In the
Supreme Court of Wisconsin

No. 2023AP76

RICHARD BRAUN,
PLAINTIFF-RESPONDENT,

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-RESPONDENT,

v.

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

PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED

Plaintiff Richard Braun sued the Wisconsin Elections Commission, challenging the longstanding approval of the National Voter Registration Form. Vote.org, a nonpartisan voter-registration organization that has for years relied on Wisconsin's acceptance of the National Form to register Wisconsin voters, moved to intervene as of right under Wis. Stat. § 803.09(1).

The Waukesha County Circuit Court denied the motion to intervene, holding that the Commission adequately represented Vote.org's interest in the case because it sought the same litigation outcome as the Commission. The circuit court later granted summary judgment to Braun, enjoining use of the National Form in Wisconsin. The Commission elected not to appeal that decision.

Vote.org appealed the denial of intervention, arguing that the Commission did not adequately represent its interests in two respects. First, unlike the Commission, Vote.org has a concrete financial and organizational stake in continuing to use the National Form in Wisconsin. Second, unlike the Commission, Vote.org would have appealed the grant of summary judgment.

The court of appeals, district II, affirmed the denial of intervention based entirely on adequacy of representation. The panel majority reasoned that the Commission and Vote.org had "the same ultimate objective" in the litigation, which it took to mean that Vote.org was adequately represented.

Judge Neubauer dissented. She would have held Vote.org's interests to be inadequately represented on both grounds Vote.org pressed on appeal. First, adequacy of representation depends on interests, not litigation objectives, and the Commission—a

government agency—cannot adequately represent Vote.org's unique private interests. Second, even with respect to litigation objectives, the Commission's failure to appeal the adverse merits decision rendered it an inadequate representative.

The issues presented for review are:

(1) Whether a named defendant adequately represents a would-be intervenor just because the defendant shares the intervenor's litigation objectives, despite different fundamental interests.

(2) 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

Other Authorities

INTRODUCTION

This case concerns the lower courts' puzzling view of who may participate in voting-rights litigation. Plaintiff Richard Braun challenged Wisconsin's use and acceptance of the National Voter Registration Form, a standardized voter form that voters may use to register in most states. But the Form has never done Braun any harm; he was already registered to vote and so has no personal stake in which registration forms Wisconsin chooses to accept from other voters. The circuit court nonetheless held that Braun had standing to seek a statewide injunction against the Form's use—an injunction which the court subsequently granted in a decision that the Wisconsin Elections Commission declined to appeal.

Vote.org, by contrast, has a grave stake in Wisconsin's continued use of the National Form. Vote.org is the country's largest technology platform for voter registration, working to register voters in every state. And the Form—mandated by Congress and maintained by the U.S Election Assistance Commission—is accepted in nearly every state. Vote.org thus built its voter-registration system on the premise that Wisconsin, like most other states, would continue to accept the Form: A voter who uses Vote.org's platform to register generates a completed National Form. Yet the circuit court denied Vote.org's motion to intervene of right, holding that the Wisconsin Elections Commission (the "Commission") adequately represented Vote.org's private interests. In doing so, the circuit court allowed Braun to bring a case that aimed to make it more difficult for Wisconsinites to register and vote, while denying Vote.org the opportunity to defend its own use of the challenged form to help voters register.

On appeal of the denial of intervention, matters grew more puzzling still. While that appeal was pending, the circuit court

granted summary judgment to Braun on the merits, enjoining the use of the National Form. The Commission chose not to appeal. Vote.org would have appealed, as it told the court of appeals. Yet a panel of the court of appeals nevertheless affirmed the denial of Vote.org's intervention over a forceful dissent from Judge Neubauer. The panel majority's decision to affirm rested entirely on a single, precarious conclusion: that the Commission adequately represented Vote.org's interests in the case. Decision ¶¶ 25–35 (App. 15–21).

The court of appeals' decision was wrong. The Commission—a government agency that regulates and administers Wisconsin's elections—does not adequately represent Vote.org's private interests as a platform working to help voters register. As Judge Neubauer's dissent explains, the panel majority held otherwise by conflating the "interests" an existing party must represent with its desired "litigation outcome." Dissent ¶ 57 (App. 34). But if a shared litigation objective were enough to defeat intervention, then intervention would almost never be possible—an intervenor will almost invariably share either the plaintiff's objective in seeking relief or the defendant's objective in opposing it. Such a result is at odds with this Court's instruction that the burden to show inadequate representation "should be treated as minimal." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 85, 307 Wis. 2d 1, 745 N.W.2d 1 (quoting *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994)).

The question that the court of appeals should have asked instead is whether Vote.org has animating interests that make its stake in the litigation fundamentally different from the Commission's—regardless of whether Vote.org and the Commission seek the same litigation outcome. This is the proper

approach not only because the burden on intervenors is "minimal," but also because intervention's purpose is to allow courts to decide matters with all interested parties participating. Such full participation promotes efficiency and leads to better-informed outcomes. And when an intervenor's animating interest is different from the existing parties' interests, excluding the intervenor raises the very real risk that its interest will not be adequately represented, because protecting that interest simply is not the responsibility of any existing party. As this case starkly illustrates, denying intervention can therefore make a real difference in how the matter is litigated and ultimately resolved.

The court of appeals' decision warrants this Court's review. The decision sets Wisconsin's law of intervention on a starkly different path from that taken by the federal courts in Wisconsin—a path on which intervention of right will become very difficult in nearly all cases. The court of appeals' decision is also difficult to square with its own precedent and threatens to throw Wisconsin's intervention jurisprudence into a state of confusion. And that confusion comes at a poor moment, with intervention disputes proliferating—in public-law litigation in general, and election-law cases in particular. Only this Court can stave off that confusion by granting review and putting Wisconsin's law of intervention back on firm footing.

CRITERIA FOR REVIEW

A grant of review is appropriate because the Court's decision in this case "will help develop, clarify or harmonize the law," and the questions presented are "question[s] of law of the type that [are] likely to recur unless resolved by the [Court]." Wis. Stat. § 809.62(1r)(c).

First, a decision from this Court is needed to clarify the fundamental nature of the adequacy-of-representation inquiry. Breaking with past Wisconsin precedent and widespread federal practice, the court of appeals panel majority assessed adequacy of representation in this case based on Vote.org's and the Commission's overlapping *litigation objectives* rather than the *interests* motivating those objectives. Whether that approach is correct is "a question of law . . . that is likely to recur," *id.*, in nearly every intervention dispute until this Court settles matters. And it is a question the panel majority answered incorrectly, by denying Vote.org intervention despite what Judge Neubauer's dissent termed its "more specific and concrete interests." Dissent ¶ 51 (App. 30).

Second, a decision from this court is needed to clarify the significance of a named party's decision not to appeal where a putative intervenor would appeal. Persuasive out-of-state authority consistently recognizes that a named party cannot provide adequate representation of an intervenor's interests when it refuses to appeal an adverse decision that the intervenor would have appealed. But this Court has not addressed the question, and the court of appeals' treatment of the issue in this case was contrary to the overwhelming weight of authority.

STATEMENT OF THE CASE

I. Statutory Framework

Wis. Stat. § 803.09(1) provides that 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).

II. Factual Background

A. The National Voter Registration Form

The National Voter Registration Form is a product of the National Voter Registration Act of 1993. Pub. L. No. 103–31, 107 Stat. 77 (first codified at 42 U.S.C. §§ 1973gg to 1973gg–10, then transferred to 52 U.S.C. §§ 20501–20511). The Act aimed "to establish procedures that will increase the number of eligible citizens who register to vote." 52 U.S.C. § 20501(b)(1). In service to that goal, the Act authorized the creation of a national voter registration form. *Id.* § 20508(a)(2). The implementing regulation requires that the Form "consist of three components: An application, . . . general instructions for completing the application; and accompanying state-specific instructions." 11 C.F.R. § 9428.3(a). The resulting National Form was first promulgated in 1994.

It was a resounding success. According to a 2013 review, the mail registration provisions of the Act consistently accounted for between one fifth and one third of all new federal voter registrations in covered states on a yearly basis. *See* R.12:2–3 (citing Royce Crocker, Cong. Rsch. Serv., R40609, *The National Voter Registration Act of 1993: History, Implementation, and Effects* 13 (2013)). Today, the United States Election Assistance Commission, a bipartisan expert commission, promulgates the

National Form. *See* U.S. Election Assistance Comm'n, *About the EAC*.[1]

Forty-four states are required by federal law to accept voter registrations made using the National Form. *See* 52 U.S.C. § 20503(a)(2). Wisconsin is not among them—because it allows election-day voter registration, Wisconsin is one of the handful of states exempted from the NVRA. *See Id.* § 20503(b). But Wisconsin nonetheless elected to accept the National Form for mail registrations immediately after the form's 1995 rollout, *see* R.85:5—a state of affairs that continued until the circuit court's injunction in this case. Until its use was enjoined, the National Form's state-specific instructions for Wisconsin included a detailed list of this state's registration requirements. R.57:29. The state-specific instructions are updated frequently; Wisconsin's, for instance, were updated on September 20, 2022, several days *after* this lawsuit was filed. *See* R.57:29.

B. Vote.org's Use of the National Form

Vote.org is a 501(c)(3) nonprofit, nonpartisan organization and technology platform dedicated to voter registration and get-out-the-vote efforts. R.11:1. Since 2016, Vote.org has helped more than 7 million voters register, including tens of thousands of Wisconsinites. R.11:1–2. Vote.org uses the national form to help voters register in Wisconsin and across the country. R.11:8. Vote.org favors the National Form because it is "a clear and approachable tool" for voters seeking to navigate the complexities of registration. R.11:8. Part of Vote.org's mission is helping lower-propensity voters to register, including young voters and voters of color. R.11:1. Vote.org's experience has been that the "simple and

[1] https://www.eac.gov/about (last accessed Aug. 30, 2024).

accessible" nature of the National Form helps it to mobilize such voters. R.11:8.

Vote.org's web platform is built around the National Form. A voter reaches the voter registration screen by clicking any of the "Register to Vote" links prominently displayed on different parts of the Vote.org website. R.11:2. The voter then enters basic contact information, including a residential address. R.11:3. If the address is in a state that allows online voter registration and accepts the National Form—including Wisconsin, until this lawsuit—the voter is given two options. R.11:4. If the voter prefers to register online and is permitted to do so, she is directed to the state's online voter registration platform—in Wisconsin, the MyVote website maintained by the Commission. R.11:5. If the voter prefers to register by mail or lacks the identification required to use the online portal, she is directed to a second screen which asks for more detailed information. R.11:5–6. After the voter fills out that information, the website populates the National Form with the voter's information. R.11:7; *see* R.11:12 (sample filled form). The voter must then print the form and sign an attestation reading, "I have reviewed my state's instructions and I swear/affirm that . . . I meet the eligibility requirements of my state" and "[t]he information I have provided is true to the best of my knowledge under penalty of perjury." R.11:12. Building its mail-registration software around the National Form enables Vote.org to "standardize its provision of mail-in voter registration forms across all 50 states," channeling all aspiring voters through a single registration workflow. R.11:9.

III. Procedural History

Braun sued the Commission to challenge Wisconsin's practice of accepting voter registrations made using the National

Form on September 15, 2022. R.2:3. In brief, Braun's theory was that the National Form both lacks some features required by Wis. Stat. § 6.33 and includes some additional ones not provided for by Wisconsin statute. *See* R.2:8–11. Braun has never asserted any particularized stake in what form or forms Wisconsin uses to register voters.

A. Vote.org's Motion to Intervene

Recognizing the substantial threat to its interests, Vote.org moved to intervene as a defendant just thirteen days after the case was filed. R.13:1; *see also* R.37:1 (amended motion to intervene). Braun opposed intervention and the Commission took no position.

The circuit court denied intervention by oral ruling at a hearing on December 2, 2022. R.73:23–29 (App. 69–75). The circuit court held that Vote.org's motion was timely, R.73:23 (App. 69), and that Vote.org's longstanding use of the National Form to assist Wisconsin voters gave it a significant interest in the lawsuit. R.73:24 (App. 70). But the circuit denied intervention of right, holding that the lawsuit did not threaten "as a practical matter" to "impair or impede" Vote.org's interest, R.73:24–25 (App. 70–71), and that the Commission adequately represented Vote.org's interest because it shared Vote.org's ultimate litigation goals, R.73:26–27 (App. 72–73). The circuit court also denied permissive intervention. R.73:29 (App. 75). The circuit court entered an order confirming the denial of intervention on December 15, 2023. R.60 (App. 45–46).

Vote.org noticed an appeal of the denial of intervention on January 13, 2023. R.66.

B. Circuit Court's Merits Decision

While the intervention appeal was pending, merits briefing in the circuit court proceeded, with Vote.org participating as *amicus curiae*. *See* R.86.

On September 5, 2023, the circuit court granted summary judgment to Braun. R.101 (App. 80–88). The circuit court held that Braun had standing under *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855, and the plurality opinion in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis.2d 607, 976 N.W.2d 519, which the circuit court took to mean that "a voter has standing to challenge the [un]lawful actions of WEC." R.101:5–6 (App. 84–85). The circuit court also held that Braun had taxpayer standing. R.101:7–8 (App. 86–87).

On the merits, the circuit court held that the National Form had not been "properly prescribed or promulgated" by the Commission. R.101:8 (App. 87). It rested that holding entirely on its dissatisfaction with the Commission's inability to produce detailed documentation of the circumstances of the Form's approval, an action taken nearly three decades ago by a different entity—the Wisconsin Elections Board—that was eliminated more than a decade ago, in 2008. R.101:8–9 (App. 87–88). Notably, Vote.org's *amicus* brief introduced circumstantial evidence that the Form *had* been approved back in 1995, *see* R.86:9 & n.2; R.85:5, but the circuit court never addressed that evidence.[2] The circuit

[2] Because its decision rested on a perceived procedural defect in the Form's approval, the circuit court never reached the crux of Braun's argument against the National Form, that it did not comply with Wis. Stat. § 6.33(1)'s substantive requirements.

court declared the use of the National Form unlawful and enjoined the Commission from contrary action. R.101:9.

C. Vote.org's Intervention Appeal

Merits briefing in Vote.org's intervention appeal closed on May 25, 2023. On September 6, 2023, one day after the circuit court granted summary judgment to Braun on the merits, Vote.org notified the court of appeals that, in light of the circuit court's order, Vote.org would "cease offering the National Form to Wisconsin registrants." Letter re Summ. J. Order (Sept. 6, 2023).[3] On November 13, 2023, Vote.org notified the court of appeals that the Commission had informed Vote.org that the Commission would not be appealing the circuit court's merits decision. Letter re Mot. to Intervene (Nov. 13, 2023). Vote.org explained that if granted intervention, "it *would* appeal," and provided the court of appeals with authority confirming that the Commission was thus an inadequate representative of its interests. *Id.* (emphasis in original).

The court of appeals affirmed the denial of intervention in a decision issued on July 31, 2024, Decision at 1 (App. 3)—19 months after Vote.org was denied intervention, 14 months after briefing in the appeal closed, and 10 months after the circuit court's merits decision.

The court of appeals agreed with Vote.org that the circuit court had erred in analyzing the third criterion for intervention of right—whether the "disposition of the action may as a practical matter impair or impede [the movant's] ability to protect" its

[3] As of this filing, Vote.org remains unable to use the National Form in Wisconsin, and accordingly offers no voter registration option for Wisconsinites who are ineligible or unwilling to register using the online MyVote WI system.

interest. Decision ¶¶ 21–24 (App. 13–15) (quoting *Helgeland*, 2008 WI 9, ¶ 38). But over a sharp dissent from Judge Neubauer, a majority of the panel rejected Vote.org's arguments with respect to the final criterion, adequacy of representation. *See id.* ¶¶ 25–35 (App. 15–21); *see also* Dissent ¶¶ 47–64 (App. 27–39).

In the panel majority's view, intervention of right was unavailable because Vote.org and the Commission had "the same ultimate objective" in the litigation: to defeat Braun's argument and establish that the National Form "complies with Wisconsin law." Decision ¶ 29 (App. 18). The majority concluded that because Vote.org and the Commission had the same objective, they also had the same "interests," *id.*, thus a "presumption[]" of adequate representation applied, *id.* ¶ 31 (App. 18–19). The majority also suggested, more briefly, that a second presumption of adequacy would apply because the Commission is "charged by law" with representing Vote.org's interest. *Id.* ¶ 30 (App. 18).

The majority held that Vote.org had not overcome the presumption of adequacy because it had not shown that it was adverse to the Commission, that the Commission was colluding with Braun, or that the Commission had failed in its duty. *Id.* ¶ 28 (App. 16–17); *see id.* ¶ 31 (App. 18–19). In a cursory footnote, the panel majority also dismissed Vote.org's argument that the Commission's decision not to appeal rendered its representation of Vote.org's interests inadequate. *Id.* ¶ 28 n.11 (App. 17).

Judge Neubauer took a very different view. She faulted the panel majority for its "simplistic focus on the entities' shared desired litigation outcome," an approach "at odds" with U.S. Supreme Court and Seventh Circuit precedent. Dissent ¶ 59 (App. 36). In Judge Neubauer's view, the majority improperly conflated litigation objectives with the more fundamental interests

motivating Vote.org's participation. *See id.* Properly understood, the presumption of adequate representation did not apply because Vote.org's interests related to using the National Form were "more specific and concrete" than the Commission's—for instance, Vote.org had "an independent interest" in using the Form to "efficiently and economically pursue its goals by using the same online platform" to register Wisconsin voters that it uses in other states. *Id.* ¶ 51 (App. 30–31). As the Commission did not share Vote.org's fundamental interests (nor have any legal duty to represent them), no presumption of adequacy applied—mere shared litigation goals were not enough. *Id.* ¶¶ 58–61 (App. 35–37).

Having rejected the presumption of adequacy, Judge Neubauer reasoned that the Commission did not adequately represent Vote.org's interests because Vote.org had a direct interest in continuing to use the National Form, whereas the Commission would not suffer "any particularized harm at all if Braun prevailed." *Id.* ¶ 52 (App. 31–32). Judge Neubauer also identified the Commission's decision not to appeal the adverse merits ruling as a separate, freestanding basis to hold its representation of Vote.org's interests inadequate. *Id.* ¶¶ 62–64 (App. 37–39).

ARGUMENT

I. Review by this Court would "clarify" and "harmonize" the law of intervention in two important respects.

This Court grants review, among other circumstances, when a "decision by the [Court] will help develop, clarify or harmonize the law" and the question presented "is a question of law of the type that is likely to recur unless resolved by the [Court]." Wis.

Stat. § 809.62(1r)(c). That standard is plainly met here, in two distinct respects.

First, the court of appeals transformed Wisconsin's intervention law by conflating fundamental interests with litigation objectives. The Court should grant review to clarify that those concepts are distinct—otherwise, showing inadequacy of representation will become impossible in most cases, in direct contravention of this Court's instruction that the burden to make such a showing "should be treated as minimal." *Helgeland*, 2008 WI 9, ¶ 85 (quoting *Armada Broad., Inc.*, 183 Wis. 2d at 476).

Second, the court of appeals held that the Commission was an adequate representative of Vote.org's interests even though it refused to appeal an adverse merits decision—a *per se* failure to represent those interests. This Court should grant review to clarify that in Wisconsin courts, as in other courts to consider the question, an existing party's decision not to appeal renders it an inadequate representative of an intervenor that would appeal.

A. This Court's review of the first question presented is necessary to clarify that shared litigation objectives do not suffice to show adequate representation where a proposed intervenor does not share named parties' fundamental interests.

The Court should grant review of the first question presented to clarify that an existing party does not adequately represent an intervenor merely because the party and the intervenor share the same litigation interest. Under Wis. Stat. § 809.03(9), the fourth requirement for intervention is that "the existing parties do not adequately represent the movants' interests." *Helgeland*, 2008 WI 9, ¶ 85. This Court has held that a presumption of adequate representation arises where (i) the

"movant's interest is identical to that of one of the parties" or (ii) the named party is "charged by law" to represent the proposed intervenor's interests. *Id.* ¶¶ 86–91. The question in this case is what it means for an intervenor and a named party to have "identical" interests.

The court of appeals here held that that an intervenor and a named party have the same interests, and therefore a presumption of adequate representation applies, whenever the intervenor and the named party seek the same outcome from the litigation. Decision ¶ 29 (App. 17–18). Specifically, the panel majority reasoned that the Commission and Vote.org shared "even if for somewhat different reasons[,] the same ultimate objective in this case: To establish that the form complies with Wisconsin law." *Id.* On that basis, the majority concluded that although Vote.org's and the Commission's "respective *uses* of the Form may be different, it does not inherently follow that they have diverging *interests*." *Id.* (emphasis in original). That understanding of "interest"—as interchangeable with litigation objective—drove the majority's application of both presumptions of adequacy. *See id.* ¶¶ 29–30 (App. 17–18).

Judge Neubauer, by contrast, carefully distinguished between interests and litigation objectives. Her dissent noted Vote.org's "specific and concrete interests": continuing to use its web-based registration platform, increasing the registration rates of lower-propensity voters, and preserving its scarce resources. Dissent ¶ 51 (App. 30–31). Judge Neubauer pointed out that the Commission lacked a similar particular interest in "registering lower-propensity voters," nor did it share Vote.org's "long-term organizational reliance on, and commitment to, the continued acceptance of the Form." *Id.* ¶ 52 (App. 31–32). Thus, Judge

Neubauer concluded, the harm to the Commission "if Braun prevailed would bear little resemblance to the harm to Vote.org." *Id.* The majority, in Judge Neubauer's view, erred because of its "simplistic focus on the entities' shared *desired litigation outcome*" rather than their different animating interests. *Id.* ¶ 59 (App. 36) (emphasis added).

For at least four reasons, the Court should grant review to resolve whether a similar desired litigation outcome forecloses intervention.

First, the disagreement springs from a perceived ambiguity in this Court's decision in *Helgeland*. There, the Court instructed that when "a movant's *interest* is *identical* to that of one of the parties . . . a compelling showing should be required to demonstrate that the representation is not adequate." *Helgeland,* 2008 WI 9, ¶ 86 (emphasis added). A few paragraphs later, the Court phrased the same point quite differently, suggesting that "adequate representation is ordinarily presumed when a movant and an existing party have the same *ultimate objective in the action*." *Id.* ¶ 90 (emphasis added). The Court in *Helgeland* never spelled out what it meant by "interest" or "ultimate objective," nor did it clarify whether they are identical or overlapping concepts. And in this case, both the majority and Judge Neubauer cited *Helgeland* to support their respective views. *See* Decision ¶¶ 25–29 (App. 15–18); Dissent ¶¶ 56–57 (App. 33–34). Only this Court can resolve the perceived ambiguity created in *Helgeland* regarding one of the basic requirements for intervention of right in Wisconsin law.

Second, the panel majority's decision in this case is in irreconcilable tension with another, older decision of the court of appeals. In *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 740, 601

N.W.2d 301 (Ct. App. 1999), a town sought to intervene in a zoning dispute alongside a defendant county. The court of appeals held that representation was inadequate even though the town and county sought "the same outcome" and were likely to "offer similar arguments." *Id.* at 748. It rested that decision on the two parties' fundamentally different animating interests: The county's interest flowed from its exposure to damages, while the town that sought to intervene had "more at stake," as the challenged zoning decision would affect its citizens more directly. *Id.* at 749.

The panel majority here dismissed *Wolff* on the theory that it "did not address" whether a presumption of adequate representation applied. Decision ¶ 31 (App. 18–19). But that misses the point: Whether any such presumption applies depends on the upstream question of what the relevant "interest" *is*—and the majority's treatment of the relevant "interest" as interchangeable with litigation goal cannot be squared with *Wolff*. The panel majority's decision therefore puts the court of appeals' precedents in irreconcilable tension, warranting this Court's review. *See* Wis. Stat. § 809.62(1r)(d).

Third, the panel majority is wrong. Intervention will become almost impossible under the panel's approach of treating "interest" as meaning nothing more than desired litigation outcome. 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. It follows that, in nearly all cases, at least one party will share the proposed intervenor's litigation objective. If that objective were equivalent to the intervenor's "interests," showing "that the existing parties do not adequately represent the movants' interests," *Helgeland*, 2008 WI 9, ¶ 85, would be a rare and difficult trick. Yet this Court has long

instructed that "the showing required for proving inadequate representation 'should be treated as *minimal*.'" *Id.* (emphasis added) (quoting *Armada Broad., Inc.*, 183 Wis. 2d at 476); *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (same). The panel majority's approach to adequacy cannot be reconciled with that principle.

Nor can the majority's approach be reconciled with intervention law more broadly. The term "interest" is central in analyzing the second and third criteria for intervention as well as the fourth. Wis. Stat. § 803.09(1). To satisfy those criteria, a putative intervenor must identify an "interest" in the litigation that is "of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *Helgeland*, 2008 WI 9, ¶ 45 (quoting *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶ 11 n.9 234 Wis. 2d 550, 610 N.W.2d 94). Clearly, such an interest cannot be a brute interest in a certain litigation outcome—the intervention statute requires that the outcome cause the intervenor to "gain or lose" outside the litigation because of the judgment. The panel majority's treatment of the term "interest" in this case thus renders its meaning different with respect to the second and third criteria and with respect to the fourth. That cannot be right.

Fourth, the panel majority's approach to adequacy puts Wisconsin law far out of step with federal practice. Because Wisconsin's intervention statute "is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure," federal courts' "interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1)." *Id.* ¶ 37. And as Judge Neubauer pointed out below, the majority's conflating of litigation objectives

with fundamental interests finds little support in federal authority. Dissent ¶¶ 57–59 (App. 34–36).

Start with the U.S. Supreme Court. In *Trbovich*, the Court's path-marking case on adequacy of representation, a union member filed a complaint with the Secretary of Labor, seeking to have the Secretary set aside a union election. 404 U.S. at 529. The Secretary, agreeing that the election in question had been unlawful, filed a federal set-aside action. *Id.* at 529–30. The union member moved to intervene but the Secretary opposed, arguing that he adequately represented the union member's interests. *Id.* at 538. The Supreme Court held otherwise, ruling that there was "sufficient doubt about the adequacy of representation to warrant intervention" where the Secretary was required to serve "distinct interests" the union member lacked. *Id.* Accordingly, under *Trbovich*, interests plainly do not equal objectives—the union member and Secretary had precisely the same desired litigation outcome, yet representation was inadequate.

The Seventh Circuit takes the same view. For instance, in *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 744 (7th Cir. 2020), the court considered several transmission companies' attempt to intervene alongside the Wisconsin Public Service Commission to defend certain permits. The district court denied intervention on the grounds that "the transmission companies and the Commission share the same goal: dismissal of the plaintiffs' suit." *Id.* at 747. But Chief Judge Sykes's opinion for the court flatly rejected that approach, explaining that "it's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed." *Id.* at 748. Because "a prospective intervenor must intervene on one side of the 'v.' or the other," such a rule would

mean that "intervention as of right will almost always fail." *Id.* Instead, the Seventh Circuit looked to the transmission companies' fundamental interests in the matter, such as their "substantial sunk and anticipated future investments in the power line, and a valid expectation of a return on their investment." *Id.* Here, the equivalent interest is Vote.org's preexisting investment in its National Form–based web infrastructure—not, as the panel majority assumed, its brute aim of defeating Braun's challenge.

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The panel majority's treatment of adequacy of representation is wrong on the law. And it is in sharp tension with court of appeals precedent and persuasive federal authority. By leveraging ambiguous phrasing in *Helgeland*, the panel majority has transformed the "minimal" requirement to show inadequate representation into a nigh-insurmountable barrier. The Court should grant review of the first question presented to clarify and harmonize the law on this important issue.

B. This Court's review of the second question presented is necessary to clarify that a party's decision not to appeal renders it an inadequate representative of a proposed intervenor who would appeal.

The Court should grant review on the second question presented to clarify that a named party that declines to appeal an adverse decision does not provide adequate representation of a putative intervenor who would appeal, if granted intervention, to protect its own interests. In the circuit court, Vote.org argued from the start that its more concrete and materially significant stake in using the National Form in Wisconsin rendered it more likely to appeal an adverse merits decision than the Commission. *See, e.g.*,

R.49:6. Vote.org repeated these arguments in its briefs in the court of appeals, while the merits litigation proceeded in the circuit court. Br. of Appellant at 20; Reply of Appellant at 9–10. And Vote.org's predictions proved correct: After Braun prevailed, the Commission decided not to appeal, leaving Vote.org harmed by an adverse circuit court ruling that the Commission declined to challenge, and the appellate courts never had the chance to review. Letter re Mot. to Intervene (Nov. 13, 2024).

Despite Vote.org's thorough briefing of this point even before the Commission elected not to appeal, the panel majority addressed this argument only in a footnote. Decision ¶ 28 n.11 (App. 17). It reasoned that if a proposed intervenor "could 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," it would become too easy to establish inadequate representation. *Id.* Judge Neubauer's dissent, by contrast, treated the Commission's decision not to appeal the merits as an "independent basis" to hold that Vote.org was inadequately represented. Dissent ¶ 62 (App. 37–38). In support of that decision, Judge Neubauer cited uniform authority from a range of federal courts. *Id.* (citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508–09 (7th Cir. 1996); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990); and *Campaign Legal Ctr. v. FEC*, 334 F.R.D. 1, 1 (D.D.C. 2019)); *see also id.* ¶¶ 63–64 (App. 38–39) (collecting further authority).

For three reasons, the Court should grant the second question presented and decide the significance of a named party's decision not to appeal.

First, as Judge Neubauer's dissent illustrates, the panel majority's decision puts Wisconsin far out step with federal practice. Federal courts of appeals quite uniformly hold that a supposedly representative party's decision not to appeal where a putative intervenor would appeal renders representation inadequate. *See, e.g.*, *Solid Waste Agency*, 101 F.3d at 508; *Ams. United*, 922 F.2d at 306; *Mich. State. AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969). Remarkably, although Vote.org briefed many of these cases, the panel majority never discussed or distinguished any of them. This Court should be chary to let Wisconsin's intervention jurisprudence fall so far out of step with federal practice—as noted above, "interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1)." *Helgeland*, 2008 WI 9, ¶ 37.

Second, Judge Neubauer is correct: An existing party's refusal to appeal an adverse decision that a proposed intervenor wishes to challenge necessarily renders the existing party an inadequate representative. The concept behind adequate representation as a barrier to intervention is that a proposed intervenor can rely on the existing party who shares its interests to represent those interests in the proposed intervenor's absence. But an existing party that fails to appeal has ceased to represent the proposed intervenor's interests at all. Moreover, an existing party's failure to appeal is clear evidence that the parties' underlying interests are different: Where an intervenor is willing to spend resources appealing, but a named party is not, the intervenor plainly has more at stake. And this is true even under the panel majority's crabbed view of interest. Even granting that an "interest" is nothing more than a desired litigation outcome, a named party's decision not to appeal is a decision not to seek the

litigation outcome that the intervenor desires. The Commission's decision not to appeal here "may amount to sound litigation strategy and a prudent allocation of . . . taxpayer money," but it nonetheless illustrates that the Commission's interests and Vote.org's "diverge." *Mich. State AFL-CIO*, 103 F.3d at 1248.

Third, the panel majority's reasoning makes little sense in general, and none in the context of this case. Of course, a party seeking to intervene must do more than "simply assert[]" in conclusory fashion that it may appeal while the allegedly representative party may not. *See* Decision ¶ 28 n.11 (App. 17). An intervenor must back up that assertion with something concrete. That is what Vote.org did below: In briefing to both the circuit court and the court of appeals, it identified several differences in motivation and institutional incentives that rendered it more likely to appeal than the Commission. *See, e.g.*, Br. of Appellant at 20. The panel majority ignored those arguments.

More to the point, there was no need here to speculate about what might happen in the future: By the time the court of appeals issued its decision, the circuit court had already entered an adverse decision, and the Commission had already declined to appeal it. Vote.org was not "simply asserting" its break from the Commission's strategy here. That break had already occurred.

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As with its analysis of "interest," the panel majority's analysis of the Commission's failure to appeal puts Wisconsin law far out of step with federal practice. And the panel's decision will deprive parties like Vote.org of the chance to defend their rights and interests where the state's agents elect not to do so. This

Court's review of the second question presented is necessary to correct the court of appeals' wrong turn.

II. The rules governing intervention—in election-law cases and otherwise—merit this Court's attention.

The questions presented are appropriate subjects of the Court's attention notwithstanding its busy docket. The rules governing intervention are of general importance in public-law litigation and are particularly vital in election law. Moreover, intervention decisions are, as a practical matter, insulated from this Court's review, so setting clear rules of the road in advance is essential.

First, the law of adequate representation is crucially important in public-law litigation in general. In cases of public importance concerning a range of topics, private-party attempts to intervene alongside government defendants are commonplace. Private-party intervention in environmental litigation, for instance, is routine. *See, e.g.*, *Sewerage Comm'n of City of Milwaukee v. State Dep't of Nat. Resources*, 104 Wis. 2d 182, 184 311 N.W.2d 677 (Ct. App. 1981); *Driftless*, 969 F.3d at 747; *Kane County v. United States*, 928 F.3d 877, 891–92 (10th Cir. 2019). Such intervention attempts often implicate the same questions as this case—adequacy of representation will usually be at issue when a private party seeks to intervene alongside a government defendant. The Court thus has good reason to review this case: The rules it sets will apply in many important domains.

Second, as this case illustrates, adequacy of representation is a central issue in election-law litigation. In Wisconsin, as elsewhere, political parties seek to intervene in cases brought by their opponents, voters seek to intervene in cases that may affect

the rules for voting, and pro-voter organizations like Vote.org seek to intervene in a wide range of cases.[4] In most of these cases, adequacy of representation is disputed.

Compounding matters, Wisconsin has quite liberal rules of standing. In this case, for instance, a Wisconsin resident who was already registered to vote and who had no personal stake in the National Form was permitted to challenge the Form's acceptance statewide—ultimately depriving other Wisconsin voters of an easy option to register and Vote.org of a key tool in its platform. Whether this Court should continue to leave the courthouse door open to such claims is a decision to be made in other cases (or, perhaps, in this one, if Vote.org is ultimately permitted to appeal the merits). But insofar as such claims are currently being heard in Wisconsin courts, intervention is yet more important: It allows voters and pro-voter organizations to intervene and represent voters' interests when individuals like Braun bring cases like this one.

Third, decisions about adequacy of representation are in practice quite insulated from this Court's review. Intervention appeals are rare, and intervention appeals to this Court are rarer still. This case illustrates one reason why—timing. Vote.org had to wait over a year just to get a decision from the court of appeals about intervention. Had that decision been favorable, Vote.org would have needed to return to the circuit court and appeal a

[4] *See, e.g.*, Notice of Mot. & Mot. to Intervene of Proposed Intervenor-Def. Democratic Nat'l Comm., *Brown v. Wis. Elections Comm'n*, No. 2022CV1324 (Cir. Ct. Racine Cnty. Feb. 20, 2023), Doc. 18; Rise, Inc.'s Notice of Mot. & Mot. to Intervene, *Kormanik v. Wis. Elections Comm'n*, No. 2022CV1395 (Cir. Ct. Waukesha Cnty. Sept. 29, 2022), Doc. 31; Proposed Intervenor Defs.' Notice of Mot. and Mot. to Intervene, *Rise, Inc. v. Wis. Elections Comm'n*, No. 2022CV2446 (Cir. Ct. Dane Cnty. Oct. 3, 2022), Doc. 42.

second time to obtain merits relief. Such long delays in obtaining relief are daunting for many intervenors and will often deter even parties with meritorious intervention appeals from pressing them all the way to this Court. Accordingly, this Court's careful attention to how the lower courts are applying its intervention precedents is essential.

III. This case is a good vehicle for clarifying intervention law.

This case is an ideal vehicle to address and resolve the questions presented. Vote.org has pressed and preserved its arguments about both issues throughout this litigation, so there will be no question of forfeiture. The key facts are undisputed, ensuring that the Court's resolution of the appeal will turn on important points of law, not evidentiary quibbles. And in evaluating the case, the Court will benefit from the thorough analysis of the court of appeals—both the panel majority's detailed decision and Judge Neubauer's thoughtful dissent. In short, this petition presents a rare opportunity to clarify the Court's intervention jurisprudence—and to do so at a time when that jurisprudence is becoming ever more important.

Granting review of this case will also have an additional benefit: to leave open the possibility of appellate review of the merits. For nearly three decades, from 1995 to late 2023, Wisconsinites had the option to register to vote using the National Form. And throughout that period, national voter-mobilization organizations such as Vote.org had the opportunity to deploy Form-based programs and systems in Wisconsin. But all that ended when the circuit court enjoined the use of the Form last September.

If that injunction is appealed, it is not likely to survive. Braun's standing to bring his claims was dubious—he never articulated *any* personal stake in how others register to vote. And the circuit court's merits analysis was, with respect, unconventional. The circuit court *assumed* that the National Form had never been validly approved because the Commission did not provide *definitive* evidence that the Wisconsin Elections Board had affirmatively voted to approve the Form's use back in 1995—*21 years* before the Commission began operations. R.101:8–9 (App. 87–88). Such reasoning improperly inverted the parties' burdens and rendered Braun the beneficiary of his own tardiness in bringing his claims—points Vote.org will be keen to press in a merits appeal, if it gets the chance to do so.

CONCLUSION

The Court should grant the petition for review.

Dated: August 30, 2024.

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CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in Sections 809.19(8)(b), (8)(bm), (8g); 809.62(2), (4); and 809.81 of the Wisconsin Statutes. I further certify that this petition has been produced with a proportional serif font. The length of this petition is 7,332 words.

Dated: August 30, 2024.

Respectfully submitted,
Electronically signed by Diane M. Welsh