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August 11, 2020

RECEIVED
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CLERK OF SUPREME COURT
OF WISCONSIN

Sheila Reiff
Clerk of Court
Supreme Court of Wisconsin
110 E Main St #440
Madison, WI 53703

Re: *Clean Wisconsin, Inc., et. al v. Wisconsin Dep't of Natural Resources*, Appeal No. 2018AP59

Dear Ms. Reiff:

Enclosed for filing on behalf of proposed intervenor, the Wisconsin Legislature, please find the original and ten copies of the Wisconsin Legislature's Brief on the Status of This Appeal and Impact of *SEIU, Local 1 v. Vos* on its Pending Motion to Intervene.

Would you please file-stamp the extra copy and return it to the delivering messenger? Copies of the enclosed have been mailed to counsel via U.S. Mail on this day.

Very truly yours,

HUSCH BLACKWELL LLP

Lisa M. Lawless

Lisa M. Lawless

Enclosures

cc: Kathryn A. Nikola and Evan Feinauer (w/enc.)
Carl A. Sinderbrand (w/enc.)
Robert Fassbender (w/enc.)
Gabe Johnson-Karp and Jennifer L. Vandermeuse (w/enc.)
Robert D. Lee (w/enc.)
Henry E. Koltz (w/enc.)

SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc. and Pleasant Lake Management District, Petitioners-Respondents, v. Wisconsin Department of Natural Resources, Respondent-Appellant, Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, Wisconsin Potato & Vegetable Growers Association, Wisconsin Cheese Makers Association, Wisconsin Farm Bureau Federation, Wisconsin Paper Council and Wisconsin Corn Growers Association, Intervenors-Co-Appellants.	Appeal No. 2018AP59

THE WISCONSIN LEGISLATURE'S BRIEF ON THE STATUS OF THIS APPEAL AND IMPACT OF *SEIU, LOCAL 1 v. VOS* ON ITS PENDING MOTION TO INTERVENE

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INTRODUCTION

In its July 28, 2020 Order, the Court has asked the parties to file simultaneous letter/briefs discussing the status of this certified appeal and the impact of the Court's recent decision in *SEIU, Local 1 v. Vos*, Case No. 2019AP614-LV and 2019AP622 (2020 WI 67) on the pending motion to intervene. This letter is submitted on behalf of proposed intervenor the Wisconsin Legislature (the "Legislature").

The merits briefing in this certified appeal was stayed pending the Court's determination of the Legislature's motion to intervene.[1] Subsequently, the intervention motion and this case as a whole were stayed pending further order of the Court (presumably, pending the Court's decision in the *Vos* case).[2] Now that the *Vos* decision has been issued, this case should proceed, and the Legislature's motion to intervene, which is fully briefed and ripe for decision, should be granted.

Vos upheld the facial constitutionality of the statutes that expressly permit the Legislature to intervene in certain litigation and the decision supports the Legislature's intervention in this appeal. In *Vos*, the Court found Wis. Stat. §§ 803.09(2m) and 13.365 constitutional on their face, and

[1] Order, May 7, 2019.
[2] Order, September 6, 2019.

noted that the Legislature has institutional interests in intervening in certain actions pertaining to core legislative functions, such as "litigation implicating the public purse or in cases arising from its statutorily granted right to request the attorney general's participation in litigation." *Vos*, 2020 WI 67, ¶ 10.

This case implicates a core legislative interest. Indeed, it directly affects the Legislature's interest in protecting its core function – lawmaking – from usurpation by the executive branch. As this Court recognized in *Vos*, "the legislature's authority comprises the power to make the law...." 2020 WI 67, ¶ 95. And this interest is protected through application of the plain language of Act 21's "explicit authority" restrictions found in Wis. Stat. § 227.10(2m). After all, administrative agencies are creatures of the Legislature and they only have such authority as provided by statute.[3] Legislative intervention is particularly important where, as here, an agency asks the Court to disregard the plain language of a controlling statute governing the limits of agency power and permit the agency to take actions

[3] *Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47 ("It is important to remember that administrative agencies are creatures of the legislature."); *see also State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶ 26, 303 Wis. 2d 570, 735 N.W.2d 131 (" '[A]n administrative agency has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates.' ") (quoting *Brown Cty. v. DHSS*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981)).

in direct conflict with the statute that intrude upon the legislative power vested in the Legislature.

While adequate representation of the Legislature is not an interest the Court need consider in granting legislative intervention, quite troubling here is that no party in this case even purports to represent the Legislature's interest. The Department of Natural Resources ("DNR") has reversed course since the appeal was originally filed, and now fully intends to argue **against** its own decision to issue eight permits for high-capacity wells, to argue against those permits and assert that DNR may perform environmental review not explicitly authorized by state statutes or rules, in direct contravention of the plain meaning of Wis. Stat. § 227.10(2m).

This is not to say that intervention by the Legislature must always be accompanied by an interest as great as the one at stake here. However, where the interest of the Legislature is the protection against usurpation of its lawmaking power by the executive branch, and where no party represents that interest, the strong institutional interest supporting intervention is undeniable.[4] Under the new intervention statutes and this

[4] While per the terms of Wisconsin's legislative intervention statutes, it is not necessary that the Legislature demonstrate that no party represents their interest to support the granting of a motion to intervene, it is undeniable that the Legislature must be granted

Court's ruling in *Vos*, the Legislature should be allowed to intervene in any case that is not exclusively within the executive branch's core powers. Those would be cases that implicate a legislative interest and would be examined on a case-by-case basis. The Court could examine whether the issues in the case have been areas in Wisconsin law exclusively reserved for the executive branch, or within Wisconsin's generous shared powers doctrine. If some issues were within the exclusive executive function, the Legislature's intervention could be limited by this Court to only those issues. In this case, however, there can be no question that limiting an agency's unfettered role in policy making is clearly within the Legislature's zone of interest, not a core executive function.

If the Court choses to reach the sort of questions above, the only questions on the motion to intervene are whether intervention in this appeal is permitted by statute and whether the Legislature meets the applicable requirements for intervention. First, the constitutionality of the legislative intervention statute is not at issue in this case, as none of the parties has argued that legislative intervention is unconstitutional. Second, the fully briefed motion to intervene simply requires the Court to determine if

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intervention in instances like this, where absolutely no party even purports to represent that interest.

legislative intervention meets the elements of Wis. Stat. §§ 803.09(2m) and 809.13, and, if so, whether the intervention statutes pose any conflict with chapter 227. As shown on the fully briefed motion to intervene, this case meets the criteria for legislative intervention under Wis. Stat. § 803.09(2m) because the construction or validity of a statute is challenged as part of the claims or defenses of the parties. Further, such intervention does not conflict with chapter 227 because appeals from chapter 227 judicial proceedings are governed by chapter 809 and chapter 227 contains no appellate intervention provision. Thus, intervention should be granted.

I. Status of Certified Appeal, Appeal No. 2016AP1688 Kinnard Farms.

In September 2016, DNR approved the high-capacity well permit applications of eight farmers pursuant to chapter 281, Wis. Stats. Chapter 281 provides that DNR may conduct an environmental review process for high-capacity wells that meet certain criteria. Wisconsin Statute sections 281.34 and 281.35 specify certain types of wells for which environmental review may be conducted. The eight wells in this case fall outside those specific categories. In considering the permit applications, DNR sought to conform its high-capacity-well program in light of 2011 Wis. Act 21 ("Act 21"), enacted as Wis. Stat. § 227.10(2m), which provides that an

administrative agency can impose requirements and conditions only if there is a statute or duly-enacted rule providing explicit authority for such requirements or conditions.

Under Act 21, DNR reviewed the environmental impact of proposed wells only where an environmental impact study was specifically authorized by statute. None of the eight wells at issue in this case fits within any of the statutory criteria for environmental review. So consistent with Act 21's imperative, DNR approved the eight wells without conducting an additional environmental review beyond the statutory review requirements. DNR followed Act 21 and lawfully issued the well permits.

Petitioners-respondents Clean Wisconsin, Inc. and Pleasant Lake Management District (collectively, "Clean Wisconsin") filed a judicial review proceeding in circuit court to challenge the well permits. Clean Wisconsin argued that DNR should not have issued the well permits without conducting an environmental impact review under DNR's general interest in regulating the State's waters under the public trust doctrine. DNR argued that the well permits were proper and the requested environmental review is barred by Act 21 because it is not authorized or provided by statute or rules.

In issuing the well permits, DNR relied upon a May 2016 Attorney General opinion that Act 21 "precluded" any type of environmental review for wells outside the limited types of wells specified in chapter 281. The Attorney General opined that the *Lake Beulah* decision did not address Act 21, Act 21 is controlling, and Act 21 " 'revert[ed] any residual duty to act under the public trust doctrine 'back to the Legislature.'" (Certification at 5). Accordingly, DNR concluded it could not require the asserted environmental review as a condition of the well permits because such measures are beyond the scope of the agency's authority. To impose them would violate Act 21.

Clean Wisconsin filed a petition for judicial review of the eight well permits under chapter 227. On October 11, 2017, the circuit court vacated the eight well approvals, citing the Court's *Lake Beulah* decision, and holding that DNR has generally been delegated the affirmative duty to regulate the waters of the State.

This appeal followed. DNR filed a notice of appeal from the order on January 5, 2018. On January 5, 2018, co-appellants-intervenors also appealed, filing a notice of appeal from the circuit court's order. Those co-appellants are represented by Great Lakes Legal Foundation and they

consist of Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, Wisconsin Potato & Vegetable Growers Association, Wisconsin Cheese Makers Association, Wisconsin Farm Bureau Federation, Wisconsin Paper Council and Wisconsin Corn Growers Association.

The appellant DNR's brief was filed on May 2, 2018 and co-appellants-intervenors filed their appeal brief on May 3, 2018. Clean Wisconsin filed its response brief on June 1, 2018, appellant DNR filed its reply brief on July 18, 2018, and co-appellants-intervenors filed their reply brief on June 18, 2018. On June 19, 2018, the Court of Appeals granted motions to file amicus briefs by Wisconsin Trout Unlimited, Inc. and Central Sands Water Action Coalition. Those amicus briefs were filed on June 19, 2018 and June 22, 2018, respectively.

The appeal was fully briefed in the Court of Appeals on June 22, 2018. On October 29, 2018, the Court of Appeals (District II) gave notice that the appeal was submitted for decision on the briefs.

A. Court of Appeals Briefing and Certification Order.

In its opening Court of Appeals brief, DNR argued that it could not condition the well permits upon environmental review requirements that are

not authorized by statute. DNR argues that it could not conduct the requested environmental review. DNR argues that by virtue of Act 21—specifically, Wisconsin Statutes section 227.10(2m)—DNR is not permitted to conduct such additional environmental review for the wells. (Opening Brief, 5/2/2018 at 1). This appeal considers the construction and scope of the applicable statutes. (*Id.* at 24, 27-36, 43-47.) Clean Wisconsin disagrees as to the proper construction of the statutes, and argues that DNR's interpretation of the statutes is unconstitutional. (Resp. Brief, 6/1/2018 at 22-40). These arguments show that the parties disagree as to the construction of Act 21, various sections of chapter 281, and the *Lake Beulah* decision. As briefed by the parties for the Court of Appeals, this case presents significant questions of statutory construction involving DNR's powers and Act 21's statutory constraints on applying requirements not expressly provided by statute.

On January 16, 2019, the Court of Appeals issued a certification decision requesting that this Court accept the appeal for decision. The court certified this appeal as a companion case to its certification in Appeal No. 2016AP1688/2016AP2502, explaining that the Court's decision in both appeals "address 2011 Wis. Act 21 (Act 21) and its application to the

regulatory permit approval process relating to 'waters of the state.'" Certification by Wisconsin Court of Appeals, Appeal No. 2018AP59, Jan. 16, 2019 at 2. As the court noted, DNR argued that Act 21 confines agencies' authority to that explicitly permitted by statute, and prohibits agencies from implementing or enforcing any standard, requirement, or threshold unless expressly permitted by statute or by a duly-enacted rule. However, Clean Wisconsin argued that notwithstanding the plain language of Act 21, DNR has the authority and general duty to preserve the waters of the state and has the discretion to undertake the review it deems necessary for all proposed high-capacity wells, citing *Lake Beulah Mgmt. Dist. v. DNR,* 2011 WI 54, ¶ 39, 335 Wis. 2d 47, 799 N.W.2d 73. (*Id.*).

The Court of Appeals certified this appeal as a companion case to Appeal No. 2016AP1688 and explained that the issues presented for decision in this appeal include (1) defining the impact of Act 21 on the regulatory permit approval process, (2) answering the question of who is trustee of the State's waters, and (3) determining whether *Lake Beulah* is still controlling law in Wisconsin. *See* Certification by Wisconsin Court of Appeals, Appeal Nos. 2016AP1688/2016AP2502, Jan. 16, 2019, at 4. The Court of Appeals' certification order explains that the companion cases

require a "determination of the scope and breadth of Act 21," which "will have implications far beyond" the issues in these companion cases and "will touch every state agency within Wisconsin." (*Id.*)

B. **Initial Proceedings in this Court**

On April 9, 2019, the Supreme Court accepted the certification and set a briefing schedule. On April 25, 2019, the Joint Committee on Legislative Organization on behalf of the Wisconsin Legislature (the "Legislature") moved to intervene in the appeal, the briefing of which is discussed below.

On May 2, 2019, the appellant DNR, by the Attorney General, filed a motion to modify the briefing schedule. Appellant DNR requested that the Court modify the briefing schedule, asking to file its opening Supreme Court brief on the respondents' schedule. DNR asserts that its briefing before the Court of Appeals was "not consistent with controlling law[,] including the public trust doctrine, the *Lake Beulah* decision, and "the effect of 2011 Wis. Act 21" on DNR's authority regarding high-capacity-well permitting. (May 2, 2019 Motion at 3). DNR "maintains that, in most meaningful respects, the judgment below should be affirmed." (*Id.*)

The Court stayed merits briefing on May 7, 2019. The Legislature filed its opposition to DNR's motion to modify the briefing schedule on May 14, 2019. On May 20, 2019, Clean Wisconsin filed a motion to strike the Legislature's opposition.

On May 30, 2019, the Court granted DNR's motion to modify the briefing schedule, permitting DNR to file its initial Supreme Court brief on the respondents' schedule. The Court denied the motion to strike as moot. Additionally, because the parties differed on the standard applicable to the Legislature's intervention motion (see part I.C, below), the Court directed the parties to file simultaneous memoranda on the applicable standard for intervention by June 19, 2019, with responses by July 9, 2019.

C. Briefing of the Legislature's Motion to Intervene

On April 25, 2019, the Legislature moved to intervene in this appeal pursuant to Wis. Stat. §§ 809.13 and 809.63. The Legislature asserted it has the right to intervene under Wis. Stat. § 803.09(2m) because the appeal challenges the construction of a statute and its application to certain administrative agency action. In the alternative, the Legislature moved for permissive intervention based on its institutional interest in the proper

application of Act 21, which clearly defines the limits of administrative agency authority.

The Legislature asserted that it must be allowed to intervene in this appeal as of right pursuant to Wis. Stat. § 803.09(2m), which provides that when a party challenges the construction or validity of a statute as part of a claim or defense the Legislature may intervene as set forth in Wis. Stat. § 13.65 "at any time in the action as a matter of right." Such intervention in appeals is pursuant to Wis. Stat. § 809.13, which incorporates section 803.09(2m) as a ground for intervention.[5]

On May 6, 2019, DNR filed a brief in opposition to the Legislature's intervention. DNR argued that the Legislature's intervention in this appeal is governed solely by Wis. Stat. § 227.53(1)(d), which provides for intervention prior to administrative hearings. DNR argued that because the administrative hearing already occurred, the Legislature is forever foreclosed from intervening in this appeal. DNR argued that Wis. Stat.

[5] Additionally, the Legislature argued that it can permissively intervene under Wis. Stat. § 803.09(2) because it has an interest in the question of law at issue, namely, the construction and application of Wis. Stat. § 227.10(2m) (Act 21) limiting an agency's authority to that delegated by the Legislature. The Legislature has an interest in legislation that clearly defines the limits of administrative agency authority, as expressed by adoption of Act 21.

§§ 803.09 and 809.13 do not apply to intervention in this appeal, arguing that those statutes conflict with Wis. Stat. § 227.53(1)(d).

On May 9, 2019, Clean Wisconsin filed a response in opposition to the Legislature's motion to intervene. It noted that the constitutionality of Wis. Stat. § 803.09(2m) had been challenged in the *Vos* case, and it "may no longer be valid" by the time the intervention motion is decided. Clean Wisconsin argued that if mandatory intervention were struck down in *Vos*, then the Legislature would not qualify for permissive intervention under Wis. Stat. § 803.09(2).

The Supreme Court entered an order in this case on May 30, 2019 requesting additional briefing on the intervention motion. As the Court noted in the order, the parties and the Legislature, the proposed intervenor, "disagree as to the legal standard that governs our consideration of the Wisconsin Legislature's motion to intervene. The Wisconsin Legislature cites Wis. Stat. § 803.09(2m), as well as Wis. Stat. §§ 803.09(1) and (2). The DNR responds that in the context of a review of an agency determination, intervention is guided by the provisions in Chapter 227, namely, Wis. Stat. § 227.53(1)(d)." (Order, May 30, 2019, at 2). The Court directed the parties to file memoranda on the correct legal standard

for an intervention motion on the facts of this case, and whether the Legislature meets that standard.

The Legislature's June 19, 2019 memorandum in support of intervention argues that Wis. Stat. §§ 809.13 and 803.09(2m) provide the standard for intervention in this case and shows that the Legislature meets that standard. Under Wis. Stat. § 803.09(2m), the Legislature may intervene in this action "at any time ... as a matter of right" where a party challenges the construction or validity of a statute as part of its claim or defense. In response to DNR's position on intervention, the Legislature shows that chapter 227 does not address or govern intervention on appeal. Chapter 227 provides that appeals from judicial review proceedings are governed by chapters 808 and 809 of the Wisconsin Statutes, thus leaving it to statutes such as Wis. Stat. § 809.13 to set the standard for intervention on appeal.

DNR's June 19, 2019 memorandum in opposition to intervention argues that chapter 227 governs intervention on appeal and that the Legislature does not meet that standard. DNR argues that Wis. Stat. §§ 809.13 and 803.09(2m) conflict with chapter 227 on appellate intervention. Additionally, it argues that the Legislature does not meet Wis.

Stat. § 803.09(2m), arguing that this appeal does not challenge the construction or validity of a statute as part of a party's claims or defenses. Clean Wisconsin's memorandum raised essentially the same arguments.

The Legislature's July 9, 2019 memorandum shows that it meets the standard for intervention under Wis. Stat. §§ 809.13 and 803.09(2m). Those statutes govern intervention in all appeals, including appeals from chapter 227 judicial review proceedings. The Legislature shows that it may intervene "at any time ... as a matter of right" in this appeal because a party challenges the construction or validity of a statute, Wis. Stat. § 227.10(2m) (Act 21), as part of its claims or defenses, as recognized by the Court of Appeals in the certification decision. The appeal turns upon the parties' respective arguments concerning the construction of the statute. The Legislature shows that chapter 227 does not address or foreclose intervention in appeals. It also shows that there is no conflict or inconsistency as between Wis. Stat. § 227.53(2) and § 809.13. Finally, the Legislature shows that DNR's and Clean Wisconsin's arguments are contrary to the statutes they rely upon, and they would re-write the terms of those statutes concerning intervention.

DNR's July 9, 2019 memorandum makes the same arguments as its June 19 memorandum, arguing that intervention under Wis. Stat. §§ 809.13 and 803.09(2m) does not apply relating to the construction or validity of a statute, and that intervention under those statutes conflicts with chapter 227 and the Legislature is not an interested person as contemplated for a chapter 227 proceeding. Clean Wisconsin's July 9, 2019 memorandum makes arguments similar to those of DNR.

II. *Vos* Upheld the Constitutionality of the Legislative Intervention Statutes and the Legislature Meets the Requirements for Intervention as of Right in this Case.

In *Vos*, this Court decided a facial constitutional challenge to a number of provisions of 2017 Wis. Act 369 and 2017 Wis. Act 370, including provisions concerning: (1) approval of settlements by the Attorney General (the "litigation control" provisions) (*Vos*, 2020 WI 67, ¶¶ 50, 52-70, 72-73); (2) intervention by the Legislature in litigation under certain circumstances (*id.*, ¶¶ 50-51, 71-73); (3) State Capitol building security (*id.*, ¶¶ 74-77); (4) multiple suspensions of administrative rules (*id.*, ¶¶ 78-83); (5) administrative agency deference (*id.*, ¶ 84); and (6) requirements for contents and promulgation of "guidance documents" (*id.*, ¶¶ 87-135).

The majority decision on categories (2), (3), (4), and (5) was joined by all seven justices, holding that those provisions are constitutional on their face. Most notably, the Court unanimously held that the legislative intervention provisions are facially constitutional. *Vos*, 2020 WI 67, ¶¶ 10, 16, 50-51, 71-73, 86, n.16, n.25 (majority opinion joined by five justices); (*id.*, ¶¶ 164, 174 & n.2, n.11) (Dallet, J., concurring, with Walsh Bradley, J.). The Court also unanimously held that the (3) Capitol security, (4) rule suspension, and (5) agency deference provisions are facially constitutional. (*Id.*, ¶ 84, 86 n.25, n.26); (*id.*, ¶ 164, n.2) (Dallet, J., with Walsh Bradley J., concurring).[6]

A. No As-Applied Constitutional Questions Concerning the Statutory Right of the Legislature to Intervene Have Been Presented Here.

As an initial matter, DNR and Clean Wisconsin have not raised a constitutional challenge to legislative intervention as applied to this case. Therefore, this case does not present that question for decision by the Court. As noted above, DNR and Clean Wisconsin argue that this case does

[6] The majority decision on category (1) was joined by five justices, with two justices dissenting. *Vos*, 2020 WI 67, ¶¶ 50-70, 72-73 (majority); (*id.*, ¶¶ 163-189) (Dallet, J., with Walsh Bradley, J., dissenting). The guidance documents majority opinion was joined by four justices, with three justices dissenting. (*id.*, ¶¶ 87-135) (majority); (*id.*, ¶¶ 136-162) (Roggensack, C.J., dissenting); (*id.*, ¶¶ 190-214) (Hagedorn, J., with Ziegler, J., dissenting).

not meet the express terms of Wis. Stat. § 803.09(2m) and, even if it does meet those terms, legislative intervention under Wis. Stat. §§ 803.09(2m) and 809.13 conflicts with chapter 227 of the Wisconsin Statutes. Thus, the only questions presented are whether the elements of Wis. Stat. § 803.09(2m) are met, such that the Legislature may intervene "as of right," and whether intervention under Wis. Stat. § 809.13 applies in appeals from chapter 227 judicial review proceedings.

B. The Legislature Meets the Statutory Criteria for Intervention as of Right.

The Legislature is entitled to intervene in this appeal "as of right" under Wis. Stat. 809.13[7] and 803.09(2m)[8] because the construction or validity of a statute is challenged as part of a party's claims or defenses in this case. This appeal involves the construction, validity, and application of Act 21, a statute that codifies core separation of powers principles as

[7] Section 809.13 provides: "A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. A party may file a response to the petition within 11 days after service of the petition. The court may grant the petition up on a showing that the petitioner's interest meets the requirements of s. 803.09(1), (2), or (2m)."

[8] Section 803.09(2m) provides: "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 or a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14." (Emphasis added).

between the Legislature and executive agencies. Central to Clean Wisconsin's claims in this case is the construction or validity of Act 21, which provides:

> No agency may implement or enforce any standard, requirement, or threshold, ... unless that standard, requirement, or threshold **is explicitly required or explicitly permitted** by statute or by a rule that has been promulgated in accordance with this subchapter . . .

Wis. Stat. § 227.10(2m) (emphasis added). As the Court of Appeals explained in its certification decision, "the court's determination regarding the scope and breadth of Act 21 will have implications far beyond the permitting process for high quality wells and pollution discharge elimination systems and will touch every agency within Wisconsin." Certification by Wisconsin Court of Appeals, Appeal Nos. 2016AP1688/2016AP2502, Jan. 16, 2019, at 4.

Indeed, the Court of Appeals' certification order establishes that the parties dispute the construction, scope, and application of Act 21. DNR argued that Act 21 prohibits it from implementing or enforcing any standard, requirement, or threshold unless expressly permitted by statute or rule. (Certification at 2). Clean Wisconsin argues that DNR has the authority and general duty to preserve the waters of the State and has the

discretion to undertake the review it deems necessary for all proposed high-capacity wells. (*Id.*) This claim is in conflict with Wis. Stat. § 227.10(2m), which bars as agency from conditioning permits upon implicit requirements not provided by any statute or duly-enacted rule.

As DNR concluded upon issuing the permit, and as it argued in the Court of Appeals briefing, the applicable statutes and rules do not provide DNR with authority to require environmental review as a condition of the well permits and requiring such review is barred by Wis. Stat. § 227.10(2m). Because there is no explicit statutory or rule-based authority empowering DNR to impose environmental review on the well permit applications, Wis. Stat. § 227.10(2m) prevented DNR from conditioning the permit upon such review. Thus, the construction or validity of a statute – Wis. Stat. § 227.10(2m) – must be determined to decide Clean Wisconsin's claim concerning the DNR well permits. Because the construction or validity of Wis. Stat. § 227.10(2m) is at issue in this case as part of a party's claims or defenses, the Legislature may intervene "as of right" under Wis. Stat. § 803.09(2m).

C. Intervention as of Right Here Serves the Legislature's Institutional Interest in the Defense and Validity of its Duly-Enacted Statute When No Other State Party Will Defend the Statute.

The *Vos* decision supports legislative intervention in this appeal because the interest at stake here is, at a minimum, one that "is within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature[.]" 2020 WI 67, ¶ 63. While the Court unanimously upheld the legislative intervention provisions, Wis. Stat. §§ 13.65 and 803.09(2m), as facially constitutional,[9] the Court suggested that an as-applied challenge may present itself to such provisions in the future. The Court explained: "[i]n 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." *Vos*, 2020 WI 67, ¶ 72. The Court suggested examples of the Legislature's "institutional interests" such as the power of the purse, where legislative officers or officials are parties, and where the Legislature granted the Attorney General authority to represent the State. (*Id.*, ¶¶ 71). However, those examples were not exhaustive. Indeed, there is no

[9] *Vos*, 2020 WI 67, ¶¶ 10, 16, 50-51, 71-73, 86, n.16, n.25 (majority opinion joined by five justices); (*id.*, ¶¶ 164, 174 & n.2, n.11) (Dallet, J., concurring, with Walsh Bradley, J.).

institutional interest more squarely within the zone of legislative power than the power to make the laws. Thus, this case squarely presents the sort of institutional interest that *Vos* envisioned as capable of surviving an as-applied challenge.

1. The Legislature's institutional interest in protecting its core law-making power is the sort of interest recognized by *Vos* as supporting intervention.

Administrative agencies are creatures of the Legislature and they only have such authority as provided by statute. *See* page 2, above, and footnote 3. In this case, an administrative agency seeks to expand its own power by imposing open-ended environmental review conditions upon well permits that are not provided by existing statutes or duly-enacted rules. DNR's request to switch sides in this pending appeal is troubling, but ultimately underscores the critical importance of intervention by the Legislature. While DNR now seeks to align itself with the parties that sued the agency over the issuance of the well permits, those permits were issued pursuant to the correct construction and application of Act 21—a statute passed by the Legislature for the purpose of ensuring that permitting decisions such as these are made according to clearly-expressed standards, not ill-defined implicit authority.

DNR now will argue that it has an implicit, broad, authority to impose requirements and conditions that serve its generalized interest in the public trust doctrine. That would create agency authority from whole cloth, outside of the statutes, in direct conflict with Act 21. Because Act 21 commands that requirements and conditions must be explicitly provided by statute, implicit authority found in the public trust doctrine cannot be a basis for agency action. In fact, Act 21 reverts to the Legislature any residual duty to act under the public trust doctrine. Therefore, Act 21 bars DNR from regulating under the public trust doctrine without explicit statutory requirements or conditions. That sphere of power is solely for the Legislature.

To permit an executive agency to impose requirements and conditions grounded upon the agency's own unspecified policy interests runs afoul of Act 21. It would violate the separation of powers as it would cast the agency in the role of legislator. In its current position, DNR must necessarily argue that the Legislature did not mean what it said in Act 21 when it required "explicit" statutory authority in order for an agency to impose conditions or requirements. Wis. Stat. § 227.10(2m). Through this

dismissal of a clear statutory directive,[10] DNR would engage in law-making, cloaking itself with powers that the Legislature never granted. This would violate the separation of powers for an agency to engage in law-making to define and expand its own powers.

This case directly implicates a core legislative function in that it affects the Legislature's institutional interest in preventing the executive branch from abrogating legislative authority and expanding an administrative agency's authority beyond that expressly provided by statute. The proper construction and application of Wis. Stat. § 227.10(2m) present a compelling institutional interest of the Legislature, because the directives of this law safeguard its core function – the power to make the law.[11] The Legislature is guaranteed the protection of this interest through the plain language of the "explicit authority" requirements established by Wis. Stat. § 227.10(2m). Here, an agency will ask the Court to disregard the plain language of that controlling statute on agency power and permit the agency to take actions in direct conflict with the statute,

[10] *Palm*, 2020 WI 42, ¶¶ 51, 52 (finding that Wis. Stat. § 227.10(2m) clearly limits agency authority and precludes agencies from finding implied authority to impose requirements).
[11] *Vos*, 2020 WI 67, ¶ 95 ("[T]he legislature's authority comprises the power to make the law....").

thereby casting aside critical safeguards and expanding the agency's power beyond the authority expressly provided by statute or duly-enacted rules.[12]

In passing Act 21, the Legislature ensured that executive-branch agencies do not impinge on the legislative branch's constitutional authority to determine public policy through the enactment of statutes. The Legislature intends to argue that Act 21 reflects and reinforces the Legislature's position vis-à-vis administrative agencies. As the source of agency authority, the Legislature has complete discretion to determine the extent of that authority. *Schmidt v. Local Affairs & Development Dept.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968) ("The very existence of the administrative agency…is dependent upon the will of the legislature; its …powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change."); *see also Koschkee v. Taylor*, 2019 WI 76, ¶ 18, 387 Wis. 2d 552, 929 N.W.2d 600 (Agencies have no inherent constitutional authority to make rules and their rule-marking power can be withdrawn or repealed by the Legislature.)

[12] As made clear by this Court in *Vos,* the Attorney General fits squarely within the executive branch, 2020 WI 67, ¶ 57, and as such, the Legislature should not be left with only hope that its interest is protected against an unconstitutional attack from another executive agency.

Thus, the Legislature must be granted intervention in this case, because intervention is necessary to serve its compelling institutional interest in preserving its core legislative functions and to defend Wis. Stat. § 227.10(2m), a statute embodying separation of powers principles and limiting administrative agency authority to impose requirements to only those expressly provided by statute or duly-enacted rules.

2. No party in this case represents the interests of the Legislature.

While inadequate representation of the Legislature's interest is not a required predicate for granting intervention, certainly the complete lack of representation requires the granting of intervention. With DNR's reversal of position on Wis. Stat. § 227.10(2m) and the permit conditions, absent the Legislature's intervention, no state party in this appeal would defend Act 21.[13] Legislative intervention is critical in this case because an agency cannot be permitted to determine the scope of its own authority. *See Schmidt*, 39 Wis. 2d at 56 (explaining that an agency's "powers, duties and

[13] Again, *see* footnote 4. The Legislature has a statutory right to intervene regardless of whether another party purports to represent its interest. Moreover, the case for intervention is made even stronger in a circumstance such as this – where there is no party even purporting to represent its interests, and in fact, the other state party is doing just the opposite.

scope of authority are fixed and circumscribed by the legislature and subject to legislative change.").[14]

DNR originally argued, and properly so, that the statute prevents imposition of environmental review conditions on well permits for which the statutes authorize no such condition. In that regard, DNR respected and followed the boundaries set by Wis. Stat. § 227.10(2m), which clearly bar it from adopting requirements or conditions that are not provided by statute or properly enacted rules. A year after properly enforcing Wis. Stat. § 227.10(2m)'s "explicit authority" requirement, DNR reversed course.[15] DNR, through the Attorney General, now argues that it is empowered to impose permit conditions not provided by statute or rules, granting itself implicit authority to impose requirements, in direct contravention of section 227.10(2m)'s explicit authority requirements.

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[14] *See also Vos*, 2020 WI 67, ¶ 98 (An executive agency's authority to make rules "is only on loan" from the Legislature, and thus "agencies necessarily 'remain subordinate to the legislature with regard to their rulemaking authority.'") (quoting *Koschkee*, 2019 WI 76, ¶ 18); *Koschkee*, 2019 WI 76, ¶ 18 (Agencies' rule-making power can be withdrawn or repealed by the Legislature.)

[15] As a related matter, given that the appellate issues were fully briefed in the Court of Appeals, and this Court accepted certification based upon those arguments, DNR's appellate position is fixed and it should not be permitted to literally switch teams mid-game. Whether as a matter of judicial estoppel, principles of forfeiture or abandonment, or some other theory, DNR should not be permitted to manipulate the process like this. This will be addressed in the merits briefing. Importantly, even if the Court were to determine that DNR were prohibited from changing its position, the Legislature continues to reserve the statutory right to intervene.

DNR adhered to Act 21 in its decision to issue the well permits without conditioning the permits upon environmental review that is not authorized by statutes. Now, DNR will argue for abrogation of Act 21, advocating for a construction and application contrary to its plain terms to impose permit conditions that are not authorized by statute or rule. DNR has said that its "briefing in this Court will support the judgment below in most meaningful respects." (May 2, 2019 Motion at 11). In other words, DNR no longer wishes to defend its own decision to issue the permits at issue here.

Now, not only does DNR switch sides, it also wants to prevent the Legislature from participating in this appeal. Legislative intervention is important in this case because an agency cannot be permitted to determine the scope of its own authority. *See Schmidt*, 39 Wis. 2d at 56 (explaining that an agency's "powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change.").[16] Where the Legislature has an undeniable institutional interest to protect in litigation, it necessarily follows that it too has an undeniable interest in the

[16] *See also Vos*, 2020 WI 67, ¶ 98 (An executive agency's authority to make rules "is only on loan" from the Legislature, and thus "agencies necessarily 'remain subordinate to the legislature with regard to their rulemaking authority.'") (quoting *Koschkee*, 2019 WI 76, ¶ 18); *Koschkee*, 2019 WI 76, ¶ 18 (Agencies' rule-making power can be withdrawn or repealed by the Legislature.)

robust defense of that interest in that litigation. Here, no party represents the Legislature's interest and therefore, it must be permitted to speak for itself.

CONCLUSION

The Legislature respectfully requests the Court to grant its motion to intervene in this appeal under Wis. Stat. §§ 809.13 and 803.09(2m), and to proceed with briefing on the merits in this appeal.

Dated this 11th day of August, 2020.

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