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

VOTE.ORG'S REPLY BRIEF

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

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INTRODUCTION

The circuit court should have granted Vote.org's motion to intervene in Plaintiff Richard Braun's lawsuit seeking to end Wisconsin's nearly 30-year policy of accepting the National Mail Voter Registration Form. Vote.org is the largest nonprofit, nonpartisan voter registration technology platform in the country, and the national form is a lynchpin of its sophisticated, nationwide web platform. If Braun's suit succeeds, Vote.org will have to either rework its software at considerable expense or stop serving Wisconsin voters who cannot or do not wish to register entirely online. Vote.org therefore has a distinct, focused interest in this case that the Wisconsin Elections Commission (WEC) does not adequately represent.

Braun has no answer to these arguments. He does not defend the circuit court's reasoning, which assumed Braun would win on the merits and then rejected Vote.org's interest because it did not itself provide a full merits defense. Braun instead questions the existence and magnitude of Vote.org's interest, but that interest is supported by undisputed record evidence. And Braun's attempts to distinguish cases holding that regulators like WEC do not adequately represent the interests of regulated parties like Vote.org only serves to strengthen Vote.org's argument, because a review of those cases establishes that representation is even *less* adequate here.

This Court should reverse.

ARGUMENT

I. Vote.org is entitled to intervention of right.

Vote.org is entitled to intervention of right. Braun concedes that Vote.org's motion was timely. Resp. Br. 11. And contrary to Braun's arguments, the remaining factors are met: Vote.org has an interest related to the subject of this case, the disposition of the case threatens to impair or impede that interest, and the existing parties do not adequately represent Vote.org's interest. *See Helgeland v. Wisconsin Muns.*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1.

A. Vote.org has an interest in the subject matter of this case, which the case threatens.

Vote.org has a direct interest in protecting its longstanding use of the national form in Wisconsin, which this lawsuit threatens. Under Wisconsin's "broader, pragmatic approach" to analyzing an intervenor's interest, *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 548, 334 N.W.2d 252 (1983), courts ask whether "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). Vote.org indisputably satisfies that test.

Vote.org has built a software platform for nationwide use that relies upon the national form. R.11:1, 8. Vote.org's software platform populates the national form based on voters' answers to questions, allowing Vote.org to "standardize its provision of mail-in voter registration" across the country. R.11:9. The issue therefore is not—as Braun claims—a question of which form Vote.org "prefer[s]," Resp. Br. 13, but whether Vote.org will be able to continue to use its existing software to help many Wisconsin voters register.

In arguing for affirmance, Braun makes no effort to defend the court's reasoning. The court recognized Vote.org's interest but rejected it because it did not itself provide a *merits defense* that required Wisconsin to continue to accept the national form. *See* R.73:4 ("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?"); *see also* R.73:5, 8, 10, 25. As Vote.org's opening brief explained, that reasoning improperly conflated the merits of the case with its effect on Vote.org. Braun has no answer to this argument, and thus concedes it. *See Singler v. Zurich Am. Ins. Co.*, 2014 WI App 108, ¶ 28, 357 Wis. 2d 604, 855 N.W.2d 707 ("Arguments not refuted are deemed conceded.").

Braun instead argues that Vote.org's interest does not exist, but the record refutes his position. Braun asks, "what cost is there to switching forms?" Resp. Br.

13. That is an evidentiary question, and undisputed evidence in the record demonstrates that replacing the national form with the EL-131 form in Vote.org's software would require the diversion of significant staff and financial resources. R.11:9. Braun's claim that Vote.org could "simply … replace one form with another" is nothing more than uninformed speculation, reflecting no understanding of the technical issues involved, and provides no basis for rejecting the contrary record evidence. Resp. Br. 13. This includes Vote.org's CEO's sworn affidavit, which demonstrates the CEO's familiarity with both Vote.org's technology platform and what would be required to change it.

Moreover, contrary to Braun's argument, the relationship between this case and Vote.org's interest is "direct and immediate." Resp. Br. 15 (quoting *Helgeland*, 2008 WI 9, ¶¶ 7, 71). When a prospective voter visits Vote.org and opts to mail their registration form themselves, Vote.org's proprietary software asks the voter questions and uses answers to fill out a copy of the national form and send it to the user to print, sign, and mail. R.11:7. Vote.org therefore uses the national form directly, to help Wisconsin voters register.

Vote.org will therefore be directly harmed if the national form is no longer accepted. It "would either have to develop software specific to Wisconsin's voter registration form to assist users with pre-populating the Wisconsin specific form, or it would need to eliminate altogether the option for Wisconsin-based users to download pre-populated voter registration forms." R.11:9. Both options would harm Vote.org.

Developing Wisconsin-specific software "would require Vote.org to expend significant staff and financial resources to modify its procedures for registering Wisconsin votes." R.11:9. As a federal court held in a similar case, if Vote.org must make state-specific modifications to its platform, it will be "forced to divert resources from its general, nationwide operations—as well as its specific programs in other states—to redesign its absentee ballot web application and employ more expensive … means of achieving its voter participation goals." *Vote.org v. Ga. State*

Election Bd., No. 1:22-CV-01734-JPB, 2023 WL 2432011, at *4 (N.D. Ga. Mar. 9, 2023).

Alternatively, if Vote.org abandons the "print-at-home" option for Wisconsin, then it will reach fewer voters. Voters who lack a Wisconsin ID—everyone from out-of-state college students to economically disadvantaged Wisconsinites—*cannot* use Wisconsin's online registration portal. Being unable to help those voters would definitionally impede Vote.org's mission.

Given this record, Braun's attempts to distinguish *Idaho Farm Bureau Federation v. Babbit*, 58 F.3d 1392 (9th Cir. 1995), *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), and *Kane County v. United States*, 928 F.3d 877 (10th Cir. 2019), miss the point. Resp. Br. 15–17. Vote.org's threatened interest is indeed somewhat different from the interests accepted as sufficient in those cases, but only because Vote.org's interest is *stronger*. If an environmental group could intervene to defend a rule it had supported, *Idaho Farm Bureau*, 58 F.3d at 1397, a business group could intervene to defend campaign finance restrictions on labor unions, "their traditional political adversaries," *Mich. State AFL-CIO*, 103 F.3d at 1243–44, and a conservation group could intervene to oppose the widening of roads on lands it did not own, *Kane County*, 928 F.3d at 891–92, then surely Vote.org has the necessary interest in defending its own use of the registration form challenged here. Braun does not cite a single case—federal *or* Wisconsin—finding no threatened, protectable legal interest under similar factual circumstances.[1]

Braun argues that "there is no potential outcome of this suit in which Vote.org will be *prevented* from continuing to help Wisconsinites to register to vote." Resp. Br. 12 (emphasis added). But Vote.org need not show that it would be

[1] Contrary to *Braun*'s arguments, consideration of federal precedent is appropriate: "Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1)." *Helgeland*, 2008 WI 9, ¶ 37. The fact that federal *substantive* law does not require Wisconsin to accept the national form, Resp. Br. 16–17, does nothing to change Wisconsin's established reliance of federal *procedural* law in construing the intervention standards.

completely prevented from carrying out its mission in order to intervene. Section 803.09(1) requires a court to grant intervention if, all other conditions being met, the case "may as a practical matter *impair or impede* the movant's ability to protect that interest." (Emphasis added.) There is no requirement that the interest be entirely destroyed. That this lawsuit threatens to make it harder for Vote.org to help Wisconsinites register to vote by posing a direct threat to its use of the national form is more than adequate to entitle it to intervene. The circuit court erred in holding otherwise.

B. WEC does not adequately represent Vote.org.

Intervention of right is also warranted because WEC does not adequately represent Vote.org's interest in this case. The burden to show inadequate representation is minimal: Vote.org need only show "that the representation of [its] interest 'may be' inadequate." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (cleaned up). Vote.org more than meets that standard.

Braun attempts to distinguish *Wolff* on the facts, but in doing so, Braun confuses *Wolff*'s consideration of the intervenor's interests with its adequate representation inquiry. Resp. Br. 21–22. Braun argues that the intervenor in *Wolff* was seeking to defend its own victory in an administrative appeal. Resp. Br. 21. Although that surely gave the intervenor the necessary interest, the adequacy of representation question was entirely separate. *Compare Wolff*, 229 Wis. 2d at 744–747 (discussing the town's interest) *with id.* at 747–750 (discussing whether town was adequately represented by existing county defendant). On the adequacy question, *Wolff* was clear: the fact that the intervenor and the existing defendant "seek the same outcome" and "would offer similar arguments in support of their mutually desired outcome" did *not* preclude intervention of right. *Id.* at 748.

Wolff therefore directly rejects Braun's argument that Vote.org and WEC's shared "position and goal" in this litigation, and the resulting similarities of their substantive arguments, mean that WEC adequately represents Vote.org. Resp. Br.

19–20. Although Vote.org was able to file an amicus brief below, Vote.org was unable to participate in the hearing and will not be able to appeal if Braun prevails. That alone is sufficient to undermine adequacy of representation. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508–09 (7th Cir. 1996); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 305 (6th Cir. 1990); *Smuck v. Hobson*, 408 F.2d 175, 177 (D.C. Cir. 1969). Braun implies that intervention is premature because "no party has stated whether they intend to appeal should they lose in whole or part." Resp. Br. 22. But Vote.org cannot wait until a decision on the merits to move for intervention: such a motion would likely not be deemed timely. *See Bilder*, 112 Wis. 2d at 550.

Braun alternatively argues for a presumption of adequate representation, but no such presumption applies. Resp. Br. 24–28. Such a presumption applies in only two situations: 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." *Helgeland*, 2008 WI 9, ¶ 86. Neither is implicated here.

First, WEC and Vote.org do not have identical interests. WEC is a state actor, and the presumption of representation arising from identical interests arises between a state actor and a private intervenor only if they share the same broad goals, not just the same litigation objectives. *See Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2204 (2022); *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538–39 (1972); *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 749 (7th Cir. 2020). Contrary to Braun's argument, these cases are directly analogous here. WEC's obligation is to regulate elections and enforce election law, not to "ensur[e] that Wisconsinites can register to vote," as Braun contends without supporting citation. Resp. Br. 27; *see* Wis. Stat. § 7.08. In contrast, Vote.org helps voters register to vote—a distinct function and interest. The difference between those objectives closely mirrors the differences between state parties and intervenors in *Trbovich*, *Berger*, and *Driftless.*

Braun tries to distinguish *Trbovich* because there, the government actor had two distinct duties—to protect union members, and to protect the public interest. Resp. Br. 25. Here, WEC's *only* duty is to protect the public interest and enforce the law—not to protect Vote.org—which only heightens the divergence between its interests and Vote.org's. Similarly, Braun's argument that *Berger* involved two competing governmental entities only strengthens the point. Resp. Br. 25–26. If one governmental entity does not presumptively represent another despite ostensibly identical objectives, then surely a governmental entity cannot adequately represent a private party with a distinct mission. This case is like *Driftless*, where regulated private parties had interests that were "independent of and different from" their regulator's, even though they wanted the same bottom-line result in the case. 969 F.3d at 748.

Second, WEC is not charged by law with defending Vote.org's interests, another basis for a presumption of adequate representation. Unlike *Helgeland*, 2008 WI 9, ¶¶ 91, 96, this is not a constitutional challenge to a statute, so WEC's Department of Justice attorneys have no obligation to make any particular argument about what Wisconsin law requires. Braun's citation of a procedural rule requiring service on the Attorney General in cases involving "the construction … of a statute" does nothing to change this. Resp. Br. 27–28 (citing Wis. Stat. § 806.04(11)). That statute does not require DOJ to take any particular position on what a statute means. In contrast, the Attorney General's duty to defend the constitutionality of duly enacted statutes is long-established and clear. *See, e.g.*, *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 34–35, 232 Wis. 2d 612, 605 N.W.2d 526; *State Pub. Intervenor v. Wisconsin Dep't of Nat. Res.*, 115 Wis. 2d 28, 37, 339 N.W.2d 324 (1983); 80 Op. Att'y Gen. 124, 128 (1991).

Under any standard, WEC does not adequately represent Vote.org because WEC and Vote.org are not in this case for the same reasons and they are not equally invested in its outcome. WEC is defending this case as one challenge to election regulations among many, and WEC has no reason to prioritize this case. *See* App.

Br. 20; *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999) (granting intervention because government defendants' "intent to represent everyone in itself indicates that the[y] represent interests adverse to the proposed interveners"). Vote.org sought to intervene out of concern that the case could undermine its operations in Wisconsin, seeking to protect its investment in a software platform built around the national form. And Vote.org has considerably more to lose in the advent of an adverse decision than WEC does. *See Wolff*, 229 Wis.2d at 749. To WEC, losing this case could mean only a slight alteration to the guidelines it issues. To Vote.org, it would mean either diverting precious resources from other priorities to revamping its flagship online platform or else serving fewer Wisconsin voters, directly impeding its mission either way.

WEC therefore does not adequately represent Vote.org in this case, and the circuit court erred in holding otherwise.

II. The circuit court should have granted permissive intervention.

Vote.org is also entitled to permissive intervention. The circuit court improperly denied such intervention in reliance on two legal errors. Using the wrong legal test is itself sufficient for reversal under any standard of review. *See Piper v. Jones Dairy Farm*, 2020 WI 28, ¶ 14, 390 Wis. 2d 762, 940 N.W.2d 701 (*citing Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756) ("A circuit court erroneously exercises its discretion when it applies an improper legal standard").

First, the circuit court applied an erroneous test to deny Vote.org's intervention. The circuit court's permissive intervention decision faults Vote.org for having "intentionally created a system in reliance on a particular form that may or may not be in accordance with Wisconsin law," before concluding that "[t]o me, that's not a basis for permissive intervention because that's their decision to do." R.73:27–28. It is incorrect and prejudicial both to punish Vote.org for failing to anticipate Braun's unprecedented legal arguments seven years ago when Vote.org began using the national form in Wisconsin, and to deny intervention on the ground

that Vote.org's interest in the case does not itself provide a substantive defense on the merits.

Second, the circuit court denied Vote.org permissive intervention for failing to satisfy the requirements for intervention as of right. Braun attempts to rehabilitate the circuit court's reasoning by attributing it to Vote.org's suggestion that its case for intervention as of right also supported permissive intervention. Resp. Br. 30. But the circuit court took that suggestion too far. Instead of simply examining the *arguments* made in support of intervention as of right, as Vote.org suggested, the court's oral decision recapitulated the *factors* required. R.73:27 ("look[ing] at a lot of the same factors that you considered under intervention by right" and "com[ing] out with the same result."). The court denied intervention as of right because, in its estimation, Vote.org had failed to demonstrate either that its interests would be impaired by the disposition of the litigation or that it was inadequately represented by WEC. *See* R.73:27–28. Although failure to meet either one of those prongs is fatal to intervention as of right, it is not a sufficient reason to deny permissive intervention, which does not have the same requirements. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019).

Because the court applied incorrect legal tests to its permissive intervention analysis, and because Vote.org has amply demonstrated its interest in this litigation, this Court should reverse the circuit court's decision.

CONCLUSION

The Court should reverse the denial of intervention.

Dated: May 25, 2023

Respectfully submitted,

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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 portions of the brief referenced in Wis. Stat. § 809.19(8)(c)(3) contains 2,780 words (2,990 including the introduction).

Dated: May 25, 2023

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