STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

MICHAEL WHITE, EVA WHITE, EDWARD WINIECKE, *and* REPUBLICAN PARTY OF WAUKESHA COUNTY,

Plaintiffs, Case No. 2022CV1008

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

PROPOSED INTERVENOR THE WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO INTERVENE

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INTRODUCTION

In 2016, the Wisconsin Elections Commission ("WEC") issued what it called a "guidance" document ("2016 Witness Certificate Alteration Mandate" or "2016 Mandate"), which *mandated* that all county and municipal clerks unilaterally correct missing or insufficient witness addresses on absentee ballots, in violation of Wisconsin law. In 2022, the Legislature's Joint Committee for Review of Administrative Rules ("JCRAR") exercised its statutory authority to order WEC to promulgate a formal rule codifying the 2016 Mandate and then vetoed the near verbatim formal rule ("Emergency Rule 2209") as unlawful. Remarkably, WEC then continued its unlawful conduct, instructing all county and municipal clerks that this 2016 Witness Certificate Alteration Mandate remained in effect even after JCRAR's veto of its substantively identical, proposed formal rule. In doing so, WEC effectively nullified the statutory provisions for addressing errors in absentee ballot witness signatures, Wis. Stat. § 6.87(6d), (9), and the Legislature's statutory authority to review rules promulgated by state agencies, while threatening core separation-of-powers principles and the integrity of future elections in the State of Wisconsin.

The Court should allow the Legislature to intervene in this matter, under three independent theories. First, the Legislature has a sovereign interest in defending state election laws against WEC's contrary 2016 Mandate—an interest codified in Wis. Stat. § 803.09(2m), which grants the Legislature the right to intervene when a party "challenges the construction or validity" of a state law. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423 (quoting Wis. Stat.

§ 803.09(2m)). Second, the Legislature is also entitled to intervene as a matter of right under Wisconsin Statute § 803.09(1), because the Legislature has filed a timely motion seeking to protect its interests in the enforcement of its statutes, its constitutional duty to oversee agency action, and the integrity of upcoming elections, which interests are unique to the Legislature and directly threatened by the unlawful 2016 Mandate. Finally, if this Court were to disagree that the Legislature may intervene as of right under the two bases just discussed, the Court should grant the Legislature permissive intervention under Wisconsin Statute § 803.09(2) because the Legislature shares Plaintiffs' claim that the 2016 Mandate is unlawful—a claim that directly implicates the same unique interests described above—and because the Legislature's timely involvement would not prejudice the existing parties at all.

The Legislature also requests that this Court align the schedule for responsive briefing to this Motion with the motion-for-temporary-injunction briefing schedule the parties have stipulated to, such that all pending motions can be decided together.

STATEMENT[1]

A. WEC Issues The 2016 Witness Certificate Alteration Mandate

Section 6.87 of the Wisconsin Statutes outlines the procedures and requirements for completing and counting absentee ballots in Wisconsin. Wis. Stat. § 6.87. Unless an absentee voter is in the military, is overseas, or resides at certain residential care facilities, Section 6.87 requires the absentee voter to mark and fold

[1] To avoid duplicative briefing, the Legislature recites the same Statement in its simultaneously filed Memorandum In Support Of Its Motion For A Temporary Injunction and its Memorandum In Support Of Its Motion To Intervene.

the absentee ballot in the presence of a witness and then place it within the official absentee-ballot envelope. *Id.* § 6.87(4)(b)(1); *see id.* § 6.875. Section 6.87 further provides that the witness must sign the absentee-ballot certificate printed on the absentee-ballot envelope, while also, generally, writing the witness's address on the certificate. *Id.* § 6.87(2). Section 6.87 then provides that "**[i]f a certificate is missing the address of a witness, the ballot may not be counted**." *Id.* § 6.87(6d) (emphasis added). Section 6.87 contains a remedial provision related to the certificate on the absentee-ballot envelope: ***if a clerk "receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector," but only if "time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6)***." *Id.* § 6.87(9) (emphasis added).

During the Fall 2016 election cycle, WEC issued the 2016 Witness Certificate Alteration Mandate, which requires that Wisconsin's county and municipal clerks alter unilaterally the information on absentee ballots, purporting to create a non-statutory addition to Sections 6.87(6d) and (9). Dated October 18, 2016, and entitled "Missing or Insufficient Witness Address on Absentee Certificate Envelopes," the 2016 Mandate creates an alternative procedure for "remedy[ing]" any "witness address error[s]" on the certificates of submitted absentee ballots. Wis. Elections Comm'n, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes* (Oct. 18, 2016).[2] Specifically, under the 2016 Mandate, "clerks *must* take

[2] Available at https://elections.wi.gov/memo/amended-missing-or-insufficient-witness-address-absentee-certificate-envelopes (all websites last visited on August 10, 2022).

corrective actions in an attempt to remedy a witness address error." *Id.* (emphasis added). The 2016 Mandate states that "clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope" if the clerks "are reasonably able to discern any missing information from outside sources." *Id.* While clerks have the option to "contact voters and notify them of the address omission," "contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources." *Id.* The 2016 Mandate contains a non-exhaustive list of ways a clerk may "reasonably . . . obtain any missing part of the witness address," including, among others, that the clerk may supply such information him- or herself where "[t]he clerk has personal knowledge of the witness and knows his/or [sic] her address." *Id.* The 2016 Mandate *requires* clerks to amend absentee-ballot certificates to supplement witness identification information. *Id.*

The 2016 Mandate also details the specific steps that clerks must take when supplementing witness information, requiring clerks to alter physically the ballot and then "initial[ ] next to the information that was added." *Id.* And while WEC acknowledges "the concern some clerks have expressed about altering information on the certificate envelope, especially in the case of a recount," the 2016 Mandate provides that "in order to promote uniformity in the treatment of absentee ballots statewide," all "clerks must attempt to obtain any information that is missing from the witness address and document any addition by including their initials." *Id.*

The Legislature is aware that absentee witnesses sometimes make errors, and has sought to make it easier for voters themselves to cure this problem, but Governor

Evers thwarted the Legislature's efforts. In 2021, the Legislature voted for 2021 Senate Bill 935, which would have required a clerk who "receives an absentee ballot with an improperly completed certificate or with no certificate," to "post a notification of the defect on the elector's voter information page on the Internet site that is used by electors for original registration," thereby notifying the elector of the need for additional action. S.B. 935 § 4, 2021 Leg. The Act also would have allowed clerks to "attempt to notify the elector of the defect by other means." *Id.* Critically, both methods assist the voters themselves, not election clerks, to address any witness errors. The State Senate and State Assembly both voted for this bill, but Governor Evers vetoed it in April 2022. *See* Wis. St. Leg. 2021–2022, S.B. 935.[3]

B. JCRAR Orders WEC To Promulgate A Rule To Codify The 2016 Witness Certificate Alteration Mandate, And Then JCRAR Strikes Down WEC's Rule

JCRAR is a bipartisan standing committee empowered by statute to review rules promulgated by state agencies. Wis. Stat. § 13.56; *see* Wis. Stat. §§ 227.19, 227.24, 227.26. JCRAR may both order state agencies to promulgate claimed guidance or policy statements as formal rules and, if JCRAR chooses, suspend agency rules after a post-promulgation review. Wis. Stat. §§ 227.19(4)(d), 227.26(2)(b), (d). That is, if JCRAR determines that "a statement of policy or an interpretation of a statute meets the definition of a rule, it may direct the agency to promulgate the statement or interpretation as an emergency rule under s. 227.24(1)(a) within 30 days." Wis. Stat. § 227.26(2)(b). And JCRAR "may suspend any rule by a majority

[3] Available at https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb935.

vote of a quorum of the committee," after a public hearing, *id.* § 227.26(2)(d), if JCRAR determines that an agency rule "fail[s] to comply with legislative intent" or was promulgated without "statutory authority," among other reasons, *id.* § 227.19(4)(d).

On January 10, 2022, JCRAR acted under its clear statutory power to require WEC "to show statutory authority for its guidance regarding completeness of addresses and correction of errors and omissions on absentee ballots [i.e., the 2016 Mandate] and promulgate it as an emergency rule or cease issuing such guidance to clerks." Ex. 1 at 1 to Affidavit of Misha Tseytlin ("Tseytlin Aff.") (JCRAR Notification Letter to WEC, (Jan. 10, 2022) (hereinafter "JCRAR Notification Letter")). JCRAR also notified WEC in its Notification Letter that WEC could not advance an emergency rule or direct this action by clerks unless the agency could show statutory authority to do so. *Id.* at 2.

After receiving the JCRAR Notification Letter, WEC scrapped its prior plans to draft a scope statement on the 2016 Mandate's promulgation *and* "on the best alternative to existing guidance," i.e., the 2016 Mandate itself, and instead proceeded only on promulgation of the 2016 Mandate. *See* Wis. Elections Comm'n, Statement of Scope: Emergency Rule Relating To Correction of Absentee Ballot Certificate Envelopes (Feb. 3, 2022) (hereinafter "WEC Scope Statement" or "Scope Statement");[4] *see generally* Wis. Stat. § 227.135 (scope statements are a necessary preliminary step in the rule-promulgation process). On February 3, 2022, WEC published this Scope

[4] Available at https://docs.legis.wisconsin.gov/code/register/2022/794a1/register/ss/ss_009_22/ss_009_22.

Statement after securing the Governor's approval, with the Commission formally adopting the statement at its March 9, 2022, meeting. Wis. Elections Comm'n, Emergency Rule 2209 (July 18, 2022) (hereinafter "Rule" or "Emergency Rule 2209").[5] WEC's Scope Statement notes its intent to "codify longstanding guidance" about missing or insufficient witness addresses "into a formal rule." WEC Scope Statement, *supra*. Thus, exactly as in the 2016 Mandate, the Scope Statement explains that, under the proposed rule, "clerks must take corrective actions to remedy a witness address error," and "[i]f clerks are able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope." *Id.*; *see* 2016 Mandate, *supra*. In support, WEC claimed it had authority to enact the 2016 Mandate as a formal rule based upon Wis. Stat. §§ 5.05(1), 6.869, 7.08(3), and 227.11(2)(a). WEC Scope Statement, *supra*; *but see infra* Part I.A.1.

On July 18, WEC filed Emergency Rule 2209 with the Legislative Reference Bureau. Emergency Rule 2209, *supra*. Mirroring the 2016 Mandate, the Rule required clerks to unilaterally amend witness information on absentee-ballot certificates. *Compare* Emergency Rule 2209, *supra*, *with* 2016 Mandate, *supra*.

On July 20, 2022, JCRAR held a public hearing on Emergency Rule 2209, and then JCRAR voted to suspend the Rule "on the grounds that the rule conflicts with state law and fails to comply with legislative intent." JCRAR, Record of Committee

[5] Available at https://docs.legis.wisconsin.gov/code/register/2022/799a3/register/emr/emr2209_rule_text/emr2209_rule_text.

Proceedings (July 20, 2022).[6] WEC "exceeded the provisions of state law and acted in violation of the limited delegation of authority granted to it by the legislature" by "improperly authoriz[ing] municipal clerks" to correct ballot information "without the knowledge of the voter or the voter's witness." Sen. Steve Nass, Press Release, JCRAR Suspends WEC Emergency Rule on Absentee Ballot Certification Curing (July 20, 2022) (hereinafter "Sen. Nass Press Release").[7] The Emergency Rule unlawfully "mandates municipal clerks to take certain actions in processing the incomplete absentee ballot certifications directly in conflict with the optional language in state law." *Id.* "[S]tate law makes clear that if an absentee ballot certification is missing elements, it can only be corrected by the voter or the voter's witness . . . The WEC emergency rule was an attempt to circumvent state law." *Id.*

C. WEC Remarkably Declares That The 2016 Witness Certificate Alteration Mandate Is Still In Force

Following JCRAR's vote to suspend the Rule, WEC issued a statement on its public website, communicating its position that the 2016 Witness Certificate Alteration Mandate remains in force. Wis. Elections Comm'n, *Statement Regarding JCRAR Emergency Rule Suspension* (July 25, 2022).[8] WEC claimed that because its

[6] Available at https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209/actions_taken_by_jcrar_on_july_20_2022_emr2209.

[7] Available at https://legis.wisconsin.gov/senate/11/nass/news/press-releases/jcrar-suspends-wec-emergency-rule-on-absentee-ballot-certification-curing/.

[8] Available at https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension.

"Commissioners have not yet authorized retracting the Commission's separate 2016 Guidance on Absentee Ballot Certificate Correction, upon which the 2022 emergency rule was based," the 2016 Mandate "continues to remain intact, as it has since 2016." *Id.* WEC justified this conclusion by explaining that "actions of the Commission require a two-thirds vote of Commission members" under Wisconsin law, and its members "have not yet met to discuss the recent [JCRAR] vote . . . suspending the WEC's 2022 emergency rule." *Id.* WEC also expressed that while the "Commissioners *may* meet to discuss the JCRAR's vote or to take further action on the Commission's 2016 guidance," "[a]s with any decision, Wisconsin's local clerks, along with their legal counsel, can consider the recent legislative committee activity as they plan for upcoming elections." *Id.* (emphasis added).

STATEMENT OF INTEREST

The Legislature comprises the State Assembly and the State Senate. *See* Wis. Const. art. IV, § 1. Wisconsin law recognizes that the Legislature, as the body "vested" with the "legislative power," *id.*, has an interest in defending the State's own sovereign interest its state law in court. *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Specifically, Section 803.09(2m) of the Wisconsin Statutes states that "[w]hen a party to an action [ ] in state or federal court . . . otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense . . . the legislature may intervene as set forth under [Section] 13.365." Section 13.365(3), in turn, provides that "[t]he joint committee on legislative organization may intervene at any time in the action on behalf of the legislature" and authorizes the hiring of counsel other than

the Attorney General. Wis. Stat. § 13.365(3). Thus, "Wisconsin has adopted a public policy that gives the Legislature a set of litigation interests," *Bostelmann*, 2020 WI 80, ¶ 8, including when—as is the case here, *infra* p. 11—a party "'otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense,'" *Bostelmann*, 2020 WI 80, ¶ 8 (quoting Wis. Stat. § 803.09(2m)).

The Legislature has also organized itself into various committees, one of which is the Joint Committee for Review of Administrative Rules ("JCRAR"). Wis. Stat. Ann. § 13.56; *accord League of Women Voters of Wis. ("LWV") v. Evers*, 2019 WI 75, ¶ 28, 387 Wis. 2d 511, 533, 929 N.W.2d 209, 220 (explaining that the Legislature has the power to conduct its own internal affairs and procedures). Under Wisconsin law, JCRAR has the power to "suspend any rule" from an administrative agency, Wis. Stat. § 227.26(2)(d), if JCRAR determines that the rule "fail[s] to comply with legislative intent" or was promulgated in "an absence of statutory authority," among other reasons, *id.* § 227.19(4)(d); *Martinez v. Dep't of Indus., Lab. & Hum. Rels.*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992) (recognizing "legislative accountability over rule-making"). That express statutory power is implicated here, *infra* p. 15, and when the Legislature intervenes in court, it also speaks on behalf of its committees, including JCRAR, and their interests. *See* Wis. Stat. §§ 13.56(2), 803.09(2m).

ARGUMENT

I. The Legislature Is Entitled To Intervene As Of Right Under Section 803.09(2m) Because Plaintiffs' Challenge Implicates The Construction Of Wis. Stat. §§ 6.84 And 6.87

Wisconsin law permits the Legislature to intervene as of right in any action "at any time" when that action "otherwise challenges the construction or validity" of a state law "as part of a claim or affirmative defense." Wis. Stat. § 803.09(2m); *see also id.* § 13.365. Pursuant to Section 803.09(2m)'s plain text, "Wisconsin has adopted a public policy that gives the Legislature . . . litigation interests" justifying intervention when "'a party otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense.'" *Bostelmann*, 2020 WI 80, ¶ 8 (quoting Wis. Stat. § 803.09(2m)). So, in such cases, "the Legislature" has "a statutory right to participate as a party, with all the rights and privileges of any other party." *Id.* ¶ 13.

The Legislature satisfies the requirements of Section 803.09(2m) here, and thus is entitled to intervene as of right. Plaintiffs' action, Dkt.2, claims that WEC's conduct directly conflicts with this State's election laws governing requirements for absentee ballots, *see* Wis. Stat. §§ 6.87(6d), (9). Thus, Plaintiffs' claim necessarily involves the "construction" of those state laws in order for Plaintiffs to prevail. That is, the Court must interpret and apply Sections 6.87(6d) and 6.87(9)—and any other absentee-voting laws within Chapter 6 implicated here—to determine whether WEC's actions are unlawful and adjudicate Plaintiffs' claims. Therefore, this Court should grant the Legislature's Motion To Intervene for this reason alone.

II. Alternatively, The Legislature Is Entitled To Intervention As A Matter Of Right Under Section 803.09(1)

The Legislature is also entitled to intervene in this action as of right under Wis. Stat. § 803.09(1). "A movant must meet four requirements to intervene as a matter of right: (1) the motion to intervene must be timely; (2) the movant must claim an interest in the subject of the action; (3) 'the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest;' and (4) the existing parties do not adequately represent the movant's interest." *City of Madison v. Wis. Emp't Relations Comm'n*, 2000 WI 39, ¶ 11, 234 Wis. 2d 550, 610 N.W.2d 94 (citations omitted); *accord Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357, 360 (1994); *see also* Wis. Stat. § 803.09(1).

The Legislature satisfies all four requirements of Section 803.09(1), thus this Court should grant its Motion To Intervene.

1. *The Legislature's Motion is Timely*. When considering the timeliness element, "courts in Wisconsin have looked at a number of factors, including: (1) when the proposed intervenor discovered his or her interest was at risk; (2) how far litigation has proceeded; and (3) the extent to which the other parties would be prejudiced by the addition of a new party," *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App. 221, ¶ 17, 247 Wis. 2d 708, 634 N.W.2d 882, which includes considerations of whether the intervenor could simply "initiate[ ] a separate [ ] action," *State ex rel. Bilder v. Twp. of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983). However, "[t]he critical factor is whether in view of all the circumstances the proposed intervenor acted promptly." *Id.* at 550.

Here, the Legislature's Motion is plainly timely. *See Roth*, 2001 WI App. 221, ¶ 17. The Legislature files this Motion promptly after it "discovered [its] interest was at risk," *id.*, since WEC issued its July 25, 2022 statement explaining that it intended to effectively nullify JCRAR's suspension of Emergency Rule 2209 approximately two weeks ago, Wis. Elections Comm'n, Statement Regarding JCRAR Emergency Rule Suspension (July 25, 2022).[9] The Legislature has filed this Motion in the early stages of litigation, *Roth*, 2001 WI App. 221, ¶ 17, just twenty-nine days after Plaintiffs filed their Complaint on July 12, 2022, Dkt.2, and before WEC has answered or otherwise responded. Finally, WEC will suffer no "prejudice[ ] by the addition of" the Legislature to this action as this exceedingly early stage in the litigation, before WEC has fully prepared even its responsive pleadings. *Roth*, 2001 WI App. 221, ¶ 17.

2. *The Legislature Has A Substantial Interest In The Subject Matter Of This Action*. To satisfy the interest element of Section 803.09(1), the proposed intervenor must have an "interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *City of Madison*, 2000 WI 39, ¶ 11 n.9 (citation omitted). This inquiry follows a "pragmatic approach," *Armada*, 183 Wis. 2d at 474, which looks to "the facts and circumstances of the particular case," in light of the liberal "policies underlying the intervention statute"—namely "the speedy and economical resolution of controversies" by joining interested parties in a single suit, with due regard that the "original parties . . . should be

[9] Available at https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension.

allowed to conduct and conclude their own lawsuit," *Bilder*, 112 Wis. 2d at 548 (citations omitted). The "interest test" is "*primarily* a practical guide to disposing of lawsuits by involving *as many apparently concerned persons as is compatible with efficiency and due process*." *Id.* at 548–49 (emphases added; citations omitted).

Here, the Legislature has a direct, substantial interest in the subject of this action for three interrelated reasons. First, Wisconsin has the sovereign and "legitimate interest in the continued enforcement of [its] statutes," *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022) (brackets altered; citations omitted), and the State has made the sovereign choice in Sections 13.365 and 803.09(2m) that the Legislature may assert this interest in court—including in in cases concerning the construction and, therefore, the enforceability, of state laws, Wis. Stat. §§ 13.365, 803.09(2m); *Bostelmann*, 2020 WI 80, ¶¶ 8, 13. Second, the Legislature also has a particular interest in the integrity and efficacy of its own powers, *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900, including JCRAR's power to "suspend any [administrative] rule" for specified reasons, Wis. Stat. §§ 227.26(2)(d), 227.19(4)(d); *Martinez*, 165 Wis. 2d at 701 ("legislative accountability over rule-making"), and its power over administrative rulemaking, *Palm*, 2020 WI 42, ¶ 13. Finally, the Legislature has a special interest in ensuring the integrity of the elections in Wisconsin through the faithful enforcement of its election-integrity statutes. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (controlling plurality of Stevens, J.); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

This case places all of these interests of the Legislature squarely in play. As explained above, the Court must interpret and apply Section 6.87(6d) and 6.87(9)—and any other relevant election laws—to adjudicate Plaintiffs' claims that WEC's actions here are unlawful. *Supra* p. 11. And those laws concern weighty interests of the Legislature, as they further the State's "indisputably [ ] compelling interest" in election integrity, *Eu*, 489 U.S. at 231, and the "orderly administration" of elections, *Crawford*, 553 U.S. at 196. Further, WEC's conduct would, if affirmed by this Court, effectively nullify JCRAR's suspension of Emergency Rule 2209, thus impinging JCRAR's rule-suspension power. *See* Wis. Elections Comm'n, Statement Regarding JCRAR Emergency Rule Suspension, *supra*. Finally, a ruling in favor of WEC would permit agencies to circumvent the formal rule-making requirements in the Wisconsin Statutes, in contravention of the Legislature's power to regulate the promulgation of administrative rules. *Palm*, 2020 WI 42, ¶ 13.

3. *The Disposition of This Lawsuit May Impair the Legislature's Interest*. The third element under Section 803.09(1) considers whether the Court's "disposition of the action may as a practical matter impair or impede the [Legislature's] ability to protect [its] interest[s]," *City of Madison*, 2000 WI 39, ¶ 11 (internal citation omitted), and this is easily met.

Here, if this Court affirms WEC's actions, this will impede the Legislature's interests. By allowing WEC to disregard the clear directives of Sections 6.87(6d) and 6.87(9), a ruling in WEC's favor would contravene the legislative intent behind, and frustrate the enforcement of, the State's election laws. Such a ruling would also

effectively nullify JCRAR's rule-suspension power and, with it, the Legislature's ability to provide a check on agency action as the separation of powers, which is "inherent in the Wisconsin Constitution," *Palm*, 2020 WI 42, ¶ 13, was designed to protect. And the Legislature also maintains an interest in ensuring that all agency rules are promulgated in accordance with "required statutory procedures" in Chapter 227, which requirements are "grounded in the concept of separation of powers." *Id.* Finally, the threat of an adverse ruling to legislative oversight is all the more serious, given the extremely important role the Legislature has in protecting election integrity. *Crawford*, 553 U.S. at 196; *Eu*, 489 U.S. at 231.

4. *No Other Party Adequately Represents Proposed Intervenor's Interests*. The final prong of Section 803.09(1) asks if any existing parties "adequately represent the [Legislature's] interest[s]." *City of Madison*, 2000 WI 39, ¶ 11. (citation omitted). This adequacy requirement imposes a "minimal" burden on the proposed intervenor to "show[ ] that the representation of [its] interest 'may be' inadequate." *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301, 306 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). This could include, for example, whether the proposed intervenor would "gain or lose" in the same manner as another party, or whether it would "protect a right that would not otherwise be protected." *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 45, 307 Wis. 2d 1, 745 N.W.2d 1 (citation omitted). Further, even if the proposed intervenor seeks the same outcome as an existing plaintiff in the litigation, the intervenor will still satisfy

the adequacy inquiry if it is "in a better position . . . to provide full ventilation of the legal and factual context." *Wolff*, 229 Wis. 2d at 748 (citation omitted).

Here, the Legislature satisfies the "minimal" burden of "show[ing] that the representation of [its] interest 'may be' inadequate," unless intervention is granted. *Id.* at 747. The Legislature has unique sovereign interests at issue in this lawsuit, *supra* pp. 11, 13–15, that none of the existing parties' share, meaning that these parties cannot possibly represent the Legislature's interests, *Helgeland*, 2008 WI 9, ¶ 45. WEC is adverse to the Legislature, as the Legislature is challenging WEC's unlawful actions, thus WEC obviously cannot adequately represent the Legislature's interests. *Id.* As for Plaintiffs, they are private citizens and a political party that cannot share the Legislature's sovereign interests in the construction of state law, the integrity of JCRAR's powers, and the enforcement of administrative rule-making procedures. *Compare* Dkt.2 at 4–5, *with supra* pp. 11, 13–15. Because these interests are unique to the Legislature—and, indeed, lie within the Legislature's core powers, *e.g.*, *Palm*, 2020 WI 42, ¶ 13; *LWV*, 2019 WI 75, ¶ 28—only the Legislature can adequately raise and assert these Legislature-specific arguments and interests here. Indeed, based upon its specific interests, the Legislature has raised two additional arguments for the illegality of the 2016 Mandate—it violates JCRAR's authority to review agency rules by outright ignoring JCRAR's rejection of a substantively identical rule, and WEC did not follow Chapter 227's requirements in promulgating the 2016 Mandate. So, while Plaintiffs and the Legislature both challenge WEC's actions, Plaintiffs cannot adequately represent the Legislature's sovereign interests

in this case. *See Berger*, 142 S. Ct. at 2203–04; *accord Helgeland*, 2008 WI 9, ¶ 45 ("protect a right that would not otherwise be protected").

III. At Minimum, This Court Should Grant The Legislature Permissive Intervention Under Section 803.09(2)

Should the Court decline to grant intervention as a matter of right, it should, at a minimum, grant the Legislature permissive intervention as an exercise of the Court's discretion. Section 803.09(2) governs permissive intervention and provides, as relevant here, that "upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). And "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," *id.*, by, for example, "making the lawsuit complex or unending." *C.L. v. Edson*, 140 Wis. 2d 168, 177, 409 N.W.2d 417, 420 (Ct. App. 1987). A proposed intervenor need only be "a proper party" to obtain permissive intervention; it need not "be necessary to the adjudication of the action." *City of Madison*, 2000 WI 39, ¶ 11 n.11.

As an initial matter, the Legislature satisfies Section 803.09(2)'s two threshold requirements. First, the Legislature's "claim" in this case is "in common" with the "main action," Wis. Stat. § 803.09(2), since, like Plaintiffs, the Legislature claims that WEC's requirement that clerks unilaterally amend absentee-ballot information is unlawful. Second, the Legislature's Motion is "timely," Wis. Stat. § 803.09(2), as it was filed in the early stages of litigation—shortly after WEC announced its decision to continue enforcing the 2016 Witness Certificate Alteration Mandate, 30 days after

Plaintiffs filed their Complaint, and before WEC has filed any responsive pleading here, *supra* pp. 12–13.

Beyond these two threshold requirements, all other appropriate permissive-intervention factors favor the Legislature's involvement here.

The Legislature has significant and direct interests that are implicated in this case, as discussed above. First, the Legislature has a sovereign interest in the enforcement of its statutes, particularly those governing election integrity. *Bostelmann*, 2020 WI 80, ¶¶ 8, 13; *Eu*, 489 U.S. at 231. That interest is implicated here because the subject matter of this lawsuit calls upon the Court to interpret, and apply, Wisconsin's election laws. Second, the Legislature has an interest in protecting JCRAR's statutory authority to suspend agency rules, a power WEC's challenged conduct has effectively nullified. *Palm*, 2020 WI 42, ¶ 13; *Martinez*, 165 Wis. 2d at 701. And third, the Legislature has an interest in requiring agencies to follow statutory rule-making procedures, which interest is implicated here because the potential of a ruling in WEC's favor would sanction and, in fact, *encourage*, agencies to disregard the Legislature's constitutional duty to oversee the promulgation of administrative rules. *Palm*, 2020 WI 42, ¶ 13.

Further, the Legislature's involvement "will [not] unduly delay or prejudice the adjudication of the rights of the original parties," Wis. Stat. § 803.09(2), but will instead directly further Section 803.09's "primary[ ]" concern with "disposing of lawsuits by involving as many apparently concerns persons as is compatible with efficiency and due process," *Bilder*, 112 Wis. 2d at 548–49 (citations omitted); *see*

Gabrielle B. Adams, et al., *Wisconsin Civil Procedure Before Trial* § 4.56 (6th ed. 2018). Granting intervention to the Legislature would *avoid* prejudice to WEC here, as it would promote a "speedy and economical resolution," *Helgeland*, 2008 WI 9, ¶ 40 (citation omitted), of the lawfulness of WEC's challenged conduct, and allow the Court to reach a "final decision on a key issue" in a single lawsuit, *Bilder*, 112 Wis. 2d at 550. Finally, the Legislature's involvement in this matter would not "mak[e] the lawsuit complex or unending," as the Legislature's claims relate to the same actions of WEC that Plaintiffs have challenged here. *Edson*, 140 Wis. 2d at 177. The Legislature is seeking the same relief as Plaintiffs, while asserting two additional claims or theories in support of that relief, based upon the Legislature's unique interests that are not represented by the existing parties.

CONCLUSION

This Court should grant the Legislature's Motion To Intervene.

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Respectfully Submitted,

Electronically signed by Misha Tseytlin

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