Appeal No. 20-AP-1634-CQ

**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*,

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

# NON-PARTY BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) LOCAL 1 & SEIU HEALTHCARE WISCONSIN AS *AMICI CURIAE*

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## INTRODUCTION

The Legislature's expansive view of its own authority in this matter turns on a remarkable proposition: that this Court in *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 (*Vos*), broadly empowered the Legislature "to speak on behalf of the State's sovereign interest in the validity of state law" by exercising freewheeling litigation authority "as an agent of the State." The Legislature points to no language in *Vos* that actually suggests such a thing—because there is none.

Sections 13.365 and 803.09(2m) were saved from facial unconstitutionality in *Vos*, 2020 WI 67, because in limited circumstances the Legislature may have a specific, institutional interest distinct from the other branches that makes it an appropriate party to litigation. *Id.* ¶ 71. To give these sections the broad interpretation the Legislature now seeks would be to

throw all of *Vos's* careful, limiting principles out the window and to re-ignite the clash between that provision and separation of powers.

The Legislature's proposed interpretation of sections 13.365(3) and 803.09(2m) is contrary not only to *Vos* but also to basic democratic governance. Extreme partisan gerrymandering has produced a Wisconsin State Assembly dominated by the state's minority party and untethered from accountability to the people (who mostly voted against them). Now, that same Assembly has joined with the State Senate here in an effort to extend the Legislature's control beyond the legislative prerogative into the gerrymander-resistant executive—all in an effort to limit voting opportunities and thereby enhance these legislators' own reelection chances. James Madison could hardly have imagined a better cautionary tale when he warned of "the very definition of tyranny." The

Federalist No. 47 at 300 (Madison) (Henry Cabot Lodge ed., 1888).

## ARGUMENT

### I. THE LEGISLATURE HAS NO AUTHORITY TO REPRESENT THE INTERESTS OF THE STATE IN LITIGATION.

There can be no serious argument that the *Vos* decision did what the Legislature claims, i.e., announce a rule that "the Legislature has standing to speak on behalf of the State's sovereign interest in the validity of state law and to litigate in defense of state law, as an agent of the State." On the contrary, this Court made clear in *Vos*, 2020 WI 67 that "representing the State in litigation is predominantly an executive function." *Id*. ¶ 63. Put another way: The Legislature "is not the state's litigator-in-chief or even the representative of the people at large" but is instead "a constitutional creation having a significant, but limited, role in governance—the enactment of laws."

*Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 235, 391 Wis.2d 497, 942 N.W.2d 900 (*Palm*) (Hagedorn, J., dissenting).

One can imagine exceptions to the predominant rule that litigation is an executive function, and it is the prospect of those exceptions that saved §803.09(2m) from facial unconstitutionality. But such circumstances are *exceptions*, not the rule. They principally involve "cases that implicate an institutional interest of the legislature," and *Vos*, 2020 WI 67 makes clear that the "appropriate institutional interest[s]" sufficient to transform litigating authority from an exclusively executive function into one "within th[e] borderlands" of shared power amount to a narrow set. *Id*. ¶¶ 64, 72.

*Vos* itself identifies only two examples. *Id*. ¶ 64. The first is the Legislature's interest in "defend[ing] a legislative official, employee, or body." *Id*. ¶ 66. The

second interest is implicated "where litigation involves requests for the state to pay money to another party." *Id.* ¶ 69. Both interests are grounded in the Constitution's text, in powers specifically allocated to the Legislative Branch.

Of course, neither interest is even remotely implicated here. The Legislature does not seek to have the attorney general represent it "in any court or before any officer"; it seeks instead to represent itself. Nor does this matter involve state payments to a third party. And nowhere does *Vos* suggest that the Legislature has some other, broad authority to vindicate the State's interest in defending state law as a general matter. *See Palm*, 2020 WI 42, ¶ 69 (Hagedorn, J., dissenting) ("While we have allowed the legislature to litigate and sue the governor and other executive branch officials in limited situations, that is

not a blanket invitation to the legislature to litigate every challenge to executive action.").

Since Wisconsin's founding, the Legislature's role in litigation has been limited. *Vos* reiterated and reinforced those limits; it did not destroy them.

## II. THE LEGISLATURE'S POSITION IS A THREAT TO DEMOCRATIC GOVERNANCE.

A decision authorizing the Legislature to, in its own words, "speak on behalf of the State's sovereign interest," would make this Court complicit in a profoundly anti-democratic takeover of Wisconsin government. As a result of extreme partisan gerrymandering, the State's Assembly has endured years of deeply-entrenched minority rule. As a result, the Legislature's effort here to usurp the power to represent the "State's sovereign interest" is not designed in any way to vindicate the people of Wisconsin's interests. It is, instead, designed

specifically to thwart those interests in favor of the legislators' own.

This type of explicitly anti-democratic effort is exactly what the separation-of-powers principles are designed to prevent. Because overreaching legislatures were the Framers' gravest concern, they warned that safeguarding liberty requires that legislators "exercise no executive prerogative." The Federalist No. 47. And, in the past, where this warning has been ignored, civil unrest has closely followed.

**A.** The extreme gerrymander that currently controls Wisconsin is no secret. In 2018, Democrats won 53% of the vote, 205,000 more votes than Republicans, but only 36% of the Assembly seats. *See* Phillip Bump, *The Several Layers of Republican Power-Grabbing in Wisconsin*, Washington Post (December 4, 2018). That is only the most recent example. As one former Republican state senator (who

voted for the original gerrymander plan in 2011) put it, "When you talk to people about our government, the thing they tell you is it's rigged."

There is truth to that. As the U.S. Supreme Court has recognized, "partisan gerrymanders," are "incompatible with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015) (internal alterations omitted). As a result of Wisconsin's gerrymander, the Wisconsin Assembly is fundamentally unrepresentative of—and unresponsive to—the people. That is because extreme partisan manipulation of the redistricting process effectively insulates a political party from any realistic attempt by the populace to unseat it, meaning that political control is determined by the mapmakers, not the voters. *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest*

*Round of Congressional Redistricting*, 2 Elec. L. J. 179, 202 (2003). This allows Wisconsin legislators in safe seats to ignore communications from voters of the opposite party: In the words of Wisconsin's former Republican Senate Majority Leader, "partisan gerrymandering dilutes democracy by taking away a voter's ability to voice their particular beliefs to legislators who will acknowledge them." Br. for *Amici Curiae* Bipartisan Grp. of 65 Current and Former State Legislators, *Gill v. Whitford*, 2017 WL 4311096, at *20 (U.S. 2017).

And in Wisconsin, gerrymandering has produced not just minority rule, but extreme minority rule. Because legislators' seats are often safe from the opposing party, the primaries—which typically have low voter turnout—decide the election. To win, therefore, legislators have to appeal to the extreme edge of their party. See *Vieth v. Jubelirer*, 541 U.S.

267, 288 n.9 (2004) (plurality opinion) (noting that Democrats or Republicans elected due to the practice are not "wishy-washy" moderates, but rather "hardcore" ideologues who render the Legislature non-responsive to voters' wishes). Just by drawing clever lines, without persuading a single voter, a party can thus pull policy outcomes toward its preferred pole. *See* Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Elec. L. J. 453 (2017), *available at* https://bit.ly/36xMNIH. Here, those outcomes are baked into the state electoral maps—the 2011 Legislature constructed its redistricting plan to be nearly impossible to undo.

**B.** Allowing these anti-democratic features to win out here will not only threaten the very fabric of Wisconsin's democracy but also sow chaos and exacerbate the protests and violence already gripping the state. *See Palm*, 2020 WI 42, ¶ 241 (Hagedorn, J.,

dissenting) (describing the consequences of unchecked overreach as not just "protest and argument" but "sometimes civil disobedience" and, in "extraordinary situations, even revolution"). Consider the underlying issues in this case: The Legislature seeks an unprecedented rule authorizing it to intervene in litigation for the specific purpose of making it even harder for voters to implement their will, by making it more difficult to vote in a pandemic.

Even more worrisome: The entrenchment of minority rule has historically often led to violence because people who see no prospect for representative government through voting turn to other means. Wisconsin has, in fact, already begun to experience unrest. *See, e.g.*, Natalie Brophy, *Stand Up for Fair Maps Protest Against Gerrymandering Planned in Downtown Appleton Thursday, Appleton Post-Crescent* (July 8, 2020)(reporting on a gerrymander protest this

past summer). Further empowering the minority-controlled Legislature, particularly in ways that will allow it to more deeply entrench its rule, would only exacerbate the chaos. *See*, e.g., Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 Colum. L. Rev. 1751, 1778–79 (1994) (noting that, "[w]hile many factors may cause unrest, certainly one of the most prevalent is distrust of the government's willingness to listen to the dissidents' voices and respect their interests"); Jason Marisam, *Voter Turnout: From Cost to Cooperation*, 21 St. Thomas L. Rev. 190, 195 (2009) (explaining that "[i]t should not come as a surprise that the framers intended the political process to be inclusive enough that grievances would be worked out without subsequent violent revolutions" but warning that, if "change does not occur democratically, then the potential for civil unrest increases vastly").

In a democratic system of government, stability, in short, "depends first on an effective means of exerting political pressure" and, "[w]here that proves insufficient, a means of redress through legal action." Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 Hamline J. Pub. L. & Pol'y 255, 319 (2002). A collapse of either of these two channels—or both, as the Legislature seeks here—undermines "the smooth working of democracy" and accelerates "the temptation to resort to violence and terrorism to draw attention to deeply felt grievances." *Id*.

## III. THE LEGISLATURE IS NOT WITHOUT RECOURSE.

The Legislature no doubt believes strongly that it has an interest in defending the laws it enacts. But an "interest" is not the same as a constitutional power

to act, and the Wisconsin Constitution provides the Legislature with only the power to make laws, not the power to enforce them. *See, e.g., J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis.2d 69, 102, 336 N.W.2d 679, 694–95 (1983) ("The legislative branch has the broad objective of determining policies and programs and review of program performance for programs previously authorized, the Executive Branch carries out the programs and policies . . . .").

That is not to say, however, that the Legislature is without recourse to protects its interests. The Legislature may, and often does, appear *as itself* to speak as the body that passed a given statute. It may also, in a given case, always move to intervene under the standards that have always applied and, if not successful, participate as amicus. *See* Patrick Marley, *GOP Legislators Seek to Intervene in More Lawsuits at Taxpayer Expense—This Time over Environmental*

*Laws*, Milwaukee J. Sentinel (Apr. 25, 2019); see *State v. Gudenschwager*, 191 Wis.2d 431, 442, 529 N.W. 2d 225 (1995) (requiring courts to consider both "the likelihood" of the purported irreparable injury's occurrence "and the proof provided by the movant" of that likelihood when deciding the irreparable-injury factor). What it seeks to do here, though, is forbidden; the Legislature has no authority to intervene *as the State* because that power is reserved exclusively to a different branch of government.

## CONCLUSION

Consistent with this Court's holding in *Vos*, and answering the certified question in the negative, the Court should hold that the Legislature does not have the authority under Wis. Stat. § 803.09(2m) to represent the State's interest in the validity of state laws.

Dated this 5th day of October 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) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,090 words.

Dated this 5th day of October 2020.

Kyle A. McCoy

**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

I will submit an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the court.

Dated this 5th day of October 2020.

Kyle A. McCoy