UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LABORERS LOCAL 236, AFL-CIO, *et al.*,

Plaintiffs,

v. **Case No. 11-CV-462**

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

Defendants.

BRIEF IN SUPPORT OF

MOTION TO INTERVENE AS DEFENDANTS

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FACTS

Christopher King is a social service specialist employed by Western Wisconsin Cares, a public long term care district. He is in a bargaining unit represented exclusively by AFSCME Local 340, AFL-CIO, and AFSCME Wisconsin Council 40. Plaintiff AFSCME Local 60 and AFSCME Local 340 are local affiliates of AFSCME Council 40 and AFSCME International, AFL-CIO. He objects to being compelled to pay union fees as a condition of employment. In addition, he objects to being forced to be represented in employment matters by his union.

Carie Kenrick is employed by the University of Wisconsin-Whitewater as a custodian lead person. She is in a bargaining unit represented exclusively by AFSCME Local 1131 and AFSCME Council 24, Wisconsin State Employees Union, who are related affiliates of Plaintiff AFSCME Local 60, AFL-CIO.[1] She objects to being compelled to pay union fees as a condition of employment. In addition, she objects to being forced to be represented in employment matters by her union.

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

1. Keep their money from being collected by their 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 their unions any more than is necessitated by law; and,

[1]Plaintiff AFSCME Local 60 is a local affiliate of AFSCME Wisconsin Council 40. AFSCME Local 1131 is a local affiliate of AFSCME Council 24. Both Council 24 and Council 40 are councils of AFSCME International, AFL-CIO.

3. Defend their federal constitutional right of free speech and association to prevent their unions from using their money for politics, collective bargaining or other purposes which are currently being attacked in this Court by Plaintiff unions.

ARGUMENT

I. Employees May Intervene as of Right

A. Employees Meet All Four Requirements for Intervention as of Right.

Fed. R. Civ. P. Rule 24(a)(2) contains four requirements for intervention of right. These are: 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) that 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 make an examination of all the circumstances. *City of Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531, 534 (7th Cir. 1994). 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 caused prejudice to the original parties; 3) whether denying the application would cause prejudice to 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 act reasonably promptly. *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 Services 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 on July 28, 2011. The Employees filed their motion, brief, declarations and responsive pleadings on September 3, 2011. Thus, the application satisfies any definition of timeliness, because it has been filed shortly after Defendants' Answer and before the pretrial conference, scheduled for September 6, 2011. Furthermore, it will not cause prejudice to the existing parties. By seeking to intervene at the pleadings stage, the Intervenor has not delayed the case at all.

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. Grp. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1259 (7th Cir. 1983). The interest is to be broadly construed and not as strictly a legal interest. *Meridian*, 683 F.2d at 203-04 (citing *Cascade Natural Gas Corp v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 no. 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

one subject, base wages. Shrinking the scope of bargaining means that most aspects of the employee's working conditions will be removed from the bargaining "table" and returned to individual discussions between the employee and the 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 the individual for discussion between the employee and the 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 unions bargaining for them and do not want to pay for that unwanted bargaining, especially since the unions typically use the Employees' forced fees for political activity. The Employees object to being forced to support the political and ideological agenda of the unions.

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 basis 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. 1098 (2009).

If the Plaintiff unions win this case, the direct result will be to take the discussion of working conditions out of the hands of the employees and place them back on the bargaining table. Employees will not only be deprived of their individual say over these matters, but they will be forced to be represented by an unwanted union and then forced to pay the unions 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, they have no valid legal argument to reduce the scope of bargaining by the union. Under the prior law permitting compulsory union payments, the Employees have no viable First Amendment claim for avoiding paying for collective bargaining costs. *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 or "fair share" agreements impair those constitutionally-protected interests. *See, e.g.*, *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 180 (2007). Agency 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 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 potion of dues devoted to bargaining activities. *See, e.g., id*. at 222 ("But the judgment clearly made in [cases addressing compulsory agency shops in the private sector] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.")

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 an anathema the next. The decision rests with the policy makers, not with the judiciary." *Id*., at 225 n.20. Moreover, the "Extraordinary authorization to coerce payment from government employees" is "totally repealable." *Davenport*, 551 U.S. at 189. 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 are no longer any sufficiently weighty state interests to justify compromising the

First Amendment interests recognized in cases such as *Abood* and *Davenport*. Thus, if the unions are able to invalidate the Act in this litigation, the Employees cannot "unwind the clock" by filing a suit claiming the Act is valid and should be reinstated.

The Employees' ability to argue their First Amendment rights is largely hedged in by the decision of the policy makers. Thus, if Act 10 is declared valid, the First Amendment claims of the Employees are vindicated. If the Act is not valid, the Employees cannot independently ask a court to create these rights.

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 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 burden for showing inadequate representation is to be treated as minimal and prospective intervenors need only show there "may be" inadequate representation. *Trobovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1978); *Lake Investors*, 715 F.2d at 1261. Regardless if "the parties have the same ultimate objective in the underlying action, the intervenors must demonstrate, at very least, that some conflict exists." *Meridian*, 683 F.2d at 205.

Three historic grounds for finding inadequate representation are: a) collusion between (as applied here) the State Defendants and the Plaintiff unions; b) the State Defendants have strategic differences with the Employees; or c) there is a substantial divergence of interests between the State Defendants and the Employees. *Meridian*, 683 F.2d at 205.

The first ground, collusion, is inapplicable. However, both of the other two grounds apply here. 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 validity of the Act.[2]

The State Defendants have no federal constitutional rights at stake. If the Employees are not in this litigation, the United States Constitution will not even be considered in opposition to the Plaintiff unions' claims. Only the Employees have First Amendment rights which could be lost.

When construing a labor relations statute, the U.S. Supreme Court has repeatedly measured its construction against the First Amendment claims of individual employees who objected to supporting the union. *Ellis v. BRAC*¸ 466 U.S. 435, 444-45 (1984); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961). Thus, the arguments made by the Employees provide this Court both a different and necessary point of view.

[2]A review of the Brief in Opposition of the Defendants and the *Amicus Curiae* Brief of Kristi Lacroix in Opposition to Plaintiffs' Motion (both filed with this Court in *WEAC v. Walker*, Case No. 11-CV-428, Docs. ## 40, 45(1))) demonstrates Intervenors' unique viewpoint and First Amendment claim, along with an alternative remedy, most likely will not fully be represented or suggested by any of the parties to this litigation. Furthermore, the Defendants in both cases are basically the same.

The Plaintiff unions do not represent the Employees in this action, for they are arguing that their "corporate" rights under the United States Constitution extinguish the Employee's First Amendment rights. It is only the Employees who are in a position to argue their First Amendment claim and resulting monetary issue. The differences in their monetary claims are discussed next.

Another significant difference is that the Employees have a personal financial stake in this litigation which is not shared by the State Defendants. 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, 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.

These two arguments of the Employees (the First Amendment claim 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 rights of 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 this one, 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.

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, and that employees can only defeat this presumption upon a showing of "gross negligence" or "bad faith" on the part of the state. *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007).[3] But a presumption is only that – a presumption – and it may be overcome in a number of ways.[4]

Ligas does not apply to the present case. First, *Ligas* only suggests that this standard applies where the "governmental body is charged by law with protecting the interests of the proposed Intervenors." *Id*. at 774. In this case, Wisconsin collective bargaining law makes the State Defendants (and other public employers) and the individual employees adversaries. Wis.

[3]Unlike *Ligas*, 478 F.3d at 772, where the state official opposed intervention, the State Defendants did not oppose a similar intervention or claimed that they adequately represent the interests of the similar nonunion employees, either as charged by law or otherwise, in the related case of *WEAC v. Walker*, Case No. 11-CV-428, filed in this Court.

[4]The isolated statement in *Ligas* that only "gross negligence" or "bad faith" can defeat a presumption of adequacy of representation is inaccurate. The accepted doctrine in this area is far more flexible, as actual practice in the Seventh Circuit demonstrates. *See* p.p. 19-20 & n.8. If the *Ligas* Court intended to disapprove of this practice or adopt, as a matter of law binding on district courts, a more stringent rule than applied anywhere else, it would have done so more explicitly. Even the District Court in *Ligas* on remand did not require a showing of "gross negligence" or "bad faith" when it ultimately allowed intervention. *Ligas v. Maram*, 2010 WL 1418583 (N.D. Ill., April 7, 2010). Instead, after quoting the isolated statement, the court explained: "In other words, 'more is needed than a presumption of inadequacy based on the diversity of the State Defendants' interests.' The events unfolding since the denial of the first motions to intervene in this case suggest that the presumption of adequacy has been overcome." *Id*. at *3 (citations omitted).

Stat. § 11.83(1) provides for individual employees to provide grievances against the government. Wis. Stat. § 11.84(2)(b) & (f) prohibit individual employees from coercing or intimidating officers or agents of the government. Even though the Employees oppose being represented by a labor union, Wis. Stat. § 11.84(1)(g) prohibits the government from using any funds to discourage unionization or from helping the Employees to remain non-union. Wis. Stat. § 11.90(2) gives the State Defendants the right to "manage" the employees and Wis. Stat. § 11.90(3) gives the right to "suspend, demote, discharge, or take other appropriate disciplinary action against the employee."

The Employees are obviously opposed to the interests of the Union, but Wisconsin law positions them as opponents of the State (and its subdivisions) when it comes to the subject matter of this lawsuit – collective bargaining and the payment of forced fees.

Second, the *Ligas* presumption that governmental bodies charged by law with protecting the interests of the proposed intervenors are adequate representatives, 478 F.3d at 774, is absent from both the text of Rule 24, Fed. R. Civ. P., and the only Supreme Court case to deal directly with the question of adequate representation when seeking to intervene on the side of the government. Far from making any mention of a presumption, the Supreme Court in *Trbovich*, 404 U.S. at 538 n.10, established only a "minimal burden" on intervenors for showing inadequate representation by the government party and then the need is only to show there "may be" inadequate representation.

Third, *Trbovich* and *Ligas* can be reconciled. The Seventh Circuit's use of the "charged by law with protecting" language limits its heightened burden to cases where the state is acting in

its sovereign capacity, such as when it is dealing with health and welfare issues and the government must represent all of its citizens. Public employees, like the Employees, have different interests than regular taxpayers. As a result of collective bargaining laws, they also have different interests than regular citizens. As we have demonstrated, collective bargaining statutes set public employees up as adversaries to the State in a way that is not true for ordinary taxpayers and citizens. Act 10 narrows the scope of collective bargaining, but does not eliminate it for most public employees.

The Supreme Court requires that intervention should be allowed with a minimal burden. Thus, the Supreme Court's minimal burden applies where the intervenor has identified an interest that is private or distinct from the public interest, as the Employees have done here.[5] The Employees have more than met this burden along with any set by the Seventh Circuit.

Fourth, 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:

[5]Although the Seventh Circuit standard might be greater than the standard announced by the Supreme Court in *Trbovich*, the district court is, nevertheless, bound to follow the United States Supreme Court, as recognized by a court in this District. *Lawrence v. Elsea*, 478 F. Supp. 480, 482 (D. Wis. 1979) ("I am bound to follow the test announced by the United States Supreme Court" in *Trbovich*).

> WildEarth argues that because MCC and the government share the same objective in defending the agency's decision and because their economic interests also generally aligned, 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 (citations omitted).

The reason is simple:

> [T]he 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."

Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1255-56 (10 Cir. 2001).[6]

Fifth, the more complex a matter is, the more likely there are to be interests that may diverge. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001). As noted above, Act 10 is a lengthy bill that accomplishes a number of objectives including the

[6]*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, v. U.S. Dept. of Transportation*, 295 F.3d 1111 (10th Cir. 2002) (both government and intervening trade association sought to defend regional transportation plan, but it was on its face impossible for the government also to protect the private interest of the intervening petitioners); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001) (both government and intervening contractors and trade associations 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 statue, 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).

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 rights of persons, like the Employees here, who do not wish to belong to or support a union.

The Employees assert that Act 10 is a multi-faceted piece of legislation that does many things. As already noted, it does restrict collective bargaining and expand the rights of persons in the position of the Employees. If the state successfully upholds the law, those rights will be preserved. But Act 10 does many other things as well, including, most significantly, mandating additional employee contributions for health insurance and pensions that were a major piece in a comprehensive plan to reduce a massive structural budget deficit. If Plaintiffs are successful in challenging the collective bargaining provisions of Act 10, it is not clear that the remaining provisions can stand – either because they too apply only to "non- public safety employees" or because they are thought to be part of a comprehensive scheme in which freedom from compelled union dues is paired with these increased contributions

Nor is it clear that a challenge to those provisions should result in invalidation of the restrictions on collective bargaining or unions. The Plaintiffs' complaint maintains that, should they prevail, Act 10 becomes a nullity; but as set forth in the *Amicus* brief of Kristi Lacroix filed in *WEAC v. Walker*, 11-CV-428 (docket # 45(1)) in this Court , that is not the law. It is quite possible that the remedy for under-inclusion is not invalidation but inclusion, i.e., to extend the law to public safety workers.[7]

[7]One of the reasons that this may be proper is that, once the state abandons a commitment to collective bargaining, the First Amendment interests of the Employees and those similarly situated become

Finally, there is no hard and fast rule in the Seventh Circuit denying intervention when the proposed intervenor takes the same position as the state and cannot prove "gross negligence" or "bad faith." *Ligas*, 478 F.3d at 774. The truth of this statement is best illustrated by one ineluctable fact: *Intervention of this type happens all of the time.* Not only does such intervention occur, it is quite common, especially in cases of extreme public importance. This is true in the Seventh Circuit and elsewhere.[8]

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paramount. Resolving that question may be aided by the development of a record on the ways in which the expressive interests of the Employees are impaired by "fair share" fee agreements.

[8]*See, e.g., 520 S. Michigan Ave. Assocs. Ltd. v. Shannon*, 549 F.3d 1119 (7th Cir. 2008) (union intervened to join state in defending labor statute from attack by hotel); *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008) (wine wholesaler group intervened to join state in defending wine distribution statute from interstate commerce attack by citizens); *Protestant Memorial Medical Center, Inc. v. Maram*, 471 F.3d 724 (7th Cir. 2006) (hospital association intervened to join state and federal government in defending the state's Medicaid plan from attack by another hospital); *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (Christian halfway house intervened to join state in defending use of religious halfway houses from First Amendment establishment clause attack by anti-religious organization); *Burlington Northern and Santa Fe Railway Co. v. Doyle*, 186 F.3d 790 (7th Cir. 1999) (union intervened to join state in defending train crew requirement statute from attack by railroad); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194 (7th Cir. 1997) (trial judge association intervened to join state in defending countywide election of trial judges from attack by civil rights organization); *Alliance for Clean Coal v. Bayh*, 72 F.3d556 (7th Cir. 1995) (union intervened to join state in defending state's environmental laws from commerce clause attack by business organization); *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988) (private individuals, including two doctors, intervened to join state in defending state's abortion laws from constitutional attack by abortion doctors); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) (defense attorneys intervened to join state in defending rules governing extrajudicial statements about pending cases from First Amendment attack by local bar association); *Stevenson v. Illinois Bd. of Elecs*., 794 F.2d 1176 (7th Cir. 1986) (successful primary candidate intervened to join state in defending candidacy filing deadlines for independent candidates from Equal Protection attack by independent candidate).

The cases cited in note 8 were not cases where an intervening defendant was necessary because the named defendant had ceased defending a law.[9] In each of these cases, both the named defendants and the intervenor-defendants actively participated in defending the state law. Moreover, there is nothing in any of them to suggest bad faith or gross negligence on the part of governmental defendants.[10]

Thus, it is quite clear that intervention under the circumstances of this case is required and the Court should grant intervention as of right.

II. In the Alternative, Employees Should Be Permitted to Intervene.

The two 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. J.B. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009). Having shown the timeliness of the Employees application above, the Employees must show only that their claim shares a common question of law or fact with the main action. As already demonstrated, 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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[9] *See, e.g., Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009) (holding that a proposed intervenor should have been permitted to intervene as of right when the governmental defendant refused to appeal the district court's decision against it).

[10] It is unclear whether intervention was opposed in each of the cases cited in note 8. We know that the plaintiff objected in at least one of them because one of the Employees' lawyers here represented the defendant-intervenors at the district court in *Thompson*, 116 F.3d 1194. *See Milwaukee Branch of the NAACP v. Thompson*, No. 94-cv-1245, Docket #32 (E.D. Wis. April 10, 1995).But, more fundamentally, the absence of objection does not relieve a proposed intervenor from demonstrating that the requisites of Rule 24 have been satisfied or a district court from making the necessary findings.

CONCLUSION

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

Respectfully submitted,

/s/ Milton L. Chappell

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