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SUPREME COURT OF WISCONSIN

No. 2023AP76

RICHARD BRAUN,
Plaintiff-Respondent,

WISCONSIN ELECTIONS COMMISSION,
Defendant-Respondent,

v.

VOTE.ORG,
Proposed-Intervenor-Appellant-Petitioner.

AMICUS CURIAE BRIEF OF LAW FORWARD, INC., IN SUPPORT OF PETITION FOR REVIEW

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INTEREST OF AMICUS

Law Forward, Inc. is a nonpartisan, nonprofit law firm that engages in impact litigation to defend and advance Wisconsin's democracy. Over the past four years, Law Forward has represented clients in dozens of high-stakes cases. Often, Law Forward's clients intervene in litigation brought by others to defend against attacks on democracy. Law Forward has successfully represented the League of Women Voters of Wisconsin, Disability Rights Wisconsin, Black Leaders Organizing for Communities, Wisconsin Faith Voices for Justice, Voces de la Frontera, and others as intervenors in circuit courts across Wisconsin, the Wisconsin Court of Appeals, and the Supreme Court of Wisconsin. Law Forward has also represented clients as *amici curiae* at all levels of Wisconsin's court system and in the U.S. Supreme Court.

While Law Forward generally appears in court on behalf of clients, the purely procedural issues raised in this petition for review are central to its work such that Law Forward is obliged to address the Court directly, on its own behalf and based on its own institutional expertise.

Intervention is an essential tool in impact litigation and, as detailed below, a bevy of negative consequences will follow if this Court does not grant the petition and reverse the Court of Appeals' published decision adopting a new, unfounded rule that effectively forecloses intervention as of right. Those consequences are not just adverse to Law Forward's work and its future clients; they also pose a significant danger to Wisconsin's democracy because they will undermine the rule of law and the ability of the judiciary to efficiently and effectively resolve disputes with broad public import and interest, including but not limited to in election-administration and voting-rights litigation.

ARGUMENT

The Court should grant Vote.org's petition for review. This case provides a strong vehicle for developing the law and for clarifying an important issue of procedure with broad ramifications.

I. The decision below and its consequences merit this Court's review.

The Court of Appeals' published decision (App. 003–026) is contrary to, and will fundamentally disrupt, existing law in Wisconsin on intervention. Because the decision below is deeply flawed and portends significant and deleterious consequences, this Court should grant review.

A. The Court of Appeals' conflation of a would-be intervenor's "interest" with its "litigation objective" upends precedent and destabilizes Wisconsin law.

A majority of the Court of Appeals panel below adopted a rule conflating a would-be intervenor's interest in the litigation with the adequacy of an existing party's representation. This novel rule is legally and logically unsound, for several reasons.

First, it merges two distinct prongs (the second and the fourth) of the long-settled intervention-as-of-right analysis this Court has prescribed, most recently articulated in *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. The Court of Appeals improperly rewrote this Court's binding precedent, which is grounds for granting review. Wis. Stat. § (Rule) 809.62(1r)(d).

Second, the decision below would render intervention as of right "almost impossible" (Pet. 23), because nearly every would-be intervenor in any case either wants the plaintiff to prevail or the defendant to win. The dichotomy of possible outcomes in adversarial litigation—either one

side wins or the other side must—applies even when a would-be intervenor has its own distinct interests, possesses unique information and insights, or wants the case resolved on a basis different from that proffered by any existing party.

Third, foreclosing intervention as of right under Wis. Stat. § 803.09(1) would shoehorn all intervention requests into the discretionary standard of § 803.09(2). Such an approach improperly writes an entire statutory subsection out of the statute as surplusage. *State v. Dorsey*, 2018 WI 10, ¶34, 379 Wis. 2d 386, 906 N.W.2d 158. And it reduces intervention motions to little more than a crapshoot.[1]

B. In practice, the Court of Appeals' rule will cause a marked increase in litigation, with broad collateral consequences.

If left in place, the rule adopted by the Court of Appeals panel majority will lead to more litigation, with sweeping—and destabilizing—effects on Wisconsin law. It will also further single out for amplification the litigation positions of legislative leadership, while largely boxing out the views of other interests.

1. The Court of Appeals' rule will needlessly multiply litigation.

While presumably neither the circuit court nor the Court of Appeals denied Vote.org's intervention to generate more impact litigation, that is nonetheless the likely outcome of the rule adopted by the panel majority. The new rule creates incentives for parties to engage in more-voluminous, more-chaotic, and less-fully-strategized impact litigation.

[1] Notably, in making these discretionary calls, circuit courts may face perverse incentives, because each party granted intervention has an opportunity to substitute judges. Wis. Stat. § 801.58. To avoid substitution, a circuit court may be more inclined to deny permissive intervention, even where the proposed intervenor's interest in the outcome of the litigation is sufficiently strong that its participation would otherwise have been warranted as a matter of right under *Helgeland* and its predecessors.

The consequences will be deleterious to courts, more expensive for litigants (including the taxpayers), and harmful to both the development of and clarity in the law.

a. The effects will be seen in the circuit courts.

Should this Court not accept the petition and reverse, any party that might otherwise seek to intervene in an existing case will instead have incentives to bring its own lawsuit. For one thing, the required showing of an interest sufficient to establish standing and pursue litigation in a Wisconsin court is lower than the unique-litigation-objective showing that essentially forecloses intervention as of right under the Court of Appeals' rule. *Compare, e.g.*, *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855 ("The law of standing in Wisconsin is construed liberally, and 'even an injury to a trifling interest' may suffice." (quoted source omitted)), *with* Decision, ¶¶10, 18–34 & nn. 9–10 (App. 007–008, 011–021). For another, a rational would-be intervenor will recognize that intervention is a longshot, whereas filing its own lawsuit virtually guarantees a seat at the hearing-room table. After all, the worst-case scenario in filing anew is being consolidated with the initial lawsuit—which essentially accomplishes intervention via other means. By contrast, the worst-case scenario in seeking intervention is a substantial waste of time, money, and effort in an unsuccessful motion, relegating the would-be intervenor to spectator status or, not much better, the opportunity to file an *amicus curiae* brief.[2]

[2] An intervenor is "a full participant in the proceedings, having all the same rights as all other parties to the action." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶39 n.19, 410 Wis. 2d 1, 998 N.W.2d 370 (quoting *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶9, 394 Wis. 2d 33, 949 N.W.2d 423). Intervenors can participate in discovery, pursue their own strategy, file procedural and dispositive motions, respond to other parties' motions, participate in hearings, and take or defend appeals. As

A greater volume of impact litigation is not the only foreseeable consequence. There will also likely be an increase in the frequency of such litigation occurring in parallel proceedings, before separate judges and even in separate venues. This will lead to greater gamesmanship and more disputes over venue, transfer, and consolidation—all of which are facets of Wisconsin law that have not been heavily scrutinized and refined through adjudication.

And since not all of these multiple, overlapping cases will be consolidated, yet another consequence is more piecemeal litigation, with some interests and issues raised and decided in one case while other, related interests and issues are ignored there, even as those are raised in parallel litigation proceedings in another court (where some elements of the first case are missing). This puts circuit courts in the unenviable position of making decisions based on partial, incomplete information, necessarily diminishing the quality of the decisions and concomitantly undermining public confidence in the judiciary and in those government actors who must strive to implement these partial, inconsistent, and shifting judicial decrees.

One more foreseeable consequence is a diminished quality of advocacy. The realities of piecemeal, parallel litigation will lead to the filing of premature and incompletely strategized litigation. Sophisticated parties and counsel, aware of the advantages of filing the first lawsuit on a given issue—and the significant disadvantages of prosecuting parallel litigation that lags chronologically behind the first suit—will

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illustrated by Vote.org's experience (*see* Pet. 16), the opportunity to file an *amicus* brief is cold comfort to a party denied intervention notwithstanding a cognizable interest in the case.

have greater incentives to race to the courthouse. The result will be rushed, incompletely theorized, and even premature filings.[3] It will also require frequently named defendants, like the Wisconsin Elections Commission, to facture their defensive efforts among several parallel lawsuits across these various venues instead of focusing their work in streamlined litigation proceedings where all relevant issues can be heard and adjudicated in an orderly, logical way and then, if need be, appealed.

Individually and taken together, these consequences run counter to the judiciary's signal goal of "secur[ing] the just, speedy and inexpensive determination of every action." Wis. Stat. § 801.01(2).

b. The effects will also reach the appellate courts.

The effects of the incentives created by the Court of Appeals' rule, as outlined above, will also create a greater likelihood for parallel appeals and therefore a greater chance of conflicting appellate decisions. This is especially true if District II persists in ignoring prior decisions, as it has recently done both here in sidelining *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999), and in proceeding to opine on the merits of *Wisconsin Voter Alliance v. Secord*, No. 2023AP36, 2023 WL 8910882 (Ct. App. Dec. 27, 2023), *rev. granted*, 2024 WI 22, which had already been adjudicated in *Wisconsin Voter Alliance v. Reynolds*, 2023 WI App 66, 410 Wis. 2d 335, 1 N.W.3d 748.

As this Court has previously explained, the Court of Appeals "must speak with a unified voice," and therefore cannot "overrule, modify or

[3] For similar reasons, the Court of Appeals' rule also incentivizes parties to run directly to court without exhausting their administrative remedies. *See, e.g.*, *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *abrogated in part on other grounds, Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429.

withdraw language from its prior published decisions," at the risk of "threatening the principles of predictability, certainty and finality relied upon by litigants, counsel and the circuit courts." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). As *Cook* went on to warn, "with the ability to rely on the rules set out in precedent thus undermined, aggrieved parties would be encouraged to litigate issues multiple times in the four districts." *Id.* In the context of impact litigation, this danger has been exacerbated by the appellate special venue statute, Wis. Stat. § 752.21(2), and the Court of Appeals' rule foreclosing intervention as of right would aggravate matters even further.

c. The consequences will also diminish the law.

The foreseeable effects of the Court of Appeals' published decision are harrowing and dissuasive. But they are not the only consequences here. The prospect of multiple, overlapping litigation, predictably leading to forum shopping (at the circuit-court and appellate levels alike) and an increase in inconsistent decisions, has implications extending beyond inconvenience to and conflict within the judiciary. Such outcomes are bad for the law, and by extension for the people of Wisconsin whom the law serves. As noted above, it is in impact litigation where intervention is both most common and most often contested. The Court of Appeals' rule that limits intervention, therefore, means that these impactful judicial decisions will be made based on incomplete information, without input from all relevant participants. And the consequent multiple, overlapping impact litigation will exacerbate the harm, increasing the number of cases in which courts must rule without all the information they should consider, yielding more decisions, more appeals, more uncertainty in the law, more confusion, and diminished public confidence. Litigants

concerned about the law's operation and officials charged with its faithful execution will alike be forced to parse conflicting rulings and make the best decisions they can. But those decisions, made under a cloud of uncertainty created by multiple litigation, will likely spawn yet more litigation, in a vicious, self-replicating cycle.

2. The Court of Appeals' rule privileges the Legislature's voice above all others in impact litigation.

By essentially foreclosing intervention as of right, the Court of Appeals' rule divorces Wisconsin law from federal practice, even though § 803.09(1) and (2) deliberately parallel federal intervention provisions. (Pet. 24–26) This divergence is more glaring, and may have great impact, because Wisconsin statutes purport to treat one frequent litigant—the Legislature—differently from all others and privilege it for purposes of intervention. Wis. Stat. § 803.09(2m); *accord Democratic Nat'l Comm.*, 2020 WI 80. The Legislature has claimed this grants its leadership *carte blanche* to intervene at will in any case on behalf of the State. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 800 (7th Cir. 2019) ("As the Legislature sees it, Wisconsin has … chosen to split its sovereign voice among several entities, so a federal court must respect this decision by lowering the burden for it to intervene."). Federal law contains no analogue for § 803.09(2m). *Id.* at 797 ("[Section 803.09(2m)] implies that intervention should be automatic, without any input from the trial court …. Wisconsin's courts may apply § 803.09(2m) that way, but no one argues that this interpretation can control in federal court.").

The Court of Appeals' rule not only marginalizes the voices of private, would-be intervenors—whether individual Wisconsinites, businesses, or nongovernmental organizations—but also creates a profound differential in power between private interests and those of legislative leaders. This

power differential is particularly unsettling because the cases in which intervention is most frequently fought over involve impact litigation—that is, disputes where the consequences will, by design, have lasting effects that reach far beyond the parties named in the complaint. Foreclosing interested parties from intervening as of right in such suits, especially while the Legislature has attempted to grant itself an artificially inflated ability to intervene at will (and at taxpayer expense), places a heavy thumb on the scales of justice and exacerbates the other factors that will require courts to decide some of the most high-profile and widely consequential cases they hear based upon incomplete, stilted presentations of fact and argument.

II. It is important that the Court address this procedural issue here, given the many cases that attract intervention petitions.

This case is a strong vehicle for addressing a crucial procedural issue that frequently recurs. It is a particularly good opportunity because there is not tremendous time-pressure to resolve the underlying merits of the case before the next election, affording the Court time to fully consider through regular order the procedural question presented.

This Court has not addressed the standards for intervention in a published decision since *Helgeland* in 2008, though both impact litigation and motions for intervention have increased markedly in the years since. While the issue has arisen frequently in lower courts and in motion practice before this Court, that is no substitute for the Court considering these issues with the benefits of full briefing, opportunities for *amicus* submissions, oral argument, the salutary effects of public transparency, and a binding, published decision that can guide lower courts and future litigants. The Court recognized these benefits when it

chose to address the standards for stays pending appeal in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263.

Here, the need for this Court's review is more pronounced, because the confusion in the law arises not only from the dynamic where the issue is most often addressed in shadow-docket rulings[4] (also true in *Waity*), but also from the Court of Appeals' rewriting the law in conflict with this Court's precedent and fundamental principles of statutory construction (not true in *Waity*). And, as was true with *Waity*, guidance from this Court in the short term will avoid the need to answer the same questions in less favorable circumstances later. Issues around intervention, like those around stays, often arise in fast-moving litigation in which courts at all levels must rule quickly. Clarity in the rules ahead of time is a benefit to courts and litigants alike in such circumstances.

CONCLUSION

For the foregoing reasons, Law Forward urges the Court to accept the petition for review in this case and to restore Wisconsin intervention law.

Dated: September 12, 2024

Respectfully submitted,

Electronically signed by Jeffrey A. Mandell

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[4] *See* Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 Wis. L. Rev. 1063.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief, as well as this Court's Order regarding page length. The length of this brief is 2,793 words.

Dated: September 12, 2024

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