UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

EXHIBIT A

OPERATING ENGINEERS OF WISCONSIN, IUOE LOCAL 139 AND LOCAL 420,

Plaintiffs,

v. Civil Action No. 2:18-cv-00285-LA

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR, *et al.*,

Defendants.

PROPOSED INTERVENOR-DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT

Plaintiffs, two labor organizations, argue that changes made to Wis. Stat. § 111.70 ("Municipal Employment Relations") by 2011 Wisconsin Act 10 ("Act 10") violate the First Amendment rights of their members. *See generally* Am. Compl., ECF #9. Specifically, they assert that the law violates their constitutional rights in five ways: (1) "[b]y restricting the topics over which Unions and municipal employers can bargain"; (2) by "preclud[ing] any agreements between Unions and municipalities over any issues besides wages, even if not 'collectively bargained'"; (3) by "prohibiti[ng] voluntary dues deductions"; (4) by counting non-votes in annual recertification elections as votes against recertification; and (5) "[b]y requiring collective bargaining units to hold annual recertification elections," "requiring . . . collective bargaining unit[s] to pay a certification fee," and "eliminat[ing] any agreements that would require non-members to pay their proportionate share of the cost of" services provided by collective bargaining units. *Id*. at 7-13.

Plaintiffs ask this Court to declare the challenged statutory changes unconstitutional and to enjoin the enforcement of Wis. Stat. § 111.70 "to the extent that it limits the subjects of collective bargaining and/or prohibits an employer and a union covered by Act 10 from agreeing that all bargaining unit employees, regardless of union membership status, must pay a service fee for union representation expenses." *Id.*

The Proposed Intervenor-Defendant ("Intervenor") is a public school teacher in Pleasant Prairie, Wisconsin, who does not belong to or wish to join or subsidize her local union, the Kenosha Education Association, and who wishes to preserve her First Amendment and statutorily-granted rights in the workplace. (Koschkee Decl. ¶¶1, 3-4.) If the Court concludes that Plaintiffs are entitled to the remedy they seek, Intervenor will suffer significant injuries as detailed below. (*See also id.* at ¶5.) Consequently, Intervenor timely seeks to intervene in this case in order to protect her interests, which interests are not adequately represented by any of the existing parties. This Court should grant Intervenor's motion to intervene. Intervenor meets the requirements for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. Alternately, permissive intervention is appropriate under Rule 24(b).

FACTUAL AND PROCEDURAL BACKGROUND

In March of 2011, Act 10 was enacted into law. The law made significant changes to the collective bargaining rights of public employees and to the recertification and funding mechanisms applicable to collective bargaining representatives chosen by employees. *See generally* 2011 Wisconsin Act 10. These changes were upheld against multiple constitutional challenges. *See Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013); *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014); *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337.

Plaintiffs are two Wisconsin labor organizations. Am. Compl. 2, ECF #9. Plaintiffs originally filed this lawsuit on February 23, 2018, but voluntarily dismissed the case on May 11, 2018. *See* Compl., ECF #1; Notice of Voluntary Dismissal, ECF #8. Following the decision of the Supreme Court of the United States in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448 (2018), Plaintiffs filed an amended complaint on May 3, 2019 asserting violations of the First Amendment rights of their members. Am. Compl., ECF #9.

Intervenor Kristi Koschkee has been a public school teacher at LakeView Technology Academy in Pleasant Prairie, Wisconsin for over a decade. (Koschkee Decl. ¶¶1-2.) She currently teaches English. (*Id.* at ¶2.) Although she is part of a collective bargaining unit, Ms. Koschkee does not belong to or wish to join or subsidize her local union, the Kenosha Education Association. (*Id.* at ¶3.) She also wishes to preserve her First Amendment and statutorily-granted rights in the workplace. (*Id.* at ¶4.) As detailed below, Plaintiffs' lawsuit jeopardizes Intervenor's constitutional and statutory rights as well as her pecuniary interests. Intervenor avers that if this lawsuit is successful she will have to choose between the profession she enjoys and is trained for and being forced to subsidize a union which she politically opposes and thus might have to leave the field of public education entirely. (*Id.* at ¶5.) On May 24, 2019, Intervenor moved to intervene in this case, either as of right or permissively.

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure offers two avenues by which individuals may intervene in federal litigation: intervention of right under Rule 24(a) and permissive intervention under Rule 24(b). Fed R. Civ. P. 24(a)-(b). Intervenor meets the requirements of both provisions and should be allowed to intervene.

I. INTERVENOR MAY INTERVENE AS OF RIGHT UNDER RULE 24(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 24(a) provides in part that "[o]n timely motion, the court must permit anyone to intervene who: . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed R. Civ. P. 24(a)(2). This rule may be restated as a four-factor test according to which a proposed intervenor must:

> (1) make a timely application, (2) have an interest relating to the subject matter of the action, (3) be at risk that that interest will be impaired by the action's disposition and (4) demonstrate a lack of adequate representation of the interest by the existing parties.

Vollmer v. Publishers Clearing House, 248 F.3d 698, 705 (7th Cir. 2001). Each of these requirements are met here.[1]

A. Timely Application

Rule 24(a)(2) requires a motion to intervene to be "timely." "The timeliness requirement forces interested non-parties to seek to intervene promptly so as not to upset the progress made toward resolving a dispute." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797 (7th Cir. 2013). Four factors are relevant to the question of whether a motion to intervene is timely: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the

[1] Also required for intervention as of right is Article III standing, *Bond v. Utreras*, 585 F.3d 1061, 1069 (7th Cir. 2009), at least where "the intervenor wishes to pursue relief not requested by a plaintiff." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, ___ U.S. ___, 137 S. Ct. 1645, 1648 (2017). However, because the Seventh Circuit has concluded that a Rule 24(a) interest "is sufficient to satisfy the Article III standing requirement," Intervenor does not discuss the requirement further in this section. *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 n.4 (7th Cir. 1997).

intervenor if the motion is denied; (4) any other unusual circumstances." *Id.* at 797-98 (quoting *Sokaogon Chippewa Cmty v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000)) (internal quotation marks omitted). The "most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994) (quoting 7C Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 1916 (1986)) (internal quotation marks omitted). The timeliness inquiry is made with "reference to the totality of the circumstances." *Shea v. Angulo*, 19 F.3d 343, 348 (7th Cir. 1994).

Intervenor's motion is timely. As an initial matter, Intervenor "knew or should have known" of her interest in the case on May 3, 2019, the day that Plaintiffs filed their amended complaint in this heretofore voluntarily dismissed case. That means that only three weeks have elapsed since Intervenor was aware that intervention was necessary. Considering the time needed to draft these pleadings, this is reasonably prompt action under any definition and weighs in favor of a finding of timeliness. *See, e.g.*, *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) ("The test for timeliness is essentially one of reasonableness . . . ."); *Nissei Sangyo Am., Ltd.*, 31 F.3d at 439 (filing motion to intervene three months after learning of action was not unreasonable given need to perform certain preliminary activities first).

Second, none of the parties will be prejudiced if this Court grants this motion to intervene. Because Intervenor has moved to intervene at this early juncture—shortly after the filing of Plaintiffs' amended complaint—intervention will not impede, complicate, or substantially delay the resolution of this case. On the other hand, denial of this motion to intervene will severely prejudice Intervenor. She will not be able to vindicate her interest in some separate case; if this Court orders that the challenged provisions of Act 10 are unconstitutional,

that will conclusively resolve Intervenor's claims without providing Intervenor an ability to protect her rights. *See, e.g., Reich*, 64 F.3d at 322 ("The prejudice to the [proposed intervenors], on the other hand, appears to be significant. . . . [T]his is their one and only opportunity to define their employment status with ABC. If denied intervention, they will find themselves precluded from bargaining for independent contractor status."). Finally, there are no "unusual circumstances" in this case weighing against intervention.

In sum, Intervenor's motion to intervene is timely.

B. Interest Relating to the Subject Matter of the Action

In order to intervene as of right, a proposed intervenor must have a "direct, significant, legally protectable" interest, *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003) (quoting *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995)) (internal quotation marks omitted), "related to the subject matter" of the action. *Id.*; *see also Sec. Ins. Co. of Hartford*, 69 F.3d at 1380 (the interest must be a "significantly protectable interest" (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971) (internal quotation marks omitted)). The asserted interest must "be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit," *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), and the claimed injury must not be too remote. *See City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 985 (7th Cir. 2011). "Whether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Sec. Ins. Co. of Hartford*, 69 F.3d at 1381.

Intervenor fulfills this requirement as well, in five different ways. First, if Act 10 is invalidated and unions are again free to become the exclusive collective bargaining

representative of employees in a unit on a host of new issues ranging from working conditions to benefits to hours of employment, Intervenor risks losing her ability to independently bargain with her employer over those issues. *See* Wis. Stat. § 111.70(4)(d)1.

Second, Plaintiffs seek the ability to enter into non-collectively-bargained agreements with municipal employers on "issues besides wages." Am. Compl. 8, ECF #9. The legislature has made a policy choice to protect employer-employee bargaining over these issues from interference by unions and if Act 10 is invalidated Intervenor will lose this protection.

Third, Plaintiffs seek an injunction barring the enforcement of Wis. Stat. § 111.70 "to the extent that it . . . prohibits an employer and a union covered by Act 10 from agreeing that all bargaining unit employees, regardless of union membership status, must pay a service fee for union representation expenses." *E.g.*, *id.* at 13. In other words, Plaintiffs place in issue Intervenor's right as a non-member to decline to pay fees to unions. This is a pecuniary interest but also a First Amendment harm. *See Janus*, 138 S. Ct. 2448.

Fourth, Plaintiffs object to the fact that Act 10 requires collective bargaining representatives to obtain "at least 51 percent of the votes *of all of the general municipal employees in the collective bargaining unit*" in order to receive recertification, Wis. Stat. § 111.70(4)(d)3.b. (emphasis added), such that abstention from a recertification election by one such employee is arguably effectively a "no" vote. That is, Plaintiffs would effectively count abstention from a recertification election as exclusion from the collective bargaining unit, coercing employees like Intervenor into active participation in an election. This implicates Intervenor's statutory and First Amendment rights to refrain from participation. *Cf. Janus*, 138 S. Ct. at 2463 ("We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.' The right to eschew association for

expressive purposes is likewise protected." (citations omitted) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

Fifth, the Seventh Circuit has indicated, in discussing the "interest" authorizing intervention as a matter of right, that where a law is "intended to protect" or "intended to . . . benefit[]" a class of individuals such that members of the class are the "statute's direct beneficiaries," a sufficient interest is present where a member of the class seeks to preserve the existing statutory scheme (and otherwise has standing). *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (association of gasoline dealers could intervene to defend law that both required gasoline to be sold a minimum price and authorized relief for violations in suits by the state or injured parties). That is clearly the case here, where Act 10 provides numerous rights, protections, and benefits to general municipal employees like Intervenor.

This case is not governed by *Wisconsin Educ. Ass'n Council v. Walker [WEAC]*, 705 F.3d 640 (7th Cir. 2013), in which an attempt by union non-members to intervene in a challenge brought by a group of unions against Act 10 was rejected by the Seventh Circuit in part because the union non-members lacked the requisite interest in the case (the other ground for the court's ruling, adequate representation by existing parties, is discussed below). *WEAC*, 705 F.3d at 642, 658-59.

In *WEAC* an assortment of unions brought a set of equal protection challenges and a First Amendment challenge to provisions of Act 10, with all claims resting on "the legislature's decision to subject general employees but not public safety employees to Act 10's restrictions on union activity." *Id.* at 642. A group of union non-members attempted to intervene, asserting "a First Amendment interest in not paying compulsory union fees and in rejecting the union as their state-imposed bargaining agent." *Id.* at 658. The Seventh Circuit denied intervention, noting

that "*Abood v. Detroit Board of Education* [431 U.S. 209 (1977)] and its progeny settle this question"; under that line of cases, the government was clearly permitted to force the proposed intervenors "to pay union charges under fair-share agreements, precisely as it did before passage of Act 10." *Id.* The interest, in other words, was illusory. Since *WEAC*, however, the Supreme Court has overruled *Abood* and affirmed that public employees may not be "forced to subsidize a union" consistent with the First Amendment. *Janus*, 138 S. Ct. at 2459-60. Consequently, the Seventh Circuit's reasoning is no longer valid. Intervenor has the right not to be forced to subsidize a union.

The Seventh Circuit separately concluded in *WEAC* that, regardless of *Abood*, the interests of the union non-members were insufficient to require intervention because they had "little to do with the claims raised by the Unions, which focus on the Unions' free speech rights." 705 F.3d at 658. The court was apparently referring to the unions' sole First Amendment claim, which was an argument that the provision of Act 10 prohibiting "payroll deduction of union dues for general employees" violated the First Amendment by burdening the speech of some unions but not others. *Id.* at 643, 645-53.

This reasoning is distinguishable. The issues in *WEAC* all pertained to the disparate treatment between two different types of unions (public safety unions and non-public safety unions); union non-members, in the Seventh Circuit's view, did not have a dog in that fight. Here, in contrast, Plaintiffs are arguing about a number of disputed legal rights and obligations in the workplace which directly affect union non-members like Intervenor for reasons already discussed in this section. In any event, Intervenor asserts a broader set of interests here than was asserted by the intervenors in *WEAC*. Intervenor's First Amendment rights pertaining to the

voting process challenged by Plaintiffs, for instance, are unquestionably at issue in this case, and not merely in a "tangential" way. *Id.* at 658.

Because Intervenor's pecuniary interests and statutory and constitutional rights are directly at stake in this litigation, Intervenor meets this part of the test for intervention of right.

C. Risk of Impairment of the Interest

Next, "disposi[tion] of the [present] action may as a practical matter impair or impede . . . [Intervenor's] ability to protect [her] interest[s]." *See* Fed R. Civ. P. 24(a)(2). "The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding," *Am. Nat. Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 147-48 (7th Cir. 1989) (quoting *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982)) (internal quotation marks omitted), with "the possibility of foreclosure . . . measured by the standards of *stare decisis*." *Id.* at 148. At the same time, "*stare decisis* effects may satisfy the standard of Rule 24(a)(2) only when the putative intervenor's position so depends on facts specific to the case at hand that participation as *amicus curiae* is inadequate to convey essential arguments to the tribunal." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988).

Plaintiffs seek a declaration that the challenged provisions of Act 10 are unconstitutional and request an injunction barring the state from enforcing protections granted to union non-members such as Intervenor. They seek a ruling that unions be permitted under Act 10 to charge union non-members like Intervenor agency fees. In other words, this case will result in a ruling on Act 10 that applies to all covered municipal employees in Wisconsin such as Intervenor. Granting Plaintiffs the relief they request would not merely present an impediment to the attainment of a favorable judgment by Intervenor in some other, future case – it would

definitively foreclose any future remedy protective of Intervenor's pecuniary interests and statutory and constitutional rights.

Moreover, this is a multi-sided dispute in which relegation of Intervenor to *amicus curiae* status would be insufficient. Workplaces such as those at issue in this case feature three sets of parties: the municipal employer (which is a statutory creation of the state), the union and its members, and union non-members. In disputes between those parties, the state also acts as both the rule-setter (by enacting legislation) and sometimes as the umpire (such as through the Wisconsin Employment Relations Commission). As discussed in further detail in the next section, Intervenor, an employee and a union non-member, is obviously in an adversarial position to (or at least has different interests than) all of the other parties: to employers, to unions (and their members) such as Plaintiffs, and to the state as rule-setter and umpire. A union non-member like Intervenor should be permitted to take discovery as to matters the other parties might find to be unhelpful or inconvenient to their legal position, such as: (a) Plaintiffs' asserted need and past attempts to negotiate with municipal employers outside of the collective bargaining process and the response of municipal employers to such attempts (which the Intervenor could only get through subpoenas); (b) Plaintiffs' assertion that their representation "benefits all bargaining unit employees" and that they "spend[] significant financial and human resources representing every employee in the bargaining units for which [they have] been elected 'exclusive representative[s]'"; (c) the claim that Act 10 has been interpreted and applied by the Wisconsin Employment Relations Commission ("WERC") to preclude any agreements between Unions and municipalities over any issues besides wages, even if not "collectively bargained"; and (d) the annual election recertification process as established by WERC, including the

specific November 2014 and April 2019 elections mentioned in Plaintiffs' amended complaint. *See* Am. Compl. 6, 8-9, 11, ECF #9.

Denying Intervenor's motion to intervene will leave Intervenor unable to discover the truth or falsity regarding these matters and utterly unable to protect her asserted rights, either in this case or any future one.

D. Inadequate Representation

Finally, a potential intervenor wishing to intervene as of right must "lack adequate representation of the [asserted] interest by the existing parties." *Nissei Sangyo*, 31 F.3d at 438. "A party seeking intervention as of right must only make a showing that the representation 'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972)).

Intervenor obviously is not adequately represented by Plaintiffs, who seek to invalidate various provisions of Act 10 to the detriment of Intervenor's rights and interests. However, two presumptions that *Defendants* adequately represents Intervenor's interests are potentially in play in this case, either of which would have the effect of heightening the Intervenor's burden of showing inadequate representation.

The first presumption arises "when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors." *Ligas*, 478 F.3d at 774. That presumption may only be rebutted by "a showing of gross negligence or bad faith." *Id.* The second presumption arises "[w]here a prospective intervenor has the same goal as the party to a suit." *Shea*, 19 F.3d at 347. "In such circumstances, the proposed intervenor 'must

demonstrate, at the very least, that some conflict exists.'" *Id.* (quoting *Meridian Homes Corp*, 683 F.2d at 205). Neither presumption applies here.

First, Defendants are not charged by law with protecting all of Intervenor's particularized pecuniary, statutory, and constitutional interests. *See WEAC*, 705 F.3d at 658-659 (explaining that the "state [was] not charged by law with protecting the interests of" union non-members in a lawsuit by Unions challenging Act 10).

Second, Defendants and Intervenor do not necessarily share the same goals. It is true that both have *a* goal in common, which is to see the various provisions of Act 10 upheld. But Intervenor seeks to protect her First Amendment rights and/or pecuniary interests respecting avoiding association with, support of, or interference by unions and in not participating in the recertification process. Defendants do not share these goals, and that could affect the defense of this lawsuit. For example, Plaintiffs argue that the way in which recertification vote abstentions votes are counted "violates the First Amendment rights of public employee non-voters to remain silent in the re-certification process." Am. Compl. 11, ECF #9. Defendants will likely argue that this is not a First Amendment issue. Defendants will contend that the First Amendment is not implicated because nothing in this voting process impairs the Plaintiffs' rights to speak or to associate. But Intervenor sees this differently. She will contend that her First Amendment rights are implicated in the issue. Intervenor will contend that the Plaintiffs' position forces the Intervenor to vote (*i.e.*, to speak) in order to defeat the certification of the union, and by doing so subjects the Intervenor to potential retribution for voting "no." Intervenor, unlike Defendants, will argue that that makes it a First Amendment issue (just not the one Plaintiffs are arguing for).

The Supreme Court's decision in *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), is instructive. There, the Secretary of Labor initiated an action to invalidate a union

election following a complaint by a union member. *Trbovich*, 404 U.S. at 529. The union member then sought to intervene in part "to seek certain specific safeguards with respect to any new election that [might] be ordered," and the Secretary of Labor argued that intervention was unwarranted because the proposed intervenor was adequately represented. *Id.* at 529, 538. In rejecting the Secretary's argument, the Court noted in part that while the Secretary was charged with protecting the individual's rights against his union, the Secretary also had "an obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'" *Id.* at 538-39 (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 475 (1968)). These two duties, the Court concluded,

> may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary [were] performing his duties, broadly conceived, as well as [could] be expected, the union member [might] have a valid complaint about the performance of 'his lawyer.' Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2).

Id. at 539.

But even if the Court concludes that the state and the Intervenor are pursuing the same goal, a conflict between the parties exists such that the presumption of adequate representation is rebutted. Specifically, Intervenor sits across the table from her municipal employer for purposes of individual bargaining, which employer is a government entity created by the state. This Court should not ask Intervenor to effectively place her fate in the workplace in the hands of her own employer. For example, much of this dispute will focus on negotiations or agreements affecting the workplace (either "collectively bargained" or otherwise) that unions are or are not able to make with government employers. Union non-members may also enter into such negotiations and agreements with their employers and may have a very different estimate than the state of the

desirability of a bargaining relationship between their employers and unions or the conditions under which that bargaining is allowed to occur. The prospects for a conflict of interest are apparent.

From what has been said above it is clear that *WEAC* is again distinguishable, where the Seventh Circuit concluded that the union non-members were adequately represented by the state in a challenge to Act 10. *WEAC*, 705 F.3d at 659. In *WEAC* the Seventh Circuit concluded that the state and the intervenors shared the same goal, which it characterized as "protecting Act 10 against the Unions' constitutional challenge." *Id.* But it noted that the non-members "admitted as much" and failed to identify a conflict sufficient to rebut the presumption, instead "rely[ing] largely on post-hoc quibbles with the state's litigation strategy." *Id.* Here Intervenor has identified both separate goals and serious conflicts. For these same reasons representation is inadequate. *See United States v. Board of School Com'rs of City of Indianapolis*, 466 F.2d 573 (7th Cir. 1972) (representation is adequate if, among other things, "the representative does not have or represent an interest adverse to the proposed intervenor" (quoting *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969) (per curiam)).

For the foregoing reasons, Intervenor is entitled to intervene as of right in this lawsuit.[2]

[2] At the time of filing state lawmakers had publicly announced their intention to intervene in the suit. *See* Patrick Marley, *GOP lawmakers are seeking to intervene in union lawsuit challenging Wisconsin's Act 10*, Milwaukee Journal Sentinel, May 20, 2019, https://www.jsonline.com/story/news/politics/2019/05/20/act-10-gop-lawmakers-seek-intervene-lawsuit-challenging-law/3746083002/. Although Rule 24(a)(2) asks whether "*existing* parties" adequately represent an intervenor's interests, *see* Fed. R. Civ. P. 24(a)(2) (emphasis added), Intervenor notes that the reasoning in this section applies with equal force to these additional state actors. They are not charged by law with protecting Intervenor's interests; do not share the goals of protecting her particular constitutional and pecuniary interests, discussed above; and are essentially adverse insofar as they can be said to represent the interests of state-created employers such as her own and of the state itself as rule-setter. Moreover, importantly, it is *Intervenor* who benefits from the changes wrought by Act 10, not state legislators.

II. ALTERNATELY, THE COURT SHOULD PERMIT INTERVENTION UNDER RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Even if this Court determines that Intervenor is not entitled to intervene as of right, it should permit her to intervene under Rule 24(b), which states that "[o]n timely motion, the court may permit anyone to intervene who: . . . has a claim or defense that shares with the main action a common question of law or fact." Fed R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). This brief has already discussed timeliness, prejudice, and delay—none of these factors suggest that intervention is inappropriate. Further, Intervenor's claims share with the main action the questions of whether the provisions enacted by Act 10 violate the First Amendment.

In determining whether to grant permissive intervention, this Court should consider that Intervenor brings a symmetry to this case which will contribute to the adversarial process and benefit the Court in its study of the issues. As discussed, workplaces involve employers and employees, with employees broken into union members and union non-members. Currently only two of these three groups are represented in this suit. Permitting intervention will ensure that the issues receive a fully adversarial presentation and analysis.

For these reasons, this Court should exercise its discretion to permit Intervenor to intervene.[3]

[3] It has not been definitively established in this circuit whether Article III standing is generally required for permissive intervention. *See Bond*, 585 F.3d at 1068-1070. But given that Article III standing "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision," *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013), even if standing is a prerequisite here, Intervenor meets it for the reasons discussed in sections I.B. and I.C. above. *See also Transamerica Ins. Co.*, 125 F.3d at 396 n.4 (interest required to intervene as of right "satisf[ies] the Article III standing requirement").

CONCLUSION

Proposed Intervenor-Defendant requests that this Court grant her motion to intervene, either by intervention as of right under Fed. R. Civ. P. 24(a)(2), or, in the alternative, by permissive intervention under Fed. R. Civ. P. 24(b).

Respectfully submitted,
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Date: May 24, 2019

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