UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Operating Engineers of Wisconsin,
IUOE Local 139 and Local 420,

Plaintiff,

v.

Tony Evers, in his official capacity as Governor; John Kaul, in his official capacity as Attorney General for the State of Wisconsin; and, James J. Daley, in his official capacity as Chairman of the Wisconsin Employment Relations Commission,

Defendant.

Case No. 2:18-cv-00285-LA

THE WISCONSIN LEGISLATURE'S
MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE

INTRODUCTION

Through Wisconsin Statutes section 803.09(2m), the State of Wisconsin made the sovereign decision that when a Plaintiff challenges the constitutionality of the State's laws in court, the Legislature should be permitted to defend the law as a party. The Legislature's invocation of its section 803.09(2m) statutory authority in the present case satisfies the standards for intervention embodied in Federal Rule of Civil Procedure 24, both as to mandatory and permissive intervention. First, the Legislature's intervention motion is unquestionably timely. Second, the Legislature has an interest—recognized as a sovereign matter under section 803.09(2m)—in the validity of state law that it has enacted, including Act 10. Third, this lawsuit plainly threatens that interest, as Plaintiffs seek an injunction blocking Act 10. Fourth and finally, it is the State of Wisconsin's sovereign judgment that the Attorney General does not adequately represent this interest in the validity of state law, in

a case such as this one. In particular, the State of Wisconsin made the decision that the Attorney General should not be the sole representative of the State's interest in defending state law where, as here, the Legislature determines that the Attorney General's political interests and policy views may lead him to put forth a less-than-vigorous defense of state law. The Legislature respectfully requests that this Court honor the State of Wisconsin's sovereign choice as to which of its public offices should defend the validity of Wisconsin law in federal court. *See Karcher v. May*, 484 U.S. 72 (1987); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Preferably, this Court would honor that choice by recognizing the Legislature's authority to intervene as a matter of right; but, at minimum, this Court should permit the Legislature to intervene on a permissive basis.

INTEREST OF PROPOSED INTERVENOR

The Wisconsin Legislature is composed of the State Assembly and State Senate. *See* Wis. Const. art. IV, § 1. Wisconsin law recognizes that the Legislature, as the body "vested" with the "legislative power," has an interest in defending the State's sovereign interest in the validity of state law in court. In particular, under Wisconsin Statutes section 803.09(2m), "[w]hen a party to an action challenges in state or federal court the constitutionality of a statute . . . the legislature may intervene as set forth under s. 13.365 . . . ." Wisconsin Statutes section 13.365(3), in turn, provides that "[t]he joint committee on legislative organization may intervene at any time in the action on behalf of the legislature," and authorizes the hiring of counsel other than the Attorney General. Accordingly, under Wisconsin law, the Legislature is a "state officer[]," acting in its "official capacit[y]," which is specifically authorized to vindicate the State's interest protecting against "a judicial decision declaring a state law unconstitutional." *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013); *see also Karcher*, 484 U.S. at 82.

ARGUMENT

I. The Legislature Is Entitled To Intervene As Matter Of Right Under Rule 24(a)(2)

Federal Rule of Civil Procedure 24(a)(2) provides 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." The Seventh Circuit has articulated four criteria for Rule 24(a)(2) intervention: "(1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) existing parties must not be adequate representatives of the applicant's interest." *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 700 (7th Cir. 2003) (citation omitted). The Legislature has satisfied these criteria here:

A. *This application is timely.* The Seventh Circuit has specified "four factors" for deciding "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 intervenor if the motion is denied; [and] (4) any other unusual circumstances." *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 388 (7th Cir. 2019) (alteration in original) (citation 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." *Id.* at 389–90.

The Legislature's motion here is unquestionably timely. The Legislature filed this motion less than a month after Plaintiffs filed their second amended complaint and on the same day that the Defendants were required to enter their appearance in this case, meaning

that no one is prejudiced by the Legislature's timing. *See e.g.*, *Doe v. County of Milwaukee*, No. 14-C-200, 2014 WL 3728078, at *2 (E.D. Wis. July 29, 2014) (intervention timely where motion filed "within a month of the initiation of this action"). Defendants have not yet filed a responsive pleading, and the only briefing that has occurred has been over certain private parties' motion to intervene. Notably, in response to those private parties' intervention motion, Plaintiffs complained that the timing of those parties' filing was premature and thereby prejudiced Defendants, who "should be given the opportunity to respond to the Complaint, and to any motion to intervene, prior to an Intervenor being given leave to be added to the action, particularly as a party defendant." Dkt. 19, at 2. No such objection could be raised as to the Legislature's timing, as the Legislature waited to file until the Defendants' deadline to enter their appearances, allowing Defendants to file their response to the present motion to intervene. And, of course, as described below, the Legislature would be prejudiced by the denial of its motion to intervene.

B. *The Legislature has an interest in the defense of Wisconsin law, as recognized by Wisconsin state law*. The Seventh Circuit has explained that although "the prospective intervenor's interest must be direct, significant, and legally protectable," "we have interpreted statements of the Supreme Court as encouraging liberality in the definition of an interest." *Lopez-Aguilar*, 924 F.3d at 391–92 (citation omitted); *accord Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982).

As a threshold matter, the State of Wisconsin has an interest in the validity of state law. As the Supreme Court has explained, "[n]o one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional." *Hollingsworth*, 570 U.S. at 709–10 (citation omitted). For example, in its recent decision in *Lopez-Aguilar*, the Seventh Circuit considered the State of Indiana's argument that it had a Rule 24(a)(2) "interest" to intervene in challenge a

stipulated judgment that imposed a restrictive interpretation of state law. The Seventh Circuit held that Indiana had a sufficient "interest," for purposes of Rule 24(a)(2), because "the State has a *fundamental* interest in the maintenance of its legislatively mandated policy . . . ." 924 F.3d at 392. In particular, "Indiana ha[d] an interest in giving effect to its legislature's determination that the State ought to cooperate fully with federal immigration enforcement." *Id.*

As a necessary corollary to the State's interest in protecting its laws from invalidation in federal court, the State also has sovereign authority to determine which of its "state officers," acting in their "official capacit[ies]," can vindicate the State's interest protecting its state law from "a judicial decision declaring a state law unconstitutional." *Hollingsworth*, 570 U.S. at 710. As the Supreme Court has explained, "[t]o vindicate [the] interest [in the continued enforceability of its laws] . . . , a State must be able to designate agents to represent it in federal court." *Id.* Thus, for example, in *Karcher v. May*, 484 U.S. 72 (1987), "'[s]ince the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals,' [the Supreme Court] held that the Speaker and the President, in their official capacities, could vindicate that interest in federal court on the legislature's behalf." *Hollingsworth*, 570 U.S. at 709 (quoting *Karcher*, 484 U.S. at 82).

The State of Wisconsin—just like the State of New Jersey in *Karcher*—has concluded that the Legislature, as the body that enacts laws, can vindicate the State's sovereign interests in the defense of its state law in federal court. In particular, Wisconsin Statutes section 803.09(2m) provides that "[w]hen a party to an action challenges in state or federal court the constitutionality of a statute . . . the legislature may intervene as set forth under s. 13.365 . . . ." *See also* Wis. Stat. § 13.365(3). To be sure, the Legislature does not have an *exclusive* authority to defend the State's interests in the validity of state law—just as was the case in New Jersey, where the Attorney General also had the authority to defend state law.

Karcher, 484 U.S. at 82. Rather, under Wisconsin law, the Attorney General and/or Governor can also defend this interest, where authorized by statute. *See* Wis. Stat. § 165.25; Wis. Stat. § 14.11. But, critically, as the Wisconsin Court of Appeals recently explained in the very first case where the Legislature intervened after the enactment of Wisconsin Statutes section 803.09(2m)—in a case where the Governor, but not the Attorney General, was a named party[1]—"*the Legislature and the Governor each represent the State.*" Order, *League of Women Voters v. Evers*, No. 2019AP559 at 5 (Wis. Ct. App. Mar. 27, 2019) (emphasis added) (attached hereto as Exhibit A). Soon thereafter, the Wisconsin Supreme Court, in the same case, held that "there is a substantial harm to the Legislature and to the public where statutes enacted by the people's elected representatives are declared unenforceable and enjoined before any appellate review can occur." Order, *League of Women Voters v. Evers*, No. 2019AP559 at 8 (Wis. Apr. 30, 2019) (attached hereto as Exhibit B). Thus, the Wisconsin Legislature has a statutorily recognized interest in representing "the State" when the laws of Wisconsin are challenged and there is "harm to the Legislature" when a court enjoins a law of the State. *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (federal courts are bound by state courts' construction of state statutes); *Cook v. Cook*, 560 N.W.2d 246, 254 (Wis. 1997) (explaining that, under a special Wisconsin rule, the decisions of the Wisconsin Court of Appeals, like the decisions of the Wisconsin Supreme Court, are entitled to statewide *stare decisis* effect).

Alternatively, although this Court need not decide the issue here, the Legislature would have a sufficiently independent interest in defending state law, including Act 10, even if the State of Wisconsin had not adopted Wisconsin Statutes section 803.09(2m). Legislators "have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman v. Miller*, 307 U.S. 433, 438 (1939). Accordingly, courts have regularly recognized

[1] The Attorney General participated for the first time on appeal, and only to argue against a stay of a portion of the injunction the trial court had issued.

that *both* States *and* legislative bodies "have an independent interest in defending the validity of [state] laws and ensuring that those laws are enforced," *Northeast Ohio Coaition for the Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006), and have permitted legislative bodies to defend the constitutionality of laws, *see, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983); *McLaughlin v. Hagel*, 767 F.3d 113 (1st Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014). Although those cases have typically arisen in the context of the other state parties choosing not to defend the laws in dispute, that should make no difference for the "interest" inquiry.

C. *This lawsuit threatens the Legislature's interest.* As explained above, under Wisconsin law, the State has a sovereign interest in defending its state law, and Wisconsin law endows the Legislature, as the body that enacted that law, with the authority to defend the State's sovereign interest in the validity of Wisconsin law in federal court. This lawsuit plainly threatens that sovereign interest, as Plaintiffs seek an injunction blocking Act 10, a law of the State of Wisconsin. *See Lopez-Aguilar*, 924 F.3d at 391–92.

D. *The other parties, including the Attorney General, do not adequately represent the Legislature's interest.* To satisfy the inadequate representation prong of Rule 24(a)(2), a movant need only show that "representation of [its] interest [by the parties] '*may b*e' inadequate; and the burden of making that showing should be treated as minimal." *Lake Inv'rs Dev. Grp. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1261 (7th Cir. 1983) (emphasis added) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The Legislature satisfies this standard in the present case, as no other party, including the Attorney General, adequately represents the Legislature's interests.

As a threshold matter, and sufficient to dispose of this issue in the Legislature's favor, Wisconsin Statutes section 803.09(2m) embodies the State of Wisconsin's sovereign judgment that the Attorney General appearing in federal court does *not* adequately represent

the State's interest in the vigorous defense of state law. Under Wisconsin law, the Attorney General's "powers and duties" are provided *entirely* by statutory law, *State v. City of Oak Creek*, 605 N.W.2d 526, 535–36 (Wis. 2000), and the State of Wisconsin has concluded that the Attorney General should not be the exclusive representative of the State in a case where the Legislature seeks to intervene to defend state law. This sovereign judgment is entitled to comity and respect. *See* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend*, 124 Yale L.J. 2100, 2116 (2015) ("[S]tates may grant whatever powers and impose whatever obligations on an attorney general that they wish, assuming they choose to have one in the first place."). Notably, under Rule 24(a)(1), if a federal statute gives a party the right to intervene, the court "must" permit intervention. While, of course, Wisconsin law cannot similarly require federal courts to grant intervention to any potential intervenor, the principle of intergovernmental respect and comity militates strongly in favor of respecting Wisconsin's sovereign choice as to which of its officials should be able to defend state law, when that law is challenged in federal court.

The Supreme Court's recent ruling in *Virginia House of Delegates v. Bethune-Hill*, while decided on standing and not on Rule 24(a)(2) grounds, emphasizes the importance of looking to the State's sovereign policy choices in deciding which of a State's officials speak for the State's interest in defending its own laws. 139 S. Ct. 1945. In *Virginia House of Delegates*, the Supreme Court held that the Virginia House of Delegates lacked standing to appeal in defense of legislative maps because, as relevant here, the House could not identify any State law under which the State of Virginia "had designated the House to represent its interests." *Id.* at 1951. The Court based its holding upon Virginia's sovereign decision "to speak as a sovereign entity with a *single* voice," and the Court made clear that it would respect the different choice made by other States, such as Indiana, to permit their legislatures to defend state law. *Id.* at 1952 (emphasis added); *accord Karcher*, 484 U.S. at 82 ("Since the

New Jersey Legislature had authority under state law to represent the State's interests . . . we need not vacate the judgments below for lack of a proper defendant-appellant."). By enacting Wisconsin Statutes section 803.09(2m), the State of Wisconsin, like Indiana (and like New Jersey in *Karcher*), made the sovereign choice that the Supreme Court in *Virginia House of Delegates* said that federal courts should respect. Again, as noted above, in the very first case that the Wisconsin appellate courts have adjudicated involving the Legislature's intervention to defend state law after the enactment Wisconsin Statutes section 803.09(2m), the Wisconsin Court of Appeals and Wisconsin Supreme Court concluded that "the *Legislature and the Governor each represent the State*," Order, *League of Women Voters*, No. 2019AP559, at 5 (Wis. Ct. App. Mar. 27, 2019) (emphasis added) (attached hereto as Exhibit A), and "there is a substantial harm *to the Legislature* . . . where statutes enacted by the people's elected representatives are declared unenforceable . . . ." Order, *League of Women Voters*, No. 2019AP559, at 8 (Wis. Apr. 30, 2019) (emphasis added) (attached hereto as Exhibit B).

While the State's sovereign decision that the Attorney General is not the sole representative of the State's interest in defending state law is sufficient, standing on its own, to satisfy this prong, there is special reason to believe that the Wisconsin Attorney General's defense of Act 10 "may be" inadequate, satisfying this "minimal" requirement for the Legislature. *Lake Inv'rs*, 715 F.2d at 1261 (citation omitted). The lead Plaintiff in this case seems to believe the Attorney General will have special reason not to zealously defend against this lawsuit. Lead Plaintiff Local 139 voluntarily withdrew its lawsuit over a year ago, and then filed several months after the current Attorney General took office. At the time of that re-filing, Terry McGowan, president and business manager of Local 139, explained that "Act 10 was a heartless attempt to destroy public-employee unions in particular and unionism in general and we won't sit idly by while our first amendment rights are being destroyed." Engineers Local 139, *Wisconsin Operating Engineers Local 139 Files Lawsuit*

Against State, Act 10 Violates First Amendment Rights, (May 6, 2019), *available at* http://www.thewheelerreport.com/wheeler_docs/files/0506iuoe.pdf. Unsurprisingly, the Terry McGowan Committee made one of the largest contributions to the Attorney General election campaign. *Kaul for Attorney General Campaign Finance Report*, Wisconsin Campaign Finance Information System (Aug. 6, 2018), *available at* https://cfis.wi.gov/ReportsOutputFiles/0105879FallPre-Primary20183a909862018121112PMCF-2Report.pdf. Other unions similarly supported Kaul's election campaign with both endorsement and campaign funds. *See, e.g.*, American Federation of State, County and Municipal Employees, AFL–CIO, *AFSCME Endorses Josh Kaul For Attorney General* (Jan. 25, 2018), *available at* https://www.afscme32.org/afscme-council-32-0/news/afscme-endorses-josh-kaul-attorney-general, *Wisconsin AFL-CIO Endorses Josh Kaul for Attorney General* (Feb. 22, 2018), *available at* http://www.wisaflcio.org/news/wisconsin-afl-cio-endorses-josh-kaul-attorney-general. Indeed, labor unions make up the lions' share of the major financial contributors to the Attorney General's election campaign, including being each of the *top eight* contributors, and nine of the top ten. *See Josh Kaul Campaign Finances*, VoteSmart (last visited June 30, 2019), *available at* https://votesmart.org/candidate/campaign-finance/182616/josh-kaul#.XMyu3ZNKiFW.

Unions' support for the current Attorney General has paid off in other litigation. Just last month, as the U.S. Supreme Court was considering the petition for certiorari in *Allen v. Int'l Ass'n of Machinists*, No. 18-855 (S. Ct. Apr. 17, 2019)—a petition in which the prior Attorney General challenged an injunction blocking another Wisconsin law placing limits on collective bargaining—the current Attorney General abruptly withdrew that petition, thereby leaving in place the Seventh Circuit's 2-1 decision affirming the permanent injunction against Wisconsin law. *See Int'l Ass'n of Machinists v. Allen*, 904 F.3d 490 (7th Cir. 2018). In his

press release celebrating this action, the Attorney General explained that one of the reasons that he abandoned the defense of Wisconsin law was that success before the Supreme Court would "*further restrict collective bargaining*." *See* Wisconsin Department of Justice, *Wisconsin Department of Justice Resolves Challenge to Wisconsin Law Regarding Dues-Checkoff Authorizations*, (May 31, 2019), *available at* https://www.doj.state.wi.us/news-releases/wisconsin-department-justice-resolves-challenge-wisconsin-law-regarding-dues-checkoff (emphasis added). Act 10, the law under attack in this case, is the crown jewel of the laws that political opponents—including the lead Plaintiff in the present case—believe "restrict collective bargaining."

Finally, the U.S. District Court for the Western District of Wisconsin's recent decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 19-cv-038-wmc, No. 2019 WL 1771929 (Apr. 23, 2019), Dkt. 31, which is on appeal before the Seventh Circuit, *id*. at Dkt. 33–35, should not guide this Court's decision. In that case, the Western District denied the Legislature's motion to intervene without meaningfully addressing Wisconsin Statutes section 803.09(2m). Instead, the Western District treated the Legislature's motion largely as if section 803.09(2m) did not exist, and cited cases either denying, *see Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007), or granting, *see Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009), intervention by *non-governmental actors* in defense of state or federal law, *where the relevant States had concluded the government defendant was the exclusive representative of the state or federal government*. *Id*. at Dkt. 31 at 5-11. With respect, those cases have no relevance here, where the proposed intervenor is a "state officer[]," acting in its "official capacity," who is specifically authorized to vindicate the State's interest protecting against "a judicial decision declaring a state law unconstitutional." *Hollingsworth*, 570 U.S. at 710; *see Karcher*, 484 U.S. at 87. In those circumstances, courts have properly respected the sovereign's decision and permitted state legislative intervention

in defense of the laws of the State. *See People's Legislature v. Miller*, No. 2:12-cv-00272-MMD, 2012 WL 3536767, at *5 (D. Nev. Aug. 15, 2012); *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695 (D.N.C. 2014).

II. In The Alternative, This Court Should Permit The Legislature To Intervene As A Permissive Matter, Under Rule 24(b)(2)

Under Rule 24(b), a district court can grant permissive intervention where a party timely files a motion to intervene and "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 deciding whether to grant such a power, the district court should take into account "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Permissive intervention under this provision is liberally granted. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1904 (3d ed. 2007). After all, "[a]ll that is required for permissive intervention . . . is that the applicant have a claim or defense in common with a claim or defense in the suit." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996).

The U.S. District Court for the Western District of Wisconsin decision in *Whitford v. Gill*, granting the Wisconsin Assembly permissive intervention, illustrates the proper application of these considerations. *See Whitford v. Gill*, No. 15-cv-421-JDP, 2018 U.S. Dist. LEXIS 193078, *5 (W.D. Wis. Nov. 13, 2018). There, the Assembly moved to intervene after the U.S. Supreme Court's remand in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). In granting permissive intervention, the court pointed to the Assembly's "defenses" against the partisan gerrymandering claim and noted that the election of a new Attorney General "introduces potential uncertainty into defendants' future litigation strategy." *Whitford*, 2018 U.S. Dist. LEXIS 193078, *5.

Applying these principles to the present case is straightforward. This case is in a far earlier posture than *Whitford*, and the Legislature intends to present "defenses" against

Plaintiffs' challenge, as articulated in the attached proposed motion to dismiss. Further, as discussed above, granting the Legislature intervention in this case shows respect for Wisconsin's judgment as to which state officials represent it, when its laws are under attack in court. And no prejudice will result to any of the current parties, including because the claims here are purely legal, meaning that the most Plaintiffs can hope for is to prevail on appeal, after convincing the Seventh Circuit and/or Supreme Court to overturn their settled precedent.

CONCLUSION

This Court should grant the Legislature's motion to intervene.

Dated this 11th day of July, 2019.

By: *s/ Eric M. McLeod*

Eric M. McLeod
State Bar No. 1021730
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
608-255-4440
608.258.7138 (fax)
eric.mcleod@huschblackwell.com

Misha Tseytlin
State Bar No. 1102199
TROUTMAN SANDERS LLP
1 N. Wacker Drive, Ste. 2905
Chicago, IL 60606
Telephone: (608) 999-1240
Facsimile: (312) 759-1939
E-mail: misha.tseytlin@troutman.com

Attorneys for the Wisconsin Legislature