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SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc., and Pleasant Lake
Management District,

Petitioners-Respondents,

v.

Wisconsin Department of Natural
Resources,

Appeal No. 18 AP 0059

Respondent-Appellant,

Wisconsin Manufacturers & Commerce,
Dairy Business Association, Midwest
Food Processors Association, Wisconsin
Potato & Vegetable Growers
Association, Wisconsin Cheese Makers
Association, Wisconsin Farm Bureau
Federation, Wisconsin Paper Council
and Wisconsin Corn Growers
Association,

Intervenor-Co-Appellants.

On Certification by Wisconsin Court of Appeals,
District II, dated January 16, 2019

On Appeal From The Dane County Circuit Court,
The Honorable Judge Valerie Bailey-Rihn, Presiding,
Case Nos. 16CV2817, 16CV2818, 16CV2819, 16CV2820,
16CV2821, 16CV2822, 16CV2823, 16CV2824

THE WISCONSIN LEGISLATURE'S PETITION TO INTERVENE

Eric M. McLeod
State Bar No. 1021730
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
608-255-4440
eric.mcleod@huschblackwell.com
Attorneys for the Wisconsin Legislature

NOW COMES the Joint Committee on Legislative Organization on behalf of the Wisconsin Legislature (the “Legislature”), by and through its attorneys, Husch Blackwell LLP, and petitions this Court for intervention in this appeal pursuant to Wis. Stat. §§ 809.13 and 809.63. First, the Legislature has a right to intervene under Wis. Stat. § 803.09(2m) because this appeal challenges the construction of a statute and its application to certain administrative agency action. Second, and in the alternative, the Legislature should be allowed to intervene permissively under Wis. Stat. § 803.09(2) because the Legislature has an interest in legislation that clearly defines the limits of administrative agency authority. In support of this petition, the Legislature states as follows:

I. Wis. Stat. § 803.09(2m) gives the Legislature a right to intervene here because this appeal challenges the construction of a statute.

The Legislature has a right to intervene in this appeal under Wis. Stat. § 803.09(2m). A variety of statutes explain why. To begin, Wis. Stat. § 809.63 explains that when this Court “takes jurisdiction of an appeal or other proceeding, the rules governing procedures in the court of appeals are applicable to proceedings in the supreme court.” In turn, Wis. Stat. § 809.13 governs intervention at the court of appeals: “The court may grant [a] petition [to intervene] upon a showing that the petitioner’s interest

meets the requirements of s. 803.09 (1), (2), or (2m).” At a minimum, this case meets the requirements of Wis. Stat. § 803.09(2m).

Specifically, Wis. Stat. § 803.09(2m) mandates that the Legislature has a right to intervene when a party to a case challenges the construction of a statute:

When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise ***challenges the construction or validity of a statute***, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 ***at any time*** in the action ***as a matter of right*** by serving a motion upon the parties as provided in s. 801.14.

(Emphasis added.) Wis. Stat. § 13.365 then confirms the Legislature’s mandatory right of intervention in the subset of cases defined in Wis. Stat. § 803.09(2m):

Pursuant to s. 803.09 (2m), when a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or ***otherwise challenges the construction or validity of a statute***, as part of a claim or affirmative defense:

...

(3) The ***joint committee on legislative organization*** may intervene ***at any time*** in the action on behalf of the legislature. The joint committee on legislative organization

may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765 (1) (a) or (b), as determined by the cochairpersons, to represent the legislature in any action in which the joint committee on legislative organization intervenes.

(Emphasis added.)

Taking these statutes together, the Legislature has an absolute right to intervene in this appeal because this case presents a dispute over the construction of a statute—Wis. Stat. § 227.10(2m). By its plain language, that statute limits an agency’s authority to that delegated to it by the legislature:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Despite this plain language, the petitioners-respondents here seek to expand the scope of Wis. Stat. § 227.10(2m).

In their brief at the court of appeals, the petitioners-respondents primary argument was that “appellant’s interpretation of Wis. Stat. § 227.10(2m) is grossly flawed, defies basic canons of statutory construction,

and contravenes over one hundred years of public trust jurisprudence.” Br. of Pet’rs-Resp’ts at 22, attached hereto as Exhibit A. Indeed, the second paragraph in the “ISSUE” section in the court of appeals’ certification order establishes that the parties dispute the construction, scope, and application of 2011 Wis. Act 21, which created Wis. Stat. § 227.10(2m). *See* Certification by Wisconsin Court of Appeals, Appeal No. 2018AP59, dated Jan. 16, 2019, attached hereto as Exhibit B.

Because this case presents a dispute over the construction of Wis. Stat. § 227.10(2m), the Legislature “may intervene [in this appeal] as set forth under s. 13.365 *at any time* in the action *as a matter of right*” Wis. Stat. § 803.09(2m). Thus, the Legislature respectfully requests that this Court grant this petition to intervene.

II. In the alternative, Wis. Stat. § 803.09(2) allows the Legislature to permissively intervene because the Legislature has an interest in legislation that clearly defines the limits of administrative agency authority.

Under Wis. Stat. § 803.09(2), a non-party can permissively intervene when (1) it makes a timely request, and (2) its “claim or defense and the main action have a question of law or fact in common.” Here, the Legislature’s request is timely, as “a non-party may intervene in an appeal after the time for filing a notice of appeal has ended.” *City of Madison v.*

Wisconsin Employment Relations Comm'n, 2000 WI 39, ¶ 8, 234 Wis. 2d 550, 554, 610 N.W.2d 94, 96. And as explained above, a question of law here is the construction, scope, and application Wis. Stat. § 227.10(2m).

The Legislature has an interest and claim in that question of law. By its plain language, Wis. Stat. § 227.10(2m) limits an agency's authority to that delegated to it by the Legislature. The Legislature has an interest in legislation that clearly defines the limits of administrative agency authority. And it expressed that interest by implementing 2011 Wis. Act 21, which created Wis. Stat. § 227.10(2m).

But now, the petitioners-respondents seek to expand the scope of Wis. Stat. § 227.10(2m) beyond its plain language. *See* Exhibit A at 22. In that light, the Legislature seeks to express its position on the scope of Act 21, and its application to the Department of Natural Resources and other administrative agencies.

Conclusion

Under the foregoing analysis, the Wisconsin Legislature respectfully requests that this Court grant its petition to intervene as of right under Wis. Stat. § 803.09(2m), or in the alternative, its petition to intervene permissively under Wis. Stat. § 803.09(2). The Legislature is mindful of

the briefing schedule established by the Court and fully intends to comply with that schedule so as to avoid any delay in these proceedings. The Legislature has acted as expeditiously as reasonably practicable to reach the decision to intervene in this matter following this Court's April 9, 2019 order accepting certification of the appeal.

Dated this 25th day of April, 2019.

HUSCH BLACKWELL LLP
Attorneys for the Wisconsin Legislature

By:



Eric M. McLeod