No. 2020AP1634-CQ

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,

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

Certified Question from the United States Court
of Appeals for the Seventh Circuit

NON-PARTY BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF INTERVENING DEFENDANTS-APPELLANTS

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INTRODUCTION

The importance of the question certified to this Court cannot be overstated. The Seventh Circuit's holding, if this Court agrees with it, poses an existential threat to the separation-of-powers principles our state and country are founded upon. The effect of the Seventh Circuit's interpretation of Wisconsin law is to allow the Attorney General and/or unelected state bureaucrats to function as a mini legislature, nullifying laws they disagree with through concession or half-hearted defense. This lawsuit is a case in point: Wisconsin's Attorney General, whose duty it is to defend state law, withdrew from the case early on, and the named Defendants, the members of the Wisconsin Election Commission, did not put up any meaningful defense or attempt to appeal when important election laws were enjoined on the eve of an election. Wisely foreseeing how constitutionally fraught a scenario like this would be, the Legislature adopted a provision allowing itself to intervene and defend state laws challenged in court. Wis. Stat. § 803.09(2m). This Court should hold that the Legislature has standing to defend the laws it enacted, *especially* when the Attorney General and named defendants have failed to do so.

STATEMENT OF INTEREST

The Wisconsin Institute for Law & Liberty has long been a champion of preserving the separation of powers, and has brought or participated in many lawsuits where the proper boundaries of power are at stake. *E.g.*, *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685; *Koschkee v. Taylor*, 2019 WI 76, 387 Wis. 2d

552, 929 N.W.2d 600; Amicus Brief of the Independent Business Association of Wisconsin, et al., *Wisconsin Legislature v. Palm*, No. 2020AP765, 2020 WI 42 (Apr. 29, 2020); Amicus Brief of the Wisconsin Institute for Law & Liberty, *SEIU v. Vos*, No. 2019AP614, 2020 WI 67 (Sept. 26, 2019); Amicus Brief of the Wisconsin Institute for Law & Liberty, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, No. 2015AP2019, 2018 WI 75 (July 24, 2017).

ARGUMENT

The basic division of power within our government is well-known and well-established: the Legislature makes the laws, the Executive Branch enforces them, and the Judiciary interprets the laws and resolves conflicts. *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600; *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384. This structure is liberty-enhancing: "After more than two hundred years of constitutional governance, that tripartite separation of independent governmental power remains the bedrock of the structure by which we secure liberty in both Wisconsin and the United States." *Gabler*, 2017 WI 67, ¶ 3. As the founders recognized, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, … may justly be pronounced the very definition of tyranny." Federalist No. 47 (James Madison).

The legislative process itself is designed to prevent any one person from wielding too much power: a new law must originate in

the Senate or Assembly, be passed by both houses, and be presented to the Governor. Wis. Const. art. 4, § 19; art. 5, § 10. And it goes without saying that this intentionally arduous process applies equally to *repealing* and *amending* laws.

While courts unquestionably have the authority to enjoin laws that violate constitutional rights, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), one of the primary checks within the judiciary is appellate review. A trial court's ruling is "the first word, not the last word, on [important] legal questions," Order Granting Stay Pending Appeal at 6, *SEIU v. Vos*, No. 2019AP622 (June 11, 2019). And one of the strongest features of our judicial system is that the higher one goes and the greater authority the court has, the more judges must agree on the legal question: two out of three at the intermediate level, and four out of seven or five out of nine at the ultimate level. This design, again, exists to prevent the accumulation of too much power in any one person.

But there is a loophole in this system that has been abused far too frequently in recent years. If a clever litigant can select a favorable venue and litigate against a sympathetic government defendant or attorney general who will throw the case, it can obtain a change in the law while evading *both* the legislative process and the ordinary checks in the court system. This case presents that problem starkly. The Attorney General, who has a *duty* to defend state law, *see SEIU v. Vos*, 2020 WI 67, ¶ 64, 393 Wis. 2d 38, 946 N.W.2d 35, is conspicuously absent from the case, having withdrawn early on with little explanation. *See* Stipulation

for Substitution of Counsel, *DNC v. Bostelmann*, No. 20-cv-249, Dkt. 48 (March 25, 2020).

And the named Defendants, the members of the Wisconsin Election Commission, have not defended the laws either. As even the district court acknowledged, the Wisconsin Legislature "offer[ed] a more robust opposition" to the challenges than did the Commission. Opinion and Order at 2, *DNC v. Bostelmann*, No. 20-cv-249, Dkt. 528 (Sept. 21, 2020). Calling the Legislature's defense "more robust" is putting it mildly. The Commission's filing in response to the Plaintiffs' preliminary injunction motions "[took] no position on the relief sought by the Plaintiffs." Memorandum of WEC Defendants in Response to Plaintiffs' Motions for Preliminary Injunctions at 3, 16, *DNC v. Bostelmann*, No. 20-cv-249, Dkt. 267 (July 20, 2020). And the Commission has not even attempted to appeal the district court's injunction. *See* Docket Entries 540–547, *DNC v. Bostelmann*, No. 20-cv-249.

Intervention is our court system's usual solution to the problem of non-adverse parties, and sometimes a private party will have a sufficiently unique stake to intervene and defend a challenged law when the Attorney General cannot or will not for whatever reason. But many laws have diffuse benefits, with no obvious non-government party with a unique interest sufficient to intervene. Election laws, in particular, exist to benefit all voters and to protect the integrity of the election system and process as a whole. Any individual voter would have a hard time showing a sufficient stake to step in and defend a particular election law. But then who? The most obvious answer—perhaps the only answer—

is the Legislature. The Legislature is "the government body closest to the will of the people." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 542, 576 N.W.2d 245 (1998). It is the entity charged with crafting policies to benefit the people it serves, and it therefore has the greatest interest in defending those policies when they are challenged.

When, as here, the Attorney General bows out and the named government defendants roll over, the Legislature must be permitted to intervene to defend state law; otherwise a single judge will be able to rewrite state law with impunity, totally upending our system of checks and balances. The Legislature adopted Wis. Stat. § 803.09(2m) in recognition of this threat to the separation of powers, and this Court should give it the intended effect.

In *SEIU v. Vos*, 2020 WI 67, this Court rejected a facial challenge to § 803.09(2m), noting that the Legislature's involvement with litigation might be within the shared power of the Legislature and Executive Branch, at least when the Legislature sought to advance some institutional interest. *Id.* ¶ 63. That interest might relate to something that the Legislature must do to implement a settlement, i.e, the expenditure of money.

But it might also be implicated when the Attorney General declines to vigorously defend a state law. In some cases that decision might be appropriate—if he or she believes there is no colorable defense or that enforcing the law is not, by some neutral measure, a wise expenditure of the state's resources. But if the Attorney General simply disagrees with the policy embodied by the

law or favors one side of an unresolved legal controversy on which reasonable lawyers might differ, a decision not to defend a law looks a lot like legislating. It is, put simply, the transformation of the state's policy. There may be no way to cabin the Attorney General's discretion in this regard, and, in many cases, the Court will not know the Attorney General's motivation for withdrawing from a case. But this Court *can* mitigate the problem by holding that when the Attorney General declines to defend a law and there is a reasonable defense available, he or she is acting within the zone of shared powers and § 803.09(2m) may be constitutionally followed. Even if, as the panel suggested, the Legislature has no institutional interest in its enactments surviving a legal challenge—itself a dubious proposition—it certainly has an interest in defending the law when the state's lawyer will not.

CONCLUSION

This Court should hold that the Wisconsin Legislature has standing to defend state law when the Attorney General for whatever reason cannot or will not.

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 1,492 words.

Dated: October 5, 2020.

LUKE N. BERG

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

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).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief.

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.

LUKE N. BERG