STATE OF WISCONSIN | CIRCUIT COURT BRANCH 8 | DANE COUNTY

MADISON TEACHERS INC., et al.,

Plaintiffs,

v.

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

SCOTT WALKER, et al.,

Defendants.

AMICUS ELIJAH GRAJKOWSKI'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION & STATEMENT OF INTEREST

Elijah Grajkowski is an elementary school band teacher for the Elmbrook School District. He is in a bargaining unit represented exclusively by a sister affiliate of the Plaintiff Madison Teachers, Inc., the Elmbrook Education Association ("EEA"). Both organizations are local affiliates of the Wisconsin Education Association Council ("WEAC"). Mr. Grajkowski has continually objected to being forced to join or financially support the EEA and WEAC, believing that the compulsory union fees (or union "agency fees") and compulsory representation deprived him of First Amendment freedoms of speech and association.

Not only is the amount of annual union fees large (in excess of $1,000) they are the financial engine for the WEAC's political agenda, which he rejects. Each year, after surmounting lengthy, unadvertised bureaucratic hurdles, Mr. Grajkowski has filed a certified letter with the union to try to withdraw his union membership. Ultimately, after dragging its feet, the union issues a small refund to him. Elijah Grajkowski, *Why this Area Teacher Chose the Non-Union Option*, JSOnline, Sept. 28, 2011, at http://www.jsonline.com/news/opinion/130741333.html (last visited March 1, 2012).

He objects to shouldering this burden. He put it this way:

> I often wondered why this kind of burden would be put on an individual teacher like me. Shouldn't it be up to the organization to convince people and to sell its benefits to potential members afresh each year? Why should I have to move mountains each fall to break ties with this group that I don't want to be a part of in the first place? Something seemed dreadfully wrong with that picture.

Id.

Mr. Grajkowski prefers to be a member of the Association of American Educators, a professional teachers' organization which does not engage in collective bargaining or support partisan politics or issues unrelated to education. Thus, its dues are a mere fraction of WEAC's. *Id.*

Nor does Mr. Grajkowski believe that he ought to be made to pay for union representation from which he is said to "benefit." To the contrary, he does not believe he benefits from the representation by the union. He opposes forced union representation in

collective bargaining because he wants the economic freedom to negotiate his own contract:

> What would happen if I went to my administrator and negotiated a deal for my own salary and benefits? Why can't I do this? Maybe I would be able to negotiate something better for myself. I don't know, as I haven't been given the chance.

Id.

But it's not just a matter of compelled financial support. Mr. Grajkowski believes that public employee unions have encouraged conflict and unprofessional – even illegal – tactics. Here is how he expressed it:

> It's the union's job to encourage unrest, discontent and unhappiness amongst the rank and file; this is how it justifies its existence. In my opinion, this has encouraged adversarial interactions with administrations. This is not how I want to live my life as a teacher. I wish to be thankful and grateful about what I have and realize that there are people out there paying taxes to support my position and benefits. . . . All this past spring, I sat watching and listening to Wisconsin teachers and others protesting, shouting, chanting and skipping school to protest in Madison. This is not a group I wish to be a part of, nor do I wish to be represented by a group that endorses or engages in these kinds of tactics.

Id.

If the plaintiff unions and individuals (hereafter collectively referred to as "Unions") are successful in striking down 2011 Wisconsin Act 10 and Act 32, then Mr. Grajkowski will never get the chance to represent himself. He will again be forced to accept unwanted representation by the teachers' union, forced to pay for this forced representation, and forced each fall to wrestle his way out of union membership.

Because Elijah Grajkowski believes the recent changes in the collective bargaining

laws are constitutional when tested by Wisconsin's constitutional equivalents of the First and Fourteenth Amendments to the U.S. Constitution, he files this brief to defend his individual rights by setting forth his arguments on those constitutional issues.

SUMMARY OF ARGUMENT

The Unions conflate the freedom of association with the privilege to collectively bargain. They seem to believe that the right of like-minded workers to associate together in a formal organization implies a corresponding constitutional right on the part of that organization to hold both a monopoly over bargaining with a government employer and the legal ability to force that employer to negotiate with it and to compel other employees to financially support such negotiations and abide by the outcome. This is not so.

Workers do have a right to associate and collectively advocate with respect to the terms and conditions of their employment and other matters of common concern. Act 10 leaves this right undisturbed. But they have no right to compel the State to recognize any resulting organization as an exclusive bargaining agent or even to permit collective bargaining. It is only that statutory privilege that Act 10 limits. .

The law is clear. There is no constitutional right to collective bargaining. A burden on the ability to collectively bargain does not burden the right to associate. The Unions' Freedom of Association claim necessarily fails.

The Unions' Equal Protection Claim rests on supposedly impermissible distinctions between "represented" and "non-represented" employees, i.e., those who have chosen to avail themselves of the statutory option to collectively bargain and those

who have chosen to bargain individually. Because collective bargaining is a creature of statute, there will always be such distinctions depending on the nature of the collective bargaining scheme that the state chooses to create. So long as employees have the choice whether to bargain collectively or individually, those who choose one path will be treated differently than those who choose the other – that is merely the natural consequence of making such a choice.

Because Act 10 does not impinge on the freedom of association (or other constitutionally protected interest), the distinction between represented and non-represented employees does not infringe a fundamental right and is not subject to heightened scrutiny. Any burdens placed on similarly-situated employees have a rational justification. , The Unions' Equal Protection claim must fail as well.

ARGUMENT

I. Introduction

The Unions' legal attack arises under the Wisconsin Constitution, but they do not argue that these state constitutional guarantees are evaluated any differently that their federal analogs. Their free speech, free association and equal protection claims cite (however incompletely) federal case law. When Wisconsin cases are cited, it is mainly for the purpose of showing that the federal standards are applicable in Wisconsin State courts.

But neither the decisions of federal or Wisconsin courts support these claims. The absence of support is evident in the structure to the Unions' brief. When citing federal

decisions, the Unions rarely do more than cite general propositions. For example, in their associational argument, the Unions spend about 2.5 pages discussing the general federal law of association. (Union Brief "UB" pp. 6-8.) When they turn to the specifics of this case, they spend the next six pages arguing without benefit of case law to support their claims. (UB pp. 8-14.[1])

The reason why the Unions are "light" on case citations in general, and are unable to cite cases specifically on point to support their argument, is that federal precedent is adverse to their position. Indeed, as we will see, the Unions fail to deal with – or to even acknowledge – a number of controlling decisions.

II. Act 10 Does Not Violate Plaintiffs' Associational Rights Under Wis. Const. Art. I, §§ 3 & 4

The Unions' claim the following four changes in the collective bargaining laws violate their associational rights: a) limitations of the topics the State will discuss with them in collective bargaining (reduced scope of the mandatory subjects of bargaining); b) an end to the compulsion of employees to financially support the union; c) the end of payroll deduction so that they must now collect their own dues; and d) the requirement to be tested annually to see if they retain the support of a majority of the employees (annual certification elections).

Each will be dealt with in turn. But, first, it is important to note that collective bargaining is a creature of statute. Unless permitted by legislative act, it would not exist.

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[1] They do cite one case, proceeded by the signal "see," for a proposition not at issue in this case. (UB p. 12.)

Its scope has always been limited, and there is a long history of creating, modifying and restricting collective bargaining privileges.

A. Collective Bargaining is Created – and Defined – by Statute

In the recent past, the State decided that it would speak to employees in collectives to determine wages and working conditions, rather than speaking to individual employees. The Unions' first complaint is that the State has modified its approach and limited the topics which it will discuss with the collective to employee base wages, and further set the parameters of that discussion so that wage increases could not exceed the consumer price index, unless approved by the taxpayers in a referendum.

Resolving conflicts between the collective and the individual, when it comes to employee interaction with a state or municipal employer is nothing new in Wisconsin. *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) reflects a time when the public policy needle of the State of Wisconsin was pointed at dialog with the collective, with the result that the right of individual voices to dialog with the State was limited.

It has not always been that way. The Wisconsin Labor Relations Act of 1937 granted bargaining rights to employees of private employers, but not to public employees. Joseph E. Slater, Public Workers 167 (2004) (hereafter "Slater"). From statehood through the 1950s., Wisconsin public employers engaged in dialog – setting wages, benefits, terms and conditions of employment and addressing disputes – on an individual, rather than collective basis. In each year between 1951 and 1957, a bill was

introduced by one or more unions to allow collective bargaining for Wisconsin public employees. Each year the bill failed to become law.[2] Slater, at 170-78.

In 1959, Wisconsin began to shift workplace dialog from individual public employees to collectives. Some municipal public employees in Wisconsin, but not public safety personnel, were given limited rights to bargain collectively. The 1959 statute (1959 Wis. Laws ch. 509, § 1), however, limited the scope of collective bargaining for it contained no requirement that Wisconsin public employers negotiate in good faith. 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 workers had much different bargaining rights than private sector workers, and other public sector employees, including public safety workers (*e.g.*, police) had no bargaining rights at all. Slater, at 183-84.

In 1962, Wisconsin enacted Bill 336-A, which strengthened public employee collective bargaining, but again did not provide for bargaining for State employees and did not permit compulsory union fees. Slater, at 189-91. Even with the 1962 change, the scope of bargaining was still limited for public employers still did not have to "bargain in good faith." Slater, at 191; Gregory M. Saltzman, *A Progressive Experiment: The Evolution of Wisconsin's Collective Bargaining Legislation for Local Government*

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[2] While there is no need to fully explore the arguments here, public sector unionization raises unique concerns quite apart from those associated with private sector unions. These include the disruption of government operations, the way in which a duty to bargain in good faith impairs sovereignty and the ability of the voters to set public policy and the potential for highly interested public employee unions to exert disproportionate influence over – and even to "capture" – those with whom they are negotiating. Thus some who support collective bargaining in the private sector have opposed it for government workers. See generally Daniel DiSalvo, The Trouble with Public Sector Unions, NATIONAL AFFAIRS (2010).

Employees, 15 Journal of Collective Negotiations in the Public Sector 1, 10 (1986) (hereafter "Saltzman").

In 1965, for the first time, limited collective bargaining rights were given to State employees. Slater, at 191.

Not until 1971 did the scope of bargaining change to force public employers to bargain in good faith with a collective. At that time some public employees obtained the right to challenge unfair labor practices and the ability to compel nonmembers to pay forced union fees. Saltzman, at 11. Law enforcement officers for the first time were able to organize and bargain. Saltzman, 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. Saltzman, at 11-12.

Attached to this brief, as Appendix 1, is a table reproduced from the Saltzman article, showing the history of the State of Wisconsin when it comes to talking to individual employees or collectives in determining employee working conditions.

Act 10 and Act 32 fit comfortably in the history of the changing attitude towards public employee collective bargaining.[3] These acts shift the needle on collective

[3] Indeed, the limitation on compensation increases is not a new concept in Wisconsin. From 1993 to 2009, Wisconsin law provided that school districts negotiating with teachers unions could avoid arbitration as long as the they made an offer equivalent to a 2.1% increase overall on the salary schedule and a 1.7% increase (as a

bargaining back towards greater dialog with individuals, and less dialogue with the collective.

B. *There Is No Constitutional Right to Bargain Collectively, and Restrictions on Collective Bargaining Do Not Impair the Freedom of Association.*

Although the Unions admit that their bargaining rights are mere "statutory privileges," (UB p.14), they nevertheless claim, without any authority, that the State cannot constitutionally withdraw those privileges or even modify them in ways that the Union opposes. The State was not violating the Constitution in the past, and it is not violating the Constitution now in its decision to readjust the needle back to open more areas for discussion with individual employees about their working conditions, and listen and dialog less with the collective.

Here is why. In *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), a public employer decided that it would dialog with individual employees about their workplace grievances, and not discuss grievances with the collective. The United States Court of Appeals for the Eighth Circuit thought this was a violation of the U.S. Constitution, but the Supreme Court disagreed. *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 reason is that "the First Amendment does not impose any affirmative

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percentage of the total compensation package) in the cost of benefits. This provision (known as the "Qualified Economic Offer") was repealed as part of the 2009 budget bill. 2009 Wis. Act 28.

obligation on the government to listen, to respond or, in this context, to recognize the [collective] and bargain with it." *Id.*

The Unions cite *Smith*, and darkly suggest that it held that "discouraging union membership" would violate associational rights. (UB p. 6.) However, it is obvious from the decision that totally ignoring the union, and refusing to speak with it at all, was ruled to be perfectly consistent with the U.S. Constitution. In light of *Smith*, the Unions' complaint that the State has reduced the degree of its dialog with them can hardly be a violation of their associational rights.

Just the opposite of *Smith* 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 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 Congress enacts bills "on which testimony has been received from only select groups." Public officials "at all levels of government daily make policy decisions based only on the advice they decide they need to 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 government policymaking would work a revolution in existing government practices." *Id.* The Court continued, "absent statutory restrictions, the state [is] free to consult or not to consult whomever it pleases." *Id.* at 285.

Thus, government employees have no right to bargain collectively. Government can choose to bargain with the collective, bargain with the individual, or as here, with a mix of the two, because government employees have neither the right to bargain collectively or bargain individually.

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

Either system is permissible. Neither system is required. The Court recognized in *Knight* that government employment rules are government policy, and no individual has a "constitutional right to participate directly in government policymaking," whether collectively or individually. *Id.* at 284-85. Thus, the State can set up a statutory scheme to proscribe how collective bargaining will take place and what subjects will be open for discussion.

C. Act 10 Represents the State's Choice Among Conflicting Speakers.

These two Supreme Court decisions drive a stake through the heart of the Unions' claim that the State must dialog with them to the same degree that it has dialoged in the past. The Unions may bemoan the State shifting the needle of discussion in the direction of *Smith v. Arkansas* rather than *Knight*, but this the State is free to do. These two decisions of the U.S. Supreme Court, applying specifically to the dialog about workplace

conditions, are the reason why the Unions are reduced to arguing generic associational cases.

Act 10 simply limits the scope of the subjects of mandatory bargaining with the collective, which opens up areas not within that scope for discussion with individual employees. None of these limitations impair the freedom of association. They simply reflect a differing policy choice with respect to the balance between the collective and the individual.

Because government employees have no right to bargain collectively with their employers, they have no right to the privileges incidental to collective bargaining they enjoyed prior to Act 10. Thus, it cannot reasonably be denied that they have no right to a raise greater than a cost of living adjustment. Contrary to the Unions' assertions, their right to associate is in no way burdened when the government chooses to limit across-the-board pay raises to the cost of living. If the government has no obligation to collectively bargain at all, then it certainly has no obligation to bargain for raises beyond a given level.[4] In fact, it makes perfect sense for the State, if it must treat employees in a largely uniform manner, to limit annual raises.[5]

Similarly, limiting the subjects of bargaining is simply part of defining collective bargaining. In fact, limitations on the scope of bargaining are quite common.[6] If the

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[4] If Unions were correct, every government employee would be able to successfully file a constitutional challenge every time a government employer had a wage freeze for its employees.

[5] *See* Section III.C.1., *infra.*

[6] Some states do not permit collective bargaining in the public sector. Others restrict it in various ways. *See* John Marshall, *Look at the Map*, http://talkingpointsmemo.com/archives/2011/02/look_at_the_map.php, Feb. 18, 2011. The federal government does not generally permit collective bargaining on wages and benefits and does not require employees to financially support unions.

state can eliminate collective bargaining in its entirety, it can certainly choose to limit the scope of that collective bargaining it chooses to permit. Indeed, the history of collective bargaining in Wisconsin reflects that.

D. The Unions Have No Associational Right to Require Support from Nonmembers

Merely stating that an organization has a constitutional right to claim dues and fees from those who reject it reveals the hollow nature of the claim. The Unions argue this point at pages 12-13 of their brief, but fail to cite a single case in support of their claim. Indeed, they cite only one case at all in this section of their brief, and it stands only for the unremarkable proposition that employees have a constitutional right to join a union – joining a union being distinct from that union's claim to be recognized as an exclusive bargaining agent. Stating that citizens have a constitutional right to join a church, says nothing whatsoever about whether the church has a constitutional right to use the arm of the State to force those who reject church membership to support the church financially.

The reason that the Unions are, once again, so "light" on precedent is due to the fact that a recent decision of the United States Supreme Court on union fees *rejects their argument.* The Unions again fail to address – and in this case to even *cite* - a controlling case that disproves their argument.

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," "in essence, to tax government employees." *Id.* at 184. As a result, 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). Here, the State has completely eliminated forced union fees, and the Supreme Court has already concluded that such an action is constitutional.[7]

E. The Unions Have No Constitutional Right to Require the State to Collect Their Dues

Again, the mere statement of the Unions' claim to have a constitutional right to require the State to become their bill collector proves nothing. The Unions fail to cite any cases to support their claim to an associational right to have the State collect their dues. That is not surprising; there are none. What is surprising is the Unions' failure to address the cases establishing that, contrary to the Unions' assertions, the right to associate is in no way burdened when the government refuses to provide a free collection service for unions. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) ("[T]he State is not constitutionally obligated to provide payroll deductions at all."); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989) (rejecting the argument that the First Amendment requires government to provide payroll deductions for unions); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *Smith*, 441 U.S. at 465-66 (public employer has no obligation to listen, to respond, or to recognize union even if such failure tends to impair

[7] *See* Section III.C.3., *infra*

or undermine the effectiveness of the union); *Arkansas State Highway Employees Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980) (First Amendment does not impose any duty on a public employer to grant payroll deductions, even if failure to do so impairs the union's effectiveness). Once again, the Unions failed to cite to any of these controlling precedents (save *Smith*, which they failed to explain or to acknowledge as dispositive of their claim).

The Unions cite but one case, *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), for the proposition that "strict scrutiny" applies to their associational claims. (UB pp. 15-16.) But Brown is primarily a case about equal protection.

In any event, *Brown* does not help the Unions. In that case, the American Federation of State, County and Municipal Employees Local 13 ("AFSCME") challenged a Tennessee statute which deprived it, but not all other public employee associations, of payroll deduction of members' dues. In particular, AFSCME claimed the purpose and effect of the statute was to "authorize discrimination in favor of [the Tennessee State Employees Association] in dues checkoff." Although the court concluded that one small section of the law prohibiting payroll deduction for AFSCME was unconstitutional (because prohibiting payroll deduction for any labor organization "affiliated" with any other labor organization impaired freedom of associate)[8], it upheld the statute allowing payroll deduction for some public employee associations and not others. *Id.* at 1429.

[8] That portion of the law really did raise constitutional concerns because it discriminated on the basis of who a union chose to associate with and not on whether it was recognized as an exclusive bargaining agent.

It is curious, moreover, that the Unions would cite the decision of the Sixth Circuit in *Brown* and fail to mention to this Court the Sixth Circuit's more recent and on point decision in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). In *Pizza*, 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 fail to mention to this Court *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. It was appropriate to save money by ending payroll deductions for the union - which did not represent all employees. *Id.* at 1103.

These circuit court decisions rely on various reasons for allowing payroll deductions for some employee organizations and not others, although a common theme is that saving money is a rational motive. Act 10 denies payroll deductions to those unions which no longer are involved in collectively bargaining all aspects of the workers' employment. It is reasonable for the State to decide, in light of their reduced duties, and the State's desire to save money, that it will no longer financially support those unions which are providing reduced services by deducting union dues from its employees.

F. The Unions Have No Constitutional Right to Be Free from an Annual Test of Employee Support

The Unions spend almost a page of their brief outlining the new election requirements to which they are subject. However, they cite not a single case to support their claim that these new requirements somehow violate the Constitution. The closest thing to an argument is the Unions' statement (UB p. 10) that these new procedures were not previously required, coupled with their later statement that "the cumulative effect" of this, together with their other complaints, "is inherently coercive and effectively induces represented employees to terminate their association as members of the labor union." (UB pp. 13-14.) But even if the annual recertification requirement makes it more difficult to retain the Unions' privilege as exclusive bargaining agent, it has absolutely nothing to do with whether employees may choose to join the union. Again, the privilege of collective bargaining is distinct from the freedom of association. Unions have a right to exist. They have no right to be recognized as an exclusive bargaining agent or even to bargain at all. The Democratic and Republican parties likewise have the right to exist. They have no right to assistance from the state or privileged legal status.

Contrary to the Unions' assertions, their right to associate is in no way burdened by requiring an organization wanting to become the exclusive representative for every member of a bargaining unit (willing or not) actually get – and maintain – majority support of that entire bargaining unit. Because government can constitutionally ban collective bargaining with government employees altogether, *see Smith* and *Knight*, *supra*, government can raise the threshold necessary to trigger collective bargaining.

Accordingly, the Unions' four associational claims: a) reduced scope of the mandatory subjects of bargaining); b) elimination of compulsory unionism; c) leaving them to collect their own dues; and, d) annual certification elections, are simply not a violation of the state parallel to the First Amendment of the U.S. Constitution.

Next, *Amicus* discusses the Unions' equal protection claims.

III. Act 10 Does Not Violate Plaintiffs' Equal Protection Rights Under Wis. Const. Art. I, § 1

A. Introduction

In claiming a violation of the Wisconsin Constitution's equal protection guarantee, the Unions' attempt the same sleight of hand. Having attempted to elide the distinction between the constitutionally protected right to associate and the statutorily conferred (and removable or modifiable) "privilege" (to use the Unions' own description) to compel the State to bargain with an exclusive representative of the collective, the Unions' equal protection argument relies on the same obfuscation.

Here the bait-and-switch is to argue that the right to join a union (an association of like-minded individuals) is fundamental and constitutionally protected and then argue for strict scrutiny of Act 10's distinctions. But those distinctions are drawn between *represented employees* (whether or not in a union) and *non-represented employees*, and not between *union members* and *non-union members.* They can only do this by ignoring their earlier admission that a represented bargaining unit can be comprised of both union members and non-union members.

The Unions admit that once 51% or more of a bargaining unit votes for a bargaining representative, that representative becomes the *exclusive* representative, meaning that those employees who voted against representation (or in favor of another representative) cannot bargain individually (or via another representative). (UB pp. 9, 12-13.) By the Unions' own argument regarding fair share agreements, they admit that being a member of the union is *completely immaterial* to bargaining representation. In other words, Act 10's burdens on collective bargaining fall equally on union and non-union members.

B. U.S. Supreme Court Decisions Foreclose the Unions' Equal Protection Claims and Application of Strict Scrutiny

1. Employees Who Join Unions Are Not a Protected Class for Equal Protection Purposes

The Unions' argument confuses several aspects of equal protection claims. First, the Unions claim that "strict scrutiny" applies to their equal protection claims because this discrimination is class-based. (UB p. 19.) In *United Brotherhood of Carpenters, Local 610 v. Scott*, 463 U.S.825 (1983), employees who were not union members brought suit under 42 U.S.C. § 1985(3). Section 1985(3) protects persons against, among other things, deprivation of their right to "the equal protection of the laws, or of equal privileges and immunities under the laws." The Court determined that this only protected against "class-based animus," and rejected the lower courts' opinion that economic groups, such as those in favor of or against unionization, were protected classes. 463 U.S. at 835-36, 839. Therefore, contrary to the Unions' argument, employees who join

labor unions are not a protected class for purposes of triggering a higher level of scrutiny. At most, the traditional "rational relationship" test applies.

2. *The State Has Significantly Greater Leeway in Its Dealings with Citizen Employees than It Does with Citizens at Large*

Second, the Unions fail to acknowledge the substantial difference in equal protection analysis when the government is acting as the proprietor of the business of the State. 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 government acting as "proprietor." *Id.* at 598. "Government has significantly greater leeway in its dealings with citizen employees than it does … [with] citizens at large. *Id.* at 599. When the 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.

Of special note is an illustration given by the Supreme Court in *Engquist*. 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 Supreme Court calls this "Congress's … careful work." *Id.* at 607. It does not call this "discrimination to be scrutinized by the judiciary."

Moreover, the only case cited by Unions in this section for a purpose other than providing the basic legal framework for an equal protection challenge is *United Food & Commercial Workers Local 99 v. Brewer*, ___ F. Supp. 2d ___, 2011 WL 4434043 (D.

Ariz. Sept 23, 2011). The most important thing to note about this case is that the court, in issuing a preliminary injunction, *did not reach* the equal protection argument. *Id.* at *8 ("[T]he Court will refrain from ruling on the other claims, including those alleging that the law . . . violates equal protection). Furthermore, as the Unions readily admit, *Brewer* involved distinctions between "some unionized state employees" and other unionized state employees. (UB p. 19.) Here, the Unions claim distinctions between represented and non-represented employees, not union members and non-union members employees or some union members and other union members. Just as government decision makers can listen and dialog with whomever they wish, so government as employer can treat employees (apart from protected classes) differently without having to answer to constitutional claims.

C. Act 10 Is Supported by a Rational Basis

The Unions claim that represented employees are discriminated against in favor of non-represented employees in a manner that abridges their fundamental rights of association – "The distinctions that [Act 10] make[s] between those two groups[, represented and non-represented municipal employees,] are based solely on the fact that represented employees have exercised their protected associational rights, *described in Section [I]V,*[9] *above,* whereas non-represented employees have not." (UB p. 17.) As explained, represented and non-represented employees are treated differently based on

[9] In a likely typo, Unions' Brief refers to Section V, which is the same section containing the reference.

their *unprotected* choice to bargain collectively, not on their *protected* choice to join any organization. Here, because government employees have no constitutional right to bargain collectively or have membership dues of any kind deducted from their paychecks, the State need only posit a legitimate government objective that is rationally related to the differences in treatment.

Applying a rational basis test, Act 10 survives the equal protection challenge. The legal standard the State must meet to defeat Equal Protection claims is low. The fact 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. *Engquist*, at 607. In fact, the State "has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citations omitted). Those seeking to invalidate a statute under the rational basis test must "negative every conceivable basis that might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). "Rational speculation" is sufficient to support the State's explanation. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

The Unions complain that three specific provisions of Act 10 treat similarly situated municipal employees in an unconstitutionally different manner: (1) the prohibition on bargaining collectively as to anything but wages; (2) the limitation of bargaining collectively on wages to a cost of living increase; and the prohibition on

municipal employers deducting labor organization membership dues. With respect to each of these allegedly "discriminatory" provisions, the State can fully satisfy the rational basis test by asserting that its ability to pick and choose and change its dialog partners "is inherent in a republican form of government." *Knight*, 465 U.S. at 285. The State's authority to pick and choose and change its dialog partners encompasses setting qualifications for its dialog partners and limitations on the areas of dialog.

1. Limiting Collective Bargaining to Wages Is Rationally Related to Legitimate Government Interests.

Thus, it is rational to prohibit collective bargaining on any topic but wages. A collective agreement is akin to a legislative act of government. "[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." Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Rev. 265, 266 (1987); *c.f. Knight* at 284-85 (recognizing that collective bargaining effects public policy). As Professor Summers, a "staunch believer in the role of labor unions,"[10] 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 process." *Id.* at 266.

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

[10] Emma Brown, *Clyde W. Summers, Legal Scholar Who Advocated Union Democracy, Dies at 91*, Washington Post, November 22, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/11/22/AR2010112207577.html (last visited March 1, 2012).

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:

> 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.

Professor Summers summarized this by saying "giving 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.

Bargaining decisions, which can involve up to 70% of the budget of local governments, 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 collective, it is forced to respond ("bargain in good faith") with the collective. The voices of individual public employees and the taxpayers are excluded.

Professor Summers was not against public employee collective bargaining; he simply recognized, as the Wisconsin legislature did and this Court must, that limiting collective bargaining is a rational choice. It is therefore 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, not the public, in mind.

Thus, avoiding or at least sharply limiting that denigration of the normal democratic decision-making process is a legitimate government objective. *Knight*, at 284-85 (recognizing as necessary to the political process government's ability to limit direct citizen involvement in crafting public policy). Limiting collective bargaining to a single topic will leave the vast majority of public policy decisions related to government works in the hands of the democratic process. Individual employees asking for changes to public policy pose no such risk, because the law does not require the employer to negotiate with that employee – that employee becomes no more than one voice among many lobbying government for a change in policy.

2. Limiting Collectively-Bargained Wage Increase to the Cost of Living is Rationally Related to Legitimate Government Interests

It is also rational to limit any raises achieved through collective bargaining to a cost of living increase without approval from a voter referendum. The government interest at play here is the interest in being responsible stewards of the public's tax dollars. *See Saenz v. Roe*, 526 U.S. 489, 506-07 (1999). It is eminently rational to

recognize that if a raise is going to be given across the board to all similarly-situated employees, that raise should be limited in scope or it may require raising taxes or spending less money on legitimate government endeavors.

On the other hand, if government is negotiating individually with employees, government has the ability to give larger raises to those employees who deserve it and smaller raises (or no raises) to those employees who do not. Government can portion out raises responsibly and not have to worry about straining the budget.

3. *Prohibiting Payroll Deductions for Labor Organizations is Rationally Related to Legitimate Government Interests*

Regarding the third complaint, the Unions have failed to show that there is any disparate treatment of represented and non-represented employees or labor organizations and other organizations. Although they are correct that payroll deductions for organizations other than labor organizations are not prohibited, they have not shown that in actuality they are granted. The Unions have submitted no evidence that similarly situated employees or organizations are permitted payroll deductions. Absent any evidence that they are being treated differently than other similarly situated classes, they have no equal protection claim.

Furthermore, other organizations to which payroll deductions are not prohibited are not similarly situated to the Unions. The "National Rifle Association, the League of Women Voters, [and] the Toastmasters" (UB p. 19) are not similarly situated to labor unions like Madison Teachers Inc. and local affiliates of the AFL-CIO. Not only do they exist for completely different reasons, they interact with governments on wholly-different

levels. Lobbying groups do not have the ability to compel government to listen to their demands.

It is rational to prohibit payroll deductions for unions. This issue has already been conclusively decided by the United States Supreme Court, in a case the Unions once again fail to acknowledge to this Court. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359-60 (2009) (holding that the state had a rational basis to deny payroll deductions for unions). The Court stated:

> The court below concluded, and Idaho does not dispute, that 'unions face substantial difficulties in collecting funds for political speech without using payroll deductions.' But the parties agree that the State is not constitutionally obligated to provide payroll deductions at all. *[C]f. Charlotte v. Firefighters*, 426 U.S. 283, 286 (1976) ("Court would reject ... contention ... that respondents' status as union members or their interest in obtaining a dues checkoff ... entitle[s] them to special treatment under the Equal Protection Clause"). While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities.

Id. at 359.

The Court explained that the failure to permit payroll deduction is "not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor." *Id.* That refusal "is not subject to strict scrutiny" under the First Amendment and requires only a "a rational basis to justify the ban on political payroll deductions." *Id.* The prohibition is "justified by the State's interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics." *Id.*

Even beyond *Ysursa*'s rationales, the State has rational reasons to prohibit payroll deductions for unions. Remember, the prohibition only kicks in for an organization that meets the statutory definition of a "labor organization" found in Wis. Stat. § 111.70(1)(h). Wis. Stat. § 111.70(3g). A union that fails to seek certification, or seeks and fails to obtain a majority vote for certification, is no longer "exist[ing] for the purpose . . . of engaging in collective bargaining" and may thus not prohibited from receiving payroll deductions.[11] § 111.70(1)(h). Once a union becomes an exclusive bargaining representative, however, it takes a position directly adverse to the government as employer. It is rational for the government to choose not to subsidize a group adverse to it by collecting dues for that group.

Courts have consistently rejected equal protection claims based on the failure to permit payroll deductions. As noted earlier, in *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989), the teachers' union (South Carolina Education Association "SCEA") filed suit contending that the state violated the Equal Protection Clause. South Carolina had passed a series of laws stopping payroll deductions for all other union dues, but allowing payroll deductions of dues for the State Employees Association and for charities. 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 1255, 1257.

[11] Of course, even if the payroll deduction is not prohibited, nothing requires the government employer to provide such a service, and the union could not collectively bargain to force the government employer to do so.

Notwithstanding the lower court's finding and the SCEA's allegations, the Fourth Circuit upheld the statute. It found 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 have failed to cite *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. It was appropriate to save money by ending payroll deductions for the union - which did not represent all employees. *Id.* at 1103.

These circuit court decisions rely on various reasons for allowing payroll deductions for some employee organizations and not others, although a common theme is that saving money is a rational motive. Act 10 denies payroll deductions to those unions which no longer are involved in collectively bargaining all aspects of the workers' employment. It is reasonable for the State to decide, in light of their reduced duties, and the State's desire to save money, that it will no longer financially support those unions which are providing reduced services by deducting union dues from its employees.

CONCLUSION

The Unions principally argue federal case law in support of their associational and equal protection claims under the Wisconsin Constitution. As shown above, federal

precedent does not require the State to speak equally with all citizens, and does not require it to provide equal financial support to all citizens. This is especially true when the State acts in its proprietary role as employer. For these reasons judgment on the pleadings should be entered in favor of the State and the Unions' summary judgment denied.

DATED: March 5, 2012

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