**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 3, 2012**

**A. John Voelker**
**Acting Clerk of Court of Appeals**

**NOTICE**

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**Appeal No. 2012AP32-AC** **Cir. Ct. No. 2011CV4195**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**FRIENDS OF SCOTT WALKER AND STEPHAN THOMPSON,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE, EACH IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, AND KEVIN KENNEDY, DIRECTOR AND GENERAL COUNSEL FOR THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD,**

**DEFENDANTS-RESPONDENTS,**

**THE COMMITTEE TO RECALL WALKER, THE COMMITTEE TO RECALL KLEEFISCH, JULIE WELLS, THE COMMITTEE TO RECALL WANGGAARD, RANDOLPH BRANDT, THE COMMITTEE TO RECALL MOULTON, JOHN KIDD, THE COMMITTEE TO RECALL SENATOR PAM GALLOWAY, NANCY STENCIL AND RITA PACHAL,**

**PROPOSED-INTERVENING DEFENDANTS-APPELLANTS.**

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APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Several recall campaign committees appeal an order denying their motion to intervene in a suit brought by Governor Scott Walker's campaign committee and an elector against the Government Accountability Board. We conclude that the recall committees are entitled to intervene as a matter of right. Therefore, we reverse the order denying intervention and remand with directions for the circuit court to vacate its later rulings that were made without the participation of the intervenors.

## I. BACKGROUND

¶2 On December 15, 2011, Friends of Scott Walker, Inc., and Stephan Thompson filed a complaint in the circuit court. The complaint identifies Friends of Walker as "the authorized campaign committee" for Governor Scott Walker. It identifies Thompson as a Wisconsin citizen and qualified elector who has chosen not to sign a recall petition. From here on, we refer to Friends of Walker and Thompson collectively as Friends of Walker. The complaint names as defendants the Government Accountability Board, the board members in their official capacities, and the director of the board. It identifies the board as the agency responsible for the administration of elections, including recall elections.

¶3 In its factual allegations, the complaint alleges that committees have registered with the board to circulate petitions seeking the recall of Governor Walker. The remaining allegations center on statements Friends of Walker alleges were made by board staff to media or in response to inquiry by Friends of Walker.

Without describing those alleged statements in detail here, it is sufficient to say that they mainly relate to the board's procedures for reviewing recall petitions, including the treatment of multiple signatures by the same person, potentially fictitious names, and illegible signatures and addresses. For example, the complaint alleges that board staff publicly stated they will not strike "obviously fictitious" names or a signature without a legible street address, and that the board's facial review of the petition will not include checking for duplicate signatures as a primary focus.

¶4 The nature of the relief sought by Friends of Walker plays an important role in this appeal, and therefore we describe it in more detail. The complaint seeks several forms of relief, including a declaration "that electors signing more than one recall petition with the intent that his or her signature be counted more than once violates the United States Constitution, the Wisconsin Constitution, and Wisconsin law." The complaint first seeks a declaration that the board's interpretation of WIS. STAT. § 9.10 (2009-10), the statute governing recalls, is unconstitutional.[1] Specifically, the complaint alleges that, insofar as the board's interpretation does not prohibit a person from signing a recall petition multiple times with the intent that the person's signature be counted twice, that interpretation is unconstitutional because it turns WIS. STAT. § 9.10 into a law that hampers, restricts, or impairs "the constitutional rights of recall of those who choose not to sign a petition."

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 The requested relief further includes a declaration that electors signing a recall petition with "patently fictitious names and illegible addresses violates the United States Constitution, the Wisconsin Constitution, and Wisconsin law." The complaint also seeks a judgment "directing [the board] to look for and eliminate facially duplicative signatures, patently fictitious names and illegible addresses during their careful examination of the petition."

¶6 Finally, the complaint seeks temporary and permanent injunctions prohibiting the board from: (1) publicly stating that electors may legally sign more than one recall petition with the intent that their signatures be counted more than once; (2) publicly stating that the board will not strike signatures containing fictitious names and/or illegible addresses; (3) placing the burden on Friends of Walker to identify and challenge multiple signatures by a single elector, which are identifiable by a facial review of the petition; and (4) placing the burden on Friends of Walker to identify and challenge patently fictitious names and illegible addresses. The complaint was accompanied by the plaintiffs' motion for a temporary injunction, with supporting brief and affidavits.

¶7 On December 20, 2011, five days after the complaint was filed, the recall committees and affiliated persons moved to intervene. We refer to these parties collectively as the recall committees or, simply, the committees. The recall committees sought intervention as a matter of right under WIS. STAT. § 803.09(1) and permissive intervention under § 803.09(2). The motion was accompanied by the committees' proposed answer and affirmative defenses, and a motion to shorten discovery deadlines. The committees contend that the board's existing procedures for reviewing recall petitions are of long standing and are lawful.

¶8 Over the next nine days, Friends of Walker filed a brief in opposition to intervention; the board moved to dismiss the complaint and filed a brief opposing a temporary injunction; and the circuit court held a hearing at which it denied the intervention motion. Following that hearing, which occurred on December 29, 2011, the circuit court's decision denying intervention was reduced to writing and entered on January 4, 2012.

¶9 The recall committees appeal from that order. Although the board appears in the appeal caption as a respondent, it did not oppose the intervention motion in circuit court and has not filed a brief in this appeal.

¶10 Following the filing of the appeal, the matter proceeded before the circuit court. The parties, Friends of Walker, and the board disputed whether the board's current practices comply with the law. We need not detail the circuit court's decision here, except to say that the court concluded, in part, that the board's current practices did not fully comply with WIS. STAT. §9.10. The court issued an order directing the board to change its review procedures.

## II. APPLICABLE LAW

¶11 The statute on intervention as a matter of right provides in relevant part:

> [U]pon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

WIS. STAT. § 803.09(1).

¶12 A party moving to intervene must satisfy four criteria to establish a claim of a right to intervene. A movant must show: (1) that the motion is timely; (2) that the movant claims an interest sufficiently related to the subject of the action; (3) that disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the existing parties do not adequately represent the movant's interest. ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. The ***Helgeland*** court explained that these criteria are not viewed in isolation from each other:

> [A] movant's strong showing with respect to one requirement may contribute to the movant's ability to meet other requirements as well…. [T]here is interplay between the requirements; the requirements must be blended and balanced to determine whether [there is a] right to intervene.
>
> … 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. § 803.03(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.***, ¶¶39-40.

¶13 Friends of Walker asserts that our review "involves … deference" to the circuit court. We disagree. The ***Helgeland*** court plainly states that "[w]hether to allow or to deny intervention as of right is a question of law that this court decides independently of the circuit court." ***Id.***, ¶41. We acknowledge language in ***Helgeland*** stating that we benefit from the analysis of the circuit court and noting language in a federal court opinion indicating that reviewing courts are unlikely to disturb an intervention ruling. *See* ***id.*** But there is no indication that

the ***Helgeland*** court intended these statements to mean anything more than what they say—that we sometimes benefit from a circuit court's analysis and that, as a practical matter, intervention decisions will often withstand even independent review.

## III. ANALYSIS OF INTERVENTION ELEMENTS

¶14 In reviewing the correctness of the circuit court's intervention decision, we focus on what was before the circuit court at the time the court rendered its decision. It would be inappropriate to reverse the circuit court because we now know something that the circuit court could not have known when it made its intervention decision. For example, we now know that the board did not pursue its legal arguments with the same vigor that the committees would have. That is, we now know that the circuit court rejected the board's legal arguments (arguments the board presumably believed to be correct) and the board has not appealed or moved for a stay of the order. But that would be viewing the matter with the benefit of information the circuit court did not have at the time of its ruling.

¶15 Similarly, an incorrect intervention decision does not become a correct decision because of subsequent events. For example, it is now well known from media accounts that all of the committees, and especially the Committee to Recall Walker, submitted many more signatures than the required number. This knowledge, at least arguably, renders less compelling the committees' legitimate concern that a court-ordered procedure, consistent with but not required by law, would burden the committees. That is, with so many excess signatures, the committees might not, as a practical matter, be burdened with defending stricken signatures.

¶16 Accordingly, we focus our attention on what was known at the time the circuit court made its intervention decision and proceed to address the intervention criteria. In the following sections of this opinion, we conclude that the recall committees are entitled to intervene as a matter of right because: (1) the motion was timely; (2) the recall committees have interests in the subject matter of the action, including not having valid signatures struck and not incurring an increased burden in the administrative proceeding, and an interest in opposing delay not required by law; (3) the disposition of this action could impair the committees' ability to protect those interests; and (4) the board does not adequately represent recall committees' interests because it does not fully share those interests.[2]

A. *Timeliness*

¶17 As to the first element, the intervention motion was filed five days after the complaint. There is no dispute that the motion was timely.

B. *Movants' Interest in the Subject of the Action*

¶18 The second element is that the movant has an interest sufficiently related to the subject of the action. Courts employ a broad, pragmatic approach, viewing the interest element "'practically rather than technically.'" ***Helgeland***, 307 Wis. 2d 1, ¶43 (quoted source omitted). This element serves 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

[2] Because we reach this conclusion on intervention as a matter of right, we do not address permissive intervention.

omitted). However, a claimed interest does not support intervention if it is only remotely related to the subject of the action. ***Id.***, ¶45. The interest must be of such direct and immediate character that the movant will gain or lose by the direct operation of the judgment. ***Id.***

¶19 The recall committees argue that the lawsuit seeks to alter the procedures to be used by the board during the recall petition review process, which is a proceeding in which the recall committees will be parties. They note that the recall committees' own petitions will be subject to the review process that Friends of Walker is seeking to alter. They assert that they have no less of an interest in the board's procedures than Friends of Walker.

¶20 In our analysis of the recall committees' interest, we focus on certain parts of the relief sought by the plaintiffs. The complaint seeks, in part, a judgment "directing [the board] to look for and eliminate facially duplicative signatures, patently fictitious names and illegible addresses during their careful examination of the petition." The plaintiffs also seek an injunction that, in part, would prohibit the board from placing the burden on Friends of Walker to identify and challenge multiple signatures by a single elector that are identifiable by a facial review of the petition, and from placing the burden on Friends of Walker to identify and challenge patently fictitious names and illegible addresses.

¶21 According to Friends of Walker, its claims for relief request changes to the existing procedures the board staff applies to recall petitions. Or, stated another way, the complaint seeks an order determining the legality of certain procedures the board has used in the past and will use in its review of these recall petitions.

¶22 We conclude that the recall committees have an interest in defending against the Friends of Walker claims. It cannot be seriously disputed that the recall committees have an interest in the procedures that will be used to review their recall petitions and strike names. To the extent the board's existing procedures are consistent with the Wisconsin Constitution, WIS. STAT. § 9.10, and administrative rules properly implementing that statute, and to the extent the procedures otherwise are considered desirable by the committees, the committees have an interest in maintaining those procedures that are in place.

¶23 Friends of Walker argues that the committees do not have such an interest because the changes it seeks will affect only the board's initial review of the petition, which is not a process the recall committees will participate in. Friends of Walker asserts that only the board and the elected officer who is the subject of the petition are participants during the initial review of the petition. *See* WIS. STAT. § 9.10(3)(b).

¶24 We disagree with that argument because it fails to consider how changes sought by Friends of Walker would affect the administrative process *after* the initial review. The relief sought potentially places an increased burden on the recall committees to prove that certain valid signatures are indeed valid. If the board is required to "look for and eliminate" certain classes of signatures, that may cause the board to strike signatures that *appear* to be improper, but which *in fact* are not improper. Because these signatures are indeed valid, the officeholder would not have been able to produce the affidavits or other evidence required to support a successful challenge to them under WIS. STAT. § 9.10(2)(h) and (3)(b). Nevertheless, even without a successful challenge, the court order may require the board to strike such signatures in its initial review.

¶25 But that initial review is not the end of the board process. If the board rejects the petition due to an inadequate number of valid signatures, the recall petitioners then have a time period within which to correct any insufficiency. WIS. STAT. § 9.10(3)(b). The petitioners may file affidavits to correct insufficiencies. WIS. STAT. § 9.10(2)(r). At that stage of the process, an increase in the number of valid signatures erroneously struck in the board's initial review necessarily increases the number of signatures that a recall petitioner either loses or must attempt to support with evidence. This increase in the burden on the recall committees is a potential result, and perhaps an inevitable result, of the order sought by Friends of Walker that would require the board to "look for and eliminate" certain types of signatures. Thus, the recall committees' interest is sufficiently "'direct and immediate'" because they will potentially "'lose by the direct operation of the judgment.'" *See* ***Helgeland***, 307 Wis. 2d 1, ¶45 (quoted source omitted).

¶26 Three examples show how this increased burden might occur. It is important to remember to view our examples not through the lens of subsequent events, including what the circuit court actually did order, but through the lens of the interests held by the committees at the time the intervention decision was rendered.

¶27 Our first example involves the legibility of addresses. WISCONSIN STAT. § 9.10(2)(e)4. states that a signature may not be counted if the "residency of the signer of the petition sheet cannot be determined by the address given." Obviously, this requirement implicates the degree of clarity of addresses written on petitions. Just as obviously, the board must have criteria for striking signatures (on its own initiative or in response to a challenge) because the related address is insufficiently clear to show the signers' qualifying residency. The implications of

new, stricter criteria are significant. If the circuit court orders the board to strike every signature where the related address is not clear in all respects, the board might strike the signatures of a large number of qualified electors. The affected committees either lose valid signatures or must commit resources to prove the validity of those signatures.

¶28 Our second example involves duplicate signatures. Friends of Walker requested an order directing the board to look for and eliminate duplicate signatures. If the circuit court were to respond to that request by directing the board to strike a signature when the printed names and addresses were the same and when the signatures were similar in appearance, the result might be the striking of valid signatures. Suppose John Smith and John Smith, Jr., live at the same address, and both sign a recall petition as "John Smith" with a similar-looking signature. Under the prior procedures described in the complaint, the board would apparently allow both signatures to pass through its initial review. But under the hypothetical order described above, the board would strike one of the Smith signatures, even though both are valid signatures. Further, the board would do so even though the officeholder could not have submitted the required affidavit proving that the signatures are duplicates because they are not, in fact, duplicates. With the board having struck one signature by court order, the affected committee would lose one valid signature or bear the burden of obtaining evidence of the validity of both signatures.

¶29 Our third example involves the "fictitious" name topic. Suppose an elector with a famous name (the name of a famous movie star or historical figure) signs a recall petition. Under the procedures described in the complaint, the board may allow this signature to pass through its initial review because the board is not able to determine from the face of the petition that this name is fictitious. But if

the plaintiffs obtain an order directing the board to "look for and eliminate patently fictitious names," the board would need to establish criteria for identifying such names. If the criteria are meaningful and therefore assist the board in identifying more suspicious names, the chances rise that the board will strike the signatures of qualified electors with famous names. The board will do so even though the officeholder would not have been able to submit the required affidavit proving that the signature is fictitious. Once again, the affected committee would lose a valid signature or bear the burden of obtaining evidence of the validity of the signature.

¶30 Friends of Walker next argues that the recall committees' interest is unripe, speculative, and too general. However, we are not able to see how the committees' interest in *preventing* these changes to the board's procedures is any less ripe or more speculative than the plaintiffs' interest in *seeking* the changes. That is, the committees' interest in how the board reviews the signatures the committees submit is no less ripe and no more speculative than the plaintiffs' interest in the same topic. And, obviously, by filing their complaint the plaintiffs have already implied that their own claims are sufficiently ripe and are not speculative.

¶31 Friends of Walker also argues that allowing the recall committees to intervene would add needless complexity to this case. We agree that added complexity is an appropriate consideration, but ***Helgeland*** suggests that permitting intervention often advances speed and economy. The ***Helgeland*** court explained that courts must

> strike a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing persons to join a lawsuit in the interest of the speedy and economical resolution of controversies without

> rendering the lawsuit fruitlessly complex or unending. We treat "the interest test as primarily 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). The ***Helgeland*** court is explaining that allowing intervention will, in some cases, be more speedy and economical than not allowing intervention.

¶32 At the time the circuit court ruled on the intervention motion, this appeared to be such a case. The reason is that one of the potential scenarios was that the circuit court would grant Friends of Walker at least some of the relief requested and the committees would be adversely affected. Obviously, it would not be more speedy and economical for the recall committees to pursue other avenues, such as filing their own separate suit against the board when it attempts to implement the ordered changes. The more efficient procedure would be to make both sides parties in a single case.

¶33 The circuit court expressed concern that allowing the recall committees to intervene would mean the court would have to permit intervention by other recall committees, electors in favor of the recalls, other officials targeted by recall efforts, and other persons or entities that might be affected in the future by the board's procedures. The flaw in the circuit court's logic is its apparent assumption that, once it permits a party with a particular interest to intervene, the court must permit other parties with a similar interest to intervene. However, as we discuss in greater detail below, one of the intervention factors to consider is whether the interests of a prospective intervening party are adequately represented in the litigation. Here, if the moving committees, represented by a single attorney, are permitted to intervene, then other parties seeking intervention face a different

equation. With the interests of several recall committees represented, the circuit court could reasonably conclude that the interests of other recall committees and electors in favor of recall are adequately represented. Similarly, because Friends of Walker is a party, presumably other officers targeted by a recall effort are adequately represented by Friends of Walker. Finally, with respect to the circuit court's concern about others that might be affected in the future—apparently by recall efforts that have not begun—it is readily apparent that the interest of such parties is too speculative to warrant intervention. Accordingly, we reject the circuit court's reasoning that permitting the committees to intervene would open the door to additional litigants.

¶34 Friends of Walker argues that the recall committees' request for discovery indicates the likelihood of unreasonable complexity and delay. However, a proposed intervenor's intent to conduct lawful discovery should not be viewed as a basis for denying intervention. Discovery is a normal part of litigation, and intervenors, once permitted to intervene, have the same status as regular parties. ***Kohler Co. v. Sogen Int'l Fund, Inc.***, 2000 WI App 60, ¶¶11-12, 233 Wis. 2d 592, 608 N.W.2d 746. Here, as in most litigation, the circuit court has broad discretion to limit and expedite discovery. *See* WIS. STAT. § 802.10 (calendar practice). If the circuit court desires to move the case along, it can do so by limiting discovery to that which will likely produce information necessary to the circuit court's proper resolution of the action. Therefore, the committees' intent to seek discovery is not a basis for denying intervention.

¶35 Beyond the recall committees' interest in not losing valid signatures and not bearing an increased burden to prove that valid signatures are indeed valid, the committees also have an interest in preventing delays to the recall process that may be caused by changes to the board's review process, if those changes are not

required by law. As we described above, the plaintiffs seek to add additional procedures to the board's initial petition review. The board's time for that review can be enlarged on a showing of good cause. WIS. STAT. § 9.10(3)(b). Therefore, the recall committees could reasonably be concerned that additional procedures by the board would increase the time the board needed to review the petitions and, ultimately, would delay recall elections.

¶36 Further, the recall committees have an interest in holding timely recall elections, as embodied by the timelines in the recall statute and our Constitution. The recall statute provides relatively short time periods for the board to review the petition, for officeholders to file challenges, and for petitioners to correct insufficiencies. WIS. STAT. § 9.10(3)(b). If the board's decision is to certify a petition, it must set the election for six weeks from that point. ***Id.***; *see also* WIS. CONST. art. XIII, § 12(2). After the board's decision, the recall petitioner or officer has only seven days to seek judicial review, and the court must "give the matter precedence over other matters not accorded similar precedence by law." § 9.10(3)(bm). Thus, the recall committees have an interest in preventing delays caused by procedural changes that are not required by law.

¶37 To summarize, the recall committees have an interest in the complaint's proposed relief because such relief may include new procedures not required by law that may result in (1) striking valid signatures and placing an increased burden on the committees at a later stage of the review process and (2) causing delay to the recall process.

C. *Impairment of Movants' Ability to Protect Interest*

¶38 The third element is whether disposition of the action may, as a practical matter, impair or impede the movant's ability to protect its interest.

Again, we are to take a pragmatic approach, focusing on the facts of each case and the policies underlying the intervention statute. ***Helgeland***, 307 Wis. 2d 1, ¶79. "Although we examine the inability of a movant to protect its interests separately, it is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest." ***Id***.

¶39 The recall committees argue that a decision granting Friends of Walker the relief sought will impair their ability to protect their interests. Friends of Walker essentially argues that the committees' interests will not be impaired because they have no interests, a position we have already rejected. We conclude that an order granting the relief requested by the plaintiffs would be a practical impediment to the committees' ability to protect their interests. Such an order would likely be binding on the board, and thus would presumably be implemented by the board. This would appear to leave the committees with few options to affect the board's review process, other than by filing a separate and later suit to dispute the necessity of the changes sought by the plaintiffs.

D. *Adequate Representation of Movants by Existing Parties*

¶40 The fourth element is whether the existing parties adequately represent the movant's interests. The showing required for proving inadequate representation should be treated as minimal, but cannot be treated as so minimal as to write the requirement out of the rule. ***Helgeland***, 307 Wis. 2d 1, ¶85. "If a movant's interest is identical to that of one of the parties, or if a party is charged by law with representing the movant's interest, a compelling showing should be required to demonstrate that the representation is not adequate." ***Id.***, ¶86. "When the potential intervenor's interests are substantially similar to interests already represented by an existing party, such similarity will weigh against the potential

intervenor." ***Id.*** "[A]dequate representation is ordinarily presumed when a movant and an existing party have the same ultimate objective in the action." ***Id.***, ¶90.

¶41 The recall committees argue that the board does not adequately represent their interests in this litigation. They argue that the board's interests are different from theirs because the board's interest is mainly in regulating and administering the recall process, without having any particular interest in how the law it administers is changed, or in its substantive content.

¶42 Friends of Walker responds first that the board is represented by the attorney general, and that this gives rise to a presumption that the interests of absent persons will be represented. In support, it cites this passage from ***Helgeland***: "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.'" ***Id.***, ¶91 (quoted source omitted). This presumption, however, does not apply here.

¶43 The attorney general's office appears in this case representing the board. Neither the attorney general nor the board is "charged by law with representing the interests" of recall committees. Indeed, both the attorney general and the board should be neutral as to the interests of the committees and Friends of Walker. The attorney general represents the board and the board's main duty is administering the laws related to elections and election campaigns. WIS. STAT. § 5.05(1). Board members cannot be members of political parties or of any partisan political club or organization, and may not make campaign contributions. WIS. STAT. § 15.60(5) and (7). The board's employees must be "nonpartisan."

WIS. STAT. § 5.05(4). In short, neither the attorney general nor the board is charged with representing the interests of recall committees and, if anything, is prohibited from doing so.

¶44 We turn next to whether the recall committees and the board share the same "ultimate objective" in the litigation. Friends of Walker argues that they do share the same objective because, at the time of the intervention motion, both the board and the committees sought dismissal of the complaint. To assess whether the board and the recall committees share the same ultimate objective, we look again to the committees' interests that we previously identified as being sufficiently related to this action.

¶45 The first interest we identified is the recall committees' interest in not losing valid signatures and not bearing an increased burden to prove that valid signatures are indeed valid. While the board has an interest in not striking valid signatures, it has no apparent interest in whether its procedures place an increased burden on recall petitioners. As the neutral arbiter of the process, the board should generally be indifferent to where that burden falls.

¶46 The second recall committee interest we identified is in avoiding delay not required by law. In contrast to the committees, the board has no apparent interest in the timing of a recall election. To the extent the board has an interest in fulfilling its statutory and constitutional duties with respect to time, that interest may be tempered by concerns about use of resources and ease of administration that the recall committees do not share. And, in deciding what procedural changes are worth added delay, the board presumably also takes into account the interests of the general public and the longer term implications for

future elections, which are of less concern to the recall committees here and, for that matter, Friends of Walker.

¶47 These differences in perspective are significant in this discussion because they may lead to a divergence of "ultimate objectives." Friends of Walker is correct that, when the intervention motion was decided, the committees and the board were united in seeking dismissal of the complaint. However, it is difficult to forecast, at that early stage, whether that unity would persist. Later in the litigation, the different underlying interests of the board and the committees could plausibly lead to divergence of their positions on significant questions like whether to stipulate to certain facts, whether to settle and on what terms, or whether to appeal.

¶48 The significance of this sort of difference in perspective was discussed in ***Armada Broadcasting, Inc. v. Stirn***, 183 Wis. 2d 463, 516 N.W.2d 357 (1994). In ***Armada***, the court discussed whether a school district would adequately protect the interests of its employee in a case in which the school district was seeking to block disclosure of a report that could potentially harm the reputation of the employee. ***Id.*** at 476-77. The court concluded it would not and reasoned in part: "[W]e cannot expect the District to defend the mandamus action with the vehemence of someone who is directly affected by public disclosure of the report. The personal nature of the interests at stake in the ... report make [the employee] the best person to protect those interests. ***Id.*** at 476. As in ***Armada***, the government entity here has an interest in complying with the law, but it does not share the same interest in the result.

¶49 Therefore, we conclude that the interests of the board and the committees are not "identical" or so "substantially similar" as to block intervention. *See* ***Helgeland***, 307 Wis. 2d 1, ¶86.

¶50 In summary, because the "minimal showing" necessary on the adequate representation element is satisfied and because the recall committees have made a strong showing on other elements of this balancing test, we conclude that the circuit court erred when it denied the committees intervention as of right.

## IV. REMEDY

¶51 Having determined that the recall committees' motion to intervene should have been granted, we next turn to the issue of remedy. The recall committees argue that, in addition to reversing the order denying intervention, we should also declare the circuit court's later orders void. That remedy would have the effect of vacating the circuit court's ultimate decision on the merits of the complaint.

¶52 Neither party has provided us with persuasive argument as to what the remedy should be when a circuit court has continued with the case and made additional rulings while the denial of intervention was being appealed. The recall committees rely on a case related to decisions made without necessary parties in foreclosure cases, but this is not a foreclosure case. *See* ***Wisconsin Fin. Corp. v. Garlock***, 140 Wis. 2d 506, 512, 410 N.W.2d 649 (Ct. App. 1987). Friends of Walker correctly notes that distinction, but presents no argument as to the appropriate remedy should we decide that intervention was improperly denied.

¶53 The silence of Friends of Walker leaves the impression that it believes no remedy should be available, but it cites no authority for that

proposition. Furthermore, Friends of Walker, the party that opposed intervention, has not attempted to demonstrate that granting the intervention motion would have had no effect on the outcome.

¶54 In the absence of argument from the parties, we have searched for guidance. The only two intervention cases we have located with comparable fact patterns are ***Armada*** and ***Dodge v. Juneau County School Committee***, 8 Wis. 2d 360, 98 N.W.2d 908 (1959). Both decisions indicate that the appropriate relief includes vacating the later order that is adverse to the intervening party.

¶55 In ***Dodge***, certain taxpayers filed an action for judicial review of a school committee's decision to dissolve one school district and attach it to another district. ***Dodge***, 8 Wis. 2d at 360. The school committee filed an answer in opposition but, at a pretrial conference, reached a stipulation that it had erred and would hold a new hearing on whether to dissolve the school district. ***Id.*** at 361. Shortly after that, other taxpayers sought to intervene to defend the original decision. ***Id.*** The circuit court accepted the stipulation and later denied the intervention motion. ***Id.*** at 361-62. On appeal, the court held that the denial of intervention was erroneous. ***Id.*** at 363. The court did not discuss the remedy to be provided, but the mandate of the opinion stated: "Order reversed, with instructions to vacate the judgment and permit the petitioners to intervene." ***Id.*** We understand that mandate to mean that the acceptance of the stipulation was to be vacated. If the court intended otherwise, it would have explained that it was reversing with respect to intervention but that its decision did not affect the decision on the merits below.

¶56 In ***Armada***, a man named Schauf moved to intervene in a circuit court mandamus action brought by a media company to compel release of public

records related to Schauf's employment and allegations of sexual harassment. 183 Wis. 2d at 467-69. The circuit court denied Schauf's intervention motion and ordered records pertaining to Schauf released. ***Id.*** at 469-70. In Schauf's appeal from the denial of intervention, the supreme court reversed as to intervention and remanded "so that Schauf may intervene." ***Id.*** at 477. Here again, we understand this mandate to mean that the supreme court expected the order on the merits to be vacated and the issue relitigated. Otherwise there would have been no point in remanding to the circuit court so that Schauf could intervene because normally circuit courts do not continue with further proceedings on issues that have been decided.

¶57 We conclude the appropriate course is to follow the supreme court's lead in ***Armada*** and ***Dodge***. Accordingly, we order the circuit court on remand to vacate the orders entered after the court denied the intervention motion. Pursuant to the statutes that govern our decisions, the orders will not be vacated by the circuit court until after remittitur, which is the transmittal of our decision and the return of the record from this court to the circuit court. *See* WIS. STAT. § 808.08(1). If no petition for review is filed, remittitur occurs thirty-one days after our decision, "or as soon thereafter as practicable." WIS. STAT. § 809.26(1).

¶58 In summary, we reverse the order denying the motion to intervene. We remand to the circuit court with directions to vacate the oral ruling of January 5, 2012, and the written order of January 20, 2012, and to permit the recall committees to intervene.

*By the Court.*—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.