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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 No. 11-CV-3774
The Honorable Juan B. Colas, and on Certification
from the Court of Appeals (District IV)

AMICI CURIAE BRIEF FOR ELIJAH GRAJKOWSKI, KRISTI LACROIX, AND NATHAN BERISH

Milton L. Chappell (*pro hac*)
Nathan J. McGrath (*pro hac*)
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160

Richard M. Esenberg, WBN 1005622
Thomas C. Kamenick, WBN 1063682
Brian W. McGrath, WBN 1016840
Wisconsin Institute for Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202

Bruce N. Cameron (*pro hac*)
Regent University School of Law, RH # 353
1000 Regent University Drive
Virginia Beach, VA 23464

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INTRODUCTION

Elijah Grajkowski, Kristi Lacroix, and Nathan Berish ("*Amici*") are current or former nonunion public employees who will be affected both in principle and economically by the outcome of this case. *Amici* filed briefs in *Wisconsin Education Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012), *aff'd in part, rev'd in part*, 705 F.3d 640 (7th Cir. 2013), and participated in oral argument before the United States Court of Appeals for the Seventh Circuit.

Amici now file this brief in support of the Defendants-Appellants' ("the State") position on the constitutionality of 2011 Wisconsin Act 10 ("Act 10").

ARGUMENT

I. PUBLIC EMPLOYEES HAVE NO CONSTITUTIONAL RIGHT TO COLLECTIVELY BARGAIN.

The argument of the Unions and the decision of the circuit court rest on a faulty premise. Act 10 does *not* treat individual—or groups of—public employees differently based on the exercise of their freedom of association. Public

employees in Wisconsin remain free to join civic associations, political parties, and unions to advocate for changes in the law or in their terms and conditions of employment. They can even join unions for the purpose of seeking to have that entity certified as an exclusive collective bargaining agent.

What Act 10 does is establish the rules that apply when Unions seek and obtain the statutory privilege of exclusive representation of *all* employees. In other words, Act 10 defines how much collective bargaining the State will permit and specifies the rules for choosing and maintaining an exclusive representative. Even a cursory reading of Act 10 reveals that all of its distinctions turn, not on the act of association, but on the decision to accept the burdens and benefits of exclusive representation.

And exclusive representation for purposes of collective bargaining is a privilege that the State may extend, withdraw, or limit at will. As the circuit court noted in its decision, "[i]t is undisputed that there is no constitutional right to collective

bargaining." (App. at 137.) The court of appeals reaffirmed this in its Certification Decision, stating, "[t]he parties agree, as they must, that public employers have no constitutional obligation to bargain with employees, either individually or collectively." (App. at 107-08.)

Two decisions of the United States Supreme Court make this clear, holding unequivocally that the state is not obligated to speak, or even to listen, equally to all of its citizens in the context of public employment. In *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), the Supreme Court determined that the state had no constitutional obligation to consider or discuss grievances filed by a union of state employees, but could instead consider only those filed by individual employees. The Supreme Court noted that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or in this context, to recognize the association and bargain with it." *Id.* at 465.

In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the state took the opposite

approach. It decided that, as an employer, it would bargain and confer exclusively with the *union* rather than the *individual*. This, too, was held constitutional. The Supreme Court stated that "[in *Smith*] the government listened only to individual employees and not to the union. Here the government 'meets and confers' with the union and not with individual employees. The applicable constitutional principles are identical . . . ." *Id.* at 286-87.

Smith and *Knight* establish conclusively that the state may pick and choose with whom it will bargain when it comes to employment matters. There is no constitutional right to collective bargaining. Nor is there a constitutional right to be free from collective bargaining. Thus, the Unions' claim that their First Amendment rights are violated by Act 10's changes to the statutory rules for exclusive representation and collective bargaining is baseless.

Not surprisingly, the United States Court of Appeals for the Seventh Circuit rejected the Unions' First Amendment claim in *Wisconsin Education Ass'n Council v. Walker*, 705

F.3d 640, 645-48 (7th Cir. 2013). Although the equal protection theory advanced by the unions there was slightly different, the Seventh Circuit recognized the clear difference between the constitutional right of free association and the mere statutory privilege of collective bargaining. Citing *Smith* and *Knight*, the court recognized that there is no right to collectively bargain and that "Wisconsin was free to impose any of Act 10's restrictions on all unions." *WEAC v. Walker*, 705 F.3d at 653. In other words, the Seventh Circuit rejected the very proposition that the Unions advance here.

Finally, it is noteworthy that the Unions challenging Act 10 in *WEAC v. Walker* declined to seek *certiorari*.

II. THE STATE IS FREE TO RESTRICT THE SCOPE OF COLLECTIVE BARGAINING.

Realizing that the Unions' First Amendment claims could not survive a direct constitutional analysis, the circuit court below used an indirect approach to strike down Act 10. It relied on *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), a case holding that a public housing authority could not condition eligibility for public housing on

whether applicants had exercised their constitutional right to associate with specified "subversive" organizations. *Lawson* held that, while there is no right to public housing, the government may not condition its availability on whether tenants choose to exercise their constitutionally protected freedom of association. *Lawson, 270 Wis. at 287-288*, 70 N.W.2d at 615.

In the eyes of the circuit court, this case is comparable to *Lawson*. In its view, Act 10 "penalizes" employees who associate "for the purpose of recognition of their association as an exclusive bargaining agent." (App. at 138.) Thus, while acknowledging that there is no right to bargain collectively, the circuit court concluded that limiting the scope of bargaining discriminates against represented employees because, in theory, unrepresented employees could negotiate pay raises without limitation or bargain on any conceivable subject. This, in the circuit court's view, constitutes an "unconstitutional condition" similar to that imposed on the tenants in *Lawson*. It is no overstatement to say that the

circuit court's decision depends completely on its analogy to *Lawson*. But if the analogy is inapt, its decision falls. With respect, the analogy is unequivocally inapt.

A. Act 10 Imposes No Penalty Based on the Exercise of Constitutionally Protected Rights.

The circuit court's analogy to *Lawson* is a category error. The limitations of Act 10 are not triggered by the exercise of the constitutionally protected right to associate. Rather, employees are absolutely free to associate and none of the limitations complained of here are conditioned on such association. Indeed, a non-represented employee could join a union—even one trying to gain the power of exclusive representation—and bargain for anything he or she wanted. It is only if employees are successful in obtaining the statutory privilege of exclusive bargaining representation that their agent is bound by the legislature's limitations on that privilege.

Recognizing this, the Unions' brief is full of awkward circumlocutions designed to blur the critical distinction between free association and mandatory exclusive

representation over *all* employees. The Unions say that Act 10 penalizes municipal government's "association with a certified agent" (Unions' Br. at 11) or employees' "fundamental associational approach" to be "represented." (*Id*. at 12.) It places burdens, they say, on those "who choose the statutory privilege of collective bargaining by association with a certified agent." (*Id*. at 11.)

The circuit court's decision is similar. It complains of burdens imposed because employees "associate for the purpose of being the exclusive agent" or for joining a union "that bargains collectively for them." (App. 138-39.) But the Unions cannot conjure a right to compulsory exclusive representation and collective bargaining by recasting it as a right to "associate with a representative" or "to associate to bargain collectively." Choosing and exercising the statutory privileges of collective bargaining and exclusive representation are not exercises of the right of free association. If they were, employees would possess a

constitutional right to collectively bargain, something that even the circuit court concedes they do not have.

It is not an "unconstitutional condition" for the State to define a statutory privilege (the power of exclusive representation) in a narrow way. Indeed, Wisconsin has repeatedly changed the scope of collective bargaining (see *infra* pp. 15-19) and the federal government itself (along with many states) limits the scope of collective bargaining for public employees. *See* Civil Service Reform Act, 5 U.S.C. § 7117 (significantly limiting the scope of bargaining for federal sector employee unions). To elide the distinction between association and representation is inconsistent with the very notion that there is no constitutional right to collectively bargain.

Moreover, the Unions' argument that there is a constitutional right to choose to be exclusively represented is nonsensical because it ignores the right of employees *not* to be represented. As the Michigan Court of Appeals recently noted in upholding that state's elimination of compulsory

union dues and "fair share" agreements, "[f]or more than 35 years, from *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) to *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), the United States Supreme Court has reiterated that compulsory funding of unions by public sector employees raises critical First Amendment concerns." *UAW v. Green*, No. 314781, 2013 WL 4404430, slip op. at 16 (Mich. Ct. App. Aug. 15, 2013) (parallel citations omitted), *available at* http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/COA/20130815_C314781_29_314781.OPN.PDF (last visited Aug. 26, 2013).

The Michigan court further recognized the state's "power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association." *Id.* at 17. Of necessity, if there are constitutional rights at stake, as opposed to statutory privileges, then this includes protecting the rights of individual employees to refrain from being forced into exclusive representation by a union. Like Wisconsin, the Michigan legislature decided to

pass legislation protecting the rights of individual employees, which the Michigan appellate court recognized was permitted under the constitution.

B. Act 10 Contains No Penalty At All.

It is wrong to say that Act 10's limits on what a union can bargain for constitute a "penalty" because the scope of bargaining is not as broad as it might be. If the circuit court were correct in finding Act 10's limitations on bargaining to be a penalty, then *any* limitation on collective bargaining would be a "penalty." But recognition of an exclusive collective bargaining agent has always involved a package of benefits traded for limitations and restrictions on the scope of bargaining.

While it is certainly true that an individual employee can ask for a bigger raise, the public employer is entitled to tell that nonunion employee to "pound sand." The employer has no duty to negotiate with the individual employee. On the other hand, represented employees have the right, through their bargaining agent, to compel the employer to bargain on

a good faith basis, albeit on a limited amount of topics. Who is better off? That is a decision for each employee to make. Act 10 simply allows each employee to make the choice for individual or collective bargaining.

C. Even if the Exercise of Associational Rights Triggered a Penalty, There is No Unconstitutional Condition.

Finally, the circuit court's *Lawson* analysis fails to acknowledge oft-accepted limits on the "unconstitutional conditions" doctrine upon which *Lawson* itself is based. The two limitations that apply directly here are that: (1) a restriction on rights that is germane to the underlying statute is more likely to be permissible, while restrictions that are not germane are problematic, and (2) the government is not required to subsidize anyone's exercise of a right.

In *Lawson*, the penalizing condition, i.e., non-association with certain subversive organizations, was not germane to the benefit of public housing. But when a public benefit is contingent on forbearance from the exercise of a constitutional right that is germane to provision of the benefit,

it makes no sense to call it a penalty, and the condition is likely to be upheld. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), illustrates this point. There, the Supreme Court upheld a Puerto Rican statute that prohibited casinos from advertising. The Court majority concluded that the statute was germane to the law allowing the existence of casinos, because it directly reduced the negative impact of casinos by reducing demand for gambling. As a result, the Court upheld the law despite the First Amendment limitations. *Id.* at 340-44.

Here, unlike *Lawson*, the alleged restrictions on collective bargaining are directly related to the underlying law. Limiting the subjects of collective bargaining is directly related to a statute allowing collective bargaining to exist at all.

Further, it cannot be an "unconstitutional condition" for the government to decline to extend subsidies or advantages such as "fair share agreements" or "dues deductions" to unions (i.e., associations that are recognized and granted a

statutory privilege). In *Lyng v. UAW*, 485 U.S. 360 (1988), the Supreme Court held that a federal statute denying food stamps to strikers and their families was constitutional. While the law made it harder for employees to maintain a strike and may have pressured them to abandon the union, the government was not required to subsidize the exercise of that right and, therefore, the law did not impair the freedom of association or place an unconstitutional condition on its exercise. *Id.* at 366; *see also Cal. Corr. Peace Officers' Ass'n v. Gilb*, No. A128189, 2011 WL 828659 (Cal. App. Mar. 10, 2011) (the state's providing a smaller monetary contribution for dental benefits to union employees than nonunion employees did not violate the union's First Amendment rights because it did not prohibit employees from associating in any way for any purpose).

III. THE STATE HAS HISTORICALLY CHANGED WITH WHOM IT WILL NEGOTIATE FROM AN EMPLOYMENT STANDPOINT, WITHOUT VIOLATING THE U.S. OR WISCONSIN CONSTITUTIONS.

The Unions may contend that reliance on U.S. Supreme Court decisions is not persuasive because *Lawson* is a

decision by this Court, which may interpret the Wisconsin Constitution different from the U.S. Constitution. But *Lawson* itself holds that "Secs. 3 and 4, art. I, of the Wisconsin constitution, guarantee the same freedom of speech and right of assembly and petition as do the First and Fourteenth amendments of the United States constitution." 270 Wis. at 274, 70 N.W.2d at 608. The holding in *Lawson* regarding unconstitutional conditions is based not upon any unique aspect of Wisconsin law, but rather on the U.S. Supreme Court cases cited therein. *Id.* at 276-77, 70 N.W.2d at 609.

In fact, Act 10 is nothing more than the latest iteration in Wisconsin's long history of legislative changes to the rules for collective bargaining. No court has ever held—and it is unclear that anyone has ever seriously suggested—that this history of qualifications and limitations on collective bargaining is unconstitutional.

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

Unions, the Law, and the State, 1900-1962, 167 (2004) ("Slater").

In 1959, Wisconsin started to shift from negotiations with individual public employees toward negotiations with unions. In that year, certain municipal employees, but not public safety employees, were granted limited collective bargaining privileges. The 1959 statute, 1959 Wis. Laws, ch. 509, § 1, however, limited the scope of collective bargaining to only wages, hours, and conditions of employment, and did not require Wisconsin public employers to negotiate in good faith. Wis. Stat. § 111.70(2) (1959); *see also* Charles C. Mulcahy & Gary M. Ruesch, *Wisconsin's Municipal Labor Law: A Need for Change*, 64 Marq. L. Rev. 103, 107 (1980). No one contended that it was unconstitutional for public-sector employees' bargaining privileges to differ from private-sector employees', nor for some public employees, including police, to have no bargaining privileges at all. Slater, *supra* at 181-84. Importantly, no one suggested that

limiting the subjects for collective bargaining by public-employee unions was unconstitutional.

In 1962, Wisconsin enacted Bill 336-A, which strengthened public-employee collective bargaining. But it neither provided state employees with bargaining, nor permitted compulsory union fees. 1962 Wis. Laws, ch. 663; Slater, *supra* at 189-91. No one seriously suggested that the absence of compulsory dues was an unconstitutional burden. And despite the 1962 changes, the scope of bargaining remained limited. *Id.* at 191; Gregory M. Saltzman, *A Progressive Experiment: The Evolution of Wisconsin's Collective Bargaining Legislation for Local Government Employees*, 15 J. of Collective Negotiations in the Pub. Sector 1, 11 (1986) ("Saltzman").

Wisconsin state employees were first given limited bargaining rights in 1965. Slater, *supra* at 191. However, not until 1971 were police granted the privileges of exclusive representation and collective bargaining. Concurrently, public

employers were forced, for the first time, to bargain in good faith. Saltzman, *supra* at 11.

This historical recitation shows that Act 10 fits comfortably in Wisconsin's tradition of changing attitudes toward public-employee collective bargaining. It revives greater dialog between individual employees and public employers, and reestablishes a lesser form of dialog between the State and unions, by limiting the scope of mandatory bargaining.

If the circuit court is correct that the First Amendment limits the State's ability to determine its level of dealings with public employees, then all of the bargaining laws Wisconsin has passed since 1937 have violated the First Amendment. If the circuit court is correct that the Equal Protection Clause is violated when bargaining laws do not apply equally to all employees—represented by unions or not—then the State has a long history of equal protection violations. But, of course, the circuit court is not correct. The State's decision to make these changes over time, including the changes in Act 10, is a

matter of concern for the citizens and their legislature, not for the constitution and the courts.

CONCLUSION

For these reasons, the circuit court's holding that Act 10 is unconstitutional should be reversed and the constitutionality of Act 10 upheld.

Respectfully submitted,

Dated: 8/27/2013 /s/ RICHARD M. ESENBERG

Richard M. Esenberg, WBN 1005622
Brian W. McGrath, WBN 1016840
Thomas C. Kamenick, WBN 1063682
Wisconsin Institute for Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202
Telephone: (414) 727-9455
Email: rick@will-law.org
brian@will-law.org
tom@will-law.org

Milton L. Chappell (*pro hac*)
Nathan J. McGrath (*pro hac*)
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Telephone: (703) 321-8510
Facsimile: (703) 321-9319
Email: mlc@nrtw.org
njm@nrtw.org

Bruce N. Cameron (*pro hac*)
Reed Larson Professor of Labor Law
Regent University School of Law
Robertson Hall # 353
1000 Regent University Drive
Virginia Beach, VA 23464
Telephone: (757) 352-4522
Facsimile: (757) 352-4571
Email: bcameron@regent.edu

Attorneys for Amici

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I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with proportional serif font. This brief is 2,974 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: August 27, 2013 /s/ RICHARD M. ESENBERG
RICHARD ESENBERG

CERTIFICATE OF COMPLIANCE
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I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 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.

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RICHARD ESENBERG