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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

DISABILITY RIGHTS WISCONSIN, et al.,

Plaintiffs,

v. Case No. 24-CV-1141

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

BRIEF IN OPPOSITION TO LEGISLATURE'S INTERVENTION

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INTRODUCTION

Plaintiffs brought this declaratory judgment action seeking to have absentee ballots electronically mailed and/or returned. Defendants are the Wisconsin Elections Commission, its administrator, Meagan Wolfe, and the individual commissioners in their official capacities—the entities responsible for administering Wisconsin elections (the "Commission defendants").

The Wisconsin State Legislature commenced a special proceeding by moving to intervene, asserting interests in acting on behalf of the State and in defending asserted institutional interests as the Legislature, primarily seeing a law upheld and "election integrity." This Court should deny the motion. The Legislature cannot constitutionally intervene to represent the State's interests where the executive branch is already defending the case, and it has no legislative role at issue in the issues presented by the case. That constitutional infirmity ends the inquiry, but the Legislature fails the second, third, and four prongs of the regular intervention standard of Wis. Stat. § 803.09(1), too. Permissive intervention would not remedy these failings and only complicate the proceedings.

BACKGROUND

Plaintiffs filed suit primarily under the federal Americans with Disabilities Act (ADA) and Rehabilitation Act, seeking accommodations in how they receive, vote, and return absentee ballots. (Doc. 9:5, 58–59.) They assert

that, to the extent Wis. Stat. § 6.87(3)(a) would prevent them from electronic receipt, voting, and return of their ballots, it must be enjoined as applied to them and those like them. (Doc. 9:58–59.)

The Wisconsin Legislature moved to intervene, thus commencing a special proceeding. The Legislature has no constitutional or statutory role in the administration of the challenged law. Provisions of Wisconsin law added by 2017 Wis. Act 369, enacted in December 2018 following the election of Attorney General Josh Kaul but before he took office, authorize a legislative committee, the Joint Committee on Legislative Organization, to authorize the Legislature, or one house thereof, to intervene as itself in certain circumstances. 2017 Wis. Act 369, §§ 5, 97. Wisconsin Stat. § 13.365(3) provides that, in the types of cases authorized by Wis. Stat. § 803.09(2m), the Joint Committee on Legislative Organization "may intervene at any time in [an] action on behalf of the Legislature." *See also* Wis. Stat. § 13.365(1)–(2) (allowing intervention by the assembly or senate). The Joint Committee has an unlimited appropriation to pay for outside counsel for that purpose. *Id.* (citing appropriation under Wis. Stat. § 20.765(1)(a), (b)).

ARGUMENT

The Court should deny the Legislature's motion for intervention. Regardless of the new intervention statutes, the Legislature cannot constitutionally intervene to represent the State's interests where the

Attorney General and executive branch are defending the case. The Legislature could intervene only if it has a constitutional role as the Legislature, but it has no such role in the issues presented by Plaintiffs' case here. In addition, the Legislature fails the statutory test for intervention, and permissive intervention presents the same constitutional impediments and is unwarranted on additional grounds.

I. Allowing the Legislature to intervene in this matter would violate the separation of powers.

The Legislature asserts that it has an interest either as the State or the Legislature in ensuring that a Wisconsin law is upheld (Doc. 52:10–11) and is entitled to intervene even when the Attorney General and Commission defendants are already defending the case. Wisconsin's separation of powers doctrine prevents that outcome in this context because it would allow the Legislature to execute the law. The Wisconsin Supreme Court has so far not read the new intervention statutes so broadly as the Legislature urges.

A. Wisconsin's separation of powers divides governmental power among the three branches and allows the Legislature to make laws, not to execute them.

1. The Wisconsin Constitution divides governmental power among the three branches of government.

Like the U.S. Constitution and all state constitutions, the Wisconsin Constitution divides governmental power among the three branches of government: the legislative, which makes the law; the executive, which

executes the law; and the judiciary, which resolves disputes over what the law means.

To preserve this balance of power, the legislative branch's constitutional role ends when a bill becomes law; thereafter, the executive branch implements the enacted law. After that critical constitutional moment, the legislative branch may neither assume the power to execute the law nor block the executive branch's ability to do so.

a. The Wisconsin Constitution guards against the concentration of power in a single branch.

Wisconsin's separation of powers—just like the United States'—derives from three constitutional vesting clauses that divide the core powers of government among three branches: "The legislative power shall be vested in a senate and assembly," "[t]he executive power shall be vested in a governor," and "[t]he judicial power of this state shall be vested in a unified court system." U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1. State administrative agencies (like the Commission) are "part of the executive branch" and carry out executive functions. *Serv. Emps. Int'l Union, Loc. 1 v. Vos ("SEIU")*, 2020 WI 67, ¶ 60, 393 Wis. 2d 38, 946 N.W.2d 35; *see also* Wis. Stat. §§ 15.61 (creation of elections commission; part of subch. III ("Independent Agencies") of Wis. Stat. ch. 15 ("Structure of the Executive Branch"); 15.01(9) ("'Independent agency' means an administrative agency within the executive

branch created under subch. III"); 15.02 ("independent agency" is a "principal administrative unit of the executive branch").

Separating these powers provides the "central bulwark of our liberty," *SEIU*, 393 Wis. 2d 38, ¶ 30, by guarding against the "concentration of governmental power" in a single branch. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 4, 376 Wis. 2d 147, 897 N.W.2d 384. Through this separation, the constitution "ensure[s] that each branch will act on its own behalf and free from improper influence by the others." *Id.* ¶ 32. "[N]o branch [is] subordinate to the other, no branch [may] arrogate to itself control over the other except as is provided by the constitution, and no branch [may] exercise the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982).

Because the legislative branch writes the laws, the separation of powers doctrine is especially wary of its stripping away power from co-equal branches through legislation. As James Madison warned, the legislative branch is "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (Clinton Rossiter ed., 1961). And the art of lawmaking enables the legislature to "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Id.* at 310. The legislative usurpation of executive power poses a particular danger because it results in the "same persons who

have the power of making laws"—that is, legislators—"also [having] in their hands the power to execute them." *Gabler*, 376 Wis. 2d 147, ¶ 5 (quoting John Locke, *The Second Treatise of Civil Government*, § 143 (1764)).

b. The legislative branch's power is to make laws, not also to execute them.

The legislative branch "may not 'invest itself or its Members with either executive power or judicial power.'" *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (citation omitted). Policing this principle requires distinguishing between executive and legislative power. This task is "not always easy," *SEIU*, 393 Wis. 2d 38, ¶ 34, but some basic principles lie beyond debate.

Generally, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). More specifically, the Legislature has constitutional authority "to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate." *Id.* (alteration in original) (citations omitted). So, when the legislative branch wants to achieve a policy goal, it may enact statutes that empower the executive branch to administer a new program and tell the executive branch how to do so.

But "[f]ollowing enactment of laws, the legislature's constitutional role as originally designed is generally complete." *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 182, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting). After the legislative branch completes its lawmaking work, the baton passes to the executive branch, whose "authority consists of executing the law." *SEIU*, 393 Wis. 2d 38, ¶ 95. Once a "policy choice[ ]" has been "enacted into law by the legislature," it is then "carried out by the executive branch." *Fabick v. Evers*, 2021 WI 28, ¶ 14, 396 Wis. 2d 231, 956 N.W.2d 856; *see also Palm*, 391 Wis. 2d 497, ¶ 91 (Kelly, J., concurring) ("The difference between legislative and executive authority has been described as the difference between the power to prescribe and the power to put something into effect . . . .").

The U.S. Supreme Court underscored this baton-passing dynamic in *Bowsher v. Synar*, 478 U.S. 714 (1986). There, Congress enacted a law creating an official who could mandate, outside the ordinary legislative process, reductions in deficit spending by the executive branch. The official could be fired only by Congress. The Court held that this statute violated the separation of powers because "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Id.* at 722. This sort of scheme "reserve[s] in Congress control over the execution of the laws"—in other words, grants it a "congressional veto"—which is something "[t]he structure of the Constitution

does not permit." *Id.* at 726. Simply put, "the Constitution does not permit Congress to execute the laws." *Id.*

In carrying out the legislative branch's policy choices, the executive is no mere "legislatively-controlled automaton." *SEIU*, 393 Wis. 2d 38, ¶ 96. Rather, the executive must "use judgment and discretion" in carrying out the legislative mandate. *Palm*, 391 Wis. 2d 497, ¶ 183 (Hagedorn, J., dissenting). That discretion is the very essence of the executive's role, exactly where the legislative branch may not intrude. As the U.S. Supreme Court explained in *Bowsher*:

> Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law. Under § 251 [of the Act], the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.
>
> . . . .
>
> Congress of course initially determined the content of the . . . Act; and undoubtedly the content of the Act determines the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.

Bowsher, 478 U.S. at 732–34.

The same is true under the Wisconsin Constitution. Implementing the law requires exercising discretion and judgment about relevant facts. That is

the essence of executive power, and the Legislature may not exercise it in the executive branch's stead.

2. Wisconsin's core and shared power framework does not alter the underlying principles that divide legislative from executive power.

Wisconsin courts have filtered these well-established separation of powers principles through a lens of "core" and "shared" powers. *See SEIU*, 393 Wis. 2d 38, ¶¶ 34–35. Those analytical tools don't alter the underlying principles, and this framework must be carefully employed to preserve the separation of powers.

a. A "core" power defines a branch's essential attributes and cannot be shared with another branch.

Each branch of government has exclusive—"core"—constitutional powers which constitute zones of authority into which no other branch may intrude. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). "A branch's core powers are those that define its essential attributes." *SEIU*, 393 Wis. 2d 38, ¶ 104. "[A] core power is a power vested by the constitution that distinguishes that branch from the other two." *Id.* ¶ 104 n.15.

"[C]ore zones of authority are to be 'jealously guarded,'" as "[t]he state suffers essentially by every . . . assault of one branch of the government upon another." *Gabler*, 376 Wis. 2d 147, ¶¶ 30–31 (first alteration in original) (citations omitted). Therefore, "any exercise of authority by another branch" in

an area of core power "is unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citations omitted).

In addition to examining constitutional text, history also provides insight into what powers are rightly considered "core." If Wisconsin's historical "practices and laws" from around the time of the founding show that an encroaching branch did not traditionally have a role in the power at issue, that further indicates that it is a core power of the encroached-upon branch. *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 38, 531 N.W.2d 32 (1995); *see also State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 44, 402 Wis. 2d 539, 976 N.W.2d 821 ("To properly confirm the meaning of the Wisconsin Constitution, we consult 'historical evidence' such as 'the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.'" (citations omitted)).

At the most basic level, our constitution vests the legislative and executive branches with the core powers to legislate and to execute the laws, respectively. *See* Wis. Const. art. IV, § 1, art. V, §§ 1, 4, art. VII, § 2. The Legislature "is tasked with the enactment of laws," and the "governor is instructed to 'take care that the laws be faithfully executed.'" *SEIU*, 393 Wis. 2d 38, ¶ 31 (citations omitted). Because the executive branch's duty

to execute the laws is its "core" power, the Legislature cannot assume any share of it.

b. Even in an arena of "shared" powers, each branch can exercise only its own constitutional powers and cannot override another branch's power.

Wisconsin courts also recognize the concept of "[s]hared" powers, which are best described as those that "lie at the intersections of . . . exclusive core constitutional powers." *Id.* ¶ 35 (citation omitted). In these "shared powers" situations, one branch exercises its own constitutional powers in an arena that affects another branch's ability to exercise *its* powers. Such actions are constitutional if they do not "unduly burden or substantially interfere with the other branch's essential role and powers." *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360–61, 441 N.W.2d 696 (1989).

Calling a power "shared" is therefore something of a misnomer. What is really "shared" is the intersecting arena of governmental action—two branches have a constitutional role in the same topic, and they each use their core powers to pursue those roles. What is *not* "shared" are the core powers that each branch uses in its pursuit of its aims. Each branch exercises only its own powers, both as a matter of process and substance.

As a matter of process, a branch can act in an area of shared power only by using its constitutional tools—in the legislative branch's case, by

passing laws that prospectively regulate another branch. At the end of the day, "[l]egislative power . . . is the authority to make laws." *Koschkee*, 387 Wis. 2d 552, ¶ 11 (citation omitted).

As a matter of substance, a branch exercising its core power in a shared arena cannot have the power to veto the other branch's constitutional authority to act.

In *Friedrich*, for example, the supreme court evaluated whether a law that impacted two branches' overlapping exercise of core powers violated the separation of powers. The statute at issue set compensation ceilings for guardians ad litem and special prosecutors, and the court reasoned that "statutes addressing the compensation of court-appointed counsel from public funds fall squarely within" the Legislature's power to "*enact legislation* . . . to allocate government resources." *Friedrich*, 192 Wis. 2d at 16 (second emphasis added). But the judiciary was exercising its core powers, too: the "power to set and order compensation at public expense for court-appointed counsel is an inherent power of the judiciary." *Id.* at 19.

Using a shared powers analysis, the Court held that the statute was not "unduly burden[some]" because "courts retain[ed] the ultimate authority to compensate court-appointed counsel at greater than the statutory rates when necessary." *Id.* at 30. In other words, the statute was constitutional because the judiciary retained its core power to set compensation higher than the

Legislature's statutory limit. The statute and statutory rate did not (because it could not) veto the judiciary's ability to exercise its constitutional role when needed in that shared arena.

By contrast, in *Matter of E.B. v. State*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983), the Court analyzed whether a statute could automatically require appellate courts to reverse judgments due to a circuit court's failure to submit jury instructions in written form. Like *Friedrich*, *E.B.* involved another shared arena; this time, the Legislature used its core legislative power to pass laws regulating jury instructions, which overlapped with the judiciary's core judicial power to determine reversible error on a case-by-case basis. *Id.* at 184, 186.

The court held that the Legislature lacked the substantive constitutional power to mandate reversal in particular cases because doing so would veto core judicial power in presiding over cases. To preserve the statute's constitutionality, the Court interpreted the statute as not requiring automatic reversal; otherwise, the Legislature would have prevented the judiciary from exercising its own core power. *Id.* at 186.

* * *

In sum, the legislative branch may not exercise or otherwise interfere with another branch's core power at all. And even in the so-called "shared powers" realm where core powers overlap, the legislative branch can act only

through statutes that prospectively regulate another branch, and such statutes cannot bar the other branch from exercising its core constitutional authority.

B. The defense of this litigation constitutes core executive power, implicating no legislative power; interpreting Wis. Stat. § 803.09(2m) as allowing the Legislature to litigate alongside the Attorney General would intrude upon that power.

The Attorney General and Commission defendants' defense of the law here constitutes core executive power. The Legislature has no constitutional role to defend the state's interest in litigation here, and it has no legislative institutional power implicated by the matter. Interpreting Wis. Stat. §§ 13.365 and 803.09(2m) as allowing the Legislature to litigate alongside the Attorney General and his executive branch clients would violate the separation of powers.

1. The Attorney General and Commission defendants' defense of the case constitutes core executive power.

The Attorney General and Commission's defense of this case is a core power. Executive power is "power to execute or enforce the law as enacted," *SEIU*, 393 Wis. 2d 38, ¶ 1, and the ability to execute enacted law to address particular circumstances is *the* "essential attribute[ ]" of the executive branch, *id.* ¶ 104.

The Attorney General is a "high constitutional executive officer." *Id.* ¶ 60 (citation omitted); Wis. Const. art. VI, § 3. He is statutorily charged with

defending state agencies named in civil litigation. Wis. Stat. § 165.25(6). Since 1849, the Attorney General has exercised the executive powers traditionally held by a state's chief legal officer, including representing the state and its entities in litigation. *See* Wis. Rev. Stat. ch. 9, §§ 36–41 (1849). The Attorney General carries that law into effect when it defends executive agency clients in litigation.

For both the Attorney General and executive branch clients, litigation is part of the day-to-day work of carrying out the law. An agency's day-to-day job is a classic executive function: "to implement and carry out the mandate of the legislative enactments." *DOR v. Nagle-Hart, Inc.*, 70 Wis. 2d 224, 226–27, 234 N.W.2d 350 (1975). "[W]hen an administrative agency acts . . . it is exercising executive power." *SEIU*, 393 Wis. 2d 38, ¶¶ 96–97. Executive law-implementation includes exercising judgment and discretion in applying generally applicable law. *See id.* ¶ 96. In *Chaffin v. Arkansas Game & Fish Commission*, 757 S.W.2d 950, 953 (Ark. 1988), for example, the Arkansas Supreme Court held that the state legislature violated separation of powers by intruding into executive branch resource-allocation decisions, explaining that "[a]llocation of resources and establishment of priorities are the essence of management."

The defense of Plaintiffs' claims in this case, primarily brought under the federal ADA and Rehabilitation Act, involves the execution of the state election

law through litigation. Under the federal laws, courts must consider whether the accommodations sought by the plaintiff would impose significant financial or administrative costs, or fundamentally alter the nature of the program or service. *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 594 (7th Cir. 2018); *see* 28 C.F.R. §§ 35.150(a)(3), 35.130(b)(7). The parties here must thus present evidence about the impact the sought-for accommodations would have on the administration of Wisconsin elections. The defense of the law must take into account how Plaintiffs' claims intersect with the costs and other factors relating to the administration of the law. That job is constitutionally tasked to the executive branch, not the Legislature. The Legislature, not an executive branch body, has no role in carrying out Wisconsin elections.

2. The Legislature has no constitutional role in defending the statute in litigation alongside the executive branch, and no legislative power is implicated by this case.

In contrast to the executive branch's constitutional role in defending the litigation at issue, the Legislature has no constitutional role or power to act as the "state's litigator-in-chief or even the representative of the people at large." *Cf. Palm*, 391 Wis. 2d 497, ¶ 235 (Hagedorn, J., dissenting). Litigating cases is an executive function and, at least where the executive branch is defending the law at issue, the Legislature has no constitutional role in defending the law for

the state. It could constitutionally intervene only where its own institutional power would be impacted, but that is not the case here.

This case impacts no constitutional power of the Legislature. As the examples mentioned by the *SEIU* court illustrate, the Legislature can constitutionally be a litigant in support of its role in the process of lawmaking. 393 Wis. 2d 38, ¶ 72, n.21 (listing cases brought by Legislature challenging Governor's veto of passed budget bills). That interest ends once the law is enacted: "Following enactment of laws, the legislature's constitutional role as originally designed is generally complete." *Palm*, 391 Wis. 2d 497, ¶ 182 (Hagedorn, J., dissenting).

Here, litigating whether an election statute complies with federal disability law implicates no part of the process of lawmaking. The Legislature has no constitutional role to defend the case alongside the Attorney General and Commission defendants. Even if the Legislature might conceivably have a role in a different kind of case—a constitutional challenge to state law, where no executive branch official was willing to defend it—this matter does not present that situation.

3. Construing the new statutory intervention provisions as permitting the Legislature to defend the law alongside the Attorney General and Commission defendants transfers core executive branch power to the Legislature.

If the intervention statutes were applied to allow the Legislature to defend this case alongside the Attorney General and executive branch defendants, the Legislature would take for itself core executive branch power. "Any" intrusion by the Legislature here would be unconstitutional. *Joni B. v. State*, 202 Wis. 2d 1, 10, 549 N.W.2d 411 (1996).

Courts in other states have recognized that allowing the legislature to direct litigation violates the separation of powers. In *In re Opinion of Justices*, 27 A.3d 859, 870 (N.H. 2011), the New Hampshire Supreme Court held that a statute directing the Attorney General to intervene in a lawsuit violated that state's separation of powers. In *State Through Board of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989), the Louisiana Supreme Court held that a statute allowing the legislature to file a lawsuit to collect penalties violated the separation of powers. And in *Stockman v. Leddy*, 129 P. 220, 223 (Colo. 1912), *overruled on other grounds by Denver Ass'n for Retarded Children, Inc. v. Sch. Dist. No. 1*, 535 P.2d 200, 204 (1975), the Colorado Supreme Court held that a statute giving the legislature the power to bring cases for certain purposes violated that state's separation of powers doctrine. In each of those cases, the court rejected the legislature's conferral upon itself the power to be a party

with the ability to make litigation decisions or to direct the Attorney General to take certain steps.

Here, allowing the Legislature to intervene would intrude on the executive branch's core power because the Attorney General and executive branch defendants would no longer have the power to control the strategy, handling, and disposition of the case. An intervening party is a full participant in the lawsuit and is treated as if it were an original party. *Kohler Co. v. Sogen Int'l Fund, Inc.*, 2000 WI App 60, ¶ 12, 233 Wis. 2d 592, 608 N.W.2d 746. That means that the Legislature can make the choices about litigation that the constitution leaves to the executive branch. The Legislature's own motion to intervene, which emphasizes that the Legislature may make different strategic choices than the Attorney General and Commission defendants (Doc. 52:22), underscores that very problem. The Legislature may believe things go well when it intervenes, but that is not the point; it is "entirely irrelevant" whether "[t]he legislature may see itself as a benign gatekeeper." *SEIU*, 393 Wis. 2d 38, ¶ 107.

C. Even if the defense of this litigation were a shared power, the Legislature's participation as a party would unduly burden and substantially interfere with the executive branch's constitutional role.

Even if this Court believed that the Legislature did have a shared constitutional role in litigating the defense of this matter, Wis. Stat.

§ 803.09(2m) would still be unconstitutional as applied here because the Legislature's simultaneous participation unduly burdens and substantially interferes with the executive branch's constitutional role.

As in *Friedrich* and *E.B.*, the new intervention statutes cannot constitutionally prevent the Attorney General and his executive branch clients from exercising their core powers. But as discussed above, because an intervenor has all the power as the original defendants, the Legislature would have the power to override or undermine their choices in litigation in pursuit of different strategies. Litigating the case is part of administering Wisconsin election law, a job that the Legislature has no power or duty to carry out. The claims in this case, which involve balancing Plaintiffs' request for accommodation with the costs and other impacts on the administration of the statute, squarely implicate executive power. Even if this litigation occupied a shared arena of power, the Legislature cannot constitutionally have the power to make contrary litigation decisions to those of the executive branch. Intervention here would violate the separation of powers regardless of whether the Court viewed it through a core or shared power lens.

D. The Wisconsin Supreme Court has not considered whether Wis. Stat. §§ 13.365 and 803.09(2m) can be constitutionally construed as allowing the Legislature to intervene where the Attorney General and executive branch are already defending the case.

The Legislature asserts that the new intervention statutory provisions automatically permit it to intervene. But the Wisconsin Supreme Court has so far not read those statutes as applying where the Attorney General and executive branch clients are already defending a case, and it would violate the separation of powers if they were.

Since 2018, the supreme court has considered the scope and constitutionality of the new intervention statutes twice: in *SEIU* and *Democratic National Committee v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423. Neither case interpreted the statutes as applied to this type of situation.

SEIU involved a facial challenge to numerous provisions of 2017 Wis. Act 369, meaning that the court saw its job as evaluating whether there could be any constitutional applications of each statute. 393 Wis. 2d 38, ¶ 4. Under that standard, the court denied the facial challenge, holding that "[w]hile representing the State in litigation is predominately an executive function, it is within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature." *Id.* ¶ 63. The court

reasoned that the intervention statutes were constitutional at least in cases implicating the Legislature's own "institutional interests." *Id.* ¶¶ 72–73.

The court noted that prior to 2017 Wis. Act 369, the Legislature had "limited power to intervene in litigation." *Id.* ¶ 51. As examples of where the Legislature's "institutional interests" may be adequate to justify intervention, the court pointed to three cases, all of which were original actions brought by legislative entities against executive branch officials in challenges to the Governor's allegedly improper use of his power to partially veto budget bills passed by the Legislature. *See id.* ¶ 72, n.21 (listing cases). Thus, all involved the Legislature's participation as a party in defense of its own institutional powers. *SEIU* did not suggest that the type of application at issue here, implicating no constitutional powers of the Legislature, would be constitutional.

Bostelmann involved the unusual situation where no executive branch official was defending the law. The Attorney General had withdrawn as the defendants' counsel due to a conflict, and the appointed special counsel declined to appeal an adverse ruling, leaving the Legislature as the only party seeking to defend the statute. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, *1 (W.D. Wis. Mar. 28, 2020) (Attorney General withdrawing and replaced with outside counsel); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020) (Legislature only appealing party).

Under those circumstances, the court held that the statute gave the Legislature a statutory interest not only where its institutional interests were implicated, but in defending state statutes as described in Wis. Stat. § 803.09(2m): "The Legislature is . . . empowered to defend not just its interests as a legislative body, but these specific interests itemized by statute." *Bostelmann*, 394 Wis. 2d 33, ¶ 8.

The *Bostelmann* court did not treat its decision as addressing larger separation of powers concerns. *Id.* ¶ 4, n.2 (question not a "wide-ranging constitutional inquiry," and noting lack of time for parties to address the separation-of-powers issue), *id.* ¶ 26 (Dallet, J., dissenting) (flagging separation-of-powers question for future cases). Neither the *Bostelmann* nor *SEIU* court was confronted with the question of whether such a power would violate Wisconsin's separation of powers in a situation like the one here, where the Attorney General and executive branch clients are defending the case.

The Legislature points to three circuit court cases where its intervention was not opposed or the circuit court granted its motion. (Doc. 52:12.) As an initial matter, that is irrelevant to the merits of the constitutional claim presented. But they are unpersuasive examples, in any event: intervention was not opposed in two of the cases because they were distinguishable from this one, and in the third case, the court declined to consider the constitutional issue presented.

In *EXPO Wisconsin, Inc. v. WEC*, the executive branch did not oppose intervention because the Legislature had its own interest as the Legislature: the *EXPO* plaintiffs asserted that the Legislature failed to provide timely notice of two constitutional referenda under Wis. Stat. § 8.37. Case No. 23-CV-0279 (Dane Cnty.); (*see* Doc. 49:15). In *Priorities USA v. WEC*, the executive branch did not oppose intervention where the executive branch was not defending on one of the issues presented by the plaintiffs: whether absentee ballot return drop boxes are permitted under Wisconsin statutes. Case No. 23-CV-1900 (Dane Cnty.); (*see* Doc. 49:12). That case is now before the Wisconsin Supreme Court on the drop box issue. *Priorities USA v. WEC*, Case No. 2024AP0164 (Wis. Sup. Ct.). In *Abbotsford Education Ass'n v. WERC*, the executive branch opposed intervention but the circuit court granted it, refusing to consider the constitutional question as underdeveloped and relied on the face of the statute. Case No. 23-CV-3152 (Dane Cnty.);(*see* Doc. 49:5).[1]

[1] The circuit court ruled that allowing the defendants in *Abbotsford* to argue for a construction of Wis. Stat. § 803.09(2m) that would not allow the Legislature to intervene would actually require the court to permit intervention in order to litigate that issue. (Doc. 49:10.) That was incorrect. The Legislature's opportunity to be heard is to file a reply brief in support of its motion to intervene. If the circuit court rules against its intervention, the Legislature has a right to appeal that ruling because the order would terminate a special proceeding. *See Wengerd v. Rinehart*, 14 Wis. 2d 575, 582, 338 N.W.2d 861 (Ct. App. 1983) (circuit court order denying intervention is a final order in that proceeding); Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 4.10 (9th ed. 2022).

Here, where the Attorney General and executive branch defendants are actively defending a law, construing the new intervention statutes as making the Legislature the "agent for the state" would violate the separation of powers, as the two branches competed to be the "litigator-in-chief" and the "representative of the people at large." *Cf. Palm*, 391 Wis. 2d 497, ¶ 235 (Hagedorn, J., dissenting) ("The legislature . . . is not the state's litigator-in-chief or even the representative of the people at large."). And the Legislature has no constitutional role as the Legislature in this litigation that would make its intervention proper under that theory, either. Wisconsin Stat. § 803.09(2m) cannot constitutionally be interpreted as allowing the Legislature to intervene in this case.

II. The Legislature does not meet the statutory standard for intervention as of right under Wis. Stat. § 803.09(1).

The separation of powers doctrine precludes the Legislature from intervening under Wis. Stat. § 803.09(1) and (2m), or permissive intervention. But the Legislature also fails the statutory standard for intervention of right under Wis. Stat. § 803.09(1). It has no protected interest as the Legislature, no interest that could be impacted by the outcome of the litigation, and its asserted interests will be more than adequately represented by the existing parties.

Intervention as of right is governed by Wis. Stat. § 803.09(1), which states:

> [A]nyone 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). To intervene as of right, a movant must meet four elements: (1) a timely intervention motion; (2) an interest sufficiently related to the subject of the action; (3) the disposition of the action may as a practical matter impair the movant's ability to protect that interest; and (4) the movant's interest is not adequately represented by existing parties. *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1.

The burden is on the movant seeking to intervene to show that the elements are satisfied. *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶ 12, 296 Wis. 2d 337, 723 N.W.2d 131. "Failure to establish one element means the motion must be denied." *Id.* Courts use these elements as a guide to best consider the competing public policies of allowing original parties to conduct and resolve their own lawsuit, with allowing interested persons to join a lawsuit so that controversies are resolved efficiently and economically. *Helgeland*, 307 Wis. 2d 1, ¶ 40.

Here, the Legislature fails to satisfy the second, third, and fourth elements: it has no protected interest, no interest that can be impaired by its non-participation as a party, and its interests will be adequately represented by the existing defendants and their counsel.

A. The Legislature has no legally protected interest related to the subject of this action, and thus also no interest that could be impaired by the outcome of this case.

The Legislature asserts that it has a protected interest as the Legislature in seeing laws it passed upheld, the "efficacy of its own powers," or the "integrity of elections." (Doc. 52:11, 16.)[2] None of these are protected interests for purposes of intervention.

The interest element for purposes of intervention corresponds with the concept of standing: it requires a direct and immediate interest relating to the statutes at issue in the case. *Id.* ¶ 45; *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (construing parallel requirement of Fed. R. Civ. P. 24). The Legislature has no such protected interest here.

Because it has no protected interest under the second prong of intervention, the Legislature also has no interest that will be impeded by the outcome of the litigation for purposes of the third prong.

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[2] The Legislature also treats its interest in defending the constitutionality of a law as a separate, fourth interest for standing purposes. (Doc. 52:16.) It does not explain how this "interest" is different from its asserted interest in seeing a law upheld more generally.

1. The Legislature has no protected interest as the Legislature in seeing the laws it passed upheld.

The Legislature has no protected interest in seeing the law it passed upheld or upheld against a constitutional claim. Neither of the cases it relies on, *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. 179 (2022), nor *Bostelmann*, 394 Wis. 2d 33, (Doc. 52:15–16), supports that assertion.

Berger does not stand for the proposition the Legislature asserts; U.S. Supreme Court case law actually supports the opposite conclusion.[3]

Several Supreme Court cases have considered whether an intervening legislative body has a protected interest for purposes of intervention under Fed. R. Civ. P. 24, which, like Wis. Stat. § 803.09(1), requires an intervenor to have a protected interest. In *Berger*, the North Carolina legislature sought to intervene in litigation based on a North Carolina statute that authorized state legislative leaders to intervene in litigation "as agents of the State." 597 U.S. at 180 (citation omitted). The Supreme Court concluded that the legislature had an interest for the purpose of intervention within the meaning of Fed. R. Civ. P. 24(a)(2) only because it was acting as the state and not the legislature. *Id.*

[3] *Berger* solely addressed whether a legislative body had a protected interest for purposes of the first prong of the federal intervention rule, Fed. R. Civ. P. 24. It did not address any separation of powers problems that the North Carolina statutes might have under that state's constitution.

In contrast, the Supreme Court has held that legislative bodies lack a protected interest when they seek to intervene based on an asserted legislative interest in seeing a law upheld. *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 670 (2019) (Virginia's house lacked a cognizable interest in a redistricting case based on the premise that the challenged law would change the individual delegates of that body). Instead, the Court has permitted legislative intervention where the case could alter the legislature's ability to have a role in enacting legislation. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791, 803 (2015) (legislature had standing to challenge a law that would have permanently deprived it of a role in the redistricting process).

Here, the Legislature's "interest" in seeing the election law it passed upheld is the type of generalized interest that those cases have declined to treat as a protected interest of the legislature for intervention purposes.

Bostelmann did not address whether the Legislature has a protected interest to defend the validity of a law *as the Legislature* where the Attorney General and executive branch are already defending that law. It treated the issue presented as whether the Legislature—in a case where no executive branch officials were defending the law—was acting to defend interests beyond its own institutional powers. *Bostelmann*, 394 Wis. 2d 33, ¶ 8.

2. The Legislature has no protected interest in the "efficacy of its own powers."

The Legislature argues that it has a protected interest in the "efficacy of its own powers." (Doc. 52:16.) It does not explain how this is different from seeing statutes it passed upheld, and *Palm* does not support its reading.

Palm held that the Legislature had standing to bring a case asserting that the secretary of the Department of Health Services had evaded the Legislature's statutory functions under Wis. Stat. ch. 227 to review proposed administrative rules. *Palm*, 391 Wis. 2d 497, ¶ 13. *Palm* did not address or suggest the ruling the Legislature seeks in this case—that it has a general protected interest as the Legislature to ensure that laws are upheld. Unlike in *Palm*, here the Legislature identifies no legislative statutory responsibilities impacted by Plaintiffs' claims.

3. The Legislature has no protected interest in the "integrity of elections."

Finally, the Legislature asserts that it can intervene on the theory it has a "powerful interest in election integrity." (Doc. 52:17.) Neither case it relies on said anything about a party's standing or protected interest to intervene for that purpose, and courts have rejected the generalized interest of "election integrity" as sufficient to support party status.

The Legislature relies on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), (Doc. 52:16, 17), but neither case addressed whether "election integrity" is a protected interest for purposes of standing or intervention. Instead, those cases addressed whether the state has an "interest" for purposes of regulating elections in ensuring voting integrity as part of evaluating whether a state law violates the U.S. Constitution. *Crawford*, 553 U.S. at 196; *Eu*, 489 U.S. at 231. That concept of interest has nothing to do with whether a legislature has a protected alleged injury sufficient to be a named party or intervenor.

To the contrary, courts agree that "election integrity" is a generalized interest that is *not* a protected interest.

Federal courts have recognized that "election integrity" is not a direct, protected interest for standing purposes. *See, e.g.*, *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021) (no particularized injury where plaintiffs asserted that a practice hurt the "'integrity' of the election process"); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (plaintiffs asserted only a generalized grievance based on desire to ensure that only lawful ballots are counted); *Iowa Voter All. v. Black Hawk Cnty.*, 515 F. Supp. 3d 980, 991 (N.D. Iowa 2021) (same).

State courts are in accord. In *Teigen v. WEC*, only three justices would have held that voters had an injury for standing purposes based on a concept of "vote dilution," which those justices viewed as an asserted injury to the integrity of the election process. 2022 WI 64, ¶ 25, 403 Wis. 2d 607, 976 N.W.2d 519 (R. Bradley, J., plurality opinion).[4] The court of appeals has expressed doubt that "vote dilution" theory could ever "amount to an actual, concrete injury that gives [plaintiffs] a justiciable stake" in a case. *Rise, Inc. v. WEC*, No. 2022AP1838, 2023 WL 4399022, ¶ 27 (Wis. Ct. App. July 7, 2023) (unpublished, authored decision cited in accordance with Wis. Stat. § (Rule) 809.23(3)).

Because the Legislature has no protected interest in this litigation, it fails both the second and third prongs for intervention: it has no recognized interest, and thus none that can be impeded by the outcome of this litigation.

B. The Attorney General and Commission defendants will adequately represent any general interests that the Legislature asserts.

Even if the Legislature could establish a protected and unique interest in this litigation, it would not be entitled to intervene because the Attorney General and Commission defendants will adequately represent its interests—the fourth requirement of the mandatory intervention analysis.

[4] The question of standing and election integrity is before the Wisconsin Supreme Court in *Brown v. WEC*, Case No. 2024AP0232.

First, adequate representation is presumed when a movant and an existing party have "the same ultimate objective" in the action. *Helgeland*, 307 Wis. 2d 1, ¶ 90 n.80. Here, the Legislature seeks the same result as the Commission defendants.

Second, there is a presumption of adequate representation when a party is "a governmental body or officer charged by law with representing the interests of the absentee." *Id.* ¶ 91 (citation omitted). Here, the Commission defendants are expressly charged under Wis. Stat. ch. 5 with administering Wisconsin election laws. And their legal representative, the Department of Justice, is statutorily and constitutionally responsible for defending the validity of state statutes. Specifically, the "Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes." *Id.* ¶ 96 (discussing Wis. Stat. § 806.04(11), which states it is "the duty of the attorney general to appear on behalf of the people of this state to show why [a] statute is constitutional").[5]

Helgeland, a challenge to the constitutionality of Wisconsin's then-ban on same same-sex marriage benefits, held that Wisconsin municipalities did

[5] The Attorney General has taken the position that he cannot defend state statutes that intrude upon the constitutional power of the executive branch as those intrude upon his own constitutional duties. *See, e.g.*, *SEIU*, 393 Wis. 2d 38 (Attorney General not defending new statutes that constrained his own powers). The case before the Court does not implicate that exception.

not satisfy the inadequacy prong based on their assertions that the Attorney General did not like the law at issue there. The court pointed to the Attorney General's duty to defend the constitutionality of the law. *Helgeland*, 307 Wis. 2d 1 ¶¶ 93–96. The court also rejected the argument that the municipalities would defend the law with more "vehemence" than the Department of Employee Trust Funds, which administered the law at issue; the court held that the state defendants would defend the law regardless of their personal views. *Id.* ¶¶ 107–08.

The Legislature asserts that, despite *Helgeland* and the fact that the Commission defendants seek the same outcome the Legislature would, it may make strategic decisions the Attorney General and Commission defendants did not choose. (Doc. 52:22.) That only underscores the constitutional issues raised above, and it is not part of the analysis under *Helgeland*.

The Attorney General and Commission defendants are charged with defending the law at issue and thus seek the same outcome as the Legislature would. They are presumed to adequately represent the Legislature's interests, and the Legislature cannot satisfy the fourth prong of the intervention test.

Beyond the constitutional prohibition on the Legislature's intervention, it also cannot satisfy all the statutory elements for intervention under Wis. Stat. § 803.09(1).

III. This Court should deny permissive intervention.

This Court should deny the Legislature's request for permissive intervention for two reasons. First and most importantly, permissive intervention would cause the same separation of powers violation that intervention as of right would cause. It solves none of the problems explained in section I. Second, adding another defendant to this case will only complicate motion practice and lengthen trial, if this case is not decided at the briefing stage.

First, as discussed above, allowing the Legislature to intervene to defend state law where the executive branch is already doing so would violate the separation of powers. That is true whether the Legislature intervened as of right or permissively.

Second, even if the Legislature has a defense that shares common questions with the main action, intervention would only complicate and delay this case. This case should be streamlined and decided quickly without unnecessarily using up the Court's time and resources with redundant defendants and process. The Legislature's asserted interests are closely aligned with those of the Commission defendants. And its argument for permissive intervention would allow it to intervene in any case challenging a state law, regardless of whether the named defendants and Attorney General were adequately defending the law.

If the Legislature believes it has policy concerns or arguments that no other party has thought to make, this Court could grant it leave to participate as an amicus. That participation would allow the Legislature to share its views on the policy importance of how the statutes are currently read or the impact of the relief sought by Plaintiffs.

CONCLUSION

Defendants ask this Court to deny the Legislature's motion to intervene.

Dated this 10th day of June 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Brief in Opposition to Legislature's Intervention with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of June 2024.

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