STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2024AP1347

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.

PERMISSIVE APPEAL FROM AN ORDER ISSUED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE EVERETT MITCHELL, PRESIDING, GRANTING INTERVENTION

REPLY BRIEF OF APPELLANT, THE WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

Prior to the 2018 enactment of Wis. Stat. § 803.09(2m), the Legislature had "limited power to intervene in litigation."[1] That limit was for good reason: the Legislature rarely has a constitutional role in representing the State in litigation.

This case is not one of those rare exceptions. Intervention would allow the Legislature to intrude upon the execution of the law and veto the executive branch's choices—exactly what *Evers I* says it may not do.

ARGUMENT

I. Wisconsin Stat. § 803.09(2m) is unconstitutional as applied in this case.

Allowing the Legislature to intervene under section 803.09(2m) violates the separation of powers, whether under a core or shared powers lens. The Legislature has found no case law supporting its position, and its assertions of Commission "concessions" are unfounded.

A. Allowing the Legislature to intervene here violates the separation of powers.

1. Legislative intervention interferes with and overrides the executive branch's core power.

Wisconsin's separation of powers doctrine allows the Legislature to make the law, not to enforce it. *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600. And once that law is passed, the baton passes to the executive branch to execute. *Evers v. Marklein*, 2024 WI 31, ¶ 15, 412 Wis. 2d 525, 8 N.W.3d 395 (*Evers I*). Thus, the Legislature

[1] *Serv. Emps. Int'l Union, Loc. 1 v. Vos* (*SEIU*), 2020 WI 67, ¶ 51, 393 Wis. 2d 38, 946 N.W.2d 35.

may not enact laws giving itself the equivalent of a "legislative veto," permitting itself to "interfere with and even override the executive branch's core power of executing the law." *Id.* ¶ 24.

Here, Wis. Stat. § 803.09(2m) does exactly that. Defending a statute in litigation is a core executive power. For both the Attorney General and executive branch clients, litigation is part of the day-to-day work of carrying out the law: "when an administrative agency acts . . . it is exercising executive power." *SEIU*, 393 Wis. 2d 38, ¶¶ 96–97.

Allowing the Legislature to intervene intrudes upon that power because an intervening party is a full participant in the lawsuit. *Kohler Co. v. Sogen Int'l Fund, Inc.*, 2000 WI App 60, ¶ 12, 233 Wis. 2d 592, 608 N.W.2d 746. That means that the Legislature can make the choices about litigation that the constitution leaves to the executive branch. That is particularly acute given the ADA and Rehabilitation federal disability law claims here, which consider whether the accommodations sought would impose significant financial or administrative costs, or fundamentally alter the nature of the program. *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 594 (7th Cir. 2018).

As to *Evers I*, the Legislature focuses on the particular statute at issue there (Leg. Br. 38), but it fails to grapple with the decision's guiding principle: once a law is passed, the Legislature must hand over the baton and let the executive branch execute it. *Evers I*, 412 Wis. 2d 525, ¶¶ 15, 24.

And the Legislature misreads *SEIU*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35. The case does not hold (Leg. Br. 28–30, 32) that defending the validity of a statute is a shared power between the legislative and executive branches or that the Legislature has an "institutional interest" in not having a court invalidate a law.

Rather, *SEIU* said that "[i]n at least some cases, we see no constitutional violation in allowing the legislature to intervene in litigation concerning the validity of a statute, *at least where its institutional interests are implicated*." 393 Wis. 2d 38, ¶ 72 (emphasis added). The court thus recognized that defending a statute's validity was not a constitutional interest itself; the Legislature needs a separate, constitutional role. And the court's examples of such roles were situations not implicated here: where the Attorney General represents the Legislature or brings a case at its request, *id.* ¶¶ 10, 64, 67, and a defense case requiring money to be paid out of the treasury, *id.* ¶¶ 10, 68, 71.

The Legislature argues that a court's injunction of a state law "nullifies" that law, so that the Legislature's ability to enact a law has been erased.[2] (Leg. Br. 32, 33.) That is incorrect: a court's decision may make a law unenforceable, but only the Legislature may repeal it. *Cnty. of Door v. Hayes-Brook*, 153 Wis. 2d 1, 27, 449 N.W.2d 601 (1990) (Abrahamson, J., concurring).

2. Even if litigating the case fell in an arena of shared powers, legislative intervention violates the separation of powers.

Even if it litigating this case fell within an arena of shared powers, the Legislature's intervention here would be unconstitutional.

As discussed in the Commission's opening brief (App. Br. 21–23, 29–30) even in a shared powers setting, the Legislature can operate only using its own constitutional procedural tool—passing legislation. And substantively, the

[2] The temporary injunction here did not invalidate the statute: it permitted a limited number of voters not to follow one aspect of it for the November election.

Legislature cannot enjoy a veto power over the encroached-upon branch. *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 30, 34, 531 N.W.2d 32 (1995); *Matter of E.B. v. State*, 111 Wis. 2d 175, 187–88, 330 N.W.2d 584 (1983).

Wisconsin Stat. § 803.09(2m) violates the separation of powers even under a shared power framework because it gives the Legislature the procedural tool of litigating cases, not passing laws, and grants it a substantive veto power over the executive branch's litigation choices.

The Legislature disputes none of this framework. It announces that the Commission's pages of argument are "conclusory" and merit no response. (Leg. Br. 41.) In failing to address that argument, the Legislature has forfeited a response.

B. The Legislature unpersuasively relies on non-existent "concessions," *Berger*, and *Bostelmann*.

Having failed to find authority supporting its theory that it has a constitutional role in litigating cases, the Legislature falsely asserts that the Commission has "conceded" that point and relies on *Berger* and *Bostelmann*, neither of which addresses the separation of powers question.

1. The Commission has not conceded that the Legislature can constitutionally intervene and did not fail to defend the case.

The Legislature announces that the Commission has conceded the very points the Legislature must prove, and that the Commission has "abandoned" the defense of the case. Those assertions are false.

The Legislature repeatedly asserts that the Commission has "conceded" or not disputed that the Legislature has a constitutional role in having statutes

upheld in litigation, and that the Legislature can constitutionally intervene if the Attorney General fails to provide a defense. (Leg. Br. 10, 33–35, 44.) The Commission has made neither concession. This is an as-applied constitutional challenge, and the Commission has only pointed out that this case does not present a situation where no executive branch official has declined to represent an agency. (App. Br. 14.)

The Legislature's support for these "concessions" appears to be a 2020 brief in *SEIU*, where the Attorney General said there might be constitutional applications of the statute if the executive branch declined to provide representation. (Leg. Br. 28, 34.) That was not a concession to begin with, does not bind the Commission or Attorney General here, and is irrelevant given the facts of this case.

The Legislature argues that by not appealing the limited preliminary injunction, the Commission abandoned the defense of the action, allowing the Legislature to constitutionally intervene. That is absurd. Whether to bring an interlocutory appeal is part of managing litigation, and a decision not to bring every possible interlocutory appeal does not give the Legislature a constitutional role in litigating a case.

The executive must use discretion to "determine for himself what the law requires him to do." *Evers I*, 412 Wis. 2d 525, ¶ 15 (citation omitted). That is what happened here. (App. Br. 28–29.) Given the reduced request for temporary relief—a limited number of visually- and manually-impaired voters could receive a ballot by email for the November election—and to avoid uncertainties for clerks and voters, the Commission made a strategic decision not to appeal that order. That is exactly the type of discretionary decision the constitution entrusts to the executive branch.

2. *Berger* and *Bostelmann* do not address the separation of powers.

The Legislature relies on *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. 179 (2022), and *Democratic National Committee v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423. Neither case addresses the separation of powers doctrine.

The Legislature cites the "interests" discussed in *Berger* (Leg. Br. 36–37), but "interest" there had a meaning unrelated to the separation of powers. *Berger* addressed whether North Carolina legislators had a protected interest for purposes of the federal intervention rule's second prong—the movant's "interest"—where a state statute authorized state legislative leaders to intervene in litigation "as agents of the State." 597 U.S. at 193 (citation omitted).

The Court mentioned the separation of powers only as a waived argument. North Carolina officials argued alternatively that the state law violated that State's separation of powers doctrine, but the Court treated the question as waived because they had agreed to permissive intervention. *Id.* at 194. The Legislature asserts *Berger* says a statute like section 803.09(2m) complies with the separation of powers, (Leg. Br. 30, 35), but the Court did not address that question.

The Legislature characterizes *Berger* as holding that "the Legislature had a legitimate interest in [statutes'] continued enforcement," (Leg. Br. 32 (citation omitted)), but that is not what the Court said: it said that "States" have such an interest. *Berger,* 597 U.S. at 191. For separation of powers purposes, it the executive branch's job, not the Legislature's, to represent that "State" interest.

The Legislature's reliance on *Bostelmann*, (Leg. Br. 18, 19, 21, 29), is similarly misplaced. Both the majority and dissent noted that the court was not taking up the

constitutional issue. 394 Wis. 2d 33, ¶ 4 & n.2, ¶ 24 n.4 (Dallet, J., dissenting).

C. Other States' courts agree that legislatures cannot represent the State or control litigation.

The Legislature tries unsuccessfully to distinguish the out-of-state cases rejecting statutes that empower a legislature to intervene or control litigation. (Leg. Br. 39–40.) It says they turned on the fact that the laws authorized plaintiff-side filings, but that is factually inaccurate and legally unhelpful.

The statutes in *Arizona ex rel. Woods v. Block*, 942 P.2d 428 (Ariz. 1997), and *Stockman v. Leddy*, 129 P. 220 (Colo. 1912), *overruled on other grounds by Denver Ass'n for Retarded Children, Inc. v. Sch. Dist. No. 1*, 535 P.2d 200, 204 (1975), gave a legislatively-controlled body the power to bring *or* defend litigation. *Arizona*, 942 P.2d at 430–31 (committee filing motions in ongoing litigation); *Stockman*, 129 P. at 221 (legislative committee could authorize "the prosecution or defense" of action). Neither case mentioned the litigation position as relevant to the separation of powers question.

In *In re Opinion of the Justices*, 27 A.3d 859 (N.H. 2011), the New Hampshire court rejected a legislative effort to force the attorney general to intervene in a challenge to the Affordable Care Act. It was immaterial which side the State intervened on. The court concluded that "[i]t is the executive, not the legislative branch, in which the constitution vests the power to determine the State's interest *in any litigation*." 27 A.3d at 870 (emphasis added). The court rejected the type of legal distinction the Legislature tries to draw here—civil enforcement cases, which the New Hampshire legislature acknowledged it could not involve itself in, and other types of litigation. *Id.* at 869–70.

And while *State Through Board of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989), involved a law providing for civil penalties, the court did not say that legislative control over other types of cases would be permissible.

The parties have discovered no case blessing a statute like Wis. Stat. § 803.09(2m) as consistent with the separation of powers.[3] The Legislature cannot constitutionally intervene under Wis. Stat. § 803.09(2m).

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

Because Wis. Stat. § 803.09(2m) is unconstitutional as applied here, the Legislature could intervene only if it satisfied the factors for intervention as of right under Wis. Stat. § 803.09(1). It cannot meet that burden.

A. The Legislature has no legally protected interest *as the Legislature*, and thus no interest that could be impaired.

As support for a protected interest, the Legislature relies on Wis. Stat. § 809.03(2m) and argues it has the "State's interest in the validity of state law." (Leg. Br. 21.)[4] That misses the point. If section 809.03(2m) is unconstitutional because it empowers the Legislature to represent the State in litigation, the Legislature must show it has a protected

[3] Ignoring the judicial rejection of such statutes, the Legislature lists a handful of statutes from other States. (Leg. Br. 31.) Two are not about intervention (Arizona (notice of claim statute), and Indiana (redistricting counsel)). Two others (Oklahoma, 2023, and North Carolina, 2014) are of recent vintage. Nevada's older law, apparently untested in court, demonstrates no national acceptance of such laws.

[4] The Legislature has abandoned its claim of an "election integrity" interest.

interest as *the Legislature* to intervene under Wis. Stat. § 803.09(1).

The U.S. Supreme Court has recognized that legislative bodies lack a protected interest for intervention based on an asserted interest in seeing a law upheld. *See Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 669–670 (2019).

The Legislature's cited cases are not to the contrary. *Berger* considered whether North Carolina legislators had protected interests where a state law treated them as the State. *Berger*, 597 U.S. at 186, 189. *Bostelmann* construed Wis. Stat. § 803.09(2m) as empowering the Legislature to defend interests beyond its own institutional powers. *Bostelmann*, 394 Wis. 2d 33, ¶ 8. Because both cases treated the legislative body as representing the State's interests, neither addressed whether the legislature had a protected interest *as the Legislature*.

SEIU and *Evers I* also don't help the Legislature. As discussed in I.A. above, *SEIU* does not hold that the Legislature "has a constitutional institutional interest in the laws that it enacts not being invalidated by the courts." (Leg. Br. 21.) And *Evers I* teaches that the Legislature acts by enacting law, not by executing it. *Evers I*, 412 Wis. 2d 525, ¶¶ 15, 24.

The Legislature cites *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900, but ignores the actual legislative "interest" there: not seeing a law upheld, but rather its statutory role reviewing administrative rules.

The Legislature has no protected interest in this litigation, and none that can be impeded by its outcome.

B. The Attorney General and Commission adequately represent any general Legislature interests.

The Legislature also fails the intervention test because the Attorney General and Commission adequately represent any interests it has.

The Legislature must overcome the double presumptions of adequacy under *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶¶ 89–91, 307 Wis. 2d 1, 745 N.W.2d 1, because the movant and an existing party have the same ultimate objective and the Attorney General and Commission are charged by law to defend the case. The Legislature does not overcome those hurdles.

The Legislature argues the Commission and Attorney General no longer share its ultimate objective because the Commission chose not to bring an interlocutory appeal. That is a difference in litigation tactics, not the ultimate goal. Under *Helgeland*, a movant's view that it will defend a law with more "vehemence" does not make the representation inadequate. *Id.* ¶¶ 107–08. And the Legislature's citation to Wis. Stat. § 803.09(2m), (Leg. Br. 25), avoids the pertinent question: whether the Legislature can satisfy 803.09(1) if section 803.09(2m) is unconstitutional.[5]

The Legislature claims that the Commission's choice not to bring an interlocutory appeal is a "quintessential means" of overcoming the presumption of adequacy. (Leg. Br. 25, 11.) That is wrong on two fronts.

[5] The Legislature relies on *Liebert v. WEC*, 345 F.R.D. 169, 172 (W.D. Wis. 2023), but that case applied the unique adequacy standard used by the U.S. Court of Appeals for the Seventh Circuit. *See Bost v. Ill. State Elections Bd.*, 75 F.4th 682, 691 (2023) (Easterbrook, J., concurring) (criticizing Seventh Circuit's test).

First, the cases discuss a decision not to appeal a *final* decision, not to forgo an interlocutory appeal. *See Solid Waste Agency of North Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996) (reasoning that representation *might* become inadequate based on a lack of appeal from a final judgment). Second, a decision not to appeal a final decision is just one factor in considering whether to allow intervention for purposes of appeal. *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997) (collecting cases and discussing factors).

The Commission and Attorney General seek the same ultimate outcome as the Legislature and are charged with defending the law. The Legislature has not overcome the presumptions of adequacy.

The Legislature fails to satisfy the intervention factors under Wis. Stat. § 803.09(1).

III. Permissive intervention would also violate the separation of powers.

Permissive intervention under Wis. Stat. § 803.09(2) solves none of the constitutional problems discussed above.

The Legislature suggests, with no support, that limiting the rules for when courts grant intervention violates the judiciary's ability to control its docket. That argument would render the entirety of the civil procedure code unconstitutional; unsurprisingly, no case law supports that result.

CONCLUSION

This Court should reverse the circuit court and hold that the Legislature could not constitutionally intervene in the underlying action under Wis. Stat. § 803.09(2m), does not meet the statutory criteria to intervene as the Legislature

under Wis. Stat. § 803.09(1), and could not constitutionally permissively intervene under Wis. Stat. § 803.09(2).

Dated this 2nd day of December 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,978 words.

Dated this 2nd day of December 2024.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 2nd day of December 2024.

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