STATE OF WISCONSIN CIRCUIT COURT BRANCH 14 DANE COUNTY

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 and its LOCAL LODGE 1061, et al.,
Plaintiffs,

v.

STATE OF WISCONSIN, et al.,
Defendants.

Case No. 15-CV-628

PROSPECTIVE *AMICI*'S REPLY TO PLAINTIFFS' OPPOSITION TO *AMICI*'S MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

INTRODUCTION

Prospective *Amici* ("*Amici*") request that the Court grant their previously filed Motion for Leave to File an *Amici Curiae* Brief ("Motion") and accept as filed and into the record their *Amici Curiae* Brief ("AC Brief"), which were filed May 11, 2015. The AC Brief contains information that is germane and relevant to this matter and further develops and expands upon certain arguments raised by the State. Additionally, it makes an argument that cannot be made by the State but can be raised by the *Amici*.

Nevertheless, Plaintiffs oppose *Amici*'s Motion to file their AC Brief and raise numerous "red-herring" arguments in an attempt to persuade the Court that the AC Brief is nongermane and undesirable. *Amici* will briefly address Plaintiffs' main contentions below.

I. *AMICI* DO NOT SEEK TO INTERVENE AS PLAINTFFS ALLEGE

Plaintiffs insist, and falsely so, that *Amici* seek to intervene in this action. (Pls.' Br. in Opp'n to Mot. for Leave to File Amici Curiae Br. ("Pls.' Opp'n. Br.") 2-3.) To be clear, *Amici* have neither filed a motion to intervene nor requested any right exclusive to parties. *Amici* have only requested

leave to file an *amici curiae* brief. Perhaps Plaintiffs misunderstood *Amici* to be moving for intervenor status because as *Amici* set forth their interests and arguments in their Motion and AC Brief it became clear that, had they wanted to, *Amici* could meet the requirements for intervention. *See Helgeland v. Wisconsin Municipalities*, 307 Wis. 2d 1, 20-21, 745 N.W.2d 1, 10 (2008) (setting forth the requirements of intervention).

Amici's Motion and AC Brief clearly show that their interests are sufficiently related to the subject of the action, (Motion 1-4; AC Br.1-2); the disposition of the action could impair or impede their ability to protect their interests, (Motion 5; AC Br. 2); and, even as conceded by the Plaintiffs, (Pls.' Opp'n Br. 8 n.3), the State is unable to raise certain arguments that *Amici* can and do raise in defense of *Amici*'s interests. (Motion 1; AC Br. 2).

This Court should grant *Amici*'s Motion for leave to file their AC Brief because since *Amici* can meet the standard used for granting intervention status, they can obviously meet the lower standard for granting *amicus* status. *See City of Madison v. Appeals Comm. of the Madison Human Servs. Comm'n*, 122 Wis. 2d 488, 491, 361 N.W.2d 734, 736 (Ct. App. 1984) (noting the "lesser role of amicus curiae" as opposed to an intervenor); *see also White House Milk Co. v. Thomson*, 275 Wis. 243, 248, 81 N.W.2d 725, 728 (1957) (approving of a circuit court granting a party the right to file an *amicus curiae* brief and make oral argument at conclusion of trial despite the court's denial of intervention status because that party did not meet the intervention standard).

Plaintiffs also incorrectly claim that the affidavits submitted by Randy Darty, Todd Momberg, Daniel Sarauer, and Daniel Zastrow ("Employee *Amici*") were filed as evidence in this action. (Pls.' Opp'n. Br. 2.) The affidavits filed in support of *Amici*'s Motion simply identify the interests of Employee *Amici* as required by Wisconsin law. Wis. Stat. § 809.19(7) ("A person not a party may by motion request permission to file a brief. The motion *shall identify the interest of the person* and state why a brief filed by that person is desirable." (emphasis added)). Had Employee *Amici* not filed their

affidavits setting forth their interests, Plaintiffs would have no doubt complained that Employee *Amici* had failed to set forth their interests as required by Wisconsin law. Employee *Amici*'s affidavits simply state their interests in this action and were filed with their Motion in compliance with Wis. Stat. § 809.19(7). However, their affidavits should be included in this action's record for the purpose of supporting their interests stated in their Motion and the desirability of their AC Brief.

Plaintiffs allege that the National Right to Work Legal Defense Foundation, Inc. ("Foundation") and the Wisconsin Institute for Law & Liberty ("WILL") should have identified their interests in the action because *counsel* provided by the organizations to the *Amici* signed the AC Brief. (Pls.' Opp'n. Br. 2 n.1.) The Foundation and WILL are charitable organizations that provide free legal aid and operate under § 501(c)(3) of the Internal Revenue Code. As part of their free legal aid program, the Foundation and WILL are providing counsel to *Amici*.

Neither the Foundation nor WILL has requested *amicus* status nor has either organization asked for leave to file an *amicus* brief on behalf of either organization. Wis. Stat. § 809.19(7) requires *only the person* requesting permission to file an *amicus* brief, *not* his or her counsel, to identify their interests in the action—not their counsel or any charitable legal aid organization that is providing counsel to the movant.[1] The Foundation and WILL are not the movant *amici* in this action, and there is no obligation for either organization to identify their interests in the action despite Plaintiffs' red-herring, misguided accusations to the contrary.

II. *AMICI*'S BRIEF IS GERMANE AND DESIREABLE TO THIS ACTION

Amici's brief raises three arguments: (1) a union's duty of fair representation owed to nonmembers is not inherently "costly" or burdensome to a union; (2) being an exclusive representative is itself full compensation to a union and, therefore, it has not provided uncompensated services to nonmembers; and (3) invalidating Act 1 would be preempted by the

[1] Wis. Stat. § 809.19(7) ("A person not a party may by motion request permission to file a brief. The motion shall identify the *interest of the person* and state why a brief filed by that person is desirable." (emphasis added)).

National Labor Relations Act ("NLRA"). Clearly, the first two arguments, involving the cost of the duty of fair representation and compensation for exclusive representation, are germane to, and go to the heart of, Plaintiffs' argument that an unconstitutional taking has occurred.

The third argument raises the preemption issue that Plaintiffs have admitted (Pls.' Opp'n. Br. 8 n.3.) the State is prohibited from raising given that it may implicate the constitutionality of Wisconsin law. As such, the State cannot fully represent *Amici*'s interests in this action because *Amici* are the only ones able to raise this argument and protect their interests through this legal theory. Contrary to Plaintiffs' assertion, (Pls.' Opp'n Br. 3-4), *Amici* have even overcome the presumption applied to intervenors that when the State defends the constitutionality of a challenged statute it is representing the interest of all of its citizens. *See Helgeland v. Wisconsin Municipalities*, 296 Wis. 2d 880, 908, 724 N.W.2d 208, 221 (Ct. App. 2006), *aff'd* 307 Wis. 2d 1, 745 N.W.2d 1 (2008).

Plaintiffs continue to miss the mark in their allegations against *Amici* by asserting that *Amici* are seeking to challenge exclusive representation, (Pls.' Opp'n Br. 3, 4), and advocate First Amendment rights through this action. (Pls.' Opp'n Br. 4.) Although Employee *Amici* believe that their First Amendment rights are being infringed by compulsory union fees and mandatory union representation, (Affidavit of Randy Darty in Support of Motion to File Brief of *Amici Curiae* ¶ 4; Affidavit of Todd Momberg in Support of Motion to File Brief of *Amici Curiae* ¶ 4; Affidavit of Daniel Sarauer in Support of Motion to File Brief of *Amici Curiae* ¶ 4; Affidavit of Daniel Zastrow in Support of Motion to File Brief of *Amici Curiae* ¶ 4), *Amici* make none of those arguments in their AC Brief in support of Act 1. Contrary to Plaintiffs' contentions that *Amici*'s arguments are non-germane and undesirable, *Amici*'s actual three arguments presented in the AC Brief are limited to the takings issue raised by Plaintiffs' lawsuit.[2]

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[2] *Amici*'s first two arguments, that a union's duty of fair representation owed to nonmembers is not inherently "costly" or burdensome to a union and that being an exclusive representative is itself full compensation to a union, adequately address Plaintiffs' taking arguments even if Wisconsin law requires exclusive representation bargaining and does not

Plaintiffs also complain that *Amici*'s first two arguments add nothing to the arguments already made by the State. (Pls.' Opp'n Br. 5-8.) That is not the case. The AC Brief presents arguments and citations relating to these issues not found in the State's briefs. But even if there is overlap, that should not preclude the Court from accepting the AC Brief. Although presenting cumulative arguments may not be enough to merit intervention, "cumulative arguments may always be brought forward through amicus curiae briefs, pursuant to Wis. Stat. § 809.19(7), which does not require intervention." *Helgeland*, 296 Wis. 2d at 908, 724 N.W.2d at 221. The denied intervenors in *Helgeland* were allowed to participate as *amicus curiae* to "present[] an argument or cit[e] authority not found in the parties' briefs." 307 Wis. 2d at 18 & n.20, 745 N.W.2d at 9 & n.20. Given that the AC Brief presents arguments and citations not contained in the State's brief, it should certainly be helpful to the Court in deciding the legal issues in dispute.

III. PLAINTIFFS ALSO MISREPRESENT *AMICI*'S PREEMPTION ARGUMENT

Contrary to Plaintiffs' unfounded assertions, (Pls.' Opp'n Br. 9-11), *Amici* do not argue that this action can be decided by the National Labor Relations Board or that the Wisconsin Constitution is preempted by the NLRA. Rather, *Amici* argue that what would be preempted is *an interpretation* of Wisconsin Constitution article I, section 13, that requires represented nonunion employees to financially support unions. (AC Br. 9-10.) While the NLRA does not per se preempt the Wisconsin Constitution, it does protect an employer's right not to enter into a forced union fees clause[3] and an employee's right to, with other employees, negate such clauses[4] and would preempt any contrary interpretation of the Wisconsin Constitution to deny employers and employees of their federal rights.

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permit members only bargaining. (Pls.' Opp'n Br. 6-7). Plaintiffs' long discussion of the legality of members only bargaining is just another smokescreen meant to obscure that the AC Brief is both relevant and appropriate.

[3] 29 U.S.C. § 158(d).

[4] 29 U.S.C. § 159(e).

Plaintiffs incorrectly claim that because a union's right to have a union security clause or forced financial support is "deeply rooted in local feeling," it is exempt from a preemption challenge under *San Diego Building Trades Council v. Garmon*, 358 U.S. 236 (1959).[5] (Pls.' Opp'n. Br. 9-11.) Clearly, refraining from paying forced union dues is not a "mere peripheral concern" or "deeply rooted in local feeling" given the breadth of federal rights regulating the financial support of unions by employees and employers, and Congress' specific direction of discretion given to the States in this matter. (AC Br. 9-10.) The purpose of the NLRA was to obtain a uniform application of its substantive rights and avoid conflicts likely to result from a variety of local procedures and attitudes toward those rights. *Cf. NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (case involved NLRA rules and local labor disputes).

NLRB v. North Dakota, 504 F. Supp. 2d 750 (D.N.D. 2007), demonstrates the futility of Plaintiffs' attempts to show that *Amici*'s preemption argument is not supported by law. (Pls.' Opp'n Br. 8-12). In that case, the federal district court held that North Dakota's statute requiring unions to charge nonmembers, who were not paying union dues, for grievance processing was preempted and in actual conflict with the NLRA—specifically Sections 7 and 8 of the Act, 29 U.S.C. §§ 157 and 158(b)(1). *North Dakota*, 504 F. Supp. 2d at 758-59.

Like the takings claim presented in Plaintiffs' lawsuit, the North Dakota statute, N.D. Cent. Code § 34-01014.1, required nonpaying, nonmember employees to pay the union for any expenses incurred in representing them in contractual grievance and arbitration procedures. *North Dakota*, 504 F. Supp. 2d at 752. The court noted that the statute was an attempt to solve "the 'free-rider' problem that results from the enactment of right-to-work legislation," *Id.* at 753, by "inject[ing] an agency fee requirement into every collective-bargaining agreement negotiated in the state." *Id.* at 757.

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[5] See *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 296-97 (1977) (citations omitted) (setting forth exceptions to pre-emption under *Garmon* rule).

Nevertheless, the court held the statute preempted because it interfered with employees' Section 7 rights to refrain from joining or assisting labor organizations. *Id.* at 756-58.[6]

North Dakota also answers Plaintiffs' attempts to argue that *Garmon* preemption only applies if NLRB jurisdiction is involved.[7] (Pls.' Opp'n Br. 9-11.) Preemption involves both primary jurisdiction concerns of the NLRB and substantive and remedial concerns of the NLRA. *North Dakota*, 504 F. Supp. 2d at 755-56 (citing *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 95 (2d Cir. 2006)). Preemption also applies if state law conflicts with federal law. "[C]onflict between state and federal law exists when 'compliance with both federal and state regulations is a physical impossibility' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 754 (quoting *Brown v. Hotel & Rest. Emps. & Bartenders*, 468 U.S. 491, 501 (1984)).

It is well established that state law which interferes with NLRA-protected rights "'creates an actual conflict and is preempted by direct operation of the Supremacy Clause.'" *Id.* "'States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Id.* at 755 (quoting *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 287-88 (1986), *accord* at 287-88 (state regulation preempted even though it augmented the remedies provided by federal labor law)). Preemption applies to any state action that is protected by federal law not as a matter of protecting the primary jurisdiction of the NLRB, but as a matter of protecting the substantive rights provided by the NLRA. *North Dakota*, 504 F. Supp. 2d at 755 (citing *Brown*, 468 U.S. at 503).

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[6] "An employee deciding whether to join a union will need to consider that if he/she does not join the union, a fee will still have to be paid to the union for grievance processing. Charging non-union members the cost of providing a service which union members get free (even though they pay dues) has a coercive effect on non-members in the exercise of their right to join or refrain from joining a union." *NLRB v. North Dakota*, 504 F. Supp. 2d 750, 757-58 (D.N.D. 2007).

[7] Plaintiffs' argument is nonsensical because *Garmon* itself found state court claims involving actions arguably protected or prohibited by the NLRA preempted even when the NLRB had declined jurisdiction over the unfair labor practice proceedings. 359 U.S. at 244; *accord North Dakota*, 504 F. Supp. 2d at 755.

CONCLUSION

For the foregoing reasons, the Prospective *Amici* request that their Motion for Leave to File an *Amici Curiae* Brief be granted..

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