UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LABORERS LOCAL 236, AFL-CIO, *et al.*,

Plaintiffs,

v. **Case No. 11-CV-462-wmc**

SCOTT WALKER, Governor of the State of Wisconsin, *et al.*,

Defendants.

AMICI BRIEF OF PROPOSED INTERVENORS IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Christopher King works for Western Wisconsin Cares, Tomah office, a public long term care district, as a social service specialist. His position is included in a bargaining unit represented by AFSCME Local 340, AFL-CIO, and AFSME Wisconsin Council 40. Plaintiff AFSCME Local 60 and AFSCME Local 340 are local sister affiliates of AFSCME Wisconsin Council 40 and AFSCME International, AFL-CIO. Declaration of Christopher King, filed September 3, 2011 (Doc. #16).

Carie Kendrick works for the University of Wisconsin-Whitewater as a C-3 custodian lead person. Her position is included in a bargaining unit represented by AFSCME Local 1131 and AFSCME Council 24, Wisconsin State Employees Union, who are related affiliates of Plaintiff AFSCME Local 60, AFL-CIO. Plaintiff AFSCME Local 60 is a local affiliate of AFSCME Wisconsin Council 40. AFSCME Local 1131 is a local affiliate of AFSCME Council 24. Both Council 24 and Council 40 are councils of AFSCME International, AFL-CIO. Declaration of Carie Kendrick, filed September 3, 2011 (Doc. #17).

As a result of being included in their respective bargaining units, *amici* are required to join or financially support the AFSMCE unions. *Amici* object to being forced to join or financially support AFSCME, and would rather not be represented by AFSCME or any union. They believe that their First Amendment freedoms of speech and association under the United States Constitution are being infringed by compulsory union fees and compulsory union representation. Mr. King and Ms. Kendrick do not want those freedoms take from they by the Plaintiffs in this case. King & Kendrick Declarations.

2011 Wisconsin Act 10 ("Act 10") frees *amici* from the obligation to join or financially support AFSCME or any union. It also reduces the subjects on which AFSCME currently represents them for collective bargaining to one subject. But the Plaintiff unions in this litigation seek to have Act 10 declared unconstitutional and enjoined. If Act 10 is declared unconstitutional or enjoined, then AFSCME will be permitted to infringe *amici's* First Amendment freedoms of speech and association and deprive them of the freedoms Act 10 has given. They do not want this to happen and want to defend their First Amendment rights by defending Act 10. *Id*.

On September 3, 2011, these employees, King and Kendrick ("the Employees"), moved to intervene in this action (Doc. # 14) to protect their First Amendment rights of association and speech. They equate the "services" provided by the Plaintiffs ("the Unions") and other unions to be akin to those of some itinerant street window washers who sling dirty water on your car windshield, smear it around, and then demand payment. The Employees neither want what the Unions are selling, nor want to pay for the unwanted "services." Accordingly, the Employees file this *Amici* Brief in support of Defendants' Motion for Judgment on the Pleadings.[1]

[1]This brief is being filed on the deadline for submission of final briefs on the motion for judgment on the pleadings in this case. Text Order (Doc. #37).

ARGUMENT

I. Introduction.

In their complaint, the Unions take issue with the fact that Act 10 requires them, but not some other unions or individuals, a) to have annual testing to see if they retain the support of a majority of the employees (annual certification elections); b) to collect their own revenue (no payroll deductions); c) to lose the coercion of the State in securing employee financial support (no compulsory unionism); and d) to lose most of the topics the State must discuss with them (reduced scope of the mandatory subjects of bargaining).

The Unions argue that the State must justify *each* of these points of differing treatment between them, on one side, and the exempted unions and individuals, on the other side. But the Unions' claim ignores the overlapping nature of the issues.

Points "a" and "d" above address the same issue: to whom will the State respond in labor matters? Will it speak with individuals or privilege a collective? In enacting Act 10, the State has decided that it will speak to some of its employees collectively only on the condition that they annually demonstrate majority support, and then only on certain subjects. Points "a" and "d" are both State-imposed limits on its willingness to listen and engage in speech.

Points "b" and "c" above also raise a common issue: the extent to which the State will provide a private party financial support. In Act 10, the State has decided that it will not continue to provide financial support to certain private parties.

To prevail on these two controverted issues and defeat the motion for judgment on the pleadings, the Unions must show that the United States Constitution requires the State to speak equally with all citizens and groups, and to provide equal financial support to all citizens and groups. This the Unions cannot show, for the United States Supreme Court has conclusively held that the government has no obligation to speak, or even listen, equally to all citizens and groups, or to provide financial support to all citizens and groups, even when they are engaging in First Amendment protected activity.

II. The State Need Not Dialog to the Same Degree with All Citizens and Groups.

A. Act 10 Represents the State's Choice among Conflicting Speakers.

The conflict between the union collective and the individual employee to dialog with the State on employment matters is long standing. For example, *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976), represents a time when Wisconsin's public policy needle was pointed at dialog with the collective, thus limiting the scope of the individual's dialog with the State on such matters. But as the State demonstrated, it has not always been that way. Defendants' Brief in Support of Motion for Judgment on the Pleadings ("Defs. Br.") at 10-12, filed November 23, 2011 (Doc. #28). In fact, over the past 50 years, the needle has varied between more dialog with individuals or more dialog with the union collective.

Act 10 fits comfortably in Wisconsin's history of changing attitudes toward public employee collective bargaining. It shifts the needle on collective bargaining back towards greater dialog with individuals and less dialogue with the union collective. It does this by limiting the subjects of mandatory bargaining with the collective to one, which opens up

all other subjects for discussion with individual employees.

If the Unions' claim here that the State must deal with all public employees and their unions in the same way on working conditions is correct, then all the bargaining laws the Wisconsin legislature passed since 1937 have violated the First Amendment and equal protection, because those bargaining laws did not apply equally to all employees on all matters. But the State did not violate the Constitution in the past, when it had inconsistent bargaining laws for both private and public employees, for some unions and not others, for some individuals and not others. And it does not violate the Constitution now, in its decision to readjust the needle back to open more areas for discussion with some individual employees about their working conditions and not other, and to listen and dialog less with some unions and not others.

As the State demonstrated, Defs. Br. at 2, 6-7, 22, *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463 (1979) and *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), drive a stake through the heart of the Unions' claim that the State must dialog equally with all employees or groups. The Unions may bemoan the State shifting the needle of discussion in the direction of *Smith*, rather than *Knight*, but this is the State's right to do, without any interference from the courts.

B. *The State's Discussion of Employee Working Conditions Opens No Forum.*

The Unions argue that the Court must apply strict scrutiny in judging the constitutionality of Act 10. Brief in Opposition to Motion for Judgment on the Pleadings ("Opp. Br.") at 15-16, 24-25, filed December 19, 2011 (Doc. #38). However, the discussion of employee working conditions by a public employer does not create a public forum. Without a public forum, there is no basis for applying strict scrutiny.

In *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the public school district allowed one union, but not the other, to use its internal mail system. The Supreme Court noted that the internal mail system was not a public forum, therefore "the government may – *without further justification* – restrict use to those who participate in the forum's official business." *Id.* at 53 (emphasis added).

Knight discussed *Perry* and concluded that the *Knight* plaintiffs' claim to be part of the process of the government discussing working conditions with its employees was "not even a claim of access to a *nonpublic* forum" (emphasis in original) as in *Perry*. 465 U.S. at 281. The *Perry* standard for a nonpublic forum is low (if official business, no further justification needed), but, as in *Knight*, 465 U.S. at 281-83, not even the low *Perry* standard applies here. Wisconsin's current decision to listen more to individuals and less to the collective does not begin to rise to the level of nonpublic forum analysis, which only requires a rational basis, not strict scrutiny. Wisconsin can simply decide, without judicial interference, to whom it will listen.

Imagine an elected representative who invites to her office and listens only to those who supported her election and not to those who did not. This elected official also entertains the opinions of one special interest group and ignores a competing special interest group. Few citizens would doubt the representative's right to make decisions. The Supreme Court in *Knight* confirmed that those kinds of decisions raise no constitutional violations for governmental decisionmakers. *Id*. at 284.

C. Speakers Possess No Equal Protection Guarantee to a Government Audience.

The discussion so far has dealt with the First Amendment. Logically, if government may pick and choose its dialog partners from among those seeking to express political opinion (a core First Amendment activity), then it follows that the government has a sufficiently compelling interest to override a mere equal protection claim, for which no heightened scrutiny is required. *Perry*, 460 U.S. at 54 (if a speech access claim cannot win when dressed as a First Amendment claim, it cannot win when dressed as a Fourteenth Amendment claim). *Knight* explicitly states that speaking to one group (there, the collective) rather than to the individual does not violate equal protection rights. After its extensive discussion of why the First Amendment is not violated, the *Knight* Court summarily dispatched the equal protection argument, calling it "meritless." 465 U.S. at 291.

D. Equal Protection Cases Where Government Acts as Regulator Are Inapposite.

Although the Supreme Court summarily dispatched the type of equal protection speech claims the Unions raise here, a more detailed consideration compels the same result. The Unions cite an equal protection case in which the government, as regulator,

provided some tangible benefit to one segment of society and not another. *United States Dep't of Agric. v. Moreno,* 413 U.S. 528 (1973) (subsidizing food stamps for related household members, but not for those unrelated).

However, that case did not involve a limitation on to whom the government must listen or speak. It involved the government as a *regulator* of commerce or society and, therefore, is inapplicable. This is an important distinction, which renders the Unions' case and argument inapposite.

In *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008), the Supreme Court explained that there is a substantial difference, for equal protection analysis, between the government acting as "regulator" and acting as "proprietor." *Id.* at 598. "[G]overnment has significantly greater leeway in its dealings with citizen employees than it does . . . with citizens at large. *Id.* at 599. When a state acts as an employer (which it does here), it need not treat all employees equally. Rather, to treat some employees differently is simply "to exercise the broad discretion that typically characterizes the employer-employee relationship." *Id.* at 605.

While *Engquist* did not eliminate all equal protection claims against a government employer for "class-based decision," *id*., the Unions' argument here is not class based. Rather, the Unions allege that different kinds of unionized employees and unionized employees and individual employees cannot be treated differently. That throws this case squarely into the arms of *Engquist,* which holds that government can make even unfair and arbitrary employment decisions without having to be measured by the Equal Protection Clause. *Id.* at 606; *cf. Carpenters Local610 v. Scott*, 463 U.S. 825, 837-39

(1983) (group action resting on economic or commercial animus, "such as animus in favor or against unionization," is not protected by the civil rights statute, 42 U.S.C. § 1985(3)).

Of special note is a Supreme Court illustration. As an example of the ability of the "government as employer" to distinguish among employees, it pointed to the fact that most federal employees are covered by civil service protections, but not all. The Court calls this "Congress's . . . careful work." *Engquist*, 535 U.S. at 607. It does not call this "discrimination to be securitized by the judiciary."

Just as government decisionmakers can listen and dialog with whomever *they wish*, so too can government, as employer, treat employees (apart from protected classes) different without having to answer to constitutional claims. As the Employees have shown, strict scrutiny applies neither to the government's decision as to whom it will listen, nor to any of its non-class based decisions as employer to treat employees differently. The State is simply not required to justify itself. The State's ability to pick and choose its dialog partners "is inherent in a republican form of government." *Knight*, 465 U.S. at 285.

Even if the State had to justify its decision to change the dial, it could. For the State to limit the scope of collective bargaining, or to condition collective bargaining on an annual re-election of the collective, is merely the State's decision as to whom it will listen when it comes to employee working conditions. The State's unfettered right to listen to some, but not all, is inherent in representative government. Its current decision

to move the dial towards listening more to individuals rather than to the collective, in most areas of the public sector, is rationally related to preserving the democratic process.

III. The State Can Decide to Support Some Financially and Not Others.

The Unions raise two financial claims: 1) that the State must collect their dues; and, 2) that the State must force unwilling employees (like the nonmember Employees) to support the Unions financially.

A. The Unions Have Failed to Provide the Court with the Most Pertinent (and Adverse) Law.

The Unions argue that if the State financially supports some, but not all unions, it has violated the Equal Protection Clause and has engaged in viewpoint discrimination. This claim is curious, notwithstanding their cited decision from the United States District Court for the District of Arizona, for they fail to mention any of the contrary federal circuit court decisions.

In addition to *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989), discussed by the State, Defs. Br. at 21-23, there are three other decisions rejecting the Unions' claim. In *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), an AFSCME local challenged a Tennessee statute that deprived it, but not all public employee unions, of payroll deduction of dues. Specifically, AFSCME claimed the purpose and effect of the statute was to "authorize discrimination in favor of [the Tennessee State Employees Association] in dues checkoff." *Id.* at 1419-20. Although the court concluded that one small section of the law prohibiting payroll deduction for AFSCME was unconstitutional,

it upheld the statute allowing payroll deduction for some public employee unions and not others. *Id.* at 1428-29. The Sixth Circuit also held that it did not violate the Equal Protection Clause to prohibit payroll deductions for public sector unions when they were allowed for private sector unions. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998).

In *Arkansas State Highway Emp. Local 1315 v. Kell*,628 F.2d 1099 (8th Cir. 1980), the public employer discontinued the payroll deduction of union dues, but "continued to withhold items other than union dues." *Id.* at 1102. The Eighth Circuit rejected the union's challenge under the Equal Protection Clause, reasoning that the motive of saving money was sufficient to satisfy the rational relationship test. *Id.* at 1103.

While these circuit court decisions rely on various reasons for allowing payroll deductions for some employee organizations and not others, the common theme in all is that saving money is a rational motive. Act 10 denies payroll deductions to those unions that no longer collectively bargaining in all aspects of the workers' employment. It is reasonable for the State to decide, in light of the Unions' reduced duties and the State's desire to save money, that it will no longer financially support those unions that provide significantly reduced services.

B. The State May Discriminate When It Subsidizes Speech.

Neither the Unions nor the State mentioned one of the most recent decisions of the United States Supreme Court dealing with the constitutionality of a state's partial restriction on forced union fees. In *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007), the Court called forced union fees "undeniably unusual," an "extraordinary

power," and an "extraordinary benefit" to unions. *Id.* at 184. Consequently, the Court noted that it would be constitutionally permissible for a state to eliminate altogether forced union fees. *Id; accord Lincoln Fed. Union v. Nw. Iron & Metal Co.*, 335 U.S. 525 (1949).

Davenport went on to discuss whether it was unconstitutional discrimination to require affirmative consent from nonmembers for payroll deduction of election-related union expenditures, but not require it for other union expenditures. The unions' contention in *Davenport* was that this amounted to "unconstitutional content-based discrimination," requiring strict scrutiny. 551 U.S. at 188.

The Court rejected the union's discrimination argument in *Davenport* and the application of strict scrutiny for the very reason the Unions' argument should be rejected here: "content discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed." *Id*. Because Wisconsin could end altogether forced union fees and payroll deduction of union fees for all public-sector unions, *see* Defs. Br. at 23, the elimination of those provisions for some is not unlawful discrimination. Furthermore, "[o]f particular relevance here, our cases recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity *other than as regulator*," as it is here, thus, "strict scrutiny is unwarranted." *Id*.(emphasis added).

Davenport points to a second reason why the Unions do not have a valid discrimination claim here. Forced union fees and the government collection of such fees

are also government subsidy of the Unions' speech. "[I] is well established that the government can make content-based distinctions when it subsidizes speech." *Id.* at 188-89.

> [W]hen totally proscribable speech is at issue, content-based regulation is permissible so long as "there is no realistic possibility that official suppression of ideas is afoot." We think the same is true when, as here, an extraordinary *and totally repealable* authorization to coerce payment from government employees is at issue. . . . Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees . . .

Id. at 189-90 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992)) (emphasis added). Contrary to the Unions' claim, the "First Amendment does not require the government to enhance a person's ability to speak." *Davenport*, 551 U.S. at 190 (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 549-50 (1983)).

CONCLUSION

The United States Constitution does not require the State to speak equally with all citizens and groups, and does not require it to provide equal financial support to all citizens and groups. This is especially true when the State acts in its proprietary role as employer. For these reasons, judgment on the pleadings is correct and the case must be dismissed.

DATED: December 30, 2011

Respectfully submitted,

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