IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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SUSAN LIEBERT, et al.,

Plaintiffs,

v. Case No. 23-CV-672

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

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**COMMISSION DEFENDANTS' BRIEF IN OPPOSITION TO WISCONSIN LEGISLATURE'S MOTION TO INTERVENE**

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## INTRODUCTION

The Wisconsin Legislature (Movant) seeks to intervene in this lawsuit. It asserts its interest "in defending its own constitutional powers," including passing laws about absentee voting, and asserts the State's interest "in the continuing validity of its own laws." (Dkt. 29:2.) Like the other proposed intervenors, Movant fails to satisfy the requirements of the intervention-as-of-right.

Movant has no direct, significant and legally protectable interest. The Legislature's interest in passing laws is not legally protected or unique from the Commission's interest in defending the law. And to represent the State, under *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022),

Wisconsin law must designate the Legislature as the agent of the State for purposes of defending litigation. Wisconsin law does not clearly do that, and if it did, it would violate Wisconsin's separation-of-powers doctrine under these circumstances. On adequacy of representation, the Legislature's asserted interests will be adequately represented by the Commission and its counsel from the Attorney General's office, which have a duty under Wisconsin law to defend the challenged laws and have already moved to dismiss the lawsuit.

This Court should deny permissive intervention, as well.

## BACKGROUND

This lawsuit is a challenge by four Wisconsin voters to the absentee ballot witness requirement in Wis. Stat. § 6.87(2) under Section 201 of the Voting Rights Act and, alternatively, the materiality provision of the Civil Rights Act. (Dkt. 1:18–22.) Commission Defendants are the Wisconsin Elections Commission—the state agency responsible for administering and enforcing Wisconsin's election laws—and its commissioners and administrator in their official capacities. (Dkt. 1:7–8.) Local election officials are also named defendants.

The proposed intervenor (Movant) is the Wisconsin Legislature. Under Wis. Stat. § 13.365, either the Legislature or one of its houses may intervene in cases described in Wis. Stat. § 803.09(2m), which include challenges to a state statute under federal law. Relevant to this case, the Legislature's Joint

Committee on Legislative Organization "may intervene at any time in [an] action on behalf of the legislature." Wis. Stat. § 13.365(3). That Committee has an unlimited appropriation to pay for outside counsel for that purpose. *Id.* (citing appropriation under Wis. Stat. § 20.7675(1)(a), (b)).

## ARGUMENT

Movant does not meet the standard for intervention as of right because its asserted interests are not protected and specific and because the Commission and its counsel from the Attorney General's office will adequately defend the law. This Court should also deny Movant's request for permissive intervention.

### I. Movant does not meet the criteria for intervention as of right.

Movant fails to satisfy two of Rule 24(a)(2)'s requirements. "Rule 24(a)(2) requires the court to allow intervention if the would-be intervenor can prove: '(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action.'" *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 686 (7th Cir. 2023) (quoting *State v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019)); Fed. R. Civ. P. 24(a)(2). Movant has neither a protected, specific interest nor a lack of adequate representation.

Movant bears the burden of establishing its entitlement to intervene as of right, and the failure to meet any of the elements requires denial of the motion. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

### A. Movant does not have a protectable, specific interest in this litigation.

Movant asserts it has two interests: (1) an interest as the Legislature in defending its right to pass laws relating to absentee voting, and (2) an interest as "the State" in the continued enforcement of Wisconsin statutes. (Dkt. 29:3–4.) Those asserted interests do not support intervention as of right. Movant's asserted interest in passing laws is not protected and specific, and Wisconsin law does not and cannot authorize the Legislature to act as the agent for the State in litigation under these circumstances.

"Intervention as of right requires a would-be intervenor to have a 'direct, significant and legally protectable interest in the [subject] at issue in the lawsuit.'" *Bost*, 75 F.4th at 686 (quoting *Keith*, 764 F.2d at 1268). The Seventh Circuit has viewed that concept as akin to Article III standing, and "required more than the minimum Article III interest" for intervention. *Planned Parenthood Wis. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (citation omitted). Federal courts consistently have held that generalized interests in the integrity of the law and its enforcement are not protected interests for standing purposes. *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 593 F.3d 923,

930 (9th Cir. 2010) (desire to see "the Nation's laws . . . faithfully enforced" is not enough to establish injury); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001) (en banc) (no standing based on an interest in seeing the law complied with); *Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997) (no standing based on desire to see laws enforced). Movant's asserted interests here do not meet that standard.

Movant asserts an interest as the Legislature in ensuring that its power to enact voting laws is defended. (Dkt. 20:12.) The U.S. Supreme Court has considered what would be sufficient to confer the type of protected, specific interest necessary for legislative bodies to intervene as parties, and seeing one's laws upheld is not among them. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 791, 803 (2016), the Court held that the legislature had standing to challenge a law that would have permanently deprived the legislature of a role in the redistricting process. In contrast, in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019), the Court concluded that Virginia's house did not have a cognizable interest in a redistricting case based on the premise that the challenged law would change the individual delegates who made up that body. *Id.*

Here, Movant's desire to see the laws it passes upheld is exactly the type of generalized interest that courts have treated as insufficient for Article III

standing. The Legislature's asserted interest does not go to its institutional power. It is no different from an interest in seeing state law upheld, an interest that courts have readily concluded does not confer standing for intervention purposes.[1]

Movant's second asserted interest is not the Legislature's interest—it is the State's. Movant argues that states have a legitimate interest in the enforcement of their own statutes. (Dkt. 29:10–11.) But under the U.S. Supreme Court's decision in *Berger*, a legislative body can assert that interest on behalf of the State only if state law designates it as the agent of the State for that purpose. *Berger,* 142 S. Ct. at 2202. In *Berger*, a North Carolina statute authorized state legislative leaders to defend the State's interests in litigation "as agents of the State." *Berger*, 142 S. Ct. at 2202. The North Carolina executive officials opposing the legislature's intervention disagreed that the statute made the legislature "agents for the State," but the Supreme Court concluded that the statute's plain language so provided. *Id.* Because the legislators were explicitly acting as agents of the State, the Court concluded they had an interest within the meaning of Rule 24(a)(2). *Id.*

[1] Three times Movant cites *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900 (Doc. 29:12, 5), which concluded the Legislature had standing to raise a separation of powers claim against actions of an executive official. That case has nothing to do with this one: the Legislature has no separation of powers claim here.

Here, Wisconsin law does not authorize the Legislature to intervene and appear as the State or an agent for the State: it allows it to intervene as the Legislature, or one house thereof. Wisconsin Stat. § 13.365(3) provides that, in the types of cases authorized by Wis. Stat. § 803.09(2m), the Legislature's 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) and (2) (allowing intervention by the assembly or senate). The fact that Wis. Stat. § 803.09(2m) gives the Legislature a litigation interest in defending state law does not answer whether it is an agent for the State if it does so.

The Wisconsin Supreme Court has twice considered the scope and constitutionality of Wis. Stat. §§ 13.365 and 803.09(2m), which were enacted in late 2018. 2017 Wis. Act 369 §§ 5, 97. In *SEIU v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, the court denied a facial separation-of-powers challenge to the provisions, reasoning that they were constitutional at least in cases implicating the Legislature's "institutional interests." *SEIU*, 393 Wis. 2d 38, ¶¶ 72–73. And in *DNC v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, in answering a certified question from the Seventh Circuit, the court held that *SEIU* did not bar a construction of those statutes as giving the Legislature an 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." *DNC*, 394 Wis. 2d 33, ¶ 8.

Neither case considered the question as subsequently framed by the U.S. Supreme Court in *Berger*: whether those statutes empower the Legislature to act as an agent for the State. And neither was confronted with the question of whether such a power would violate Wisconsin's separation of powers if the Attorney General were defending the challenged law.

*SEIU* was a facial challenge. And in *DNC*, the Attorney General had withdrawn 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. *DNC v. Bostelmann*, 2020 WL 1505640, *1 (W.D. Wis. March 28, 2020) (Attorney General withdrawing and replaced with outside counsel); *DNC v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020) (Legislature only appealing party). The Wisconsin Supreme Court did not treat the case as addressing larger separation of powers concerns. *DNC*, 394 Wis. 2d 33, ¶ 4 & n.2 (question not a "wide-ranging constitutional inquiry," and noting lack of time for parties to address the separation-of-powers issue); ¶ 26 (Dallet, J., dissenting) (flagging separation-of-powers question for future cases).

In the situation here, where the executive branch and Attorney General are defending the state law, construing the Wisconsin 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." *Wis. Legis. v. Palm*, 2020 WI 42, ¶ 235, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting). Under Wisconsin law, the Legislature is not the State for intervention purposes, and does not have an Article III interest under *Berger*.

Movant fails the second prong of the intervention-as-of-right analysis.

### B. The Commission and Attorney General adequately represent Movant's interests.

Even if Movant could establish a protected and unique interest in this litigation, it is not entitled to intervene because the Commission and its counsel will adequately represent Movant's interests in defending the statute at issue.

The Seventh Circuit uses a tiered test for adequacy of representation because "some litigants are better suited to represent the interests of third parties than others." *Bost*, 75 F.4th at 688. The "three different standards for showing inadequacy depend[ ] on the relationship between the party and the intervenor" such that "the stronger the relationship between the interests of the existing party and the interest of the party attempting to intervene, the more proof of inadequacy" required before allowing intervention. *Id.*

The first standard applies when there is no notable relationship between the existing party and the applicant for intervention. This standard is the most

lenient—the movant need only show "that representation of his interest [by the existing party] '*may be*' inadequate." *Id.* (citation omitted). The second, intermediate standard applies if "the prospective intervenor and the named party have 'the same goal.'" *Id.* (quotation and citation omitted). This standard is a "higher bar, under which the applicant can only show inadequate representation by pointing to 'some conflict' between itself and the existing party." *Id.* (citation omitted). The strictest test applies "when the representative party 'is a governmental body charged by law with protecting the interests of the proposed intervenors.'" *Id.* (citation omitted). "In those cases, because the existing party is legally required to represent the interests of the would-be intervenor," courts presume adequate representation "unless there is a showing of gross negligence or bad faith." *Id.* (citation omitted).

Here, the Commission and its counsel from the Attorney General's office are legally required to defend the statutes at issue and ensure that Wisconsin elections are fair and properly administered. The Attorney General has the duty by statute to defend challenges to state statutes. *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 96, 307 Wis. 2d 1, 745 N.W.2d 1. The Wisconsin Supreme Court holds that "[t]he obligation of both the Department of Justice and public officers charged with the enforcement of state statutes is clear: they must defend the statute regardless of whether they have diverse constituencies with diverse views." *Id.* ¶ 108. Under Wisconsin law, the Commission and

Attorney General share the goal of defending the state statute the Legislature passed.

Under the intermediate or highest standard, Movant has identified *no* conflict between itself and the Commission, much less gross negligence or bad faith on the Commission's part. Even if the more lenient default rule applied, Movant does not show inadequacy; the Seventh Circuit recently upheld the denial of intervention by the Democratic Party of Illinois under the default rule where that movant identified no conflict between itself and the state agency defending the law at issue. *Bost*, 75 F.4th at 690.

Relying extensively on *Berger*, Movant argues that adequacy of representation cannot be assumed despite the Commission and Attorney General's duties under Wisconsin law. (Doc. 29:13–15, 17–18 (citing *Berger* throughout).) As discussed above, *Berger*'s reasoning was based on the fact that both the defendants and intervenor there had been chosen by North Carolina to act as "agents for the State." *Berger*, 142 S. Ct. at 2202 (statute designated legislature to appear as "agents of the State"); 2204–05 (rejecting presumption of adequacy for "duly designated state agents").

Aside from its presumption argument, Movant offers two arguments that there is actual inadequacy: (1) it has a unique interest; and (2) its proposed filings are better than the Commission's. Neither of these does the work Movant needs.

As to interests, Movant suggests that it is the only party with an interest in "robustly defending all of the State's laws." (Dkt. 29:14.) Movant offers no evidence of that, and the assertion is flatly contradicted by *Helgeland*. Beyond that, Movant's asserted interest goes to the "interest" prong of Rule 24(a), not the "representation" prong. In *Bost,* the Democratic Party argued that inadequacy was proven simply because the parties' specific interests diverged. The Seventh Circuit disagreed, reasoning that the parties' interests were a separate prong of the intervention analysis. *Bost*, 75 F.4th at 690.

And on the ground, the Commission and Attorney General are robustly defending the case. Movant acknowledges that the Commission has already moved to dismiss the Complaint, but brags that it has prepared a longer brief in support of a motion to dismiss, making a few arguments about the federal statute that the Commission chose not to make, and raising a *Pullman* abstention argument. (Doc. 29:15.) The adequacy of representation inquiry is not a competition to see which lawyers can write the longest brief: law is not a "more is more" endeavor.

The adequacy prong instead looks at the defendants' larger litigation strategies to determine whether they are robustly defending the case. So in *Berger*, the case Movant cites for its repeated "casting aspersions on no one" quotation (Doc. 29:15, 17 (quoting *Berger*, 142 S. Ct. at 2204)), the defendants indicated their primary objective wasn't even defending the law, but just

obtaining guidance about which law to apply (*Berger*, 132 S. Ct. at 2199); they produced no expert witness report, in a factual case about the burdens of a voting law (*id.*); declined to seek a stay when the district court enjoined the state law (*id.* at 2205); and were appointed by an official who filed briefs in the very litigation saying the law was unconstitutional (*id.*). The Court found that representation inadequate for purposes of Rule 24, but those facts are nothing like the robust, competent, and timely defense by the Commission in this case.

Even assuming arguendo that the Court would engage Movant's "whose filings are best?" inquiry as part of the inadequacy prong, Movant's proposed *Pullman* abstention argument (Doc. 29:15–16) is a great example of why more paper can make the representation worse. Apart from the inaptness of *Pullman* as applied to this case, staying this federal case could result in delays that hurt the State's interests in defending the law. Waiting for the finality of a state case could result in the federal case's proceeding later in 2024—precisely the time that clerks and voters would be utilizing the very absentee ballot certificates that include the challenged witness certification.

The last thing the State needs is a stay: the Commission seeks to resolve this matter expeditiously so that absentee ballot certificates, with the statutory language on them, can be timely printed and used by voters. Defending a state law is not just a matter of getting a favorable ruling from a

court: it is getting that ruling *in time*, so there is finality in the law when it matters.

Movant has made no showing that the Commission and Attorney General's representation will be inadequate.

Movant fails the second and fourth prongs of the intervention test and is not entitled to intervene as of right.

## II. This Court should also deny Movant's request for permissive intervention.

The Court also should deny permissive intervention under Rule 24(b). The Rule provides that a court may permit intervention as a matter of discretion if (1) the motion is timely and (2) the movant "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)(B). The court, in exercising its discretion, must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Thus, a court may deny permissive intervention where "adding the proposed intervenors could unnecessarily complicate and delay all stages of this case." *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015).

Here, even if Movant has a defense that shares common questions with the main action, this Court still should deny permissive intervention because adding more defendants would only complicate and delay this case. This

election law case should be streamlined and decided quickly without unnecessarily using up the court's time and resources with redundant defendants and process. Movant's asserted interests are closely aligned with those of the Commission, such that its addition as a party would add little substance. Further, Movant's participation would create the same separation-of-powers violation discussed above.

This Court has denied permissive intervention to parties seeking to join the Attorney General in defending a statute, holding that "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *One Wis. Inst., Inc.*, 310 F.R.D. at 399 (quoting *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996)). Movant's argument for permissive intervention would allow it to intervene in every challenge to a state law, regardless of whether the named defendants and Attorney General were adequately defending the law.

Further, Movant's intervention would likely infuse additional politics into a matter which should be a question of non-partisan election law. As the district court in *Planned Parenthood* concluded in denying the Legislature's request to permissively intervene there, "to allow intervention would likely infuse additional politics into an already politically-divisive area of the law and

needlessly complicate this case." *Planned Parenthood, Inc. v. Kaul*, 384 F. Supp. 3d 982, 990 (W.D. Wis. 2019).

This is a case about the meaning of a Wisconsin non-partisan election statute and its intersection with federal law. The Commission and its counsel are defending the law, and adding additional defendants with the same goals would only complicate the litigation. If Movant believes it has arguments that no other party will make, this Court could grant it leave to participate as an amicus.

## CONCLUSION

Commission Defendants ask this Court to deny Movant's motion to intervene.

Dated this 6th day of November 2023.

Respectfully submitted,

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