STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUNTY

Kristi Lacroix and
CarrieAnn Glembocki,

Plaintiffs,

v. Case No. 13-CV-1899

Kenosha Unified School District Board of Education,
Kenosha Unified School District, and
Kenosha Education Association Building Corporation,
d/b/a Kenosha Education Association,

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A TEMPORARY INJUNCTION

INTRODUCTION

On Friday, November 15, 2013, Defendant Kenosha Unified School District Board of Education (the "Board") voted to approve a collective bargaining agreement between the Kenosha Unified School District (the "School District") and the Kenosha Education Association Building Corporation, d/b/a Kenosha Education Association ("KEA"). That is a blatant violation of state law. The unlawful agreement contains provisions with respect both to wages and to the factors and conditions of employment that are illegal subjects for collective bargaining between school districts and their employees. In addition, the agreement requires teachers to pay union dues against their will under a so-called "fair share" provision. Such provisions are expressly prohibited by state law.

Plaintiffs' Complaint seeks a declaration that the November 15, 2013, collective bargaining agreement (the "CBA") between the School District and KEA is invalid on the grounds that: (a) KEA is not the authorized bargaining agent of Kenosha teachers; (b) the CBA is the product of unlawful collective bargaining in violation of Wis. Stat. § 111.70(4)(mb); (c) the CBA violates teachers' rights under Wis. Stat. § 111.70(2); (d) the CBA is an unlawful agreement in restraint of trade in violation of Wis. Stat. § 133.03(1); and (e) the CBA was the result of a violation of the Wisconsin Open Meetings Act. The Plaintiffs are Kristi Lacroix, a

School District taxpayer, and CarrieAnn Glembocki, a Kenosha teacher. The Plaintiffs seek a temporary injunction under Wis. Stat. §813.02 preventing the implementation of the unlawful CBA pending a full hearing on the merits.

FACTUAL BACKGROUND

The Parties

Plaintiff Kristi Lacroix is a resident of the Town of Somers in Kenosha County and is a taxpayer whose taxes are used to fund the School District. (Lacroix Aff. ¶¶ 2-3.) Plaintiff CarrieAnn Glembocki is currently employed by the School District as a teacher. (Glembocki Aff. ¶ 2.) Ms. Glembocki has been employed by the School District since January, 2008. (*Id.*) She is a "general municipal employee" as defined in Wis. Stat. §111.70(1)(fm). The School District is a "municipal employer" as defined in Wis. Stat. §111.70(1)(j). The Board has the powers set forth in Wis. Stat. § 120.12. The School District and the Board are "governmental bodies" as defined in Wis. Stat. § 19.82(1). KEA is a union that purports to represent Kenosha public school teachers in collective bargaining with the Board and the School District.

Act 10

In 2011, the Wisconsin Legislature enacted sweeping changes to the statutes that govern collective bargaining between public employees and their employers. These changes included 2011 Act 10 together with 2011 Act 32, which amended and modified Act 10. Act 10 became the law in Wisconsin on June 29, 2011, Act 32 on July 1, 2011. Act 32 and Act 10 (together known as "Act 10"), among other things, amended Wis. Stat. § 111.70, the statute that governs collective bargaining between municipal employers and municipal employees. Section 111.70(4)(mb), as amended by Act 10, now prohibits municipal employers such as the School District from bargaining collectively with a union representing its employees with respect to any of the factors or conditions of employment, including the deduction of union dues or the payment of nonmember "fair share" fees, except for total base wages. Base wages do not include overtime, premium pay, merit pay, pay schedules, or automatic pay progression. Wis. Stat. § 111.70(4)(mb). Act 10 also prohibits municipal employers from "deduct[ing] labor organization dues from the earnings of a general municipal employee or supervisor." § 111.70(3g).

Pursuant to Act 10, teachers have the right, among other things, to: (a) vote in an annual election on the certification of a collective bargaining agent; (b) refrain from union activity: (c) not pay union dues; and (d) not pay any amount under any so-called "fair share" agreements, i.e. provisions in union contracts that require non-union teachers to pay a union a portion of union dues against their wishes. Wis. Stat. § 111.70(2) and (4)(d).

Act 10 Litigation

In the wake of its passage by the Legislature, several lawsuits were filed that challenged the validity of Act 10 on constitutional or other grounds. The U.S. District Court for the Western District of Wisconsin dismissed many of these challenges and, on appeal, the U.S. Court of Appeals for the Seventh Circuit dismissed all challenges to the statute on federal constitutional grounds. *WEAC v. Walker*, 705 F.3d 640 (7th Cir. January 18, 2013).[1] On September 11, 2013, the U.S. District Court of the Western District of Wisconsin upheld Act 10 against a related constitutional challenge similar to the one raised in *Madison Teachers, Inc. v. Walker*, Dane County Circuit Court No. 11CV3774, discussed below, dismissing that case as well. *Laborers Local 236, AFL-CIO v. Walker*, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013). On October 23, 2013, the Dane County Circuit Court, the Honorable John Markson, presiding, upheld Act 10 against another constitutional challenge brought by state employees and a union representing them, dismissing that case. *Wisconsin Law Enforcement Association v. Walker*, Dane County Circuit Court No. 12CV4474.

But on September 14, 2012, contrary to these other judicial decisions, another Dane County Circuit Court judge, the Honorable Juan Colás, held parts of Act 10 to be in violation of the Wisconsin State Constitution. *Madison Teachers, Inc. v. Walker*, Dane County Circuit Court No. 11CV3774. That decision was appealed to the Wisconsin Court of Appeals, and then certified to the Wisconsin Supreme Court. The Wisconsin Supreme Court heard oral argument on November 11, 2013 but has not yet decided the case. On November 21, 2013, however, the Wisconsin Supreme Court vacated a contempt order issued by the circuit court in *Madison Teachers.*

[1] Copies of each of the Act 10 cases cited in this section of the brief are being provided to the Court in a separate appendix filed herewith.

Recent History of the School District and KEA

At the time of the passage of Act 10 there was a collective bargaining agreement in place between the School District and the Kenosha Education Association ("KEA"). That agreement expired on June 30, 2013. (Lacroix Aff. ¶5.) A copy of the expired collective bargaining agreement is attached to the Complaint in this case as Exhibit L. The expired collective bargaining agreement contained numerous provisions that are no longer allowed to be the subject of lawful collective bargaining under Act 10. *See* Wis. Stat. § 111.70(4)(mb). Act 10 would now forbid, for example, the previous agreements on Working Conditions, Teacher Assignments, Fringe Benefits, Wages (other than base wages), Teacher Tenure, Dismissal, Non-Teaching Duties, Payroll Deductions, Union Dues, "Fair Share", Sick Leave (and other absences), Teacher Evaluations, and Grievance Procedures set forth in the agreement. See Wis. Stats. § 111.70(4)(mb). In fact, virtually all of the expired collective bargaining agreement would be illegal under Act 10 because Act 10 limits the subject of collective bargaining to only base wages.

Moreover, under Act 10, KEA was automatically decertified as the collective bargaining representative for the Kenosha teachers at the end of the expired agreement (*i.e.*, as of June 30, 2013), unless it was recertified as their collective bargaining representative in an election on or before December 1, 2013, as required by Wis. Stat. § 111.70(4)(d)3.a. Section 111.70(4)(d)3.a. states as follows: "If no representative receives at least 51percent of the votes of all of the general municipal employees in the collective bargaining unit [in the required election], at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented.") (emphasis added).

On September 13, 2013, KEA declared that it was not going to be filing for recertification and therefore would not request the election required by Act 10. Complaint, Exhibit C.[2] No election was held to certify KEA as the collective bargaining agent for Kenosha teachers after the expiration of the previous collective bargaining agreement on June 30, 2013. (Lacroix Aff. ¶ 6.) As a result, KEA was decertified as a matter of law by the provisions of Wis. Stat. § 111.70(4)(d)3.a., and KEA lacks the statutory authority to collectively bargain on behalf of Kenosha teachers including Ms. Glembocki, even over base wages.

---

[2] The Court can take judicial notice of the public facts as set forth in the newspaper articles and Board records attached to the Complaint. *See* Wis. Stat. §902.01. The Plaintiffs do not anticipate that any of these public facts will be disputed.

On January 29, 2013, the Board approved the adoption of an employee handbook that would replace all school district employee contracts that were created through collective bargaining. (The January 29th Board minutes are attached to the Complaint as Exhibit D.) The handbook was scheduled to go into effect on July 1, 2013 which was the day after the expiration of the then existing collective bargaining agreement.

But the handbook was not implemented on July 1, 2013. Instead, the Board decided to collectively bargain with KEA in violation of Act 10. The agenda for the Board's October 22, 2013, regular monthly meeting contains an item labeled "Old – Business Continued, L. Discussion/Action Adoption of Employee Handbook." (The relevant sections of the October 22, 2013 agenda are attached to the Complaint as Exhibit F.)

Page 84 of the Agenda provides further information on the Agenda item:

> Effective July 1, 2013, the collective bargaining agreements between Kenosha Unified School District and the Kenosha Education Association (Teachers, Educational Support Professionals, Interpreters, Carpenters and Painters and Substitute Teachers) and Local 2382 (Secretary Union) expired. Therefore, with the implementation of Act 10, which prohibits unions and employers from bargaining over conditions of employment other than base wages, the Administration is recommending the adoption of a district-wide employee handbook.
>
> Although the handbook was originally adopted in January 2013, in July of 2013, the Board of Education directed the Administration to "meet and confer" with employees groups regarding concerns associated with the original handbook. A series of meetings were held and recommendations from those meetings were incorporated into the draft handbook which will be available on the KUSD website by noon on Tuesday, October 22, 2013.

At the October meeting, instead of taking up the Employee Handbook, Board member Taube introduced a three-part motion. She moved to "postpone action on the Employee Handbook" until November 26, 2013," "that KUSD administration and members of the School Board begin to bargain with the respective represented groups regarding mandatory and permissive subjects to reach an agreement no later than November 15, 2013," and "that the School Board maintain the status quo with respect to all mandatory subjects of bargaining as provided for by the represented groups' respective 2011-2013 Agreements, and the SEIU 2009-

2013 Agreement,[3] until new agreements have been ratified." A copy of the Taube motion is attached the Complaint as Exhibit G.

The Agenda for the October 22, 2013, Board meeting contained no notice that the Board would be discussing and voting on engaging in collective bargaining with its employees' unions, including KEA. The Board nevertheless approved the Taube motion by a vote of 4-3. Based upon the Board's decision on October 22, 2013, the School District and the Board began collective bargaining with KEA, including but not limited to bargaining which occurred on Friday, November 8, 2013. Complaint, Exhibit H.

On Saturday, November 9, 2013, the Board held another meeting, most likely in response to complaints that it had violated the Open Meetings law by authorizing negotiation at its October meeting without placing that topic on its agenda. Thus, the Board met for the ostensible purpose of "discussion/action regarding **commencing** collective bargaining negotiations" (emphasis added), even though collective bargaining had already started. A copy of the notice for the November 9th meeting is attached to the Complaint as Exhibit I. It is of course remarkable that the Board was meeting on November 9th to discuss "commencing" collective bargaining that had already occurred the day before.

In any event, the unlawful (and apparently unauthorized) collective bargaining that had occurred on Friday, November 8th led to agreement between the School District and KEA and on Monday, November 11th they signed a copy of a Tentative Agreement. A copy of the Tentative Agreement is attached to the Complaint as Exhibit J. The Board then held a meeting on November 12, 2013, to determine whether it would ratify the Tentative Agreement. At the November 12th meeting the Board voted to postpone the decision on whether or not to ratify the collective bargaining agreement until its regularly scheduled meeting on November 26, 2013.

However, on November 14, 2013, the Board scheduled a meeting on 24-hour's notice for 10:00 a.m. on November 15, 2013 to ratify the collective bargaining agreement. A copy of the November 14th notice is attached to the Complaint as Exhibit K. At the November 15th meeting the Board, by the same 4-3 vote, ratified the terms of the Tentative Agreement (Complaint, Exhibit J) that had been negotiated based on the authorization at the October 22, 2013 meeting and which occurred on November 8, 2013. Their ratification resulted in a final agreement, the CBA.

---

[3] The SEIU represents certain non-teacher employees.

The CBA consists of all of the terms of the collective bargaining agreement that had expired on June 30, 2013, as amended by the Tentative Agreement. A copy of the previous collective bargaining agreement is attached to the Complaint as Exhibit I. The copy of the previous collective bargaining agreement that is attached to the Complaint is not signed but it is the copy that was posted on the School District's website while the agreement was in effect. (Lacroix Aff. ¶ 5.)

The CBA includes numerous provisions which are unlawful for collective bargaining under Act 10. It covers matters that go far beyond what is permitted by Act 10, including but not limited to provisions on working conditions, teacher assignments, fringe benefits, teacher tenure, payroll deductions for union dues, "fair share" payments, wages (other than base wages), employee healthcare contributions, retiree healthcare, pension, sick leave, and pay schedules, etc. all of which are expressly prohibited by Wisconsin law. Moreover, the CBA includes terms which violate the specific rights of teachers under Act 10.

ARGUMENT

I. THE PLAINTIFFS ARE ENTITLED TO A TEMPORARY INJUNCTION PROHIBITING THE IMPLEMENTATION OF THE CBA

Section 813.02 Wis. Stats. provides that "when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act." The standards for the issuance of an injunction under § 813.02 are well-known:

> The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.

Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 519-20, 259 N.W.2d 310, 313-14 (1977).

The Plaintiffs can meet each of these requirements. The Plaintiffs have a high probability of success on the merits. Act 10 is constitutional and enforceable as against the Board, the School District, and KEA. The CBA ratified by the Board for the School District blatantly violates Act 10. The CBA requires the immediate lump sum payment of $1,100 to each of the School District's teachers. There are approximately 1,500 teachers employed by the School District which amounts to a total immediate payment of approximately $1.65 million. (Lacroix Aff. ¶ 12.) Once this money is spent, it cannot be practically recouped. The payments are not the proper subject of a collective bargaining agreement. A lump sum payable to each teacher is not a negotiated increase in base wages. The CBA also provides for increases in teacher compensation that exceed the limits under Act 10. Even if the lump sum payment could be characterized as an increase in base wages, for certain teachers,[4] the $1,100 increase would exceed the percentage increase permitted under Act 10. *See* Exhibit J at p. 5.

In addition, the CBA requires Kenosha teachers to make fair share payments to the KEA against their will in further violation of Act 10. Section XI(B) at pages 19-20 of the previous collective bargaining agreement (Complaint, Exhibit L) specifically states that "all employees covered by this Agreement shall become members of the Kenosha Education Association or pay to the Association their proportionate share of the cost of collective bargaining process and contract administration …." This provision was not modified or amended in any way by the Tentative Agreement (Complaint, Exhibit J). It is unlawful both as a prohibited subject of collective bargaining, Wis. Stat. § 111.70(4)(mb) and as a violation of municipal employees' rights under Act 10, § 111.70(2).

Section XI(B) further contains the procedures for the School District to automatically deduct such forced dues from the employees' payroll checks. As well as being a prohibited subject of collective bargaining, § 111.70(4)(mb), such deductions are expressly prohibited by Act 10, § 111.70(3g).

The CBA also changes teachers' work day from the current 8 hours to a 7 ½ hour. Kenosha taxpayers are harmed by that provision because they are paying more money for approximately 6% fewer work-hours. All-told, teachers will work approximately 135,000 fewer hours during a school year (1,500 teachers x 30 minutes per day x 180 school days). In any

[4] Those teachers earning less than approximately $53,140 per year. *See infra,* Section I.B. for the calculation.

event, collective bargaining on the length of the work day is prohibited by Act 10. § 111.70(4)(mb).

The Plaintiffs have no adequate remedy at law to prevent this conduct absent an injunction, and the Plaintiffs will be irreparably injured by these violations of law. The status quo in Kenosha is that Act 10 is the law of the land and the CBA dramatically changes that status quo.

A. *The Plaintiffs Have a Reasonable Probability of Success on the Merits*

1. Act 10 is constitutional and applicable to the parties to this case

The Plaintiffs are entitled to rely on the strong presumption that Act 10 is constitutional. *In re Termination of Parental Rights to Diana P.*, 2005 WI 32, 279 Wis. 2d 169, 179-80, 694 N.W.2d 344, 350. As the Wisconsin Supreme Court found in that case:

> Generally, a challenged statute is presumed to be constitutional. *Cole*, 264 Wis. 2d 520, ¶ 11, 665 N.W.2d 328; *Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 20, 580 N.W.2d 156 (1998); *State v. Konrath*, 218 Wis. 2d 290, 302, 577 N.W.2d 601 (1998). This presumption is based on our respect for a co-equal branch of government and is meant to promote due deference to legislative acts. *Cole*, 264 Wis.2d 520, ¶ 18, 665 N.W.2d 328. "[E]very presumption must be indulged to sustain the law." *Jackson v. Benson*, 218 Wis. 2d 835, 853, 578 N.W.2d 602 (1998); *accord Cole*, 264 Wis. 2d 520, ¶ 11, 665 N.W.2d 328.
>
> The court must resolve any doubt about the constitutionality of a statute in favor of upholding its constitutionality. *Kelli B.*, 271 Wis. 2d 51, ¶ 16, 678 N.W.2d 831; *Cole*, 264 Wis. 2d 520, ¶ 11, 665 N.W.2d 328. Further, "'[g]iven a choice of reasonable interpretations of a statute, this court must select the construction which results in constitutionality.'" *American Family Mut. Ins. Co. v. Wisconsin Dep't of Revenue*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998) (quoting *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 526, 261 N.W.2d 434 (1978)).
>
> A party challenging a statute's constitutionality bears a heavy burden to overcome the presumption of constitutionality. *Dowhower v. West Bend Mut. Ins. Co.*, 2000 WI 73, ¶ 10, 236 Wis. 2d 113, 613 N.W.2d 557. Therefore, it is insufficient for the party challenging the statute to establish either that the statute's constitutionality is doubtful or that the statute is probably unconstitutional. *Cole*, 264 Wis. 2d 520, ¶ 11, 665 N.W.2d 328; *Jackson,* 218 Wis. 2d at 853, 578 N.W.2d 602. Instead, a party challenging a statute's constitutionality must demonstrate that the statute is unconstitutional beyond a reasonable doubt. *Cole*, 264 Wis. 2d 520, ¶ 11, 665 N.W.2d 328; *Jackson*, 218 Wis. 2d at 853, 578 N.W.2d 602; *Konrath*, 218 Wis. 2d at 302, 577 N.W.2d 601.

In determining the constitutionality of Act 10, this Court is not bound by the Dane County Circuit Court's decision in *Madison Teachers*. *See Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993) *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995) ("circuit court decision is neither precedent nor authority"); *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶8, 310 Wis. 2d 230, 240, 750 N.W.2d 492, 497 ("[A]lthough circuit-court opinions may be persuasive because of their reasoning, they are *never* 'precedential.'") (emphasis in original).

The Dane County Circuit Court erred in *Madison Teachers* by conflating the constitutional right to associate with the statutory privilege of collective bargaining. Indeed, the United States District Court for the Western District of Wisconsin recently rejected the very constitutional argument accepted by the Dane County Circuit Court for that reason. *Laborers Local 236, AFL-CIO v. Walker*, No. 11-cv-462, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013). Moreover, the United States Court of Appeals for the Seventh Circuit rejected the same argument in *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013), as did Judge Markson (another Dane County Circuit Court judge) in another action, *Wisconsin Law Enforcement Ass'n v. Walker*, Case No. 12-CV-4474 (Order dated Oct. 23, 2013).

Furthermore, the Wisconsin Supreme Court recently made clear that the ruling in *Madison Teachers* did not bar the application of Act 10 to non-parties – in essence that there was no "window" for other unions to avoid Act 10. Judge Colás' October 25, 2013 order found WERC in contempt for its efforts to apply Act 10 to non-parties (including KEA) and directed the Commissioners to cease and desist from doing so. The Wisconsin Supreme Court vacated that order on November 21, 2013, finding that the circuit court had exceeded its authority by "expand[ing] the scope of the September 2012 declaratory judgment by granting injunctive relief to non-parties." *Madison Teachers, Inc. v. Walker*, 2012AP2067, Nov. 21, 2013 Order, ¶20. The court ruled that "by requiring [WERC] to cease application of [the municipal portions of Act 10] against non-parties in order to purge the contempt order, the circuit court granted different relief than it originally granted in the September 2012 order." *Id.* (emphasis added). Logically, that could only be true if the original order did not grant relief as to non-parties.

As demonstrated by the decisions of the United States Court of Appeals for the Seventh Circuit, the United States District Court for the Western District of Wisconsin, Judge Markson, and the Wisconsin Supreme Court, Act 10 is constitutional. And, according to the supreme

court, Act 10 is the law in Wisconsin except as to the specific parties to the Dane County case, which does not include the KEA.[5]

2. The KEA had no authority to bargain with the School District on behalf of School District employees

Act 10 requires that annually, the Wisconsin Employment Relations Commissions "shall conduct an election to certify the representative of the collective bargaining unit," and that such "election shall occur no later than December 1 for a collective bargaining unit containing school district employees." § 111.70(4)(d)3.b. (emphasis added). "If no representative receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented." *Id.* (emphasis added).

Thus, any union that does not receive 51% of the votes of all bargaining unit employees in an annual recertification election shall be decertified and the teachers in that district shall be nonrepresented. That applies directly to KEA, which did not receive 51% of the votes of the Kenosha teachers in a recertification election and, as a result, was decertified as a matter of law and does not represent the Kenosha teachers. Any agreement negotiated by the Board or the School District with KEA is therefore void.

3. The CBA violates Act 10

Further, even if KEA was authorized to represent Kenosha teachers, the CBA itself, other than any agreement on base wages, was unlawful because it covers numerous subjects not permitted by Act 10. Section 111.70(4)(mb) expressly prohibits municipal employers such as the School District from bargaining collectively with a union representing its employees with respect to any of the factors or conditions of employment except for total base wages. Base wages do not include overtime, premium pay, merit pay, pay schedules, or automatic pay progression. Wis. Stat. § 111.70(4)(mb).

[5] Although the KEA filed a motion in the *Madison Teachers* case seeking contempt, it did not move to intervene as a party, and furthermore was not involved in the case in any way at the time the court issued its September 2012 order.

The CBA contains provisions on Working Conditions, Teacher Assignments, Fringe Benefits, Teacher Tenure, Union Dues, "Fair Share" Payments, Wages (other than base wages) etc., all of which are expressly prohibited by Wisconsin law. It has been the law of Wisconsin for well over one hundred years that a contract made in violation of the law is void. *Melchoir v. McCarty*, 31 Wis. 252 (1872) ("The general rule of law is, that all contracts which are . . . contrary to the provisions of a statute, are void . . . ."); *Abbot v. Marker*, 2006 WI App 174, ¶6, 295 Wis. 2d 636, 722 N.W. 2d 162 ("A contract is considered illegal when its *formation* or performance is forbidden by civil or criminal statute . . . .") (emphasis added).

This is as true for labor agreements as it is for other contracts. *Bd. of Ed. of Unified Sch. Dist. No. 1 v. WERC*, 52 Wis. 2d 625, 635, 191 N.W.2d 242, 247 (1971) ("A labor contract term that is violative of public policy or a statute is void as a matter of law."); *Glendale Prof'l Policemen's Ass'n v. City of Glendale*, 83 Wis. 2d 90, 106, 264 N.W.2d 594, 602 (1978) ("When an irreconcilable conflict exists [between law and a labor agreement], we have held that the collective bargaining agreement should not be interpreted to authorize a violation of law."). Because the CBA is a blatant violation of Act 10, it is void as a matter of law.

4. The CBA violates Wis. Stat. §133.03

The first Wisconsin antitrust statute was enacted in 1893. Amended several times since then, Chapter 133 of the Wisconsin statutes contains analogues to sections 1 and 2 of the Federal Sherman Act, as well as antitrust rules that are unique to Wisconsin law. Section 133.03 forbids agreements in restraint of trade, as does Section 1 of the Sherman Act. It is well-established that these state and federal antitrust statutes serve the same purposes, and federal court interpretations of the Sherman Act are controlling precedent for Wisconsin courts in their interpretation of Section 133.03. *See, e.g.*, *Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473, 480 (1980) ("We have repeatedly stated that sec. 133.01, Stats., was intended as a reenactment of the first two sections of the federal Sherman Antitrust Act of 1890 . . . and that the question of what acts constitute a combination or conspiracy in restraint of trade is controlled by federal court decisions under the Sherman Act."); *State v. Waste Management, Inc.*, 81 Wis. 2d. 555, 569, 261 N.W.2d 147, 153 (1978) ("[T]he broad variety of anticompetitive practices prohibited by the Sherman Act are illegal under the state act.").

Historically, the U.S. Supreme Court generally held that the organized and concerted activities of employees to bargain as a unit with respect to the terms and conditions of their individual employment violated the Sherman Act as agreements in restraint of trade. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274 (1907). Thus, such activity would also constitute a violation of Wis. Stat. § 133.03.

In order to permit collective bargaining, Congress passed the Clayton Act, which provided an exception to the antitrust laws for labor organizations. Congress clarified and expanded this exception in the Norris-Laguardia Act of 1932, and subsequent court decisions have clarified the labor exemption by making it clear that it applies to the concerted activities of labor unions to the extent that their activities fall within the core labor market issues that are the subject of authorized collective bargaining. *See, e.g., U.S. v. Hutcheson*, 312 U.S. 219 (1941); *Connell Constr. Co. v. Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975).

However, but for this legislative exemption, collective bargaining would be unlawful as a matter of antitrust law. Collective bargaining by employees has the purpose and effect of eliminating competition among them and, absent the application of statutory labor market exemptions, the conduct of an employer in negotiating with a union would constitute an unlawful restraint of trade and thus violate the antitrust laws. "Among the fundamental principles of federal labor policy is the legal rule that employees may eliminate competition among themselves through a governmentally supervised majority vote selecting an exclusive bargaining representative." *Wood v. NBA*, 809 F 2d. 954, 959 (2nd Cir. 1987) (emphasis added). Markets in which employees offer their services to employers are no different from other markets for antitrust purposes. *See, e.g., In re NCAA I-A Walk-on Football Players Litigation*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005); *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995), aff'd, 134 F.3d 1010 (10th Cir. 1998). Agreements that restrict competition in labor markets are unlawful unless they are clearly related to and necessary to facilitate the authorized collective bargaining activity of legitimate labor unions. *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

Like federal law, Wisconsin antitrust laws create an exemption for the otherwise anticompetitive conduct that occurs in the context of *lawful* labor negotiations. Section 133.09 specifically provides that Chapter 133 shall "be so construed as to permit collective bargaining…by associations of employees." This exception cannot logically apply, however, to circumstances in which the State of Wisconsin has by statute expressly forbidden certain

employers from engaging in collective bargaining. As noted above, Act 10 made it unlawful for the School District to collectively bargain with the union, except for base wages. Their non-base wages negotiations and the subsequent CBA are not exempt from Wisconsin antitrust law, and under the well-established principles of antitrust jurisprudence described above they constitute an unlawful agreement in restraint of trade.

Section 133.14 provides that any agreement that "is founded upon, is the result of, grows out of or is connected with" a violation of § 133.03 "shall be void." The CBA, except for the section on base wages, is just such an agreement.

5. The CBA is voidable because the Board violated the Wisconsin Open Meeting Law

The Board's meeting on October 22, 2013 in which it authorized the collective bargaining with KEA was unlawful because the Board did not give notice that it intended to take up the issue of collective bargaining at that meeting. Certainly, the Agenda for the October 22, 2013 Board meeting contained no notice that the Board would be discussing and voting on engaging in collective bargaining with KEA. As a result, the public notice for the meeting did not adequately set forth the subject matter of said meeting in such form as was reasonably likely to inform the public and did not provide 24 hours prior notice of the subject matter of the meeting in violation of Wis. Stat. § 19.84.

Because the decision to collectively bargain was made in violation of the Wisconsin Open Meetings Law, any action taken as a result of such decision is voidable. Wis. Stat. § 19.97 (3); *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 74-75, 508 N.W.2d 603, 607 (1993) (pursuant to Section 19.97(4), if the district attorney refuses to prosecute an Open Meetings violation, a relator is empowered to bring an action and is entitled to have the decision voided if the Court finds that the public interest in enforcing the Open Meetings Law outweighs the public interest in sustaining the government body's actions).

The entire process engaged in by the Board in this case was unlawful from the start. The Board authorized and began collective bargaining with KEA at an illegal meeting without adequate notice to the public. The Board and School District then collectively bargained with

KEA in express violation of Act 10. The egregious conduct of the Board easily justifies the Court voiding the CBA as the product of illegal Board conduct at the outset.[6]

B. *The Plaintiffs Lack an Adequate Remedy at Law and Will Be Irreparably Harmed if the CBA Is Implemented*

As taxpayers, the Plaintiffs are harmed by the spending of tax money for an unlawful purpose. *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312, 314 (1993) (plaintiffs possess taxpayer standing to bring action if they may suffer a pecuniary loss from the challenged transaction). As taxpayers, Plaintiffs each have a financial interest in public funds akin to that of a stockholder in a private corporation and they sue not only in their own right, but as representatives of all taxpayers. *Id.* Here, the School District is about to spend at least $1.65 million of taxpayer money on a contract that is illegal.

Section 111.70(4)(mb) expressly prohibits municipal employers such as the School District from bargaining collectively with a union representing its employees with respect to any of the factors or conditions of employment except for total base wages. These lump sum payments are not part of "base wages." "Base wages" do not include overtime, premium pay, merit pay, pay schedules, or automatic pay progression. § 111.70(4)(mb). Moreover, the bargaining over "base wages" is limited to an increase no greater than the increase in the Consumer Price Index ("CPI"). As can be seen from page 5 of the Tentative Agreement (Complaint, Ex. J) negotiated by the Board and/or the School District with KEA, most of the raises are at 2.07%, because 2.07% was the relevant CPI as of July 2013. But there is no way to justify a lump sum payment of $1,100 as a CPI-based pay increase of 2.07%. First, any teacher earning $53,140 per year or less would be receiving an increase greater than 2.07%. Second, paying this amount as a lump sum to teachers making more than $53,140 per year would mean that every such teacher that leaves the employ of the School District prior to the end of a full year would likely be receiving an increase greater than 2.07%.

[6] The Plaintiffs are not asking the Court to void the Board's action under the Open Meetings Law at this time, because the required statutory prerequisites of Wis. Stat. § 19.97 have not yet been met – specifically, Plaintiff Lacroix filed a verified complaint with the Attorney General and Kenosha County District Attorney, but neither of those persons has declined to prosecute, nor has 20 days passed. The Plaintiffs merely demonstrate yet another potential claim they have that has a reasonable probability of success, when it is tried on the merits at a future point in time. That is sufficient to establish the first prong of the test for a temporary injunction.

Moreover, once this money is spent there is no practical way to get the money back. It is not likely that the School District would start individual lawsuits against 1,500 teachers in order to recoup this money. Absent this Court issuing a temporary injunction, the Kenosha taxpayers cannot be adequately protected from the unlawful payments to be made and costs to be incurred by the Board and the School District.

Taxpayers will also be injured by the expenditure of public funds in order to facilitate the payroll deductions for union dues. At the very least, administrative personnel will expend time to set up the deductions, and there may well be fees charged by financial institutions for the transfers. Neither the time spent by staff or the money spent on fees would be recoverable.

Similarly, the CBA imposes irreparable harm on Plaintiff Glembocki as a teacher. Ms. Glembocki has a right to be unrepresented and not to have to pay union dues under Wis. Stats. §§ 111.70(2) and 111.70(4)(d)3.b. and under the First Amendment. "[C]ompulsory [union] fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2298 (2012) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). Given that "'freedom of association . . . plainly pre-supposes a freedom not to associate,'" *Knox*, 132 S. Ct. at 2288 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)), a state infringes on First Amendment rights when it compels association for an expressive purpose. *Id.* at 2289; *see, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). This includes when a state compels individuals to accept and support an exclusive union representative for dealing with government, as the purpose of this mandatory association is to "petition the Government for a redress of grievances" within the meaning of the First Amendment. As shown here in the collective bargaining over the subjects prohibited by Act 10, "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences," *Knox*, 132 S. Ct. at 2289. Indeed, exacting compulsory fees even from public employees is an "'unusual' and 'extraordinary'" exercise of state power. *Id.* at 2291 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184, 187 (2007)), which the State of Wisconsin through Act 10 has disavowed and disallowed.

The Board and the School District have taken away Ms. Glembocki's statutory rights and infringed her First Amendment rights by forcing her to be represented by KEA. Such infringement constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 346, 373 & n. 29 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably

constitutes irreparable injury."). That action by the Board and the School District means that Plaintiff Glembocki must pay union expenses against her will and prevents her from representing herself in negotiations with their employer. The only way to protect Plaintiff Glembocki's rights under Act 10 is to prohibit the CBA from being implemented.

Further, the CBA is unlawful as described above, and the Wisconsin Supreme Court has held that unlawful activity may be enjoined even in the absence of an express showing of irreparable harm. *Joint School Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 309-310, 234 N.W. 2d 389 (1975). "The express basis for such holdings is that the fact that the activity has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public." *Id.*

There is a substantial public harm occurring here. The Board and the School District are acting in a manner expressly forbidden by state law. That conduct creates ongoing harm to the Plaintiffs and to the public that can only be prevented by an injunction.

C. *An Injunction Is Necessary to Preserve the Status Quo.*

Until the Board ratified the CBA, the status quo was that Act 10 was being complied with in Kenosha. Taxpayer money was not being spent illegally, and teachers' statutory and constitutional rights were not being violated. The only way to preserve that status quo is to grant an injunction.

In fact, under Wisconsin law, where the complaint states a cause of action, and the motion papers disclose a reasonable probability of plaintiff's ultimate success, "it is well-nigh an imperative duty of the court to preserve the *status quo* by temporary injunction, if its disturbance *pendente lite* will render futile in considerable degree the judgment sought, or cause serious and irreparable injury to one party; especially if injury to the other is slight." *Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377, 381 (1964). This applies directly to this case. Allowing the unlawful CBA to go forward demolishes the status quo in a way that cannot be undone.

CONCLUSION

For the reasons set forth above the Plaintiffs request a temporary injunction prohibiting the implementation of the CBA.

Dated this 26th day of November, 2013.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

Richard M. Esenberg, WI Bar No. 1005622
414-727-6367; rick@will-law.org
Thomas C. Kamenick, WI Bar No. 1063682
414-727-6368; tom@will-law.org
Michael Fischer, WI Bar No. 1002928
414-727-6371; mike@will-law.org
Charles J. Szafir, WI Bar No. 1088577
414-727-6373; cj@will-law.org
Brian McGrath, WI Bar No. 1016840
414-727-7412, brian@will-law.org
Wisconsin Institute for Law & Liberty, Inc.
1139 East Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385

Milton L. Chappell, mlc@nrtw.org
Nathan J. McGrath, njm@nrtw.org
Pro hac vice status to be applied for
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510