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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2012AP000032

FRIENDS OF SCOTT WALKER
and
STEPHAN THOMPSON
Plaintiffs-Respondents,
v.

Waukesha County Circuit
Court Case No. 2011-CV-4195

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CAYNE, THOMAS BARLAND, and TIMOTHY VOCKE each in his official capacity as a member of the Wisconsin Government Accountability Board and KEVIN KENNEDY Director and General Counsel for the Wisconsin Government Accountability Board,
Defendants-Respondents,

THE COMMITTEE TO RECALL WALKER, THE COMMITTEE TO RECALL KLEEFISCH, JULIE WELLS, THE COMMITTEE TO RECALL WANGGAARD, RANDOLPH BRANDT, THE COMMITTEE TO RECALL MOULTON, JOHN KIDD, THE COMMITTEE TO RECALL SENATOR PAM GALLOWAY, NANCY STENCIL and RITA PACHAL,
Proposed-Intervening Defendants-Appellants.

BRIEF AND APPENDIX OF PROPOSED-INTERVENING DEFENDANTS-APPELLANTS
APPEAL FROM THE CIRCUIT COURT OF WAUKESHA COUNTY, THE HONORABLE J. MAC DAVIS PRESIDING

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the circuit court erred when it denied appellants' motion to intervene as a matter of right?

   Answer by the Circuit Court: The circuit court ruled that intervention as a matter of right was not required.

2. Whether the circuit court erred when it denied appellants' motion for permissive intervention?

   Answer by the Circuit Court: The circuit court ruled that permissive intervention was not required.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In light of the need to resolve this matter with speed, appellants do not believe that oral argument is necessary, unless the Court believes that argument will assist in a more prompt adjudication. However, publication of the Court's decision is warranted as the issues addressed in the decision will likely be of substantial and continuing public interest.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Scott Walker's campaign committee and the Executive Director of the Wisconsin Republican party have sued the Wisconsin Government Accountability Board seeking abrupt and fundamental changes to the process by which recall petitions that have been circulating for well over a month will be reviewed for sufficiency. At the last minute, Scott Walker has demanded that the Circuit Court for the County of Waukesha issue an order changing the law governing recall petitions to make it more advantageous for him and other incumbents facing recall. Appellants are recall committees (and the individuals who organized them and registered them with the GAB) who gathered signatures offered for filing with the GAB on January 17, 2012. The law Scott Walker wants suddenly changed, and which the circuit court did suddenly change, governs them and their efforts every bit as much as it affects the incumbent Republican officials facing recall. Appellants were not made parties to the lawsuit filed in Waukesha County Circuit Court. When they sought to intervene, their request was denied. Appellants now appeal the denial of their motion to intervene.

II. STATEMENT OF THE FACTS AND PROCEDURAL STATUS OF THE CASE LEADING UP TO APPEAL.

On November 15, 2011, proposed-intervening defendants-appellants ("appellants") Julie Wells, Randolph Brandt, John Kidd, Nancy Stencil, and Rita Pachal duly registered The Committee to Recall Walker, The Committee to Recall Kleefisch, The Committee to Recall Wanggaard, The Committee to Recall Moulton, and The Committee to Recall Senator Pam Galloway with the defendants-respondents, the Government Accountability Board ("GAB"), pursuant to Art. XIII, § 12 of the Wisconsin Constitution and § 9.10, Wis. Stats. Many thousands of Wisconsin residents joined them in obtaining many hundreds of thousands of signatures in support of recall elections for these Republican incumbents. Well over one million signatures were offered for filing with the GAB on January 17, 2012.

At its December 13, 2011 meeting, the members of the GAB were presented with a detailed plan proposed by the GAB's staff for reviewing what is anticipated to be an unprecedented volume of recall petitions pursuant to existing standards. *See 12 13 11 Open Agenda and Board Materials* at pages 13-21.[1] While minutes of that meeting have yet to be

[1] http://gab.wi.gov/about/meetings/2011/december

made available, it has been reported that the GAB adopted these procedures. *See* http://elections.wispolitics.com/2011/12/gab-approves-recall-procedures.html.

On December 15, 2011, Scott Walker's campaign committee and the Executive Director of the Wisconsin Republican party, plaintiffs-respondents ("respondents"), sued the GAB in the Circuit Court for Waukesha County seeking abrupt and fundamental changes to the process by which recall petitions that have been circulating for well over a month will be reviewed for sufficiency. (R.2. – R.7.) The complaint was filed in Waukesha County pursuant to § 801.50, Wis. Stats. This statute was recently amended to permit a plaintiff suing the state to pick any county as venue if the "sole defendant" is the state, its agencies, agents, *etc*.[2]

The respondents' complaint filed in the circuit court directly attacked the foundation of the petition review process. While it purported to assert that the GAB's procedures violate principles of equal protection, it actually demanded that the circuit court change the process established by § 9.10(2)(f), Wis. Stats., whereby the GAB is directed to "review a verified

[2] Presumably, respondents intentionally did not name the appellants as parties because, had they done so, the respondents would not have been permitted to select Waukesha County as the forum for their lawsuit.

challenge to a recall petition." Section 9.10(2), Wis. Stats., provides, in relevant part, as follows:

> (g) The burden of proof for any challenge rests with the individual bringing the challenge.
>
> (h) Any challenge to the validity of signatures on the petition shall be presented by affidavit or other supporting evidence demonstrating a failure to comply with statutory requirements.
>
> (i) If a challenger can establish that a person signed the recall petition more than once, the 2nd and subsequent signatures may not be counted.
>
> (j) If a challenger demonstrates that someone other than the elector signed for the elector, the signature may not be counted, unless the elector is unable to sign due to physical disability and authorized another individual to sign in his or her behalf.
>
> (k) If a challenger demonstrates that the date of a signature is altered and the alteration changes the validity of the signature, the signature may not be counted.
>
> (l) If a challenger establishes that an individual is ineligible to sign the petition, the signature may not be counted.
>
> (m) No signature may be stricken on the basis that the elector was not aware of the purpose of the petition, unless the purpose was misrepresented by the circulator.
>
> (n) No signature may be stricken if the circulator fails to date the certification of circulator.
>
> (p) If a signature on a petition sheet is crossed out by the petitioner before the sheet is offered for filing, the elimination of the signature does not affect the validity of other signatures on the petition sheet.

> (q) Challenges are not limited to the categories set forth in pars. (i) to (l).

Additionally, § 9.10(3)(bm), Wis. Stats., provides that the party seeking a recall or the officer against whom the recall petition is filed may file a writ of mandamus with the circuit court challenging whether the recall petition is sufficient.

On December 21, 2011, appellants moved to intervene as parties in the circuit court action. (R.8 – R.9.) At a December 29, 2011 hearing, the circuit court denied appellants' motion, leaving only Scott Walker's campaign committee, the Executive Director of the Republican Party, and the GAB as parties. (Appx. 1-19; R.27.) The circuit court entered an order reflecting this ruling on January 4, 2012. (Appx. 20-21; R.25.)

The circuit court denied appellants' motion to intervene primarily because it concluded that appellants' interests "lacks immediate, specific legal interest" and that their interests are "to some degree . . . prospective, to some degree speculative, … largely general; and, therefore unripe." (Appx. 12; R.27, 12:15-19.) In support of this conclusion, the circuit court stated the following on the record: the appellants have yet to file any recall petitions; Governor Walker may resign prior to a recall petition being filed; and appellants may have obtained so many signatures in favor of recalling

the Governor that there may not be much of a challenge to the recall. (Appx. 11-12; R.27, 11:17-12:19.)

Additionally, the circuit court concluded that permitting intervention would substantially slow down the case (Appx. 9; R.27, 9:22-25), lead to "chaos" or a "free-for all" (Appx. 10; R.27, 10:1-6), establish a precedent for requiring intervention of third-parties every time a private entity sues a government agency seeking a proper application of constitutional or statutory law (Appx. 10-11; R.27, 10:7-11:10), and make the proceedings fruitlessly complex and unending. (Appx. 11; R.27, 11:11-17.) Finally, the circuit court concluded that appellants' interests were adequately represented by the GAB, which is represented by the Attorney General's office. (Appx. 12-13; R.27, 12:20-13:12.)

The circuit court then scheduled a hearing for January 5, 2012 to take up both respondents' demands for injunctive and declaratory relief regarding their demands for changes in the petition review process and the GAB's motion to dismiss the case. (Appx. 16-17; R.27, 16:18-17:3.)

On December 30, 2011, appellants filed a motion with the circuit court seeking a stay of any proceedings on respondents' demands for injunctive and declaratory relief. (R.21.) On January 3, 2012, appellants

moved this Court for an order staying further circuit court proceedings in connection with respondents' demands.

On January 4, 2012, this Court ordered appellants to advise the Court as to the status of their motion to stay filed in the circuit court. After this Court issued that order, the circuit court scheduled a hearing on appellants' motion to stay for January 12, 2012 – one week after the January 5, 2012 hearing to resolve the case on the merits. (R.25A.)

On January 4, 2012 this Court denied both appellants' motion for a stay and the respondents' motion to dismiss the appeal.

On January 5, 2012, the circuit court took up respondents' motion for injunctive and declaratory relief and the GAB's motion to dismiss. Though counsel for the GAB requested that its motion be heard first, the circuit court decided that both motions should be presented and heard simultaneously. It then issued a verbal ruling, which to date has not been entered as a written order. A transcript of the circuit court's verbal ruling and the proposed orders submitted by the respondents and the GAB have been filed with the Court.

Section 9.10(3)(b), Wis. Stats., requires the GAB to "determine by careful examination whether the petition ***on its face*** is sufficient."

(emphasis supplied). The statute also establishes a framework by which the incumbent who is the target of the recall can challenge petitions or signatures as invalid and such challenges can be litigated before the GAB. The statute further provides that a party dissatisfied with the GAB's ruling as to the sufficiency of a petition can seek relief in circuit court. § 9.10(3)(bm), Wis. Stats.

The GAB has long had in place rules and procedures for conducting a "careful examination [to determine] whether the petition *on its face* is sufficient." (emphasis supplied). Though the circuit court's verbal ruling speaks for itself, it declares that § 9.10, Wis. Stats., imposes on the GAB a duty to go beyond a facial review and to take undefined "affirmative" steps in reviewing petitions to detect and remove duplicate signatures and those that purportedly appear fictitious.

Though styled as a declaration rather than an injunction, the circuit court effectively ordered vaguely defined changes in the rules governing the GAB's handling of recall petitions just before the largest collection of recall petitions in Wisconsin's history were to be submitted to the GAB, triggering the review process. Though the circuit court's declaratory order

has yet to be reduced to writing, the GAB is apparently setting about to change its longstanding petition review processes.

A day or two after the circuit court's ruling, the GAB's Executive Director and General Counsel stated in a televised interview that the GAB was trying to create a plan for entering every single signature into a database, something that the GAB has never done before. *See* http://www.wisn.com/video/30159459/detail.html (relevant commentary begins at approximately 3m 50s). He indicated that this will entail increased expense and will lengthen the review process.

Section 9.10, Wis. Stats., contemplates a very swift process, one that relies on the proponent of a recall and the target to test the validity of the petitions in adversarial administrative litigation. The statute provides that the process should be completed within 31 days but permits a circuit court to extend the timeline for good cause. Given the number of petitions anticipated, the GAB had estimated that it needed approximately 60 days to complete the process – under its established review protocols.

Mere days before the petitions were due – the nature of the process, the amount of time it is likely to take, and the standards to be used – became suddenly unknown. There has been no change to any statute or

administrative rule. But the rules governing the GAB's review of recall petitions was changed long after recall efforts began and just before that review was to begin. And appellants and all other Democratic Party interests were completely shut out of the process by which Scott Walker and the Republican Party were able to get the rules changed at the last second.

The GAB's Executive Director and General Counsel confirmed what is manifest: absent an order reversing the circuit court's order, the process will take longer than anticipated. Indeed, the recall efforts were planned and undertaken in reliance on the existing process and the GAB's estimate of a 60 day process. And, the length of the process controls the timing of ensuing recall elections.

ARGUMENT

I. INTERVENTION AS OF RIGHT IS WARRANTED.

"Whether to allow or deny intervention as of right is a question of law that [an appellate] court decides independently of the circuit court . . . but benefiting from the analyses of [the circuit] court." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 41, 307 Wis. 2d 1, 23, 745 N.W.2d 1.

The case below was a Republican attack on Democratic recall efforts. The committees and individuals behind those efforts and all Democratic Party interests were excluded. Republican interests and the GAB were the only parties to the proceeding that changed the rules at the last second. Denial of the motion to intervene was error.

Section 803.09(1), Wis. Stats., provides, in relevant part, as follows:

> [U]pon 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.

As set forth in *Helgeland*, the party moving to intervene in an action must satisfy four requirements to satisfy the statutory standard:

> (1) The motion to intervene is timely;
>
> (2) The movant claims an interest sufficiently related to the subject of the action;
>
> (3) The disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
>
> (4) The existing parties do not adequately represent the movant's interests.

307 Wis. 2d at 20-21, ¶ 38. The four criteria are analyzed together, and a strong showing with respect to one requirement will "contribute to the movant's ability to meet other requirements as well." *Id.* at 21-22, ¶ 39.

A court should "evaluate the motion to intervene practically, not technically, with an eye toward 'disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 742-43, 601 N.W.2d 301 (Ct. App. 1999) (*quoting State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)).

A. The Motion Seeking Intervention was Timely.

The complaint in this matter was filed on December 15, 2011. Appellants' motion promptly followed. It has not been, and cannot be, suggested that appellants' motion to intervene was untimely.

B. Appellants' Interests are Directly and Inextricably Tied to the Subject of the Action.

As the Supreme Court has instructed, the "interests" requirement is not subject to any precise test, but is viewed through a "pragmatic" lens focusing on the specific facts and circumstances of the case at issue, and attempts to "strike a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing persons to

join a lawsuit in the interests of the speedy and economical resolution of controversies without rendering the lawsuit fruitlessly complex or unending." *Helgeland*, 307 Wis. 2d at 24-25, ¶¶ 43-44. The movant's interest must be more than "remotely related to the subject of the action" and the movant should demonstrate an interest "of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *Id.* at 25, ¶ 45 (citation omitted).

Here, the analysis is straightforward. The complaint seeks to alter the procedures to be used during the recall petition review process, proceedings to which appellants will be parties. By definition, appellants have no less of an interest in this matter than does the Friends of Scott Walker. It is the appellants' recall efforts that will be reviewed pursuant to the procedures changed by the circuit court.

Efficiency, fairness, concepts of due process, and the benefit of the circuit court having the fullest array of perspectives represented support intervention. This is especially true because Art. XIII, § 12 of the Wisconsin Constitution establishes that appellants' recall efforts are constitutionally protected conduct.

And finally, on a concrete level, the complaint seeks to obstruct, impede, and delay the appellants' (and many others') profound efforts. For all of these reasons, appellants should be permitted to intervene and be heard.

The interest claimed by appellants is more than "remotely related to the subject of the action," and there can be no doubt that the interest of the appellants is "of such direct and immediate character that [they] will either gain or lose by the direct operation of the judgment." *Helgeland*, 307 Wis. 2d at 25, ¶ 45. (citation omitted);

C. The Disposition of the Action will Necessarily Extinguish Appellants' Ability to Protect their Interests.

The complaint seeks the circuit court's intervention in administrative hearings likely to begin in mid-January, 2012. And now that the circuit court has accepted respondents' invitation to alter the established procedures for those proceedings, appellants have no means of effectively protecting their own interests in the established process.

In changing the settled procedures governing appellants' efforts, the circuit court confirmed that disposition of this matter will impede appellants' interests. Indeed, the circuit court's ruling has changed the

decades-long settled rules resulting from a proceeding from which the appellants were excluded.

D. The Existing Parties do not Adequately Represent Appellants' Interests.

The Wisconsin Supreme Court noted that the "showing required for proving inadequate representation should be treated as minimal," but not "so minimal as to write the requirement completely out of the rule." *Helgeland*, 307 Wis. 2d at 44, ¶ 85 (citations omitted). "If a movant's interest is identical to that of one of the parties, or if the party is charged by law with representing the movant's interest, a compelling showing should be required to demonstrate that the representation is not adequate." *Id.* at 44, ¶ 86.

No current party to this matter has an interest "identical" to that of the appellants. By definition, respondents' interests are directly adverse to appellants' interests.

And the interests of the GAB are fundamentally different from those of appellants. The GAB's interest is in overseeing, regulating, and administering elections and election-related matters such as the recall process. While the GAB presumably has an interest in doing so correctly,

it has no interest in how the law it administers is shaped or changed or the substantive content thereof.

Indeed, the GAB cannot and did not adequately represent appellants' interests. The record below indicates that, for institutional reasons, the GAB opted not to pursue discovery and certain defenses that appellants would have pursued had they been permitted to intervene. (R.10 – R.11.) Additionally, the GAB has indicated that it will likely not appeal the circuit court's decision on the merits.[3]

For the foregoing reasons, the circuit court's decision denying appellants' motion for intervention as a matter of right should be reversed.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION IS WARRANTED.

A circuit court's decision with respect to a motion for permissive intervention is subject to an erroneous exercise of discretion standard of review. *Helgeland*, 307 Wis. 2d at 58, ¶ 120.

Section 803.09(2), Wis. Stats., provides in relevant part:

> [U]pon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question

[3] http://www.jsonline.com/news/statepolitics/elections-board-to-create-petition-database-request-more-time-oe3pc9a-137193673.html ("Kennedy said he did not expect the board to appeal Davis' decision")

> of law or fact in common … [and] [i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

This provision has been interpreted to require a showing that the proposed intervener has the type of claim or defense that could be litigated independently. *See, e.g., Helgeland v. Wisconsin Municipalities,* 2006 WI App 216, ¶¶ 41-42, 296 Wis. 2d 880, 920-21, 724 N.W.2d 208. As the court of appeals therein recognized, "the primary purpose of the rule is to allow persons to become parties in order to litigate their claims or defenses on the merits." *Id.* at 921, ¶ 42.

For the reasons discussed in Section II, *supra*, the circuit court's decision denying intervention should be reversed.

III. BECAUSE APPELLANTS ARE NECESSARY PARTIES, THE CIRCUIT COURT'S ORDERS ARE VOID.

Appellants were necessary parties to the proceedings below pursuant to § 803.03, Wis. Stats. And, in *Wisconsin Finance Corp. v. Garlock*, 140 Wis. 2d 506, 512, 410 N.W.2d 649 (Ct. App. 1987), the court held that "[a] judgment may be void for failure to join a necessary party . . . ." "Necessary parties . . . are parties whose interests are inseparable such that a court would be unable to determine the rights of one party without

affecting the rights of another." *Id*.; *see also Brotherhood of R.R. Trainmen v. Swan*, 214 F.2d 56 (7th Cir. 1954) (discussing decisions declared void because of the absence of necessary parties). Accordingly, this Court should declare as void any orders entered by the circuit court.

CONCLUSION

Based on the foregoing and the record in this matter, intervention should be granted and any orders entered by the circuit court should be declared void.

Dated this 18th day of January, 2012.

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CERTIFICATION PURSUANT TO § 809.19(8)(d), WIS. STATS.

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,486 words.

Dated this 18th day of January, 2012.

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CERTIFICATION PURSUANT TO § 809.19(12), WIS. STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19 (12), Wis. Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of January, 2012.

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CERTIFICATION PURSUANT TO § 809.19(2)(b), WIS. STATS.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION PURSUANT TO § 809.19(13), WIS. STATS.

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 18th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2012 the original and ten (10) copies of the Brief and Appendix of Proposed-Intervening Defendants-Appellants were served upon the Wisconsin Court of Appeals via hand-delivery. Three (3) copies of the same were served upon counsel of record via overnight mail.

Dated this 18th day of January, 2012.

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