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No. 2023AP76

In the Supreme Court of Wisconsin

RICHARD BRAUN,
PLAINTIFF-RESPONDENT,

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-RESPONDENT,

V.

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

RESPONSE TO PETITION FOR REVIEW

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

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INTRODUCTION

Election law appeals frequently present important matters of public interest necessitating the involvement of this Court. This is not such a case.

To begin with, it is essential to understand what this lawsuit—now concluded for many months—was actually about. The Plaintiff-Respondent, Richard Braun, sought judicial clarification as to whether electors could lawfully use the National Mail Voter Registration Form ("the Form"), a federal voter registration form, in Wisconsin. Mr. Braun's concerns were premised on the Form's failure to contain information that Wisconsin law explicitly requires appear in voter registration forms such as a means of ensuring that the elector is not a felon and has resided in the relevant ward for 28 days. At the same time, the Form also requested seemingly irrelevant information *not* authorized by Wisconsin law for collection, namely the elector's political party and race.

In contrast, this lawsuit was never about whether Wisconsinites should have easy access to a simple means of registration—they undisputedly do, and this case did not change that. Before, during, and after this lawsuit, voters could and can register in-person (including on Election Day), by mail using the Wisconsin Elections Commission's ("WEC") official EL-131 Form, or even online. And Mr. Braun specifically disavowed in his complaint any relief relating to voters who had already registered to vote using the Form—in other words, this lawsuit did not seek and did not result in the de-registration of a single Wisconsin elector. Vote.org's charge that this case "aimed to make it more difficult

for Wisconsinites to register and vote," Pet. 8, is inaccurate and unfortunately inflammatory.

In any event, as it turns out, the parties below never fully reached the merits. It was discovered during proceedings that WEC had no record it had ever actually approved the Form for use. Contrary to Vote.org's unprecedented position that laws need not be memorialized in some kind of way, WEC met publicly following the Circuit Court's ruling that the Form could not be used until officially authorized by WEC and *unanimously* decided that the Form should *not* be used going forward, except by specific groups of Wisconsinites like those serving abroad in the military. Mr. Braun did not challenge that decision (and neither did Vote.org). The result was a happy ending for Wisconsin: the law was clarified in a bipartisan fashion and registration in Wisconsin remains quick and easy whether in-person, by mail, or online. So why is this case here?

Vote.org, a special interest group with no obvious ties to the State of Wisconsin, built its business model on use of the Form and doesn't want to update its website. So it moved to intervene. The Circuit Court correctly rejected that motion on the basis that if Vote.org were right that the Form complied with Wisconsin law, WEC itself would fully represent Vote.org's interest in this simple declaratory judgment case; if Vote.org were wrong and the Form was illegal, then the group was not "harmed" in any pertinent sense because it has no right to continued use of a particular form in Wisconsin, any more than TurboTax could sue to keep Wisconsin's Department of Revenue from swapping out a particular tax form. The Court of Appeals affirmed. But Vote.org now wants a third

bite at the apple, asking this Court to review a routine intervention denial even though this case resolved itself almost a year ago and has been mooted by WEC's subsequent actions (which is why WEC did not appeal the Circuit Court's merits decision).

It is difficult to imagine a worse use of this Court's resources, for four reasons.

First, Vote.org waived its right to relief in this case. The time for appeal of the Circuit Court's merits decision has long since expired, and Vote.org did not, as instructed in cases like one that Vote.org itself cites, file a conditional notice of appeal to preserve the jurisdiction of the appellate courts. Even if Vote.org had done so, its argument at this stage rests on developments that occurred *after* the denial of its motion to intervene. To preserve an appellate record sufficient to permit this review, Vote.org needed to renew its motion to intervene following WEC's decision not to appeal—but did not do so.

Second, this case has been mooted by WEC's on-the-record decision *not* to prescribe the Form for use in Wisconsin except for certain overseas voters. So even if this Court accepted review of this case, and even if Vote.org prevailed and the case were sent back to the Circuit Court for Vote.org to appeal the Circuit Court's merits decision, that appeal would be immediately dismissed because there is no longer any factual dispute that the Form is not prescribed for use in Wisconsin. That was a political decision by WEC, not a judicial one, so there is no reversal to be had.

Third, in order to even reach the inadequate representation ruling that Vote.org incorrectly suggests is worthy of high court review, this Court will first need to resolve the threshold question of whether the two

other intervention factors are met. The Circuit Court's factual finding that Vote.org failed to demonstrate any significant harm is dispositive in Mr. Braun's favor on this question and will prevent this Court from reaching the items that supposedly justify an additional level of review.

Finally, and assuming none of these issues prove a bar to review here, Vote.org is simply wrong to paint the inadequate representation ruling below—which was correct in any event—as so groundbreaking as to call for this Court's attention. The Circuit Court's ruling was a garden-variety intervention denial premised on the fact that this case called for nothing more than a comparison of the Form with Wis. Stat. § 6.33(1) and provisions of Chapter 227—a pure question of law—and WEC, represented by the Department of Justice, would obviously brief that question adequately and in a way that supported those like Vote.org who wish to see the Form used in Wisconsin.

Far from conflating interest and ultimate objective, the Court of Appeals meticulously distinguished between the two, correctly reciting all applicable principles and presumptions, relying on Vote.org's *own* definition of its interest, and leaving Wisconsin caselaw in a state of harmony. Vote.org's position here, like that of the dissent below, boils down to disagreement with how those rules were applied—but even if the Court of Appeals had erred in its application of the law to the facts at bar, and it did not, this is not an error-correcting court. Likewise, the Court of Appeals was correct to reject Vote.org's request for a "per se" rule that failure to appeal *always* demonstrates inadequate representation. Such a rule, which has no basis in federal case law, ignores the fact-specific nature of intervention inquiries and would

wreak havoc in Wisconsin courts by preventing finality in a huge variety of cases.

All told, if this Court grants review of this case, it is far likelier, in having to navigate the significant waiver, jurisdiction, mootness, and merits problems just recounted, to produce confusion in Wisconsin's intervention law than to develop or clarify that law. And none of that work will ultimately have any purpose, since this case has been over for a long time now and has been completely overcome by subsequent events.

As the saying goes, "if it ain't broke, don't fix it." Nothing in the proceedings below harmed Wisconsin law on intervention or voter registration. Vote.org's petition should be denied.

STATEMENT OF THE CASE

Vote.org's Statement of the Case is incomplete in several critical respects.

This was a lawsuit seeking a declaratory judgment regarding the legality of use of the National Mail Voter Registration Form ("the Form"), a federal voter registration form, in Wisconsin. The Form is made available by the United States Election Assistance Commission ("EAC") for voter registration by mail. R. 57 ¶2 and Ex. A. Pursuant to 52 U.S.C. § 20505(a), states are generally obligated to accept the Form for use in elections for federal office, but Wisconsin is exempt from that provision because it allows same-day registration. *See* 52 U.S.C. § 20503(b). Before this lawsuit, WEC's Election Administration Manual (a manual that WEC publishes and makes available to all municipal clerks and the public regarding election administration) provided that the Form was

approved for use for voter registration by mail in Wisconsin. R. 57 Ex. C. It is undisputed that Wisconsin residents have used the Form to register to vote in Wisconsin in multiple municipalities. R. 2:7 at ¶18; R. 34:4 at ¶18.

On July 26, 2022, counsel for Plaintiff-Respondent Richard Braun sent a letter to WEC explaining why use of the Form in Wisconsin violated Wisconsin law both by failing to contain statutorily-mandated information and by incorrectly requesting information not authorized by statute. R. 57 Ex. D. Counsel's letter requested either a legally sufficient explanation from WEC as to why, despite these clear deficiencies, the Form was approved for use in Wisconsin or withdrawal of approval of the Form. R. 57:34–5. WEC provided neither. See R. 2:7–8 at ¶20; R. 34:4 at ¶20; R. 57 Exs. E–F.

Mr. Braun then brought this action on September 15, 2022, alleging two claims: first, that the Form failed to comply with statutory requirements; and second, that adoption of that form amounted to the unlawful adoption of an administrative rule and was therefore invalid. R. 2.

On September 28, 2022, Vote.org filed a motion to intervene in the action and its supporting brief and materials. R. 10–13. On November 17, 2022, Mr. Braun filed his opposition to Vote.org's intervention motion (R. 46 and 47), and on November 23, 2022, Vote.org filed its reply (R. 48 and 49). On December 2, 2022, the Circuit Court heard argument on Vote.org's motion to intervene and denied that motion. In its view, any costs Vote.org might have to incur in updating its system was a result of Vote.org's own system design choice, which was not a matter of judicial

cognizance. R. 73:25. Further, the case involved the "narrow question" of "whether or not this national form complies with Wisconsin law"; both WEC and Vote.org were "pursuing exactly the same outcome," namely that the Form was compliant; and differences in the two parties' reasons for pursuing that outcome would not affect WEC's representation of Vote.org's interests. *Id.* at 26.[1]

A written order was entered on December 15, 2022. R. 60. Vote.org appealed on January 13, 2023. R. 66.

In the meantime, beginning on December 15, the original parties litigated the legal questions at issue via cross-motions for summary judgment. *See, e.g.*, R. 57–59, 80–83, 93–94, 96. Vote.org participated in the briefing as *amicus curiae*, submitting nearly 100 pages of materials. R. 84–86. That participation was unopposed. *See* R. 75. On March 21, 2023, the Court heard argument and took the case under advisement. *See* R. 99. While the Circuit Court was writing its decision, Mr. Braun and Vote.org briefed the issue of Vote.org's intervention denial before the Court of Appeals.

The Circuit Court issued a written merits decision on September 5, 2023, but did not rule on whether the contents of the Form complied with § 6.33(1). R. 101. Instead, it determined that WEC was unable to "provide any credible evidence as to where, when, or how the National Form was approved" as required by that statute. *Id.* at 8. The Circuit Court characterized properly prescribing which voter registration forms

[1] The Circuit Court also rejected Vote.org's request for permissive intervention, R. 73:27-29, but as Vote.org has abandoned any appeal of that ruling before this Court, Mr. Braun will not address it further.

could be used in Wisconsin as a "most basic duty" of WEC. *Id.* at 9. It enjoined WEC from issuing guidance that the Form could be used, but only "[u]ntil such time as [WEC] prescribes use of the National Form." *Id.* Under Wis. Stat. § 808.04(1), WEC had until December 4, 2023, to appeal.

Vote.org notified the Court of Appeals of the decision, but otherwise did nothing. *See* Vote.org's Ltr (Sept. 6, 2023). Vote.org's intervention appeal was submitted to the Court of Appeals for decision approximately one week later. *See* Notice of Submission on Briefs (Sept. 12, 2023).

On November 2, 2023, although not required to do so by the Circuit Court, WEC took steps to establish whether the Form could lawfully be used in Wisconsin. Specifically, at a publicly noticed meeting at the State Capitol, WEC considered five staff-recommended options relating to the Form, including prescribing the Form for use in Wisconsin, prescribing the Form for use by specific groups of voters, and taking no action.[2] With respect to the first option just mentioned, WEC staff noted in part that even if the Form were prescribed, "the reality is that some of the missing information is still required by statute." *Id.* at 99.

WEC declined to prescribe the Form for general use, instead *unanimously* "prescrib[ing] the [Form] for use in the limited

[2] *See* Agenda at 95–102. The Agenda is available at https://elections.wi.gov/sites/default/files/documents/Open%20Session%2011.2.2023%20FINAL.pdf. This Court may take judicial notice of publicly-available records of government agencies. *See, e.g.*, *Bethke v. Auto-Owners Ins. Co.*, 2013 WI 16, ¶36 n.13, 345 Wis. 2d 533, 825 N.W.2d 482. Additionally, as will be discussed below, the fact that these materials are not in the record is a result of Vote.org's own failures.

circumstances of being used by Military and Overseas ([Uniformed and Overseas Citizens Absentee Voting Act]) voters in the 45 days prior to an election."[3] No one (including Mr. Braun and Vote.org) has challenged WEC's decision to prescribe the Form for only limited use.

On November 13, 2022, Vote.org informed the Court of Appeals that it had email confirmation from WEC that WEC would not be appealing the Circuit Court's decision. Vote.org's Ltr. (Nov. 13, 2023). It did not inform the Court of Appeals that WEC had declined to prescribe the Form for general usage and had instead prescribed the Form for only limited usage. Further, while noting the December 4, 2023 "deadline to notice an appeal," *id.*, Vote.org did not renew its motion to intervene at the Circuit Court or file a conditional notice of appeal itself. December 4 came and went.

On July 31, 2024, the Court of Appeals affirmed the Circuit Court's intervention denial on the ground that WEC adequately represented Vote.org's interests. Its ruling will be discussed in greater detail below.

Vote.org filed its Petition for Review on August 30, 2024.

[3] *See* Minutes at 10. The Minutes are available at https://elections.wi.gov/sites/default/files/documents/November%202%2C%202023%20Open%20Session%20Minutes%20APPROVED.pdf. *See supra* n.2.

REASONS FOR DENYING THE PETITION FOR REVIEW

I. Vote.org waived its right to any relief from this Court by failing to file a conditional notice of appeal from the Circuit Court's summary judgment ruling and failing to move to intervene below following the Wisconsin Election Commission's decision not to appeal.

Vote.org's petition is dead on arrival because the relief Vote.org seeks via its intervention motion—the ability to appeal the Circuit Court's summary judgment decision—is unavailable. The deadline to appeal the Circuit Court's decision ran in December of 2023, and no appeal was filed. That is, even if this Court accepted review and reversed the Circuit Court on its denial of Vote.org's intervention motion, Vote.org's subsequent notice of appeal would be untimely. It is a basic rule that an "effective notice of appeal is jurisdictional," *Jadair Inc. v. U.S. Fire Ins. Co.*, 209 Wis. 2d 187, 211, 562 N.W.2d 401 (1997), so the case would have to be dismissed.

There is abundant authority explaining what Vote.org should have done to ensure it could obtain appellate review of the Circuit Court's merits ruling even though Vote.org's participation ended before final judgment: "If final judgment is entered with or after the denial of intervention, the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed." 15A Fed. Prac. & Proc. Juris. § 3902.3 (3d ed.); *see, also, e.g.*, *Purcell v. BankAtlantic Financial Corp.*, 85 F.3d 1508, 1511 n.2 (11th Cir. 1996) (intervenor who appealed intervention denial issued before finalization of class action settlement filed protective appeal following entry of final judgment); *Mausolf v. Babbitt*, 125 F.3d

661, 665–66 (8th Cir. 1997) ("Because it appeared that the Association's intervention appeal would not be decided by this Court before the expiration of the time period for filing a notice of appeal from the District Court's merits decision, and because the Association wished to preserve its right to appeal the District Court's decision on the merits should its motion to intervene be granted on appeal, the Association timely filed a notice of appeal from the District Court's decision on the merits."). This rule reconciles the unforgiving, jurisdictional reality of the notice-of-appeal deadline with the need to ensure that "a prospective intervenor who successfully appeals the district court's denial of his intervention motion" is not "prevent[ed] . . . from securing the ultimate object of such motion—party status to argue the merits of the litigation." *Id.* at 666. This balance is achieved via use of the "well settled" rule that "only parties to a lawsuit, *or those that properly become parties*, may appeal an adverse judgment." *Id.* (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam)).

Other cases could be added to those just cited. Indeed, one of the primary cases upon which Vote.org relies in urging this Court to accept review of this case itself urges the practice of filing a "conditional" notice of appeal in order for a "would-be intervenor" to "protect himself." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 101 F.3d 503, 509 (7th Cir. 1996).

For unknown reasons, although Vote.org was aware at least 3 weeks before the expiration of the time to appeal the Circuit Court's ruling that WEC was forgoing its appeal rights, *see* Vote.org's Ltr. (Nov. 13, 2023), it did nothing and allowed its time to appeal to expire. So

again, even if this Court granted review of the intervention denial and remanded for Vote.org to take a merits appeal, that appeal would be subject to immediate dismissal for lack of jurisdiction. *See, e.g.*, *City of Sheboygan v. Flores*, 229 Wis. 2d 242, 248, 598 N.W.2d 307, 310 (Ct. App. 1999) (per curiam) ("[T]he deadline for filing the notice of appeal was April 5. Flores filed her notice of appeal on April 8. The notice of appeal was untimely and this court lacks jurisdiction over her appeal. Appeal dismissed.") (citation omitted)).[4]

Vote.org's inaction also makes *this* appeal impossible. Vote.org rests its inadequate representation argument in large part on WEC's failure to appeal. But the Circuit Court never ruled on whether WEC's decision not to appeal rendered its representation of Vote.org inadequate, because Vote.org never sought such a ruling. There is, in other words, no Circuit Court decision on this question before this Court to review.

Vote.org *could* have obtained a Circuit Court ruling on whether WEC's decision not to appeal rendered representation inadequate in at least two different ways. First, if a potential failure of WEC to appeal was Vote.org's driving concern in this litigation, it could have "file[d] at the outset of the case a standby or conditional application for leave to intervene and ask the district court to defer consideration of the question of adequacy of representation until [Vote.org was] prepared to

[4] Vote.org's November 13th letter could not possibly be construed as a notice of appeal, as is shown by its comparison with the requirements set forth in Wis. Stat. § 809.10(1), not least of which is notice that an appeal is occurring and the filing of that notice in the Circuit Court.

demonstrate inadequacy" through failure to appeal. *Solid Waste Agency*, 101 F.3d at 509; *cf. Citizens' Util. Bd. v. Pub. Serv. Comm'n of Wisconsin*, 2003 WI App 206, ¶1, 267 Wis. 2d 414, 671 N.W.2d 11 (motion for intervention conditional on grant of other motion). Second, it could easily have renewed its motion to intervene before the Circuit Court on November 13, or whenever it learned that WEC would not appeal, arguing that circumstances had changed.

It did neither. One possible explanation for this failure to act is that litigation before the Circuit Court would have brought to light WEC's post-judgment decision not to prescribe the Form for use, a decision that mooted both Vote.org's intervention request and any subsequent merits appeal. (It also would have allowed the parties to supplement the appellate record on these developments). But ultimately the reasons for Vote.org's strategic decision is unknown. What is known is that the only step Vote.org actually took was the filing of a brief letter with the *Court of Appeals*—after the case had already been submitted to that Court for decision—notifying it of Vote.org's knowledge that WEC was not appealing.

The letter did not make clear what the parties or the Court of Appeals were supposed to do with this information. The failure to appeal had no direct bearing on the decision the Court of Appeals was actually reviewing, namely the December 2022 denial of its motion to intervene. With no Circuit Court decision, evidence, or other record on the question of WEC's decision not to appeal—indeed, with no real argument on the matter at all—the Court of Appeals could reference the development only briefly in footnotes.

That was sufficient for standard appellate review for Circuit Court error in a decision that predated these developments. But Vote.org now wants to make WEC's failure to appeal the *centerpiece* of a case before Wisconsin's high court that could fundamentally affect Wisconsin's intervention law. It waived that opportunity by failing to create a record sufficient to permit real review of the issue.

In sum, by declining to file a notice of appeal and by declining to renew its motion to intervene following judgment, Vote.org utterly failed to take the steps necessary to enable appellate review of the questions litigated below. For these reasons alone, the petition must be denied.

II. This case is now moot because the Wisconsin Elections Commission made a post-judgment, formal decision to prescribe the National Voter Registration Form only for specific groups of individuals.

Vote.org's Petition for Review does not mention that the *ultimate* relief it seeks in this case—a judicial ruling that electors may lawfully use the Form in Wisconsin—is likewise no longer possible. As recounted in the Statement of the Case above, and in a decision not required by any judicial authority and thus one totally divorced from this appeal, WEC has since voted that the Form may *not* lawfully be used in Wisconsin, except by those covered by the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").[5] Mr. Braun would argue that it is clear from the materials WEC staff drafted in advance of that vote that

[5] Mr. Braun's position in the lawsuit has always been that the registration process for voters covered by UOCAVA is different than the process for other voters and Mr. Braun did not challenge the Form with respect to UOCAVA voters. See, e.g. R. 93:16.

the obvious reason for this result is because WEC realized that the Form does *not* comply with Wisconsin law (for non-UOCAVA voters), but WEC's motives are ultimately irrelevant. The point is that this appeal is moot, and thus "will not be considered by an appellate court," since "its resolution will have no practical effect on the underlying controversy." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

Here, WEC *has* taken new regulatory action to clarify whether the Form may be used generally in Wisconsin, and concluded it cannot be. Indeed, not only did WEC decline to adopt a staff recommendation that the Form be approved for general usage, it expressly (and unanimously) determined that *only* voters subject to UOCAVA could use it. That ruling, which was political in nature rather than the result of any judicial mandate, is inconsistent with the result that Vote.org now seeks and thus precludes it.

Second, mootness can also be considered from the perspective of what the Circuit Court below actually ordered: it ruled that WEC had never prescribed the Form for use under Wis. Stat. § 6.33 and enjoined WEC "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" *but only* "[u]ntil such time as the Wisconsin Elections Commission prescribes use of the National Form." R. 101. This left WEC free to moot the order by prescribing the Form for use—that is, the Circuit Court's ruling did *not* limit WEC's future ability to prescribe the Form. WEC's action to prescribe the Form for use by UOCAVA voters only, while certainly precipitated by the events of this lawsuit, was an

independent choice. This means that reversal on the merits below (following a grant of this petition for review, a second appeal by Vote.org, and victory on that appeal) would be ineffectual in light of WEC's subsequent regulatory action, which a reversal would not affect.

III. The Circuit Court's intervention findings and Vote.org's own post-judgment curative measures doom Vote.org's appeal.

As if all of this were not enough to disprove Vote.org's claim that this case is an "ideal vehicle" for addressing the inadequate representation questions it raises, Pet. 32, this Court would in all likelihood be prevented from reaching those questions even if it makes it to the merits.

Assessing intervention as-of-right is a four-step process, *see Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶37, 307 Wis. 2d 1, 745 N.W.2d 1, and before this Court can determine whether an intervenor's interests are adequately represented it must conclude those interests exist and are actually at risk. *See* Wis. Stat. 803.09(2) ("Upon timely motion anyone shall be permitted to intervene in an action when the movant *claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest*, unless the movant's interest is adequately represented by existing parties." (emphasis added)). That is a problem for Vote.org, because to date it has never clearly identified such an interest.

As noted above, the Form is not the only means by which Wisconsinites can register to vote—not by a long shot. Voters can

register in-person (including on Election Day), online, or by mail using WEC's EL-131 Form (which was not challenged here). *See* Wis. Stat. §§ 6.30(1), (4), (5), 6.55; *see also* R. 57 Ex. B. So there was never any potential outcome of this suit in which Vote.org would be prevented from continuing to help Wisconsinites to register to vote. It would simply have to send the proposed registrant a different form—WEC's EL-131 Form (which complies with Wisconsin law)—instead of the Form in dispute (which does not). The undisputed fact is that Vote.org's interest in assisting citizens to register to vote is and will remain unimpeded.

Vote.org obviously has no legally cognizable interest that justifies intervention merely in ensuring that Wisconsin uses Vote.org's preferred form. Yet, that is what it is trying to claim in order to obtain intervention as of right. But such a generalized interest would require any person be permitted to intervene any time any Wisconsin governmental entity makes any choice with respect to any legal requirement. Wisconsin law requires more. *Helgeland*, 307 Wis. 2d 1, ¶71 (interest of proposed intervenor should be "unique or special").

More importantly, however, Vote.org did not allege—much less prove—that Wisconsin's EL-131 Form is any less simple or accessible than the Form. The EL-131 Form is available online and is no longer than the Form, but unlike the Form, the EL-131 form is designed to comply with the statutory requirements that the Form does not. *See* R. 57 ¶3 and Ex. B. And again, resolution of this case would not eliminate Vote.org's ability to use the EL-131.

Vote.org's real complaint, then, has been that it will have to switch from the Form to the EL-131. But what cost (*i.e.*, harm) is there to

switching forms? Vote.org simply needs to replace one form with another, much as it has to do whenever the Election Assistance Commission updates the Form itself. Below, Vote.org provided no information as to how or why it would be particularly difficult for it to replace the Form on its website with Wisconsin's EL-131 form. Instead, Vote.org simply alleged that it would require a "significant" expenditure, based on the statement of Vote.org's CEO to the same effect. But this statement was conclusory and completely unsupported by any actual facts. Vote.org's affiant below did not even explain the basis for her allegation. Such unsupported statements are insufficient. *See, e.g.*, Wis. Stat. § 906.02 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Grunwald v. Halron*, 33 Wis. 2d 433, 441, 147 N.W.2d 543 (1967) ("mere speculation" is not admissible). What Vote.org's affiant *did* make clear, however, is that Vote.org's model *already* involves substantial state-specific tailoring, undercutting its claim that it uses a one-size-fits-all approach. *See, e.g.*, R. 11:7 ("Wisconsin-based users are provided information about state-specific requirements at multiple points during this process.").

Mr. Braun acknowledges that the merits of these factors are not relevant per se at this stage, where this Court is only considering whether to accept review of the case. However, the merits are highly relevant if Vote.org's position on them is so deficient as to preclude this Court from reaching the legal issues that Vote.org claims actually justify a grant of its petition. As to this consideration, Mr. Braun wishes to make two points.

First, the Circuit Court already ruled that Vote.org failed to establish that its costs would be significant. R. 73:25 ("I don't know if it's significant or not because I don't think there's a sufficient record before the Court to know whether the cost is sufficient other than the allegations of the affidavit of the president."). The record is now closed and that factual finding is virtually impossible for Vote.org to displace.

Second, assuming Vote.org could displace it, Vote.org admitted during Court of Appeals proceedings that it has ceased offering the Form for use, *see* Vote.org's Ltr. (Nov. 13, 2023) and this Court can judicially notice that Vote.org still offers Wisconsinites the ability to register to vote on its website.[6] Thus, Vote.org has already incurred any supposed harm it originally sought to prevent. Because this is not a case in which Vote.org has sought or could be awarded damages, this renders its intervention request moot—it can no longer establish all four intervention factors (if it ever could). *See Olson*, 233 Wis. 2d 685, ¶3.

It is true that the Court of Appeals concluded that Vote.org had established the first three intervention factors. But it did so on a basis that Vote.org has now expressly *disclaimed* in order to make possible its Petition for Review: that Vote.org's interest could be characterized as ensuring "continued acceptance of the Form in Wisconsin." *Braun v. Vote.org*, 2024 WI App 42, ¶20; *see, e.g.*, Pet. 21. Vote.org now strenuously objects to any designation of its interest as relating to this purpose. What is left is its supposed interest in preventing "direct pecuniary harm." Vote.org's COA Br. 14. But that interest has vanished.

[6] Available at https://www.vote.org/state/wisconsin/. *See* Wis. Stat. § 902.01.

IV. Neither of the routine intervention rulings made by the Court of Appeals justify the involvement of this Court.

These preliminaries, while gravely (and dispositively) problematic for Vote.org, should not overshadow the fact that even on the issues for which it actually seeks review, Vote.org comes to this Court empty-handed. The Court of Appeals' ruling that the Department of Justice and Wisconsin Elections Commission adequately represented Vote.org's interest in seeing the Form preserved for use did not break any new ground.

a. The Court of Appeals properly stated and applied the presumption of inadequate representation arising from shared litigation objectives.

Vote.org first asks this Court to resolve "[w]hether a named defendant adequately represents a would-be intervenor just because the defendant shares the intervenor's litigation objectives, despite different fundamental interests." Pet. 3. The answer to this question is already well-established in Wisconsin case law: not necessarily, but "adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action," a presumption that is "rebuttable." *Helgeland*, 307 Wis. 2d 1, ¶90. That is exactly what the Court of Appeals held. *Braun*, 2024 WI App 42, ¶29 ("We conclude, however, that this presumption applies because the WEC and Vote.org share . . . the same ultimate objective in this case: To establish that the Form complies with Wisconsin law.").

Vote.org strains mightily to find fault with the Court of Appeals' ruling that would go beyond, at best, "the misapplication of a properly stated rule of law." *Cf.* Rule 10, Rules of the Supreme Court of the United

States (certiorari petition "is rarely granted" when this is the asserted error); *see also* Wis. Stat. § 809.62(1r)(c)1. (relevant consideration is whether "[t]he case calls for . . . merely the application of well-settled principles to the factual situation"). It says that by ruling that representation was adequate because both WEC and Vote.org sought "[t]o establish that the Form complies with Wisconsin law," Pet. 21 (quoting *Braun*, 2024 WI App 42, ¶29), the Court of Appeals failed to distinguish between Vote.org's interests and its litigation objectives.

There are two major problems with Vote.org's argument. First, it was not the Court of Appeals' job to define Vote.org's interest—that fell to Vote.org. And Vote.org's Court of Appeals brief shows that *it* was the one who characterized its interest in terms of its ultimate objective. It titled its section on inadequate representation "WEC does not adequately represent Vote.org's *interest in continuing to use the national form in Wisconsin*," and in discussing its interest said the following:

> The circuit court held that Vote.org had satisfied this related-interest requirement for intervention as of right. It recognized that Vote.org had articulated an interest in seeing that "the national form is . . . able to be utilized in Wisconsin." App. 26 (R.73:24). And it found that interest to have a "sufficient connection" to the action for purposes of the intervention statutes. App. 26 (R.73:24). *Those conclusions were correct.*

Vote.org's COA Br. 13, 18 (emphases added). Vote.org now criticizes the Court of Appeals for properly reciting Vote.org's own argument.

Second, what were the interests the Court of Appeals supposedly failed to note? Vote.org, quoting the Court of Appeals dissent, says "[1]

continuing to use its web-based registration platform, [2] increasing the registration rates of lower-propensity voters, and [3] preserving its scarce resources." Pet. 21. But none of these were disregarded by the Court of Appeals. The Court correctly rejected the third as unsupported by the evidence, *Braun*, 2024 WI App 42, ¶34 n.12, and to the extent the first does not overlap with these cost concerns, it amounts to just a slightly different way of saying "continuing to use [the Form]." This leaves the second interest, which the Court of Appeals explicitly noted and took pains to *distinguish* from Vote.org's ultimate objective. *See id.* at ¶29. The Court of Appeals' basic conclusion was correct and sensible: Vote.org's bare use of the Form to register voters did not rebut the presumption that WEC would adequately represent its interest because WEC was also arguing for preservation of the Form to register voters.

Vote.org is wrong on each of the four reasons it provides for review of this issue. First, there is no ambiguity in *Helgeland*. Identical interests and identical ultimate objectives *both* tend to show adequate representation; these rules are not mutually exclusive. Second, the Court of Appeals' decision is consistent with *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999); as Vote.org admits, that case did not even involve the presumptions of adequate representation. Further, *Wolff*'s result is independently justifiable by the facts of that case, like the existing party's exposure to damages, a harm not shared by the intervenor. *See Wolff*, 229 Wis. 2d at 748-49.

Third, Vote.org argues that if allowed to stand, the Court of Appeals' decision will make intervention impossible because "[a] proposed intervenor will in nearly all cases either support or oppose the

relief sought in the complaint—otherwise, there would be little cause to intervene." Pet. 23. This is really an argument with the presumption of adequate representation, which is well-established and needs no defending. But even on its own terms, the argument fails. Vote.org wrongly perceives litigation in Wisconsin to consist *only* of public interest litigation—cases in which interest and ultimate objective will typically be much closer than in the contract and tort cases that make up the bulk of court's civil workloads.

Consider the gloss that courts, in public interest cases, typically put on the intervention statute. Wisconsin Stat. § 803.09(1) describes cases in which the movant "claims an interest relating to the *property* or *transaction* which is the subject of the action." (Emphasis added.) This illustrates the sorts of cases in which intervention is most likely to arise: disputes over allocation of contract proceeds, or claims to property rights relating to a particular piece of land, or questions over how an injury must be compensated. One can think up all kinds of cases in which an intervenor with a bona fide interest at risk in a lawsuit (say, a claim to funds paid out from a sale) will seek relief that differs drastically from that requested by any parties.

It is in public interest cases like this one—which often, but not always, involve an up-or-down legal question over the legality or constitutionality of governmental action—that interest and objective frequently merge. But there are good reasons why inadequate representation should require more careful assessment in these cases, since in cases involving the validity of laws a much higher number of persons may be affected, potentially threatening final resolution of cases.

Finally, the two federal cases Vote.org cites do not help it. *Trbovich* featured several circumstances not present here, like the fact that the proposed intervenor was the one who had "initiated the entire enforcement proceeding" at issue and was seeking relief beyond what the Secretary of Labor sought. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 529–30, 537 n.8 (1972). The *Driftless* Court, in turn, concluded that the intervention request "f[ell] within a line of cases involving permit holders that have successfully invoked Rule 24(a)(2) to intervene in litigation challenging their permits"; the permit holders could not "be forced to rely entirely on *their regulators*" for protection. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748–49 (7th Cir. 2020). The *Driftless* Court *distinguished* those facts from "the line of cases involving intervention motions by individual members of the public, citizen groups, or other units of government that hold identical or closely aligned interests and objectives as existing governmental parties." *Id.* at 748–49. That is this case. Thus, *Trbovich* and *Driftless* involved intervenors with much closer and more unique ties to the litigation. The Court of Appeals did not bring Wisconsin law out of conformity with federal law in issuing its decision in this case.[7]

[7] Vote.org does very little to rebut the Court of Appeals' conclusion that a second presumption of adequate representation, arising where a governmental entity is charged by law with representing the interest of the proposed intervenor, applies. *Braun*, 2024 WI App 42, ¶30. Yet this conclusion renders any supposed errors in the Court's application of the first presumption academic.

b. The Court of Appeals was correct to reject Vote.org's request for a "per se" rule that a losing party's decision not to appeal gives any interested party a right to intervene and prolong a case.

Vote.org's second claimed issue is "Whether a named defendant adequately represents a would-be intervenor where the intervenor would appeal an adverse merits decision that the defendant did not appeal." Pet. 3. Vote.org is clear, both in this framing and elsewhere, that it seeks a per se rule that failure to appeal *always* constitutes inadequate representation. *See, e.g.*, Pet. 20. To be fair, Vote.org's all-or-nothing request is understandable given that, as discussed above, Vote.org failed to create a record in the Circuit Court on this issue that would allow fact-specific review and the Circuit Court was never able to rule on it.

Indeed, with no case-specific facts available to assess, this is also how the Court of Appeals understood it had to resolve the question. *See Braun*, 2024 WI App 42, ¶28 n.11. It began by discussing the question in terms of what was actually before it, *i.e.*, the Circuit Court's decision, rendered at a time when the question of whether WEC would appeal was a matter of speculation. The Court of Appeals concluded that a party could not "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," because *any* proposed intervenor could make this simple assertion, writing the inadequate representation rule out of the statute. *Id.* (emphases added). Vote.org does not really take on this common-sense conclusion.

The Court of Appeals then briefly confronted the factual development *not* before it, namely WEC's having *actually* abandoned

appeal of the Circuit Court's decision, and confirmed that it understood Vote.org to be asking for a blanket rule that "taking a different approach as to whether to file an appeal *ipso facto* renders a representative party's interest and a proposed intervenor's interest unaligned." *Id.* (emphasis added). It declined to do so, observing that "a representative party might choose not to appeal for any number of reasons despite having the same interests as the proposed intervenor." *Id.* It did not hold, and Vote.org does not contend that it does, that failure to appeal can *never* render representation inadequate. It simply depends on the case.

The Court of Appeals' reluctance to adopt a per se rule fits well within intervention jurisprudence in Wisconsin, which is to be "holistic, flexible, and highly fact specific." *Helgeland*, 307 Wis. 2d 1, ¶40 (footnotes omitted). Indeed, this case illustrates well an instance where failure to appeal was not the result of inadequate representation: WEC declined to pursue appeal because the case was moot. This was not only adequate representation of the interests of those who initially sought preservation of the Form, it was the only avenue available. There is no rule that party representatives are required to exhaust every farfetched or frivolous appeal in order to render adequate representation, any more than a lawyer must do so with respect to his client.

It is Vote.org's proposed rule, not the Court of Appeals', that is out of step with federal practice. As one well-regarded federal treatise puts it, "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." 7C Fed. Prac. & Proc. Civ. § 1909 (3d ed.) (footnote omitted) (emphasis added); *see also id.* at n. 38 (collecting

cases). Vote.org's own citations also illustrate this. *Smuck* concludes that "a failure to appeal may be *one factor* in deciding whether representation by existing parties is adequate." *Smuck v. Hobson*, 408 F.2d 175, 181 (1969). *Michigan State AFL-CIO v. Miller* says that "a decision not to appeal by an original party to the action *can* constitute inadequate representation of another party's interest," not that it always does. 103 F.3d 1240, 1248 (6th Cir. 1997) (quoting *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990)) (emphasis added). And the *Solid Waste Agency* Court, in discussing an example of inadequate representation, hypothesized a circumstance in which the government "decide[d] *for reasons unrelated to the likely outcome of an appeal* not to authorize appeal." *Solid Waste Agency*, 101 F.3d at 508. WEC's decision here had everything to do with likelihood of success on appeal.

The negative practical effects of Vote.org's automatic rule are obvious, especially in public interest cases: there will often be some entity willing to pick up the baton and prevent a case's conclusion regardless of the inappropriateness of appeal and the resultant costs to the litigants and the court system. These proceedings illustrate that waste well. Adoption of Vote.org's arguments promises more of the same.

CONCLUSION

Contrary to Vote.org's position, this case does not meet the criteria of Wis. Stat. § 809.62(1r)(c)-(d). It will bring confusion to Wisconsin's intervention law, which is not in need of clarification or harmonization; requires nothing more than the application of already-well-settled

principles; and is bound up in factual developments that have mooted this case and made Vote.org's desired relief impossible.

But Vote.org is right about one thing: intervention motions arise in a huge number of cases. Here that heightens, rather than lessens, the need for caution by this Court in deciding whether to further refine jurisprudence on this topic. In contexts like intervention rarely, if ever, should this Court go further than announcing broad principles, leaving it to the lower courts to apply them to the thousands of individual factual scenarios that will arise.

This is not one of those rare cases. For all of the reasons discussed, this case does not squarely and cleanly present the legal questions Vote.org raises, and even if it did, those questions do not merit this Court's attention. This Court should deny the petition.[8]

Dated: September 13, 2024

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Lucas T. Vebber

Richard M. Esenberg (WI Bar No. 1005622)
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[8] Per Wis. Stat. § 809.62(3)(d)-(e), if this Court nevertheless grants the Petition, Mr. Braun reserves the right to raise before this Court each of the alternative grounds supporting the Court of Appeals' decision and identified herein. The issues in sections I and II of this response were not raised before the Court of Appeals, but as respondent, Mr. Braun can raise grounds for affirmance not presented below, *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973), and as explained any earlier inability by Mr. Braun to brief these issues was a result of Vote.org's actions. The issues in sections III and IV of this brief were raised and briefed on the merits before the Court of Appeals and resolved as set forth above.

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (8g) for a response produced with a proportional serif font. The length of this response is 7,760 words.

Dated: September 13, 2024.

Electronically signed by Lucas T. Vebber
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