STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RISE, INC. and JASON RIVERA,
Plaintiffs,

v. Appeal No. 2022-AP-1838

WISCONSIN ELECTIONS COMMISSION,
Defendant – Respondent,

MARIBETH WITZEL-BEHL,
Defendant,

WISCONSIN STATE LEGISLATURE,
Intervenor,

and

MICHAEL WHITE and EVA WHITE,
Proposed-Intervenors – Appellants.

On Appeal from the October 20, 2022 Decision and Order of the Circuit Court of Dane County, Case No. 2022CV2446
The Honorable Juan B. Colás, Presiding.

BRIEF AND APPENDIX OF PROPOSED INTERVENORS – APPELLANTS

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STATEMENT ON ISSUES FOR REVIEW

1. Do Appellants have a right to intervene in this case under Wis. Stat. §803.09(1)? The circuit court answered no.

2. In the alternative, should Appellants be granted permissive intervention under Wis. Stat. §803.09(2)? The circuit court answered no.

ORAL ARGUMENT AND PUBLICATION

While oral argument should not be necessary to vindicate Michael and Eva Whites' right to intervene, a precedential opinion clarifying that parties are entitled to intervene in a case directly attacking their prior lawsuit would be helpful to avoid similar appeals in the future.

INTRODUCTION

Courts disfavor collateral attacks on judgments. That is because the appeal process provides parties a fair opportunity to challenge the validity of final judgments. Likewise, the intervention process provides third parties a fair opportunity to be heard in cases affecting their interests. Plaintiffs Rise, Inc. and Jason Rivera (collectively, "Rise") spurned both of those opportunities. Appellants Michael and Eva White had obtained a favorable, now final, judgment from the Waukesha County Circuit Court in *Michael White et. al. v. Wisconsin Elections Commission ("WEC")*, Case No. 2022-CV-1008. Rise chose not to intervene in that case. Instead, to avoid the intervention-and-appeal process, Rise filed *this* Dane County case to undermine the Waukesha County Circuit Court's final judgment. That is not how Wisconsin's court system is supposed to work.

Even worse, the Dane County Circuit Court has denied Michael and Eva White a voice in this case. Rise attacks the very judgment that the Whites obtained in Waukesha County. Yet, the Whites have been sidelined, forced to watch as Rise attempts to dismantle their relief. The complaint explicitly names the injunction in *White v. WEC* as the source of Rise's injury. There can be no question that the Whites, as the lead plaintiffs in *White v. WEC*, have substantial interests at stake in this case, which calls out them and their hard-won relief by name. The Dane County Circuit Court wrongly denied the Whites' intervention request, and its two pages of reasoning are replete with legal errors. This Court should reverse the Dane County Circuit Court's decision and allow the Whites to participate as intervenors in this case.

STATEMENT OF THE CASE AND FACTS

This lawsuit is about how WEC must handle absentee ballots. Wisconsin law requires absentee voters to sign a certification in the presence of "one witness who is an adult U.S. citizen." Wis. Stat. §6.87(4)(b). The municipal clerk must provide voters with a return envelope that includes the required witness certificate. *Id.* §6.87(2). The certificate provides a space for the voter to certify eligibility to vote and for the absentee ballot witness to certify that she witnessed the voter's lawful marking of the ballot and certification. *Id.* In addition to signing the certificate, the witness must provide her address. *Id.* The certificate contains a space to list the address. "If a certificate is missing the address of a witness, the ballot may not be counted." *Id.* §6.87(6d). But if "time permits," the clerk "may return the ballot … inside the sealed envelope" to the voter. *Id.* §6.87(9).

These statutory requirements are clear and "mandatory" under Wisconsin law. *Id.* §6.84(2). And mandatory election statutes such as those at issue here "require[] strict compliance." *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶16, 394 Wis. 2d 602, 951 N.W.2d 556. Thus, "[b]allots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election." *Id.*

Despite the clear and mandatory nature of the address requirement, WEC nevertheless violated it, instructing municipal clerks and local election officials to "rehabilitat[e]"—without voter or witness input—"an absentee certificate that does not contain the street number and street name (or P.O. Box) and the municipality of the witness address." (R.4, Ex. 2; A.App.87). WEC instructed clerks to accept ballots with incomplete witness addresses if, for example, the clerk believed he or she had personal knowledge of the witness's address or thought it could be determined from unidentified "extrinsic sources." (A.App.87).

In July 2022, Michael White, Eva White, and others filed a lawsuit in the Waukesha County Circuit Court. They argued that WEC's guidance violated Wisconsin law. After a hearing, the court granted a temporary injunction prohibiting WEC from instructing municipal clerks and local elections officials that they have the duty or ability to modify or add information to incomplete absentee ballot certifications. (R.38:21-35, 88-89; R.4, Ex. 3; A.App.92-94). The court also required WEC to notify municipal clerks and local election officials of the court's determination that WEC's guidance was invalid and contrary to law. (R.38:30-31; R.4, Ex. 3). WEC followed through by publishing guidance regarding the injunction. (R.38:88-89). *See Temp. Inj. on WEC Guidance re Missing Absentee Witness Address (White v. WEC, 22-CV-1008)*, Wis.

Elections Comm'n (Sept. 14, 2022), https://elections.wi.gov/memo/temporary-injunction-wec-guidance-re-missing-absentee-witness-address-white-v-wisconsin. The court later converted the temporary injunction into a permanent injunction. (R.38:105-107; A.App.95-97).

On September 27, Rise filed this lawsuit. (R.3). Frustrated by the Waukesha court's injunction, Rise seeks to "restore the functional result of the 2016 guidance" enjoined by the Waukesha court. (R.3:9; A.App.21). Rise complains that the injunction in *White v. WEC* also removed guidance on the definition of "address." (R.3:7; A.App.19) (The court in *White v. WEC* later clarified that its order did no such thing.) To that end, Rise demands an order declaring that an "address" is complete if it contains merely enough "information necessary to reasonably discern the location where the witness may be communicated with." (R.3:8-9; A.App.20-21). On October 7, the circuit court denied Rise's motion for a temporary injunction. (R.79; A.App.35). Rise later moved for a second temporary injunction, which the court denied on November 2. (R.129:1-3; A.App.37-39).

Meanwhile, on October 3, Michael and Eva White promptly moved to intervene in this case to defend the judgment they obtained in Waukesha. (R.42:1-2, 43:1-10; A.App.3-12). They have a critical interest at stake in this case: the express purpose of Rise's lawsuit is to "restore the functional result of the 2016 guidance"—the same unlawful guidance the court enjoined in *White v. WEC*. (R.3:9; A.App.21). Rise also claims that the Whites' lawsuit has caused voter confusion. (R.3:8; A.App.20). The Whites moved to intervene, in part to rebut those claims and defend their case. (R.43:7; A.App.9).

The Dane County Circuit Court denied the Whites' intervention. Although the court found their motion was timely and their participation would "not unduly delay or prejudice the litigation," it said the Whites had no right to intervene because they did not have an interest relating to the subject of the action. (R.100:1-2; A.App.1-2). The court analyzed three plausible interests: (1) in the enforcement of election laws, (2) in protecting the right to vote in elections that are administered equally and in accordance with the law, and (3) in preserving the relief the Whites won in the Waukesha County Circuit Court. (R.100:1; A.App.1). The court said the first two interests were insufficient because they were "broad and not unique" to the Whites and "are likely shared" by other Wisconsin voters. (R.100:1; A.App.1). The court also determined that those interests were adequately represented by the Wisconsin Legislature (which the court *did* allow to intervene), and by defendant WEC. (R.100:1; A.App.1). The court dismissed the Whites' third interest because it believed the relief sought in this case "is not inconsistent with or contrary to" the Waukesha court's injunction. (R.100:2; A.App.2).

The court also denied the Whites' request for permissive intervention. (R.100:2; A.App.2). The court found that the Whites' "claims and defenses are related in law and fact to the main action," that the motion was timely, and that intervention would not unduly delay the case or prejudice the parties. (R.100:2; A.App.2). But the court nevertheless denied permissive intervention because it found that the Whites' interests "are not so specific or unique, or inadequately represented, that their intervention is needed to protect their interests, to ensure that the issues presented are fully litigated or to assist the court." (R.100:2; A.App.2). Michael and Eva White timely appealed.

SUMMARY OF THE ARGUMENT

Michael and Eva White have an interest in protecting their right to vote in elections conducted in accordance with Wisconsin law. The Waukesha County Circuit Court vindicated that interest in *White v. WEC* when it enjoined WEC's unlawful practice of accepting absentee ballots with incomplete witness addresses. Frustrated by that ruling, Rise filed this case to expand the definition of "address." Its stated goal is to "functionally" restore WEC's practice that the Waukesha County Circuit Court enjoined. Naturally, the Whites moved to intervene, but their efforts were frustrated by the circuit court's order denying their intervention both as of right and by permission.

First, the circuit court erred in denying the Whites' intervention as of right. The Whites have a right to defend against Rise's attack on the judgment they obtained in Waukesha. The circuit court didn't think Rise's suit was an attack on that judgment because relief in the two cases wouldn't necessarily conflict. But that improperly looks at the interests from WEC's legal perspective, not from the Whites' practical perspective. Looking at the Whites' practical interests—as the court must—Rise's lawsuit could nullify the effect of the *White* injunction. The Whites have an interest in an effective address requirement, which the *White* injunction protects. Rise's attempt to invalidate the address requirement through a different avenue directly harms their interests.

At the very least, the Whites have an interest in defending their right to vote in election conducted in accordance with Wisconsin law. The Waukesha court found that same interest gave the Whites standing to challenge WEC's guidance. At a minimum, then, the interest is sufficient for intervention. And no party adequately represents the Whites'

interests, as the Whites are the only voters who have stepped up to defend against Rise's suit.

Second, even if this Court holds that the circuit court did not err in denying the Whites' intervention as of right, it should still reverse the court's denial of permissive intervention. The circuit court simply applied the wrong legal standard, which is an abuse of discretion. Had it applied the correct legal standard, its factual findings all but require permitting the Whites to intervene.

For these two independent reasons, this Court should reverse the circuit court's order denying the Whites' intervention.

ARGUMENT

I. Michael and Eva White Have a Right to Intervene in This Case.

A moving party must satisfy four requirements to intervene as a matter of right under Wis. Stat. §803.09(1). The movant must show that:

(A) the motion to intervene is timely;
(B) the movant claims an interest sufficiently related to the subject of the action;
(C) disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
(D) the existing parties do not adequately represent the movant's interest.

Helgeland v. Wis. Muns., 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1.

No party disputes that Michael and Eva Whites' motion was timely. The circuit court found that the Whites moved to intervene "at the earliest stage of the proceedings." (R.100:2; A.App.2). "The question of the timeliness of a motion to intervene is left to the discretion of the

circuit court." *Helgeland*, 2008 WI 9, ¶42. The Whites thus indisputably satisfy the first requirement.

The only dispute is whether the Whites satisfy the other three requirements, which are legal issues that this Court reviews de novo. *See Town of Mentor v. State*, 2021 WI App 85, ¶18, 400 Wis. 2d 138, 968 N.W.2d 716. If the Whites meet each of the requirements, the court "must allow [them] to intervene." *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994).

A. Michael and Eva White have valid interests relating to the subject matter of the case.

The interest test is "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, ¶44. To that end, "[c]ourts employ a broad, pragmatic approach, viewing the interest element 'practically rather than technically.'" *Friends of Scott Walker v. Brennan*, 2012 WI App 40, ¶18, 340 Wis. 2d 499, 812 N.W.2d 540 (quoting *Helgeland*, 2008 WI 9, ¶43). The proposed intervenor must, as the Whites do, have an interest "relating to" the subject matter of the case, Wis. Stat. §803.09(1), that is of "such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment," *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶11, n.9, 234 Wis. 2d 550, 610 N.W.2d 94 (citation omitted). An insufficient interest is one that "is only remotely related to the subject of the action." *Helgeland*, 2008 WI 9, ¶45. The Whites have two interests "relating to" the subject matter of this case.

First, the Whites have an interest in ensuring that unlawful absentee votes do not dilute their lawful in-person votes. The circuit

court rejected that interest because it was "broad and not unique" to the Whites and was "likely shared by every resident of Wisconsin and by every eligible voter." (R.100:2; A.App.2). But rejecting the Whites' interest *because* it is "broad" blatantly defies the "broad, pragmatic approach to intervention as of right required by Wis. Stat. §803.09(1)." *Helgeland*, 2008 WI 9, ¶70. And while courts do consider whether an interest is "unique or special," they do so to assess whether that interest is "adequately represented" by an existing party. *Id.* at ¶71. That is, courts use "the phrase 'unique' as a shorthand for the proposition that an intervenor's interest 'must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit.'" *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (citation omitted); *see also State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983) (recognizing that a newspaper's interest in public records supports intervention even though the general public shares the same interest).

By requiring the Whites' interest to be unique from "every resident of Wisconsin" and "every eligible voter," the circuit court committed the same error this Court reversed in *Friends of Scott Walker*. (R.100:2; A.App.2). As an initial matter, the Whites' interests are not so broadly shared. As in-person voters, the Whites' interests are, for example, distinct from the interests of absentee voters, who might prefer a laxer witness address requirement. And even if they were as broadly shared as the circuit court believed, "every resident of Wisconsin" and "every eligible voter" are not "existing parties" to this lawsuit, so it doesn't matter whether they share the Whites' interests. *Helgeland*, 2008 WI 9, ¶38. In other words, "[t]he flaw in the circuit court's logic is its apparent

assumption that, once it permits a party with a particular interest to intervene, the court must permit other parties with a similar interest to intervene." *Friends of Scott Walker*, 2012 WI App 40, ¶33. But allowing the Whites to intervene does not mean that "every resident of Wisconsin" or "every eligible voter" must also be allowed into the case. (R.100:2; A.App.2). Even aside from timeliness issues, those intervenors would "face a different equation" if they move to intervene, as the Whites would already be representing their interests. *Friends of Scott Walker*, 2012 WI App 40, ¶33. The circuit court committed the same error.

Moreover, the Whites' interest in preserving their own right to vote is unique among the existing parties. The circuit court rejected that interest out of hand because it is "presumably" shared by the other defendants. (R.100:2; A.App.2). Not so. Wisconsin voters have independent standing to enforce election laws to prevent "their votes" from being "diluted by unlawful votes." *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶25, 403 Wis. 2d 607, 976 N.W.2d 519. In fact, the Supreme Court explained that "[a] man with an obscured vote may as well be 'a man without a vote,' and without the opportunity for judicial review, such a man 'is without protection; he is virtually helpless.'" *Id.* (quoting 106 Cong. Rec. 5082, 5117 (1960) (statement of Sen. Lyndon B. Johnson)). Intervention is the only avenue to preserve judicial review of the Whites' interests in this case. And neither the named Defendants nor the Legislature share the Whites' interest in preserving "their votes" from unlawful voting that "pollutes the integrity of the results." *Id.* This Court should reverse the circuit court's disregard of the Whites' interest in preserving their right to vote in a lawful election.

Second, Michael and Eva White have an independent interest shared by no other party in preserving the "functional result" of the relief they obtained in *White v. WEC*. (R.3:9; A.App.21). The circuit court did not dispute the validity of that interest, but it ruled that this case does not threaten to impair it. (R.100:2; A.App.2). That was error, as explained *infra* Section I.B, but the Whites indisputably have an interest in preserving the *White* injunction.

The circuit court also rejected a third interest in generalized enforcement of elections laws. (R.100:1-2; A.App.1-2). But the Whites never asserted that interest. (R.43:7-8; A.App.9-10). If anything, the circuit court's rejection of an interest that the Whites never claimed demonstrates its misunderstanding of the interests the Whites *did* assert. And rejecting those interests is reversible error.

B. Disposition of this case could impair the interests of Michael and Eva White.

The next requirement is that the intervenors must be "so situated that the disposition of the action may as a practical matter impair or impede" their "ability to protect" their interests. Wis. Stat. §803.09(1). Rise's complaint threatens both of the Whites' interests.

First, it is beyond dispute that a ruling in Plaintiffs' favor will impair the Whites' interest in preserving their right to vote in a lawful election. Rise seeks to alter election rules and "restore the functional result of the 2016 guidance." (R.3:9; A.App.21). But that guidance unlawfully permitted election officials to add information to absentee ballot witness certifications, permitting those ballots to be counted. Rise's case likewise would permit ballots with incomplete witness certifications to be counted in violation of law. Rise demands a return to

a regime in which incomplete witness certifications are accepted. Thus, disposition of this case "may as a practical matter impair or impede" the Whites' "ability to protect" their right to vote in an election not diluted by unlawful votes. Wis. Stat. §803.09(1).

Second, and perhaps more importantly, disposition of the case will impair the Whites' interest in preserving the relief they obtained from the Waukesha court in *White v. WEC*. The circuit court rejected that interest because the injunction in *White v. WEC* "expressly does not enjoin WEC from giving guidance regarding the definition of 'address.'" (R.100:2; A.App.2). But that reasoning ignores Rise's own claims about its lawsuit. Rise filed this case in direct response to *White v. WEC*. It claims the injunction in that case resulted in voter confusion, which Rise says injures them and warrants relief. (R.3:7-9; A.App.19-21). To that end, it requests an injunction requiring WEC to employ Rise's preferred definition of "address" to "restore the functional result" of WEC's guidance before the injunction in *White v. WEC*. (R.3:9; A.App.21). All of this demonstrates that Rise's lawsuit is an improper attempt "to avoid, evade, or deny the *force and effect* of a judgment in an indirect manner." *In re Brianca M.W.*, 2007 WI 30, ¶27, 299 Wis. 2d 637, 728 N.W.2d 652 (emphasis added).

The circuit court simply did not properly apply the law to the facts of this case. It discounted the Whites' interest in preserving their judgment because the two cases concern different *legal questions*. But that ignores the "force and effect" of relief in both cases, which conflict by Rise's design. This Court need only observe what Rise says of its own suit—that it seeks "functional" relief from the *White* injunction—to

properly recognize that the Whites have a legal interest in preserving the "force and effect" of that favorable judgment.

Moreover, in comparing the legal arguments between the cases, the court improperly viewed the cases "technically" rather than "practically." *Friends of Scott Walker*, 2012 WI App 40, ¶18. The circuit court reasoned that the two cases are different because the *White* injunction "does not enjoin WEC from giving guidance regarding the definition of 'address' nor make any determination of what the statute means by that term." (R.100:2; A.App.2). From WEC's perspective, that is "technically" true—the cases concern different legal arguments as to *why* WEC can or cannot accept incomplete addresses. *Helgeland*, 2008 WI 9, ¶43. But from *voters'* perspective, the "pragmatic" question raised in both cases is identical: what does a witness need to write in the address line so that WEC will accept the certification? *Friends of Scott Walker*, 2012 WI App 40, ¶18. That is, the voter has a practical interest in "what" goes in the address line, not a technical interest in "why" it is accepted or rejected by WEC.

In other words, the Whites, as voters, have an interest in ensuring that WEC does not accept incomplete witness certifications. The *White* injunction preserved that interest, but Rise now attempts to nullify it through a judicial decree that would require WEC to accept addresses that are incomplete under its current guidance and understanding of that term. That WEC can conceivably comply with relief in both cases says nothing about whether the *Whites' interests*, as in-person voters, will be impaired.

The circuit court thus failed to view the interest element "practically rather than technically," and it failed to view the interest

from the Whites' perspective. *Helgeland*, 2008 WI 9, ¶43. The Whites are the only voters defending the address requirement. The *White* injunction preserves that requirement, and the Whites have an interest in maintaining the "force and effect" of that judgment. The Dane County Circuit Court erred in concluding otherwise.

C. No party adequately represents the interests of Michael and Eva White.

Neither the named Defendants nor the Legislature adequately represent the Whites' interests. The requirement to show inadequate representation "is satisfied 'if the applicant shows that the representation of his interest "may be" inadequate.'" *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747-48, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. UMWA*, 404 U.S. 528, 538 n.10 (1972)). "[T]he showing required for proving inadequate representation 'should be treated as minimal.'" *Armada Broad.*, 183 Wis. 2d at 476 (quoting *Trbovich,* 404 U.S. at 538, n.10).

The circuit court did not apply these controlling standards. Indeed, the only reasoning that conceivably relates to inadequate representation was the circuit court's claim that the Whites' proposed answer is "substantively the same" as the Legislature's. (R.100:2; A.App.2). Of course, it is to be expected that the Legislature and the Whites, neither of whom are named defendants, would have similar responses in their answers to Rise's complaint. But similar responses in that one early filing say nothing about the parties' *interests* in the case, their goals, the arguments they will make, the strategies they will employ, or their positions on future issues. Indeed, the Legislature has obvious political interests that could affect its approach to this case that the Whites do

not necessarily share. Thus, although the Whites and the other Defendants might "have some similar goals in this litigation, their ultimate objectives are not identical." *Ritter v. Farrow*, 2014 WI App 83, ¶37, 355 Wis. 2d 577, 851 N.W.2d 471.

Regardless, this Court has found representation inadequate even when two parties "would offer similar arguments in support of their mutually desired outcome," and "their positions were tactically similar." *Wolff*, 229 Wis. 2d at 748. Indeed, even when there "would be *no difference* 'in how the case is *substantively* presented to the Court,'" representation can be inadequate. *Id.* (emphases added). Dismissing the Whites' interests because a single *pleading* was "substantively" similar was thus error. (R.100:2; A.App.2).

Even assuming the Whites' interests resemble those of the other Defendants, they "are not 'identical' or so 'substantially similar' as to block intervention." *Friends of Scott Walker*, 2012 WI App 40, ¶49. The Whites, as the plaintiffs in *White v. WEC*, have a unique interest in preserving the injunction entered in their favor. WEC cannot adequately represent that interest because, as a defendant in both cases, WEC is clearly adverse. *Armada Broad.*, 183 Wis. 2d at 473-76. And the Legislature and the Whites have already diverged on multiple filings, demonstrating clear differences in argument, strategy, and goals. (R.190:1-5; A.App.41-45 - Proposed Intervenors' Motion to Transfer; R.66:1-8; A.App.46-53 - Proposed Intervenors' Motion to Dismiss; R.134:1-15; A.App.54-68 - Wisconsin Legislature's Brief in Support of Motion to Dismiss). As the plaintiffs in *White v. WEC* and the only voters on the defendant side of this case, the Whites thus have "a unique and significant interest in attempting to persuade the court" that it should

dismiss the complaint. *Armada Broad.*, 183 Wis. 2d at 473-76. At the very least, the Whites' participation will "'provide full ventilation of the legal and factual context' of the dispute." *Wolff*, 229 Wis. 2d at 748 (quoting *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967)). This Court should reverse the Dane County Circuit Court's contrary conclusion.

II. The Circuit Court Failed to Provide a Reasoned Application of the Appropriate Legal Standard in Denying Permissive Intervention.

A moving party not entitled to intervene as of right can still 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). "It is within a court's discretion to decide whether a party may permissively intervene." *City of Madison*, 2000 WI 39, ¶11, n.11. A court abuses 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 circuit court abused its discretion by applying the wrong legal standard for permissive intervention, as it simply re-applied the test for intervention as of right. The court found that (1) the Whites' "claims and defenses are related in law and fact to the main action," (2) the motion was timely, and (3) "intervention will not unduly delay or prejudice the litigation of the original action." (R.100:2; A.App.2). But it *denied* permissive intervention because it found that the Whites' interests "are not so specific or unique, or inadequately represented, that their intervention is needed to protect their interests, to ensure that the issues presented are fully litigated or to assist the court." (R.100:2; A.App.2). But that reasoning just restates the test for intervention as of right, which is not "the appropriate legal standard" for permissive

intervention. *Helgeland*, 2008 WI 9, ¶126. Even if the court is correct that the Whites are not "needed" in this case, they are indisputably a "proper party," which is all that is required for permissive intervention. *City of Madison*, 2000 WI 39, ¶11, n.10. In other words, the Whites not being "needed," is not a proper basis for the court's exercise of discretion to deny them permission to intervene. *Helgeland*, 2008 WI 9, ¶126.

Moreover, the court's reasoning flouts the policies supporting intervention. The Whites indisputably qualify for permissive intervention because, as the circuit court found, their "claims and defenses are related in law and fact to the main action." (R.100:2; A.App.2). That makes them "proper part[ies]." *City of Madison*, 2000 WI 39, ¶11, n.10. The next step is to "strike a balance" by "involving as many apparently concerned persons as is compatible with efficiency and due process." *Helgeland*, 2008 WI 9, ¶44. The circuit court found those factors also favored intervention because the Whites "will not unduly delay or prejudice the litigation of the original action." (R.100:2; A.App.2). The Whites satisfied both the statutory requirement and the balancing test. That should have been the end of the matter, absent a justification for excluding the Whites independent of the reason for denying them intervention as of right. The court nevertheless tossed those findings aside, ignored Wisconsin's policy favoring intervention in these cases, and, without any independent justification, refused to allow the Whites into the case. Had the court applied the correct legal standard, then its factual findings, without more, require allowing the Whites to intervene.

CONCLUSION

For these reasons, the Court should reverse the circuit court's order denying Appellants' intervention motion.

Dated this 22nd day of December 2022.

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CERTIFICATION AS TO FORM AND LENGTH

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. The length of this brief is 4,727 words.

Dated this 22nd day of December, 2022.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of December, 2022, I caused a copy of this brief to be served upon counsel for each of the parties via the appellate court's electronic filing system and via e-mail.

Dated this 22nd day of December, 2022.

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