No. 22-3034

IN THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL J. BOST, ET AL.,
Plaintiffs-Appellees,

v.

ILLINOIS STATE BOARD OF ELECTIONS
AND BERNADETTE MATTHEWS,
Defendants-Appellees,

APPEAL OF: DEMOCRATIC PARTY OF ILLINOIS,
Proposed Intervenor-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 22-cv-02754
The Honorable Judge John F. Kness

BRIEF OF PLAINTIFFS-APPELLEES

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Date: February 2, 2023

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-3034

Short Caption: Michael Bost, et al. v. Democratic Party of Illinois

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Attorney's Signature: s/ Eric W. Lee Date: 02/02/2023

Attorney's Printed Name: Eric W. Lee

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☑ No ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees Michael J. Bost, Laura Pollastrini, and Susan Sweeney (collectively "Plaintiffs-Appellees") submit the jurisdictional statement in Appellant Democratic Party of Illinois' ("DPI") opening brief is complete and correct.

STATEMENT OF THE ISSUES

1. Whether DPI's interest of protecting Democratic voters is sufficiently independent to warrant intervention as of right.

2. Whether DPI's overall goal of defending mail-in balloting for Democratic voters is sufficiently aligned with existing defendants to warrant the presumption of adequate representation.

3. Whether DPI has shown evidence of adversity of interests to rebut the presumption of adequacy of representation.

4. Whether the district court abused its discretion in denying permissive intervention when it considered equitable factors, as well as overlapping interests and repetitive pleadings by DPI.

STATEMENT OF THE CASE

I. Illinois' Extension of the Federal Election Day Deadline for Absentee and Vote-By-Mail Ballots.

More than 175 years ago, Congress established the Tuesday after the first Monday in November of every even-numbered year as the uniform national election day in the United States ("Election Day"). A historical overview from that time

shows that the ordinary public meaning of Election Day was the day by which all ballots must be received by state election officials. In accordance with that practice and up until 2005, Illinois law required that absentee ballots must be postmarked the day preceding Election Day and received by state election officials on or before Election Day. 2005 Ill. Laws 557 (P.A. 94-557).

That changed in 2005 with an amendment to 10 ILCS 5/19-8(c) ("Receipt Deadline"), which holds voting open in Illinois for fourteen days after Election Day. The Illinois' Receipt Deadline allows absentee ballots received "after the polls close on election day" but before "the close of the period for counting provisional ballots" to be counted as if cast and received on or before Election Day. *See* 2005 Ill. Laws 557 (P.A. 94-557). Election officials shall complete the "the validation and counting of provisional ballots within 14 calendar days of the day of the election." 10 ILCS 5/18A-15(a). Read together, these two provisions mean that ballots received up to 14 calendar days after Election Day shall be counted as if cast and received on or before Election Day. In 2013, the legislature materially increased the number of eligible voters who could avail themselves of this extended Election Day deadline by including vote-by-mail ballots within the category of acceptable absentee ballots under 10 ILCS 5/19-8(c). 2013 Ill. Laws 1171 (P.A. 98-1171).

Plaintiffs-Appellees include a member of Congress representing Illinois' 12th Congressional District, who will be seeking re-election in 2024. The two other

Plaintiffs-Appellees are Republican appointees who served as nominees for presidential and vice-presidential electors in the Electoral College. All three are lawfully registered voters in Illinois, and have sued to enjoin the enforcement of Illinois' Receipt Deadline on the grounds that it contravenes the ordinary public meaning of Election Day as set forth in 2 U.S.C. § 7 and 3 U.S.C. § 1. Plaintiffs-Appellees do not seek to disenfranchise any eligible voter who seeks to cast a ballot either in person or by absentee ballot on or before Election Day. Plaintiffs-Appellees only seek a court order enjoining the practice of accepting ballots received up to 14 days after Election Day.

II. DPI's Motion to Intervene as Defendant.

On June 16, 2022, DPI moved to intervene in the action as of right or permissively under Rule 24 to defend the challenged Illinois Receipt Deadline alongside the two named Defendants, the Illinois State Board of Elections and its Executive Director. DPI claimed an interest in the underlying action in defending its registered voters' rights to lawfully cast a ballot by mail and have that ballot properly counted. Dkt. 13 at 7-9. Despite the fact the interest is shared by virtually every political organization in Illinois, as well as the current existing Defendants, DPI argued this interest was sufficiently "unique" to warrant intervention as of right. DPI also claimed that the existing Defendants could not represent DPI's interests, arguing they satisfied the most lenient test that requires intervenors only to show that

representation "may" be inadequate. DPI made no argument in the district court as to why the heightened presumption of adequacy in this Circuit should not apply here.

Alternatively, DPI argued below they should be allowed to intervene permissively because they maintain defenses to Plaintiffs-Appellees' claims, notwithstanding that as a private political party, DPI could never be a named defendant in a 42 U.S.C. § 1983 action, such as the one here. Dkt. 13 at 12.[1]

III. The District Court's Order Denying Intervention.

On October 11, 2022, the district court below denied DPI's motion to intervene under Rule 24. Dkt. 56 at 1, A1. With respect to intervention as of right, the court found that DPI's interest in resource allocation in its organizational activities was a sufficient interest that may be impaired absent intervention, but that its interest in protecting its members' rights to vote by absentee or vote-by-mail ballot was not sufficiently unique to warrant intervention as of right. *Id.* at 8-10, A8-A10. According to the court, the State Board's interest in the current action subsumes

[1] As a private political party that is not responsible for administering state election law, DPI's request to participate as Defendant does not comport with 42 U.S.C. § 1983 or U.S. CONST. art. I, § 4 cl. 1 and art. II, § 1 cl. 4. *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))). The court below has allowed DPI to participate extensively as *amicus curiae*. As such, DPI has fully apprised the trial court of its concerns regarding this matter, including participating in oral arguments in December 2022 and filing separate briefs in support of the State Board's Motion to Dismiss and in opposition to Plaintiffs-Appellees' Motion for Partial Summary Judgment. *See* Dkt. 71 (order granting motion for leave to participate in argument as *amicus curiae*); Dkt. 57.

DPI's narrower interest because defending the Receipt Deadline for *all* Illinois voters necessarily would include DPI's interest in protecting its members and constituents. Because this interest is not unique to DPI, it is not sufficient for intervention as of right. *Id.* at 9-10, A9-A10.

The district court found the rebuttable presumption of adequacy appropriate since there was an "alignment of interests between DPI and the State Board." *Id.* at 12, A12. According to the court, the goals of both DPI and the State Board of Elections were essentially the same. "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." *Id.* "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." *Id.* at 15, A15 (citing *Mi Familia Vota v. Hobbs*, No. CV-22-00509-PHX-SRB (D. Ariz. June 23, 2022)).

The district court also denied DPI's request to intervene permissively. In exercising its considerable discretion under Rule 24(b), the court found the equitable considerations weigh heavily in favor of not adding additional parties to a litigation that depends on a prompt resolution of the case. *Id.* at 16, A16. The court noted additional considerations weigh against intervention, such as the similarity of interests between DPI and the Defendants, the fact that DPI's narrower, more

partisan interests make it a less-than-ideal choice to defend a state law that protects all voters, and DPI's admission that it will make essentially the same legal arguments as the State Board. *Id.* at 16-17, A16-A17. All of these factors, in the court's view, weighed against allowing additional parties into the action.

The court allowed DPI to participate in the action as an *amicus curiae* (*id.* at 17-18, A17-A18), and later agreed to allot time to DPI's counsel to present arguments at the hearing on the Defendants' Motion to Dismiss. Dkt. 71.

SUMMARY OF ARGUMENT

DPI, a statewide political party with interests solely related to the success of Democratic candidates and the ability of Democratic voters to cast ballots, seeks to intervene in the action as defendants alongside the State Board of Elections and its Executive Director. The district court correctly found that DPI failed to meet the standard in this Circuit for intervention as of right and did not abuse its discretion in denying permissive intervention based on several reasoned factors.

First, DPI's interest in protecting *Democratic* voters' right to vote by mail is not sufficiently unique or independent to satisfy this Circuit's standard for showing a protectable interest. The State Board of Elections and its Executive Director, the two named Defendants here, are also equally interested in protecting and counting the ballots of Democratic voters and preserving the Ballot Receipt Deadline statute at issue in this litigation. The district court correctly noted that "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." In other words, protecting voters' ability to vote by absentee ballot is not "independent" of the interest that belongs to an existing party to the suit, namely the State Board of Elections.

Second, the district court correctly concluded that DPI, as a private organization seeking to intervene alongside a state governmental agency, failed to show sufficient evidence to overcome the presumption in this Circuit of adequacy of representation. DPI's more narrow interest of protecting the vote-by-mail ballots of its voters and the organizational resources spent on voter education and advocacy does not automatically trigger a more lenient standard of adequacy or overcome the presumption of adequate representation. Almost all political organizations have more specific interests than existing defendants. If that was enough to show that existing representation was inadequate, then all such organizations could satisfy this element of intervention as of right.

But that is not the law. This Court has expressly said that the proper inquiry for adequacy of representation is whether the *goals* of the intervenor and the existing parties are essentially the same. Here, they unquestionably are. Despite its more specific interests, DPI's broader goals are effectively the same as those of the State Board of Elections, which is defending the current vote-by-mail practice on behalf

of all voters, including Democratic ones. DPI has made no showing of any adversity of interest between itself and the existing Defendants that would overcome this presumption.

Finally, the district court did not abuse its discretion when it considered several factors and found that the additional parties would tax judicial resources in a time-sensitive case and lead to repetitive briefing and arguments by a party that is already adequately represented. DPI's arguments that called into question the district court's reasoned judgment on the time-sensitive case overlooked the other factors the court relied on in finding additional parties unnecessary. DPI has cited no case law in this Circuit and provided no evidence showing that the district court abused its discretion. DPI's motion to intervene should be denied.

ARGUMENT

I. Standard of Review

A party may intervene in a matter under Fed. R. Civ. P. 24(a)(2) when (1) the motion is timely; (2) the intervenor 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. *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). The intervenor "has the burden of establishing all four elements; the lack of even one requires that the court deny the motion." *Planned Parenthood of Wis., Inc.*

v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019) (citing *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir. 2001)). Where timeliness is not at issue, as here, this Court reviews a denial of a motion to intervene as of right de novo. *Id.*

Alternatively, a party may intervene permissively under Fed. R. Civ. P. 24(b) if the proposed intervenor "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).

The district court's decision on permissive intervention is "wholly discretionary," and is reviewed by this Court "for an abuse of that discretion." *Planned Parenthood*, 942 F.3d at 803 (citing *Babbitt*, 214 F.3d at 949). "Reversal of a district court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique." *Shea v. Angulo*, 19 F.3d 343, 346 n.2 (7th Cir. 1994) (citation omitted).

II. The District Court Properly Applied This Court's Precedent in Denying Intervention as of Right.

A. DPI's Interest in Protecting Its Members Right to Vote is Not Sufficiently Unique to Proposed Intervenor.

The district court properly concluded that DPI's interest in protecting the "rights of its members and constituents" by counting Democratic ballots "received after Election Day" is not sufficiently unique to warrant intervention. Dkt. 56 at 9, A9. According to the court, the State Board of Elections also are equally interested in protecting and counting the ballots of Democratic voters and preserving the Ballot Receipt Deadline statute at issue in this litigation, since the State Board is "the entity charged with overseeing and administering election laws" in Illinois. *Id.*

As this Court has routinely explained, the "proposed intervenor must demonstrate a direct, significant and legally protectable interest in the property at issue in the law suit" in order to intervene as of right. *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." *Id.* (citing *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982)). In other words, the interest must be "unique" to the prospective party. *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) ("WEAC").

By citing Judge Sykes' concurring opinion in *Planned Parenthood*, 942 F.3d at 806, DPI argues that "unique" in the proper context "means an interest that is

independent of an existing party's, not different from an existing party's." Brief of Appellate DPI at 11 ("DPI Br.").[2] Because the "Board seeks a result in this case that would ultimately inure to the benefit of all voters does not strip DPI of that independent interest, sufficiently unique" to warrant intervention. DPI Br. at 12-13.

But even assuming DPI's standard is correct, it is hard to see how DPI's interest of defending Democratic voters is *independent* from the State Board's interest of defending *all* voters. As the district court correctly observed, "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." Dkt. 56 at 10, A10. Protecting voters' ability to vote absentee is not the "independent" interest that "belongs to the proposed intervenor rather than to an existing party in the suit." *Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring); *WEAC*, 705 F.3d at 658; *Common Cause Ind. v. Lawson*, No. 1:17-cv-03936-TWP-MPB, 2018 U.S. Dist.

[2] Judge Sykes' concurring opinion on sufficient interest to warrant intervention did not garner a second panel vote from this Court. The majority opinion in *Planned Parenthood* did not disturb the district court's opinion that the Wisconsin Legislature's interest was not "unique" or different from the existing defendants in that case since the Legislature could not overcome the presumption of adequacy of representation. *See id.* at 798 ("We need not decide whether the Legislature's interest is unique in that sense, because the Legislature has the burden of proving all four elements of intervention, and we agree with the district court that the Legislature has failed to establish that the Attorney General is an inadequate representative of the State's interests."). Judge Sykes ultimately agreed with the panel that the intervenors failed to overcome the presumption of adequacy. *Id.* at 810-811. As explained in part II.B. *infra*, the U.S. Supreme Court later determined the heightened presumption of adequacy for state legislative intervenors to be inappropriate. *See Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022).

LEXIS 30917, at *12-*13 (S.D. Ind. Feb. 27, 2018) (finding that an organization's interest to preserve the "democratic right to participate effectively and in state-prescribed elections" was not sufficiently unique to warrant intervention). Similarly, as the district court rightly concluded, DPI's interest in protecting Democratic voters to vote by mail in Illinois is not sufficiently unique or independent from that of the existing Defendants who also have an interest in protecting such voters.[3] Such a claimed interest is insufficient to warrant intervention as of right.[4]

Moreover, DPI's interest is not sufficient to itself be a named party defendant in this action. It is settled law that Plaintiffs-Appellees, 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-Appellees did so here, bringing claims under the First and Fourteenth Amendment and 42 U.S.C. § 1983

[3] DPI'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 Court 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*, 764 F.2d at 1268 (citation omitted). Ensuring that voters are not disenfranchised is certainly not an interest that is "unique to the proposed intervenor." *See WEAC*, 705 F.3d at 658; *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *12-*13.

[4] Nor does DPI's appeal to associational standing, based on the claimed representation of Democratic voters who were unlawfully deprived of their right to vote, automatically confer an interest sufficient to justify intervention under Rule 24. As this Court has made clear, something more than Article III standing is required to intervene as of right. *See Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); *Planned Parenthood*, 942 F.3d at 798. DPI cannot simply rely on associational standing to establish a protectable interest under Rule 24 when *more* than standing is required to intervene.

against the two state defendants responsible for enforcing the alleged unlawful act. 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 state law responsible for defending state election officials. Rule 24 does not allow private political organizations to intervene as of right to defend state laws they have no role in enforcing.

B. DPI is Adequately Represented by State Defendants.

This Court has recognized a three-tiered approach for determining adequacy of representation under Rule 24. Under the more lenient standard, an intervenor can satisfy this element of Rule 24 whenever representation "may be inadequate." *Planned Parenthood*, 942 F.3d at 799 (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). This default standard applies when the proposed intervenor has interests that are "materially different" from the current representative party. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 749 (7th Cir. 2020).

Alternatively, whenever the proposed intervenor and the representative party share "the same goal," there exists a "rebuttable presumption of adequate representation that requires a showing of 'some conflict'" between the proposed intervenor and the representative party "to warrant intervention." *Planned*

Parenthood, 942 F.3d at 799 (quoting *WEAC*, 705 F.3d at 659). This rebuttable presumption is heightened when the "representative party 'is a governmental body charged by law with protecting the interests of the proposed intervenors'" and can only be rebutted then by a showing of "gross negligence or bad faith." *Id.* (quoting *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)).

i. The District Court Appropriately Rejected the Lenient Standard of Adequacy of Representation Since the State Board and DPI Share the Same Broader Goals.

The district court concluded that the intermediate standard applied in these circumstances, which imposes a presumption of adequacy of representation and "requires the proposed intervenor to show 'some conflict'" to overcome that presumption.[5] Dkt. 56 at 11, A11. The district court correctly rejected DPI's position that the more lenient standard applied, since "DPI and the State Board's interest are much closer than merely seeking the denial of [Plaintiffs-Appellees'] proposed injunction." *Id.* at 12, A12. That is because "[b]oth 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." DPI's narrower interest to protect its

[5] The district court also disagreed with Plaintiffs-Appellees that the most heightened standard applied, since the State Board is not charged by law with protecting the interests of political parties and candidates. *See id.* at 12, A12 (citing *Feehan v. Wis. Elections Comm'n*, No. 20-cv-1771-pp, 2020 U.S. Dist. LEXIS 228591, at *15-*16 (E.D. Wis. Dec. 6, 2020) ("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))).

members "does not mean its interests are materially distinct from the State Board's" since the "State Board's broader interest in the rights of all voters includes DPI's narrower interest in the rights of its members." *Id.* at 12-13, A12-A13.

DPI takes issue with the district court's reasoning primarily on the grounds that it failed to consider *all* of DPI's interests when analyzing adequacy, including DPI's organizational interests, and that the district court applied the wrong standard. Without citing any authority, DPI argues that the district court committed reversible error when it failed to consider "DPI's organizational interest in resource allocation in analyzing the adequacy of representation." DPI Br. at 15. But DPI misunderstands the rule for adequacy of representation that this Court has clearly outlined: "When the intervenor's and the named party's ultimate *goals* are identical, … it is reasonable, fair, and consistent with the practical inquiry required by Rule 24(a)(2) to start from a presumption of adequate representation" where the intervenor must "show a concrete, substantive conflict or an actual divergence of interests to overcome it." *Planned Parenthood*, 942 F.3d at 810 (Sykes, J., concurring) (emphasis added) (citation omitted); *see also WEAC*, 705 F.3d at 659 ("where the prospective intervenor and the named party have the same goal, a 'presumption [exists] that the representation in the suit is adequate,'" (quoting *Shea*, 19 F.3d at 347)).

In other words, the interests of the organization are only relevant insofar as there is some material conflict of the overall goals between the proposed intervenor and the representative party. It is only then that the more lenient standard applies. There is no requirement for the district court to analyze *all* interests of the proposed intervenor when determining whether the presumption of adequacy applies if the ultimate goals of the proposed intervenor and representative party are the same. *See Feehan*, 2020 U.S. Dist. LEXIS 228591, at *16-*17 (finding a presumption of adequacy when intervenor and state defendants both shared "the same goal" in defending the results of the Wisconsin general federal election); *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *15-*16 (analyzing the broader goals of the non-profit organization in determining adequacy of representation rather than going over each interest individually). The district court followed such precedent, analyzing DPI's overall goals of defending the Ballot Receipt Deadline for Democratic voters and then assessing whether those interests were "materially different" from, or similar to the Defendants. The court found that the interests were similar enough and were not in material conflict so as to warrant the presumption of adequacy.

DPI's reliance on *Driftless*, 969 F.3d 742 (7th Cir. 2020) is misplaced. There, the district court operated at "too high a level of generality" when it found the intervenor and the representative party "share the same goal." *Id.* at 748. The district

court found that the parties shared the same goal solely because both parties wanted the case dismissed. *Id.* This Court "require[d] a more discriminating comparison of the absentee's interests and the interests of existing parties." *Id.*

Unlike in *Driftless*, the district court here did not simply find that the similarities were due to the fact both parties wanted the case dismissed. According to the court, the two parties' "interest are much closer than merely seeking the denial of [Plaintiffs-Appellees'] proposed injunction." Dkt. 56 at 12, A12 (citing *Driftless*, 969 F.3d at 748). "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." *Id.* DPI's more narrow interests in protecting Democratic voters are not materially distinct from the State Board's interest of protecting all voters so as to warrant the more lenient standard of adequacy that DPI argues here.

DPI makes broad claims about how its interests are not shared with the State Board. But DPI never identifies a material argument that the State Board should have, but did not make, or one that is contrary to DPI's interests. Moreover, a comparison of DPI's two amicus briefs and proposed pleadings (Dkt. 13-1, 45) to the State Board's Motion to Dismiss (Dkt. 26) and Opposition to Plaintiffs' Motion for Partial Summary Judgment shows that they rely on the same arguments. Dkt. 40.

DPI relies on a host of cases from the Ninth and Eleventh Circuits that are simply inapplicable. Both the Ninth and Eleventh Circuits do not apply the same

exacting standard for adequacy that the Seventh Circuit has adopted. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (multi-factored test to determine whether the presumption of adequacy applies); *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 910 (11th Cir. 2007) (characterizing the presumption of adequacy raised by common objectives as a "weak" one).

The district court decisions from the Ninth Circuit are also easily distinguishable. In *Issa v. Newsom*, No. 20-cv-01044, 2020 U.S. Dist. LEXIS 102013, at *9-*10 (E.D. Cal. June 10, 2020), candidates and voters challenged the Governor's Executive Order issuing vote-by-mail ballots to all registered voters statewide, which was in direct contradiction to the state law at the time of the issuance of the executive order. The district court there found the defendants' interests of issuing and administering the ballots to be materially distinct from the proposed intervenor's interests of ensuring an opportunity for party members to *cast* and *count* the members' ballots. *Id.* at *10. That is simply not the case here, where both DPI and the State Board share an interest in *counting* vote-by-mail ballots received 14 days after Election Day.

In *Paher v. Cegavske*, No. 20-cv-000243, 2020 U.S. Dist. LEXIS 74095, at *7-*8 (D. Nev. Apr. 28, 2020), the district court found inadequacy simply because the intervenor would present arguments that the existing defendants did not, thereby applying a standard routinely rejected in this Circuit. *See Planned Parenthood*, 942

F.3d at 808 (Sykes, J., concurring) ("mere disagreement over litigation strategy is not enough to show inadequacy of representation" (citation omitted)); *United States v. Bd. of Sch. Comm'rs of Indianapolis*, 466 F.2d 573, 575 (7th Cir. 1972) ("That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [defendants] did not adequately represent their interests" (citations omitted)). But even if that were the standard in this Circuit, the pleadings between DPI and the existing Defendants show there is no disagreement over litigation strategy.

Unlike the cases relied on by DPI, the most analogous case applying this Circuit's precedent is *Feehan*, 2020 U.S. Dist. LEXIS 228591. There, the Democratic National Committee filed a motion to intervene alongside state defendants in an action seeking to challenge the certification of Wisconsin's 2020 presidential election results. *Id.* at *2-*4. The Democratic Party there asserted similar interests to DPI here, namely, "an interest in avoiding disenfranchisement of its constituents and in avoiding having to 'divert resources to safeguard the timely certification of statewide results.'" *Id.* at *9. The Wisconsin Elections Commission, the named defendant, had a broader goal of defending the certification and the votes of *all* voters in Wisconsin, which aligned with the intervenor's more narrow goal of defending Democratic voters. *Id.* at *18-*19. The court concluded that the alignment of goals between the two parties warranted the presumption of adequacy. *Id.* at *19.

DPI's attempt to distinguish *Feehan* fails. Though the remedies requested here are different than in *Feehan*, there is no indication in *Feehan* that the presumption analysis somehow turned on whether it involved a post-election certification challenge. Rather, the state defendants' ultimate goal of protecting the certification of *all* ballots sufficiently aligned with Democratic Party's interest of safeguarding *Democratic* ballots. The asserted interests here and those in *Feehan* are, in that sense, identical.

The district court correctly concluded that the intermediate standard of presumption of adequacy applies to DPI.[6]

ii. DPI Failed to Make Any Showing to Overcome the Presumption of Adequacy of Representation.

Under the general rule, when the "intervenor's and the named party's ultimate goals are identical … it is reasonable, fair, and consistent with the practical inquiry required by Rule 24(a)(2) to start from a presumption of adequate representation," which can be rebutted by showing "a concrete, substantive conflict or an actual

[6] Even assuming *arguendo* that the more lenient standard applies here, DPI has made no showing either before the trial court or in its opening brief that representation "may" be inadequate. DPI's sole argument for why representation may be inadequate is that it "has specific interests and concerns" that none of the existing parties in this action share. *See* DPI Br. at 20-21. But proposed intervenors can always restate or recast their interests as more "specific" than existing parties. If this were all that were required to show inadequacy of representation, private parties could always satisfy this element by simply alleging a more "specific" interest. It is DPI's burden to make a showing of inadequacy of representation, and DPI cites no controlling authority in this Circuit that has found representation inadequate whenever a proposed intervenor claims "specific interests and concerns." Plaintiffs-Appellees have found none.

divergence of interests to overcome it." *Planned Parenthood*, 942 F.3d at 810 (Sykes, J., concurring) (citations omitted); *see also* 7C Charles Alan Wright, et al., Federal Practice & Procedure § 1909, at 393-394 (3d ed.). DPI does not even come close to showing a conflict or an actual divergence of interests between itself and the existing Defendants sufficient to overcome this presumption.

DPI's "specific interests and concerns" regarding "its overall electoral prospects" and "the most efficient use of its limited resources to promote" voter registration efforts do not show the type of "conflict" or "divergence" of interests required to overcome this presumption. Small "differences between the State's interest and those of the [proposed intervenor]" do not rebut the presumption of adequacy when both the named defendants and the proposed intervenor "share the same narrow objective: to uphold [the state law]." *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *15. As the Fourth Circuit explained in considering a similar argument:

> At bottom, appellants' argument is that . . . their interests . . . are "stronger" and more "specific" than the state's general interest. But stronger, more specific interests do not adverse interests make—and they surely cannot be enough to establish inadequacy of representation since would-be intervenors will nearly always have intense desires that are more particular than the state's (or else why seek party status at all). Allowing such interests to rebut the presumption of adequacy would simply open the door to a complicating host of intervening parties with hardly a corresponding benefit.

Stuart v. Huff, 706 F.3d 345, 353 (4th Cir. 2013).[7] *See also Planned Parenthood*, 942 F.3d at 810-811 (Sykes, J., concurring) ("political and policy differences with the [current defendants]" and "disagreements about litigation strategy in this and other cases" is "not enough to rebut the presumption of adequate representation."); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996) (the government agency's "additional interests stemming from its [counsel's] unique status as the lawyer for the entire federal government" does not rebut the presumption of adequacy).

DPI here fails to identify any specific question where there might be adversity, or cite any specific fact to show such adversity. Its argument that an allegation of "specific interests" is enough to show a material conflict to warrant the more lenient standard regarding adequacy of representation has been routinely rejected by this Circuit and district courts within it, as well as courts of appeal in the Fourth Circuit. *See Keith*, 764 F.2d at 1270; *Solid Waste Agency*, 101 F.3d at 508; *Stuart*, 706 F.3d at 353; *Feehan*, 2020 U.S. Dist. LEXIS 228591, at *16-*17; *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *15.

DPI's reliance on *Trbovich*, 404 U.S. 528 (1972) and *Berger*, 142 S. Ct. at 2203-04 is misplaced. DPI Br. at 17. In *Trbovich*, "the government had substantive

[7] Unlike the Ninth and Eleventh Circuits, the Fourth Circuit follows the same presumption of adequacy of representation approach as the Seventh Circuit whenever the proposed intervenor and government share similar goals.

interests at variance with that of the individual on whose behalf it had sued." *Solid Waste Agency*, 101 F.3d at 508. The law at issue in *Trbovich* "impose[d] on the Secretary the duty to serve two distinct interests, which are related, but not identical." *Id.* at 538. Not so here, where there is no legal obligation of the State Board of Elections to serve substantive interests at variance with those of DPI. Rather, the duty imposed upon the State Board is to defend the interests of all voters who wish to vote by mail, including *Democratic* voters. *See* Dkt. 56 at 15, A15.

Berger's reasoning is also unhelpful to DPI's position. *Berger* involved *legislative governmental* intervenors who attempted to intervene alongside state governmental defendants. The Supreme Court found the presumption of adequacy of representation inappropriate whenever a legislative governmental body attempts to intervene to defend state law alongside governmental defendants, regardless of whether the defendants share similar goals. *See id.* at 2204 (the "presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law."). The Court did "not decide whether a presumption of adequate representation might sometimes be appropriate when a private litigant seeks to defend a law alongside the government." *Id.*

The presumption of adequacy whenever a private litigant seeks to intervene alongside a government body that shares similar goals with the private litigant is the law of this Circuit and can only be overcome by a showing of some conflict or

adversity of interests. As the district court here correctly noted, DPI has made no such showing, and it is adequately represented by the existing Defendants.

III. The District Court Did Not Abuse Its Discretion in Denying Permissive Intervention.

A 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. The district court's decision on "permissive intervention is 'wholly discretionary,'" and this Court will "review the denial of permissive intervention for an abuse of that discretion." *Planned Parenthood*, 942 F.3d at 803 (citing *Babbitt*, 214 F.3d at 949). While district courts may not deny permissive intervention solely on the grounds of failure to satisfy an element of intervention as of right, this Court does not "prohibit consideration of the elements of intervention as of right as discretionary factors" for denial of permissive intervention. *Id.* at 804. Even where a district court "did not explicitly break out its reasoning" on the denial of permissive intervention, this Court has "affirmed so long as the 'decision shows a thorough consideration of the interests of all the parties.'" *Id.* (citing *Ligas*, 478 F.3d at 776). "Reversal of a district court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique." *Id.* at 803 (quoting *Shea*, 19 F.3d at 346 n.2).

The bulk of DPI's objection to the district court's decision denying permissive intervention is its objection to the court's determination that additional parties would

delay proceedings in an otherwise time-sensitive case. DPI Br. at 21-22. But the district court in its considerable discretion found that additional equitable considerations weighed in favor of denying permissive intervention here. In addition to finding that intervention would impede the timely resolution of this action, the district court found that the interests of DPI and existing defendants were "categorically the same," that defending the statute on behalf of *one ideological* set of voters makes DPI "a less ideal candidate" to defend the interests of all voters, and that DPI, "by its own admission, makes functionally the same legal arguments" as existing defendants in its pleadings. Dkt. 56 at 16-17, A16-A17. The district court's "decision shows a thorough consideration of the interests of all the parties" and concluded that allowing additional parties to intervene in the case would tax judicial resources without any corresponding benefit to the litigation. *Ligas*, 478 F.3d at 776 (citing *United States v. Perry County Bd. of Educ.*, 567 F.2d 277, 280 (5th Cir. 1978)); *see also 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, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988) (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").

The district court did not abuse its discretion in finding the equitable considerations weighed in favor of denying permissive intervention.

CONCLUSION

For the foregoing reasons, the district court's decision denying DPI's motion to intervene should be affirmed.

Dated: February 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and per Microsoft Word count, the brief is within the word limit at 6510 words excluding tables and certificates.

Dated: February 2, 2023 *s/ Eric W. Lee*

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d)(2), that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the appellate CM/ECF system. I certify that the parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF service.

Dated: February 2, 2023 *s/ Eric W. Lee*