UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN EDUCATION ASSOCIATION COUNCIL *et al.*,

Plaintiffs,

v. **Case No. 11-CV-428-wmc**

SCOTT WALKER, Governor of the State of Wisconsin *et al.*,

Defendants.

AMICI BRIEF OF PROPOSED INTERVENORS IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

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INTRODUCTION

Kristi Lacroix is an English teacher at Lakeview Technology Academy of the Kenosha Unified School District. She is in a bargaining unit represented exclusively by an affiliate of Plaintiff Wisconsin Education Association Council ("WEAC"). She objects to being compelled to pay, as a condition of employment, union fees. Not only is the amount of annual union fees substantial (in excess of $1,000), but these fees are the financial engine for the WEAC's political agenda, which she rejects. Ms. Lacroix also opposes forced union representation in collective bargaining, because she wants the economic freedom to negotiate her own contract.[1] Declaration of Kristi Lacroix, filed July 19, 2011 (Doc. #60).

Nathan Berish is a Theater and English teacher at Waukesha West High School. He works hard to create a meaningful and memorable experience for his students, including spending hundreds of hours in after school activities. As an example, he worked with his drama students raising $8,000 for charity. He is in a bargaining unit represented exclusively by a WEAC affiliate. He believes that the WEAC not only undermines his own political views with his union fees, but does not share his views of life. For these reasons, and because he brings unique skills and great industry to his job, he wants to limit his association with the WEAC and its affiliates and be able to negotiate

[1] On June 27, 2011, Ms. Lacroix filed a Motion for Leave to File Brief *Amicus Curiae* (Doc. #45) and an *Amicus* Brief in Opposition to Plaintiffs' Motion for a TRO and/or Preliminary Injunction (Doc. #11).

for himself to the maximum extent possible. Declaration of Nathan Berish, filed July 19, 2011 (Doc. #58).

Ricardo Cruz is employed by the Wisconsin Department of Employee Trust Funds as a trust fund specialist. He is in a bargaining unit represented exclusively by Plaintiff AFT-Wisconsin, AFL-CIO ("AFT-W") and its local affiliate. He objects to being compelled to pay union fees as a condition of employment. In addition, he objects to being forced to be represented in employment matters by those unions. Declaration of Ricardo Cruz, filed July 19, 2011 (Doc. #59).

On July 19, 2011, these three employees, Lacroix, Berish, and Cruz (hereafter "Employees"), moved to intervene (Doc. #56) to protect their First Amendment rights of association and speech. They equate the "services" provided by the Plaintiff unions (hereafter "Unions") to be akin to those of some itinerant street window washers who sling dirty water on your car windshield, smear it around, and then demand payment. The Employees neither want what the Unions are selling, nor want to pay for the unwanted "services." Accordingly, the Employees file this *Amici* Brief in support of Defendants' Motion for Judgment on the Pleadings and in opposition to the Unions' request for injunctive relief. In the alternative, and notwithstanding their argument opposing issuance of any injunction against 2011 Wisconsin Act 10 ("Act 10"), the Employees offer an alternative injunction to the one the Unions requested. [2]

[2]This brief is being filed on the deadline for the simultaneous filing of dispositive motions in this case. While Defendants filed their dispositive motion on September 13, 2011 (Doc. #75), the Unions have not, but they are expected to file their own Motion for Summary Judgment by the

ARGUMENT

I. Introduction.

The Unions' legal attack against Act 10 is very narrow. They do not argue that the State is powerless to reduce the scope of collective bargaining. They do not claim that the State is obliged to gather the Unions' dues and PAC contributions for them. They do not even contend that the State must bargain collectively with its employees. Rather, they argue that the State runs afoul of the United States Constitution if it engages in these activities with some employees and not with others.

The Unions take issue with the fact that Act 10 requires them, but not other unions, a) to have annual testing to see if they retain the support of a majority of the employees (annual certification elections); b) to collect their own revenue (no payroll deductions); c) to lose the coercion of the State in securing employee financial support (no compulsory unionism); and d) to lose most of the topics the State must discuss with them (reduced scope of the mandatory subjects of bargaining).

The Unions argue that the State must justify *each* of these points of differing treatment between the two classes of unions Act 10 identifies. But the Unions' claim ignores the overlapping nature of the issues. Points "a" and "d" above address the same issue: to whom will the State respond in labor matters? Will it speak with individuals or privilege a collective? In enacting Act 10, the State has decided that it will speak to some

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deadline. *Amici* expect the Unions to reiterate their request for injunctive relief and the accompanying arguments that they made in their original motion for a TRO (Doc. #11) and brief in support (Doc. #14), filed on June 20, 2011. Accordingly, *Amici* will respond in this brief to some of the anticipated arguments of the Unions.

of its employees collectively only on the condition that they annually demonstrate majority support, and then only on certain subjects. Points "a" and "d" are both State-imposed limits on its willingness to engage in speech.

Points "b" and "c" above also raise a common issue: the extent to which the State will provide a private party financial support. In Act 10, the State has decided that it will not continue to provide financial support to certain private parties.

To prevail on these two controverted issues, the Unions must show that the U.S. Constitution requires the State to speak equally with all citizens, and to provide equal financial support to all citizens. This the Unions cannot show, for the United States Supreme Court has conclusively held that the government has no obligation to speak, or even listen, equally to all citizens, or to provide financial support to all citizens, even when they are engaging in First Amendment protected activity.

II. The State Need Not Dialog to the Same Degree with All Citizens.

A. Act 10 Represents the State's Choice among Conflicting Speakers.

The conflict between the union collective and the individual employee to dialog with the State on employment matters is long standing. For example, *Madison Joint School District v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976), represents a time when Wisconsin's public policy needle was pointed at dialog with the collective, thus limiting the scope of the individual's dialog with the State on such matters.

But it has not always been that way. The Wisconsin Labor Relations Act of 1937 granted collective bargaining rights to private sector, but not public sector, employees. Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962* 167 (2004) ("Slater"). From 1951 to 1957, Wisconsin public employers dialoged with individual employees, not collectives. In each of those years, one of the Plaintiff Unions introduced a bill to permit collective bargaining for Wisconsin public employees. Each year the bill failed to become law. *Id.* at 170-78.

In 1959, Wisconsin began to shift its dialog from individual public employees to union collectives. Some municipal employees in Wisconsin, but not public safety employees, were granted limited rights to bargain collectively. 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 failed to 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 had much different bargaining rights than private sector employees, and other public employees, including police, had no bargaining rights at all. Slater, *supra*, at 183-84.

In 1962, Wisconsin enacted Bill 336-A, which strengthened public employee collective bargaining, but again it did not provide for bargaining for state employees or t permit compulsory union fees. 1962 Wis. Laws, ch. 663; Slater, *supra*, at 189-91. Even with the 1962 change, the scope of bargaining was still limited and public employers still

did not have to "bargain in good faith." 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 given limited bargaining rights for the first time in 1965. Slater, *supra*, at 191. However, law enforcement officers were not able to organize and bargain collectively until 1971. At the same time, the scope of bargaining changed to force public employers 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 two additional separate statutes, one covering only the Milwaukee police, and the other covering police outside Milwaukee, plus firefighters and sheriff's deputies. These statutes gave different rights to the two groups, rights which also differed from those held by other local government employees. *Id.* at 11-12.

As recently as 2009, the Wisconsin legislature amended Wis. Stat. § 111.70(3)(a)4, and allowed municipal employees (other than teachers) to have collective bargaining agreements for three years, while teachers could have them for four years. 2009 Wis. Legis. Serv. Act 28, § 2225F (2009 A.B. 75). Due to the contract bar rule that bars decertification elections during the term of a collective bargaining contract teacher

unions were protected from representation elections for a longer period(four years) than were other municipal employee unions (three years).[3]

Act 10 fits comfortably in Wisconsin's history of changing attitudes toward public employee collective bargaining. It shifts the needle on collective bargaining back towards greater dialog with individuals and less dialogue with the union collective. It does this by limiting the subjects of mandatory bargaining with the collective to one, which opens up all other subjects for discussion with individual employees.

If the Unions' claim here that the State must deal with all public employees and their unions in the same way on working conditions is correct, then all the bargaining laws the Wisconsin legislature passed since 1937 have violated equal protection, because those bargaining laws did not apply equally to all employees on all matters. But the State did not violate the Constitution in the past, when it had inconsistent bargaining laws for both private and public employees. And it does not violate the Constitution now, in its decision to readjust the needle back to open more areas for discussion with some individual employees about their working conditions and not other, and to listen and dialog less with some unions and not others.

In *Smith v. Arkansas State Highway Emp., Local 1315,* 441 U.S. 463 (1979), the United States Supreme Court reviewed the State Highway Commission policy allowing

[3] For the Court's convenience, a table from the Saltzman article, showing the evolution and various inconsistencies in Wisconsin public employee collective bargaining laws over the years, is attached as Appendix 1.

only individual employees to file and discuss workplace grievances, and refusing to consider or discuss grievances filed by the union. The United States Court of Appeals for the Eighth Circuit ruled that this was a violation of the U.S. Constitution, but the Supreme Court disagreed.[4] *Id.* at 463-64.

The Supreme Court held that when it comes to discussion about public employee working conditions, the government could dialog with the individual and not the collective. The Court held 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), a case neither the Unions nor the State has cited to this Court. In *Knight* the public employer both bargained and conferred exclusively with the union, rather than the individual. This, too, was held constitutional, for nothing "suggests that the rights to speak, associate, and petition require government policy makers to listen or respond." *Id.* at 285.

The Supreme Court in *Knight* observed that legislatures enact bills "on which testimony has been received from only a select group." Public 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. This creates absolutely no constitutional issue at all, according to the Court, for to "recognize a constitutional right to participate directly in

[4] The Seventh Circuit disagreed with the Eighth Circuit on this issue. *Hanover Twp. Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972).

government policymaking would work a revolution in existing government practices." *Id.* The Court continued, "[a]bsent statutory restrictions, the state [is] free to consult or not to consult whomever it pleases." *Id.* at 285.

The *Knight* Court considered *Smith* to be a mirror image decision: "There the government listened only to individual employees and not to the union. Here the government [dialogs] with the union and not with individual employees. The applicable constitutional principles are identical." 465 U.S. at 286-87.

Smith and *Knight* drive a stake through the heart of the Unions' claim that the State must dialog equally with all employee groups. The Unions may bemoan the State shifting the needle of discussion in the direction of *Smith* , rather than *Knight,* but this is the State's right to do, without any interference from the courts.

B. Although the State Has Historically Based Its Dialog Decisions on Political Considerations, That Is Irrelevant.

The Unions cite *Perry Education Ass'n v. Perry Local Educators Ass'n* in support of their contention that the current change in the needle of discussion here was based on political considerations, not "reasonable, viewpoint neutral grounds," 460 U.S. 37, 54 (1983). This is not new in Wisconsin. Both Slater and Saltzman discuss in detail the political machinations behind Wisconsin's past decisions to speak less with the employee and more and more with the collective about employee relations. Slater, *supra,* at 179-91; Saltzman, *supra,* at 13-19. That there now may have been political considerations in shifting the needle in favor of the individual is irrelevant.

More importantly, the Wisconsin legislature's motivation in passing Act 10 is irrelevant. "It should be noted that the Supreme Court has specifically rejected an inquiry into motive in an equal protection claim." *South Carolina Educ. Ass'n v. Campbell,* 883 F.2d 1251, 1263 n.14 (4th Cir. 1989) (citing *Palmer v. Thompson*, 403 U.S. 217 (1971)). When it comes to constitutional questions generally, the "Supreme Court has long recognized that judicial inquiries into legislative motivation are to be avoided."*Id.* 883 F.2d at 1257 (citing *Village of Arlington Heights v. Metro. Housing Dev.t Corp.*, 429 U.S. 252 (1977))

C. *The State's Discussion of Employee Working Conditions Opens No Forum.*

The Unions' dependence upon *Perry* highlights a second fundamental problem with their First Amendment analysis. In *Perry*, the state allowed one union, but not another, to use a public school's internal mail system. The Supreme Court noted that the internal mail system was not a public forum, therefore "the government may – *without further justification* – restrict use to those who participate in the forum's official business." 460 U.S. at 53 (emphasis added).

Knight discussed *Perry* and concluded that the *Knight* plaintiffs' claim to be part of the process of the government discussing 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 official business, no further justification 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 begin to rise to the level of nonpublic forum analysis. Wisconsin can simply decide, without judicial interference, to whom it will listen.

Imagine an elected representative who invites to her office and listens only to those who supported her election and not to those who did not. This elected official also entertains the opinions of one special interest group and ignores a competing special interest group. Few citizens would doubt the representative's right to make those decisions, and the Supreme Court in *Knight* confirmed that those kinds of decisions raise no constitutional violations for governmental decisionmakers. *Id*. at 284.

D. Speakers Possess No Equal Protection Guarantee to a Government Audience. The discussion so far has dealt with the First Amendment. Logically, if government may pick and choose its dialog partners from among those seeking to express political opinion (a core First Amendment activity), then it follows that 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, the *Knight* Court summarily dispatched the equal protection argument, calling it "meritless." 465 U.S. at 291.

E. Equal Protection Cases Where Government Acts as Regulator Are Inapposite.

Although the Supreme Court summarily dispatched the type of equal protection speech claims the Unions raise here, a more detailed consideration compels the same result. The Unions cite a series of equal protection cases in which the government, as regulator, provided some tangible benefit to one segment of society and not another. *United States Dep't of Agric. v. Moreno,* 413 U.S. 528 (1973) (subsidizing food stamps for related household members, but not for those unrelated); *Romer v. Evans,* 517 U.S. 620 (1996) (protecting certain minorities from discrimination, but prohibiting protection for one); *Craigmiles v. Giles,* 312 F.3d 220 (6th Cir. 2002) (allowing one group, but not others, to sell caskets); *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).

Not one of those cases involves a limitation on to whom the government must listen or speak. They all involve the government as a *regulator* of commerce or society and, therefore, are inapplicable. This is an important distinction, which renders the Unions' cases inapposite.

In *Engquist v. Oregon Dep't of Agric.,* 553 U.S. 591 (2008), the Supreme Court explained that there is a substantial difference, for equal protection analysis, between the government acting as "regulator" and acting 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 (which it 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.

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

Of special note is a Supreme Court illustration. As an example of the ability of the "government as employer" to distinguish among employees, it pointed to the fact that most federal employees are covered by civil service protections, but not all. The Court calls this "Congress's … careful work." *Engquist,* 535 U.S. at 607. It does not call this "discrimination to be scrutinized by the judiciary."

Just as government decisionmakers can listen and dialog with whomever they wish, so too can government, as employer, treat employees (apart from protected classes) differently without having to answer to constitutional claims.

F. Act 10 Represents a Reasonable Listening Choice.

As the Employees have shown, the rational basis test applies neither to the government's decision as to whom it will listen, nor to any of its non-class based decisions as employer to treat employees differently. The State is simply not required to justify itself.

If this Court improperly decided to subject Act 10 to a rational basis test, the statute would survive. The legal standard the State must meet to defeat equal protection claims is low. That a law "seems unwise or works to the *disadvantage* of a particular group, or if the rationale for it seems tenuous" does not matter if the law advances a legitimate government interest. *Romer*, 517 U.S. at 632. More important, those seeking to invalidate a statute under the rational basis test must "'negative every conceivable basis which might support it.'" *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (citations omitted). The Unions can never meet this burden because the State's ability to pick and choose its dialog partners "is inherent in a republican form of government." *Knight*, 465 U.S. at 285.

Moreover, "rational speculation unsupported by evidence or empirical data" is enough to support the State's explanation. *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993). However, other important reasons attend the State's decision to dialog less with the collective. In *Bargaining in the Government's Business: Principles and Politics,*

Labor Law Professor Clyde Summers,[5] analyzed the political dislocation caused by public employee collective bargaining. 18 U. Tol. L. Rev. 265 (1987). He first noted that public employee collective bargaining is akin to passing budgetary legislation:

> [I]n the public sector the collective agreement is not a private decision, but a governmental decision; it is not so much a contract as a legislative act. Labor costs may be seventy percent of a city's budget. Bargaining on wages and other economic items, therefore, inevitably involves the level of taxes and the level of services. An agreement to increase wages requires either an increase in taxes or a decrease in services…. Other contractual provisions may affect the kind or quality of public services provided.

Id. at 266.

To collectively bargain a "legislative act" denigrates the normal democratic decision-making process, for it dislocates the rights of taxpayers. As Professor Summers explained, from the public "employer's side, the collective agreement is not an economic decision but a political decision; it shapes policy choices which rightfully belong to the voters to be made through the political processes." *Id*.

In the normal political process, taxpayers have a vote and a voice. They have the right to vote and to voice their opinions to their elected representatives. However, as noted above, the elected representatives have no obligation to listen. Political decision-making through collective bargaining is much different. Professor Summers describes it this way:

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[5] The Washington Post called Summers, who taught at Yale for nearly two decades "a staunch believer in the role of labor unions." http://www.washingtonpost.com/wp-dyn/content/article/2010/11/22/AR2010112207577.html. (Last visited October 8, 2011).

> Collective bargaining significantly changes the political process. The union, as an exclusive bargaining representative, formulates its demands, and on each of these issues proceeds to negotiate with the school board's representative behind closed doors. The board is required to respond by giving reasons for its positions, meeting arguments with arguments, and having those arguments examined. Parent organizations and taxpayer organizations are not present. Individual teachers with different views are not present. When agreement is reached, it is then presented as part of a package decision including many other issues. The taxpayer, the parents and the dissenting teachers do not know the background information, the competing considerations, or the compromises which led to the decision. They have no active voice until the next election when they may by vote to change the composition of the school board.

Id, at 267.

In summary, Professor Summers noted that "[g]iving employees and their collective representatives this special role in government decision-making is a significant departure from our traditional political processes." *Id*, at 268. Elsewhere in his law review article he noted that collective bargaining with its "rule curbing open communications has serious implications for the political process." *Id.* at 270.

Political decisions, which can involve up to 70% of a local government's budget, are taken out of the sunshine of public debate and discussion and moved behind closed doors where the government is not only forced to listen to the union collective, it is forced to respond ("bargain in good faith") with the collective. The voices of individual public employees and the taxpayers are excluded.

Although Professor Summers was not against public employee collective bargaining, he recognized, as the Wisconsin legislature did and this Court must, that limiting collective bargaining is a rational choice. Therefore, even if Act 10 were

subjected to a rational basis analysis, it would be well within the Wisconsin legislature's legitimate decision-making purview. Public employee collective bargaining dislocates the normal democratic processes, and restricts political decision-making on a substantial part of the government's budget to a special interest faction – a faction which has the interests of its members, and not the public, in mind.

For the State to limit the scope of collective bargaining, or to condition collective bargaining on an annual re-election of the collective, is merely the State's decision as to whom it will listen when it comes to employee working conditions. The State's unfettered right to listen to some, but not all, is inherent in representative government. *See Knight,* 465 U.S. at 286-87. Its current decision to move the dial towards listening more to individuals rather than to the collective, in most areas of the public sector, is rationally related to preserving the democratic process.

Not only is it reasonable for the State to move incrementally in reducing the scope of public employee collective bargaining, but it cannot be said that the State acts irrationally by saving public safety employees for its last changes. Long before many states adopted public employee collective bargaining, public safety employees were organizing. In 1919, the AFL chartered the Boston Policemen's Union. Joseph R. Grodin, June M. Weisberger, Martin H. Malin, *Public Sector Employment, Cases and Materials* 4 (2004).

That same year the union called a strike when the Boston police commissioner resisted unionization. Without full police presence on the streets of Boston, rioting and

looting began and lasted for two days, until the state guard restored order. *Id.* That was not the last example of unionized public safety officers idly standing by while union militants disrupted public order.[6]

Surely the Wisconsin legislature could rationally decide that it would change collective bargaining for public safety employees last, so that they could help to maintain order in the face of the predictable disorder created in Madison, Wisconsin, by union militants and their sympathizers who were opposed to reducing the scope of bargaining for general public employees.

[6] *See* Don Walker, *The Quiet after the Capitol Storm*, Journal Sentinel, March 10, 2011, available at http://www.jsonline.com/blogs/news/117727713.html (last visited Oct. 13, 2011) (the police did not try and stop protesters from entering what was supposed to be a building closed for the night). William A. Jacobson, Associate Clinical Professor, Cornell Law School, chronicled the law enforcement situation in Madison earlier this year. Jacobson, *The Other Loser in Wisconsin – Law Enforcement Credibility*, Le-gal In-sur-rec-tion, March 10, 2011, available at http://legalinsurrection.com/2011/03/the-other-loser-in-wisconsin-law-enforcement-credibility/ (last visited Oct. 13, 2011).

Also on March 10, 2011, seven union officials sent a letter to a private business owner. Three of the officials represent law enforcement unions, two represent fire fighter unions, and two represent local affiliates of Plaintiff WEAC. Charlie Sykes, *Unions Threaten Business,* 620 WTMJ News Radio, March 10, 2011, available at http://www.620twmj.com/blogs/charliesykes/117764004.html (last visited Oct. 13, 2011). This letter not only embraces the "massive demonstrations" that took place in response to Act 10, but directly threatens a private business with a "boycott [of] the goods and services provided by your company" if the business owner fails to join the unions in opposing Act 10. *Id.* Given such bold threats of economic blackmail by the police, and the history of the 1919 Boston police strike, is it unreasonable for the Wisconsin legislature to believe that public safety officers might idly stand by in the face of union disorder?

III. The State Can Decide to Support Some Financially and Not Others.

The Unions raise two financial claims: 1) that the State must collect their dues; and, 2) that the State must force unwilling employees (like the nonmember Employees) to support the Unions financially.

A. The Unions Have Failed to Provide the Court with the Most Pertinent (and Adverse) Law.

The Unions do not assert in the abstract that the State must provide this financial support. In fact, they acknowledge that is not the law. Br. in Supp. of Pls.' Mot. for TRO and/or Prelim. Inj. at 18-19 (Doc. #14) ("Unions TRO Br.") Instead, they argue that if the State financially supports some, but not all unions, it has violated the Equal Protection Clause and has engaged in viewpoint discrimination. *Id.* at 20-28, 33-38. The Unions claim that "numerous" cases involving union fees support their argument, but they cite only two federal district court decisions and one state court decision, which does not deal with union fees at all. *Id.* at 19-20.

The Unions' claim is curious, at best, for they fail to mention any of the contrary federal circuit court decisions. In *South Carolina Educ. Ass'n v. Campbell,* 883 F.2d 1251 (4th Cir. 1989), the South Carolina Education Association "SCEA") filed suit contending that the state violated the Equal Protection Clause when it passed a law allowing payroll deductions for the State Employees Association and for charities, but denying dues deductions for the SCEA and most other unions. The SCEA alleged this was done to punish it for "speech related activities and its affiliation with the [National Education Association]," and the district court found that the SCEA's "controversial positions and

political activities" were why the state stopped the payroll deductions. *Id.* at 1253, 1255, 1257.

Notwithstanding the lower court's finding and the SCEA's allegations, the Fourth Circuit upheld the statute. It held that one legitimate basis for stopping the dues deduction was that it would be "unduly burdensome and expensive … to withhold membership dues for every organization that requests it." *Id.* at 1263-64.

The Unions also neglected to mention the Sixth Circuit's decision in *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983). In that case, the American Federation of State, County & Municipal Employees, Local 13 ("AFSCME") challenged a Tennessee statute that deprived it, but not all public employee unions, of payroll deduction of dues. Specifically, 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 1419-20. Although the court concluded that one small section of the law prohibiting payroll deduction for AFSCME was unconstitutional, it upheld the statute allowing payroll deduction for some public employee unions and not others. *Id.* at 1428-29.

The Unions also failed to mention *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), in which the Sixth Circuit held that 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.

The Unions also overlooked *Arkansas State Highway Emp. Local 1315 v. Kell,* 628 F.2d 1099 (8th Cir. 1980). In *Kell,* the public employer discontinued the 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 was sufficient to satisfy the rational relationship test. *Id.* at 1103.

While these circuit court decisions rely on various reasons for allowing payroll deductions for some employee organizations and not others, the common theme in all is that saving money is a rational motive. Act 10 denies payroll deductions to those unions that no longer collectively bargaining 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 those unions that provide significantly reduced services.

B. The State May Discriminate When It Subsidizes Speech.

Again, neither the Unions nor the State mentioned one of the most recent decisions of the United States Supreme Court dealing with the constitutionality of a state's partial restriction on forced union fees. In *Davenport v. Washington Educ. Ass'n,* 551 U.S. 177 (2007), the Court called forced union fees "undeniably unusual," an "extraordinary power," an "extraordinary benefit" to unions. *Id.* at 184. Consequently, the Court noted that it would be constitutionally permissible for a state to eliminate altogether forced

union fees. *Id; accord Lincoln Fed. Union v. Nw. Iron & Metal Co*., 335 U.S. 525 (1949). This much the Unions seem to admit. Unions TRO Br. at 19, 38.

Admitting that compulsory union fees can be proscribed altogether admits more than the Unions recognize. *Davenport* went on to discuss whether it was unconstitutional discrimination to require affirmative consent from nonmembers for payroll deduction of election-related union expenditures, but not require it for other union expenditures. The unions' contention in *Davenport* was that this amounted to "unconstitutional content-based discrimination." 551 U.S. at 188.

The Court rejected the union's discrimination argument in *Davenport* for the very reason the Unions' argument should be rejected here: "content discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed." *Id.* Because all parties agree that Wisconsin could end altogether forced union fees and payroll deduction of union fees for all public-sector unions, then eliminating those provisions for some is not unlawful discrimination.

Davenport points to a second reason why the Unions do not have a valid discrimination claim here. Forced union fees and the government collection of such fees are a government subsidy of the Unions' speech. "[I]t is well established that the government can make content-based distinctions when it subsidizes speech." *Id* at 188-89.

> [W]hen totally proscribable speech is at issue, content-based regulation is permissible so long as 'there is no realistic possibility that official suppression of ideas is afoot.' We think the same is true when, as here, an extraordinary *and totally repealable* authorization to coerce payment from government employees is at issue. . . . Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees . . .

Id. at 189-90 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992)) (emphasis added). Contrary to the Unions' claim, the "First Amendment does not require the government to enhance a person's ability to speak," *Davenport,* 551 U.S. at 190 (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 549-50 (1983)).

IV. Alternatively, If the Court Decides That an Injunction Is Appropriate, the Proper Remedy for an Alleged Equal Protection Violation Is to Enjoin the Portion of the Statute Causing the Constitutional Violation -- the Exceptions for Public Safety Employees.

The Unions previously requested a TRO and/or a preliminary injunction (Doc. #11) against those sections of Act 10 that change the law as to them and other public general employees on the grounds that Act 10 exempts public safety employees from those changes. The Employees fully expect the Unions in their Summary Judgment motion to request a similar permanent injunction. Therefore, alternatively, and without waiving *Amici*'s arguments which support both denying any injunction and dismissing the complaint, the grant of any requested injunction requires examination of the proper remedy at equity.

The Unions claim that the public safety employee exemptions from Act 10's bargaining provisions violate equal protection. Yet their proposed remedy is not to strike

that exemption, but rather to undo all the otherwise constitutional changes that Wisconsin has made to public-sector labor relations.

Here, again, the Unions have strayed from the case law on remedies. Although courts have broad discretion in granting injunctions, injunctions cannot be overly broad under Federal Rule of Civil Procedure 65. *See Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Educational Testing Serv, v. Katzman*, 793 F.2d 533 (3d Cir. 1986). Here, if an injunction is to be granted, it may only enjoin that part of the challenged statute that causes the constitutional violation.

As the Employees have demonstrated, the changes Act 10 makes for general public employees and their Unions are not unconstitutional. And, as the Unions admit, the alleged equal protection violation comes from the exemption of public safety employees and their unions from the changes Act 10 requires. Unions TRO Br. at 27-28. Thus, at most, this court should only enjoin implementation of the public safety exceptions.

A. The Exemption Sections of Act 10 That Violate Equal Protection Can Be Severed from the Rest of the Act.

Act 10 covers a wide range of topics and contains over 400 provisions, many of which are unrelated to collective bargaining. Should the court rule that a violation of equal protection exists; it will have to invalidate part of Act 10, but not the whole act. Severance is the typical remedy in equal protection cases, and is even part of the remedy the Unions requested. Unions TRO Br. at 57.

State law usually applies to severability issues when state legislation is struck down due to federal constitutional violations. Thus, when a state statute is found unconstitutional some federal courts have sent the severability issue to the state's supreme court to determine the remedy while other federal courts have determined the appropriate remedy themselves by applying the applicable state severability law. *Compare Larson v. Valente*, 456 U.S. 228, 237 (1982) (state law applied at appellate court in regards to severability for First Amendment violation) *with Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 818 (1989) (case sent to state court for determination of severability).

In this case, severability should be decided by Wisconsin law, which contains a statute on severability applicable to all state laws:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Wis. Stat. § 990.001(11). Therefore, "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part [of a statute] may be dropped if what is left is fully operative as a law.'" *Nankin v. Village of Shorewood*, 630 N.W.2d 141, 155 (Wis. 2001) (citations omitted).

A general presumption of severability is also present. "'Whether an unconstitutional provision is severable from the remainder of the statute in which it

appears is largely a question of legislative intent, but the presumption is in favor of severability.'" *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 884 (Wis. Ct. App. 1999) (citations omitted). Furthermore, no party to this proceeding has argued against the severability of Act 10. The broad range of topics the Act covers, and the fact that it was passed in response to a crisis, suggest that the legislature intended that individual provisions that offend the constitution be severed to save the act as a whole.

B. If Anything Should Be Severed from Act 10, It Is the Public Safety Workers Exemptions.

The question of remedy comes down to what provisions of the Act should be severed. This, too, is a question of Wisconsin law. *Larson*, 456 U.S. at 237*; Davis*, 489 U.S. at 818. And again, the focus of a court's inquiry is the intent of the legislature that passed the law. *Bence v. City of Milwaukee* 267 N.W.2d 25, (Wis. 1978).

When considering laws with unconstitutional provisions, severability should be permitted if "elimination of a void portion leaves a complete law in some reasonable aspect capable of being carried into effect consistent with the intention of the legislature which enacted it in connection with the void part." *In re Zeimet's Estate*, 49 N.W.2d 924, 928 (Wis. 1951). Thus, a court may sever "that portion of an act which is unconstitutional and . . . declare that the remaining portion is valid. As a general matter, the determination of whether an invalid portion so infects the remainder of the legislation as to require the entire law to be invalidated is a question of legislative intent." *Bence*, 267 N.W.2d at 30 (citations omitted).

In *Estate of Trainer*, 365 N.W.2d 893, 899 (Wis. Ct. App 1985), the court considered a Wisconsin law that allowed powers of appointment created before 1942 to be modified in order to qualify for a new inheritance exemption the legislature passed in 1951. The law was silent concerning changes to powers of appointment created after 1942. The court found this pre-1942 and post-1942 distinction violated equal protection. As a remedy, the court held that changes should be allowed to post-1942 powers of appointment, because the intent of the legislature was to permit powers of appointment to be changed to parallel federal estate tax law. Additionally, the court discussed the importance of finding the narrowest possible remedy, holding that "[w]e perceive no good reason to use a broadax when a scalpel is more suitable." *Id.* In sum, the two determinative severability standards are legislative intent and finding the narrowest allowable remedy.

Thus, where a new law is passed and a small group is *explicitly* excepted from that law in an unconstitutional manner, the generally accepted remedy is to remove that exception. *See Nankin, supra.* (striking an exception that prevented the owners of property located in large counties from seeking de novo review of property tax assessments); *Metro. Assocs. v. City of Milwaukee*, 796 N.W.2d 717 (Wis. 2011) (striking benefits conferred upon a class excepted by the legislature).

In *Wisconsin Wine & Spirits Inst. v. Ley*, 141 Wis.2d 958, 416 N.W.2d 914 (Wis. Ct. App. 1987), the Wisconsin Supreme Court addressed a law that prohibited businesses from owning both a liquor wholesale operation and a retail liquor store. The law

contained a grandfather clause that allowed liquor wholesalers who had owned a retail store before October 1963 to remain in operation. An association of liquor wholesalers who did not own retail stores before 1963 argued that the grandfather clause violated equal protection. The court agreed. However, instead of striking down the entire law and thereby extending the exception to allow liquor wholesalers to own retail stores, the court severed the grandfather clause, the exception from the law, and upheld the rest of the law. *Id.* at 970-72. In doing so, the court looked at the "principal object of the legislature in enacting" the law, and concluded that its purpose was to ban such "tied houses" between liquor wholesalers and retailers. *Id.* at 972. Thus, the court looked at legislative intent and adopted the narrowest remedy.

This case is like *Ley*. In both, a group of similarly-situated people are subject to a status quo (wholesalers who can run retail stores; government employees who are subject to certain privileges and burdens related to collective bargaining. In both, a law was passed changing the status quo (wholesalers prevented from running retail stores; government employees relieved of some of their privileges and burdens). In both, the group of similarly-situated people was subdivided (wholesalers who already held retail licenses and those who did not; government employees who provide vital and necessary public safety roles and those who do not). In both, one group was excepted from the changes to the status quo (wholesalers with grandfathered retail licenses; public safety government employees). The *Ley* remedy applies here: strike the exceptions for public safety employees from Act 10's changes.

Like Wisconsin, federal law requires a determination of what portions of a partially invalid law should be severed, keeping legislative intent as the prime focus. "[A] court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *From Welsh, II v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring In *Tilton v. Richardson*, 403 U.S. 672 (1971) the United States Supreme Court pointed specifically to a legislative intent analysis when determining federal severability law.

Whether the court uses federal or Wisconsin law to decide the severability and remedies issues, the standard and outcome are the same.[7] 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 exemption is a narrow exemption and invalidating it would bring Act 10 into compliance with equal protection standards.

Looking at Act 10's specifics, it would be most in line with the legislature's intent to simply end the public safety exemption. The Unions' TRO brief supports this conclusion:

[77] In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-32 (2006), the United States Supreme Court established three rules for courts to apply in determining severability: 1) do not nullify more of a legislature's work than is necessary; 2) refrain from rewriting the law to conform it to constitutional requirements; and 3) determine whether the legislature would have preferred what is left of its statute to no statute at all.

> According to Milwaukee Mayor Barrett, "the city would miss out on $19 million in savings because police and firefighters are spared the cuts other workers would have to make under the bills," and the lost savings greatly exceed $19 million when other "public safety" units are included in the tally. Movants' Facts ¶ 34. *In this area, where the Act directly addresses budget problems, there is no rational reason why only general employees, and not the favored group of "public safety" employees, should be part of the solution.*

Unions TRO Br. at 25 (emphasis added) (Doc # 14).[8]

The political upheaval (both for and against) that surrounded passage of Act 10 was focused on the changes to the general public employee bargaining scheme. The Unions, in their role as political entities, strongly opposed Act 10 because of the changes it made to the bargaining scheme for general public employees. Most of the public debate, for and against the Act, was concerned with changes to the bargaining scheme for general employees. Clearly the legislature intended those changes when it passed Act 10 in the face of that debate. The public safety employee exemption, on the other hand, was merely an exception to those sweeping changes.

If the Court holds that Act 10 violates equal protection and a remedy must be crafted, *Amici* agree with the implication of the Unions' above-quoted statement that the most logical remedy, and the remedy most in line with the legislative intent of this budget oriented act, would be to eliminate the public safety exemption.

[8] Tellingly, the Unions spend the first several dozen pages of their TRO Brief explaining why they believe that the narrow public safety exemption is constitutionally impermissible. But when then addressing the remedy, they immediately change course and request a remedy that will invalidate nearly all of the changes the Wisconsin legislature decided to make to collective bargaining, rather than seek a remedy to remove the allegedly unconstitutional exemption.

CONCLUSION

The U.S. Constitution does not require the State to speak equally with all citizens and groups, and does not require it to provide equal financial support to all citizens and groups. This is especially true when the State acts in its proprietary role as employer. For these reasons, the case must be dismissed. Alternatively, if the Court issues a permanent injunction because the exemptions for public safety employees violates equal protection, then only those exemptions should be enjoined, because such an injunction is consistent with the legislative intent and the narrowest remedy available.

Respectfully submitted,

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