STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT IV
Appeal No. 2012-AP-32

FRIENDS OF SCOTT WALKER, and
STEPHAN THOMPSON,

Plaintiffs-Respondents,

v.

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, 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 OF PLAINTIFFS-RESPONDENTS FRIENDS OF SCOTT WALKER AND STEPHAN THOMPSON

Appeal from the Circuit Court of Waukesha County, The Honorable J. Mac Davis Presiding, Case No. 2011CV004195

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did Appellants satisfy the requirements to intervene as a matter of right pursuant to Wis. Stat. § 803.09(1)?

Circuit Court Answer: No.

2. Did the Circuit Court err in denying Appellants permissive intervention pursuant to Wis. Stat. § 803.09(2)?

Circuit Court Answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are not warranted since the issues involved require the application of settled law to facts which are not unique.

STATEMENT OF THE CASE

The Circuit Court correctly denied Appellants' motion to intervene as a matter of right and motion for permissive intervention pursuant to Wis. Stat. §§ 803.09(1) & (2) and *Helgeland v. Wis. Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. This Court should affirm.

DISPOSITION IN THE TRIAL COURT

The Circuit Court denied Appellants' motion to intervene as a matter of right and motion for permissive

intervention. (Appx. 8-13, 20-21.) Relying on the Supreme Court's decision in *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1, the Circuit Court applied the correct legal standard to the facts of this case and reached the correct result. (Appx. 8-13.) This Court should affirm.

In particular, the Circuit Court denied Appellants' motion for intervention as a matter of right because they failed to identify an immediate and specific legal interest and Appellants' interests were adequately represented by the Government Accountability Board ("GAB"). These findings are correct and should not be overruled. Additionally, Appellants have failed to explain how the Circuit Court's resolution of the merits has impeded their ability to protect their interests.

The Circuit Court denied Appellants' motion for permissive intervention because the addition of Appellants as parties would unduly delay the resolution of the merits and would create a standard by which the court could not justify keeping various other third parties out of the case. Additionally, Appellants have failed to make the required showing that they have an actual legal "claim or defense" that

shares a common question of law or fact with the current action. Wis. Stat. § 803.09(2). This Court should affirm the Circuit Court's decision.

STATEMENT OF FACTS AND PROCEDURAL STATUS OF THE CASE

On December 15, 2011, Plaintiffs-Respondents Friends of Scott Walker ("FOSW") and Stephan Thompson filed their complaint and motion for temporary injunction challenging the procedures the GAB intended to use while conducting their statutorily required "careful examination" of the recall petitions. (Supp. Appx. 1, 4, 15, 17.) The Court scheduled a hearing on FOSW and Thompson's motion for December 29, 2011.

On December 21, 2011, before the scheduled hearing, Appellants moved to intervene. They requested that the Circuit Court grant their motion prior to the hearing on the temporary injunction motion. (Supp. Appx. 37, 39.) Appellants also moved for shortened discovery deadlines to allow them to take depositions and issue subpoenas, document requests, and interrogatories all to be completed prior to the December 29, 2011 hearing date. (Supp. Appx. 47-52.)

FOSW and Thompson opposed both motions. (Supp. Appx. 53.) In response, the Circuit Court delayed the hearing on the motion for temporary injunction to January 5, 2012, and used the December 29th hearing date to consider Appellants' motion to intervene. (Appx. 1.)

Upon consideration of the parties' briefs and oral argument, the Circuit Court denied Appellants' motion to intervene. (Appx. 8-13, 20-21.)[1]

Thereafter, Appellants filed a series of motions to stay the proceedings pending this appeal. This Court denied their Motion for Emergency Stay. Appellants withdrew the motion they filed with the Circuit Court despite it having been set for a hearing. (Supp. Appx. 104, 107.) Appellants' third attempt at a stay (styled as their Second Emergency Motion) remains pending in this Court.

ARGUMENT

I. LEGAL STANDARDS

Wisconsin recognizes two types of intervention: Intervention as a matter of right and permissive intervention.

[1] The Circuit Court ultimately proceeded to the merits of the case, denying GAB's motion to dismiss, denying FOSW and Thompson's request for injective relief and issuing a declaratory judgment concerning GAB's obligations with regard to their "careful review" of the recall petitions.

See Wis. Stat. §§ 803.09(1) & (2). A movant must satisfy four requirements to intervene as a matter of right under Wis. Stat. § 803.09(1). The movant must show:

> (A) the movant's motion to intervene is timely;
>
> (B) the movant claims an interest sufficiently related to the subject matter of the action;
>
> (C) disposition of the action may as a practical matter, impair or impede the movant's ability to protect that interest; and
>
> (D) the existing parties do not adequately represent the movant's interest.

Helgeland v. Wis. Municipalities, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1. Although, "a strong showing with respect to one requirement may contribute to the movant's ability to meet the other[s]," the movant nonetheless must satisfy all four criteria. *Id*. at ¶ 39.

There is no precise formula for determining whether a potential intervenor meets the requirements of sec. 803.09(1). The analysis is holistic, flexible, and highly fact-specific. *Helgeland*, 307 Wis. 2d 1, ¶ 40. Consequently, this Court's review of a trial court's decision on intervention as a matter of right, while technically *de novo*, in fact involves consideration of and deference to Circuit Court:

> Whether to allow or to deny intervention as of right is a question of law that this court decides independently of the circuit court and court of appeals but *benefiting from the analyses of each court*. One federal court concluded: "Despite its nomenclature, *intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes."*

Id. at ¶ 41 (emphasis added and citations omitted).

As its label suggests, permissive intervention is left to the sound discretion of the Circuit Court. *Id*. at ¶ 120. In exercising that discretion, the court must consider whether permissive intervention "will unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2). Moreover, permissive intervention is only available to a movant who has an actual "claim or defense" that has "a question of law or fact in common" with the main action. *Id*.

This Court will not overturn a Circuit Court's decision denial of permissive intervention "so long as the record reflects the circuit court's reasoned application of the appropriate legal standard to the relevant facts of the case." *Id*. at ¶¶ 119-120 (citations omitted).

II. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S DENIAL OF INTERVENTION AS OF RIGHT

Appellants do not assert the Circuit Court made "clear

mistakes" in denying intervention as of right. With the exception of a few refinements, Appellants simply reargue what the Circuit Court rejected. The Circuit Court, however, applied the correct legal standard to the facts of this case and did not clearly err in its factual findings. (Appx. 20-21.)

As indicated above, the Recall Committees must make four showings to establish a right to intervene. The first, the timeliness of the motion to intervene, is not in dispute. But they fail to establish the other three prongs, and thus this Court should affirm.

A. The Recall Committees Did Not and Cannot Claim an Interest Sufficiently Related to the Subject Matter of the Action.

Several principles guide this Court's determination of the sufficiency of a putative intervenor's claimed interest. The interest must be of such "*a direct and immediate nature* that the intervenor will either gain or lose by the direct operation of the judgment." *Helgeland*, 307 Wis. 2d 1, ¶ 45 (emphasis added). Generally, a movant should be allowed to intervene when the movant "needs to *protect a right that would not otherwise be protected in the litigation*." *Id*. (emphasis added.)

In considering these principles, the Court must

remember that its goal is "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 interest of the speedy and economical resolution of the controversies without rendering the lawsuit fruitlessly complex or unending." *Id*. at ¶ 44.

This Court should affirm the Circuit Court's decision to permit the original parties to conduct and conclude their own lawsuit because Appellants' asserted interests are neither legally cognizable nor related to the subject matter of the action.

1. The subject matter of the action.

Before analyzing whether Appellants' claimed interests sufficiently relate to the subject matter of the action, it is necessary to accurately identify the subject matter of the action. FOSW and Thompson challenged the GAB's interpretation and public statements related to the GAB's statutorily required "careful examination" of the petition. (Supp. Appx. 4-36.) Specifically, FOSW and Thompson's complaint asserted that the GAB violated plaintiffs' rights by: (a) determining the GAB has no responsibility to, and will not, strike facially duplicative signatures, (b) publicly stating

that an elector may legally sign more than one recall petition with the intent that his or her signature be counted more than once; (c) determining the GAB has no duty and will not strike patently fictitious names; (d) publicly stating the GAB will not strike signatures containing fictitious names and/or illegible addresses; (e) placing the burden on FOSW to identify and challenge multiple signatures by a single elector, which are identifiable by a facial review of the petition; and (f) placing the burden on FOSW to identify and challenge patently fictitious names and illegible addresses. (Supp. Appx. 4-14.)

2. Appellants failed to articulate an immediate and specific interest.

Although Appellants may by *politically interested* in the litigation, or interested in a generic sense of the word, they lack a *legally protectable interest* that is sufficiently related to the subject matter of the action.

Appellants' claimed interest is that they will be forced to participate in the petition review process pursuant to the procedures determined by the Circuit Court. "The complaint seeks to alter the procedures to be used during the recall petition review process, proceedings to which appellants will

be parties." Appellants' Br. at 13.

The Circuit Court rejected this claimed interest noting it was "largely general; and, therefore unripe." (Appx. 12: 19.) Specifically, the Circuit Court held:

> But I guess the point here is that the proposed intervener's interest lacks immediate, specific legal interest. Their interest to some degree is prospective, to some degree speculative, *is largely general; and, therefore, unripe.*

(Appx. 12: 15-19.) (emphasis added.)

The Circuit Court also found that accepting this general interest as sufficient would require allowing the intervention of a host of others:

> The more people we allow in makes this thing fruitlessly complex and unending in the Court's view. If I allow these interveners I would be hard pressed to deny the incumbent legislators whom they seek to recall, expanding the universe further, delaying the case further, etcetera.

(Appx. 11: 11-16.)

The Circuit Court's analysis is correct. The Recall Committees' claimed interest is too general to justify intervention. Importantly, the claims asserted in this case do not address any procedures applicable to any part of the recall process to which Appellants can or might be parties. The subject matter of the complaint solely concerns the GAB's "careful examination of the petition," which involves only the

GAB. Pursuant to Wis. Stat. § 9.10 and Wis. Admin. Code Chapter GAB 2, GAB is the only party to GAB's facial review of recall petitions. Indeed, this review is GAB's statutory obligation as the filing officer for all recall petitions aimed at state officers. Wis. Stat. § 9.10. GAB conducts this review independent of any review or challenge conducted by FOSW. It is GAB's procedures and GAB's statements related to this independent, GAB review which lie at the heart of this case. Appellants are not and cannot be parties to that review process.

Moreover, FOSW, not Appellants, is the party authorized to file a written challenge with the GAB specifying any alleged insufficiency. *See* Wis. Stat. § 9.10(3). Again, this challenge is separate and distinct from the GAB's independent review. Appellants can only become a part of the review process if FOSW submits its own challenge. In that instance, Appellants may submit a response to FOSW's challenge. *Id.* But this is a process that is separate and distinct from GAB's own review, and the claims in this case do not relate to that process.

In the end, such generic interests are not sufficient to warrant intervention:

> the [movant's] interest in the present case is not a unique or special interest but rather, … one that other … entities or individuals could claim in almost any action challenging the constitutionality of a state statute …

Helgeland, 307 Wis. 2d 1, ¶ 71. Appellants' "interest" in the procedures to be used during the GAB review process is not unique or special. As the Circuit Court held, there is no rationale for allowing the Recall Committees in but keeping every other potential putative intervenor out. (Appx. 10: 7-24; 11: 11-16); *see Helgeland*, 307 Wis. 2d 1, ¶ 148 (Butler, J. concurring).

The Circuit Court also correctly found that allowing Appellants into this case as parties would jeopardize the goal of speedy and economical resolution of the case. (Appx. 9: 11-25); *see Helgeland*, 307 Wis. 2d 1, ¶ 44. The sufficiency of the putative intervener's interest must be analyzed against the goals and policies underlying the intervention statute, which includes the speedy and economical resolution of controversies without rendering the litigation "fruitlessly complex or unending." *Id*. In this regard, the Circuit Court held:

> It appears this case before the Court needs to be ruled on by - - before January 17th, which is the time when the recall signatures have to be filed if they are filed at all in this instance. And since the case is all about how to review them, and how to count them I guess you might

> say, we need to have an answer before then. So, this is the kind of case where timeliness is especially weighty and critical, and expanding the universe of participants is going to bog that down to a substantial degree.

(Appx. 9: 15-25.)

The Circuit Court's concern was well founded. In addition to seeking intervention, Appellants demanded that the substantive hearing be delayed and they be allowed to take depositions, issue document requests and interrogatories – in a case where the actual parties informed the Court that discovery was not necessary. (Supp. Appx. 47-52; Appx. 14: 17-25, 15: 1-7.) Had the Circuit Court allowed Appellants into this case as parties, their presence and demands would have seriously undermined the goal of speedy and economical resolution of the case.

3. Appellants' "interest" is political, not legal.

As this Court has previously noted, Appellants' real interest in this action is *political - not legal*. (Ct. App. Order 1/4/2012.) They demonstrate that political, rather than legal, interest again before this Court in their brief: "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 case below was a Republican attack on Democratic

recall efforts"; "Republican interests and the GAB were the only parties to the proceeding that changed the rules at the last second." Appellants' Br. at 10-11.

Appellants' interest in this case, if any, is not sufficient to warrant intervention as a matter of right. Accordingly, this Court should affirm the Circuit Court's ruling.

B. The Attorney General Adequately Represented Appellants' "Interest."

"When the potential intervenor's interests are substantially similar to interests already represented by an existing party, such similarity will weigh against the potential intervenor." *Helgeland*, 307 Wis. 2d 1, ¶ 86. Furthermore, "adequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action." *Id*. at ¶ 90.

Here, GAB is represented by the Attorney General of Wisconsin. That governmental representation gives rise to a second presumption the interests of an absent person will be adequately represented:

> when the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises … This presumption applies in the present case because … both DETF and the Department of Justice are charged by law with the duty to defend the constitutionality of Wis. Stat. § 40.02(20) ...

Id. at ¶¶ 90-91.

Here, the Circuit Court correctly held that Appellants' interest was adequately represented by the Attorney General:

> The Government Accountability Board has already filed written materials defending, I guess you would say, the status quo, and seeking dismissal of this lawsuit. I think that's what the proposed intervener wants. They haven't filed a counterclaim as such doing something different than the Government Accountability Board or the plaintiffs want, they just want the plaintiff's actions defeated, since the Government Accountability Board takes the same position that provides a substantial consideration to determine whether intervention must be, or should be granted.

(Appx. 13: 1-12.)

The Circuit Court's analysis is correct. Appellants' objective is identical to GAB's: both seek to uphold (or return to) the procedures the Circuit Court found to be deficient. GAB adequately defended this interest. Indeed, GAB moved to dismiss the complaint; submitted a brief, documentary and testimonial evidence, and oral argument in opposition to FOSW and Thompson's motion for temporary injunction; and defended GAB's prior enforcement of Wis. Stat. § 9.10 throughout the proceedings. (*See* Supp. Appx. 70-103; R.19C.)

Appellants take issue with the manner in which GAB has defended the case. Appellants complain that the GAB did

not pursue discovery, did not pursue certain defenses, and has indicated it does not plan to appeal. Appellants' Br. at 16. But, second-guessing of GAB's litigation strategy is irrelevant and cannot overcome the presumption of adequate representation.

In rejecting the same argument, the Supreme Court held in *Helgeland*, "Reasonable lawyers and litigants often disagree about trial strategy." *Helgeland*, 307 Wis. 2d 1, ¶ 111. The Court continued, "[M]ere disagreements over trial strategy such as the one apparent here are not sufficient to demonstrate inadequacy of representation." *Id.* at ¶ 112 (rejecting a claim that Attorney General was not adequately representing the interests of a putative intervenor because the Attorney General did not assert certain defenses.)

A review of their specific complaints yields the same result. First, the discovery Appellants sought would not have changed the outcome in the Circuit Court. Appellants sought discovery related to FOSW and Thompson's assertion that they would suffer irreparable harm in the absence of an injunction. (Supp. Appx. 47-50.) The Circuit Court denied FOSW and Thompson's request for injunctive relief and made no findings regarding irreparable harm. Accordingly,

the Attorney General's decision to forgo discovery was immaterial. *See Helgeland*, 307 Wis. 2d 1, ¶¶ 100-106.

Second, Appellants' complaint about its preferred defenses is the exact argument that *Helgeland* rejected. And third, Appellants' displeasure with GAB's stated intention not to appeal is insufficient to overcome the presumption because it is again, nothing more than a disagreement about litigation strategy. The time for GAB to appeal has not even expired.

In the end, Appellants' interests were adequately represented by the Attorney General.

C. The Disposition of the Action Will Not, As a Practical Matter, Impair or Impede Appellants' Ability to Protect their Alleged Interest.

The analysis of this factor is necessarily tied to the analysis of the nature of the claimed interest and whether one of the parties will adequately represent their interest. *Id*. at ¶ 79 ("Although we examine the inability of a movant to protect its interests separately, it is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest.")

Appellants' argument highlights its lack of a valid legal interest in need of protection: "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." Appellants' Br. at 14.

As explained above, this case addresses solely the procedures used by the GAB during a portion of the process to which Appellants cannot be parties. It necessarily follows, that nothing the Circuit Court has decided will alter the procedures that govern the separate, limited part of the petition challenge process that might involve Appellants. Appellants have failed to articulate any specific legal interest impacted by the Circuit Court's ruling.

Likewise, any interest Appellants could have were adequately represented by the Attorney General.

In the end, the Appellants have not made a sufficient showing on three of the four prongs of the test for intervention as of right. For that reason, this Court should affirm the Circuit Court's decision.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DENYING PERMISSIVE INTERVENTION.

Permissive intervention is left to the sound discretion of the Circuit Court. In exercising this discretion, the Circuit

Court is required to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2). This Court will not upset the Circuit Court's denial of permissive intervention unless it is convinced that the Circuit Court abused its discretion. *Helgeland*, 307 Wis. 2d 1, ¶¶ 119-120 (citations omitted).

The Circuit Court applied the appropriate legal standard to the facts and, as more fully explained above, held that the permissive intervention was inappropriate because allowing it would unduly delay the resolution of the merits and create a standard by which the court could not justify keeping various other third parties out of the case. (Appx. 8-13.) The Circuit Court succinctly summed up its reasoning: "And I deny the request on a discretionary ground for the same reasons they overlap." (Appx. 13: 15-16.)

The Circuit Court did not abuse its discretion. It reasonably applied the statutory legal standard to the facts of this case. This Court should affirm.

As the Circuit Court explained, the standards for intervention as of right and permissive intervention overlap. However, the permissive intervention standard is higher in at

least one respect. As discussed above, intervention as of right requires that the movant have an "interest sufficiently related to the subject matter of the action." *Helgeland*, 307 Wis. 2d 1, ¶ 38. In contrast, permissive intervention requires that the movant have an actual legal "claim or defense" that shares a common question of law or fact with the current action. Wis. Stat. § 803.09(2). The Court of Appeals decision in *Helgeland* explained:

> We focus on the meaning of "defense." … "Defense" is a term that has a legal meaning and we may consult Black's Law Dictionary to determine its common legal meaning. … Black's Law Dictionary defines "defense" as "[a] defendant's stated reason why the plaintiff or prosecutor has no valid case, especially, a defendant's answer, denial or plea[:] ... 'that which is alleged by a party proceeded against in an action or suit, as a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition.'" Black's Law Dictionary 451 (8th ed. 2004). Thus, "defense" is commonly understood as a legal term to mean not just anyone's arguments, but the arguments or allegations of a person proceeded against to defeat what the claimant seeks. In the context of Wis. Stat. § 803.09(2), "defense" conveys that the person seeking to intervene, although not named as a defendant, could be a defendant to a claim in the main action or a defendant to a similar or related claim.
>
> … "claim" or "defense" is more than arguments or issues a non-party wishes to address and is the type of matter presented in a pleading-either allegations that show why a party is entitled to the relief sought on a claim or allegations that show why a party proceeded against is entitled to prevail against the claim.

Helgeland v. Wis. Municipalities, 2006 WI App 216, at ¶¶ 40-41, 296 Wis. 2d 880, 724 N.W.2d 208, *affirmed on other*

grounds, Helgeland, supra; accord Diamond v. Charles, 476 U.S. 54, 76-77, 106 S. Ct. 1697, 90 L.Ed.2d 48 (1986) (O'Connor, J., concurring) ("The words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law…"); *Laube v. Campbell*, 215 F.R.D. 655, 659 (M.D. Ala. 2003); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wis.*, 116 F.R.D. 608, 611-12 (W.D. Wis. 1987) (denying permissive intervention because movant "does not articulate a claim or defense per se, but rather recites a number of aspects of its interest in the [action]").

Appellants fail to present an actual legal defense to the complaint. They simply refer to their discussion of intervention as of right. Appellants' Br. at 16-17. Nothing in the complaint could form the basis of a claim against Appellants. And thus, this Court should affirm the Circuit Court's denial of permissive intervention.

IV. APPELLANTS COULD HAVE SOUGHT LEAVE TO FILE AN AMICUS CURIAE BRIEF.

Appellants could have sought leave to file an amicus curiae brief in this case. As Justice Butler stated in his concurrence in *Helgeland*, "any … interested party can seek

permission to file an amicus brief, putting forth their position. Such requests are routinely granted." *Helgeland*, 307 Wis. 2d 1, ¶ 148 (Butler, J. concurring). Appellants' choice to forego this option cannot be a basis for intervention, either as a right or permissively.

V. APPELLANTS ARE NOT NECESSARY PARTIES AND THE CIRCUIT COURT'S ORDERS ARE NOT VOID.

Appellants argue that they were necessary parties to the proceedings below, pursuant to Wis. Stat. § 803.03, and thus the Circuit Court should have joined them. They conclude that failure to join them should result in the Circuit Court's orders being voided.

"If a person has no right of intervention under Wis. Stat. § 803.09(1), the courts have no duty to join that person *sua sponte*, as a necessary party under Wis. Stat. § 803.03(1)(b)1." *Helgeland*, 307 Wis. 2d 1, ¶ 137. A movant who fails to meet the requirements of intervention as of right may not force its way into the action by arguing that the court must join the movant as a necessary party. *Id*. at ¶ 136. Appellants' failure to satisfy the requirements of Wis. Stat. § 803.09 is dispositive. *Id.*

Even if Appellants could somehow be considered

necessary parties, it does not follow that the Circuit Court's order is void. Appellants' argument is based on a misreading of *Wis. Finance Corp. v. Garlock*, 140 Wis. 2d 506, 512, 410 N.W.2d 649 (Ct. App. 1987) and *Brotherhood of R.R. Trainmen v. Sawn*, 214 F.2d 56 (7th Cir. 1954).

Appellants provide a partial quote from *Garlock* to argue that the failure to join them as a necessary party is grounds for voiding the judgment. Appellants' Br. at 17. However, *Garlock* is uniquely applicable to foreclosure actions: "a judgment may be void for failure to join a necessary party *to a foreclosure action*." *Garlock*, 140 Wis. 2d at 512 (emphasis added). The unique nature of a foreclosure proceeding, which impacts who has legal title to real property, suggests that this pronouncement should not be taken as a general proposition. Further, *Garlock* does not state that a judgment <u>is</u> void. Rather, it states only that the judgment <u>may be</u> void. Indeed, Wis. Stat. § 803.03, recognizes that cases may proceed in the absence of necessary parties. Wis. Stat. § 803.03(3). Appellants offer no argument as to why the present judgment should be void due to their absence from the case.

Appellants' reliance on *Sawn* also misses the point.

Appellants represent that case as "discussing decisions declared void because of the absence of necessary parties." Appellants Br. at 18. But *Sawn* discussed a much narrower issue. *Sawn* ordered the re-opening of five administrative cases decided by the National Railroad Adjustment Board because the Board failed to give "notification to a third party of the hearing" as required by statute. *Sawn*, 214 F.2d at 57. The case involved a specific statutory requirement that notice be given to certain third parties. Here, there is no comparable statutory provision.

Appellants are not necessary parties, and even if they were, Appellants have offered no reason the Circuit Court's orders should be declared void.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Circuit Court's denial of Appellants' motion to intervene as a matter of right and motion for permissive intervention.

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FORM AND LENGTH CERTIFICATION PURSUANT TO WIS STAT. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,655 words.

Signed: S/ Joseph Louis Olson

By: Joseph Louis Olson, SBN 1046162

CERTIFICATE OF COMPLIANCE WITH WIS STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

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.

Signed: S/ Joseph Louis Olson

By: Joseph Louis Olson, SBN 1046162

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he has caused three (3) true and correct copies of the foregoing Brief and Supplemental Appendix to be served upon counsel of record *via* hand delivery on January 23, 2012.

Signed: S/ Joseph Louis Olson

By: Joseph Louis Olson, SBN 1046162

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