FILED
10-04-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP0076

RICHARD BRAUN,

Plaintiff-Respondent,

WISCONSIN ELECTIONS COMMISSION,

Defendant-Respondent,

v.

VOTE.ORG,

Proposed-Intervenor-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

LYNN K. LODAHL
Assistant Attorney General
State Bar #1087992

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendant-Respondent
Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219 (LKL)
(608) 266-0020 (BPK)
lodahllk@doj.state.wi.us
keenanbp@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Vote.org, a national voter registration organization, helps individuals register to vote. It prefers to use the National Voter Registration Form for these efforts. The National Form is a federally-required method of voter registration in most states, but Wisconsin is exempt from that requirement.

Richard Braun brought suit to argue that use of the National Form is prohibited under Wisconsin law. Vote.org sought to intervene. Its motion was denied by the circuit court and affirmed by the court of appeals. The Wisconsin Elections Commission (the "Commission") did not object to permissive intervention, and so did not object to the motion.

Whether the National Form complies with Wisconsin law is now a moot point. Following the circuit court's summary judgment decision, the Commission unanimously decided against approving the National Form as a generally available method of voter registration in Wisconsin, voting instead to prescribe its use only for overseas and military voters in certain circumstances. No one disputes that this use is permitted.

Vote.org petitions for review, arguing that it was entitled to intervene as of right. This Court should deny the petition because the case is moot: further appeals by Vote.org would not lead to the National Form's use in Wisconsin. Even if the case were not moot, the petition is not a good vehicle to take up the two issues Vote.org identifies regarding the fourth prong for intervention: inadequacy of representation.

Petitioner's first issue essentially seeks to overrule part of the standard under *Helgeland v. Wisconsin Municipalities*, which presumes adequate representation when a movant and an existing party have the same ultimate objective in the litigation. 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. But even if this Court wanted to change that part of *Helgeland*, the

other presumption of adequacy—which applies when an existing party is a governmental body charged by law with representing the interests of the movant—would still apply, and Vote.org never sought below to overcome that presumption.

Petitioner's second issue seeks a *per se* rule that, whenever a defendant decides not to appeal a circuit court decision, its representation is automatically inadequate. None of the parties have discovered a case that has adopted such a standard. Instead, a decision not to appeal can be a factor in considering inadequacy, but it is not determinative. And federal courts recognize that parties do not have standing to intervene in order to appeal once a case—as the one here—becomes moot.

STATEMENT OF THE CASE

I. Braun sues the Commission to challenge use of the National Form as a method of voter registration in Wisconsin.

Braun sued the Commission to challenge use of the National Form as a method of voter registration in Wisconsin. (R. 2:3.) His primary argument was that the National Form fails to comply with Wis. Stat. § 6.33(1), a statute containing requirements for voter registration forms. (R. 2:8–10.)

II. Vote.org moves to intervene and the circuit court denies the motion.

Vote.org moved to intervene as a defendant, both as of right under Wis. Stat. § 803.09(1) and permissively under Wis. Stat. § 803.09(2). (R. 13; 37.) Braun opposed intervention and the Commission took no position. The circuit court denied Vote.org's motion. (R. 60.)

As to intervention as of right, the circuit court reasoned that this case involves the "narrow question" of "whether or not this national form complies with Wisconsin law;" both the Commission and Vote.org were "pursuing exactly the same outcome;" and differences in the two parties' reasons for pursuing that outcome would not affect the adequacy of the Commission's representation of Vote.org's interests. (R. 73:26–27.) The circuit court granted Vote.org leave to file an amicus brief instead. (R. 75.)

III. The circuit court grants summary judgment to Braun based on the lack of evidence that the National Form had been formally prescribed for use in Wisconsin.

Braun and the Commission briefed the merits of the case in cross-motions for summary judgment. The circuit court granted summary judgment to Braun on September 5, 2023, but did not reach the question of whether the National Form substantively complies with Wis. Stat. § 6.33(1). (Pet. App. 87–88.) Instead, the circuit court held that the National Form had not been "properly prescribed or promulgated" by the Commission. (*Id*. at 87.) The circuit court then enjoined the Commission "from issuing guidance of any kind that the National Form is approved for use or that the National Form may be used to register voters in Wisconsin," "[u]ntil such time as the Wisconsin Elections Commission prescribes use of the National Form." (*Id*. at 88.)

The Commission elected not to appeal the circuit court decision and order.

IV. The Commission considers whether to prescribe the National Form for general use in Wisconsin and decides against it.

At a meeting on September 14, 2023, the Commission passed a motion directing staff "to present to the Commission a solution that contemplates prescribing

the National Mail Voter Registration Form in compliance with Wisconsin law." Open Session Minutes, Wis. Elections Comm'n (Sept. 14, 2023), at 2 https://elections.wi.gov/sites/default/files/documents/9.14.23%20Open%20Session%20Minutes%20APPROVED.pdf. In response to this directive, the Commission's legal counsel prepared a memorandum for the commissioners that sets forth "[s]everal possible courses of action . . . each of which represents a possible solution to the prescription-based issues detailed in *Richard Braun v. Wisconsin Elections Commission*, Case No. 2022CV1336." Open Session Memorandum, Wis. Elections Comm'n (Nov. 2, 2023), at 93–99, https://elections.wi.gov/sites/default/files/documents/Open%20Session%2011.2.2023%20FINAL.pdf.

The memorandum then provided several possible alternatives for Commission action regarding prescription of the National Form pursuant to Wis. Stat. § 6.33, including (a) prescribing the National Form for general use in Wisconsin; (b) prescribing the National Form for use in Wisconsin, but only for specific voter types (particularly, voters falling under the umbrella of the federal Uniformed and Overseas Citizens Absentee Voting Act; and (c) doing nothing. *Id*.[1]

On November 2, 2023, the Commission met in open session to discuss possible action to prescribe the National Form, as addressed in the memorandum, in addition to other agenda items. Open Session Minutes, Wis. Elections Comm'n (Nov. 2, 2023), https://elections.wi.gov/sites/default/files/documents/November%202%2C%202023%20Open%20Session%20Minutes%20APPROVED.pdf. Following a discussion, the Commission

[1] In the memorandum, the Commission's chief legal counsel indicated that "UOCAVA voters" are "the group of voters who are most likely to use or rely on the Form." Open Session Memorandum, Wis. Elections Comm'n, at 98.

declined to prescribe the National Form for general use. The Commission instead voted unanimously to prescribe the National Form "for use in the limited circumstances of being used by Military and Overseas (UOCAVA) voters in the 45 days prior to an election." *Id.* at 10.

V. The court of appeals affirms the circuit court's decision denying Vote.org's intervention motion.

Meanwhile, Vote.org pursued an appeal of the circuit court's decision to deny its intervention motion. On July 31, 2024, the court of appeals affirmed. As relevant to this petition for review, the court of appeals agreed with the circuit court that Vote.org could not satisfy the fourth criterion for intervention as of right under Wis. Stat. § 803.09(1): inadequacy of representation by the existing parties. (Pet. App. 15–21, ¶¶ 25–35.) The court's reasoning is discussed in greater detail below.

Vote.org asks this Court to review the court of appeals' decision regarding intervention as of right.

REASONS FOR DENYING THE PETITION FOR REVIEW

The Court should deny this petition for review because the case is moot. Even if this Court were to reverse the court of appeals, reopen the case, and grant Vote.org's intervention motion, it would be to no practical effect. Following the circuit court's summary judgment decision, the Commission acted on its own and decided to limit use of the National Form to a small category of Wisconsin voters. This action moots the underlying legal dispute, and it prevents Vote.org from obtaining the outcome it sought in the circuit court.

Setting aside mootness, Vote.org states that a decision from this Court is needed to clarify the fundamental nature of the adequacy-of-representation inquiry, especially where a named party decides not to appeal an adverse decision and a

putative intervenor would have made a different choice. (Pet. 11.)

This case is not a good vehicle for such review. The court of appeals correctly applied *Helgeland* to affirm the circuit court's denial of intervention, and the holding of that case is not ambiguous. While this Court could overrule *Helgeland*, Vote.org's motion would have failed under *Helgeland*'s other presumption of adequacy, which Vote.org does not challenge. Vote.org's second issue, a request that this Court adopt a rule finding inadequacy of representation whenever state defendants don't appeal, would depart from the standard in other jurisdictions. A case involving only moot issues—where no appeal can make a difference—is not the case to explore that idea.

Circuit courts retain discretion to grant permissive intervention, or participation as *amicus curiae*, when advocacy groups have perspectives to assist the court. And there may be a future case that will properly tee up the issues Vote.org identifies here.

I. The case is moot.

Vote.org's petition for review should be denied because this case—and the issue of whether Vote.org should have been allowed to intervene—is moot.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 766 N.W.2d 559. A "moot question is one which circumstances have rendered purely academic." *Id.* ¶ 29 (citation omitted). To determine whether a matter is moot, the court looks to the petitioner's requested relief to determine whether any remedy it sought could have any practical effect on the existing controversy. *Id.* ¶ 31.

Vote.org has "built its voter-registration system on the premise that Wisconsin, like most other states, would continue to accept the [National] Form," and it sought to intervene in this case to defend its use of the National Form to help Wisconsinites register to vote. (Pet. 8.) But federal law makes use of the National Form optional in Wisconsin, and, following the conclusion of this case, the Commission decided against it. The Commission decided instead to approve the National Form for use only by military and overseas voters, and even then, only in the 45 days preceding an election. This action by the Commission moots the underlying dispute regarding whether Wisconsin law permits the National Form to be used as a generally available method of voter registration in Wisconsin—a question that is now "purely academic." *PRN Assocs. LLC*, 317 Wis. 2d 656, ¶ 29 (citation omitted).

Likewise, whether the circuit court erred when denying Vote.org's intervention motion is also a moot question. Even if the case were reopened and Vote.org were allowed to intervene, it would have no practical effect on the outcome. The legal dispute at the heart of this case is over.

The Court may deny Vote.org's petition for review for this reason alone.

II. There is no need for this Court to clarify or harmonize Wisconsin's law on intervention with respect to the two issues presented for review.

Setting aside mootness, this Court should also deny Vote.org's petition for review because the court of appeals decision was correct and there is no need for this Court to clarify or harmonize Wisconsin's law on intervention with respect to the two issues presented for review.

A. The court of appeals correctly followed *Helgeland* and *Rise*, a recent District IV case addressing intervention in election cases; Vote.org seeks to overrule *Helgeland* in favor of the Seventh Circuit's rule.

The court of appeals was correct in holding that the Attorney General and Commission would adequately represent Vote.org's interests. The court followed *Helgeland* and *Rise, Inc. v. Wisconsin Elections Commission*, No. 2024AP0165, 2024 WL 3373576 (Wis. Ct. App. July 11, 2024) (unpublished), a recent unpublished but authored decision from District IV. Vote.org ignores one of the two core presumptions in *Helgeland* and seeks to replace the other presumption with a different test.

1. The court of appeals correctly followed *Helgeland* and *Rise*.

Helgeland involved a constitutional challenge to a state statute that barred same-sex domestic partners of state employees from being treated as dependents under the state health insurance plan. *Helgeland*, 307 Wis. 2d 1, ¶ 22. Several municipalities sought to intervene as defendants. *Id.* ¶ 23. In affirming the denial of that request, the supreme court recognized two presumptions of adequacy that are relevant in a case challenging an aspect of state law.

First, adequate representation is presumed when a movant and an existing party have "the same ultimate objective" in the action. *Id.* ¶ 90.

Second, adequate representation is presumed when a party is "a governmental body or officer charged by law with representing the interests of the absentee." *Id.* ¶ 91 (citation omitted). The *Helgeland* court pointed specifically to the Attorney General's duties: the "Attorney General of Wisconsin has the duty by statute to defend the

constitutionality of state statutes." *Id.* ¶ 96 (discussing Wis. Stat. § 806.04(11)).

Where either of the *Helgeland* presumptions applies, the proposed intervenor must make a "compelling showing" that the representation is not adequate. *Id.* ¶ 86. Differences between the parties' enthusiasm for the law, or a preference for different litigation strategies, do not meet that standard. *Helgeland* rejected the proposed intervenors' theory that the Attorney General's personal dislike of the law demonstrated inadequacy, pointing to the Attorney General's duty to defend its constitutionality. *Id.* ¶¶ 93–96. The court also rejected the argument that the proposed intervenors demonstrated inadequacy based on the premise that they would defend the law with more "vehemence" than the Department of Employee Trust Funds (DETF), which administered the law at issue. *Id.* ¶¶ 107–08.

In *Rise*, the court of appeals, District IV, applied *Helgeland* to deny intervention to proposed intervenors in an election-related case, holding that they could not meet in the inadequacy prong. *Rise, Inc. v. WEC*, No. 2022AP1838, 2023 WL 4399022, ¶¶ 31–44 (Wis. Ct. App. July 7, 2023) (unpublished) (authored decision cited in accordance with Wis. Stat. § (Rule) 809.23(3)).

Rise involved a challenge to the interpretation of a statute requiring a witness address for absentee ballots, and the proposed intervenor defendants had been plaintiffs in another case relating to witness addresses. *Id.* ¶¶ 7–8. In affirming the denial of intervention, the court of appeals held that both *Helgeland* presumptions applied: (1) the parties sought the same ultimate objective, and (2) the Commission and Department of Justice were charged with "representing the rights of electors so that all may enjoy the benefits of the correct application of the laws governing elections." *Id.* ¶¶ 35–36. The court concluded that the proposed intervenors had not rebutted those presumptions by making a compelling

showing the Commission did not adequately represent their asserted interests. *Id.* ¶¶ 37–44. The court rejected the proposed intervenors' argument that they met the standard based on their political views or interests as voters. *Id.* ¶¶ 42–43.

Here, in affirming that the Vote.org was not entitled to intervene as of right, the court of appeals followed the standards set forth in *Helgeland* and *Rise*. The court held that both *Helgeland* presumptions applied, quoting *Rise* as to the charge to the Department of Justice to represent the rights of electors. *Braun v. Vote.org*, 2024 WI App 42, ¶¶ 29–30, 11 N.W.3d 106. And it concluded that Vote.org had not rebutted those presumptions with a compelling showing of inadequacy. *Id.* ¶¶ 30–34.

Here, in saying the court of appeals erred, the petition never mentions *Rise* and it does not fully engage with *Helgeland*'s standards. It cites the two relevant presumptions for cases challenging state law (Pet. 21), but its argument ignores the second presumption—about the Commission and Department of Justice—altogether. And its discussion of the first presumption seeks to replace *Helgeland*'s "ultimate objective" test. (*Id.* at 22–26.)

2. Vote.org seeks to replace *Helgeland*'s "same objective" presumption with an "animating interest" standard similar to that used by the Seventh Circuit.

Regarding the question of whether the proposed intervenor has the "same ultimate objective in the action," *Helgeland*, 308 Wis. 2d 1, ¶ 90, Vote.org asks instead for an "animating interest" standard, (Pet. 22). It does not ask this Court to overrule *Helgeland*, arguing that its holding was ambiguous. (*Id.*) It is not.

Helgeland explained that the "same ultimate objective" standard was met where the state defendant, DETF, and proposed intervenors sought the same ultimate outcome in

the case; there, both groups "ask[ed] the court to uphold the constitutionality of DETF's plans and of Wis. Stat. § 40.02(20)." *Helgeland*, 308 Wis. 2d 1, ¶ 90. This Court rejected the proposed intervenors' view that representation was inadequate based on their greater vehemence in defending the law, their preference for a different litigation strategy, or their view that their interests were different from DETF's. *Id.* ¶¶ 92–108 (discussing proposed intervenors' view that their interest was different from DETF, which "merely administers the law").

Vote.org offers no analysis based on *Helgeland* or the intervention statute itself, Wis. Stat. § 803.09(1), to support its animating interest test. Instead, Vote.org urges this Court to follow the standard in the U.S. Court of Appeals for the Seventh Circuit. (Pet. 25–26.) Vote.org is correct that the Seventh Circuit has a different standard in applying, the federal intervention rule, Fed. R. Civ. P. 24, but that circuit's test is not the uniform rule among the federal courts, and adopting that rule would require this Court to overrule *Helgeland*.[2]

The Seventh Circuit test is illustrated in *Bost v. Illinois State Board of Elections*, 75 F.4th 682, 686 (2023), where the Seventh Circuit considered the denial of a political party's motion to intervene as a defendant challenging an Illinois election law. The court held that a presumption of adequacy

[2] The other two cases cited by Vote.org don't help it. *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999), predated *Helgeland* and thus does not use *Helgeland*'s analytical framework. It never discusses whether one of the presumptions applies that would then guide the proposed intervenor's burden to demonstrate inadequacy. And *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), was a case where the party and intervenor had different ultimate objectives in the case. *See Stuart v. Huff*, 706 F.3d 345, 351–52 (4th Cir. 2013) (describing *Trbovich*).

did not apply because, even though the party sought the same outcome as the state elections board, there were somewhat different stakes for each. *Id*. at 688, 689.[3] That meant that the default rule applied, under which the party needed to show that it wanted to make different litigation choices than the existing defendant. *Id.* at 689–90. Even under that lenient standard, the court affirmed the denial of intervention because the party failed to show that it would have taken different steps from the state defendant. *Id*. at 690.

Judge Easterbrook joined the opinion because it "accurately appl[ies] this circuit's norms," but he wrote a concurrence to express his disagreement with the Seventh Circuit's test:

> If the need to search for unique interests, or the multiple tiers of justification, came from the Supreme Court, we would be obliged to conform. As far as I can see, however, the Justices have not told us to use the approach that now prevails in this circuit. It can't be traced to the text of Rule 24 or to the Committee Notes on that text. Nor does it have the support of scholarly sources. It is homegrown and lacks any apparent provenance.

Id. at 691, 692 (Easterbrook, J., concurring).[4] Judge Easterbrook went on to explain the result of the "unique interest" test:

---

[3] *Bost* relied on *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 744 (7th Cir. 2020), a case also relied on by Vote.org here. *Bost*, 75 F.4th at 688.

[4] For examples of other circuits that apply the "ultimate objective" test, *see Albright v. Ascension Mich.*, 2024 WL 1114606, *2 (6th Cir. 2024) (unreported); *Sec. & Exch. Comm'n v. LBRY, Inc.*, 26 F.4th 96, 99 (1st Cir. 2022); *Guenther v. BP Ret. Accumulation Plan*, 50 F.4th 536, 543 (5th Cir. 2022); *Stuart*, 706 F.3d at 351–52; *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898–99 (9th Cir. 2011).

> The [government] Board's interest is in defending and enforcing state law, while the [political] Party's interest lies in using that law for the benefit of its candidates and members. But if the Board vigorously defends the statutes, that defense protects the Party's interest as well.
>
> By the Party's lights, any private person with a concrete interest at stake can intervene in every suit against a public official, because the official's interest inevitably diverges from the private interest. Intervenors could number in the dozens, making discovery and settlement difficult if not impossible.

Id. at 692.

Of course, this Court could decide to overrule *Helgeland* and choose to adopt the Seventh Circuit's approach. The Commission submits, however, that this case is a poor vehicle to make that significant choice.

First, as discussed in section I, this case is moot. Second, even under the Seventh Circuit's test, Vote.org did not argue below (and still does not here) that it wanted to make different decisions or take different positions than the Commission did in the circuit court. These facts are thus like those in *Bost*, where the court affirmed the denial of intervention even under the more lenient test. Vote.org's intervention would thus have been properly denied even under the Seventh Circuit's test.

3. Vote.org ignores the second *Helgeland* presumption, applicable where the executive branch defendant and the Department of Justice are defending the case.

Regarding the second presumption, applicable where the executive branch defendant and Department of Justice are defending the law, *Helgeland*, 307 Wis. 2d 1, ¶ 91, Vote.org ignores it altogether. Under *Helgeland*, Vote.org had

to make a "compelling showing" of inadequacy if *either* presumption applied. *Id.* ¶ 86. Vote.org makes no argument that this presumption didn't apply or that it made a compelling showing of inadequacy to the circuit court.

B. Vote.org's second issue presented for review seeks a rule unsupported by case law and is poorly presented by the facts of this case.

Vote.org's second issue argues that the government's representation in a case challenging a state law becomes per se inadequate if the state decides not to appeal. The case law Vote.org relies on does not support that proposition, and the facts of this case are poorly suited to develop such a rule of law.

Vote.org argues that federal courts "uniformly hold" that a defendant's decision not to appeal "renders representation inadequate." (Pet. 28.) That is incorrect. The cases Vote.org relies on treat a decision not to appeal as one factor in considering whether to allow intervention for purposes of appeal, not a per se showing of adequacy. (*Id.* (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969)).)

For example, in *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, the court upheld the denial of intervention where the would-be intervenors claimed that they had different interests from the defendant United States. 101 F.3d 503, 508 (7th Cir. 1996). The court said that such a rule would mean the federal government's representation was always inadequate for purposes of intervention. *Id.* The court went on to consider factors that later "might" make the representation inadequate if the government lost in the trial court and decided not to appeal "unrelated to the likely outcome of an appeal" or because the case was "unimportant." *Id.*

In *Chiglo v. City of Preston*, proposed intervenors made the same argument Vote.org here does: that a failure to appeal in itself shows inadequacy. 104 F.3d 185 (8th Cir. 1997). The court rejected that proposition:

> We conclude that the proposed intervenors must show something more than mere failure to appeal. "'Even a decision not to take an appeal is ordinarily within the discretion of the representative, though in unusual cases this may show inadequate representation.'" [citing cases[5]]. Admittedly, failure to appeal, combined with diverging interests between the representative and the proposed intervenor, is surely enough to warrant intervention. *See Triax*, 724 F.2d at 1228. There are certainly other situations in which failure to appeal will be a key factor in showing a need for intervention. *See, e.g.*, *Meek v. Metropolitan Dade Cty.*, 985 F.2d 1471, 1478 n.2 (11th Cir.1993); *Yniguez v. Arizona*, 939 F.2d 727, 730, 737 (9th Cir. 1991) (governor failed to appeal from judgment invalidating initiative measure; governor had previously expressed political opposition to the measure). *See generally Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (en banc) ("[A] failure to appeal may be one factor in deciding whether representation by existing parties is adequate."); *Nuesse v. Camp*, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967).

---

[5] *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984) (citing 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909, at 532 (1972), now found at 7C Charles Alan Wright, et al., *Federal Practice and Procedure* § 1909, at 344–45 (1986)); *accord Orange Env't, Inc. v. Cnty. of Orange*, 817 F. Supp. 1051, 1060–62 (S.D.N.Y.), *aff'd*, *Orange Env't, Inc. v. Orange Cnty. Leg.*, 2 F.3d 1235 (2d Cir. 1993); *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 396 (6th Cir. 1993); *United States v. City of Chi.*, 897 F.2d 243, 244 (7th Cir. 1990).

> We will not attempt to catalog the possible factors which could combine with failure to appeal to effectively rebut the presumption of adequate representation. It is sufficient to say that in this case the proposed intervenors make absolutely no showing of any factor other than the failure to appeal. Moreover, the City would face significant legal obstacles in seeking a reversal of the district court's preemption ruling. We conclude that the proposed intervenors have fallen short of carrying their burden of proof.

Id. at 188–89 (citations omitted).[6]

As the *Chiglo* court explained, whether a decision not to appeal constitutes inadequacy will depend on a number of fact-specific factors. So far, as the Commission has discovered, no federal court has embraced a per se rule.

The decision whether to appeal often must consider more factors than just an assessment of the likelihood of success. For example, the state defendant may have achieved partial success in the trial court and might not want to risk that outcome on appeal. Vote.org's general legal question—when does a decision not to appeal constitute inadequacy?—will thus depend on the facts of the particular case.

---

[6] The U.S. Supreme Court's decision in *Cameron v. EMW Women's Surgical Center, P.S.C.*, 595 U.S. 267, 277–78 (2022), is not to the contrary. That case held that Kentucky's Attorney General could intervene for purposes of appeal to defend the constitutionality of a Kentucky abortion statute where another executive branch official, the secretary of Health and Family Services, had decided not to defend the law. Both state and federal law supported the Kentucky Attorney General's power to appeal in lieu of the secretary. *Id.* ("[A] State's opportunity to defend its laws in federal court should not be lightly cut off. Respect for state sovereignty must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court.").

On the facts of this case, the court of appeals correctly held that the Commission's decision not to appeal did not constitute inadequacy. A motion to intervene to appeal is moot where an appeal could not effectuate the relief the proposed intervenor seeks. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 593–94 (9th Cir. 2023). Here, there is no such relief possible. The Commission unanimously decided not to prescribe the National Form for general use, permitting it only for military and overseas voters in certain circumstances, and so any appeal could have no effect on that issue. Thus, even if this Court accepted the petition for review, determined that Vote.org should have been allowed to intervene, and Vote.org went on to "prevail" on the merits of whether the National Form complies with Wis. Stat. § 6.33(1), the National Form would not be eligible for use by all votes but only for military and overseas voters.

III. Vote.org's petition for review ignores the availability of permissive intervention under Wis. Stat. § 803.09(2).

Vote.org argues that the court of appeals decision sets Wisconsin's law of intervention on a path "on which intervention of right will become very difficult in nearly all cases." (Pet. 10.) But circuit courts retain the ability to grant permissive intervention under Wis. Stat. § 803.09(2), and Vote.org does not explain why the opportunity for permissive intervention is generally insufficient.

CONCLUSION

This Court should deny Vote.org's petition for review.

Dated this 4th day of October 2024.

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Lynn K. Lodahl
LYNN K. LODAHL
Assistant Attorney General
State Bar #1087992

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendant-Respondent
Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-6219 (LKL)
(608) 266-0020 (BPK)
(608) 294-2907 (Fax)
lodahllk@doj.state.wi.us
keenanbp@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 4824 words.

Dated this 4th day of October 2024.

Electronically signed by:

Lynn K. Lodahl
LYNN K. LODAHL
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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed to:

Jeffrey A. Mandell
Stafford Rosenbaum LLP
Post Office Box 1784
Madison, WI 53701-1784

Dated this 4th day of October 2024.

Electronically signed by:

Lynn K. Lodahl
LYNN K. LODAHL
Assistant Attorney General