UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN EDUCATION ASSOCIATION COUNCIL *et al.*,

Plaintiffs,

v. **Case No. 11-CV-428**

SCOTT WALKER, Governor of the State of Wisconsin *et al.*,

Defendants.

BRIEF IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

Cases

CONSTITUTION and RULES

FACTS

Kristi LaCroix and Nathan Berish are public school teachers employed by Kenosha Unified School District No. 1 and the School District of Waukesha, respectively. Each is in a bargaining unit represented exclusively by an affiliate of Plaintiff Wisconsin Education Association Council ("WEAC"). They object both to being compelled to pay union fees as a condition of employment and to being forced to be represented in employment matters by an affiliate of Plaintiff WEAC.

Ricardo Cruz is employed by the Wisconsin Department of Employee Trust Funds as a trust fund specialist. He is in a bargaining unit represented exclusively by Plaintiff AFT-Wisconsin, AFL-CIO ("AFT-W") and its local affiliate. He objects to being compelled to pay union fees as a condition of employment and to being forced to be represented in employment matters by Plaintiff AFT-W and its local.

These employees (collectively, "Employees") seek to intervene in this litigation to:

1. keep their money from being collected by their respective unions for politics, collective bargaining and other purposes;
2. retain their right to work for the State of Wisconsin or its public school districts without being compelled to be represented by unions any more than is necessitated by law; and,

3. defend their First Amendment rights of free speech and association to prevent their bargaining representatives from using their money for politics, collective bargaining or other purposes that are currently being attacked in this Court by Plaintiff unions.

ARGUMENT

Federal Rule of Civil Procedure Rule 24(a)(2) describes the following four requirements for intervention of right:1) the application is timely; 2) the applicant has an interest relating to the subject matter of the action; 3) the disposition of the action may impair practically the applicant's ability to protect that interest; and 4) the existing parties do not adequately represent the applicant's interest. *Shea v. Angulo*, 19 F.3d 343, 346 (7th Cir. 1994); *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 203 (7th Cir. 1982). These requirements are discussed in turn.

1. Timeliness. In order to determine the timeliness of an application, this Court must examine all of the circumstances. *City of Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531, 534 (7th Cir. 1987). Factors that are to be considered are: 1) the length of time intervenors knew or should have known of their interest in the case; 2) whether the intervenors' delay in applying for intervention causes prejudice to the original parties; 3) whether denying the application would prejudice the potential intervenors; and 4) any unusual circumstances. *Shea*, 19 F.3d at 349. Potential intervenors must show that they were reasonably diligent in learning of a suit that might affect their rights and acted

within in a reasonably prompt time period. *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994). The Seventh Circuit Court of Appeals has clarified that it does not "want a rule that would require a potential intervenor to intervene at the drop of a hat." *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006). The factors regarding prejudice are considered to be weightier in determining timeliness. *Id*.

The State Defendants filed their Answer to the Compalint on July 6, 2011. The Employees are filing their motion, brief, declarations and responsive pleadings on July 19, 2011. Thus, the application satisfies any definition of timeliness, because it has been filed shortly after Defendants' Answer and before any pretrial conference. Furthermore, it will not cause prejudice to the existing parties. By seeking to intervene at the pleadings stage, the Employees haves not delayed the case.

2. Interest in Dispute. The required showing is a claim to a legally protected right that is in jeopardy and can be secured by that suit. *Id*. at 1022. The interest must be "significantly protectable" and "direct and substantial." *Lake Investors Dev. Group, Inc. v. Egidi Dev. Group.*, 715 F.2d 1256, 1259 (7th Cir. 1983)(citation omitted). The interest is to be broadly construed and not strictly as a legal interest. *Meridian Homes*, 683 F.2d at 203-04 (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967)).

Plaintiff unions' complaint seeks to invalidate 2011 Wisconsin Act 10 ("Act 10"). This affects individual public employees in three direct ways. First, Act 10 reduces the scope of collective bargaining for public employees covered by the Act, including these Employees, to the single subject of base wages. Shrinking the scope of bargaining means that most aspects of an employee's working conditions will be removed from the bargaining "table" and returned to individual discussions between the employee and employer.

The Employees do not want to be represented by a labor union. Therefore, every item removed from the bargaining table is an item returned to them individually for discussion with their employer without the imposition of unwanted representation.

Second, Act 10 nullifies the ability of public employee unions covered by the Act to compel employees to join or financially support the unions as a condition of employment. The Employees do not want their unions to bargain for them nor do they want to pay for that unwanted bargaining. Even more repugnant, the Employees' unions typically use the forced fees for politics. The Employees object to being forced to support the unions' political and ideological agendas.

Third, Act 10 requires that all public employee unions covered by the Act be elected each year to remain the representative of the employees in the bargaining unit. The Employees do not want to be represented by a union and this gives them an annual opportunity to achieve that objective.

Fourth, Act 10 prohibits State and local governmental agencies from deducting union dues from public employees' wages. Because the Employees do not want to be represented by unions and do not want to advance the unions' bargaining and political agendas, they have an interest in seeing that the State does not, through payroll deduction of union dues, "aid the unions in their political [and other] activities," *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 129 S. Ct. 1093, 1098 (2009).

If the Plaintiff unions prevail in this case, the direct result will that the discussion of working conditions will be stripped from the Employees and placed back on the bargaining table. The Employees not only will be deprived of their individual say over these matters, but will be forced to be represented by an unwanted representative who they will be forced to pay for this unwanted deprivation. Thus, the Employees have both a monetary interest and a civil rights claim at stake in this litigation.

3. Interest Impaired. Potential intervenors must show that the decision of a legal question, as a practical matter, forecloses their rights in a subsequent proceeding. *Lake Investors*, 715 F.2d at 1260. Foreclosure of these rights is to be measured *stare decisis*. *Id*.

The problem faced by the Employees, should Act 10 be declared unconstitutional, goes far beyond that of adverse precedent. Without the Act in place, the Employees have no valid legal argument to reduce the scope of union bargaining. Under the prior law, which permitted compulsory union payments, the Employees had no viable First

Amendment claim for avoiding payment of collective bargaining costs where the state has asserted a compelling interest in managing its labor relations through collective bargaining. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225-26 (1977).

But this is not the same as saying that persons in the position of the Employees have no constitutional interest at stake. The Supreme Court has recognized the tension between statutory compulsory "agency fee" requirements and the First Amendment, and that agency shop and "fair share" agreements impair those constitutionally protected interests. *See, e.g.*, *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 180 (2007) ("[A]gency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment"); *Abood* , 431 U.S. at 222 ("To compel employees financially to support their collective- bargaining representative has an impact upon their First Amendment interests.") .

Under current law, in those states - but only in those states - that have chosen a collective bargaining model for public employees, the First Amendment interests of dissenters are trumped by the state's interest in choosing that model for labor relations - albeit only with respect to that portion of dues devoted to bargaining activities. *See, e.g.*, *id*. at 222 ("But the judgment clearly made [by the legislature] in [cases addressing compulsory "agency shops" in the private sector] is that such interference as exists is constitutionally justified.")

However, a state need not make that choice and, even having made it, remains free to change it. As the Supreme Court noted in *Abood* regarding the shifting views of public employee unionism, "[w]hat would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Id.*, at 225 n.20. The change in policy direction, such as has occurred in Wisconsin, also changes the constitutional calculus.

Act 10 opens the door for the Employees to directly assert their nascent First Amendment claims. Wisconsin has now disavowed any compelling interest in the impairment of the First Amendment rights of public employees who do not wish to be represented by or pay dues to a union. There no longer are any sufficiently weighty state interests to justify compromising the First Amendment interests recognized in cases such as *Abood* and *Davenport*.

This is why the First Amendment rights of the Employees are inextricably bound up with this case. The Employees' ability to argue their First Amendment rights is largely hedged by the decision of the policy makers. Thus, if Act 10 is declared valid, the First Amendment rights of the Employees are vindicated. If the Act is held invalid, the situation is less clear. The Employees cannot independently ask a court to create these rights if the state has asserted a compelling interest in collective bargaining.

If Act 10 is invalid under the equal protection clause, it may be that the policy landscape returns to the status quo *ex ante* and the Employees will be unable to assert

their claim. Perhaps invalidation on equal protection grounds would not have that effect or, as urged in employee Lacroix's *amicus* brief in opposition to Plaintiffs' motion for a temporary restraining order or preliminary injunction, the remedy for any such violation would be the invalidation of Act 10's exclusion of public safety workers. In any event, considerations of equity and judicial efficiency suggest that the Employees have important interests at stake that should be heard now.

4. Inadequate Representation. The three historic grounds for finding inadequate representation are: a) collusion between (as applied here) the State Defendants and Plaintiff unions; b) the State Defendants have strategic differences from the Employees; or c) there is a substantial divergence of interests between the State Defendants and the Employees. *Meridian Homes*, 683 F.2d at 205. The burden for showing inadequate representation is to be treated as minimal, and prospective intervenors need only show that there "may be" inadequate representation. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)(citation omitted); *Lake Investors*, 715 F.2d at 1261.

The first ground, collusion, is inapplicable here. However, both of the other two grounds apply. The State Defendants are defending the procedures by which the Act was passed, and the constitutionality of the Act under the equal protection clause. The Employees, in contrast, are arguing their individual First Amendment rights in support of the Act's validity.[1]

[1] A review of the Brief in Opposition of the Defendants (Doc. No. 40) and the *Amicus Curiae* Brief of Kristi Lacroix in Opposition to Plaintiffs' Motion (Doc. No. 45(1)) demonstrates

Of course, Plaintiff unions do not represent the Employees in this action, because the unions are arguing that their "corporate" rights under the constitution extinguish the Employees' individual First Amendment rights. The State Defendants have no constitutional rights at stake. While the State Defendants have the same sort of governmental concern about giving public employees the freedom to choose whether to support a labor union, just as they have given citizens the freedom to choose whether to support a church, synagogue or other private membership association, only the Employees are in a position to defend their own First Amendment rights. Only they have First Amendment rights that could be lost—a claim which is highlighted by their Affirmative Defenses in their Answer. If the Employees are not in this litigation, the First Amendment to the United States Constitution will not even be considered in opposition to Plaintiff unions' claims.[2]

That omission may well be significant. When construing labor relations statutes, the United States Supreme Court has repeatedly measured their construction against the First Amendment rights of individual employees who object to supporting the union. *Ellis v. Railway Clerks*¸ 466 U.S. 435, 444-45 (1984); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961). Thus, the Employees' arguments provide this

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Lacroix's unique viewpoint and constitutional claim, along with an alternative remedy, not fully represented or suggested by any of the current parties to this litigation.

[2] The state may be reluctant to make a full throated defense of that claim given that the application of Act 10 is not uniform.

Court both a different and a necessary point of view. Discernment and assessment of the rationale for the exclusion of public safety workers ought to be undertaken with the First Amendment interests of the Employees in mind, as should consideration of the appropriate remedy, if a violation is found.

Another significant difference is that the Employees have a personal financial stake in this litigation that the State Defendants do not share. The financial consequences of the State Defendants losing the right to work aspect of this litigation would fall disproportionately on the Employees. It is the Employees who would be forced to pay union dues or fees, not the State Defendants. In fact, the State has no standing to raise or recover the personal financial lost to the Employees. This carries through to any potential settlement in which the lawsyers for the State would have a potential ethical conflict if they compromisd the interests of the taxpayers to protet the purses of the individual pulic employees.

The Employees' two arguments (their First Amendment rights and the differences in damages), while central to deciding the constitutionality of the Act, go beyond the mere defense of the statute by the State Defendants. Thus, neither the Plaintiff unions, nor the State Defendants, are adequate representatives for defending the First Amendment rights of the individual intervening public employees.

Concomitantly, the state has broader interests than the Employees. It may wish to emphasize – and to preserve – the financial concessions of Act 10 as opposed to the

Employees First Amendment interests. It may take a differing position on remedy. That we do not yet know how these matters will play out is of no concern to those cases, like here, representing the inherent conflict between a broad public interest in upholding a statute and particularized and unique private interests that may or may not be congruent with that broader interest.

Although courts often say that there is a presumption of adequate representation where the defendant is a state agency charged with representing the interests of the proposed intervenors, *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007), this is not such a case. The State Defendants are not charged with protecting the particularized First Amendment rights of the Employees. Courts have made clear that the question of adequate representation by a state agency cannot be reduced to whether it and the proposed intervenors seek the same outcome.

For example, in *WildEarth Guardians v. U.S. Forest Service*, 573 F.3d 992 (10th Cir. 2009), both the United States Forest Service and a mining company who sought to intervene were attempting to uphold the Forest Service's approval of plans for the company to vent methane from one of its mines. The court rejected the argument that the intervenor was adequately represented by the government:

> WildEarth argues that because MCC and the government "share the same objective in defending the agency's decision" and because "their economic interests are also generally aligned," Aplee. Br. at 16, the government defendants will adequately represent MCC. We have held, however, that the intervenor's "showing is easily made when the party upon

> which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor's particular interest."

Id. at 996 (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001)) (both the government and intervening environmental and tourist associations sought to defend designation of federal land as a public monument).

The reason is simple:

> [T]the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor.

Clinton, 255 F.3d at 1255-56.[3]

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[3] *See also WildEarth Guardians v. National Park Service*, 604 F.3d 1192 (10th Cir. 2010) (government and intervening hunting and conservation groups both sought to defend plan for reduction of elk population); *Utahns For Better Transportation*, 295 F.3d 1111 (10th Cir. 2002) (the task of protecting not only the interest of also the private interest of petitioners in intervention is "on its face impossible")(both government and intervening trade association seeking to defend regional transportation plan); *Southwest Center For Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001) (both government and intervening contractors and trade associations both sought to uphold government approval of land management and species conservation plans); *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104 (1st Cir. 1999) (both state and intervenors sought to uphold campaign finance law), *see id*. at 115 (principle that government, in defending the constitutionality of the statute, is presumed to be adequately representing the interests of all citizens who support the statute. "has limited application here, where the intervenors have concrete personal interests apart from generalized citizen support of the statute.") (Lynch, J. concurring); *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1992) (both government and intervening students and nonprofits sought to uphold affirmative action plan).

The more complex a matter is, the more likely there are to be interests that may diverge. *Berg*, 268 F.3d at 823. As noted above and elsewhere, Act 10 is a lengthy bill that accomplishes a number of objectives including the limitation of certain substantive agreements between the government and public employees, the limitation of proper subjects of bargaining and a variety of protections for the First Amendment interests of persons, like the Employees here, who do not wish to belong to or support a union. Not all implicate the First Amendment rights of the Employees, yet the State must defend them all.[4]

5. Permissive Intervention. The two relevant requirements for permissive intervention are: 1) a timely application for intervention; and 2) that the intervenor has a claim that shares with the main action a common question of law or fact. *Flying J, Inc. v.Van Hollen*, 578 F.3d 569, 572-73 (7th Cir. 2009); Fed. R. Civ. P. 24(b)(1)(B) & (3). Having shown already the timeliness of their application, the Employees now must show only that their claim shares a common question of law or fact with the main action. As demonstrated above, if Act 10 is struck down as unconstitutional in the pending litigation, there will be a detrimental and direct impact on the Employees' First Amendment rights and finances.

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[4] Although the plaintiffs claim to be "uninterested" in challenging limitations on increases in compensation and mandatory employee contributions to his or her health insurance and pension, it is not clear that the action – or, should the unions prevail, it's issue preclusive effect can be so limited.

CONCLUSION

Having shown that they satisfy all requirements for intervention, the Employees ask that their motion to intervene be granted. If the Court believes that the Employees have not clearly satisfied all the requirements for intervention of right, they ask the Court to allow them permissive intervention.

Respectfully submitted,

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