

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2012-AP-2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

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

***AMICI CURIAE* BRIEF OF THE WISCONSIN INSTITUTE FOR LAW &
LIBERTY IN SUPPORT OF ACCEPTING
THE COURT OF APPEALS' CERTIFICATION**

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INTRODUCTION

Interest of Amicus

The Wisconsin Institute for Law & Liberty is a non-profit, public interest law firm dedicated to promoting the public interest in free markets, limited government, individual liberty, and a robust civil society. It served as co-counsel for public employees acting as *amici* in support of the defendant-appellants in this case.

The Situation

Across Wisconsin, local units of government – none of whom are parties to this case – confront competing claims about Act 10. Public unions across the state are pressuring counties, municipalities, and school districts to enter into negotiations over terms that are improper subjects for collective bargaining under Act 10 or for wage increases that the new law does not permit.

The public impact is not simply uncertainty. Whether one agrees or disagrees on the merits of Act 10, there is no denying that it has had a monumental impact on local government. In just two years, billions of taxpayer dollars have been saved and public education has been reformed in ways previously unimaginable. In the wake of the circuit decision here, some local units of government – whether from

sympathy or fear – are acting as if there is “a window of opportunity” to evade the law. The Milwaukee Area Technical College, Dane County, and Middleton-Cross Plains Public Schools, to name just a few, have entered into labor agreements that violate state law. Other municipalities, such as the Milwaukee and Janesville Public Schools, are on the precipice of – and quite possibly already are – engaging in illegal collective bargaining. (Representatives of one local unit of government, the Milwaukee County Board of Supervisors, publicly denied such negotiations until an open records request put paid to the lie.¹) As noted above, many unions are calling for similar evasions and, in fact, counsel for the plaintiff-appellees in this very case has publicly suggested that the Wisconsin Employment Relations Commission must resolve any disputes between municipal employers and unions over what must be bargained by applying the law as it existed prior to Act 10.²

This precarious situation is compounded by the fact that many public employee labor contracts entered into before Act 10 went into

¹ Daniel Bice, *Milwaukee County Negotiator Offered Deal to AFSCME, Emails Indicate*, Milwaukee Journal Sentinel, April 22, 2013, available at <http://www.jsonline.com/watchdog/noquarter/milwaukee-county-negotiator-offered-deal-to-afscme-emails-indicate-fn9ln2r-204210381.html>.

² Cullen Weston Pines & Bach, *Media Release*, March 15, 2013, available at http://thereport.com/wheeler_docs/wheelerfiles/0315cwpb_01.pdf.

effect, will expire this summer. Absent this Court accepting certification in this matter and quickly bringing legal clarity to the duty of local governments to comply with Act 10, large numbers of government employers will find themselves in a lose-lose situation where they are likely to be sued if they choose to bargain or sued if they choose not to.

Only the Supreme Court can resolve this confusion and prevent extensive future litigation. We urge this Court to immediately accept the Court of Appeals' certification of this case, and pursuant to Section 809.20 Wis. Stats., advance the submission of this case and schedule this matter for argument on the briefs already submitted to the Court of Appeals this term so as to put an end to the current confusion.

ARGUMENT

I) Act 10 Has Brought Enormous Benefits to Local Governments and Schools.

In 2011, the Wisconsin Legislature enacted epic changes to the statutes that govern collective bargaining between public employers and their employees. These changes included 2011 Act 10 and 2011 Act 32, which amended and modified Act 10 (collectively "Act 10").

As of 2012, Act 10 had saved taxpayers well over \$2 billion.³

Specific examples of the benefits of Act 10 include:

- The Marinette School District reducing spending by 3.3% and not having to lay off any teachers.⁴
- The New Berlin school district reducing its unfunded pension liability by nearly \$14 million.⁵
- Local governments renegotiating their healthcare contracts away from the union-mandated WEA Trust. Consequently, the average premium cost of health insurance, for a single plan monthly plan for teachers, dropped from \$754 to \$665.⁶

Schools have also used Act 10 to dramatically restructure their operations. For instance, the Oconomowoc School District extended teaching time by 90 minutes and laid off 15 teachers due to merit, not seniority.⁷ In addition, many school districts are using Act 10 to implement merit pay systems that allow schools to hire and maintain

³ MacIver News Service, *Act 10 Taxpayer Savings Now Exceed \$2 Billion*, Oct. 29, 2012, <http://www.maciverinstitute.com/2012/10/-you-can-see-our/>.

⁴ Maureen Martin, *Wisconsin's Act 10: A Partial Fix for the State Budget Deficit*, 16, available at http://heartland.org/sites/default/files/05-21-12_act_10_for_online.pdf.

⁵ *Id.* at 17.

⁶ EAG News, *First Years of Freedom*, 2, available at <http://eagnews.org/wp-content/uploads/2013/04/First-Years-of-Freedom-report.pdf>.

⁷ 620 WTMJ, *Oconomowoc Schools Considering Sweeping Academic Changes*, April 25, 2012, available at <http://www.620wtmj.com/news/local/148971715.html>; Alan J. Borsuk, *Time Will Render Bold Oconomowoc School Plan Effects*, Milwaukee Journal Sentinel, April 28, 2012, available at <http://www.jsonline.com/news/education/time-will-render-bold-oconomowoc-school-plan-effects-da56n8d-149398195.html>.

the best teachers. The Neenah School District, for instance, instituted a “pay for performance” program.⁸

All of these reforms, and many others too numerous to recount, were accomplished as a direct result of Act 10. But as a result of the misinterpretation of the effect of Judge Colas’ decision in this case, similar reforms are now in jeopardy. Public labor unions are using Judge Colas’ decision to undermine and violate Act 10 outside the confines of this case and with entities not a party to this case. There can be no dispute that this case presents significant questions of state constitutional law (which were fully laid out by the court of appeals in its Certification to the Supreme Court) and that a decision by the Supreme Court is needed to clarify the law.

II. There Is Mass Confusion Regarding the Impact of Judge Colas’ Decision.

On September 14, 2012, in *Madison Teachers, Inc. v. Walker*, Dane County Circuit Court Judge Juan Colas ruled that parts of Act 10 were unconstitutional.⁹ According to his decision, the law is “null

⁸ WTAQ, *Neenah Schools Looking to Tie Pay to Teacher Evaluations*, September 4, 2012, <http://wtaq.com/news/articles/2012/sep/04/neenah-schools-looking-to-tie-pay-to-teacher-evaluations/>.

⁹ *MTI v. Walker*, Dane County Case No. 2011CV3774, Decision and Order dated September 14, 2012, *27.

and void” as applied to local government employees.¹⁰ Chaos and confusion followed. When reporting the Judge Colas decision, the Journal Sentinel stated that “for now, it appears school districts and local officials will have to return to the bargaining table with their workers in a much more significant way.”¹¹ Public employee unions wholeheartedly agreed and immediately began demanding that local governments come back to the bargaining table to redo their current labor contracts in ways that expressly violate Act 10.

The unions argued that the “Dane County ruling applies to the entire state” and that, therefore, the statutes relating to collective bargaining repealed and modified by Act 10 are once again in force.¹² The teachers unions in Kenosha, for example, declared that “this court decision clearly opens the window [for negotiations].”¹³ Dane County

¹⁰ *Id.*

¹¹ Jason Stein, Don Walker, and Erin Richards, *Judge Throws Out Walker’s Union Bargaining Law*, Milwaukee Journal Sentinel, September 14, 2012, available at <http://www.jsonline.com/news/statepolitics/judge-throws-out-walkers-union-bargaining-law-3h6s8fp-169834626.html>.

¹² Frank Schultz, *Teachers Union to School Board: Negotiate or Face Lawsuit*, GazetteExtra.com, March 13, 2013, <http://www.gazettextra.com/weblogs/latest-news/2013/mar/13/teachers-union-school-board-negotiate-or-face-laws/>.

¹³ Joe Kiriaki, *A Window Opens*, Glue, vol. 47, issue 3, available at <http://keanow.com/files/glue/2012-2013/glue-9-21-12.pdf>.

Board Chairman Scott McDonell exclaimed that there is “a window here, and we’re going to take advantage of it.”¹⁴

Attorney Lester Pines, the lead attorney for the plaintiffs in this case, has stated that local governments must collectively bargain with their public employees, as required by Wisconsin law prior to the passage of Act 10. Attorney Pines argues that the Commissioners of the Wisconsin Employment Relations Commission (“WERC”), as a losing party in *MTI v. Walker*, are prevented from enforcing Act 10. Consequently, “Commissioners may not enforce or administer those provisions in any matter that comes before them. If they do, we will bring them back to court to be held in contempt of court for ignoring the circuit court’s decision.”¹⁵

These statements are wrong. It is well-established that circuit court decisions do not have the same precedential impact as a supreme court or court of appeals decision. Circuit court decisions are only binding on the parties in the particular lawsuit – the plaintiffs in *MTI v. Walker* are Madison Teachers Inc. and Public Employees Local 61 and members of those unions. No other union is a party.

¹⁴ Wisconsin Reporter, *Taxpayer Alert! Dane County Resolution to Extend Contracts*, September 20, 2012, available at <http://watchdog.org/63587/wirep-taxpayer-alert-dane-county-resolution-to-extend-union-contracts/>.

¹⁵ Cullen Weston Pines & Bach, *Media Release*, March 15, 2013, available at http://thereport.com/wheeler_docs/wheelerfiles/0315cwpb_01.pdf.

Nor have the lower courts clarified the confusion caused by Judge Colas' decision. The Dane County Circuit Court and the Court of Appeals, District IV both denied the Attorney General's request to stay the decision. Although the court of appeals attempted to address this question by stating in a footnote in its order denying a stay that "we reject out of hand the proposition that the circuit court's decision has the same effect as a published opinion of this court or the supreme court,"¹⁶ that statement was not clear enough to put a stop to the unions' efforts to engage in prohibited collective bargaining. As a result, local governments have been in limbo since September 2012.

III. Labor Unions and Certain Local Governments Are Using this Confusion to Violate Act 10.

Although a circuit court decision does not have statewide precedential value, as shown below, several local governments have relied upon Judge Colas' decision and have already violated Act 10. Moreover, a number of current labor contracts are set to expire this summer and public unions are urging local governments to ignore Act 10 based on Judge Colas' decision.

A. Dane County

¹⁶ *MTI v. Walker*, 2012AP2067, Order Denying Motion for Stay, 14, fn. 1 (Wis. Ct. App. March 12, 2013).

On September 20, 2012, – mere days after Judge Colas’ decision - the Dane County Board agreed to a new labor agreement with the county union, which was not a party to *MTI v. Walker*. In addition to the unlawful collective bargaining that led to the agreement, the new contract violated Act 10 by forcing union employees to pay dues for political purposes.¹⁷

B. City of Madison

Not to be outdone by its county counterpart, the City of Madison also rushed through a labor agreement immediately after Judge Colas’ decision. On September 27, 2012, the Madison Common Council voted to approve a new contract with AFSCME Local 60, AFL-CIO, and the Building and Construction Trades Council of South Central Milwaukee.¹⁸ None of these parties were involved in *MTI v. Walker*.

C. Middleton-Cross Plains Public Schools

In December 2012, the Middleton-Cross Plains Area School District reopened negotiations with its teachers union, the Middleton

¹⁷ Sunny Schubert, *Dane County Unions Rush to Take Advantage of Colas’ Act 10 Ruling: Liberals Happy to Oblige*, Purple Wisconsin, September 21, 2012, <http://www.jsonline.com/blogs/purple-wisconsin/170742256.html>.

¹⁸ Nora G. Hertel, *Act 10 on Hold, Madison City Employee Unions Rush to Renew Contracts*, Isthmus, September 28, 2012, available at <http://www.thedailypage.com/daily/article.php?article=37886>.

Education Association (“MEA”). The two organizations exchanged proposals over topics that are not permitted under Act 10, such as retirement benefits, teacher evaluation, vacation days, and fair share union dues.¹⁹ In February 2013, Middleton Public Schools and the MEA ratified the labor agreement for the 2013-2014 school year. The new contract includes changes to salary and compensation, the school calendar, vacation time, caseload assignments, and voluntary early retirement benefits.²⁰ These terms are illegal under Act 10.

D. Milwaukee Area Technical College (“MATC”)

On February 26, 2013, the MATC Board agreed to a labor agreement with its employees’ labor union, AFT-Local 212. They did so even though the current agreement does not expire until February 2014. The Labor Agreement covers matters that go far beyond what is permitted by Act 10, including wages other than total base wages, employee healthcare contributions, retiree healthcare, pension, sick leave, pay schedules, and requirements for staffing and hiring.

E. Janesville Public Schools

¹⁹ Middleton-Cross Plains Area School District, Contract Negotiations, <http://www.mcpasd.k12.wi.us/staff/employee-services/contract-negotiations>.

²⁰ Matt Geiger, *School Board Ratifies New MEA Contract*, Middleton Times-Tribune, February 26, 2013, available at <http://middletontimes.com/articles/2013/02/26/school-board-ratifies-new-mea-contract>.

On March 13, 2013, when word got out that the Janesville School Board was going to follow Act 10 by giving its teachers employee handbooks rather than negotiate via collective bargaining, the teachers' union threatened to sue the school board.²¹ As a result, the Board dropped its plans for the employee handbook and instead decided to "meet and confer with employee unions about benefits and working conditions."²²

F. Milwaukee Public Schools

A very similar situation is unfolding with Milwaukee Public Schools ("MPS"). The Milwaukee Teachers Education Association ("MTEA") is demanding to collectively bargain with the MPS Board because it believes that Act 10 is no longer the law.²³ School Board member Meagan Holman said that she "favor[ed] collaboration and conversation" in discussions with labor unions.²⁴ On April 18, 2013,

²¹ Schultz, *supra*.

²² Frank Schultz, *Janesville School Unions, Board to 'Meet and Confer'*, GazetteExtra.com, March 20, 2013, <http://gazettextra.com/weblogs/latest-news/2013/mar/20/janesville-school-unions-board-meet-and-confer/>.

²³ Erin Richards, *MTEA Union to Pressure School Board to Negotiate New Contracts*, Milwaukee Journal Sentinel, March 21, 2013, <http://www.jsonline.com/blogs/news/199377201.html>.

²⁴ *Id.*

the Journal Sentinel reported that the MTEA was exchanging labor proposals with MPS. The current MPS contract expires on June 30.²⁵

G. Milwaukee County

According to the Journal Sentinel, the Milwaukee County Board has negotiated and already reached tentative agreements with four employee unions. Under each agreement, the county would be required to collect union dues from the paychecks of union members, an arrangement prohibited by Act 10.²⁶ The Board has also entered into negotiations with AFSCME District Council 48, which was a public union that is no longer currently certified.²⁷

CONCLUSION

Act 10 is currently the law – and there is no lawful basis to evade it. However, absent an immediate decision by this Court to hear and decide this dispute, or to stay Judge Colas' Decision, the illegal conduct described above will continue. Only this Court can

²⁵ Erin Richards, *Union Exchanges New Teachers Contract Proposals with MPS*, Milwaukee Journal Sentinel, April 18, 2013, <http://www.jsonline.com/blogs/news/203614941.html>.

²⁶ Daniel Bice, *4 Proposed Labor Deals Deflate Milwaukee County Board's No-Talks Claim*, Milwaukee Journal Sentinel, April 29, 2013, available at <http://www.jsonline.com/watchdog/noquarter/4-proposed-labor-deals-deflate-milwaukee-county-boards-notalks-claim-t99ot71-205336671.html>.

²⁷ *Id.*

resolve the problem. This situation cries out for Certification to the Supreme Court.

Dated this 3 day of May, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'RME', is written over a horizontal line.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,341 words, calculated using Microsoft Word 2010's word count function.

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 3 day of May, 2013.



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