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.

REPLY BRIEF OF PROPOSED INTERVENORS – APPELLANTS

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WEC's response echoes the circuit court's reasoning. In doing so, it adds little to the discussion and makes the same mistakes. WEC fails to rebut Appellants' arguments, and it ignores the worst errors of the circuit court. This Court should correct them.

I. WEC does not address the circuit court's erroneous ruling that the interests supporting intervention must be unique from "every eligible voter."

Wisconsin law does not prohibit an intervenor from asserting "broad" interests. WEC nevertheless echoes the circuit court's statement that the Whites' interests are insufficient to support intervention because they are "broad" and "shared by every resident of Wisconsin and by every eligible voter." Resp. Br. 14-15. That claim is incorrect, as Appellants explain in their opening brief: the Whites have a specific interest in preserving the injunction they obtained in Waukesha County, and as in-person voters they have definite interests in ensuring absentee procedures are lawfully followed. Even if the Whites' interests were "broad," however, neither the circuit court nor WEC have explained why that would be a disqualifying characteristic. Nor could they, as Wisconsin law does not require that interests be "narrow" or "unique."

To the contrary, Wisconsin's intervention statute considers only whether the interests are "represented by *existing parties*." Wis. Stat. §803.09(1) (emphasis added). That is one reason why Wisconsin presumes adequate representation only when the asserted interests "are substantially similar *to those of a party*." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶71, 307 Wis. 2d 1, 745 N.W.2d 1 (emphasis added). In other words, whether non-parties might share the Whites' interests is irrelevant. The circuit court impermissibly added to the statutory text by requiring that the Whites present interests unique from all *possible* parties. This

holding, if allowed to stand, would foreclose intervention any time an interest is shared by anyone, regardless of whether they are involved in the lawsuit or not. That novel requirement is not in the text, and it frustrates the "broader, pragmatic approach to intervention as of right" that courts are supposed to employ by preventing concededly valid—albeit widely shared—interests and perspectives from being reflected in cases. *Id.* ¶43.

As Appellants pointed out in their opening brief, this Court has already identified and reversed precisely this type of error. "The 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 v. Brennan*, 2012 WI App 40, ¶33, 340 Wis. 2d 499, 812 N.W.2d 540. If the Whites' motion is granted, as it should have been, and other voters then try to intervene, those voters' interests would be represented by the Whites, who would be "existing parties" to the action. Wis. Stat. §803.09(1). Those "other parties seeking intervention face a different equation." *Friends of Scott Walker*, 2012 WI App 40, ¶33. But denying intervention because the Whites' interests might be shared by others who are not "represent[ing]" those interests in this action adds an atextual requirement to the intervention statute and unquestionably harms the Whites. WEC has no response to this error.

WEC is also wrong that the Whites' right to vote is not harmed. WEC tries to distinguish *Teigen v. Wisconsin Elections Commission* on the ground that "Justice Hagedorn … specifically did *not* join paragraph 25 about standing by way of the polluting or diluting of votes." Resp. Br. 15. But they ignore Justice Hagedorn's concurring opinion, which supports the Whites' asserted interests here. Justice Hagedorn

concluded that voters have "a legal right protected by Wis. Stat. §5.06 to have local election officials in [their] area comply with the law." *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶165, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring). And, as he further noted, "unlawful WEC guidance can threaten harm to the legal rights and privileges Wis. Stat. §5.06 provides to voters like Teigen." *Id.* ¶166. Teigen had thus "sufficiently alleged standing" on the question of "whether WEC issued an allegedly unlawful rule or guidance document that makes it likely local election officials will not follow election laws." *Id.* The Whites assert precisely the same interest here. Whether viewed from the perspective of voter dilution, or of defending a statutory right to vote in valid elections, *Teigen* supports the principle that voters such as the Whites have standing to challenge unlawful enforcement of election laws.

Simply put, "in cases challenging ... statutory schemes as unconstitutional or as improperly interpreted and applied, ... the interests of those who are governed by those schemes are sufficient to support intervention." *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (citation omitted). "Even under the stricter standing test federal courts apply, impairment of the right to vote has been deemed sufficient to confer standing." *Teigen*, 2022 WI 64, ¶36 (plurality op.).

II. WEC repeats the circuit court's error of treating the Whites' interests technically rather than practically.

Plaintiffs' own complaint asks the circuit court to "restore the functional result of the 2016 guidance" enjoined by the Waukesha County Circuit Court. (R.3:9; A.App.21). Both WEC and the circuit court have entirely ignored Plaintiffs' own characterization of their case. That

characterization matters because courts must view the interest requirement "practically rather than technically." *Helgeland*, 2008 WI 9, ¶43.

WEC, like the circuit court, takes an improper technical view of the Whites' interest in preserving their injunctive relief. Intervention considers whether "the *movant* claims an interest relating to the property or transaction," not whether WEC has interests at stake. Wis. Stat. §803.09(1) (emphasis added). Thus, that WEC can potentially comply with multiple orders, or that the cases raise different legal issues, says nothing about whether this case could impair Michael and Eva White's "legally protected interest" in the relief they obtained from the Waukesha County Circuit Court. *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 546, 334 N.W.2d 252, 256 (1983). As the Legislature explains, Plaintiffs' lawsuit, if successful, "would nullify the effect of the injunction the White Plaintiffs previously obtained." Amicus Br. 23. That is enough to support intervention as of right.

In any event, Plaintiffs freely admit that the *White* injunction is the cause of their injuries. (R.3:7-9; A.App.19-21). They would not have filed this lawsuit but for the Waukesha County Circuit Court granting relief to the Whites in *White v. WEC*. Plaintiffs' own complaint frames this case as conflicting with the judgment in *White*. WEC would have the Court ignore that practical fact, but that would be error. *See Helgeland*, 2008 WI 9, ¶43. Appellants have a right to intervene in a lawsuit that explicitly seeks to undermine "the force and effect of a judgment" they obtained in another case. *In re Brianca M.W.*, 2007 WI 30, ¶27, 299 Wis. 2d 637, 728 N.W.2d 652.

III. The Legislature's brief conclusively shows that the existing parties do not adequately represent Michael and Eva White's interests.

The Legislature, "the only party aligned with the Whites," has expressly disclaimed the ability to represent the Whites' interests. Amicus Br. 20. The Legislature explains it has independent interests in (1) the continued enforcement of its statutes, (2) the integrity of its legislative authority, and (3) safeguarding election integrity. Amicus Br. 27. But because the Legislature "speaks solely from the State's sovereign perspective," Amicus Br. 28, it is unable to represent "the *individual right* of the citizen to vote." *State v. Anderson*, 100 Wis. 523, 76 N.W. 482, 486 (1898) (emphasis added). The Whites' interests cannot be presumptively represented by a party that expressly disclaims the ability to adequately represent their interests. Thus, "[t]he Circuit Court incorrectly held that the Legislature adequately represented the White Plaintiffs' interests." Amicus Br. 29.

Likewise, WEC "is an arm of the State," Amicus Br. 28, whose mission is "to further the interests of the public ... not to represent an individual," even if the individual "may ultimately benefit" from WEC's defense of the laws, *State v. Zien*, 2008 WI App 153, ¶36, 314 Wis. 2d 340, 761 N.W.2d 15. This tension is stark in the context of elections. Defendants have no interest in the individual concerns of voters. Instead, state officials, acting on behalf of all Wisconsin citizens and the State itself, must consider "a range of interests likely to diverge from those of the intervenors." *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). Those interests include "the expense of defending the current [laws] out of [state] coffers," "the social and political divisiveness of the election issue," "their own desires to remain politically popular and effective leaders," and even the interests of Plaintiffs. *Clark v. Putnam*

Cnty., 168 F.3d 458, 461 (11th Cir. 1999); *Meek*, 985 F.2d at 1478. All of this makes Defendants less likely to make the same arguments, less likely to exhaust all appellate options, and more likely to settle. *Clark*, 168 F.3d at 461-62.

WEC clings to the presumption of adequate representation, but the presumption does not and cannot save the circuit court's ruling. First, courts "often conclude[] that governmental entities do not adequately represent the interests of aspiring intervenors," generally because a state defendant would be "shirking its duty were it to advance [a] narrower interest at the expense of its representation of the general public interest." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003) (citation omitted). Moreover, in the Waukesha County Circuit Court, WEC was directly adverse to the Whites' interests—the same interests that the Whites assert in this case. Notwithstanding WEC's opposition to the Whites' interest in that case, WEC argues it adequately represents those same interests in this case because WEC "will continue to respect and follow the *White* final order." Resp. Br. 19. But the "minimal" showing of inadequate representation does not require the Whites to prove that WEC will violate a court order. *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994) (quoting *Trbovich v. UMWA*, 404 U.S. 528, 538 n.10 (1972)).

The question is whether WEC will "adequately represent[]" the Whites' interests and vigorously defend the *White* injunction—not whether it will violate that injunction. Wis. Stat. §803.09(1). It defies the logic of our adversarial system to presume that a defendant will actively defend a judgment entered against it after vigorously opposing that very judgment. The Whites thus easily meet the minimal showing that "the representation of [the movant's] 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*, 404 U.S. at 538 n.10).

Finally, WEC complains there are no "substantive difference[s]" between the Whites' answer and WEC's answer. Resp. Br. 16 n.2. But, as Appellants have already pointed out, 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. Again, WEC ignores these principles.

WEC cannot accurately describe the Whites' interests,[1] let alone adequately represent them. The Court should not entertain WEC's weak assurance that it will adequately represent the Whites' interests, particularly given the Legislature's persuasive arguments to the contrary.

IV. The circuit court applied the wrong legal standard for permissive intervention.

WEC cannot explain the circuit court's illogical analysis in denying permissive intervention. A court abuses its 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. As Appellants have explained, the circuit court erred in denying permissive intervention even after finding that (1) the Whites' "claims and defenses are related in law and fact to the main action," (2) the motion was timely, and

[1] WEC argues against a strawman: "Contrary to the Whites' contention here, the *White* court did not determine *when* a clerk may conclude that a witness is [*sic*] address is missing or incomplete." Resp. Br. 18. But Appellants never suggested that the Waukesha County Circuit Court ruled on the temporal question regarding when an address is considered missing or incomplete. Appellants' argument is far simpler: from the perspective of voters, such as the Whites, both cases affect what a witness needs to write in the address line for that ballot to be accepted.

(3) "intervention will not unduly delay or prejudice the litigation of the original action." (R.100:2; A.App.2). The circuit court essentially reapplied the test for intervention as of right, which is not "the appropriate legal standard" for permissive intervention. *Helgeland*, 2008 WI 9, ¶126. That is enough for reversal.

WEC tries to save the circuit court's analysis by arguing that the Seventh Circuit permits courts to consider the intervention-as-of-right elements as factors in ruling on permissive intervention. Even if this Court were to adopt the Seventh Circuit's position, WEC's argument suffers from several problems. First, the circuit court did not treat the elements as factors. The court merely restated the reasons that it "noted above" in denying intervention as of right and treated those elements as dispositive in denying permissive intervention. (R.100:2; A.App.2). Second, even the case WEC relies on notes that the federal rule "is vague about the factors relevant to permissive intervention, but it is not just a repeat of [intervention as of right]." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019). The Seventh Circuit has "thus cautioned courts not to deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right," which is precisely what the circuit court did here. *Id.* The circuit court was rather clear that it denied permissive intervention solely because it concluded that the Whites had no right to intervene. It thus applied the wrong legal standard.

WEC also defends the circuit court's reasoning that intervention is not necessary "to ensure that the issues presented are fully litigated or to assist the court." Resp. Br. 21. But as several federal courts have observed, "whether the proposed intervenor's participation is 'necessary to advocate for an unaddressed issue' is not the correct standard." *Coffey*

v. Comm'r, 663 F.3d 947, 951 (8th Cir. 2011) (quoting *Appleton v. Comm'r*, 430 F. App'x 135, 138 (3d Cir. 2011)). Rather, Wisconsin's standard—which is identical to the federal standard—"is whether the intervention will cause 'undue delay' or 'prejudice the adjudication of the original parties' rights.'" Wis. Stat. §803.09(2)). *Compare with* Fed. R. Civ. P. 24(b)(3).

When "the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, the district court is well within its discretion in deciding that the applicant's contributions to the proceedings would be superfluous and that any resulting delay would be 'undue.'" *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982). But "redundancy ... due to identity of interest should only be a bar to intervention *when it has the adverse effect* of 'undue delay' or 'prejudice.'" *Appleton*, 430 F. App'x at 138 (emphasis added). Given the circuit court's conclusion that intervention would *not* cause undue delay or prejudice, its reasoning "to ensure that the issues presented are fully litigated or to assist the court" was not a valid basis for denying intervention. (R.100:2; A.App.2).

In other words, the circuit court denied intervention after concluding that there are zero costs associated with permitting the Whites to intervene. Although appellate courts do not lightly second-guess the "weighing the costs and benefits of permissive intervention," abuse of discretion must include, at a minimum, arbitrarily denying intervention after concluding that intervention would cause no problems. *Kaul*, 942 F.3d at 804.

Federal courts have held that trial courts abuse their discretion by failing to consider undue delay or prejudice. *E.g.*, *Coffey*, 663 F.3d at 951; *Appleton*, 430 F. App'x at 138. Courts can even abuse their discretion by

miscalculating the degree of delay. *E.g.*, *City of Chicago v. FEMA*, 660 F.3d 980, 986 (7th Cir. 2011) (holding the trial court abused its discretion in concluding permissive intervention would be "unwieldy" when the six intervenors filed as a single party and their intervention could prevent additional litigation). Much worse, then, is the circuit court's denial of permissive intervention despite its finding that the Whites' intervention will not cause undue delay or prejudice.

Given the circuit court's discretionary findings that "the Whites claims and defenses are related in law and fact to the main action," and that "intervention will not unduly delay or prejudice the litigation of the original action," the only reasonable conclusion was to permit them to intervene. (R.100:2; A.App.2). The circuit court's arbitrary denial based on improper legal standards was an abuse of discretion.

CONCLUSION

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

Dated this 28th day of February, 2023.

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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 2,794 words.

Dated this 28th day of February, 2023.

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CERTIFICATE OF SERVICE

I certify that on this 28th day of February, 2023, 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 28th day of February, 2023.

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