Appeal No. 16-AP-1688

SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc., Lynda Cochart, Amy Cochart, Roger DeJardin, Sandra Winnemueller, and Chad Cochart,

Petitioners-Respondents,

v.

Wisconsin Department of Natural Resources,

Respondent-Appellant,

and

Kinnard Farms, Inc.,

Intervenor-Co-Appellant.

PETITIONERS-RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE WISCONSIN LEGISLATURE'S PETITION TO INTERVENE

INTRODUCTION

Petitioners-Respondents Clean Wisconsin, Inc. and Cochart et al. ("Petitioners-Respondents") submit this memorandum in Opposition to the Joint Committee on Legislative Organization's ("JCLO" or the "Proposed

Intervenor")[1] Petition to Intervene. The Proposed Intervenor seeks to intervene under Wis. Stat. § 803.09(2m) or, in the alternative, Wis. Stat. § 803.09(2).

Petitioners-Respondents establish herein that Wis. Stat. § 227.53(1)(d) is the correct legal standard for an intervention motion on the facts presented by this case. Petitioners-Respondents further establish that the Proposed Intervenor fails to meet that standard. Finally, Petitioners-Respondents demonstrate that JCLO also fails to meet the legal standard for intervention as set forth in Wis. Stat. § 803.09(1), (2), or (2m). The Proposed Intervenor's failure to meet this standard stems in part from the fact that this case involves the Department of Justice's ("DOJ") interpretation of statute, rather than DOJ contesting the validity or constitutionality of a statute. For this reason and others detailed herein, the precedential and policy ramifications of JCLO's request extend far beyond the context of this case and threaten a significant disruption of

[1] Petitioners-Respondents will reference to the Wisconsin Legislature generally as the Legislature.

judicial efficiency and due process.

We therefore respectfully urge this Court to apply the strong legal and policy bases for denying intervention under Wis. Stat. ch. 227 and the more general rules of civil procedure in Wis. Stat. § 803.09.

ARGUMENT

Petitioners-Respondents concur with the Department of Natural Resources' ("DNR") conclusion that Wis. Stat. ch. 227 supplies the standard for intervention in this matter due to the conflict between Wis. Stat. § 227.53 and Wis. Stat. § 803.09. *See generally*, DNR Resp. to Leg. Pet. to Intervene. The presence of a conflict requires this Court to apply the standard outlined in Wis. Stat. ch. 227, and for the reasons presented by DNR the Proposed Intervenor does not meet that standard.

Petitioners-Respondents aim to minimize duplication of DNR's position and supporting arguments as outlined in DNR's May 6, 2019, Response to the Legislature's Petition to Intervene. Petitioners-

Respondents are compelled, however, to briefly analyze why this Court must apply the standard set forth in Wis. Stat. § 227.53. Petitioners-Respondents will then detail why the Proposed Intervenor also to satisfy the standard for intervention provided in Wis. Stat. § 803.09.

I. This Court must apply the standard set forth in Wis. Stat. § 227.53 and deny the Petition to Intervene.

a. Conflict between Wis. Stat. §§ 227.53 and 803.09(2m) requires application of Wis. Stat. ch. 227 to this proceeding.

The correct legal standard for the Petition to Intervene is found in Wis. Stat. § 227.53(1)(d). The Legislature created Wis. Stat. ch. 227 to "establish a uniform procedure for judicial review" of administrative actions. *Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 640, 511 N.W.2d 874, 877 (1994). To that end, Wis. Stat. ch. 227 provides clear limits regarding who may intervene in judicial review proceedings and when they must do so:

> The court may permit other interested persons to intervene. Any person petitioning the court to

> intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

Wis. Stat. § 227.53(1)(d).

JCLO instead moves to intervene pursuant to Wis. Stat. § 809.03(2m), claiming that section provides an absolute right to intervene in this case. Leg. Pet. to Intervene at 4. Wis. Stat. ch. 227 "contemplates the limited use of those civil procedure statutes which do not conflict with ch. 227." *Wagner*, 181 Wis. 2d at 641 (quoting *State ex rel. Delavan v. Cir. Ct. for Walworth Cty.*, 167 Wis. 2d 719, 724, 482 N.W.2d 899 (1992)). To ensure realization of the Legislature's intent to create a separate procedure for judicial review of administrative actions, "when a conflict occurs between the rules of civil procedure and ch. 227, the dictates of ch. 227 must prevail." *Wagner*, 181 Wis. 2d at 639; *see also State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals*, 2018 WI 25, ¶ 18, 380 Wis. 2d 354, 909 N.W.2d 114.

Wisconsin Stat. § 803.09(2m) and Wis. Stat. ch. 227 conflict in at least two ways. First, as noted above, Wis. Stat. § 227.53(1)(d) requires that petitions to intervene in judicial review proceedings be served upon the other parties at least five days before the hearing on the petition to intervene. In implementing this requirement, "[t]he intervention hearing also must come before the judicial review proceeding or intervention would be moot." *Citizens Util. Bd. v. Pub. Serv. Comm'n*, 2003 WI App 206, ¶ 17, 267 Wis. 2d 414, 671 N.W.2d 11. Wis. Stat. § 803.09(2m), by contrast, states that the Legislature may intervene "at any time."

Second, Wis. Stat. § 227.53(1)(d) provides that "[t]he court may permit other interested persons to intervene." The requirement that the Proposed Intervenor be "interested" is one of standing. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 415, 466 N.W.2d 227 (Ct. App. 1991). The only persons with a "right" to become parties to the proceedings are "the agency and all parties to

the proceeding before it." Wis. Stat. § 227.53(1)(d). Those parties have a right to participate because they have already demonstrated that they have an interest that will be injured or affected by the administrative decision. Wis. Stat. §§ 227.42(1)(a), 227.44(2m). The requirement that parties must have an interest in the administrative decision is thus the same for intervenors as it is for parties initiating the judicial review proceedings. Since intervenors are considered full parties, *see Kohler v. Sogen,* 2000 WI App 60, ¶¶ 7, 11-12, 233 Wis. 2d 592, 608 N.W.2d 746 (citation omitted), the Proposed Intervenor's interpretation would allow the propose intervenor to have all the rights of a party under Wis. Stat. ch. 227 without meeting the requirements to become a party under that chapter.

A clear conflict therefore exists between Wis. Stat. ch. 227 and Wis. Stat. § 803.09(2m), as the latter would allow a party to intervene in a judicial review proceeding without demonstrating standing. Given the conflicting

provisions, the "uniform procedure" of Wis. Stat. ch. 227 must control.

b. The Petition to Intervene does not meet the Chapter 227 standard.

The Proposed Intervenor is not an "interested person" for the purpose of demonstrating standing in this judicial review proceeding. To demonstrate standing under Wis. Stat. § 227.53, a person must first identify an interest that will be injured by the agency's decision and then show that the injury is to an interest which the law recognizes or seeks to regulate or protect. *Eller Media, Inc. v. State Div. of Hearings & Appeals*, 2001 WI App 269, ¶ 7, 249 Wis. 2d 198, 637 N.W.2d 96 (quoting *In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d at 411).

JCLO clearly lacks standing under this standard. The purported "interest in legislation that clearly defines the limits of administrative agency authority" is not an interest recognized or protected by law. Leg. Pet. to Intervene at 5. In the context of a case concerning judicial review of an administrative decision, to determine whether

a person has a legally recognized and protected interest, courts look to "law the DNR was applying in making" the underlying administrative decision. *Waste Mgmt. of Wis., Inc. v. Dep't of Nat. Res.*, 144 Wis. 2d 499, 507, 424 N.W.2d 685 (1988); *see also Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶ 44, 333 Wis. 2d 402, 797 N.W.2d 789 ("[I]n cases involving review of a rule or decision of an administrative agency, courts have interpreted standing in light of the substantive statutes and regulations at issue and the text of chapter 227."). Here, the substantive statutes and regulations at issue are the permitting standards present in Wis. Stat. ch. 283 and Wis. Admin. Code ch. NR 243. These standards are implemented by DNR and intended to address water quality concerns caused by large farms.

Unlike DNR, the Legislature does not implement or enforce the Wisconsin Pollutant Discharge Elimination System ("WPDES") permitting program. Unlike Kinnard Farms, Inc., the Legislature is not regulated under these

programs. And unlike Petitioners, the Legislature will not suffer water quality impacts based on how this Court rules on the permit. Put another way, the Proposed Intervenor's interest is indistinguishable from any other person with an opinion about the proper interpretation of statutes and rules DNR implements and enforces. It is not an interest protected or recognized by law because it is not an interest the underlying statute seeks to protect. *See Waste Mgmt. of Wis., Inc.*, 144 Wis. 2d 499, 507-08 (finding that Wis. Stat. § 144.44(2)(nm) protects environmental interests, not the economic interest asserted by Waste Management, and dismissing for lack of standing); *MCI Telecomms. Corp. v. Pub. Serv. Comm'n*, 164 Wis. 2d 489, 494-95, 476 N.W.2d 575 (Ct. App. 1991) (finding that Wis. Stat. § 196.194 does not protect or regulate MCI's economic interest as a customer of entities regulated under that statute and dismissing for lack of standing).

For these reasons, this Court must deny the Petition to Intervene for failure to meet the intervention

requirements of Wis. Stat. § 227.53.[2]

II. The Proposed Intervenor does not establish grounds to intervene as a matter of right in this matter.

Even if the Court determines that Wis. Stat. § 227.53 does not provide the applicable standard for proposed intervention, JCLO also fails to demonstrate a right to intervene as a matter or right or permissively under Wis. Stat. § 803.09.

a. Intervention as a matter of right pursuant to Wis. Stat. § 803.09(2m) does not equate to an automatic right to intervention.

This Court must not conflate intervention "as a matter of right" with an "automatic" or "absolute" right to intervention. *See* Leg. Pet. to Intervene at 4; Leg. Resp. to DNR Mot. to Modify Br. Schedule at 6. Petitioners-Respondents establish below that neither precedent nor principles of statutory interpretation support the Proposed

---

[2] The Legislature's Petition to Intervene is also untimely. The Proposed Intervenor was required to petition to intervene before the judicial review proceedings. *See supra* Section I.a. The Proposed Intervenor now seeks to intervene in proceedings before the Supreme Court, some five years after Petitioners-Respondents filed for judicial review of the Kinnard Farms, Inc. permit, and some three after the circuit court issued its ruling. This Court must therefore deny the Petition to Intervene as untimely.

Intervenor's attempt to claim an automatic right to intervene in this case.

i. Historical application of Wis. Stat. § 803.09 affirms that "as a matter of right" intervention is discretionary rather than absolute.

The Proposed Intervenor sets forth no support for an argument that this Court should apply a novel definition to the term "as a matter of right" in Wis. Stat. § 803.09(2m), particularly considering the longstanding judicial application of the intervention as a matter of right standard from Wis. Stat. § 803.09(1). This Court has specifically found that "as a matter of right" intervention does not grant an absolute right. *See Helgeland v. Wis. Municipalities,* 2008 WI 9, ¶ 41, 307 Wis. 2d 1, 745 N.W.2d 1 ("Despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments . . . . "). Wis. Stat. § 803.09(1), consistently defined by Wisconsin courts as intervention "as a matter of right," still requires courts to analyze and balance four discretionary factors.

Specifically, Wisconsin courts have granted

requests to intervene as a matter of right when the following factors are established: 1) the movant claims an interest relating to the property or transaction which is the subject of the action; 2) the disposition of the action may as a practical matter impair or impede the Proposed Intervenor's ability to protect that interest; 3) the movant's interest will not be adequately represented by existing parties to the action; and 4) the motion to intervene was made in a timely fashion. *See* Wis. Stat. § 803.09(1). A prospective intervenor has the burden of meeting these four factors. *See Helgeland*, 2008 WI 9, ¶ 38; *see also M&I Marshall & Ilsley Bank v. Urquhart Cos.*, 2005 WI App 225, ¶ 7, 287 Wis. 2d 623, 706 N.W.2d 335.

Case law clarifies that discretion remains with courts both for permissive intervention as well as intervention as a matter of right. *See, e.g., City of Madison v. Wis. Emp't Relations Comm'n*, 2000 WI 39, ¶ 11-12, 234 Wis. 2d 550, 610 N.W.2d 94. The Wisconsin Supreme Court has exercised its discretion in analyzing requests for

intervention not in a legally rigid way, but in a highly fact-specific manner. *State ex rel. Bilder v. Twp. of Delavan ("Bilder")*, 112 Wis. 2d 539, 548, 334 N.W.2d 252 (1983) ("We agree with the broader, pragmatic approach to intervention as of right.").

Petitioners-Respondents acknowledge that Wis. Stat. § 803.09(2m) modifies the timeliness prong of Wis. Stat. § 803.09(1) and makes other changes that ensure that these provisions are not exact replicas. However, no evidence supports the Proposed Intervenor's position that this Court should displace established case law governing petitions to intervene as a matter of right. This Court must therefore assume an intentional decision by the Legislature to maintain the longstanding meaning of "as a matter of right" when utilized in Wis. Stat. § 803.09(2m).

ii. Principles of statutory interpretation require this Court to align interpretation of Wis. Stat. § 803.09(1) and (2m).

Wis. Stat. § 803.09(2m) does not obviate all discretion of a reviewing court when responding to a

petition to intervene as a matter of right. By using the language "as a matter of right," the Legislature intended to apply certain components of Wis. Stat. § 803.09(1) to Wis. Stat. § 803.09(2m).

When analyzing laws, courts must give proper and intended meaning to legal terms of art. *See* Wis. Stat. § 990.01(1); *see also Estate of Matteson v. Matteson*, 2008 WI 48, ¶ 22, 309 Wis. 2d 311, 749 N.W.2d 557; *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Intervention "as a matter of right" is a legal term of art that now has an accepted meaning, namely the standard established in Wis. Stat. § 803.09(1) and applied consistently by Wisconsin courts. *See, e.g., City of Madison*, 2000 WI 39, ¶ 11 (stating that "the contours of Wis. Stat. § (Rule) 803.09 are well defined. Subsection (1) of the statute relates to intervention *as a matter of right.*").

In sum, it is consistent with the rules of statutory interpretation and precedent only to interpret Wis. Stat. §

803.09(2m) in the same context as Wis. Stat. § 803.09(1), and with consistent purposes in mind. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686. To do otherwise would upend longstanding judicial interpretation of the terminology "as a matter of right," a term that was not modified when used in Wis. Stat. § 803.09(2m).

iii. The Federal Rules of Civil Procedure affirm the discretionary nature of Wis. Stat. § 803.09(2m).

It is appropriate for this Court to consider the Federal Rules of Civil Procedure (FRCP) and federal case law interpreting those rules. *See Bilder*, 112 Wis. 2d at 547. Wisconsin intentionally modeled Wis. Stat. § 803.09 after FRCP 24. *See id.*; *see also Helgeland*, 2008 WI 9, ¶ 37 ("Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1)"); *see also Fox v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 536,

334 N.W.2d 532 (1983) (citing federal court interpretations of FRCP 24 as persuasive).

It is instructive that FRCP 24 utilizes the term "unconditional," whereas Wis. Stat. § 803.09(2m) does not. *See* FED. R. CIV. P. 24(a)(1). This rule, which refers to unconditional rights of intervention, existed when the Court adopted Wis. Stat. § 803.09. *See* 39 F.R.D. 69, 223 (1966) (demonstrating that an unconditional right to intervene under federal law existed at least nine years prior to adoption of Wis. Stat. § 803.09). The Legislature's decision not to include the phrase "unconditional" in Wis. Stat. § 803.09(1), (2), or (2m) demonstrates an intention to retain judicial discretion in deciding on petitions to intervene as a matter of right.

The intentional exclusion of an unconditional right of intervention from state law is further proven by the fact that the Legislature has amended Wis. Stat. § 803.09 on more than one occasion, pursuant to its power set forth in Wis. Stat. § 751.12, and has never adopted the term

"unconditional" intervention from FRCP 24(a)(1). *See* 2007 Wis. Act 20, § 3753; 2015 Wis. Act 55, § 4610(g).

Wisconsin Stat. § 803.09(2m) merely gives an explicit right to prospective intervenors to intervene in certain cases—not unconditionally, but when other conditions in Wis. Stat. § 803.09(1) are met. Wisconsin courts have unambiguously denied previous attempts of the Legislature to intervene in cases—even those involving the constitutionality of statute(s)—based on a failure of the Legislature to establish a legally cognizable interest. *See, e.g.*, *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶¶ 8, 11, 296 Wis. 2d 880, 724 N.W.2d 208 (denying Legislature's request to intervene as a matter of right), *cert. denied to the Legislature*, 2007 WI 59, 299 Wis. 2d 327, 731 N.W.2d 637 (Table), *and aff'd*, 2008 WI 9.

b. The outcome of this case will not impair a unique interest of the Proposed Intervenor.

The Proposed Intervenor fails to establish interests that meet the requirements for intervention as a matter of right. JCLO asserts an interest in the construction, scope,

and application of 2011 Wis. Act 21 (Act 21) due to its constitutional authority to establish the rules by which administrative agencies operate. Pet. to Intervene at 5; Resp. to Mot. to Modify Br. Schedule at 1. The Proposed Intervenor also purports to have "an interest in legislation that clearly defines the limits of administrative agency authority." Pet. to Intervene at 2.

These asserted interests are exactly the indirect type this Court has previously rejected when considering requests to intervene as of right. *Helgeland*, 2008 WI 9, ¶ 7. Courts have declined to find that general interests can be the basis for an ability to intervene as of right. Rather, interests must be "of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *Helgeland,* 2008 WI 9, ¶ 45 (citations omitted); *see also Helgeland*, 2006 WI App 216, ¶¶ 8, 11 (Court of Appeals determined that the Legislature had no legally cognizable interest to support intervention). Direct and immediate interests are also a means of

guaranteeing that an intervenor is a necessary addition to an ongoing legal matter. *See City of Madison*, 2000 WI 39, ¶ 11, n.11 ("[I]ntervention as a matter of right requires a person to be *necessary* to the adjudication of the action . . . .") (emphasis added).

Furthermore, interests must also be unique to any prospective intervenor. *See Helgeland,* 2008 WI 9, ¶ 116*; see also, e.g., Planned Parenthood of Wis., Inc. v. Kaul ("Planned Parenthood")*, No. 19-CV-038-WMC, 2019 WL 1771929, at *3 (W.D. Wis. Apr. 23, 2019) (unreported; copy attached) (citing *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013)). This Court has stressed the import of establishing a unique interest as a means of preventing judicially inefficient and burdensome intervention. *See Helgeland*, 2008 WI 9, ¶ 116. This and other crucial policy considerations are further discussed *infra*, section II.d.

Here, the Legislature has the constitutional authority to enact statutes but must then rely on other branches of

government to apply and interpret the law. This ensures separation, checks, and balances between government branches. *See Helgeland*, 2006 WI App 216, ¶ 14 ("By claiming an interest in defending its statutes against constitutional challenges, the Legislature conflates the roles of our government's separate branches. Under our tripartite system of government, the legislature's role is to determine public policy by enacting legislation.") (citations omitted).

The Proposed Intervenor in this case has already acknowledged the ultimate responsibility of the judiciary to interpret the law. Resp. to Mot. to Modify Br. Schedule at 7. Therefore, the Proposed Intervenor offers no insight or expertise necessary to this Court to rule in this case.

JCLO also lacks a right to intervention because it fails to establish that the outcome of the matter would impair any purported interests. *See Planned Parenthood* at *4 (citations omitted). The Proposed Intervenor's stated interest of its constitutional prerogative to oversee

administrative agencies is not implicated in this matter. And even if that interest were implicated, any precedent set with this Court's decision will not impact that interest. If the Proposed Intervenor does not agree with this Court's interpretation of Act 21, nothing will prevent the Legislature from enacting subsequent legislation clarifying the application of Act 21 to broad grants of discretionary agency authority. *See Helegland*, 2008 WI 9, ¶¶ 76, 84.

The fact that Act 21 is not a byproduct of the current legislature should also sway this Court's analysis. The existing Legislature's interest in a law enacted in 2011 is questionable. *See Planned Parenthood* at *4 ("[T]he 2018-2019 Wisconsin legislature's interest in the legislation at issue in this case is far less clear than . . . where the challenged legislation was enacted or up for passage in the current term. The challenged statutes and regulations implicated in this lawsuit are not new."). To conclude, the already questionable and general interests of the Proposed Intervenors in the implementation of Act 21

is further called into question by the fact that the Proposed Intervenor is not the Legislature that enacted Wis. Stat. § 227.10(2m). Act 21 has also evolved since its inception in 2011 as various administrative and judicial forums have applied and interpreted the law.

c. The Proposed Intervenor's interests are adequately represented by existing parties.

Should JCLO establish a unique interest that would be impaired by the outcome of this case, intervention is still precluded because DOJ will adequately represent that interest. Parties seeking intervention as a matter of right typically have a minimal burden to establish inadequate representation of their interests. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 92 (1972). However, when a governmental body is charged by law to protect the asserted interest of the Proposed Intervenor, adequate representation is presumed "unless there is a showing of gross negligence or bad faith." *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (citations omitted); *see also Helgeland*, 2008 WI 9, ¶¶ 91,

108. As the Proposed Intervenor pointed out, DOJ is charged with representing the state's interests in this matter. *See* Leg. Resp. to DNR's Mot. to Modify Br. Schedule at 4.

JCLO asserts that DOJ is arguing that DNR can violate Act 21 by expanding "its authority beyond that conferred by the Legislature." *Id.* No such thing has occurred. DOJ indicated that it determined "certain positions asserted in its briefing to lowers courts . . . are not consistent with controlling law"—namely, that DNR has the authority to impose off-site groundwater-monitoring requirements. DNR's Mot. to Modify Br. Schedule at 2. That is not the equivalent of arguing that DNR can violate Act 21. Rather, DOJ is merely forwarding an interpretation of DNR's authority that it believes is consistent with Act 21. In so doing, DOJ is fulfilling "its traditional role defending legislation before the court." *Helgeland*, 2006 WI App 216, ¶ 16. "Legislators may often have a preference for how the judicial branch should

interpret a statute, but such mere preferences do not constitute sufficiently related or potentially impaired interests within the meaning of Wis. Stat. § 803.09(1)." *Id.* JCLO's disagreement with DOJ's interpretation of Act 21 does not mean DOJ has neglected its duty to represent the state.

The Proposed Intervenor's discussion of *State v. City of Oak Creek*, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526, is irrelevant because that case involved DOJ proactively challenging the constitutionality of a statute. Leg. Resp. to DNR's Mot. to Modify Br. Schedule at 3-4. In this case, DOJ is not acting in bad faith by challenging the constitutionality Act 21. Further, the constitutionality of Act 21 is not implicated, much less the Legislature's "constitutional authority to establish the rules by which administrative agencies . . . must operate." *Id.* at 1. The Proposed Intervenor has therefore failed to show gross negligence or bad faith DOJ's part, and as such has failed

to overcome the heavy burden required to rebut the presumption of adequate representation.

Finally, Kinnard Farms, Inc. is representing the JCLO's preferred interpretation of Act 21 and has been since this case began. DOJ has only reconsidered the validity of its arguments with respect to DNR's authority to impose off-site groundwater-monitoring requirements. DOJ "continues to maintain that it is not explicitly required to impose animal-unit caps as a WPDES permit condition." DNR's Mot. to Modify Br. Schedule at 2, n.2. As such, the Proposed Intervenor's asserted interest is unquestionably and adequately represented in this case.

d. Allowing intervention as a matter of right in this case would violate policy objectives behind Wis. Stat. § 803.09.

Wisconsin courts have consistently interpreted and applied the intervention statute in a manner that attempts to "strike a balance between two conflicting public policies." *Bilder*, 112 Wis. 2d at 548. On one hand, "original parties to a lawsuit should be allowed to conduct and conclude

their own lawsuit." *Id.* On the other, persons should be allowed "to join a lawsuit in the interest of the speedy and economical resolution of controversies without rendering the lawsuit fruitlessly complex or unending." *Helgeland*, 2008 WI 9, ¶ 44. Just as Wis. Stat. § 803.09(2m) does not create an unconditional right of intervention, this provision does not override these longstanding, underlying policy objectives. Such an unconditional right to intervene would not just upset the balance between the two conflicting policies—it would break the scale.

Allowing JCLO to participate as a party in this case would unduly interfere with the original parties' ability to conduct and conclude their own lawsuit and unnecessarily complicate this case because it would inject politics into already politically divisive judicial proceedings. *See, e.g., Planned Parenthood* at *6 (citations omitted). Wis. Stat. § 803.09(2m) should not be interpreted in such a way that turns "the courtroom into a forum for political actors who claim ownership of the laws that they pass." *One Wis.*

Inst., Inc. v. Nichol, 310 F.R.D. 394, 397 (W.D. Wis. 2015). The Proposed Intervenor's attempt to involve itself in this case adds no value and has already delayed these proceedings.

Further, interpreting Wis. Stat. § 803.09(2m) to allow intervention in this case would fail to promote the speedy and economical resolution of controversies. To the contrary, it would lead to an absurd, judicially inefficient result. *State ex rel. Kalal v. Cir. Ct. of Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results."). Cases involving the constitutionality or construction of statutes are not a "narrow category of actions" as asserted by the Proposed Intervenor. Leg. Resp. to DNR's Mot. to Modify Br. Schedule at 6. Without the limiting principles contained in Wis. Stat. § 803.09(1) for intervention as a matter or right, a handful of legislators could vote to intervene in virtually any case where the judiciary might exercise its

constitutional prerogative "to say what the law is." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 50, 382 Wis. 2d 496, 914 N.W.2d 21 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

Adopting the Proposed Intervenor's broad interpretation of Wis. Stat. § 803.09(2m) would create results that Wisconsin courts have intentionally avoided when analyzing petitions for intervention. As stated by the Court of Appeals: "[a]llowing intervention in this case would open the door to similar intervention in any case with policy or budgetary ramifications, even when, as here, the executive branch, through the attorney general, fulfills its traditional role defending legislation before the court[.]" *Helgeland*, 2006 WI App 216, ¶ 16.

III. JCLO does not qualify for permissive intervention in this matter.

The Proposed Intervenor moves in the alternative for permissive intervention pursuant to Wis. Stat. § 803.09(2). This provision provides, in its entirety:

> Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Court must deny the Petition to Intervene permissively for the reasons that follow.

a. The Proposed Intervenor has no claim or defense in common with the main action.

A party may only permissively intervene based upon a claim or defense with questions of law or fact in common with the main action. Wis. Stat. § 803.09(2). The Proposed Intervenor fails to articulate a claim or defense that satisfies the standard for permissive intervention.

The terms "claim" and "defense" are not defined in Wis. Stat. ch. 803. However, "defense" as used in this subsection has been interpreted in accordance with its common legal meaning. "In the context of WIS. STAT. §

803.09(2), 'defense' conveys that the person seeking to intervene, although not named as a defendant, *could be* a defendant to a claim in the main action or a defendant to a similar or related claim." *Helgeland*, 2006 WI App 216, ¶ 40. Further, a "'claim' or 'defense' is more than arguments or issues a non-party wishes to address and is the type of matter presented in a pleading." *Id.*, ¶ 41.

The Proposed Intervenor could not be a defendant in this action, which is a challenge to DNR's permitting decisions. Instead of identifying a "claim or defense," JCLO describes a generalized interest in limits on administrative agency authority that amounts to a mere policy preference. The Petition to Intervene asserts an "interest and claim" in the "construction, scope, and application of Act 21." Leg. Pet. to Intervene at 5. It is unclear if the Proposed Intervenor intends "interest" and "claim" to be synonyms in this instance. The only further description in the Petition to Intervene of this "claim" is that "the Legislature has an interest in legislation that

clearly defines the limits of administrative agency authority." *Id.* That policy interest is not a "claim or defense" for purposes of permissive intervention. *Helgeland*, 2006 WI App 216, ¶¶ 40-43. This Court must therefore deny the Petition to permissively intervene in this case.

b. The Legislature is not an officer or agency that administers the statutes in question.

State or federal governmental officers or agencies may seek to intervene in cases where a party's claim or defense is based on a statute, rule, or executive action administered by that officer or agency. Wis. Stat. § 803.09(2). The Proposed Intervenor cannot intervene under this authority for a pair of reasons.

First, the Legislature is neither an "officer" nor an "agency." *See* Wis. Stat. § 227.01(1) (defining "agency"). Though not defined by statute, the Legislature is plainly not an "officer." Second, this provision allows an officer or agency to intervene as a party only to the extent that the officer or agency "administers" the implicated statute, rule,

or executive action. DNR alone administers the statutes and rules at issue here.

The Legislature therefore does not qualify for permissive intervention under the standard enunciated in Wis. Stat. § 803.09(2) for state governmental actors.

CONCLUSION

Petitioners-Respondents respectfully ask that the Court deny the Petition to Intervene in the above-captioned case.

Dated this 19th day of June 2019.

Respectfully submitted,

Tressie Kamp (State Bar No.1082298)
Robert D. Lee (State Bar No. 1116468)
Midwest Environmental Advocates
Attorneys for Lynda Cochart, Amy Cochart, Roger DeJardin, Sandra Winnemueller, and Chad Cochart
612 West Main St., Suite 302
Madison, Wisconsin 53703
tkamp@midwestadvocates.org
608-819-7729

Evan Feinauer (State Bar No. 1106524)
Kathryn Nekola (State Bar No. 1053203)
Clean Wisconsin
634 W. Main Street, Suite 300
Madison, WI 53703
efeinauer@cleanwisconsin.org
608-251-7020 x21

FORM AND LENGTH

CERTIFICATION

I hereby certify that this motion conforms to the rules contained in Wis. Stat. § 809.81 as to form and certification, and length requirement set forth in the supreme court order. The length of this brief is 5,383 words.

Dated: June 19, 2019.

Tressie Kamp

2019 WL 1771929
Only the Westlaw citation is currently available.
United States District Court, W.D. Wisconsin.

PLANNED PARENTHOOD OF WISCONSIN, INC., Dr. Kathy King, Natalee Hartwig, Sara Beringer and Katherine Melde, Plaintiffs,

v.

Joshua KAUL, Ismael Ozanne, Dawn Crim, Kenneth B. Simons, Timothy W. Westlake, Mary Jo Capodice, Alaa A. Abd-Elsayed, David A. Bryce, Michael Carton, Padmaja Doniparthi, Rodney A. Erickson, Bradley Kudick, Lee Ann R. Lau, David M. Roelke, Robert L. Zoeller, Peter J. Kallio, Pamela K. White, Romsemary Dolatowski, Jennifer Eklof, Elizabeth S. Houskamp, Sheryl A. Krause, Lillian Nolan and Luann Skarlupka, Defendants.

19-cv-038-wmc
|
Signed 04/23/2019

Synopsis

Background: Health care providers that provided abortion services brought action seeking declaration that various abortion-related laws violated the Fourteenth Amendment and the Equal Protection Clause. Wisconsin legislature filed motion to intervene.

Holdings: The District Court, William M. Conley, J., held that:

[1] legislature did not have right to intervene, and

[2] legislature was not permitted to intervene.

Motion denied.

Procedural Posture(s): Motion to Intervene.

West Headnotes (15)

[1] **Federal Civil Procedure**

There is a right to intervene when: (1) the motion to intervene is timely filed, (2) the proposed intervenors possess an interest related to the subject matter of the action, (3) disposition of the action threatens to impair that interest, and (4) the named parties inadequately represent that interest. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[2] **Federal Civil Procedure**

An intervenor has the burden to demonstrate each of requirement for intervention is satisfied. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[3] **Federal Civil Procedure**

A failure to establish any requirement for intervention is grounds to deny a petition to intervene. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[4] **Health**

Wisconsin legislature did not have right to intervene in health care providers' action seeking declaration that various abortion-related laws violated the Fourteenth Amendment and the Equal Protection Clause; statute purporting to provide legislature with authority to defend Wisconsin in federal court did not relieve legislature from satisfying requirements for intervening under federal rule, legislature's interest was not sufficiently

unique, parties were not stripping powers from legislature, and Wisconsin attorney general was not stripped of obligation to defend constitutionality of challenged statutes and regulations. U.S. Const. Amend. 14; Wis. Stat. Ann. §§ 253.10(3)(c)(1), 253.105(2)(a), 253.105(2)(b), 803.09(2); Fed. R. Civ. P. 24(a); Wis. Admin. Code Med § 11.03.

Cases that cite this headnote

[5] **Federal Civil Procedure**

Intervention as of right requires a direct, significant, and legally protectable interest in the question at issue in the lawsuit. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[6] **Federal Civil Procedure**

Establishing standing is not a sufficient basis to seek intervention as of right. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[7] **Federal Civil Procedure**

A legislator's personal support does not give him or her an interest sufficient to support intervention. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[8] **Federal Civil Procedure**

The desire to reenact invalidated legislation hardly serves as a cogent basis for intervening. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[9] **Federal Civil Procedure**

While concern with the stare decisis effect of a decision can be a ground for intervention, the decision of a district court has no authority as precedent. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[10] **Federal Civil Procedure**

Typically only a minimal showing of inadequate representation of a direct, unique, and threatened interest is required for intervention as of right. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[11] **Federal Civil Procedure**

When a representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to represent their interests adequately unless there is a showing of gross negligence or bad faith. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[12] **Constitutional Law**

Under Wisconsin law, the attorney general has the duty by statute to defend the constitutionality of state statutes. Wis. Stat. Ann. § 165.25(6).

Cases that cite this headnote

[13] **Federal Civil Procedure**

Permissive intervention is wholly discretionary. Fed. R. Civ. P. 24(b).

Cases that cite this headnote

[14] **Federal Civil Procedure**

In determining whether to exercise discretion to permit intervention, the court considers the prejudice to the original parties and the potential for slowing down the case. Fed. R. Civ. P. 24(b).

Cases that cite this headnote

[15] **Health**

Wisconsin legislature was not permitted to intervene in health care providers' action seeking declaration that various abortion-related laws violated the Fourteenth Amendment and the Equal Protection Clause, where intervention would have likely infused additional politics into already politically-divisive area of law and would have needlessly complicated case. U.S. Const. Amend. 14; Wis. Stat. Ann. §§ 253.10(3)(c)(1), 253.105(2)(a), 253.105(2)(b); Fed. R. Civ. P. 24(b); Wis. Admin. Code Med § 11.03.

Cases that cite this headnote

Attorneys and Law Firms

Leslie Anne Freehill, Lester A. Pines, Pines Bach LLP, Tamara Beth Packard, Cullen Weston Pines & Bach LLP, Madison, WI, Alison I. Stein, David B. Diesenhouse, Emily A. Bruemmer, Jessica A. Martinez, Susan J. Kohlmann, Jenner & Block LLP, Diana Olga Salgado, Planned Parenthood Federation of America, New York, NY, for Plaintiffs.

Brian P. Keenan, Jennifer Lynn Vandermeuse, Wisconsin Department of Justice, Madison, WI, for Defendants.

OPINION AND ORDER

WILLIAM M. CONLEY, District Judge

***1** Plaintiff Planned Parenthood of Wisconsin, Inc., and four of its health care providers bring this lawsuit against Wisconsin Attorney General Joshua Kaul, the District Attorney for Dane County Ismael Ozanne, in his official capacity and as a representative of a defendant class of District Attorneys, the Secretary of the Department of Safety and Professional Services Dawn Crim and members of the Medical Examining Board and the Board of Nursing. Plaintiffs claim that various laws and regulations unnecessarily require the participation of a physician (and at times the *same* physician) at various stages of the abortion services in violation of their rights, as well as the rights of their patients. (Compl. (dkt. #1).) In answering the complaint, defendants deny that these requirements violate the constitutional rights of plaintiffs or their patients. (Answ. (dkt. #20).) Presently before the court is a motion by the Wisconsin legislature that seeks to intervene in this ongoing lawsuit, either as a matter of right or by permission under Federal Rule of Civil Procedure 24. (Dkt. #21.) All the parties to this lawsuit oppose the motion. (Dkt. ##27, 28.) Having reviewed the parties' submissions, as well as the proposed intervenor's unsolicited reply brief (dkt. #30), the court will deny the motion for the reasons set forth below, principal of which is the failure of the proposed intervenor to distinguish controlling Seventh Circuit case law.

BACKGROUND

Plaintiffs filed their complaint on January 16, 2019, seeking a declaratory judgment that the following abortion-related regulations violate the Fourteenth Amendment and the Equal Protection Clause.

- Wis. Stat. § 940.15(5) and Wis. Admin. Code MED § 11.03, which prohibit anyone other than a physician from performing a medication or surgical abortion. (Compl. (dkt. #1) ¶ 2.)

- Wis. Stat. § 253.105(2)(a) and § 253.10(3)(c)(1), which require that "woman may not be given an abortion-inducing drug for a medication abortion unless the same physician who prescribes the drug has also conducted a pre-abortion physical examination of the woman at least 24 hours before the medication abortion is induced." (*Id.* at ¶ 5.)

- Wis. Stat. § 253.105(2)(b), which requires that a physician must be in the same room as the woman when she is given the abortion-inducing drug. (*Id.* at ¶ 6.)

As indicated above, defendants answered the complaint on March 21, 2019, denying that these regulations violate the Fourteenth Amendment. (Answ. (dkt. #20.)) On March 28, 2019, the Wisconsin legislature filed the present motion to intervene. This case is set for a preliminary pretrial conference with Magistrate Judge Steven Crocker today, April 23, 2019.

OPINION

I. Intervention as of Right

In this case, there is no statutory basis for intervention under 28 U.S.C. § 2403(b), because that provision is limited to cases where "the State or an agency, officer, or employee thereof is *not* a party." (Emphasis added.) Nevertheless, some courts have concluded that a lack of a statutory right to intervene does not undermine a finding of a right to intervene under Federal Rule of Civil Procedure 24(a). *See, e.g., Ne. Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1007-08 (6th Cir. 2006) (rejecting State's argument that it had a right to intervene under § 2403(b), but finding intervention as of right under Rule 24(a) was appropriate).

***2** **[1]** **[2]** **[3]** Rule 24(a) recognizes a "right to intervene when: (1) the motion to intervene is timely filed; (2) the proposed intervenors possess an interest related to the subject matter of the action; (3) disposition of the action threatens to impair that interest; and (4) the named parties inadequately represent that interest." *Wis. Educ. Ass'n Council v. Walker* ("*WEAC*"), 705 F.3d 640, 657–58 (7th Cir. 2013) (citing *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007)). The proposed intervenor has the burden to demonstrate each of these requirements is satisfied. *Ligas*, 478 F.3d at 773. "A failure to establish any of these elements is grounds to deny the petition. *Id.* (citing *United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003)).

[4] There is no dispute that the first element is met here. The Wisconsin legislature filed the motion to intervene approximately two and a half months after the complaint was filed and within a week of defendants' answer, before a schedule was even set in this case. However, all parties challenge whether the other three requirements are satisfied.

[5] As for the interest requirement, "[i]ntervention as of right requires a 'direct, significant[,] and legally protectable' interest in the question at issue in the lawsuit." *WEAC*, 705 F.3d at 658 (quoting *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)). The Wisconsin legislature argues that it is "well established that state legislatures (or legislators) have an interest in defending the constitutionality of legislative enactments when state law authorizes them to do so." (Proposed Intervenor's Br. (dkt. #22) 5.) In support, the proposed intervenor points to recently-enacted legislation providing:

> When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied ... the assembly, the senate, and the legislature may intervene as set forth under § 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in § 804.14.

Wis. Stat. § 803.09(2). [1] Section 13.365 further provides that the Joint Committee on Legislative Organization may retain legal counsel and seek to intervene. The Committee

authorized intervention in this lawsuit on March 14, 2019. (Proposed Intervenor's Br. (dkt. #22) 6.)

[6] The legislature also points to United States Supreme Court cases, which primarily address whether a legislative body has standing to represent the state's interest. (*Id.* at 5-6 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); *Karcher v. May*, 484 U.S. 72, 87, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987); *INS v. Chadha*, 462 U.S. 919, 930 n.5, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)).) As the Seventh Circuit has explained, however, establishing standing is not a sufficient basis to seek intervention as of right. *See* *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) ("The interest required by Article III is not enough by itself to allow a person to intervene in a federal suit and thus become a party to it. There must be more.").

Nothing in the earlier decisions by the United States Supreme Court cited by the proposed intervenor suggests otherwise. In *Arizonans for Official English*, the Supreme Court explained that its earlier decision in *Karcher* recognized that "state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests," but concluded that the coalition seeking to intervene on appeal was not a legislative body, and therefore its standing was in doubt. 520 U.S. at 66, 117 S.Ct. 1055. As a result, the Supreme Court did *not* consider whether the motion to intervene satisfied the requirements of Rule 24. Like the Seventh Circuit's *Flying J* decision, the other two Supreme Court cases concerned proposed intervention because the state attorney general or other state entities decided *not* to defend the challenged statute. *See* *Karcher*, 484 U.S. at 75, 108 S.Ct. 388 (allowing intervention after "it became apparent that neither the Attorney General nor the named defendants would defend the statute"); *Chadha*, 462 U.S. at 940, 103 S.Ct. 2764 ("Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.").

*3 In *Flying J*, the Seventh Circuit followed this approach, granting an association of Wisconsin gasoline dealer's motion to intervene on appeal because the Wisconsin attorney general opted *not* to appeal an adverse decision by the district court. The court explained:

> Had the association sought to intervene earlier, its motion would doubtless (and properly) have been denied on the ground that the state's attorney general was defending the statute and that adding another defendant would simply complicate the litigation. For there was nothing to indicate that the attorney general was planning to throw the case—until he did so by failing to appeal.

578 F.3d at 572.

So, too, here. A state statute purporting to provide the Wisconsin legislature with the authority under state law to defend the State in federal court, arguably satisfying the *standing* requirements under Article III, does *not* relieve the legislature from satisfying the requirements for intervening under a federal rule. Even if it did impact the calculus, the statute certainly does not automatically satisfy the requirements for intervention as of right under Rule 24(a).

[7] Putting aside this state statutory hook, the Seventh Circuit has instructed that the intervenor's "interest must be *unique* to the proposed intervenor." *WEAC*, 705 F.3d at 658 (emphasis added); *see also* *Keith*, 764 F.2d at 1268 ("The interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit."). Here, the Wisconsin legislature's interest -- defending the constitutionality of the challenged statutes and regulations -- is the *same* as that of the defendants. As this court previously explained in denying a similar motion to intervene in an earlier case, "a legislator's personal support does not give him or her

an interest sufficient to support intervention." *One Wis. Institute, Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (citing cases). [2]

Even if the Wisconsin legislature's interest were sufficiently unique, a proposed intervenor must also demonstrate that "the disposition of this action threatens to impair that interest." *WEAC*, 705 F.3d at 658. Here, the legislature complains that a decision in favor of plaintiffs could render the "majority votes in support of the challenged measures ... 'completely nullified.' " (Proposed Intervenor's Br. (dkt. #22) 7 (quoting *Raines*, 521 U.S. at 823, 117 S.Ct. 2312).) However, the proposed intervenor's interpretation of *Coleman* and *Raines* is also flawed. As the Eighth Circuit explained in *Planned Parenthood of Mid–Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573 (8th Cir. 1998), "*Coleman* related to whether legislators had standing in a lawsuit where they contended an allegedly illegal action of the Lieutenant Governor nullified their votes. It does not hold that when a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment can intervene." *Id.* at 578; *see also* *Raines*, 521 U.S. at 824 n.7, 117 S.Ct. 2312 (describing *Coleman* as recognizing that legislators have standing where "a bill they voted for would have become law if their vote had not been stripped of its validity"); *Risser v. Thompson*, 930 F.2d 549, 550 (7th Cir. 1991) (describing *Coleman*'s limited holding as "state legislators do indeed have standing to challenge measures that diminish the effectiveness of their votes"). Once again, there is no argument or basis to argue that the parties to this lawsuit are stripping powers from the legislative branch or otherwise nullifying their votes.

***4** Even if the cases cited by the proposed intervenor could be read as allowing intervention of a state legislature (or individual legislators) to defend their vote, the 2018-2019 Wisconsin legislature's interest in the legislation at issue in this case is far less clear than the interests at stake in the standing cases cited above, where the challenged legislation was enacted or up for passage in the current term. The challenged statutes and regulations implicated in this lawsuit are not new. The requirement that abortions "must be performed by physicians duly licensed by the medial examining board," now codified in Wisconsin Administrative Code § MED 11.03, was adopted in January 1974 in the wake of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). *See* No. 217, Wis. Admin. Reg. 19 (Jan. 1974) (Wis. Admin. Code MED § 12.03 (effective February 1, 1974)). [3] Similarly, the challenged statutes were enacted in 1985, 1995, and in 2011. *See* 1985 Wis. Act 56 sec. 35, p.642 (eff. Nov. 20, 2015) (codified as Wis. Stat. § 940.15(5)); 1985 Wis. Act 56, sec. 32, pp.641-42 (eff. Nov. 20, 1985) (codified as Wis. Stat. § 253.10); 1995 Wis. Act 309, sec. 4, pp.2034-38 (eff. May 16, 1996) (codified as Wis. Stat. § 253.10 (adding 24-hour language)); 2011 Wis. Act 217, sec. 10, pp.1252-53 (eff. Apr. 20, 2012) (codified as Wis. Stat. § 235.105). As such, the proposed intervenor's "nullified votes" argument does not fit with the circumstances of this case, even assuming the court were to adopt the proposed intervenor's broad reading of *Coleman* and its progeny.

[8] **[9]** The proposed intervenors also complain that an adverse decision in this case could have an impact on the legislature's ability to pass abortion-related legislation in the future. While any decision in this case necessarily will be limited to the challenged regulations, any attempt by the legislature to reenact the *same* regulations would be thwarted. However, the desire to reenact invalidated legislation hardly serves as a cogent basis for intervening. Moreover, while "concern with the stare decisis effect of a decision can be a ground for intervention, ... the decision of a district court has no authority as precedent." *Flying J*, 578 F.3d at 573. [4] As such, a concern about possible, future legislation is not sufficiently tied to the issues presented in this lawsuit to warrant intervention.

[10] **[11]** Even assuming the Wisconsin legislature could point to a direct, unique interest implicated by this lawsuit, and that this lawsuit somehow threatens to impair that interest, the proposed intervenor's argument that defendants, including Attorney General Kaul, "inadequately represent that interest" falls short. Typically, as the proposed intervenor notes, "only

a 'minimal' showing of inadequate representation" is required. *WEAC*, 705 F.3d at 659 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972)). The proposed intervenor, however, fails to acknowledge that "when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to represent their interests adequately unless there is a showing of gross negligence or bad faith." *Ligas*, 478 F.3d at 774; *see also* *WEAC*, 705 F.3d at 659 ("[W]hen the prospective intervenor and the named party have the same goal, a 'presumption [exists] that the representation in the suit is adequate.' ") (quoting *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994)). [5]

*5 **[12]** Here, the attorney general is a defendant in this case and the Wisconsin Department of Justice, which the Wisconsin attorney general oversees, is defending the constitutionality of the challenged statutes and regulations. Moreover, under Wisconsin law, the attorney general "has the duty by statute to defend the constitutionality of state statutes." *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 96, 307 Wis. 2d 1, 745 N.W.2d 1 (denying motion to intervene based on argument that attorney general would not adequately defend the law); *see also* *State Pub. Intervenor v. Wis. Dep't of Nat. Res.*, 115 Wis. 2d 28, 36, 339 N.W.2d 324, 327 (1983) ("[I]t is the attorney general's duty to defend the constitutionality of state statutes."); Wis. Stat. § 165.25(6) (setting forth authority of attorney general). Nothing about recently-enacted Wis. Stat. § 803.09(2) strips the attorney general of that obligation, nor have the proposed intervenor offered evidence that the attorney general does not intend to fulfill this responsibility.

Still, the Wisconsin legislature persists that this case "illustrates the divergence between the legislative and executive branches," arguing that Attorney General Kaul "may not litigate this case as ardently as the Legislature." (Proposed Intervenor Mot. (dkt. #22) 9.) Specifically, the proposed intervenor points to: the attorney general's endorsement by the political arm of Planned Parenthood during the election; his decision to join a lawsuit against the federal government challenging a regulation barring taxpayer-funded family planning clinics from referring patients to abortion providers; his decision to withdraw Wisconsin from two, multi-state amicus briefs defending abortion regulations *unrelated* to those challenged here, nor adopted by Wisconsin; and defendants' choice to file an answer, rather than a motion to dismiss. (*Id.* at 9-10.)

Even viewed collectively, this litany fails to demonstrate (or even come close to demonstrating) either gross negligence or bad faith. *See* *Ligas*, 478 F.3d at 774 (affirming district court's conclusion that "the inadequacy challenge was at best speculative, and at worst conclusory" (quotation marks omitted)). To the contrary, defendants answered the complaint, denying the allegations. Indeed, other than an odd "introduction" section full of argument, the proposed answer of the Wisconsin legislature, submitted with its motion to intervene, largely mirrors the answer submitted by defendants. (*Compare* Defs.' Answ. (dkt. #20), *with* Proposed Intervenor's Answ. (dkt. #22-1).) [6] Moreover, the same attorneys for the Wisconsin Department of Justice who previously diligently defended abortion regulations in this court and on appeal to the Seventh Circuit Court of Appeals have been assigned to this action, and there is also nothing to suggest that they will not fulfill their ethical obligations. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465 (W.D. Wis. Filed July 5, 2013); *id.*, No. 13-2726 (7th Cir. Filed Aug. 6, 2013); *id.*, No. 15-1736 (7th Cir. Apr. 6, 2015).

II. Permissive Intervention

[13] **[14]** In the alternative, the Wisconsin legislature seeks permissive intervention under Rule 24(b), which is "wholly discretionary." *Sokaogon v. Chippewa Cnty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000). In determining whether to exercise this discretion, the court considers the prejudice to the original parties and the potential for slowing down the case. *City of Chi. v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 987 (7th Cir. 2001). Moreover, this court has previously held, "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of

adequate representation by the government, the case for permissive intervention disappears." *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996); *see also One Wis. Institute*, 310 F.R.D. at 399 (same).

***6 [15]** For many of the same reasons the court found that the proposed intervenor failed to demonstrate a right to intervene, the court declines to exercise its discretion to allow it to intervene permissively. Moreover, to allow intervention would likely infuse additional politics into an already politically-divisive area of the law and needlessly complicate this case. *See* *Flying J.*, 578 F.3d at 572 (explaining that motion to intervene would have been denied if brought earlier when attorney general was defending lawsuit because "adding another defendant would simply complicate the litigation"); *One Wis. Institute*, 310 F.R.D. at 397 ("Rule 24 is not designed to turn the courtroom into a forum for political actors who claim ownership of the laws that they pass.").

While denying this motion, the Wisconsin legislature is free to seek leave to file amicus curiae briefs, *see* *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (setting forth Seventh Circuit standard for considering amicus curiae briefs), or to renew its motion if the attorney general declines at some point to defend the challenged statutes or regulations, or should he opt not to appeal an adverse final judgment as in *Flying J.*, 578 F.3d at 572-74 (granting motion to intervene after attorney general opted not to take appeal).

Finally, the Wisconsin legislature may appeal immediately this denial to the Seventh Circuit Court of Appeals. *See Shea v. Angulo*, 19 F.3d 343, 344–45 (7th Cir. 1994) (holding that the Seventh Circuit has "jurisdiction pursuant to 28 U.S.C. § 1291 because the denial of a motion to intervene, whether as of right or by permission of the court, is treated in this Circuit as a final appealable order"). If it elects to do so, however, it should do so promptly so as to not derail the schedule which will be set in this case today.

ORDER

IT IS ORDERED that the Wisconsin Legislature's motion to intervene (dkt. #21) is DENIED.

All Citations

--- F.Supp.3d ----, 2019 WL 1771929

Footnotes

1 As the proposed intervenor acknowledges, there are pending challenges to the constitutionality of this legislation. (Proposed Intervenor's Br. (dkt. #22) 6 n.1.)

2 Independent of its statutorily recognized interest, the proposed intervenor argues that its interest is "powerful," directing the court to *Coleman v. Miller*, 307 U.S. 433, 438, 59 S.Ct. 972, 83 L.Ed. 1385 (1939), for the proposition that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." (Proposed Intervenor's Br. (dkt. #22) 7 (quoting *Raines v. Byrd*, 521 U.S. 811, 823, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (discussing *Coleman*)).) Here, again, this argument concerns standing -- and even then, proves an ill fit for the reasons described below. Nor does it address how the legislature's interest in defending the challenged state regulations and laws is distinct from the interest of defendants.

3 Effective November 1, 1976, Wis. Admin. Code MED § 12.03 was replaced by Wis. Admin. Code MED § 11.03. *See* No. 250, Wis. Admin. Reg. 23 (Oct. 1976).

4 In its reply brief, the proposed intervenor contends that this language constitutes dicta since the court concluded that intervention was appropriate. The discussion, however, was material to the court's finding that the intervenor's rights would be impaired by the disposition of this lawsuit. In that case, intervention was not appropriate until the Wisconsin attorney general opted not to appeal an adverse decision. The court explained that while the adverse decision in the district court had no *stare decisis* effect -- and, thus, this was not an adequate basis to find an impairment of the proposed

intervenor's interest -- the lack of an appeal *would* impair the intervenor's interest. *Flying J.*, 578 F.3d at 573. As discussed below, if the state attorney general opts not to continue defending this lawsuit or appeal an adverse, then the legislature may renew its motion, and the court's analysis would likely change. Regardless, the fact that a district court's opinion has no stare decisis effect is well-established. *See* *Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 457 (7th Cir. 2005) ("[A]s we have noted repeatedly, a district court decision does not have stare decisis effect; it is not a precedent.").

5 In its reply brief, the proposed intervenor urges the court not to adopt the "bad faith or gross negligence" standard, arguing that this standard has not been endorsed by the United States Supreme Court. (Proposed Intervenor's Reply (dkt. #30) 9.) This argument is silly. The Seventh Circuit has repeatedly required a showing of bad faith or gross negligence to rebut the presumption of adequacy of representation when the party is charged with defending against a constitutional challenge. *See* *United States v. South Bend Cmty. Sch. Corp.*, 692 F.2d 623, 627 (7th Cir. 1982); *United States v. Bd. of Sch. Comm'rs of Indianapolis*, 466 F.2d 573, 575–76 (7th Cir. 1972); *cf.* *WEAC*, 705 F.3d at 659 (acknowledging standard but not applying it because the state is not charged with protecting the First Amendment interests of the proposed intervenor state employees). Moreover, other circuits have also adopted it. *See, e.g.*, *United States v. Franklin Par. Sch. Bd.*, 47 F.3d 755, 758 (5th Cir. 1995) (affirming denial of intervention and dismissing appeal where there was no evidence of "bad faith" on part of defendant); *United States v. State of Ga.*, 19 F.3d 1388, 1394 (11th Cir. 1994) (denying motion to intervene, finding "absolutely no evidence in the record before us of gross negligence or bad faith"). The fact that Wis. Stat. § 803.09(2) purports to give the legislature the authority to represent the State in court does not undermine the long-standing statutory authority of the attorney general. Regardless, this court is bound by Seventh Circuit precedent.

6 The proposed intervenor contends that it would have filed a motion to dismiss or a motion for judgment on the pleadings, and that if its motion is granted, it will promptly do so. This argument, however, is simply a "quibble[ ] with the state's litigation strategy," and does not rise to the level of negligence or bad faith, or otherwise support a finding that the attorney general is not adequately representing the State's interests. *WEAC*, 705 F.3d at 659.

End of Document