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In the Supreme Court of Wisconsin

DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC PARTY OF WISCONSIN, SYLVIA GEAR, CHRYSTAL EDWARDS AND JILL SWENSON, PLAINTIFFS-APPELLEES,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, MARK L. THOMSEN AND ROBERT SPINDELL, JR., DEFENDANTS,

and

REPUBLICAN PARTY OF WISCONSIN, REPUBLICAN NATIONAL COMMITTEE, AND WISCONSIN STATE LEGISLATURE, INTERVENING DEFENDANTS-APPELLANTS.

On Certified Question From The United States Court Of Appeals For The Seventh Circuit

PRINCIPAL BRIEF OF THE WISCONSIN STATE LEGISLATURE

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CERTIFIED QUESTION PRESENTED

1. Whether, under Wis. Stat. § 803.09(2m), the State Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws.

The Seventh Circuit panel initially answered no, but then certified this question to this Court.[1]

[1] The Seventh Circuit panel initially adopted this position. App. 1–5 (*Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-cv-249 & 20-2844, slip op. (7th Cir. Sept. 29, 2020)). But given that the Seventh Circuit panel has since certified this question to this Court, for this Court's resolution, the Legislature throughout this brief refers to this as Plaintiffs' position.

INTRODUCTION

In granting the Legislature's stay application leading up to *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"), this Court held that "the Legislature . . . and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App. 13 (Order Granting Temporary Relief Pending Appeal, *SEIU*, No. 2019AP622 (June 11, 2019)). Plaintiffs' contrary position here is that the Legislature has no authority to speak on behalf of the State's interests in the validity of state law that the Legislature has enacted, and can only speak for its own institutional interests by defending *only* those few laws that specially impact the Legislature's operations. If this Court adopts Plaintiffs' position, then the State, the Legislature, and the public would have no right *ever* to obtain "appellate review" of a federal-court order blocking a "statute enacted by the people's elected representatives" in a case—like this one—where the Attorney General has withdrawn and the named state defendants do not appeal. *Id.*

Plaintiffs' position is not the law in this State for two independent reasons. First, the Legislature enacted Section 803.09(2m) to ensure that "[w]hen a party to an action challenges in state or federal court the constitutionality of a statute" or "challenges a statute as violating or preempted by

federal law," the Legislature can defend that law in "state or federal court." Wis. Stat. § 803.09(2m). This statute recognizes that when the Legislature enacts a law, it has the state-law authority to represent the State's interest in the validity of that law. This is especially true in cases such as this one, where no other sovereign party is defending that law, risking the elimination of the Legislature's handiwork without any opportunity to appeal. Second, even independent of Section 803.09(2m), this Court's practice in multiple cases—including *SEIU* and *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020)—necessarily recognizes the Legislature's authority to speak for the State's interests in the validity of state law, including election laws.

Simply put, under well-established Wisconsin law, the Legislature—*as part of the State*—has the authority to speak on behalf of the State's sovereign interest in the *validity* of the laws that the Legislature has itself enacted, as those terms and concepts are used in U.S. Supreme Court cases such as *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), and *Karcher v. May*, 484 U.S. 72 (1987). That is the import of the Seventh Circuit's Certified Question, and the Legislature respectfully requests that this Court enter an order to that effect by Wednesday, October 7, if feasible.

This Court's affirmance of these principles is essential to avoiding a separation-of-powers fiasco, in the middle of a Presidential Election. In the present case, the Attorney General withdrew from representing the defendants,

members of the Wisconsin Elections Commission (the "Commission") long ago. The Commission, meanwhile, has refused to say a word against (or appeal) a broad injunction blocking Wisconsin law, including judicially extending the absentee ballot receipt deadline notwithstanding Wis. Stat. § 6.87(6). Indeed, the Commission told the district court here that it has "no authority to . . . oppose the injunctive relief requested" and "no authority to appeal any such [injunctive] decision" blocking state election law. App. 23–24 (capitalization altered). So Plaintiffs' position would ensure that, in this Court's words, state law will remain "declared unenforceable and enjoined [without] any appellate review" *ever* occurring. App. 13 (Order Granting Temporary Relief Pending Appeal, *SEIU*, No. 2019AP622 (June 11, 2019)).

The present appeal in the Seventh Circuit is just the tip of the iceberg in terms of the devastating separation-of-powers harms of Plaintiffs' position. Just for the November 2020 Election, Plaintiffs' position will ensure that the Legislature never has authority to appeal future court injunctions blocking Wisconsin election law, no matter how far-reaching those injunctions. Since the Attorney General is unwilling to represent the Commission in the present case, and since the Commission (correctly) understands itself to be unable to appeal, a district court order requiring post-election-day voting, or a revote, or even more drastic relief would get no appellate review. This would make Wisconsin ground zero for a separation-of-powers calamity on the

national stage, and potentially delay the national election results by an untold amount of time. And these state election laws are only a fraction of the larger implications of Plaintiffs' position, as their position would ensure that *any* time the Attorney General decided not to defend virtually any state law—either by withdrawing from the case, as here, or by simply agreeing with the plaintiffs—that decision would become entirely unreviewable by the Seventh Circuit or the U.S. Supreme Court.

This Court can and should immediately avert these unthinkable results by saying what Wisconsin law plainly means: the Legislature—as part of the State—has authority to defend the State's interest in the validity of its law. And that is especially true where, as here, no other sovereign party is defending that law.

ORAL ARGUMENT AND PUBLICATION

As this Court's October 2, 2020, Order stated, "in light of the time constraints set forth in the order of the United States Court of Appeals for the Seventh Circuit, this court will render a decision in this matter based on the written briefs of the parties without oral argument." Order Accepting Certified Question at 2, *Democratic Nat'l Comm. v. Bostelmann*, No. 2020AP1634-CQ, at 2 (Wis. Oct. 2, 2020). The importance of the Certified Question justifies a precedential opinion.

STATEMENT OF THE CASE[2]

A. In December 2018, the Legislature enacted 2017 Act 369 and 2017 Act 370 (hereinafter, "Acts 369 and 370"). *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 9, 287 Wis. 2d 511, 929 N.W.2d 209 ("*LWV*"); *SEIU*, 2020 WI 67, ¶ 15. As relevant here, Acts 369 and 370: (i) entitle the Legislature to notice when the constitutionality or validity of a state statute is challenged, Wis. Stat. § 806.04(11); (ii) permit the Legislature to intervene "at any time," *see* Wis. Stat. § 165.25(1)–(1m), where a statute's constitutionality or other basis of validity is challenged "in state or federal court," Wis. Stat. §§ 803.09(2m), 13.365; and (iii) allow the Legislature to obtain its own counsel, other than the Attorney General, for its representation, Wis. Stat. § 13.124.

In *SEIU*, 2020 WI 67, "several labor organizations and individual taxpayers . . . filed suit against the leaders of both houses of the legislature (the Legislative Defendants), the Governor, and the Attorney General," claiming that Acts 369 and 370 violated the separation of powers. *Id.* ¶¶ 3–4. The circuit court granted a temporary injunction against certain provisions of Acts 369 and 370, an injunction that the Governor and the Attorney General supported. *Id.* ¶¶ 5, 18–

[2] The Legislature has adapted this Statement of the Case from its Combined Memorandum In Support Of Petitioner's Emergency Petition For Original Action And Emergency Motion For Declaratory Judgment, filed on October 1, 2020, with this Court in *Wisconsin State Legislature v. Democratic National Committee*, No. 2020AP1629-OA.

19. Only the Legislature—speaking through its leadership, Legislative Defendants—appealed a lower court's decision blocking state laws. *Id.* ¶¶ 5, 21. This Court largely granted the Legislature's stay motion, explaining that "the Legislature . . . and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App. 13 (Order Granting Temporary Relief Pending Appeal, *SEIU*, No. 2019AP622 (June 11, 2019)). Thereafter, this Court "assumed jurisdiction over" the Legislative Defendants' "appeal[s]." *SEIU*, 2020 WI 67, ¶¶ 5, 21. With respect to Section 803.09 (2m), this Court found that this law allows "the legislature [to] participate in carrying out the executive branch functions previously assigned to the attorney general," *id.* ¶¶ 50, 62—which functions are "to represent the State in litigation," *id.* ¶ 50, or "to litigate on behalf of the State," *id.* ¶ 63; *see id.* ¶¶ 62–63. This Court proceeded to uphold the facial constitutionality of almost all challenged provisions, with Legislative Defendants being the *only* party defending these provisions. *See id.* ¶¶ 21, 73, 86.

B. This Certified Question arises out of ongoing, consolidated federal lawsuits filed in the U.S. District Court for the Western District of Wisconsin. These lawsuits originally challenged, on federal constitutional grounds, the enforcement of certain Wisconsin election-law provisions for the April 7 Election. *Democratic Nat'l Comm. v. Bostelmann*,

451 F. Supp. 3d 952, 957 (W.D. Wis. 2020). The Attorney General withdrew his representation of the Commission in the early stages of the litigation. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-cv-249, *et al.*, Dkts. 56–58 (W.D. Wis. Mar. 26, 2020); *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 958 n.2. And, as the Commission subsequently explained, it has concluded that it lacks the authority to itself defend state law against Plaintiffs' claims for injunctive relief: it (1) "*ha[s] no authority to grant or oppose the injunctive relief requested*" in any of these cases challenging state election laws; and (2) "*has no authority to appeal any such decision*" if the court imposes injunctive relief. App. 23–24 (emphases added; capitalization altered).

The defense of these state laws, including on appeal, went generally smoothly in the Spring. The district court enjoined a series of election laws with respect to the April 7 Election. *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 982–83. The Legislature, along with the Republican National Committee and Republican Party of Wisconsin, appealed; the Seventh Circuit and the U.S. Supreme Court stayed almost all of the injunction, including that portion of the injunction that ordered the State to accept post-election day votes. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 & 20-1546, 2020 WL 3619499 (7th Cir. Apr. 3, 2020). As part of its ruling, the Seventh Circuit held that the "Legislature has standing to pursue this

appeal," citing the Supreme Court's decision in *Bethune-Hill. Democratic Nat'l Comm.*, 2020 WL 3619499, at *2.

Now, in these same consolidated cases, Plaintiffs have again brought a host of challenges against Wisconsin election laws, as to the upcoming November 3, 2020 Election. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-cv-249, *et al.*, 2020 WL 5627186, at *2–4 (W.D. Wis. Sept. 21, 2020).

On September 21, 2020, the district court entered an order granting to Plaintiffs the following relief: (1) extending the deadline for online and mail-in registration to October 21, 2020, under Wis. Stat. § 6.28(1); (2) directing the Commission to include on the MyVote and WisVote websites (and on any additional materials that may be printed explaining the "indefinitely confined" option) certain language included in the Commission's March 2020 guidance; (3) extending the receipt deadline for absentee ballots by six days until November 9, 2020, under Wis. Stat. § 6.87(6), while still requiring the ballots to be mailed and postmarked on or before election day; (4) allowing access to replacement absentee ballots online or via email from October 22 through October 29, for any voters who timely requested an absentee ballot, which request was approved and the ballot was mailed but not received by the voter; and (5) enjoining Wis. Stat. § 7.30(2)'s rule that each election official be an elector of the county in which the municipality is located. *Democratic Nat'l Comm.*, 2020 WL 5627186, at *29–30.

The district court stayed its preliminary injunction for seven days, to provide the Legislature and other aggrieved parties with an opportunity to seek emergency appellate relief. *Id.* at *30. The Legislature sought such relief by requesting a stay pending appeal from a Seventh Circuit panel on September 23, which relief the Seventh Circuit originally granted. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-2835 & 20-2844, Dkt. 49 (7th Cir. Sept. 29, 2020) ("*DNC*").

But on September 29, the Seventh Circuit panel vacated its stay, after concluding that none of the movants had standing to appeal, viewing *SEIU* as stripping the Legislature of its authority to represent the State's interest in the validity of state law. App. 2–5 (*DNC*, 2020 WL 5796311). The Seventh Circuit also held that the Republican National Committee and the Republican Party of Wisconsin lack standing on grounds not relevant to this Certified Question. *See* App. 3. The Seventh Circuit then initially denied the Legislature's motion for certification to this Court. *DNC*, Dkts. 52, 54. The Legislature petitioned for emergency en banc review in the Seventh Circuit, *id.* at Dkt. 57, and filed an Emergency Petition For Original Action and an Emergency Motion For A Declaratory Judgment in this Court, *Wis. State Legislature v. Democratic Nat'l Comm.*, No. 2020AP1629-OA (Wis. Oct. 1, 2020).

The same panel of the Seventh Circuit then reconsidered its certified-question denial on October 2, 2020,

and certified the following question to this Court: "whether, under Wis. Stat. § 803.09(2m), the State Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws." *DNC*, Dkt. 63. This Court accepted the Seventh Circuit's certified question as written that same day, while noting that it "reserves the right to later formulate the question certified and to determine the scope of its inquiry." Order Accepting Certified Question at 2, *Democratic Nat'l Comm.*, No. 2020AP1634-CQ (Oct. 2, 2020).

STANDARD OF REVIEW

The Certified Question presents solely a question of law. This Court reviews such legal questions de novo, *see Moustakis v. State of Wis. Dep't of Justice*, 2016 WI 42, ¶ 16, 368 Wis. 2d 677, 880 N.W.2d 142, including when considering a certified question from the Seventh Circuit on the meaning of Wisconsin law, *see Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011); *see also Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶¶ 23–24, 381 Wis. 2d 732, 914 N.W.2d 631.

ARGUMENT

I. Wisconsin Law Authorizes The Legislature To Represent The State's Interest In Litigating to Defend The Validity Of State Law, Especially When No Other State Party Is Defending That Law

A. The U.S. Supreme Court Has Explained That A State Can Authorize A Legislative Body To Defend State Law Either By Statute Or By Practice In The State's Courts

A. Whether a state legislative body has the authority to represent in court the State's interest in the validity of state law is a question of state law. *See Bethune-Hill*, 139 S. Ct. at 1952 (2019); *Karcher*, 484 U.S. at 82. "[A] State must be able to designate agents to represent it in federal court," which means that the State has the sovereign freedom to designate any "officials to speak" on its behalf. *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013) (citation omitted).

In *Bethune-Hill*, the U.S. Supreme Court identified two state-law avenues through which a State may grant legislative bodies the authority to speak in court on behalf of the State's interest in the validity of state law: *either* (1) through a state statute "authoriz[ing] [a legislature] to litigate on the State's behalf" in defending the State's sovereign interests in court, as a matter of state statutory law, *or* (2) through a record of legislative litigation in defense of state law in state court. *Id.* at 1952. The Court also identified two States that had satisfied each method, in the course of concluding that the Virginia House of Delegates—which

sought to appeal in defense of its laws before the Court—failed to make a showing under either avenue. *See id.* 1949–52.

For the first path—whether a State has granted its legislature statutory authorization—*Bethune-Hill* identified the State of Indiana as having "authorized [its legislature] to litigate on the State's behalf" by state statute. 139 S. Ct. at 1952, citing Indiana Code § 2-3-8-1. That Indiana statute, in full, provides that "[t]he House of Representatives and Senate of the Indiana General Assembly are hereby authorized and empowered to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." Ind. Code § 2-3-8-1. As *Bethune-Hill* explains, such a statute provides a legislature with the necessary state-law authority to litigate in federal court as an agent of the State. The State of Virginia did not adopt any such statute authorizing the Virginia House of Delegates to litigate in defense of state law. *Bethune-Hill*, 139 S. Ct. at 1952.

For the second path—the presence of a practice of the legislature's litigation in defense of state law in state courts—*Bethune-Hill* identified the State of New Jersey, as described in the Supreme Court's prior decision in *Karcher*. *Id.* There, the Court explained that New Jersey had provided its legislature (speaking through its leaders) with the "authority under state law to represent the State's interests" in its "legislative enactment[s]" by virtue of the New Jersey

Supreme Court previously allowing legislative leaders "to intervene" in litigation to defend state law. *Karcher*, 484 U.S. at 81–82. That "record . . . of litigation by state legislative bodies in state court" empowered the New Jersey legislature (through its leaders) to speak for the state in defense of state law in federal court, even in the absence of state statutory authority. *Bethune-Hill*, 139 S. Ct. at 1952 (discussing *Karcher*, 484 U.S. at 82, and noting that the Virginia House of Delegates lacked such a litigation record).

B. Wisconsin Law Authorizes The Legislature To Represent In Court The State's Interest In The Validity Of State Law, And Certainly When No Other State Party Is Defending The Law

1. Explicit Statutory Authority

By enacting Section 803.09(2m), Wisconsin granted the Legislature—as the part of the State that enacts laws—the authority to represent in court the State's interest in defending the validity of the state laws that the Legislature has enacted, as those concepts are used in cases such as *Bethune-Hill* and *Karcher*.

a. The text and context of Section 803.09(2m) expressly authorize the Legislature to speak on behalf of the State's sovereign interests in defense of the validity of the laws that the Legislature has enacted. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 44–46, 271 Wis. 2d 633, 681 N.W.2d 110. Section 803.09(2m) provides that "[w]hen a party to an action challenges in state or federal court the

constitutionality of a statute" or "challenges a statute as violating or preempted by federal law, . . . as part of a claim or affirmative defense, . . . the legislature may intervene as set forth under [Section] 13.365." Wis. Stat. § 803.09(2m). Section 13.365(3), in turn, states that "[t]he joint committee on legislative organization may intervene at any time in the action on behalf of the legislature" and authorizes the Legislature to "obtain legal counsel" other than the Attorney General. Wis. Stat. § 13.365(3). Thus, *whenever* a party "claim[s]" that a statute is invalid or asserts the invalidity of a statute as an "affirmative defense," the State has specifically authorized the Legislature to "intervene" in court and defend the validity of state law. Wis. Stat. § 803.09(2m).

Put another way, Section 803.09(2m) provides the Legislature with the authority to defend the laws it has enacted, in cases where their validity is challenged. *See* Wis. Stat. §§ 803.09(2m), 13.365. That is why this Court explained in its *SEIU* stay decision that "the Legislature . . . and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App. 13.

Statutory context further supports the conclusion that the Legislature has the authority to speak on behalf of the State's sovereign interests in defense of state law. *Kalal*, 2004 WI 58, ¶ 46 ("surrounding or closely-related statutes"). Act 369 created Wis. Stat. § 803.09(2m) with Section 97 and

then—*in the very next Section*—amended Wis. Stat. § 806.04(11) to require *any* party alleging that *any* statute is unconstitutional to "serve . . . a copy of the proceeding" on the Legislature, just as that party must (under pre- and post-Act 369 law) serve the Attorney General. 2017 Act 369 § 98; *see id.* § 97 (creating Section 803.09(2m)). Section 98 then specifically provides that the Legislature may intervene in these constitutional challenges, cross-referencing Section 803.09(2m)'s intervention provision and stating that "[i]f . . . the joint committee on legislative organization intervenes as provided under s. 803.09(2m) . . . [it] shall represent the legislature." Act 369, § 98. If State law did not authorize the Legislature to speak on behalf of the State in its interest in the validity of all state law, then there would be no reason for Section 98 of Act 369 to mandate notice for the Legislature in *all* cases that a party challenges the constitutionality of a state statute. *See Kalal*, 2004 WI 58, ¶ 46.

b. Plaintiffs' contrary arguments to the Seventh Circuit are unpersuasive.

First, Plaintiffs argued that Section 803.09(2m) does not provide the Legislature with the authority to speak on behalf of the State's interests in the validity of its laws because, while the statute does provide for "interven[tion]" "on behalf of the Legislature," it does not use magic words: "intervene on behalf of, and appear for, the State's interest in the validity of state law." *See* Joint Opp'n Of Plaintiffs-

Appellees To The Wis. Legislature's Emergency Pet. For Reh'g En Banc, *DNC*, Nos. 20-2835, 20-2844, Dkt. 62:3, 8–9.

But nothing in Wisconsin law (or *Bethune-Hill* or *Karcher*) requires Plaintiffs' magic-words test to authorize the Legislature, as the part of the State that enacts laws, to speak in court on behalf of the State's interests in the validity of state law. Section 803.09(2m)'s use of "on behalf of the Legislature" refers simply to the part of the State—the Legislature—that is appearing in court, in the relevant set of cases: "[w]hen a party to an action challenges in state or federal court the constitutionality of a statute" or "challenges a statute as violating or preempted by federal law, . . . as part of a claim or affirmative defense, . . . the legislature may intervene as set forth under [Section] 13.365." Wis. Stat. § 803.09(2m). When the Legislature enters such an appearance, and defends state law, it is—as part of the sovereign State of Wisconsin—appearing in court on behalf of the State's interest in the validity of its laws. This is especially obvious in a case, such as the present one, where no other sovereign entity is defending state law. In such a case, the Legislature is the *only* sovereign entity that is representing the State's interest in the validity of state laws.

Notably, Section 165.25(6) of the Wisconsin Statutes, which governs the Attorney General's powers to represent state entities in defense-side cases, parallels the structure of Section 803.09(2m). Section 165.25(6), similar to Section 803.09(2m), simply provides that the Attorney General may

represent "any state department, or any state officer, employee, or agent," upon proper request. Wis. Stat. § 165.25(6). That is, Section 165.25(6) identifies *which* state officials and entities the Attorney General may appear in court for—and thus which state entities will appear on the briefs—without using Plaintiffs' magic-words of "appear on behalf of the State's interest in the validity of state law." *See id.* Yet, no one would dispute that *every time* the Attorney General takes on the representation of state entities, under Section 165.25(6), in a case where the constitutionality of state law is challenged—*and actually defends the statute being challenged*—he is representing not just these named defendants, but the State's interest in the validity of state law as well. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018) (Attorney General representing members of the Wisconsin Elections Commission and defending state law); *see also Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1053 (7th Cir. 2018) (Attorney General representing Secretary of Department of Agriculture, Trade and Consumer Protection and defending state law).

This analysis is also consistent with the U.S. Supreme Court's decisions in *Karcher* and *Bethune-Hill*. In *Karcher*, the Supreme Court explained that the New Jersey Supreme Court "granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment," that established the state-law point

that the "New Jersey Legislature had authority under state law to represent the State's interests" in the validity of New Jersey laws. *Karcher*, 484 U.S. at 82. New Jersey common law did not use Plaintiffs' proposed magic-word template to convey these authorities on its legislature. Similarly, in *Bethune-Hill*, the Supreme Court identified the following statute as sufficient to confer standing on the Indiana legislature to defend state law: "[t]he House of Representatives and Senate of the Indiana General Assembly are hereby authorized and empowered to employ attorneys other than the Attorney General to defend any law enacted creating legislative or congressional districts for the State of Indiana." Ind. Code § 2-3-8-1; *Bethune-Hill*, 139 S. Ct. at 1952 (citation omitted). Under the last-antecedent statutory canon, the phrase "for the State of Indiana" most naturally refers to the phrase "legislative or congressional districts," not "[t]he House of Representatives and Senate of the Indiana General Assembly." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 144–46 (2012). Indiana law did not use Plaintiffs' magic-words formulation, but the Supreme Court nevertheless identified that statute as sufficient to confer standing on the state legislature to defend state law.

Second, Plaintiffs argue that this Court's decision in *SEIU* supports their reading of Section 803.06(2m). Joint Opp'n Of Plaintiffs-Appellees, Nos. 20-2835, 20-2844, Dkt. 62:3. This is plainly wrong, first of all, because—as

described below—this Court in *SEIU* allowed the Legislature to appeal in a case impacting a variety of state laws, where the Legislature was the *only* appellant. *Infra* Part I.B.2. Further, *SEIU* specifically limited its relevant analysis to *upholding* the facial validity of most of the laws challenged there, including Section 803.06(2m). *SEIU*, 2020 WI 67, ¶¶ 72–73. This Court only briefly mentioned the Legislature's constitutional interest in validity-of-state-law cases as a potentially valid basis for legislative intervention, "[i]n at least in some cases," without purporting to spell out the full permissible scope of legislative intervention authority (which was all that was needed, given the facial-challenge posture of that case). *See id.* Regardless, *SEIU*'s language supports the Legislature's interpretation of Section 803.06(2m). This Court explained that Section 803.06(2m) allows "the legislature [to] participate in carrying out the executive branch functions previously assigned to the attorney general," *id.* ¶ 62, and described those functions as "to *represent the State* in litigation," *id.* ¶ 50 (emphasis added), and "to litigate *on behalf of the State*," *id.* ¶ 63 (emphasis added).

2. This Court's Practice

This Court's well-established practice of permitting the Legislature, its leaders and its committees to appear on "behalf of the legislature in defense of a legislative enactment" provides an *independently sufficient* basis to recognize the

Legislature's "authority under state law to represent the State's interests" in the validity of state law, even beyond Section 803.06(2m). *Karcher*, 484 U.S. at 81–82; *accord Bethune-Hill*, 139 S. Ct. at 1952.

This Court has regularly permitted the Legislature, its leaders, and its committees, to appear on "behalf of the legislature in defense of a legislative enactment." *Karcher*, 484 U.S. at 82. Examples abound. *See, e.g.*, *LWV*, 2019 WI 75; *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 695, 478 N.W.2d 582 (1992); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964).

This Court's recent decision in *SEIU* confirmed the Legislature's authority to represent in court the State's interest in the validity of the laws it enacts, without needing to further inquire into the specific nature of the law at issue, especially when no other state party was defending that law. The plaintiffs in *SEIU*, with the support of the Governor and the Attorney General, moved in the circuit court for a temporary injunction against Acts 369 and 370, and the circuit court temporarily enjoined many provisions of those Acts. *SEIU*, 2020 WI 67, ¶¶ 5, 16, 18, 20. For his part, the Attorney General abandoned defense of those laws, even ones not related to his own authority. In response, Legislative

Defendants—and *only* Legislative Defendants—"sought appellate review" of the circuit court's temporary-injunction order, which this Court reviewed on its merits and in full. *Id.* ¶¶ 8–14, 21; *LWV*, 2019 WI 75, ¶¶ 1 & n.1, 11–12, 42 (same).

This Court upheld the facial constitutionality of multiple provisions of Acts 369 and 370, without an inquiry into whether the laws at issue impacted special institutional powers of the legislature beyond the interest of enacting legislation. For example, this Court upheld Sections 65–71 of Act 369, which "make guidance documents reviewable by the courts in the same fashion as administrative rules." *SEIU*, 2020 WI 67, ¶ 111 (op. of Kelly, J.). And the Court upheld Section 35 of Act 369, which codified *Tetra Tech EC, Inc. v. Wisconsin DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, by "instructing agencies not to ask for [ ] deference" in "any proceeding," *SEIU*, 2020 WI 67, ¶ 84. Neither the judicial-review-of-guidance-documents provisions nor the *Tetra Tech* provision impacts the Legislature's distinct prerogatives beyond the enactment of generally applicable laws. Indeed, each of those provisions adjust the power between *the other two branches*, by subjecting more executive action to searching judicial review. Nevertheless, this Court still considered and rejected the facial constitutional challenges that plaintiffs presented, in a case where the Legislature alone was defending those laws. Presumably, if the Legislature did not have standing to speak on behalf of the State's interest in the validity of these laws, then this Court

would have dismissed Legislative Defendants' appeal as to these provisions. *See, e.g.*, *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 1, 53–54, 232 Wis. 2d 612, 605 N.W.2d 526; *accord SEIU*, 2020 WI 67, ¶ 18 n.5.

Finally, *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020)—which arose in the context of the Governor attempting to evade state election laws—further recognizes the Legislature's authority to represent the State's interests in the validity of state law, including election laws. There, this Court considered an original action brought *solely* by the Legislature against the Governor, challenging the Governor's order that "suspend[ed] or rewr[ote] numerous election-related statutes, including mandatory election dates, election procedures, and terms of office for local officials." App. 61–62. After this Court concluded that the Governor does not have "the authority to suspend or rewrite state election laws," it enjoined the Governor's order, thereby preventing his "unilateral[ ]," unauthorized "suspending and rewriting" of the State's election laws. App. 63–64. This Court could not have reached this disposition if the Legislature did not have the authority to represent the State's interests in the validity of state laws, including its election laws.

II. The Legislature's Position Here Is Essential To *Safeguarding* The Separation Of Powers

A. There Is No Separation-Of-Powers Violation When The Legislature Defends A State Law, Especially When No Other Sovereign Party Is Defending That Law

"A separation-of-powers analysis ordinarily begins by determining if the power is core or shared": Core powers are those that belong "to a single branch" of government, while shared powers lie in the constitutional "borderlands"—exercisable by two branches of government so long as one does not "unduly burden or substantially interfere with" another. *SEIU*, 2020 WI 67, ¶ 35 (citation omitted). The shared-powers analysis looks to "actual and substantial encroachments," which prohibit the "practical sharing" of powers. *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis. 2d 69, 104, 336 N.W.2d 679 (Ct. App. 1983). This Court applies the separation-of-powers doctrine liberally for shared powers, because the Constitution "envisions a government of separated branches sharing certain powers." *State v. Holmes*, 106 Wis. 2d 31, 43, 315 N.W.2d 703 (1982) (citations omitted).

In *SEIU*, this Court held that "representing the State in litigation . . . is within those borderlands of shared power" between the Legislature and the Executive, for at least some categories of cases. 2020 WI 67, ¶ 63. And the Court recognized that cases implicating the State's interest in the validity of its laws fall "within the zone of shared powers" of

the Legislature, because those cases also implicate the Legislature's core interests. *Id.* ¶¶ 63, 67.

The Legislature—the body that enacts laws, *see* Wis. Const. art. IV, § 1; *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998)—has a core interest in having its laws surviving judicial invalidation. That is why this Court explained that both "the Legislature . . . and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App. 13.

Analogously, if one of this Court's rules were threatened with invalidation in federal court, *see, e.g.*, *File v. Kastner*, No. 2:19-cv-01063, __ F. Supp. __, 2020 WL 3513530 (E.D. Wis. June 29, 2020), *appeal docketed*, No. 20-2387 (7th Cir. July 28, 2020), this Court would suffer similar sovereign harm from such an invalidation. This Court would, of course, be permitted to litigate in the State's sovereign interest in defense of such a rule against a federal lawsuit, especially if the Attorney General declined to defend that rule.

Permitting the Legislature to vindicate the interest in the validity of state law, on behalf of the State's sovereign interests, does not "unduly burden" or "substantially interfere" with the Attorney General's powers, *especially in a case—like this one—where the Attorney General has withdrawn. SEIU*, 2020 WI 67, ¶ 35. If the Attorney General is not defending a state law, it imposes no burden on his office

whatsoever for the Legislature to defend that law. Indeed, in *SEIU*, the Attorney General expressly *conceded* that the Legislature may constitutionally intervene to defend state laws when "the state's attorney general declines to do so." AG Resp. Br., *SEIU*, Nos. 2019AP614-LV, -622, 2019 WL 4645564, at *40 (Wis. Sept. 17, 2019) (citing *Hollingsworth v. Perry*, 570 U.S. 693 (2013)).

Beyond the Legislature's interest in defending state law when the Attorney General will not, the Legislature's authority to represent the State's interest in the validity of its laws allows it to vindicate the Legislature's interest in the public fisc. *SEIU*, 2020 WI 67, ¶¶ 68–71. Virtually all cases challenging the validity of state law in federal court place the "spending [of] state money" directly "at issue," *id.*, at ¶ 71, under the federal fee-shifting provisions that provide for recovery of attorneys' fees and costs by prevailing parties, *see* 28 U.S.C. § 1920; 42 U.S.C. § 1988(b); Fed. R. Civ. P. 54(d).

In this case, one set of plaintiffs that decided not to renew claims for the November Election has moved for $324,552 in attorneys' fees and costs for litigation about the April Election. *Democratic Nat'l Comm.*, Nos. 20-cv-249, *et al.*, Dkts. 205, 239 (W.D. Wis. May 21, 2020), Dkt. 239 (July 2, 2020). Under state law, those fees and costs can only be paid out of the public fisc. Wis. Const. art. VIII § 2; *see SEIU*, 2020 WI 67, ¶ 68. When the current election litigation finally ends, Plaintiffs will very likely seek to recover more than $1 million in attorneys' fees and costs as claimed prevailing

parties, *assuming that the Legislature is prohibited from overturning the district court's preliminary injunction on appeal.* The Legislature's intervention in defense of state law—and to stave off such enormous public costs, by winning on appeal—only further demonstrates that the Legislature intervening to defend the State's interest in the validity of state laws is a "constitutional application[ ]" of its intervention authority. *SEIU*, 2020 WI 67, ¶ 72.

Finally, although this case does not raise this question and this Court need not reach it, the Legislature's intervention would not "unduly burden" or "substantially interfere" with the Attorney General, even if he were vigorously defending state law in a case. *SEIU*, 2020 WI 67, ¶ 35. When the Legislature appears in defense of state law, this appearance does not force the Attorney General to withdraw. Instead, *both* the Legislature and the Attorney General will defend the law, which allows the Attorney General to continue fulfilling the duties of his Office without *any* "interfere[nce]." *SEIU*, 2020 WI 67, ¶ 35. In such a situation, the Attorney General retains his authority to determine whether and when to file dispositive motions, which arguments to raise, how to present evidence and examine witness, and so on. Given the independence that the Attorney General would retain in such a case, there could be no "actual" or "practical" burden here—the concerns of the shared-powers analysis. *Ahern*, 114 Wis. 2d at 104.

B. Plaintiffs' Contrary Position Would Lead To A Separation-Of-Powers Calamity

If Plaintiffs prevail on the Certified Question, this would create a separation-of-powers calamity for our State, especially in cases—such as the present one—where the Attorney General is not defending the state law.

First, the underlying consolidated federal cases here are the most immediate example of the grave harm that Plaintiffs' position will inflict. The district court entered a variety of unjustified injunctive relief against a variety of Wisconsin election laws, including extending the ballot-receipt deadline for the November 2020 Election by six days. *See supra* p. 9. Under Plaintiffs' view, *no one can challenge this significant injunction on appeal.* According to Plaintiffs, the Legislature cannot appeal this injunction. The Attorney General withdrew long ago. And the Commission has (correctly) made clear that it (1) "ha[s] no authority to . . . oppose the injunctive relief requested" in any of these cases, and (2) has "no authority to appeal any such decision" if a court imposes injunctive relief, because it is no longer represented by the Attorney General. App. 23–24 (capitalization altered). That means that if Plaintiffs prevail on the Certified Question, the district court's injunction will block multiple Wisconsin laws, without *any* Seventh Circuit or U.S. Supreme Court review.

Second, Plaintiffs' position, if accepted by this Court, could well lead to chaos throughout the November 2020

Election, without any opportunity for Seventh Circuit or U.S. Supreme Court review. This year alone has seen multiple challenges to Wisconsin's election laws, including a federal lawsuit seeking to delay the election *the night before the April Election*. *See Taylor v. Milwaukee Election Comm'n*, 452 F. Supp. 3d 818, 819–820 (E.D. Wis. 2020) (request to enjoin election the day before the April Election); *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 961 (W.D. Wis. 2020) (granting injunctive relief five days before the April Election in three consolidated cases). Given Wisconsin's swing-state status, Plaintiffs could seek to have the district court significantly impact the November 2020 Presidential Election by ordering a recount, a revote, post-election-day voting, or any other extraordinary relief. Under Plaintiffs' view, the Seventh Circuit and the U.S. Supreme Court would be powerless even to review such Nation-altering orders because the Legislature could not appeal, the Attorney General is refusing to represent the Commission, and the Commission has admitted that it has no power to appeal.

Third and finally, moving beyond election law, Plaintiffs' theory would give the Attorney General an effective veto authority over *any* state law challenged in court, since the Legislature would have no power to appeal any adverse judgment on the law's constitutionality. So, as long as litigants keep filing lawsuits challenging state laws that the Attorney General may oppose, the Attorney General could

nullify those laws simply by refusing to defend the laws in court and allowing courts to enjoin them.

Notably, the Attorney General has been the only appellant in many critical cases protecting Wisconsin laws in federal court in recent years, and it takes little imagination to anticipate how such cases would come out in the future, in areas where the current Attorney General may disagree with the laws that the Legislature has enacted. *See, e.g.*, *Loertscher v. Anderson*, 893 F.3d 386, 387 (7th Cir. 2018) (Attorney General alone appealing invalidation of law designed to address the effects of prenatal substance abuse); *Int'l Ass'n of Machinists v. Allen*, 904 F.3d 490 (7th Cir. 2018) (Attorney General alone appealing invalidation of portion of Wisconsin's 2015 Act 1); *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (Attorney General alone appealing invalidation of, among other provisions, portions of Act 10 limiting collective bargaining). Indeed, the current Attorney General has already conceded away the validity of one law that he opposes, where the Legislature had not intervened to defend the law. *See Allen v. Int'l Ass'n of Machinists*, No. 18-855 (S. Ct. Apr. 19, 2019) (voluntarily withdrawing pending petition for certiorari defending this law before the U.S. Supreme Court, thereby unilaterally conceding the law's unconstitutionality before U.S. Supreme Court had opportunity to review).

CONCLUSION

This Court should hold that the Legislature has the authority under state law to represent in court the State of Wisconsin's interest in the validity of state laws, especially when no other sovereign party is defending the law.

Dated: October 5, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,076 words.

Dated: October 5, 2020.

MISHA TSEYTLIN

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12), AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12), to the extent not superseded by this Court's October 2, 2020 Order.

I further certify that:

I have submitted an electronic copy of this brief to the Clerk of this Court via email, and to all parties, per this Court's October 2, 2020 Order.

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: October 5, 2020.

MISHA TSEYTLIN