STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ABBOTSFORD EDUCATION ASSOCIATION, et al.,

Plaintiffs,

Case No. 23-CV-3152

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, et al.,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF KRISTI KOSCHKEE'S RENEWED MOTION TO INTERVENE AS DEFENDANT**

On January 29, 2024, just two months after this action was filed, proposed Intervenor-Defendant Kristi Koschkee notified this Court that the Plaintiffs' lawsuit threatened her with significant harm: Ms. Koschkee is a public school district employee, and she feared that if the Plaintiffs succeeded, she could lose rights granted her by Act 10, rights that protect her from the often-coercive presence of powerful public unions in the workplace. With this Court's recent decision granting judgment on the pleadings, that fear has now not only been realized but compounded by direct violation of her First Amendment right not to associate with public employee unions.

At the time she initially moved to intervene, however, Ms. Koschkee faced a quandary. Under § 803.09(1), intervention is not appropriate where "the movant's interest is adequately represented by existing parties," and, at least at the time, it seemed that the Legislature as intervenor and the existing Defendants represented by the Department of Justice might adequately represent Ms. Koschkee's interests.

On the other hand, if Ms. Koschkee waited for representation to become inadequate to move to intervene, she risked a charge by the other parties, and a finding by this Court, that her eventual motion to intervene was untimely.

Therefore, consistent with federal guidance and to prevent any such untimeliness argument, Ms. Koschkee moved to intervene in January of this year but asked this Court to hold her motion in abeyance until such time as she was prepared to show that representation had become inadequate. In the meantime, Ms. Koschkee sought to participate in this case as amicus curiae. This Court granted both requests. It held Ms. Koschkee's motion in abeyance while allowing her to participate in this case as amicus curiae, ordering her to notify the Court when she was prepared to supplement her motion. R. 76.

Since that time, representation by the existing Defendants and current Intervenor has become inadequate. Among other reasons, the breadth of the remedy this Court selected creates a serious First Amendment problem under *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018). Neither the Defendants nor the current Intervenor are able to represent Ms. Koschkee's unique constitutional interest in curing that injury.

Ms. Koschkee thus renews her motion to intervene so that she may take an appeal from this Court's December 2, 2024 order[1] granting the Plaintiffs' motion for judgment on the pleadings and thereby seek to protect her interests fully.

[1] The December 2 decision and order does not say it is a final order, in the event that it is not a final order for purposes of appeal, Ms. Koschkee would seek to appeal whatever final order is entered based on that December 2 decision.

## BRIEF FACTUAL AND PROCEDURAL BACKGROUND

On November 30, 2023, the Plaintiffs filed this lawsuit arguing that several provisions of Act 10 violate Article I, Section 1 of the Wisconsin Constitution. The Wisconsin Legislature moved to intervene on December 18, 2023. Ms. Koschkee moved to intervene on January 29, 2024, but asked this Court to hold her motion in abeyance until she was prepared to demonstrate inadequate representation by existing parties and to permit her to participate as amicus curiae in the meantime.

On January 29, this Court agreed to hold Ms. Koschkee's motion in abeyance and granted her amicus status. On February 2, this Court granted the Legislature's motion to intervene. Following a May 28, 2024, oral argument on the Defendants' motions to dismiss, this Court denied the motions on July 3, 2024. The parties then briefed the Plaintiffs' motion for judgment on the pleadings, which this Court granted on December 2, 2024. The Legislature immediately appealed. This renewed motion follows, fewer than 2 weeks after this Court issued its order granting judgment.

Ms. Koschkee's local union has historically been the Kenosha Education Association, which recertified annually up until 2023, when there was no recertification election. Currently, that union is attempting to certify itself once again, and that election is currently ongoing. *See generally*, Koschkee Decl. filed herewith.

## ARGUMENT

### I. Ms. Koschkee incorporates by reference her prior argument in support of her intervention on the first three factors of intervention as of right.

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, 545, 334 N.W.2d 252 (1983).

This Court is currently holding in abeyance Ms. Koschkee's prior motion to intervene. That motion and its supporting materials fully explained why Ms. Koschkee meets the first three intervention factors. To avoid duplicative briefing and to conserve this Court's resources, Ms. Koschkee will not re-brief those items in full but instead incorporates her prior arguments by reference. She briefly addresses the first three factors below only as needed to take account of developments since she first filed her motion.

#### A. Ms. Koschkee's motion is timely.

Ms. Koschkee explained in her previous filing how her motion, filed just two months after the institution of this action, was prompt and prejudiced no one. *See Bilder*, 112 Wis. 2d at 550.

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, further explains why

the initial timeliness of Ms. Koschkee's motion is not changed by her post-judgment renewal of the motion. Where a would-be intervenor like Ms. Koschkee is unable at the start of a case to demonstrate inadequate representation, she may avoid the "charges of foot-dragging that doom as belated the usual post-judgment application to intervene" by "fil[ing] at the outset of the case a standby or conditional application for leave to intervene and ask[ing] the … court to defer consideration of the question of adequacy of representation until the applicant is prepared to demonstrate inadequacy." *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).

This is exactly what Ms. Koschkee did in this case, without objection from any other party.

Even if Ms. Koschkee had not filed a conditional intervention motion at the outset of this case, her renewed motion is still timely at this juncture. Even post-judgment motions to intervene can be timely depending on the circumstances, *see, e.g.*, *C.L. v. Edson*, 140 Wis. 2d 168, 177-80, 409 N.W.2d 417 (Ct. App. 1987), and that is true here too. Ms. Koschkee was not on notice of the violation of her First Amendment rights until this Court announced its sweeping remedy, which was to strike down virtually all the challenged provisions of Act 10 rather than simply eliminating the public safety exception to those protections (or simply expanding the

public safety exception to include the purportedly similarly situated groups which gave rise to the equal protection claim).

Further, Ms. Koschkee's renewed motion does not prejudice any party to this suit. The Legislature has already appealed this matter, and Ms. Koschkee seeks only the ability to file her own appeal and brief the issues alongside the existing parties given her unique interest and the unique harm that will come to her interest. This does not create any meaningful delay. *See Bilder*, 112 Wis. 2d at 550 (promptness and prejudice the major considerations governing timeliness of a motion to intervene).

### B. Ms. Koschkee possesses an interest related to, imperiled, and now actually harmed by this lawsuit.

Again, Ms. Koschkee will not regurgitate her prior explanation of why she possesses "an interest relating to the property or transaction which is the subject of the action" and why "the disposition of the action may as a practical matter impair or impede [her] ability to protect that interest." *Bilder*, 112 Wis. 2d at 544; *see generally* Koschkee Decl. filed herewith (detailing harms to Ms. Koschkee's interests).

Since she initially filed her motion, however, Ms. Koschkee's worst fears have been realized. As a general municipal employee who does not belong to or wish to join, subsidize, associate with, or support her local union, Ms. Koschkee depended for her protection on the numerous statutory privileges the Legislature provided her via Act 10. These include the prohibition on payroll deductions, which eliminated any incentive for unions to pressure employees like Ms. Koschkee into "voluntary" dues deductions, *see Madison Tchrs., Inc. v. Walker*, 2014 WI 99, ¶85, 358 Wis. 2d 1, 851 N.W.2d 337; the recertification requirements, which ensured that a union's activities

in the workplace are actually supported by a majority of employees and relieved 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 640, 656-57 (7th Cir. 2013); and the limitations on collective bargaining, both as to topic and duration, which restricted 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.

By striking all of these provisions down—rather than taking the expected, and more limited, step of simply curing the Plaintiffs' claimed equal protection harm by eliminating the public safety exception in Act 10 (or, as explained *supra*, simply expanding the public safety exception to include the purportedly similarly situated groups which gave rise to the equal protection claim) this Court's remedy violates Ms. Koschkee's First Amendment right not to associate with or support union activities. *See Janus*, 585 U.S. 878.

In the 2018 case of *Janus v. AFSCME*, the Supreme Court concluded that forcing public employees to subsidize a union they choose not to join violates the First Amendment. 585 U.S. at 884–86. In so doing, the Court overruled a 1977 case, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which permitted such coercion. *See id.* at 886. While the pre-Act 10 Wisconsin labor law landscape may have passed constitutional muster under *Abood*, it is flatly inconsistent with *Janus*. Yet this Court's final order now resurrects that unlawful statutory scheme, to the detriment of Ms. Koschkee's First Amendment rights.

In other words, there is now no longer the *risk* that disposition of this action will impair or impede Ms. Koschkee's ability to protect her interests—this Court's order actively harms her interests. This is sufficient to support intervention. *See, e.g.*, *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶¶15–16, 258 Wis. 2d 210, 655 N.W.2d 474 (relevant questions include whether intervenor will "either gain or lose by the direct operation of the judgment" (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)); *Helgeland*, 307 Wis. 2d 1, ¶¶80–81 (considering "the extent to which an adverse holding in the action would apply to the movant's particular circumstances").

As further evidence of this existing harm, Ms. Koschkee's local union is currently engaged in a certification election. As a result of this Court's recent order, the threshold that must be met for her union to certify would revert back to state law before amendment by Act 10, rather than the standard set forth as a result of Act 10, making it easier for the union to obtain certification, and requiring Ms. Koschkee to affirmatively vote "no" to oppose certification, rather than simply abstaining from voting. Ms. Koschkee's interests are imperiled by this lawsuit and are now actually harmed by it.

### C. Representation of Ms. Koschkee's interests by the existing parties to this suit has 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). This is a "minimal" burden met by a showing that representation "may be" inadequate. *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting

*Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)). Here, representation of Ms. Koschkee's interests by the Defendants is wholly inadequate.

Representation is inadequate for purposes of intervention where "the representative's interest is adverse to that of the proposed intervenor." *See Helgeland*, 307 Wis. 2d 1, ¶87. As Ms. Koschkee foreshadowed might be the case back in January, here there is a clear conflict of interest between the Defendants and Ms. Koschkee: the former all represent the State of Wisconsin, which created, and 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 into the hands of her own employer or its proxy. *See, e.g.*, *Trbovich*, 404 U.S. at 538–39 (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 Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471–72, 516 N.W.2d 357 (1994) (school district could not, in defending against demand by records requestor to release employee records, adequately represent proposed employee intervenor).

Even in theory, public entities such as the current Intervenor or Defendants—entities the First Amendment was created to protect *against*—cannot possibly represent the First Amendment rights of a Wisconsin citizen. They do not have the

same interest there, and so could not possibly adequately represent Ms. Koschkee's interest. But even if such defense was theoretically possible, *in practice* the existing Defendants have *also* shown throughout their briefing that they have no actual inclination to vindicate the *Janus* rights of Ms. Koschkee and those like her. Under the circumstances, Ms. Koschkee must be permitted to represent herself. The same is true of the existing intervenor, the Legislature. The Legislature, like the Defendants in this action, does not have the same First Amendment interest that Ms. Koschkee has as a result of this judgment—and so the Legislature also cannot possibly adequately represent her interests here. While the Legislature did mention potential First Amendment harms in their briefing, it was not a major focus and Ms. Koschkee cannot be adequately represented by someone who does not share the same interest she has in this case.

Further, neither the existing Defendants nor the existing Intervenor could possibly adequately represent Ms. Koschkee's interests as it relates to maintaining Act 10 as it relates to the ongoing certification election in her workplace. If she is not allowed to intervene, there will be no one who can represent her interest at all, much less adequately. In anticipation of a possible argument by the Plaintiffs, Ms. Koschkee reiterates that the need for more direct participation was not evident until the end of this case. It was not until that time that it became clear that (1) this Court intended to strike down all of Act 10, unconstitutionally returning Wisconsin to the previous *Abood* regime, rather than simply removing (or otherwise fixing) the public safety employee exception from the law. To be clear, Ms. Koschkee's First

Amendment interests would be completely unprotected if she is not allowed to intervene—exactly what Wis. Stat. § 803.09(1) was created to address.

## CONCLUSION

For the foregoing reasons, Ms. Koschkee respectfully requests that this Court permit her to intervene.

Dated: December 11, 2024

Respectfully Submitted,

WISCONSIN INSTITUTE
FOR LAW & LIBERTY

*Electronically signed by Lucas T. Vebber*

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