

**FILED**  
**08-02-2023**  
**CLERK OF WISCONSIN**  
**SUPREME COURT**

STATE OF WISCONSIN  
IN SUPREME COURT

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No. 2022AP1999-W

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STATE OF WISCONSIN EX. REL.  
ANTONIO S. DAVIS,

Petitioner,

v.

CIRCUIT COURT FOR DANE COUNTY  
AND HONORABLE ELLEN K. BERZ,

Respondents.

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**BRIEF OF STATE OF WISCONSIN**

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Pursuant to this Court's July 26, 2023 order, the State of Wisconsin submits this brief addressing whether the State is a necessary party to this action. As discussed below, the State is a necessary party.

**BACKGROUND**

On November 21, 2022, Antonio Davis filed a petition for supervisory writ challenging a trial court decision denying his request to substitute judges. (Ex. 1:3.)<sup>1</sup> The only respondents that Davis named in his petition were the Dane County Circuit Court and Judge Berz. The Wisconsin Court of Appeals denied the petition, concluding that Davis had not met the supervisory writ standard. (Ex. 1:3.) Davis then

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<sup>1</sup> "Ex. 1" references the exhibit accompanying this brief and which consists of the appeal history in Appeal No. 2022AP1999-W.

petitioned for Wisconsin Supreme Court review, which this Court granted.

Based on the issues in the petition for review, the State of Wisconsin moved to amend the caption to include the State as a party. (Ex. 1.) The Court denied the motion. The State then made a motion to intervene, which it later withdrew.

The Court has now ordered the respondents and the State to file briefs addressing whether the State is a necessary party to this action.

## **ARGUMENT**

### **I. The State is a necessary party to this proceeding.**

The State of Wisconsin is a necessary party to this action because it is a party to the underlying criminal case, and because the State has an interest relating to the subject of the action.

#### **A. As a party to the underlying action, Wis. Stat. § (Rule) 809.51(1) makes the State of Wisconsin a necessary party to this proceeding.**

Wisconsin Stat. § (Rule) 809.51 authorizes the use of supervisory writ petitions and sets forth the requisite procedures for filing such petitions. In pertinent part, the statute states that, “[t]he petitioner shall name as respondents the court and judge, or other person or body, and all other parties in the action or proceeding.” Wis. Stat. § (Rule) 809.51(1).

As the Judicial Council Committee’s Notes from 1978 for Wis. Stat. § (Rule) 809.52 explain, “[t]he parties in the action or proceeding in the trial court must be made respondents in the Court of Appeals because they in most cases are the real parties in interest.”

In this case, the petitioner was required to name the State of Wisconsin as a respondent because the State was the plaintiff in the underlying criminal case. *See* Dane County Case No. 2022CM1737. By not naming the State as a respondent, the only interests being represented in this action are those of the petitioner, the Dane County Circuit Court, and Judge Berz.

The State did not assert its right as a party in the Wisconsin Court of Appeals because it believed that, given the rigorous standard for relief in a supervisory writ proceeding, its interests were adequately represented by counsel for the circuit court and Judge Berz. But given how the issues have been reframed on review to this Court, the State now believes that its interests might go beyond those of the other respondents.

**B. Given the framing of the issues presented in the petition for review, the State of Wisconsin is a necessary party under Wis. Stat. § 803.03(1).**

The reframed issues that the petitioner now presents to this Court implicate additional state interests, making the State a necessary party under Wis. Stat. § 803.03(1), as well.

A party may be considered “necessary” under any one or more of the criteria set forth in Wis. Stat. § 803.03(1). *See McNally CPA’s & Consultants, S.C. v. DJ Hosts, Inc.*, 2004 WI App 221, ¶ 22, 277 Wis. 2d 801, 692 N.W.2d 247. And, pertinent here, section 803.03(1)(b)1. requires a party to be joined if the party claims an interest relating to the subject of the action and if their absence may impair or impede their ability to protect that interest.

The State’s interests in the issues accepted for review make the State a necessary party under Wis. Stat. § 803.03(1) because, if the petitioner is allowed to go beyond the supervisory writ standard and address the substance of his

underlying claims about his right to substitute, the State has an interest related to that subject.

In his brief before this Court, the petitioner has re-framed his issues for review. As a result, the State anticipates that, depending upon what the other respondents argue in their brief, the State's interests might extend beyond the interests of the other respondents. The State's interests are distinct from those of the circuit court and circuit court judge. And, if this case proceeds without the State, there will be no party that can speak to the State's position on the issues presented.

## **II. Non-party brief**

The State withdrew its motion to intervene so that it could wait and see what the other respondents argue in their brief. The State decided that, once the other respondents have finalized their position, the State will be better able to assess any potential internal conflicts and articulate a basis for its intervention.

If the Court disagrees that the State is a necessary party or has forgone its time to intervene, the State is amenable to seeking permission to file a non-party brief pursuant to Wis. Stat. § (Rule) 809.19(7).

## CONCLUSION

The State respectfully requests that the Court find the State a necessary party to this action.

Dated this 2nd day of August 2023.

Respectfully submitted,

Electronically signed by:

Abigail C.S. Potts

ABIGAIL C. S. POTTS

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# Wisconsin Supreme Court and Court of Appeals Case Access

**Antonio S. Davis v. Circuit Court for Dane County**

**Appeal Number 2022AP001999 - W**

**Supreme Court**

## CASE HISTORY

| Status   | Court | Filing Date | Anticipated Due Date | Activity                        |
|--|-------|-------------|----------------------|---------------------------------|
| PEND   | SC    |             | 08-02-2023           | Response                        |
| Comment: Parties & State of Wisconsin to file simultaneous briefs not to exceed 10 pages addressing whether State of Wisconsin is a necessary party to this proceeding (See 7/26/23 CTO)   |       |             |                      |                                 |
| PEND   | SC    |             | 08-08-2023           | Response Brief-Supreme Court    |
| RECV   | SC    | 06-22-2023  |                      | Motion to Intervene             |
| Filed By: Abigail Potts<br>Submit Date: 6-22-2023<br>Motion Response<br>Filed By: Abigail Potts<br>Motion Response<br>Filed By: Kelsey Loshaw<br>Comment: State of Wisconsin   |       |             |                      |                                 |
| OCCD   | SC    | 07-26-2023  |                      | Court Order                     |
| IT IS ORDERED that within five days of the date of this order, the parties to this case and the State of Wisconsin shall file simultaneous briefs not to exceed 10 pages in length, addressing whether the State of Wisconsin is a necessary party to this proceeding.             |       |             |                      |                                 |
| OCCD   | SC    | 06-23-2023  |                      | Motion to Extend Time           |
| Filed By: Jennifer Vandermeuse<br>Submit Date: 6-23-2023<br>Decision: (G) Grant<br>Decision Date: 6-26-2023<br>IT IS ORDERED that the motion is granted. Respondents-respondents' response shall be served and filed on or before August 8, 2023.<br>See BR2 event due on 8-8-2023 |       |             |                      |                                 |
| OCCD   | SC    | 06-20-2023  |                      | Motion for Miscellaneous Relief |
| Filed By: Abigail Potts<br>Submit Date: 6-20-2023<br>Decision: (D) Deny  |       |             |                      |                                 |

Ex. 1

Decision Date: 6-22-2023

IT IS ORDERED that the motion to amend the caption is DENIED.

Comment: Motion to Amend Caption

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OCCD SC 06-15-2023

Certificate of Service

Comment: Letter and Certificate of Mailing

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OCCD SC 06-15-2023

First Brief-Supreme Court  
First Brief-Supreme Court

Filed By: Kelsey Loshaw

Comment: Efiling Pilot Program

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OCCD SC 04-17-2023

Motion to Extend Time

Filed By: Kelsey Loshaw

Submit Date: 4-17-2023

Decision: (G) Grant

Decision Date: 4-21-2023

IT IS ORDERED that the motion is granted. Petitioner-petitioner's opening brief shall be served and filed on or before June 15, 2023.

See BR1 event due on 6-15-2023

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OCCD SC 04-13-2023

Received SPD Appointment Order

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OCCD SC 04-13-2023

Notice of Appearance

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OCCD SC 03-31-2023

Court Changed to Supreme Court

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OCCD CA 01-12-2023

Rejected Electronic Document

Comment: The signatures on the E-Filed Appendix cannot be accepted as filed. Signatures must either be an electronic signature or a scanned/hand written signature. Electronic signatures must say "electronically signed by," followed by the filing partys name. See Rule 809.801(12)(a).

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OCCD CA 01-12-2023

Rejected Electronic Document

Comment: The signatures on the E-Filed Petition for Review cannot be accepted as filed. Signatures must either be an electronic signature or a scanned/hand written signature. Electronic signatures must say "electronically signed by," followed by the filing partys name. See Rule 809.801(12)(a).

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OCCD CA 01-12-2023

Fee Waived

Comment: SPD Appointment

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OCCD SC 01-12-2023

Petition for Review  
Response to Petition for Review  
Petition for Review

Filed By: Laura Breun

Submit Date: 1-26-2023

Decision: (G) Grant

Decision Date: 3-31-2023

IT IS ORDERED that the petition for review is granted and that pursuant to Wis. Stat. (Rule) 809.62(6),

the petitioner-petitioner may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court; and  
IT IS FURTHER ORDERED that from this date forward, this case shall be part of this court's eFiling pilot project. FRO briefs due 30/20/10.

Motion Response

Filed By: Jennifer Vandermeuse

Submit Date: 1-26-2023

Comment: Petition for Review & Appendix Response to Petition for Review Cover Letter 03-31-2023  
Court Order

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OCCD CA 12-13-2022

Opinion/Decision

Judge Panel: Blanchard, Kloppenburg, Graham

Opinion: Memo Opinion

Decision: Denied Without Costs Pages: 6

Order Text: IT IS ORDERED that the petition for a supervisory writ is denied. No costs to any party.

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OCCD CA 11-23-2022

Court Order

IT IS ORDERED that, within fourteen days of the date of this order, the respondents shall file a response to the petition under WIS. STAT. RULE 809.51(2).

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OCCD CA 11-22-2022

Notice of Appearance

Comment: AAG Vandermeuse substituting for AAG Winn Collins as Counsel for the Respondents

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OCCD CA 11-21-2022

Fee Waived

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OCCD CA 11-21-2022

Petition for Supervisory Writ

Filed By: Laura Breun

Submit Date: 11-21-2022

Decision: (D) Deny

Decision Date: 12-13-2022

IT IS ORDERED that the petition for a supervisory writ is denied. No costs to any party.

Motion Response

Filed By: Jennifer Vandermeuse

Submit Date: 12-6-2022

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