**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT II**

RICHARD BRAUN,

Plaintiff–Respondent,

WISCONSIN ELECTIONS COMMISSION,

Defendant–Respondent,

v.

VOTE.ORG,

Proposed Intervenor–Appellant.

Appeal No. 2023AP76

Circuit Court Case No. 2022CV1336



# BRIEF OF PROPOSED INTERVENOR–APPELLANT VOTE.ORG

On Appeal from the
Circuit Court for Waukesha County
Case No. 2022CV1336
The Honorable Michael P. Maxwell, Presiding

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   The circuit court answered no and denied intervention.

   This Court should answer yes.

2. Under Wis. Stat. § 803.09(2), should Vote.org be granted permissive intervention in this lawsuit?

   The circuit court answered no and denied intervention.

   This Court should answer yes.

## STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Vote.org requests that the Court hear oral argument in this appeal because it presents the important question of the proper application of standards for intervention, a question which is arising with increasing frequency in election litigation. Publication is appropriate for the same reason.

## INTRODUCTION

Vote.org is the largest nonprofit, nonpartisan voter registration technology platform in the country. It helped over 4.2 million Americans register to vote in the last presidential election cycle alone. A lean organization, Vote.org achieves these extraordinary results thanks in large part to its sophisticated web platform. To use that platform, an aspiring voter simply types "vote.org" into a browser and clicks on the large blue button reading "Register to Vote." Vote.org's proprietary technology then walks the voter through the steps necessary to register. The platform works for all states that permit online or mail registration, explains local requirements such as voter ID and residency, and even tells voters in states where local clerks process registrations—like Wisconsin—where to mail their forms.

The underlying case threatens to sharply limit Vote.org's work in Wisconsin by prohibiting registration using the National Mail Voter Registration Form (the "national form")—a key component of Vote.org's successful platform. Vote.org uses the national form to help voters whose registrations cannot be processed entirely online, such as Wisconsin voters who lack identification showing a current address. These are often young voters, elderly voters, and voters who have recently moved. The national form is essential to Vote.org's work assisting such voters because it allows Vote.org to channel *all* would-be voters through a single web system with a unified workflow, regardless of state. If Plaintiff Richard Braun's lawsuit succeeds, Vote.org will need to substantially revamp its platform to continue assisting Wisconsin voters. Yet the circuit court denied Vote.org's motion to intervene.

This Court should reverse. Vote.org's motion to intervene was timely, filed just days after Braun filed his complaint. As the circuit court recognized, Vote.org's reliance on the national form to help voters register gives Vote.org a significant interest in this lawsuit. That interest would undeniably be impaired if Braun gets the relief he seeks—an order prohibiting the use of the national form in Wisconsin. And the Wisconsin Elections Commission (WEC) is a government entity that does not

share or adequately represent Vote.org's particular interest in the use of the national form. Vote.org is therefore entitled to intervention of right or permissive intervention. The Court should reverse the circuit court's contrary order.

## STATEMENT OF THE CASE

Braun filed this lawsuit against WEC to challenge Wisconsin's practice of accepting voter registrations made using the national form. R.2:3.[1] He argues that the national form does not comply with the requirements of Wis. Stat. § 6.33(1). R.2:4. In brief, Braun's theory is that the national form both lacks some required features and includes some additional ones not provided for by Wisconsin statute. *See* R.2:8–11. Braun does not assert any particularized stake in what form or forms Wisconsin uses to register voters, but he nonetheless seeks to end the national form's use statewide. *See* R.2:12.

The national form is a product of the 1993 National Voter Registration Act. Pub L. No. 103–31, 107 Stat. 77, 42 U.S.C. § 1973gg–1 *et seq.* (1993). The Act aimed "to establish procedures that will increase the number of eligible citizens who register to vote." 52 U.S.C. § 20501(b)(1). In service to that goal, the Act authorized the creation of a national voter registration form. 52 U.S.C. § 20508(a)(2). The implementing regulation requires that the form "consist of three components: An application, . . . general instructions for completing the application; and accompanying state-specific instructions." 11 C.F.R. § 9428.3. The resulting national form was first promulgated in 1994. It was a resounding success. According to a 2013 review, the mail registration provisions of the Act consistently accounted for between one fifth and one third of all new federal voter registrations in covered states on a yearly basis. *See* R.12:2–3 (citing Royce Crocker, Cong. Rsch. Serv.,



[1] Citations to the record on appeal have the format "R.[document number]:[page number]." Citations to the Appendix, which contains the circuit court's order denying intervention and the transcript of the intervention hearing (including the circuit court's oral ruling), have the format "App. [page number]," followed by a parallel citation to the record.

R40609, *The National Voter Registration Act of 1993: History, Implementation, and Effects* 13 (2013)). Today, the United States Election Assistance Commission (EAC), a bipartisan expert commission, promulgates the national form. *See* U.S. Election Assistance Comm'n, About the U.S. EAC.[2]

Vote.org is a 501(c)(3) nonprofit, nonpartisan organization and technology platform dedicated to voter registration and get-out-the-vote efforts. R.11:1. Since 2016, Vote.org has helped more than 7 million voters register, including tens of thousands of Wisconsinites. R.11:1–2. Vote.org uses the national form to help voters register in Wisconsin and across the country. R.11:8. Vote.org favors the national form because it is "a clear and approachable tool" for voters seeking to navigate the complexities of registration. R.11:8. Part of Vote.org's mission is helping lower-propensity voters to register, including young voters and voters of color. R.11:1. Vote.org's experience has been that the "simple and accessible" nature of the national form helps it to mobilize such voters. R.11:8.

Vote.org's web platform is built around the national form. A voter reaches the voter registration screen by clicking any of the "Register to Vote" links prominently displayed on different parts of the Vote.org website. R.11:2. The voter then enters basic contact information, including a residential address. R.11:3. If the address is in a state that allows online voter registration and accepts the national form, like Wisconsin, the voter is given two options. R.11:4. If the voter prefers to register online and is permitted to do so, she is directed to the state's online voter registration platform—in Wisconsin, the MyVote website maintained by WEC. R.11:5. If the voter prefers to register by mail or lacks the Wisconsin identification required to use the online portal, she is directed to a second screen which asks for more detailed information. R.11:5–6. After the voter fills out that information, the website generates a national form with the voter's information. R.11:7; *see* R.11:12



[2] https://www.eac.gov/about-the-useac (last accessed Apr. 10, 2023).

(sample filled form). The voter must then print the form and sign below an attestation reading, "I have reviewed my state's instructions and I swear/affirm that . . . I meet the eligibility requirements of my state" and "[t]he information I have provided is true to the best of my knowledge under penalty of perjury." R.11:12. Building its mail-registration software around the national form enables Vote.org to "standardize its provision of mail-in voter registration forms across all 50 states," channeling all aspiring voters through a single registration workflow. R.11:9.

Wisconsin has accepted the national form ever since it was introduced. *See* R.85:5. Forty-four states are required by federal law to accept voter registrations made using the national form. *See* 52 U.S.C. § 20503(a)(2). Wisconsin is exempt from this requirement because it allows election-day voter registration. *See* 52 U.S.C. § 20503(b). But Wisconsin has nonetheless chosen to accept the national form for mail registrations since the form's 1995 rollout. *See* R.85:5. The present edition of the Wisconsin Election Administration Manual indicates, without further comment, that Wisconsin "accepts the National Mail Voter Registration Form and the Federal Post Card Application." R.57:33. The national form's state-specific instructions for Wisconsin include a detailed list of this state's registration requirements. R.57:29. The state-specific instructions are updated frequently; Wisconsin's were last updated several days *after* this lawsuit was filed, on September 20, 2022. *See* R.57:29. And state election agencies—including WEC—may request specific updates to their state's instructions. *See* U.S. Election Assistance Comm'n, National Mail Voter Registration Form.[3]



Braun's lawsuit aims to end over 20 years of Wisconsin practice by halting the national form's use in this state. Recognizing the substantial threat to its interests, Vote.org moved to intervene as a defendant just thirteen days after the case was filed. R.13.1. Vote.org claimed a right to intervene under Wis. Stat. § 803.09(1)

[3] https://www.eac.gov/voters/national-mail-voter-registration-form (last accessed Apr. 10, 2023).

and moved in the alternative for permissive intervention under Wis. Stat. § 803.09(2). R.13:2–3. Braun opposed the motion. R.47. WEC took no position. R.45.

The circuit court held a hearing on December 2, 2022. App. 3 (R.73:1). It denied Vote.org's motion in full by oral ruling at the hearing's conclusion. App. 25–31 (R.73:23–29). In its oral ruling, the circuit court held that Vote.org's motion was timely, App. 25 (R.73:23), and that Vote.org's longstanding use of the national form to assist Wisconsin voters gave it a significant interest in the lawsuit, App. 26 (R.73:24). The court nonetheless denied intervention as of right for two reasons. First, the court held that the lawsuit did not threaten "as a practical matter" to "impair or impede" Vote.org's interest, notwithstanding the suit's express aim of banning the national form's use statewide. App. 26–27 (R.73:24–25). The court reached that conclusion because it did not see why it "should care about Vote.org's decision" to build a system reliant on the national form. App. 26 (R.73:24). The court nonetheless indicated that it was "not disputing that Vote.org is making the claim that there's going to be significant costs" to Vote.org if Braun prevailed. App. 27 (R.73:25). Second, the court held that despite WEC's very different statutory role and motivations, it adequately represented Vote.org's interest because it shared Vote.org's ultimate litigation goals. App. 28–29 (R.73:26–27). The court denied permissive intervention for the same reasons. App. 31 (R.73:29). This appeal followed.[4]



## STANDARD OF REVIEW

"Whether to allow or to deny intervention as of right is a question of law," reviewed *de novo*. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 41, 307

[4] Also pending before the Court of Appeals is another appeal from the denial of intervention in another lawsuit against WEC. *See Rise, Inc. v. Wis. Elections Comm'n*, No. 2022AP1838. That appeal presents many of the same issues as this one.

Wis. 2d 1, 745 N.W.2d 1. A denial of permissive intervention is reviewed for an erroneous exercise of discretion. *Id.* ¶¶ 120–21.

## ARGUMENT

### I. Vote.org is entitled to intervene in this case as of right.

The circuit court erred in denying Vote.org's motion to intervene as of right under Wis. Stat. § 803.09(1). A court must grant a motion to intervene if (A) the motion is timely, (B) the movant claims an interest sufficiently related to the subject of the action, (C) the movant shows that that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest, and (D) the movant shows that the existing parties do not adequately represent its interest. Wis. Stat. § 803.09(1); *Helgeland*, 2008 WI 9, ¶ 38; *see also Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994).



The four criteria are not to be "analyzed in isolation from one another"; rather, a "strong showing" on one "may contribute to the movant's ability to meet other requirements." *Helgeland*, 2008 WI 9, ¶ 39. While precedent is informative, each intervention inquiry should be "holistic, flexible, and highly fact-specific." *Id.* ¶ 40. Courts balance two interests: allowing the original parties "to conduct and conclude their own lawsuit" and encouraging "the speedy and economical resolution of controversies" by permitting interested parties to join the suit. *Id.* And because Wis. Stat. § 803.09(1) "is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure" the interpretation and application of the federal rule may "provide guidance" about the Wisconsin rule's interpretation and application. *Id.* ¶ 37.

Here, Vote.org's motion met each of the four requirements for intervention of right, so the circuit court erred in denying the motion.

#### A. Vote.org's motion to intervene was timely.

As the circuit court held, Vote.org's motion was unquestionably timely. A motion to intervene is timely if "in view of all the circumstances the proposed intervenor acted promptly." *State ex rel. Bilder v. Township of Delavan*, 112 Wis.

2d 539, 550, 334 N.W.2d 252 (1983). Vote.org filed its motion just thirteen days after the Complaint was served and before WEC, the sole defendant, had answered. As a result, Braun and the circuit court agreed that the motion was timely. App. 25 (R.73:23).

### B. Vote.org has an interest in continuing to use the national form in Wisconsin.

As the circuit court also held, Vote.org has an adequate interest to support intervention as of right because of its longstanding use of the national form to help Wisconsinites register to vote. "No precise test exists" to determine whether an interest is sufficient to warrant intervention as of right; rather, the related-interest requirement has "generated a spectrum of approaches." *Helgeland*, 2008 WI 9, ¶ 43. The Wisconsin Supreme Court favors a "broader, pragmatic approach," which "measures the sufficiency of the interest by focusing on the facts and circumstances of the particular case before it as well as the stated interest in intervention." *Bilder*, 112 Wis. 2d at 548. Under that approach, "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 (internal quotation marks omitted). And in cases alleging that a "statutory scheme" is being "improperly interpreted and applied," courts "have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." 7C Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1908.1 (3d ed.) [hereinafter "Wright & Miller"].



The circuit court held that Vote.org had satisfied this related-interest requirement for intervention as of right. It recognized that Vote.org had articulated an interest in seeing that "the national form is . . . able to be utilized in Wisconsin." App. 26 (R.73:24). And it found that interest to have a "sufficient connection" to the action for purposes of the intervention statutes. App. 26 (R.73:24). Those conclusions were correct.

Vote.org will lose by "direct operation" of a judgment for Braun. Most concretely, Vote.org will suffer direct pecuniary harm. Vote.org has invested considerable resources to develop a web platform that helps voters in every state navigate the registration process—a one-stop shop. For many Wisconsin voters, that platform depends on the national form: a filled-out national form is the final output for Wisconsin voters who need to register by mail. R.11:7. That group is sizeable, because young voters, elderly voters, and voters who recently moved all may lack identification reflecting their current address, a prerequisite to registering online. *See* Wis. Stat. § 6.30(5). If Wisconsin stops accepting the national form because of this lawsuit, Vote.org will need to redesign and re-code large parts of its website's flowthrough for Wisconsin voters, which will entail considerable costs. R.11:9. Because Vote.org's website actually fills out the form for voters to the extent possible, updating the website will require far more than just uploading the state form. R.11:9. Instead, a software engineer will need to make substantial, costly changes to Vote.org's web architecture. *See* R.11:9. And the resulting pecuniary injury to Vote.org will be a direct consequence of the judgment in this case.

A judgment for Braun will particularly harm Vote.org's capacity to register lower-propensity voters in Wisconsin—including first-time and younger voters and voters of color. The national form is designed by a nonpartisan expert commission pursuant to a congressional mandate to make voter registration simple and straightforward. *See* R.12:8 (quoting J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, Demos (May 20, 2013)). The Wisconsin form, in contrast, is not produced by an expert body specifically funded by Congress to ease the burden of voter registration. A judgment banning the use of the form in Wisconsin will thus undermine Vote.org's mission to enfranchise lower-propensity voters.

And on a national level, judgment for Braun would undermine a key premise of Vote.org's organizing strategy: the near-universal acceptance of the national form for mail registration. At present, 47 states accept mail registrations made using the

national form.[5] That fact allows Vote.org to channel *all* aspiring voters in those 47 states through a single web platform with a unified workflow. Any decrease in the number of states accepting the form undermines that model. A judgment for Braun would have that direct and immediate effect.

Courts routinely hold that such interests suffice for intervention as of right where, as here, the intervenor is a nonprofit organization regulated by the disputed statutory scheme. For instance, in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995), the Ninth Circuit held that a conservation group had an interest sufficient to intervene in a case interpreting how the Environmental Protection Act applied to a species the group had worked to protect. Similarly, in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245–47 (6th Cir. 1997), the Sixth Circuit held that the chamber of commerce had an interest sufficient to intervene in a case challenging amendments to campaign finance laws it had lobbied about and would be subject to. *See also* Wright & Miller § 1908.1 n.45 (collecting nineteen other similar cases). Indeed, nonprofits whose pecuniary or organizational interests will be affected by statutory determinations have been granted intervention as of right even in *property disputes*. *See, e.g.*, *Kane County v. United States*, 928 F.3d 877, 891–92 (10th Cir. 2019) (holding that a conservation group had an interest sufficient to intervene in a quiet-title action between the federal government and a state because the action could affect whether certain roads were widened). Vote.org is in a similar position to the organizations granted intervention in these cases because it has been operating under the statutory scheme in dispute for years. It thus has a substantial interest in whether that scheme will be reinterpreted to render its longstanding practices unlawful.



[5] Practically speaking, only one state can be said to *reject* the national form. North Dakota does not require voter registration at all. R.57:4, 24. New Hampshire treats submission of the national form as an application for a state-specific form. R.57:4, 22. Only Wyoming—the smallest state by population—fully disallows use of the national form, because it does not allow any form of mail registration. R.57:4.

### C. This litigation threatens to impair Vote.org's interest in continuing to use the national form in Wisconsin.

Despite concluding that Vote.org has an interest in the underlying case, the circuit court held that Vote.org's interest was not threatened. That holding was error. Judgment for Braun would prevent Vote.org's continued use of the national form in Wisconsin, a practical impairment to its interest sufficient to warrant intervention as of right. The practical-impairment requirement, like the interest requirement just discussed, "is flexible, and its application depends on a pragmatic analysis of the circumstances of a given case." *Helgeland*, 2008 WI 9, ¶ 79 n.70 (quoting Moore's Federal Practice § 24.03[3][a]). The requirement "is satisfied whenever disposition of the present action would put the movant at a practical disadvantage in protecting its interest." Wright & Miller § 1908.2. Such a disadvantage often will be found when an "adverse holding in the action would apply to the movant's particular circumstances," *Helgeland*, 2008 WI 9, ¶ 80, or when the case will result in "a novel holding of law" that will affect the movant in future litigation, *id.* ¶ 81.

The risk of impairment to Vote.org's interest is straightforward: This case aims to stop the use of the national form in Wisconsin. A holding for Braun would apply to Vote.org's "particular circumstances" because the voters it aims to assist will not be able to register using the national form if state officials are barred from accepting that form by a court order. Nothing more is required to satisfy the practical-impairment requirement. If Vote.org has an interest in using the form in Wisconsin—which *the circuit court itself recognized to be true*—it follows directly that that its interest will be impaired by a judgment banning that form's use statewide.[6]



[6] In the other election-law intervention appeal pending in the Court of Appeals, both the Proposed-Intervenors-Appellants and the Wisconsin State Legislature have argued in support of a practical approach to the impairment requirement. *See* Brief for Appellant at 17–18, *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022AP1838 (Ct. App. Dec. 22, 2022); Brief of Intervenor the Wisconsin

*Helgeland* provides an illustrative contrast. The intervenors there, eight municipalities, sought to intervene in a lawsuit brought by state employees to challenge the inequitable allocation of state benefits to same-sex couples. 2008 WI 9, ¶¶ 1–7. The municipalities claimed an interest in the case primarily because they offered their employees similar or identical benefits plans, meaning a judgment for the state employees would have cast doubt on the legality of the municipal plans. *Id.* ¶¶ 47–52. The Court held that a concern about hypothetical future legal challenges to the municipal plans was "too remote and speculative" to support intervention as of right. *Id.* ¶ 53. Here, in contrast, Vote.org is using the exact form that Braun seeks to ban, so no speculation about future litigation is necessary—Vote.org's use of the form to help Wisconsin voters register would become unlawful as soon as a court forbade the form's use in this state.

In concluding that Vote.org did not show a practical impairment to its interest, the circuit court conflated the required showing of impairment with a (non-existent) requirement that Vote.org establish a merits defense at the intervention stage. The circuit court repeatedly asked why it should "care if Vote.org created a system that doesn't comply with the form that the plaintiffs say is lawful[?] . . . I mean, why should the Court care if Vote.org spent all this time, effort, and money creating a system *that doesn't comply with the form used in Wisconsin*?" App. 6 (R.73:4) (emphasis added); *see also* App. 7 (R.73:5); App. 10 (R.73:8); App. 12 (R.73:10). The court made the same point as part of its oral ruling. App. 27 (R.73:25).

There are two problems with this reasoning. First, at present, the national form *is* used in Wisconsin. Only if Braun succeeds will it not be. The court

State Legislature at 26, *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022AP1838 (Ct. App. Jan. 23, 2023). Both suggest that where, as here, a movant's interest is substantial, any practical hindrance to that interest warrants intervention. Reversal in *Rise* would thus support reversal here.

effectively evaluated the practical impairment to Vote.org's interest against a presumption that Braun was right on the merits. And it denied intervention because it found that *if* Braun prevailed on the merits, then Vote.org would have no impaired interest. Put simply, that is not the standard for intervention as of right. A would-be intervenor needs only to show that the *disposition of the litigation* may, as a practical matter, impair its interest. *Helgeland*, 2008 WI 9, ¶ 79. It need not establish as a threshold to intervention that the plaintiff's challenge to the law is *wrong on the merits*. Thus, the fact that a ruling for Braun in this case would harm Vote.org—as the circuit court's question about its expenditure of "time, effort, and money" recognized—is enough to show that Vote.org faces an impairment of its interest.

Second, the circuit court's approach seemed to require that Vote.org's interest in the litigation *itself be* the source of its substantive defense on the merits. But those are separate matters. Vote.org's interest in the litigation is in preserving the acceptance of the national form so that it can maintain its existing process for helping Wisconsin voters. But Vote.org's argument is *not* that this interest *itself* prevents a court from ruling that the national form violates Wisconsin law. Rather, Vote.org's argument is simply that such a ruling would harm it, as plainly it would. The merits will come later, after intervention, and Vote.org's argument on the merits will be simple—the national form complies with Wisconsin law.



### D. WEC does not adequately represent Vote.org's interest in continuing to use the national form in Wisconsin.

The circuit court also concluded that Vote.org is adequately represented in this litigation by WEC, and that conclusion is erroneous. "[T]he showing required for proving inadequate representation should be treated as minimal." *Helgeland*, 2008 WI 9, ¶ 85 (cleaned up). This Court has explained that the "requirement is satisfied if the applicant shows that the representation of his interest 'may be' inadequate." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 748, 601 N.W.2d 301 (Ct. App. 1999) (cleaned up). That standard is met if the proposed intervenor "may be in a position" to litigate "more vigorously" than the relevant existing party, or if

the intervenor has "more at stake" than the existing party. *Id.* at 748–50. This is so even when the intervenor may offer "similar arguments" to the existing party. *Id.* at 748. *Helgeland* recognized just two narrow exceptions to this "minimal" requirement: if "a movant's interest is *identical* to that of one of the parties, or if a party is *charged by law* with representing the movant's interest" then a more "compelling showing" of inadequacy may be required. *Helgeland*, 2008 WI 9, ¶ 86 (emphasis added).

Under these standards, WEC does not adequately represent Vote.org's interest in this case. Both the circumstances identified in *Wolff* are present: Vote.org is likely to litigate more vigorously than WEC because if Braun prevails it will suffer more direct and particularized harms than WEC. And neither of the *Helgeland* exceptions apply. WEC's interests are not identical to Vote.org's; WEC does not help voters to register using the national form at all. And WEC is not charged by law with representing Vote.org's interests, but rather with administering the election laws.



**1. Vote.org satisfies the default minimal standard for inadequate representation because it has more at stake than WEC and more incentive to litigate vigorously.**

Vote.org has much more to lose in this litigation than does WEC. WEC's obligation is simply to enforce the voter registration rules as the courts construe them. WEC has a position—articulated in the case below—on what those rules require and whether the national form complies. But if the courts reject that position, then WEC will just conform to the courts' ruling and revise its position on what the law provides. WEC will not otherwise be harmed. Vote.org, in contrast, will face the concrete, material harm of having to expend resources to entirely rework and rethink the way it helps Wisconsin residents register to vote. As a consequence, Vote.org believes that it has much more incentive to litigate vigorously than WEC. The Court need not speculate further to grant intervention as of right—applying

*Helgeland*'s default minimal standard, the Court should treat Vote.org as "the best judge of the representation of [its] own interests." Wright & Miller § 1909.

Moreover, in the event of a merits appeal, WEC's and Vote.org's strategies may diverge further, to Vote.org's severe detriment. In particular, WEC may choose not to exhaust appellate review, in itself enough to render its representation inadequate. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508–09 (7th Cir. 1996) (recognizing that "representation of the would-be intervenors' interest . . . could well be thought inadequate" where the existing party decides not to appeal); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.3d 303, 306 (6th Cir. 1990) (same); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (same). WEC is actively litigating around a dozen election-law cases at present.[7] Because WEC must manage such a large caseload, it needs to be judicious about its use of resources (such as the Department of Justice's limited attorney time) based on the relative importance of each case. Moreover, the composition of WEC is subject to change from time to time, which may in turn lead to changes in its litigation position as the appeals process unfolds. Some commissioners may be more concerned about facilitating registration for all Wisconsin citizens than others. Vote.org, in contrast, is profoundly invested in the continued use of the national form for the reasons explained above. Its appellate strategy will spring from its overriding goal: preserving that form's legality in Wisconsin in order to enable easy voter registration. And that goal will hold notwithstanding any changes of leadership or strategy at WEC.



[7] *See, e.g.*, *Kormanik v. Wis. Elections Comm'n*, 2022CV1395 (Cir. Ct. Waukesha Cnty.); *Concerned Veterans of Waukesha Cnty. v. Wis. Elections Comm'n*, 2022CV1603 (Cir. Ct. Waukesha Cnty.); *Rise, Inc. v. Wis. Elections Comm'n*, 2022CV2446 (Cir. Ct. Dane Cnty.); *League of Women Voters of Wis. v. Wis. Elections Comm'n*, 2022CV2472 (Cir. Ct. Dane Cnty.); *EXPO Wis., Inc. v. Wis. Elections Comm'n*, 2023CV0279 (Cir. Ct. Dane Cnty.).

### 2. The circuit court erred by applying the *Helgeland* exceptions, neither of which applies.

The above considerations more than satisfy the "minimal" showing of inadequate representation that is required. *See Helgeland*, 2008 WI 9, ¶ 85. But the circuit court seemed to assume that one of the two exceptions to that minimal burden described in *Helgeland*—where "a movant's interest is identical to that of one of the parties," or where "a party is charged by law with representing the movant's interest," 2008 WI 9, ¶ 86—applied, and therefore required a "compelling" showing of inadequate representation, App. 28 (R.73:26). The circuit court did not address *Wolff*, explain *which* of the two exceptions it thought applied, or address any of Vote.org's detailed briefing distinguishing *Helgeland*.

Neither of the *Helgeland* exceptions applies to Vote.org's proposed intervention. For starters, WEC's interests are not "identical" to Vote.org's in the sense required for a presumption of adequate representation to arise. A long line of authority makes clear that when an intervenor seeks to come into a case on the side of a state actor, the relevant interests are "identical"—and adequate representation is presumed—only when the state actor shares the intervenor's motivations and broad goals, not just its litigation objectives. In the path-marking case, *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538–39, the United States Supreme Court held that the Secretary of Labor did not adequately represent a union member, though both aimed to set aside the same union election, because the Secretary had an obligation to protect the "public interest" that exceeded "the narrower interest of the complaining union member." For that reason, the Secretary's and the union member's interests were "related, but not identical," *id.* at 538, and the union member's burden to show inadequacy was "minimal," *id.* at 538 n.10. Drawing on *Trbovich*, the Supreme Court explained just last year that a presumption of adequate representation "applies only when interests 'overlap fully.'" *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022) (cleaned up). As the Seventh Circuit put it in a recent case arising from Wisconsin, to "trigger the presumption of

adequacy . . . it's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020). Rather, courts must undertake a "contextual analysis" that accounts for both "interests and objectives." *Id.*

The facts of *Driftless* illustrate this approach. There, the party defendant was the Wisconsin Public Service Commission, a utility regulator, and the putative intervenors were utilities holding permits to construct a controversial transmission line. *Id.* at 744. Conservation groups sued the Commission to invalidate the permits. *Id.* Though both the Commission and the utilities had the same litigation goals, the Seventh Circuit held that representation was not presumptively adequate—and reversed the district court's denial of intervention to the utilities—because "the Commission *regulates* the transmission companies, it does not *advocate for* them or represent their interests." *Id.* at 749 (emphasis in original). *Driftless* illustrates what all the above cases make clear: A presumption of adequate representation arises only when motivations and objectives *beyond* litigation are shared.



Under the approach from these cases, WEC's interests are in no sense "identical" to and do not "overlap fully" with Vote.org's interests. WEC lacks Vote.org's motivations—such as registering lower-propensity voters—its unique perspective, and above all its long-term organizational reliance on and commitment to the continued acceptance of the national form. Thus, WEC's harms if Braun prevails will bear little resemblance to Vote.org's. It will not, for instance, need to hire a software developer to redesign parts of its website. Indeed, because WEC *already* prepares and distributes the Wisconsin-specific form that Braun insists should be used for registrations, it is far from clear that WEC will suffer any particularized harm at all if Braun prevails. In that sense, *Driftless* is directly on point—WEC *regulates* voter registration; it does not *advocate* for it. Accordingly, WEC's representation of Vote.org's interest in advocating for easy, straightforward voter registration is not presumptively adequate.

Nor is WEC "charged by law" with representing Vote.org's interests. Although WEC and its attorneys from the Department of Justice presently share some of Vote.org's broad litigation goals, WEC is a government entity charged with administering Wisconsin's elections laws. *See* Wis. Stat. § 5.05. And this is not a case, like *Helgeland*, that implicates the Attorney General's categorical duty under *City of Oak Creek* to defend state statues against claims of unconstitutionality. *See Helgeland*, 2008 WI 9, ¶ 96 (discussing *State v. City of Oak Creek*, 2000 WI 9, ¶ 12, 232 Wis. 2d 612, 605 N.W.2d 526). Braun's theory is that the statutes require the use of the Wisconsin-specific form, not that the statutes are invalid. WEC and the Department of Justice have a different interpretation of the statutes. But they are not *required* to take the litigation position they have taken, as was true in *Helgeland*. *See id.* Nor do WEC or the Department have any duty to represent the interests of nonprofits like Vote.org.

Thus, neither of *Helgeland*'s two presumptions of adequacy apply to Vote.org here. The Court must instead apply *Helgeland*'s default "minimal" standard. *Id.* ¶ 85. *Wolff* illustrates that standard's proper application. There, the Court of Appeals held that a town could intervene as a defendant alongside a county even though both sought "the same outcome" in the litigation and "would offer similar arguments in support of [that] mutually desired outcome." 229 Wis. 2d at 748. Here, by the same logic, Vote.org should be granted intervention.

Notably, in the *Rise* appeal, both the appellants and the Legislature have argued that *Wolff* provides the appropriate inadequate-representation standard in cases like this one. The underlying case in *Rise* concerns the proper standards for absentee ballot witness certificates, and two voters sought to intervene in the circuit court proceedings but were denied. Both the voters and the Legislature have argued on appeal that where a private party seeks to intervene alongside WEC as a defendant, WEC's status as a state agency means the private party will most often easily show inadequate representation. Brief for Appellant at 18–19, *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022AP1838 (Ct. App. Dec. 22, 2022); Brief of

Intervenor the Wisconsin State Legislature at 27–29, *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022AP1838 (Ct. App. Jan 23, 2023). A decision in the appellants' favor on the inadequate-representation issue in *Rise* would thus be difficult to reconcile with a different result here.

## II. The circuit court erroneously exercised its discretion in denying Vote.org permissive intervention.

At a minimum, Vote.org should have been granted permissive intervention. A movant may intervene with the court's permission if the "movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). Whether to grant permissive intervention is "within a court's discretion." *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶ 11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94. A court erroneously exercises that discretion if it "fail[s] to apply the appropriate legal standard in a reasoned manner to the relevant facts of the case." *Helgeland*, 2008 WI 9, ¶ 126. "The existence of a zone of discretion does not mean that the whim of the district court governs." *Miller*, 103 F.3d at 1248.



Vote.org's defense has questions of law and fact in common with the main action—chief among them, whether the national form complies with the Wisconsin statutes. Where that threshold requirement is satisfied, courts routinely exercise their discretion to grant interested organizations permissive intervention in election-law cases. *See, e.g.*, *Public Int. Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 800–02 (E.D. Mich. 2020) (League of Women Voters); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1307 (campaign); *Campaign Legal Ctr. v. Fed. Election Comm'n*, 334 F.R.D. 1, 6 (D.D.C. 2019) (two political action committees). Granting Vote.org permissive intervention would be consistent with the usual practice in this category of cases.

In exercising its discretion to break with that trend and deny Vote.org permissive intervention, the circuit court erred in two ways. First, the court failed to apply the appropriate legal standard. It explicitly questioned whether the Section

803.09(2) test for permissive intervention is the correct one. App. 29 (R.73:27) (suggesting that "it can't simply be that you show a common interest or common issue of fact [or] issue of law that you timely file because if that were—if the bar were so low as to that, then there would be no reason for the [Section] 803.09(1) [factors]"). The court then looked explicitly to the factors governing intervention *as of right*, concluding that because Vote.org had not shown a right to intervene, it should not be permitted to intervene permissively. App. 29 (R.73:27). The Seventh Circuit recently cautioned courts against precisely this error, *i.e.*, "deny[ing] permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019). The circuit court did just that, and in so doing seemed to misunderstand Vote.org's argument that its very substantial showing under the Section 803.09(1) framework made the decision to *grant* permissive intervention under the less demanding Section 803.09(2) framework an easy one. *See* App. 31 (R.73:29). Because the court failed to apply the appropriate standard, its exercise of discretion was error.



Second, the court failed to apply its own flawed standard in a reasoned manner. Specifically, the court once again faulted Vote.org for "intentionally create[ing] a system in reliance on a particular form that may or may not be in accordance with Wisconsin law." App. 29–30 (R.73:27–28) "To me," the court continued, "that's not a basis for permissive intervention because that's their decision to do." App. 29–30 (R.73:27–28). But as explained above, that reasoning conflates the merits of Braun's claims with the undeniable harm Vote.org will suffer if Braun prevails. It also flouts common sense. The national form was accepted in Wisconsin for over 20 years before Vote.org ever began its work in the state. *See* R.85:5 As Braun acknowledges, WEC's Election Administration Manual states flatly that "Wisconsin . . . accepts the National Mail Voter Registration Form." R.57:33. And before this lawsuit, to Vote.org's knowledge, no one had questioned the legality of the national form's use in Wisconsin. The circuit court never

addressed any of those facts, let alone explained why Vote.org should have anticipated this lawsuit and its underlying legal theory years ago, when it was designing its web platform or software. Vote.org legitimately relied on settled Wisconsin practice, and that reliance does not suffice to deny permissive intervention.

## CONCLUSION

For the foregoing reasons, Vote.org requests that the order of the Waukesha County Circuit Court be reversed and that Vote.org be granted intervention as of right or permissive intervention.

Dated: April 10, 2023

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*Admitted *pro hac vice* by the circuit court

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief produced with a proportional-serif font. This brief is set in 13-point Times New Roman, its footnotes are set in 11-point Times New Roman, and the brief contains 6,609 words.

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