August 11, 2020

VIA U.S. MAIL

Sheila T. Reiff
Clerk of the Supreme Court and Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53703

Re: Petitioners-Respondents' Letter in Response to the Court's Order of July *Clean Wisconsin, Inc. v. DNR*, Appeal No. 2018AP000059.

Dear Ms. Reiff:

The Court requested a letter on the "status of the certified appeal and the impact of the decision in *SEIU, Local 1 v. Vos*, case nos. 2019AP614-LV and 2019AP622, if any, on the appeal and pending motion [for intervention]." Order (July 28, 2020). Clean Wisconsin and Pleasant Lake Management District ("Petitioners-Respondents") submit this letter in response to the Court's Order.

INTRODUCTION

The Joint Committee on Legislative Organization ("JCLO") requested to intervene in this appeal pursuant to Wis. Stat. § 803.09(2m). As Petitioners-Respondents explained in briefing ordered by the Court in 2019, JCLO's request to intervene must be denied because JCLO fails to satisfy the applicable statutory standard for intervention in administrative appeals under Wis. Stat. ch. 227.

Accordingly, the Court need not reach the question, raised *in SEIU,* of whether Wis. Stat. § 803.09(2m) is invalid as applied in this case due to a violation of the constitutional separation of powers between the branches of government. Under the doctrine of constitutional avoidance, the Court should rule based on the statutory arguments previously raised by Petitioners-Respondents.

If the Court determines that it must reach the constitutional question, then JCLO's pending motion must be denied. Interpreting Wis. Stat. § 803.09(2m) as JCLO urges in support of its motion creates a constitutional conflict because it would violate the separation of powers. That interpretation must therefore be rejected.

ARGUMENT

I. JCLO fails to satisfy the applicable statutory standard for intervention under Wis. Stat. ch. 227, so the Court need not address the impact of *SEIU*.

We will not rehash our statutory arguments opposing JCLO's Petition for Intervention here, but instead summarize: Petitioners-Respondents established that Wis. Stat. § 227.53(1)(d) is the correct legal standard for an intervention motion on the facts presented by this case. *See* Petitioners-Respondents Memo. at 4-8 (June 19, 2019); Petitioners-Respondents Response Memo. at 4-15 (July 9, 2019); DNR Memo. at 6-13 (June 19, 2019); DNR Response Memo. at 5-9 (July 9, 2019). Petitioners-Respondents further established that JCLO fails to meet that standard. *See* Petitioners-Respondents Memo. at 8-11; Petitioners-Respondents Response Memo. at 15-20; *see also* DNR Memo. at 14-18; DNR Response Memo. at 9-10. In addition, the parties explained that JCLO may not properly move for intervention under the general intervention statute, Wis. Stat. § 803.09, because Wis. Stat. § 803.09(2m) does not apply. *See* DNR Memo. at 4-5; DNR Resp. Memo. at 3-5. Even if the statute could be construed to apply here, JCLO fails to satisfy the applicable standards for intervention "as a matter of right." *See* Petitioners-Respondents Memo. at 11-28; Petitioners-Respondents Response Memo. at 20-21. Finally, last year JCLO abandoned the argument that it satisfies the standards for permissive intervention under Wis. Stat. § 803.09(2). *See* DNR Response Memo. at 2-3. JCLO failed to show that it meets the standard under Wis. Stat. § 809.03(2) for permissive intervention in any event. *See* Petitioners-Respondents Memo. at 29-33. Since JCLO's motion must be denied on these grounds, the Court need not reach the constitutional question raised in *SEIU*. *See Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, ¶91, 294 Wis. 2d 441, 717 N.W.2d 803 (citation omitted).

II. *SEIU* confirms why the statutory intervention standards above cannot be read to allow JCLO's intervention here.

SEIU confirms why Wis. Stat. ch. 227 or Wis. Stat. § 803.09 must be read to prevent JCLO from participating without the requisite interest. Otherwise, those statutes would violate the constitutional separation of powers as applied in this case. The Court is faced with two differing interpretations of Wis. Stat. § 803.09(2m). JCLO's incorrect interpretation not only misapplies the law, it creates a constitutional conflict by sanctioning interventions that would violate the separation of powers. Where the Court can reasonably adopt a construction of a statute that avoids a constitutional conflict, it should do so. *In re Commitment of Hager*, 2018 WI 40, ¶31, 381 Wis. 2d 74, 911 N.W.2d 17 (citations omitted). Petitioners-Respondents' interpretation is not just reasonable, it is correct. That it is also the constitutionally permissible interpretation only confirms why the Court must deny JCLO's motion to intervene.

A. Granting intervention violates the separation of powers because JCLO has no institutional interest and thus litigating this case intrudes on a core power of the executive branch.

SEIU clarified that Wis. Stat. § 803.09(2m) is unconstitutional where it intrudes on the core powers of the executive. 2020 WI 67, ¶35, 946 N.W.2d 35; *id.*, ¶63 ("representing the State in litigation is predominantly an executive function"). However, the Court recognized that the legislature may intervene in certain cases and categories of matters where its institutional interests are implicated without running afoul of separation of powers principles. *Id.*, ¶63. Under those limited circumstances, representing the State in litigation is a shared power. *Id.* Shared powers may be exercised to the extent that it does not "unduly burden or substantially interfere with another branch." *Id.*, ¶35 (citation omitted).

The Court then identified three instances that it explained, in the proper case, could be a constitutional application of Wis. Stat. § 803.09(2m):

> Namely, where a legislative official, employee, or body *is represented by the attorney general*, the legislature has, in at least some cases, an institutional interest in the outcome of that litigation. Similarly, where a legislative body is the principal authorizing *the attorney general's representation* in the first place, the legislature has an institutional interest in the outcome of that litigation in at least some cases. This is true where the attorney general's representation is in defense of the legislative official, employee, or body, or where a legislative body is the principal authorizing the prosecution of a case. And in cases where spending state money is at issue, the legislature has a constitutional institutional interest in at least some cases sufficient to allow it to require legislative agreement with certain litigation outcomes, or even to allow it to intervene.

Id., ¶71 (emphasis added).

None of those interests is implicated here. As to the first two institutional interests identified, the Department of Justice, under the authority of the attorney general, is already involved in this case on behalf of the state, and the legislature (or JCLO) has not asked the attorney general to represent it. Thus, these first two institutional interests cannot be invoked by the legislature.[1] The legislature does not share power with the attorney general

[1] The cases cited in *SEIU* for the proposition that "[t]he legislature, or its committees or members, have litigated cases in Wisconsin impacting potential institutional interests throughout the history of the state," *SEIU*, 2020 WI 67, ¶72 n.21, all involved a party bringing its own litigation to challenge an executive veto, on behalf of individual members and non-legislative individuals or groups, invoking the Court's original jurisdiction which is not at issue here. *See Risser v. Klauser*, 207 Wis. 2d 176, 180, 558 N.W.2d 108 (1997) (action of individual members that also involved a taxpayer); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 487-88, 534 N.W.2d 608 (1995) (action by individual members that also involved a public interest advocacy

in litigation when the attorney general is already in the litigation on behalf of the State, as here.[2] As to the third institutional interest, this case does not involve a dispute over an appropriation law that would implicate the legislature's constitutional role in enacting such laws under Wis. Const. art. VIII, § 2. *See SEIU*, 2020 WI 67, ¶68.

Instead, JCLO has identified its interest in this case as an interest "in legislation that clearly defines the limits of administrative agency authority." Leg. Pet. to Intervene at 5. JCLO's interest is thus outside the Court's identified zone of constitutionally viable applications of Wis. Stat. § 803.09(2m). None of the claims in this case seeks to invalidate the power of the legislature to limit administrative agency authority via legislation. *See* Petitioners-Respondents Memo. at 4-8 (June 6, 2019).

The decision in *SEIU* implied that there may be other instances in which the legislature has an institutional interest that renders representation of the State in litigation a shared power. 2020 WI 67, ¶73. However, JCLO's asserted interest in this case is not the sort of "institutional interest" that makes litigating this case a shared power and thus does not avoid separation of powers conflicts.

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600 (citation and quotation omitted). This case concerns a dispute as to whether DNR properly issued a high capacity well permit consistent with existing statutes and the

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group); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 433, 424 N.W.2d 385 (1988). The Court only mentioned the ability of the Legislature to bring the action on its own behalf in *Thompson*. There, it "decline[d] ... to resolve questions of the apparent authority of those purporting to represent the legislature—i.e., the Senate and Assembly and their respective leadership as well as the Joint Committee on Legislative Organization,—to bring and maintain this declaratory judgment action." *Thompson*, 144 Wis. 2d at 435. It also declined to address the Legislature's standing and, instead, noted that two individual plaintiffs had standing as "as residents and taxpayers." *Id.*

[2] In the 1848 statutes identified by the Court in *SEIU*, there were two possibilities for the attorney general's appearance in litigation on behalf of the state—either where the state is itself a party or where requested by the governor or the legislature. *See* An Act concerning the Attorney General, Wis. Laws 1848; *SEIU*, 2020 WI 67, ¶65. The modern statutes are in accord. The attorney general's representation of a state agency in this judicial review action was not requested by the legislature. The attorney general's participation in this litigation is a representation of the State pursuant to Wis. Stat. § 165.25(1), not an "other matter" covered by Wis. Stat. § 165.25(1m). It is this latter, residual category of cases that formed the basis for the Court's conclusion that the legislature has an institutional interest in litigation when it has authority to direct the attorney general to conduct litigation on behalf of the state in the first instance. *SEIU,* 2020 WI 67, ¶¶63-67. Here, the legislature did not exercise any statutory authority to initiate the attorney general's representation of the state in the first instance, and so does not have an institutional interest.

Public Trust Doctrine. *See* Wis. Stat. §§ 227.10(2m), 281.34 and Wis. Const. art. IX, § 1. DNR is exercising executive power when it determines whether a high capacity well permit application meets statutory and constitutional requirements:

> The executive, however, is not a legislatively-controlled automaton. Before executing, he must of necessity determine for himself what the law requires him to do. As Alexander Hamilton said, "[h]e who is to execute the laws must first judge for himself of their meaning." *See* Alexander Hamilton, *Letters of Pacificus No. 1* (June 29, 1793), *reprinted in* 4 *The Works of Alexander Hamilton* 438 (Henry Cabot Lodge ed. 1904). This is intrinsic to the very nature of executive authority.

SEIU, 2020 WI 67, ¶96.

> The executive must certainly interpret and apply the law; it would be impossible to perform his duties if he did not. After all, he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). Our constitution not only does not forbid this, it requires it.

Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 2018 WI 75, ¶53, 382 Wis. 2d 496, 914 N.W.2d 21. *See also Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").[3]

Neither Petitioners-Respondents nor DNR is arguing that any statute is facially unconstitutional, preempted, or otherwise invalid. While JCLO may disagree with how DNR decides to administer the high capacity well permitting program, or how the attorney general defends those decisions in judicial review cases, that disagreement does not correspond to any institutional interest held by the legislative branch. *See Bowsher*, 478 U.S. at 733-34 ("[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."). JCLO cannot both make the laws and seek to administer or enforce them. *See, e.g.*, *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶5, 376 Wis. 2d 147, 897 N.W.2d 384.

JCLO's disagreement with the executive branch in this regard is no different from that of anyone else. Members of the legislature "have no more right to construe one of its enactments retroactively than has any private individual." *Northern Trust Co. v. Snyder*,

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[3] Making executive branch enforcement decisions like permitting decisions is not a shared power just because the legislature enacted the statutes DNR must enforce. "[W]hen an administrative agency acts (other than when it is exercising its borrowed rulemaking function), it is exercising executive power." *SEIU*, 2020 WI 67, ¶97. *See also id.*, ¶130 ("the legislature does not confer on administrative agencies the ability to exercise executive power; that comes by virtue of being part of the executive branch.").

113 Wis. 516, 530 89 N. W. 460, (1902). Indeed, it is error for a court to allow a legislator to opine as to the legislature's intent in promulgating a statute. *See, e.g.*, *Cartwright v. Sharpe*, 40 Wis. 2d 494, 508-509, 162 N.W.2d 5 (1968) (explaining that a lower court erred in permitting a "legislator to testify as to the intention of the legislature").[4] This Court has thus been clear that members of the legislative branch have no role, much less a unique constitutional role, in arguing for a particular interpretation of statute. Accordingly, they cannot have an institutional interest in making such an argument as a party to this litigation.

For these reasons, JCLO's purported interest not only extends beyond its constitutional powers, it intrudes on those of the executive branch.

Even if JCLO were properly presenting an institutional interest in this permit challenge such that a "shared power" were implicated, the Court would still have to conclude that intervention does not unduly burden or substantially interfere with the powers of a coordinate branch. *SEIU*, 2020 WI 67, ¶35. JCLO has provided no reason for the Court to make such a finding here. Thus, in this case, using Wis. Stat. § 803.09(2m) to allow intervention in this litigation would be an unconstitutional application of the statute.

B. Granting intervention violates separation of powers because it substantially interferes with the judiciary's authority.

Granting intervention in this case would also substantially interfere with the judicial branch's constitutional powers. JCLO's argument that intervention "as of right" gives it a "mandatory right" to intervene in the appeal and requires the Court to admit it as a party without further consideration would infringe upon the judicial power. JCLO Pet. at 3. The Court's judicial power requires that it maintain its discretion to manage intervention, including under Wis. Stat. § 803.09(2m). As we explained in prior briefing, even for a party intervening "as a matter of right," the judiciary must still evaluate whether the party meets the minimum standards for intervention. Petitioners-Respondents Memo. at 11-28. JCLO is simply wrong that the Court must allow it in no matter what. JCLO's "mandatory right" interpretation of Wis. Stat. § 803.09(2m) seeks to arrogate judicial powers for the legislature and must be rejected. "[A] truly independent judiciary must be free from control by the other branches of government." *Gabler*, 2017 WI 67, ¶38 (citation omitted); *see also id.*, ¶41 (explaining that another branch may not assume judicial power by "mandat[ing] particular judicial action").

Additionally, JCLO's claim of a "mandatory right" intrudes on the Court's "superintending and administrative authority over all courts," a core power of the judicial branch. *Koschkee v. Evers*, 2018 WI 82, ¶¶8-9, 382 Wis. 2d 666, 913 N.W.2d 878 (quoting and citing Wis. Const. art. VII, § 3). The judicial branch has inherent authority to determine whether

[4] That error would be compounded here, as the proposed intervenor does not represent the legislature that was seated when the statute was enacted.

parties, in addition to the attorney general, are required to provide adequate representation for the State and its agencies. *See id.*, ¶12. Mandatory intervention by JCLO would impermissibly allocate this judicial power to the legislative branch. Indeed, the Court's discussion in *SEIU*—that only in certain categories of cases is it constitutionally permissible for JCLO to intervene and then, only in certain cases within those categories—takes as its premise that the Court's proper role is to determine when executive versus legislative representation of the State in litigation is consistent with the constitutional separation of powers. *SEIU*, 2020 WI 67, ¶¶71-73.[5]

CONCLUSION

JCLO's motion must be denied because it fails to satisfy the standard for intervention under Wis. Stat. ch. 227, which is the governing standard for intervention in this case. Even if Wis. Stat. § 803.09 applied to JCLO's motion, which it does not, JCLO also fails to satisfy those standards, including Wis. Stat. § 803.09(2m). Even if the Court rejects these statutory arguments, the Court must still deny JCLO's motion because it does not present a constitutional application of Wis. Stat. § 803.09(2m). For all the reasons contained herein and previously articulated in briefing, JCLO's Petition to Intervene must be denied.

Sincerely,

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[5] This judicial separation of powers argument was not addressed by the Court in *SEIU*. However, we raise it here because the Court's order on briefing for JCLO's Petition explained that the parties "need not and should not address the Constitutionality of Wis. Stat. § 803.09(2m)." Order at 1 (May 30, 2019).

Statement of Mailing

In accordance with the Court's April 13, 2020 Order ("Temporary Mailbox Rule"), I hereby certify that on August 11, 2020 I mailed Petitioners-Respondents' Letter in Response to the Court's Order of July *Clean Wisconsin, Inc. v. DNR*, Appeal No. 2018AP000059 via U.S. Mail. I personally handed these documents to a postal worker at the 2 East Mifflin Street post office.

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