

FILED
11-21-2023
CLERK OF WISCONSIN
SUPREME COURT

No. 2023AP2020-OA

In the Supreme Court of Wisconsin

TONY EVERS, GOVERNOR OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, *and* MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING, AND SOCIAL WORK EXAMINING BOARD,
PETITIONERS,

v.

SENATOR HOWARD MARKLEIN *and* REPRESENTATIVE MARK BORN, *in their official capacities as chairs of the Joint Committee on Finance*; SENATOR CHRIS KAPENGA *and* REPRESENTATIVE ROBIN VOS, *in their official capacities as chairs of the Joint Committee on Employment Relations*; *and* SENATOR STEVE NASS *and* REPRESENTATIVE ADAM NEYLON, *in their official capacities as co-chairs of the Joint Committee for Review of Administrative Rules*,
RESPONDENTS.

On Petition For Original Action Before this Court

**BRIEF IN SUPPORT OF THE WISCONSIN
STATE LEGISLATURE'S MOTION TO
INTERVENE AS RESPONDENT**

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
KEVIN M. LEROY
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

Attorneys for the Wisconsin State Legislature

TABLE OF CONTENTS

INTRODUCTION	6
BACKGROUND	7
A. The Legislature Has Created Various Legislative Committees To Better Serve Wisconsinites.....	7
B. Petitioners File Their Petition For Original Action, Challenging As Unconstitutional Legislative Committees' Review Authority	11
STATEMENT OF INTEREST	13
ARGUMENT	14
I. The Legislature Has A Right To Intervene Under Section 803.09(2m) Because The Petition Challenges The Constitutionality Of State Statutes	15
II. The Legislature Also Has The Right To Intervene Under Section 803.09(1)	16
III. Finally, And At A Minimum, This Court Should Grant The Legislature Permissive Intervention Under Section 803.09(2)	22
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Armada Broad., Inc. v. Stirn</i> , 183 Wis. 2d 463, 516 N.W.2d 357 (1994).....	16, 17
<i>Berger v. N.C. State Conf. of the NAACP</i> , 142 S. Ct. 2191 (2022).....	18
<i>C.L. v. Edson</i> , 140 Wis. 2d 168, 409 N.W.2d 417 (Ct. App. 1987).....	22, 24
<i>City of Madison v. Wis. Emp. Rels. Comm'n</i> , 2000 WI 39, 234 Wis. 2d 550, 610 N.W.2d 94.....	<i>passim</i>
<i>Clarke v. Wis. Elections Comm'n</i> , 2023 WI 70, 995 N.W.2d 779.....	6
<i>Democratic Nat'l Comm. v. Bostelmann</i> , 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423.....	<i>passim</i>
<i>Helgeland v. Wis. Municipalities</i> , 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1.....	15, 18, 20
<i>Koschkee v. Taylor</i> , 2019 WI 76, 387 Wis. 2d 552, 929 N.W.2d 600.....	14
<i>Martinez v. Dep't of Indus., Lab. & Hum. Rels.</i> , 165 Wis. 2d 687, 478 N.W.2d 582 (1992).....	8
<i>Roth v. La Farge Sch. Dist. Bd. of Canvassers</i> , 2001 WI App 221, 247 Wis. 2d 708, 634 N.W.2d 882.....	17
<i>Serv. Emps. Int'l Union, Local 1 v. Vos</i> , 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.....	13, 14, 18
<i>Trbovich v. United Mine Workers</i> , 404 U.S. 528 (1972).....	20
<i>Wis. ex rel Bilder v. Twp. of Delavan</i> , 112 Wis. 2d 539, 334 N.W.2d 252 (1983).....	18, 23
<i>Wis. Legislature v. Palm</i> , 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.....	14, 18, 23
<i>Wolff v. Town of Jamestown</i> , 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999).	20, 21, 22

Constitutional Provisions

Wis. Const. art. IV, § 1.....	13, 14, 21
Wis. Const. art. VIII, § 2.....	14, 19, 20
Wis. Const. art. VIII, § 5.....	14, 19

Statutes And Rules

Wis. Stat. § 13.09.....	8
Wis. Stat. § 13.093.....	8
Wis. Stat. § 13.45.....	8
Wis. Stat. § 13.56.....	10
Wis. Stat. § 13.111.....	9
Wis. Stat. § 13.365.....	14, 15, 18
Wis. Stat. § 16.53.....	9
Wis. Stat. § 20.916.....	9
Wis. Stat. § 20.917.....	9
Wis. Stat. § 20.923.....	9
Wis. Stat. § 23.0917.....	9, 12, 16
Wis. Stat. § 227.19.....	10, 11, 12, 16
Wis. Stat. § 227.26.....	10, 11, 12, 16
Wis. Stat. § 230.12.....	9, 10, 12, 16
Wis. Stat. § 803.09.....	<i>passim</i>
Wis. Stat. ch. 227.....	10

Other Authorities

Dave Loppnow, Wis. Legis. Fiscal Bureau, <i>Informational Paper #81: Joint Committee on Finance</i> (Jan. 2023).....	8, 9
Gabrielle B. Adams, et al., <i>Wisconsin Civil Procedure Before Trial</i> (6th ed. 2018).....	23
Info. Mem., Wis. Legis. Council, <i>Administrative Rulemaking</i> (Mar. 2021).....	10
Jessica Karls-Ruplinger, Wis. Legis. Council, <i>Joint Committee on Employment Relations</i> (Oct. 2019).....	9, 10
Scott Grosz, Wis. Legis. Council, <i>Powers of the Joint Committee for Review of Administrative Rules</i> (Jan. 2021).....	10

Tamara Dodge, Wis. Legis. Reference Bureau,
Legislative Committees (June 2016) 8

Wis. State Legis., *2023 Joint Committee on Finance* 8

INTRODUCTION

The Wisconsin State Legislature (“Legislature”) respectfully moves to intervene as a Respondent in this case, which case challenges the constitutionality of statutes providing review authority over actions of agencies to three specific legislative committees. The Legislature has three independent grounds for intervention, all of which this Court recently addressed in *Clarke v. Wisconsin Elections Commission*, 2023 WI 70, 995 N.W.2d 779, 781.

First, Wis. Stat. § 803.09(2m) provides the Legislature a right to intervene in any case challenging the constitutionality of state law. Here, the Petition targets the constitutionality of statutes that provide review powers to legislative committees. Thus, the Legislature has a right to intervene in this proceeding to defend the constitutionality of those statutes under Section 803.09(2m).

Second, the Legislature is entitled to intervene here as a matter of right under Wis. Stat. § 803.09(1). This Motion is timely, having been filed in accordance with the deadline for Respondents to respond to the Petition For Original Action. The Legislature maintains three sovereign, institutional interests in this case—an interest in the validity and faithful enforcement of the statutes the Legislature has enacted (particularly those related to the Legislature’s own organization), an interest in protecting the Legislature’s constitutionally granted power over appropriations, and an interest in the integrity of the Legislature’s constitutional

law-making powers. Moreover, the Petition directly implicates these interests, given that the case attacks the constitutionality of the statutes that authorize legislative committees to take specific actions. And, finally, because Petitioners are adverse to the Legislature and Respondents do not share the Legislature's unique, sovereign, institutional interests, no existing parties can adequately represent the Legislature's interests here.

Finally, and in the alternative, the Legislature should be permitted to intervene under Wis. Stat. § 803.09(2). Permissive intervention is appropriate here because the Legislature intends to raise defenses that implicate the same questions of law and fact as Petitioners' constitutional claims. Further, permissive intervention would allow the Legislature to protect its institutional interests in the faithful execution of its laws and in the protection of its law-making powers, while facilitating the speedy resolution of this matter.

For any of these independent reasons, this Court should grant the Legislature's Motion To Intervene.

BACKGROUND

A. The Legislature Has Created Various Legislative Committees To Better Serve Wisconsinites

The Legislature has a longstanding history of utilizing legislative committees to provide a venue for deliberation, craft and introduce legislation, conduct investigations, and, pursuant to the Legislature's "inherent interest[] in the . . . oversight of administrative agencies," *Martinez v. Dep't of*

Indus., Lab. & Hum. Rels., 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992), review proposed and existing administrative rules on issues relevant to their subject matter, Tamara Dodge, Wis. Legis. Reference Bureau, *Legislative Committees* 1 (June 2016) (“*Legislative Committees*”);¹ Dave Loppnow, Wis. Legis. Fiscal Bureau, *Informational Paper #81: Joint Committee on Finance* 1–2 (Jan. 2023) (“*Info. Paper #81*”);² see generally Wis. Stat. § 13.45, *et seq.* Relevant here are three such legislative committees: the Joint Committee on Finance, the Joint Committee on Employment Relations, and the Joint Committee for Review of Administrative Rules.

The Joint Committee on Finance. The Joint Committee on Finance (“JCF”) is a 16-member standing committee with eight members from each chamber of the Legislature. Wis. Stat. § 13.09; *Info. Paper #81, supra*, at 1; Wis. State Legis., *2023 Joint Committee on Finance*.³ JCF’s primary purpose is to review all state appropriations and revenues, including the Governor’s budget recommendation. Wis. Stat. §§ 13.09(5), 13.093(1); *Info. Paper #81, supra*, at 1–2. Statutory provisions further define a myriad of related oversight duties, see generally *Info. Paper #81, supra*, at 4, two of which are most relevant here. First, JCF may decline the encumbrance

¹ Available at https://docs.legis.wisconsin.gov/misc/lrb/legislating_in_wisconsin/lrb_legislating_in_wisconsin_no_6.pdf.

² Available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2023/0081_joint_committee_on_finance_informational_paper_81.pdf.

³ Available at <https://docs.legis.wisconsin.gov/2023/committees/joint/2640>.

or expenditure of more than \$250,000 for any project to be funded from the Warren Knowles-Gaylord Nelson Stewardship 2000 program (“Knowles-Nelson”).⁴ Wis. Stat. § 23.0917(6m); *Info. Paper #81, supra*, at 34. Second, the Committee must approve, with 12 of 16 members voting in favor, any acquisition of land under Knowles-Nelson for land that is outside of the boundaries of stewardship projects established before May 1, 2013. Wis. Stat. § 23.0917(8)(g); *Info. Paper #81, supra*, at 34.

The Joint Committee on Employment Relations. The Joint Committee on Employment Relations (“JCOER”), Wis. Stat. § 13.111, approves state employee compensation plans and contracts with represented state employees. Wis. Stat. §§ 13.111(2), 16.53(1)(d)1, 20.916, 20.917, 20.923; Jessica Karls-Ruplinger, Wis. Legis. Council, *Joint Committee on Employment Relations* 1 (Oct. 2019) (“*Joint Committee on Employment Relations*”).⁵ Consequently, the Department of Administration must submit to JCOER any proposed changes to certain state employee compensation plans, including, as relevant here, compensation and benefit adjustments for employees of the University of Wisconsin System. Wis. Stat. §§ 230.12(1), (3)(a), (3)(e)1, 20.923(4); *Joint Committee on Employment Relations, supra*, at 1. After receiving any

⁴ Department of Natural Resources property development projects under Wis. Stat. § 23.0917(4) are exempted from this rule. Wis. Stat. § 23.0917(6m)(e).

⁵ Available at https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2019/employment_and_labor/ib_jcoer_jk_2019_10_01.

proposed changes, JCOER holds a public hearing on the proposal and either approves or modifies the proposal. Wis. Stat. § 230.12(3)(b). Thereafter, the Governor may “disapprove[]” any modifications, which JCOER can only “set aside” through a vote of six of the Committee’s eight members. *Id.* Once this process is complete, the proposed changes are applied to the compensation plan for the ensuing fiscal year. *Id.*; *Joint Committee on Employment Relations, supra*, at 1.

The Joint Committee for Review of Administrative Rules. The Joint Committee for Review of Administrative Rules (“JCRAR”), Wis. Stat. § 13.56, is a 10-member standing committee that oversees the administrative rulemaking process, *see* Wis. Stat. ch. 227, through a variety of mechanisms, *see generally* Scott Grosz, Wis. Legis. Council, *Powers of the Joint Committee for Review of Administrative Rules* (Jan. 2021).⁶ As relevant here, these oversight mechanisms include the power to object to or request modification of a proposed rule, Wis. Stat. § 227.19(5)(c), (d), (dm), and authority to suspend an existing rule, Wis. Stat. § 227.26(2)(d), (im); *see also* Info. Mem., Wis. Legis. Council, *Administrative Rulemaking* (Mar. 2021).⁷

Proposed agency rules are referred to JCRAR for a 30-day review period, Wis. Stat. § 227.19(5), during which

⁶ Available at https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2021/administrative_rules/ib_jcrar_sg_2021_01_27.

⁷ Available at https://docs.legis.wisconsin.gov/misc/lc/information_memos/2021/im_2021_08#:~:text=An%20agency%20must%20prepare%20an,Legislative%20Council%20staff%20for%20review.

JCRAR may request modifications or object to all or part of a proposed rule for certain statutorily defined reasons, Wis. Stat. § 227.19(5)(d). An objection bars the relevant agency from promulgating the rule until the Legislature either fails to enact a bill supporting the objection, Wis. Stat. § 227.19(5)(d), (e), or enacts a bill authorizing promulgation, Wis. Stat. § 227.19(5)(dm), (em). For the same statutorily defined reasons, JCRAR may also suspend an agency rule. Wis. Stat. § 227.26(2)(d). A suspension requires JCRAR to introduce a bill to repeal the suspended rule, *id.* § 227.26(f), which both houses of the Legislature must enact, lest the rule remain in effect, *id.* § 227.26(i).

B. Petitioners File Their Petition For Original Action, Challenging As Unconstitutional Legislative Committees' Review Authority

Petitioners filed this Petition For Original Action on October 31, 2023, alleging that the various statutory provisions granting authority to JCF, JCOER, and JCRAR discussed above violate the fundamental doctrine of separation of powers and seeking a declaration of their unconstitutionality from this Court. Pet.34–40. Petitioners are the Governor of Wisconsin, Tony Evers, three executive agencies—namely, the Department of Natural Resources, the Board of Regents for the University of Wisconsin, and the Department of Safety and Professional Services (“DSPS”)—and a licensing board within DSPS, the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board (“the Board”). Pet.8. As Respondents, the

Petition names six members of the Legislature: Senator Howard Marklein and Representative Mark Born, in their official capacities as co-chairs of JCF; Senator Chris Kapenga and Speaker of the Assembly Robin Vos, in their official capacities as co-chairs of JCOER; and Senator Steve Nass and Representative Adam Neylon, in their official capacities as co-chairs of JCRAR. Pet.9.

The Petition raises constitutional challenges to the statutory authority of JCF, JCOER, and JCRAR. First, Petitioners claim Wis. Stat. § 23.0917(6m) and (8)(g)3, which govern JCF's review process, facially violate the constitution's fundamental principle of separation of powers. Pet.34–36. Second, Petitioners allege that JCOER's review provision—set forth in Wis. Stat. § 230.12(3)(e)1—is similarly facially unconstitutional because it functions as a legislative veto that violates the constitutional separation of powers. Pet.36–38. Finally, Petitioners contend that Wis. Stat. §§ 227.19(5)(c), (d), (dm), and 227.26(2)(d), (im), which govern JCRAR's review authority, are unconstitutional legislative vetoes as applied to all executive branch agency rulemaking. Pet.38–40. Finally, and in the alternative, Petitioners allege that JCRAR review provisions are unconstitutional as applied to DSPS's and the Board's rulemaking, specifically in the context of commercial building standards and social worker, marriage and family therapist, and professional counselor ethics. Pet.40. On

these grounds, Petitioners seek a declaration that the statutes authorizing JCF and JCOER to review agency expenditures are facially unconstitutional, the statute authorizing JCRAR to review executive rulemaking is unconstitutional, and the overturning of this Court's decision in *Martinez*, 165 Wis. 2d 687, as well as the portions of this Court's decision in *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, that rely on *Martinez*.

The Legislature now moves to intervene as a Respondent in this action.⁸

STATEMENT OF INTEREST

The Legislature is made up of the State Assembly and the State Senate. *See* Wis. Const. art. IV, § 1. The constitution "vest[s]" the Legislature with "legislative power," *id.*, such that the Legislature has a sovereign interest in defending the State's sovereign interest in the validity of the State's laws, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶¶ 8, 13, 394 Wis. 2d 33, 949 N.W.2d 423. In recognition of that fact, Wis. Stat. 803.09(2m) provides that, when a lawsuit "challenges . . . the constitutionality of a statute, facially or as applied," or the "validity of a statute, as part of a claim or affirmative defense . . . the legislature may

⁸ Per this Court's November 7, 2023, Order requesting responses to the Petition, Respondents have contemporaneously filed a Response In Opposition to the Petition For Original Action. Should this Court grant the instant Motion To Intervene, the Legislature intends to join in Respondents' Response in full without filing an additional Response.

intervene as set forth under [Section] 13.365.” Wis. Stat. § 803.09(2m). Wis. Stat. § 13.365(3), in turn, allows “[t]he joint committee on legislative organization [to] intervene at any time in the action on behalf of the legislature” and authorizes the Legislature to hire counsel other than the Attorney General. *Id.* Thus, when the “constitutionality of a statute” is at stake, the Legislature possesses a “set of litigation interests,” as a matter of “public policy,” that give it the right to intervene as a party. *Bostelmann*, 2020 WI 80, ¶ 8 (quoting Wis. Stat. § 803.09(2m)).

The Legislature also has an institutional interest in protecting the powers granted to it by the Constitution. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900; *SEIU*, 2020 WI 67, ¶¶ 63–73. Here, the Petition For Original Action implicates both the Legislature’s general law-making power, *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600; Wis. Const. art. IV, § 1, and its power to oversee the State’s sovereign expenses, Wis. Const. art. VIII, § 2, and “other sources of income,” Wis. Const. art. VIII, § 5, *see SEIU*, 2020 WI 67, ¶¶ 68–71.

ARGUMENT

Intervention is a “favorabl[e] . . . tool for ‘disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’” Intervention Order at 2, *Johnson v. Wis. Elections Comm’n*, No. 2021AP001450-OA (Oct. 14, 2021) (quoting *Helgeland v. Wis. Municipalities*, 2008 WI 9 ¶ 38, 307 Wis. 2d 1, 745

N.W.2d 1); *see also* Order at 3, *Clarke v. Wis. Elections Comm'n*, No. 2023AP001399-OA (Oct. 6, 2023). This Court should take advantage of this “favorabl[e] . . . tool” here and grant the Legislature’s Motion for three independently sufficient reasons. Intervention Order at 2, *Johnson*, No. 2021AP001450-OA (Oct. 14, 2021). First, the Legislature is entitled to intervene as a matter of right under Section 803.09(2m) because the Petition challenges the constitutionality of state laws. *Infra* Part I. Second, intervention is alternatively appropriate as a matter of right under Section 803.09(1). *Infra* Part II. Finally, and at minimum, the Court should grant the Legislature permissive intervention under Section 803.09(2). *Infra* Part III.

I. The Legislature Has A Right To Intervene Under Section 803.09(2m) Because The Petition Challenges The Constitutionality Of State Statutes

Section 803.09(2m) provides the Legislature the right to intervene “at any time” in any lawsuit that targets “the constitutionality of a statute, facially or as applied.” Wis. Stat. § 803.09(2m); *see also id.* § 13.365. In other words, Section 803.09(2m) codifies “a public policy that gives the Legislature . . . litigation interests” entitling it to intervene in any case that “challenges . . . the constitutionality of a statute . . . as part of a claim or affirmative defense.” *Bostelmann*, 2020 WI 80, ¶ 8 (quoting Wis. Stat. § 803.09(2m)).

Here, Section 803.09(2m) gives the Legislature the right to intervene. The Petition challenges the

“constitutionality,” Wis. Stat. § 803.09(2m), of various statutory provisions that grant legislative committees the power to review spending decisions taken by executive agencies as well agency rulemaking—namely, Wis. Stat. § 23.0917(6m), (8)(g)3, Wis. Stat. § 230.12(3)(e)1, and Wis. Stat. §§ 227.19(5)(c), (d), (dm), 227.26(2)(d), (im)— Pet.5–6, 34–42. Petitioners allege that these statutes are unconstitutional under the separation of powers. Thus, Section 803.09(2m) provides an independently sufficient basis upon which to grant the Legislature’s Motion To Intervene. Wis. Stat. § 803.09(2m); *see Bostelmann*, 2020 WI 80, ¶¶ 8, 13.

II. The Legislature Also Has The Right To Intervene Under Section 803.09(1)

The Legislature is also entitled to intervene as a matter of right under Section 803.09(1). For intervention of right, “[a] movant must meet four requirements . . . : (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); Wis. Stat. § 803.09(1). The Legislature satisfies all four requirements here.

1. *This Motion Is Timely.* Among other factors, timeliness depends on “(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. Here, the Legislature filed this Motion promptly upon “discover[ing that its] interest was at risk,” during the earliest stages of litigation. *Id.* (citations omitted), and before the deadline for Respondents to respond to the Petition. Thus, this Motion is timely. Additionally, should this Motion be granted, the Legislature seeks to join in full the Response simultaneously filed by Respondents, *see supra* p.13 n.8, such that none of the existing parties could possibly be “prejudiced by the addition of” the Legislature here. *Roth*, 2001 WI App. 221, ¶ 17.

2. *The Legislature Has A Serious Interest In The Subject Matter Of This Action.* To warrant intervention, a proposed intervenor must identify 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). This inquiry requires a “pragmatic approach,” *Armada Broad., Inc.*, 183 Wis. 2d at 474, that calls on the Court to review “the facts and circumstances of the particular case” in light of the liberal “policies underlying the intervention statute,” including “the speedy and economical resolution of

controversies” that intervention facilitates, *Wis. ex rel Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 548, 334 N.W.2d 252 (1983) (citations omitted); see Intervention Order at 2, *Johnson*, No. 2021AP001450-OA (Oct. 14, 2021) (quoting *Helgeland*, 2008 WI 9, ¶ 38). This “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.” *Bilder*, 112 Wis. 2d at 548–49 (citations omitted).

Here, the Legislature has a significant interest in the subject matter of this case for at least two reasons. First, the Legislature has a clear sovereign “interest in the continued enforcement of [its] own statutes,” *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022) (brackets altered; citations omitted), which interest Sections 13.365 and 803.09(2m) permit the Legislature to defend in court, Wis. Stat. §§ 13.365, 803.09(2m); *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Second, the Legislature has an independently sufficient interest in protecting its own powers, *Palm*, 2020 WI 42, ¶ 13, including its general constitutional law-making power under Article IV, Section 1, and its power to oversee the expenditure of state funds under its “power of the purse,” under Article VIII, Sections 2 and 5, *SEIU*, 2020 WI 67, ¶¶ 68–71.

Each of these interests are directly implicated in this lawsuit. The Petition challenges the validity of various state statutes; thus, this lawsuit threatens the Legislature’s interest in the enforcement of those duly enacted laws.

Accord Bostelmann, 2020 WI 80, ¶ 13 (noting that the Legislature has right to intervene to “defend[] the state’s interest in the validity of its laws”); Pet.4–6, 34–40. The Petition separately implicates the Legislature’s general interest in the protection of its constitutional law-making authority, as Petitioners challenge the constitutionality of the statutes the Legislature has enacted to improve the operational efficiency of the legislative body and, in consequence, provide good governance to Wisconsinites. Furthermore, the Petition threatens the Legislature’s authority over the State’s sovereign expenses, Wis. Const. art. VIII, § 2, and “other sources of income,” Wis. Const. art. VIII, § 5—powers related to several of the challenged statutes here, which authorize various legislative committees to oversee certain state expenditures proposed by executive branch agencies that are within the legislative committees’ purview.

3. *The Disposition Of This Lawsuit Would Impair The Legislature’s Interest.* Section 803.09(1) further requires a proposed intervenor to show that “disposition of the action may as a practical matter impair or impede the [proposed intervenor’s] ability to protect [its] interest[s].” *City of Madison*, 2000 WI 39, ¶ 11 (citation omitted). This element is satisfied here, because a decision granting Petitioners’ request to invalidate the challenged statutes would necessarily impede the Legislature’s interests as described above. *Supra* pp.18–19. Indeed, such a ruling would undermine the Legislature’s interest in the constitutionality

and validity of the laws it passed on behalf of the State—including the laws it has passed to improve legislative operations and to provide good governance in the State. *Supra* pp.18–19. Moreover, if this Court did invalidate the statutes at issue here, that ruling would entirely undermine the Legislature’s interest in the efficacy and integrity of its constitutional authority to oversee state expenditures. *See* Wis. Const. art. VIII, § 2.

4. *No Other Party Can Adequately Represent The Legislature’s Interests.* This element of Section 803.09(1) requires a proposed intervenor to show that no existing parties are able to “adequately represent the [proposed intervenor’s] interest[s].” *City of Madison*, 2000 WI 39, ¶ 11 (citation omitted). This involves a “minimal” “show[ing] that the representation of [the proposed intervenor’s] 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)). This element turns on whether the proposed intervenor would “gain or lose” in the same way as another party, or whether an existing party can “protect a right that would not otherwise be protected in the litigation.” *Helgeland*, 2008 WI 9, ¶ 45 (citation omitted). And even if the proposed intervenor and the existing parties share a desired outcome in the litigation, an intervenor should be allowed to participate if it is “in a better position” than the existing parties “to provide full

ventilation of the legal and factual context.” *Wolff*, 229 Wis. 2d at 748 (citation omitted).

Here, the Legislature meets its “minimal” burden of demonstrating that the existing parties cannot adequately represent its substantial and unique sovereign interests threatened by this litigation. *See id.* at 747; *supra* pp.17–19. For one thing, Petitioners’ interests are adverse to the Legislature’s, given that they seek to completely invalidate, as unconstitutional, a number of state statutes that grant legislative committees certain powers—statutes the Legislature enacted in the exercise of its constitutional law-making authority, Wis. Const. art. IV, § 1, to facilitate the operation of the State government and the law-making process, and which the Legislature wishes to defend from Petitioners’ attack. Respondents, for their part, do not adequately represent the Legislature’s interests as a collective body and constitutional institution. While their interests are related to the Legislature’s, the Legislature is the only entity with constitutional authority to enact laws in the State, Wis. Const. art. IV, § 1, which laws Petitioners challenge here. Respondents Senator Marklein, Representative Born, Senator Kapenga, Speaker Vos, Senator Nass, and Representative Neylon are individual legislators that co-chair JCF, JCOER, and JCRAR. But these committees are just parts of the Legislature, and so neither these committees, nor their chairpersons, have the capacity to represent the institutional interests of the Legislature as a

whole. For these reasons, the Legislature has satisfied its “minimal” burden of “show[ing] that the representation of [its] interest ‘may be’ inadequate” should it not be permitted the chance to intervene. *Wolff*, 229 Wis. 2d at 747.

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

Even if this Court decides against allowing the Legislature to intervene as a matter of right, *but see supra* Parts I–II, it should allow the Legislature to intervene as a permissive matter. Under Section 803.09(2), “[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 (Ct. App. 1987). The statute requires a proposed intervenor to be “a proper party,” but its presence need not “be necessary to the adjudication of the action.” *City of Madison*, 2000 WI 39, ¶ 11 n.11.

Here, the Legislature satisfies both of the threshold requirements under Section 803.09(2). First, because the Legislature seeks to defend the legislative committee statutes challenged in the Petition on the grounds that they are constitutional, it seeks to assert a “defense” that clearly has a “question of law . . . in common” with the “main action.” Wis.

Stat. § 803.09(2). Second, because the Legislature filed this Motion before the deadline for Respondents to file their responses and in the early stages of litigation, this Motion is unquestionably “timely.” *Id.*; *supra* p.17.

The other permissive-intervention factors also weigh in favor of the Legislature’s intervention here. As explained above, the Legislature has at least two significant interests that this case directly seeks to undermine, *supra* Part II—specifically, the “institutional [sovereign] interest[]” in the validity of its duly enacted laws, *Bostelmann*, 2020 WI 80, ¶¶ 8, 11, 13, and in the efficacy and integrity of its own, constitutionally mandated law-making powers, *Palm*, 2020 WI 42, ¶ 13. This Petition directly implicates both interests by seeking to invalidate, on constitutional grounds, various statutes that authorize certain legislative committees to review executive branch agencies’ expenditure requests and rulemakings. Nor is there any risk that intervention would “unduly delay or prejudice the adjudication of the rights of the original parties,” Wis. Stat. § 803.09(2); rather, the Legislature’s participation here would advance 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 (citations omitted); *see* Gabrielle B. Adams, et al., *Wisconsin Civil Procedure Before Trial* § 4.56 (6th ed. 2018).

Finally, the Legislature’s participation would not “mak[e] the lawsuit complex or unending.” *Edson*, 140 Wis.

2d at 177. As explained above, the Legislature's position is directly responsive to the claims raised in the Petition, which claims explicitly implicate the Legislature's exclusive, constitutionally mandated authority to enact laws and oversee expenditures in Wisconsin. And the Legislature will defend this suit alongside Respondents by filing papers jointly under the representation of the same counsel.

CONCLUSION

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

Dated: November 21, 2023.

Respectfully submitted,

Electronically signed by
Misha Tseytlin

MISHA TSEYTLIN

(State Bar No. 1102199)

Counsel of Record

SEAN T.H. DUTTON

(State Bar No. 1134675)

KEVIN M. LEROY

(State Bar No. 1105053)

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

Attorneys for the Wisconsin State Legislature