UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT; ANNA HAAS; ANNA POI; *and* ANASTASIA FERIN KNIGHT,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION; DON M. MILLIS; ROBERT F. SPINDEL; MARGE BOSTELMANN; ANN S. JACOBS; MARK L. THOMSEN; *and* JOSEPH J. CZARNEZKI, *in their official capacities as commissioners of the Wisconsin Elections Commission*; Meagan Wolfe, *in her official capacity as administrator of the Wisconsin Elections Commission*; MICHELLE LUEDTKE, *in her official capacity as city clerk for the City of Brookfield*; MARIBETH WITZEL-BEHL, *in her official capacity as city clerk for the City of Madison*; *and* LORENA RASE STOTTLER, *in her official capacity as city clerk for the City of Janesville*,

Defendants.

Case No. 3:23-cv-00672-slc

THE WISCONSIN STATE LEGISLATURE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

The Wisconsin State Legislature ("Legislature") is entitled to intervene as a matter of right in this challenge to the validity of Wis. Stat. § 6.87 because the Legislature satisfied all four elements under Federal Rule of Civil Procedure 24(a)(2). First, this Motion is timely because the Legislature promptly moved to intervene less

than a month after Plaintiffs filed their complaint. Second, the Legislature has an interest in the subject matter of this litigation for two independently sufficient reasons. As a threshold matter, the Legislature has an interest in speaking for the State's sovereign interest in the continued validity of its own laws, and it has the state-law authority to advance that interest under Wis. Stat. § 803.09(2m) and Wis. Stat. § 13.365(3). Further, the Legislature possesses a separate and distinct sovereign interest in defending its own constitutional powers, which powers include enacting laws "[p]roviding for absentee voting," Wis. Const. art. III, § 2, such as Section 6.87's absentee-ballot witness requirement. Third, Plaintiffs' lawsuit threatens the Legislature's interests. Finally, no existing party can adequately represent the Legislature's interests under *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022).

Alternatively, the Court should exercise its discretion to grant the Legislature permissive intervention under Rule 24(b), including to further the interests of federal-state comity. The Legislature satisfies both requirements for permissive intervention because it timely filed its motion and has filed a proposed Answer and Motion To Dismiss attached to this Motion, raising defenses to Plaintiffs' claims that share a question of law with the main action. Granting the Legislature intervention here would also further the interests of federal-state comity by respecting Wisconsin's decision to designate the Legislature as its authorized representative in actions challenging state law, while also allowing for full adversarial litigation of this

important issue without causing any practical difficulties in the management of this case.

This Court should grant the Legislature's Motion To Intervene.

INTEREST OF PROPOSED INTERVENOR

Plaintiffs' lawsuit challenges a Wisconsin absentee-voting law—the absentee-ballot witness requirement, Wis. Stat. § 6.87—as a violation of the Voting Rights Act of 1965 or, alternatively, the Civil Rights Act of 1964. Dkt.1 ¶¶ 55–58. This challenge directly implicates the Legislature's sovereign interests in two respects.

First, Plaintiffs' lawsuit impacts the Legislature's interests in the enforcement of the absentee-ballot witness requirement. As the Supreme Court held in *Berger*, "States possess a legitimate interest in the continued enforce[ment] of [their] own statutes." 142 S. Ct. at 2201 (citations omitted). Further, *Berger* explained, States "must be able to designate agents to represent [them] in federal court" to protect this interest "and may authorize [their] legislature[s] to litigate on the State's behalf, either generally or in a defined set of cases"—with the "choice belong[ing] to the sovereign State." *Id.* at 2202 (internal quotations and citations omitted). Thus, where a lawsuit questions the validity of a State's law and the State's duly authorized representative seeks to intervene to defend that law, "federal courts should rarely question that [the] State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in [the] federal litigation challenging [the] state law." *Id.* at 2201.

Consistent with *Berger*, Wisconsin law designates the Legislature—the body "vested" with the "legislative power" of the State, Wis. Const. art. IV, § 1—as an agent that may litigate in defense of the State's interests in the validity of the State's laws, on the State's behalf. *Berger*, 142 S. Ct. at 2201–02. Specifically, Wis. Stat. § 803.09(2m) provides that "[w]hen a party to an action . . . challenges a statute as violating or preempted by federal law . . . *the legislature* may intervene as set forth under [Section] 13.365." Wis. Stat. § 803.09(2m) (emphasis added); *see Berger*, 142 S. Ct. at 2201–02. Section 13.365(3) of the Wisconsin Statutes further provides that "[t]he joint committee on legislative organization may intervene at any time in the action on behalf of the legislature" and permits the hiring of counsel to assist it. Wis. Stat. § 13.365(3); *see Berger*, 142 S. Ct. at 2201–02. Thus, "Wisconsin has adopted a public policy that gives the Legislature a set of litigation interests," *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶¶ 8, 13, 394 Wis. 2d 33, 949 N.W.2d 423 (2020), including where, as here, a party "otherwise challenges the . . . validity of a statute, as part of a claim or affirmative defense," *id.* (quoting Wis. Stat. § 803.09(2m)); *see Berger*, 142 S. Ct. at 2201–02.

Second, Plaintiffs' lawsuit also directly implicates the Legislature's interest in its own constitutional powers, which is an additional interest separate and distinct from the enforcement-of-state-law interest recognized most recently in *Berger*. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900; *Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos*, 2020 WI 67, ¶¶ 63–73, 393 Wis. 2d 38, 946 N.W.2d 35. Wisconsin's Constitution provides that the Legislature "may" enact laws

"[p]roviding for absentee voting." Wis. Const. art. III, § 2. Thus, the Legislature has a core interest in defending against claims, such as Plaintiffs' claims here, that threaten to undermine the efficacy and integrity of the Legislature's constitutional authority to enact laws governing the absentee-voting process in Wisconsin. *Palm*, 2020 WI 42, ¶ 13.

STATEMENT

A. Article III of the Wisconsin Constitution provides for the right to vote, Wis. Const. art. III, § 1, but it does not provide for the right to vote absentee, *id.* § 2. Rather, Article III grants the Legislature the authority to enact laws governing voting, including by providing that the Legislature "may" enact laws "[p]roviding for absentee voting." *Id.* Pursuant to this specific constitutional authority, the Legislature has enacted a comprehensive statutory scheme allowing all Wisconsin voters to exercise the "privilege" of voting absentee. Wis. Stat. § 6.84. Because "voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place," the Legislature recognizes that the process "must be carefully regulated to prevent the potential for fraud or abuse." *Id.* The only statutory regulation of the State's absentee-voting process at issue here is the absentee-ballot witness requirement within Section 6.87. *See* Dkt.1 ¶ 5.

As particularly relevant here, Wisconsin law requires qualified electors who wish to cast absentee-ballots by mail[1] to complete their ballots in the presence of one

[1] Wisconsin law allows absentee voters the option of casting their absentee ballots in person up to two weeks before Election Day during designated "early voting" times at the municipal clerk's office or another site designated by the clerk. Wis. Stat. § 6.855(1). Absentee voters may also cast absentee

witness, Wis. Stat. § 6.87(2), who—with certain exceptions for overseas and military voters—must be "an adult U.S. citizen," *id.* § 6.87(4)(b)(1). Specifically, Section 6.87 requires the absentee voter to mark and fold her absentee ballot before the witness, place it within the official absentee-ballot envelope, and then sign certifications that she is "a resident" of a particular political subdivision, that she is "entitled to vote" in that subdivision, that she is "not voting at any other location," and that she "exhibited the enclosed ballot unmarked to the witness" before marking the ballot "in [the witness's] presence and in the presence of no other person." *Id.* § 6.87(2); *see id.* § 6.875. The witness must then complete and sign the certification on the absentee-ballot envelope stating, as relevant here, that "the above statements are true and the voting procedure was executed as there stated," in addition to providing his or her "[p]rinted name" and "[a]ddress." *Id.* § 6.87(2). Section 6.87 also contains a cure provision providing that "[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the [absentee] ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot." *Id.* § 6.87(9).

B. On October 2, 2023, Plaintiffs Susan Liebert, Anna Haas, Anna Poi, and Anastasia Ferin Knight (collectively, "Plaintiffs") filed this lawsuit against WEC; WEC's six commissioners, Don M. Millis, Robert F. Spindell, Marge Bostlemann, Ann S. Jacobs, Mark L. Thomsen, and Joseph J. Czarnezki; WEC's Administrator Meagan

ballots by delivering them to the municipal clerk's office or designated polling place before or on Election Day. Wis. Stat. § 6.87(4)(b)(1), (5). Finally, all voters have the option of casting an absentee ballot by mail before Election Day. *Id.* § 6.87(4)(b)(1).

Wolfe (collectively, "WEC"); and City Clerk for the City of Brookfield Michelle Luedtke, City Clerk for the City of Madison Maribeth Witzel-Behl, and City Clerk for the City of Janesville Lorena Rae Stottler. Dkt.1. WEC is a Wisconsin state agency charged with overseeing and administering Wisconsin's election laws. *See* Wis. Stat. § 5.05(1). Municipal clerks, like those named as Defendants here, are local-government officials tasked with providing administrative support to city governments, including by overseeing election procedures in their respective municipalities. *See* Wis. Stat. §§ 5.02(10), 5.84, 5.89, 5.72, 6.87, 7.41. Plaintiffs' complaint broadly challenges Wisconsin's absentee-ballot witness requirement, claiming that this requirement is unlawful under the Voting Rights Act of 1965 and, alternatively, the Civil Rights Act of 1964. Plaintiffs request as remedies: (1) a declaration that the absentee-ballot witness requirement "violates the Voting Rights Act, or, in the alternative, violates the Civil Rights Act"; (2) an injunction prohibiting Defendants from enforcing the absentee-ballot witness requirement; and (3) an injunction prohibiting WEC from preparing and distributing absentee-ballot instructions, certifications, and other forms that include the absentee-ballot witness requirement. Dkt.1 at p.21.

On October 16, 2023, the Republican National Committee and the Republican Party of Wisconsin (collectively, the "Republican Party") filed a motion to intervene as Defendants, contending that their own private interests and those of their members in fair and efficient elections entitles them to intervene in this action. *See* Dkt.9. This Court issued a briefing schedule on the Republican Party's motion, with

Plaintiffs' brief in opposition due October 30, 2023, and the Republican Party's brief in reply due November 6, 2023.

Defendants have recently filed their responsive pleadings. City Clerk for the City of Janesville Lorena Rae Stottler filed her answer on October 16, 2023. Dkt.8. City Clerk for the City of Madison Maribeth Witzel-Behl filed her answer on October 25, 2023. Dkt.18. City Clerk for the City of Brookfield Michelle Luedtke filed her answer on October 27, 2023. Dkt.21. Finally, WEC filed its motion to dismiss on October 25, 2023. Dkt.19. As to that motion, this Court ordered Plaintiffs to file any brief in opposition by November 15, 2023, with WEC's reply due December 1, 2023. *See* October 25, 2023 Text Order.

ARGUMENT

I. The Legislature Is Entitled To Intervene As A Matter Of Right Under Rule 24(a)(2)

Federal Rule of Civil Procedure 24(a)(2) provides that "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." There are four elements for intervention as of right under Rule 24(a)(2): "(1) the motion is timely; (2) the moving party has an interest relating to the property or transaction at issue in the litigation"; "(3) that interest may, as a practical matter, be impaired or impeded by disposition of the case"; and (4) the "existing parties" do not "adequately represent [the moving parties'] interests." *Driftless Area Land*

Conservancy v. Huebsch, 969 F.3d 742, 746 (7th Cir. 2020). The Legislature satisfies each of these elements here.

1. *The Legislature's Motion Is Timely.* Courts "look to four considerations" when "evaluating [the] timeliness" of a motion to intervene: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; and (4) any other unusual circumstances." *Cook Cnty. v. Texas*, 37 F.4th 1335, 1341 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 565 (2023). The "most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 389–90 (7th Cir. 2019) (citation omitted).

This Motion is timely, as the Legislature "move[d] promptly to intervene as soon as it kn[ew] . . . that its interests might be adversely affected" by this litigation and less than a month after Plaintiffs filing their complaint, with this lawsuit still in its early stages. *Cook Cnty.*, 37 F.4th at 1341. This Court has repeatedly found similarly timed intervention motions to be timely. *See, e.g., Hunter v. Bostelmann*, No. 21-cv-512-jdp-ajs-eec, 2021 WL 4592659, at *3 (W.D. Wis. Oct. 6, 2021) (five weeks); *Edwards v. Vos*, No. 20-cv-340-wmc, 2020 WL 6741325, at *1 (W.D. Wis. June 23, 2020) (eight weeks); *Donald J. Trump for President, Inc. v. Northland Television, LLC*, No. 20-cv-385-wmc, 2020 WL 3425133, at *1 (W.D. Wis. June 23, 2020) (eight weeks); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*

of Wis. v. United States, No. 02-C-0553-C, 2002 WL 32350046, at *2 (W.D. Wis. Nov. 20, 2002) (more than two months). Accordingly, there could be no plausible prejudice to any party from the grant of intervention to the Legislature here, while the Legislature itself would be substantially prejudiced if this Court excluded it as a party from this case, given its interests at stake here.

2. *The Legislature Has An Interest In This Litigation*. Under Rule 24(a)(2), a proposed intervenor must "claim[ ] an interest relating to the property or transaction that is the subject of the action[.]" *Berger*, 142 S. Ct. at 2200. This interest must "be direct, significant, and legally protectable," but the Seventh Circuit has "interpreted statements of the Supreme Court as encouraging liberality in the definition of an interest." *Lopez-Aguilar,* 924 F.3d 391–92 (citations omitted). Thus, the Seventh Circuit has stated that "the term 'interest' [i]s to be broadly construed" in favor of intervention. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.,* 683 F.2d 201, 204 (7th Cir. 1982).

Here, the Legislature has two independently sufficient interests justifying its intervention as of right.

First, as the Supreme Court held in *Berger*, States have "a legitimate interest in the continued enforce[ment] of [their] own statutes," *Berger*, 142 S. Ct. at 2201–02 (citations omitted), and thus "a strong interest" in litigation "seek[ing] to attack a state law on the ground that it is inconsistent with the Federal Constitution," *id.* at 2197. Further, States may empower "duly authorized representatives" to "participat[e] in federal litigation challenging state law" in order to protect that

interest—"either generally or in a defined set of cases"—as determined by "the sovereign State." *Id.* at 2201–02 (citations omitted). And recognizing the importance of this interest, the Supreme Court has instructed the federal courts to "rarely question that [a] State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging [a] state law." *Id.* at 2201.

Here, Plaintiffs seek an order declaring that Wisconsin's absentee-ballot witness requirement violates federal law, *supra* p.7, which implicates Wisconsin's "strong" sovereign interest in the "continued enforceability of [its] own statutes"—including, as directly relevant here, the absentee-ballot witness requirement, *id.* at 2197 (citation omitted); *see Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013) (citation omitted); *Lopez-Aguilar*, 924 F.3d at 392. Wisconsin, like all States, possesses the "prerogative to select which agents may defend its laws and protect [these] interests," *Berger*, 142 S. Ct. at 2204–05, and Sections 13.365 and 803.09(2m) demonstrate Wisconsin's sovereign choice "to authorize *its legislature* to litigate on the State's behalf" to defend the State's interests in state law. *Id.* at 2202 (citation omitted) (emphasis added). Specifically, under Section 803.09(2m), "[w]hen a party to an action . . . challenges a statute as violating or preempted by federal law . . . *the legislature* may intervene as set forth under [Section] 13.365." *Id.* Thus, the Legislature unquestionably has an interest here, sufficient for mandatory intervention. *Id.* at 2201–02.

Second, the Legislature also possesses an independent interest in defending the efficacy and integrity of its own constitutional authority to make laws for the State of Wisconsin, *Palm*, 2020 WI 42, ¶ 13—which is the "authority over a State's most fundamental political processes," *Berger*, 142 S. Ct. at 2201 (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)). The Wisconsin Constitution provides that the Legislature "may" enact laws "[p]roviding for absentee voting," Wis. Const. art. III, § 2, and the Legislature exercised that power in enacting the absentee-ballot witness requirement to secure the integrity of the absentee-ballot process, *see* Wis. Stat. § 6.87(4)(b)1; *accord Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (controlling plurality of Stevens, J.). Yet here, Plaintiffs claim that a core feature of Wisconsin's absentee-ballot regime violates federal law and thus is unenforceable in Wisconsin. *Supra* p.7. That challenge directly implicates the Legislature's strong interest in defending the effective use of its own constitutional powers, *Palm*, 2020 WI 42, ¶ 13, including especially its authority to enact laws "[p]roviding for absentee voting," Wis. Const. art. III, § 2.

3. *This Lawsuit Would Plainly Impair The Legislature's Interests*. The third element of Rule 24(a)(2) intervention is that the action "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." *Berger*, 142 S. Ct. at 2200–01 (citation omitted). In this case, granting Plaintiffs' request to invalidate the absentee-ballot witness requirement would directly impair both of the Legislature's interests, as noted above. Again,

Wisconsin has a sovereign interest in defending the constitutionality of its own election laws, *Berger*, 142 S. Ct. at 2202, and the State has designated the Legislature to defend this interest on behalf of the State in federal court, *see* Wis. Stat. §§ 13.365, 803.09(2m); *supra* p.4. Plaintiffs' lawsuit here, if successful, would directly impair that interest by prohibiting the enforcement of the absentee-ballot witness requirement all together. *See Berger*, 142 S. Ct. at 2201–02; *accord Lopez-Aguilar*, 924 F.3d at 385. And if Plaintiffs succeed, this would also impair the Legislature's interests in the efficacy and integrity of its own constitutional power to enact procedures governing the State's absentee-voting regime for the same reason, as any relief for Plaintiffs on their claims would thwart those powers. *See* Wis. Const. art. III, § 2.

4. *No Other Party Adequately Represents The Legislature's Interest*. The final requirement for intervention as of right under Rule 24(a)(2) is that no "existing defendant already 'adequately represent[s]' the same interests a proposed intervenor seeks to vindicate." *Berger*, 142 S. Ct. at 2203 (citation omitted). Where a proposed intervenor's interest is "similar to, but not identical with, that of one of the parties," the proposed intervenor's burden in establishing that its interests are not adequately represented "should be treated as minimal," as the possession of similar interests alone "normally is not enough to trigger a presumption of adequate representation." *Id.* at 2204 (citation omitted). In particular, state actors often "may pursue 'related' state interests" in litigation without being "fairly presumed to bear 'identical' ones." *Id.* (quoting *Trbovich*, 404 U.S. at 538). Thus, "a presumption of adequate

representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law," and it is "*especially* inappropriate when wielded to displace a State's prerogative to select which agents may defend its laws and protect its interests." *Id.* at 2204–05. So, at bottom, "a State's chosen representatives should be greeted in federal court with respect, not adverse presumptions," and "duly designated state agents seeking to vindicate state law" should only face "a 'minimal' burden" to establish inadequacy of representation rather than "some higher hurdle." *Id.* at 2205.

Here, the Legislature satisfies its "'minimal' burden" to show that the existing parties do not adequately represent its interests—which minimal burden applies both because the Legislature is one of Wisconsin's "duly designated state agents seeking to vindicate state law," *id.*, and because its interests are "similar to, but not identical with, that of [Defendants]," *id.* at 2205. Plaintiffs are adverse to the Legislature's interests, in that they seek to invalidate the absentee-ballot witness requirement duly enacted by the Legislature pursuant to its state constitutional authority. Thus, Plaintiffs cannot adequately represent the Legislature's interests.

Defendants—WEC and local election officials—do not adequately represent the Legislature's interests either. While WEC's interest may be "related" to the Legislature's interests in some respects, it does not possess "identical" interests to the Legislature, *Berger*, 142 S. Ct. at 2204 (citations omitted)—namely, robustly defending all of the State's laws, including the absentee-ballot witness requirement, against any federal challenge, *see* Wis. Stat. §§ 13.365, 803.09(2m).

So, while WEC does seek to dismiss Plaintiffs' claims here, *see* Dkt.20, the Legislature has offered a more fulsome merits defense of the absentee-ballot witness requirement than WEC, reflecting the Legislature's own "tactical choice[s]" that "give voice to [its] different perspective." *Berger*, 142 S. Ct. at 2205; *accord Driftless Area Land Conservancy*, 969 F.3d at 748 ("[I]t's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed."). Specifically, as to Count I of Plaintiffs' complaint, the Legislature has presented fulsome arguments on each of the three key features of Section 201 of the Voting Rights Act, including by arguing that the absentee-ballot witness requirement is not a "*requirement*" that a voter must satisfy "as a *prerequisite*" to "vot[e] or regist[er] for voting," 52 U.S.C. § 10501(b) (emphases added); Leg.MTD.17–26. WEC, in contrast, only presents arguments on two of the three salient features here, omitting any defense on the Section 201's "requirement/"prerequisite" feature. Dkt.20 at 6–17. As for Count II, the Legislature has offered a broad-based defense of the absentee-witness voting requirement on a number of elements of the Civil Rights Act's Materiality Provision, developing its argument over approximately 14 substantive pages. Leg.MTD.26–40. "Casting aspersions on no one," *Berger*, 142 S. Ct. at 2204, WEC's defense against Count II is far more limited, spanning approximately three pages, Dkt.20 at 17–20.

Beyond these differences in strategy on the merits, the Legislature has also raised procedural arguments that WEC has not made—specifically, that this Court should abstain or stay this case, in recognition of the related, ongoing state-court

litigation. Leg.MTD at 12–17. These important differences in litigation strategy, reflective of the Legislature's and WEC's pursuit of "related state interests" that are not "identical ones," are more than sufficient to overcome the Legislature's "minimal" burden on the adequacy-of-representation element. *See Berger*, 142 S. Ct. at 2204 (citations omitted); *id.* at 2205 ("[T]his litigation illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court."). And, separately, only the Legislature has an interest in its constitutional authority to pass laws regulating absentee voting, *supra* pp.3–4, thus WEC could not possibly adequately represent that unquestionably unique interest of the Legislature, *see Berger*, 142 S. Ct. at 2203–05.

And as to local election-official defendants, they do not share the Legislature's interests—even to a "related" degree, *Berger*, 142 S. Ct. at 2204—including because they are not agents of the State with the duty or authority to defend state law.

II. Alternatively, This Court Should Afford The Legislature Permissive Intervention Under Rule 24(b)(1)(B)

If the Court declines to find that the Legislature can intervene as of right, then the Legislature respectfully requests that the Court exercise its discretion to grant permissive intervention under Rule 24(b)(1)(B), including to be consistent with "the needs of federal-state comity." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 803 (7th Cir. 2019).

To begin, the Legislature satisfies the only two requirements for permissive intervention: the Legislature "timely" filed its intervention motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed.

R. Civ. P. 24(b)(1). As described above, the Legislature's motion is timely. *Supra*, pp.9–10. Further, the Legislature has filed an attached proposed Answer and proposed Motion to Dismiss and supporting Memorandum, raising defenses to the claims in Plaintiffs' complaint, and so "shares a question of law with the main action." *Planned Parenthood*, 942 F.3d at 803.

The Legislature also satisfies other appropriate permissive-intervention factors as well. As the Seventh Circuit explained in *Planned Parenthood*—which *Berger* superseded only as to its *mandatory* intervention analysis, *see supra* pp.3–4—Rule 24(b)(1)(B) also "allows the district court to consider a wide variety of factors" when deciding whether to grant permissive intervention, including whether intervention would "overwhelm" the Court and whether intervention would serve "the needs of federal-state comity." *See* 942 F.3d at 802–03.

Here, the Legislature's intervention is necessary for the Court to enjoy full adversarial briefing against an action seeking to set aside state election law, so as to "avoid[ ] setting aside duly enacted state law based on an incomplete understanding of relevant state interests." *Berger*, 142 S. Ct. at 2202. As explained above, the existing Defendants are not required to defend robustly the State or the Legislature's interests in the continued enforceability of Wisconsin's election laws when facing a federal challenge, while the Legislature is the State's duly authorized representative to do so. *See supra* p.11. Thus—"[c]asting aspersions on no one"—only the Legislature has thus far presented a full, robust defense against each of Plaintiffs'

claims, reflective of its own "tactical choice[s]" that "give voice to [its] different perspective." *Berger*, 142 S. Ct. at 2204–05.

Further, granting the Legislature intervention would promote "the needs of federal-state comity," *Planned Parenthood*, 942 F.3d at 803, affording "[a]ppropriate respect" for the State's choice of who are its "duly authorized representatives . . . in federal litigation challenging state law," *Berger*, 142 S. Ct. at 2201. As *Berger* recognized, where, as here, a State has chosen "to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives." *Id.* at 2203. Thus, the Court may not "presume a full overlap of interests when state law more nearly presumes the opposite," as this "would make little sense and do much violence to our system of cooperative federalism." *Id.* at 2204.

Finally, allowing the Legislature to intervene would pose no practical difficulties, but would, instead, allow for full adversarial litigation in this significant case, from those state officials authorized by state law to defend the State's interests in Court. Indeed, "federal courts routinely handle cases involving multiple officials sometimes represented by different attorneys taking different positions," and the Legislature fully anticipates here that, "[w]hatever additional burdens adding the legislative leaders to this case may pose, those burdens [will] fall well within the bounds of everyday case management." *Id.* at 2206 (citations omitted).

CONCLUSION

This Court should grant the Legislature's Motion to Intervene.

Dated: October 30, 2023.

Respectfully submitted,

/s/Misha Tseytlin
MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
CARSON A. COX*
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

Attorneys for the Wisconsin State Legislature

**pro hac vice pending*

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2023, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/Misha Tseytlin
MISHA TSEYTLIN