STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ABBOTSFORD EDUCATION ASSOCIATION, *et al.*,

Plaintiffs,

v. Case No. 2023-cv-3152

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, *et al*.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT AND FOR AMICUS CURIAE STATUS

There is no question that 2011 Wisconsin Act 10 significantly changed labor relations in Wisconsin. But since Act 10's enactment over a decade ago, state and federal courts have repeatedly rebuffed constitutional challenges to the law by those who oppose it. *See Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013); *Madison Teachers., Inc. v. Walker,* 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337; *Int'l Union of Operating Engineers, Loc. 139, AFL-CIO v. Daley*, 983 F.3d 287 (7th Cir. 2020). Despite this consistent line of cases, Plaintiffs now try to argue in this Court that no conceivable rational basis exists for Act 10's occupational classifications. The Plaintiffs have their work cut out for them. Rational basis review is a "deferential" test that is such a "paradigm of judicial restraint" that it specifically *permits* "statutory classification[s] result[ing] in some inequity." *State v. Hirsch*, 2014 WI App 39, 353 Wis. 2d 453, 847 N.W.2d 192 (first quoting *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993), then quoting *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989)). And their claim is nothing new or novel. Indeed, both the U.S. District Court for the Western District of Wisconsin and Seventh Circuit in *Walker* had little trouble concluding that

Wisconsin was free to distinguish between public safety and general employees, with the latter labeling this conclusion as "uncontroversial." *Walker*, 705 F.3d at 655; *see also Wisconsin Educ. Ass'n Council v. Walker*, 824 F. Supp. 856 (W.D. Wis. 2012), *aff'd in part, rev'd in par*t by 705 F. 3d 640.

Nevertheless, should the Plaintiffs prevail, proposed Intervenor-Defendant Kristi Koschkee faces significant harm. Like certain of the Plaintiffs, Ms. Koschkee is a public school district employee. Koschkee Aff. ¶1. But unlike those Plaintiffs, Ms. Koschkee values the benefits the Legislature provided her via Act 10: she does not want her local union interfering with her relationship with her employer by bargaining on subjects beyond those permitted by Act 10 or entering agreements that last longer than a year; she supports requiring unions to recertify annually, does not want to have her decision to abstain from a union certification vote work in the union's favor, and does not want to be pressured into participating in recertification elections; and she opposes allowing unions to access employee wages directly through payroll deductions. *Id.* at ¶¶6-10 These rules individually and collectively protect Ms. Koschkee (and other public employees) from the often-coercive presence of powerful public unions in the workplace. *Id.* at ¶11. Yet if the Plaintiffs are successful, Ms. Koschkee's rights under the law will be lost.

Were it not for the involvement of the Legislature and the Department of Justice in this case, Ms. Koschkee would simply move to intervene as a matter of right. But under § 803.09(1), intervention is not appropriate where "the movant's interest is adequately represented by existing parties." Therefore, consistent with federal guidance and to prevent any argument that a motion filed later in this case would be untimely, Ms. Koschkee is timely moving to intervene now but asking this Court to hold her motion in abeyance until such time as she is prepared to show that representation has become inadequate. In the meantime, Ms. Koschkee asks that this Court grant

her amicus curiae status so that she can share with the Court a perspective that is currently lacking in this lawsuit: that of public employees who support Act 10 and its beneficial effects.

BRIEF FACTUAL AND PROCEDURAL BACKGROUND

2011 Wisconsin Act 10 was enacted on March 11, 2011, and significantly altered public employee, employer, and union rights and obligations in Wisconsin. Over the following decade, provisions of the law were upheld against numerous constitutional challenges. *See Wisconsin Educ. Ass'n Council*, 705 F.3d 640 (Equal Protection Clause and First Amendment); *Madison Teachers., Inc.,* 358 Wis. 2d 1 (federal and state associational freedoms; federal and state equal protection guarantees; state Home Rule Amendment; state Contract Clause); *Int'l Union of Operating Engineers*, 983 F.3d 287 (First Amendment).

On November 30, 2023, the Plaintiffs filed this lawsuit arguing that several provisions of Act 10 violate Article I, Section 1. The Wisconsin Legislature moved to intervene on December 18, 2023, and this Court ordered briefing of that motion through January 22, 2024. This motion to intervene and for amicus curiae status by Proposed Intervenor-Defendant Kristi Koschkee, a public school teacher at LakeView Technology Academy in Pleasant Prairie, follows. Koschkee Aff. ¶1.

ARGUMENT

I. This Court should hold Ms. Koschkee's Motion to Intervene in abeyance until she is prepared to demonstrate that the representation of her interest is inadequate.

Ms. Koschkee is entitled to intervene in this action so long as she meets each factor of a four-part test:

> (1) timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest; and (4) that the proposed intervenor's interest is not adequately represented by existing parties.

State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 544, 334 N.W.2d 252 (1983). As explained below, Ms. Koschkee currently meets the first three of factors, but it is unclear whether the existing parties will adequately represent her interest. If Ms. Koschkee waits until representation becomes inadequate to move to intervene, she risks a finding by this Court that her motion is untimely. Case law on the federal counterpart to Wis. Stat. § 803.09(1), which "provide[s] guidance in interpreting and applying § 803.09(1)," *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶37, 307 Wis. 2d 1, 745 N.W.2d 1, explains how to handle this situation:

> The proper way to handle such an eventuality is for the would-be intervenor, when as here no present inadequacy of representation can be shown, to file at the outset of the case a standby or conditional application for leave to intervene and ask the district court to defer consideration of the question of adequacy of representation until the applicant is prepared to demonstrate inadequacy. This procedure, to which we find no objection in the federal rules or elsewhere, would not expose the applicant for intervention to charges of foot-dragging that doom as belated the usual post-judgment application to intervene.

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 101 F.3d 503, 509 (7th Cir. 1996); *cf. Citizens' Util. Bd. v. Pub. Serv. Comm'n of Wisconsin*, 2003 WI App 206, ¶1, 267 Wis. 2d 414, 671 N.W.2d 11 (case involving conditional motion for intervention denied for reasons not relevant here).

Consistent with this approach, Ms. Koschkee below explains why representation of her interest may become inadequate in this case and why she otherwise meets the requirements of § 803.09(1). She asks this Court to defer ruling on the motion until such time as she is ready to demonstrate inadequate representation.

A. Ms. Koschkee's motion is timely.

Wisconsin Stat. § 803.09(1) requires that applications for intervention of right be "timely." While "there is no precise formula to determine whether a motion to intervene is timely," courts primarily consider whether "in view of all the circumstances the proposed intervenor acted

promptly," and secondarily "whether the intervention with prejudice the original parties to the lawsuit." *Bilder*, 112 Wis. 2d at 550.

Ms. Koschkee has acted promptly, moving to intervene just two months after the suit was filed. Wisconsin courts have ruled that much tardier intervention motions satisfy § 803.09(1)'s timeliness requirement. *See, e.g.*, *C.L. v. Edson*, 140 Wis. 2d 168, 177-80, 409 N.W.2d 417 (Ct. App. 1987) (post-judgment motion to intervene was timely); *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471-72, 516 N.W.2d 357 (1994) (motion to intervene filed the day oral arguments were heard on subject petition was timely). Additionally, as demonstrated by the nature of this conditional motion to intervene, Ms. Koschkee was entitled to some amount of time to determine the extent to which her interests would be adequately represented by existing parties and/or would-be intervenors.

Second, the timing of Ms. Koschkee's motion causes no prejudice to the original parties to the suit because she is not currently seeking intervention.

B. Ms. Koschkee's possesses an interest related to and imperiled by this lawsuit.

The second and third requirements for intervention of right are "an interest relating to the property or transaction which is the subject of the action" and "that the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest." *Bilder*, 112 Wis. 2d at 544.

Wisconsin courts takes a "broader" and more "pragmatic" approach to intervention as of right than many other courts. *See Bilder*, 112 Wis. 2d at 548. The Supreme Court of Wisconsin has instructed that lower courts "should view the interest sufficient to allow the intervention practically rather than technically." *Id.* Thus, for example, "there is no requirement that the potential intervenor's interest be 'judicially enforceable' in a separate proceeding." *Wolff v. Town*

of Jamestown, 229 Wis. 2d 738, 744, 601 N.W.2d 301 (1999). Instead, the question is whether the intervenor will "either gain or lose by the direct operation of the judgment." *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶15, 258 Wis. 2d 210, 655 N.W.2d 474 (quoting *City of Madison v. Wisconsin Employment Relations Com'n*, 2000 WI 39, ¶11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94).

Ms. Koschkee has much to lose in this case. As an English teacher at LakeView Technology Academy in Pleasant Prairie, Wisconsin, she belongs to one of the classes—general public employees—to whom the Legislature provided numerous statutory privileges via Act 10, privileges that the Plaintiffs ask this Court to invalidate. Koschkee Aff. ¶¶1, 3. These privileges are critical for public employees like Ms. Koschkee who do not belong to or wish to join, subsidize, associate with, or support their local unions. Koschkee Aff. ¶¶4, 12.

Most notably, several of the provisions at stake protect general employees like Ms. Koschkee from the often-coercive presence of powerful public unions in the workplace. The prohibition on payroll deductions, for example, eliminates any incentive for unions to pressure employees like Ms. Koschkee into "voluntary" dues deductions. *See Madison Tchrs., Inc.*, 358 Wis. 2d 1, ¶85 (observing that the payroll deduction prohibition "affects the influence of labor organizations over general employees who are less enthusiastic about participating in the collective bargaining process"); Koschkee Aff. ¶10. The recertification requirements ensure that a union's activities in the workplace are actually supported by a majority of employees and relieves employees from the pressure of involvement in controversial recertification elections by automatically treating their abstention as a no vote. *See Wisconsin Educ. Ass'n Council*, 705 F.3d at 656 (explaining that the "recertification burden . . . impacts unions' influence over employees who are less passionate about union representation"); Koschkee Aff. ¶9. And the limitations on

collective bargaining, both as to topic and duration, restrict the ability of unions to interfere with the relationship Ms. Koschkee enjoys with her employer such as by negotiating for items she may not want. Koschkee Aff. ¶¶7-8. These unwanted items include more substantial employer contributions to employee benefits, which may require a trade-off in other terms and conditions of employment. *Id.* at ¶8. All of these protections, individually and collectively, limit union involvement in Ms. Koschkee's workplace so she can do more of what she loves without interference: teaching students. *Id.* at ¶¶11, 13. They also help Ms. Koschkee vindicate her First Amendment right not to associate with or support union activities. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); Koschkee Aff. at ¶12. Ms. Koschkee's interest in the preservation of these rights is more than sufficient to justify her intervention. *See, e.g.*, *Dairyland Greyhound Park, Inc.*, 258 Wis. 2d 210, ¶16 (determining, in analyzing intervention case law for purposes of determining whether tribes were necessary parties, that interest of tribes in protecting benefits they had obtained from the governor via compact was sufficient).

Disposition of this action will likewise impair or impede Ms. Koschkee's ability to protect her interest. The Plaintiffs straightforwardly ask that this Court enjoin implementation of the statutory protections discussed above by the defendant state agencies and officials. If the Plaintiffs are successful, Ms. Koschkee will not have some later chance to protect her interest. Intervention in this lawsuit is her only chance to do so. *See Helgeland*, 307 Wis. 2d 1, ¶¶80-81 (relevant considerations for this factor include "the extent to which an adverse holding in the action would apply to the movant's particular circumstances" and "the extent to which the action into which the movant seeks to intervene will result in a novel holding of law").

C. Ms. Koschkee does not argue that representation of her interests by the existing parties to this suit is currently inadequate but that representation may become inadequate.

Intervention as of right is not appropriate if the "movant's interest is adequately represented by existing parties." Wis. Stat. § 803.09(1). Both the Defendants and, if permitted to intervene, the Legislature, may argue that representation is adequate given the presumptions of adequate representation that arise where "a movant and an existing party have the same ultimate objective in the action" and where an existing party is a governmental entity charged by law with representation of the citizen-intervenor's interest. *Helgeland*, 307 Wis. 2d 1, ¶¶89-91.

Ms. Koschkee will not brief this factor now since, as noted above, she is not prepared to demonstrate inadequate representation. But she does emphasize that, assuming *arguendo* that these presumptions apply, they are rebuttable in at least three instances: "if there is a showing of collusion between the representative and the opposing party; if the representative fails in the fulfillment of his duty; or if the representative's interest is adverse to that of the proposed intervenor." *Id.* at ¶87; *see also id.* at ¶89. With respect to this last factor in particular, there is a clear potential conflict of interest between the Defendants and Ms. Koschkee: the former all represent the State of Wisconsin, which created, in many respects controls, and is aligned in interest with her municipal employer. Ms. Koschkee should not be expected to place her fate in the workplace in the hands of her own employer or its proxy. *See, e.g.*, *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972) (Secretary of Labor did not adequately represent union member because although 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'" (quoting *Wirtz v. Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 475

(1968))); *Armada*, 183 Wis. 2d at 471-72 (school district could not, in defending against demand by records requestor to release employee records, adequately represent proposed employee intervenor).

Although its constitutionality is clear, Act 10 was—and remains—a law on which there are sharp political divisions. Ms. Koschkee hopes that the existing parties to the suit will adequately represent her interests in this case. But it is not at all unusual for the Attorney General to decline to defend laws with which he disagrees, and the positions of the Legislature (if they are made a party) can change as well. While that has not yet occurred, if it does become the case, Ms. Koschkee believes that her interest as an employee affected by Act 10's provisions ought to be represented. But she asks this Court to defer ruling on her motion to intervene so that if her putative representatives fail, she can promptly intervene to defend her statutory privileges.

II. This Court should grant Ms. Koschkee amicus curiae status in these proceedings.

Regardless of whether Ms. Koschkee is entitled to intervene as of right, her perspective is valuable in this suit. 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).

In the current lawsuit all of these various interests are directly represented but one: that of union non-members. Ms. Koschkee should therefore be permitted to file amicus curiae briefs on all dispositive motions and matters related to remedy so that this Court has before it for consideration the full spectrum of viewpoints related to the legality and practical effects of Act 10. This input is especially important given that the Plaintiffs have made clear in their complaint that

they intend to argue about how Act 10 has changed the workplace and employer-employee relations. This Court should not hear only from those employees who oppose Act 10 but also from an employee who supports it. And the submission of amicus curiae briefs by Ms. Koschkee will not delay or prejudice the proceedings in any way.

CONCLUSION

For the foregoing reasons Ms. Koschkee respectfully requests that this Court hold this intervention motion in abeyance until Ms. Koschkee is prepared to demonstrate inadequate representation and to immediately grant Ms. Koschkee amicus curiae status until that time.

Dated this 29th day of January, 2024.

Respectfully submitted,

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