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 PROPOSED SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO INTERVENE

ARGUMENT

The Legislature has moved to intervene in this challenge to the constitutionality of portions of Act 10, under Federal Rule of Civil Procedure 24. In *Planned Parenthood of Wisconsin, Inc. v. Kaul*, No. 19-1835, ___ F.3d ___, 2019 WL 5800060 (7th Cir. Nov. 7, 2019), the Seventh Circuit explained that the Legislature cannot intervene to defend Wisconsin law as of right under Rule 24(a)(2) unless it makes "a concrete showing of the Attorney General's bad faith or gross negligence." Slip Op. 13. The Court held, however, that a district court exercising its discretion under Rule 24(b)(1)'s permissive-intervention standard should stand "ready" to grant such intervention, including after properly considering "the needs of federal-state comity" under Rule 24(b)(1), given Sections 13.365 and 803.09(2m) of the Wisconsin Statutes. Slip Op. 16, 19. Such permissive intervention would be particularly proper if "the Legislature is willing to accept conditions" on its participation in the action "that would reduce any disruption to the levels the court will tolerate." Slip Op. 19. The Legislature "is willing to accept [such] conditions" in the

case here, Slip Op. 19, as it has previously and repeatedly made clear that it hopes and expects to take a back seat to the Attorney General's heretofore vigorous defense of Act 10. Dkt. 14 at 13 ("Mem."); Dkt. 29 at 9 ("Reply Mem."). The Legislature simply requests a court-limited seat at the litigation table in defense of its landmark Act 10 law, consistent with Wisconsin law and Rule 24(b)(1)'s permissive-intervention standards.

1. In *Planned Parenthood of Wisconsin*, the Legislature sought to intervene in a challenge to the constitutionality of several of Wisconsin's abortion laws. Slip Op. 1–2. The district court denied the Legislature's motion to intervene, and the Seventh Circuit affirmed. Slip Op. 1–2.

The Seventh Circuit first held that the Legislature could not intervene as a matter of right. The Court explained that it was "comfortable adopting the district court's assumption that [Wis. Stat.] § 803.09(2m) gives the Legislature standing as an agent of the State of Wisconsin" in defense of state law. Slip Op. 7; *see Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). That provision, together with Wis. Stat. § 13.365, reflects Wisconsin's sovereign choice that the Wisconsin Legislature can speak in court, as a party, for the people's interest in the defense of their duly enacted laws. But the Court then held that intervention as of right was not appropriate because the Legislature failed to show that "the Attorney General is an inadequate representative," Slip Op. 8, since it had not made "a concrete showing of the Attorney General's bad faith or gross negligence," Slip Op. 13. The Court explained that while the State has the right to designate "an agent" to represent its interests in federal court, that right did not extend to designating multiple agents "to litigate beside" each other, irrespective of inadequacy concerns. *See* Slip Op. 14–16 (emphasis removed). Otherwise, "a state could . . . overwhelm a district court" by designating "as many entities as it wishes," all of which would become full-fledged parties because of "the fundamentally non-discretionary nature of Rule 24(a)(2)." Slip Op. 15.

The Court then affirmed the district court's denial of the Legislature's motion to intervene on a permissive basis, but in doing so, articulated important principles that courts should follow in conducting the permissive-intervention inquiry for future motions to intervene by the Legislature, in light of Sections 13.365 and 803.09(2m) of the Wisconsin Statutes. Rule 24(b)(1) permits a party that "has a claim or defense that shares with the main action a common question of law or fact" to intervene, subject to the district court's discretion. Slip Op. 17 (quoting Fed. R. Civ. P. 24(b)(1)). The Legislature had a defense that "shares with the main action a common question of law or fact" under the Rule: specifically, that plaintiff Planned Parenthood of Wisconsin's complaint failed to state a claim. Slip Op. 17–18. The Court then stated that "the needs of federal-state comity"—like respecting a State's designation of which agents represent its interests in the validity of state law in court—could be part of the district court's discretionary permissive-intervention calculus. Slip Op. 16. Further, the Court held that "[t]he district court should be ready to reconsider [any] ruling" denying permissive intervention "if the Legislature is willing to accept conditions, however strict, that would reduce any disruption to levels the court will tolerate—perhaps even as stringent as allowing it only to file amicus briefs and oppose any consent decrees." Slip Op. 19. Unlike with intervention as of right, a district court may qualify a grant of permissive intervention in such manner, allowing for more liberal permissive intervention by state officers—consistent with "the needs of federal-state comity"—without "overwhelm[ing]" the district court with multiple full-fledged state parties. *See* Slip. Op. 15–16.

2. Although *Planned Parenthood of Wisconsin* does not permit the Legislature to intervene as of right in this case—because, at least as of now, the Attorney General has zealously defended Act 10 in this case and has not currently failed the "bad faith or gross negligence" standard, Slip

Op. 13—this decision supports the Legislature's permissive-intervention showing under Rule 24(b)(1), *see* Slip Op. 19; Mem. 14–15; Reply Mem. 8–9.

First, as the Legislature previously explained, Mem. 14–15; Reply Mem. 2, 8, the Legislature "timely" filed its motion 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)—namely, the "defense" presented in the Legislature's proposed Motion to Dismiss that Plaintiffs' "complaint fails to state a claim" because Act 10 is constitutional, Slip Op. 17. This is all that is required for permissive intervention. *See* Slip Op. 17; Mem. 14–15; Reply Mem. 2, 8.

Second, granting the Legislature permissive intervention would further "the needs of federal-state comity"—that is, it would respect the Legislature's interest in defending state law, as provided in Sections 13.365 and 803.09(2m) of the Wisconsin Statutes. *See* Slip Op. 7, 16. Wisconsin has made the sovereign judgment, expressed in Sections 13.365 and 803.09(2m), that the Legislature may speak in defense of the constitutionality of state law in court. Mem. 8; Reply Mem. 9. The Court's grant of permissive intervention here would respect that sovereign choice, promoting "federal-state comity," by allowing the Legislature to defend the interests in the validity of state law "as an agent of the State." Slip Op. 7, 16; *see Bethune-Hill*, 139 S. Ct. at 1951.

Finally, affording the Legislature permissive intervention would not "overwhelm" this Court or compromise its "authority to manage th[is] litigation" in any way. Slip Op. 15–16. The Legislature has repeatedly made clear that it "expect[s] to take a back seat to the Attorney General in leading the defense of the challenged laws" here, given "the Attorney General's vigorous defense" of Act 10 in this case thus far. Mem. 13; Reply Mem. 9. Accordingly, and consistent with *Planned Parenthood of Wisconsin*, the Legislature is readily "willing to accept conditions [on its status as a party]." Slip Op. 19.

3. The Attorney General has offered no persuasive reason to deny the Legislature permissive intervention here, especially after *Planned Parenthood of Wisconsin*. The Attorney General conceded by his silence that the Legislature's Motion is "timely" and 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), which are the only requirements for permissive intervention, *see* Slip Op. 17; Mem. 14–15; Reply Mem. 2, 8. And the Attorney General's argument that granting permissive intervention, no matter the conditions, "would simply complicate the litigation," is conclusory and therefore not sustainable after *Planned Parenthood of Wisconsin.* Dkt. 25 at 17–19 ("Resp. Mem.") (quoting *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009)). The Seventh Circuit has expressly recognized and discussed district courts' authority to obviate the Attorney General's concern by conditioning the grant of permissive intervention on the Legislature's "willing[ness] to accept conditions," which the Legislature is willing to accept here. Slip Op. 19. Plaintiffs apparently do not share the Attorney General's speculative fears about permitting the Legislature to intervene, as they decided to "take no position" on the Legislature's Motion. Dkt. 27 at 2 n.1.

CONCLUSION

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

Dated this 15th day of November, 2019.

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