In the

Supreme Court of Wisconsin

No. 2023AP76

RICHARD BRAUN,
PLAINTIFF-RESPONDENT,

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-RESPONDENT,

v.

VOTE.ORG,
PROPOSED-INTERVENOR-APPELLANT-PETITIONER.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Petitioner Vote.org seeks this Court's review to clarify Wisconsin's rules governing adequate representation for purposes of intervention. Respondents Richard Braun and the Wisconsin Elections Commission oppose review, arguing that the court of appeals' decision worked no significant shift in Wisconsin intervention law.

Recent events—and Law Forward's amicus brief—belie that suggestion. Just this week, in a case brought to purge thousands of Latino-Americans from Wisconsin's voter rolls, the Waukesha County Circuit Court denied two Latino voter-protection organizations' motion to intervene. *See* Decision & Order on Mot. to Intervene at 7, *State ex rel. Cerny v. Wis. Elections Comm'n*, No. 24-cv-1353 (Waukesha Cnty. Cir. Ct. Oct. 11, 2024) (Supp. App. 9). Because the proposed intervenors "sought the same outcome" as the Commission, the court concluded that intervention had to be denied unless they showed "collusion" between the plaintiff and existing defendants. *Id.* at 6 (Supp. App. 8). Such an approach to intervention analysis renders this Court's instruction that a movant's burden to show inadequate representation should be "minimal," *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 85, 307 Wis. 2d 1, 745 N.W.2d 1, a functional dead letter.[1]

Braun and the Commission are wrong to argue that this case is unworthy of the Court's attention. Absent a grant of review, cases—like this case and *Cerny*—that affect the votes of thousands of Wisconsinites will be decided or settled with voters left out in

[1] And contrary to the Commission's argument that permissive intervention solves any problems created by the decision below, *see* WEC Resp. 23, the Waukesha County Circuit Court denied permissive intervention as well, *see Cerny* Order at 8 (Supp. App. 10).

the cold. Respondents are similarly wrong to stack up baseless purported barriers to this Court's review. In particular, they are wrong in claiming that the underlying case was mooted by the Commission's authorization of the National Voter Registration Form for use by military and overseas voters. That authorization did not purport to revoke any prior authorization, so if the circuit court's merits judgment is reversed, the National Form will once again be available to all Wisconsin registrants. Nor was Vote.org obliged to file a "conditional notice of appeal" from the merits decision to preserve jurisdiction. Wisconsin precedent establishes that the reversal of the denial of the motion to intervene would in itself vacate the circuit court's subsequent rulings.

The bottom line is simple. The court of appeals' 2-1 split decision in this case leaves Wisconsin's intervention rules far stricter than this Court's precedents warrant, and far stricter than those employed by the Seventh Circuit and many other federal courts. Absent review, the decision's effect will be to deprive Wisconsin courts of the perspectives of many parties who stand to be directly affected by those courts' decisions. The Court should grant review.

ARGUMENT

I. This case is not moot.

Both Braun and the Commission wrongly argue that this case was mooted by the Commission's vote to authorize the use of the National Form by voters covered by the Uniformed and Overseas Absentee Voting Act (UOCAVA). Braun Resp. 18–20; WEC Resp. 12–13. Their arguments misunderstand or misrepresent what the Commission actually voted to do.

It is true that on November 2, 2023, the Commission voted to *affirmatively* "prescribe[] the National Mail Voter Registration form for use in the limited circumstances of being used by Military and Overseas (UOCAVA) voters in the 45 days prior to an election." Open Session Minutes for Nov. 2, 2023, Wis. Elections Comm'n Mtg. at 10 (Supp. App. 20); *see also* Tr. of Videorecording of Nov. 2, 2023, Wis. Elections Comm'n Mtg. at 4:18–5:10 (Supp. App. 88–89).[2] But in affirmatively authorizing the use of the National Form for UOCAVA voters, the Commission did not vote to *restrict* its use to only those voters, nor did it vote to repeal any prior authorization. *Id.* And prior to the circuit court's merits order, all Wisconsin voters could use the National Form. Thus, if the circuit court's merits holding is reversed, nothing in the Commission's November 2 vote would invalidate the Form's prior approval or prevent it from again being used statewide—as it was for over 25 years before this case. Put differently: the November 2 vote *added* an approval for a limited set of voters, but it did not *repeal* any prior approval. The case therefore is not moot.

The Commission's claim that it "*unanimously* decided against approving the National Form as a generally available method of voter registration," WEC Resp. 7 (emphasis added), is particularly baffling. A transcript of the Commission's own deliberations shows nothing like unanimity: in fact, at the September 14, 2023, emergency meeting called to address the circuit court's order, the Democratic Commissioners *immediately* advocated for reinstating the form's general approval. Tr. of Videorecording of Sept. 14, 2023, Wis. Elections Comm'n Meeting

[2] Videorecording available at https://perma.cc/KZ6C-27TC.

at 12:7–13 (Supp. App. 35).[3] And Commissioners Jacobs and Thomsen voiced considerable chagrin at the circuit court's decision to enjoin a form that had served Wisconsin well for a quarter century. *See, e.g.*, *id.* at 7:22–8:4 (Supp. App. 30–31) ("[T]he national voter registration application form was used by two prior agencies. We have ratified its use since I've been on the Commission in 2016 and I was really, really surprised at the court['s analysis]"). Plainly, the Commission did not vote "against approving the National Form as a generally available method of voter registration," WEC Resp. 7, at any point. And had such a vote taken place, it certainly would not have been "unanimous." Grasping for vehicle issues, the Commission badly misstates the factual record.

If the case were moot, however, then the appropriate course would be to grant the Petition and vacate the court of appeals' decision. The established practice of the U.S. Supreme Court, where a case becomes moot before certiorari can be sought, is to "reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 40 (1950). "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* And it is particularly appropriate here, where if Respondents are correct about mootness, this case became moot in November 2023, more than six months before the court of appeals issued its decision. There is no reason why that decision should stand but this Court's review be barred.

[3] Videorecording available at https://perma.cc/EU73-NYMW.

II. Vote.org was not required to file a conditional notice of appeal.

Braun—but not the Commission—also wrongly argues that Vote.org needed to file a "conditional notice of appeal" from the final merits judgment to preserve its rights. Braun Resp. 14. Braun hinges his argument entirely on federal cases. But Wisconsin follows a different rule: that if the denial of intervention of right is reversed on appeal, the circuit court's subsequent orders must be vacated so that they can be revisited with the intervenor's participation. No separate filing of "a conditional notice of appeal" has ever been required.

Thus, in *Dodge v. Juneau County School Committee*, 8 Wis. 2d 360, 360–61, 98 N.W.2d 908 (1959), this Court reversed denial of intervention to taxpayers in a dispute about dissolution of a school district. Although a final judgment had already been entered, the Court's mandate "reversed with instructions to *vacate the judgment* and permit the petitioners to intervene." *Id.* at 363 (emphasis added). Nothing in the Court's opinion suggests that the intervenors had filed a "conditional notice of appeal" as a necessary step to preserve vacatur as a remedy.[4]

Similarly, in *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 467, 516 N.W.2d 357 (1994), petitioner Richard Schauf sought to intervene in Armada's action "to compel disclosure of an investigative report in which Schauf [was] a subject." The circuit court denied the motion and ordered part of the report released, including a paragraph relating to Schauf. *Id.* at 470. This Court ultimately "reverse[d] the decision of the court of appeals and

[4] Indeed, a Westlaw search for the phrase "conditional notice of appeal" yields no Wisconsin results.

remand[ed] to the circuit court so that Schauf [could] intervene." *Id.* Although the Court did not expressly specify that the circuit court's order compelling disclosure was vacated, that is the only conceivable way to understand the mandate—the only purpose of Schauf's intervention was to oppose that disclosure. Again, this Court did not mention, let alone require, any "conditional notice of appeal." Nor would such a requirement make sense given the Court's practice—once a circuit court's post-intervention merits determination is vacated, there is no final order to appeal.

In litigating this appeal, Vote.org relied on these precedents, as well as on the court of appeals' unpublished decision in *Friends of Scott Walker v. Brennan*, 2012 WI App 40, ¶ 52, 340 Wis. 2d 499, 812 N.W.2d 540, which canvassed *Armada Broadcasting* and *Dodge* and held that the appropriate remedy when denial of intervention is reversed is to "order the circuit court on remand to vacate the orders entered after the court denied the intervention motion." As *Brennan* is unpublished, Vote.org cites it not as "precedent or authority," Wis. Stat. § 809.23(3)(a), but merely to explain Vote.org's reasons for litigating this case as it did.

Braun also makes the puzzling suggestion that Vote.org should have "renewed its motion to intervene before the Circuit Court" after Vote.org "learned that WEC would not appeal." Braun Resp. 17. Such a motion would have been improper. At that juncture, the question of Vote.org's intervention was pending the court of appeals. The circuit court therefore lacked jurisdiction over intervention unless authorized by Wis. Stat. § 808.075. *See, e.g.*, *Hengel v. Hengel*, 120 Wis. 2d 522, 524, 355 N.W.2d 846 (Ct. App. 1984) (noting that service of a "notice of appeal" and "the filing thereof with the clerk of the circuit court strips that court of all jurisdiction with reference to the case, except in certain

unsubstantial and trivial matters"). And nothing in Section 808.075 authorizes a circuit court to consider a renewed motion to intervene while intervention is within the court of appeals' jurisdiction.

III. No other barriers preclude the Court's review.

A. Vote.org satisfies the other criteria to intervene as of right.

Braun argues that the Court might not reach adequacy of representation because Vote.org does not satisfy the other criteria for intervention of right. Braun Resp. 20–23. But the court of appeals *unanimously* agreed that Vote.org had an interest in the subject matter of this case which the case threatened to impair. Decision ¶¶ 21–24 (App. 13–15). And even the circuit court found that Vote.org had an interest in using the National Form in Wisconsin, R.73:24 (App. 70), although it also found, counterintuitively, that this case did not threaten that interest, R.73:24–25 (App. 70–71).

In any event, Vote.org plainly satisfies the interest and impairment criteria. Vote.org operates a web-based voter registration platform built around the National Form. R.11:1–8. A voter who uses Vote.org's proprietary technology to register answers straightforward questions on Vote.org's website. *Id.* Vote.org uses those answers to generate a completed National Form—all the voter has to do is print the Form, sign it, and mail it to the appropriate official. *Id.* As the National Form is accepted in nearly every state—in 46, after the circuit court's decision—Vote.org's platform allows it to assist voters in registering in nearly every state. And as the National Form is maintained and updated by the Election Assistance Commission on a predictable

schedule, Vote.org can quickly adjust its platform in response to changes to the Form. Notably, this includes changes mandated by changes in state laws, which the Election Assistance Commission promptly incorporates into each state's state-specific instructions or, as appropriate, the National Form itself.

By contrast, building the web infrastructure to facilitate completing 50 state-specific forms would be extremely expensive—Vote.org would need to program 50 discrete webpages to fill 50 different, unique forms. And maintaining such a platform would be all but impossible—Vote.org, a small nonprofit, would need to track changes in form requirements across every state and rewrite its code in response to each and every change.

In this context, Vote.org necessarily has "an interest relating to . . . the subject of the action" that Braun's claims threaten to "impair or impede." Wis. Stat. § 803.09(1). As Vote.org's CEO warned in an uncontroverted affidavit, redesigning Vote.org's website to fill out a state-specific Wisconsin form would entail considerable effort and cost. R.11:7–9.[5] And as the Petition explained, Vote.org has thus far been unable to make the necessary changes and is therefore unable to assist Wisconsinites

[5] Braun cites a statute governing the admissibility of evidence *at trial* to challenge the specificity of this affidavit. Braun Resp. 22 (citing Wis. Stat. § 906.02). But courts routinely decide intervention motions based on uncontroverted affidavits—no rule requires trial-admissible evidence. And Braun provides no reason to think that Vote.org's CEO is unable to assess whether changes in Vote.org's platform would entail substantial costs.

who are required to register by paper form. Pet. 17 n.3.[6] That group is sizeable—young voters, elderly voters, and voters who recently moved all may lack identification reflecting a current address, R.11:7, a prerequisite to registering online in Wisconsin, *see* Wis. Stat. § 6.30(5). Helping such voters to register is a core part of Vote.org's mission.

With the benefit of full briefing about these issues, all four judges to consider this case so far have agreed that Vote.org satisfied the interest criterion. And all three judges of the court of appeals agreed that Vote.org also satisfied the impairment criterion. This Court is not likely to reach a different conclusion about either criterion—whether or not Braun continues to press his alternative arguments.

Regardless, because the court of appeals' denial of intervention rested entirely on adequacy of representation, this case cleanly presents that issue for review. And because the court of appeals' opinion transformed Wisconsin law about adequacy of representation, review of the questions presented is appropriate. The Court should not assume, in deciding whether to grant review of those important questions, that Braun will overcome the panel's consensus about other intervention criteria when the parties brief the merits. To the extent that the Court is concerned that those issues could distract from the questions presented, however, the

[6] Braun's speculations about the "curative measures" he thinks Vote.org may have enacted in response to the circuit court's injunction, Braun Resp. 20, 23, are both inaccurate and inappropriate. What possible basis Braun could have for claiming that Vote.org "has already incurred" the cost of updating its platform he does not say. To be clear, it has not.

Court could limit its grant of review to the adequacy of representation issues. *See* Wis. Stat. § 809.62(6).

B. Both *Helgeland* presumptions depend on the answer to the first question presented.

The Commission also argues that the *second Helgeland* presumption bars intervention here. WEC Resp. 19–20. That presumption applies when an existing party "is a governmental body or officer charged by law with representing the interests of the" would-be intervenor. *Helgeland*, 2008 WI 9, ¶ 91. But as with the first presumption, *see* Pet. 19, whether the second presumption applies depends on whether "interest" means fundamental motivating interest or litigation objective. The Commission surely has no legal duty to represent Vote.org's interest in maintaining its existing voter registration infrastructure or mission of promoting the National Form nationwide. The Court's answer to the first question presented will therefore be dispositive of whether the second *Helgeland* presumption applies.

The panel majority's application of this presumption may be reversed on other grounds as well. In particular, the second presumption arises only when "the would-be intervenor is a citizen or subdivision of the governmental entity." *Id.* Vote.org is neither a citizen nor a subdivision of Wisconsin—it is a national nonprofit.

IV. Respondents' remaining arguments confirm the importance of the questions presented.

Finally, both Braun and the Commission argue at length that the court of appeals' decision was correct on the merits. But their arguments, much like the dispute between the court of appeals majority and dissent, just serve to emphasize the importance of the issues presented by the Petition. The Court has

not directly addressed intervention standards since *Helgeland*, more than 15 years ago. In the interim, the intervention standards applied by the court of appeals have sharply diverged from the standards applied in the Seventh Circuit and other federal courts. The Commission concedes as much. WEC Resp. 17. The issue cries out for this Court's review.[7]

CONCLUSION

The Court should grant the petition for review.

[7] A recent decision from the Eleventh Circuit further confirms the fitness of the issues presented for review. Judge Neubauer's dissent cited *Kane County v. United States*, 928 F.3d 877 (10th Cir. 2019), to support her view of adequate representation. Dissent ¶ 57 (App. 34); *see also* Pet. 30. *Kane County* explains that "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation." 928 F.3d at 894. On September 3, 2024, the Eleventh Circuit denied a petition seeking rehearing *en banc* to reconsider that rule. *Kane County v. United States*, 113 F.4th 1290, 1290–91 (10th Cir. 2024). Several dissenters argued for *exactly* the rule the court of appeals applied here: that courts should assess adequacy by looking to "the parties' identical litigation objectives as opposed to their ultimate motivations in reaching those objectives." *Id.* at 1293 (Tymkovich, J., dissenting from denial of rehearing *en banc*). The Eleventh Circuit has thus recently and expressly *rejected* the same standard for adequate representation the court of appeals adopted—further discrediting Braun's argument that this case involves only the "routine" application of settled law.

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CERTIFICATIONS

I hereby certify that this reply conforms to the rules contained in Sections 809.19(8)(b), (8)(bm), (8)(c), (8g); and 809.81 of the Wisconsin Statutes. I further certify that this reply has been produced with a proportional serif font. The length of this reply is 2,986 words.

Dated: October 18, 2024 By: *Electronically signed by Samuel T. Ward-Packard*