STATE OF WISCONSIN | CIRCUIT COURT BRANCH 10 | DANE COUNTY

MADISON TEACHERS INC., et al.,
Plaintiffs,

v.

CASE NO: 2011-CV-3774
CASE CODE: 30701

SCOTT WALKER, et al.,
Defendants.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN OPPOSITION TO NON-PARTY UNIONS' MOTION FOR CONTEMPT AND FOR REMEDIAL SANCTIONS

A group of public school teachers in Wisconsin, Tracie Ann Happel, Nicholas Alan Johnson, Jennifer Henderson, and Amy Rosno, by their attorneys, the Wisconsin Institute for Law & Liberty, hereby move this Court for leave to file an *amici curiae* brief in opposition to the non-party unions' motion for contempt and for remedial sanctions. In support of this motion, they make the following averments:

1. *Amici*, as will be articulated below, have substantial, direct, and continuing interests in this matter.

2. Nicholas Alan Johnson is a public school teacher, employed by Milwaukee Public Schools. He resides in Milwaukee, Wisconsin. The Milwaukee Teachers' Education Association is seeking certification to represent the teachers employed by Milwaukee Public Schools. He wants the election to go forward as scheduled and to be able to exercise his right to vote on whether to certify the union.

3. Amy Rosno is a public school teacher, employed by the School District of Waukesha. She resides in Eagle, Wisconsin. The Education Association of Waukesha is seeking certification in November to represent the teachers employed by the School District of

Waukesha. She wants the election to go forward as scheduled and to be able to exercise her right to vote on whether to certify the union.

4. Jennifer Henderson is a public school teacher, employed by the Racine Unified School District. She resides in Sturtevant, Wisconsin. The Racine Education Association is seeking certification to represent the teachers employed by the Racine Unified School District. She wants the election to go forward as scheduled and to be able to exercise her right to vote on whether to certify the union.

5. Tracie Ann Happel is a public school teacher, employed by the School District of La Crosse. She resides in the township of Onalaska, Wisconsin. The La Crosse Education Association is seeking certification to represent the teachers employed by the School District of La Crosse. She wants the election to go forward as scheduled and to be able to exercise her right to vote on whether to certify the union.

6. As a result of Act 10, *Amici* and their fellow public school teachers across Wisconsin have been given many new rights and freedoms. They are no longer forced to join or financially support labor organizations with which they disagree or accept unwanted representation on nearly all topics of workplace policy, unless there was a bargaining agreement in effect on June 29, 2011. In addition, they have the right under Section 111.70(4)(d) to vote next month as to whether they will or will not be represented by a particular union in negotiations with their employers.

7. With the exception of the two unions that are party to this lawsuit and their employers, all of the other more than two thousand local governments and their respective unions are indisputably bound by Act 10. No court has held that *Amici* do not have the right to vote on certification of their union.

8. This Court's decision on the non-party's motion for contempt will have a profound impact on *Amici* as well as all public school teachers across the state. The non-party unions are asking the court to prohibit WERC from applying Act 10 to any individual teacher across the state. This request could result in public school teachers' rights under Act 10 being put into jeopardy.

9. *Amici's* immediate concern is in holding recertification elections in November. The non-party unions are asking that WERC be estopped from holding those elections. Therefore, if teachers want to vote to decertify, as is their right under Act 10, they would be denied the right to do so. If they want to vote to recertify, as is also their right under Act 10, they may not do so. *Amici*, as public school teachers, would be denied this right even though they are not parties to the original lawsuit.

For the above reasons, Tracie Ann Happel, Nicholas Alan Johnson, Jennifer Henderson, and Amy Rosno, by their attorneys, the Wisconsin Institute for Law & Liberty, ask that this Honorable Court grant them leave to file an *amici curiae* brief in opposition to the non-party unions' motion for contempt and for remedial sanctions.

Respectfully submitted,

Date: 10/9/2013

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CASE NO: 2011-CV-3774

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AMICI CURIAE BRIEF OF TRACIE HAPPEL, NICHOLAS JOHNSON, JENNIFER HENDERSON, AND AMY ROSNO IN OPPOSITION TO NON-PARTY UNIONS' MOTION FOR CONTEMPT AND FOR REMEDIAL SANCTIONS

INTRODUCTION

There are 72 counties, 424 school districts, and 1,856 municipalities in Wisconsin. None of them are parties to this lawsuit. There are tens of thousands of general municipal employees who work for those counties, school districts and municipalities. None of them are parties to this lawsuit. Not one of these public employees or local units of government are bound by this Court's prior rulings.

In any action seeking to prevent any of them from exercising their rights under Act 10, each would be able to rely on the strong presumption that a state statute is constitutional. Conversely, in an action seeking to prevent the application of Act 10 to them, each would have to overcome that strong presumption. No court hearing such an action would be bound to follow this Court's decision, either as a matter of precedent or issue preclusion. Indeed, the United States District Court for the Western District of Wisconsin recently rejected the very constitutional challenge accepted by this Court. *Laborers Local 236, AFL-CIO v. Walker*, 2013

WL 4875995 (W.D. Wis. Sept. 11, 2013) ("As such, the court finds that plaintiffs cannot state a violation of the Equal Protection clause premised on the differential treatment of represented versus unrepresented employees under Act 10."). The Seventh Circuit rejected a related challenge. *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013).

In other words, Act 10 is presumptively applicable to all of the local units of government and public employees not parties here. Until a court with jurisdiction over them or whose decision has precedential effect says otherwise, they are all bound to follow Act 10 and they all have the rights and obligations imposed by Act 10.

The movants in the current matter pending before the Court are non-party unions (the "Non-party Unions") that likewise are bound to comply with Act 10. The Non-party Unions are asking this Court to grant relief that affects the rights and obligations of these thousands of government entities and tens of thousands of individuals who are not subject to this Court's jurisdiction, who have not been given notice of this motion, and who have no opportunity to be heard.

Notwithstanding their sharp language about "outrageous" "disrespect" for the judiciary, the contempt motion is a blatant exercise in forum shopping. Normally, a non-party would have to argue that this court's decision has issue preclusive or persuasive effect. Because Non-party Unions know that there is no preclusive effect and another court might disagree on the constitutionality of Act 10, proceeding by contempt is an attempt to have the rights of non-parties litigated in a court that has already ruled on the issue. It is, as the Defendant commissioners point out, an attempt to obtain an injunction that has been denied and to obtain a state-wide impact for this Court's judgment that the Court of Appeals has held it does not have.

Amici are individual Wisconsin teachers who are members of collective bargaining units represented by unions that must stand for recertification elections next month (the "Individual Teachers"). They are general municipal employees as defined in Section 111.70(1)(fm). Each has the right under Section 111.70(4)(d) to vote next month as to whether they will or will not be represented by a particular union in negotiations with their employers. All of them want to exercise that right to vote. They want to exercise their right under Act 10 to be heard on whether or not they must continue to abide by the terms and conditions of employment negotiated for them by a collective. Each wants to deal with his or her employer as an individual.

They have that right under Act 10, and no court has held otherwise. Yet the Non-party Unions ask this Court to deny these teachers their right to vote.

The relief sought by the Non-party Unions should be denied because it is both substantively and procedurally unwarranted.

I) WERC Must Apply the Law to Which Public Unions and Public Employers Are Bound

WERC is an administrative body that has both adjudicative and ministerial duties. It must adjudge disputes between employers and unions, applying the law as it applies to those parties. *See* Wis. Stat. § 111.70(a)-(cm). Determining whether or not public employees, such as the Individual Teachers, have a right to insist that they be permitted to vote on recertification as Act 10 requires would ultimately require an exercise of its adjudicative capacity. With the exception of the two unions that are party to this lawsuit and their employers, all of the other more than two thousand local governments and their respective unions are presumptively bound by Act 10, and the general municipal employees who work for those governmental entities have rights under Act 10. This Court's declaratory ruling has no effect on those non-parties' rights

and responsibilities. *See* Wis. Stat. § 806.04(11) ("[N]o declaration may prejudice the right of persons not parties to the proceeding."). WERC must, as a matter of law, apply Act 10 to these other governmental agencies and unions, and WERC must protect the rights of the employees who work for these governmental agencies. *See* September 17, 2013 Decision and Order on Petition for Injunction, 2 (recognizing that only the Defendants, and not non-parties, are bound by this Court's ruling).

To say that WERC itself is bound by this court's ruling does not change that result. An adjudicative body is not asserting its own rights, but applying the law to claims brought by others. Everyone agrees that a circuit court decision does not have precedential value. Therefore, WERC cannot be bound to follow it in its capacity as an adjudicative body. To hold otherwise would give an action for declaratory relief an impact on non-parties that it plainly does not – and cannot – have. *See* Wis. Stat. § 806.04(11). Thus, an administrative body is not bound to follow a principle of law asserted by a circuit court decision. *See Gould v. DHSS*, 216 Wis. 2d 356, 365-70, 576 N.W.2d 292, 296-98 (Ct.App.1998) (rejecting a plaintiff's assertion that the DHSS was bound to apply adverse circuit court decisions to individuals not party to those decisions). If, for example, a single circuit court concluded that a decision by WERC or any other quasi-judicial agency was unconstitutional or otherwise contrary to law, the agency would not be bound to follow that conclusion in cases involving other parties. Naming the WERC commissioners as individual defendants does not change that.

If WERC could be bound in its adjudicative capacity, nonsensical results would occur. WERC's decisions are subject to judicial review, Wis. Stat. § 227.52, and the reviewing court, of course, would not be bound to follow this Court's decisions in its review. Depending on WERC's expertise applying the law at issue, the reviewing court could even give WERC's

interpretation deference. *See Rock-Koshkonong Lake Dist. v. DNR*, 2013 WI 74, ¶59, __ Wis. 2d __, 833 N.W.2d 800 (describing the three-tiered system of judicial review of agency determinations). Forcing WERC, under penalty of contempt, to rule in a certain way would not foreclose judicial review and would only expose it to the risk of conflicting obligations.

Likewise, WERC has a ministerial duty to oversee certification and recertification elections, verify their results, and certify or decertify exclusive bargaining representatives based on those results. Wis. Stat. § 111.70(4)(d)3.b. The Non-party Unions are bound to stand for recertification elections every year under Act 10. *Id.* This Court has no authority to relieve them of that duty, as it has no jurisdiction over them or their employers. The Individual Teachers have the right to vote in such elections. WERC must fairly apply the law to which those unions and employers are bound and must protect the rights of the Individual Teachers.

WERC cannot be held in contempt for actions it is duty-bound to carry out. *See* LRB comment to Wis. Stat. § 785.01, L. 1979, C. 257, §11 ("[T]he previous [contempt] section contained language that a refusal to do something had to be "without legal justification" before it constituted contempt. These words are not necessary because no contempt can be found if the refusal had a legal justification. It is not the purpose of the council to change the law of contempt as it relates to intent or the defenses available to a contempt charge.") (emphasis added).

II) Granting the Motion Would Create Irreconcilable Paradoxes and Lose-Lose Situations

The Non-Party Unions are asking this court to move from a fairly straightforward situation to a nightmarishly complex one. Currently, WERC is bound to follow this Court's ruling with respect to the two unions that are parties to this litigation.[1] But every other union must follow Act 10, and local units of government and public employees who wish to assert their

[1] However, if this court decision is reversed, any contract entered into in violation of Act 10 would be invalid.

rights under Act 10 are free to do so. As noted above, should any non-party seek to contest the applicability of Act 10 or assert rights under the law, other circuit courts would not be bound by this Court's decision, and the presumption of the law's constitutionality would still be in place.

While such a situation is somewhat complicated, it is by no means out of the ordinary. The United States operates such a system with 50 various sets of rules different groups of people must follow. "Circuit splits" in federal courts result in similar divisions.

But because non-parties – including over two-thousand local units of government, numerous unions, and tens of thousands of public employees – are not bound by this Court's decision, any one of them seeking to avail themselves of their rights under Act 10 are free to do so and may well commence litigation to enforce those rights. For example, any taxpayer could file a lawsuit challenging any conduct by the governmental agency in violation of Act 10. *See City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W. 2d 249 (1988) (recognizing both derivative and direct tax payer standing under Wisconsin law). Similarly, one of the Individual Teachers or any other public employee who does not wish to have the terms of his or her employment negotiated by a union could file a lawsuit challenging a collective bargaining agreement reached in violation of Act 10 as infringing on their personal rights to negotiate individually and not be subject to fair share agreements and/or challenge the denial of their right to vote for a bargaining agent. Any public employee (not represented by the parties to this litigation) would also be able to file an action for mandamus seeking to order WERC to hold recertification elections this November.

Those cases would likely not be filed in Dane County, and the courts that handle those cases would not be bound by this Court's prior decision relating to the constitutionality of Act

10. *MTI v. Walker*, No. 2012AP2067, March 12, 2013, Order 14, n.1 (the court of appeals recognizing that other circuit courts need not follow this Court's ruling).

Another court would be well within its rights to issue such an order (especially in light of the fact that both the Seventh Circuit Court of Appeals and the United States District Court for the Western District of Wisconsin have held that Act 10 is constitutional), at which point WERC would be in a classic Catch-22, subject to contempt no matter whether it held or did not hold the election.

While WERC would, if ordered by this Court, be bound to resolve a dispute as if Act 10 were not in place, any court reviewing that agency action would be bound to presume that Act 10 is unconstitutional and might well conclude, as did the Western District of Wisconsin, that it is. Thus, just as in the Schrödinger's Cat paradox, Act 10 would be both dead and alive at the same time until the Wisconsin Supreme Court "opens the box" by making a final decision. WERC should not be made, by penalty of contempt, to choose among these competing scenarios with respect to persons who are not parties to this case.

Public employees themselves – whether they oppose or support recertification – are also placed in a Catch-22 if this Court grants the relief sought and stops WERC from holding recertification elections. If teachers want to vote to decertify, as is their right under Act 10, they would be denied the right to do so. If they want to vote to recertify, as is also their right under Act 10, they may not do so. In that regard, consider what happens if this Court halts all recertification elections statewide, and then Act 10 is upheld by the Wisconsin Supreme Court in 2014. Because, as required by Section 111.70(4)(d)3.b., there was no election prior to December 1, 2013 certifying any bargaining agents for 2014, no union will have the right to be the exclusive bargaining representatives for anyone in 2014. Thus, even general municipal

employees who want to certify an exclusive bargaining agent for 2014 could be prejudiced if this Court grants the relief sought by the Non-Party Unions. If this Court's decision regarding the unconstitutionality of Act 10 is reversed by the Wisconsin Supreme Court and if this Court grants the Non-party Unions the relief they seek, this Court will be stripping general municipal employees (whether for or opposed to certification) of their right to vote and to have the results of that vote count in 2014.

III) The Relief Sought by the Non-party Unions Is Procedurally Inappropriate.

Finally, it is worth pointing out how unusual the Non-party Unions' request is from a procedural standpoint. First, they are not parties and have no right to seek relief from this Court. Second, this Court only has limited jurisdiction while the case is on appeal.

A) The Movants Are Not Parties

The Non-party Unions are not parties to this litigation (hence the appellation of "Non-party"). While § 785.03 refers to "a person aggrieved," the Individual Teachers could find no case where a contempt motion was brought by a non-party. Although it is difficult, if not impossible, to prove a negative, the absence of authority supporting the Non-party Unions' ability to bring this motion suggests that the Court should be loathe to grant the extraordinary and far-reaching relief sought by the Non-party Unions.

Moreover there are obvious reasons for limiting relief under section 785.03 to parties. Non-parties have their own remedy for violations of their rights; they must file their own lawsuits against the defendants they accuse of the violations. Then, if they think that a prior decision of another circuit court supports their claim, they can argue issue preclusion against the defendants even though they were not parties to the previous action. *Northern States Power Co.*

v. Bugher, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723, 727 (1995) (issue preclusion does not require an identity of parties). But importantly, Wisconsin courts have refused to apply issue preclusion against administrative agencies like WERC when a plaintiff who was not a party to a previous case attempts to use the results of that case offensively against the agency to preclude the agency from litigating the issue. *Gould, supra*, 16 Wis. 2d 356, 576 N.W.2d 292; *Teriaca v. Milwaukee Employees' Retirement System/Annuity and Pension Bd.*, 2003 WI App 145, 265 Wis. 2d 829, 667 N.W.2d 791. Given that even issue preclusion does not always apply when a non-party wants to use a prior judgment offensively, a fortiori, that non-party ought not have the benefit of seeking contempt as a method of short-cutting that process. This is particularly so where, as here, different courts have resolved the issue in different ways.

B) The Motion for Contempt by Non-Parties Is Not Proper While the Case Is On Appeal

The Court is already well aware of the provisions of Section 808.07, having reviewed and interpreted that statute in its Decision and Order dated September 17, 2013. In that ruling the Court concluded that it could rule on the Plaintiffs' motion for an injunction even though the case was on appeal because it was expressly allowed to do so under Section 808.07(2)(a)2. Here, however, the motion is not for an injunction and, as a result, Section 808.07(2)(a)2 does not apply and there is no corresponding subpart of Section 808.07 that permits a circuit court to consider a non-party's motion for contempt under Section 785.03 while a case is on appeal. Nor is a motion under Section 785.03 one of the permissible "court actions pending appeal" set forth in Section 808.075.

The Non-party Unions may contend that this Court can consider their motion under Section 808.07(2)(a)3, but any such contention would be without merit. That section says that a

circuit court may "[m]ake any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered." This does not apply to the Non-party Unions' motion for contempt. In that motion the Non-party Unions are not seeking to preserve the existing state of affairs, they are trying to obtain new relief for unions that are not parties in this case. Nor does their motion seek to preserve the effectiveness of a judgment subsequently to be entered because there is no "judgment subsequently to be entered" in this case.

Here, the existing state of affairs for the Individual Teachers and the unions that seek to represent them is that Act 10 applies and those teachers want to have elections (and the right to vote) and those unions have submitted the paperwork to have elections in November. No court has held that the Individual Teachers do not have rights under Act 10 and they have never been heard on that subject. Likewise no court has held that the Non-party Unions are not bound by Act 10 and they have submitted the required paperwork to have an election next month. The Non-party Unions are not seeking to preserve this state of affairs but are instead seeking to radically alter them and to expunge the rights of the Individual Teachers without those teachers ever having a right to be heard. That conduct does not fit within the narrow confines of Section 808.07(2)(a)3.

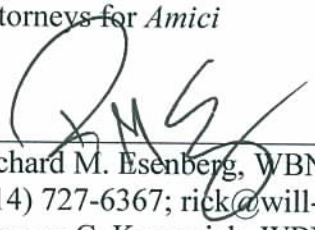
Nor can the motion of the Non-party Unions be considered as a request for an order to preserve the effectiveness of a judgment subsequently to be entered in this case. First, as a purely semantic matter there is no judgment subsequently to be entered in this case. The Non-party unions certainly point to none. Second, there can be no judgment in this case that adversely affects the tens of thousands of public employees in this state who are not parties to this case because, as stated above, Wis. Stat. § 806.04 states that "no declaration may prejudice the right of persons not party to the proceedings."

CONCLUSION

For the reasons set forth above the Individual Teachers request that this Court deny the motion of the Non-Party Unions for a finding of contempt and for remedial sanctions.

Dated this 9th day of October, 2013.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for *Amici*



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