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CLERK OF WISCONSIN
SUPREME COURT

**IN THE SUPREME COURT OF WISCONSIN**
**No. 2024AP001643**

DAVID STRANGE, INDIVIDUALLY AND AS DEPUTY OPERATIONS DIRECTOR - WISCONSIN FOR THE DEMOCRATIC NATIONAL COMMITTEE,

*Petitioner,*

v.

WISCONSIN ELECTIONS COMMISSION (WEC); MEAGAN WOLFE, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF WEC; DON MILLIS, ROBERT SPINDELL, JR., MARGE BOSTELMANN, ANN JACOBS, MARK THOMSEN, AND CARRIE RIEPL, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF WEC, AND WISCONSIN GREEN PARTY,

*Respondents.*

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# REPUBLICAN PARTY OF WISCONSIN'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE

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## INTRODUCTION

Proposed Intervenor-Respondent, the Republican Party of Wisconsin ("RPW"), respectfully seeks leave to intervene pursuant to Wis. Stat. § 803.09(1)-(2) to oppose the Petition for Original Action ("Petition") filed by David Strange, Deputy Operations Director of the Wisconsin Democratic Committee ("Petitioner").

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). If granted, Petitioner's request to remove the Wisconsin Green Party ("WGP") from the ballot will substantially affect the RPW's interests, not only with regard to this election but how it governs itself as a political party. The RPW should be permitted to intervene.

The RPW acknowledges this Court's August 22, 2024 Order instructing non-parties to file a non-party brief amicus curiae. The RPW believes, however, that it should be made a party in this case in order to adequately protect its interests. First, any resolution of the underlying merits of this case will necessarily impact the internal administration of the RPW. Second, it is unclear whether the WGP, as a minor party, will be able to mount a complete and adequate defense in this case, especially in light of the fact that the WGP has not yet been able to find legal counsel.[1] Even if it were able, the interests of the WGP as a minor party inevitably diverge from those of the RPW.[2] Third, the vast import of this case

[1] *See* E-mail received from Michael J. White, Co-Chair, Wisconsin Green Party, August 22, 2024.

[2] This divergence is evidenced by statements made by representatives of the WGP indicating that they believe Wis. Stat. § 8.18(1) does not apply to the WGP at all because it is a minor party. *See* Sarah Lehr, *Democrats ask Wisconsin Supreme Court to boot Green Party from ballot*, Wisconsin Public Radio, August 20, 2024 (available at: https://www.wpr.org/news/democrats-wisconsin-supreme-court-boot-green-party-

and the timeline on which it has been presented may invite further litigation in federal court. Namely, an emergency stay in the United States Supreme Court. As a non-party, the RPW would not have standing to seek such relief.

Finally, no party will be harmed if the RPW is granted intervention. The RPW fully intends to file a substantive response brief by the Court's August 23, 2024, 5:00 pm deadline whether it is granted intervention or, if intervention is denied, as a non-party pursuant to Wis. Stat. § 809.19(7), with leave of this Court.

## ARGUMENT

### I. The RPW is 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. *See also Helgeland v. Wis. Muns.*, 2008 WI 9, ¶¶ 37-38, 307 Wis. 2d 1, 745 N.W.2d 1. The RPW meets each of these factors and is entitled to intervene as a matter of right.

#### A. RPW's Motion to Intervene is Timely

First, the Motion to Intervene is timely. The RPW is seeking intervention at the earliest possible moment—four days after the Petition was filed and before any counsel

voting-ballot-2024). This position could very well result in the WGP advocating legal positions that undermine the proper interpretation of § 8.18 and negatively impact the RPW.

have appeared for any Respondent. Further, this Court has not yet decided whether to exercise its original jurisdiction and the deadline for responses has not yet passed.

Intervention by the RPW will neither delay the resolution of this matter nor prejudice any party. There are no other motions pending in the case. None of the nine respondents have appeared. RPW seeks to participate at the ground floor. No delay will result. 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 RPW has compelling interests at stake in this action**

The RPW has compelling interests in the issues addressed in the Petition. Wisconsin courts assess whether a movant's interests are "sufficiently related" to an action by employing a "pragmatic, policy-based approach" that views the asserted interest[s] "practically, rather than technically." *Bilder*, 112 Wis. 2d at 547–48. In other words, judicial efficiency matters, and a movant's asserted interests function "'primarily as a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with due process.'" *Id*. at 548–549 (citation omitted). While there must be some "sense in which the 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, the movant's interest does not have to be "'judicially enforceable' in a separate proceeding." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 744, 601 N.W.2d 301 (Ct. App. 1999). Additionally, an interest that is "special, personal, or unique" weighs in favor of intervention. *Helgeland*, 2008 WI 9, ¶¶ 116. The RPW, as one of two major political parties

in Wisconsin, has a "special, personal, or unique" interest in the outcome of this case—especially when it opposes the positions taken and relief sought by the only other major political party. Additionally, at this time, it is unclear if the WGP will appear in this litigation. The Court should welcome the opportunity to have the political parties representing the other candidates implicated by this action participate, particularly when it is asked to decide questions related to ballot access and internal party governance.

The RPW has "a direct and substantial interest in the proceedings" because they "affect the [Movants'] ability to participate in and maintain the integrity of the election process in [Wisconsin]." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022). Courts routinely recognize that political parties have interests in election cases like this one. *See, e.g., Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991); *Radogno v. Ill. State Bd. of Elections*, 2011 WL 5868225, *1 (N.D. Ill. Nov. 22, 2011).[3] Indeed, given their inherent and broad interest in elections, usually "[n]o one disputes" that a political party "meet[s] the impaired interest requirement for intervention as of right." *Citizens United v. Gessler*, 2014 WL 4549001, *2 (D. Colo. Sept. 15, 2014).

The law Petitioner invokes is designed to serve "the integrity of [the] election process," *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and promote the "orderly administration" of elections*, Crawford v. Marion Cty. Election Bd.*, 553 U.S.

[3] Though the cited federal cases reference the Federal intervention standard found in Rule 24, the requirements of that standard are substantially identical to Wis. Stat. § 803.09(1).

181, 196 (2008) (op. of Stevens, J.). The RPW "ha[s] a legally protectable interest" in the correct interpretation and constitutionality of this law, because it helps the RPW effectively "maintain the integrity of the election process." *La Union del Pueblo Entero*, 29 F.4th at 306. And because the RPW's candidates "actively seek [election or] reelection in contests governed by the challenged rule[]," the RPW also has an interest in "demand[ing] adherence" to that law as properly applied. *Shays v. FEC*, 414 F.3d 76, 88 (D.C. Cir. 2005).

Not only does the RPW have a direct interest in the integrity of the ballot, but § 8.18(1), and in particular Petitioner's interpretation of that section, impacts the internal governance and structure of the RPW. State regulations on how a political party governs itself, particularly in the context of a presidential election, implicate important associational rights and are subject to First Amendment scrutiny. *See Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) (state cannot dictate the process of selecting state delegates to Democratic National Convention); *Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975) (State cannot dictate who may sit as state delegates to Democratic National Convention). Any interpretation of § 8.18(1) necessarily affects how the RPW operates.

Because RWP's interests are direct and significant, the balance weighs strongly in favor of intervention.

**C. Denial of the Motion would impair the RPW's ability to protect its interests**

Denial of RPW's Motion would interfere with the RPW's ability to protect its interests. This Court emphasizes "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). This Court considers two potential factors: (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, Petitioner advances a potentially incorrect and unconstitutional interpretation of Wis. Stat. § 8.18(1), a statute that bears directly on the process by which the RPW governs itself. Further, no court has interpreted the provision of § 8.18(1) at issue in this case, rendering any such interpretation "novel." As such, the RPW must be allowed to protect its interests at this and all stages of litigation.

**D. The existing parties do not adequately represent the RPW's interests**

Finally, no existing party adequately represents the RPW's interests.

First, the WEC and its commissioners do not share the RPW's interests in its own operation and structure. The WEC additionally has no interest in who the RPW will face on the ballot in Wisconsin, the election of particular candidates, the mobilization of particular voters, or the costs associated with such an undertaking. Accordingly, the RPW seeks to intervene in this case to ensure that the following arguments are at least considered by the Court.

**1. RPW would argue that the Court should refrain from exercising original jurisdiction.**

Simply, the WEC's meeting to certify candidates for the presidential election has not occurred. As it stands, the WEC has yet to decide whether the WGP's candidates will

be certified to the counties under Wis. Stat. § 10.06(1)(i). Petitioner's claims are, therefore, contingent on the WEC's subsequent decision to include the WGP's presidential and vice presidential candidates on the ballot in spite of that failure. *See Int. of C. G.*, 2021 WI App 11, ¶29 n.7, 396 Wis. 2d 105, 955 N.W.2d 443, *aff'd,* 2022 WI 60, 403 Wis. 2d 229, 976 N.W.2d 318 (A "claim is not ripe if it rests on contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citations omitted)); *Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, ¶3, 320 Wis. 2d 45, 768 N.W.2d 783 (when the resolution of a claim "depends on hypothetical or future facts, [it is] not ripe for adjudication and will not be addressed by this court.") (citations omitted)).

Additionally, there are disputed facts which require adversarial development and judicial factfinding, particularly flowing from Petitioner's assertion that excluding the WGP from the presidential ballot would not implicate the constitutional rights of the WGP and other political parties, including the RWP. Wis. Stat. § 5.06(8) requires Petitioner to file its grievance in the "circuit court for the county where the official conducts business or the complainant reside[.]" This makes sense, as the legislature contemplated that these types of disputes would require factual development, rendering them poor fits to be heard in the first instance by this Court. Foregoing the normal litigation process deprives the parties of the ability to "hone, winnow, and refine" their legal arguments through the adversarial process. *Evers v. Marklein*, No. 2023AP2020, unpublished order at 4 (Wis. Feb. 2, 2024) (Hagedorn, J., dissenting). It also denies the Court the opportunity to "benefit from the work of [its] colleagues in the circuit court and court of appeals." *Id.*

**2. The Court should hear from the RPW regarding whether § 8.18 requires a minor political party to have non-presidential candidates or officeholders to place a presidential candidate on the ballot.**

Section 8.18 is the sole basis for Petitioner's requested relief. It claims that the WGP has no enumerated individuals capable of nominating its electors. Petitioner claims that "state officer" as used in § 8.18 has the same meaning as "state office" in § 5.02(23), such that "state officer" in § 8.18 means a member of that political party who holds one of the listed "office[s]" in § 5.02(23). This interpretation suffers from two primary flaws. First, the terms "state office" and "state officer" are not the same, and "state officer" is undefined. Second, the definition of "state office" in § 5.02(23) includes nonpartisan positions that necessarily would not be "of" any political party, as that phrase is used in § 8.18.

If the Court accepts Petitioner's interpretation of § 8.18—particularly that the term "the state officers…of each political party" means statewide elected officials of that party, rather than the party's internal leadership—the process for nominating presidential electors in Wisconsin has an enormous blind spot. Minor parties that want to only run for one office (*i.e.*, president) effectively *cannot* do so, even if they showed a sufficient modicum of support in the prior election by putting forth a candidate that received over 1% of the vote. Wis. Stat. § 5362(1)(b). The Court's interpretation of the term "state officers" is important to RPW, as it will implicate how the RPW conducts itself in future elections.

**3. If Petitioner's interpretation is correct, § 8.18 is an unconstitutional restriction on minor party ballot access for presidential elections.**

Finally, without the presence of WGP to advocate for itself, Petitioner proactively argues that its interpretation of § 8.18 would not violate WGP's constitutional rights. Pet.

MIS at p. 25. But a requirement that a party run candidates for multiple unrelated, state-level elections just to gain access to the presidential ballot *does* burden the party's First Amendment rights, particularly when layered on top of the requirement under § 5362(1)(b) that the party have a candidate garner more than 1% of the vote in the prior election. Though states may "insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support," *Am. Party of Texas v. White*, 415 U.S. 767, 782 (1974), that is already accomplished here (and often, in other states) by setting a statewide support requirement like 1%.

Requiring a party to field candidates in additional state-level races in Wisconsin to gain access to the *presidential* ballot is not only far more burdensome than the 1% requirement, it doesn't serve as a legitimate proxy, or test, for the constitutionally-legitimate "modicum of support" attribute. Rather than testing for a party's support within the general population where voters can cast secret ballots, Wisconsin's requirement tests for something completely different: the degree of individual courage within those who choose to subject themselves to scrutiny and, potentially, retaliation by becoming state-level candidates themselves. But that attribute—the courageousness of individuals willing to potentially take a reputational bullet as a minor party's state-level candidate—is not a relevant factor for determining the minor party's degree of support for purposes of keeping an orderly presidential ballot, and therefore requiring it as a condition of ballot access is not a legitimate—or at least not a sufficiently weighty—state interest. Indeed, it seems tailored to stifle the development of minor parties by depriving them of the ability to initially grow their support through the casting of secret ballots by voters who are

sympathetic but not yet ready to publicly take risks for the party. With secret ballots, no person (other than a presidential candidate, and the handful of electors chosen before the election) needs to stick out his or her neck for a minor party. Wisconsin cannot have a good reason for requiring otherwise.

Nor is there any reason to believe the requirement is necessary to ensure that the electors chosen are sufficiently loyal to the minor party. Actual officers of the party itself, who in fact run its operations, recruit candidates, and deal with donors, are arguably far more likely than statewide officers—who may well have been captured by interests inimical to the minor party in order to accomplish their political program while in office—to choose loyal electors who would cast their ballots in accord with the popular election results should the minor party candidate be elected. And at any rate, there is no demonstrated history in Wisconsin of party-chosen electors being disloyal to the party's popular vote winner.

Even the most forgiving standard under *Anderson-Burdick* requires the court to weigh the burdens that § 8.18 imposes against the state's interests in requiring the WGP and other parties to clear Petitioner's hurdle. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). At minimum, the Court must hear from the WGP and other political parties—including RPW—regarding the burdens this interpretation would impose. *Anderson*, 460 U.S. at 793 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment."). And it must hear from the state,

via the WEC, regarding its interest in this duplicative and potentially pernicious requirement. The Supreme Court has recognized:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

*Id.* at 794-5 (footnotes omitted). Art. II, § 1 does not "give[] the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." *Id.* at 794, n. 18 (citation omitted).

For all of these reasons, the Petitioner's interpretation of § 8.18 appears to severely burden minor parties while doing little to advance legitimate and important state interests and is therefore likely to fail under *Anderson-Burdick*.

### E. "Blending and balancing" the intervention requirements confirms RPW's right to Intervene.

RPW's right to intervene 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 RPW's right to intervene. Not only is the RPW's request timely, but the RPW

has unique rights at stake that would be impaired by Petitioner's requested relief. Further, no other party can adequately defend these rights, and none have surfaced to do so.

**F. In the alternative, the Court should exercise its discretion under Wis. Stat. § 803.09(2) to permit the RPW to intervene.**

In the alternative, this Court should permit the RPW 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.

The RPW meets 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 RPW will inevitably raise common questions of law and fact as to those at issue in this case, including the threshold issue of whether an original action is appropriate in the circumstances of this case. The RPW is prepared to proceed in accordance with the Court's August 22, 2024 Order mandating responses be filed by 5:00 pm August 23, 2024, and with any subsequent schedule as determined by this Court, and its intervention will contribute to the complete development of the factual and legal issues before this Court.

## CONCLUSION

For the reasons state above, this Court should grant the Intervenor's motion to intervene as a matter of right, or, in the alternative, this Court should exercise its discretion and grant the Republican Party of Wisconsin permissive intervention.

Dated: August 23, 2024

Respectfully Submitted,

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