STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2012-AP-2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

On Appeal from the Decision and Final Order dated September 14, 2012
Dane County Circuit Court Case, Case No. 11-CV-3774
The Honorable Juan B. Colas

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INTRODUCTION

Elijah Grajkowski , Kristi Lacroix, and Nathan Berish ("*Amici*") are nonunion public employees who will be affected both in principle and in a pecuniary way by the outcome of the current matter being litigated regarding 2011 Wisconsin Act 10 ("Act 10"). *Amici* file this *Amici Curiae* Brief in support of the Defendants-Appellants' ("the State") position, and in doing so, further expand upon applicable law as to why this Honorable Court should reverse the lower court's decision and rule constitutional all of Act 10.

ARGUMENT

I. STATES NEED NOT DIALOG WITH OR LISTEN TO ALL CITIZENS TO THE SAME DEGREE

A. Plaintiffs-Respondents' First Amendment Claims are Foreclosed by Controlling U.S. Supreme Court Precedent

The United States Supreme Court ("Supreme Court") has held that a state is not obligated to speak, or even to listen, equally to all of its citizens, even when they are public employees engaging in protected First Amendment activity. Two controlling Supreme Court decisions curtail, and

ultimately render invalid, Plaintiffs-Respondents' ("Unions") arguments that provisions of Act 10 infringe upon their First Amendment rights, in violation of the United States and Wisconsin Constitutions.

In *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), the Supreme Court determined that the state had no constitutional obligation to consider or discuss grievances filed by the union collective, but could instead limit its discussions to individual employees. The Supreme Court noted that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the [collective] and bargain with it." *Id.* at 465.

The exact opposite happened in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). In *Knight*, the public employer both bargained and conferred exclusively with the union collective rather than the individual. This, too, was upheld as constitutional, for "[n]othing in the First Amendment . . . suggests that the rights

to *speak, associate, and petition* require government policy makers to listen or respond." *Id.* at 285 (emphasis added). For purposes of the First Amendment, the Supreme Court considers the dealings of public employees and public employers to be the functional equivalent of elected government representatives interacting with lobbyists or any other individual or group seeking an audience with them. Supporting the proposition that government officials can pick and choose to whom they wish to listen, the Supreme Court noted in *Knight* that legislatures enact bills "on which testimony has been received from only a select group" and that "[p]ublic officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear." *Id.* at 284. Such selective listening and dialog creates no constitutional issue, and according to the Supreme Court, "[t]o recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices." *Id.*

The Supreme Court continued: "Absent statutory restrictions, the state [is] free to consult or not to consult whomever it pleases." *Id.* at 285. The Supreme Court considered its decision in *Knight* consistent with its decision in *Smith*, and stated that "[in *Smith*] the government listened only to individual employees and not to the union. Here the government [dialogs] with the union and not the individual employees. The applicable constitutional principles are identical . . . ." *Id.*

The Supreme Court's First Amendment analyses in *Smith* and *Knight*—relevant to this matter because they offer insight into a state's ability to pick and to choose to whom they wish to listen to and dialog with—are the beginning and the end of the analysis needed to determine that Unions' claim, that their First Amendment rights are violated by Act 10, is baseless.

The United States Seventh Circuit Court of Appeals recently rejected this same First Amendment claim, citing to these Supreme Court cases and others and stating that

> [w]hile the First Amendment prohibits plac[ing] obstacles in the path of speech, nothing requires

> government to assist others in funding the expression of particular ideas, including political ones, (noting that Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of a constitutional right).

Wis. Educ. Ass'n Council v. Walker, Nos. 12-1854, 12-2011, 12-2058, 2013 WL 203532, at *4 (7th Cir. Jan. 18, 2013) (citations & quotation marks omitted).[1] The Seventh Circuit recognized the settled principle that the State could choose with whom to discuss employment matters (individual employees or the collective union) without any negative constitutional consequence when it cited to the Supreme Court's language in *Knight* indicating as much. *See Walker*, 2013 WL 203532, at *11.

In an effort to shrug off the controlling language of *Smith*, the court below attempted to distinguish the present matter from the opinion of the Supreme Court on the basis that, in *Smith*, there was no "evidence of different treatment because of union membership." (App. to Br. of Defendants-Appellants at App. 014.) While the lower court's attempted distinction is

[1] Complete opinion in appendix.

questionable with regard to *Smith*, it cannot distinguish *Knight*, a case presented below to the court by these *amici*.

The Supreme Court considered *Knight* to be a mirror-image of the "constitutional principles" found in *Smith*, *Knight*, 465 U.S. at 285, although *Knight* involved employees who were *not* union members but were barred from meeting, conferring, or bargaining with their public employer. In *Knight*, the differing treatment between individuals was *based on union membership status*, yet the Court held that the "state [is] free to consult or not to consult whomever it pleases." *Id*. at 285; *accord Walker*, 2013 WL 203532, at *11 (Seventh Circuit held that the State was "free to impose any of Act 10's restrictions on all unions," affirming the State's right to choose to whom it would listen.). When considered in conjunction with *Knight*, the lower Court's attempt to distinguish the present matter from *Smith*, and other controlling Supreme Court decisions, fails.

Act 10 does not treat public employees differently based on the exercise of their freedom of association. Public

employees are free to join unions or any other common association and advocate for changes in the law or certain terms and conditions of employment. What Act 10 does is establish the rules of the game when those associations seek the statutory privilege to collectively bargain and to be recognized as an exclusive representative for that purpose—something that *Smith* and *Knight* make clear that the state may extend, withdraw, or limit at will.

B. State has Constitutionally and Historically Changed with Whom to Dialog and Talk

The conflict between the union collective and the individual employee to dialog with the State on employment matters is long standing. For example, while *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), represents a time when Wisconsin's public policy was in favor of dialog with the collective, it has not always been so.

The Wisconsin Labor Relations Act of 1937 granted collective bargaining rights to only private-sector employees. Joseph E. Slater, *Public Workers: Government Employee*

Unions, the Law, and the State, 1900-1962 167 (2004) ("Slater"). From 1951 to 1957, public employers dialoged with individual employees, not collectives. In each of those years, the legislature rejected union-backed bills to permit collective bargaining for public employees." *Id.* at 170–78.

In 1959, Wisconsin shifted its dialog away from individual public employees and toward union collectives. Some municipal employees, but not public safety employees, were granted limited collective bargaining privileges. The 1959 statute, 1959 Wis. Laws ch. 509, § 1, however, limited the scope of collective bargaining to only wages, hours, and conditions of employment and did not require Wisconsin public employers to negotiate in good faith. Wis. Stat. § 111.70(2) (1959); *see also* Charles C. Mulcahy & Gary M. Ruesch, *Wisconsin's Municipal Labor Law: A Need for Change*, 64 Marq. L. Rev. 103, 107 (1980–81). As a result, some public-sector employees' bargaining privileges varied from private-sector employees', and other public employees,

including police, had no bargaining privileges at all. Slater, *supra*, at 183–84.

In 1962, Wisconsin enacted Bill 336-A, which strengthened public employee collective bargaining, but neither provided state employees with bargaining, nor permitted compulsory union fees. 1962 Wis. Laws, ch. 663; Slater, *supra*, at 189–91. Despite the 1962 changes, the scope of bargaining remained limited. Slater, *supra*, at 191; Gregory M. Saltzman, *A Progressive Experiment: The Evolution of Wisconsin's Collective Bargaining Legislation for Local Government Employees*, 151 J. of Collective Negotiations in the Pub. Sector 1, 11 (1986) ("Saltzman").

Wisconsin state employees were first given limited bargaining rights in 1965. Slater, *supra*, at 191. However, police were unable to organize and bargain collectively until 1971. Concurrently, public employers were forced to bargain in good faith, and some public-sector unions obtained the right to file unfair labor practice charges and compel nonmembers to pay forced union fees. Saltzman, *supra*, at 11.

In 1972, the Wisconsin legislature enacted a statute pertaining to the Milwaukee police, and another pertaining to police outside Milwaukee, plus firefighters and sheriff's deputies. These statutes gave different privileges to the two groups, and differed from the privileges of other municipal employees. *Id.* at 11–12.

The Wisconsin legislature amended Wis. Stat. § 111.70(3)(a)4 in 2009 to allow three year collective bargaining agreements for municipal employees and four year agreements for teachers. 2009 Wis. Legis. Serv. Act 28, § 2225F (2009 A.B. 75). Because the contract bar rule prohibits decertification elections during the term of an agreement, teacher unions were protected from representation elections for four years and other municipal employee unions for only three years.

Act 10 fits comfortably in Wisconsin's history of changing attitudes toward public employee collective bargaining. It revives greater dialog between individual employees and the State and reestablishes decreased dialog

between the State and union collective by limiting the scope of mandatory bargaining with the collective.

If the court below is correct that the First Amendment limits the State's ability to determine its level of dealings with public employees, then all the bargaining laws Wisconsin passed since 1937 have violated the First Amendment. If, as discussed next, the court below is correct that the Equal Protection Clause is violated when bargaining laws do not apply equally to all employees on all matters, then the State has a long history of equal protection violations.

II. THE EQUAL PROTECTION CLAUSE WEIGHS MORE LIGHTLY WHEN GOVERNMENT ACTS AS EMPLOYER, RATHER THAN REGULATOR

The State's briefs have extensively addressed the lower court's misguided Equal Protection analysis, including its error in applying strict scrutiny, and Unions' equally mistaken claims that provisions of Act 10 violate the equal protection clauses of the United States and Wisconsin constitutions. Therefore, *Amici* limit their discussion to a distinction not recognized by the lower court or Unions nor discussed by the

State.[2] The distinction is that, absent a protected class—which Unions are not—the State has virtually unlimited discretion to treat citizens unequally when it acts in its capacity as employer or proprietor, as opposed to when it acts as a sovereign or regulator.

In *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008), the Supreme Court explained that there is a substantial difference, in an Equal Protection analysis, between the government acting as "regulator" and as "proprietor." *Id.* at 598. "[G]overnment has significantly greater leeway in its dealings with citizen employees than it does . . . [with] citizens at large." *Id.* at 599. When a state acts as an employer (as the State does here), it need not treat all employees equally. Rather, to treat some employees differently is simply "to exercise the broad discretion that typically characterizes the employer-employee relationship." *Id.* at 605.

[2] The State also failed to mention that, in *Knight*, the Supreme Court dismissed the equal protection claim of the individual employees *not listened to* as "meritless." 465 U.S. at 291. Clearly, the State's freedom to listen to whomever it wants in employment related matters does not violate the Equal Protection Clause.

Engquist did not eliminate all Equal Protection claims against a government employer for "class-based decisions," *id.*, but Unions' claims here do not involve a protected-class. Rather, Unions allege that different kinds of unionized employees cannot be treated differently. Unions' argument throws the instant Equal Protection issue squarely into the arms of *Engquist*: government can make unfair and arbitrary employment decisions without having to be measured by the Equal Protection Clause. 553 U.S. at 606; *cf. United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 837–39 (1983) (group action resting on economic or commercial animus, "such as animus in favor of or against unionization," *id.* at 826, is not prohibited by the civil rights statute, 42 U.S.C. § 1985(3)).

Engquist cited as an example of the ability of the "government as employer" to distinguish among employees to the fact that most federal employees are covered by civil service protections, but not all. The Supreme Court called this "Congress's . . . careful work." 553 U.S. at 607. It did not call

this unequal treatment "discrimination" to be scrutinized by the judiciary.

Just as government decision-makers can listen and dialog with whomever they wish, so too can government, as employer, treat employees (apart from protected classes, such as race) differently, without having to answer to constitutional claims. That is all that Act 10 has done.

III. STRICT SCRUTINY IS NOT TRIGGERED BY UNION MEMBERSHIP OR DISPROPORTIONATE STATE SUBSIDIZATION OF EXERCISE OF PROTECTED RIGHTS

Unions' attempt to cast this matter as a violation of the Equal Protection Clause that would require Act 10 to withstand strict scrutiny review, is simply a desperate attempt to use flawed legal analysis to shift the law in their favor. Unions admit, as they must, *see Walker*, 2013 WL 203532, at *10–15, in their brief that they lose their Equal Protection claims if Act 10 provisions are reviewed under a rational review standard instead of strict scrutiny (Br. of Pls.- Resp'ts at 39). Hence Unions' attempt to invent a violation of a fundamental right where none exists.

In its recent decision upholding the relatively new Indiana right to work law, the United States District Court of the Northern District of Indiana correctly stated that "[t]he Supreme Court has long ago indicated that union membership is not a suspect classification triggering the strict scrutiny standard." *Sweeney v. Daniels*, No. 2:12CV81, 2013 WL 209047, at *7 (N.D. Ind. Jan. 17, 2013);[3] *accord Walker*, 2013 WL 203532, at *10–11. The District Court continued and cited the Supreme Court case *City of Charlotte v. Local 660, International Association of Firefighters*, 426 U.S. 283 (1976), to support the proposition that union membership alone does not entitle one to special treatment under the Equal Protection Clause, and as such, "the city's practice must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny." *Daniels*, 2013 WL 209047, at *7 (citation omitted); *accord Walker*, 2013 WL 203532, at *10.

[3] Complete opinion in appendix.

The District Court also quashed the union's attempt to cast the State's limitations on collective bargaining for unions, but not for non-union employees, as an infringement on First Amendment fundamental rights or a protected class when it quoted *Local 514 Transport Workers Union of America v. Keating*, 358 F.3d 743 (10th Cir. 2004), that "neither union nor non-union status implicates a fundamental right or constitutes a protected class, so that a statute which addresses or favors one group over another need only reflect a rational basis." *Daniels*, 2013 WL 209047, at *7 (citations and internal quotations omitted).

Even if the union member or union is engaged in constitutionally protected action (association or speech), that does not mean that they are a protected class or that their fundamental rights have been violated when the State chooses to begin bargaining and listening to a different party. "A person's right to speak [or to associate] is not infringed when government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288.

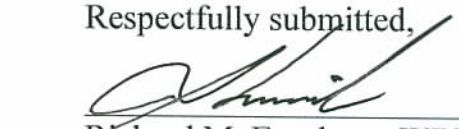
The right to be heard and to collectively bargain is not a protected right, but merely "an act of legislative grace." *Bd. of Regents of Univ. of Wis. Sys. v. Wis. Personnel Comm'n*, 103 Wis. 2d 545, 556 (Ct. App. 1981). As such, when the State pivoted to listen more to the individual employees instead of Unions, Unions' Equal Protection rights were not violated, and therefore, only a rational basis review of Act 10 is proper.

CONCLUSION

The United States Constitution and the Wisconsin Constitution neither require the State to speak equally with all citizens and groups, nor does it require the State to provide equal financial support (subsidy) to all citizens and groups in the exercise of their constitutional rights. This is especially true when the State acts in its proprietary role as employer. For these reasons, the lower court's holding that Act 10 is unconstitutional should be reversed by this Court, and the constitutionality of Act 10 upheld.

Dated: February 1, 2013

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(d)

I, the undersigned, hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief, including the Introduction, Argument, Conclusion, headings, footnotes, and quotations is 2,827 words, as calculated by the Microsoft Word, word count function.

Dated: February 1, 2013

Thomas C. Kamenick

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I, the undersigned, hereby certify that I have submitted a copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed with the court and served on all opposing parties.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: February 1, 2013

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