UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO, KAREN ERICKSON, and HEATH HANRAHAN,

Plaintiffs,

v.

JAMES J. DALEY, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Defendant.

CIVIL ACTION

NO. 19-cv-1233

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs, International Union of Operating Engineers, Local 139, *et al.*, by and through their attorneys, hereby file their Response in Opposition to the Motion to Dismiss filed by Defendant, James J. Daley. To the extent this Court grants the Motion to Intervene filed by the Wisconsin Legislature, this Memorandum will further serve as Plaintiffs' response to the Legislature's Motion to Dismiss attached to its Motion to Intervene.

INTRODUCTION

Plaintiffs filed this action challenging various discrete aspects of the Wisconsin Municipal Employment Relations Act ("MERA"), Wis.Stat. § 111.70, *et seq.*, as amended by 2011 Wisconsin Act 10 ("Act 10"). Plaintiffs recognize the prior decisions upholding many of the same provisions under Act 10, as decided by the Seventh Circuit Court of Appeals and the Wisconsin Supreme Court, specifically including the *Wisconsin Education Association Counsel v. Walker*, 705 F.3d 640 (7th Cir.

2013); *Laborers Local 236 v. Walker*, 749 F.3d 628 (7th Cir. 2014); and *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1 (Wis. 2014). It is Plaintiffs' position that the decision by the United States Supreme Court in *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 585 U.S. __, 138 S.Ct. 2448 (2018) has substantially changed First Amendment jurisprudence to the point where the pertinent holdings in *WEAC* and the *Laborers* case should be revisited. Even if this Court determines that *Janus* does not allow it to distinguish Plaintiffs' challenges from the prior Seventh Circuit decisions, the Seventh Circuit certainly can revisit these issues in light of the First Amendment principles outlined in *Janus*.

Plaintiffs are challenging three provisions of Act 10. In Count I, Plaintiffs challenge the provision of Act 10 requiring annual recertification elections, but only that portion which treats a non-vote as a vote against union representation. *Wis.Stat. § 111.70(4)(d)3b*. Local 139 and the individual Plaintiffs were directly harmed by the application of this provision in recertification elections conducted in April 2019 (Docket # 1, ¶ 21). Local 139 received 100% of the votes cast by the bargaining unit in which the individual Plaintiffs work for the County of Manitowoc (Docket # 1, ¶ 21). However, because Local 139 did not receive 51% of the entire bargaining unit, it was not recertified as representative of these employees (Docket # 1, ¶ 21). Local 139 recognizes and respects the fact that individuals have the right not to participate in the election process. Indeed, *Janus* emphasized the primacy of individuals' right not to speak. 139 S.Ct. at 2463. By treating a non-vote as a vote against representation, Act 10 has stripped individuals of the right not to speak and instead compels speech by non-voters in violation of their First Amendment rights. Moreover, by equating a non-vote with a "no" vote, Act 10 not only infringes on the rights of non-voters who

wished to remain neutral, but also infringes on the rights of those who did vote and spoke clearly that they wanted to be represented by Local 139.

In Count II, Plaintiffs challenge that portion of Act 10 which precludes collective bargaining between unions and municipalities over any issues besides wages. *Wis. Stat. § 111.70(4)(mb)1*. Local 139 is not challenging this provision on its face. Rather, it is challenging the interpretation of this provision as stated at various times by the Wisconsin Employment Relations Commission ("WERC"), that Act 10 precludes Unions and employers from entering into agreements on any issue besides wages, even if not collectively bargained. While Local 139 disagrees with the reasoning in the *Laborers* case, 749 F.3d at 634-638, WERC's interpretation goes further, infringing on the First Amendment rights of Local 139 and its members to enter into voluntary agreements with municipal employers, notwithstanding the absence of collective bargaining over such issues.

Finally, Plaintiffs challenge that provision of Act 10 which precludes municipal employers from deducting dues from its employees' wages, even when the employees voluntarily request that their dues be deducted and remitted to the Union. *Wis. Stat. § 111.70(3g)*. In contrast to the *WEAC* decision, 705 F.3d at 645-653, Plaintiffs assert an infringement of the rights of individual employees to speak via financially supporting Local 139, while the State allows that same payroll deduction mechanism to be used to facilitate speech to favored entities. *Janus* recognized the important speech rights of public employees to support or not support Unions, and Act 10 draws a viewpoint discriminatory line between those who may speak and those who may not.

ARGUMENT

As the matter is before the Court on Defendant's Rule 12(b)(6) motion to dismiss, the familiar standard of review should be applied. *Fed.R.Civ.Proc. 12(b)(6)*. Under Rule 12(b)(6), the

courts consider whether a plaintiff has alleged sufficient facts to state a legally cognizable claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). When considering a motion to dismiss, a court construes the allegations in the light most favorable to the plaintiff and all well pleaded factual allegations must be taken as true. *Twombly*, 550 U.S. 544 (2007). In order to survive a motion to dismiss, the complaint must contain enough facts to state a claim for relief that is "plausible on its face and also must state sufficient facts to raise [his] right to relief above the speculative level." *Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs' complaint satisfies the pleading requirements of Rule 12(b)(6).

This case highlights the law of unintended consequences. The political motivations behind Act 10 and the *Janus* case are clear, driven by a desire to undermine public sector labor unions and the thousands of employees they represent. However, if the Supreme Court is to be taken at its word and apply the broad First Amendment principles outlined in *Janus* fairly and uniformly, then Plaintiffs' challenges to Act 10 should be well taken, notwithstanding the pre-*Janus* precedent upholding Act 10.

Janus did not just overrule the well-established precedent established by *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). 138 S.Ct. at 2460. *Janus* announced a sea-change in First Amendment jurisprudence, with the Supreme Court broadening and more aggressively enforcing First Amendment rights of public sector employees, both as to their right to speak and their right to remain silent. Early in the Opinion, authored by Justice Alito, the Supreme Court reiterated that it has "held time and time again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id*. at 2463 (citations omitted). Justice Alito went on, "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal

constitutional command, and in most contexts, any such effort would be universally condemned."

Id. Indeed, Justice Alito explained:

> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.

Id. at 2464 (citations omitted). From this base, the Court addressed the issue in *Janus*, explaining that "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns." *Id*. Justice Alito continued:

> [w]hen a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employees official duties, the employer may insist that the employee deliver any lawful message. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree.

Id. at 2473 (citations omitted).

Janus made unequivocally clear that matters of collective bargaining in the public sector are matters of great public concern. *Id*. at 2476. As Justice Alito explained:

> Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics and they are undoubtedly matters of profound 'value and concern to the public.' We have often recognized that such speech 'occupies the highest rung of the hierarchy of First Amendment values' and merits 'special protection.'

Id. (citations and footnotes omitted). Thus, the rights of public employees to speak or not speak on issues relating to Union representation are absolutely protected by the First Amendment.

Although *Janus* did not decide which standard of review should apply, "exacting scrutiny" or "strict scrutiny," it applied the lesser standard of exacting scrutiny and found that the State's interest in compelling employees to subsidize speech with which they disagreed could not satisfy either standard. *Id*. at 2465. The Court also highlighted that governmental action affecting the First Amendment rights of many should receive stricter scrutiny than action affecting the few. Justice Alito stated:

> [a] speech-restrictive law with 'widespread impact,' . . . 'gives rise to far more serious concerns than could any single supervisory decision.' Therefore, when such a law is at issue, the government must shoulder a correspondingly 'heav[ier]' burden, and is entitled to considerably less deference in its assessment that a predicted harm justifiies a particular impingement on First Amendment rights.

Id. at 2472 (citaitons omitted). Similarly here, whether reviewed under the exacting scrutiny or strict scrutiny standards, the provisions of Act 10 at issue here, having widespread impact on public employees throughout Wisconsin, violate the First Amendment rights of the Plaintiffs.

A. Plaintiffs have stated a claim that Act 10's recertification procedures compel speech in violation of Employees' First Amendment Rights.

Plaintiffs are not challenging the annual recertification requirement; they are only challenging the infringement of employees' First Amendment rights caused by the way Act 10 treats non-voters. Act 10 compels Union supporters and those neutral to Union representation to speak, even if they would prefer to remain silent, deeming any abstention in a certification or recertification election as a vote against union representation. *Wis. Stat. § 111.70(4)(d)3b*. The intent of non-voters should neither be deemed as indicating support for or opposition to union representation. Rather, as in any popular election or referendum, the intent of non-voters is to do nothing more than acquiesce to the will of those who did vote. Put simply, if no employee can be compelled to speak by subsidizing

a Union, as *Janus* held, 138 S.Ct. at 2478, then no employee can be compelled to speak by having their silence count as vote for or against Union representation.

In 1937, interpreting the Railway Labor Act ("RLA"), the Supreme Court held:

> Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as a requiring only the consent of the specified majority of those participating in the election. Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.'

Virginia Railway Co. v. System Federation No. 40, 300 U.S. 515, 560 (1937) (internal citations omitted). A more recent decision by the D.C. Court of Appeals, following *Virginia Railway*, provides further guidance. *Air Transportation Association of America, Inc. v. National Mediation Board*, 663 F.3d 476 (D.C.Cir. 2011). In *ATA*, the employer association challenged how the National Mediation Board conducted elections under the RLA. *Id*. at 479. Previously, ballots would reflect a choice of being represented by one (or more) Unions, but did not have a selection for "no Union." *Id*. at 478. Those who did not want Union representation would abstain from voting, and all non-votes were counted as "no" votes. *Id*. In 2011, the procedures were revised to include a "no Union" option, and the Board began interpreting "the intent of non-voters using 'the political principle of majority rule with the presumption that those not voting assent to the expressed will of the majority voting." *Id*.

The ATA asserted that the RLA effectively requires a quorum of employees voting for there to be a valid election. *Id*. at 480. It relied on the statutory language stating: "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class." *Id.; 45 U.S.C. §152*. The D.C. Circuit correctly rejected the ATA's argument, explaining:

> The fact that a majority of eligible voters decides to abstain–i.e., not exercise its right–hardly suggests that the majority was deprived of its right. That is how voting rights work. Citizens with the right to vote in a presidential election must register, show up to a polling place on the Tuesday after the first Monday in November, wait in line, enter the booth, and pick a candidate in order to exercise their right. Those who fail to do so have not been deprived of their right.

Id. at 480-81. The Court found that there was "nothing unreasonable about extending that logic to elections where less than a majority of all eligible voters participate." *Id*. at 481. The court noted that "political elections are often premised on just that reasoning[]," citing to several presidential elections that were decided even though less than half of all eligible voters participated. *Id*. at 481-82.

These RLA cases do not appear to have considered the First Amendment rights of the affected employees, as the challenges were brought by employers or employer associations. As the Supreme Court noted, an employer "can complain only of the infringement of its own constitutional immunity, not that of its employees." *Virginia Railway*, 300 U.S. at 558. Thus, they do not address the First Amendment rights of employees not to speak in the context of a Union election.

Act 10's counting of non-votes as "no" votes is particularly troubling in the context of the annual recertification elections. Leading up to a recertification election, the *status quo* is that the Union is the collective bargaining representative of the unit, having won an election just twelve months prior. Treating employees' silence as indicating a desire to change the *status quo*, rather than acquiescence to it, makes a mockery of basic democratic principles. Indeed, if Act 10 instead equated a non-vote as a vote in favor of Union representation, Plaintiffs suspect that the putative Intervenor would be raising the same argument, that *Janus* precludes the State from compelling the non-voters to speak against their will. However, the viewpoint compelled by the State does not alter

the First Amendment analysis. *See generally, Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 390-394 (1993).

Eligible voters have the right to say whether they support or oppose union representation, but they also have the right to not take a position on the question. Given the importance of the right to remain silent as emphasized in *Janus*, the way in which non-votes are treated under Act 10 infringes on the rights of both those who wish not to speak and on the rights of those who wish to speak. By treating non-votes as votes against representation, the State now speaks for those who choose not to vote, which has led to results which overruled the will of those who did speak. As alleged in the complaint, Local 139 was the certified representative of two bargaining units in 2018, and timely filed its petitions for recertification in 2019 (Docket # 1, ¶ 21). In both bargaining units, Local 139 received 100% of all votes cast (Docket # 1, ¶ 21). Nevertheless, since it did not receive votes from more that 51% of the entire bargaining unit, it was not recertified (Docket # 1, ¶ 21). These results frustrated and interfered with the rights of employees who wished to not speak on the issue–deeming them "no" votes–and the rights of those who did speak–nullifying their votes. Accordingly, this provision of Act 10 should be struck down for violating employees' First Amendment rights to speak or not speak as they choose. As such, Plaintiffs state a legally cognizable claim and the motion to dismiss should be denied.

B. Plaintiffs have stated a claim that WERC's application of Act 10 to preclude municipalities from entering into non-collectively bargained agreements with Unions violates the First Amendment.

In the *Laborers* case, although upholding the restrictions imposed by Act 10 concerning the topics of collective bargaining, the Seventh Circuit noted:

> True, the *Knight* opinion emphasized that while individual instructors could not utilize the meet-and-negotiate and-meet-and-confer processes, nothing prevented the employer from listening to the excluded instructors in a less formal setting. The present situation is no different in this regard. Nothing in *Wis. Stat. § 66.0508(1m)*, or Act 10 generally, precludes the unions or their members from expressing their views to their municipal employer or from trying to persuade the employer to adopt a particular policy. In fact, since Act 10's enactment, some local employers and unions have collaborated informally in order to make changes in the workplace.

Laborers Local 236, 749 F.3d at 636-37. If the WERC would confirm its agreement with the statements expressed by the Seventh Circuit (and the position of the State as explained by the *Laborers* court, *Id*. at 633-34), Plaintiffs' Count II would be moot. Although Plaintiffs are unaware of any formal regulations or written guidance promulgated by WERC, Plaintiffs' counsel has been advised verbally by representatives of WERC that it would strike down any agreement containing terms other than wages, even if those terms were not collectively bargained (Docket # 1, ¶ 24). Likewise, municipalities have expressed interest in Local 139's affiliated health and training funds, but have declined to enter into agreements with Local 139 based on advice they received from WERC that such agreements would violate Act 10 (Docket # 1, ¶ 25-28). The only writing hinting at this broad interpretation of Act 10 appears on the WERC's website, in a note regarding a decision concerning enforcement of a grievance settlement agreement.[1] Troublingly, that note references the settlement agreement as: "(AKA a collective bargaining agreement)." Such an interpretation is inconsistent with the definition of collective bargaining in Act 10, as explained by the Seventh Circuit. *Laborers Local 236*, 749 F.3d at 636-37. MERA defines collective bargaining as:

> the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective

[1] See, the top of page 4, on the attached Exhibit A, regarding State of Wisconsin, Dec. No. 37790-B (Davis, 2/19), aff'd Dec. No. 37790-C. http://werc.wi.gov/doaroot/outline_of_recent_developments_september_2019.pdf

> bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, with respect to . . . wages for general municipal employees. . . . Collective bargaining includes the reduction of any agreement reached to a written and signed document.

Wis Stat. § 111.70(a)(1). Elsewhere, MERA expressly prohibits collective bargaining for general employees over any subject other than wages. *Wis Stat. §111.70(4)(mb)1*. Notwithstanding these limited definitions, WERC is interpreting Act 10 as prohibiting voluntary agreements outside of the context of collective bargaining, foreclosing any avenue that municipalities, Unions and Union members may have to reach a voluntary agreement on important issues of public policy.

Janus was clear that Unions and their members have the right and ability to speak on a great number of topics of public concern, whether through collective bargaining or otherwise:

> Unions can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics and they are undoubtedly matters of profound 'value and concern to the public.' We have often recognized that such speech 'occupies the highest rung of the hierarchy of First Amendment values' and merits 'special protection.'

Id. at 2476 (citations omitted). Given the importance of speech by Unions and Union members that even Justice Alito recognized, Local 139 remains troubled by the artifice used to uphold this provision previously; that Act 10 does not restrict Unions' ability to speak, only the municipalities' ability to listen. *Laborers Local 236*, 749 F.3d. at 635-36.[2] It is simply not logical or practical to claim that the right to speech of an individual or entity is unrestrained in the face of governmental

[2] Local 139 further recognizes that the Seventh Circuit's decision in the *Laborers* case relies upon prior Supreme Court precedent: *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979) and *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). Given the significant rejection of precedent that *Janus* itself represents, there is every reason to believe the Supreme Court would be open to righting this historical wrong to the extent *Smith* and *Knight* bar Plaintiffs' claim on this issue.

action that preclude it from interacting with the government. Speech without an audience is a proverbial tree falling in the woods with noone to hear it. Local 139 is not claiming a right to compel municipalities to do anything, only the right to have a meaningful interaction on a voluntary basis. Act 10 is being read to preclude such voluntary interactions, even outside of collective bargaining, in clear violation of the First Amendment rights of Unions and their members to petition the government. As such, Plaintiffs state a legally cognizable claim and the motion to dismiss should be denied.

C. Plaintiffs have stated a claim that Act 10's preclusion of voluntary dues deductions infringes on the First Amendment rights of individual employees.

Plaintiffs recognize the decision in the Seventh Circuit upholding Act 10's prohibition on voluntary dues deductions. *WEAC*, 705 F.3d at 645-653. Plaintiffs further recognize the Supreme Court case upon which *WEAC* relied, *Ysursa v. Pocatello Education Association*, 555 U.S. 353 (2009). However, the *WEAC* court failed to recognize the important differences between Act 10 and the statute at issue in *Ysursa*, which is highlighted by the rationale behind *Janus*. Moreover, the *WEAC* court did not consider Act 10's impact on employees' First Amendment rights, focusing on the First Amendment rights of Unions.

As noted previously, *supra*, p. 11, *Janus* made unequivocally clear that matters of collective bargaining in the public sector are matters of great public concern. 138 S.Ct. at 2476. Thus, the First Amendment rights of public employees to speak on such issues must be protected. Given that money is now equivalent to speech, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 351 (2010), the State may not allow its employees to utilize its payroll deduction mechanism to support some favored entities, but not others. As the Supreme Court explained in *Citizens United*:

> All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.

Id. (citations omitted). The State of Wisconsin allows municipal employees to utilize its payroll deduction system to support various non-public entities, but denies some of its employees the similar right to support some Unions through voluntarily dues deductions. It is clear that the decision to allow employees to support some entities, but not others was made based on the presumed viewpoint of employees who wish to financially support a given organization. *See, Lamb's Chapel*, 508 U.S. at 394 (The First Amendment precludes government actions that "favor some viewpoints or ideas at the expense of others.") (citations omitted).

Unlike the statute at issue in *Ysursa*, Act 10 does not impose a blanket prohibition on payroll deductions for political purposes or draw other constitutionally permissible lines. 555 U.S. at 360; *Wis. Stat. § 111.70(3g)*. Indeed, Act 10 allows payroll deductions for some favored Unions, but not others. *Wis Stat. § 111.70(2)*. It limits employees' ability to express certain viewpoints while continuing to allow expressions–in the form of monetary support–to other favored viewpoints. Looking at the issue from the viewpoint of individual employees who wish to speak on matters of great public importance, the *WEAC* court's reliance on speech subsidy cases is misplaced and should be reconsidered in light of *Janus*. 705 F.3d at 646. Moreover, the line of speech subsidy cases on which the *WEAC* decision is based are inconsistent with the decision in *Citizens United*, making clear that the ability to financially support speech is speech itself. 558 U.S. at 351. As such, Plaintiffs state a legally cognizable claim and the motion to dismiss should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully request that the Motions to Dismiss filed by Defendant and putative Intervenor be denied.

Respectfully submitted,

/s/ Brian C. Hlavin

Dated: October 24, 2019

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on or before 5:00 p.m. on October 24, 2019, he electronically filed the foregoing document (Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss) with the Clerk of Court using the ECF system, which will provide notification to the following ECF participants:

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