STATE OF WISCONSIN CIRCUIT COURT Branch 10 DANE COUNTY

MADISON TEACHERS, INC.,
PEGGY COYNE,
PUBLIC EMPLOYEES LOCAL 61, AFL-CIO,
and JOHN WEIGMAN,

Plaintiffs,

v.

Case No. 11CV3774

SCOTT WALKER,
JAMES R. SCOTT,
JUDITH NEUMANN, and
RODNEY G. PASCH,

Defendants.

DEFENDANTS' RESPONSE OPPOSING PLAINTIFFS' MOTION FOR AMENDMENT OF JUDGMENT

Defendants Scott Walker, James R. Scott, Judith Neumann, and Rodney G. Pasch, by and through their attorneys, submit this brief in opposition to Plaintiffs' motion for amendment of judgment (hereafter "Plaintiffs' Motion") filed September 28, 2012.

BACKGROUND

On September 28, 2012, Plaintiffs filed a motion to amend the Court's final order entered on September 14, 2012, granting summary judgment in their favor and declaring that Wis. Stat. §§ 62.623, 66.0506, 118.245, 111.70(1)(f), 111.70(3g), 111.70(4)(mb), and 111.70(4)(d)3 unconstitutional, null, and void. Plaintiffs bring their motion under Wis. Stat. § 806.07(1)(h), which permits a court to modify an order "upon such terms as are just" for "any reason justifying relief from the operation of the [order]." Plaintiffs ask the Court to amend its final order to declare a "relevant part" of Wis. Stat. § 111.70(2) unconstitutional, null, and void.

Wisconsin Stat. § 111.70(2), as amended by 2011 Wisconsin Act 10, expressly recognizes that municipal employees have "the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [and] to refrain from any and all such activities." Significantly, and in addition, while a public safety employee may be required to pay dues in the manner provided in a "fair-share" agreement, "**[a] general municipal employee has the right to refrain from paying dues [in the manner provided in a 'fair-share' agreement] while remaining a member of a collective bargaining unit.**" Based on Plaintiffs' Motion, and in particular paragraph 7, Defendants believe that Plaintiffs now ask the Court to strike down the above-referenced bolded sentence of Wis. Stat. § 111.70(2).

ARGUMENT

Plaintiffs' Motion should be denied for several reasons. First, Plaintiffs' argument that the Court's failure to declare a part of Wis. Stat. § 111.70(2) unconstitutional was an "omission" or "oversight" is unconvincing. Defendants cannot find in either of Plaintiffs' briefs any section where they asked the Court to strike down Wis. Stat. § 111.70(2), either in whole or "in relevant part." In fact, Plaintiffs twice referenced only "Wis. Stat. §§ 111.70(1)(f); 111.70(4)(mb)" in their initial brief when arguing that MERA (as amended by Acts 10 and 32) burdens employees' associational rights by prohibiting fair-share agreements. *See* Plaintiffs' Brief in Support of Motion for Summary Judgment, pp. 9, 13. The Court granted their wishes. Thus, the omission of Wis. Stat. § 111.70(2) from being one of the statutes declared unconstitutional was not an

"oversight" on the part of the Court as Plaintiffs now claim. Rather, Plaintiffs' Motion displays a disappointment in the outcome of the case better left for an appeal.

Second, even if the Court were to declare unconstitutional the specific sentence of Wis. Stat. § 111.70(2) recognizing the right of a general municipal employee to refrain from paying dues in the manner provided in a "fair-share" agreement, Plaintiffs would still not obtain the outcome they apparently seek. For instance, general municipal employees could not be required to pay dues in the manner provided in a "fair-share" agreement, because Wis. Stat. § 111.70(2) still would expressly permit public safety employees to be required to pay "fair-share" dues, and the absence of a comparable provision for general municipal employees would lead to the reasonable inference that general municipal employees could not be required to pay "fair-share" dues. *See Lang v. Lang*, 161 Wis. 2d 210, 224, 467 N.W.2d 772 (1991) ("the expression of one thing is the exclusion of another") citing *Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, n.18, 95, 279 N.W.2d 479 (Ct. App. 1979). In addition, even absent the specific sentence, the first sentence of Wis. Stat. § 111.70(2) expressly recognizes the right of all municipal employees to refrain from any and all concerted activities for the purpose of collective bargaining, and there is no exception for "fair-share" agreements.

Third, Plaintiffs' motion demonstrates why the\is Court's judgment should be stayed, not expanded. In its decision, the Court's basic premise was that general municipal employees who associate for the purpose of negotiating wages with their employer cannot be placed in a worse position than an individual general municipal employee who negotiates with the employer individually with respect to wages. This logic, however, does not lead to declaring unconstitutional provisions relating to "fair-share" agreements, annual recertification elections, or labor organization dues deductions. That is because an individual general municipal

employee does not enjoy a preferred status over general municipal employees who associate for collective bargaining with respect to any of those aforementioned matters.

Furthermore, in the decision (pp. 15-16), the Court states: "The prohibition on fair share agreements means that employees in a bargaining unit who join the union that bargains collectively for them are required to bear the full costs of collective bargaining for the entire bargaining unit, including employees in the unit who do not belong to the union but receive the benefits of bargaining." If the Court means that because an individual general municipal employee who negotiates wages individually with a municipal employer bears his own "costs" of negotiation, while a general municipal employee who associates for the purpose of negotiating wages with a municipal employer bears not only his own individual costs of negotiation but also the cost of negotiating for bargaining unit members who are (involuntarily) associated in a collective bargaining agreement but who refrain from joining the labor organization that represents the bargaining unit, the Court assumes that there is an "added cost" in negotiating wages for those bargaining unit members who refrain from joining the labor organization. There is no evidence in the record, however, nor is it intuitive, that there is any **added** cost involved in negotiating wages for bargaining unit members who refrain from joining the labor organization than there is for negotiating wages for bargaining unit members who join the labor organization.

Fourth, in *Wisconsin Education Association Council, et al. v. Scott Walker, et al.*, Case No. 11-cv-428-wmc (W.D. Wis. March 30, 2012), even though federal district court judge William M. Conley decided that the sections of MERA providing for annual recertification elections and prohibiting dues deductions for general municipal employees violated the constitutional rights of municipal general employees, his decision left in place state law allowing **voluntary** dues deductions. That is, the federal court decision does **not** require general

municipal employees to pay "fair-share" dues. Indeed, as the United States Supreme Court recently recognized in *Knox v. Service Employees Intern. Union, Local 1000*, __ U.S. __, 131 S. Ct. 2277, 2289 (2012), compulsory union dues as a condition of employment can impose a form of compelled speech and association that imposes a "significant impingement on First Amendment rights" of those bargaining unit members who otherwise would refrain from paying dues. Although the Supreme Court declined to reach the issue in *Knox*, it certainly signaled the likelihood that it would revisit "whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." *See Knox*, 131 S. Ct. at 2289. In other words, Plaintiffs are asking the Court to strike down a law that the United States Supreme Court forecasts as *compliant* with the Constitution.

Defendants oppose Plaintiffs' Motion and respectfully submit that its filing not delay the Court's decision on Defendants' pending motion to stay the final order. *See* Wis. Stat. § 806.07(2) (motion filed under statute "does not affect the finality of a judgment or suspend its operation").

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' Motion to Amend the Judgment.

Dated this 2nd day of October, 2012.

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