No. 19-1835

In the United States Court of Appeals for the Seventh Circuit

PLANNED PARENTHOOD OF WISCONSIN, INC., et al.,

Plaintiffs-Appellees,

v.

JOSHUA L. KAUL, et al.,

Defendants-Appellees.

APPEAL OF: WISCONSIN LEGISLATURE,

Proposed Intervenor.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:19-cv-00038-wmc.
The Honorable **William M. Conley**, Judge Presiding.

BRIEF OF APPELLANT WISCONSIN LEGISLATURE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1835

Short Caption: Wisconsin Legislature v. Joshua Kaul et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Wisconsin Legislature

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Consovoy McCarthy PLLC (name changed from Consovoy McCarthy Park PLLC on May 16, 2019 following departure of partner)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Jeffrey M. Harris Date: 5/24/2019

Attorney's Printed Name: Jeffrey M. Harris

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Patrick Strawbridge Date: 5/24/2019

Attorney's Printed Name: Patrick Strawbridge (admission to Seventh Circuit Bar pending)

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents important and novel questions about the interplay between state law and the criteria for intervention under Federal Rule of Civil Procedure 24. It is the first federal case to address Wis. Stat. § 803.09(2m), which authorizes the Wisconsin Legislature to intervene in proceedings involving constitutional challenges to state statutes. In denying the Legislature's motion to intervene, the district court embraced a narrow interpretation of Rule 24 that effectively nullifies Wisconsin's policy judgments about who speaks for the State in constitutional litigation in federal court. To give these important issues of first impression the full airing they deserve, the Legislature respectfully requests oral argument.

STATEMENT OF JURISDICTION

This case involves a constitutional challenge to several longstanding Wisconsin laws regulating certain aspects of abortion procedures. Plaintiff-Appellees are Planned Parenthood of Wisconsin, Inc., and several of its physicians and nurse practitioners. Defendant-Appellees are the Attorney General of Wisconsin and a number of other state officials (all sued in their official capacities) who have some role in administering the challenged laws.

The U.S. District Court for the Western District of Wisconsin had jurisdiction over this case under 28 U.S.C. § 1331 because Plaintiff-Appellees allege that the challenged state laws violate the Due Process and Equal Protection Clauses of the U.S. Constitution.

Plaintiff-Appellees filed their complaint on January 16, 2019. On March 28, 2019, the Wisconsin Legislature (Appellant here) filed a motion to intervene as a defendant, arguing that it was entitled to intervention as of right under Rule 24(a)(2) or permissive intervention under Rule 24(b)(1). On April 23, 2019, the district court issued an Opinion and Order denying the Legislature's motion to intervene, which is the order at issue here. *See* App. 1-14. The Legislature filed a timely notice of appeal on April 29, 2019.

This Court has jurisdiction under 28 U.S.C. § 1291. *See CE Design, Ltd. v. Cy's Crab House North, Inc.*, 731 F.3d 725, 730 (7th Cir. 2013) ("[F]rom the perspective of a disappointed prospective intervenor, the denial of a motion to intervene is the end of the case, so an order denying intervention is a final, appealable decision under 28 U.S.C. § 1291."). There is ongoing litigation in the district court regarding the underlying merits of Plaintiff-Appellees' claims, but that litigation is irrelevant to this Court's appellate jurisdiction because the denial of Appellant's intervention motion is a final, appealable order under § 1291.

STATEMENT OF ISSUES

Recognizing the Legislature's independent institutional interest in defending the constitutionality of its enactments, Wisconsin law authorizes the Legislature to intervene in proceedings involving constitutional challenges to state statutes. *See* Wis. Stat. § 803.09(2m). The district court nonetheless refused to allow the Legislature to intervene in this case, holding that it had no cognizable interest in defending the validity of state laws and that the Legislature's interests were adequately represented by the Attorney General. The questions presented on appeal are:

1. Does the Legislature have an "interest" in defending the constitutionality of its enactments that would warrant intervention as of right under Rule 24(a)(2)?

2. When state law expressly authorizes a co-equal branch of government to intervene in litigation, is an intervention motion under Rule 24(a)(2) governed by the normal, minimal standard for adequacy of representation or instead by a heightened standard that requires a showing of gross negligence or bad faith by the existing defendants?

3. In the alternative, did the district court abuse its discretion by refusing to grant the Legislature permissive intervention under Rule 24(b)?

STATEMENT OF THE CASE

I. The Wisconsin Legislature's Independent Authority to Defend the Constitutionality of State Statutes

In times of divided government, a state attorney general can seek to use litigation tactics to nullify state laws that he or she opposes. If a statute is challenged as violating the U.S. Constitution, the attorney general can effectively repeal it with no action by the legislature by failing to mount a defense. *Cf. United States v. Windsor*, 570 U.S. 744, 762 (2013) ("[W]hen Congress has passed a statute and a President has

signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court."). The attorney general could also undermine state law by settling a constitutional challenge on favorable terms to the plaintiffs or by declining to take an appeal following an initial decision striking down the law. Alternatively—but just as problematically—the attorney general can mount a halfhearted defense of a law that he or she opposes, thereby making invalidation of the statute far more likely.

Wisconsin sought to avoid these problems by ensuring that state laws would *always* have a vigorous defense when they are challenged in state or federal court. Wisconsin law provides that "[w]hen 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 § 801.14." Wis. Stat. § 803.09(2m). Section 13.365, in turn, allows the Joint Committee on Legislative Organization to retain legal counsel and intervene in actions on behalf of the Legislature. In short,

when the constitutionality of a Wisconsin law is called into question, state law authorizes the Legislature to participate in the defense of its enactment.[1]

Other States have conferred similar power on their legislatures to defend the constitutionality of state laws. For example, "when the State of North Carolina is named as a defendant" in a constitutional challenge to a state statute, "both the General Assembly and the Governor constitute the State of North Carolina," and any "federal court presiding over any such action" is "requested to allow both the legislative branch and the executive branch of the State of North Carolina to participate in any such action as a party," unless the legislature expressly waives that right to participate. N.C. Gen. Stat. § 1-72.2; *see also id.* § 120-32.6(b). Similarly, Nevada law grants its legislature an "unconditional right and standing to intervene" in, *inter alia*, any action in which a party

[1] Various challenges have been filed to the legislation that adopted the intervention provision, but that provision is in full force and effect. A trial judge had temporarily enjoined the statute on the ground that the Legislature adopted it in an improper session, but the Wisconsin Court of Appeals promptly stayed that decision pending further appellate proceedings. *See League of Women Voters v. Evers*, No. 2019AP559, 2019 WL 1397017, at *4 (Wis. Ct. App. Mar. 27, 2019). And another trial court refused to enjoin the intervention provision, explaining that the court "cannot say at this time that plaintiffs are reasonably likely to prove that the Senate's or the Assembly's power to intervene violates the Wisconsin Constitution." *SEIU, Local 1 v. Vos*, No. 2019-cv-302, 2019 WL 1396826, *21 (Wis. Cir. Ct., Mar. 26, 2019).

challenges the "validity, enforceability or constitutionality" of any state law. Nev. Rev. Stat. 218F.720(2)-(3); *see People's Legislature v. Miller*, No. 2:12-cv-00272-MMD, 2012 WL 3536767, at *5 (D. Nev. Aug. 15, 2012) (granting Nevada Legislature's motion to intervene under Rule 24(a)(2) in constitutional challenge to state law).

II. Planned Parenthood's Complaint

Cases like this one are precisely why the Legislature enacted the intervention provision. From 2007 to 2018, the Wisconsin Attorney General strongly defended the constitutionality of state legislation regulating abortion practices. For example, the Attorney General defended—up to the U.S. Supreme Court—Wisconsin's legislation requiring that abortion doctors obtain admitting privileges at a local hospital. *See Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016). In November 2018, however, Josh Kaul—a candidate who took a starkly different view of abortion-related legislation than the previous Attorney General, and who was strongly endorsed by pro-abortion groups—was elected Attorney General.

Mr. Kaul took office on January 7, 2019. *Nine days later*, on January 16, 2019, Plaintiff-Appellees—Planned Parenthood of

Wisconsin, Inc., and several of its physicians and nurse practitioners—filed a 56-page complaint challenging three longstanding provisions of Wisconsin law: (1) statutes and regulations that prohibit anyone other than a physician from performing a medication or surgical abortion; (2) statutes and regulations providing that any abortion-inducing drugs must be administered by the same physician who conducted a pre-abortion physical examination at least 24 hours before the abortion is performed; and (3) a statute requiring that the physician be physically present when the abortion-inducing drug is administered. Dkt. No. 1 at 1-3. Plaintiff-Appellees allege that these laws violate the Due Process and Equal Protection Clauses of the U.S. Constitution. *Id.* at 48-51.

On March 21, 2019, Defendant-Appellees—represented by the new Attorney General—filed an answer consisting solely of boilerplate denials. *See* Dkt. No. 20. Defendant-Appellees did not move to dismiss the complaint even though the Supreme Court has held that laws very similar to the ones challenged here are not unconstitutional. *See*, *e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992) ("Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed

professionals, even if an objective assessment might suggest that those same tasks could be performed by others."); *Mazurek v. Armstrong*, 520 U.S. 968, 973-75 (1997) (per curiam) (holding that "States may mandate that only physicians perform abortions," and noting that *Casey* itself had upheld a "physician-only requirement"); *see also A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (noting that in *Mazurek* the Supreme Court upheld a physician-only abortion law "without factual inquiries into whether other medical professionals could do the job as safely, and how much prices may be elevated by a physician-only rule").

With no motion to dismiss filed, the case is currently heading for more than a year of costly and burdensome litigation. Under the current schedule, expert discovery will take place through February 2020, dispositive motions will be filed in May 2020, and a trial is scheduled for December 2020. *See* Dkt. No. 32 (Preliminary Pretrial Conference Order).

III. The District Court's Denial of the Legislature's Intervention Motion

On March 28, 2019, the Wisconsin Legislature filed a motion to intervene as of right under Rule 24(a)(2) or, in the alternative, by permission under Rule 24(b). *See* Dkt. Nos. 21, 22. As required by Rule

24(c), the Legislature included with its motion a draft pleading setting forth "the claim or defense for which intervention is sought." *See* Dkt. No. 22-1. The Legislature stated in its motion that, if granted party status, it would "seek dismissal or judgment on the pleadings at the earliest possible opportunity on the ground that Plaintiffs' claims fail as a matter of law." Dkt. No. 21 at 2.

The Legislature argued that intervention as of right was warranted because Wisconsin law expressly authorized the Legislature to defend the constitutionality of its enactments. *See* Dkt. No. 22 at 5-8. The Legislature further argued that no other party adequately represented its interests. The new Attorney General was strongly endorsed by pro-abortion groups—including groups affiliated with Plaintiff-Appellees here—and has taken several actions in other cases that raise serious questions about whether he will zealously defend Wisconsin's abortion-related regulations. *Id.* at 8-10. In the alternative, the Legislature sought permissive intervention on the ground that its arguments shared common questions of law or fact with the parties' contentions, and would not result in undue delay or prejudice. *Id.* at 10-11.

The district court denied the motion to intervene in an Opinion and Order issued on April 23, 2019. *See* App. 1-14. The court held that the Legislature's motion was timely, App. 4, but concluded that it did not satisfy the remaining criteria for intervention as of right under Rule 24(a)(2).

The district court first held that the Legislature had no cognizable interest in defending the constitutionality of its enactments, notwithstanding clear state law authorizing it to do just that. *See* App. 4-7. Conflating the "interest" and "adequacy" elements, the court held that so long as the Attorney General was defending the constitutionality of the challenged laws, the Legislature had no interest in participating in the case. App. 5-7. And the court further reasoned that the current Legislature had no interest in defending statutes that had been enacted in earlier legislative sessions, nor did it have an interest in defending against a broad constitutional holding that could constrain its ability to enact future legislation regarding abortion practices. App. 7-9.

The district court next held that even if the Legislature had a sufficient interest in this case, it was adequately represented by the Attorney General. App. 9-12. In reaching that conclusion, the district

court held that the Legislature could not refute a showing of adequacy unless it demonstrated "gross negligence or bad faith" by the Attorney General. App. 10-11. Applying that highly demanding standard, the court found that the Attorney General adequately represented the Legislature's interests notwithstanding his close political relationship with the plaintiffs; his actions in other cases that show his opposition to reasonable regulation of abortion practices; and his curious litigation decisions in this case, such as his baffling refusal to file a motion to dismiss despite a number of on-point Supreme Court decisions. App. 11-12.

Finally, the district court held that the Legislature was also not entitled to permissive intervention under Rule 24(b). App. 12-13. The court based that holding on unspecified concerns about "complicat[ing]" the case, and noted that its decision turned on "many of the same reasons" as its analysis of intervention as of right. App. 13. The court stated that the Legislature could file amicus briefs and could "renew its motion if the attorney general declines at some point to defend the challenged statutes or regulations." *Id.*

SUMMARY OF ARGUMENT

I. The district court correctly concluded that the Legislature's motion to intervene was timely, but erred in its analysis of the other criteria for intervention as of right under Rule 24(a)(2).

A. The Legislature—a coequal branch of the Wisconsin state government—has a clear interest in this matter, and that interest would be impaired by an unfavorable decision. Wisconsin law recognizes the Legislature's unique institutional interest in defending the constitutionality of its enactments, and has expressly authorized the Legislature to participate in the defense of state statutes. Courts have routinely allowed legislatures or legislators to participate in litigation involving constitutional challenges to state laws; that participation would have been impossible if a legislature had no interest in defending its enactments. Even the district court recognized as much, noting that the court may allow the Legislature to intervene later in the case if the attorney general declined to defend the challenged laws.

The district court nonetheless held that the Legislature has no interest in this case because the Attorney General is already defending the challenged statutes. But that reasoning conflates the distinct elements of the *interest* and the *adequacy of representation*. The whole

point of the adequacy element is to consider whether intervention is appropriate given the existing parties to the case. But that is a separate question from whether the movant has an *interest* in the subject matter of the suit. The district court cited no authority for the counterintuitive (and legally foreclosed) proposition that a state legislative body has no cognizable interest in ensuring that its enactments are not nullified. And the district court's reasoning proves far too much: if the court's analysis of the interest element were correct, then a legislature or legislators would *never* be able to intervene to defend the constitutionality of a law, even if the state attorney general declined to defend it. The "interest" and "impairment" elements of Rule 24(a)(2) are readily satisfied here.

B. The Legislature also established that the Attorney General does not adequately represent its independent institutional interests in defending the challenged statutes. Although many States give their attorneys general exclusive litigation authority in constitutional challenges to state statutes, Wisconsin has made a different choice by authorizing its Legislature to independently participate in the defense of state laws. That sovereign determination should be entitled to comity and respect. A federal court's determination that the Attorney General

adequately represents the Legislature's interests notwithstanding a state law that makes the exact opposite determination would inflict a serious sovereign harm on Wisconsin and would nullify its policy judgment about how its laws should be defended.

In all events, developments in this litigation and other cases make clear that the Attorney General does not adequately represent the Legislature's interests. The Attorney General is a close political ally of pro-abortion groups—including groups affiliated with Plaintiff-Appellees—who strongly supported his campaign. Even though the challenged laws have been in force for years (and, in some cases, decades), Plaintiff-Appellees brought this suit just *nine days* after the new Attorney General took office. The Attorney General then declined to file a motion to dismiss notwithstanding multiple on-point Supreme Court decisions; as a result of this baffling decision, it will likely take nearly two years of costly and protracted litigation for the case to be resolved.

The Attorney General's conduct in other cases also raises serious doubts about his willingness to zealously defend legislation regulating abortion. In just his first few months in office, the Attorney General has withdrawn from two multi-state amicus briefs that defend reasonable

state regulations of abortion practices, and has sued the federal government to challenge regulations that prohibit certain recipients of federal funds from making referrals to abortion providers.

The district court nonetheless found that the Attorney General adequately represented the Legislature's interests. But the court reached that holding only by applying an extremely demanding test that was designed for a different type of situation. Because the Attorney General was defending the challenged laws, the district court required the Legislature to demonstrate *bad faith or gross negligence* to prove inadequate representation. But each of the cases the district court cited involved a situation in which private parties were seeking to intervene as defendants even though the government was defending the challenged law. Granting intervention would have thus allowed non-governmental intervenors to usurp the government defendants' exclusive litigating authority.

The concerns that led courts to apply a heightened standard of adequacy in that context are entirely absent here. Far from intruding upon the Attorney General's exclusive litigating authority, the Legislature is *independently* authorized under Wisconsin law to defend

the constitutionality of state statutes. Indeed, the Wisconsin intervention statute is premised on a presumption that the Attorney General will *not* necessarily defend the Legislature's unique institutional interests, especially when the challenged statutes involve politically sensitive matters where the Attorney General may not agree with the policy underpinning the legislation. The bad-faith-or-gross-negligence standard was designed for a very different type of situation and should have no applicability here.

II. In the alternative, the district court abused its discretion by denying permissive intervention under Rule 24(b). The Legislature sought to intervene early in the litigation, before any meaningful proceedings had taken place, and its participation would have resulted in the addition of just one additional party. And to the extent there were concerns about delaying or complicating the litigation, the district court could have imposed reasonable limits on the Legislature's participation rather than denying intervention outright.

The district court held that because the Legislature's interests were purportedly represented by the Attorney General, permissive intervention must be denied as well. But nothing in the text of Rule

24(a)(2) imposes an adequacy requirement; it merely requires that the motion be timely and that the intervenor's claim or defense share common questions of law or fact with the main action. This Court has repeatedly held that district courts cannot engraft additional requirements onto the text of Rule 24(b). The district court's analysis thus rested on a basic error of law and should be reversed for that reason alone.

ARGUMENT

I. Standard of Review

In considering a denial of a motion to intervene as a matter of right under Rule 24(a), this Court reviews timeliness determinations for abuse of discretion, and all other elements of the intervention inquiry de novo. *See Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705-06 (7th Cir. 2001).

A denial of permissive intervention under Rule 24(b) is reviewed for abuse of discretion. *See id.* at 707. "[B]ut a legal error by the court is necessarily an abuse of discretion." *Westefer v. Neal*, 682 F.3d 679, 683 (7th Cir. 2012).

II. The District Court Erred by Denying Intervention as of Right Under Rule 24(a)(2).

Under Rule 24(a)(2), intervention as a matter of right is appropriate when, upon a timely motion, a party

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Rule 24 "should be liberally construed with all doubts resolved in favor of the proposed intervenor." *S.D. ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003); *accord Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011); *Clark v. Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953).

Appling Rule 24(a)(2), this Court has held that a party may intervene as of right if: (1) the application is timely; (2) the applicant claims an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) existing parties do not adequately represent the applicant's interests. *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 700 (7th Cir. 2003) (citing *Sokaogon Chippewa Cmty. v. Babbitt*, 214

F.3d 941, 945-46 (7th Cir. 2000)). The Legislature readily satisfies each of these criteria, and the district court erred by concluding otherwise.[2]

A. The Legislature has an interest in this case that could be impaired by an unfavorable decision.

1. "Intervention as of right requires a direct, significant, and legally protectable interest in the question at issue in the lawsuit." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) ("*WEAC*") (cleaned up). The Supreme Court and this Court have "encourag[ed] liberality in the definition of an interest." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). The proposed intervenor must also show that it is "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Here, the Legislature plainly has an interest in this case that could be impaired by an adverse decision.

The Legislature—a co-equal branch of the Wisconsin government—has a legally protectable interest in this case because state law expressly

[2] No party disputed that the Legislature's motion was timely, and the district court found that element to be satisfied. *See* App. 4 (finding motion timely because 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 the case").

grants it such an interest. Wisconsin law provides that "[w]hen 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 § 801.14." Wis. Stat. § 803.09(2m). Section 13.365, in turn, allows the Joint Committee on Legislative Organization to retain legal counsel and seek to intervene in an action on behalf of the Legislature. Here, the Joint Committee authorized intervention in this suit on March 14, 2019, and retained undersigned counsel shortly thereafter. The Legislature thus has an interest in this case pursuant to its express grant of authority under Wisconsin law. *See*, *e.g.*, *Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 703-04 (M.D.N.C. 2014) (holding that the "authorized representatives of the legislature" had an interest in "defend[ing] the constitutionality of legislation passed by the legislature").

The Supreme Court has recognized several times that legislative bodies (or legislators) have an interest in defending the constitutionality of their enactments when they are authorized to do so by law. *See, e.g., Karcher v. May,* 484 U.S. 72, 82 (1987) ("Since the New Jersey

Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant."); *INS v. Chadha*, 462 U.S. 919, 930 n.5 (1983) (holding that Congress was a proper party to defend the one-house legislative veto where both houses, by resolution, had authorized intervention in the litigation); *Arizonans for Official English v. Arizona,* 520 U.S. 43, 65 (1997) ("We have 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.").[3] Just as in those cases, the Legislature here has a sufficient interest to warrant intervention because it has "authority under state law to represent the State's interests." *Karcher*, 484 U.S. at 82.

Moreover, even apart from any state-law grant of authority, courts have recognized that legislative bodies have "an independent interest in defending the validity of [state] laws and ensuring that those laws are

[3] Numerous other cases have also allowed legislators or legislatures to intervene as parties in defense of their enactments. *See*, *e.g.*, *United States v. Windsor*, 570 U.S. 744 (2013); *McLaughlin v. Hagel*, 767 F.3d 113 (1st Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991); *Synar v. United States*, 626 F. Supp. 1374, 1378-79 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

enforced." *Ne. Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006). In *Coalition for the Homeless*, the Sixth Circuit granted intervention as of right under Rule 24(a)(2) to the State of Ohio and the Ohio General Assembly in a suit against the Ohio Secretary of State challenging the constitutionality of absentee voting laws; the court held that the State and the General Assembly had independent interests in the challenged laws that were not adequately represented by the Secretary. *See id.*

There is also no question that the Legislature's interests could be impaired by an adverse ruling. If the Legislature has an interest in defending its enactments—which it does for all the reasons noted above—then those interests would self-evidently be impaired if the challenged statutes were struck down as unconstitutional. *See*, *e.g.*, *Revelis v. Napolitano*, 844 F. Supp. 2d 915, 925 (N.D. Ill. 2012) ("[Legislators'] interest in upholding the constitutionality of [the Defense of Marriage Act] in this and subsequent proceedings plainly would be impaired by a ruling in favor of Plaintiffs."). The Supreme Court has also held that state legislators "have a plain, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman v. Miller*, 307 U.S. 433, 438 (1939),

an interest that is significantly impaired when duly enacted legislation is enjoined by the courts. *See also Raines v. Byrd*, 521 U.S. 811, 823 (1997) (state legislators have standing to bring suit to challenge actions that could result in their votes being "completely nullified").

2. In ruling to the contrary, the district court held that the Legislature—a co-equal branch of state government and the entity that enacted the challenged statutes—has *no interest* in defending the constitutionality of its enactments. *See* App. 4-9. That holding was flawed on several levels.

At the outset, the district court's holding flouts the long line of precedent holding that legislative bodies or legislators may be proper parties to defend the constitutionality of state laws. *See supra* II.A.1. If legislatures had no interest in defending their enactments, then they would *never* be allowed to intervene under Rule 24(a)(2), full stop. The district court's holding thus proves too much. Indeed, even the district court refused to accept the full implications of its reasoning; the court strongly suggested that it would allow the Legislature to intervene later in this case if the Attorney General stops defending the challenged statutes. *See* App. 13. But such intervention would, of course, be

impossible if the Legislature had no interest in defending the constitutionality of its enactments.

In finding no interest under Rule 24(a)(2), the district court relied primarily upon *Flying J, Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009), which is surprising given that *Flying J* reversed a denial of intervention and held that the appellant was entitled to intervene as of right. This Court found that the proposed intervenor—an association of gasoline dealers that was the beneficiary of a challenged state law—had a sufficient interest to intervene to defend the statute after the Attorney General declined to pursue an appeal from an unfavorable ruling. *Id.* at 571-72.

The district court relied heavily on dicta in *Flying J* suggesting that the association would not have been allowed to intervene earlier in the case "while the state's attorney general was defending the statute." *Id.* at 572. But the Court made that statement while discussing the element of *timeliness*, not the movant's interest; the Court was merely observing that the dealers had filed their motion promptly once the need for intervention became apparent. *Id.*

Even more fundamentally, however, the district court erred by relying on *Flying J* for the proposition that an intervenor has no legally protectable interest under Rule 24(a)(2) as long as the state attorney general is defending the challenged law. *See* App. 5-6. That reasoning conflates the distinct elements of the *interest* and the *adequacy of representation*. Nothing about the dealers' interest in *Flying J* would have changed depending on whether the Attorney General was defending the statute; the only thing that could have changed is whether that interest was adequately protected by the existing parties. But adequacy of representation—which is discussed at length below, *see infra* II.B—is a separate element of the intervention inquiry. This Court did not hold (or even suggest) in *Flying J* that the dealers had no cognizable interest in the case as long as the Attorney General was defending the statute.

For the same reasons, the district court missed the mark when it attempted to distinguish the Supreme Court's decisions in *Karcher* and *Chadha* on the ground that, in those cases, the "attorney general or other state entities decided *not* to defend the challenged statute." App. 5. *Karcher* and *Chadha* both involved a legislature or legislators who were allowed to intervene to defend the challenged legislation. *See Karcher*,

484 U.S. at 77 (noting that legislators had "intervened in this lawsuit in their official capacities as presiding officers on behalf of the New Jersey Legislature"); *Chadha*, 462 U.S. at 930 n.5 (noting that House and Senate were granted intervention and were therefore proper parties to the case). It follows *a fortiori* that those parties must have had a sufficient interest in defending the constitutionality of their enactments to satisfy the requirements of Rule 24. The interest the Legislature asserts here is in all relevant respects identical to the interests of the intervenors in *Karcher* and *Chadha*.

The district court also cited *Flying J* for the proposition that "more" than Article III standing is needed to warrant intervention under Rule 24(a)(2). *See* App. 5-6. But this Court made that statement while discussing *economic* interests; the Court was merely explaining that a party cannot satisfy Rule 24(a)(2) just because the case would have some indirect impact on its business. 578 F.3d at 571. But in the context of a legislature's *institutional* interests, the same type of interest can satisfy both Article III and Rule 24(a)(2). That was the case in *Karcher* and *Chadha*; if the legislators had lacked the requisite interest under Rule 24, they never would have been allowed to intervene in the first place.

Here, the district court repeatedly noted that more than just Article III standing was needed, but it cited no authority for the proposition that a legislature's interest in defending its enactments was *insufficient* to satisfy the "interest" element of Rule 24(a)(2).

The district court further asserted that the Legislature did not have a *unique* interest in this case vis-à-vis the Attorney General. *See* App. 6. Once again, that argument addresses issues that are more relevant to adequacy than to the interest element. The two cases the district court cited—*WEAC*, 705 F.3d at 658, and *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985)—did not turn on any holding about "uniqueness" and mentioned that word only in passing. The cases used the term to mean only that an intervenor must have its *own* interest, rather than assuming the interest of "an existing party in the suit." *Keith*, 764 F.2d at 1268. In all events, even if there were a "uniqueness" gloss on the interest element of Rule 24(a)(2), it would be satisfied here: Wisconsin law is clear that the Legislature—a co-equal branch of government—has a unique, *independent* interest in defending the constitutionality of its enactments, regardless of any actions taken by the Attorney General. That is the entire point of the intervention statute.

The district court also cited *Planned Parenthood of Mid-Missouri v. Ehlmann*, 137 F.3d 573 (8th Cir. 1998), and *One Wisconsin Institute, Inc. v. Nichol*, 310 F.R.D. 394 (W.D. Wis. 2015), for the proposition that a legislator's vote or personal support for a piece of legislation is not a cognizable interest under Rule 24(a)(2). *See* App. 6-7. But the proposed intervenors in both cases were *individual legislators*, not the entire legislative body. And, unlike this case, nothing in state law authorized them to defend the constitutionality of legislation. Indeed, the Eighth Circuit distinguished *Ehlmann* from a case—like this one—where "legislators may obtain standing to defend the constitutionality of a legislative enactment when authorized by state law." 137 F.3d at 578 (citing *Karcher*).

Finally, the district court asserted that any interests the Legislature might have in the challenged statutes were too attenuated given that those laws had been enacted years earlier. *See* App. 8 (suggesting that Legislature only had an interest in legislation "enacted or up for passage in the current term"). The district court cited no authority for that proposition, and there is none. Once again, the district court's theory proves far too much. Under the court's conception of the

relevant interest, a legislature would not be able to intervene to defend an earlier enactment *even if the attorney general failed to defend it*, since the current legislature's interests would have become too attenuated to be impaired. Nothing in law or logic supports the district court's myopic approach to the interest element of Rule 24(a)(2).

B. The Attorney General does not adequately represent the Legislature's unique institutional interests.

1. Contrary to the district court's holding, *see* App. 9-12, no current party to this litigation adequately represents the Legislature's unique institutional interests. A party seeking to intervene under Rule 24(a)(2) need only show that the "representation of [its] interest '*may be*' inadequate; and the burden of making that showing should be treated as minimal." *Lake Invest. Dev. Grp. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1261 (7th Cir. 1983) (emphasis added; quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (intervention appropriate if parties "do not have sufficiently congruent interests").

At the outset, the whole premise of Wis. Stat. § 803.09(2m) is that the Legislature—a co-equal branch of the Wisconsin government—has an *independent* institutional interest in the defense of its enactments as

a matter of state law, regardless of whether the Attorney General is also participating in the case. Policies and priorities change depending on the outcomes of elections, and the Attorney General may have weaker incentives to defend some types of legislation than others—especially when the laws reflect policies with which the Attorney General disagrees.

Section 803.09(2m) thus provides the Legislature a mechanism to ensure that its enactments are always defended to the fullest possible extent, regardless of the Attorney General's views about a particular law. Under Wisconsin law, the Legislature has the power to define the Attorney General's "powers and duties," *State v. City of Oak Creek*, 605 N.W. 2d 526, 535-36 (Wis. 2000), and here the Legislature made a reasoned policy judgment that the Attorney General should not necessarily be the exclusive representative of the State in constitutional challenges to state statutes. That sovereign determination should be entitled to comity and respect from the federal courts.

This case well illustrates the potential for divergence between the interests of the Legislature and the Attorney General. The challenged statutes and regulations have been in force for years and, in some cases, decades. *See* App. 8 (noting that Wisconsin has required abortions to be

performed by physicians since 1974, and that the challenged statutes were enacted in 1985, 1995, and 2011). Yet Plaintiff-Appellees did not bring suit to challenge those laws until January 16, 2019—a mere *nine days* after the new Attorney General took office. The timing of this suit certainly suggests that Plaintiff-Appellees believed there would be a strategic advantage to litigating against this Attorney General rather than the previous one.

Those concerns are further heightened by the close political alliance between the Attorney General and Plaintiff-Appellees. The Attorney General was strongly endorsed by the political arm of Planned Parenthood of Wisconsin, the lead Plaintiff in this case. *See* Vote Josh Kaul for Attorney General on November 6th, Planned Parenthood Advocates of Wisconsin, https://perma.cc/9YB5-MR45. In its endorsement, the group boasted that "**Josh will fight against the unconstitutional laws that block women from the care they need.**" *Id.* (emphasis in original). That is quite similar to how Plaintiff-Appellees characterize the challenged statutes in the first paragraph of their complaint. *See* Dkt. No. 1 ¶ 1 (arguing that the challenged laws

"curtail[] the availability of abortion care" and "impose[] an undue burden on Wisconsin women").

After receiving that endorsement, the Attorney General replied on his Facebook page on February 8, 2018: "Thanks Planned Parenthood Advocates of Wisconsin!" *See* Dkt. No. 30, Exh. A. The same page quoted the Attorney General as saying that he was "honored to have the endorsement of Planned Parenthood—an organization that provides critical health-care services to Wisconsinites." *Id.*

The Attorney General's curious litigation strategy also raises serious questions about his willingness to zealously defend against a suit brought by his close political allies challenging laws with which he disagrees as a matter of policy. Multiple decisions of the Supreme Court and this Court foreclose Plaintiff-Appellees' claims as a matter of law. *See*, *e.g.*, *Casey*, 505 U.S. at 885 ("Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others."); *Mazurek*, 520 U.S. at 973-75 (holding that "States may mandate that only physicians perform abortions," and noting that

Casey itself had upheld a "physician-only requirement"); *A Woman's Choice*, 305 F.3d at 688 (noting that in *Mazurek* the Supreme Court upheld a physician-only abortion law "without factual inquiries into whether other medical professionals could do the job as safely, and how much prices may be elevated by a physician-only rule").

Given that long line of binding, on-point precedent, it is inexplicable that the Attorney General has not filed a motion to dismiss the complaint—unless, of course, he is not fully committed to defending these particular laws. Instead of filing what would be a strong motion to dismiss, the Attorney General has filed an answer and acquiesced in a litigation schedule that entails a year and a half of costly and burdensome discovery followed by a trial in December 2020. *See* Dkt. No. 32 (Preliminary Pretrial Conference Order). The Attorney General's refusal to file a motion to dismiss despite an abundance of on-point Supreme Court precedent only underscores that he appears unwilling to litigate aggressively against his close political allies or to make all possible arguments in defense of the challenged laws.

The Attorney General's actions in other cases further suggest that he is unwilling to advance arguments that would preserve a broad role

for the States in regulating abortion practices. Shortly after taking office, the Attorney General withdrew from two multi-state amicus briefs defending state regulation of certain aspects of abortion procedures. *See AG Josh Kaul Withdraws Wisconsin from Two Cases*, The Cap Times (Mar. 19, 2019), https://perma.cc/TT49-JHC6. Both of those cases—like this one—involved suits brought by affiliates of the Planned Parenthood Federation of America.

The Attorney General has also joined a lawsuit against the federal government challenging a regulation that bars taxpayer-funded family planning clinics from referring patients to abortion providers. *See Wisconsin Joins 20 AG's Challenging New Title X Restrictions on Women's Reproductive Healthcare*, Wis. Dept. of Justice (Mar. 5, 2019), https://perma.cc/9UBK-PRXW. The Planned Parenthood Federation of America has joined a companion suit challenging the same policies. *See* Complaint, *Am. Med. Ass'n et al. v. Azar*, No. 6:19-cv-318 (D. Or. Mar. 5, 2019).

In sum, under the "minimal" standard for refuting a finding of adequacy, there is certainly reason to believe that the Attorney General's "representation of [the Legislature's] interest '*may be*' inadequate." *Lake*

Invest. Dev. Grp., 715 F.2d at 1261 (emphasis added). Nothing more is required to satisfy this element of the intervention inquiry under Rule 24(a)(2).

2. The district court nonetheless concluded that the Attorney General adequately represented the Legislature's interests in defending the challenged state laws. *See* App. 9-12. But instead of applying the normal, minimal standard for adequacy, the district court applied a much stricter standard, requiring the Legislature to show "gross negligence or bad faith" by the Attorney General. App. 10. The district court's analysis was flawed in several critical respects.

The district court cited six cases for the proposition 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.'" App. 10 (quoting *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)).[4] But those cases are

[4] The court also cited *WEAC*, 705 F.3d at 659; *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); *United States v. Franklin Par. Sch. Bd.*, 47 F.3d 755, 758 (5th Cir. 1995); *United States v. State of Ga.*, 19 F.3d 1388, 1394 (11th Cir. 1994).

readily distinguishable. In each, the defendants were government entities that had *exclusive* authority under state or federal law to litigate the matters at issue. The proposed intervenors, by contrast, were *private parties* who had no such right. Granting intervention would have thus allowed non-governmental intervenors to usurp the defendants' exclusive litigating authority.

For example, in *Ligas*, the plaintiffs—a class of developmentally disabled individuals—sued Illinois officials to force the State to provide community-based care rather than institutionalized care. 478 F.3d at 773. Another group of developmentally disabled individuals did not want to be forced into community-based care, and sought to intervene in support of the State. Under Illinois law, the defendant state officials were "responsible for administering the Illinois Medicaid and developmental disabilities programs." *Id.* at 775. The proposed intervenors, by contrast, had no such statutory authorization to administer the programs or litigate the case. This Court thus applied the heightened adequacy standard and found that the state officials adequately represented the proposed intervenors' interests.

Similarly, in *Board of School Commissioners of Indianapolis*, the United States brought a racial-discrimination suit against the Indianapolis School Board, and a citizens' group sought to intervene to defend the Board's student-assignment policies. 466 F.2d at 574. The school board had sole authority to litigate on its own behalf, and no state law gave the students an independent right to litigate these issues. The court thus denied a motion for intervention as of right because the proposed intervenors had failed to show that the Board's interests were adverse to their own or that the Board was acting in bad faith. *Id.* at 575; *see also South Bend Cmty. Sch. Corp.*, 692 F.2d at 627-28 (denying cross-motions by private parties to intervene on behalf of United States and school board in school desegregation case); *Franklin Parish Sch. Bd.*, 47 F.3d at 757-58 (denying parents association's motion to intervene on behalf of school board); *State of Ga.*, 19 F.3d at 1394 (same).

The concerns that that led the courts to apply a heightened standard of adequacy in those cases are entirely absent here. Under Wisconsin law, the Legislature is *independently* "charged by law" with defending the constitutionality of state statutes. *Ligas*, 478 F.3d at 774. It makes no sense to apply a heightened standard or a presumption of

adequacy given that Wisconsin law incorporates the exact opposite presumption: that the Attorney General *does not* necessarily represent the Legislature's independent institutional interests in defending the constitutionality of its enactments.

Wisconsin law cannot, of course, override the Federal Rules of Civil Procedure or authorize intervention in a manner inconsistent with Rule 24. But, when determining whether the Attorney General adequately represents the Legislature's interests, this Court must necessarily consider the authority and respective roles of each branch under state law. After all, "states may grant whatever powers and impose whatever obligations on an attorney general that they wish, assuming they choose to have one in the first place." Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend*, 124 Yale L.J. 2100, 2116 (2015); *see also id.* at 2116-19 (noting that States take a variety of different approaches in deciding how to defend the constitutionality of state statutes).

WEAC—a case the district court cited several times—actually supports the Legislature on this point. There, several unions were

challenging a Wisconsin law that restricted collective-bargaining rights, and a group of employees who supported the state law sought to intervene as defendants. Notably, this Court *declined* to apply the "gross negligence or bad faith" standard, holding that this strict standard does not apply unless the state defendants are "charged by law with protecting the interests" of the proposed intervenor. 705 F.3d at 658-59. Here, the Legislature is *independently* "charged by law" with defending its enactments, rendering the heightened standard inapplicable for the same reasons set forth in *WEAC*.

The district court also relied heavily on the fact that the Attorney General has a duty to defend the constitutionality of state laws. *See* App. 10-11. According to the court, the Legislature has offered no "evidence that the attorney general does not intend to fulfill this responsibility." App. 11. But there are powerful reasons to believe that the Attorney General will not zealously defend state laws that are opposed by his political allies.

On May 3, 2019, the Attorney General voluntarily dismissed a petition for certiorari in the U.S. Supreme Court that sought to revive a Wisconsin law allowing employees to stop unions from deducting dues

directly from employees' paychecks. *See* Joint Stipulation of Dismissal, *Allen v. Int'l Ass'n of Machinists*, No. 18-855 (S. Ct. Apr. 17, 2019). This right-to-work law (enacted in 2015) was strongly opposed by Wisconsin's labor unions, who—like Plaintiff-Appellees here—strongly supported the Attorney General's candidacy.[5] The Attorney General abandoned his defense of this state law notwithstanding his "duty to defend"—and even though the petition for certiorari (supported by five amicus curiae briefs) was fully briefed and a decision from the Supreme Court was imminent.

The Attorney General has also refused to defend the intervention statute and related legislation in ongoing challenges to those measures in state court. *See supra* n.1. Indeed, he is unwilling to defend the intervention statute even against the far-fetched allegation that it has deprived Wisconsin of a *republican form of a government*. *See* Complaint, *Democratic Party of Wis. v. Vos*, No. 3:19-cv-142 (W.D. Wis. Feb. 21, 2019). The Attorney General's "duty to defend" thus provides cold comfort to the Legislature that he will, in fact, zealously defend state laws that run counter to his political interests.

[5] Labor unions were the top seven contributors to the Attorney General's campaign. *See* Vote Smart, Josh Kaul's Campaign Finances, https://bit.ly/2QbyYWa.

Finally, the district court suggested that the Attorney General's representation was adequate because the attorneys from the Department of Justice who are working on this case have previously defended other regulations of abortion practices and "there is … nothing to suggest that they will not fulfill their ethical obligations." App. 12. But that misstates the relevant inquiry. The Legislature is not accusing counsel of acting unethically, nor is it seeking to disqualify the Attorney General's office. Instead, the Legislature simply wants to participate in this case as a party to protect its independent institutional interests that are expressly recognized by state law. The fact that the attorneys representing Defendant-Appellees—like, hopefully, all attorneys—intend to comply with their ethical obligations does not diminish the need for intervention by a co-equal branch of government with an express statutory authorization to participate in cases like this one.

III. The District Court Abused Its Discretion by Denying Permissive Intervention Under Rule 24(b).

Rule 24(b) provides for permissive intervention where a party timely files a motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion under this rule, a court must consider whether

intervention will "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Here, the Legislature sought to intervene early in this litigation, before any meaningful proceedings on either substantive or procedural issues, and the Legislature's defenses in its proffered pleading were based on the same underlying legal and factual issues being litigated by the parties. Moreover, a refusal to allow the Legislature to intervene could significantly prejudice its interests and rights. If the challenged statutes were invalidated as a matter of *federal constitutional law*, this would not only nullify the Legislature's enactments, but could also constrain the Legislature's ability to enact legislation on similar matters in the future.

Courts have granted permissive intervention in cases similar to this one. For example, in *Carcaño v. McCrory*, the Speaker of the North Carolina House and the President Pro Tempore of the North Carolina Senate sought to intervene to defend a state law regarding access to bathrooms and changing facilities. 315 F.R.D. 176, 178-79 (M.D.N.C. 2016). The district court granted permissive intervention, holding that intervention would result in minimal prejudice to the parties because the

legislators' defenses were similar to those of the parties and would follow the same deadlines. *Id.*

In its brief discussion of permissive intervention, *see* App. 12-13, the district court cited two nonprecedential decisions for the proposition that "the case for permissive intervention disappears" if the proposed intervenor has "fail[ed] to overcome the presumption of adequate representation by the government." *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996); *see also One Wis.*, 310 F.R.D. at 399 (same).

But that holding rests on a basic error of law, which is grounds for reversal even under the deferential abuse-of-discretion standard. *See Kruger v. Apfel*, 214 F.3d 784, 786 (7th Cir. 2000) ("We will find an abuse of discretion where the district court commits an error of law"). This Court has squarely held that district courts must not add atextual requirements to Rule 24(b)'s permissive intervention framework. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996). But that is exactly what the district court did here, by importing an adequacy requirement into Rule 24(b) that is found nowhere in its text.

The *Menominee* and *One Wisconsin* decisions—which were the primary basis for the district court's holding on adequacy—conflict with this Court's precedents and do not accurately characterize the law. As another district court has explained,

> the court in *Menominee Indian Tribe* did not cite any authority for its conclusion, which effectively creates an additional hurdle for proposed intervenors that does not comport with the Seventh Circuit's approach to permissive intervention. *See, e.g.*, *Security Ins. Co. of Hartford v. Schipporeit*, 69 F.3d 1377, 1381 (7th Cir. 1995) ("Other than the two requirements of a common question of law or fact and independent jurisdiction, intervention under 24(b)(2) is entirely discretionary."); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996) (rejecting the district court's imposition of an additional requirement for permissive intervention).

Students & Parents for Privacy v. U.S. Dep't of Educ., 16 C 4945, 2016 WL 3269001, at *3 (N.D. Ill. June 15, 2016) (cleaned up). Under the proper test, "[a]ll that is required for permissive intervention ... is that the applicant have a claim or defense in common with a claim or defense in the suit." *Solid Waste Agency*, 101 F.3d at 509. "If this condition is satisfied, ... the judge must then decide as a matter of discretion whether intervention should be allowed." *Id.*

The district court further asserted in conclusory fashion that the Legislature's participation would "needlessly complicate the case."

App. 13. But intervention *always* results in the addition of some complexity by adding another party. The district court failed to offer any reason why the Legislature's participation would "*unduly* delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3) (emphasis added). Intervention would involve only one additional party, and the Legislature would take all necessary steps to ensure the prompt and efficient resolution of this case.

Finally, the district court asserted that amicus curiae status for the Legislature is sufficient. *See* App. 13. But amicus status would not give the Legislature the ability to seek dismissal or judgment on the pleadings, to offer evidence in support of the challenged laws, or to engage in depositions or cross-examination of Plaintiff-Appellees' expert witnesses, which is critical for developing the strongest possible record. Moreover, amicus status is more appropriate than permissive intervention only if "intervention may materially diminish the original parties' rights." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 473 (5th Cir. 1984) (en banc). Here, intervention would do no such thing; to the contrary, a *denial* of intervention would "materially diminish" the Legislature's status as a co-equal branch of the Wisconsin

government, and would disregard state laws that specifically protect the Legislature's independent institutional interests. Permissive intervention should have been granted even if the Legislature were not entitled to intervene as a matter of right.

CONCLUSION

For all these reasons, the Court should reverse the decision of the district court and remand with instructions to grant the Legislature's motion to intervene under Rule 24(a)(2) or Rule 24(b).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 9,152 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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/s/ Jeffrey M. Harris
Jeffrey M. Harris
Counsel for Appellant
Dated: May 24, 2019

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/ Jeffrey M. Harris
Jeffrey M. Harris

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, the Brief of Appellant was filed with the Clerk of the Court for the United States court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. i certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey M. Harris
Jeffrey M. Harris

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF 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.

OPINION AND ORDER

19-cv-038-wmc

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).

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)).

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.

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*, 70 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.)

The legislature also points to United States Supreme Court cases, which primarily

[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.)

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 (1997); *Karcher v. May*, 448 U.S. 72, 87 (1987); *INS v. Chadha*, 462 U.S. 919, 930 n.5 (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 559, 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. 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 (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 ("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.").

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).

Putting aside this state statutory hook, the Seventh Circuit has instructed that the intervenor's "interest must be *unique* to the proposed intervenor." *WEAC*, 70 F.3d at 358 (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.3d 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*, 421 U.S. at 823).) 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 East 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*, 421 U.S. at 824 n.7 (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

[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 (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*, 421 U.S. 811, 823 (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.

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.

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 (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

[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).

intervenor's broad reading of *Coleman* and its progeny.

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.

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

[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.").

F.3d at 659 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (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]

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, 45 N.W.2d 1 (denying motion to intervene based on argument that attorney general would not

[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.

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

In the alternative, the Wisconsin legislature seeks permissive intervention under Rule 24(b), which is "wholly discretionary." *Sokaogon v. Chippewa Cmty. 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*, 600 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

[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*, 7045 F.3d at 659.

F.R.D. at 399 (same).

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.

Entered this 23rd day of April, 2019.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge