# Supreme Court of Wisconsin

Appeal No. 2020AP001634 - CQ

DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC PARTY OF WISCONSIN, SYLVIA GEAR, CHRYSTAL EDWARDS and JILL SWENSON,

*Plaintiffs-Appellees*,

*v.*

MARGE BOSTLEMANN, 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*.

Certified Question in the Wisconsin Supreme Court

**PLAINTIFFS-APPELLEES DEMOCRATIC NATIONAL COMMITTEE'S AND DEMOCRATIC PARTY OF WISCONSIN'S BRIEF ON THE CERTIFIED QUESTION FROM THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## STATEMENT OF THE ISSUE PRESENTED

At the request of the United States Court of Appeals for the Seventh Circuit, this Court has granted certification of the following question: "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."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has ordered the matter will be decided based on the written briefs of the parties without oral argument. The Court's opinion should be published because the certified question raises important questions of Wisconsin statutory and constitutional law, in particular, separation-of-powers issues under Wisconsin's Constitution.

## STATEMENT OF THE CASE

The certified question comes to this Court in the context of an appeal of a federal district court's ruling in four consolidated cases filed last March, April, and May, examining the federal constitutional implications of the application of several provisions of Wisconsin's election laws during the current global pandemic. That consolidated litigation, pending in the United States District Court for the Western District of Wisconsin, and currently on appeal to the United States Court of Appeals for the Seventh

Circuit, involves 31 plaintiffs, all of whom have litigated the issues presented here together in the Seventh Circuit.

In the early weeks of the COVID-19 emergency, the federal district court issued an order (in an earlier iteration of two of these consolidated cases) that the Wisconsin election administrators must accept mail-in absentee ballots received within six days of the April 2020 election. *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 983 (W.D. Wis. 2020). In doing so, the court relied on the Wisconsin Elections Commission ("WEC") filing asserting that the bipartisan Commission found a six-day extension of the ballot-receipt deadline would be acceptable. *Id*. at 976. The Seventh Circuit and the United States Supreme Court affirmed that order, holding hours before Wisconsin's spring election that, "in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8 p.m." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020) ("*RNC*"). The WEC later determined that this six-day extension of the ballot-receipt deadline prevented the disqualification of nearly 80,000 valid absentee ballots that

voters timely returned by mail on or before election day but that were not received by municipal clerks until after. App. 23.

On September 21, the federal district court (Conley, J.) adopted this identical six-day extension again with respect to the fast-approaching November 3 general election, together with additional targeted relief, narrowly crafted after extensive briefing and an evidentiary hearing, designed to ensure that registered Wisconsin voters are not disenfranchised by the exceptional, if not unprecedented, circumstances they face. App. 74. The district court found there is an even more urgent need for this extension now than in April because of: (1) the explosive surge in COVID-19 cases in Wisconsin in recent weeks; (2) the "unprecedented number" of expected absentee ballots, which will "overwhelm the WEC and local election officials"; and (3) deteriorating USPS service and growing delays in mail delivery. App. 9, 26-30, 53-57.[1] The pandemic's impacts in Wisconsin

[1] The district court emphasized at the outset of its September 21 decision: "Let me stress … the limited relief awarded today is without regard to (or even knowledge of) who may be helped, except the average Wisconsin voter, be they party-affiliated or independent. Having grown up in Northern Wisconsin with friends across the political spectrum (and in some cases back again), my only interest, as it should be for all citizens, is ensuring a fair election by giving the overtaxed, small WEC staff and local election officials what flexibility the law allows to vindicate the right to vote during a pandemic." App. 10-11 n.2.

have grown far greater and spread more geographically throughout the state since the district court's decision two weeks ago, with even rural counties such as Forest, Iron, Kewaunee, Waupaca and others experiencing higher new case rates than counties with larger urban areas.[2] The State is now reportedly "one of the nation's coronavirus hotspots, with the recent explosion of cases alarming health officials and straining hospitals in the Fox River, Green Bay, and Wausau."[3] Wisconsin had the third highest number of new cases in the country over the past week and recorded its highest single-day death toll from the virus five days ago.[4]

The Legislature has participated in the federal litigation from the outset. The district court denied the Legislature's motions to intervene in the early days of the litigation but encouraged the Legislature's active *amicus* participation; the Seventh Circuit ordered several days before the

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[2] Wis. Dep't of Health Servs., COVID-19: County Data https://www.dhs.wisconsin.gov/covid-19/county.htm#rate%20map (last visited Oct. 5, 2020).

[3] Mary Spicuzza & Sophie Carson, *Wisconsin reports more than 2,700 new coronavirus cases as outbreak continues to rank among nation's worst*, Milwaukee Journal Sentinel (Oct. 2, 2020), https://www.jsonline.com/story/news/2020/10/02/wisconsin-coronavirus-spike-continues-2-700-new-cases-friday/3591450001.

[4] Erin Ailworth, *Wisconsin Struggles to Explain Sudden Covid-19 Spike*, WALL STREET JOURNAL (Oct. 3, 2020), https://www.wsj.com/articles/wisconsin-struggles-to-explain-sudden-covid-19-spike-11601730000?mg=prod/com-wsj.

April 7 election that the Legislature be granted intervention. *See Democratic National Committee v. Bostelmann*, Nos. 20-1538 and 20-1539, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020) ("*Bostelmann*"), *stayed in part by RNC*. The Legislature thereafter participated in the district court litigation as an intervening defendant, together with the Republican National Committee ("RNC") and the Republican Party of Wisconsin ("RPW"). The original defendants in the federal litigation—the WEC Commissioners and Administrator, all sued in their official capacities—elected not to appeal from the tailored relief granted in the district court's September 21 injunction. The three intervening defendants all appealed to the Seventh Circuit and moved to stay the district court's injunction.

The Seventh Circuit immediately spotted a federal standing issue, directing the parties to brief whether the intervenor-defendants have standing to appeal under Article III of the United States Constitution, in addition to briefing the merits.

The Seventh Circuit panel (Easterbrook, Rovner, and St. Eve, JJ) declined to address the merits of the district court's injunction, instead denying the intervening defendants' stay motions "because none of the three appellants has a legal interest in the outcome of this litigation." App.

3. With respect to the Legislature, the *per curiam* decision explained in relevant part:

> *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), shows that a state legislature may litigate in federal court, consistent with Article III of the Constitution, when it seeks to vindicate a uniquely legislative interest. See also, e.g., *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 797–98 (7th Cir. 2019). The interest at stake here, however, is not the power to legislate but the validity of rules established by legislation. All of the legislators' votes were counted; all of the statutes they passed appear in the state's code. Constitutional validity of a law does not concern any legislative interest, which is why the Supreme Court held in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), that a state legislature is not entitled to litigate in federal court about the validity of a state statute, even when that statute concerns the apportionment of legislative districts. "This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." *Id*. at 1953. State legislatures must leave to the executive officials of the state, such as a governor or attorney general, the vindication of the state's interest in the validity of enacted legislation.

App. 4-5. The Seventh Circuit's decision that the Legislature lacks sufficient legal interest to appeal the district court's order turns in significant part on this Court's recent decision in *Service Employees International Union Local 1 v. Vos,* 2020 WI 67 (July 9, 2020) ("*SEIU*"), which assessed the constitutionality Wis. Stat. § 803.09(2m).[5]

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[5] Section 803.09(2m) provides in relevant part: "When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the

The Seventh Circuit acknowledged that, "[i]n an earlier stage of this litigation, we concluded that § 803.09(2m) permits the legislature to act as a representative of the state itself, with the same rights as the Attorney General of Wisconsin." App. 5 (citing *Bostelmann*, 2020 WL 3619499). However, the panel explained, this Court's *SEIU* decision constitutes "intervening authority" requiring a new analysis and outcome (at 4-5):

> Three months after we concluded that § 803.09(2m) permits the legislature to represent the state, the Supreme Court of Wisconsin held that this statute, if taken as broadly as its language implies, violates the state's constitution, which commits to the executive branch of government the protection of the state's interest in litigation. [*Vos,* 2020 WI 67, ¶¶50-73.] Capacity to sue or be sued is a matter of state law, see Fed. R. Civ. P. 17(b)(3); *Bethune-Hill*, 139 S. Ct. at 1952, so a holding that, as a matter of Wisconsin law, the legislature cannot represent the state's interest, controls in federal court too. Under *Vos* the legislature may represent *its own* interest, *see* ¶¶ 63-72, which puts Wisconsin in agreement with federal decisions such as *Arizona Independent Redistricting Commission*, but that proviso does not allow the legislature to represent a general state interest in the validity of enacted legislation. That power belongs to Wisconsin's executive branch under the holding of *Vos*.

The Court concluded that, per *SEIU,* the Legislature "is not entitled to represent Wisconsin's interests as a polity" on an appeal from a federal district court ruling. App. 6. After a flurry of additional motions and other filings, the Seventh Circuit on Friday, October 2 "decided that it would be

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assembly, the senate, and the legislature may intervene . . . at any time in the action as a matter of right by serving a motion upon the parties."

appropriate" for this Court to "resolve" the certified question and this Court granted certification later that day. App. 1.

## ARGUMENT

The answer to the certified question is clear: the State Legislature does not have the authority to represent the State of Wisconsin's interest in the validity of state laws.

As the Seventh Circuit panel recognized, the separation-of-powers principles relied on by this Court in *SEIU* permit the Legislature to intervene and prosecute cases *only* when specific "institutional interests of the legislature" are at stake. 2020 WI 67, ¶¶68-72. Here, the Legislature concedes that it has not intervened or appealed in the federal litigation to protect any legislature-specific interests, such as the Legislature's power to litigate (at issue in *SEIU*) or the spending power (highlighted in *SEIU* as a classic interest of the Legislature as legislature). Rather, it expressly told the Seventh Circuit in April that it sought intervention to "speak for the State" and to "vigorously defend the constitutionality" of the election statutes at issue "*on behalf of the State's interest.*" App. 81, 94, 95. *SEIU* makes clear that this is precisely what the Legislature may not do.

At bottom, therefore, the Legislature's effort in the Seventh Circuit, and now in this Court, is really an attempt to have this Court reconsider its holding in *SEIU* for the purpose of applying a rule that is contrary to this Court's precedent but that the Legislature favors in a specific federal case. That is improper, in no small part because *SEIU* was a fully litigated case, decided after extensive briefing, less than three months ago. The Legislature did not ask *SEIU* to be reconsidered at the time, and there is no basis for doing so now. To the contrary, the plain text of the intervention statute at issue in *SEIU* confirms that the Legislature may intervene in litigation only on "on behalf" of its own institutional interests. And even if the text did not itself decide the question, the constitutional avoidance principles applied in *SEIU* preclude stretching the statutory language to permit the Legislature to litigate on behalf of the State's general interest in the validity of its statutes.

If the Legislature does not like how the Seventh Circuit has applied laws passed by the Legislature and interpreted by this Court, then the Legislature should perform the role accorded to it by our state's Constitution: amend the law, or pass a new one. But it should do this through its *legislative* function, rather than attempt to transform this Court

into a legislative body by asking this Court to take over the job of legislating for it.

## I. AS THE SEVENTH CIRCUIT RECOGNIZED FROM THE OUTSET, *SEIU* ANSWERS THE CERTIFIED QUESTION: THE LEGISLATURE LACKS AUTHORITY TO LITIGATE ON BEHALF OF THE STATE.

The Seventh Circuit panel correctly read *SEIU* as authorizing the Legislature to intervene and prosecute cases only when specific institutional interests of the legislature are at stake. All parties agree that no such interests are at stake here. That should end this matter.

*SEIU* recognized that, under the Wisconsin Constitution's separation of powers—"the central bulwark of our liberty"—"representing the State in litigation is predominantly an executive function," not a legislative one. *SEIU*, 2020 WI 67, ¶¶30, 63; *see also Buckley v. Valeo,* 424 U.S. 1, 138 (1976) (explaining that a "lawsuit is the ultimate remedy for a breach of the law, and it is to the [Executive], and not to the [Legislature], that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed"). The Court applied that principle in the context of a *facial* challenge to Sections 803.09(2m) and 13.365 of the Wisconsin statutes, statutes that, in the Court's words, gave "three state legislative committees, each *acting on behalf of a particular legislative entity* . . . the

power to intervene in an action in state or federal court." *SEIU*, 2020 WI 67, ¶51 (emphasis added). The burden faced by the plaintiffs, the Court explained, was "the most difficult of constitutional challenges"—they had to show that *"all* applications" of these statutes are unconstitutional." *Id*., ¶¶39, 48 (emphasis added).

The Court ultimately held that the plaintiffs could not meet their burden because there are "at least some cases" in which the Legislature could constitutionally intervene "on behalf" of the "particular legislative entity." *Id*., ¶¶51, 71. But those cases, the Court repeatedly emphasized, were ones where the Legislature's "institutional interests are implicated." *Id*., ¶51. As the Court summarized:

> The legislature may have an institutional interest in litigation implicating the public purse or in cases arising from its statutorily granted right to request the attorney general's participation in litigation. These institutional interests are sufficient to allow at least some constitutional application of these laws.

*Id*. ¶10. In other words, legislative intervention does not "unduly burden or substantially interfere" with executive authority "[w]here the legislature has appropriate institutional interests." *Id*. ¶72 n.22.

But here, the critical component that saved the facial validity of the intervention statutes in *SEIU* is missing. The federal district court order that the Legislature wishes to appeal does not require the Legislature to take

any action nor to fund any measures. Instead, the order enjoins *only* the WEC and its Administrator from taking certain actions under the election statutes that the Legislature has delegated to them. App. 74. The Legislature is thus not attempting to intervene to protect any institutional interests. It is simply seeking to defend a general interest in the validity of state election law as applied to the coming election.

The Legislature does not hide this fact. As it told the Seventh Circuit, it is attempting to apply the statutes to "speak for the State" and "vigorously defend the constitutionality of all the challenged statutes *on behalf of the State's interest*." App. 81, 94, 95 (emphasis added).[6] But, if the Legislature had a broad mandate to represent the State to defend the validity of already-enacted state laws (such as the election statutes at issue in the federal case), there would be no limits to its litigation authority; after all, there is no more generalized interest than the interest in ensuring that state law is enforced as written, so if the Legislature could litigate to defend that interest, it could litigate to defend *any* interest. That is precisely the

[6] To the same effect, see the Legislature's motion to intervene during the earliest stages of the federal action. *Democratic Nat'l Comm. v. Bostelmann* ("*DNC I*"), 3:20-cv-249, ECF No. 21, Legislature's Mem. ISO Mot. to Intervene, at 1 (W.D. Wis. Mar. 20, 2020) ("The Wisconsin Legislature moves to intervene . . . *to defend the State of Wisconsin's interest in the enforcement of several of Wisconsin's election laws*.") (emphasis added).

sort of arrogation of executive power that *SEIU's* separation-of-powers analysis does not tolerate. *See SEIU*, 2020 WI 67, ¶35 (explaining that even in areas of shared powers, "'no branch may unduly burden or substantially interfere with another branch"' (quoting *State v. Horn*, 226 Wis. 2d 637, 644 594 N.W.2d 772, 776 (1999)).

## II. THE PLAIN LANGUAGE OF WIS. STATS. §§ 803.09(2M), 13.365 DOES NOT PERMIT THE LEGISLATURE TO INTERVENE ON BEHALF OF THE STATE.

*SEIU's* holding that the Legislature may intervene only to protect its institutional interests is not only compelled by separation of powers principles, but by the plain language of the intervention statutes themselves.

The Legislature hangs its claimed right to intervene on behalf of the state on section 803.09(2m). But that statute only permits the Legislature to intervene "as set forth under s. 13.365," which in turn is narrowly circumscribed. Under section 13.365:

- The committee on assembly organization "may intervene at any time in the action *on behalf of the assembly*." Wis. Stat. § 13.365(1) (emphasis added).

- The committee on senate organization "may intervene at any time in the action *on behalf of the senate*." Wis. Stat. § 13.365(2) (emphasis added).
- And the joint committee on legislative organization "may intervene at any time in the action *on behalf of the legislature*." Wis. Stat. § 13.365(3) (emphasis added).

Section 13.365 thus permits the named legislative committees to litigate only "on behalf" of their own institutional interests. Nothing in that statute permits them to litigate on behalf of the *State's* general interest in the validity of its statutes. So, when section 803.09(2m) says that the Legislature may intervene "as set forth" in section 13.365, it necessarily embraces the same limitation: the Legislature may litigate only "on behalf" of its unique institutional interests. This should end this Court's inquiry. *See Seider v. O'Connell*, 2000 WI 76, ¶¶41-42, 236 Wis. 2d 211, 232612 N.W.2d 659 (2000) (explaining that when "the meaning of the statute is plain, we ordinarily stop the inquiry").

But there is even more. Statutory context confirms that, when the Legislature intends to empower litigation on behalf of the State, it says so explicitly. *See State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58,

¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results."). Thus, section 165.25 provides that Wisconsin's *Department of Justice* shall "[r]epresent [the] state in appeals and on remand . . . in the court of appeals and the supreme court, in which the state is interested or a party." Wis. Stat. § 165.25(1). And section 165.25(1m) provides that the *Department of Justice* shall "[r]epresent state in other matters." Wis. Stat. § 165.25(1m). No statute similarly authorizes the Legislature to "represent the state."

Section 165.25(1m) goes on to suggest exactly the opposite. It declares that in litigation "in which the state or the people of this state may be interested," "either house of the legislature" (or the governor), may *direct the Department of Justice* to represent the State. This is the Legislature's role when it comes to litigation involving the State's interests: it may direct the Department of Justice to represent those interests—implicitly signaling that it may not do so itself. *See FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (detailing how under the doctrine of *expressio unius est exclusion alterius*, "the

express mention of one matter excludes other similar matters [that are] not mentioned") (quotation and citation omitted).

Even were there any doubt as to this statutory analysis (and there should not be), those doubts should be resolved in this interpretation's favor. To read section 803.09(2m) as authorizing the Legislature to represent the state would be a sea change not only in Wisconsin law, but would depart from decisions throughout the Nation that deny legislatures' ability to litigate in the name of the state.[7] If the Legislature had intended such a change, it could have done so in clear terms. *See, e.g.*, *Wis. Ass'n of State Prosecutors v. Wis. Empl't Relations Comm'n*, 2018 WI 17, ¶45, 380 Wis. 2d 1, 907 N.W.2d 425 ("'Nothing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est).'" (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012))). Indeed, one would expect that the Legislature would be most careful to speak precisely when it is delineating its own powers. The fact that the Legislature enacted a statute that by its terms

[7] *See, e.g.*, *In re Opinion of the Justices of the Supreme Judicial Court*, 112 A.3d 926 (Me. 2015); *In re Opinion of Justices*, 27 A.3d 859, 868 (N.H. 2011); *Riley v. Cornerstone Cmty. Outreach, Inc.,* 57 So.3d 704, 724 (Ala. 2010); *Perdue v. Baker*, 586 S.E.2d 606, 615 (Ga. 2003); *State Through Bd. of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989); *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 P. 982, 985 (Okla. 1908).

gave itself the power to litigate on its own behalf—and did not give itself the much broader power granted to the Department of Justice—is conclusive evidence that the Legislature did not intend section 803.09(2m) to have any broader reach.

More fundamentally, an interpretation giving the Legislature this authority would raise the very separation-of-powers concerns that animated this Court's analysis in *SEIU.* That is a path that the doctrine of constitutional avoidance does not permit. *See, e.g. State v. Scott*, 2018 WI 74, ¶12, 382 Wis. 2d 476, 914 N.W.2d 141 ("We adhere to the doctrine of constitutional avoidance: A court ordinarily resolves a case on available non-constitutional grounds."); *Labor & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 354, 344 N.W.2d 177, 179 (1984) ("This court does not normally decide constitutional questions if the case can be resolved on other grounds.").

## III. SIGNIFICANT POLICY AND INSTITUTIONAL CONCERNS MILITATE AGAINST USING THIS CERTIFIED QUESTION TO OVERRULE *SEIU.*

In substance, the Legislature has run to this Court simply because it is dissatisfied with that Seventh Circuit's interpretation of this Court's *SEIU* decision. This Court should neither countenance nor reward this end-

run around a plethora of procedural principles. Doing so implicates a host of concerns and will undermine the rule of law, as well as this Court's position at the head of a coequal branch of Wisconsin government.

The *SEIU* decision resulted from extensive, adversarial litigation. The parties there—including the Governor, the Attorney General, and the Legislature—briefed and argued the case before the circuit court and then again on appeal in this Court. The Court had extensive briefing to inform its consideration and substantial time to craft a decision that fully expressed its reasoning. Now, less than three months after this Court published that decision, the Legislature mounted a collateral attack in the federal court and, since that failed, now presses this Court to revise its analysis in *SEIU*—on an emergency basis, for a specific purpose in a federal case, with incomplete briefing that affords no opportunity for the parties to respond to each other's arguments, and outside the presence of most parties that litigated the *SEIU* case. This is not the way to make good law.

If the Legislature believed the narrowing construction this Court adopted for section 803.09(2m) was incorrect, it could have asked this Court to reconsider or clarify when the decision was issued. It did not do so. If the Legislature believed that the proper interpretation of

section 803.09(2m) remained an open question of state law beyond the Seventh Circuit's reach, it could have sought to certify the issue at the outset of the appeal, when the Seventh Circuit instructed the parties to address the standing issue. Again, it did not do so. Instead, dissatisfied with the analyses of this Court in *SEIU* and the Seventh Circuit in the present appeal, the Legislature runs back to this Court, urging a belated, rushed reconsideration of *SEIU* solely because a federal court applied the plain language and clear meaning of that decision to a specific issue in a particular federal case. This turns Wisconsin's certification statute on its head, disregards the fundamental principle of stare decisis, threatens to undermine election administration, and undermines the separation of powers, both in the result the Legislature seeks here and in how it expects this Court to jump to its tune.

### A. The Legislature's Request Here Is an Abuse of Wisconsin's Certification Statute.

This Court's power to answer questions certified to it by a federal court of appeals is set forth in section 821.01 of the Wisconsin statutes. That statute, which is the Wisconsin Legislature's enactment of the Uniform Certification of Questions of Law Rule, *see* Wis. Stat. § 821.12, provides that this Court "may answer" such questions if the proceeding

from which the question arises involve "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state." Wis. Stat. § 821.01. Here, neither condition is met.

***First***, this Court should not answer the question posed because the Court's answer to the question now, in the posture of this certification by the Seventh Circuit, would not be determinative of the action pending before the Seventh Circuit. The Seventh Circuit already has issued an order interpreting and applying this Court's ruling in *SEIU*. The only way that answering the question now could make a difference from that ruling would be if this Court were to *now* answer the question posed differently than it answered the question a mere *three months ago*. But as the United States Supreme Court long ago recognized, courts "should not answer . . . questions which admit of one answer under one set of circumstances and a different answer under another, neither of which is inconsistent with the [certified question]." *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 573 (1939).

***Second***, there *is* controlling precedent here: this Court's own opinion

in *SEIU*, issued just three months ago. The Seventh Circuit held that opinion to control the issue of the Legislature's standing; simply because the Legislature believes the Seventh Circuit's application of *SEIU* to be in error does not transform this Court's opinion in *SEIU* to be anything other than controlling authority. Consequently, the Legislature's request that this Court now change its mind to hold that *SEIU* now means something other than what that opinion meant when it was published three months ago does not confer on this Court jurisdiction to answer that question. *See Sanchelima Int'l Inc. v. Walker Stainless Equip. Co.*, 920 F.3d 1141, 1146 (7th Cir. 2019) ("Nor may we certify this question to the Wisconsin Supreme Court to check if that court has changed its mind . . . .").

### B. To Answer the Certified Question as the Legislature Requests Would Require Abandoning *Stare Decisis*.

This Court cannot answer the certified question in the affirmative without overruling its decision in *SEIU*. Reversing that decision, issued so recently, would necessitate a wholesale abandonment of *stare decisis*. "This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law." *Johnson Controls, Inc. v. Emp's Ins. of Wausau*, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257. "Stare decisis is the preferred course of judicial action because it promotes

evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Id.*, ¶95. As a result, this Court requires "special justification . . . to overturn prior decisions." *Id.*, ¶96. The "familiar criteria" in Wisconsin are when "changes or developments in the law have undermined the rationale behind a decision," "there is a need to make a decision correspond to newly ascertained facts," or "there is a showing that the precedent has become detrimental to coherence and consistency in the law." *Id.*, ¶98.

None of these criteria is met here. *First*, changes or developments in the law have not undermined the rationale behind the decision. They have not had a chance to do so, as this Court decided *SEIU* less than three months ago. *Second*, there are no "newly ascertained facts," as Petitioners themselves admit. *Wis. State Legislature v. Democratic Nat'l Comm.*, 2020AP001629–OA, Leg. Memo. ISO OA and DJ at 17 (Wis. Oct. 1, 2020). *Third*, the *SEIU* decision has not become "detrimental to coherence and consistency in the law." To the contrary, the Seventh Circuit found *SEIU* entirely coherent and noted that the decision "puts Wisconsin in agreement with federal decisions such as *Arizona Independent Redistricting Commission*." App. 6.

Even if one of more criteria for possibly overruling precedent were satisfied—and they are not—the procedural posture of this certified question would militate against overruling *SEIU* in this instance. The question is presented to this Court in a rushed, incomplete fashion that leaves this Court unable to perform its duty of carefully weighing all considerations and entering a considered judgment. The timeframe imposed by the Seventh Circuit does not even allow full adversarial process. Key parties from the *SEIU* litigation—including the Governor and the Attorney General—are not parties to the federal litigation at issue here. The parties are submitting simultaneous briefs with no opportunity to meaningfully engage one another's arguments. There is no opportunity for a hearing at which the Court can probe and test the parties' positions. And the Court is on a strict deadline, with barely any time to consider the weighty, complex constitutional dimensions of the question at issue. Given all of this, even if there were reason to reconsider *SEIU*, this would not be an appropriate opportunity for the Court to do so.

### C. Granting the Legislature's Request Would Interfere with Wisconsin's Election Administration and Violate the Supreme Court's *Purcell* Principle.

The answer the Legislature requests here is not itself a question of

election law, but it is still in tension with the U.S. Supreme Court's teaching in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). That case instructed that courts should be wary of issuing decisions that can create voter confusion.

If this Court disrupts its precedent in *SEIU*, it opens the floodgates for confusion on the part of all Wisconsin voters and Wisconsin's thousands of election officials. In that event, the federal case will go back to the Seventh Circuit for a reversal on the standing question and then a decision on the merits of the stay issue and appeal, almost certainly followed by a petition—filed by one or more parties—to the U.S. Supreme Court. All of this will occur against the backdrop of an election that this Court recognized *three weeks ago* "ha[d] essentially begun," *Hawkins v. Wis. Elections Comm'n*, No. 2020AP1488-OA, Order, ¶5 (Wis. Sept. 14, 2020). And all of this would occur weeks later than would have been the case had the Legislature followed proper procedure and sought reconsideration of *SEIU* when the decision was issued. The end result could be a stay of the district court's injunction that was announced on September 21 and has been in effect since September 29 and on which increasing numbers of Wisconsin voters and election administrators are

relying. The U.S. Supreme Court has warned that "[c]ourt orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5 (emphasis added). In this context, the *Purcell* principle militates against the extraordinary relief the Legislature is requesting.

### D. Granting the Legislature's Request Would Undermine the Separation of Powers.

Finally, the Legislature's actions here threaten the separation of powers. For one thing, as this Court has already held, the broad interpretation the Legislature insists upon anew here raises serious constitutional questions about usurpation of executive authority to litigate on behalf of the state. As argued above, those questions should not be reconsidered outside of a concrete case or controversy properly developed and brought to this Court with a full record, adversarial briefing, argument, and time for the Court to issue a considered decision. For another, the very process here is injurious to separation of powers, because the Legislature is acting as if this Court, a coequal branch of Wisconsin's government, is subject to the Legislature's beck and call.

The Court administers the judicial branch of government for the State of Wisconsin. It stands for and embodies the rule of law. It has standards, and it applies them to the matters that pass before the bench. The Court "certainly do[es]n't let the legislature bring any case it wants." *Palm*, 2020 WI 42, ¶243 (Hagedorn, J., dissenting). This is more than a question of being persnickety about procedure. It is an issue about the separation of powers and respect among coequal branches of government.

This Court reached a clear and decisive ruling in *SEIU* that the Legislature may intervene and prosecute cases only when specific "institutional interests of the legislature" are at stake. *SEIU*, 2020 WI 67 ¶¶68-72; *see also id.* ¶63 (explaining that "representing the State in litigation is predominately an executive function" except "most notably in cases that implicate an institutional interest of the legislature"). It accorded with prior enunciations that "harm to the legislature as a constitutional body . . . is the only kind of harm that can establish the standing necessary to raise this claim. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) ('[A] litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.' (citation omitted))." *Palm*, 2020 WI 42, ¶240 (Hagedorn, J., dissenting). It was no

surprise that this holding would limit the Legislature's standing to participate in federal-court litigation. Indeed, the author of the Court's majority opinion in *SEIU* had recently acknowledged that standing requirements are both jurisdictional and more stringent in federal court than in Wisconsin courts, where they are merely prudential. *See Palm*, 2020 WI 42, ¶236. It follows that, even if Wisconsin courts recognize the Legislature's ability to participate in litigating certain issues in state courts, it is entirely foreseeable, and legally correct, that federal courts will not welcome the Legislature acting similarly. Indeed, *SEIU* held that the Legislature cannot litigate even in Wisconsin courts unless it can show a specific injury unique to its legislative interests. *SEIU*, 2020 WI 67 ¶¶68-72; *accord Palm*, 2020 WI 42, ¶239 (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.").

Here, the Legislature has pounded on this Court's door, taking significant liberties with procedure in both the Seventh Circuit and this Court. This comes on the heels of an unprecedented volley of original action petitions by or involving the Legislature over the past eighteen

months. That is the background against which several Justices asserted that the Court "certainly do[es]n't let the legislature bring any case it wants." *Palm*, 2020 WI 42, ¶243 (Hagedorn, J., dissenting). The Legislature's constant recourse to this Court, outside of regular order, and without following the time-honed procedures that "assist this court in separating the wheat from the chaff," *id.*, can—even unintentionally—veer into an abuse of the separation of powers. As the U.S. Supreme Court has noted with respect to the role of congress and the limitations on its proper litigation function, "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733-34.

So, too, here. If, as it now appears, the Legislature is dissatisfied with its victory in *SEIU*, it could have sought reconsideration, or it could have fulfilled its own unique purpose by litigating a solution. What it cannot do—and what this Court should not abide—is the Legislature taking neither path and then, the first time a dispute in another court adheres to this Court's decision, race to this Court and demand immediate, extraordinary, unwarranted relief. If that becomes the norm, this Court

(and Wisconsin's judiciary) will have chosen to assume a subservient role to the Legislature, in contravention of separation of powers that is fundamental to our constitutional design. *See SEIU*, 2020 WI 67, ¶¶30-31.

## CONCLUSION

For the reasons stated above, this Court should decline to revisit its decision in *SEIU* and should inform the Seventh Circuit that sections §§ 803.09(2m) and 13.365 of the Wisconsin statutes does not authorize the Legislature to represent Wisconsin's interest in the validity of state laws.

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## CERTIFICATION

I certify that the foregoing petition conforms to the rules contained in Wis. Stat. § (Rule) 809.62(4) and § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 6,312 words, exclusive of the caption, Table of Contents and Authorities, and the Certificates.

Dated: October 5, 2020.

*s/ John Devaney*
John Devaney

**CERTIFICATION OF FILING AND SERVICE**

I certify that on October 5, 2020, this brief was hand delivered to the Clerk of the Supreme Court.

I certify that on October 5, 2020, I caused a copy of this brief to be emailed to counsel of record for Petitioners and the other Respondent as previously agreed when they waived service of paper copies.

Dated: October 5, 2020.

*s/ John Devaney*
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