SUPREME COURT OF WISCONSIN

CASE NO.: 2020AP1634-CQ

COMPLETE TITLE: 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

OPINION FILED: October 6, 2020
SUBMITTED ON BRIEFS:
ORAL ARGUMENT:

SOURCE OF APPEAL:
COURT:
COUNTY:
JUDGE:

JUSTICES:
HAGEDORN, J., delivered the majority opinion of the Court, in which ROGGENSACK, C.J., ZIEGLER, and REBECCA GRASSL BRADLEY, JJ., joined. DALLET, J., filed a dissenting opinion, in which ANN WALSH BRADLEY and KAROFSKY, JJ., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellees, there were briefs filed by *Charles G. Curtis, Jr.*, *Michelle M. Umberger*, *Sopen B. Shah* and *Perkins Coie LLP*, Madison; *Marc E. Elias* (pro hac vice), *Bruce V. Spiva* (pro hac vice), *John Devaney* (pro hac vice), *Amanda R. Callais* (pro hac vice), *Zachary J. Newkirk* (pro hac vice) and

Perkins Coie LLP, Washington D.C.; *Jeffrey A. Mandell*, *Douglas M. Poland* and *Stafford Rosenbaum LLP*, Madison; *Joseph S. Goode*, *Mark M. Leitner* and *Laffey, Leitner & Goode LLC*, Milwaukee; *Jay A. Urban* and *Urban & Taylor, S.C.*, Milwaukee; *Stacie H. Rosenzweig* and *Halling & Cayo, S.C.*, Milwaukee and *Rebecca L. Salawdeh* and *Salawdeh Law Office, LLC*, Wauwatosa.

For the intervening defendants-appellants Wisconsin State Legislature, there were briefs filed by *Misha Tseytlin*, *Kevin M. LeRoy* and *Troutman Pepper Hamilton Sanders LLP*, Chicago.

An amicus curiae brief was filed on behalf of Tony Evers, Governor of the State of Wisconsin and the Office of the Wisconsin Attorney General by *Eric J. Wilson*, deputy attorney general, *Colin T. Roth*, assistant attorney general and *Thomas C. Bellavia*, assistant attorney general, Madison.

An amicus curiae brief was filed on behalf of Service Employees International Union (SEIU) Local 1 and SEIU Healthcare Wisconsin by *Kyle A. McCoy* and *Soldon McCoy, LLC*, Middleton and *Matthew Wessler* (pro hac vice) and *Gupta Wessler PLLC*, Washington, D.C.

2020 WI 80

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

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STATE OF WISCONSIN : IN SUPREME COURT

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FILED

OCT 6, 2020

Sheila T. Reiff
Clerk of Supreme Court

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CERTIFICATION of a question of law from the United States Court of Appeals for the Seventh Circuit. *Certified question answered and cause remanded.*

¶1 BRIAN HAGEDORN, J. The Seventh Circuit Court of Appeals has certified the following question to this court: "whether, under Wis. Stat. § 803.09(2m), the Wisconsin Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws." We answer the question in the affirmative. The plain language of § 803.09(2m) (2017-18),[1] along with its statutory context, grants the Legislature this power. In Service Employees International Union, Local 1 v. Vos, we held that this provision survived a facial challenge to its compatibility with the separation of powers in the Wisconsin Constitution. 2020 WI 67, ¶73, 393 Wis. 2d 38, 946 N.W.2d 35. This court has not had occasion to consider, nor have we held, directly or by necessary implication, that any particular applications of this statute are unconstitutional as applied. Therefore, the current state of the law in Wisconsin is that the Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws under § 803.09(2m).

I. BACKGROUND

¶2 This question arises in the context of litigation over election-related laws challenged in federal court. In that litigation, the Wisconsin Legislature was denied standing to appeal an adverse ruling below. Democratic Nat'l Comm. v. Bostelmann, Nos. 20-2835 & 20-2844, 2020 WL 5796311, at *2 (7th

[1] All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

Cir. Sept. 29, 2020) (per curiam). The Seventh Circuit previously held that the Legislature had standing, but ruled that our decision in Vos constituted intervening authority justifying a departure from the law of the case. Id. The Seventh Circuit stated that under our decision in Vos, "the legislature may represent its own interest," but the Legislature may not "represent a general state interest in the validity of enacted legislation." Id. The Legislature sought reconsideration and then en banc review of this decision.

¶3 The Seventh Circuit's decision makes clear that key to its determination on standing is a question of state law, an issue on which this court has the final word. Id. Accordingly, under Wis. Stat. § 821.01 and 7th Circ. R. 52, the Seventh Circuit has requested that this court "decide 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."

II. DISCUSSION

¶4 The question certified is not a wide-ranging constitutional inquiry.[2] Rather, the Seventh Circuit has focused our attention on the language of Wis. Stat. § 803.09(2m), and whether that provision grants the Legislature the authority to defend a particular state interest in court——the "interest in the

[2] Neither do the briefs raise comprehensive separation of powers arguments rooted in our constitutional text, a reality understandable in light of the abbreviated time frame the current circumstances require.

validity of state laws." This court has weighed in on the constitutionality of this statute only once, in Vos. The Seventh Circuit read Vos as limiting the reach of this statute, and on that basis determined the Legislature no longer had standing. Bostelmann, Nos. 20-2835 & 20-2844, at *2. We therefore begin with Vos——discussing what this court held, and what it did not. Then we proceed to the statutory question squarely presented by the certified question.

¶5 The question before this court in Vos involved a facial challenge to Wis. Stat. § 803.09(2m), among other laws. Vos, 393 Wis. 2d 38, ¶¶10, 73, 86. As we explained, a facial challenge under Wisconsin law cannot succeed unless the law is unconstitutional in "all applications." Id., ¶¶38, 48. In other words, if at least some applications of the law are constitutional, the facial challenge must fail. Id., ¶72 ("Because this is a facial challenge, and there are constitutional applications of these laws, that challenge cannot succeed."). In our analysis of the Legislature's power to intervene and represent the state, we concluded there are constitutional applications of § 803.09(2m). Id. ("In at least some cases, we see no constitutional violation in allowing the legislature to intervene in litigation concerning the validity of a statute, at least where its institutional interests are implicated."). Because at least some applications of § 803.09(2m) were consistent with the Wisconsin Constitution, the facial challenge did not succeed. Id., ¶73.

¶6 Our decision in Vos was limited. This court did not hold or imply that the institutional interests discussed were the

only circumstances in which these laws could be enforced consistent with the Wisconsin Constitution. Id., ¶¶50-73. Rather, we more narrowly concluded that certain institutional interests defeated the facial challenge. Id., ¶73. While the institutional interests discussed were sufficient for us to conclude the statute survived a facial challenge, we never concluded those or any other interests were necessary for the statute to be constitutionally applied. To say it more plainly, this court has not held that any application of Wis. Stat. § 803.09(2m) runs contrary to the Wisconsin Constitution; we have merely concluded some applications do not. Id. ("We express no opinion on whether individual applications or categories of applications may violate the separation of powers, or whether the legislature may have other valid institutional interests supporting application of these laws. But the facial challenge . . . does not succeed.").

¶7 What remains, then, is the statutory question of whether Wis. Stat. § 803.09(2m) grants the Legislature the authority to represent the State of Wisconsin's interest in the validity of state laws. Chapter 803 provides the rules of procedure for parties in civil cases, and the relevant provision here states:

> 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 assembly, the senate, and the legislature may intervene as set forth under [Wis. Stat. §] 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in [Wis. Stat. §] 801.14.

§ 803.09(2m).

¶8 This statute gives the Legislature the power to intervene in certain types of cases. Intervention in Wisconsin is generally premised on protecting a party's interests in litigation. Wis. Stat. § 803.09(1). This begs the question, what interests does the Legislature have? By enacting § 803.09(2m), Wisconsin has adopted a public policy that gives the Legislature a set of litigation interests, namely when a party "[1] challenges in state or federal court the constitutionality of a statute, facially or as applied, [2] challenges a statute as violating or preempted by federal law, or [3] otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense." § 803.09(2m). The Legislature is therefore empowered to defend not just its interests as a legislative body, but these specific interests itemized by statute. Whatever constitutional interests the Legislature may have as a branch of government that could justify intervention apart from § 803.09(2m), the statutory text unmistakably grants the

Legislature an interest in defending the validity of state law when challenged in court.[3]

¶9 Moreover, under Wisconsin law, an intervenor is a full participant in the proceedings, having all the same rights as all other parties to the action. Zellner v. Herrick, 2009 WI 80, ¶22, 319 Wis. 2d 532, 770 N.W.2d 305; Kohler Co. v. Sogen Int'l Fund, Inc., 2000 WI App 60, ¶¶10-12, 233 Wis. 2d 592, 608 N.W.2d 746. This includes the power to raise "any legal claims and defenses," as well as the power to appeal an adverse decision just as any other party could. Kohler Co., 233 Wis. 2d 592, ¶11; Prince Corp. v. Vandenberg, 2016 WI 49, ¶13, 369 Wis. 2d 387, 882 N.W.2d 371 (noting that the intervenors there "separately appealed the circuit court's order").

¶10 The Plaintiffs-Appellees urge a different approach by making much of Wis. Stat. § 13.365. This provision is found in a chapter of Wisconsin law addressing the Legislature and cross-referenced in Wis. Stat. § 803.09(2m), parroting the language in that section. It provides:

[3] The Seventh Circuit Court of Appeals accurately recognized this is the plain reading of Wis. Stat. § 803.09(2m) in Planned Parenthood of Wisconsin, Inc. v. Kaul, 942 F.3d 793 (7th Cir. 2019). The majority said, "The State of Wisconsin has chosen to have an attorney general as its representative, but it also has recently provided a mechanism by which its legislature (or either of its constitutive houses) can intervene to defend the State's interest in the constitutionality of its statutes." Id. at 795. And the concurrence likewise observed, "section 803.09(2m) reflects a sovereign policy judgment that the Attorney General is not the State's exclusive representative in court when state laws are challenged." Id. at 806 (Sykes, J., concurring).

> Pursuant to [Wis. Stat. §] 803.09(2m), 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:
>
> (1) The committee on assembly organization may intervene at any time in the action on behalf of the assembly. The committee on assembly organization may obtain legal counsel other than from the department of justice . . . to represent the assembly in any action in which the assembly intervenes.
>
> (2) The committee on senate organization may intervene at any time in the action on behalf of the senate. The committee on senate organization may obtain legal counsel other than from the department of justice . . . to represent the senate in any action in which the senate intervenes.
>
> (3) The joint committee on legislative organization may intervene at any time in the action on behalf of the legislature. The joint committee on legislative organization may obtain legal counsel other than from the department of justice . . . to represent the legislature in any action in which the joint committee on legislative organization intervenes.

§ 13.365. This statute explains the vehicle by which each legislative entity may exercise its authority to intervene under § 803.09(2m). Specifically, § 13.365 gives the committee on assembly organization, the committee on senate organization, and the joint committee on legislative organization authority to act "on behalf of" their corresponding legislative entity to defend the validity of state laws as intervenors.

¶11 The statutory use of "on behalf of" has a simple and straightforward meaning: it identifies which legislative entity the particular legislative committee is acting for, and how that

entity effectuates intervention.[4] Nothing in Wis. Stat. § 13.365 limits the interests of the entities permitted to intervene or otherwise narrows the authority given to the Legislature to defend those interests under Wis. Stat. § 803.09(2m). Nothing in § 13.365 references the institutional interests of the Legislature as a body. The only interests referenced in § 13.365 are the same ones repeated verbatim in § 803.09(2m). Therefore, as a statutory matter, the Legislature's litigation interests under § 13.365 are identical to those in § 803.09(2m). To read § 13.365 as limiting the Legislature's interests to its institutional interests both adds words to the statute (the Legislature's institutional

[4] Our statutes commonly use the phrase "on behalf of" to indicate that an individual is acting or bringing a claim or challenge for another. See, Wis. Stat. § 803.01(3)(a) (requiring an appointment of a guardian ad litem when "the guardian fails to appear and act on behalf of the ward or individual adjudicated incompetent") (emphasis added); Wis. Stat. § 803.08(1) ("One or more members of a class may sue or be sued as representative parties on behalf of all members") (emphasis added); § 803.08(12)(d) ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.") (emphasis added); Wis. Stat. § 885.06(2) ("No witness on behalf of the state in any civil action, matter or proceeding, on behalf of either party in any criminal action or proceeding, on behalf of a municipality in a forfeiture action or on behalf of an indigent respondent in a paternity proceeding") (emphasis added); Wis. Stat. § 885.285(1)(a) ("A settlement with or any payment made to an injured person, or to another on behalf of any injured person") (emphasis added); Wis. Stat. § 885.37(3)(a)1. ("'Agency' includes any official, employee or person acting on behalf of an agency.") (emphasis added).

The use of this same phrase suggests the Legislature intended the phrase to have the same meaning. Bank Mut. v. S.J. Boyer Constr., Inc., 2010 WI 74, ¶31, 326 Wis. 2d 521, 785 N.W.2d 462.

interests are discussed in our cases, but not in the statute), and deletes the interests separately itemized. Section 13.365, then, reinforces the plain language of § 803.09(2m).

¶12 Wisconsin Stat. § 165.25, the statute granting the Department of Justice (DOJ) authority to represent the state in litigation, further supports the plain reading of § 803.09(2m). Alongside that section's grant of authority to the Attorney General and DOJ are multiple references to the power of the Legislature to intervene under Wis. Stat. § 803.09(2m). See § 165.25(1) (representing the state in appeals and on remand); § 165.25(1m) (representing the state in other matters); § 165.25(6)(a)1. (requiring that legislative intervenors approve settlements entered by the Attorney General). In each instance, the statutes now give the Legislature power to step in as a party and defend state law. When it comes to the interests statutorily granted to the Legislature under § 803.09(2m), the authority given to the DOJ to defend those interests is not exclusive.

¶13 Putting these principles together, Wis. Stat. § 803.09(2m) gives the Legislature a statutory right to participate as a party, with all the rights and privileges of any other party, in litigation defending the state's interest in the validity of its laws. While defending state law is normally within the province and power of the Attorney General, § 803.09(2m) grants this same power to defend the validity of state law to the Legislature in certain circumstances. Where the prerequisites in § 803.09(2m) are met, Wisconsin law gives the Legislature, if it

chooses to intervene, the power to represent the State of Wisconsin's interest in the validity of its laws.

III. CONCLUSION

¶14 As we have explained, in our only decision addressing the matter, this court has held that Wis. Stat. § 803.09(2m) is facially constitutional under a challenge based on the Wisconsin Constitution's separation of powers. Vos, 393 Wis. 2d 38, ¶73. Furthermore, the text of § 803.09(2m) permits the Legislature to intervene when the validity of a state statute is at issue and to defend that interest. Therefore, in answer to the question certified by the Seventh Circuit Court of Appeals, under § 803.09(2m), the Legislature does have the authority to represent the State of Wisconsin's interest in the validity of state laws.

By the Court.—Certified question answered and cause remanded.

¶15 REBECCA FRANK DALLET, J. *(dissenting).* The certified question before us is whether, pursuant to Wis. Stat. § 803.09(2m), the Wisconsin Legislature has the authority to represent not only its own interests as the state's lawmaking institution, but the interests of the State of Wisconsin as a whole. It does not. The plain language of our statutes demarcates a clear line between the legislature's right to appear and be heard on behalf of its own interests, and the attorney general's mandatory duty to appear and make litigation decisions on behalf of the State of Wisconsin. Nothing about our decision last term in Service Employees International Union, Local 1 v. Vos, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, disturbs this unambiguous distinction. I dissent because the clear answer to the question certified by the Seventh Circuit is "no."

¶16 Under Wisconsin law, it is the attorney general, or special counsel appointed by the governor,[1] who must represent the state's interests in appellate litigation. The attorney general, a constitutional officer and head of the Wisconsin Department of Justice, has the powers and duties as "prescribed by law." Wis. Const. art. VI, § 3; Wis. Stat. § 15.25. One of those duties is

[1] Pursuant Wis. Stat. § 14.11(2)(a), the governor may employ special counsel to either "assist" or "act instead of the attorney general in any action or proceeding." The appointed special counsel assumes the duties of the attorney general to represent the state.

a legislatively prescribed mandate directing the attorney general to appear for the state and defend its interests:

> The department of justice shall . . . appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party . . . .

Wis. Stat. § 165.25(1) (emphasis added). The attorney general, and only the attorney general, has the authority to represent the state on appeal. To further clarify the attorney general's mandate, § 165.25(1) declares that "[n]othing in this subsection [which explicitly refers to § 803.09(2m)] deprives or relieves the attorney general" of this duty. By contrast, the extent of the legislature's role in representing the state's interests is prescribed by § 165.25(1m): "either house of the legislature" may "request[]" that the attorney general "appear for and represent the state."

¶17 Here, special counsel fulfilled its duty under Wis. Stat. § 165.25(1). After the district court granted plaintiffs their requested injunctive relief——for the second time——the Wisconsin Elections Commission's special counsel decided not to appeal. Among the strategic litigation decisions the legislature may participate in, whether to pursue appeal on behalf of the state is not one of them. See Wis. Stat. §§ 165.08(1) and 165.25(6)(a)(1) (authorizing legislative bodies to review and veto certain attorney general settlement, compromise, or discontinuance decisions). The legislature has no statutory right to reverse the

attorney general's——or, in this case, special counsel's——decision not to appeal.

¶18 The majority, however, contends that the legislature's intervention right pursuant to Wis. Stat. § 803.09(2m), and mentioned in Wis. Stat. § 165.25(1), deprives and relieves special counsel of the duty to appear for the state. Majority op., ¶¶8–13. The majority claims that because our statutes allow the legislature to intervene on its own behalf, such intervenor status permits the legislature to appear for and litigate on behalf of the entire state. Id. This reading fails for three reasons: (1) the court must construe the distinct terms "appear for" and "intervene" as having distinct and different meanings; (2) section 803.09(2m), by its reference to § 13.365, confirms that the legislature may intervene only "on behalf of the legislature," not on behalf of the state; and (3) it conflates an intervenor's interest with an intervenor's legal rights.

¶19 First, when two different words appear in the same statute, particularly in the same subsection, we presume the choice was intentional and that the words have distinct meanings. See Augsburger v. Homestead Mut. Ins. Co., 2014 WI 133, ¶17, 359 Wis. 2d 385, 856 N.W.2d 874 ("When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings." (quoted source omitted)). Under Wis. Stat. § 165.25(1), the legislature chose to describe the attorney general's authority as "appear[ing]

for the state," while in the same subsection, it described the legislature's authority as "interven[ing]."[2] To avoid any overlap disfavored by our canons of construction, intervention cannot be the same as appearing for the state.

¶20 Second, Wis. Stat. § 803.09(2m), by cross-reference to Wis. Stat. § 13.365, permits the legislature to appear only on its own behalf. Section 803.09(2m) states that the legislature "may intervene as set forth pursuant to [§] 13.365," subsection (3) of which, in turn, limits the legislature's representative interests to its own:

> Pursuant to [§] 803.09(2m), . . . [t]he joint committee on legislative organization may intervene at any time in the action on behalf of the legislature.

(Emphasis added.) As this court has repeatedly stated, "[u]nder the doctrine of expressio unius est exclusio alterius, 'the express mention of one matter excludes other similar matters [that are]

[2] The United States Supreme Court has recognized that it is the text of a state statute which identifies the state institution that can represent the state's interests. In Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019), the Court held that Virginia's state legislature had no standing to appeal on the state's behalf because, similar to Wisconsin's law, Virginia's attorney general has the sole authority to represent the state in civil litigation.

Under Wis. Stat. § 165.25(1), the duty to "defend all actions and proceedings" unambiguously appears in the sentence discussing what the attorney general shall do. Again, the legislature chose to use the word "defend" with regard to the attorney general and "intervene" with regard to the legislature. Those distinct terms should be given distinct meanings. See Augsburger v. Homestead Mut. Ins. Co., 2014 WI 133, ¶17, 359 Wis. 2d 385, 856 N.W.2d 874.

not mentioned.'" E.g., FAS, LLC v. Town of Bass Lake, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287 (second alteration in original) (quoted source omitted). The legislature's inclusion of the phrase "on behalf of the legislature" precludes a reading of § 13.365, and by extension § 803.09(2m), that extends the legislature's representation right to additionally include "on behalf of the state." The plain language of these statutes confers upon the legislature the right to intervene on behalf of its own interests; it lacks statutory authority to "appear for" or "defend" the state as a substitute attorney general.[3]

¶21 Nothing this court said last term in Vos, 393 Wis. 2d 38, compromises the attorney general's exclusive authority to represent the state's interests in litigation. We noted only that there is "no constitutional violation" in the legislature's

[3] Under the majority's reading of, Wis. Stat. § 803.09(2m), the joint committee on legislative organization, the committee on assembly organization, and the committee on senate organization could all appear for the state, in addition to the attorney general.

It is no stretch to imagine a scenario where the assembly and senate are controlled by different parties who may take diametrically opposed positions on appeal. If the assembly concedes an argument but the senate wishes to contest it, which position should the court accept as the state's position? What if the attorney general is still participating——how many competing voices can speak for the state? These absurd results are yet another reason to reject the majority's misguided reading. State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results.").

intervening in at least some circumstances in order to represent its own institutional interests. Id., ¶72. Vos does not stand for the proposition that Wis. Stat. § 803.09(2m) allows the legislature to become the de facto attorney general. Indeed, the legislature "is not the state's litigator-in-chief or even the representative of the people at large. The legislature is 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 (Hagedorn, J., dissenting); see also id., ¶243 ("[W]e certainly don't let the legislature bring any case it wants.").

¶22 Finally, I address the majority's shocking assertion that "Wisconsin law gives the Legislature, if it chooses to intervene, the power to represent the State of Wisconsin's interest in the validity of its laws." Majority op., ¶13 (emphasis added). The majority correctly points out that the legislature, when acting as an intervenor, has "all the same rights as all other parties to the action," including the "power to raise 'any legal claims and defenses.'" Id., ¶9 (quoted source omitted). But it immediately goes awry by insisting that a party's right to raise a legal claim or defense also allows it to assume the interest of other parties and raise a claim or defense on their behalf. See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, 2011 WI 36, ¶62, 333 Wis. 2d 402, 797 N.W.2d 789 (explaining that a party is "prohibit[ed] . . . from raising another's legal rights" (quoted

source omitted)). An intervenor stands only on the interests upon which it entered the case. See Karcher v. May, 484 U.S. 72, 78 (1987) (holding that a party who intervened upon one interest cannot rely upon another party's interest to pursue an appeal).

¶23 This distinction matters because the question certified to this court is not about whether an intervenor has the same rights as a named defendant to pursue a claim in federal court. Those rights are established by federal law. See Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019) ("The right to intervene 'is a purely procedural right and even in a diversity suit it is the Federal Rules of Civil Procedure rather than state law that dictate the procedures . . . to be followed.'" (quoted source omitted)). The certified question is whether Wisconsin law allows the legislature to step into the role of the attorney general and represent the state's interests.

¶24 The answer is no. Wisconsin Stat. § 13.365 makes clear that the legislature can appear "on behalf of the legislature." It can represent the legislature's interest. In Vos, this court enumerated a list of such legislative interests, both statutorily and constitutionally based: (1) where the legislature requests the attorney general to represent the state; (2) where the legislature or one of its bodies are the subject of the lawsuit; or (3) where the public fisc is sufficiently implicated, such as a challenge involving an appropriations bill or involving a damages claim against a state entity. Vos, 393 Wis. 2d 38, ¶¶63-71. These

are not equivalent to the state's general interest in the validity of state law.[4] See Bethune-Hill, 139 S. Ct at 1953 ("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."). In short, the legislature can represent its institution's interest, but it cannot, by the plain terms of our statutes, appropriate the state's interests so as to veto the executive's decision not to appeal.

¶25 The majority appears troubled by the notion that the attorney general or appointed special counsel could discharge its duty to represent the state's interests by declining to pursue an

[4] Consider what is at issue in the federal case that brings us this question. The plaintiffs are seeking an injunction against an executive branch agency to stop it from executing a law during a public health crisis. Nothing about that injunction will "strike" the challenged laws from the statute books. As the Seventh Circuit panel correctly observed regarding the challenged laws, "All of the legislators' votes were counted; all of the statutes they passed appear in the state's code." Democratic Nat'l Comm. v. Bostelmann, Nos. 20-2835 & 20-2844, 2020 WL 5796311, at *1 (7th Cir. Sept. 29, 2020); see also Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) ("[O]nce 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.").

Nothing about this dispute concerns the legislature, so why should it determine the position of Wisconsin's executive branch when that branch has already spoken? As this question demonstrates, the majority's atextual conclusion is plagued with unanswered constitutional dilemmas. Instead, it leaves for another day the significant constitutional questions this court will no doubt face under the majority's holding.

appeal. Setting aside the fact that questions about the executive's duty are not before the court, the majority's solution to that unpresented problem is not to interpret the law but to rewrite it. It asserts "intervene . . . on behalf of the legislature" means "appear for and defend the state." This practice is just the latest in a growing number of instances whereby this court——ironically at the legislature's behest—— legislates from the bench. For instance, in Palm, 391 Wis. 2d 497, this court excised the word "order" from a statute so that it could classify an executive's action as "rulemaking." Today, it blatantly redefines "intervene" as "appear for" or "defend" because that is what the legislature now wishes it wrote. Such a misuse of this court's authority is becoming a disturbing habit of the court, and one I would urge my fellow Justices to break.

¶26 The plain language of Wis. Stat. §§ 165.25(1)-(1m), 803.09(2m), and 13.365 confirms that the legislature's role in state litigation is either to request that the attorney general represent the State or to intervene, standing only upon its own institutional interests in litigation. Vos reinforced this clear textual demarcation. The legislature lacks the statutory authority to usurp the executive's exclusive power to represent Wisconsin's interests; and therefore the answer to the Seventh Circuit's question is a resounding "no." The majority's decision to the contrary creates out of whole cloth authority for the legislature to act as the attorney general, a holding that, in

addition to the statutory issues discussed above, raises significant issues of constitutional separation of powers. Those issues are not before us today but when they are, the errors underlying the majority's decision will be even more transparent.

¶27 For the foregoing reasons, I respectfully dissent.

¶28 I am authorized to state that Justices ANN WALSH BRADLEY and JILL J. KAROFSKY join this dissent.