Supreme Court of Wisconsin

Appeal No. 2020AP001634 - CQ

DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC PARTY OF WISCONSIN, SYLVIA GEAR, CHRYSTAL EDWARDS and JILL SWENSON,

Plaintiffs-Appellees,

v.

MARGE BOSTLEMANN, JULIE M. GLANCEY, DEAN KNUDSON, MARK L. THOMSEN and ROBERT SPINDELL, JR.,

Defendants,

REPUBLICAN PARTY OF WISCONSIN, REPUBLICAN NATIONAL COMMITTEE and WISCONSIN STATE LEGISLATURE,

Intervening Defendants-Appellants.

Certified Question in the Wisconsin Supreme Court

PLAINTIFFS-APPELLEES' REBUTTAL BRIEF ON THE CERTIFIED QUESTION FROM THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ARGUMENT IN REBUTTAL

After repeatedly demanding (at 17) a "textualist," "plain-language" approach, the Wisconsin Legislature now does a U-turn and denounces any "magic-words test" to construing Wis. Stat. § 803.09(2m). The Legislature instead urges an approach that would permit the Legislature to do whatever it wants in any state or federal litigation whenever it wants, using multiple out-of-state law firms charging Wisconsin taxpayers millions of dollars (and climbing)—all in the guise of protecting "the State's interest." That approach violates every principle of construction the Legislature purports to espouse.

1. A negative answer to the Question Presented will not create a "calamity" or "fiasco."

The Legislature warns (at 3, 4) of a "fiasco," "calamity," and "unthinkable results" if it does not have its way here. Among other things, it claims there might be "post-election-day voting" or even a "revote" after November 3. No one is seeking such relief here; the United States Supreme Court has clearly held that absentee ballots must be postmarked by election day, period. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020) ("*RNC*"). The Legislature also darkly warns (at 5) that what is happening in Wisconsin might "potentially delay the national

election results by an untold amount of time." There's no chance of that. As discussed in our opening brief, Judge Conley's injunction orders the same relief that the United States Supreme Court ordered last April—a modest six-day extension of the ballot-receipt deadline for any absentee ballots postmarked on or before election day. That extension is entirely within canvassing and other statutory deadlines, and the Wisconsin Election Commission ("WEC") has reported no concerns about this extension. Meanwhile, fourteen other States and the District of Columbia follow a postmark-by-election-day rule (or a close variant) and count ballots that arrive in the days following the election so long as they are timely postmarked.[1] And while claiming to represent the people of Wisconsin, the Legislature says not a whit about the pandemic now ravaging the State or any of the tens of thousands—potentially hundreds of thousands—of citizen's whose valid and timely cast ballots are at grave risks of being rejected. *These* are the potential fiascos and calamities.

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[1] *See generally* Nat'l Conference of State Legislatures, VOPP: *Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, (June 15, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx;

2. Without any justification or mention of *stare decisis*, the Legislature seeks to throw this Court's decision in *SEIU* to the winds.

The Legislature's brief is written as if this Court never decided *SEIU*. But *SEIU* decided the very question posed by the Seventh Circuit. To accept the Legislature's position here would be tantamount to an overruling of *SEIU*—without any basis for doing so, let alone any grounds that would overcome the weight of stare decisis.

SEIU made clear (at ¶¶30, 63) that under bedrock separation-of-powers principles, "representing the State in litigation is predominantly an executive function," not a legislative one—a point that the Legislature utterly ignores. Even more specifically, the Legislature ignores that seven separate times in its opinion, *SEIU* emphasized that, to avoid intruding on executive authority, the Legislature's only role in intervening or prosecuting litigation is to protect its unique "institutional interests." *See SEIU*, 2020 WI 67, ¶¶10, 63-64, 67-72.

The Legislature now says (at 26) that it does have a unique interest—to protect the "public fisc" from attorneys' fees in litigation over the validity of state law. This argument is fully addressed in the Department of Justice's brief at (8-10). A few brief points to note, however.

First, the Legislature asserted only a generalized interest in enforcing state laws when it sought to intervene in this case. *See* Plaintiffs' Br. at 12 & n.6. Second, the Legislature's argument proves to much: it would mean that the Legislature may represent the state in virtually any case where fee-shifting is possible, thereby turning the narrow role *SEIU* recognized for its litigation authority into a gaping canyon.

The Legislature also now suggests (at 2) that it does have an institutional interest in defending the validity of state law. But were that true, the Supreme Court's decision in *Bethune-Hill*, *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), would have come out the other way. To defend state statutes on appeal, the Supreme Court held that a legislative intervenor must have either (1) the *legal authority* "to represent the State's interests", or (2) standing in "its own right." *Id*. at 1951. None apply here under Wisconsin law. Rather than a uniquely legislative interest, as this Court held in *SEIU*, the defense of already enacted state legislation is the most generalized interest there is. Again, giving the Legislature that authority would eviscerate *SEIU's* analysis of the limited scope of the Legislature's litigation authority.

The Legislature finally, points (at 22) to two short paragraphs in *SEIU* where the Court commented on issues in which the Legislature's interests were supposedly not implicated. (Citing 202 WI 67, ¶¶84, 111). Neither paragraph supports the sweeping claim of authority the Legislature invokes. First, commenting on a statutory provision concerning deference to agency action, the Court simply observed that the legislation reiterated this Court's own prior holding and therefore could not possibly be unconstitutional. 2020 WI 67, ¶84. With respect to another provision allowing guidance documents to be reviewed by the courts, the Court noted that no party had made "any particularized argument" against its constitutionality and the Court thus effectively deemed the argument abandoned, at least on a facial challenge. *Id.* ¶111 (Op. of Kelly, J.).

These brief, passing comments in *SEIU* on two ancillary issues that were not seriously contested and in which the Court announced no holding cannot bear the weight the Legislature puts on them. The Court did not, in these stray paragraphs, implicitly recognize a sweeping legislative power to defend the validity of any and all laws in court for any reason. That interpretation of *SIEU* would in fact contradict the actual, explicit reasoning of this Court, which elaborated at length on the constitutional boundaries of

the Legislature's powers and rested its central holdings upon a careful, narrow description of the Legislature's constitutional authority to participate only in "cases that implicate an institutional interest of the Legislature." 2020 WI 67, ¶63; *see generally id.* ¶¶63–72.

3. The Legislature ignores the governing statutory language that limits its litigation authority.

This Court's decision in *SEIU* was mandated by the plain text of §§ 803.09(2m) and 13.365. Under *Bethune-Hill*, the dispositive question is whether these statutes grant the Legislature the authority to "appeal as the State's agent." 139 S. Ct. at 1952-53. While "magic words," Leg. Br. at 18, of course are not required, neither statute has any words that can be construed to create such a relationship. Section 803.09(2m) allows legislative bodies to intervene subject to the limitations of § 13.365. And § 13.365 clearly authorizes intervention "*on behalf of the legislature*," not on behalf of the State, Wis. Stat. § 13.365(3) (emphasis added), exactly as this Court observed in *SEIU*, 393 Wis. 2d 38, 69 ¶51 (section 13.365 and 803.09(2m) allow intervention by legislative committees "acting on behalf of a particular legislative entity"). *See also* Leg. Br. at 16 (observing that an intervenor under § 98 of 2017 Act 369 "shall represent the legislature").

The Legislature responds that this "on behalf of" language is meant only to refer "to the part of the State … that is appearing in court." Leg. Br. at 17. That is an implausible reading of § 13.365. The provision (in the general Chapter on the "Legislature's" authority) allows intervention on behalf of three legislative committees—which are obviously part of the Legislative branch—so there would be no reason to insert this language simply to denote that a legislative committee is "part of the" Legislature. Thus, on the Legislature's reading, "on behalf of the legislature" (or "assembly" or "senate") would be surplusage. The statute would have the same meaning if that text was simply deleted and the statute read: "[t]he joint committee on legislative organization may intervene at any time in the action." As this Court repeatedly has held, statutory text should not "needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Matter of D.K.*, 2020 WI 8, ¶40, 390 Wis. 2d 50, 75, 937 N.W.2d 901, 913 (quotations omitted).

The additional provisions the Legislature cites further undermine its reading. Section 165.25(1) and (1m) authorize the attorney general to

"appear for and represent the state."[2] This is precisely the type of language that *Bethune-Hill* says is necessary, and it shows that if the Legislature intended to grant itself similar authority, it certainly knew how to do so. The Indiana statute referenced in *Bethune-Hill* is to similar effect. That statute authorized the Indiana Legislature "to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." Leg. Br. at 13 (quoting Ind. Code § 2-3-8-1). But again, there is no similar language in either § 13.365 or § 803.09(2m) that would allow the Legislature "to defend any law enacted," which is why the Legislature repeatedly has to *insert* the phrase "defend the validity of state law" into these statutes when it characterizes them. *See, e.g.*, Leg. Br. at 15 (selectively quoting § 803.09(2m) and inserting language that was not enacted into law).

Nor would *SEIU*'s construction of these provisions render the notice requirement of § 806.04(11) redundant. Putting the Legislature on notice of all litigation that *might* implicate its interests obviously does not mean

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[2] The Legislature ignores subsection (1) and (1m)—which are the major grants of authority—and focuses instead on subsection (6). But even subsection (6) talks about "attorney[s] for state." And no provision of § 13.365 specifies "the part of the State … that is appearing in court," Leg. Br. 17—i.e., the Executive—because such language is unnecessary.

that *all* litigation implicates its interests, which is what the Legislature implicitly contends. *See* Leg. Br. at 16. An even if the Legislature had an interest in all proceedings in questioning the validity state law such that it wanted to receive notice, that would not mean that the Legislature has authorized *itself* (contrary to § 13.365's text) to represent the State *as its agent*. This Court should decline the Legislature's invitation to draw such an inference from statutory provisions that do not even purport to speak to the question.

On the contrary, when important separation-of-powers principles are implicated, this Court should expect the Legislature to speak clearly. If the Legislature intended to give itself the broadest possible power; it should have used the broadest possible language. The Legislature clearly knew how to do so, *see* Wis. Stat. § 165.25, but chose not to in §§ 803.09(2m) and 13.365. That choice—reflected in the statutes' plain text—must be respected.

The Legislature's speculation (at 26-27) that attorney's fees may be awarded at the close of litigation also does not somehow give the Legislature a general interest in defending the substance and validity of state laws on the merits. The U.S. Supreme Court has emphasized that "a

request for attorney's fees . . . raises legal issues collateral to and separate from the decision on the merits." *Budinich v. Becton Dickinson & Co.*, 486 US 196, 200 (1988) (emphasis added) (quotations omitted). It is possible that the Legislature may have an "institutional interest in the expenditure of state funds" when it comes to the collateral issue of fees. 2020 WI 67, ¶69. But this narrow interest is fully protected by the Legislature's ability to intervene in the federal district court and to be heard there on a plaintiff's entitlement to attorney's fees. See Fed. R. Civ. P. 54(d)(2)(C). The Legislature has also protected its institutional interest in the expenditure of funds by asserting the authority to approve settlements, thereby preventing executive branch official from agreeing unilaterally to pay attorney's fees. Wis Stat. 165.08(1); 2020 WI 67, ¶69. The Legislature's particular interest in the question of fees is thus fully protected by specific measures directed at that question. The Legislature cannot shoehorn a broad authority to defend the validity of any state law into its narrow, speculative interest in the possibility of a collateral award of attorney's fees.

Finally, it is significant that the WEC is a creation of the same legislative leadership that brings the certified question before this Court.

In December 2015, the Legislature passed 2015 Wisconsin Act 118, which eliminated the Government Accountability Board and replaced it as of June 30, 2016, with the current bipartisan WEC that is charged with administering elections. Act 118 was enacted under the leadership of Robin Vos, then (as now) the Assembly Speaker, and Scott Fitzgerald, then (as now) the Senate Majority Leader.

Unlike the SEB, by the Legislature's own design, the WEC is structured to deadlock, with three partisan members appointed by legislative leadership of each major political party. In addition, the Legislature expressly delegated to the WEC the administration of Wisconsin Statutes chapters 5-10 and 12 (which include the statutory election provisions at issue before the district court and Seventh Circuit), including the ability to sue and be sued. Wis. Stat. § 5.05.

4. There is no "well established practice" that authorizes the Legislature to defend the State's interest in the validity of its laws.

The Legislature argues (at 20-23) that, even if no statute gives it generalized litigation authority, the Wisconsin courts have a "well established practice" of giving it such authority. It points to the Court's decision in *SEIU* as a prime example. But there was no question in *SEIU*

that a uniquely legislative interest was at stake. The case involved the constitutionality of laws that altered the Legislature's own role in the separation of powers scheme.

None of the cases cited by the Legislature (at 21) stands for the "well established" proposition. Each, as this Court recognized in *SEIU*, involved the Legislature's "institutional interests." 393 Wis. 2d. at 81 n.21 (citing *Risser v. Klauser*, 207 Wis. 2d 176 (1997); *Citizens Util Bd. v. Klauser*, 194 Wis. 2d 484 (1995); *State ex rel Wis. Senate v. Thompson*, 144 Wis. 2d 429 (1988). The same is also true of *League of Women Voters of Wis. v. Evers*, 929 N.W. 2d 209, 215 (Wis. 2019), which involved the constitutionality of actions taken by the Legislature itself, *i.e.*, whether its "2018 extraordinary session comported with the Wisconsin Constitution," or if any legislation it passed during that session was "void ab initio." *Id.* And it is also true of *Martinez v. Department of Industries, Labor & Human Relations*, 165 Wis. 2d 687 (1992) (constitutionality of statute authorizing temporary legislative suspension of administrative rules), and *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606 (1964) (legislative apportionment). All of these cases fit neatly within *SEIU*'s separation-of-powers analysis and are consistent with historical practice in this state allowing the Legislature to

litigate when its own institutional interests are implicated, but not when it seeks to represent the State's general interests in the validity of state law.

5. There is no separation-of-powers "calamity" resulting from the Legislature's lack of authority to represent the State's general interest in the validity of its legislation.

There is no "separation-of-powers calamity" here, despite the Legislature's overwrought protests. As *Bethune-Hill* confirmed, it's entirely commonplace that sometimes decisions invalidating state laws will not be appealed by the state entity to which litigation authority has been delegated. *See Bethune-Hill*, 139 S. Ct. at 1953 ("This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage."). And the fact that the Legislature's best example of this "calamity" that will befall the state is that Wisconsin voters will receive the relief that the Seventh Circuit and the Supreme Court already upheld in April, demonstrates that there is no real harm here.

Nor does the fact that the Attorney General withdrew his representation here help the Legislature's case. Nothing in the statutes authorize the Legislature to represent the State in the specific circumstances where the Attorney General withdraws. *See* Wis. Stat. §§ 803.09(2m),

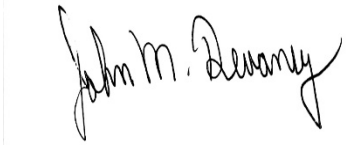
13.365. The Legislature did not object when the Attorney General withdrew, nor has it asserted its statutory authority to direct the Attorney General to defend the law. Indeed, the Legislature has multiple remedies here—it cannot create out of whole cloth an authority to defend the state's interests simply because it doesn't like how the Executive Branch has chosen to defend them. To the contrary, the fact that the Wisconsin Elections Commission—the executive agency responsible for administering Wisconsin's election laws, Wis. Stat § 5.05(1)—did not appeal the district court's order only underscores the impropriety of the Legislature's claim to "speak for the State." The Legislature's attempt to continue this litigation on its own necessarily "substantially interfere[s]" with a decision made by the Executive Branch, in direct contravention of *SEIU*. 2020 WI 67 ¶35. There is nothing in Wisconsin law or constitutional doctrine that says that a legislation's validity must be defended through every possible appeal. There is no separation-of-powers calamity if the state chooses to acquiesce in a court judgment that a law is unconstitutional, or, as in the case here, that a law's application in the particular circumstances of an extraordinary pandemic would burden voters' constitutional rights.

In all events, the Legislature's claimed "calamity" is of its own making. As discussed above, if the Legislature wants to give itself generalized litigation authority, it may do so by simple amendment to the intervention statute. That amendment would need to survive the constitutional analysis in *SEIU*, but that would be an issue for another day.

CONCLUSION

The Court should inform the Seventh Circuit that the Wisconsin statutes does not authorize the Legislature to represent Wisconsin's interest in the validity of state laws.

Dated: October 5, 2020.



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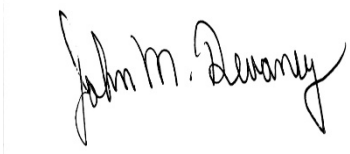
FORM AND LENGTH CERTIFICATION

I certify that the foregoing rebuttal brief conforms to the rules contained in Wis. Stat. § (Rule) 809.62(4) and § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 2,982 words, exclusive of the caption, Table of Contents and Authorities, and the Certificates.

Dated: October 5, 2020.



John Devaney

CERTIFICATION OF FILING AND SERVICE

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) to the extent not superseded by this Court's October 2, 2020 Order ("Order") I also hand delivered to the Clerk of the Supreme Court on October 5, 2020, the printed copies of this brief required by the Order.§ (Rule) 809.19(12) to the extent not superseded by this Court's October 2, 2020 Order ("Order").

I further certify that (1) I have submitted an electronic copy of this brief to the Clerk of this Court and all parties as required by the Order; (2) this electronic brief is identical in content and format to the printed form of the brief filed on October 5, 2020, with this Court except that the printed form contains a notation on the first page that "[t]his document was previously filed via email" as the Order requires; and (3) a copy of this certificate has been served with the printed copies of this brief filed with this Court and served on all opposing parties.

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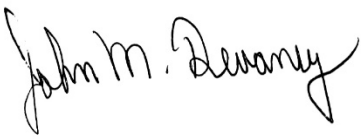

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