FILED
11-08-2024
CLERK OF WISCONSIN
COURT OF APPEALS

**No. 2024AP1347**

# In the Wisconsin Court of Appeals

DISTRICT I

DISABILITY RIGHTS WISCONSIN, LEAGUE OF WOMEN VOTERS OF WISCONSIN, MICHAEL R. CHRISTOPHER, STACY L. ELLINGEN, TYLER D. ENGEL, *and* DONALD NATZKE,
PLAINTIFFS-RESPONDENTS,
*v.*
WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, *as Administrator of WEC*, DON MILLIS, *as Commissioner of WEC*, ROBERT SPINDELL, JR., *as Commissioner of WEC*, MARGE BOSTELMANN, *as Commissioner of WEC*, ANN JACOBS, *as Commissioner of WEC*, MARK THOMSEN, *as Commissioner of WEC and* CARRIE RIEPL, *as Commissioner of WEC*,
DEFENDANTS-APPELLANTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-RESPONDENT.

On Appeal From The Dane County Circuit Court,
The Honorable Everett D. Mitchell, Presiding
Case No. 2024CV001141

## RESPONSE BRIEF OF INTERVENOR-DEFENDANT-RESPONDENT THE WISCONSIN STATE LEGISLATURE

KEVIN M. LEROY
State Bar No. 1105053
EMILY A. O'BRIEN
State Bar No. 1115609
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, Illinois 60606

*Attorneys for the Wisconsin State Legislature*

MISHA TSEYTLIN
*Counsel of Record*
State Bar No. 1102199
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitutional Provisions**



**Statutes And Rules**



**Other Authorities**

## ISSUES PRESENTED

1. Whether the Wisconsin State Legislature ("Legislature") has the statutory right under Section 803.09(2m) and/or Section 803.09(1) of the Wisconsin Statutes to intervene in this case to defend state laws that Plaintiffs challenged as unconstitutional and/or invalid.

The Circuit Court did not explicitly address this question, as it granted the Legislature's Motion To Intervene without specifying whether its decision rested on the Legislature's statutory right to intervene under Section 803.09(2m) or Section 803.09(1), or whether the Circuit Court rested its decision on a grant of permissive intervention under Section 803.09(2). *See* App.101.

2. Whether the Legislature has a "constitutional institutional interest" in this case under *Service Employees International Union (SEIU), Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, such that it could constitutionally intervene as a matter of right under Section 803.09(2m) or Section 803.09(1).

The Circuit Court did not explicitly address this question, as it granted the Legislature's Motion To Intervene without specifying whether its decision rested on the Legislature's statutory right to intervene under Section 803.09(2m) or Section 803.09(1), or on permissive intervention under Section 803.09(2). *See* App.101.

3. Whether the courts have a "constitutional institutional interest" in determining whether to permit the Legislature's

intervention in this case under Section 803.09(2)'s permissive-intervention framework.

The Circuit Court did not explicitly address this question, as it granted the Legislature's Motion To Intervene without specifying whether its decision rested on its grant of permissive intervention under Section 803.09(2) or the Legislature's statutory right to intervene under Section 803.09(2m) or Section 803.09(1). *See* App.101.

## INTRODUCTION

Two straightforward propositions defeat the Attorney General's argument that the Legislature acts unconstitutionally when it intervenes as matter of right under Sections 803.09(2m) or 803.09(1) to defend the validity of state laws that it enacted. First, as the Supreme Court reaffirmed this past term, the Constitution gives the Legislature the "legislative power"—a "vast" power that "encompasses the ability to determine whether there shall be a law, to what extent the law seeks to accomplish a certain goal, and any limitations on the execution of the law." *Evers v. Marklein*, 2024 WI 31, ¶ 12, 412 Wis. 2d 525, 8 N.W.3d 395. Second, as the Supreme Court held just a few years earlier in *SEIU*, it is constitutional for the Legislature to exercise a statutory right to intervene in a case where the Legislature has a "constitutional institutional interest." 2020 WI 67, ¶¶ 63–73. Putting these propositions together: because a court invalidating a state law—thereby nullifying that law—obviously implicates the Legislature's core lawmaking authority (proposition one), the Legislature exercising a statutory right to intervene to defend that law is constitutional, given the presence of the Legislature's constitutional institutional interests (proposition two). Indeed, the U.S. Supreme Court's recent 8-1 decision in *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. 179 (2022), confirms that state legislatures may constitutionally have an interest in defending state law in court, and no court—anywhere in the country—has held that a legislature lacks such an interest where authorized to intervene under state law.

The Attorney General does not dispute that the Legislature can have a sufficient constitutional interest to intervene to defend state law that the Legislature has enacted, instead making the bespoke argument that when the Attorney General is defending a law in court, legislative intervention *becomes* unconstitutional. But this argument fails because nothing in the constitutional text, history, or caselaw suggests that the Legislature's "constitutional institutional interest," *SEIU*, 2020 WI 67, ¶¶ 63–73, in its laws not being struck down evaporates when the Attorney General chooses to defend those laws. In any event, the Attorney General's narrower argument has no relevance in this case any longer because the Attorney General has stopped defending the state laws at issue by declining to appeal the Circuit Court's temporary injunction blocking those laws. At the very minimum, therefore, the Legislature has a constitutional institutional interest in defending the laws challenged here against that injunction, even under the Attorney General's own misguided theory.

Finally, permissive intervention under Section 803.09(2) provides an independent basis for the Legislature's involvement here. The judiciary has the authority to permit a party's intervention to promote the full resolution of controversies under Section 803.09(2). Permitting the Legislature to intervene to defend state law is especially sensible here, where the Attorney General refused to appeal an injunction against multiple duly enacted laws. After all, this Court of Appeals and the Supreme Court have the constitutional right and responsibility to adjudicate significant issues like the one that the Circuit Court's

temporary injunction order raises, and no such adjudication would have been possible without the Legislature's intervention, given the Attorney General's decision not to appeal. Notably, permitting intervention when a party defending a statute refuses to appeal is a traditional basis for permitting intervention in a case.

This Court should affirm the Circuit Court's decision granting the Legislature's Motion To Intervene.

## ORAL ARGUMENT AND PUBLICATION

Given the issues of public importance in this appeal, the Legislature respectfully submits that oral argument and publication are appropriate.



## STATEMENT OF THE CASE

### A. Legal Background

1. Under the Constitution, the Legislature has the "power to make the law." *SEIU*, 2020 WI 67, ¶ 95 (citing Wis. Const. art. IV, § 1). Further, and more specifically, the Constitution empowers the Legislature to enact laws governing various aspects of the voting process, including absentee voting. Wis. Const. art. III, § 2.

Exercising these constitutional powers, the Legislature has provided for absentee voting, while recognizing that the "privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1). Under those laws, a voter generally must request an absentee ballot from the municipal clerk, *id.* § 6.86; receive a physical copy of the absentee ballot and its accompanying envelope, *id.* § 6.87(3); mark her selections on the ballot and obtain a witness's certification on the envelope, *id.* § 6.87(4)(b); and then return the ballot via mail or

physical delivery to the municipal clerk by 8:00 p.m. on Election Day, *id.* § 6.87(6). Alternatively, an absentee voter may take advantage of in-person absentee-voting procedures to simultaneously request and cast an absentee ballot at a clerk's office or another designated location before Election Day. *Id.* §§ 6.86(1), 6.855(1).

Recognizing that "military [and overseas] voters" face unique challenges, Wisconsin law allows such voters to obtain electronic *delivery* of absentee ballots. *Luft v. Evers*, 963 F.3d 665, 677 (7th Cir. 2020); *see* Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e), 6.87(3)(d). Those voters must "mark[ ] and return[ ]" their absentee ballots "in the same manner as other absentee ballots." Wis. Stat. §§ 6.22(5), 6.24(7); Wis. Elections Comm'n, Form EL-128u, *Uniform Instructions for Military & Overseas Absentee Voters (Email & Fax)* (Revised Aug. 2023)[1]; *see* Wis. Elections Comm'n, *Military and Overseas Voting* 14 (Feb. 2022).[2]

Although this State has numerous voting provisions to accommodate voters with disabilities, Wisconsin law only allows the electronic delivery of absentee ballots to military and overseas voters. Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e) , 6.87(3)(d). This policy decision recognizes that electronic ballot delivery raises significant security and secrecy concerns. *See* Susan Greenhalgh et al., *Email and Internet Voting: The Overlooked Threat to Election Security*

[1] Available at https://elections.wi.gov/sites/default/files/documents/EL-128u%20%28US%20Letter%20Size%29%20Uniform%20Instructions%20UOCAVA_0.pdf (all websites last visited Nov. 7, 2024).

[2] Available at https://elections.wi.gov/sites/default/files/legacy/2022-02/UOCAVA%2520Manual%25202.2022_0.pdf.

(Oct. 2018).[3] The electronic delivery of ballots *via email*—as opposed to a specialized website or portal—creates additional security problems, including given the well-documented prevalence of data breaches in email platforms in the United States. *See, e.g.*, FCC, *Privacy and Data Protection Task Force* (updated Mar. 5, 2024).[4] These security and privacy concerns are particularly acute in Wisconsin's decentralized election system, where municipal clerks, many of whom work part-time, administer elections, and at least some clerks use unsecured email addresses to conduct their official election duties. R.112 at 52:6–53:11; *see* Greenhalgh et al., *supra*.

2. Wisconsin law allows the Legislature to intervene when a party challenges "the constitutionality of a statute," "challenges a statute as violating or preempted by federal law," or "otherwise challenges the . . . validity of a statute, as part of a claim or affirmative defense." Wis. Stat § 803.09(2m). Section 13.365(3) further provides that "[t]he joint committee on legislative organization may intervene at any time in the action on behalf of the legislature" and permits hiring outside counsel. *Id.* § 13.365(3). This guarantees the Legislature's right to defend laws that it enacts, and is consistent with the legislative-intervention statute that the U.S. Supreme Court recently blessed in *Berger* as a valid exercise of a State's ability to "diffus[e] its sovereign powers among various branches and officials." 597 U.S. at 191.



[3] Available at https://www.commoncause.org/wp-content/uploads/2018/10/ElectionSecurityReport.pdf.

[4] Available at https://www.fcc.gov/privacy-and-data-protection-task-force.

Additionally, Wisconsin law allows for intervention as of right and permissive intervention under Section 803.09. To intervene as of right under Section 803.09(1), a movant need only submit a "timely" motion "claim[ing] an interest in the subject of the action," and show that "the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest" and "the existing parties do not adequately represent [its] interest." *City of Madison v. Wis. Emp. Rels. Comm'n*, 2000 WI 39, ¶ 11, 234 Wis. 2d 550, 610 N.W.2d 94 (citations omitted); *accord Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994). The requirements for permissive intervention are even less demanding: permissive intervention under Section 803.09(2) is appropriate when the movant files a "timely" motion and asserts a "claim or defense" that has a "question of law or fact in common" with the "main action." Wis. Stat. § 803.09(2).



**B. Litigation Background**

On April 16, 2024, Plaintiffs filed this lawsuit against the Wisconsin Elections Commission ("WEC" or the "Commission"), its Administrator, and its individual members, alleging that Wisconsin's statutory absentee-voting scheme violates the Americans with Disabilities Act, the Rehabilitation Act, the Wisconsin Constitution, and the U.S. Constitution. R.9. For their federal statutory claims, Plaintiffs contend that Wisconsin's absentee-voting laws fail to provide "reasonable accommodations" for voters with print disabilities to cast absentee ballots "privately and independently." R.9 ¶ 166; *see* R.9 ¶ 179. For their constitutional claims, Plaintiffs contend that Wisconsin's third-

party assistance provisions violate the right to vote by secret ballot, Wis. Const. art. III, § 3; *see* R.9 ¶¶ 188–89, and that this State's absentee-voting regime "imposes [an] undue burden on the right to vote," in violation of the state and federal rights to equal protection, R.9 ¶¶ 196, 202.

Plaintiffs then moved for a temporary injunction, R.43, requesting that the Circuit Court compel Defendants to "make available for the upcoming August 2024 primary and November 2024 general elections an option to request and receive an electronic absentee ballot that can be marked electronically using an at-home accessibility device," R.42 at 35. Plaintiffs subsequently narrowed their requested temporary-injunctive relief to the November 2024 General Election. R.101.

The Legislature moved to intervene, R.51, invoking its right under Section 803.09(2m), given that Plaintiffs challenged the constitutionality of several state election laws governing absentee voting, R.52 at 10–11. Alternatively, the Legislature argued that it had a right to intervene under Section 803.09(1) because the Legislature has a substantial interest in the subject matter of this lawsuit, which, again, involves the Legislature's ability to enact rules governing the absentee-voting process. R.52 at 11–16. Lastly, the Legislature explained that, at a minimum, the Circuit Court should grant permissive intervention under Section 803.09(2) because of the Legislature's significant and direct interest in the litigation. R.52 at 17–20.

Plaintiffs did not oppose the Legislature's intervention, but the Attorney General[5] did, R.68, primarily arguing that Section 803.09(2m) is unconstitutional as applied here, where the Attorney General is already defending the statutes at issue, R.68 at 7–18. The Attorney General also asserted in passing that the "separation of powers doctrine precludes the Legislature from intervening" permissively under Section 803.09(2), without providing any reasoning for this claim. R.68 at 29, 39.

The Legislature's briefing in opposition to Plaintiffs' injunction request proved helpful to the Attorney General's defense of the challenge statutes, notwithstanding his opposition to the Legislature's intervention. Most strikingly, the Attorney General copied almost verbatim certain authorities and parentheticals that the Legislature researched, drafted, and provided to the Circuit Court in its earlier-filed opposition as it relates to Plaintiffs' secret-ballot claim. *Compare* R.53 at 23 (citing authorities and providing parenthetical information to support the proposition that voting-with-assistance laws repeatedly withstand constitutional secret-ballot-provision challenges nationwide), *with* R.69 at 37 (copying the Legislature's cited authority and parenthetical explanations practically word for word).



On June 24, 2024, the Circuit Court heard oral argument on both the Legislature's intervention motion and Plaintiffs' temporary injunction motion. Of note, the Legislature pointed out that intervention is necessary even when the Attorney General is

[5] This Response Brief refers to the Attorney General throughout, who is defending this matter on behalf of the Commission.

defending the challenged statute because the Attorney General has made policy decisions not to defend certain statutes or not to defend them on appeal. R.112 at 110–11. The Legislature pointed out that its presence is especially necessary to ensure that the validity and constitutionality of the challenged statutes is defended on appeal, as any failure by the Attorney General to appeal would mean that a single circuit court would have blocked validly enacted laws statewide without any ability for the Court of Appeals or the Supreme Court to weigh in. R.112 at 111. The following day, the Circuit Court issued orders on both motions, ruling in favor of the Legislature as to intervention, R.103, and in favor of Plaintiffs as to the temporary injunction, R.104.

The Legislature appealed the Circuit Court's orders granting the temporary injunction. R.114, 140. The Legislature also filed a motion for a stay pending appeal in the Circuit Court. R.135. The Circuit Court heard argument on that motion on July 30, 2024. *See* R.149. On August 1, 2024, the Circuit Court issued a decision denying the Legislature's motion to stay. R.157. The Legislature then filed a motion for a stay pending appeal in this Court, which this Court granted, staying the Circuit Court's temporary injunction pending disposition of its appeal on August 19, 2024. Pls.App.078–097.

Despite agreeing with the Legislature that the absentee-voting laws that Plaintiffs challenge are constitutional and would be constitutional for the 2024 General Election, the Attorney General did not appeal the Circuit Court's decision to block those laws for the 2024 General Election, apparently deciding that he

did not want the challenged laws in place during that Election, for policy reasons. That was exactly the scenario that the Legislature had warned about in arguing why its intervention in this case was so critical. R.112 at 111.

Instead, the Attorney General only petitioned for leave to appeal the Circuit Court's decision granting the Legislature's motion to intervene under Wis. Stat. § 803.09(2m), R.125, 130, and this Court granted the petition, R.162.

## ARGUMENT

### I. The Legislature Has A Statutory Right To Intervene In This Case

#### A. The Legislature Has A Statutory Right To Intervene Under Section 803.09(2m) Because Plaintiffs Challenge The Validity Of Laws That The Legislature Has Enacted



The Legislature has a statutory right under Section 803.09(2m) to intervene in any lawsuit where a party challenges a state statute as unconstitutional or "as violating or preempted by federal law." Wis. Stat. § 803.09(2m); *see also id.* § 13.365; *see generally Berger*, 597 U.S. at 200 (holding that States are ordinarily free to choose who will speak in court on behalf of their interests). So, in such cases, Section 803.09(2m) "gives the Legislature . . . litigation interests" and "the power to represent the State of Wisconsin's interest[s]" and thereby confers a statutory right to intervene. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶¶ 8, 13, 394 Wis. 2d 33, 949 N.W.2d 423 (quoting Wis. Stat. § 803.09(2m)); *see also* Order at 2, *Abbotsford Educ. Ass'n v. Wis. Emp. Relations Comm'n*, No.2023CV3152, Dkt.79 (Dane Cnty. Cir. Ct. Feb. 2, 2024) (granting the

Legislature's motion to intervene); Order, *Priorities USA v. WEC*, No.2023CV1900, Dkt.73 (Dane Cnty. Cir. Ct. Sept. 11, 2023) (same); Order at 1, *EXPO Wis., Inc. v. WEC*, No.2023CV279, Dkt.34 (Dane Cnty. Cir. Ct. Feb. 10, 2023) (same).[6] Here, the Legislature is entitled to intervene as of right under Section 803.09(2m) because Plaintiffs alleged in their Complaint that several Wisconsin election laws governing absentee voting violate federal law, the Wisconsin Constitution, and the U.S. Constitution. *See* R.9 ¶ 25. And, in intervening here under this Section, the Legislature "represent[s] the State of Wisconsin's interest in the validity of its laws." *Bostelmann*, 2020 WI 80, ¶ 13; *accord Berger*, 597 U.S. at 200 (State may choose who defends its interests in court). Thus, the Legislature here is "defending the state's interest" in its laws not being invalidated in court. *Bostelmann*, 2020 WI 80, ¶ 13; *accord Berger*, 597 U.S. at 200. The Attorney General does not dispute that the Legislature has a statutory right to intervene here under Section 803.09(2m).



### B. The Legislature Can Also Intervene As Of Right Under Section 803.09(1)

1. The Legislature was also entitled to intervene in this action as a matter of right under Section 803.09(1). That statute has four requirements: (1) "the motion . . . must be timely"; (2) "the movant must claim an interest in the subject of the action"; (3) "the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest"; and (4) "the

[6] The *Abbotsford*, *Priorities USA*, and *EXPO* intervention orders are reproduced at R.49.

existing parties do not adequately represent the movant's interest." *City of Madison*, 2000 WI 39, ¶ 11 (citations omitted); *accord Armada Broad., Inc.*, 183 Wis. 2d at 471; *see* Wis. Stat. § 803.09(1). The Legislature meets each requirement.

a. The Legislature's Motion To Intervene was timely, as the Legislature filed shortly after "discover[ing its] interest was at risk." *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App. 221, ¶ 17, 247 Wis. 2d 708, 634 N.W.2d 882. The Legislature filed its Motion just over one month after Plaintiffs filed their Complaint, *see* R.9, a week before the Attorney General filed his answer, *see* R.57, and a month before the Circuit Court's hearing on Plaintiffs' Motion For Emergency Declaratory Relief And Temporary Injunction, *see* R.44, 112. The Attorney General does not dispute that the Legislature met Section 803.09(1)'s timeliness requirement. *See* Br.33.

b. The Legislature has an interest in the subject matter of this case because judgment in Plaintiffs' favor would block multiple of the Legislature's duly enacted laws. Courts take a "pragmatic approach" in assessing this element, *Armada Broad., Inc.*, 183 Wis. 2d at 474, in light of the permissive "policies underlying the intervention statute"—namely, to "involv[e] as many apparently concerned p[arties] as is compatible with efficiency and due process," *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 548–49, 334 N.W.2d 252 (1983) (citation omitted). Thus, a party satisfies Section 803.09(1)'s interest element by showing that it "will either gain or lose by the direct

operation of the judgment" upon one or more of its "interest[s]." *City of Madison*, 2000 WI 39, ¶ 11 n.9 (citation omitted).

The Legislature has a "constitutional institutional interest" in the laws that it enacts not being invalidated by the courts, and so has a substantial interest in this lawsuit. *See SEIU*, 2020 WI 67, ¶¶ 63–73. Closely related, the Legislature is also empowered to speak on behalf of the State's interest in the validity of state law as well, pursuant to Wis. Stat. § 803.09(2m). *See Bostelmann*, 2020 WI 80, ¶¶ 8, 13; *Berger*, 597 U.S. at 191–93. Here, Plaintiffs request a determination as to the validity and constitutionality of Wis. Stat. § 6.87's requirements that only overseas or military electors may receive absentee ballots electronically, and that no voter may return an absentee ballot electronically. *See* Wis. Stat. §§ 6.87(3), (4)(b)(1). The Legislature has an interest in the efficacy of its own constitutional power to enact these laws. *SEIU*, 2020 WI 67, ¶¶ 63–73. After all, the Wisconsin Constitution vests the Legislature with "vast" "legislative power" that "encompasses the ability to determine whether there shall be a law." *Marklein*, 2024 WI 31, ¶ 12; Wis. Const. art. IV, § 1. And so where a lawsuit seeks invalidation of state law, as this one does, that lawsuit implicates the Legislature's core lawmaking authority and the interrelated State interest of those laws not being invalidated.

If that were not enough, the Legislature also has a "constitutional institutional interest," *SEIU*, 2020 WI 67, ¶ 71, in cases involving the validity of the State's absentee-voting laws, in particular, as the Constitution specifically empowers and entrusts the Legislature to enact laws "[p]roviding for absentee voting," *see*

Wis. Const. art. III, § 2. This includes absentee-voting laws designed to make absentee voting accessible to individuals with disabilities. *See* Wis. Stat. § 6.87(5). Here, Plaintiffs seek to invalidate laws governing the distribution, marking, and return of absentee ballots, *see id.* § 6.87(3), and the State's prohibition on electronic absentee ballot returns, *see id.* § 6.87(4)(b)1, thereby implicating the Legislature's constitutional authority to enact laws "[p]roviding for absentee voting," Wis. Const. art. III, § 2.

c. The third element of Section 803.09(1)—whether "disposition of the action may as a practical matter impair or impede the [Legislature's] ability to protect [its] interest[s]," *City of Madison*, 2000 WI 39, ¶ 11 (citation omitted)—is also met here. Plaintiffs' request to invalidate certain of the State's election laws impedes all of the interests noted above by declaring the laws invalid and unconstitutional. *Supra* pp.20–22.

d. The last element of Section 803.09(1) is whether any existing parties "adequately represent the [Legislature's] interest[s]." *City of Madison*, 2000 WI 39, ¶ 11 (citation omitted). To satisfy this requirement, the proposed intervenor bears the "minimal" burden of "show[ing] that the representation of [its] interest 'may be' inadequate." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Courts look to whether the proposed intervenor would "gain or lose" in the same way as another party, or whether it would "protect a right that would not otherwise be protected in the litigation." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 45, 307 Wis. 2d

1, 745 N.W.2d 1 (citation omitted). Even when the proposed intervenor seeks the same outcome as an existing party in the action, intervention is nonetheless appropriate if the intervenor is "in a better position . . . to provide full ventilation of the legal and factual context." *Wolff*, 229 Wis. 2d at 748 (citation omitted; alteration in original).

No other party could adequately represent the Legislature's substantial interests here, so the Legislature meets the "minimal" burden of "show[ing] that the representation of [its] interest 'may be' inadequate" absent intervention. *Id.* at 747 (citation omitted). The Legislature's unique "constitutional institutional interest[s]," *SEIU*, 2020 WI 67, ¶ 71, in enacting laws, in general, and absentee-voting laws, in particular, are at issue in this action. *Supra* pp.20–22. None of the existing parties share those interests, and so none of these parties can fully or adequately represent the Legislature's interests. *Helgeland*, 2008 WI 9, ¶ 45. Plaintiffs cannot represent the Legislature's interest in the validity of the absentee-voting laws and the Legislature's constitutional power to enact those laws, as Plaintiffs are adverse to the Legislature. *See id.* Nor can the Attorney General adequately advance the Legislature's interests in the validity of the absentee-voting laws, including because the Legislature, not WEC, has the authority to enact laws "[p]roviding for absentee voting." Wis. Const. art. III, § 2.

2. The Attorney General contends that the Legislature does not have an interest in this lawsuit and that, even if it did, the

Attorney General would adequately represent the Legislature's interests. Br.34–41. Both arguments are wrong.

To start, the Attorney General claims that the Legislature does not have a protected interest in "seeing the law it passed upheld," Br.35, but that is incorrect. As explained further below, the Wisconsin Supreme Court's decision in *SEIU*, as well as the U.S. Supreme Court's decision in *Berger*, make clear that the Legislature has a protected interest in cases like this one: States "possess a legitimate interest in the continued enforcement of their own statutes" and can choose to vest the authority to defend that interest in their legislatures, which make the law. *Berger*, 597 U.S. at 191–93 (alternation accepted; citation omitted). The Attorney General's efforts to explain away these directly on-point decisions are unconvincing, *see* Br.30–31, 35–36, for the reasons addressed below, *see infra* pp.35–42. And contrary to the Attorney General's assertions, *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900, recognizes that the Legislature has an interest in defending its own powers. Those powers include the Legislature's power to enact laws, generally, *see SEIU*, 2020 WI 67, ¶ 95, and to enact laws "[p]roviding for absentee voting," specifically, *see* Wis. Const. art. III, § 2.

Nor can the Attorney General adequately represent the Legislature's interests. *Contra* Br.38–41. That the Attorney General and the Legislature once sought the "same ultimate objective in the action" until the Attorney General declined to appeal the Circuit Court's temporary injunction, Br.39, is insufficient to show adequate representation. Contrary to the

Attorney General's argument, Br.39, no presumption of adequate representation applies where Wisconsin law authorizes the Legislature to intervene. Wis. Stat. § 803.09(2m); *Berger*, 597 U.S. at 197 (a presumption of adequate representation "is inappropriate" where "a duly authorized state agent seeks to intervene to defend a state law"); *see also Liebert v. Wis. Elections Comm'n*, 345 F.R.D. 169, 172 (W.D. Wis. 2023) (rejecting presumption of adequacy where Legislature sought to raise arguments not shared by other state-affiliated parties). While the Attorney General relies on the Court of Appeals' decision in *Helgeland* for the proposition that a presumption of adequate representation exists here, Br.39 (citing *Helgeland*, 307 Wis. 2d 1, ¶ 22), that case was decided prior to the enactment of Wis. Stat. § 803.09(2m), and so does not purport to consider whether a presumption of adequate representation applies where the Legislature has an express statutory right to intervene. Regardless, any argument that the Attorney General adequately represents the Legislature's interests was rebutted when the Attorney General did not appeal the Circuit Court's grant of a temporary injunction blocking multiple state laws, as failure to take appeal is a quintessential means of rebutting a presumption of adequate representation. *See infra* pp.42–44.

## II. The Legislature Has A "Constitutional Institutional Interest" Under *SEIU* In Having The Laws That It Enacts Not Invalidated, Making Its Intervention As A Matter Of Right Here Constitutional

### A. Under *SEIU*, The Legislature Has An "Institutional Interest" In The Validity Of The Laws That It Has Enacted—A Point That The Attorney General Does Not Appear To Dispute, And Ends The Inquiry

1.a. The Wisconsin Constitution "divides government power into three separate branches, each vested with a specific core government power" exclusive to each branch, *State ex rel. Kaul v. Prehn,* 2022 WI 50, ¶ 46, 402 Wis. 2d 539, 976 N.W.2d 821 (citations omitted), as well as shared powers among or between the branches, *see id.* ¶ 47. Thus, conducting "a separation-of-powers analysis" under the Wisconsin Constitution with respect to a challenged statute "ordinarily begins by determining if the power in question is core or shared," *SEIU,* 2020 WI 67, ¶ 35, as this "facilitates [the Court's] review," *Marklein,* 2024 WI 31, ¶ 11.

Core powers reflect the "zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding." *League of Women Voters of Wis. ("LWV") v. Evers,* 2019 WI 75, ¶ 34, 387 Wis. 2d 511, 929 N.W.2d 209 (citation omitted). Such core powers include, for example, the Legislature's "vast" "legislative power" to "make laws," *Marklein*, 2024 WI 31, ¶ 12 (citation omitted), which core power is "vested in a senate and assembly," *SEIU*, 2020 WI 67, ¶ 31 (citation omitted). "The people bestowed much power on the legislature . . . to make the laws," *LWV*, 2019 WI 75, ¶ 35 (citation omitted), with the legislative power "encompass[ing] the

ability to determine whether there shall be a law, to what extent the law seeks to accomplish a certain goal, and any limitations on the execution of the law," *Marklein,* 2024 WI 31, ¶ 12. Indeed, the Legislature may "exercise all legislative power not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States." *Id.* (citation omitted). And, as particularly relevant to the merits of this case, the Wisconsin Constitution also provides that the Legislature "may" enact laws "[p]roviding for absentee voting," Wis. Const. art. III, § 2, which would include the absentee-voting procedures challenged by Plaintiffs in this case, *supra* pp.14–15, 21–22. That is an additional grant of a core power to the Legislature, specific to the absentee-voting context. *See* Wis. Const. art. III, § 2.

In contrast to core powers, shared powers "are those that lie at the intersections of these exclusive core constitutional powers." *SEIU,* 2020 WI 67, ¶ 35 (citation omitted). "The branches may [each] exercise power within these borderlands" without violating separation-of-powers principles, so long as no branch "unduly burden[s] or substantially interfere[s] with another branch" in doing so. *Id.* Notably, "[t]he *majority* of governmental powers lie within these great borderlands of shared authority, where it is neither possible nor practical to categorize [such] governmental action as exclusively legislative, executive or judicial." *Barland v. Eau Claire County*, 216 Wis. 2d 560, 573, 575 N.W.2d 691 (1998) (emphasis added) (citation omitted). Thus, the Wisconsin Constitution often provides for "shared and merged powers of the branches of government rather than an absolute, rigid and

segregated political design" typified by the far more limited core-powers framework. *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 696, 478 N.W.2d 582 (1992) (citation omitted).

b. In *SEIU*, the Wisconsin Supreme Court held that representing the State in court is a power shared between the Legislature and the Attorney General, not a core power of the Attorney General alone, at least in cases where the Legislature had an "institutional interest." 2020 WI 67, ¶¶ 50–73.

*SEIU* considered a facial challenge to Section 803.09(2m)'s legislative-intervention provision brought by certain plaintiffs and supported by the Attorney General. *See id.* There, the Attorney General argued either that Section 803.09(2m) "takes a core executive power"—representing the State in litigation—"and gives it to the legislature in violation of the separation of powers," or that, "[i]f deemed a shared power," Section 803.09(2m) "substantially burden[s] the executive branch in violation of the separation of powers." *Id.* ¶ 55 (noting that Attorney General agreed with the plaintiffs' presentation of this argument). Notably, the Attorney General *conceded* in *SEIU* that "the power to participate in [ ] litigation for the purpose of defending a challenged statute that the executive branch has declined to defend could be viewed as a power that is shared by the executive and legislative branches." AG Resp.Br., *SEIU*, Nos.2019AP614, 2019AP622, 2019 WL 4645564, at *40 (Sept. 17, 2019).

*SEIU* rejected the challenge to Section 803.09(2m)'s legislative-intervention provision as a facial matter. Looking to the Constitution's text, *see, e.g.*, 2020 WI 67, ¶ 65, and conducting

a historical inquiry, *see, e.g.*, *id.* ¶¶ 65–66, 72 n.21, the Court held that "[w]hile representing the State in litigation is predominantly an executive function, it is within those borderlands of shared powers" between the Legislature and the Executive under the Constitution, "most notably in cases that implicate an institutional interest of the legislature," *id.* ¶ 63. "[T]he attorney general's power to litigate on behalf of the State is not, at least in all circumstances, within the exclusive [or core] zone of executive authority." *Id.* Instead, "[t]he legislature's institutional interest . . . puts at least some of these cases within the zone of shared powers." *Id.* ¶ 67.

*SEIU* then provided non-exhaustive examples of "institutional interests" of the Legislature that would constitutionally justify its intervention on behalf of the State in court in a given case, in an exercise of this shared power. *Id.* ¶¶ 64–73; *accord Bostelmann*, 2020 WI 80, ¶ 6. For example, the Legislature has "the general power to spend the state's money" under the Constitution, *SEIU*, 2020 WI 67, ¶ 69, so, "in cases where spending state money is at issue, the legislature has a constitutional institutional interest in at least some cases sufficient to . . . allow it to intervene," *id.* ¶ 71. Further, "where a legislative body is the principal authorizing the attorney general's representation in the first place, the legislature has an institutional interest in the outcome of that litigation in at least some cases" that "allow[s] it to intervene." *Id.* Crucially, nowhere did *SEIU* condition the Legislature's "institutional interests" on

the failure of the Attorney General to appear and either prosecute or defend the law at issue. *See generally id.* ¶¶ 50–73.

The U.S. Supreme Court's recent decision in *Berger* shows the "shared understanding" that legislative intervention reflects "legitimate institutional, even constitutional, legislative interests." *Id.* ¶ 70. There, the U.S. Supreme Court held that two legislative leaders in North Carolina could intervene as of right in federal court under Federal Rule of Civil Procedure 24(a) on behalf of North Carolina to defend state law, even though the North Carolina attorney general had already appeared to defend the law, because North Carolina had enacted a law permitting such legislative intervention to defend state law. *Berger*, 597 U.S. at 185–87, 200. The U.S. Supreme Court explained "that States may organize themselves in a variety of ways" and "allocate authority among different officials who do not answer to one another," including by denominating multiple "duly authorized representatives" to appear in court on behalf of the State's interest—even where "different interests and perspectives" among these officials "may emerge." *Id.* at 191–92. For example, "state law may provide for other officials, besides an attorney general, to speak for the State in federal court as some States have done for their presiding legislative officers." *Id.* (citation omitted). Nor do these arrangements violate state separation-of-powers doctrines, as the state "executive branch[s] [do not] hold[ ] a constitutional monopoly on representing [the State's] practical interests in court." *Id.* at 193–94 (discussing North Carolina constitutional provisions that are similar to Wisconsin's analogous provisions).

Consistent with these principles in *Berger*, multiple other States (beyond Wisconsin and North Carolina) have enacted statutes empowering *both* the state attorney general and the state legislature and/or legislative leaders to intervene when state laws are challenged in court. *See* Ariz. Rev. Stat. § 12-1841(A); Ind. Code § 2-3-8-1; Nev. Rev. Stat. § 218F.720(2)-(3); Okla. Stat. tit. 12, § 2024(D)(2). No court, anywhere in the country, has even suggested that any of these statutes are constitutionally suspect. And, as *SEIU* explained, "the practice of other states" is relevant when considering "constitutional questions" raised by Wisconsin statutes like Sections 803.09(2m) or 803.09(1), 2020 WI 67, ¶ 70—a principle that applies with even more force when other states' constitutions are similarly worded to Wisconsin's Constitution, *State v. Cole*, 2003 WI 112, ¶ 35, 264 Wis. 2d 520, 665 N.W.2d 328.

2. These principles establish that the Legislature has a "constitutional institutional interest," *SEIU*, 2020 WI 67, ¶ 71, in its own laws not being invalidated in court, and thus may constitutionally intervene as a matter of right to defend those laws, where such intervention is authorized by a duly enacted statute.

The Legislature has the vested constitutional power to make law for the State, both as a general matter, Wis. Const. art. IV, § 1; *Marklein*, 2024 WI 31, ¶¶ 12–13; *SEIU*, 2020 WI 67, ¶ 31, and in the particular context of "absentee voting," Wis. Const. art. III, § 2—such as the absentee-voting laws at issue here, Sections 6.87(3)(a) and 6.87(4)(b)(1). Once the Legislature passes laws like Sections 6.87(3)(a) and 6.87(4)(b)(1) through both the Assembly and the Senate, the Governor has the constitutional right to

"approve[ ] and sign[ ] the bill" or to "return the bill" under his qualified veto power. Wis. Const. art. V, § 10(1)–(2); *see Marklein*, 2024 WI 31, ¶ 13. And here, the Governor signed and approved the laws at issue. *See* 2011 Wis. Act 75, § 50; 1965 Wis. Act 666, § 1. Once those provisions were signed into law, the Legislature had a "legitimate interest in the[ir] continued enforce[ment]." *Berger*, 597 U.S. at 191 (citation omitted) (second alteration in original). This necessarily means the Legislature's interest includes *not* having their laws invalidated in court. *See id*.

The Legislature's interest in not having a court invalidate its laws in a given case is an "institutional interest" under *SEIU*, sufficient to establish the constitutionality of the Legislature's intervention where the Legislature's intervention is authorized by law. *SEIU*, 2020 WI 67, ¶ 67. A court issuing an injunction against a state law enacted by the Legislature effectively nullifies that law, as such extraordinary remedies mean the law "has ceased to be valid." *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 548, 569, 126 N.W.2d 551 (1964); *see also, e.g.*, *SEIU*, 2020 WI 67, ¶ 115 (explaining that a "temporary injunction" against state laws means that it is "unlawful to enforce them"). In effect, it is the court that has determined "whether there shall be a law," not the Legislature in the exercise of its "legislative power." *Marklein,* 2024 WI 31, ¶ 12. Whether such a result will occur implicates "a constitutional institutional interest" of the Legislature, "sufficient to allow it . . . to intervene." *SEIU*, 2020 WI 67, ¶ 71.

All of these principles apply here. The Legislature adopted Sections 6.87(3)(a) and 6.87(4)(b)(1) in accordance with its core

power to make law, Wis. Const. art. III, § 2; *id.* art. IV, § 1, and the Governor signed the statutes into law, *see, e.g.*, 2011 Wis. Act 75, § 50; 1965 Wis. Act 666, § 1. Plaintiffs then brought this lawsuit challenging the constitutionality and/or validity of these laws in various respects, and the Circuit Court temporarily enjoined their enforcement, *supra* p.17—meaning that Sections 6.87(3)(a) and 6.87(4)(b)(1) would have "ceased to be valid" while the parties litigate this to final judgment, *Reynolds*, 22 Wis. 2d at 569. This threatened the Legislature's "constitutional institutional interest" in the validity of Sections 6.87(3)(a) and 6.87(4)(b)(1) directly at issue, such that the Legislature could constitutionally intervene to defend these interests under *SEIU*, 2020 WI 67, ¶ 71.

3. A contrary conclusion—that the Legislature has no "constitutional institutional interest," *id.*, in the laws that it enacts not being thrown out in court—would be absurd, which is why the Attorney General does not even try to defend it. Such a conclusion would mean that the Attorney General working with politically aligned plaintiffs could essentially nullify a law enacted by the Legislature and signed by the Governor (or vetoed, but legislatively overridden) based upon a single circuit court's conclusion without the appellate courts—including the Wisconsin Supreme Court—having any say. This would undermine the Legislature's core constitutional "power to enact laws," *id.* ¶ 68, and "put [them] in force," *LWV*, 2019 WI 75, ¶ 36 (citation omitted). Allowing this would impermissibly add to the executive branch's authority the power to take part in the "repeal, modif[ication], or alter[ation]" of state law—which is a core legislative function,

*Marklein*, 2024 WI 31, ¶ 23—even after the Governor signed a law (or the Legislature overrode his veto). This would violate Wisconsin's separation-of-powers doctrine, as it would allow the executive branch to "substantially interfere with [the legislative] branch," *SEIU,* 2020 WI 67, ¶ 35 (citation omitted), by usurping its constitutional authority to determine what, if any, "limitations [to place] on the execution of the law," *Marklein,* 2024 WI 31, ¶ 12.

### B. The Attorney General's Position That The Legislature Somehow Loses Its "Institutional Interest" Under *SEIU* When The Attorney General Defends State Law Is Meritless And Inapplicable Here In Any Event

1. The Attorney General appears to concede the points discussed immediately above, which is why he does not take the position that the Legislature cannot intervene to defend state law when the Attorney General is not defending a challenge law. *See* Br.26, 38–41. Indeed, the Attorney General conceded this point before the Supreme Court in *SEIU*, explaining that the power to defend state law in court "could be viewed as a power that is shared by the executive and legislative branches" where "the executive branch had declined to defend" the "challenged statute" at issue. AG Resp.Br., *SEIU*, Nos.2019AP614, 2019AP622, 2019 WL 4645564, at *40 (Sept. 17, 2019). Rather, the Attorney General's bespoke position is that "where the executive branch is defending the law at issue, the Legislature has no constitutional role in defending the law for the state." Br.26. In his view, "[i]f the intervention statutes were applied to allow the Legislature to defend this case alongside the Attorney General and Commission, the Legislature would take for itself core executive branch power."

Br.27. Thus, the Attorney General's position appears to be that the Legislature has a "constitutional institutional interest" in defending its own laws, *SEIU*, 2020 WI 67, ¶ 71, but that interest disappears when the Attorney General chooses to defend those laws. That argument is wrong in multiple respects.

*First*, the Supreme Court made clear in *SEIU* that "[w]hile representing the State in litigation is predominantly an executive function, it is within those borderlands of shared powers," particularly in "cases that implicate an institutional interest of the legislature." *Id.* ¶ 63. The Legislature has an institutional interest in defending the validity of the statutes it enacts, *supra* pp.20–22—a point that the Attorney General does not dispute—and nothing in *SEIU* or the Wisconsin Constitution suggests that this interest evaporates because the Attorney General takes one litigation position or another, *contra* Br.27. The Attorney General argues otherwise, Br.27, but he fails to "ground [his] arguments in our constitution's text or our state's history, as reflected in [the Supreme Court's] recent separation of powers jurisprudence." *Marklein*, 2024 WI 31, ¶ 25. Instead, he simply lays out general separation-of-powers principles that do not bear upon the precise issues before the Court, Br.26–27, but—critically—does not attempt to explain what constitutional principle takes away the Legislature's interest in the validity of its own laws when another constitutional branch takes a particular litigation position.

*Second*, the Attorney General's position cannot be reconciled with the U.S. Supreme Court's 8-1 decision in *Berger*. As noted above, *supra* pp.30–31, *Berger* held that States are free to

designate legislative leaders *and* attorneys general to defend state law in court and that such arrangements do not violate separation-of-powers principles like those found in the Wisconsin Constitution because state "executive branch[s] [do not] hold[ ] a constitutional monopoly on representing [the State's] practical interests in court," *Berger*, 597 U.S. at 193–94. Nothing in *Berger* holds that a state legislature's institutional interest in speaking for its State in defense of its state law hinges upon the state attorney general opting not to defend that law, *contra* Br.36, which is the only argument that the Attorney General rests upon here, Br.30–33. Indeed, *Berger* contemplated that both the state legislature and the state attorney general would appear to defend state law, given its references to these state officers' "different interests and perspectives" in a given case, *Berger*, 597 U.S. at 191–92, and its analysis of the litigation positions of the state parties there when discussing whether the "adequate representation" element for intervention was satisfied, *id.* at 197–200.



The Attorney General's claim that *Berger* only concluded that a state legislature has an interest in defending state law where it is "acting as the state and not the legislature," Br.36, is without merit. *Berger* explained that "the legislative leaders" themselves had "a distinct state interest" in litigation challenging state law. 597 U.S. at 199. The "different interests" that "different officials" have in such litigation is why States are "free to empower multiple officials to defend [their] sovereign interests" in "the continued enforcement of their own statutes." *Id.* at 191–92 (citation omitted; alterations accepted). Because North Carolina

law "expressly authorized the legislative leaders to defend the State's practical interests in [such] litigation," *id.* at 193, the Court held that the legislature itself had an interest in the litigation sufficient to justify intervention. Thus, *Berger* supports the Legislature's argument here—the Legislature "bring[s] a distinct state interest to bear on this litigation," *id.* at 199, and Wisconsin, like North Carolina, "is free to empower [its Legislature] to defend its sovereign interests," alongside other officials like the Attorney General, *id.* at 192, which it has chosen to do.

Rather than grapple with *Berger*'s direct application, the Attorney General points to inapposite federal cases. For example, the Attorney General invokes *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658 (2019), to suggest that "legislative bodies lack a protected interest when they seek to intervene based on an asserted legislative interest in seeing a law upheld." Br.36. The issue there, however, was that the legislative body did not have "any legal basis for its claimed authority to litigate on the State's behalf." *Id.* at 663. That is clearly not the case here, as the Legislature has enacted the very legislative intervention law missing in *Bethune-Hill* (and present in *Berger*). The Attorney General also cites *Bowsher v. Synar*, 478 U.S. 714 (1986), to suggest that the Legislature cannot "supervise" the Attorney General by participating in litigation alongside the Attorney General. Br.18–19. But *Bowsher* does not speak to that point at all. It instead involved Congress' attempt to create a position, subject to its removal, that could mandate reductions in executive branch spending, a wholly executive power. *Bowsher*, 478 U.S. at

726. The Court explained that Congress could not "grant an officer under its control [power] it does not possess," *id.* at 726, or "supervis[e] officers charged with the execution of the laws it enacts," *id.* at 722. Unlike the power at issue in *Bowsher*, the power here is the same one the U.S. Supreme Court discussed in *Berger*, where the Court enforced a materially similar legislative intervention statute that the North Carolina legislature enacted.

*Third*, contrary to the Attorney General's claims, Br.18–19, the Wisconsin Supreme Court's recent decision in *Marklein* also provides no support for the Attorney General's argument that the Legislature loses its institutional interest in defending state law when the Attorney General has appeared to defend that law. *Marklein* considered the constitutionality of two statutes authorizing the Joint Committee on Finance to veto certain statutorily-authorized agency expenditures. 2024 WI 31, ¶ 6. The Court held that these legislative vetoes violated the separation of powers by interfering with "the executive branch's core power," *id.* ¶ 24, reasoning that while the Legislature has the power to make the laws, it is a "core function" of the executive "to carry out the law," *id.* ¶ 19. "Once [the legislature] has conferred spending power on the executive, the legislative branch lacks any constitutional authority" to reject the Executive's exercise of that power without subsequently enacting or amending a law. *Id.* ¶ 21. *Marklein* says nothing about the Legislature's institutional interest in defending state law, including whether that interest dissipates based on the Attorney General's litigation decisions as is his core submission here.

*Fourth*, the out-of-state cases that the Attorney General relies on, Br.27–29, do not even arguably stand for the proposition that it is unconstitutional for a legislature to confer upon itself the power "to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws," *Bostelmann*, 2020 WI 80, ¶ 13, without regard to whatever position the state's attorney general takes.

*Arizona ex rel. Board of Ethics v. Block*, 942 P.2d 428 (Ariz. 1997), dealt with a statute that gave a legislative body the ability to "initiate and pursue 'any action concerning a law, regulation, order, policy or decision of the United States or any agency of the United States, including court rulings, that the [body] determines will further its purposes.'" *Id.* at 430 (quoting Ariz. Rev. Stat. § 41-401(F)). That statute, unlike Section 803.09(2m), is not cabined to intervening in already-existing litigation challenging the validity of a statute enacted by the Legislature, and nothing in *Block* supports the Attorney General's position here that defending state law is constitutional only when the executive decides against providing such defense.



*State ex rel. Board of Ethics v. Green*, 545 So. 2d 1031 (La. 1989), involved a statute that allowed a committee consisting of mainly "legislatively appointed members" to "institute civil proceedings to collect [certain] civil penalties." *Id.* at 1034 (citing La. R. S. 18.1511.1–18:1511.6). This statute had nothing to do with a legislature's ability to defend the validity of laws it enacted; rather, the statute gave the legislature the ability initiate a civil enforcement action. As such, nothing in the case supports the

Attorney General's position that the Legislature defending state law is permissible only if the Attorney General declines to do so.

The statute at issue 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 (Colo 1975), allowed a legislative committee to determine whether anyone infringed on or interfered with Colorado's right to control the water within its borders and to "authorize the prosecution or defense of such action or actions as it may deem proper to . . . protect" Colorado's rights. That statute, in other words, allowed the committee to *initiate* prosecutions—something the Supreme Court of Colorado found to be an executive power. *See id.* at 223. That case, however, had nothing to do with the Colorado legislature's ability to participate in already-existing litigation to defend the statutes it enacted, and the case therefore fails to lend support for the Attorney General's argument here.



The final case that the Attorney General relies on, *In re Opinion of Justices*, 27 A.3d 859 (N.H. 2011), is irrelevant. That case involved a statute requiring the attorney general "to join the state of New Hampshire as a plaintiff" in a particular lawsuit. *Id.* at 163. The Supreme Court of New Hampshire determined that the statute was unconstitutional because "it would divest the executive branch entirely of its authority to decide whether to *initiate* a particular civil action on the part of the State." *Id.* at 170 (emphasis added). Again, nothing in this case supports the Attorney General's argument that defending state law is permissible only when the Attorney General declines to do so.

In sum, the Attorney General is unable to identify any case from any jurisdiction that would prohibit a State from doing what many other States have done, *supra* pp.31, and what the U.S. Supreme Court blessed States doing in *Berger*: authorizing a state legislature to intervene in litigation challenging the constitutionality of state law, in order to protect the State's "legitimate interest in the continued enforcement of their own statutes," without regard to what position the Attorney General happens to take in the litigation. *Berger*, 597 U.S. at 191, 192.

*Fifth*, the Attorney General has insufficiently developed his argument that, even if "the Legislature did have a shared constitutional role in litigating the defense of this matter, Section 803.09(2m) would still be unconstitutional." Br.29. His argument here is conclusory and lacks citation to legal authority, and this Court should reject it for this reason alone. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). For all of the reasons explained above, the Legislature defending the laws it enacts does not infringe on the Attorney General's authority, but merely defends the Legislature's clear institutional interest in not having its duly enacted laws enjoined.

*Finally*, despite not opposing the Legislature's intervention below, *see* R.112:4, Plaintiffs now claim that the Circuit Court's intervention decision was incorrect because it "obstructed" Plaintiffs "from judiciously, sensibly, and economically obtaining [ ] temporary injunctive relief," Pls.Resp.Br.10–11. While Plaintiffs forfeited their arguments by not opposing the Legislature's Motion below, *State v. Huebner*, 2000 WI 59, ¶ 10,

235 Wis. 2d 486, 611 N.W.2d 727, their arguments are wrong in any event. Plaintiffs cannot complain, Pls.Resp.Br.10, that the Legislature's appeal prejudices their rights because appeals are an ordinary and expected part of litigation, such that Plaintiffs "could not have assumed that . . . there would be no appeal," *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573–74 (7th Cir. 2009) (considering federal intervention). Plaintiffs' complaints about harm to judicial economy are unconvincing for a similar reason: the appellate courts reviewing significant legal issues of statewide importance is the courts' core function. *See Cook v. Cook*, 208 Wis. 2d 166, 188–90, 560 N.W.2d 246.

2. In any event, even if the Attorney General were correct that "[t]he Legislature has no constitutional role to defend the case alongside" the Attorney General, Br.26, the Legislature could nonetheless intervene as of right for purposes of the pending appeals because the Attorney General is no longer defending the challenged statutes through the constitutional appellate process.

Defending a statute requires "appeal[ing] an adverse decision" that blocks a duly enacted law, assuming there is a lawful basis for taking an appeal. *See Bostelmann*, 2020 WI 80, ¶¶ 8–9. That is why trial courts sometimes deny intervention to a proposed intervenor seeking to defend state law on adequacy-of-representation grounds when an attorney general is defending the law at the trial level court, only to grant intervention to that same proposed-intervenor for purposes of pursuing an appeal the Attorney General does not appeal. *See, e.g., Flying J*, 578 F.3d at 572; *see also, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army*

*Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1294 (D.C. Cir. 1980).

Importantly, the Attorney General *agrees* with the Legislature that the statutes that the Circuit Court blocked here for the 2024 General Election are entirely constitutional and lawful, *see* R.69:5, and thus should have been in force for that Election under a proper application of the rule of law. But despite that (entirely correct) position, the Attorney General did *not* appeal the Circuit Court's injunction prohibiting these provisions' enforcement during the 2024 General Election. The failure to appeal the Circuit Court's legally unsound temporary injunction orders is manifestly *not* asserting a "defense of the law at issue in this case." Br.24. Rather, the Attorney General presumably decided that it would be better if these laws did not exist for the 2024 General Election, wrongly arrogating for himself the Legislature's core "ability to determine whether there shall be a law." *Marklein,* 2024 WI 31, ¶ 12. And while the Legislature "acknowledged" in the Circuit Court that the Attorney General had provided "competent representation" below prior to his failure to take an appeal, Br.41, that failure specifically renders the Attorney General's representation decidedly not competent.



This point defeats the Attorney General's position here, even on its own terms. Although the Legislature's involvement in the Circuit Court alongside the Attorney General *prior* to the Circuit Court's entry of the temporary injunction was unquestionably helpful—including as evidenced by the Attorney General's copying of citations and explanatory parentheticals from the Legislature,

*supra* p.16—what happened in this case *after* the Circuit Court's entry of that injunction shows just how essential the Legislature's intervention was. As the Legislature explained to the Circuit Court, it was "so important for the Legislature to be given . . . intervention status" because the Attorney General "might decide not to appeal" and to "abandon the defense" of Sections 6.87(3)(a) and 6.87(4)(b)(1), R.112:108, meaning that these laws would be invalidated by the Circuit Court for the 2024 General Election without appellate review. That is what would have happened here without the Legislature's intervention: the Attorney General *declined* to appeal the Circuit Court's temporary-injunction order against Sections 6.87(3)(a) and 6.87(4)(b)(1), leaving the Legislature alone to bring this defense of state law to the appellate courts. *Supra* pp.17–18. So, without the Legislature's involvement, a single circuit court elected solely by Wisconsinites from one county, *see* Wis. Const. art. VII, § 7, would have decided for the entire State whether certain absentee-ballot laws would be in place for the November 2024 Election, without any opportunity for the elected judges of the Court of Appeals or the state-wide-elected Justices of the Supreme Court to weigh in, *see id.* art. VII, §§ 4(1), 5(2). And, upon the Legislature's appeal and motion for stay, District II stayed the Circuit Court's temporary injunction of these laws, thereby vindicating the Legislature's position. *See* Order Granting Motion To Stay, *Disability Rts. Wis. v. WEC*, No.2024AP1298 (Ct. App. Aug. 19, 2024).

## III. The Courts Have Their Own Constitutional And Statutory Authority To Grant Permissive Intervention, Which Provides Ample Authority To Affirm The Grant Of Intervention Here

A. Courts have statutory authority to grant permissive intervention under Section 803.09(2) upon a "timely motion" asserting a "claim or defense" that "ha[s] a question of law or fact in common" with the "main action." Wis. Stat. § 803.09(2). When exercising that discretion, courts "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," *id.*, by, for example, "making the lawsuit complex or unending," *C.L. v. Edson*, 140 Wis. 2d 168, 177, 409 N.W.2d 417 (Ct. App. 1987). A proposed intervenor need not "be necessary to the adjudication of the action," so long as the intervenor is "a proper party." *City of Madison*, 2000 WI 39, ¶ 11 n.11. This ensures that the Court "dispos[es] of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Bilder*, 112 Wis. 2d at 548–49 (citation omitted).



The courts of this State have a "constitutional institutional interest," *see SEIU*, 2020 WI 67, ¶ 71, in exercising the discretionary authority that Section 803.09(2) provides. "No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 54, 382 Wis. 2d 496, 914 N.W.2d 21 (opinion of Kelly, J.) (citation omitted). That power includes the "inherent authority" to "ensur[e] that the court

functions efficiently and effectively to provide the fair administration of justice," *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 750, 595 N.W.2d 635 (1999), and so is implicated whenever courts decide under Section 803.09(2) whether "persons should be allowed to join a lawsuit in the interest of the speedy and economical resolution of controversies," *see Bilder*, 112 Wis. 2d at 548. Moreover, the judiciary has an independent constitutional duty to "say what the law is," *Tetra Tech*, 2018 WI 75, ¶ 50 (opinion of Kelly, J.) (citation omitted), and so has a constitutional interest in deciding under Section 803.09(2) whether an intervenor would assist the court in illuminating the legal issues at stake in a case.

B. Here, the Circuit Court had ample support for granting permissive intervention under Section 803.09(2), and events that transpired thereafter show that the Legislature's intervention was absolutely essential to the courts of this State carrying out their constitutional duties. The Legislature's motion was "timely," and its "defense" presents "question[s] of law" "in common" with the "main action," given that the Legislature contends that the challenged absentee-voting provisions are valid and in accord with Wisconsin and federal law. Wis. Stat. § 803.09(2); *see supra* Part I. Nor did the Legislature's involvement "unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2). To the contrary, the Legislature's intervention advanced Section 803.09's "primar[y]" goal of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Bilder*, 112 Wis. 2d at 548–49 (citation omitted). Most notably, the

Legislature advanced the efficient adjudication of the parties' rights by appealing the Circuit Court's temporary injunction order, so that this State's appellate courts had a chance to weigh in on whether the Circuit Court properly enjoined state election laws on the eve of an election.

C. The Attorney General asserts without development that permitting the Legislature to intervene here would violate the separation of powers for the same reasons as if the Legislature had intervened under Section 803.09(2m). Br.42. Beyond the inaccuracy of that argument on its own merits, *see supra* Part II, the Attorney General does not even attempt to address the serious separation-of-powers concerns that would arise from any decision preventing courts from granting the Legislature permissive intervention, *see generally* Br.42. The judiciary has its own "constitutional institutional interest[s]," *SEIU*, 2020 WI 67, ¶ 71, arising from its "exclusive responsibility to exercise judgment in cases and controversies arising under the law," *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. A court's discretion to grant permissive intervention where a proposed intervenor may assist the court in elucidating the law and "efficiently and effectively," *City of Sun Prairie*, 226 Wis. 2d at 750, resolving the case is part and parcel with this constitutional authority, *see supra* pp.45–46. It would violate the separation of powers for the Attorney General to be able to thwart unilaterally the courts' power to allow the Legislature to participate in this litigation, where the courts decide that this participation would help the judiciary carry out its own constitutional responsibilities.

*See Gabler*, 2017 WI 67, ¶ 31 ("The preservation of liberty in Wisconsin turns in part upon the assurance that each branch will defend itself from encroachments by the others.").

## CONCLUSION

This Court should affirm the Circuit Court's decision granting the Legislature's Motion To Intervene.

Dated: November 8, 2024

Respectfully submitted,

*Electronically signed by Misha Tseytlin*
MISHA TSEYTLIN
*Counsel of Record*
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
EMILY A. O'BRIEN
State Bar No. 1115609
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1938 (KL)
(312) 759-5939 (EO)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com
emily.obrien@troutman.com

*Attorneys for the Wisconsin State Legislature*

## CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,396 words.

Dated: November 8, 2024

*Electronically signed by Misha Tseytlin*
MISHA TSEYTLIN