STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT 1

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, and CARRIE RIEPEL, as Commissioner of WEC,

Defendants-Appellants,

WISCONSIN LEGISLATURE,

Intervenor-Defendant-Respondent.

APPEAL FROM AN ORDER IN A SPECIAL PROCEEDING ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE EVERETT MITCHELL, PRESIDING

BRIEF OF APPELLANT, THE WISCONSIN ELECTIONS COMMISSION

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INTRODUCTION

On July 5, the Wisconsin Supreme Court issued *Evers v. Marklein*, rejecting two statutes that gave a legislative committee the power to override decisions of the executive branch about how to administer and execute the law. 2024 WI 31, 412 Wis. 2d 525, 8 N.W.3d 395. The court reaffirmed the separation of governmental powers enshrined in the Wisconsin Constitution. It held that statutes that "effectively create a legislative veto" violate the separation of powers because they allow a legislative committee to "interfere with and even override the executive branch's core power of executing the law." *Id.* ¶ 24.

Here, the Legislature seeks a similar power to veto decisions of the executive branch. It moved for intervention in an election case brought against the Wisconsin Elections Commission. The Legislature was not a named defendant, and no legislative power is implicated by the case. But under Wis. Stat. § 803.09(2m), a statute passed as part of 2017 Wis. Act 369 after the election of Governor Evers and Attorney General Kaul but before they took office, the Legislature has the statutory power to intervene even when it is not a named party, has no interest as the legislature, and the executive branch is defending the case.

As applied here, that statute is unconstitutional. Managing litigation is part and parcel of executing and administering the law. Just as in *Marklein*, the Legislature's power to override the executive branch's management—here, by becoming an intervenor defendant with the full power to make different litigation decisions—violates the separation of powers.

In seeking to intervene below, the Legislature invoked both Wis. Stat. § 803.09(2m) and the regular intervention as of right statute, Wis. Stat. § 803.09(1). The latter statute would also have done the Legislature no good because the

Legislature would fail the second, third, and fourth prongs of the test under that statute: it has no protected interest as the Legislature, no interest that thus can be impaired, and is adequately represented by the Attorney General and Commission. The Legislature sought permissive intervention, too, but that would not remedy the separation of powers violation here.

ISSUES PRESENTED

1. Is Wis. Stat. § 803.09(2m), which permits the Legislature to intervene in a case seeking accommodations under the federal ADA and Rehabilitation Act, unconstitutional as applied here because it violates the separation of powers?

The circuit court granted the Legislature's motion to intervene but did not explain why. It did not address the Commission's argument that the statute is unconstitutional as applied.

This Court should answer yes.

2. Does the Legislature fail to meet the standards for mandatory intervention under Wis. Stat. § 803.09(1) based on its interests as the Legislature?

The circuit court granted the Legislature's motion to intervene but did not explain why.

This Court should answer yes.

3. Would granting permissive intervention to the Legislature here also be unconstitutional?

The circuit court did not answer this question.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs will fully present the issues. Publication is warranted: the criteria in Wis. Stat. § (Rule) 809.23(1) apply. An opinion resolving the issues presented in this appeal would decide a case of substantial and continuing public interest: the constitutionality of a statute that permits the Legislature to intervene in almost any action involving Wisconsin statutes. Wis. Stat. § (Rule) 809.23(1)(a)5. Further, an opinion in this case will likely clarify and contribute to the separation of powers doctrine and legal literature in Wisconsin. Wis. Stat. § (Rule) 809.23(1)(a)1, 4.

STATEMENT OF THE CASE

This case involves the constitutionality of the Legislature's intervention in a civil action against the Wisconsin Elections Commission involving claims under the federal Americans with Disabilities Act (ADA) and Rehabilitation Act. The plaintiffs seek accommodations in how voters with print disabilities receive, vote, and return absentee ballots. (R. 9:5, 58–59.)

Until relatively recently, the Legislature's power to intervene in litigation involving the state was limited. *Serv. Emps. Int'l Union, Loc. 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 51, 393 Wis. 2d 38, 946 N.W.2d 35. But in December 2018, after the election of Governor Evers and Attorney General Kaul but before they took office, the Legislature passed 2017 Wis. Act 369.

Among other things, provisions of Act 369 allow a legislative committee, the Joint Committee on Legislative Organization, to authorize the Legislature, or one house thereof, to intervene as itself in certain circumstances. Wis. Stat. § 13.365(3). Wisconsin Stat. § 803.09(2m), in turn,

provides that, in the types of cases authorized by Wis. Stat. § 13.365(3), the assembly, the senate, or the Legislature "may intervene . . . at any time in [an] action." Wis. Stat. § 803.09(2m); *see also* Wis. Stat. § 13.365(1)–(2) (allowing intervention by the assembly or senate). The Joint Committee has an unlimited appropriation to pay for outside counsel for that purpose. *Id.* (citing appropriation under Wis. Stat. § 20.765(1)(a), (b)).

Since the law's passage, the Legislature has intervened in a multitude of cases, particularly election-related cases brought by pro-voting groups. (R. 112:86–87; 96:7 (discussing "almost a dozen" circuit court cases and additional Court of Appeals and Wisconsin Supreme Court cases in which the Legislature has intervened).) From 2018 to 2021, the Legislature spent $8.5 million in taxpayer funds in matters related to executive orders and to defend statutes including election provisions.[1] This included almost $2 million dollars in 2020 on involvement in election lawsuits against the Commission alone.[2]

The Legislature moved to intervene in this case (R. 51, 52), and the Commission opposed the Legislature's intervention. The Commission argued that Wis. Stat. § 803.09(2m) was unconstitutional as applied and that the Legislature did not meet the criteria for intervention as of right under Wis. Stat. § 803.09(1) or for permissive intervention under Wis. Stat. § 803.09(2). (R. 68.) The Legislature filed a reply. (R. 96.) The circuit court heard oral argument on the motion. (R. 112.) The morning after the

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[1] Hope Karnopp, *Republican lawmakers spent more than $8.5 million in taxpayer money on lawsuits over three years*, Milwaukee Journal Sentinel, June 10, 2021.

[2] Patrick Marley, *Republicans spend nearly $2 million in taxpayer money to fight election lawsuits*, Milwaukee Journal Sentinel, Oct. 15, 2020.

argument, the circuit court granted the Legislature's motion without any written or oral explanation. (R. 103.)

The Commission appealed and alternatively petitioned for leave to appeal. (R. 125, 130.) This Court granted that petition on August 14, 2024. (R. 162.)

ARGUMENT

This Court should reverse the circuit court's order granting the Legislature's motion for intervention and hold that (1) Wis. Stat. § 803.09(2m) is unconstitutional, as applied here, under the separation of powers; (2) the Legislature does not meet the standard for intervention as of right under Wis. Stat. § 803.09(1); and (3) that permissive intervention under Wis. Stat. § 803.09(2) would also be unconstitutional here.

The Legislature cannot constitutionally intervene to represent the State's interests where the Attorney General and executive branch are already defending this case. The Legislature has no constitutional role in the issues presented. In addition, the Legislature fails the statutory test for intervention as of right, and permissive intervention presents the same constitutional impediments as with Wis. Stat. § 803.09(2m).

I. The Legislature's intervention in this matter violates the separation of powers.

In seeking to intervene, the Legislature asserted that it has an interest either as the State or the Legislature in ensuring that a Wisconsin law is upheld and is entitled to intervene even when the Attorney General and Commission defendants are already defending the case. Wisconsin's separation of powers doctrine prevents that outcome: defending litigation is an executive branch function, and intervention would allow the Legislature to execute the law. In the two cases where the Wisconsin Supreme Court has looked at the new statute, it did not endorse its

constitutionality as applied in the way the Legislature urges. Instead, that court noted that this issue remains to be decided.

A. Wisconsin divides governmental power among three branches and allows the Legislature to make laws, not to execute them.

1. The Wisconsin Constitution divides governmental power among the three branches of government.

Like the U.S. Constitution and all state constitutions, the Wisconsin Constitution divides governmental power among the three branches of government: the legislative, which makes the law; the executive, which executes the law; and the judiciary, which resolves disputes over what the law means.

To preserve this balance of power, the legislative branch's constitutional role ends when a bill becomes law; thereafter, the executive branch implements the enacted law. After that critical constitutional moment, the legislative branch may neither assume the power to execute the law nor block the executive branch's ability to do so.

a. The Wisconsin Constitution guards against the concentration of power in a single branch.

Wisconsin's separation of powers—just like the United States'—derives from three constitutional vesting clauses that divide the core powers of government among three branches: "The legislative power shall be vested in a senate and assembly," "[t]he executive power shall be vested in a governor," and "[t]he judicial power of this state shall be vested in a unified court system." Wis. Const. art. IV, § 1, art. V, § 1, art. VII, § 2. State administrative agencies (like

the Commission) are "part of the executive branch" and carry out executive functions. *SEIU*, 393 Wis. 2d 38, ¶ 60; *see also* Wis. Stat. §§ 15.61 (creation of elections commission; part of subch. III ("Independent Agencies") of Wis. Stat. ch. 15 ("Structure of the Executive Branch"); 15.01(9) ("'Independent agency' means an administrative agency within the executive branch created under subch. III"); 15.02 ("independent agency" is a "principal administrative unit of the executive branch").

Separating these powers provides the "central bulwark of our liberty," *SEIU*, 393 Wis. 2d 38, ¶ 30, by guarding against the "concentration of governmental power" in a single branch. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 4, 376 Wis. 2d 147, 897 N.W.2d 384. Through this separation, the constitution "ensure[s] that each branch will act on its own behalf and free from improper influence by the others." *Id.* ¶ 32. "[N]o branch [is] subordinate to the other, no branch [may] arrogate to itself control over the other except as is provided by the constitution, and no branch [may] exercise the power committed by the constitution to another." *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982).

Because the legislative branch writes the laws, the separation of powers doctrine is especially wary of its stripping away power from co-equal branches through legislation. As James Madison warned, the legislative branch is "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (Clinton Rossiter ed., 1961). And the art of lawmaking enables the legislature to "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Id.* at 310. The legislative usurpation of executive power poses a particular danger because it results in the "same persons who have the power of making laws"—that is, legislators—"also [having] in their hands the power to execute them." *Gabler*,

376 Wis. 2d 147, ¶ 5 (quoting John Locke, *The Second Treatise of Civil Government*, § 143 (1764)).

b. The legislative branch makes laws but does not execute them.

The legislative branch "may not 'invest itself or its Members with either executive power or judicial power.'" *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (citation omitted). Policing this principle requires distinguishing between executive and legislative power. This task is "not always easy," *SEIU*, 393 Wis. 2d 38, ¶ 34, but some basic principles lie beyond debate.

Generally, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). More specifically, the Legislature has constitutional authority "to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate." *Id.* (alteration in original) (citations omitted). So, when the legislative branch wants to achieve a policy goal, it may enact statutes that empower the executive branch to administer a new program and tell the executive branch how to do so.

After the lawmaking process is complete, the baton passes to the executive branch to execute the law. *Evers v. Marklein*, 2024 WI 31, ¶ 15, 412 Wis. 2d 525, 8 N.W.3d 395; *SEIU*, 393 Wis. 2d 38, ¶ 95. In other words, once the Legislature enacts a policy choice into law, the executive branch carries out that law. *Fabick v. Evers*, 2021 WI 28, ¶ 14, 396 Wis. 2d 231, 956 N.W.2d 856; *see also Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, ¶ 91, 942 N.W.2d 900 (Kelly, J., concurring) ("The difference between legislative and executive authority has been

described as the difference between the power to prescribe and the power to put something into effect . . . .").

In *Marklein*, the Wisconsin Supreme Court reaffirmed the separation of powers in Wisconsin and emphasized that the "executive branch's role is to effectuate the policies passed by the legislature." 412 Wis. 2d 525, ¶ 15. When "executing the law, the executive branch must make decisions about how to enforce and effectuate the laws": to decide what the law requires and how to apply it. *Id.* ¶¶ 15–16.

The *Marklein* court struck down statutes giving the Legislature's Joint Committee on Finance the power to veto program decisions of the Department of Natural Resources because they allowed a legislative body to execute the law. The court held that the challenged statutes "effectively create a legislative veto," allowing the Legislature to

> interfere with and even override the executive branch's core power of executing the law. . . . The review process ultimately permits the members of the JFC to serve as gatekeeper to the exercise of a core executive function. . . . This unfettered interference by the committee oversteps the boundaries of legislative authority by arrogating the executive branch's core power to choose which conservation projects best carry out the statutory purposes of the Program.

Id. ¶ 24. The court held that once the statutes are enacted, the Legislature may not "insert itself into the machinery of the executive branch in an attempt to control the executive branch's ability to carry out the law." *Id.* ¶ 23.

Marklein is consistent with the U.S. Supreme Court's approach in *Bowsher v. Synar*, 478 U.S. 714 (1986). There, Congress enacted a law creating an official who could mandate, outside the ordinary legislative process, reductions in deficit spending by the executive branch. The official could be fired only by Congress. The Court held that this statute violated the separation of powers because "[t]he Constitution does not contemplate an active role for Congress in the

supervision of officers charged with the execution of the laws it enacts." *Bowsher,* 478 U.S. at 722. This sort of scheme "reserve[s] in Congress control over the execution of the laws"—in other words, grants it a "congressional veto"—which is something "[t]he structure of the Constitution does not permit." *Id.* at 726. Simply put, "the Constitution does not permit Congress to execute the laws." *Id.*

In carrying out the legislative branch's policy choices, the executive is no mere "legislatively-controlled automaton." *SEIU*, 393 Wis. 2d 38, ¶ 96. Rather, the executive must use discretion to "determine for himself what the law requires him to do." *Marklein*, 412 Wis. 2d ¶ 15 (citation omitted).

Because the power to execute the law is vested in the executive branch, only the executive branch may exercise it. Neither the Legislature nor the executive branch may "possess directly or indirectly, an overruling influence over the other[ ] in the administration of their respective powers." *Marklein*, 412 Wis. 2d 525, ¶ 16 (alteration in original) (citation omitted). If the Legislature wishes to influence how its laws are carried out, it may pass legislation.

2. Wisconsin's core and shared power framework does not alter the underlying principles that divide legislative from executive power.

Wisconsin courts have filtered the well-established separation of powers principles through a lens of "core" and "shared" powers. *See SEIU*, 393 Wis. 2d 38, ¶¶ 34–35. Those analytical tools don't alter the underlying principles, and this framework must be carefully employed to preserve the separation of powers.

a. A "core" power defines a branch's essential attributes and cannot be shared with another branch.

Each branch of government has exclusive—"core"—constitutional powers that constitute zones of authority into which no other branch may intrude. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). "A branch's core powers are those that define its essential attributes." *SEIU*, 393 Wis. 2d 38, ¶ 104. "[A] core power is a power vested by the constitution that distinguishes that branch from the other two." *Id.* ¶ 104 n.15.

"[C]ore zones of authority are to be 'jealously guarded,'" as "[t]he state suffers essentially by every . . . assault of one branch of the government upon another." *Gabler*, 376 Wis. 2d 147, ¶¶ 30–31 (first alteration in original) (citations omitted). Therefore, "any exercise of authority by another branch" in an area of core power "is unconstitutional." *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21 (citations omitted).

In addition to the constitutional text, history also provides insight into what powers are rightly considered "core." If Wisconsin's historical "practices and laws" from around the time of the founding show that an encroaching branch did not traditionally have a role in the power at issue, this further indicates that it is a core power of the encroached-upon branch. *State ex rel. Friedrich v. Cir. Ct. for Dane Cnty.*, 192 Wis. 2d 1, 38, 531 N.W.2d 32 (1995); *see also State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 44, 402 Wis. 2d 539, 976 N.W.2d 821 ("To properly confirm the meaning of the Wisconsin Constitution, we consult 'historical evidence' such as 'the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.'" (citations omitted)).

At the most basic level, our constitution vests the legislative and executive branches with the core powers to legislate and to execute the laws, respectively. *See* Wis. Const. art. IV, § 1, art. V, §§ 1, 4, art. VII, § 2. The Legislature "is tasked with the enactment of laws," and the "governor is instructed to 'take care that the laws be faithfully executed.'" *SEIU*, 393 Wis. 2d 38, ¶ 31 (citations omitted). Because the executive branch's duty to execute the laws is its "core" power, the Legislature cannot assume any share of it.

b. Even in an arena of "shared" powers, each branch can exercise only its own constitutional powers and cannot override another branch's power.

Wisconsin courts also recognize the concept of "[s]hared" powers, which are best described as those that "lie at the intersections of . . . exclusive core constitutional powers." *Id.* ¶ 35 (citation omitted). Even in an area of shared power, the Legislature still may use only its constitutional tools—not utilize the executive's. And substantively, the Legislature still may not have the power to veto the executive branch's decisions.

In a "shared powers" situation, one branch exercises its own constitutional powers in an arena that affects another branch's ability to exercise *its* powers. Such actions are constitutional if they do not "unduly burden or substantially interfere with the other branch's essential role and powers." *State v. Unnamed Defendant*, 150 Wis. 2d 352, 360–61, 441 N.W.2d 696 (1989). Calling a power "shared" is therefore something of a misnomer. What is really "shared" is the intersecting arena of governmental action—two branches have a constitutional role in the same topic, and they each use their core powers to pursue those roles.

What is *not* "shared" are the core powers that each branch uses in its pursuit of its aims. Each branch exercises only its own powers, both as a matter of process and substance.

As a matter of process, a branch can act in an arena of shared power only by using its constitutional tools—in the legislative branch's case, by passing laws that prospectively regulate another branch. At the end of the day, "[l]egislative power . . . is the authority to make laws." *Koschkee*, 387 Wis. 2d 552, ¶ 11 (citation omitted).

As a matter of substance, a branch exercising its core power in a shared arena cannot have the power to veto the other branch's constitutional authority to act.

In *Friedrich*, for example, the supreme court evaluated whether a law that impacted two branches' overlapping exercise of core powers violated the separation of powers. The statute at issue set compensation ceilings for guardians ad litem and special prosecutors, and the court reasoned that "statutes addressing the compensation of court-appointed counsel from public funds fall squarely within" the Legislature's power to "*enact legislation* . . . to allocate government resources." *Friedrich*, 192 Wis. 2d at 16 (emphasis added). But the judiciary was exercising its core powers, too: the "power to set and order compensation at public expense for court-appointed counsel is an inherent power of the judiciary." *Id.* at 19.

Using a shared powers analysis, the Court held that the statute was not "unduly burden[some]" because "courts retain[ed] the ultimate authority to compensate court-appointed counsel at greater than the statutory rates when necessary." *Id.* at 30. In other words, the statute was constitutional because the judiciary retained its core power to set compensation higher than the Legislature's statutory limit. The statute and statutory rate did not (because it could

not) veto the judiciary's ability to exercise its constitutional role when needed in that shared arena.

By contrast, in *Matter of E.B. v. State*, 111 Wis. 2d 175, 330 N.W.2d 584 (1983), the Court analyzed whether a statute could automatically require appellate courts to reverse judgments due to a circuit court's failure to submit jury instructions in written form. Like *Friedrich*, *E.B.* involved another shared arena; this time, the Legislature used its core legislative power to pass laws regulating jury instructions, which overlapped with the judiciary's core judicial power to determine reversible error on a case-by-case basis. *Id.* at 184, 186.

The court held that the Legislature lacked the substantive constitutional power to mandate reversal in particular cases because doing so would veto core judicial power in presiding over cases. To preserve the statute's constitutionality, the Court interpreted the statute as not requiring automatic reversal; otherwise, the Legislature would have prevented the judiciary from exercising its own core power. *Id.* at 186.

* * *

In sum, the legislative branch may not exercise or otherwise interfere with another branch's core power at all. And even in the so-called "shared powers" realm where core powers overlap, the legislative branch can act only through statutes that prospectively regulate another branch, and such statutes cannot veto the other branch's exercise of its constitutional authority.

B. The defense of this litigation is core executive power and implicates no legislative power; interpreting Wis. Stat. § 803.09(2m) as allowing the Legislature to litigate alongside the executive branch would intrude upon that power.

The Attorney General and Commission's defense of the law at issue in this case constitutes core executive power. The Legislature has no constitutional power to defend the state's interest in litigation here, and it has no legislative institutional power implicated by the matter. Interpreting Wis. Stat. §§ 13.365 and 803.09(2m) as allowing the Legislature to litigate alongside the Attorney General and his executive branch clients would violate the separation of powers.

1. The Attorney General and Commission's defense of the case constitutes core executive power.

The Attorney General and Commission's defense of this case is a core executive power. Executive power is "power to execute or enforce the law as enacted," *SEIU*, 393 Wis. 2d 38, ¶ 1, and the ability to execute enacted law to address particular circumstances is the "essential attribute[ ]" of the executive branch, *id.* ¶ 104.

The Attorney General is a "high constitutional executive officer." *Id.* ¶ 60 (citation omitted); Wis. Const. art. VI, § 3. He is statutorily charged with defending state agencies named in civil litigation. Wis. Stat. § 165.25(6). Since 1849, the Attorney General has exercised the executive powers traditionally held by a state's chief legal officer, including representing the state and its entities in litigation. *See* Wis. Rev. Stat. ch. 9, §§ 36–41 (1849). The Attorney General carries that law into effect when it defends executive agency clients in litigation.

For both the Attorney General and executive branch clients, litigation is part of the day-to-day work of carrying out the law. An agency's day-to-day job is a classic executive function: "to implement and carry out the mandate of the legislative enactments." *DOR v. Nagle-Hart, Inc.*, 70 Wis. 2d 224, 226–27, 234 N.W.2d 350 (1975). "[W]hen an administrative agency acts . . . it is exercising executive power." *SEIU*, 393 Wis. 2d 38, ¶¶ 96–97. Executive law-implementation includes exercising judgment and discretion in applying generally applicable law. *See id.* ¶ 96.

Here, the Attorney General and Commission are executing the law by litigating this case. They are exercising judgment and discretion in applying the generally applicable law, assessing the relevant facts on the ground, deciding how to present evidence, and taking into account how the plaintiffs' claims will affect the administration of Wisconsin elections law. This job is constitutionally tasked to the executive branch.

The defense of the plaintiffs' specific claims, primarily brought under the federal ADA and Rehabilitation Act, involves the execution of the state election law through litigation. Under the federal laws, courts must consider whether the accommodations sought by the plaintiff would impose significant financial or administrative costs, or fundamentally alter the nature of the program or service. *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 594 (7th Cir. 2018); 28 C.F.R. §§ 35.150(a)(3), 35.130(b)(7). The parties here must thus present evidence about the impact the sought-for accommodations would have on the administration of Wisconsin elections. The defense of the law must take into account how Plaintiffs' claims intersect with the costs and other factors relating to the administration of the law. That job is constitutionally tasked to the executive branch.

2. The Legislature has no constitutional role in defending the statute in litigation alongside the executive branch, and no legislative power is implicated by this case.

In contrast to the executive branch's constitutional role in defending the litigation at issue, the Legislature has no constitutional role or power to act as the "state's litigator-in-chief or even the representative of the people at large." *Cf. Palm*, 391 Wis. 2d 497, ¶ 235 (Hagedorn, J., dissenting). Litigating cases is an executive function and, at least where the executive branch is defending the law at issue, the Legislature has no constitutional role in defending the law for the state. It could constitutionally intervene only where its own institutional power would be impacted, but that is not the case here.

This case impacts no constitutional power of the Legislature. The Legislature can constitutionally be a litigant in cases challenging the Governor's veto, for example, because that veto affects the Legislature's constitutional job to pass bills. *SEIU*, 393 Wis. 2d 38, ¶ 72, n.21 (listing cases brought by Legislature challenging Governor's veto of passed budget bills). That role does not exist once a law is enacted: it is then up to the executive branch to carry out. *See Marklein*, 412 Wis. 2d 525, ¶ 28.

Here, litigating whether an election statute complies with federal disability law implicates no part of the process of lawmaking. The Legislature has no constitutional role to defend the case alongside the Attorney General and Commission. To exercise its policy preference on this topic, the Legislature may engage in the lawmaking process by passing new legislation. But it may not litigate whether an already-enacted statute complies with federal law.

3. Construing the new intervention provisions as permitting the Legislature to defend the law alongside the Attorney General and Commission transfers core executive branch power to the Legislature.

If 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. "Any" intrusion by the Legislature here would be unconstitutional. *Joni B. v. State*, 202 Wis. 2d 1, 10, 549 N.W.2d 411 (1996).

Allowing the Legislature to intervene in a case like this intrudes on the executive branch's core power because the Legislature has the power to control the strategy, handling, and disposition of the case. An intervening party is a full participant in the lawsuit and is treated as if it were an original party. *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.

Courts in other states have recognized that allowing the legislature to direct litigation violates the separation of powers. In *Arizona v. Block*, 942 P.2d 428, 429–31 (Ariz. 1997), the en banc Arizona Supreme Court considered a state law that gave a legislatively-controlled committee the power to hire outside counsel and pursue litigation relating to any federal law, regulation or order. The committee asserted positions in cases contrary to those being asserted by the Attorney General on behalf of the state. *Id.* at 430–31. The Arizona Supreme Court held that the statute violated the separation of powers because conducting litigation on behalf of the state is an executive function, and both the committee and Attorney General were purporting to represent the interests of the state. *Id.* at 438.

Similarly, in *State Through Board of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989), the Louisiana Supreme Court held that a statute allowing the legislature to file a lawsuit to collect penalties violated the separation of powers. 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 (1975), the Colorado Supreme Court held that a statute giving the legislature the power to bring cases for certain purposes violated that state's separation of powers doctrine. And in *In re Opinion of Justices*, 27 A.3d 859, 870 (N.H. 2011), the New Hampshire Supreme Court held that a statute directing the Attorney General to intervene in a lawsuit violated that state's separation of powers.

In each of those cases, the court rejected the legislature's conferral upon itself the power to be a party with the ability to make litigation decisions or to direct the Attorney General to take certain steps.

While the statute's unconstitutionality flows from the power it gives the Legislature, not how the Legislature chooses to exercise it, the Legislature has already interfered with the trajectory of litigation in this case. The plaintiffs originally sought broad-ranging and quickly applicable temporary relief—relief that would have required the Commission and municipal election clerks to implement changes on an impossible timeline and risk the safe and secure administration of the upcoming elections. (R. 42.) After deposing the Commission's administrator, however, the plaintiffs took stock and significantly cut back on the preliminary relief they sought, including abandoning a request to alter the MyVote system and withdrawing their demand that any accommodations be in place for the August election. (R. 112:6–7.)

The circuit court's June 25 temporary injunction reflected those reduced demands. (R. 104.) In light of those

changes, the timing requirements for the fast-approaching election, and to avoid uncertainty going into the November election, the Commission decided not to appeal the temporary injunction. The Legislature, however, appealed the temporary injunction, despite playing no role in administering elections. (R. 114.)

The Legislature's desire to control the litigation—and make different choices from the executive branch defendants and Attorney General—is precisely why the Legislature seeks to intervene. In the circuit court, responding to the possibility that it could simply be an amicus and thus be heard in that way, counsel for the Legislature responded that it wanted the power to make different choices from those that the Commission and Attorney General would select. (R. 112:108–16.) This overriding is precisely what is unconstitutional with legislative intervention here.

The Legislature presumably views its litigation choices as preferable. But it is "entirely irrelevant" whether "[t]he legislature may see itself as a benign gatekeeper." *SEIU*, 393 Wis. 2d 38, ¶ 107. It is not the Legislature's constitutional role to litigate cases alongside the executive branch.

C. Even if the defense of this litigation were a shared power, the Legislature's participation as a party would unduly burden and substantially interfere with the executive branch's constitutional role.

Even if this Court believed that the Legislature did have a shared constitutional role in litigating the defense of this matter, Wis. Stat. § 803.09(2m) would still be unconstitutional as applied here because the Legislature's simultaneous participation unduly burdens and substantially interferes with the executive branch's constitutional role.

As in *Friedrich* and *E.B.*, the new intervention statutes cannot constitutionally prevent the Attorney General and his

executive branch clients from exercising their core powers. But as discussed above, because an intervenor has all the power as the original defendants, the Legislature would have the power to override or undermine their choices in litigation in pursuit of different strategies. Litigating the case is part of administering Wisconsin election law, a job that the Legislature has no power or duty to carry out. The claims in this case, which involve balancing Plaintiffs' request for accommodation with the costs and other impacts on the administration of the statute, squarely implicate executive power. Even if this litigation occupied a shared arena of power, the Legislature cannot constitutionally have the power to make contrary litigation decisions to those of the executive branch. Intervention here would violate the separation of powers regardless of whether the Court viewed it through a core or shared power lens.

D. The Wisconsin Supreme Court has not considered whether Wis. Stat. § 803.09(2m) can be constitutionally construed as allowing the Legislature to intervene where the Attorney General and executive branch are already defending the case.

Since 2018, the supreme court has considered the new intervention statutes twice: in *SEIU* and *Democratic National Committee v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423. Neither case interpreted the statutes as applied to this type of situation.

SEIU involved a facial challenge to numerous provisions of 2017 Wis. Act 369, meaning that the court saw its job as evaluating whether there could be any constitutional applications of each statute. 393 Wis. 2d 38, ¶ 4. Under that standard, the court denied a facial challenge to statutes including Wis. Stat. § 13.365 and § 803.09(2m), holding that "[w]hile representing the State in litigation is predominately an executive function, it is within those borderlands of shared

powers, most notably in cases that implicate an institutional interest of the legislature." *Id.* ¶ 63. The court reasoned that the intervention statutes were constitutional at least in cases implicating the Legislature's own "institutional interests." *Id.* ¶¶ 72–73.

The court noted that, prior to 2017 Wis. Act 369, the Legislature had "limited power to intervene in litigation." *Id.* ¶ 51. As examples of where the Legislature's "institutional interests" may be adequate to justify intervention, the court pointed to three cases, all of which were original actions brought by legislative entities against executive branch officials in challenges to the Governor's allegedly improper use of his power to partially veto budget bills passed by the Legislature. *See id.* ¶ 72, n.21 (listing cases). Thus, all involved the Legislature's participation as a party in defense of its own institutional powers. *SEIU* did not suggest that the type of application at issue here, implicating no constitutional powers of the Legislature, would be constitutional.

Bostelmann involved the unusual situation where no executive branch official was defending the law. The Attorney General had withdrawn as the defendants' counsel due to a conflict, and the appointed special counsel declined to appeal an adverse ruling, leaving the intervenor Legislature as the only defendant. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, *1 (W.D. Wis. Mar. 28, 2020) (Attorney General withdrawing and replaced with outside counsel); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020) (Legislature only appealing party). Under those circumstances, the court held that the statute gave the Legislature a statutory interest not only where its institutional interests were implicated, but in defending state statutes as described in Wis. Stat. § 803.09(2m): "The Legislature is . . . empowered to defend not just its interests as a legislative body, but these specific interests itemized by statute." *Bostelmann*, 394 Wis. 2d 33, ¶ 8.

The *Bostelmann* court did not treat its decision as addressing larger separation of powers concerns. *Id.* ¶ 4 & n.2 (noting that the question before the court was not a "wide-ranging constitutional inquiry," and pointing to the lack of time for parties to address the separation-of-powers issue), ¶ 24 n.4 (Dallet, J., dissenting) (flagging separation-of-powers question for future cases). Neither the *Bostelmann* nor *SEIU* court was confronted with the question of whether such a power would violate Wisconsin's separation of powers in a situation like the one here, where the Attorney General and executive branch clients are defending the case.

Below, the Legislature pointed to three circuit court cases where its intervention was not opposed or the circuit court granted its motion. (R. 52:12.) As an initial matter, that is irrelevant to the merits of the constitutional claim presented. But they are unpersuasive examples, in any event: intervention was not opposed in two of the cases because they were distinguishable from this one, and in the third case, the court declined to consider the constitutional issue presented.

In *EXPO Wisconsin, Inc. v. WEC*, the executive branch did not oppose intervention because the Legislature had an institutional role as the Legislature: the EXPO plaintiffs asserted that the Legislature failed to provide timely notice of two constitutional referenda under Wis. Stat. § 8.37. *EXPO Wis. Inc. v. Wis.,* Case No. 23-CV-0279 (Dane Cnty.); (*see* R. 49:15). In *Priorities USA v. WEC*, the executive branch did not oppose intervention where the executive branch was aligned with the plaintiff on one of the issues presented by the plaintiffs: whether absentee ballot return drop boxes are permitted under Wisconsin statutes. *Priorities USA v. WEC,* Case No. 23-CV-1900 (Dane Cnty.); (*see* R. 49:12). The Wisconsin Supreme Court decided that issue in July. *Priorities USA v. WEC*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429. In *Abbotsford Education Association v. WERC*, the executive branch opposed intervention, but the circuit

court granted it and refused to consider the constitutional question as underdeveloped; it relied on the face of section 803.09(2m). *Abbotsford Edu. Ass'n. v. WERC,* Case No. 23-CV-3152 (Dane Cnty.); (*see* R. 49:5).

In this matter, construing the new intervention statutes as making the Legislature the "agent for the state" would violate the separation of powers, as the two branches competed to be the "litigator-in-chief" and the "representative of the people at large." *Cf. Palm*, 391 Wis. 2d 497, ¶ 235 (Hagedorn, J., dissenting) ("The legislature . . . is not the state's litigator-in-chief or even the representative of the people at large."). And the Legislature has no constitutional role as the Legislature in this litigation that would make its intervention proper under that theory, either. Wisconsin Stat. § 803.09(2m) cannot constitutionally be interpreted as allowing the Legislature to intervene in this case.

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

Without its new intervention statute, the Legislature must satisfy the traditional factors for intervention of right under Wis. Stat. § 803.09(1). It is no surprise that, under that well-established standard, the Legislature rarely intervened prior to 2019. The Legislature cannot meet the standards of Wis. Stat. § 803.09(1) here: it has no protected interest as the Legislature, no interest that could be impacted by the outcome of the litigation, and its asserted interests will be more than adequately represented by the existing parties.

Intervention as of right is governed by Wis. Stat. § 803.09(1), which provides:

> [A]nyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter

> impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

To intervene as of right, a movant must meet four elements: (1) a timely intervention motion; (2) an interest sufficiently related to the subject of the action; (3) the disposition of the action may as a practical matter impair the movant's ability to protect that interest; and (4) the movant's interest is not adequately represented by existing parties. *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1.

The burden is on the proposed intervenor to show that the elements are satisfied. *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶ 12, 296 Wis. 2d 337, 723 N.W.2d 131. "Failure to establish one element means the motion must be denied." *Id.* Courts use these elements as a guide to best consider the competing public policies of allowing original parties to conduct and resolve their own lawsuit, with allowing interested persons to join a lawsuit so that controversies are resolved efficiently and economically. *Helgeland*, 307 Wis. 2d 1, ¶ 40.

Here, the Legislature fails to satisfy the second, third, and fourth elements: it has no protected interest, no interest that can be impaired by its non-participation as a party, and its interests will be adequately represented by the existing defendants and their counsel.

A. The Legislature has no legally protected interest related to the subject of this action, and thus no interest that could be impaired by the outcome of this case.

The Legislature asserted below that it has a protected interest as the Legislature in seeing laws it passed upheld, the "efficacy of its own powers," or the "integrity of elections." (R. 52:11, 16.) None of these are protected interests for purposes of intervention.

The interest element for purposes of intervention corresponds with the concept of standing: it requires a direct and immediate interest relating to the statutes at issue in the case. *Helgeland*, 307 Wis. 2d 1, ¶ 45; *Bost v. Ill. State Bd. of Elections*, 75 F.4th 682, 686 (7th Cir. 2023) (construing parallel requirement of Fed. R. Civ. P. 24). The Legislature has no such protected interest here.

Because it has no protected interest under the second prong of intervention, the Legislature also has no interest that will be impeded by the outcome of the litigation for purposes of the third prong.

1. The Legislature has no protected interest as the Legislature in seeing the laws it passed upheld.

The Legislature has no protected interest in seeing the law it passed upheld or upheld against a constitutional claim. Neither of the cases it relied on below, *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. 179 (2022), nor *Bostelmann*, 394 Wis. 2d 33, (R. 52:15–16), supports that assertion.

Berger does not stand for the proposition the Legislature asserts; U.S. Supreme Court case law actually supports the opposite conclusion.

Several U.S. Supreme Court cases have considered whether an intervening legislative body has a protected interest for purposes of intervention under Fed. R. Civ. P. 24, which, like Wis. Stat. § 803.09(1), requires an intervenor to have a protected interest. In *Berger*, the North Carolina legislature sought to intervene in litigation based on a North Carolina statute that authorized state legislative leaders to intervene in litigation "as agents of the State." 597 U.S. at 180 (citation omitted). The Supreme Court concluded that the legislature had an interest for the purpose of intervention

within the meaning of Fed. R. Civ. P. 24(a)(2) only because it was acting as the state and not the legislature. *Id*.

In contrast, the U.S. Supreme Court has held that legislative bodies lack a protected interest when they seek to intervene based on an asserted legislative interest in seeing a law upheld. *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 670 (2019) (Virginia's house lacked a cognizable interest in a redistricting case based on the premise that the challenged law would change the individual delegates of that body). Instead, the Court has permitted legislative intervention where the case could alter the legislature's ability to have a role in enacting legislation. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791, 803 (2015) (legislature had standing to challenge a law that would have permanently deprived it of a role in the redistricting process).

Here, the Legislature's "interest" in seeing the election law it passed upheld is the type of generalized interest that those cases have declined to treat as a protected interest of the legislature for intervention purposes.

Bostelmann did not address whether the Legislature has a protected interest to defend the validity of a law as the Legislature where the Attorney General and executive branch are already defending that law. It treated the issue presented as whether the Legislature—in a case where no executive branch officials were defending the law—was acting to defend interests beyond its own institutional powers. *Bostelmann*, 394 Wis. 2d 33, ¶ 8.

2. The Legislature has no protected interest in the "efficacy of its own powers."

The Legislature argued below that it has a protected interest in the "efficacy of its own powers." (R. 52:16.) It did

not explain how this is different from seeing statutes it passed upheld, and *Palm* does not support its reading.

Palm held that the Legislature had standing to bring a case asserting that the secretary of the Department of Health Services had evaded the Legislature's statutory functions under Wis. Stat. ch. 227 to review proposed administrative rules. *Palm*, 391 Wis. 2d 497, ¶ 13. *Palm* did not address or suggest that the Legislature has a general protected interest as the Legislature to ensure that laws are upheld. Unlike in *Palm*, here the Legislature identifies no legislative statutory responsibilities impacted by the plaintiffs' claims.

3. The Legislature has no protected interest in the "integrity of elections."

Finally, the Legislature asserted that it has a protected interest for intervention purposes on the theory it has a "powerful interest in election integrity." (R. 52:17.) Neither case it relied on said anything about a party's standing or protected interest to intervene for that purpose, and courts have rejected the generalized interest of "election integrity" as sufficient to support party status.

The Legislature relied on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), (R. 52:16, 17), but neither case addressed whether "election integrity" is a protected interest for purposes of standing or intervention. Instead, those cases addressed whether the state has an "interest" in ensuring voting integrity when regulating elections as part of evaluating whether an election law violates the U.S. Constitution. *Crawford*, 553 U.S. at 196; *Eu*, 489 U.S. at 231. That concept of "interest" has nothing to do with whether a legislature has a protected interest sufficient to be a named party or intervenor.

To the contrary, courts agree that "election integrity" is a generalized interest that is not a protected interest.

Federal courts have recognized that "election integrity" is not a direct, protected interest for standing purposes. *See, e.g., Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021) (no particularized injury where plaintiffs asserted that a practice hurt the "'integrity' of the election process"); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (plaintiffs asserted only a generalized grievance based on desire to ensure that only lawful ballots are counted); *Iowa Voter All. v. Black Hawk Cnty.*, 515 F. Supp. 3d 980, 991 (N.D. Iowa 2021) (same).

State courts are in accord. In *Teigen v. WEC*, only three justices would have held that voters had an injury for standing purposes based on a concept of "vote dilution," which those justices viewed as an asserted injury to the integrity of the election process. 2022 WI 64, ¶ 25, 403 Wis. 2d 607, 976 N.W.2d 519 (R. Bradley, J., plurality opinion). The court of appeals has expressed doubt that "vote dilution" theory could ever "amount to an actual, concrete injury that gives [plaintiffs] a justiciable stake" in a case. *Rise, Inc. v. WEC*, No. 2022AP1838, 2023 WL 4399022, ¶ 27 (Wis. Ct. App. July 7, 2023) (unpublished, authored decision cited in accordance with Wis. Stat. § (Rule) 809.23(3)).

Because the Legislature has no protected interest in this litigation, it fails both the second and third prongs for intervention: it has no recognized interest, and thus none that can be impeded by the outcome of this litigation.

B. The Attorney General and Commission will adequately represent any general interests that the Legislature asserts.

Even if the Legislature could establish a protected and unique interest in this litigation, it would not be entitled to intervene because the Attorney General and Commission will adequately represent its interests—the fourth requirement of the mandatory intervention analysis.

Helgeland involved a constitutional challenge to a state statute that barred same-sex domestic partners of state employees from being treated as dependents under the state employee health insurance plan. *Helgeland*, 307 Wis. 2d 1, ¶ 22. Several municipalities sought to intervene as defendants. *Id.* ¶ 23. In affirming the denial of that request, the supreme court recognized two presumptions of adequacy that are relevant in a case challenging an aspect of state law.

First, adequate representation is presumed when a movant and an existing party have "the same ultimate objective" in the action. *Id.* ¶ 90.

Second, adequate representation is presumed when a party is "a governmental body or officer charged by law with representing the interests of the absentee." *Id.* ¶ 91 (citation omitted). The *Helgeland* court pointed specifically to the Attorney General's duties: the "Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes." *Id.* ¶ 96 (discussing Wis. Stat. § 806.04(11), which states it is "the duty of the attorney general to appear on behalf of the people of this state to show why a statute is constitutional").

Where either of the *Helgeland* presumptions applies, the proposed intervenor must make a "compelling showing" that the representation is not adequate. *Id.* ¶ 86. Differences between the parties' enthusiasm for the law, or a preference for different litigation strategies, do not meet that challenging standard. *Helgeland* rejected the proposed intervenors' theory there that the Attorney General's personal dislike of the law demonstrated inadequacy, pointing to the Attorney General's duty to defend its constitutionality. *Id.* ¶¶ 93–96. The court also rejected the argument that the proposed intervenors demonstrated inadequacy based on the premise that they would defend the law with more "vehemence" than the Department of Employee Trust Funds, which administered the law at issue. *Id.* ¶¶ 107–08.

Recent election cases have applied *Helgeland* to deny intervention to proposed intervenors in election-related cases, holding that the Attorney General and Commission would adequately defend them. *Rise, Inc. v. WEC*, No. 2022AP1838, 2023 WL 4399022, ¶¶ 31–44 (Wis. Ct. App. July 7, 2023) (unpublished, authored decision cited in accordance with Wis. Stat. § (Rule) 809.23(3)); *Braun v. Vote.org*, 2024 WI App 42, ¶¶ 25–34. In *Rise v. WEC* and *Braun v. Vote.org*, the courts held that both *Helgeland* presumptions applied: the parties sought the same ultimate objective, and the Commission and Department of Justice were charged with "representing the rights of electors so that all may enjoy the benefits of the correct application of the laws governing elections." *Rise,* 2023 WL 4399022, ¶¶ 35–36; *Braun*, 2024 WI App 42, ¶¶ 29–30 (quoting *Rise*).

Both courts concluded that the proposed intervenors had not rebutted those presumptions by making a compelling showing the Commission did not adequately represent their asserted interests. *Rise*, 2023 WL 4399022, ¶¶ 37–44; *Braun*, 2024 WI App 42, ¶¶ 30–34. *Rise* rejected the proposed intervenors' argument that they met the standard based on political views or interests as voters. *Rise*, 2023 WL 4399022, ¶¶ 42–43. *Braun* concluded that the standard was not met based on the theory the proposed intervenors would "litigate more vigorously." *Braun*, 2024 WI App 42, ¶ 33.

The same is true here. Like in *Helgeland*, *Rise*, and *Braun*, both presumptions apply. The Legislature seeks the same result as the Commission defendants. The Commission is expressly charged with administering Wisconsin election laws, and its legal representative, the Department of Justice, is responsible for defending the validity of state statutes. The Legislature provided no compelling showing to overcome those presumptions.

While claims of "vehement" representation do not meet the compelling showing under *Helgeland*, it is also worth

noting that the Commission and Attorney General's representation resulted in a positive outcome in the initial proceedings. In opposing the plaintiffs' requested temporary injunction, the Commission submitted briefing that not only addressed the plaintiffs' legal arguments, but also provided a detailed explanation of why expanding electronic absentee balloting to additional voters would be difficult to implement ahead of the upcoming election—and could put election security and uniformity at risk. (R. 69:9–12.) This included detailed descriptions of necessary new technological capabilities, a complex multi-step software development process, timeframes required to implement new ballot-delivery procedures, challenges related to determining eligibility, training requirements for Wisconsin's 1,850 municipal clerks, and more. (R. 69:9–12; *see also* R. 112:49–51.) The Commission provided a declaration from Commission Administrator Meagan Wolfe in support of these points and presented Administrator Wolfe as an agency representative for deposition. (R. 67.) At oral argument, the plaintiffs' counsel recognized that this evidence caused them to shrink their request for temporary relief. (R. 112:6.)

The Legislature acknowledged the Attorney General's competent representation at the temporary injunction hearing. (R. 112:108 ("[T]he Attorney General is doing a nice job today defending the State Law.")); (R. 112:115 ("[T]he Attorney General did a fantastic job presenting.").)

The Attorney General and Commission seek the same ultimate outcome and are charged with defending the law at issue. They are doubly presumed to adequately represent the Legislature's interests, and the Legislature has not overcome those presumptions. It cannot satisfy the fourth prong of the intervention test.

* * *

Beyond the constitutional prohibition on the Legislature's intervention to represent the state's interests, the Legislature cannot, as the Legislature, satisfy all the statutory elements for intervention under Wis. Stat. § 803.09(1).

III. This Court should deny permissive intervention.

The Legislature has also sought permissive intervention, but that would fail for the reasons discussed above. The Legislature has no protected interest in being a party as the Legislature, and it seeks intervention to keep an eye on how the Attorney General and Commission defend the case and to potentially make different litigation choices. As counsel for the Legislature said at oral argument, "[w]e just want to have a seat at the table to argue that the Statute we enacted is constitutional," (R. 112:120), and to appeal, even if the Commission decides that an appeal is not in the best interest of elections administration in Wisconsin, (R. 112:108–10 ("[W]hat will happen if they choose not to appeal? Then we would have to . . . take the appeal because at that point they would not be defending State law.")).

But becoming an intervenor-defendant for that reason presents the same separation of powers violation as if the Legislature had intervened under Wis. Stat. § 803.09(2m).

If the Legislature has policy concerns or arguments that no other party has thought to make, the circuit court can grant it leave to participate as an amicus. That participation would allow the Legislature to share its views on the policy importance of how the statutes are currently read or the impact of the relief sought by Plaintiffs.

CONCLUSION

This Court should reverse the circuit court's decision granting the Legislature's motion to intervene and hold that the Legislature could not constitutionally intervene in the

underlying action under Wis. Stat. § 803.09(2m), that it does not meet the statutory criteria to intervene as the Legislature under Wis. Stat. § 803.09(1), and that it could not constitutionally permissively intervene, either.

Dated this 23rd September 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 9,474 words.

Dated this 23rd day of September 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 23rd day of September 2024.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § (Rule) 809.23 (3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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