

SUPREME COURT OF WISCONSIN

No. 2020AP001971

DONALD J. TRUMP, MICHAEL R. PENCE, and DONALD
J. TRUMP FOR PRESIDENT, INC.,

Petitioners,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official
capacity, *et al.*,

Respondents.

Original Action in the Wisconsin Supreme Court

**MOTION TO INTERVENE OF PROPOSED
INTERVENOR-RESPONDENTS DEMOCRATIC
NATIONAL COMMITTEE AND THE BIDEN
ELECTORS**

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TABLE OF CONTENTS

INTRODUCTION1

ARGUMENT.....3

I. The proposed Intervenor-Respondents are entitled to
intervene as a matter of right3

 A. The Motion to Intervene is timely4

 B. The DNC and Biden Electors both have compelling
 interests at stake in this action.....5

 C. Denial of the Motion to Intervene would impair the
 Biden Electors’ and the DNC’s ability to protect
 their interests.....9

 D. The Biden Electors’ and DNC’s interests are not
 adequately represented by the current parties11

 E. “Blending and balancing” the intervention
 requirements confirms the right of proposed
 Intervenor-Respondents to intervene15

II. In the alternative, the Court should exercise its
discretion under Wis. Stat. § 803.09(2) to permit the
Biden Electors and DNC to intervene16

CONCLUSION17

CERTIFICATION **ERROR! BOOKMARK NOT
DEFINED.**

TABLE OF AUTHORITIES

CASES

<i>Armada Broad., Inc. v. Stirn</i> , 183 Wis. 2d 463, 516 N.W.2d 357 (1994)	11, 12
<i>Bay Cnty. Democratic Party v. Land</i> , 347 F. Supp. 2d 404 (E.D. Mich. 2004)	6
<i>Citizens for Balanced Use v. Mont. Wilderness Ass’n</i> , 647 F.3d 893 (9th Cir. 2011)	11
<i>City of Chicago v. Fed. Emergency Mgmt. Agency</i> , 660 F.3d 980 (7th Cir. 2011)	17
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , No. 4:20-cv-02078, 2020 WL 6821992	11
<i>Donald J. Trump for President Inc. v. Boockvar</i> , No. 4:20-cv-02078 (M.D. Pa. Nov. 12, 2020)	8
<i>Donald J. Trump for President, Inc. v. Cegavkse</i> , No. 2:20-cv-1445, 2020 WL 5229116 (D. Nev. Aug. 21, 2020)	8
<i>Donald J. Trump for President, Inc. v. Murphy</i> , No. 20-cv-10753, 2020 WL 5229209 (D. N.J. Sept. 01, 2020)	14

<i>Flying J, Inc. v. Van Hollen</i> , 578 F.3d 569 (7th Cir. 2009)	10
<i>Helgeland v. Wis. Muns.</i> , 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1	passim
<i>In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election</i> , No. 1171 C.D. 2020 (Pa. Nov. 19, 2020)	8
<i>Issa v. Newsom</i> , No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351 (E.D. Ca. June 10, 2020)	14
<i>State ex rel. Bilder v. Twp. of Delavan</i> , 112 Wis. 2d 539, 334 N.W. 2d 252 (1983)	5
<i>Tex. Democratic Party v. Benkiser</i> , 459 F.3d 582 (5th Cir. 2006)	7
<i>Utah Ass’n of Counties v. Clinton</i> , 255 F.3d 1246 (10th Cir. 2001)	13

STATUTES

Wis. Stat. § 803.09(1)	3, 4, 6, 16
Wis. Stat. § 803.09(1)–(2)	1, 3
Wis. Stat. § 803.09(2)	16
Wis. Stat. § 803.09(3)	2

OTHER AUTHORITIES

Federal Rules of Civil Procedure Rule 24(a)(2)	6
--	---

1 Jean W. Di Motto, *Wisconsin Civil Procedure*
Before Trial § 4.61 (2d ed. 2002).....12

INTRODUCTION

The proposed Intervenor-Respondents, the Democratic National Committee (“DNC”), and Margaret J. Andrietsch, Sheila Stubbs, Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, and Benjamin Wikler (collectively, the “Biden Electors”) (together, the “Intervenors”), respectfully seek leave to intervene in these proceedings pursuant to Wis. Stat. § 803.09(1)–(2) to oppose the Petition for Original Action (“Petition”) filed by Donald J. Trump, Michael Pence, and Donald J. Trump for President, Inc. (“Petitioners”). Each of the Biden Electors is among the slate of ten presidential electors nominated by the Democratic Party and certified by Governor Tony Evers.¹ They are now empowered to and intend to cast Wisconsin’s electoral college votes for

¹ Elector Tony Evers is already a defendant in this action.

President-Elect Biden and Vice President-Elect Harris. The Intervenor has conferred with Petitioners, who object to the DNC and Biden Electors' intervention.

On November 3, 2020, and as subsequently confirmed by a recount, President-Elect Biden won the popular vote in Wisconsin. Petitioners now are trying to undo those election results. The Intervenor requests this Court deny the Petition. If, on the other hand, this Court accepts this matter as an original action, the Intervenor requests to be permitted to participate fully in all subsequent proceedings in this Court. In compliance with Wis. Stat. § 803.09(3), the Intervenor is filing with this motion their Opposition to the Petition for Original Action, which establishes that Petitioners do not meet the requirements for the Court to exercise its limited original jurisdiction.

In part, Petitioners ask this Court to declare "the Governor's certification of the election and naming of the

electors void *ab initio* and order[] it withdrawn.” Pet. at 25. Granting this relief would be unprecedented and would silence the voices of more than 3.2 million Wisconsin voters who voted lawfully.

Wisconsin law allows for intervention as of right and for permissive intervention under this Court’s broad discretion to allow intervention by parties with cognizable interests in a matter. Wis. Stat. § 803.09 (1)–(2). Petitioners’ request to set aside the results of the election would dramatically affect both the Biden Electors’ and the DNC’s interests and both should be permitted to intervene.

ARGUMENT

I. The proposed Intervenor-Respondents are entitled to intervene as a matter of right.

A party has the right to intervene under Wis. Stat. § 803.09(1) if four conditions are met: (1) the motion to intervene is timely; (2) the movant claims an interest sufficiently related to the subject of the action; (3) the movant

is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interests; and (4) the movant's interests are not adequately represented by the existing parties. Wis. Stat. § 803.09 (1); *see also Helgeland v. Wis. Muns.*, 2008 WI 9, ¶¶ 37–38, 307 Wis. 2d 1, 745 N.W.2d 1. Both the Biden Electors and DNC meet each of these factors and are entitled to intervene as a matter of right.

A. The Motion to Intervene is timely.

First, the Motion to Intervene is timely. The Intervenors are seeking intervention the same day Petitioners filed their Petition and within the time period that the Court requested Respondents to file their responses to the Petition. Further, this Court has not yet decided whether to accept original jurisdiction.

Intervention by the DNC and Biden Electors also will neither delay the resolution of this matter nor prejudice any

party. There are no motions pending in the case and thus no plausible claim that intervention would cause any delay. Under these circumstances, the motion is timely. *See State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 550, 334 N.W. 2d 252 (1983) (“The critical factor is whether in view of all of the circumstances the proposed intervenor acted promptly.”).

B. The DNC and Biden Electors both have compelling interests at stake in this action.

Both the Biden Electors and the DNC have compelling interests in the issues addressed in the Petition.

First, the Biden Electors have a direct and compelling interest in defending the certification of their own electoral victory from Petitioners’ attack.

Under Wisconsin law, the interest requirement is satisfied where a petitioner’s interest “is ‘of such direct and immediate character that the intervenor will either gain or

lose by the direct operation of the judgment.” *Helgeland*, 2008 WI 9, ¶ 45 (quoting *City of Madison v. Wisconsin Employment Relations Comm’n*, 2000 WI 39, ¶ 11 n.9, 234 Wis. 2d 550, 558, 610 N.W.2d 94, 98). There is no question that the Biden Electors will “gain or lose by the direct operation of [a] judgment” in this suit. *Id.* Petitioners seek to prevent their appointment to the Electoral College in direct contravention of the decision of Wisconsin’s electorate. Further, the Biden Electors also have a direct interest in defending and supporting the will of the Wisconsin voters who supported their election.² See *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004)

² “Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1).” *Helgeland*, 2008 WI 9, ¶ 37.

(“[P]olitical parties and candidates have standing to represent the rights of voters.”).

Second, the DNC’s interests lie in protecting the voting rights of the DNC’s members and constituents and ensuring that the DNC’s presidential and vice-presidential candidates—President-Elect Biden and Vice President-Elect Harris—are not stripped of their electoral victory in Wisconsin. *Cf. Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (Texas Democratic Party had direct standing based on “harm to its election prospects”). The DNC thus satisfies this Court’s “broader, pragmatic approach” to intervening as a matter of right, in which the interests test serves “primarily [as] a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Helgeland*, 2008 WI 9, ¶¶ 43–44 (quoting *Bilder*, 112 Wis. 2d at 548–49).

Courts have repeatedly granted motions to intervene by the DNC in similar post-election contexts. *See, e.g.*, Order, *Donald J. Trump for President Inc. v. Boockvar*, No. 4:20-cv-02078 (M.D. Pa. Nov. 12, 2020), ECF No. 72 (granting DNC's motion to intervene in litigation seeking to block certification of presidential election in Pennsylvania). And, in analogous circumstances, courts have repeatedly held that when proposed relief carried with it the prospect of disenfranchising the Democratic Party's members, the Democratic Party had a legally cognizable interest at stake. *See Donald J. Trump for President, Inc. v. Cegavkse*, No. 2:20-cv-1445, 2020 WL 5229116, at *1 (D. Nev. Aug. 21, 2020) (DNC allowed to intervene in challenge to voting laws); Order, *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 1171 C.D. 2020 (Pa. Nov. 19, 2020) (DNC participated as intervenor in case concerning validity of mail ballots).

Because both the Biden Electors' and DNC's injuries are direct and significant, the balance weighs strongly in favor of allowing both parties to intervene.

C. Denial of the Motion to Intervene would impair the Biden Electors' and the DNC's ability to protect their interests.

Denial of the Motion to Intervene would interfere with both the Biden Electors' and DNC's ability to protect their interests. As to this element of the test for intervention, this Court has similarly emphasized "a pragmatic approach" and a "focus on the facts of each case and the policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶ 79 (citing Moore's Fed. Prac. § 24.03[3][a], at 24–42). The Court has identified two potential factors to weigh in considering this prong: (1) "the extent to which an adverse holding in the action would apply to the movant's particular circumstances"; and (2) "the extent to which the action into which the movant seeks to intervene will result in a novel holding of law." *Id.* ¶¶

80–81. Intervention is more warranted when a novel holding is at stake because its *stare decisis* effect is “more significant when a court decides a question of first impression.” *Id.* ¶ 81.

In this case, Petitioners seek to render the “Governor’s certification of the election and naming of the electors void *ab initio* and order[] it withdrawn.” Pet. at 25. Accordingly, there is no question that an adverse ruling would severely impair the Biden Electors’ ability to protect their interests. *See, e.g., Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (granting intervention when proposed intervenors “would be directly rather than remotely harmed by the invalidation” of challenged statute). The DNC’s interests would be similarly impaired.

Further, the Biden Electors’ and DNC’s right to intervene is especially clear given that the Petitioners are asking this Court for the extraordinary and unprecedented relief of nullifying the election results. Pet. at 25–26; *see also*

Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-cv-02078, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020 (“This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated.”)).

Ultimately, when, as here, a proposed intervenor has a protectible interest in the outcome of litigation, courts have “little difficulty concluding” that its interests will be impaired. *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 898 (9th Cir. 2011).

D. The Biden Electors’ and DNC’s interests are not adequately represented by the current parties.

Finally, the Biden Electors’ and DNC’s interests are not adequately represented by the existing parties. The burden to satisfy this factor is “minimal.” *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994) (quoting

Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972)). When there is a realistic possibility that the existing parties' representation of the proposed intervenor's interests will be inadequate, "all reasonable doubts are to be resolved in favor of allowing the movant to intervene and be heard on [its] own behalf." 1 Jean W. Di Motto, *Wisconsin Civil Procedure Before Trial* § 4.61, at 41 (2d ed. 2002) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)).

The named government Respondents do not adequately represent either the Biden Electors' or DNC's interests. Both intervenors have a "special, personal [and] unique interest[s]" that are distinct from the Respondents' interests. *Helgeland*, 2008 WI 9, ¶ 116. Government entities cannot be expected to litigate "with the vehemence of someone who is directly affected" by the litigation's outcome. *Armada Broad.*, 183 Wis. 2d at 476.

As described, the DNC faces severe injuries in the form of massive disenfranchisement of its members and constituents and having its presidential and vice-presidential candidates stripped of their electoral votes. Further, the Biden Electors face severe injury. Petitioners request that their naming be “void *ab initio*.” Pet. 25.

By contrast, the Respondents’ interests are defined by their statutory duties to conduct elections and their responsibilities to their constituents as a whole. *See, e.g., id.*; *see also Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001) (“[T]he government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [political candidate] merely because both entities occupy the same posture in the litigation.”).

Notably, as to the DNC, because government entities and political parties and candidates have fundamentally

different interests and objectives, courts routinely permit political parties to intervene in actions where election officials are named as defendants. *See, e.g., Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Ca. June 10, 2020) (“While Defendants’ arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the proposed Intervenor is concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures.”); *Donald J. Trump for President, Inc. v. Murphy*, No. 20-cv-10753, 2020 WL 5229209, at *1 (D. N.J. Sept. 01, 2020).

E. “Blending and balancing” the intervention requirements confirms the right of proposed Intervenor-Respondents to intervene.

That the Biden Electors and the DNC are entitled to intervene as a matter of right is further supported by this Court’s guidance that “the criteria need not be analyzed in isolation from one another, and a movant’s strong showing with respect to one requirement may contribute to the movant’s ability to meet other requirements as well.” *Helgeland*, 2008 WI 9, ¶ 39. The “interplay” between the intervention factors “must be blended and balanced.” *Id.*

Here, the interplay strongly confirms the Biden Electors’ and DNC’s right to intervene in this proposed original action. Not only is the Intervenor’s request timely, both parties have unique rights at stake that would be impaired by Petitioners’ requested relief. Further, no other party can adequately defend these rights—preventing the disenfranchisement of the Wisconsinites who voted for the

DNC's presidential and vice-presidential candidates and preserving the electoral votes won by those candidates. Therefore, under Wis. Stat. § 803.09(1), both the DNC and Biden Electors are entitled as a matter of right to intervene.

II. In the alternative, the Court should exercise its discretion under Wis. Stat. § 803.09(2) to permit the Biden Electors and DNC to intervene.

In the alternative, this Court should permit the Biden Electors and the DNC to intervene under Wis. Stat. § 803.09(2). This Court can exercise its broad discretion to permit a party to intervene when the “movant’s claim or defense and the main action have a question of law and fact in common,” intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties,” and the motion is timely. Wis. Stat. § 803.09(2); *see also Helgeland*, 2008 WI 9, ¶¶ 119–20. Even when courts deny intervention as of right, they often find that permissive intervention is

appropriate. *See, e.g., City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986 (7th Cir. 2011).

The Biden Electors and the DNC meet the criteria for permissive intervention. The motion to intervene is timely and, given that this litigation is at an early stage, intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Moreover, the Biden Electors and DNC will inevitably raise common questions of law and fact, including the threshold issue of whether an original action is appropriate in the circumstances of this case. The Biden Electors and DNC are prepared to proceed in accordance with the schedule this Court determines, and its intervention will contribute to the complete development of the factual and legal issues before this Court.

CONCLUSION

For the reasons stated above, this Court should grant the Intervenors' motion to intervene as a matter of right. In

the alternative, this Court should exercise its direction and grant the Biden Electors and DNC permissive intervention.

Dated: December 1, 2020

By: __



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CERTIFICATION

I certify that on this 1st day of December, 2020, I caused a copy of this motion to be served upon all parties via e-mail.

Dated: December 1, 2020.

A handwritten signature in blue ink, appearing to read "Charles G. Curtis, Jr.", is written over a horizontal line.

Charles G. Curtis, Jr.