UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

International Union of Operating Engineers of Wisconsin, Local 139, AFL-CIO, Karen Erickson, and Heath Hanrahan,

Plaintiffs,

v.

Case No. 2:19-cv-01233-JPS

James J. Daley, in his official capacity as Chairman of the Wisconsin Employment Relations Commission,

Defendant.

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

INTRODUCTION

Through Sections 13.365 and 803.09(2m) of the Wisconsin Statutes, the people of Wisconsin decided that the Wisconsin Legislature can speak, as a party, for the people's interest in the defense of their duly enacted laws. In his opposition to the Legislature's Motion to Intervene, the defendant, James J. Daley, Chairman of the Wisconsin Employment Relations Commission, asks this Court to render Sections 13.365 and 803.09(2m) a dead letter in federal court, thereby permitting plaintiffs—rather than the people of Wisconsin—to decide how and by whom the State's laws will be defended. According to the central theory underlying the defendant's opposition, so long as the state official chosen by plaintiffs as the defendant asserts that he will defend the state law, no other state official or body may be permitted to defend the law as a party, absent an exceedingly-difficult-to-meet "gross negligence or bad faith" showing, even where, as here, state law expressly endows that state body with the right to defend the law.

Such an approach disregards the principles of comity and mutual respect owed to States, and nothing in Federal Rule of Civil Procedure 24 or the relevant caselaw suggests that federal courts should adopt such an approach. This Court should reject defendant's argument, apply Rule 24's plain terms, and grant the Legislature's Motion to Intervene.

ARGUMENT

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

Rule 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." As the Legislature explained in its Motion, the Legislature has made Rule 24(a)(2)'s required showings: (1) the Legislature's motion was plainly "timely"; (2) the Legislature has "an interest relating to the . . . transaction which is the subject of the action," given Wisconsin's sovereign interest in the validity of the state law at issue here, which the Legislature has the right to vindicate under Sections 13.365 and 803.09(2m); (3) the potential "disposition of the action"—a declaration that provisions of Act 10 are unconstitutional and an injunction against their enforcement—would "impair or impede" that interest; and (4) the people of Wisconsin have determined that the "existing part[y]"—Chairman Daley, represented here by the Attorney General—is not an "adequate representative[ ]" of this interest, a decision entitled to comity and respect in this Court. Mem. 3–14. The Attorney General's contrary arguments do not overcome this showing.

First, the Attorney General concedes by silence the timeliness of the Legislature's Motion to Intervene. *See* Mem. 3–4.

Second, the Legislature's interest, under Rule 24(a)(2), follows from the State's interest in the defense of Act 10 because the Legislature is a "state [body]," acting in its "official capacit[y]," which is specifically authorized by Sections 13.365 and 803.09(2m) to vindicate the State's interest in protecting against "a judicial decision declaring a state law unconstitutional." *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013); *accord Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Karcher v. May*, 484 U.S. 72, 82 (1987); Mem. 4–7.

The Attorney General's claim that the Legislature's interest is not "unique"—because the Attorney General asserts that, in this case, he *shares* the State's interest in defending state law, Resp. Mem. 4—misunderstands Rule 24(a)(2)'s interest inquiry. A proposed intervenor satisfies the "interest" standard when it has a "direct, significant, and legally protectible" interest, *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 391–92 (7th Cir. 2019), without regard to whether any other party shares that interest, *see* 7C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §§ 1908, 1908.1, 1908.2 (3d ed. 2019) (no mention of any "non-shared" interest obstacle). *Wisconsin Education Association Council* ["*WEAC*"] *v. Walker*, 705 F.3d 640 (7th Cir. 2013), the only case that the Attorney General cites for his non-sharing-of-interest thesis, is not to the contrary. There, the Seventh Circuit merely stated that the "interest must be unique to the proposed intervenor." *WEAC*, 705 F.3d at 658. The Seventh Circuit then cited *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), which, in turn, explains that "[t]he interest must be based on a right that *belongs to the proposed intervenor rather than to an existing party in the suit*." 764 F.2d at 1268 (emphasis added). In other words, the intervenor's interest must be "unique," only in that *the interest must "belong to" intervenor*. Here, the authority to defend state law "belongs to" the Legislature, under Sections 13.365 and 803.09(2m), meaning that the Legislature possesses a "unique" interest, as articulated in *WEAC* and *Keith*. *See id.*

That the Attorney General claims that he *also* has an interest in defending state law in this case, Resp. Mem. 4–5—an interest that he is willing to abandon selectively in this area of law, in cases like *Allen v. International Association of Machinists*, No. 18-855 (S. Ct. Apr. 19, 2019), *see* Mem. 10–13—does nothing to undermine the Legislature's *own*, state-law-recognized interest in defending Act 10. Indeed, the statute that the Attorney General cites here—Wis. Stat. § 165.25—cross-references the Legislature's intervention rights under Wisconsin Statute Section 803.09(2m). *See infra* p. 6.

The Attorney General's further point that, unlike with the state attorney general in cases such as *Karcher*, he is defending state law here (at least for now, *see* Mem. 10–13), Resp. Mem. 5, similarly misunderstands Rule 24(a)(2)'s "interest" inquiry. Rule 24(a)(2)'s interest prong merely asks whether the proposed intervenor has "an interest relating to the . . . transaction which is the subject of the action," and the Legislature's "interest"—as recognized by Sections 13.365 and 803.09(2m)—does not somehow disappear by virtue of the Attorney General's assertion that he will, at least at the current time, defend the state law at issue here.

Third, this lawsuit plainly threatens the Legislature's interest in the validity of state law. *See* Mem. 7; *accord Lopez-Aguilar*, 924 F.3d at 391–92. The Attorney General's contrary argument—"because . . . the Legislature ha[s] no unique interest . . . it follows that the result in this case cannot impair or impede any such interest," Resp. Mem. 8—is merely a repetition of his erroneous non-uniqueness argument, discussed immediately above.

Fourth, the Attorney General does not "adequately represent" the Legislature's interest in defense of state law. Given Sections 13.365 and 803.09(2m), and the other considerations that the Legislature explained at length in its Motion, *see* Mem. 7–13, the Legislature has made the showing that current "representation of [its] interest [by the parties] 'may be' inadequate," *Lake*

Inv'rs Dev. Grp. v. Egidi Dev. Grp., 715 F.2d 1256, 1261 (7th Cir. 1983). In arguing that this Court should override the State of Wisconsin's sovereign judgment that the Attorney General's representation is not "adequate" to protect Wisconsin laws from constitutional challenge, *the Attorney General does not dispute that the Legislature satisfies the "may be inadequate" standard*. The arguments that the Attorney General does make are legally wrong.

The Attorney General argues that the Legislature must meet a heightened "gross negligence or bad faith" standard, citing *WEAC* and *Ligas ex rel. Foster v. Maram*, 478 F.3d 771 (7th Cir. 2007). Resp. Mem. 9–10. But *WEAC* and *Ligas* dealt with an entirely different situation, where a state body was exclusively "charged by [state] law" with defending or administering the statute, and *private parties*, with no such state-law rights, sought to intervene. *Ligas*, 478 F.3d 773–74. These cases and the "gross negligence or bad faith" standard that they articulate have no application in a case like the present one—where the proposed intervenor is a "state [body]," acting in its "official capacity," which is specifically authorized to vindicate the State's interest in protecting against "a judicial decision declaring a state law unconstitutional." *Hollingsworth*, 570 U.S. at 710; *see Karcher*, 484 U.S. at 82. In such circumstances, the considerations at issue in *Ligas* decidedly *favor* intervention because the proposed intervenor—here, the Legislature—is "charged by [state] law" with defending the statute. *Ligas*, 478 F.3d 774. Exporting the "gross negligence or bad faith" standard to such an inapposite circumstance would dishonor the State's sovereign right to decide how its own laws should be defended, and by whom. And it would also—remarkably—allow *the plaintiff* to hand-pick its state-official adversary, subject only to an exceedingly difficult-to-meet "gross negligence or bad faith" override, so that the plaintiff could avoid having to litigate against a particular state body that is "charged by [state] law" with defending the statute. *Id.*

The Attorney General next points out that he has a statutory right to "represent state officers and the State" in some circumstances, citing Wis. Stat. § 165.25. Resp. Mem. 12. What the Attorney General neglects to mention is that, while Wis. Stat. § 165.25 recognizes his authority to represent the State and its officers in some circumstances, that very provision is specifically limited by the Legislature's intervention right in Wisconsin Statute Section 803.09(2m), in cases where a statute's constitutionality is under attack. In fact, both Wis. Stat. § 165.25(1) and Wis. Stat. § 165.25(1m) specifically cross-reference Section 803.09(2m). Put another way, because, under Wisconsin law, the Attorney General's "powers and duties" are *entirely* a matter of statutory law, *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 30–33, 232 Wis. 2d 612, 605 N.W.2d 526, the Attorney General's limited right to represent the State or state bodies in cases where state law is under attack is explicitly limited by the Legislature's commensurate right to participate as a party.

For similar reasons, the Attorney General misunderstands the Legislature's reliance on the Supreme Court's decision in *Bethune-Hill*. Resp. Mem. 13–14. Just as *Bethune-Hill* held that federal courts should look to the State's sovereign decision about which officials represent the State in conducting the *federal* Article III standing inquiry, *see* 139 S. Ct. at 1952, federal courts—for the same comity and federalism reasons—should take the *same* sovereign judgment into account in making the *federal* adequacy inquiry under Rule 24(a)(2). Contrary to the Attorney General's claim, Resp. Mem. 13, nothing in *Bethune-Hill* turned on whether the Virginia Attorney General was, in fact, defending the state law. The inquiry in *Bethune-Hill* was whether Virginia had determined "to speak as a sovereign entity with a single voice" when defending state law, and the Supreme Court made clear that it would respect the different choice made by other States, such as Indiana. 139 S. Ct. at 1952. Wisconsin—unlike Virginia, but like

Indiana—has made clear that the Legislature shares the State's interests when a Wisconsin law is challenged, and the federal courts should respect that judgment in the Rule 24(a)(2) context, for the same reason that the Supreme Court held that they should respect that judgment when conducting the Article III standing inquiry.

The Attorney General's discussion of his actions during the *Allen* case only further undermines his position. The Attorney General claims that he acted consistent with his duty to defend Wisconsin law when he "[w]ithdr[ew] a voluntary Supreme Court petition for certiorari" in *Allen.* Resp. Mem. 14. But the Attorney General's actions in *Allen* ended the State's defense of a state labor law by ministerial operation of the Supreme Court's rules, notwithstanding that the pending petition was supported by numerous *amici*, including several sovereign States. Mem. 11–12. The Attorney General thereafter bragged that his actions were justified by his policy preference not to defend Wisconsin laws that "further restrict collective bargaining." Mem. 12. The Attorney General's defense of his actions in *Allen* shows why the Legislature has easily met its burden to show that the Attorney General's "representation . . . 'may be' inadequate." *Lake Inv'rs*, 715 F.2d at 1261. The concern that a future Attorney General would take actions just like the current Attorney General took in *Allen* is why the Legislature enacted Sections 13.365 and 803.09(2m), allowing the Legislature to speak as a party in defense of state laws. The Attorney General offers no basis in Rule 24(a)(2)'s text or in caselaw to support nullifying that sovereign decision.

The Attorney General also notes that "lead counsel for Defendant" has defended similar laws in the past. Resp. Mem. 15. The Legislature has no quarrel with the specific attorneys that the Attorney General has selected to litigate this case. The Legislature very much doubts that any individual attorney unilaterally made the decision in *Allen* to abandon unexpectedly the

defense of state law on the eve of Supreme Court review, or that it would be an individual attorney's decision whether to make a similar litigation compromise at a later stage in this case, including on appeal. A decision of such consequence would, presumably, come from the Attorney General himself. The Legislature merely submits this Motion to have a seat at the table as a party, consistent with Rule 24(a)(2), Sections 13.365 and 803.09(2m), and principles of comity, so it has all the rights of a party. If the Attorney General actually intends to defend Act 10 vigorously to the end of this case—and to not take the type of unexpected actions that he took in *Allen*—the Legislature would gladly "expect to take a back seat to the Attorney General in leading the defense" here. Mem. 13.

Finally, there is no reason to hold this Motion in abeyance pending the Seventh Circuit's decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, No. 19-1835 (7th Cir.). *See* Resp. Mem. 6 n.1. The Legislature has shown that it is entitled to intervene under Rule 24(a)(2) and the current, binding caselaw, such as the Seventh Circuit's recent decision in *Lopez-Aguilar* and the Supreme Court's recent decision in *Bethune-Hill*. If the Seventh Circuit or Supreme Court changes that law in a relevant respect in any case, including *Planned Parenthood of Wisconsin, Inc. v. Kaul*, either party can seek reconsideration in light of that intervening authority.

II. Alternatively, The Court Should Grant The Legislature Permissive Intervention Under Rule 24(b)(2), Which Would Not Complicate This Litigation

This Court should grant the Legislature's Motion to Intervene as a permissive matter, under Rule 24(b). Mem. 14–15. The Attorney General does not dispute that the Legislature "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). Instead, he argues that the Legislature's intervention will unduly "complicate the litigation." Resp. Mem. 17. But he offers no support for this speculation. Indeed, plaintiffs apparently have no such concerns, as they "take no position" on the

Legislature's motion to intervene. Dkt. 27: 2 n.1. So far, both the Attorney General and the Legislature have filed motions to dismiss, and no undue complications arose, as the plaintiffs filed a combined opposition. Dkt. 26. In the event that this Court denies those motions, the Legislature will "expect to take a back seat to the Attorney General in leading the defense" here, Mem. 13, so long as the Attorney General continues to defend Act 10 vigorously.

In any event, any litigation complication would be greatly outweighed by the heavy sovereign interests at stake here. Again, this case involves a challenge to a duly enacted state law, and the people of Wisconsin have made clear that they want the Legislature to have a seat at the table in the law's defense. For the federal courts to deny the Legislature that seat at the table, especially in the context of the liberally applied permissive-intervention standard, would be an unnecessary affront of federalism and comity principles. Far from "defeat[ing] the purpose of the presumption that state officers adequately represent the [State's] interests," Resp. Mem. 17–18, granting intervention would *honor* the underlying purpose of that presumption in cases where it applies, enforcing the State's sovereign right to determine how its laws will be defended, and by whom. *See supra* pp. 6–7.

CONCLUSION

This Court should grant the Legislature's Motion to Intervene.

Dated this 1st day of November, 2019.

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