and distinct from the prejudice that will result in the admission of additional parties under permissive intervention. *See* 6 MOORE'S FEDERAL PRACTICE § 24.21(3) (noting the different analysis between prejudice for timeliness and prejudice for permissive intervention). As discussed below, the addition of more defendants with the same ultimate objective as existing Defendants and who are already adequately represented is reasonably likely to delay resolution at the trial level and any subsequent appeal.

Movant here asserts an interest in allowing Democratic voters to cast vote-by-mail ballots ("VBM") beyond that which is proscribed by federal law. Doc. 13 at 7-9. Movant then pivots to argue that since case law has recognized Movant's associational standing to assert the injuries of Democratic voters, it also has a significant interest that warrants intervention here. *Id.* at 9. But this Circuit "makes clear that more than the minimum Article III interest is required" in order to intervene as of right. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); *see also Common Cause Ind. v. Lawson*, No. 1:17-cv-03936-TWP-MPB, 2018 U.S. Dist. LEXIS 30917, at *12-*13 (S.D. Ind. Feb. 27, 2018) (finding a non-profit organization's interest in intervening as a defendant to uphold a challenge to state election law insufficient as the interests were "the same for the proposed intervenor as for every registered voter in Indiana").[3]

Movant also argues that "courts regularly grant intervention to political parties." Doc. 13 at 8. Of course, given that intervention "is a highly fact-specific determination" (*Schipporeit*, 69 F.3d at 1381), the particular facts of the cases granting intervention matter a great deal, and Movant's blanket assertion is meaningless. Movant failed to note, moreover, that the law firm representing Movant, including several of its attorneys here, argued in a Motion just three weeks ago that the Republican National Committee, the Republican Party of Arizona, and several other Republican organizations could not intervene in a § 1983 lawsuit seeking to enjoin the enforcement of an Arizona election statute. *Mi Familia Vota, v. Hobbs*, 2:22-cv-509-SRB (D. Ariz. 2022) (ECF 46). Shortly after the instant Motion was filed, the Arizona District Court agreed with them, denying the Republican party's motion to intervene. *See* Ex. 1, June 23, 2022, Order.

[3] Plaintiffs do not contest the Movant's associational standing to bring a lawsuit on behalf of Democratic voters who were wrongfully denied the right to vote based on a state election law or procedure. Movant's own purported intervention interests are undermined by the arguments in its attached pleading. *See generally* Doc. 13-1 at 4-9 (arguing that Plaintiffs lack standing). According to Movant, there is a sufficient interest for private parties to intervene to defend a state law but not a sufficient interest for private parties to confer standing to challenge it.

Movant does not begin to explain how their associational rights to assert standing on behalf of their members translate into a significant interest that is unique to Movant for purposes of intervention as of right here. If the threat of "subject[ing] the counting of mail-in ballots—including those of Democratic voters—to circumstances entirely outside the voter's control" is a sufficient protectable interest under Rule 24, would all 2,025,662 registered voters in Illinois who voted by mail last election have a sufficiently protectable interest to intervene in this litigation? Would every other political party in Illinois also have an automatic right to intervene? Under Movant's reasoning, such organizations and voters certainly would have a compelling argument. But that is not the standard under Rule 24. Movant's interest in protecting its members' rights through upholding state election law is no different than that of any other political organization in the state and no different than that of any other registered voter who votes by mail. As this Circuit has made clear, the significant protected property interest "must be based on a right that belongs to the proposed intervenor," and that is "so direct that the applicant would have 'a right to maintain a claim for the relief sought.'" *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) (citation omitted). Ensuring that voters are not disenfranchised is certainly not an interest that is "unique to the proposed intervenor." *See Walker*, 705 F.3d at 658; *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *12-*13.

Allowing political organizations, such as Movant here, to intervene as of right without a more significant interest in the litigation risks "turn[ing] the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute (or have the court resolve it expeditiously)." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988). Movant may prefer a particular outcome to the case in order to ensure more Democratic votes, but such an interest is an ideological one, not the significant interest required for

intervention. *See Texas v. U.S.*, 805 F.3d 653, 657 (5th Cir. 2015) ("[A]n intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological … reasons; that would-be intervenor merely prefers one outcome to the other.") (citations omitted).

For all of the foregoing reasons, Movant has failed to state a significantly protectable interest in this case sufficient to justify intervention.

B. Movant Fails to Show How Its Interest Would Be Impaired Absent Intervention.

Impairment of a legally protected interest "depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) (citation omitted). Determining whether the Movant's interest is foreclosed "is measured by the general standards of *stare decisis*." *Revelis v. Napolitano*, 844 F. Supp. 2d 915, 925 (N.D. Ill. 2012) (citation omitted).

Similar as to how Movant cannot demonstrate a significant protectable interest, so too it cannot show that the disposition of this action will impair those interests. Movant bases its impairment argument on speculation, arguing that the relief Plaintiffs *may* seek and this Court *may* adopt *may* result in the disenfranchisement of eligible voters on the "condition" of the "timelines (sic) of the U.S. Postal Service."[4] Doc. 13 at 8. Movant's "parade of horribles" is baseless conjecture at this stage of the litigation and not sufficient to find impairment of its interests.

[4] Moreover, it is not entirely clear that Movant understands the nature of this lawsuit. *See* Doc. 13 at 8 (claiming incorrectly that "Plaintiffs seek an injunction preventing Illinois from counting any mail-in ballots after 'election day,' regardless of when they are postmarked or dated."). Plaintiffs are not seeking such an injunction. Counting ballots past Election Day is consistent with federal law so long as the ballot is cast *and* received by the election authority by Election Day. Illinois law allows *receipt* of ballots up to 14 days past Election Day, which is inconsistent with federal law and severely burdens Plaintiffs as candidates and voters.

But even if the Court accepts Movant's doomsday scenario, nothing in this action would prevent Movant from bringing a suit on behalf of its members or any registered voter under state and federal voting laws if it ever happens that the voter were wrongfully denied the right to vote. Section 10301(b) of the Voting Rights Act provides voters a remedy to sue state officials if they discriminate on the basis of race and 42 U.S.C. § 1983 provides a cause of action should the state violate the voter's First and Fourteenth Amendment rights. In short, there would be no *stare decisis* or preclusive effect absent Movant's intervention.

C. Movant Cannot Overcome the Strong Presumption of Adequacy by Government Defendants Charged with Defending State Law.

This Circuit has recognized a three-tiered approach for determining adequacy of representation under Rule 24. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). The first, as cited by Movant, is a liberal standard that is satisfied by intervenors whenever representation "may be inadequate." *Id.* (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). This more lenient default standard applies when the proposed intervenor has interests that are "materially different" than the representative party. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 749 (7th Cir. 2020).

But when the Movant and existing parties share "the same goal," there exists a "rebuttable presumption of adequate representation that requires a showing of 'some conflict' to warrant intervention." *Planned Parenthood*, 942 F.3d at 799 (quoting *Walker*, 705 F.3d at 659). Where, as here, the "representative party 'is a governmental body charged by law with protecting the interests of the proposed intervenors'" the "presumption of adequacy becomes even stronger" and can only be rebutted by a showing of "gross negligence or bad faith." *Id.* (quoting *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)).[5]

[5] The United States Supreme Court recently held that the heightened burden to overcome the

The stronger presumption of adequacy is appropriate here. One of the named Defendants, the Illinois State Board of Elections, is the sole statewide governmental agency in charge of administering Illinois state election law, including the distribution of election information to local election authorities in order for voters to vote-by-mail, and to receive the results of the canvassing and certification of vote-by-mail ballots. 10 Ill. Comp. Stat. Ann. § 5/22-18; 26 Ill. Adm. Code §§ 207.150, 219.10. The other named Defendant is the chief state election official responsible for administering federal election law in Illinois. 26 Ill. Adm. Code § 216.100(b)-(c). Both Defendants are represented in this action by the Attorney General of Illinois, charged by law with defending all actions brought against the State. 15 Ill. Comp. Stat. Ann. § 205/4.

A recent case in this Circuit applied this presumption finding adequate representation when the Democratic Party sought to intervene to defend an election certification, and when the existing defendants were the officials in charge of election administration and with the counting and certifying of all votes. *See Feehan v. Wis. Elections Comm'n*, No. 20-cv-1771-pp, 2020 U.S. Dist. LEXIS 228591, at *19 (E.D. Wis. Dec. 6, 2020). Other cases have found a presumption of adequacy when private parties tried to intervene alongside a governmental agency charged by law with defending the state. *See Keith*, 764 F.2d at 1269 (applying the presumption of adequate representation in denying intervention to private organization who supported abortion restrictions when the State of Illinois was "required to defend and enforce the law of Illinois, including" the relevant abortion statute); *see also Liga*, 478 F.3d at 775 (intervention was not appropriate when

presumption of adequate representation is not appropriate when the proposed intervenor is itself a governmental legislative body. *See Berger v. North Carolina State Conf. of the NAACP*, No. 21-248, 2022 U.S. LEXIS 3052 (June 23, 2022). The Supreme Court majority noted it did not disturb the presumption of adequate representation "when a private litigant seeks to defend a law alongside the government." *Id.* at *29. The heightened presumption of adequacy set forth in *Planned Parenthood* that whenever *private* litigants seek to intervene alongside a governmental body charged by law to protect the interests of intervenors is still controlling law in this Circuit. *See also Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 393 (7th Cir. 2019).

private intervenors made "no effort to show gross negligence or bad faith on the part of the state defendants" when seeking to intervene alongside state defendants responsible for administering federal programs); *United States v. South Bend Community School Corp.*, 692 F.2d 623, 628 (7th Cir. 1982) (presumption appropriate where the government "is charged by law with representing the interests of the absentee") (citation omitted)); *American Nat'l Bank & Trust Co. v. Chicago*, 865 F.2d 144, 148 (7th Cir. 1989) (same).

Rather than cite this standard and argue why it should not apply in this circumstance, Movant completely ignores it. Movant instead assumes the more liberal standard should apply without any justification and then proceeds to argue that they meet it since Movant has more "specific concerns" than Defendants, namely "ensuring that every Democratic voter in Illinois has a meaningful opportunity to cast a ballot and have that ballot counted." Doc. 13 at 10. But "stronger, more specific interests" do not rebut the presumption of adequacy of representation "since would-be intervenors will nearly always have intense desires that are more particular than the state's." *Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013). Regardless, the small "differences between the State's interest and those of the [Movant]" do not rebut the presumption of adequacy when both the named Defendants and the Movant "share the same narrow objective: to uphold [the state law]." *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *15.

Movant makes only broad assertions about how their interests are not shared with Defendants. Doc. 13 at 11. Movant never identifies a material argument that Defendants will not make or refer to a contention Defendants are likely to make that is contrary to Movant's interests. Moreover, a comparison of Movant's proposed Motion to Dismiss (Doc. 13-1) and Defendants' Motion to Dismiss (Doc. 26) shows that both rely on the same dismissal arguments (*i.e.*, Plaintiffs lack standing and failed to state a claim under Rule 12(b)(6)). Indeed, Defendants included two

additional dismissal grounds that Movant did not raise. Accordingly, many of Movant's speculative arguments regarding adequate representation, which were made before Defendants filed their responsive pleading, are unfounded.

Regardless, Movant's interests of ensuring more Democratic voters are counted do not overcome the presumption of adequacy when the named Defendants are already charged with ensuring that all vote-by-mail votes are properly counted. *See Feehan*, 2020 U.S. Dist. LEXIS 228591, at *19 (finding the Democratic National Committee could not overcome the presumption of adequate representation despite being more "concerned about valid *Democratic* votes being disregarded" since "its concern about *any* votes being disregarded aligns with the defendants' interests in defending the legality of the [state law] certification.").

Movant's more specific interests come nowhere close to the "gross negligence or bad faith" needed in this Circuit to rebut the presumption of adequate representation whenever private parties who share the same ultimate objective (*e.g.*, upholding state law) intervene alongside a governmental agency charged by law with defending the state. *See Keith*, 764 F.2d at 1269.[6]

Movant's authorities in support of finding inadequacy of representation all fail. First, all but one of the cases are from outside this Circuit and not controlling. The sole decision from this Court noted it was specific to "regulatory agencies" because such agencies "do not adequately represent the narrow, parochial interests of regulated entities." *Michigan*, 2010 U.S. Dist. LEXIS 85821, at *20-*21 (citations omitted). The Court made clear the "case is distinguishable from the

[6] It is worth noting this situation is not one where the current Defendants or those defending the action are adverse to the proposed intervenor. Attorney General Kwame Raoul, whose office is currently representing the named Defendants here, is a member of the Democratic Party and has been recently endorsed for re-election by Movant. "*Press Release: DeVore Takes Circus Act Statewide in Bid for Attorney General*," Democratic Party of Illinois, Feb. 22, 2022, available at https://bit.ly/3PmcqPS (last visited July 13, 2022). Surely, if Movant believes Attorney General Raoul is fit to hold this office, then he is also fit to defend the Movant's interests here.

fairly common scenario in which a lawsuit is filed against a state or a state official to challenge the constitutionality of a statute." *Id.* at *24. In such a circumstance, like here, "the Attorney General alone is presumed to be an adequate representative because he or she is charged by law with defending the statute — and thus upholding the interest of all of those who wish to defeat the challenge." *Id.* at *24-*25 (citing *American Nat'l Bank*, 865 F.2d at 147-48).

The other cases cited by Movant are two unpublished district court decisions out of the Ninth Circuit. *See* Doc. 13 at 10-11, citing *Issa v. Newsom*, 2020 U.S. Dist. LEXIS 102013 (C.D. Cal. June 10, 2020) and *Paher v. Cegavske*, 2020 U.S. Dist. LEXIS 74095 (D. Nev. April 28, 2020). But the Ninth Circuit has adopted a multi-factored test to determine adequacy of representation, which is more lenient than the Seventh Circuit's tiered approach. While the "most important factor" of the Ninth Circuit's test is "how the interest compares with the interest of existing parties," it is not the only factor to determine the presumption of adequacy. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citation omitted). A proposed intervenor in the Ninth Circuit can still show inadequacy of representation based on the totality of the circumstances, regardless of whether the intervenor is seeking to join alongside a government official. *See Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (noting that the intervention standards in the Ninth Circuit are "guided primarily by practical considerations, not technical distinctions") (citations omitted). Not so in the Seventh Circuit, which as stated above, requires a heightened burden if the goal of the intervenor and state are the same and the government is charged by law with defending the constitutionality of a statute.

Accordingly, Movant has failed to rebut the presumption of adequacy of representation and its motion to intervene as of right should be denied.

II. Alternatively, Movant's Request for Permissive Intervention Should Be Denied.

In the alternative, Movant seeks to intervene permissively. Doc. 13 at 12. Under Rule 24(b)(1), a district court "may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." *Planned Parenthood*, 942 F.3d at 803. While a district court may not "deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right," it may consider "the elements of intervention as of right as discretionary factors" in weighing permissive intervention. *Id.* at 804 (citations omitted).

Movant's request for permissive intervention fails the "claim or defense" threshold. Movant, as a private political party, is not the entity in charge of administering state election law in Illinois and can offer no defense to the action except for rehashing the existing Defendants' arguments. As noted previously, Defendants' Motion to Dismiss includes all the grounds relied on by Movant, as well as other grounds such as the Eleventh Amendment. Doc. 26 at 11-13. Movant's own interests for permissive intervention, that they will more expeditiously argue this case "ensur[ing] that every eligible Illinoisan is allowed to cast a ballot and have that ballot counted in the coming election," is virtually identical to the duties charged to existing Defendants. *Feehan*, 2020 U.S. Dist. LEXIS 228591, at *21 (denying permissive intervention to the Democratic National Committee when it could not show "any conflict that would prevent the current defendants from adequately representing its interests."); *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *19 (when "intervention of right is denied because the state is likely to provide adequate representation, the case for permissive intervention is largely eroded" (citing *Menominee Indiana Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996))). Permissive intervention is not appropriate when a party on the same ideological side seeks to intervene to defend interests that the state is already charged by law to defend, unnecessarily cluttering the

action. *Arney v. Finney*, 967 F.2d 418, 421-22 (10th Cir. 1992) (affirming the denial of permissive intervention where the addition of parties "would only clutter the action unnecessarily" without adding any corresponding benefit to the litigation); *Bethune Plaza*, 863 F.2d at 533 (courts should avoid intervention when it risks "turn[ing] the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute").

Furthermore, as Movant is a private organization and not a state, Plaintiffs cannot assert a claim against it for violations of 42 U.S.C. § 1983. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) (Section 1983 actions are not proper against "merely private conduct, no matter how discriminatory or wrongful"). There can be no claims to resolve between Movants and Plaintiffs. Though Movant claims the goal of mobilizing voters for the upcoming election, Movant has no role in tabulating or certifying the electoral results in Illinois. *See Feehan*, 2020 U.S. Dist. LEXIS 228591, at *19. That responsibility lies solely with the named Defendants in this action. In essence, it "is doubtful whether [Movant] even has a claim or defense in common with the main action" since the federal law "cannot be used to enforce a claim against the [private organization]." *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *18.

CONCLUSION

For the foregoing reasons, Movant's Motion to Intervene should be denied.

July 14, 2022

Respectfully submitted,

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* *Application for admission pro hac vice forthcoming*