

Case No. 12-2011
(Consolidated with Case Nos. 12-1854 and 12-2058)

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

WISCONSIN EDUCATION ASSOCIATION COUNCIL *et al.*,
Plaintiffs-Appellees, Cross-Appellants,

v.

SCOTT WALKER, Governor of the State of Wisconsin *et al.*,
Defendants-Appellants, Cross-Appellees,

and

Appeal of:

KRISTI LACROIX, NATHAN BERISH,
and RICARDO CRUZ,

Proposed Defendants-Intervenors-Appellants-Cross-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
District Court Case No. 11-cv-00428
The Honorable Judge William M. Conley

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ORAL ARGUMENT REQUESTED

AMENDED DISCLOSURE STATEMENT

Appellate Court No.: 12-2011

Short Caption: *WEAC et al. v. Walker et al.*

- (1) The full name of every party 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)):

Kristi Lacroix, Nathan Berish, and Ricardo Cruz

- (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:

No law firms have appeared. Attorneys Milton Chappell of the National Right to Work Legal Defense Foundation, Inc., Bruce Cameron of Regent University School of Law, and Richard Esenberg and Thomas Kamenick of the Wisconsin Institute for Law & Liberty appeared for these parties in the district court and will continue to do so in this Court.

Attorney Nathan J. McGrath of the National Right to Work Legal Defense Foundation, Inc., entered his appearance on behalf of the above-mentioned parties on August 13, 2012.

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

- (i) identify all its parent corporations, if any: *N/A*, and
- (ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: *N/A*.

s/ Glenn M. Taubman

DATED: August 13, 2012

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I, Glenn M. Taubman, certify that I am Counsel of Record for the above-listed parties pursuant to Circuit Rule 3(d).

TABLE OF CONTENTS

	PAGE
AMENDED DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES.....	iv
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The District Court Wrongly Denied Employees Intervenor Status	6
A. Employees Have Overcome Any Presumption of Adequate Representation by the State.....	7
B. Employees’ Constitutional Interests, Which Are at Risk in This Litigation, Extend Beyond Eliminating Compulsory Union Fees.....	10
II. The District Court Correctly Upheld Act 10’s Provisions That Reduce the Scope of Mandatory Collective Bargaining	14
A. The State’s Reduction of the Scope of Mandatory Collective Bargaining Is Not an Issue for Constitutional Review.....	15
B. The State’s Reduction in the Scope of Collective Bargaining Did Not Violate the Equal Protection Clause	16
1. It Is Inappropriate for the Judiciary to Consider Political Motivation When Reviewing Equal Protection Claims for Which There Is a Rational Basis and No Invidious Discrimination.....	16
2. The Unions’ Mere Speculation That the Creation of Two Public Sector Employee Groups Aligned with an Illegitimate Objective Does Not Violate Equal Protection.....	20

TABLE OF CONTENTS

	PAGE
3. The State Gave an Appropriate Rational Basis for Act 10's Division Between Public Safety and General Employees	22
III. The District Court Erred When It Declared That the State Must Continue to Subsidize the Unions and Collect Union Dues from Employees	24
IV. Act 10's Annual Recertification Requirement Is Constitutional and Is Within the State's Power to Require When Acting as an Employer	26
V. Removing the Public Safety Exception, Rather than Act 10's Core Application to General Employees, Is More Faithful to the Legislative Intent and Cures Any Possible Equal Protection Problem	28
CONCLUSION	31
CERTIFICATE OF COMPLIANCE	32
CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

CASES	PAGE
<i>520 S. Michigan Ave. Associates Ltd. v. Shannon</i> , 549 F.3d 1119 (7th Cir. 2008)	8
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977)	12, 13, 14
<i>Alliance for Clean Coal v. Bayh</i> , 72 F.3d 556 (7th Cir. 1995)	9
<i>Arkansas State Highway Employees Local 1315 v. Kell</i> , 628 F.2d 1099 (8th Cir. 1980)	25
<i>Brown v. Alexander</i> , 718 F.2d 1417 (6th Cir. 1983)	25
<i>Burlington Northern & Santa Fe Railway Co. v. Doyle</i> , 186 F.3d 790 (7th Cir. 1999)	8
<i>Charles v. Daley</i> , 846 F.2d 1057 (7th Cir. 1988)	9
<i>Chicago Council of Lawyers v. Bauer</i> , 522 F.2d 242 (7th Cir. 1975)	9
<i>Chicago Teachers Union v. Hudson</i> , 475 U.S. 292 (1986)	8
<i>Craigsmiles v. Giles</i> , 312 F.3d 220 (6th Cir. 2002)	20
<i>Davenport v. Washington Education Ass’n</i> , 551 U.S. 177 (2007)	<i>passim</i>
<i>Del Marcelle v. Brown County Corp.</i> , 680 F.3d 887 (7th Cir. 2012)	20, 21
<i>Engquist v. Oregon Department of Agriculture</i> , 553 U.S. 591 (2008)	10, 20, 21
<i>FCC v. Beach Communications, Inc.</i> , 508 U.S. 307 (1993)	22
<i>Flying J. Inc. v. City of New Haven</i> , 549 F.3d 538 (7th Cir. 2008)	18, 19
<i>Fraternal Order of Police Hobart Lodge # 121, Inc. v. City of Hobart</i> , 864 F.2d 551 (7th Cir. 1988)	17
<i>Freedom from Religion Foundation, Inc. v. McCallum</i> , 324 F.3d 880 (7th Cir. 2003)	8
<i>Frost v. Corporation Commission</i> , 278 U.S. 515 (1929)	28, 29, 30
<i>Grossbaum v. Indianapolis-Marion County Building Authority</i> , 100 F.3d 1287 (7th Cir. 1996)	17
<i>Hernandez v. Woodard</i> , 714 F. Supp. 963 (N.D. Ill. 1989)	17
<i>Hillside Transit Co. v. Larson</i> , 265 Wis. 568, 62 N.W.2d 722 (1954)	28, 29, 30

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>In re Warden of Wisconsin State Prison</i> , 541 F.2d 177 (7th Cir. 1976)	20
<i>Knox v. Service Employees International Union, Local 1000</i> , ___ U.S. ___, 132 S. Ct. 2277 (2012).....	11, 12
<i>Lauth v. McCollum</i> , 424 F.3d 631(7th Cir. 2005).....	21
<i>Ligas ex rel. Foster v. Maram</i> , 478 F.3d 771 (7th Cir. 2007).....	7
<i>Ligas ex rel. Foster v. Maram</i> , 2010 WL 1418583 (N.D. Ill., Apr. 7, 2010)	9
<i>Milwaukee Branch of the NAACP v. Thompson</i> , 116 F.3d 1194 (7th Cir. 1997).....	8
<i>Milwaukee Branch of the NAACP v. Thompson</i> , 935 F. Supp. 1419 (E.D. Wis. 1996).....	9
<i>Minnesota State Board for Community Colleges v. Knight</i> , 465 U.S. 271 (1984)	<i>passim</i>
<i>Moran v. Beyer</i> , 734 F.2d 1245 (7th Cir. 1984).....	20
<i>Perry Education Ass'n v. Perrry Local Educators' Ass'n</i> , 460 U.S. 37 (1983).....	26, 27
<i>Protestant Memorial Medical Center, Inc. v. Maram</i> , 471 F.3d 724 (7th Cir. 2006)	8
<i>Railway Employes' Department v. Hanson</i> , 351 U.S. 225 (1956).....	13
<i>Remington v. Wood County</i> , 238 Wis. 172, 298 N.W. 591 (1941).....	28
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	20, 26
<i>Stevenson v. State Board of Elections</i> , 794 F.2d 1176 (7th Cir. 1986)	9
<i>Stevenson v. State Board of Elections</i> , 638 F. Supp. 547 (N.D. Ill. 1986).....	9
<i>Toledo Area AFL-CIO Council v. Pizza</i> , 154 F.3d 307 (6th Cir. 1998)	25
<i>Town of Beloit v. City of Beloit</i> , 37 Wisc. 2d 637, 155 N.W.2d 633 (1968).....	29
<i>Trbovich v. United Mine Workers of America</i> , 404 U.S. 528 (1972).....	7
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	16
<i>United States Department of Agriculture v. Moreno</i> , 413 U.S. 528 (1973).....	20, 26

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Village of Arlington Heights v. Metropolitan Housing Development Corp.</i> , 429 U.S. 252 (1977).....	17
<i>Ysursa v. Pocatello Education Ass'n</i> , 555 U.S. 353 (2009).....	11
 CONSTITUTION	
U.S. Const. amend. I.....	<i>passim</i>
U.S. Const. amend. XIV, § 1.....	<i>passim</i>
 STATUTORY AND RULE PROVISIONS	
Wis. Stat.	
§ 111.83(1)	7
§ 111.84(1)(g).....	8
§ 111.90(2).....	8
§ 111.90(3).....	8
2011 Wisconsin Act 10.....	<i>passim</i>
§ 58.....	29
§ 168.....	29
§ 210.....	29
§ 213–14.....	29
§ 216–17.....	29
§ 219–20.....	29
§ 222–23.....	29
§ 225.....	29
§ 227.....	29
§ 231–34.....	29
§ 236.....	29
§ 238.....	29
§ 240.....	29
§ 242.....	29
§ 245-46	29
§ 252.....	29
§ 255.....	29
§ 259.....	29
§ 260.....	29

TABLE OF AUTHORITIES

	PAGE	
STATUTORY AND RULE PROVISIONS		
2011 Wisconsin Act 10		
§ 262.....	29	
§ 267.....	29	
§ 268.....	29	
§ 271-73	29	
§ 276.....	29	
§ 278.....	29	
§ 284.....	29	
§ 286.....	29	
§ 289.....	29	
§ 295.....	29	
§ 298–99.....	29	
§ 303.....	29	
§ 308.....	29	
§ 312.....	29	
§ 314–15.....	29	
§ 320.....	29	
§ 322.....	29	
Fed. R. App. P.		
28(i).....	1	
28.1(c)(3).....	1	
 OTHER AUTHORITIES		
Charlie Sykes, <i>Unions Threaten Business</i> , 620 WTMJ News Radio (Mar. 10, 2011), http://www.620wtmj.com/blogs/charliesykes/117764004.html (last visited Aug. 7, 2011)		23
Don Walker, <i>The Quiet after the Capitol Storm</i> , J. Sentinel (Mar. 10, 2011), http://www.jsonline.com/blogs/news/117727713.html (last visited Aug. 7, 2012).....		23
Joseph R. Grodin et al, <i>Public Sector Employment: Cases & Materials</i> 4 (2004)		23
Phil Oliff et al., <i>States Continue to Feel Recession’s Impact</i> , Center on Budget and Policy Priorities, Tables 3 & 6 (June 27, 2012), http://www.cbpp.org/cms/index.cfm?fa=view&id=711 (last visited Aug. 9, 2012)		16
Stephen C. Webster, <i>Madison Firefighters Prez Calls for General Strike</i> , The UpTake (Mar. 9, 2011), http://www.youtube.com/watch?v=i_Z_TVrBUtw (last visited Aug. 8, 2012)		23

TABLE OF AUTHORITIES

	PAGE(S)
OTHER AUTHORITIES	
1A <i>Sutherland Statutory Construction</i> § 22:37 (7th ed.).....	28
William A. Jacobson, <i>The Other Loser in Wisconsin—Law Enforcement Credibility, Legal In-surrection</i> (Mar. 10, 2011), http://legalinsurrection.com/2011/03/the-other-loser-in-wisconsin-law-enforcement-credibility/ (last visited Aug. 7, 2012).....	23

ISSUES PRESENTED FOR REVIEW¹

1. Did the lower court err when it denied Proposed Intervenors' Motion to Intervene as Defendants?
2. Did the lower court err when it declared two sections of 2011 Wisconsin Act 10 ("Act 10") unconstitutional because it could not determine a rational basis for those sections?
3. Was the lower court correct when it concluded that the State had a rational basis for reducing the scope of collective bargaining for general employees and upheld the constitutionality of those sections of Act 10?

STATEMENT OF THE CASE²

Employees are dissatisfied with the Plaintiffs-Appellees, Cross-Appellants' Statement of the Case. They adopt by reference the Statement of the Case in the Brief and Required Short Appendix of Proposed Intervenors 2–3, June 5, 2012, ECF No. 13 in 12-1854 ("Employees Br."), as if fully set forth herein.

¹ Proposed Intervenors, Kristi Lacroix, Nathan Berish, and Ricardo Cruz ("Employees") are appellants on the first two issues and cross-appellees on the last issue. This combined brief is Employees' response brief on the constitutionality of the reduction in the scope of collective bargaining for general employees, but not public safety employees. It is also Employees' reply brief on the issues of intervention and the constitutionality of Act 10's requirement that general employee unions, but not public safety employee unions, seek annual recertification and its prohibition on government employers from deducting the dues for members of general employee unions, while allowing such deductions for public safety employees.

² Fed. R. App. P. 28.1(c)(3) allows Employees to dispense with five sections of the brief unless they are dissatisfied with the appellee's statement in those sections in the cross-appeal. Fed. R. App. P. 28(i) allows parties in consolidated cases, like this one, to adopt by reference a part of another's brief. *See* Order entered Apr. 27, 2012, EFC No. 3 in 12-1854.

STATEMENT OF THE FACTS

Employees are dissatisfied with the Plaintiffs-Appellees, Cross-Appellants' Statement of the Facts. Employees adopt by reference the Statement of the Facts in Employees Br. 3–6.

SUMMARY OF ARGUMENT

Employees do not have to show “gross negligence” or “bad faith” by the State to overcome the presumption of adequate representation that caused the district court to deny them intervention. Any heightened burden on Employees is limited to cases where the government body is charged by law with protecting the interests of the proposed intervenors. Here, far from protecting the Employees' interests, the State and other public employers are their adversaries both by law and in practice. More important, the Unions have cited no law that *requires* Employees' public employer or the State to protect them in the matters of the instant litigation. In fact, there are several examples of the State's and Employees' divergent interests in this case.

Employees constitutional interests extend beyond eliminating compulsory union fees. While both unions and individual employees have a First Amendment right to speak to the government employer, the employer has no obligation to respond to either. The Unions and Employees are in direct competition to have Wisconsin public employers respond to them.

With annual certification elections, Employees have improved opportunities to have the government employer respond to them, not the Unions. When the scope of mandatory subjects of bargaining is reduced, the government employer will be

speaking less with the Unions and more with Employees. Because Employees do not want the Unions' representation, or to advance the Unions' bargaining and political agendas, they have an acute interest in seeing the government employer remain neutral by not aiding the unions in their political and other activities through the payroll deduction of union dues.

Employees First Amendment rights are the same both before Act 10 and under Act 10. What changes with time and varying circumstances is the interest of the State in overriding those rights. Now, Act 10 has changed the constitutional calculus through its abandonment of the only justification sufficient to overcome and restrict Employees' First Amendment interests.

Act 10 does not restrain the Unions' speech. The decision to narrow the scope of collective bargaining with general employees and to maintain current topics of collective bargaining with public safety employees is a choice of to whom and to what extent the State will listen. It is not a decision for judicial review, as no union or employee constitutional rights have been restrained.

Even though the Unions do not agree with the validity or sincerity of the state's stated reasons for treating public safety and general employee unions differently, there are rational reasons for Act 10's distinction between these employee groups. Under equal protection analysis, the Unions must first establish no imaginable rational reason or motive for the injurious action, without relying on speculative animus, before the court may even consider animus. This they have not done.

If the Unions could establish no imaginable rational reason for the inequality of Act 10, this Court would still not review the motivation and purpose of Act 10's provisions because the Unions lack *actual proof* that there was "discriminatory intent or purpose" behind the challenged provisions. The Unions can only speculate over suspicions. Speculations and suspicions do not rise to the level of proof needed by the Court to set aside its normal judicial deference to the legislature's motive and purpose for enacting Act 10.

The Unions cannot establish an equal protection violation in Act 10's differing treatment between public safety and general employees because the equal protection analysis is substantially different when the government acts as "regulator" than when it acts as "proprietor" or "employer." The Equal Protection Clause does not require government to treat all of its employees equally. Traditional equal protection analysis is situation specific. Cases involving the specific situation of government acting as employer, not regulator, provide minimal, if any, equal protection consideration to public employees and their unions.

The State provided a rational basis, concern about strikes by essential public safety employees, for Act 10's differing treatment between public safety and general employees on the scope of collective bargaining. The legislature must be allowed leeway to approach a perceived problem incrementally. Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.

The State's fear of strikes was not unfounded just because it is illegal for most public safety employees to strike. There are numerous examples in history along

with events during the passage of Act 10 that demonstrate that some public safety employees will illegally strike or fail to protect the public in such circumstances.

The State's participation in collecting the dues of the Unions is actually the State subsidizing the "speech" of the Unions by doing their collection work for them. Act 10 has not restricted the Unions' First Amendment rights by prohibiting government employers from collecting union dues. Rather, it merely has put an end to taxpayer subsidization of the Unions' "speech."

When government subsidizes speech, it can make content-based distinctions. It is not viewpoint discrimination to reward political supporters and to punish political opponents, nor is the decision to end dues deductions of some unions subject to strict scrutiny under the First Amendment. Neither does it, as several Circuits have recognized, violate the Equal Protection Clause.

Limiting the scope of bargaining and requiring annual recertification are part of the same issue: to whom will the State respond in labor matters. A claim to participate in the government's discussion of working conditions with its employees does not rise to the level of nonpublic forum analysis. The Unions' equal protection argument against the annual recertification requirement for general employee unions, which was accepted by the district court, is meritless.

A general rule, that if an amendment is unconstitutional, the preexisting statute remains in force because the amendment is now a nullity, does not apply to Act 10 or the alternative remedy Employees suggested to the district court. When a court determines that legislation violates equal protection it must determine legislative

intent and then adopt the narrowest remedy that meets that intent. Invalidating Act 10's exception for public safety employees, rather than the core application of Act 10's reforms to general employees, is more faithful to the legislative intent of Act 10, while bringing it into compliance with any applicable equal protection requirements.

Accordingly, this Court should reverse the decision of the district court denying Employees the right to intervene and should also reverse the lower court's ruling invalidating and enjoining portions of Act 10. If this Court finds any portion of Act 10 to violate equal protection, it should remand the case with instructions to vacate the injunction, grant the alternative remedy suggested by Employees, and enjoin the exception to Act 10's reforms for public safety employees.

ARGUMENT

I. The District Court Wrongly Denied Employees Intervenor Status

The Wisconsin Education Association Council *et al.*, Plaintiffs-Appellees, Cross-Appellants, ("Unions") press two main points to support the District Court's Order denying intervention to Employees: (1) the presumption of adequate representation by the State can only be defeated by showing "gross negligence or bad faith," which Employees did not argue (Brief of Plaintiffs-Appellees, Cross-Appellants 62, July 13, 2012, ECF No. 26 in 12-1854 ("Unions Br.")); and (2) Employees have no valid constitutional claim to protect, (*id.*) Both assertions by the Unions are incorrect.

A. Employees Have Overcome Any Presumption of Adequate Representation by the State

The Unions cite *Ligas ex rel. Foster v. Maram*, 478 F.3d 771 (7th Cir. 2007),³ as requiring Employees to show “gross negligence” or “bad faith” by the State to overcome the presumption of adequate representation. The Unions read too much into *Ligas*.

First, as Employees demonstrated in their opening brief (Employees Br. 12–13), when the United States Supreme Court has dealt with adequate representation by government defendants in intervention cases, it has mentioned no presumption, and has established only a “minimal” burden on intervenors for showing inadequate representation by the government. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Second, *Ligas*’ heighten burden is limited to cases where the “governmental body [is] charged by law with protecting the interests of the proposed intervenors.” 478 F.3d at 774. Here, far from protecting the interests of nonunion Employees, Wisconsin collective bargaining law makes the State (and other public employers) their adversaries. The reduced scope of collective bargaining for general employees does not change this. Wis. Stat. § 111.83(1) allows individual employees to file their own grievances against the government employer. Even though Employees oppose

³ Unlike *Ligas*, 478 F.3d at 772, where the State official opposed intervention, the State here has not opposed intervention or claimed that it adequately represents the interests of the Employees, either as charged by law or otherwise. Nor could the State make such a claim. (See Employees Br. at 9, 12–16, 20–21, 23, & 25–26.) In fact, the State admitted that Employees’ three briefs in the district court presented different legal arguments that are germane to the merits. (Combined Reply Br. in Supp. of Mot. for J. on the Pleadings & Resp. Br. in Opp’n to Pls.’ Mot. for Summ. J. 4 n.2, Nov. 8, 2011, ECF No. 95.)

being represented by a labor union, Wis. Stat. § 111.84(1)(g) prohibits the government from using any funds to discourage unionization or from helping Employees to remain nonunion. Wis. Stat. § 111.90(2) gives the State the right to “[m]anage” the employees, and Wis. Stat. § 111.90(3) gives them the right to “[s]uspend, demote, discharge, or take other appropriate disciplinary action against the employee.”⁴

Even outside of collective bargaining, the employer-employee relationship between the State and its public employees is still adversarial. The government, as employer, is not charged with protecting the expressive or associational rights of Employees. *Cf. Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.20 (1986) (the courts remain available as the ultimate protectors of constitutional rights). The Unions have cited no law that *requires* Employees’ public employer or the State to protect them in the matters of the instant litigation.

Third, intervention of the type sought by Employees happens frequently in the Seventh Circuit, especially in cases of extreme public importance.⁵ In each case

⁴ Employees are obviously opposed to the interests of the Unions, but Wisconsin law also positions them as opponents of the State (and its subdivisions) when it comes to the subject matter of this lawsuit—collective bargaining, union representation, and union privileges.

⁵ *See, e.g., 520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1121 (7th Cir. 2008) (union intervened to join state in defending labor statute from attack by hotel); *Protestant Mem’l Med. Ctr., Inc. v. Maram*, 471 F.3d 724, 727 n.1 (7th Cir. 2006) (hospital association intervened to join state and federal government in defending state’s Medicaid plan from attack by another hospital); *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (Christian halfway house, the direct beneficiary of the challenged governmental action like Employees herein, intervened to join state in defending use of religious halfway houses from First Amendment establishment clause attack by anti-establishment of religion organization); *Burlington N. & Santa Fe Ry. v. Doyle*, 186 F.3d 790, 794 (7th Cir. 1999) (union intervened to join state in defending train crew requirement statute from attack by railroad); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d

cited in the footnote, both the named defendants and the intervenor-defendant, including unions, actively participated in defending the state law. None indicated “bad faith” or “gross negligence” by government defendants, nor were the intervenors required to prove gross negligence.⁶ The government in the example cases was charged with no less duty to defend or “represent” those intervenors than the State is in the present matter.

Finally, the State’s and Employees’ divergent interests are illustrated in the State’s failure to provide any justification for the “public safety” exceptions to Act 10’s dues deduction prohibition and annual recertification requirement which was the proximate cause of the district court’s invalidation of those sections. (Required Short App. of Proposed Intervenors A-3–4, A-21–23, & A-35–36, June 5, 2012, ECF

1194 (7th Cir. 1997) (trial judge association intervened to join state in defending countywide election of trial judges from attack by civil rights organization: facts at *Milwaukee Branch of the NAACP v. Thompson*, 935 F. Supp. 1419, 1436 (E.D. Wis. 1996)); *Alliance for Clean Coal v. Bayh*, 72 F.3d 556, 558 n.2 (7th Cir. 1995) (union intervened to join state in defending state’s environmental laws from commerce clause attack by business organization); *Charles v. Daley*, 846 F.2d 1057, 1059 (7th Cir. 1988) (private individuals, including two doctors, intervened to join state in defending state’s abortion laws from constitutional attack by abortion doctors); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 247 (7th Cir. 1975) (defense attorneys intervened to join U.S. Attorney in defending rules governing extrajudicial statements about pending cases from First Amendment attack by local bar association); *Stevenson v. State Bd. of Elecs.*, 794 F.2d 1176 (7th Cir. 1986) (successful primary candidate and beneficiary of existing filing deadlines intervened to join state in defending candidacy filing deadlines for independent candidates from Equal Protection attack by independent candidate: facts at *Stevenson v. State Bd. of Elecs.*, 638 F. Supp. 547, 548–49 (N.D. Ill. 1986)).

⁶ Even the district court in *Ligas*, on remand, did not require an actual showing of “gross negligence” or “bad faith” when it ultimately allowed intervention. 2010 WL 1418583 (N.D. Ill., Apr. 7, 2010). Instead, after quoting the isolated statement, the court explained: “In other words, ‘more is needed than a presumption of inadequacy based on the diversity of the State’s interests.’ The events unfolding since the denial of the first motions to intervene in this case suggest that the presumption of adequacy has been overcome.” *Id.* at *3 (citations omitted). Similarly, the events mentioned in Employees Br. 12–16, 20–21, 23, & 25–26, demonstrate that any presumption of adequacy has been overcome.

No. 13 in 12-1854 (“App.”); Employees Br. 9, 12–16, 20–21, 23, & 25–26.) In contrast, Employees presented the district court with two critical United States Supreme Court decisions⁷ that would uphold the constitutionality of those two sections against the Unions’ attack, which the State never cited to either the district court or this Court. (Employees Br. 11, 19–21, & 24–26.) The Employees also presented an alternative remedy for the district court to use if it determined any part of Act 10 unconstitutional, which was neither argued by the State nor considered below. (*Id.* at 26–31; *see also infra* at 24–26.) If the State’s failure to make these arguments does not constitute “gross negligence” or “bad faith,” it reflects a view of the interest of the State that is different from and not protective of the unique interests of Employees.

B. Employees’ Constitutional Interests, Which Are at Risk in This Litigation, Extend Beyond Eliminating Compulsory Union Fees

The Unions also claim that Employees’ only constitutional interest here is eliminating compulsory union fees, and that such fee collections are constitutional. (Unions Br. 62.) That is false. Employees have shown their constitutional interests extend beyond eliminating compulsory union fees. (Employees Br. 9–11.) They have also explained that while both unions and individual employees have a First Amendment right to speak to the government employer, the employer has no obligation to respond to either. (*Id.* at 16–18 & 21–22.)

⁷ *Engquist v. Ore. Dep’t of Agric.*, 553 U.S. 591 (2008); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177 (2007).

The Unions and Employees are in direct competition to have Wisconsin public employers respond to them. As the United States Supreme Court noted, the party to whom the employer responds has its voice “amplified.” *Minnesota State Bd. for Comty. Colls. v. Knight*, 465 U.S. 271, 288 (1984). With annual certification elections, Employees have improved opportunities to have the government employer respond to them, and not to the Unions. When the scope of mandatory subjects of bargaining is reduced, it means that the government employer will be speaking less with the Unions and more with Employees. Every subject removed from the realm of mandatory exclusive representation is a subject open for discussion with individual employees.

Even Act 10’s prohibition on government employers deducting union dues from public employees’ wages provides Employees with a significant First Amendment interest to advance. Because Employees do not want the Unions’ representation, or to advance the Unions’ bargaining and political agendas, they have an acute interest in seeing the State remain neutral by not “aid[ing] the unions in their political [and other] activities” through the payroll deduction of union dues. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 359 (2009); *see also Knox v. Serv. Emps. Int’l Union, Local 1000*, ___ U.S. ___, 132 S. Ct. 2277, 2288, 2295–96 (2012); (Employees Br. 24–25).

The Unions also obscure Employees’ First Amendment rights that are at issue. (Unions Br. 62.) The fact those constitutional rights might have been different under “pre-Act 10 law” does not mean the Employees’ First Amendment rights are

the same under Act 10 or their core First Amendment rights are not at risk by this litigation.

Act 10 changes the constitutional calculus through its abandonment of the only justification sufficient to overcome and restrict Employees' First Amendment interests. (*See* Employees Br. 10–11.) Under the prior law, which permitted compulsory union payments, Employees had no viable First Amendment claim for avoiding payment of collective bargaining costs because the State had asserted a compelling interest in managing its labor relations through collective bargaining. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225–26 (1977). Should Act 10 be declared unconstitutional, Employees face a problem that goes far beyond that of adverse precedent.

But this is not the same as saying persons in Employees' position have no constitutional interest at stake. The Supreme Court has recognized the tension between compulsory "agency fee" requirements and the First Amendment, noting that agency shop and "fair share" agreements significantly impair those constitutionally protected interests. *See, e.g., Knox*, 132 S. Ct. at 2289 ("compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights'") (citations omitted); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 180–81 (2007) (agency shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment); *Abood*, 431 U.S. at 222 (compelling employees financially to support

their collective bargaining representative has an impact upon their First Amendment interests).

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

However, a state need not choose the compulsory unionism model and, even having made it, remains free to change it. The Supreme Court made this clear in *Abood*, regarding legislatures’ shifting views of public employee unionism:

“[T]he question is one of policy with which the judiciary has no concern. . . . [The legislature], acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. . . . The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary.”

Id. at 225 n.20 (quoting *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225, 233–34 (1956))

(footnote omitted). The change in policy direction, such as has occurred in

Wisconsin, also alters the constitutional calculus, but not the nature of Employees’ First Amendment rights.

The constitutional rights held by Employees do not change. What changes is the interest of the State in overriding those rights. While the State’s interest may

change with time and varying circumstances (*see* Br. of Defendants-Appellants 19–21, June 5, 2012, ECF No. 17 in 12-1854 (“State Br.”)), and this change might affect the outcome of the judicial balance, it does not alter the nature of the First Amendment rights held so dearly by Employees.

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

This is why Employees’ First Amendment rights are inextricably bound up with this case. Employees’ ability to advocate for and protect their First Amendment rights is largely hedged by the decision of the policy makers. If Act 10 is declared valid, Employees’ First Amendment rights are completely vindicated. If Act 10 is held invalid, the situation is less clear, since *Abood* prevents Employees from asking a court to re-establish the prominence of their First Amendment rights once a state has asserted a compelling interest in collective bargaining.

II. The District Court Correctly Upheld Act 10’s Provisions That Reduce the Scope of Mandatory Collective Bargaining

The Unions allege that Act 10’s provisions that reduce the scope of mandatory collective bargaining to wages for general employees violate the Equal Protection Clause. (Unions Br. 43.) The Unions’ allegations, however, are both misguided and incorrect.

A. The State's Reduction of the Scope of Mandatory Collective Bargaining Is Not an Issue for Constitutional Review

This case is not about restraining the Unions' speech. It is about the State deciding, after decades, that it will now listen less to the Unions representing general employees and more to the individual general employees and taxpayers. The constitutional "rights to speak, associate, and petition" do not "require government policymakers to listen or respond." *Knight*, 465 U.S. at 285; (*accord* Employees Br. 17–18 & 21–22).

As explained by Employees and the State (Employees Br. 17 n.5; State Br. 14 & 18), this Court recognizes that a state has no obligation to permit collective bargaining by public employees, or, if it permits it, to adopt any particular definition of what is or is not mandatory bargaining. *Cf. Davenport*, 551 U.S. at 184 ("it is uncontested that it would be constitutional . . . to eliminate agency fees entirely").

The Wisconsin Legislature exercised proper authority when it reduced general employees' scope of collective bargaining to base wages. Through Act 10, the State chose with whom and over what topics it will bargain collectively. Its decision to narrow the scope of collective bargaining with general employees and to maintain current topics of collective bargaining with public safety employees is a choice of to whom and to what extent it will listen. It is not a decision for judicial review, as no union or employee constitutional rights have been restrained.

B. The State's Reduction in the Scope of Collective Bargaining Did Not Violate the Equal Protection Clause

1. It Is Inappropriate for the Judiciary to Consider Political Motivation When Reviewing Equal Protection Claims for Which There Is a Rational Basis and No Invidious Discrimination

The Unions speculate that Act 10's creation of two public employee groups, public safety employees and general employees, is political payback and lacks a rational basis that supports a legitimate governmental interest, thereby violating the Equal Protection Clause. (Unions Br. 19, 48–49, & 51–52.) In actuality, the State was motivated by an impending fiscal crisis,⁸ but the motivations that led it to enact Act 10 are irrelevant—because there are sound, rational justifications for the challenged provisions and the inequality does not involve protected classes.

As the State noted, the Supreme Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. (State Br. 40.) Judicial inquiries into legislative motivation or purposes are “a hazardous matter.” *United States v. O'Brien*, 391 U.S. 367, 383 (1968). The Unions even acknowledge that “the mere fact that a piece of legislation happens to disfavor a group that campaigned against—or to favor a group that campaigned for—the legislation's proponents is not a *sufficient* ground for invalidating the legislation under the Equal Protection Clause.” (Unions Br. 51 (emphasis in original).)

⁸ Phil Oliff *et al.*, *States Continue to Feel Recession's Impact*, Ctr. on Budget & Pol'y Priorities, Tables 3 & 6 (June 27, 2012), <http://www.cbpp.org/cms/index.cfm?fa=view&id=711> (last visited Aug. 9, 2012), which is based on data provided by the Wisconsin Legislative Fiscal Bureau/Wisconsin Budget Project.

Courts are rightfully hesitant to investigate legislation that on its face is constitutional. However, to apprehend any hidden motivation or purpose of a legislature, sometimes, a court puts aside its practice of judicial deference—such as when a protected class member asserts an equal protection challenge to legislation.⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977). Even in such an instance, however, a court will only consider the motivation and purpose behind particular legislation after there has been a showing of actual proof that “discriminatory intent or purpose” was a motivating factor. *Id.*; *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989).

There is “[n]o automatic cause of action . . . whenever allegations of unconstitutional intent can be made, but courts will investigate motive when precedent, text, and prudential considerations suggest it necessary in order to give full effect to the constitutional provision at issue.” *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1294 (7th Cir. 1996). Disproportionate impact because of the challenged legislation, upon the alleging protected class member, while not irrelevant, is not enough to provoke the court to investigate the motivation and purpose behind the legislation. *Arlington Heights*, 429 U.S. at 264–65.

Employees firmly assert that the purposes and motivation behind Act 10 should not be considered by this Court due to well-established principles of judicial

⁹ This Court stated in *Fraternal Order of Police Hobart Lodge # 121, Inc. v. City of Hobart*, 864 F.2d 551, 554 (7th Cir. 1988), that the long-established rule of granting judicial deference to the legislature’s enactment decisions remain intact as long as “the statute or ordinance does not single out particular individuals or groups for benefits or burdens and is not challenged as discriminating on invidious grounds such as race, religion, and sex.”

deference. The Unions have no grounds to argue that the exception to the judicial deference rule applies to their situation because they are not a protected class for which the exception is available.

But if the Unions successfully convince this Court that they should be designated a protected class for the exception analysis, persuading this Court to review the motivations and purpose of Act 10's provisions still fails, because the Unions cannot clear the second hurdle of the analysis: they lack *actual proof* there was "discriminatory intent or purpose" behind the challenged provisions.

The Unions can only speculate over suspicions. Speculations and suspicions do not rise to the level of proof needed by the Court to set aside its normal judicial deference to the Wisconsin Legislature's motives and purpose for enacting Act 10.

The Unions selectively quote from *Flying J Inc. v. City of New Haven*, 549 F.3d 538 (7th Cir. 2008) (a "class-of-one" case, *see infra* at 16 n.10) to support their position that this Court must consider the motives behind Act 10 as part of its consideration of whether there is a rational basis for the distinction between public safety and general employees. (Unions Br. 52.) But a common sense review of the *Flying J* language quoted by the Unions, and the language surrounding that quote (which the Unions studiously failed to include in their brief) nullifies their argument.

In *Flying J*, this Court set forth the standard that

a plaintiff who does not belong to any 'suspect' (that is, favored) class-by definition, the situation of a class-of-one plaintiff-must, to prevail, negative any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . Animus comes into play only

when, no rational reason or motive being imaginable for the injurious action taken by the defendant against the plaintiff, the action would be inexplicable unless animus had motivated it.

Id. at 546 (citation omitted) (emphasis added to language omitted by the Unions).

Even though the Unions do not agree with the validity or sincerity of the State's stated reason for treating public safety and general employee unions differently, there are rational reasons or motives for Act 10's distinction between these employee groups. (*See* State Br. 22, 31–37; Employees Br. 20, 24–26.) The Unions must first establish no imaginable rational reason or motive for the injurious action—without relying on speculative animus—before the court may even consider animus. This they have not done and nothing in *Flying J* supports the Unions' misguided approach and timing to a consideration of possible animus.

Finally, the Unions grossly speculate that Act 10's distinctions between public safety employees and general employees are the work of Governor Walker, as either political payback or retribution against unions that supported or opposed his candidacy. (Unions Br. 51.) Even if this were relevant, which it is not, the Unions ignore that the Wisconsin Legislature, participating in the legislative process, enacted Act 10, as is their role. It is both inaccurate and misleading to look only at Governor Walker when speculating whether “political payback” caused Act 10's distinctions between the two categories of public employees.

2. The Unions' Mere Speculation That the Creation of Two Public Sector Employee Groups Aligned with an Illegitimate Objective Does Not Violate Equal Protection

The Unions insinuated, again incorrectly, that the Wisconsin Legislature's creation of two employee groups serves an "*illegitimate* governmental objective," which allows a court to strike down the provisions on equal protection grounds. (Unions Br. 51–52 (emphasis in original).) The Unions fail to mention that the cases they cite¹⁰ do not involve a limitation as to whom the government must listen, speak, or respond to as an employer. Instead, they concern the government as a *regulator* of commerce or society, instead of the government as an *employer*. Those cases, therefore are neither analogous nor applicable to the present matter, which involves only labor relations of the government employer.

As Employees noted in their opening brief (Employees Br. 19–21), in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 598 (2008)¹¹ the Supreme Court stated that substantial differences exist between the government acting as

¹⁰ *Romer v. Evans*, 517 U.S. 620 (1996) (protecting certain minorities from discrimination, but prohibiting protection for one); *U.S. Dep't of Agric. v. Moreno*, 431 U.S. 528 (1973) (subsidizing food stamps households containing related individuals, but not for those unrelated persons); *Moran v. Beyer*, 734 F.2d 1245 (7th Cir. 1984) (permitting tort suits against all, except between married persons); *In re Warden of Wis. State Prison*, 541 F.2d 177 (7th Cir. 1976) (allowing prisoners to attend state civil, but not federal, proceedings); *accord Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (allowing one group, but not others, to sell caskets); (see also Union Br. 44–45, 51–52, & 55–57).

¹¹ *Engquist* is a "class-of-one" equal protection case. However, its pronouncements are applicable here because they are based on the "traditional view of the core concern of the Equal Protection Clause" and the Court's long held views and principles on the "nature of the government's mission as employer" gathered from numerous cases not involving a "class-of-one." 128 U.S. at 598. Moreover, a "'class of one' refers not to the number of plaintiffs but to the fact that the plaintiff or plaintiffs is not suing as a member of an identifiable group, such as a race or a gender, or for that matter an industry." *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 895 (7th Cir. 2012).

“regulator” and as “proprietor” “employer” in an equal protection analysis. *Id.* at 598; *cf. Davenport*, 551 U.S. at 191–92 (comparing statutory limitations on unions in the public and private sectors and noting that in the private sector, where government is not the employer, those limitations are *regulation*, and the differences between the public and private sectors present somewhat different constitutional questions and analysis). The Equal Protection Clause does not require government to treat all of its employees equally. *Engquist*, 553 U.S. at 599, 605–07.

This Court recognizes that

“traditional equal protection analysis” is situation specific: industry groups complaining about discriminatory regulations do not receive the same consideration in equal protection case law as blacks or women complaining about racial or sexual discrimination. Women for that matter don't receive as much consideration as blacks; and hippies, the elderly, and the mentally impaired don't receive as much consideration as women or blacks.

Del Marcelle v. Brown Cnty. Corp., 680 F.3d 887, 890 (7th Cir. 2012). This case involves the specific situation of government acting as employer, not regulator, and provides public employees dealing with their employer minimal, if any, equal protection consideration. *See Lauth v. McCollum*, 424 F.3d 631, 633 (7th Cir. 2005) (when “the unequal treatment arises out of the employment relation [and involves union activities], the case for federal judicial intervention in the name of equal protection is especially thin” for it is “a paradox . . . to provide federal judicial protection (in the name of equal protection of the laws) for the union activities of a part of the workforce (namely state and municipal employees) that Congress has placed outside the protection of federal labor law”) (“class-of-one” case).

3. The State Gave an Appropriate Rational Basis for Act 10's Division Between Public Safety and General Employees

The Unions attempt to negate the State's rational basis for the limitation on the scope of collective bargaining, which it did give and the district court accepted (App. A-17—A-21), in dividing public sector employees into two groups by criticizing the State's concern about strikes by essential public safety employees. (Unions Br. 37–39, 48–49, 52–53, & 55–57.) But this is just a smoke screen.

[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (citations omitted). The State's "legislative choice" for Act 10's public employee designations "may be based on rational speculation unsupported by evidence or empirical data" because "the legislature must be allowed leeway to approach a perceived problem incrementally. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination" *Id.* at 315–16 (citations omitted).

The Unions feign outrage at the mere suggestion that public safety employees might strike to fight back against Act 10. They argue that the State's fear of strikes is unfounded, in part, because it is illegal for most public employees to strike. (Unions Br. 38 n.8, 39, & 55–57.) Obviously, the Unions did not take at face value the threat by President Conway of Madison Local 311 of the International

Association of Firefighters. Advocating for a general strike, Conway stated, “we should start walking out tomorrow, the next day . . . see how long they can last.”¹²

That the State had a legitimate, rational fear that the public safety unions might strike is evidenced both by Conway’s own words, and a look at history. In 1919, the Boston Policemen’s Union went on strike when the city’s police commissioner resisted unionization. Without full police presence in its streets, Boston residents were subjected to two days of rioting and looting, at which point the state guard restored order. Joseph R. Grodin et al., *Public Sector Employment: Cases & Materials* 4 (2004). The Boston example is not the only such incident. Examples of some Wisconsin public safety officers’ lack of fidelity to their job of protecting the public during the debate over Act 10 are well documented.¹³

¹² Stephen C. Webster, *Madison Firefighters Prez Calls for General Strike*, The UpTake (UpTakeVideo) (Mar. 9, 2011), http://www.youtube.com/watch?v=i_Z_TVrBUtw (last visited Aug. 8, 2012).

¹³ William A. Jacobson, Associate Clinical Professor, Cornell Law School, chronicled the law enforcement situation in Madison last year. Jacobson, *The Other Loser in Wisconsin—Law Enforcement Credibility*, Legal In-surrection (Mar. 10, 2011), <http://legalinsurrection.com/2011/03/the-other-loser-in-wisconsin-law-enforcement-credibility/> (last visited Aug. 7, 2012); see also Don Walker, *The Quiet after the Capitol Storm*, J. Sentinel (Mar. 10, 2011), <http://www.jsonline.com/blogs/news/117727713.html> (last visited Aug. 7, 2012) (police did not try and stop protesters from entering a building that was supposed to be closed for the night).

Also on March 10, 2011, seven union officials sent a letter to a private business owner. Three of the officials represented law enforcement unions, two represented fire fighter unions, and two represented local affiliates of Plaintiff-Appellee WEAC. Charlie Sykes, *Unions Threaten Business*, 620 WTMJ News Radio (Mar. 10, 2011), <http://www.620wtmj.com/blogs/charliesykes/117764004.html> (last visited Aug. 7, 2011). This letter directly threatens a private business with a “boycott [of] the goods and services provided by your company” if the business owner failed to join the unions in opposing Act 10. *Id.* Given such bold threats of economic blackmail by this Wisconsin police union, and mindful of the history of the 1919 Boston police strike, is it irrational for the Wisconsin Legislature to believe that public safety officers might stand idly by or look the other way in the face of union disorder?

III. The District Court Erred When It Declared That the State Must Continue to Subsidize the Unions and Collect Union Dues from Employees

The Unions' characterization of Act 10's prohibition on payroll dues deductions as a First Amendment violation, which needs to satisfy a heightened level of scrutiny, and an equal protection violation, which must pass a rational basis (Unions Br. 19 & 22), are misguided assertions.

Regarding the Unions' First Amendment violation claim, it is important to note at the outset that the State's participation in collection of Union dues is actually the State subsidizing the "speech" of the Unions by doing their collection work for them. Wisconsin has not restricted the Unions' First Amendment rights or free speech by no longer collecting union dues. Rather, it merely has put an end to taxpayer subsidization of the Unions' "speech." There is nothing to prevent the Unions from collecting their own dues and continuing their "speech." If the Unions have the support of their voluntary members to the degree they claim, they should have no problem collecting the dues themselves and "speaking" all they want.

When a government subsidizes speech, it is well established it "can make content-based distinctions." *Davenport*, 551 U.S. at 188–89 (citations omitted); (*see also* Employees Br. 24–25). As the State noted, even if Act 10's prohibition on payroll deductions was crafted to address certain unions' political support—as the Unions' insinuate—it is not viewpoint discrimination to reward political supporters and to punish political opponents, nor is the decision to end dues deductions of some unions subject to strict scrutiny under the First Amendment. (State Br. 39–40.) It merely is the State's choice to cease subsidizing those rights.

The Unions also fail in their claim that Act 10's payroll deduction prohibition violates the Equal Protection Clause. In *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), the American Federation of State, County & Municipal Employees, Local 1308 ("AFSCME") challenged a Tennessee statute that deprived it, but not all public employee unions, of payroll deduction dues. AFSCME claimed the purpose and effect of the statute was to "authorize discrimination in favor of [the Tennessee State Employees Association] in dues checkoff." *Id.* at 1428. Although the court held unconstitutional one small section of the law prohibiting payroll deduction for AFSCME, it upheld the statute allowing payroll deduction for some public employee unions and not others. *Id.* at 1428–29.

In *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), the Sixth Circuit held it did not violate the Equal Protection Clause to prohibit payroll deductions for public sector unions when they were allowed for private sector unions. *Id.* at 322.

In *Arkansas State Highway Employees Local 1315 v. Kell*, 628 F.2d 1099 (8th Cir. 1980), the public employer discontinued payroll deduction of union dues, but "continued to withhold items other than union dues." *Id.* at 1102. The Eighth Circuit rejected the union's challenge under the Equal Protection Clause, reasoning that the motive of saving money satisfied the rational relationship test. *Id.* at 1103.

While these circuit court decisions rely on various reasons for permitting payroll deductions for some employee organization and not others, their common theme is that saving money is a rational motive. Act 10 denies payroll deductions to those

unions that no longer collectively bargain in all aspects of the workers' employment. It is reasonable for the State to decide, in light of the Unions' reduced duties and the State's desire to save money, that it will no longer financially support unions providing significantly reduced services.

IV. Act 10's Annual Recertification Requirement Is Constitutional and Is Within the State's Power to Require When Acting as an Employer

The Unions cite *Romer v. Evans*, 517 U.S. 620 (1996) and *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) as support for the district court's invalidation of Act 10's annual recertification requirement on general employee unions. (Unions Br. 44–45 & 56–57.) Employees have already shown, *supra* at 15–16, why *Romer* and *Moreno* do not support the Unions or the district court. Employees also anticipated many of the Unions' arguments. (See Employees Br. 15–16 & 18–22.)

Employees also have demonstrated how both limiting the scope of bargaining and requiring annual recertification are part of the same issue: to whom will the State respond in labor matters? (*Id.* at 15–22.) The Unions' dependence upon *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), although for another point, illustrates a fundamental problem both with the district court's First Amendment and equal protection analyses. In *Perry*, the state permitted one union, but not another, to use a public school's internal mail system. The Court noted that the internal mail system was not a public forum. *Id.* at 53.

Knight discussed *Perry* and concluded that the employees' claims in *Knight*, to participate in the government's discussion of working conditions with its employees,

was “not even a claim of access to a *nonpublic* forum” (emphasis in original) as in *Perry*. 465 U.S. at 281. The *Perry* standard is low (if it is official business, no further justification is needed), but, as in *Knight*, 465 U.S. at 281–83, not even the low *Perry* standard applies here. Wisconsin’s current decision to listen more to individuals and less to the collective does not rise to the level of nonpublic forum analysis. Wisconsin has the right to decide, without judicial interference, to whom it will listen, and the rules under which it will listen and dialog.

Imagine an elected representative who invites to her office and listens only to those who supported her election and ignores those who did not. She entertains the opinions of one special interest group, excluding the competing groups. Few citizens would doubt the representative’s right to make those decisions, and *Knight* confirmed that those kinds of decisions create no constitutional violations for government decisionmakers. *Id.* at 284.

Logically, if government can choose its dialog partners from among those seeking to express political opinion (a core First Amendment activity), then the government has a sufficiently compelling interest to override a mere equal protection claim for which no heightened scrutiny is required. *Perry*, 460 U.S. at 54 (if a speech access claim cannot win when dressed as a First Amendment claim, it cannot win when dressed as a Fourteenth Amendment claim).

Knight explicitly states that speaking to one group (there, the collective) rather than to the individual does not violate equal protection rights. After its extensive discussion of why the First Amendment is not violated, *Knight* summarily

dispatched the equal protection argument, calling it “meritless.” 465 U.S. at 291. The Unions’ equal protection argument against the annual recertification requirement for general employee unions is equally meritless.

V. Removing the Public Safety Exception, Rather Than Act 10’s Core Application to General Employees, Is More Faithful to the Legislative Intent and Cures Any Possible Equal Protection Problem

The Unions cite *Frost v. Corporation Commission*, 278 U.S. 515, 526–27 (1929) and *Hillside Transit Co. v. Larson*, 265 Wis. 568, 586, 62 N.W.2d 722, 731 (1954) as foreclosing the more appropriate remedy suggested by Employees to the district court. (See Unions Br. 63 & n.14; Employees Br. 26–31.)¹⁴ *Frost* and *Larson* state a general rule that if an amendment is unconstitutional, the preexisting statute remains in force because the amendment is now a nullity. But the Unions’ reliance on *Frost* and *Larson* and the rule itself is misplaced.

The *Frost/Larson* rule was a response to the charge that finding an amendment unconstitutional also makes the preexisting law, as amended, unconstitutional because a court cannot recreate or reinstate statutes. See *Remington v. Wood Cnty.*, 238 Wis. 172, 177–79, 298 N.W. 591, 594–95 (1941). The necessity for the rule is limited to where the amendatory act is wholly invalid, 1A *Sutherland Statutory Construction* § 22:37 (7th ed.), or is a simple exception from the preexisting statutes, not where the amendments go to the heart of the preexisting basic law and change

¹⁴ Employees provided an alternative remedy if the lower court decided Act 10’s differing treatment of general public employees and public safety employees violated Equal Protection. They argued the court should enjoin that portion of Act 10 causing the constitutional violation (the exception for public safety employees from the budgetary reforms to public sector labor relations applicable to general employees), not the otherwise constitutional reforms of Act 10 applicable to general employee unions.

it substantially. *Town of Beloit v. City of Beloit*, 37 Wis. 2d 637, 648–49, 155 N.W.2d 633, 638–39 (1968). The alleged equal protection violations to which the Unions cite in both cases were between the amendment and the preexisting law, not within the amending law itself. *Frost*, 278 U.S. at 517–19; *Larson*, 265 Wis. at 574–76, 62 N.W.2d at 725–27.¹⁵

Here, Act 10 is a major overhaul of the preexisting public sector labor law, not a simple exception or mere amendment to preexisting law. Many of its sections are new, not amendments.¹⁶ The basic reform sections prohibiting dues deductions, requiring annual recertification by an absolute majority, and limiting the scope of bargaining for general employees are all new sections, not amendments. *See* Act 10, §§ 227, 242, 245, 289, 298, & 314. Act 10 divides many of its multiple reforms between general employees and public safety employees,¹⁷ two terms that did not exist in the preexisting law.

The alleged Equal Protection violations occurred within Act 10 itself because of its division of public employees into general and public safety categories. Act 10 is not a mere exception to preexisting labor law, or a simple amendment to that law.

¹⁵ Actually, the challenged exceptions in *Larson* did not violate equal protection. 265 Wis. at 588–89, 62 N.W.2d at 733.

¹⁶ For example, Act 10 mentions general employees or public safety employees in both new statutes it created and the amendments it made to existing ones. Compare Act 10, §§ 168, 214, 216, 227, 242, 245, 268, 272, 278, 286, 289, 298, 314, 315, 320, & 322 (“[a section] of the statutes is created to read:”) with Act 10, §§ 58, 210, 213, 217, 219, 220, 222, 223, 225, 231–34, 236, 238, 240, 246, 252, 255, 259, 260, 262, 267, 271, 273, 276, 284, 295, 299, 303, 308, & 312 (“[a specific section] is amended to read:”).

¹⁷ The actual terms are “general municipal employees,” “general employees” (for state employees) and “public safety employees” (for both).

Nullifying the two allegedly unconstitutional sections of Act 10 does not leave the existing statute unchanged and coherent. *Frost*, 278 U.S. at 528.

A court, finding an equal protection violation must enjoin one of the two categories creating the inequality or favoritism. Here the court must either enjoin the exception for public safety employees or the general application of Act 10's reforms to general employees so that the rights of all public employees rest "upon the same rule under similar circumstances." *Id.* at 522. Any illegal inequality created by the statute disappears by the removal of either category.¹⁸

Frost and *Larson* are unavailing and provide no guidance for the Court in determining the proper remedy for any Equal Protection violation caused by certain sections within Act 10. Instead, Employees provided the proper remedy in their opening brief: the court must determine legislative intent and then adopt the narrowest remedy possible in meeting that intent. Act 10's principal intent is to limit collective bargaining due to budget concerns.

The public safety employee exception is the narrow exception, relating to a potential breakdown in public order, which has now passed. It is also the portion of Act 10 that the Unions claim violates equal protection, and the district court concurred, because the public safety exception has no rational basis. (Employees Br. 26–31.) Invalidating the public safety exception, rather than the core general

¹⁸ "Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary." *Frost*, 278 U.S. at 522.

employee application, is more faithful to the legislative intent of Act 10, while bringing it into compliance with any applicable equal protection requirements.

CONCLUSION

For all the foregoing reasons, and the reasons stated in their original brief, Employees ask this Honorable Court to reverse the decision of the district court denying them intervention, grant them party status, consider their arguments on the merits, and reverse the lower court's ruling invalidating and enjoining two portions of Act 10. If this Court finds any portion of Act 10 in violation of the Equal Protection Clause, it should remand the case with instructions to vacate the injunction, grant the alternative remedy suggested by Employees and enjoin the public safety exception.

Dated: August 13, 2012

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) & 28.1(e)(2)(A)

I, Glenn M. Taubman, hereby certify that this Response and Reply Brief of Proposed Intervenors complies with the type-volume limitations set forth for response and reply briefs in Federal Rule of Appellate Procedure 28.1(e)(2)(A). Said Brief, including headings, footnotes, and quotations, contains 8,913 words, as calculated by the Microsoft Word, word count function.

DATED: August 13, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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