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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2022AP1838

RISE, INC. and JASON RIVERA,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Respondent,

MARIBETH WITZEL-BEHL,

Defendant,

WISCONSIN STATE LEGISLATURE,

Intervenor,

MICHAEL WHITE and EVA WHITE,

Proposed-Intervenors-Appellants.

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APPEAL FROM A FINAL ORDER DENYING INTERVENTION OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JUAN B. COLAS, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

Michael and Eva White, voters from Waukesha County, filed a motion to intervene in a Dane County Circuit Court action brought by Rise, Inc. and Jason Rivera, also a voter, seeking declaratory and injunctive relief concerning the meaning of a "missing address" as it pertains to the witness certificate of an absentee ballot. The Whites had already successfully obtained a final judgment from the Waukesha County Circuit Court against the Wisconsin Elections Commission (the "Commission") in *White v. WEC*, prohibiting local election officials from themselves directly adding witness information to the absentee ballot certificate. The circuit court properly denied the Whites' motion to intervene as of right. The Whites claim an interest in protecting their right to vote in elections in accordance with Wisconsin law. The court correctly held that this purported interest was insufficient to sustain their motion, both because it was too indirect and abstract and because the Commission and the Legislature—which the circuit court granted intervention—adequately represent this broad, non-specific interest. The court further denied the Whites' motion based on their asserted interest in protecting the *White* judgment against collateral attack because they mischaracterize the *Rise* action and the *White* judgment. Lastly, the circuit court properly exercised its discretion denying their motion for permissive intervention by concluding that the Whites' interests were already adequately represented by multiple parties and their involvement would not benefit the court in adjudicating the issues.

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ISSUES PRESENTED FOR REVIEW

1. Did the circuit court properly deny the Whites' motion to intervene as of right under Wis. Stat. § 803.09(1)?

This Court should answer yes.

2. Did the circuit court properly exercise its discretion in denying the Whites' motion for permissive intervention under Wis. Stat. § 803.09(2)?

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs will fully present the issues and relevant legal authority. Publication is also unnecessary because the criteria under Wis. Stat. § (Rule) 809.23(1)(a) are not present.

STATEMENT OF THE CASE

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I. Nature of the action.

Michael White and Eva White moved to intervene—both as of right and permissively—in *Rise Inc., et al. v. Wisconsin Elections Commission, et al.*, No. 22-CV-2446 (Wis. Cir. Ct. Dane County). Their motion initiated a special proceeding, separate from that main action. *See Grand View Windows, Inc. v. Brandt*, 2013 WI App 95, ¶42, 349 Wis. 2d 759, 837 N.W.2d 811 ("A motion to intervene is a form of special proceeding."). The circuit court denied the Whites' motion in a written decision, which is considered a final order in that special proceeding. *See State v. Lamping*, 36 Wis. 2d 328, 337, 153 N.W.2d 23 (1967). This is the Whites' appeal of that final order.

II. Statement of facts and procedural history.

The Whites seek to intervene in *Rise* based on purported interests in the interpretation of Commission guidance related to absentee voting and in protecting relief they obtained in an earlier circuit court action challenging such Commission guidance. A review of the relevant guidance

and of that prior action will thus provide helpful background to this Court.

A. The Commission guidance.

In 2016, the Commission issued written guidance to municipal clerks in response to questions that arose following the enactment of Wis. Stat. § 6.87(6d), which states that "[i]f a[n absentee ballot] certificate is missing the address of a witness, the ballot may not be counted." (R. 4:5–6.) In the guidance, the Commission determined that the minimum components of a "complete" witness address include a street number, street name, and municipality. The guidance also stated that, if a witness address on an absentee ballot envelope is missing one or more of those components, a clerk should take one of four enumerated steps to obtain the missing components. One of the enumerated steps authorized clerks to themselves add missing address components to an absentee ballot certificate. However, the guidance did not discuss whether an absentee ballot should be rejected if one or more of those three components is missing at the time when the ballot is to be counted.

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B. The Waukesha County Circuit Court action: *White v. Wisconsin Elections Commission*, 22-CV-1008.

In July 2022, the Whites commenced an action in Waukesha County Circuit Court against the Commission. *White, et al. v. Wis. Elections Comm'n, et al.*, No. 22-CV-1008 (Wis. Cir. Ct. Waukesha Cnty.). They challenged the 2016 Commission guidance to municipal clerks, permitting them, among other things, to add missing witness address information to an absentee ballot certificate. (R. 4:7–9 (*White* temporary injunction), 10–101 (*White* Temporary Injunction argument).)

The *White* court temporarily enjoined the Commission from publicly displaying or disseminating the 2016 guidance or any other communication advising that it is permissible for municipal clerks or other local election officials to modify or add information to an absentee ballot witness certification. (R. 4:7–9; 38:6–36 (*White* Temporary Injunction oral ruling.)

On September 14, 2022, per the *White* court's order, the Commission withdrew the 2016 guidance and gave notice of that withdrawal in a memorandum to municipal clerks. In that memorandum, the Commission clarified the status of its witness address guidance as follows:

> In a hearing on September 13, 2022, the Court clarified that it had not ruled on what constitutes a witness address or a missing witness address, and it had not overturned the existing WEC definition of address contained in the now invalidated memoranda—namely, street number, street name, and name of municipality. The Court emphasized that its ruling was limited to invalidating any WEC guidance directing clerks to themselves add address information to witness certifications.

(R. 38:88–89.)

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On October 3, 2022, the *White* court issued a final order permanently enjoining the Commission from publicly displaying or disseminating the 2016 guidance or any other communication advising that it is permissible for municipal clerks or other local election officials to modify or add information to an absentee ballot witness certification. (R. 38:105–07.) The final order expressly indicated that it applied to "portions" of the Commission guidance indicating that municipal clerks or local election officials could modify or add information to absentee ballot certifications and that it did not enjoin the Commission from continuing to provide guidance regarding the definition of "address" as used in Wis. Stat. § 6.87. (R. 38:105–07.)

C. The Dane County Circuit Court action: *Rise, Inc. v. Wisconsin Elections Commission*, 22-CV-2446.

On September 27, 2022, Rise, Inc. and Jason Rivera (hereafter "Rise"), commenced a Wis. Stat. § 806.04 action seeking a declaratory judgment defining the term "address" in Wis. Stat. § 6.87(2)—the law governing witness certification of an absentee ballot. (R. 3.) Rise named the Commission and Maribeth Witzel-Behl, the Clerk of the City of Madison, as defendants. (R. 3 ¶¶ 23–24.) Rise also seeks an injunction directing the Commission to instruct municipal clerks to apply the definition to be declared by the court, when determining whether a witness address is sufficient. (R. 3 ¶¶ 61–64.) Rise also moved for a temporary injunction. (R. 5.)

The Wisconsin Legislature and the Whites filed separate motions to intervene as defendants in *Rise*. (R. 35; 42.) The circuit court ordered the parties to state whether they objected to either of the intervention motions. (R. 49.) The Commission opposed the Whites' intervention but did not object to the Legislature being granted permissive intervention. (R. 68.) On October 6, 2022, the court granted permissive intervention to the Legislature but stated that the Whites' motion would be decided at a future hearing. (R. 71:1–2.) The court also denied the Whites the opportunity to participate at the temporary injunction hearing. (R. 71:1–2.)

The Commission and the Legislature opposed Rise's temporary injunction motion. (R. 76; 40.) The court held a temporary injunction hearing on October 7, 2022, and, at its conclusion, denied the motion. (R. 79.)

On October 20, 2022, the circuit court issued a written decision denying the Whites' intervention motion under both Wis. Stat. § 803.09(1) and (2). (R. 100.)

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The Whites appealed that order. (R. 109.)

STANDARDS OF REVIEW

The Court independently reviews a circuit court's denial of a motion to intervene as of right, but benefits from its analysis. *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 41, 307 Wis. 2d 1, 745 N.W.2d 1. It reviews a decision denying permissive intervention under an erroneous exercise of discretion standard. *Id.* ¶ 120.

ARGUMENT

This Court should affirm the circuit court's decision in full. The court correctly denied the Whites' motion to intervene as of right. It also properly exercised its discretion in denying their motion for permissive intervention.

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I. The circuit court properly denied the Whites' motion to intervene as of right under Wis. Stat. § 803.09(1).

A. The law of a motion to intervene as of right.

Intervention as of right is governed by Wis. Stat. § 803.09(1), which states: "[A]nyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and 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 that interest, unless the movant's interest is adequately represented by existing parties."

The supreme court has interpreted Wis. Stat. § 803.09(1) as establishing four requirements, the last three of which are relevant here: "(1) timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) that the disposition of the action may as a practical matter impair or

impede the proposed intervenor's ability to protect that interest; and (4) that the proposed intervenor's interest is not adequately represented by existing parties." *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶ 12, 296 Wis. 2d 337, 723 N.W.2d 131 (citing *State ex rel. Bilder v. Twp. of Delavan,* 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983)). With regard to the second and third requirements, the supreme court has further held that the movant's interest must be "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. WERC*, 2000 WI 39, ¶ 11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94.

"The burden is on the party seeking to intervene to show that the [statutory] factors are met." *Olivarez*, 296 Wis. 2d 337, ¶ 12. "Failure to establish one element means the motion must be denied." *Id.*

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B. The circuit court correctly denied the Whites the right to intervene in *Rise* based on their asserted interest in protecting their right to vote in elections administered in accordance with the law.

In support of their motion to intervene as of right, the Whites claim "an interest in protecting their right to vote in elections conducted in accordance with Wisconsin law." (Whites' Br. 10.) More specifically, they describe this as "an interest in ensuring that unlawful absentee votes do not dilute their lawful in-person votes." (Whites' Br. 12.) The circuit court correctly held that this purported interest was insufficient to sustain their motion, both because it was too indirect and abstract to support intervention as of right and

because the Commission and the Legislature adequately represent this broad, non-specific interest.[1] (R. 100:1 (citing R. 42).)

1. The Whites' purported interest in avoiding dilution of their votes is too indirect and abstract to support intervention as of right.

The Whites' purported interest in avoiding dilution of their votes is too general and abstract to support intervention as of right in the *Rise* litigation. *Rise* seeks judicial clarification of what constitutes an incomplete or missing witness address under Wis. Stat. § 6.87(2) and (9). The circuit court reasoned that the Whites' asserted interests in that issue are "broad and not unique to them, but are likely shared by every resident of Wisconsin and by every eligible voter." (R. 100:2.) These interests are also "presumably shared by the Legislature and the named defendants." (R. 100:2.) Such broad interests are "only remotely related to the subject of the action." *Helgeland*, 307 Wis. 2d 1, ¶ 45. The court thus correctly concluded that these interests "are not of sufficiently direct or immediate character that the Whites will gain or lose by the direct operation of the judgment." (R. 100:2.) Put simply, the Whites do not need to intervene in *Rise* to "protect a right that would not otherwise be protected in the litigation." *Helgeland*, 307 Wis. 2d 1, ¶ 45.

More fundamentally, the Whites' abstract theory of harm through vote dilution does not amount to an actual, concrete injury that gives them a justiciable stake in the *Rise* litigation. To support their purported interest in avoiding

[1] The circuit court also construed the Whites' motion as advancing a general interest in the enforcement of state election laws and concluded that that interest, too, was insufficient to support intervention as of right. (R. 100:1.) The Whites maintain that they did not assert that generalized interest. (Whites' Br. 15.)

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dilution of their votes, the Whites rely on a discussion of standing endorsed by only three of the seven justices of the Wisconsin Supreme Court. (Whites' Br. 14 (citing *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 25, 403 Wis. 2d 607, 976 N.W.2d 519).) Those three justices adopted a theory of vote pollution, under which a violation of election laws may degrade the legitimacy of election results and thereby impose on all voters sufficient harm to give them standing to seek to overturn that violation of the law. *Teigen*, 403 Wis. 2d 607, ¶ 25 (lead opinion).

That vote pollution theory of standing, however, was not adopted by a majority of the supreme court and thus is not a statement of the law of this state. Justice Hagedorn concurred in the result in *Teigen* and joined much of the lead, plurality opinion, but he specifically did *not* join paragraph 25 about standing by way of the polluting or diluting of votes. *See id.*, ¶¶ 149 n.1, 157–67 (Hagedorn, J., concurring); ¶¶ 211–15 (A.W. Bradley, J., dissenting). The Whites thus claim the right to intervene in *Rise* based on a purported interest that is not recognized by our courts as sufficient even to support standing, let alone intervention.

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2. The Commission and the Legislature adequately represent the Whites' asserted interest in protecting their right to vote.

The circuit court also correctly held that the Whites were not entitled to intervene as of right because the Commission and the Legislature "adequately represent" the "broad, non-specific interests" that the Whites assert. (R. 100:2.) The court accurately found that the admissions and denials in the Whites' proposed answer and in the Legislature's answer are substantively the same. (R. 100:2.) That is equally true of the Commission's subsequently filed

answer.[2] (*See* R. 134.) The court similarly found that the existing defendants could adequately represent the affirmative defenses alleged by the Whites. (R. 100:2.)

"Adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action." *Helgeland*, 307 Wis. 2d 1, ¶ 90. Here, the Whites' proposed answer prays for dismissal of the complaint and denial of the relief sought by Rise. (R. 44:12.) The answers of both the Commission and the Legislature likewise pray for judgment against Rise and dismissal of the complaint. (R. 39:16; 134:11.) Because the Whites, the Commission, and the Legislature have the same ultimate objective in the *Rise* litigation, it is presumed that the Commission and the Legislature will adequately represent the White's interests.

A presumption of adequate representation also arises "when the putative representative is a governmental body or officer charged by law with representing the interests of the absentee." *Helgeland*, 307 Wis. 2d 1, ¶ 91. Here, the Commission is expressly charged with administering and enforcing Wisconsin's election laws. *See* Wis. Stat.

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[2] The only substantive difference between the Commission's answer and the Whites' proposed answer is in their responses to paragraph 33 of Rise's complaint, which alleged that the Waukesha County Circuit Court, in *White v. WEC*, "did not consider the issue of what constitutes an adequate address for purposes of Wis. Stat. § 6.87(2)." (R. 3 ¶ 33.) The Commission admitted that allegation, in accordance with the express language in the final order in *White*. (R. 134 ¶ 33; R. 38:105–07.) The Whites denied that allegation, in direct contradiction of that final order. (R. 44 ¶ 33.) This difference in the positions of the Commission and of the Whites, however, relates only to their alleged interest in protecting the judgment in *White v. WEC* against collateral attack, which is discussed in section I.C., below. The difference does not impair the Commission's ability to adequately represent the Whites' asserted general interest in protecting their right to vote in elections run according to law.

§ 5.05(1)–(2m), (2w). The Commission is thus presumed to adequately represent the Whites' asserted interest in protecting their right to vote in elections run according to law.[3]

* * *

For all of the above reasons, the circuit court correctly denied the Whites the right to intervene in *Rise* based on their asserted interest in protecting their right to vote in elections administered in accordance with the law.

C. The circuit court correctly held that the Whites' asserted interest in protecting the judgment in *White v. WEC* against collateral attack did not give them the right to intervene in *Rise*.

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The Whites also characterize the *Rise* litigation as an attempt to collaterally attack the judgment of the Waukesha County Circuit Court in *White v. WEC*. On that basis, they claim the right to intervene in *Rise* in order to protect the *White* decision against such an attack. (*See* Whites' Br. 16–18.) The circuit court correctly concluded that the Whites mischaracterize the relationship between the two cases and that this purported interest does not support their motion to intervene as of right in *Rise*. (R. 100:2.)

The *Rise* complaint is not a collateral attack on the *White* permanent injunction. (R. 100:2.) Rise seeks judicial clarification of what constitutes an incomplete or missing witness address under Wis. Stat. § 6.87(2) and (9). (R. 3:21.) In *White v. WEC*, the Whites neither sought nor obtained such clarification. The final order in *White* permanently enjoins the Commission from disseminating any communication advising

[3] The Legislature, of course, is charged with making the laws, not with administering and enforcing them. *See* Wis. Const. art. IV, § 1.

that it is permissible for municipal clerks or other local election officials to modify or add information to an absentee ballot witness certification. (R. 38:105–07.) However, the final order expressly indicated that it did not enjoin the Commission from continuing to provide guidance regarding the definition of "address" as used in Wis. Stat. § 6.87. (R. 38:105–07.)

In other words, what the Whites sought and obtained in *White v. WEC* was a ruling that, *if* a clerk determines that a witness address is missing or incomplete, *then* the clerk may not fill in the missing information, but may return the absentee ballot to the voter under Wis. Stat. § 6.87(9). Contrary to the Whites' contention here, the *White* court did not determine *when* a clerk may conclude that a witness is address is missing or incomplete. That is the issue in *Rise*. It was not an issue in *White*.

Based on their inaccurate characterization of the two cases, the Whites assert that the *White* decision preserved their interest as voters in ensuring that absentee ballots containing incomplete witness certifications are not accepted and counted. They further assert, conversely, that if Rise succeeds, in the *Rise* litigation, in obtaining its preferred definition of missing or incomplete address information, then some absentee ballots will be counted that would not have been counted under the *White* decision. Those assertions are incorrect.

The *White* court expressly noted that it was *not* ruling on what constitutes a complete or incomplete witness address. What that court did was to eliminate *one* possible method of *curing* a deficient witness address prior to the time for counting the ballot. The *White* court expressly held, however, that a deficient witness address could be cured pursuant to the mechanism in Wis. Stat. § 6.87(9). (R. 188:2.) Under the *White* decision, therefore, *any or all* absentee ballots with missing or incomplete witness address information could

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potentially be cured and counted. That remains true without regard to *which* particular ballots fall into that category. Therefore, contrary to the Whites' contention here, the decision in *White* did not itself affect which absentee ballots are countable. The Whites' asserted interest in preserving which absentee ballots are countable under *White* thus is illusory.

Moreover, apart from the Whites' inaccurate characterization of the relationship between *White* and *Rise*, there is no basis to suggest that the Commission in *Rise* would act inconsistently with the relief ordered in *White*. The Commission's position on the merits in *Rise* is that its existing three-component definition of a minimally complete witness address is legally valid. Regardless of how the circuit court in *Rise* may resolve that issue, the Commission will still be prohibited under *White* from instructing municipal clerks to add any incomplete witness address information to absentee ballot certificates. Nothing in the Commission's Answer or opposition to Rise's motion for a temporary injunction is to the contrary. Merely because the Whites and the Commission *were* adverse in *White* (Whites' Br. 19) does not mean they will *remain* adverse. *See Herro v. DNR*, 67 Wis. 2d 407, 426, 227 N.W.2d 456 (1975) ("presumption that governmental agencies comply with the law unless evidence is introduced to the contrary"). The Commission will continue to respect and follow the *White* final order, and the Whites' interests in that order are not threatened.

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The circuit court correctly held that "preserving the relief the Whites won in the Waukesha case is not a basis for intervention by right or by leave." (R. 100:2.) The court's decision denying the Whites' motion to intervene as of right should be affirmed.

II. The circuit court properly exercised its discretion in denying the Whites' motion for permissive intervention under Wis. Stat. § 803.09(2).

The circuit also properly exercised its discretion in denying the Whites' motion to intervene under Wis. Stat. § 803.09(2).

Wisconsin Stat. § 803.09(2) states that "anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). It also states, "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

An appellate "court will not disturb a circuit court's discretionary decision so long as the record reflects "the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case." *Helgeland*, 307 Wis. 2d 1, ¶ 120. "Discretionary determinations are not tested on appeal by [this Court's] sense of what might be a 'right' or 'wrong' decision in the case." *Olivarez*, 296 Wis. 2d 337, ¶ 16. (quoting *State v. Jeske,* 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995)). Instead, the circuit court's determination must stand "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Id.* (quoting *Jeske,* 197 Wis. 2d at 913).

Here, the circuit court used the correct legal standard in denying the Whites' motion for permissive intervention. It understood that Wis. Stat. § 803.09(2) governed. (R. 100:2.) And it performed a reasoned application of that legal standard to the facts before it. The court concluded that "the Whites['] claims and defenses are related in law and fact to the main action." (R. 100:2.) And at the time of the Whites' motion—"at the earliest stage of the proceedings (the time for

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the named defendants to file an answer has not yet run)" —it also held that "their intervention will not unduly delay or prejudice the litigation of the original action." (R. 100:2.) Even though the court held that the Whites met the statutory requirements, it nevertheless concluded that, because the Whites' interests are not specific or unique, and the defendants and Legislature adequately represent them, intervention was not "needed to protect their interests, to ensure that the issues presented are fully litigated or to assist the court." (R. 100:2.)

A circuit court's "[r]easons must be stated, but 'need not be exhaustive.'" *Olivarez*, 296 Wis. 2d 337, ¶ 17 (quoting *Burkes v. Hales,* 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991)). "It is enough that [this Court] can glean from them that the circuit court undertook a reasonable inquiry and examination of the facts and that the record shows a reasonable basis for its determination." *Id.* (citing *Hedtcke v. Sentry Ins. Co.,* 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982)). Here, although the circuit court may not have stated in such express terms, this Court can glean from its decision that it determined that the Whites' intervention would be duplicative of the positions of the two defendants and one intervenor-defendant already participating in the action and, therefore, ultimately unhelpful to the future adjudication of the action. In analyzing the similar federal rule for permissive intervention, the Seventh Circuit has explained that "unlike the more mechanical elements of intervention as of right, [permissive intervention] leaves the district court with ample authority to manage the litigation before it." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019). The circuit court's decision, concluding that there are enough parties already participating in the action that adequately represent the Whites' interests, reveals a proper understanding of the legal standard and a reasoned application of that standard to the facts of the case.

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The Whites complain that the circuit court's basis for denying them permissive intervention is the same basis for denying them intervention as of right, and this is an erroneous exercise of discretion. They also claim that because they "satisfied the statutory requirement and the balancing test . . . [t]hat should have ended the matter" and their motion should have been granted. (Whites' Br. 20–21.) The Whites misunderstand permissive intervention.

The circuit court did not simply deny permissive intervention because the Whites failed to prove an element of intervention as of right. Although it did here, even if the circuit court "did not explicitly break out its reasoning" on the separate mandatory and permissive intervention requests, this Court can still "affirm[] so long as the 'decision shows a thorough consideration of the interests of all the parties.'" *Planned Parenthood*, 942 F.3d at 804 (quoting *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 776 (7th Cir. 2007)). Here, as explained directly above, that occurred. Further, the Whites point to no case law "prohibit[ing] consideration of the elements of intervention as of right as discretionary factors." *Id.* And the Whites improperly attempt to confine the circuit court's discretion to only the referenced factors in Wis. Stat. § 803.09(2). While the statute references undue delay and prejudice to the adjudication of rights to the other parties, it "otherwise does not cabin the [circuit] court's discretion." *Id.* (referencing the almost-identical Federal Rule of Civil Procedure 24(b)(1)). For these reasons, the Seventh Circuit has said that "[r]eversal of a [circuit] court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique." *Id.* (quoting *Shea v. Angulo*, 19 F.3d 343, 346 n.2 (7th Cir. 1994)). This case is not unique.

Whether this Court would have come to a different conclusion in response to the Whites' permissive intervention motion is of no moment. The circuit court's decision must be affirmed as long as it cannot be said that "no reasonable

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judge, acting on the same facts and underlying law, could reach the same conclusion" as the circuit court here to deny the Whites' motion. *Olivarez*, 296 Wis. 2d 337, ¶ 16. Here, a reasonable judge could have reached the same conclusion—declining the Whites' permissive intervention because multiple parties already share their interests, already protect them, and would adequately litigate the issues for the court's consideration.

The circuit court properly exercised its discretion in denying the Whites' motion for permissive intervention. That decision should be affirmed.

CONCLUSION

Defendant-Respondent Wisconsin Elections Commission asks this Court to affirm the final order of the circuit court denying intervention to Michael White and Eva White.

Dated this 13th day of February 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,756 words.

Dated this 13th day of February 2023.

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Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of February 2023.

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General

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