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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN ex rel.
ARDIS CERNY,
Petitioner-Respondent,
ANNETTE KUGLITSCH,
Respondent,
v.

WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, DON M. MILLIS, CARRIE RIEPL, ROBERT F. SPINDELL, MARK L. THOMPSEN in their official capacities as Commissioners, MEAGAN WOLFE in her official capacity as Administrator of the Wisconsin Elections Commission, WISCONSIN DEPARTMENT OF TRANSPORTION and CRAIG THOMPSON in his official capacity as Secretary of the Wisconsin Department of Transportation,
Respondents,
FORWARD LATINO and VOCES DE LA FRONTERA,
Appellants.

Appeal No.
2025AP55

Circuit Court Case No.
2024CV1353

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FORWARD LATINO AND VOCES DE LA FRONTERA'S OPENING BRIEF

On Appeal from the Circuit Court for Waukesha County
Case No. 2024CV1353
The Honorable Michael P. Maxwell, Presiding

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STATEMENT OF ISSUES FOR REVIEW

1. Are Forward Latino and Voces de la Frontera entitled to intervene as of right in this lawsuit under Wis. Stat. § 803.09(1)?

The circuit court answered: No.

This Court should answer: Yes.

2. Should Forward Latino and Voces de la Frontera be granted permissive intervention in this lawsuit under Wis. Stat. § 803.09(2)?

The circuit court answered: No.

This Court should answer: Yes.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Forward Latino and Voces de la Frontera request that the Court hear oral argument in this appeal because it presents the important question of the proper application of standards for intervention, a question which is arising with increasing frequency in election litigation. Publication is appropriate for the same reason.

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INTRODUCTION

Forward Latino and Voces de la Frontera moved to intervene in this case to defend their members' fundamental right to vote. Petitioner Arnis Cerny filed a mandamus action just months before the November 2024 election demanding that the Wisconsin Elections Commission purge voters from the rolls based on a comparison with inherently unreliable citizenship data from the Wisconsin Department of Transportation—a comparison that had never before been done in Wisconsin. Cerny's suit threatens naturalized citizens most of all, because they are particularly likely to be misidentified as non-citizens if such a comparison is made.

The circuit court recognized Forward Latino's and Voces' substantial interests in the case, that those interests were threatened, and that the organizations timely moved to intervene. But the court held that Forward Latino and Voces had no right to intervene because their members were adequately represented by the Wisconsin Elections Commission, a governmental body tasked with fairly enforcing election law but not with protecting any particular voter or group of voters. This was error. The standard to show inadequate representation is generally minimal, and neither of the two exceptions to that low bar applies.

First, Forward Latino's and Voces' interests are not *identical* to those of an existing party. The State Respondents' interest is to faithfully execute Wisconsin's transportation and election laws, whatever those laws may require, and they argue that the laws do not *require* them to adopt Cerny's citizenship-matching scheme. Forward Latino and Voces, in contrast, seek intervention to protect their members' fundamental rights by obtaining a ruling that Cerny's proposal is affirmatively *unlawful*. These interests are not the same.

Second, a presumption of adequacy applies when an existing party is *charged by law* with representing the movant's interests. This is not the case here. The Commission's duty under state law is to administer Wisconsin's election code. This duty does not capture the organizations' more tailored interest in defending the rights of its naturalized-citizen members.

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In ruling otherwise, the circuit court relied on the recent decision in *Braun v. Vote.org*, 2024 WI App 42, 413 Wis. 2d 88, 11 N.W.3d 106 (Ct. App. 2024). *Braun* is distinguishable because there, the Commission and the proposed intervenor had *identical* objectives. But to the extent that *Braun* appears to support the circuit court's ruling, it should be narrowed or distinguished, or overruled by the Wisconsin Supreme Court, because such an interpretation threatens to render intervention as of right a nullity by applying a presumption of adequate representation in nearly every case involving a government litigant.

Finally, the circuit court abused its discretion in denying permissive intervention. The circuit court reasoned that allowing Forward Latino and Voces into the case risked undue delay, and that the groups would advance materially the same arguments as the Commission, but the record refutes both points. Forward Latino and Voces had acted swiftly and complied with every court deadline, and they had made additional arguments that the Commission had not made.

The Court should therefore reverse the denial of intervention, vacate any subsequent proceedings in the circuit court, and remand for further proceedings with Forward Latino and Voces as parties, entitled to defend their members' fundamental rights against Cerny's unprincipled assault.

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STATEMENT OF THE CASE

A. Cerny filed suit on the eve of the 2024 election seeking to impose an unprecedented citizenship-verification regime.

Cerny filed this case on August 16, 2024, less than three months before the November 2024 general election. She seeks a writ of mandamus compelling the Wisconsin Election Commission to immediately compare Wisconsin's voter rolls with Department of Transportation databases and purge voters' registrations if the DOT data suggests they may not be U.S. citizens. R.10; *see also* R.49 (Amended Petition).

The Commission has never before performed such comparisons. And DOT's citizenship information is unreliable, particularly for naturalized citizens. Lawful

permanent residents receive ordinary drivers' licenses and identification cards, and they do not need to provide updated immigration documents to renew them. *See* Wis. Stat. §§ 343.03(3m), 343.50(3)(a). Nothing requires newly naturalized citizens to tell DOT that they have been naturalized. As a result, Wisconsinites who obtain drivers' licenses when they are lawful permanent residents but later become naturalized citizens—as thousands of Wisconsinites do every year—may remain indicated as noncitizens in DOT records for years or decades after they naturalize. *See* App.16 (Morin Decl. ¶¶ 10-11).

No Wisconsin statute requires the citizenship matching that Cerny seeks to compel. Cerny's argument relies on Section 85.61, which directs the Commission and DOT to "enter into an agreement to match personally identifiable information on the official registration list maintained by the commission under s. 6.36(1) and the information specified in s. 6.34(2m) with personally identifiable information in" DOT records to "the extent required to enable the secretary of transportation and the administrator of the elections commission to verify the accuracy of the information provided for the purpose of voter registration." Wis. Stat. § 85.61(1); *see also* Wis. Stat. § 5.056 (similar). In turn, Section 6.36(1) specifies sixteen categories of information that the official registration list must contain, and Section 6.34(2m) refers to matching a voter's driver's license number, name, and date of birth. Neither section mentions citizenship information.

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Wisconsin has many other checks in place to ensure that only citizens vote. Voters must attest that they are citizens when registering to vote. Both online and on the mail-in voter-registration application, citizenship is the first question, and registrants are instructed not to complete the application if they are unable to attest that they are a U.S. citizen. R.50, 51. Voters must also certify that the information on the application is accurate, and they are reminded on the form that any false information may subject them to fines and/or imprisonment. R.50, 51. Noncitizens who register to vote or vote face criminal liability under state law, Wis. Stat. § 12.13(1)(a), and under federal law, 18 U.S.C. § 611. They also render themselves

permanently "inadmissible" under federal immigration law, 8 U.S.C. § 1182(a)(6)(C)(ii), (10)(D), which can lead to deportation and will prevent them from ever renewing a visa, becoming a naturalized citizen, or returning to the United States if they leave. Cerny offered neither evidence nor allegations that any meaningful number of noncitizens have voted anywhere in the United States, much less in Wisconsin specifically. *See generally* R.49.

B. Forward Latino and Voces moved to intervene to protect their members' voting rights.

Forward Latino and Voces de La Frontera—two Wisconsin-based organizations that represent and assist naturalized citizens—moved to intervene in Cerny's case just weeks after it was filed. R.35.

Forward Latino is a Wisconsin-based, nonpartisan nonprofit organization centered on Latino rights, including the rights of noncitizens and new citizens. App.15 (Morin Decl. ¶ 5). It is a volunteer-run organization with approximately 225 members in Wisconsin, as well as affiliates including Crusaders of Justicia of Manitowoc, La Casa de Esperanza of Waukesha, LULAC Council #333 of Milwaukee, and LULAC Council #339 of Kenosha. App.15 (Morin Decl. ¶ 7). Forward Latino engages in large-scale nonpartisan voter education and mobilization efforts in Wisconsin focused on educating and turning out Latino voters. App.15–16 (Morin Decl. ¶ 8). Forward Latino also trains poll monitors and operates an election-day hotline to answer questions from voters and prospective voters, including those seeking same-day registration. *Id.* Many of those voters—and some of Forward Latino's members—are naturalized citizens, who stand to be particularly harmed by Cerny's requested relief. App.16 (Morin Decl. ¶¶ 11–12).

Voces de La Frontera is a membership-based non-profit that works to protect civil rights and workers' rights in Wisconsin through leadership development, community organizing, and programs to empower workers, immigrants, and youth. App.12 (Neumann-Ortiz Decl. ¶ 5). Voces has approximately 1,200 members statewide and six regional chapters, including a chapter based in Waukesha. *Id.*

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Voces programs include the New American Program, a comprehensive program through which Voces has helped approximately 1,300 lawful permanent residents (including many Voces members) obtain U.S. citizenship. App.12 (Neumann-Ortiz Decl. ¶¶ 6–8). Voces therefore has many naturalized citizen members, and a strong interest in ensuring the citizens it has helped to naturalize are in fact able to vote. *See id.*

Concerned that Cerny's claims threatened naturalized citizens' voting rights, Forward Latino and Voces de La Frontera filed a motion to intervene, a proposed answer, and a proposed motion to dismiss on September 3, 2024—the same day that the State Respondents responded to Cerny's Petition. R.34–39; *see* R.31, 32. Cerny opposed both the motion intervene and the proposed motion to dismiss, R.81–82. The State Respondents did not oppose permissive intervention, R.80.

On September 30, Cerny amended her petition, maintaining her request for a writ of mandamus and adding a complaint for a declaratory judgment and common law certiorari review, and filed a motion for temporary relief or a preliminary injunction for the first time. R.49, 62.

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II. The circuit court denied intervention.

On October 11, 2024—just before Forward Latino and Voces' would-be deadline to oppose Cerny's preliminary-injunction motion—the circuit court denied their motion to intervene. App.3-10. The circuit court acknowledged that Forward Latino and Voces' motion was timely, coming "only two weeks after the petition was filed and before any hearing had been held in the case." App.6. It further found that Forward Latino and Voces "do have [a legally protected] interest in this case," because of their work "help[ing] naturalized citizens ensure they are registered to vote and to prove their citizenship if necessary." App.6–7. And it held that Forward Latino and Voces had shown that their interest was threatened by Cerny's claims. App.7.

The circuit court nevertheless denied the motion to intervene because it concluded that the State Respondents adequately represented Forward Latino and

Voces' interests. App.7–9. The court did not conclude that the State Respondents had any particularized interest in preserving naturalized citizens' voting rights. *See id.* Instead, it observed that the State Respondents, Forward Latino, and Voces shared the same "ultimate objective" of defeating Cerny's effort to force the Commission to remove voters based on DOT's citizenship data, and its view that the Commission "and the Department of Justice are charged with representing the rights of all electors." App.7–8. The circuit court therefore concluded that Forward Latino and Voces would need to make a "compelling showing" of inadequate representation to be entitled to intervention as of right, and that they had not make such a showing. App.8.

The circuit court also denied Forward Latino and Voces' alternative request for permissive intervention, due to a perceived "risk of undue delay and prejudice to the parties" in a "time-sensitive" case. App.9.

On October 17, the circuit court held a hearing on Cerny's preliminary injunction motion and the State Respondents' motion to dismiss. R.118. The next day, the court dismissed several state legislators who Cerny had sought to dragoon into the case as "[i]nvoluntary [p]laintiffs." R.117. As of the date of this brief, Cerny's preliminary injunction motion and the remainder of the State Respondents' motion to dismiss remain pending before the circuit court without a ruling nearly seven months later.

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On January 9, 2025, Forward Latino and Voces timely appealed the order denying their motion to intervene. R.119.

STANDARD OF REVIEW

"Whether to allow or to deny intervention as of right is a question of law," reviewed *de novo*. *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 41, 307 Wis. 2d 1, 745 N.W.2d 1. A denial of permissive intervention is reviewed for an erroneous exercise of discretion. *Id.* ¶¶ 120–21.

ARGUMENT

I. Forward Latino and Voces de la Frontera are entitled to intervene as of right.

The circuit court erred in denying Forward Latino and Voces de la Frontera's motion to intervene as of right under Section 803.09(1), because the State Respondents do not adequately represent Forward Latino and Voces' particular interests in protecting their members' and constituents' voting rights.

A movant is entitled to intervention if (A) its motion is timely, (B) it claims an interest sufficiently related to the subject of the action, (C) it shows that that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest, and (D) it shows that the existing parties do not adequately represent its interest. Wis. Stat. § 803.09(1); *Helgeland*, 2008 WI 9, ¶ 38; *see also Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994); *Braun*, 2024 WI App 42, ¶ 14.

The four criteria are not to be "analyzed in isolation from one another"; rather, a "strong showing" on one "may contribute to the movant's ability to meet other requirements." *Helgeland*, 2008 WI 9, ¶ 39. Although precedent is informative, each intervention inquiry should be "holistic, flexible, and highly fact-specific." *Id.* ¶ 40. Courts balance two interests: allowing the original parties "to conduct and conclude their own lawsuit" on the one hand, and encouraging "the speedy and economical resolution of controversies" by permitting interested parties to join the suit on the other. *Id.* And because Section 803.09(1) "is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure" the interpretation and application of the federal rule may "provide guidance" about the Wisconsin rule's interpretation and application. *Id.* ¶ 37.

Here, the circuit court correctly determined that Forward Latino and Voces satisfied the first three Section 803.09(1) factors: they (1) timely sought intervention and (2) have interests related to the action—protecting their members' voting rights—that (3) the action threatens to impair or impede. But the circuit court erred

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when it nevertheless denied Forward Latino and Voces' motion because it wrongly concluded that the State Respondents adequately represent the organizations' interests. This Court should reverse.

A. The circuit court correctly determined that Forward Latino and Voces timely sought intervention to protect threatened interests.

The circuit court started off on the right track, correctly concluding that Forward Latino and Voces satisfied the first three factors for intervention as of right: (A) their motion was timely; (B) they had a relevant interest in the litigation; and (C) Cerny's case may practically impair or impede their ability to protect that interest.

i. Forward Latino and Voces timely moved to intervene.

As Cerny conceded and the circuit court determined, Forward Latino and Voces timely moved to intervene. App. 6. A motion to intervene is timely if "in view of all the circumstances the proposed intervenor acted promptly." *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). Forward Latino and Voces filed their motion to intervene less than three weeks after Cerny filed her Petition, on the same day that the State Respondents filed their answers and before any substantive proceedings in the case began. R.35. Forward Latino and Voces also filed a proposed motion to dismiss that same day, making them the first parties to provide substantive legal briefing on the merits of the case. R.39. And Forward Latino and Voces' subsequent actions while their motion was pending made clear that their participation would not delay the case: they appeared for the scheduled status conference on September 23, and they abided by the expedited scheduling order that the circuit court entered after that hearing. R.47; *see* R.83, 84.

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ii. This litigation threatens Forward Latino's and Voces' critical work helping naturalized citizens vote.

The circuit court also properly determined that Forward Latino and Voces satisfy the second requirement for intervention because they have strong interests in participating in this litigation to defend naturalized citizens' voting rights. App.6–

7. While "[n]o precise test exists" to govern the threatened-interest requirement, Wisconsin courts consider 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, ¶¶ 43–45, 79. This "pragmatic approach" assesses "the sufficiency of the interest by focusing on the facts and circumstances of the particular case before it as well as the stated interest in intervention." *Bilder*, 112 Wis. 2d at 548. Forward Latino's and Voces' clear interests in this case easily satisfy that standard.

Most importantly, Forward Latino and Voces have a strong interest in protecting the voting rights of their members and constituents, including those who are naturalized citizens. Wisconsin law recognizes organizations' right to litigate on behalf of their members' interests. *Wis.'s Env't Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 19–20, 230 N.W.2d 243 (1975) (recognizing the doctrine of member-based associational standing in Wisconsin), *overruled in part on other grounds by Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 11, 402 Wis. 2d 587, 977 N.W.2d 342; *Metro. Builders Ass'n of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, ¶¶ 14–15, 282 Wis. 2d 458, 698 N.W.2d 301 (applying the doctrine).

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Both Forward Latino and Voces have naturalized citizens among their membership. App.12–13, 16 (Neumann-Ortiz Decl. ¶¶ 8–10; Morin Decl. ¶ 11). Naturalized citizens are precisely the voters who stand to have their voter registrations unlawfully cancelled by election officials based on out-of-date DOT records if Cerny is successful. Protecting their members' and constituents' voting rights is a core part of what Forward Latino and Voces do as civil rights organizations, fully justifying their participation in this case.

In addition, and as the circuit court found, Forward Latino and Voces have significant organizational stakes in the case on their own behalf. App.7. A central feature of Forward Latino's work is nonpartisan get-out-the-vote programming targeting the tens of thousands of Latino Wisconsinites, including naturalized

citizens. App. 15–16 (Morin Decl. ¶¶ 8, 10–11). If this lawsuit succeeds, the efficacy of Forward Latino's get-out-the-vote effort will be directly undermined when many of the voters whom Forward Latino reaches find themselves purged from the voter rolls and unable to register or vote. App. 16–17 (Morin Decl. ¶¶ 12–15). To reduce this harm, Forward Latino would need to divert mission-critical resources to rework its programming to prepare targeted voters to check their registration status and be prepared to prove their citizenship at the polling place if needed, which is not something voters are ordinarily prepared to do. App.16–17 (Morin Decl. ¶¶ 13–15).

Similarly, Voces de la Frontera works to help lawful permanent residents become naturalized U.S. citizens through its New American Program and assists its members and constituents with voter registration. App.12–13 (Neumann-Ortiz Decl. ¶¶ 6–8). If Cerny's is successful, those efforts will be ineffective because many of the new citizens Voces helps will be purged from the voter rolls based on outdated DOT data as soon as they are registered. Voces would therefore need to revise its programs to ensure that newly naturalized citizens are not wrongfully disenfranchised because their DOT information is out of date. App.13 (Neumann-Ortiz Decl. ¶ 11).

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Similar impairments of voter-registration activities have sufficed to meet the second criterion for intervention as of right, *Braun*, 2024 WI App 42, ¶¶ 17–20, and the circuit court correctly reached that conclusion here, App.6–7.

iii. This litigation threatens to impair Forward Latino's and Voces' interests.

Forward Latino and Voces also satisfy their minimal burden to show that this case threatens practically to impair their interests. The practical-impairment requirement, like the interest requirement just discussed, "is flexible, and its application depends on a pragmatic analysis of the circumstances of a given case." *Helgeland*, 2008 WI 9, ¶ 79 n.70 (quoting 6 James William Moore, et al., *Moore's Fed. Prac.* § 24.03[3][a], at 24–42 (3d ed. 2002)). The requirement "is satisfied whenever disposition of the present action would put the movant at a practical

disadvantage in protecting its interest." 7C Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1908.2 (3d ed. 2022). Such a disadvantage often will be found when an "adverse holding" will apply "to the movant's particular circumstances," *Helgeland*, 2008 WI 9, ¶ 80, or when the case will result in "a novel holding of law" that will affect the movant in future litigation, *id.* ¶ 81.

The circuit court properly held that Forward Latino and Voces satisfy this requirement. App.7. A ruling for Cerny would directly harm Forward Latino and Voces by disrupting their naturalization, voter registration, and get-out-the-vote work, requiring Forward Latino and Voces to alter those programs to help new citizens update their driver's license information, too. In *Braun*, Vote.org satisfied the third criterion based on a similar showing, and that reasoning applies equally here. *See* 2024 WI App 42, ¶ 24. Moreover, Forward Latino's and Voces' members' interests are directly threatened because a ruling for Cerny would directly increase the risk that naturalized citizen members will have their voter registrations cancelled. For both reasons, the third criterion for intervention is readily satisfied here.

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B. The State Respondents do not adequately represent Forward Latino's and Voces' interests.

The circuit court's analysis went awry on the last element of intervention as of right—inadequacy of representation by the existing parties. The standard for this element is generally quite low. In most cases, "the showing required for proving inadequate representation should be treated as minimal." *Helgeland*, 2008 WI 9, ¶ 85 (cleaned up). Because the course of litigation is difficult to predict, the relevant question is whether representation *may* be inadequate, not whether it *will* be inadequate. *See Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999). That standard is met if the proposed intervenor "may be in a position" to litigate "more vigorously" than the relevant existing party, or if the intervenor has "more at stake" than the existing party. *Id.* at 749–50.

The circuit court did not consider whether Forward Latino and Voces satisfy

this minimal standard. Instead, it applied a presumption that the State Respondents would adequately represent Forward Latino's and Voces' interests and then held the groups failed to overcome that presumption with a "compelling showing" otherwise. App.7–8; *see Helgeland*, 2008 WI 9, ¶ 86. Both steps of that analysis were error.

i. The circuit court erroneously applied a presumption of adequacy.

The circuit court was wrong to presume that the State Respondents would adequately represent Forward Latino's and Voces' interests. Such a presumption applies *only* (1) "[i]f a movant's interest is identical to that of one of the parties"; or (2) "if a party is charged by law with representing the movant's interest." *Helgeland*, 2008 WI 9, ¶ 86. Neither is true here, and to the extent *Braun* suggests otherwise, it should be narrowed or overruled. *See* 2024 WI App 42.

First, the State Respondents do not have interests "identical to" Forward Latino's or Voces' interests in this case. Forward Latino and Voces have direct and personal stakes in protecting their naturalized-citizen members and constituents from disenfranchisement, as well as in protecting the efficacy of their pro-voting programming and their own limited resources to pursue that programming. The State Respondents, in contrast, have an interest in enforcing Wisconsin law, whatever that law may require. Forward Latino and Voces therefore have "more at stake" and more incentive to litigate "vigorously" than the Commission. *See Wolff*, 229 Wis. 2d at 748–49; *see also Armada Broad., Inc.*, 183 Wis. 2d at 476 ("The personal nature of the interests at stake in [the litigation] make [someone affected by government action] the best person to protect those interests."). Their interests and the State Respondents' interests are not "identical." *Helgeland*, 2008 WI 9, ¶ 86.

Framing the question instead as whether Forward Latino and Voces have the same "ultimate objective in the action" as State Respondents (as Wisconsin courts have sometimes described the test), does not change the analysis. *Helgeland*, 2008 WI 9, ¶ 90. Forward Latino and Voces' "ultimate objective" is to protect naturalized

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citizens' voting rights. The State Respondents, in contrast, seek only to enforce Wisconsin law. That difference in ultimate objective drove a difference in litigation strategy: Forward Latino and Voces were consistently more aggressive in opposing Cerny's claims. Forward Latino and Voces filed a proposed motion to dismiss the initial Petition; the State Respondents filed only answers. R.31, 32, 39. And in moving to dismiss the Amended Petition, Forward Latino and Voces argued that the Commission "lacks the authority" to remove voters in the manner Cerny demanded, R.89 at 16, while the State Respondents focused on arguing that they had "no plain and positive duty" to do so, R.86 at 1. The circuit court's description of the parties' objectives—that "both WEC and Proposed Intervenors seek to prevent the DOT from sharing citizenship information with WEC and WEC's subsequent use of that information to remove non-citizens from the WisVote List"—failed to recognize these substantial differences in objectives and arguments. App.8.

The difference between the parties' objectives here distinguishes *Braun* and *Helgeland*, where the Court of Appeals and the Supreme Court (respectively) denied intervention as of right. In *Braun*, both the Commission and Vote.org sought an order that Wisconsin law *allowed* WEC to utilize the National Voter Registration Form, as it had for years. *See Braun*, 2024 WI App 42, ¶¶ 3–4. In affirming the denial of intervention, this Court emphasized that "[b]oth Vote.org and the WEC seek to maintain the WEC's position that the Form complies with Wisconsin's voter registration laws." *Id.* ¶ 34. Similarly, in *Helgeland*, the Supreme Court held that the Attorney General adequately represented the would-be intervenors interests because both sought nothing more than to "uphold the constitutionality" of Wisconsin law. *Helgeland*, 2008 WI 9, ¶ 90. Here, in contrast, Forward Latino and Voces make a more far-reaching argument than the State Respondents—that the relief Cerny seeks is affirmatively prohibited, rather than merely not required.

Because the Commission shares neither Forward Latino's and Voces' specific interests nor ultimate objective in the litigation, the circuit court erred in presuming the Commission adequately represented the organizations' interests in

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the litigation.

Second, the Commission is not "charged by law" with representing Forward Latino's and Voces' interests. *Helgeland*, 2008 WI 9, ¶ 86. The Commission is charged with "the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns." Wis. Stat. § 5.05(1). As a neutral arbiter of the state's election code, the Commission's task is to faithfully execute the laws as the legislature enacted them—not to protect the interests of any particular group of voters.

In holding otherwise, the circuit court cited only *Braun*'s observation that "WEC is a governmental body represented by the Department of Justice in this matter, and both entities are charged by law with the duty of representing the rights of electors so that all may enjoy the benefits of the correct application of the laws governing elections." App.8 (quoting *Braun*, 2024 WI App 42, ¶ 30). But here, too, *Braun* is distinguishable, because in that case the proposed intervenors sought to defend *the Commission's decision* to accept a particular type of form. Forward Latino and Voces seek to defend a far more direct and substantial interest in their members' voting rights, which the Commission has no particular duty to defend.

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ii. If *Braun* is interpreted to require a different conclusion, it should be narrowed or overruled.

If *Braun* supports the circuit court's ruling that a presumption of adequate representation applies, then *Braun* should be narrowed or overruled. Read broadly, as the circuit court read it, *Braun* would turn the usual "minimal" showing of inadequate representation, *Helgeland*, 2008 WI 9, ¶ 85, on its head, instead requiring a presumption of adequate representation in nearly every case.

Start with *Braun*'s ruling that litigants share "identical" interests and have the same "ultimate objective" in a case whenever they seek the same judicial relief. *Braun*, 2024 WI App 42, ¶ 29. If a party's interest in the litigation and desired outcome were in fact one and the same, the standard to intervene would be virtually impossible to satisfy. In nearly all cases, at least one party will share the proposed

intervenor's litigation objective. If that objective were equivalent to the intervenor's "interests," showing "that the existing parties do not adequately represent the movants' interests," *Helgeland*, 2008 WI 9, ¶ 85, would be a rare and difficult trick. Because "a prospective intervenor must intervene on one side of the 'v.' or the other," such a rule would mean that "intervention as of right will almost always fail." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020); *see id.* ("[I]t's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed."). Whereas *Helgeland* cautions that the inadequate-representation requirement "cannot be treated as so minimal as to write the requirement completely out of the rule," 2008 WI 9, ¶ 85, the circuit court's application of *Braun* approach sets the bar so high it writes the rule out of existence.

Moreover, treating "interest" as equivalent to "litigation outcome" is inconsistent with the text of Section 803.09(1), which uses the term "interest" *both* to describe the putative intervenor's basis for intervening—their "interest relating to the property or transaction at issue"—*and* to describe the adequate representation test—whether "the movant's interest is adequately represented by existing parties." *Id.* The first use of the term "interest" indisputably refers to the intervenor's particularized *reason for intervening*, not just their brute desire for a certain litigation outcome. *See Helgeland*, 2008 WI 9, ¶ 46 (analyzing as possible "interest[s]" three specific reasons that the would-be intervenors gave for wanting to intervene). The other uses of that same term in the same sentence of the same statute must be understood in the same way. *See State ex rel. Dep't of Nat. Res. v. Wis. Ct. App.*, 2018 WI 25, ¶ 30, 280 Wis.2d 354, 909 N.W.2d 114 ("When the legislature uses a particular word more than once in an act, we understand it to carry the same meaning each time, absent textual or structural clues to the contrary."). Yet *Braun* as construed by the circuit court does just the opposite, focusing on the intervenors' "interest" to assess their basis for intervening but then on litigation outcome when assessing adequate representation.

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Braun's separate ruling that the Commission and the Department of Justice are charged by law with representing the interests of litigants who seek to protect their own, discrete interests in a case is equally unjustified. The Commission and the Department of Justice have no duty to adopt or defend any particular litigant's views of how Wisconsin election laws should be construed—they apply their own best judgment. In contrast, *Helgeland* was a constitutional challenge to the validity of a Wisconsin statute, and the Department of Justice therefore was "charged by law to defend the constitutionality of" the law at issue. *Helgeland*, 2008 WI 9, ¶ 91. As the circuit court construed *Braun*, it would expand the presumption of adequate representation to seemingly cover *any* litigant that seeks to intervene on the side of the government, in the absence of a specific legal duty for the government to defend the would-be intervenor's position—an expansion for which neither *Braun* nor the circuit court offered any adequate justification.

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Federal intervention precedent agrees on both points. In the U.S. Supreme Court's decision in *Trbovich*, for example, the Supreme Court allowed a union member to intervene on the side of the Secretary of Labor, even though both sought the same relief—to have a union election set aside—and even though the Secretary of Labor was a government official. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538–39 (1972). And in *Driftless*, Chief Judge Sykes explained for the Seventh Circuit that "it's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed." *Driftless*, 969 F.3d at 748. Courts instead must look to the parties' underlying interests—that is, whether the intervenors' *reasons* for seeking relief are the same as an existing party's. *See id.*

The Eighth Circuit—where the Wisconsin Supreme Court looked to support its decision in *Helgeland*, *see* 2008 WI 9, ¶ 91 n. 81 (citing *Curry v. Regents of the University of Minnesota*, 167 F.3d 420, 423 (8th Cir. 1999))—agrees. Eighth Circuit precedent recognizes that a presumption of adequate representation "does *not* necessarily apply in all cases to which the government is a party" because "when

the proposed intervenors' concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it." *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996). The presumption therefore does not apply when a proposed intervenor's "interests in [the litigation] are narrower interests not subsumed in the general interest" of the state, and the intervenor "instead seek[s] to protect local and individual interests not shared by the general citizenry of [the state]." *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 1001 (8th Cir. 1993).

These concerns are fully present here. Even if the Commission is duty-bound to represent the interests of *all* Wisconsin voters, Cerny's lawsuit, if successful, would not burden all Wisconsinites equally. Forward Latino and Voces represent the "narrower interests" of naturalized citizen voters that face disenfranchisement if Cerny's view prevails—a concern the vast majority of Wisconsin's electors simply do not face. This interest is not "subsumed in the general interest" the Commission asserts properly administering Wisconsin's election laws.

Moreover, a rule that asks only whether an existing party seeks the same outcome as a proposed intervenor—without regard to *why* the respective parties desire that outcome—has already proven underinclusive. In *Braun*, this Court held that WEC adequately represented Vote.org's interests because, before the circuit court, "[b]oth Vote.org and the WEC [sought] to maintain the WEC's position that the Form complies with Wisconsin's voter registration laws." *Braun*, 2024 WI App 42, ¶ 34. But after losing in the circuit court, the Commission abandoned its position, opting to forego any appeal and capitulate to the plaintiff's view that Wisconsin law did not allow use of the National Form. *See id.* ¶¶ 12 n.7, 62. The Commission's decision not to appeal left Vote.org harmed by an adverse circuit court ruling that the appellate courts never had the chance to review. And it "thr[ew] into stark relief that [the Commission's] interests [were] not the same" as Vote.org's. *Id.* ¶ 53 (Neubauer, J., dissenting). The *Braun* Court's decision otherwise was, respectfully, misguided. After all, "[i]nadequacy is established where the purported representative has determined not to appeal and a proposed

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intervenor has demonstrated actual impairment of a concrete interest." *Id.* ¶ 61 (Neubauer, J., dissenting) (citing *Solid Waste Agency of N. Cook Cnty. v. United States 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, 306 (6th Cir. 1990); and *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 1 (D.D.C. 2019)).[1]

It is impossible to know at this stage whether similar circumstances will unfold in this case. They should not, because Cerny's lawsuit is meritless. But it should suffice for intervention as of right that the Commission's materially different interests *may* lead it to stop defending the case in a way that protects Forward Latino's and Voces' interests. *See Wolff*, 229 Wis. 2d at 747 (a movant shows inadequacy of representation if it "shows that the representation of his interest *may be* inadequate" (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (emphasis added)). To the extent that *Braun* seems to depart from these longstanding principles, it must be clarified, narrowed, or overruled. To do otherwise will improperly sideline prospective litigants with meaningful, direct interests in a case that a state agency charged with neutrally administering laws does not—and cannot—share.

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[1] The *Braun* majority dismissed the significance of the Commission's decision not to appeal in a footnote. By its telling, if a proposed intervenor "could establish inadequate representation by simply asserting that it might appeal in the face of an adverse decision whereas the representative party might choose not to appeal," the inadequate-representation element would be rendered meaningless "because any proposed intervenor could simply assert that it might take a different approach regarding whether or not to appeal, thereby establishing inadequate representation without a showing of anything more." *Braun*, 2024 WI App 42, ¶ 28 n.11.

Judge Neubaur was correct that an existing party's refusal to appeal an adverse decision that a proposed intervenor wishes to challenge necessarily renders the existing party an inadequate representative. *See id.* ¶ 62 (Neubaur, J., dissenting). The majority did not grapple with—or even address—the authority Judge Neubaur and Vote.org cited in support of that common-sense proposition. *Id.* ¶¶ 53-56, 62-64 (Neubaur, J., dissenting). Of course, a party seeking to intervene must do more than "simply assert[]" in conclusory fashion that it may appeal while the allegedly representative party may not. *See id.* ¶ 28 n.11. An intervenor must back up that assertion with something concrete. By identifying several differences in motivation and institutional incentives that rendered them more likely to challenge any adverse ruling than the Commission, as well as the Commission's history of not appealing adverse rulings where would-be intervenors would have done so, that is exactly what Forward Latino and Voces have done.

* * *

The circuit court erred by presuming the Commission adequately represents Forward Latino's and Voces de la Frontera's interests in this case. Neither of the *Helgeland* presumptions applies. Forward Latino and Voces made at least a "minimal" showing that the Commission would not represent their interests, for all the reasons we describe above. The circuit court should have required no more.

II. The circuit court erroneously exercised its discretion in denying Forward Latino and Voces permissive intervention.

The circuit court also erred in denying Forward Latino and Voces permissive intervention under Section 803.09(2), because the record showed they were prepared to meet all relevant deadlines and that they made arguments distinct from those of the State Respondents.

A movant may intervene with the court's permission if its "claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). Whether to grant permissive intervention is "within a court's discretion." *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶ 11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94. A court erroneously exercises that 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. "The existence of a zone of discretion does not mean that the whim of the district court governs." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

The circuit court agreed that Forward Latino and Voces satisfied the prerequisites for permissive intervention because their defense has questions of law and fact in common with the main action—namely, whether Wisconsin law requires DOT to share its citizenship data with WEC, and whether WEC must in turn purge any registered voter from the rolls if DOT data does not confirm citizenship. App.9. Where that threshold requirement is satisfied, courts routinely exercise their discretion to grant interested organizations permissive intervention in election-law cases. *See, e.g.*, *Public Int. Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 800–

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02 (E.D. Mich. 2020) (League of Women Voters); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1307 (N.D. Ga. 2018) (campaign); *Campaign Legal Ctr.*, 334 F.R.D. at 6 (two political action committees). Granting Forward Latino and Voces permissive intervention would be consistent with the usual practice in this category of cases. But the circuit court nevertheless denied it.

The circuit court offered three inadequate reasons for its denial.

First, the court stated that admitting Forward Latino and Voces into the case would "create a risk of undue delay and prejudice to the parties" because the court had already set a hearing on Cerny's preliminary-injunction motion, and that hearing "would not likely be possible if permissive intervention was granted." App.9. This concern flies in the face of the procedural record, which shows that Forward Latino and Voces had consistently acted quickly, complied with all court-imposed deadlines, and never sought delay. In fact, Forward Latino and Voces participated in setting the very deadlines that the court inexplicably thought they could not meet. On September 23, 2024, the parties—including Forward Latino and Voces—appeared before the circuit court for a status conference. *See* R.47. After the hearing, the parties jointly proposed a scheduling order. R.46. The parties' proposal included a timeline for briefing and resolving the motion to intervene *and* the October 17, 2024, hearing on (a) the motion to dismiss; and (b) Cerny's preliminary-injunction motion. *Id.* The Court adopted the schedule as proposed. R.47. The circuit court provided no explanation as to why it believed Forward Latino and Voces would be unable to meet a schedule that they themselves had helped to propose. And the circuit court's asserted concern about the "time-sensitive nature of the case" rings hollow given that it *still* has not issued a decision on Cerny's preliminary injunction motion, seven months later. App.9.

Second, the court remarked that Forward Latino and Voces were "likely to make arguments very similar, if not identical, to WEC's arguments," and neither organization had indicated otherwise. App.10. But as Forward Latino and Voces explained to the circuit court, they in fact made different arguments: the

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Commission emphasized "its discretion in applying Wisconsin law and arguing that it is not *required* to adopt Cerny's preferred system, whereas [Forward Latino's and Voces'] interest is in arguing that the relief Cerny seeks is affirmatively unlawful and could not—and should not—be adopted even by a willing Commission." R.38 at 15. The circuit court provided no reason for discounting this substantial difference in position.

Third, the court repeated its belief that the existing government respondents were "fully capable [of] representing the interests of all lawful voters in this state—including those that are members of the Proposed Intervenors." App.10. But this is *also* the only reason the court denied intervention as of right. Permissive intervention is a different standard, and the Seventh Circuit has cautioned courts against "deny[ing] permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019) (citing *City of Chicago v. FEMA*, 660 F.3d 980, 987 (7th Cir. 2011); *Solid Waste Agency*, 101 F.3d at 509). Even if the Commission was positioned to adequately represent the organizations' interests (which they are not), that alone is not enough to justify the court's exercise of discretion.

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In short, the circuit court failed to offer a colorable explanation, separate and apart from its discussion of intervention as of right, for why it denied Forward Latino and Voces' motion for permissive intervention. This is an abuse of discretion.

CONCLUSION

For the foregoing reasons, Forward Latino and Voces de la Frontera request that the order of the Waukesha County Circuit Court be reversed and that Proposed-Intervenor-Appellants be granted intervention as of right or permissive intervention.

Dated: May 6, 2025

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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 brief contains 7,205 words.

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