STATE OF WISCONSIN

IN THE SUPREME COURT

(Court of Appeals District IV)

Appeal No. 2012AP002067

Circuit Court Case No. 2011CV003774

MADISON TEACHERS, INC. PEGGY COYNE, PUBLIC EMPLOYEES, LOCAL 61, AFL-CIO AND JOHN WEIGMAN,

Plaintiffs-Respondents,

-vs-

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMANN AND RODNEY G. PASCH,

Defendants-Co-Appellants.

APPEAL FROM THE STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE JUAN B. COLAS,
CIRCUIT JUDGE PRESIDING

AMICI CURIAE BRIEF FOR LABORER'S LOCAL 236 AND AFSCME LOCAL 60

Dated: August 15, 2013

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this Amici Curiae Brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a Brief and appendix produced with a proportional serif font. The length of this brief is 2,970 words, exclusive of the case caption and signature block.

Dated: August 15, 2013.

_____
BRUCE F. EHLKE

ELECTRONIC BRIEF CERTIFICATION

The text of the electronic copy of this Amici Curiae Brief is identical to the text of the paper copy of the Brief.

Dated: August 15, 2013.

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BRUCE F. EHLKE

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INTRODUCTION

Labor unions, including public sector labor unions, exist for two reasons. They exist in order to bargain, collectively, with the employers of the employees who they represent, regarding the wages and other conditions of employment of those employees; and they exist to provide a collective voice for the employees regarding matters of public interest. Both reasons for the existence of labor unions involve an exercise, by the employees who they represent, of the rights of association and petition that constitutionally are secured to the employees by the Ist Amendment to the United States Constitution and Article I of the Wisconsin Constitution.

The instant appeal concerns 2011 Wisconsin Act 10, which, as is well known, made significant changes in the statutory provisions that had been enacted over the past fifty years or so to protect the right of public employees collectively to bargain with their employers concerning their wages and other conditions of employment, and to speak collectively regarding matters of public interest. In an action challenging the constitutionality of the indicated statutory changes, the Circuit Court below determined that a number of the provisions of 2011 Wisconsin Act 10, which had amended Sec. 111.70, Wis. Stat., which also is known as the Municipal Employment Relations Act or MERA, impermissibly had impaired the "general" public employees' exercise of rights secured at Article I of the Wisconsin Constitution and the Ist and XIVth Amendments to the United States Constitution. It is the Defendants' appeal from that determination that now is before the Supreme Court of Wisconsin.

Laborers Local 236 and AFSCME Local 60 submit that the Circuit Court's determination regarding the unconstitutionality of certain provisions of 2011 Wisconsin Act 10 is solidly supported by a long line of appellate court decisions, both Federal and State. Beyond this, however, based on their observations and experience during the past 24 months, they also have concluded that, regardless of the unconstitutionality of this or that particular provision of Act 10, the cumulative effect of all of the Municipal Employment Relations Act changes made by Act 10 effectively has been to single out and substantially impair the ability of general public employees to associate together for the purpose of petitioning their employers concerning their wages and other conditions of employment, and to speak out collectively regarding matters of public interest, in derogation of the those employees' rights secured at Article I of the Wisconsin Constitution and the Ist and XIVth Amendments to the United States Constitution.

ARGUMENT

I. THE ACTIVITY OF BARGAINING COLLECTIVELY AND THE STATUTORY RIGHT TO "COLLECTIVELY BARGAIN".

Historically, in the United States the term "collective bargaining" has been used to describe two legally different activities, oftentimes without any effort being made to identify in what sense the term was being used or which activity was being described. The first way in which the term has been used has been to describe an activity that is an element of the right of individual citizens to associate together for the purpose of advocating regarding matters of mutual interest or concern, including matters concerning wages and employment conditions. When used in this way the term "collective bargaining" is descriptive of a collective effort and refers to an activity where the party that is the object of the advocacy, the employer, has no legal obligation to respond affirmatively to the advocacy, but may do so voluntarily.

At common law individuals had a recognized right to associate together for the purpose of engaging in any activity that it was lawful for an individual to engage in as an individual. This included the right to associate with others for the purpose of bargaining with their employer regarding wages and other conditions of employment. E.g., Carew v. Rutherford, 106 Mass. 1, 14 (1870); Commonwealth v. Hunt, 45 Mass. 111, 129 (1842). This right has been recognized in Wisconsin as an "inherent liberty", State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 534- 535, 90 N.W. 1098 (1902); and it is a "fundamental" and constitutionally secured right, e.g., Thomas v. Collins, 323 U.S. 516, 534 (1945); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (l937); AFSCME, AFL-CIO v. Woodward, 406 F. 2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F. 2d 288, 288-289 (7th Cir. 1968). Where employees, including public employees, engage in such collective bargaining with their employer incidental to their

constitutionally secured right to associate together for the purpose of petitioning their employer regarding their wages and conditions of employment, e.g., AFSCME, AFL-CIO v. Woodward, 406 F.2d at 139, the employer is not constitutionally obligated to reach an agreement with them regarding those matters, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-465 (1979), although it may do so voluntarily, as often occurred in the case of public sector employees, prior to when the public sector collective bargaining statutes in Wisconsin were enacted.

For example, Laborers local 236, AFL-CIO, was chartered by the Laborers International Union of North America in 1934. It is an organization of employees of the City of Madison, Wisconsin who have associated together in order to bargain collectively with their employer, to engage in legislative and other activities to promote and advance the general welfare, and in order to engage in other lawful activities.

As it concerns the American Federation of State, County and Municipal Employees, or AFSCME, AFSCME Local 1 was established in May, 1932, in Wisconsin. The nation-wide AFSCME, which was affiliated with the then AFL union, was established four years later, in September, 1936. The first President of the national union was Arnold Zander, a Wisconsin State government employee, who served in this position for almost three decades. D. Holter, Workers and Unions in Wisconsin at 161 (1999); R. W. Ozanne, the Labor Movement in Wisconsin at 74-77 (1984).

In 1936, the same year in which the national AFSCME Union was established, AFSCME Local 60 was chartered as an AFSCME Local Union. AFSCME Local 60 is an organization of employees of the City of Madison, the Madison Metropolitan School District and other municipalities in Dane County, Wisconsin who have associated together in order to bargain collectively with their respective employers, to foster and

promote a progressive attitude toward public administration, and to engage in political and other lawful activities.

Both Laborers Local 236 and AFSCME Local 60 collectively bargained with the City of Madison and the other governmental employers who employed the employees who they represent, on behalf of those employees, before there was any statute in place protecting their right to do so. See, e.g., Madison City Council Minutes at attached Addendum. The agreements that were reached as a result of that collective bargaining were enforceable at law, without regard to whether there was a statute confirming their lawfulness. See, e.g., AFSCME Local 1226 v. City of Rhinelander, 35 Wis. 2d 209, 215-216, 151 N.W. 2d 30 (1967).

In short, the activity of bargaining collectively is nothing more than two or more employees acting together to discuss proposals with their employer regarding their wages and conditions of employment, with the hope, and possibility, that they might reach an agreement with the employer regarding the same. This is one of those ordinary activities that is so widely accepted in our democratic society that we tend to take it for granted, like talking over the fence with the neighbor, or walking the dog around the neighborhood or taking the family to a municipal park for a picnic. It is a fundamental right that constitutionally is protected.

The second way in which the term "collective bargaining" has been used is to refer to a statutorily mandated relationship between an association of employees and their employer, by the terms of which an employer and its employees are obligated to negotiate, in "good faith", for the purpose of reaching an agreement regarding the employees' wages and conditions of employment.

Such statutorily recognized "collective bargaining" is subject to legislative modification, for the purpose, at least heretofore, of protecting the employees' fundamental right to bargain with their employer. E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 33-34 ; Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 263-264 (1940). There is, however, no constitutionally secured right to such statutory protection. See, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. at 464-467.

In sum, the term "collective bargaining" describes the activity where an association of individuals, acting in concert with each other, on the one hand, exchange proposals regarding a possible agreement with their employer concerning matters of mutual concern, when the parties' involvement in the process is not based on any statute and is voluntary. Engaging in this activity is a fundamental right. The term also refers to a statutorily established procedure where a bargaining obligation, and related requirements, may be imposed on the parties by law, in order to protect the exercise of the fundamental right in question.

Whether invoked as a statutorily protected right or as an activity that has been recognized as a fundamental right -- "collective bargaining" or engaging in the activity of bargaining collectively, if bargaining in either sense of that term is an element of the employees' association for the purpose of seeking to maintain or improve their wages and conditions of employment in a relationship with their employer, it is an essential attribute of the association, one that inextricably is intertwined with the employees' freedoms of association and expression. The imposing of penalties on the exercise of the bargaining activity or the withholding of benefits from an association that has been established for

the purpose of engaging in such activity, necessarily impairs the employees' exercise of the freedoms in question.

II. THE CONSTITUTIONALLY SECURED RIGHT OF INDIVIDUALS TO ASSOCIATE TOGETHER FOR THE PURPOSE OF EXPRESSING THEIR VIEWS REGARDING MATTERS OF MUTUAL CONCERN, INCLUDING MATTERS RELATED TO THEIR EMPLOYMENT, MAY NOT BE DIRECTLY, NOR INDIRECTLY, IMPERMISSIBLY BURDENED.

The United States Supreme Court has discussed the importance of the constitutionally secured right of individuals to associate, and to act in concert with each other for the purpose of petitioning their government regarding matters that are of mutual interest and concern, as follows:

> This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments, N.A.A.C.P. v. Alabama, 357 U.S. 559, …. as was said in N.A.A.C.P. v. Alabama, supra, "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech" 357 U.S., at 460 ….
>
> The First and Fourteenth Amendment rights of free speech and free association are fundamental and highly prized, and "need breathing space to survive." N.A.A.C.P. v. Button, 371 U.S. 415, 433, 405 "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. Little Rock, supra, 361 U.S., at 523 …. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 543-544 (1963).

This proposition repeatedly has been affirmed by the courts. E.g., Rutan v. Republican Party of Illinois, 497 U.S. 62, 77-78 (1990); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981) ("... by collective effort individuals can make their views known, when individually, their voices would be faint or lost. …"); Christian Legal Society v. Walker, 453 F. 3d 853, 861 (7th Cir. 2006).

> … Necessarily included with such constitutionally guaranteed incidents of liberty is the right to exercise the same in union with others through member membership in organizations seeking political or economic change. …
>
> …The holding out of a privilege to citizens by an agency of government upon condition of non-membership in certain organizations is a more subtle way of encroaching upon constitutionally protected liberties than a direct criminal statute, but it may be equally violative of the constitution. Lawson v. Housing Authority of City of Milwaukee, 270 Wis. 269, 274-275, 70 N.W.2d 605 (1955)
>
> …Government action may impermissibly burden the freedom to associate in a variety of ways; two of them are "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and "interfer[ing] with the internal organization or affairs of the group." Roberts, 468 U.S. at 623 ….
> …
> …The protections of the Constitution … are not limited to direct interference with First Amendment freedoms. …The Constitution also protects against indirect interference. … Christian Legal Society v. Walker, 453 F. 3d at 861, 865, 867.

III. ACT 10 IMPAIRS THE EXERCISE OF FUNDAMENTAL RIGHTS THAT ARE SECURED AT ARTICLE I OF THE WISCONSIN CONSTITUTION AND AT THE IST AND XIVTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

To begin with, Act 10, at Section 169, bars municipalities and their employees from engaging in the historically recognized and heretofore protected activity of voluntarily bargaining, collectively, except as provided for at the amended Sec. 111.70, Wis. Stat., and it declares that any local ordinance or resolution to the contrary may not be enforced. This provision does two things.

First, it abolishes altogether the common law right of employees to engage in the voluntary activity of bargaining collectively with their employers, while, at the same time, Act 10 permits individual employees to bargain with their municipal employers regarding their wages and conditions of employment, without any limitation. Second, as indicated, it forces the employees, if they want to exercise their right to associate together for the purpose of petitioning their employer regarding their wages and conditions of

employment, to do so only within the limitations of the amended Sec. 111.70, Wis. Stat., which limitations render such activity effectively meaningless.

The limitations of the amended Sec. 111.70, Wis. Stat., render the ability of the employees collectively to bargain with their municipal employers effectively meaningless in a number of ways. For one thing, the amended Sec. 111.70, Wis. Stat., limits "collective bargaining" to bargaining simply to maintain the employees' current base wage, plus or minus the CPI. Bargaining concerning conditions of employment is prohibited and declared to be unlawful. Act 10 at Sections 210, 245. At the same time that Act 10 limits collective bargaining to an effectively meaningless exercise, it eliminates any procedure for the resolution of an impasse in the bargaining, should that occur, and it limits the term of any agreement, if one somehow should be reached, to a term not to exceed one year, at Sections 237, 238.

While imposing these severe restrictions on what the labor organization can do for those who it represents, Act 10 imposes conditions on such an association that seriously impair the ability of the organization to function. As a starter, the Act requires the organization to run for re-election every year, and to "win" by obtaining the votes of not less than 51% of the eligible voters, regardless of the number who vote (which effectively creates a presumption of a vote against representation on the part of those who do not vote, regardless of their reason for not voting), at section 242. This has a debilitating effect on the ability of the labor organization to be re-elected. Almost 150 years ago the Wisconsin Supreme Court declared such a procedure to be "a thing unknown in the history of constitutional law". Gillespie v. Palmer, 20 Wis. 544, 555 (1866).

In addition to imposing the foregoing burdens on the ability of the employees to associate and act in concert with each other as it concerns their relationship with their

municipal employer, Act 10, at Section 227, bars municipal employers from permitting payroll deductions for the payment of labor organization dues. (This is the only payroll deduction that the Wisconsin Statutes do not allow municipalities to make for their employees.) At the same time, Act 10 expressly permits "free riders" to claim labor organization representation, without paying anything for the services provided, at Sections 213, 219, and without foregoing their right to demand "fair representation" by the labor organization, see, e.g., Gray v. Marinette County, 200 Wis.2d 426, 411-422, 546 N.W. 2d 553 (Ct. App. 1996), should they require assistance related to their employment, Act 10 at Section 170. These measures, too, have a negative impact on the ability of the labor organization to continue to function.

Act 10 encourages individual employee dealings with their employers, in which situation there apparently is no limit on the wages and conditions of employment that can be negotiated by an individual, while at the same time discouraging any employee association, by substantially limiting, if not eliminating altogether, any benefit to be derived from the association and by impairing the ability of any representative organization to function. Having eliminated the historically recognized "fundamental right" of employees to bargain collectively with their employers, leaving them only the statutory provisions of a wholly emasculated MERA, the provisions of Act 10 impose a substantial burden on and impair the exercise by general municipal employees of their constitutionally secured right to associate and to express their views in concert with one another and to petition their State and local governments regarding matters that are of mutual concern to them. In short, the provisions of Act 10, in their cumulative effect, impose burdens on and discourage the exercise of the constitutionally secured freedoms of association and expression by the general municipal employees.

CONCLUSION

This case concerns the constitutionality of the provisions of a law that apply to certain public employees, but not others. Given their cumulative effect, the provisions of 2011 Wisconsin Act 10 that relate to collective bargaining in the public sector impair the general public employees' exercise of the rights secured at Article I of the Wisconsin Constitution and at the Ist and XIVth Amendments to the United States Constitution.

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