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**2026CV000103**

STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY  
Branch 5

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WISCONSIN PTA, *et al.*,

*Plaintiffs,*

Case No. 26CV103

v.

WISCONSIN STATE ASSEMBLY, *et al.*,

*Defendants.*

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**PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO PENDING  
MOTIONS TO INTERVENE AS DEFENDANTS**

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## INTRODUCTION

In this consolidated brief, Plaintiffs address two separate motions for intervention. (Dkt. 75, 87) Because neither motion meets the applicable legal tests for intervention, both should be denied.

The would-be intervenors (collectively, “movants”) use both motions to distort the Complaint beyond recognition in an unavailing effort to support their requests. One group of movants, comprising five private school parents, three public school parents, individual private schools, networks of such schools, and a membership organization for such schools (the “Large Group”), reveals the extent to which it mischaracterizes the Complaint by barely citing that document in their brief supporting their motion to intervene. The minimal cites they do include (*see* Dkt. 88 at 7, 11) never point to any claim or request for relief, because those operative portions of the Complaint deviate from the Large Group’s caricature of that document. The other group of movants, comprising three private school parents (the “Small Group”), presents a brief including many citations to the Complaint (*see generally* Dkt. 76), but those repeated references serve to demonstrate only the inaccuracy of their characterizations when compared with the express allegations themselves as they appear in the Complaint.

The reason for these distortions is obvious: they are necessitated by the intervention standard, under which the movants must show—counterfactually—that the interests they claim as grounds justifying intervention are implicated in this action. The insurmountable challenge that poses here is that this lawsuit simply is

not about the interests and issues they desperately want to discuss. Their goal is to hijack this litigation and turn it into a vehicle to resolve legal issues that are nowhere to be found in Plaintiffs' Complaint. The Complaint focuses on funding for *public* schools, not the *private* ones in which movants claim an interest. And Plaintiffs' Complaint seeks no relief whatsoever with respect to vouchers. Movants' insistence to the contrary is both unsupported and fabricated. Neither their repetition nor their indignation can change what the Complaint actually says. And the Complaint demonstrates that neither the Large Group nor the Small Group of proposed intervenors has an interest sufficiently implicated here, much less practically impaired—as required to support intervention as of right.

Moreover, movants are adequately represented by Defendants. The Legislature is elected by the people and constitutionally vested with the legislative power. It is the primary policy-making body for the State of Wisconsin. While some or all proposed intervenors may disagree with their individual legislators on certain issues, that does not qualify as inadequate representation. The law recognizes as much by imposing presumptions that proposed intervenors cannot overcome because the Legislature itself is defending this case and adequately represents the interests of the proposed intervenors, who are its constituents.

Nor do movants fare any better under the standard for permissive intervention. Neither the Large Group nor the Small Group actually has a significant question of law or fact in common with the Complaint. And their intervention would

be superfluous, bogging this Court down in unnecessary lawyering. Their request does not warrant an exercise of this Court's discretion.

The Court should deny both motions. Any or all of the proposed intervenors can file *amicus curiae* briefs at key junctures to present any particularized knowledge they have or views they believe this Court should consider.

### LEGAL STANDARD

The motions invoke two different grounds of intervention, each with its own legal standard.

#### 1. Intervention as of right.

To intervene in an action as a matter of right under Wis. Stat. § 803.09(1), an interested non-party must make four showings:

- (A) that the movant's motion to intervene is timely;
- (B) that the movant claims an interest sufficiently related to the subject of the action;
- (C) that disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
- (D) that 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 (footnotes omitted). To gain intervention, a movant “must meet each of these four criteria,” though “the criteria need not be analyzed in isolation from one another.” *Id.*, ¶39.<sup>1</sup> The Supreme Court has instructed that in evaluating intervention motions:

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<sup>1</sup> Nor does the fact that Plaintiffs seek declaratory relief change this calculus. Our Supreme Court has made clear that intervention standards, including the requirement that the case would impair the would-be intervenor's rights, remain in full force where suit is filed under the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, like this one is. *Helgeland*, 2008 WI 9, ¶¶138–43.

A court is mindful that Wis. Stat. § 803.0[9](1) “attempts to strike a balance between two conflicting public policies.” On the one hand, “the original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit.” On the other hand, “persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies.”

*Id.*, ¶40 (quoting *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 548, 334 N.W.2d 252 (1983)).

## **2. Permissive intervention.**

A movant seeking permissive intervention must show that its motion was timely filed, that the “movant’s claim or defense and the main action have a question of law or fact in common,” and that the movant’s intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § 803.09(2). If these requirements are not met, permissive intervention cannot be granted; if they are met, the court has broad discretion to grant or deny permissive intervention. *Braun v. Vote.org*, 2024 WI App 42, ¶37, 413 Wis. 2d 88, 11 N.W.3d 106, *rev. denied*, 2025 WI 1, 15 N.W.3d 767; *Helgeland*, 2008 WI 9, ¶120.

## **ARGUMENT**

### **I. The Private School Parents, Private Schools, and Their Associations Do Not Meet the Requirements for Intervention as of Right.**

Both intervention motions primarily advance the interests of stakeholders in private schools (the “private school stakeholders”). (*See* Dkt. 76, 88.) The leading Wisconsin case on intervention, *Helgeland v. Wisconsin Municipalities*, which both the Large Group and the Small Group cite heavily (*see* Dkt. 76 at 9, 14–17; Dkt. 88 at 9–10, 13–15, 18), is instructive and makes clear that, though their motions are timely, intervention as of right must be denied.

**A. The private-school stakeholders do not have a sufficient interest that is at stake in this lawsuit.**

“No precise test exists ‘for determining which type of interest is sufficient to allow a party to intervene as a matter of right.’” *Id.*, ¶43 (quoting *Bilder*, 112 Wis. 2d at 547). Instead, “courts employ a ‘broader, pragmatic approach to intervention as of right,’ viewing ‘the interest sufficient to allow the intervention practically rather than technically.’” *Id.* (quoting *Bilder*, 112 Wis. 2d at 548). An interest “only remotely related to the subject of the action” will not suffice. *Id.*, ¶45 (citing 6 James Wm. Moore et al., *Moore’s Federal Practice* § 24.03[2][b], at 24–29 (3d ed. 2002)). Rather, “[t]here must be some sense in which the interest is ‘of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.’” *Id.* (quoting *City of Madison v. WERC*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94).

*Helgeland* is illuminating here. That case involved a constitutional challenge to the statutory definition of “‘dependent’ for purposes of state employee health insurance eligibility.” *Id.*, ¶46. Though **state employees** and their same-sex partners sued a department of the state over issues related to health insurance offered to state workers, eight **municipalities** sought to intervene, “put[ting] forth a number of interests and assert[ed] that each [was] sufficiently related to the subject of the action to allow intervention as of right.” *Id.* These were “only generalized claims that [the municipalities had] interests related to the subject of the action.” *Id.*, ¶7. The circuit court denied the municipalities’ motion to intervene, and both the Court of Appeals and the Supreme Court affirmed that ruling. *Id.*, ¶34.

The private-school stakeholders here are similarly situated to the municipalities in *Helgeland*; their request should be similarly denied. Their motions fail to demonstrate that the private-school stakeholders have a sufficient interest to satisfy the intervention standard. The Small Group's motion seeks to serve "the purpose of defending Wisconsin's school choice programs and to assert the defenses set forth in their proposed Answer." (Dkt. 76 at 1) The Large Group's motion purports to be necessary "to protect the continued existence of the laws and policies that [movants] rely on and support and to show that they are constitutional." (Dkt. 88 at 2) Neither motion meets the applicable legal standard.

The problem movants cannot avoid is that this lawsuit seeks no relief against, nor even relates to, Wisconsin's school choice programs. Movants concede as much. Among the affirmative defenses that the Small Group seeks to assert is that "Plaintiffs' claims do not support any declaration concerning the constitutionality of, or relief affecting, the Wisconsin Parental Choice Program, Milwaukee Parental Choice Program, Racine Parental Choice Program, or Special Needs Scholarship Program." (Dkt. 75 at 129) Plaintiffs fully agree. There is no dispute, which illustrates that movants lack a real interest to vindicate.<sup>2</sup> The Large Group notes that the Legislature's policy decision to offer school vouchers has been upheld by the Supreme Court. (Dkt. 88 at 2) Here, too, no dispute. Movants cite *Davis v. Grover*, 166 Wis. 2d

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<sup>2</sup> The Small Group's only other proffered affirmative defense is that Plaintiffs "fail to state a claim upon which relief can be granted." (Dkt. 75 at 129) Several Defendants have already filed a motion making that argument. (Dkt. 84 at 4; Dkt. 85) Similarly, the Large Group asserts neither counterclaims nor cross-claims, and the only affirmative defenses they assert are general justiciability points that Defendants are already arguing. (Dkt. 83 at 33-34)

501, 480 N.W.2d 460 (1992), a decision Plaintiffs chose to feature in the Complaint (Dkt. 23, ¶25). The Complaint does not attack *Davis* but rather accepts it as a premise and argues that Defendants are failing to meet the obligations *Davis* established; this is the antithesis of seeking to overrule the precedent that the movants paint as meriting their intervention to defend.

To meet the standard for intervention as of right, the interest that movants evince must be of “direct and immediate character.” *Helgeland*, 2008 WI 9, ¶45 (quoting *City of Madison*, 2000 WI 39, ¶11 n.9). “[M]erely naming an indirect interest in a lawsuit’s subject matter is not enough.” *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶9, 296 Wis. 2d 880, 724 N.W.2d 208, *aff’d*, 2008 WI 9. “One whose interest is indirect cannot intervene as a matter of right.” *Lodge 78, Int’l Ass’n of Machinists v. Nickel*, 20 Wis. 2d 42, 46, 121 N.W.2d 297 (1963). The private-school stakeholders seeking to intervene here cannot come close to meeting this standard. At its core, their argument is that Plaintiffs’ request for a declaratory judgment about the Legislature’s constitutional obligation to fund public schools could have downstream effects that might redound to their detriment. The downstream effects asserted here are not sufficiently direct to support intervention as of right.

*Helgeland* provides a clear illustration of how and why the arguments here fall short of justifying intervention. In that case, the Supreme Court rejected four arguments the municipalities articulated to show that the lawsuit directly related to their interests. Its treatment of each argument is illustrative here.

**First**, three municipalities argued that a ruling as to state employees would increase their costs because they had municipal health-insurance contracts administered by the state. 2008 WI 9, ¶¶48–49. The State defendants disputed the claimed connection, but the Supreme Court held that it did not matter who was right. Even assuming the municipalities were correct, “[t]he relationship between [their] interest and the subject of Helgeland’s action is [] too remote and speculative to support a right of intervention.” *Id.*, ¶53. It follows that, even if a ruling for Plaintiffs in this case could have financial implications for private-school stakeholders—an attenuated and uncertain prospect, with several additional actors in the causal chain—that still would not satisfy the intervention standard.

**Second**, the municipalities insisted that a ruling for the plaintiffs would cause them trouble later because it would create a binding precedent that would be wielded against them in collective bargaining over future contracts. *Id.*, ¶¶54–58. The Court rejected this argument as well, noting that “no judgment for Helgeland as a state employee would directly bind the municipalities” and that “the effect of *stare decisis*” on would-be intervenors, “is not determinative” of whether they have a sufficient interest. *Id.*, ¶58. For the same reason, the private-school stakeholders cannot prevail here by arguing that a ruling on Plaintiffs’ claims relating to public-school finance could, through *stare decisis*, later impinge on their arrangements with the State.

**Third**, the municipalities in *Helgeland* spun out theories about the downstream legal consequences the ruling sought could have for them. *Id.*, ¶¶60–62. The Supreme Court rejected those theories as “based on ‘likely scenarios’ and

speculation about the effect of Helgeland’s action on the tax status of the retirement and deferred compensation plans and application of [various federal statutes]” while “cit[ing] no examples or case law illustrating the dire consequences they predict.” *Id.*, ¶66. It follows that the theories spun out by the private-school stakeholders here, about how a ruling in this lawsuit about the State’s constitutional obligation to fund public schools might have indirect effects on policy decisions regarding voucher schools, do not constitute a sufficient interest for intervention.

*Fourth*, the *Helgeland* Court rejected a broad assertion that the lawsuit would diminish the municipalities’ constitutional rights. The notion was that a ruling in the plaintiffs’ favor would limit municipal flexibility in designing its benefits programs, thereby impairing “constitutional and statutory home rule powers.” *Id.*, ¶67. The theory parallels the suggestion here by private-school stakeholders that their own rights are at risk here. (*See, e.g.*, Dkt. 76 at 2, 11, 17, 18; Dkt. 88 at 7, 14.) Our Supreme Court dispatched this theory with ease, noting both that “home rule authority is not related to” the lawsuit’s claims and that “[h]ome rule powers”—like the rights invoked by movants here—“are explicitly constrained by the state constitution and the statutes.” *Helgeland*, 2008 WI 9, ¶¶68–69. The movants here are similarly concerned about rights that are not related to this lawsuit’s claims and that are co-existent with, rather than separate from, the state constitution and statutes.

In sum, *Helgeland* held that, “[a]lthough the municipalities claim that they have interests related to the subject of Helgeland’s action, they have failed to show in the circuit court or here how their interests relate to the subject of the action in a

direct and immediate fashion.” *Id.*, ¶71. “The municipalities’ generalized interest” existed “at the far edge of what may constitute a sufficiently related interest for purposes of the right to intervene statute.” *Id.*, ¶74. The private-school stakeholders make even weaker showings; their interests simply are not sufficiently related to this lawsuit to support intervention as of right.

**B. Disposition of this action will not impair the private-school stakeholders’ ability to protect their interests.**

The private-school stakeholders fare no better on the next requirement. Recognizing that their interests in this lawsuit are indirect at best, they repeatedly distort the Complaint in an effort to present this case as being uniquely focused on their particular interests, rather than its actual subject. This is inaccurate, improper, and unavailing.

The Small Group states that this lawsuit is only “[o]stensibly” about public schools and insists that vouchers are also a “target in the Plaintiffs’ crosshairs.” (Dkt. 76 at 1, 2) But even they acknowledge the inaccuracy of such rhetoric, as shown by their reliance on qualifiers like “apparently” and “seems to” to soften their (false) assertions that the lawsuit “implicates” voucher programs. (*Id.* at 7) Indeed, as the Small Group concludes, “when the Wisconsin Supreme Court heard the last constitutional challenge to school choice (*Jackson*), parents were granted intervention to ensure that they had a full and fair opportunity to defend their children’s interests.” (*Id.* at 19) The problem for them is that this case is not a “constitutional challenge to school choice”—which is why their interests are not sufficiently involved and why the lawsuit will not impair their ability to protect those interests.

The Large Group’s papers similarly contort the Complaint. They assert that the lawsuit “alleges that the amount of state funding for education must be increased in an amount to be decided by this Court” and insist that “this Court ha[s] to determine the future existence of school choice in this State” as well as “the amount, structure, and distribution of state funding for public education and for choice and charter schools.” (Dkt. 88 at 1–2) These assertions are just wildly inaccurate. None of this comports with the actual Complaint, which seeks a series of judicial declarations that the current school finance system violates provisions of the Wisconsin Constitution and establishment of a schedule within which *the political branches* can and should address these constitutional shortcomings. (Dkt. 23 at 96–97, ¶¶A–D)

In an effort to make the alleged impairment appear concrete, the Small Group asserts that “if Plaintiffs succeed” in this case, the movants “stand to lose the financial support for their children’s education that they are receiving from the Programs this year as well as the opportunity to continue receiving that support in years to come.” (Dkt. 76 at 12) This is false.<sup>3</sup> As noted above, the Complaint seeks no relief whatsoever regarding vouchers. **None.** The only mentions of vouchers are part and parcel of the Complaint’s historical background explanation of how Wisconsin’s school

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<sup>3</sup> In an effort to substantiate their “direct” interest as “beneficiaries” of programs purportedly threatened here (Dkt. 76 at 13), the Small Group cites an unpublished, per curiam decision, *Friends of Scott Walker v. Brennan*, No. 2012AP32-AC (Ct. App. Feb. 3, 2012) (cited in Dkt. 76 at 13, 15, 16). The Small Group also cites, at page 18, another unpublished, per curiam decision, *Watton v. City of Eau Claire Housing Auth.*, No. 2013AP2466 (Ct. App. July 29, 2014). Such citations are improper, and Plaintiffs bear no obligation to address the cases. Wis. Stat. § (Rule) 809.23(3)(b). By “repeatedly cit[ing] to an unpublished decision as support,” an attorney “blatantly fails to conform to the rules of this court.” *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶12 n.3, 305 Wis. 2d 658, 741 N.W.2d 256 (citing *Tamminen v. Aetna Cas. & Sur. Co.*, 109 Wis. 2d 536, 563–64, 327 N.W.2d 55 (1982)).

finance system has developed and currently operates. Acknowledging this aspect of the system's evolution is not an attack on vouchers but an essential piece of providing this Court with complete and accurate context. Its inclusion **does not** put voucher schools at issue or constitute a legal challenge to them.

Nor is it true, as the Large Group asserts, that Plaintiffs “seek a novel holding of law and a novel result.” (Dkt. 88 at 14) Movants are attempting to capitalize on a note in *Helgeland* that “[t]he effect of *stare decisis* is more significant when a court decides a question of first impression.” 2008 WI 9, ¶81. But this case is not about first impression so much as enforcing the holdings of *Vincent v. Voight*, 2000 WI 93, 236 Wis. 2d 588, 614 N.W.2d 388. Moreover, the private-school stakeholders ignore *Helgeland's* observation that a “movant’s ability to meet the impairment requirement is weakened to the extent that any future action against the movant is likely to be factually distinguishable from the action into which the movant seeks to intervene.” 2008 WI 9, ¶80. Any claim brought by, for, or against the voucher programs on which the private-school stakeholders’ interests center would absolutely “be factually distinguishable” from this case; such a claim would bear almost no similarity, factually or legally, to Plaintiffs’ claims here. This underscores that Plaintiffs’ Complaint will not “as a practical matter impair or impede the movant’s ability to protect [their asserted] interest.” *Id.*, ¶38.

In the absence of any practical impairment, the private-school stakeholders fail to meet the impairment requirement.

**C. The private-school stakeholders' interests are adequately represented by the Legislature's participation as a defendant.**

Even if the private-school stakeholders articulated sufficient interests that were impaired here, those interests would be properly represented by named Defendants. “In determining whether an existing party adequately represents a movant’s interest, [courts] look to see if there is a showing of collusion between the representative and the opposing party; if the representative fails in the fulfillment of his duty; or if the representative’s interest is adverse to that of the proposed intervenor.” *Id.*, ¶87 (cited sources omitted). Beyond that, the court “must also consider” each of “two rebuttable presumptions”:

First, courts typically presume adequate representation when a movant and an existing party have the same ultimate objective in the action. Second, 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 whether the would-be intervenor is a citizen or subdivision of the governmental entity. If either presumption applies, a more “compelling showing” of inadequate representation may be required.

*Braun*, 2024 WI App 42, ¶26 (cleaned up; quoting *Helgeland*, 2008 WI 9, ¶¶86–91).

The private-school stakeholders make no effort to meet the threshold test for inadequacy. They do not suggest, much less make a “showing of collusion.” *Helgeland*, 2008 WI 9, ¶87. Indeed, most Defendants filed an extensive motion to dismiss the Complaint (Dkt. 84–85), which strongly undercuts any notion that they are in cahoots with Plaintiffs. For the same reasons, the would-be intervenors do not, and cannot, assert that Defendants are “fail[ing] in the fulfillment of [their] duty.” *Helgeland*, 2008 WI 9, ¶87. Even worse for them, they cannot show that Defendants’ “interest is

adverse to” theirs. *Id.* They do suggest that their interests do not fully coincide, but that is not the legal standard. *Braun*, 2024 WI App 42, ¶28 (“[W]hile Vote.org asserts that an adverse outcome will have a greater impact on it than on the WEC ..., this is insufficient to establish that the WEC’s interest is actually adverse to its own.”).

Looking beyond the threshold considerations, the presumptions are fatal to the private-school stakeholders. Here, they and most Defendants seek the same outcome—that Plaintiffs’ lawsuit fail. Of the affirmative defenses the private-school stakeholders assert, the relevant ones are already addressed in the motion to dismiss filed by a majority of the Defendants. (*Compare* Dkt. 75 at 129 and Dkt. 83 at 33–34 *with* Dkt. 84 at 4.) The private-school stakeholders raise no claims of their own and seek no relief. They simply oppose Plaintiffs’ prayer for relief. As do most Defendants. They and most Defendants “have the same ultimate objective in the action.” *Braun*, 2024 WI App 42, ¶26 (quoting *Helgeland*, 2008 WI 9, ¶90).

The second presumption also applies. The Wisconsin State Assembly and the Wisconsin State Senate are both named Defendants. Because each is a “body ... charged by law with representing the interests of” all Wisconsinites, including the private-school stakeholders, “a presumption of adequate representation” applies. *Id.* (quoting *Helgeland*, 2008 WI 9, ¶91). This is established by our constitution, which vests the lawmaking power in the Legislature. Wis. Const. art. IV, § 1. And it has been repeatedly recognized by our courts. *See, e.g., Helgeland*, 2006 WI App 216, ¶10 (“[T]here is no doubt that the Legislature is entrusted with setting public policy for the state.”); *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 186, 290 N.W.2d 276

(1980) (“[T]he determination of what public policy best serves the people of the state remains a legislative question.”).<sup>4</sup>

*Braun* teaches that where, as here, the presumptions apply, they “magnif[y]” ‘the presumption of adequate representation.’ 2024 WI App 42, ¶34 (quoting *Rise, Inc. v. Wis. Elections Comm’n*, No. 2022AP1838, ¶¶31–44, 995 N.W.2d 500 (Ct. App. July 7, 2023) (unpublished, authored decision)).<sup>5</sup> Overcoming this “magnified” presumption requires “a more compelling showing of inadequate representation.” *Id.*, ¶26 (internal quotation marks omitted). The private-school stakeholders fail even to offer such a “more compelling showing.” The Small Group relies entirely on *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999) (which *Braun* holds cannot suffice because it did not address the presumptions and the heightened showing they require, see 2024 WI App 42, ¶31), on the unusable *Friends of Scott Walker* case (see note 3, *supra*), and on a variety of inapposite case law from other jurisdictions. (Dkt. 76 at 12–17) The Large Group offers nothing other than a naked denial, without any explanation or citation, that the Legislature represents them and the assertion that similarly situated intervenors have participated in materially distinguishable litigation in other states. (Dkt. 88 at 15–17)

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<sup>4</sup> The Small Group speculates that the composition of the Assembly and the Senate may change during the pendency of this litigation and further extrapolates that, in that event, those parties could alter their litigation positions. (Dkt. 76 at 14–15) The speculative and unknowable nature of this perspective renders it inapposite. Besides, that is true in almost all litigation involving state bodies, agencies, or officers, and it is not grounds for circumventing Wisconsin’s established intervention rules. Rather than speculate wildly in an effort to evade the rules, would-be intervenors should instead return to court if and when circumstances materially change in ways that allow them to meet the intervention standard.

<sup>5</sup> In accord with Wis. Stat. § (Rule) 809.23(3)(c), a copy of the *Rise* opinion is attached to this brief as Exhibit A.

On top of having no sufficient interests and failing to show that those interests will be practically impaired by this litigation, the private-school stakeholders also cannot show a lack of adequate representation. Of the four requirements for intervention as of right, they satisfy only the first, timeliness. Their request to intervene as a matter of right under Wis. Stat. § 803.09(1) must be denied.

## **II. The Parents/Taxpayers Do Not Satisfy the Requirements for Intervention as of Right.**

For similar reasons, the parents/taxpayers within the Large Group also do not merit intervention as of right. (*See* Dkt. 88 (filed on behalf of, inter alia, five private-school parents and three public-school parents, the “parents/taxpayers”).)<sup>6</sup>

*First*, those parents do not have a sufficiently direct interest in this litigation.

Here are various ways the parents/taxpayers explain their interest:

- They “support the existing laws that govern funding for public schools and funding for choice schools and will defend them as constitutional.” (*Id.* at 3)
- “They believe that changing the existing laws through the courts will result in a worse (not better) system than the system that exists today.” (*Id.*)
- “They believe that parents should have a choice between their local public school and a school in one of the choice programs.” (*Id.* at 4)
- They “believe that simply spending more money on public schools will not solve any existing problems that exist in public education, but rather schools that are not doing an effective job need better leadership, better teachers, different curriculum, different rules and more parental involvement.” (*Id.*)
- “They believe that the problems that exist at individual schools are best solved by an active citizenry, local leaders, the Superintendent of Public

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<sup>6</sup> While all members of the Small Group are also parents and taxpayers, their filings do not articulate these interests in the way that the Large Group’s filings do.

Instruction (as the constitutional officer responsible for supervising public education in Wisconsin) and the Legislature, and not by a court.” (*Id.* at 4–5)

- “[T]heir interest as taxpayers and parents of children currently in Wisconsin schools are the exact opposite of ... Plaintiffs in this action.” (*Id.* at 5)
- They “want control of their schools and school districts through the democratic process of local and state elections.” (*Id.*)
- They “want to maintain the system of revenue limits and related laws that control excessive spending by school districts.” (*Id.*)
- They “are interested in a result that does not take and spend their tax dollars in ways that are not approved by the Legislature and not required under the Wisconsin Constitution.” (*Id.* at 11)
- “[T]hey have an interest in making sure that their school districts obtain the best possible result under the state funding laws.” (*Id.*)
- “[T]hey are interested in improving low performing school districts but in meaningful ways.” (*Id.* at 12)

The parents/taxpayers insist that their interests are unique: “no other party in this case has the same interests.” (*Id.* at 5) And they present themselves as “similarly situated” to the individual Plaintiffs: “The only difference is that ... [they] are seeking to intervene to advocate for precisely the opposite result.” (*Id.* at 11) But they also assert that, as taxpayers, they are independent voices with “different interests than” individual Plaintiffs, whom they label, without evidence, as “represent[atives]” of “the educational establishment.” (*Id.* at 12) At times they paint themselves as necessary parties, who cannot be excluded from this case, while at other moments they suggest they are mere stand-ins and that the case cannot be adjudicated without individual stakeholders from every one of Wisconsin’s 421 school districts. (*Id.* at 11–12) They provide no authority in support of either position.

Whatever the parents/taxpayers' scattershot approach may add up to, it does not meet the standard for intervention as of right. The parents/taxpayers seeking to inject themselves here have no interests distinct from those of *all* Wisconsin taxpayers who are stakeholders in their local school districts. Without "any legally protectable interest in enforcing the challenged statute that differs from the public at large," intervention as of right is not available. Order at 2–3, *Planned Parenthood of Wis. v. Urmanski*, No. 2024AP330 (Wis. July 2, 2024).<sup>7</sup>

**Second**, a generalized interest is inconsistent with intervention as of right, which requires "some sense in which the interest 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*, 2000 WI 39, ¶11 n.9). The parents/taxpayers cannot meet that standard, because they do not stand to "either gain or lose by direct operation of the judgment" sought here. *Id.* Should Plaintiffs prevail upon this Court to declare Wisconsin's current school finance system unconstitutional, that will lead to change; but the judgment itself will not accomplish that change, which will require intervening action by the Legislature. It follows that "direct operation of the judgment" will not cause the parents/taxpayers to "gain or lose" at all. *Id.* None of the various interests the parents/taxpayers throw at the wall is sufficiently related to this action, nor can they show "that disposition of the action" will "as a practical matter impair or impede [their] ability to protect" any interest. *Id.*, ¶38.

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<sup>7</sup> A copy of this order is attached to this brief as Exhibit B.

*Third*, the various interests that the parents/taxpayers articulate are all adequately represented by existing Defendants. The parents/taxpayers assert in a conclusory manner that “Defendants sued in their capacities as legislators do not have the[] same interests.” (Dkt. 88 at 12) But that is contrary to law. The sundry interests the parents/taxpayers claim share one common thread: they are all about wanting to influence public policy about Wisconsin’s K–12 education programs— which government actors exercise control, how tax money is allocated, and the design of Wisconsin’s school finance system. (*Id.* at 3–5, 11–12) These issues of public policy are constitutionally entrusted to the Legislature, *see, e.g., Helgeland*, 2006 WI App 216, ¶10; *Mulder*, 95 Wis. 2d at 186, both chambers and the leadership of which are already Defendants participating in this case. The parents/taxpayers aver that no legislators “are charged with defending the interests of [] taxpayers [and] parents.” (Dkt. 88 at 16) This is likely a surprise to Defendants, who are elected to represent their constituents, taxpayers and parents included, and it would certainly be a surprise to the framers of the Wisconsin Constitution, who expressly prescribed the following formula to introduce every law: “The people of the state of Wisconsin, **represented in senate and assembly**, do enact as follows.” Wis. Const. art. IV, § 17(1) (emphasis added).<sup>8</sup>

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<sup>8</sup> The parents/taxpayers also complain that Defendants “are being separately represented in this action based on their political affiliations.” (Dkt. 88 at 15–16) It is far from clear what relevance this has here, and the parents/taxpayers have offered no authority for the proposition that intervention as of right turns on whether the would-be intervenors approve of the lawyers the original parties have chosen to retain.

As with the collective group of private-school stakeholders discussed above, the parents/taxpayers fail to show inadequate representation. The parents/taxpayers have made no showing of collusion among the existing parties, have alleged no failure of duty by the Assembly and the Senate, and have no adversity with the Assembly and the Senate (as demonstrated by those Defendants' motion to dismiss). *Helgeland*, 2008 WI 9, ¶87. This means that, as a matter of law, the Assembly and the Senate adequately represent the parents/taxpayers' interests.

Furthermore, both presumptions against inadequate representation apply here. For one, the parents/taxpayers seek dismissal of this lawsuit or, in the alternative, failure on the merits (*see* Dkt. 83, ¶199 and at 33–34), and most Defendants seek the same ultimate objective here (*see* Dkt. 84–85). For the other, the Assembly and the Senate are charged by law with representing all Wisconsinites, including the parents/taxpayers. The parents/taxpayers fail to make any heightened showing to overcome these presumptions.

At bottom, the parents/taxpayers rely primarily on non-Wisconsin cases in which they assert that “a variety of proposed parties have been allowed to intervene.” (Dkt. 88 at 16) Those cases shed no light on Wisconsin's intervention law, and several of them are wholly irrelevant:

- In the Texas case (cited in Dkt. 88 at 16–17), individuals intervened as plaintiffs to raise novel constitutional claims as alternative grounds for relief. *See Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 840 (Tex. 2016). That in no way suggests that the parents/taxpayers get to intervene as defendants here to echo arguments already being made.
- In the Arkansas and Washington cases (both cited in Dkt. 88 at 17), intervention was granted in lawsuits directly challenging school-choice

statutes. *See Lara v. Faulkenberry*, 725 S.W.3d 26, 28–30 (Ark. 2025); *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1135 (Wash. 2015).<sup>9</sup> These cases materially differ from this case, which does not include a challenge to Wisconsin’s school choice programs.

- In the Wyoming and North Carolina cases (both cited in Dkt. 88 at 17), school districts—not individuals—were granted intervention. In Wyoming, after several school districts brought suit, other school districts were permitted to intervene, one as an additional plaintiff and several others as defendants. *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1244 (Wyo. 1995). In North Carolina, when a state agency approved a virtual charter school, the School Boards Association and 89 school districts that stood to lose funding were granted intervention. *N. Car. State Bd. of Educ. v. N. Carolina Learns, Inc.*, 751 S.E.2d 625, 628, 631–33 (N.C. 2013). These cases provide no support to the parents/taxpayers here.

The parents/taxpayers have no sound basis to suggest their interests are not adequately represented, much less a basis to make the more compelling showing necessary to overcome contrary presumptions imposed by law. Like the private-school stakeholders, they satisfy only the first requirement for intervention as of right. Their request to intervene as a matter of right under Wis. Stat. § 803.09(1) must be denied.

### **III. None of the Movants Should Be Granted Permissive Intervention.**

As was true in considering intervention as of right, the movants here satisfy only the timeliness requirement and fail the others with respect to permissive intervention at this Court’s discretion.

Other than basic points of justiciability, which Defendants have already argued (*see* Dkt. 85 at i–ii), they fail to raise any “claim or defense” turning on “a

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<sup>9</sup> In summarizing the Washington case, the parents/taxpayers assert that “six charter school supporters were granted intervenor status.” (Dkt. 88 at 17) This is both true and misleading. Four of those supporters were organizational entities, one was the legislator who sponsored the challenged statute, and only one was granted intervention on the basis of their status as a charter-school parent. *League of Women Voters of Wash.*, 355 P.3d at 1135 n.6.

question of law or fact in common” with “the main action.” Wis. Stat. § 803.09(2). This is fatal, as our Supreme Court has denied permissive intervention where movants “have not identified any specific ‘claim or defense’ that they possess,” observing that “[m]erely propounding a general position on a topic of debate in society, lobbying for that position, or wishing to make legal arguments consistent with that position does not give [movants] a legal claim or defense that is sufficient to support permissive intervention.” *Planned Parenthood of Wis.*, Order at 3 (attached as Exh. B).

Here, the Small Group explains that they seek to address “the constitutionality of [voucher p]rograms under Wisconsin law.” (Dkt. 76 at 17) But, as discussed above, that is not a question at issue here.<sup>10</sup> The Large Group also relies on voucher issues, before adding that “they seek to ensure that this litigation does not ... improperly impact taxpayers, or harm the schools where the Parent Intervenors send their children.” (Dkt. 88 at 18) This rationale ignores the provinces of both legislative Defendants and the Wisconsin judiciary, who are charged with ensuring, and will ensure, that the outcome of this case will not “improperly” impair anyone’s rights. The reality is that the would-be intervenors’ motions do not contest any material allegation or legal premise in the Complaint. Instead, they raise distinct issues of law and fact and seek to ascribe them to the Complaint, solely through bare assertions.

Moreover, their intervention would “unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § 803.09(2). Their primary rationale

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<sup>10</sup> The sole precedent they cite for the proposition that this articulation can “satisfy the standard for permissive intervention” (Dkt. 76 at 18) is the unpublished, per curiam Court of Appeals decision in *Watton v. City of Eau Claire Housing Authority*, which cannot be cited in Wisconsin courts. See note 3, *supra*.

for intervention is to rewrite the Complaint and hijack this lawsuit to litigate issues of their choosing that are not otherwise alleged. Movants seek to interject the constitutionality of the voucher system as an additional issue in the case. The Large Group lays out in considerable detail the assertions they seek to establish in so doing. (Dkt. 88 at 12–13) What could conceivably cause more delay and prejudice? While the movants promise to proceed expeditiously, their irrelevant arguments about vouchers and claims duplicative to the motion to dismiss belie this assertion. The resulting inefficiency would impose both undue delay and prejudice.

And, even if the Court determines that the movants do somehow satisfy the prerequisites for permissive intervention, all that does is make them eligible for this Court's exercise of discretion. Wisconsin appellate courts "will not disturb a circuit court's discretionary decision so long as the record reflects 'the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case.'" *Helgeland*, 2008 WI 9, ¶120 (quoting *State v. Delgado*, 223 Wis. 2d 270, 281, 588 N.W.2d 1 (1999)). Such discretion should not be exercised here to allow intervention. The Large Group does not even offer an argument in favor of discretion. (See Dkt. 88 at 18–19.) The Small Group feints toward such an argument (Dkt. 76 at 18–19) but instead recycles material already addressed. The best they can muster is a promise to "provide a more complete understanding and defense of [voucher p]rograms and their constitutionality under Wisconsin law." (*Id.* at 18) They back this up with a string cite to cases where their lawyers serve "as lead counsel in the defense of educational choice programs in multiple states." (*Id.*) None of this weighs in their

favor, given that they are pledging to introduce information and arguments that are not relevant to this case, which is not about school choice.

**IV. Denying the Motions Here Leaves Open the Possibility that Movants Can Participate in this Litigation as *Amici Curiae*.**

“Denying intervention to become a party does not mean that the Proposed Intervenors are without any ability to submit their arguments to this court.” *Planned Parenthood of Wis.*, Order at 3 (attached as Exh. B). To the extent that they demonstrate “special knowledge and experience” about a subject actually at issue, *id.*, the movants may move this Court, or any appellate court that may review this Court’s judgment, for leave to submit a non-party brief, Wis. Stat. § (Rule) 809.19(7).

**CONCLUSION**

For the foregoing reasons, both pending motions for intervention as Defendants (Dkt. 75 and 87) should be denied.

May 5, 2026.

Respectfully submitted,

*/s/ Electronically signed by Jeffrey A. Mandell*

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# EXHIBIT A

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Unpublished Disposition

See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.

Court of Appeals of Wisconsin.

RISE, INC. and Jason Rivera, Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, Defendant-Respondent,  
Maribeth Witzel-Behl, Defendant,  
Wisconsin State Legislature, Intervenor,  
Michael White and Eva White,  
Proposed-Intervenors-Appellants.

Appeal No. 2022AP1838

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July 7, 2023

APPEAL from an order of the circuit court for Dane County, Cir. Ct. No. 2022CV2446: JUAN B. COLÁS, Judge. *Affirmed.*

Before Blanchard, P.J., Kloppenburg, and Graham, JJ.

**Opinion**

BLANCHARD, J.

**\*\*1** ¶1 This an appeal from a special proceeding involving a request for intervention.<sup>1</sup> Michael White and Eva White appeal the denial by the Dane County circuit court of their motion to intervene in a suit brought by nonprofit Rise, Inc. and Jason Rivera (“Rise”) against the Wisconsin Elections Commission and the City of Madison clerk.

<sup>1</sup> A motion to intervene initiates a special proceeding and a circuit court order denying intervention is a final order in that proceeding, providing a basis for appeal regardless of the status of the underlying action that the movant seeks to join as

an intervenor. *See Wengerd v. Rinehart*, 114 Wis. 2d 575, 582, 338 N.W.2d 861 (Ct. App. 1983).

¶2 In the underlying case, Rise seeks a declaratory judgment regarding one issue of statutory interpretation: the correct definition of “the address of a witness” that is required to be included in the witness certification accompanying absentee ballots in a Wisconsin election.

¶3 We conclude that the circuit court correctly applied WIS. STAT. § 803.09(1) (2020-21) to deny the Whites intervention as of right because they fail to overcome multiple presumptions that existing parties in the case will adequately represent the Whites’ interests.<sup>2</sup> We also conclude that the court did not erroneously exercise its discretion in denying the Whites permissive intervention under § 803.09(2). Accordingly we affirm the order denying the Whites’ motion to intervene in its entirety.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

**BACKGROUND**

¶4 The following is pertinent legal context. An elector’s completion of an absentee ballot must be witnessed and, as proof of that, an envelope containing a ballot is required to contain a written certification by a witness. WIS. STAT. § 6.87(2), (4)(b)1. The required witness certification must include the witness’s address. *Id.* In 2015 Wisconsin Act 261, the legislature enacted § 6.87(6d), which provides that a witness certification that “is missing the address of a witness” “may not be counted.” Neither § 6.87(2) nor § 6.87(6d) defines the word “address.” Regarding permitted activities of clerks in this context, § 6.87(9) provides in pertinent part, “[i]f a municipal clerk receives an absentee ballot with an improperly completed [witness] certificate or with no certificate, the clerk may return the ballot to the elector ... whenever time permits the elector to correct the defect and return the ballot.”

¶5 In October 2016 the Commission, responding to the enactment of WIS. STAT. § 6.87(6d), sent guidance to local clerks statewide that contained two positions pertinent to the arguments made by the parties in this appeal. First, the “address” on the witness certification must include the following information: street number, street name, and municipality name. Second, local clerks were to “take corrective actions in an attempt to remedy a witness address

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error.” Options for corrective actions included making corrections to a witness address directly on the certificate envelope, so long as the clerk was “reasonably able to discern” “from outside sources” the content of “any missing information.” For example, the guidance provided, a clerk could use “lists or databases at his or her disposal to determine the witness’s address.” Other options to attempt to complete an address included directly contacting voters and “offer[ing] suggestions for correcting the certificate envelope to ensure the voter’s absentee ballot will not be rejected.”

**\*\*2 ¶6** One of the Whites’ arguments for intervention in the Dane County case rests on the outcome of a separate legal action that the Whites and others successfully pursued against the Commission in the Waukesha County circuit court. The Waukesha case involved the options clerks have under the law to correct address information on witness certifications. The Waukesha County case was resolved before the Whites moved to intervene in the Dane County case. We now summarize the Waukesha County case.

¶7 The Whites’ position in the Waukesha County case was that the aspect of the Commission’s guidance that called for clerks to use various options to attempt to complete witness certifications violated the intent of pertinent Wisconsin statutes. *White v. WEC*, Waukesha Cnty. No. 2022CV1008, Compl. (Waukesha Cnty. Cir. Ct. July 12, 2022). As the Waukesha County circuit court explained in addressing the parties’ arguments, the issue was “whether Wisconsin law authorizes clerks to insert address information in the witness certification on an absentee ballot and, if not, whether the guidance [that the Commission] provides mandating such actions can be tolerated.” *Id.* (hearing held Sept. 7, 2022)

¶8 The Waukesha County circuit court agreed with the Whites and the other plaintiffs, entering an order enjoining the Commission from disseminating the following guidance: (1) clerks “can add information to absentee ballot witness certifications in any form,” (2) clerks may take actions contrary to the terms of WIS. STAT. § 6.87(9), quoted in pertinent part above; or (3) clerks “have the duty or ability to modify or add information to incomplete absentee ballot certifications.” *White*, No. 2022CV1008 (order issued Oct. 3, 2022). The order granting final judgment states that it “applies to portions” of the Commission’s guidance “that contain[ ] or indicate[ ] that municipal clerks or local election officials can modify or add information to absentee ballot certifications.” *Id.* The order also states: “Nothing herein is intended, nor shall be construed, to enjoin [the Commission] from issuing or

distributing its guidance regarding the definition of ‘address’ as used in WIS. STAT. § 6.87.” *White*, No. 2022CV1008 (order issued Oct. 3, 2022).

¶9 No party appealed the final order of the Waukesha County circuit court.

¶10 Shortly after the Waukesha County circuit court made its oral ruling and shortly before the court entered its final order, Rise initiated the Dane County case underlying the special proceeding here, naming as defendants the Commission and the Madison clerk. Rise does not challenge the ruling in the Waukesha County case involving how witness certifications may or may not be corrected or completed by clerks or others. Instead, the Dane County case is about the correct definition of the phrase “the address of a witness” in WIS. STAT. § 6.87(6d) and related statutory references. More specifically, Rise seeks a declaratory judgment (and matching injunctive relief) containing the following closely related propositions: that “address” in this context means “a place where a witness may be communicated with”; that certifications “that include portions of a witness’s address are sufficient under WIS. STAT. § 6.87(2) if a local clerk can reasonably discern where a witness may be communicated with”; and that “[a]n otherwise valid ballot from which a local clerk can reasonably discern where a witness may be communicated with is properly completed for purposes of WIS. STAT. § 6.87(9).”

**\*\*3 ¶11** The Wisconsin State Legislature and the Whites filed motions to intervene as defendants in the Dane County case. The Commission (represented by the state Department of Justice) opposed intervention by the Whites, but it did not oppose intervention by the Legislature. The circuit court granted the Legislature permissive intervention based on WIS. STAT. § 803.09(2), without deciding whether it could intervene as of right under § 803.09(1).<sup>3</sup>

3 The Legislature also argued that it is entitled to intervene under WIS. STAT. § 803.09(2m), but the circuit court did not address that separate ground.

¶12 After considering the arguments of the parties, the circuit court in a written order denied the Whites’ motion for intervention, either as of right or on a permissive basis. The Whites appeal that order. No party raises an issue about intervention by the Legislature in the Dane County case. The city clerk is not a party to this appeal. Our review is limited to the challenged intervention rulings of the circuit court in

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the special proceeding denying the Whites's motion and we do not consider subsequent events in the Dane County case.

## DISCUSSION

### I. Intervention of Right

#### A. Legal standards

¶13 We review de novo a circuit court order addressing a motion to intervene as of right under WIS. STAT. § 803.09(1). *Helgeland v. Wisconsin Muns.*, 2008 WI 9, ¶41, 307 Wis. 2d 1, 745 N.W.2d 1.

¶14 WISCONSIN STAT. § 803.09(1) provides:

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.

¶15 Our supreme court has explained that this requires that the movant show that four criteria are met: (1) the movant made a timely application; (2) the movant has an interest relating to the subject of the action; (3) disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) the movant's interest is not adequately represented by existing parties. *Helgeland*, 307 Wis. 2d 1, ¶¶38-39. While a “movant must meet” each of the four criteria, the criteria “need not be analyzed in isolation from one another, and a movant's strong showing with respect to one [criterion] may contribute to the movant's ability to meet” others. *Id.*, ¶39 (footnotes omitted).

¶16 The *Helgeland* court explained further how the four criteria are to be considered:

The analysis is holistic, flexible, and highly fact-specific. A court must look at the facts and circumstances of each

case “against the background of the policies underlying the intervention rule.” A court is mindful that WIS. STAT. § 803.09(1) “attempts to strike a balance between two conflicting public policies.” On the one hand, “[t]he original parties to a lawsuit should be allowed to conduct and conclude their own lawsuit....” On the other hand, “persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies.”

*Id.*, ¶40 (footnotes omitted).

#### B. Analysis

##### 1. Timely application.

¶17 The first criterion is not disputed; the intervention motion was timely filed.

##### 2. Interest related to the subject of the litigation.

\*\*4 ¶18 The second criterion which the Whites must meet is that they have an interest that is sufficiently related to the subject of the Dane County case.<sup>4</sup> We note that the identification of a movant's asserted related interest will affect the analysis of the third and fourth criteria as well, because all three of these criteria are defined in part by the movant's asserted interest.

<sup>4</sup> For ease of discussion, we sometimes speak in terms of a single related “interest,” but of course a movant may attempt to identify multiple interests. As will be seen, the Whites argue that they have two interests related to the subject of the Dane County case that support intervention as of right.

¶19 We now explain why we reject Whites’ arguments as to the first of the two related interests they assert and why we question whether the Whites have fully developed an argument as to the second related interest. In the interest of judicial efficiency, however, we assume without deciding that the Whites’ second asserted related interest satisfies the second criterion.

¶20 In addressing the related-interest criterion, courts “employ a ‘broad[ ] , pragmatic approach,’ ” under which “ ‘the interest sufficient to allow the intervention’ ” is to be viewed “ ‘practically rather than technically.’ ” *Helgeland*,

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307 Wis. 2d 1, ¶43 (quoted source omitted). Courts primarily employ this criterion as “ ‘a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’ ” *Id.*, ¶44 (quoted source omitted).

¶21 At the same time, it weighs against intervention as of right when the movant's asserted interest “is only remotely related to the subject of the action.” *Id.*, ¶45 (quoted source omitted). “There must be some sense in which the interest is ‘of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment’ ” sought in the underlying action. *Id.* (quoted sources omitted). Further, a movant must identify a need “ ‘to protect a right that would not otherwise be protected in the litigation.’ ” *Id.* (quoted source omitted). We note that, in making these statements, our supreme court has interpreted WIS. STAT. § 803.09(1) to require that “the subject of the action” be closely tied to particular relief that existing parties and potential intervenors seek to obtain or to prevent in the underlying action.

¶22 The Whites argue that they have two interests that count in favor of intervention as of right because they are sufficiently related to the subject of the Dane County case: “preserving the ‘functional result’ of the relief [the Whites] obtained” in the Waukesha County case; and “preserving [the Whites’] right to vote in a lawful election,” without having “unlawful absentee votes” “dilute” their lawful votes.<sup>5</sup>

<sup>5</sup> The Whites attempt to draw a distinction between those Wisconsin electors who use absentee ballots and those who vote in person at a polling place on election days. They apparently intend to suggest, albeit obliquely, that they have a special interest for purposes of intervention based on their assertion that they personally always vote in person. We fail to see what this distinction between lawful in-person voters and lawful absentee voters could add to a proper analysis, even when one assumes some potential validity to their vote-dilution theory that we discuss in the text below.

**\*\*5** ¶23 There is no merit to the Whites’ asserted interest in preserving the relief they obtained in the Waukesha County case. They argue that Rise, in the Dane County case, “collateral[ly] attacks” the order in the Waukesha County case enjoining the Commission regarding what information clerks can add to witness certifications. In the same vein, in the special proceeding before the Dane County court the

Whites contended that the relief sought by Rise in the Dane County case is “a competing injunction” to the relief that they obtained in the Waukesha County case. But, as the Waukesha County court expressly recognized, there is no competition whatsoever. The Waukesha court explained that it did not resolve the definition of “address” in this context, which is the only issue in the Dane County case. Indeed, as summarized above, the Waukesha County court identified the address-definition topic as falling outside the scope of its rulings. The Whites now attempt to label as merely “technical” the distinction between the issue of whether clerks can add information to certifications and the issue of what counts as an “address” on a valid certification. But the distinction is self-evident and complete. The Whites fail to identify a result of the Waukesha County case that they could hope to “preserve” through advocacy in the Dane County case.

¶24 On this issue, the Whites argue that both the Waukesha County case and the Dane County case address an “identical” question: “what does a witness need to write in the address line so that [the Commission] will accept the certification?” But that is the issue in the Dane County case only; it was not the issue in the Waukesha County case. The Waukesha litigation was entirely about whether and how clerks could modify certifications.

¶25 Both the Whites and the Legislature, in an amicus brief filed on appeal, direct us to opinions offered by Rise in its complaint in the Dane County case that confusion could result among electors who are “not aware of the Waukesha court's decision” and that the relief Rise requests in the Dane County case would “restore the functional result of” the Commission's guidance. But these are simply opinions of Rise that it offers for context and do not represent a challenge to the results of the Waukesha County case.

¶26 For these reasons, the circuit court in this special proceeding correctly ruled that “preserving the relief the Whites won in the Waukesha [County] case is not a basis for intervention by right or by leave.”

¶27 Turning to the Whites’ dilution theory of related interest, the Whites provide thin legal support for this theory. We question whether the Whites have articulated a clear theory of vote dilution that fits this context. As best we can discern, the theory seems to be that accepting Rise's definition of “address” for absentee voter witnesses would, through some means left unexplained by the Whites, dilute lawfully cast votes with a greater number of unlawfully cast votes. There is

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some appeal in the Commission's argument that this “theory of harm through vote dilution does not amount to an actual, concrete injury that gives them a justiciable stake in” the Dane County case. We also note that the Whites fail to provide clear legal authority to support the vote-dilution theory.<sup>6</sup>

<sup>6</sup> We ignore positions taken by the Whites on this issue that are based on two different forms of improper citations to case law. We also remind counsel for the Whites of their obligations to properly cite to and discuss legal authorities. First, on this issue the Whites rely extensively on a per curiam opinion of this court—putting aside the second per curiam opinion of this court that they separately cite on a different issue, *see infra* n.8. Of course, this violates WIS. STAT. RULE 809.23(3) (a), which provides that such opinions may not be cited in any court of this state as precedent or authority, except in limited circumstances that are not present here. Second, in their opening brief the Whites rely on one paragraph in the lead opinion in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, ¶25, 403 Wis. 2d 607, 976 N.W.2d 519, discussing a theory of “vote pollution” in the context of a standing issue, as if this paragraph has precedential value. However, that paragraph of the lead opinion does not have precedential value because no four justices in that fractured opinion expressed agreement with any point made in that paragraph. *Compare id.*, ¶¶16-18, 25, 32-36 (lead op.) with *id.*, ¶¶149 n.1, 159, 165-67 (Hagedorn, J., concurring); *see also State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (“A general principle of appellate practice is that a majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court.”). After the Commission on appeal makes and supports the point that the Whites’ opening brief improperly fails to present the statements in the lead opinion in proper legal context, the Whites in their reply brief for the first time cite to *different* paragraphs in one of the concurrences to *Teigen* that do not explicitly discuss the theory of “vote pollution.” Not only do those paragraphs not explicitly discuss “vote pollution,” this argument about the *Teigen* concurrence comes too late. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588

N.W.2d 285 (Ct. App. 1998) (we generally ignore arguments raised for the first time in a reply brief). Further, we need not resolve this issue to reach our dispositive conclusion, as explained in the text.

**\*\*6** ¶28 Nevertheless, we assume without deciding that the vote-dilution theory could be a related interest that favors intervention under the required “holistic, flexible, and highly fact-specific” analysis. *See Helgeland*, 307 Wis. 2d 1, ¶40 (footnotes omitted). More specifically, we assume that the Whites show that their asserted interest to avoid dilution of their lawful votes is, as *Helgeland* requires, “ ‘of such direct and immediate character that’ ” the Whites “ ‘will either gain or lose by the direct operation of the judgment’ ” sought by Rise, namely, that a witness's address in this context is a place where a clerk can reasonably discern where a witness may be communicated with. *See id.*, ¶45 (quoted source omitted).

¶29 At the same time, however, as we explain below, even when this asserted interest is assumed to be a related interest that could support intervention, the complete failure of the Whites to show that they are not adequately represented by existing parties is dispositive. This is so in part because the vote-dilution theory as now presented by the Whites is weak. Therefore, the Whites cannot show that their asserted related interest rises to a level of strength that it could save their complete failure to meet their obligation under the fourth criterion to show that their interests are not sufficiently protected by existing parties. *See id.*, ¶39 (“a movant's strong showing with respect to one requirement may contribute to the movant's ability to meet other requirements as well.”).

3. *Disposition may impair or impede ability to protect interest.*

¶30 We take the same approach regarding the third criterion as with the second, which is a closely related consideration. While we question the nature of the second interest asserted by the Whites as they describe it, we assume without deciding that the Whites could show based on the vote-dilution theory that disposition of the Dane County case may as a practical matter impair or impede their ability to protect their asserted interest.

4. *Interest not adequately represented by existing parties.*

¶31 We conclude that the circuit court correctly determined that the Whites are not entitled to intervene as of right because

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the Commission and the Legislature “adequately represent” their asserted interest in avoiding dilution of their votes. The Whites do not overcome multiple presumptions that these two existing parties will adequately represent their asserted interests in resolving the single legal issue in the Dane County case.

¶32 Our supreme court has explained the following regarding the fourth criterion:

We will ordinarily deem a party's representation of a potential intervenor adequate (1) if there is no showing of collusion between the representative and the opposing party; (2) if the representative's interest is not adverse to that of the proposed intervenor; and (3) if the representative does not fail in the fulfillment of its duty. The movant requesting intervention as a matter of right has the burden of establishing inadequate representation. While the burden of proving inadequate representation generally “should be treated as minimal,” ..., this requirement “cannot be treated as so minimal as to write the requirement completely out of the rule.”

*Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, ¶20, 296 Wis. 2d 880, 724 N.W.2d 208 (quoted sources omitted).

¶33 For the following reasons, the Whites do not carry their burden, even though the burden is minimal.

¶34 The Whites fail to show any of the following: collusion between Rise, on the one hand, and either the Commission or the Legislature, on the other hand; that the Whites’ asserted interest, particularly as it could affect the nature of the relief requested by existing parties from the Dane County court, is adverse to that of the Commission or the Legislature; or that the Commission or the Legislature could not or would not fulfill their shared duties to advocate for what those entities view as the correct application of the statutes to the narrow legal issue in the Dane County case. We now expand on some of these points and add others.

\*\*7 ¶35 The Commission points out that, as the Dane County court determined, the positions of the Commission and the Legislature are aligned with the position that the Whites take on the merits of the Dane County case: all advocate that the Dane County court reject the relief sought by Rise and thus maintain as the status quo the Commission's interpretation of “address.” The Whites do not develop a substantive reply.<sup>7</sup> This concedes the point, consistently with

the statement quoted above from *Helgeland*, that ordinarily representation is adequate if the representative's interest in the underlying action is not adverse to that of the proposed intervenor. See *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. Thus, two parties, not just one, are committed to pursuing the same position as the Whites in support of their mutually desired outcome. See *Helgeland*, 307 Wis. 2d 1, ¶90 (“[A]dequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action.”). Notably, the Commission and the Legislature are pursuing this shared goal in a case involving a well-defined issue of statutory interpretation, and the *only* relief that the Whites seek to “gain ... by the direct operation of the judgment” in the Dane County case is already sought by existing parties. *Id.*, ¶45.

7 In an undeveloped argument, the Whites assert that there have been “clear differences in argument, strategy, and goals” between the Legislature and the Whites, but they fail to direct us to record evidence of differences that could matter to the protection of their asserted interest.

¶36 Further, the presumption of adequate representation is magnified here by yet another presumption: the fact that the Commission, as represented by the state department of justice, is “charged by law” with “ ‘acting on behalf of a constituency that it represents’ ” in this area of the law. *Id.*, ¶91 n.81 (quoting *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)). The court in *Helgeland* also cites *Curry v. Regents of the University of Minnesota*, 167 F.3d 420, 423 (8th Cir. 1999), for the proposition that “when a government entity is a party and the case concerns a matter of sovereign interest, the government is presumed adequately to represent the interests of the public.” *Helgeland*, 307 Wis. 2d 1, ¶91 n.81. The Whites do not dispute that both the Commission and the state department of justice are charged by law with the duty of representing the rights of electors so that all may enjoy the benefits of the correct application of the laws governing elections.

¶37 The Whites rely heavily on the result in *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999), but they inaccurately present one statement in *Wolff* and more generally fail to address its specific reasoning.

¶38 In *Wolff*, we determined that a town met the requirements for intervention as of right in a zoning dispute between a county and landowners, even though the town and the county

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were “not wholly adverse parties” and “would offer similar arguments in support of their mutually desired outcome.” *Wolff*, 229 Wis. 2d at 748. In support of its ruling that the town showed that it was not adequately represented by the county, the *Wolff* court cited a federal appeals court opinion, *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967). *Wolff*, 229 Wis. 2d at 748. In *Nuesse*, a state banking commissioner proposed to intervene in an action involving federal and state banking practices and regulations. *Wolff*, 229 Wis. 2d at 748; *Nuesse* at 385 F.2d at 703. In *Wolff*, we noted that the court in *Nuesse* determined that the banking commissioner was “ ‘in a better position [than existing parties] to provide full ventilation of the legal and factual context’ ” of that banking dispute, creating “ ‘a serious possibility’ ” that the commissioner’s interest may not be adequately represented by the existing parties. *Wolff*, 229 Wis. 2d at 748 (quoting *Nuesse*, 385 F.2d at 703). Following the persuasive reasoning in *Nuesse*, we noted that the county and the town in *Wolff* had “significantly different” interests, in multiple respects, which created “a serious possibility” that the county would not adequately represent the town’s interests in the litigation. *Wolff*, 229 Wis. 2d at 748-50 & n.2.

**\*\*8 ¶39** The first problem with the Whites’ argument based on *Wolff* is that they make inaccurate use of one of its passages. They represent in their briefing that the court in *Wolff* stated that representation can be inadequate “even when there ‘would be *no difference* ‘in how the case is *substantively* presented to the Court.’ ” (Emphasis in briefing.) In fact, however, this passage in *Wolff* is the court’s summary of *the position of the party opposing intervention*, and the court goes on to explain why the court questioned that position. *See id.* at 748-50 (explaining reasons for the court to *doubt* that there would be no difference between the substantive presentations of the town and the county).

¶40 Further, and more important, the facts of *Wolff* and of *Nuesse* bear no resemblance to the facts here. The banking commissioner in *Nuesse* was expected to bring special knowledge and expertise to allow “ ‘full ventilation of the legal and factual context’ ” of a case involving national and state banking laws and practices. Similarly, the town in *Wolff* was expected to represent the particular interests of town residents and taxpayers in a zoning dispute that the town could not rely on the county to adequately represent, including the town’s interests in a lawsuit settlement that might be excessive. *See Wolff*, 229 Wis. 2d at 748-50. Here, in contrast, the Dane County case involves a single issue of statutory interpretation, and the Whites fail to identify a category of

knowledge, expertise, or perspective that they would bring that would not be adequately represented by the Commission and the Legislature, given the nature of the issue in the case. That is, “ ‘[f]ull ventilation’ ” of the legal issue here does not require participation by the Whites.

¶41 The Whites make the broad assertion that “the Legislature has obvious political interests that could affect its approach to this case that the Whites do not necessarily share.”<sup>8</sup> But they do not develop an argument from this assertion that affects a proper analysis. In addition, this particular point does not counter the presumption that the Commission will adequately represent their asserted interest.

8 On this issue regarding the fourth criterion, as with the Whites’ discussion of the second criterion, we ignore any argument that is based on their improper citation to two per curiam opinions of this court. *See supra* n.6.

¶42 The Whites suggest that the Commission, because it was a defendant in the Waukesha County case and is also a defendant in the Dane County case, cannot adequately represent their interest in the Dane County case. We have already explained the complete lack of overlap between the two cases, which negates this argument.

¶43 Both the Whites and the Legislature emphasize two broad, unobjectionable propositions: the right of a qualified elector to vote is an individual right, not a collective right; and the Legislature has the perspective of a branch of state government, representing interests that include its legislative authority, while the Commission is, in the words of the Legislature, “an arm of the State.” Based on these general propositions, the Whites and the Legislature assert that the Legislature and the Commission are both incapable of adequately representing the legitimate interests of all individual qualified electors, including the Whites, in the Dane County case. This is a highly abstract, undeveloped argument that is not supported by legal authority cited by either the Whites or the Legislature and is not tied to the standard articulated in *Helgeland*. We reject it on those grounds.

**\*\*9 ¶44** The Whites quote as persuasive authority the statement of a federal appeals court that intervention by individual citizens may be appropriate in the following circumstance: a government agency that is an existing party is “charged by law with representing the public interest of

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its citizens” and would have to “shirk[ ] its duty” to those citizens if it were to advance a “more narrow and ‘parochial’ financial interest [of the proposed intervenor] not shared by” all of the agency’s citizens. *See Fund for Animals Inc. v. Norton*, 322 F.3d 728, 737-38 (D.C. Cir. 2003) (permitting intervention as of right for a ministry of Mongolia in an environmental group’s challenge to U.S. agency’s listing of a particular sheep breed as merely threatened because the Mongolian ministry had a related interest, as the agency responsible for implementing the country’s hunting program for tourists; relief sought by plaintiffs included listing of the breed as endangered in Mongolia, cancellation of existing permits to import trophies, and a ban on new permits). But here there are existing parties who are not adverse in the slightest to the outcome that the Whites seek, which means that the Whites fail to show that, in the words of *Helgeland*, “the representative’s interest is adverse to that of the proposed intervenor.” *See Helgeland*, 307 Wis. 2d 1, ¶87. Unlike the Mongolian ministry’s concerns in *Fund for Animals*—that the executive branch of the U.S. government would permit the court to grant relief that failed to consider, and take into account as appropriate, the Mongolian ministry’s “narrow” and “parochial” concerns regarding management and hunting of that country’s breed of sheep—the Whites here are entirely aligned with the Commission and the Legislature in the Dane County case on the outcome they seek under pertinent statutory interpretation.

## II. Permissive Intervention

### A. Legal standards

¶45 In pertinent part, WIS. STAT. § 803.09(2) provides:

Upon timely motion anyone may be permitted to intervene in an action when a movant’s claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

¶46 We review a decision regarding a motion for permissive intervention under an erroneous exercise of discretion standard. *Helgeland*, 307 Wis. 2d 1, ¶120. A discretionary

decision will be affirmed as long as the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898.

¶47 WISCONSIN STAT. § 803.09(2) requires circuit courts to consider three factors in making its discretionary determination. A person “may,” in the discretion of the court, “be permitted to intervene in an action”:

1. “Upon timely motion”;
2. When “movant’s claim or defense and the main action have a question of law or fact in common”; and
3. After the court “[i]n exercising its discretion” considers “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

*See* WIS. STAT. § 803.09(2); *see also Helgeland*, 307 Wis. 2d 1, ¶120 (“As the text of [ ]§ 803.09(2) itself makes clear, the circuit court has discretion to decide whether a movant may be permitted to intervene when the movant’s claim or defense and the main action have a question of law or fact in common.”); *City of Madison v. WERC*, 2000 WI 39, ¶11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94 (“While intervention as a matter of right requires a person to be necessary to the adjudication of the action, permissive intervention requires a person to be merely a proper party.”). We interpret *Helgeland* and *City of Madison* to construe § 803.09(2) to mean that a circuit court must consider the three factors to determine whether a person is eligible to be considered for permissive intervention, which is then denied or granted in the discretion of the court. We do not interpret the statute, or any statement in *Helgeland* or *City of Madison*, to mean that all persons who meet the three factors must be permitted to intervene.

¶48 Here the Dane County circuit court, in explaining its decision to deny permissive intervention, addressed the three factors and deemed them satisfied: “the Whites[’] claims and defenses are related in law and fact to the main action”; they filed their motion to intervene “at the earliest stage of the proceedings (the time for the named defendants to file an answer has not yet run); and their intervention will not unduly delay or prejudice the litigation of the original action.”

\*\*10 ¶49 Having concluded that the Whites met the three factors, the circuit court then turned to other factors weighing

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against permissive intervention. “[T]he interests of the Whites are not so specific or unique, or inadequately represented, that their intervention is needed to protect their interests, to ensure that the issues presented are fully litigated[,] or to assist the court.” Regarding the adequate representation point, the court determined that the Commission, the city clerk, and the Legislature “adequately represent” the Whites’ asserted dilution interest, in part because the admissions and denials in Whites’ proposed answer and the Legislature’s answer “are substantively the same.” In addition, the “affirmative defenses alleged by the Whites also can be adequately represented [by] the Legislature and by the Elections Commission and Clerk of the City of Madison....”

¶50 We conclude that the circuit court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach in denying permissive intervention. For reasons explained above in addressing intervention as of right, we conclude that the court could reasonably reach the conclusion that the Whites had absolutely nothing of value to add to the Dane County case. In other words, the logic of the court’s ruling was not simply that the Whites failed to meet the fourth criterion of the test under WIS. STAT. § 803.09(1). It is that they came so far from meeting the criterion that nothing beneficial would be accomplished by permitting them to intervene under § 803.09(2). Under this view, which we consider reasonable based on the record and the arguments of the parties, the court exercised its discretion to, in the words of *Helgeland*, “allow[ ] the original parties to [the] lawsuit to conduct and conclude their own lawsuit.” *Helgeland*, 307 Wis. 2d 1, ¶44. The circuit court could reasonably determine that the Whites’ contributions to the proceedings would be completely superfluous and therefore only wasteful of the time and attention of the existing parties and the court.

¶51 For the first time in their reply brief, the Whites argue that, because the circuit court made a determination that intervention by the Whites would “not unduly delay or prejudice the litigation of the original action,” therefore the court could not logically rest on the proposition that the Whites’ contributions to the proceedings would be superfluous and therefore any and all delay resulting from intervention would be wasteful. *See Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982) (“[W]here ... the interests of the applicant in every manner match those of an existing party and the party’s representation is deemed adequate, the district court is well within its discretion in deciding that

the applicant’s contributions to the proceedings would be superfluous and that any resulting delay would be ‘undue.’”). First, the White’s argument comes too late. We need not address arguments raised for the first time in a reply brief. *A.O. Smith v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). Second, even if we were to address the argument, we do not interpret the circuit court to have made a determination that intervention by the Whites would not result in any delays at all, even short delays. Instead, the court effectively made the following determinations: there would not be significant (“undue”) delays if the Whites were allowed to intervene, but *any* amount of resulting delay, even the ordinary and relatively short delays that could be expected to result through their participation, should be avoided given the complete lack of value in the Whites’ participation. There is a reasonable basis in the record for these implicit determinations.

¶52 The Whites argue that the circuit court committed legal error because, having determined that the Whites met the three required considerations, the court was obligated to grant the motion. We disagree. The Whites do not cite legal authority that supports the proposition that a circuit court must exercise its discretion in favor of permissive intervention whenever a person files a timely motion, the person states a claim or defense that contains an issue of law or fact in common with the underlying action, and intervention will not “unduly delay or prejudice the adjudication of the rights” of existing parties. Further, as referenced above, we do not construe WIS. STAT. § 803.09(2) in that manner.

\*\*11 ¶53 The Whites quote a passage in *Helgeland* in which our supreme court rejected a challenge to a circuit court’s denial of a motion for permissive intervention. *See Helgeland*, 307 Wis. 2d 1, ¶126. In rejecting the challenge, the supreme court explained that the circuit court relied on the factor of “delay, a factor explicitly specified in WIS. STAT. § 803.09(2).” *See Helgeland*, 307 Wis. 2d 1, ¶126. But this is not a statement that a circuit court is obligated to cite only “factor[s] explicitly specified” in § 803.09(2) in order to properly deny a motion for permissive intervention.

¶54 In a related argument, the Whites contend that it was legal error for the circuit court to “simply re-appl[y],” in addressing permissive intervention, “the test for intervention as of right.” It is true that the court relied on factors that it had considered in denying intervention as of right. But the Whites do not direct us to legal authority that prevents that. A party may fall short in attempting to meet one or more criteria of

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WIS. STAT. § 803.09(1), but if the party satisfies the three factors that must be considered under § 803.09(2) the party then has an opportunity to persuade a circuit court that there are good reasons to permit intervention. Relevant reasons for and against permissive intervention would logically tend to involve some or all of the same considerations at issue in applying the four criteria of § 803.09(1), which a court entertaining a motion under § 803.09(2) is free to consider in its exercise of discretion.

¶55 For all of these reasons we affirm the circuit court order denying the Whites' motion for intervention as of right or, in the alternative, for permissive intervention.

*By the Court.*—Order **\*501** affirmed.

Not recommended for publication in the official reports.

**All Citations**

2023 WI App 44, 995 N.W.2d 500 (Table), 2023 WL 4399022

**CONCLUSION**

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# EXHIBIT B

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July 2, 2024

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\*Distribution list continued on Page 7.

You are hereby notified that the Court has entered the following order:

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No. 2024AP330-OA      Planned Parenthood of Wisconsin v. Urmanski

On February 22, 2024, petitioners, Planned Parenthood of Wisconsin; Kathy King, M.D.; Allison Linton, M.D., M.P.H.; “Maria L.”; “Jennifer S.”; “Leslie K.”; and “Anais L.”<sup>1</sup> filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70. Concurrently with this order, the court is issuing a separate order that grants the petition for leave to commence an original action.

On April 25, 2024, a motion to intervene or, in the alternative, a motion to file an amicus brief along with a supporting memorandum, a proposed brief, and supporting affidavits were filed on behalf of Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin (collectively, the “Proposed Intervenor”). The proposed brief opposed the petition for leave to commence an original action. On April 29, 2024, petitioners filed a response opposing the motion to intervene, but stating they had no objection to the Proposed Intervenor filing an amicus brief. On May 6, 2024, District Attorney Chisolm filed a response in opposition to both the motion to intervene and the alternative motion to file an amicus brief.

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<sup>1</sup> “Maria L.,” “Jennifer S.,” “Leslie K.,” and “Anais L.” are pseudonyms used in the original action petition and supporting affidavits to refer to four individual women petitioners.

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The Proposed Intervenor's motion to intervene seeks both intervention as of right under Wis. Stat. § 803.09(1)<sup>2</sup> and permissive intervention under Wis. Stat. § 803.09(2).<sup>3</sup>

To be granted intervention as of right, a proposed intervenor must satisfy four criteria:

(1) timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest; and (4) that the proposed intervenor's interest is not adequately protected by existing parties.

State ex rel. Bilder v. Delavan Township, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983). The movant must satisfy each of these criteria to claim a right to intervene, but the criteria are not to be analyzed in isolation from each other. Helgeland v. Wisconsin Municipalities, 2008 WI 9, ¶39, 307 Wis. 2d 1, 745 N.W.2d 1. A strong showing on one of them "may contribute to the movant's ability to meet the other requirements as well." Id. This analysis is to be "holistic, flexible, and highly fact-specific." Id., ¶40.

We conclude that the Proposed Intervenor has not met their burden to demonstrate that they have a sufficient legal interest relating to the subject of this original action. The Proposed Intervenor indicates that they are primarily lobbying and public education groups, which courts have found to lack legal interests that would support intervention as a matter of right. See, e.g., Keith v. Daley, 764 F.2d 126 (7th Cir. 1985); Northland Family Planning Clinic, Inc. v. Cox, 394 F. Supp. 2d 978 (E.D. Mich. 2005); Rodriguez-Williams v. Johnson, 542 P.2d 632 (Wyo. 2024). The affidavits they submitted in support of their motion are insufficient to show that they possess

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<sup>2</sup> Section 803.09(1), Stats. (2021-22), provides as follows:

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.

<sup>3</sup> Section 803.09(2), Stats. (2021-22), provides in relevant part as follows:

Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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any legally protectable interest in enforcing the challenged statute that differs from the public at large or even from other individuals or organizations that share their views. They fail to demonstrate that they, as independent entities, will suffer any specific, legally recognized injury from a ruling by this court in this matter. Given their inability to satisfy this requirement, we need not address the other criteria for intervention as of right.

We also conclude that the Proposed Intervenor has failed to demonstrate that they should be permitted to intervene despite lacking a right to do so. The statute directs that courts considering motions for permissive intervention consider three factors: (1) timeliness; (2) whether the movant has a “claim or defense” that has a question of law or fact in common with the “main action”; and (3) whether intervention will “unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § 803.09(2). A court, whether a circuit court or an appellate court, is required to exercise its discretion when considering these factors and deciding whether a movant should be permitted to intervene. Helgeland, 307 Wis. 2d 1, ¶120.

In this case, timeliness is not an issue, as the motion to intervene was brought before we decided to exercise our original jurisdiction. The Proposed Intervenor, however, has not identified any specific “claim or defense” that they possess regarding the constitutionality of Wis. Stat. § 940.04. See Keith, 764 F.2d at 1272 (affirming the district court’s denial of permissive intervention where the district court found, inter alia, that the pro-life organization seeking intervention had failed to show that it had a direct claim or right in the issues presented in that case). Merely propounding a general position on a topic of debate in society, lobbying for that position, or wishing to make legal arguments consistent with that position does not give them a legal claim or defense that is sufficient to support permissive intervention. Moreover, if we were to permit intervention by the Proposed Intervenor, there would be no logical distinction that would preclude intervention by all of the many other lobbying and education organizations on both sides of the abortion debate. Permitting intervention to all such parties would create the very real possibility that the case would be unduly delayed or that the ability of the original parties to litigate the issues presented would be prejudiced. Consequently, we exercise our discretion to deny permissive intervention to the Proposed Intervenor.

Denying intervention to become a party does not mean that the Proposed Intervenor is without any ability to submit their arguments to this court. The Proposed Intervenor has also moved, in the alternative, for leave to submit their response opposing the original action petition as a non-party brief. See Wis. Stat. § (Rule) 809.19(7). We conclude that the Proposed Intervenor has shown that they have special knowledge and experience regarding the matter at issue so as to render a response from them of significant value to the court. Wis. S. Ct. I.O.P. III.B.6.c. Accordingly, we grant the Proposed Intervenor’s alternative motion for leave to file their response as a non-party brief, and we have considered their response in deciding whether to exercise our original jurisdiction in this matter.

Upon consideration of the foregoing and for the reasons set forth above,

IT IS ORDERED that the motion to intervene as of right and the motion for permissive intervention are denied; and

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IT IS FURTHER ORDERED that the alternative motion for leave to file a non-party brief is granted, and the proposed response opposing the petition for leave to commence an original action is accepted as filed.

BRIAN HAGEDORN, J. (*concurring*). I join the court’s decision denying the motion to intervene. The proposed intervenors have a sincere interest in the legal issues raised in this case, and they are welcome to weigh in as amici. But in my view, they have not met the requirements to intervene as a party to the case. As the court’s order explains, to become a party to the case, the organizations “must have some cognizable interest in its outcome,” meaning they “must ‘either gain or lose by the direct operation of the judgment.’” Priorities USA v. Wis. Elections Comm’n, No. 2024AP164, unpublished order at 2 (Wis. Apr. 18, 2024) (Hagedorn, J., dissenting) (quoting Helgeland v. Wis. Municipalities, 2008 WI 9, ¶45, 307 Wis. 2d 1, 745 N.W.2d 1). As I recently said in dissenting to the Governor’s intervention in a different case, “public policy views do not create the kind of legally protected interest one must have to become a party to litigation.” Id.

At least one of the organizations argues that it has a legally protected interest because it provides counseling and care for women who have had abortions. But this does not appear to create an injury cognizable in the law any more than litigation concerning crime or addiction would create an injury for an organization running homeless shelters simply because it may affect its operations. Accepting a standard that lenient would seem to work a significant shift in our doctrine of standing. And as I have said elsewhere, standing is not a mere technicality. See Teigen v. Wis. Elections Comm’n, 2022 WI 64, ¶160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring) (“Standing is the foundational principle that those who seek to invoke the court’s power to remedy a wrong must face a harm which can be remedied by the exercise of judicial power.”). It is an important threshold inquiry that keeps the judiciary within its lane of deciding cases, not just offering abstract interpretations of the law.

It is true that Planned Parenthood, an advocacy organization among other things, is a named plaintiff in this case. It appears, however, that they are bringing this suit at least in part on behalf of their employee physicians, claiming that the physicians have a constitutional right to perform abortions as part of their medical practice. This asserted right raises a different kind of alleged injury than the proposed intervenors. To be sure, the organizations raise important arguments about fairness; voices on all sides should be heard. And they will—just not as parties. Therefore, I respectfully concur in the court’s order denying intervention.

REBECCA GRASSL BRADLEY, J. (*dissenting*). Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin (“proposed intervenors”) petitioned this court to intervene because these organizations dispute the existence of a state constitutional right to procure an abortion. The majority denies their motion to intervene, permitting the principal advocate for abortion rights to be heard while silencing every leading pro-life organization in the state. The majority’s astonishing unwillingness to consider the pro-life position in this matter will only erode what remains of the public’s trust in the legitimacy of any decision the majority makes in this case.

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Regardless of whether the proposed intervenors have a right to intervene under Wis. Stat. § 803.09(1), this court has absolute discretion to permit their intervention under § 803.09(2). Helgeland v. Wis. Muns., 2008 WI 9, ¶120, 307 Wis. 2d 1, 745 N.W.2d 1; City of Madison v. WERC, 2000 WI 39, ¶11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94. Permitting the pro-life organizations, which are all represented by the same counsel, to intervene would not “unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § 803.09(2). At this point, no merits briefing has been filed and allowing these organizations to intervene would not create a cascading effect as the majority’s order suggests. The decision to exclude Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin from participating as parties speaks volumes as to how the majority will handle this politically and morally sensitive case.

The majority’s track record this term on permissive intervention suggests its exercise of discretion tilts only in one direction. For example, the court allowed a land conservation organization, which aligned with the governor’s legal position, to intervene in a separation of powers dispute between the governor and the legislature. Evers v. Marklein, No. 2023AP2020-OA, unpublished order (Wis. Feb. 28, 2024). The majority also allowed the governor to intervene in an election administration dispute even though the governor plays no direct role in election administration at either the state or local level. Priorities USA v. Wis. Elections Comm’n, No. 2024AP164, unpublished order at 1 (Wis. Apr. 18, 2024). Because permissive intervention is within the court’s discretion, the majority’s denial of intervention for the pro-life organizations showcases the majority’s different treatment of litigants advocating positions in tension with the majority’s “values.”

As a prudential consideration, the majority should allow at least one of the three largest pro-life organizations in the state to intervene to at least present an appearance of impartiality in light of the fact that the largest pro-abortion rights organization in the state brought the suit. Putting the leading advocacy organizations on each side of the abortion issue on equal footing in this case would ensure the court gives every argument equivalent attention. The three pro-life organizations seek intervention based on their shared mission of protecting unborn children and promoting alternatives to abortion. While District Attorney Urmanski and his office will presumably present zealous advocacy, the pro-life organizations understandably question whether their collective interests and perspectives on the law could be adequately represented by a local district attorney. After all, Urmanski’s primary role as the elected district attorney for Sheboygan County is to “prosecute all criminal actions before any court within his [] prosecutorial unit and have sole responsibility for prosecution of all criminal actions[.]” Wis. Stat. § 978.05(1).

When presented with a monumental question of constitutional law, the court should welcome well-versed advocacy to present arguments covering every nuance of the issue. By relegating pro-life organizations to amicus status while the state’s largest pro-choice organization advocates for Wisconsin’s version of Roe v. Wade, 410 U.S. 113 (1973), overruled by Dobbs v. Jackson Women’s Health Organization, 597 U.S. 215 (2022), the majority fails to live up to its own promises of pluralism, inclusivity, and openness. It reeks of hypocrisy, but tipping the

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scales of justice toward its political allies has become the standard operating procedure of this new progressive majority.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

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Samuel A. Christensen  
Clerk of Supreme Court

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