

DISABILITY RIGHTS WISCONSIN, LEAGUE OF
WOMEN VOTERS OF WISCONSIN, MICHAEL R.
CHRISTOPHER, STACY L. ELLINGEN, TYLER
D. ENGEL, *and* DONALD NATZKE,

Plaintiffs,

Case No.
2024CV001141

v.

WISCONSIN ELECTIONS COMMISSION,
MEAGAN WOLFE, in her official capacity as
Administrator of the Wisconsin Elections
Commission, DON MILLIS, ROBERT SPINDELL,
JR., MARGE BOSTELMANN, ANN JACOBS,
MARK THOMSEN, and CARRIE RIEPL, in their
official capacities as Commissioners of the
Wisconsin Elections Commission,

Defendants.

**PROPOSED-INTERVENOR DEFENDANT THE
WISCONSIN STATE LEGISLATURE'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO INTERVENE**

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INTRODUCTION

The Wisconsin State Legislature (“Legislature”) has enacted statutory provisions allowing Wisconsinites to exercise the privilege of absentee voting, including the procedures governing that privilege, just as the Wisconsin Constitution specifically authorizes the Legislature to do. Plaintiffs challenge those procedures, asking this Court to declare certain of Wisconsin’s laws concerning absentee ballots unlawful and order the State to adopt an entirely new system of electronic voting, so voters with disabilities may vote absentee without third-party assistance. But the State’s decisions concerning who may receive an electronic absentee ballot and how those ballots may be returned reflect its policy of “carefully regulat[ing]” the privilege of absentee voting “to prevent the potential for fraud or abuse.” Wis. Stat. § 6.84(1). This lawsuit undermines the Legislature’s substantial interest in ensuring the integrity of the State’s absentee voting regime.

The Legislature is entitled to intervene as a matter of right for two independent reasons. First, the Legislature has a statutory right to defend the State’s election laws against Plaintiffs’ preemption and constitutional challenges. Wis. Stat. § 803.09(2m); *see also Democratic Nat’l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423. Second, the Legislature is entitled to intervene as of right under Wis. Stat. § 803.09(1), as the Legislature has filed a timely motion seeking to protect its interests in the constitutionality and validity of its statutes, the efficacy of its own constitutional powers, and the integrity of upcoming elections, all of which this lawsuit threatens.

Alternatively, this Court should grant the Legislature permissive intervention under Wis. Stat. § 803.09(2), because the Legislature will raise core defenses grounded in Plaintiffs' claims and the Legislature's involvement as a party in this matter will not prejudice the existing parties in any way.

STATEMENT¹

A. Legal Background

1. Wisconsin Law Helps Individuals With Disabilities Vote In-Person And Absentee

Article III of the Wisconsin Constitution provides for the right to vote and mandates that “[a]ll votes shall be by secret ballot.” Wis. Const. art. III, §§ 1, 3. Article III also empowers the Legislature to enact laws governing various aspects of the voting process, including “absentee voting.” *Id.* § 2. Pursuant to its constitutional authority, the Legislature has enacted “lots of rules that making voting easier” than in “many other states.” *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). Most relevant here, the Legislature has “extend[ed] the privilege of voting by absentee ballot to [all] otherwise qualified electors who, for any reason, are unable or unwilling to appear at the polls.” *Id.* (citing Wis. Stat. § 6.85).

Because voting by absentee ballot is a “privilege” and not a right under Wisconsin law, Wis. Stat. § 6.84; *see Luft*, 963 F.3d at 672, “[s]tate law requires citizens who wish to vote absentee to comply with various procedural requirements,”

¹ To avoid duplicative briefing, the Statement section of this brief is identical to the Statement section in the Legislature's Memorandum In Opposition To Plaintiffs' Motion for Emergency Declaratory Relief And Temporary Injunction.

Liebert v. Millis, No.23-CV-672, 2024 WL 2078216, at *2 (W.D. Wis. May 9, 2024). Subject to certain exceptions discussed below, an absentee voter must request an absentee ballot from the municipal clerk, Wis. Stat. § 6.86; receive a physical copy of the absentee ballot and the accompanying absentee ballot envelope from the clerk, *id.* § 6.87(2); mark his or her selections on the ballot and obtain the signature and certification of a witness on the absentee-ballot envelope, *id.*; and return the ballot to the municipal clerk by 8:00 p.m. on Election Day either by mail or physical delivery, *id.* § 6.87(6). An absentee voter can also take advantage of in-person absentee-voting procedures to simultaneously request and cast an absentee ballot at a clerk's office or an alternatively designated location for such voting in a designated period before Election Day. *Id.* §§ 6.86(1), 6.855.

Recognizing that “military [and overseas] voters” often “face special problems” in accessing “regular voting methods,” such voters may request that their absentee ballots be delivered electronically. *Luft*, 963 F.3d at 677; *see* Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e), 6.87(3)(d). But these voters must nevertheless “mark[] and return[]” such ballots “in the same manner as other absentee ballots,” Wis. Stat. §§ 6.22(5), 6.24(7); *see also id.* § 6.87(3)(d) (“[M]ilitary or overseas elector[s]” must “make and subscribe to the [absentee-voter] certification,” “enclose the absentee ballot in a separate envelope contained within a larger envelope, that shall include the completed certificate,” “affix sufficient postage,” and “mail the absentee ballot to the municipal clerk.”). As detailed in the WEC Uniform Instructions for Military and Overseas Absentee Voters, after a military or overseas absentee voter receives her emailed or

faxed ballot from the clerk, she must print out both the ballot and the absentee certificate, mark the printed ballot in the presence of a witness, fold the ballot and place it in an envelope, fill out the required sections of the absentee ballot certificate, glue or tape the absentee ballot certificate to the envelope, put that envelope inside a larger envelope, and then send that larger envelope back to the clerk. WEC, Form EL-128u, *Uniform Instructions for Military & Overseas Absentee Voters (Email & Fax)* (hereinafter “Form EL-128u”);² see WEC, *Military and Overseas Voting* 14 (Feb. 2022) (hereinafter “WEC Military and Overseas Voting”) (“The elector should be instructed to print the ballot, vote the ballot in the presence of a witness, fold the ballot and seal it inside a regular, non-window envelope, complete and sign the absentee certificate.”).³ Wisconsin law does not permit such voters to return absentee ballots electronically. See Wis. Stat. §§ 6.22(5); 6.24(7).

Wisconsin law also endeavors to make voting easier for voters with disabilities. On Election Day, voters with disabilities may vote at their polling place with the assistance of a person of the voter’s choosing, which assistant may physically help the individual cast the ballot. *Id.* § 6.82. Polling places must also provide accessible voting devices upon which voters with disabilities can vote privately and independently. See 52 U.S.C. § 21081(a)(3)(A)–(B). To make in-person voting more

² 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 May 24, 2024).

³ Available at https://elections.wi.gov/sites/default/files/legacy/2022-02/UOCAVA%2520Manual%25202.2022_0.pdf.

accessible for voters with disabilities, Wisconsin “funds specialized transportation assistance programs” to help such voters “get to the polls,” *Luft*, 963 F.3d at 672 (citing Wis. Stat. § 85.21)—programs the State budgeted \$15,977,800 to provide in 2024 alone, see Wis. Dep’t of Trans., *2024 Application Guidelines: Specialized Transportation Assistance 85.21 Program for Counties (Wis. Stat. 85.21)*, (Dec. 15, 2023).⁴ As for absentee voting, voters with disabilities may elect to “automatically” receive absentee ballots “for every election,” Wis. Stat. § 6.86(2)(a), and may submit a signed witness statement that “verifies” the voter’s name and address “in lieu of [the voter] providing proof of identification,” *id.* § 6.87(4)(b)2.

Electors who are “unable to read, ha[ve] difficulty in reading, writing or understanding English or due to disability [are] unable to mark” their own absentee ballots may “select any individual, except the elector’s employer or an agent of that employer or an officer or agent of a labor organization which represents the elector, to assist in marking the ballot.” Wis. Stat. § 6.87(5). The person assisting the disabled elector then certifies his or her name on the back of the ballot, *id.*, and may assist the voter either in the privacy of the voter’s home or at an in-person absentee ballot location (commonly known as “early voting”), *id.* § 6.855. The certification ensures that the assistant truthfully and accurately helped complete the absentee ballot on the voter’s behalf, and if an assistant “intentionally fail[s] to cast a vote in

⁴ Available at <https://wisconsindot.gov/Documents/doing-bus/local-gov/astnce-pgms/transit/8521-guide.pdf>.

accordance with the elector's instructions," or "reveal[s] the elector's vote to any 3rd person," *id.* § 12.13(3)(j), it is a Class I felony, *id.* § 12.60(1)(a).

2. Wisconsin Law Limits The Availability Of Electronic Absentee Ballots Because Such Ballots Are Not Secure

Electronic absentee balloting—meaning the process of receiving, marking, and returning marked absentee ballots for counting through electronic means—is a relatively new technology. Numerous federal agencies, including the Cybersecurity and Infrastructure Security Agency (“CISA”), the Election Assistance Commission (“EAC”), the National Institute of Standards and Technology (“NIST”), and the Federal Bureau of Investigation (“FBI”), have expressly recognized this fact, and accordingly “recommend paper ballot return as electronic ballot return technologies are high-risk even with controls in place.” CISA, *Risk Management For Electronic Ballot Delivery, Marking, And Return* 1 (Feb. 2024);⁵ *see also* EPI Ctr., Am. Ass’n for the Advancement of Sci., (Apr. 2021) (“Experts agree that ballots should not be transmitted over the internet.”).⁶ Less than two years ago, a working group from the University of California, Berkeley, Center for Security in Politics aptly stated the concern: “Implementing widespread adoption of secure and accessible internet ballot return requires technologies that do not currently exist and others that have not been fully tested.” R. Michael Alvarez, et al., Ctr. for Sec. in Pol., Univ. of Cal., Berkeley,

⁵ Available at https://www.cisa.gov/sites/default/files/2024-02/Final_%20Risk_Management_for_Electronic-Ballot_05082020_508c.pdf.

⁶ Available at https://www.aaas.org/sites/default/files/2021-04/EPI-Center_FactSheet_Online-Voting.pdf?adobe_mc=MCORGID%3D242B6472541199F70A4C98A6%2540AdobeOrg%7CTS%3D1715564537.

Working Group Statement on Developing Standards for Internet Ballot Return 2, (Dec. 2022).⁷ That same study identified six specific risks presented by electronic absentee voting, including the risk of “[p]ervasive client-side malware,” “[r]educed confidence through international malfeasance,” “[t]argeted denial of service attacks,” “lack of deployed digital credentials among potential voters,” “[a]bsence of a directly voter-verifiable ballot of record,” and “[i]ncreased threat of wholesale attacks.” *Id.* at 6–10.

OmniBallot Online—the electronic voting tool Plaintiffs suggest for Wisconsin, Dkt.9 (“Compl.”) ¶¶ 149–50—is not immune from these security concerns. One study found that OmniBallot “is vulnerable to vote manipulation by malware,” Michael A. Specter & J. Alex Halderman, Internet Pol’y Rsch. Inst., Mass. Inst. of Tech., *Security Analysis of the Democracy Live Online Voting System* 1 (June 7, 2020),⁸ leading Delaware to abruptly cease using OmniBallot during the COVID-19 pandemic, see Kathryn McGrath, Am. Ass’n for the Advancement of Sci., *Scientific Experts Discuss Vulnerabilities Of Delaware’s Online Voting System With The State Election Commissioner* (July 17, 2020).⁹ OmniBallot also poses a specific threat to voter privacy because the tool collects “sensitive personally identifiable information—including the voter’s identity, ballot selections, and browser fingerprints.” McGrath, *supra*. Thus, “using OmniBallot for electronic ballot return represents a severe risk to election security.” Specter & Halderman, *supra*, at 1.

⁷ Available at <https://csp.berkeley.edu/wp-content/uploads/2022/12/Working-Group-Statement-on-Internet-Ballot-Return.pdf>.

⁸ Available at <https://internetpolicy.mit.edu/wp-content/uploads/2020/06/OmniBallot-1.pdf>.

⁹ Available at <https://www.aaas.org/news/scientific-experts-delaware-internet-voting>.

Reflecting these concerns, only a small minority of States—thirteen, by Plaintiffs’ count—permit people with disabilities to return absentee ballots electronically. *See* Compl. ¶¶ 130, 135–48.

B. Procedural Background

On April 16, 2024—over 57 years after the Legislature enacted Wis. Stat. § 6.87, outlining the modern absentee voting procedure, *see* 1965 Wis. Act 666—Plaintiffs filed this lawsuit alleging that Wisconsin’s absentee voting laws, which allow voters with disabilities to use third-party assistance to cast absentee ballots, leave voters with certain disabilities unable to vote an absentee ballot privately and independently. Compl. ¶¶ 1, 8. Plaintiffs bring claims under the Americans with Disabilities Act (“ADA”) and Rehabilitation Act, asserting that Wisconsin’s prohibitions on the electronic transmission and return of absentee ballots, Wis. Stat. §§ 6.87(3)(a), (4)(b)(1), discriminates against people with disabilities in violation of Title II of the ADA and Section 504 of the Rehabilitation Act, Compl. ¶¶ 168, 182. Plaintiffs bring additional claims under the Wisconsin Constitution’s “right to vote by secret ballot,” Compl. ¶ 185, Wisconsin’s equal protection guarantee, Compl. ¶¶ 196–98, and the First and Fourteenth Amendments of the U.S. Constitution, Compl. ¶¶ 200, 205.

STATEMENT OF INTEREST

The Legislature comprises the State Assembly and the State Senate. *See* Wis. Const. art. IV, § 1. Wisconsin law recognizes that the Legislature—as the body “vested” with the “legislative power,” *id.*—has an interest in defending the State’s

sovereign interest in its law in court, *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Specifically, Section 803.09(2m) provides that “[w]hen a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied,” “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 . . . the legislature may intervene as set forth under [Section] 13.365.” 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 the hiring of counsel other than the Attorney General. *Id.* § 13.365(3). Thus, “Wisconsin has adopted a public policy that gives the Legislature a set of litigation interests,” *Bostelmann*, 2020 WI 80, ¶ 8, including where, as here, a party “otherwise challenges the . . . validity of a statute, as part of a claim or affirmative defense,” *id.* (quoting Wis. Stat. § 803.09(2m)).

The Legislature also has a core interest in its constitutional powers. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900; *Serv. Emps. Int’l Union, Loc. 1 v. Vos (“SEIU”)*, 2020 WI 67, ¶¶ 63–73, 393 Wis. 2d 38, 946 N.W.2d 35. The Constitution provides that the Legislature “may” enact laws “[p]roviding for absentee voting.” Wis. Const. art. III, § 2. Therefore, the Legislature has an interest in claims, such as those asserted by Plaintiffs here, that would undermine the efficacy and integrity of the Legislature’s constitutional authority to enact laws governing the procedures for absentee voting in Wisconsin. *Palm*, 2020 WI 42, ¶ 13.

ARGUMENT

I. The Legislature Is Entitled To Intervene As Of Right Under Section 803.09(2m) Because Plaintiffs' Challenge Involves The Validity And Constitutionality Of Wisconsin's Absentee-Voting Laws

The Legislature has the authority to intervene as a matter of right in any lawsuit and “at any time,” when a party challenges “the constitutionality of a statute, facially or as applied,” or “challenges a statute as violating or preempted by federal law.” Wis. Stat. § 803.09(2m); *see also id.* § 13.365. In Section 803.09(2m), Wisconsin “adopted a public policy that gives the Legislature . . . litigation interests,” which gives the Legislature a statutory right to intervene when a party challenges the “validity of a statute, as part of a claim or affirmative defense.” *Bostelmann*, 2020 WI 80, ¶¶ 8, 13 (quoting Wis. Stat. § 803.09(2m)); *see* Decision & Order On The Legislature’s Mot. To Intervene at 2, *Abbotsford Educ. Ass’n v. Wis. Emp. Relations Comm’n*, No.2023CV3152, Dkt.79 (Dane Cnty. Cir. Ct. Feb. 2, 2024) (“[T]he statute grants the Legislature a seemingly unrestricted right to intervene in any case involving a challenge to the constitutionality of a statute.”) (attached hereto as Exhibit 1 to the Affidavit of Kevin M. LeRoy (“LeRoy Aff.”)); Order Granting The Wisconsin Legislature’s Mot. To Intervene, *Priorities USA v. WEC*, No.2023CV1900, Dkt.73 (Dane Cnty. Cir. Ct. Sept. 11, 2023) (granting intervention “[b]ecause the Legislature has a statutory right to intervene”) (attached hereto as Exhibit 2 to the LeRoy Aff.); Order Granting Mot. To Intervene at 1, *EXPO Wisconsin, Inc. v. WEC*, No.2023CV279, Dkt.34 (Dane Cnty. Cir. Ct. Feb. 10, 2023) (granting intervention to the Legislature) (attached hereto as Exhibit 3 to the LeRoy Aff.). The Legislature’s

authority to intervene extends to instances where a party “challenges a statute as violating or preempted by federal law.” Wis. Stat. § 803.09(2m); *Bostelmann*, 2020 WI 80, ¶¶ 8, 13.

Here, the Legislature is entitled to intervene as of right under Section 803.09(2m). Plaintiffs’ Complaint challenges several state election laws governing the use of electronic absentee voting in Wisconsin, *see* Wis. Stat. § 6.87(3)(a), as well as the State’s requirement that an absentee ballot “be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots,” *id.* § 6.87(4)(b)(1). *See* Compl. ¶ 25. Plaintiffs contend that these laws deprive them of the ability to vote privately and independently in violation of state and federal law, including the Wisconsin and U.S. Constitutions. Thus, Plaintiffs’ claims will require this Court to determine the “constitutionality” or “validity” of these election laws and the meaning of the constitutional provisions. Wis. Stat. § 803.09(2m); *see Bostelmann*, 2020 WI 80, ¶¶ 8, 13. For that reason alone, this Court should grant the Legislature’s Motion To Intervene.

II. The Legislature Is Also Entitled To Intervene As Of Right Under § 803.09(1)

The Legislature is also entitled to intervene in this action as a matter of right under Section 803.09(1). “A movant must meet four requirements to intervene as a matter of right: 1) the motion to intervene 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 existing parties do not adequately represent the movant’s 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); see also Wis. Stat. § 803.09(1). The Legislature meets each of Section 803.09(1)'s requirements.

1. The Legislature's Motion Is Timely

In deciding whether a motion to intervene is timely, "courts in Wisconsin have looked at a number of factors, including: (1) when the proposed intervenor discovered his or her interest was at risk; (2) how far litigation has proceeded; and (3) the extent to which the other parties would be prejudiced by the addition of a new party." *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App. 221, ¶ 17, 247 Wis. 2d 708, 634 N.W.2d 882. Courts also consider whether the intervenor could simply "initiate[] a separate [] action." *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). But "[t]he critical factor is whether in view of all the circumstances the proposed intervenor acted promptly." *Id.*

Here, the Legislature's proposed intervention is timely, as the Legislature filed this Motion in the early stages of this case, soon after it "discovered [its] interest was at risk." *Roth*, 2001 WI App. 221, ¶ 17. The Legislature filed its Motion a little over one month after Plaintiffs filed their Complaint on April 16, 2024, and before WEC has filed an answer. Furthermore, the Legislature has filed its Motion well in advance of this Court's scheduled hearing on Plaintiffs' Motion for Emergency Declaratory Relief and Temporary Injunction, and before WEC filed a response to that Motion. Therefore, neither Plaintiffs nor WEC will be "prejudiced by the

addition of” the Legislature to this suit at this very early stage before WEC has even submitted its own responsive papers. *Id.*

2. The Legislature Has A Substantial Interest In The Subject Matter Of This Lawsuit

A proposed intervenor meets Section 803.09(1)’s interest element by showing an “interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.” *City of Madison*, 2000 WI 39, ¶ 11 n.9 (citation omitted). Courts take a “pragmatic approach” in assessing this element, *Armada Broad., Inc.*, 183 Wis. 2d at 474, examining “the facts and circumstances of the particular case” in light of the liberal “policies underlying the intervention statute,” namely, “the speedy and economical resolution of controversies” that results when interested parties are joined in a single suit, with due regard that the “original parties . . . should be allowed to conduct and conclude their own lawsuit,” *Bilder*, 112 Wis. 2d at 548. The “interest test” is “primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Id.* at 548–49 (citation omitted).

The Legislature has a direct and substantial interest in the subject matter of this litigation, for four independent reasons. First, Wisconsin has the sovereign and “legitimate interest in the continued enforcement of [its] own statutes.” *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 191 (2022) (brackets altered; citation omitted). Sections 13.365 and 803.09(2m) reflect the State’s sovereign choice to permit the Legislature to assert that interest in court. Wis. Stat. §§ 13.365,

803.09(2m); *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Second, the Legislature has an interest in the efficacy of its own powers, *Palm*, 2020 WI 42, ¶ 13, such as its constitutional authority to enact laws “[p]roviding for absentee voting,” Wis. Const. art. III, § 2, including absentee voting laws designed to make absentee voting accessible to individuals with disabilities, see Wis. Stat. § 6.87(5). Third, the Legislature has an interest in ensuring the integrity of elections throughout Wisconsin via the faithful enforcement of its election-integrity statutes. *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 196 (2008) (controlling plurality of Stevens, J.); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Finally, the Legislature has an interest in defending against claims that its statutes are unconstitutional and/or invalid under federal law. Wis. Stat. § 803.09(2m); *Bostelmann*, 2020 WI 80, ¶¶ 8, 13.

This lawsuit implicates each of these interests. First, as explained above, Plaintiffs ask this Court to determine the constitutionality and validity of Sections 6.86, 6.87, and other relevant election laws to adjudicate Plaintiffs’ constitutional and statutory claims, and the Legislature has an interest in the continued validity of those laws. Second, if this Court grants the particular relief requested in Plaintiffs’ Complaint—namely, an order permitting voters with disabilities to receive, mark, and return absentee ballots by electronic means, Compl. at 58–59 (prayer for relief)—it would undermine the Legislature’s constitutional authority to enact laws “[p]roviding for absentee voting,” Wis. Const. art. III, § 2, which authority encompasses enacting the rules and procedures governing the absentee-voting

process that Plaintiffs challenge in this lawsuit, see *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 5, 58, 357 Wis. 2d 360, 851 N.W.2d 302. Finally, Plaintiffs' lawsuit seeks to invalidate the Legislature's laws governing the distribution, marking, and return of absentee ballots, see Wis. Stat. § 6.87(3)(a), and its complete prohibition on electronic absentee ballot returns, see Wis. Stat. § 6.87(4)(b)1. The Legislature has an interest in defending these statutes because it "indisputably has a compelling interest in preserving the integrity of its election process." *Eu*, 489 U.S. at 231; *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.). That interest is especially compelling here because Plaintiffs ask for an order requiring the State to adopt an entirely new method of electronic absentee voting, see Compl. at 59 (prayer for relief), which would undermine the Legislature's powerful interest in election integrity.

3. The Disposition Of This Lawsuit May Impair The Legislature's Interest

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.

If this Court grants Plaintiffs' request to invalidate several of the State's election laws, in whole or in part, its decision will impede the Legislature's interests noted above, *supra* Part II.B. A ruling from this Court in Plaintiffs' favor would undermine the Legislature's interests in the "constitutionality" and "validity" of its laws. Wis. Stat. § 803.09(2m); *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Further, if this Court were to invalidate the State's absentee-voting laws challenged here, that would

harm the Legislature's interest in the efficacy and integrity of its own powers—specifically, its constitutional authority to enact the procedures governing the State's absentee-voting regime. *See* Wis. Const. art. III, § 2. Finally, by invalidating Section 6.87's rules regarding the distribution and return of absentee ballots and the prohibition on electronic absentee ballot return, an order in favor of Plaintiffs here would undermine the Legislature's compelling interest in election integrity. *See* Wis. Stat. § 6.84(1); *accord Eu*, 489 U.S. at 231; *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.).

4. No Other Party Adequately Represents The Legislature's Interests

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 adequacy 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 sovereign interests are at issue in this action. *Supra* pp.10–15. None of the existing parties share those interests, and thus 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, efficacy, and integrity of the absentee-voting laws and the Legislature’s constitutional power to enact those laws, as Plaintiffs are adverse to the Legislature: they expressly seek to invalidate as unconstitutional and/or preempted by federal law several absentee-voting laws enacted by the Legislature pursuant to Article III of the Constitution, including laws governing the use of facsimile and electronic transmission of ballots. *See id.* Nor can Defendant WEC adequately advance the Legislature’s interests in the validity, efficacy, and integrity 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.

III. At Minimum, This Court Should Grant The Legislature Permissive Intervention Under Section 803.09(2)

If this Court declines to grant the Legislature intervention as a matter of right, it should exercise its discretion to grant the Legislature permissive intervention. Section 803.09(2) provides, in relevant part, that “[u]pon timely motion anyone may

be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). "In exercising its discretion the court shall 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, 420 (Ct. App. 1987). A proposed permissible intervenor need only be "a proper party," and need not "be necessary to the adjudication of the action." *City of Madison*, 2000 WI 39, ¶ 11 n.11.

Here, the Legislature meets both of Section 803.09(2)'s threshold inquiries. First, the Legislature's "defense" in this action is "in common" with the "main action," Wis. Stat. § 803.09(2), as the Legislature asserts that the absentee voting provisions challenged in this action are valid and do not violate the Wisconsin Constitution, the U.S. Constitution, or federal law. Second, the Legislature's Motion is "timely," *id.*, because it was filed at an early stage in this litigation, roughly one month after Plaintiffs filed their Complaint and before WEC filed any responsive pleading, well in advance of the scheduled hearing on Plaintiffs' Motion For Emergency Declaratory Relief And Temporary Injunction, and before WEC's response to that Motion, *supra* Part II.A.

Beyond these two threshold requirements, all other appropriate permissive-intervention factors support the Legislature's intervention. The Legislature has significant and direct interests that are implicated in this case, as discussed above, *supra* Part II.B, including the sovereign interest in the validity of its statutes,

Bostelmann, 2020 WI 80, ¶¶ 8, 13; *Eu*, 489 U.S. at 231. That interest is implicated here, as this lawsuit asks the Court to determine whether certain of Wisconsin’s absentee voting laws are unlawful. Further, the Legislature has a special interest in ensuring the validity of the State’s election-integrity statutes, such as its restrictions on electronic absentee voting, which protect the integrity of the State’s elections. See *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.); *Eu*, 489 U.S. at 231. The Legislature’s involvement in this suit will not “unduly delay or prejudice the adjudication of the rights of the original parties,” Wis. Stat. § 803.09(2), but will advance Section 803.09’s “primar[y]” concern with “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 (citations omitted). Finally, the Legislature’s intervention would not “mak[e] the lawsuit complex or unending,” as the Legislature will raise core arguments grounded in the claims alleged in Plaintiffs’ Complaint, which all implicate the Legislature’s exclusive constitutional authority to enact laws providing for absentee voting. See *Edson*, 140 Wis. 2d at 177.

Wisconsin’s circuit courts have frequently granted the Legislature intervention to defend the constitutionality, validity, and construction of the State’s laws (either as of right or permissively), including election laws and Section 6.87, with no indication that such intervention has caused any issues in the orderly or efficient resolution of those cases. *Priorities USA v. WEC*, No.2023CV1900 (Dane Cnty. Cir. Ct.); *Rise*, No.2022CV2446 (Dane Cnty. Cr. Ct.); *League of Women Voters of Wis. v. WEC*, No.2022CV2472 (Dane Cnty. Cir. Ct.); *Abbotsford Educ. Ass’n v. WEC*,

No.2023CV3152 (Dane Cnty. Cir. Ct.); accord *Liebert v. WEC*, 345 F.R.D. 169 (W.D. Wis. 2023). Indeed, the Legislature's involvement has helped courts clarify issues, enabling the courts to better resolve the disputes. For example, in *League of Women Voters of Wisconsin*, the plaintiffs sought declaratory judgments construing the meaning of Section 6.87's witness-address requirement for absentee ballots, and the Legislature's briefing in that case led to the dismissal of certain claims, which dismissal WEC had not sought. See Decision And Order On Mot. To Dismiss, *League of Women Voters of Wis. v. WEC*, No.2022CV2472, Dkt.107 (Dane Cnty. Cir. Ct. Mar. 14, 2023) (dismissing count one of the second amended complaint) (attached hereto as Exhibit 4 to the LeRoy Aff.); Order On Stipulation Of The Parties, *League of Women Voters of Wis. v. WEC*, No.2022CV2472, Dkt.111 (Dane Cnty. Cir. Ct. June 13, 2023) (granting parties' stipulation to dismiss count three of the second amended complaint without prejudice) (attached hereto as Exhibit 5 to the LeRoy Aff.).

CONCLUSION

This Court should grant the Legislature's Motion To Intervene.

Dated: May 24, 2024

Respectfully submitted,

Electronically signed by Misha Tseytlin

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