IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, et al.,

Plaintiffs,

v. Case No. 19-CV-1233

JAMES J. DALEY,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTIONS TO INTERVENE

INTRODUCTION

Defendant James J. Daley, sued in his official capacity as Chairman of the Wisconsin Employment Relations Commission, opposes the two Fed. R. Civ. P. 24 motions to intervene filed by proposed intervenors-defendants Kristi Koschkee and the Wisconsin Legislature. (Dkt. 13; 18.) Neither of these proposed intervenors meet all the requirements for mandatory intervention, and the circumstances do not justify permissive intervention, either. Both motions should be denied because Defendant, represented by the Wisconsin Department of Justice (DOJ), adequately represents their interests in upholding the provisions of 2011 Wisconsin Act 10 ("Act 10") being challenged.

LEGAL STANDARDS

Under Rule 24(a)(2), a "party has a right to intervene when: (1) the motion to intervene is timely filed; (2) the proposed intervenors possess an interest related to the subject matter of the action; (3) disposition of the action threatens to impair that interest; and (4) the named parties inadequately represent that interest." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 657–58 (7th Cir. 2013) ("*WEAC*"). The proposed intervenor bears the burden to prove each requirement is satisfied. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007). If one requirement is not met, denial of the motion to intervene is required. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

A court's disposition of a Rule 24(b) motion for permissive intervention is discretionary. *Sokaogon v. Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000). The court considers prejudice to the original parties and the potential for slowing down the litigation. *City of Chi. v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 987 (7th Cir. 2016). It also properly considers whether allowing permissive intervention would undermine the as-of-right intervention principles. *One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015).

ARGUMENT

I. Neither the Legislature nor Ms. Koschkee meets the standard for intervention as of right.

The Legislature and Ms. Koschkee fail to satisfy the four requirements for mandatory intervention under Rule 24(a)(2). Neither possesses a unique interest in the case and the "disposition of the action" does not "threaten[ ] to impair that interest," and neither shows that Defendant (and his counsel, DOJ) inadequately represent the interest and goal of upholding the Act 10 provisions being challenged. *WEAC*, 705 F.3d at 658. Given these failures, this Court should deny the two motions to intervene as of right.

A. Ms. Koschkee and the Legislature do not have unique interests that would be impaired in this case.

Ms. Koschkee and the Legislature do not have "direct, significant, legally protectable" interests "related to the subject matter" of the action that is unique to them. *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003); *WEAC*, 705 F.3d at 658.

1. The Legislature does not satisfy this Court's standard for an interest justifying intervention.

While the Legislature may be interested in the outcome of this litigation in preserving portions of Act 10, it does not have the required legal interest that supports mandatory intervention. As the Seventh Circuit explained in the first appeal of an Act 10 challenge, mandatory intervention "requires a 'direct,

significant[,] and legally protectable' interest in the question at issue." *WEAC*, 705 F.3d at 658 (alteration in original) (quoting *Keith*, 764 F.2d at 1268). And, importantly, this "interest must be *unique* to the proposed intervenor." *Id.* (emphasis added). Merely establishing an injury for Article III standing purposes "is not enough by itself to allow a person to intervene in a federal suit and thus become a party to it. There must be more." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009).

The Legislature's assertion that it has an interest in the defense of Act 10 (Dkt. 14:7 (Legislature's Br.)), does not meet the standard for intervention as of right, because its asserted interest in defending the constitutionality of laws is not unique. The Legislature's alleged interest is merely supplementary to the Defendant's interest in defending the Act 10 laws and DOJ's parallel duty.

In Wisconsin, DOJ is required by statute to defend state officials in lawsuits. *See* Wis. Stat. § 165.25(6). When DOJ represents a defendant in a case challenging a state law—usually a state officer who administers or enforces the challenged law in his or her official capacity, it "has the duty by statute to defend the constitutionality of state statutes." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 96, 307 Wis. 2d 1, 745 N.W.2d 1; *State v. City of Oak Creek*, 2000 WI 9, ¶ 23 n.14, 232 Wis. 2d 612, 605 N.W.2d 526; *State Pub. Intervenor v. Wis. Dep't of Nat. Res.*, 115 Wis. 2d 28, 37, 339 N.W.2d

324 (Wis. 1983). "The obligation of both the Department of Justice and public officers charged with the enforcement of state statutes is clear: they must defend the statute regardless of whether they have diverse constituencies with diverse views." *Helgeland*, 307 Wis. 2d 1, ¶ 108.

Here, the Legislature's interest in defending the constitutionality of the Act 10 laws is the very interest that Defendant, represented by DOJ, has. The Legislature's interest is not unique.

The Legislature cites no legal authority that grants a legislative body the right to intervene in a case in federal court where the defendants were actually defending the laws being challenged. Instead, it relies on cases in which legislative bodies intervened after the defendants failed to defend the constitutionality of the laws at issue. (Dkt. 14:5–7.)

For example, in *Karcher v. May*, 484 U.S. 72, 75 (1987), the presiding officers of both houses of the New Jersey legislature intervened after "it became apparent that neither the Attorney General nor the named defendants would defend the statute." Likewise, in *INS v. Chadha*, 462 U.S. 919, 940 (1983), the Court allowed Congress to intervene because "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." And in *League of Women Voters v. Evers*, No. 2019AP559, the Governor, a named defendant, did not defend the

constitutional challenge to state laws. These cases, then, do not support a "unique" interest because, here, Defendant and his attorney, DOJ, are defending the challenged laws.

Rather, a recent decision by the Western District of Wisconsin is on point. In *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 384 F. Supp. 3d 982, 984 (W.D. Wis. April 23, 2019),[1] the Wisconsin Legislature filed a Rule 24(a) and (b) motion to intervene in a lawsuit challenging the constitutionality of abortion-related statutes and regulations. Like here, DOJ is representing state officers (in *Planned Parenthood* the Attorney General is also a named defendant). *Id.* The district court denied the Legislature's motion to intervene. *Id.* at 990. The court explained that the Legislature's articulated interest—defending the constitutionality of statutes and regulations—"is the *same* as that of the defendants." *Id.* at 986. The same holds true here. For this reason, alone, the Legislature's request should be denied.

2. Ms. Koschkee does not satisfy this Court's standard for an interest justifying intervention.

Ms. Koschkee also does not have a unique interest justifying intervention. None of her assertions show otherwise.

[1] The Legislature has appealed the district court's ruling. Briefing and oral argument are complete. The parties are awaiting a decision. *Planned Parenthood of Wisconsin, Inc. v. Kaul*, No. 19-1835 (7th Cir.). Given that pending decision, if this Court does not deny the pending motions to intervene outright, it may wish to hold the motions in abatement pending guidance from the Seventh Circuit in that case.

In attempting to show a unique interest, she first asserts that she has a First Amendment right "to refrain from participation" in voting in the annual collective bargaining representative certification elections. However, she does not support that this right is in play here. The challenged Act 10 provision provides that not voting in an annual election equates to a "no" vote. However, Ms. Koschkee supplies no legal authority for that non-vote mechanism being a First Amendment *right*. Because of this failure, Ms. Koschkee identifies no "direct, significant, *legally protectable*" interest in the action. *BDO Seidman*, 337 F.3d at 808 (emphasis added).

Ms. Koschkee next points to Plaintiffs' claim that they have a constitutional right to enter into non-collectively bargained agreements with municipal employers on issues other than wages. (Dkt. 18-1:7; 1:6.) While she asserts that she has "an interest in protecting all statutory rights granted to her by the legislature with respect to the bargaining relationship she enjoys with her employer," she admits that the "nature of Plaintiffs' challenge is unclear at this stage." (Dkt. 18-1:7; 1:6.) As a result, Ms. Koschkee has not identified a "significantly protectable interest" in the action unique to her, apart from the interest Defendant has in upholding this specific Act 10 provision. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

Finally, as to Plaintiffs' challenge to the Act 10 provision prohibiting municipal employers from using the payroll system to deduct wages for

employees' union dues or fair share payments, Ms. Koschkee claims an interest in maintaining protection of her right not to be coerced into "voluntary" payroll deduction. (Dkt. 18-1:7.) This interest, however, is not unique; it is no different than Defendant's interest in defending this Act 10 provision. *See WEAC*, 705 F.3d at 658.

For these reasons, Ms. Koschkee's and the Legislature's motions to intervene as of right can be denied based on their failure to show a legally protected and unique interest, as required.

3. The result in this case will not impair or impede Ms. Koschkee's and the Legislature's abilities to protect their alleged interests.

Relatedly, because Ms. Koschkee and the Legislature have no unique interest apart from the interest of Defendant, it follows that the result in this case cannot impair or impede any such interest. *See WEAC*, 705 F.3d at 658.

Thus, the proposed intervenors-defendants' Rule 24(a) motions to intervene also may be denied on the ground that they fail to articulate an interest that will be impaired.

If it is the Legislature's view that it currently has an interest in intervening *for an appeal*, it is incorrect. That first would require Defendant both to lose and choose not to appeal. Here, in contrast, Defendant is moving to dismiss the case entirely. In the event that this case proceeds and Defendant were to lose, then the Legislature would be free to raise an intervention

argument based on these hypothetical future circumstances. *See Flying J*, 578 F.3d at 572. They are not ripe now.

B. Defendant adequately represents the Legislature's interests and Ms. Koschkee's goal of upholding provisions of Act 10.

Even if the Legislature and Ms. Koschkee have unique interests and this lawsuit threatens to impair them, they are still not entitled to intervene as of right because they cannot overcome the presumption that Defendant provides adequate representation of those interests.

1. The proper legal standards for inadequate representation

a. As to the Legislature

The Legislature argues that, under Rule 24(a)(2), a proposed intervenor only needs to show that representation of its interest "may be" inadequate. (Dkt. 14:7.) That is not the proper legal standard here.

While in an ordinary case a proposed intervenor only needs to make a "minimal" showing that the representation "'may be' inadequate," *Lake Investors Development Group, Inc. v. Egidi Development Group*, 715 F.2d 1256, 1261 (7th Cir. 1983) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)), when the party to the case "is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless

there is a showing of gross negligence or bad faith," *Ligas*, 478 F.3d at 774. *See also WEAC*, 705 F.3d at 659.

Thus, as to the Legislature, it must show gross negligence or bad faith to meet the inadequate-representation prong.

b. As to Ms. Koschkee

Ms. Koschkee contends that she only needs to show that Defendant's representation "may be inadequate." (Dkt. 18-1:11–12.) She too has not articulated the proper standard here.

Unlike the Legislature, Ms. Koschkee's standard is less rigorous because Defendant and the Attorney General are not state officers charged with protecting her First Amendment rights (assuming she had identified a separate, cognizable right). *WEAC*, 705 F.3d at 659. Nevertheless, "where a prospective intervenor *has the same goal* as a party to a suit, there is a presumption that the representation in the suit is adequate." *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994) (emphasis added). The prospective intervenor then must rebut that presumption and show that "some conflict exists." *WEAC*, 705 F.3d at 659 (citation omitted).

Here, Defendant and Ms. Koschkee have the same goal "to see the various provisions of Act 10 upheld." (Dkt. 18-1:12; 9–10.) *See WEAC*, 705 F.3d at 659 (holding that the State and the proposed-intervenor union non-members had the same goal of "protecting Act 10 against the Unions' constitutional

challenge"). Ms. Koschkee claims that Defendant does not necessarily share *all* the same goals as her, such as avoiding union interference and annual certification elections. (Dkt. 18-1:12–13.) However, she makes "no references to legal authority supporting [her] position" that a proposed-intervenor and the state officer must share the same motives where, as here, they share the same overall goal of defending the law. *Kyle v. Morton High School*, 144 F.3d 448, 458 (7th Cir. 1998) (citation omitted). For this reason, the Court can disregard this argument. *Mathis v. New York Lite Inc. Co.,* 133 F.3d 546, 548 (7th Cir. 1998). (a "litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point").

Therefore, because Ms. Koschkee and Defendant share the same goal—that the challenged provisions of Act 10 be upheld—Ms. Koschkee must identify "some conflict" rendering Defendant's representation inadequate. *WEAC*, 705 F.3d at 659.

2. Neither the Legislature nor Ms. Koschkee has shown Defendant's representation to be inadequate.

Under either legal standard, neither the Legislature nor Ms. Koschkee has shown inadequate representation by Defendant.

a. The Legislature has failed to show gross negligence or bad faith.

The Legislature fails to show anything remotely supporting gross negligence or bad faith in Defendant's representation here. To the contrary, it comments that Defendant's initial filings are "commendable." This recognition, and the reality behind it, defeats their motion.

Nothing the Legislature asserts shows otherwise. It first points to a recently passed state law—Wis. Stat. § 803.09(2)—that purportedly allows it to intervene in state or federal court in cases where the constitutionality of a statute is being attacked. (Dkt. 14:8.) While stopping short of asserting that the statute requires a federal court to grant intervention, the Legislature nonetheless contends that this state law shows that Wisconsin does not consider the attorney general to adequately represent its interest in defending state laws. (Dkt. 14:8–9.) This argument fails for three reasons.

First, Wisconsin law continues to recognize that the Attorney General and DOJ *do* represent state officers and the State. Wis. Stat. § 165.25(6) (titled "Attorney for the state"). The legislative-intervention law did not change that.

Second, the legislative-intervention state statute does not show gross negligence or bad faith as a matter of federal law, which is what governs here. The Legislature must show that to meet the inadequate-representation prong. *Ligas*, 478 F.3d at 774; *WEAC*, 705 F.3d at 659.

Third, to the extent that the Legislature argues that Wis. Stat. § 803.09(2) gives it standing, that does not address the right standard. The Seventh Circuit requires more to intervene than merely the minimum interest required by Article III standing. *See Planned Parenthood*, 384 F. Supp. 3d at 985–86 (rejecting the Legislature's argument that Wis. Stat. § 803.09(2) is sufficient basis to seek intervention as of right).

Thus, the Legislature's reliance on the Supreme Court's recent decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (June 17, 2019), does not forward their argument because, among other differences, it is a standing case, not an intervention case. There, the Court held that one house of the Virginia Legislature had no standing to represent the state's interest on appeal because Virginia law vested that authority "exclusively with the State's Attorney General," *id.* at 1951, and because "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole," *id.* at 1953–54. *Bethune-Hill* did not hold that simply passing a state law allowing for intervention would satisfy federal intervention standards, especially not where, as here, Defendant and DOJ already are defending the law. To the contrary, *Bethune-Hill* addressed a scenario where the original state party and attorney general *ceased* defending a law. *Bethune-Hill*, 139 S. Ct. at 1950. And, again, it did not address intervention in any scenario—it simply discussed Article III standing. However, as the Seventh Circuit

correctly has held, for intervention "[t]here must be more." *Flying J*, 578 F.3d at 571.

Likely recognizing its heavier burden, the Legislature changes the subject entirely and argues that the *Attorney General* may not zealously defend this Act 10 challenge because the plaintiff union here—and other labor unions generally—contributed to his election campaign. (Dkt. 14:10–11.) However, this concern that the Attorney General will not fulfill his duty to represent Defendant and defend this Act 10 challenge is without evidentiary support and, in fact, is directly contradicted by DOJ's representation.

The Legislature references the Attorney General's withdrawal of a United States Supreme Court certiorari petition in *Allen v. Int'l Ass'n of Machinists*, No. 18-855 (S.Ct.). (Dkt. 14:11–12.)[2] But this reference to *Allen* is misplaced. First, it is a separate case that has no bearing on Defendant's adequate representation of the proposed-intervenors' interests in this one. Second, there, DOJ had provided a diligent defense of the state law both in the district court and in the Seventh Circuit. However, the State lost that case at each level because the state law "applies to the extent permitted under federal law," Wis. Stat. § 111.06(1)(i), and governing federal case law held the state law was preempted. *See Int'l Ass'n of Machinists Dist. Ten & Local Lodge 873*

[2] Ms. Koschkee also cites that separate case (Dkt. 18-1:15 n.2), but this does not support her "some conflict" premise, for the same reasons discussed in the text.

v. Allen, 904 F.3d 490, 493 (7th Cir. 2018). Moreover, the Seventh Circuit denied the State's petition for rehearing and rehearing en banc. *Id.* Withdrawing a voluntary Supreme Court petition for certiorari under those circumstances shows neither gross negligence nor bad faith. *See Ligas*, 478 F.3d at 774; *WEAC*, 705 F.3d at 659.

As the Legislature acknowledges, Defendant has done as much as possible in defending the Act 10 laws being challenged here: the filing of a motion to dismiss all of Plaintiffs' claims. (Dkt. 9–10; 14:13.) Moreover, lead counsel for Defendant was a member of the litigation teams that defended Act 10 in the previous challenges—*Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337, *WEAC*, and *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628 (7th Cir. 2014)—and he argued the appeal in the latter case. *Cf. Planned Parenthood*, 384 F. Supp. 3d at 989–90 (citing the assignment of DOJ attorneys who had "previously diligently defended abortion regulations" before district court and on appeal in concluding no inadequate representation). Both Defendant and DOJ are fulfilling their duties to defend the constitutionality of the portions of Act 10 under attack here. *Helgeland*, 307 Wis. 2d 1, ¶ 108.

The Legislature has not shown any deficiencies in Defendant's representation of its alleged interests, let alone bad faith or gross negligence.

Thus, the Legislature has not met the inadequate-representation prong. *WEAC*, 705 F.3d at 658.

b. Ms. Koschkee has failed to show "some conflict."

Ms. Koschkee argues that Defendant provides inadequate representation even if she is pursing the same goal. She asserts there is a relevant conflict of interest, but she misunderstands the circumstances. (Dkt. 18-1:13–14.) In particular, he claims that, as a public school teacher, her "employer is a government entity created by the state," and this "Court should not ask [her] to effectively place her fate in the workplace in the hands of her own employer." (Dkt. 18-1: 14.) This argument fails because her premise is mistaken.

Defendant, the Chairman of the Wisconsin Employment Relations Commission, does not represent Ms. Koschkee's employer, or any other municipal employers. Rather, he *conducts* elections and *adjudicates* disputes involving municipal employers and labor unions. *See* Wis. Stat. §§ 111.70(1)(j) (including "school districts" in the definition of "municipal employer"), 111.70(4) ("Powers of the commission"), 111.70(4)(d)3.b. ("the commission shall conduct an election"). Moreover, neither the Attorney General nor DOJ have any duty or authority to represent municipal employers. *See, e.g.*, Wis. Stat. §§ 165.015, 165.25. Thus, Defendant is not effectively her employer, and there is

no conflict of interest. She has failed to show "some conflict" in the representation here. *WEAC*, 705 F.3d at 659.

In sum, the Legislature's and Ms. Koschkee's motions to intervene under Rule 24(a) should be denied for the additional reason that they fail to show inadequate representation.

II. This Court should exercise its discretion to deny permission intervention.

This Court should also deny the Legislature's and Ms. Koschkee's Rule 24(b) motions to intervene permissively.

Where appropriate, "[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). As a general matter, a court considers "the prejudice to the original parties and the potential for slowing down the case." *Planned Parenthood*, 384 F. Supp. 3d at 990 (citing *City of Chi.*, 660 F.3d at 987).

Specific to the present circumstances, the Seventh Circuit has recognized that it is proper to deny a motion to intervene when the state's attorney general is defending the statute and when "adding another defendant would simply complicate the litigation." *Flying J*, 578 F.3d at 572. Indeed, while permissive intervention under Rule 24(b) is discretionary within the bounds of the intervention standards, *Sokaogon*, 214 F.3d at 949, it should not be used to

defeat the purpose of the presumption that state officers adequately represent the interests they are charged with representing, *see One Wisconsin Institute,* 310 F.R.D. at 399.

This Court should reach that conclusion here. As explained above, Defendant is adequately defending the constitutionality of state statutes. Adding the Legislature and a public school teacher as parties would only complicate this litigation. With multiple defendants, this case would become more complex during discovery, summary judgment, and trial (to the extent this Court does not grant Defendant's motion to dismiss). Instead of one defendant represented by the same counsel, there would be three sets of counsel asking questions at depositions, propounding discovery, and trying the case. Although the Legislature has stated that it would allow the Attorney General to take the lead in defense of the case if it were allowed to intervene (Dkt. 14:13), the Legislature does not justify this added complexity by identifying a corresponding benefit, nor does Ms. Koschkee join in the Legislature's gesture.

And, importantly, allowing the Legislature and Ms. Koschkee to use permissive intervention here would defeat the purpose of the presumption that state officers adequately represent the interests they are charged with representing. *See WEAC*, 705 F.3d at 658–59. A party would be able to sidestep

that presumption merely by meeting the much less demanding standard for permissive intervention.

A district court has recognized this problem. In *One Wisconsin Institute, Inc. v. Nichol*, the court denied permissive intervention to parties seeking to join a state defendant and DOJ in defending a statute, holding that "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." 310 F.R.D. at 399 (quoting *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996)). The Legislature's argument for permissive intervention would allow it to intervene in every challenge to a state law in federal court, regardless of whether the state officer defendant and DOJ are adequately defending the law. That proposal is not consistent with the standards governing intervention where, as here, the government defendant is providing a defense.

CONCLUSION

The Court should deny the two proposed-intervenors' motions.

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Dated this 18th day of October, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 18, 2019, I electronically filed the foregoing Defendant's Memorandum of Law In Opposition to the Motions to intervene with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 18th day of October, 2019.

s/ Steven C. Kilpatrick
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