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STATE OF WISCONSIN
SUPREME COURT

Case No. 2012 AP 2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

On Appeal from the Decision and Final Order dated
September 14, 2012 in Dane County Circuit Court
Case No. 2011 CV 3774, The Honorable
Juan B. Colas, Presiding, and on Certification from the
Court of Appeals (District IV)

BRIEF OF AMICI CURIAE WISCONSIN EDUCATION ASSOCIATION COUNCIL, AFSCME DISTRICT COUNCILS 24, 40 and 48, AFT-WISCONSIN, SEIU HEALTHCARE WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS AND STATE OF WISCONSIN AFL-CIO

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
thawks@hq-law.com

Marianne Goldstein Robbins
SBN 1015168
Attorney for Wisconsin State AFL-CIO
The Previant Law Firm, S.C.
PO Box 12993
Milwaukee, WI 53212-0993
(414) 223-0433
(414) 271-6308 Fax
mgr@previant.com

Stephen Pieroni, SBN 1015275
Attorney for WEAC
Wisconsin Education Ass'n Council
PO Box 8003
Madison, WI 53708-8003
(608) 276-7711
(608) 276-8203 Fax
pieronis@weac.org

Peggy A. Lautenschlager
SBN 1002188
Attorney for AFSCME Council 24
Bauer & Bach, LLC
123 East Main Street, Suite 300
Madison, WI 53703-3360
(608) 260-0292
(608) 260-0002 Fax
lautenschlager@bauer-bach.com

Aaron N. Halstead, SBN 1001507
Attorney for AFSCME Council 40
Hawks Quindel, S.C.
PO Box 2155
Madison, WI 53701-2155
(608) 257-0040
(608) 256-0236 Fax
ahalstead@hq-law.com

Barbara Zack Quindel, SBN 1009431
Attorney for SEIU Healthcare Wisconsin
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
bquindel@hq-law.com

Jeffrey P. Sweetland, SBN 1001737
Attorney for the Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
jsweetland@hq-law.com

Mark A. Sweet, SBN 1024320
Attorney for AFSCME Council 48
Sweet and Associates, LLC
2510 East Capitol Drive
Milwaukee, WI 53211
(414) 332-2255
(414) 332-2275 Fax
msweet@unionyeslaw.com

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Amici curiae Wisconsin Education Association Council; Wisconsin State Employees Union, AFSCME District Council 24, AFL-CIO; Wisconsin Council of County and Municipal Employees, AFSCME District Council 40, AFL-CIO; AFT–Wisconsin, AFL-CIO; Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO; the Wisconsin State AFL-CIO; SEIU-Healthcare Wisconsin, CTW, CLC; and AFSCME District Council 48, AFL-CIO are statewide or regional labor organizations that represent, either directly or through their local affiliates, approximately 100,000 public employees. They file this Brief in support of affirmance of the trial court's decision.

INTRODUCTION

Cooperation among people who hold a common goal improves their prospect of achieving it. For public employees seeking to improve conditions of employment and advance their economic and employment security, their choice is to negotiate with their employers individually or cooperatively, in association with fellow employees. Before enactment of the Municipal Employment Relations Act (MERA), local governments voluntarily recognized and negotiated with their employees' associations, reducing their agreements to writing. AFSCME locals and District Councils, local affiliates of WEAC, the Wisconsin AFL-CIO, AFT and SEIU, representing tens of thousands of Wisconsin public sector employees, were first chartered in the three decades preceding Wisconsin's first public sector bargaining law. JOSEPH E. SLATER, PUBLIC WORKERS 165 (2004).

Act 10 constitutionally burdens employees' right to associate with one another to improve their employment conditions by making illegal: collective negotiation with employers as existed pre-MERA on virtually all matters of importance to employees; retention of selected

representatives; support of representatives through the nearly universal practice of voluntary payroll deduction of union dues and the payment of fair share fees to cover the cost to negotiate and enforce a bargaining agreement. Act 10 has thus reduced MERA to an instrument which destroys constitutional rights.

Notably, this Court has recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Elections Bd. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 664, 597 N.W.2d 721 (1999) (citations omitted). This association is a constitutionally protected freedom, and it extends to labor union activities. *State Emp. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126 (2d Cir. 2013). Nevertheless, after Act 10, in order for employees to address the full range of bargaining issues with their public employer, they must relinquish their right to join a union.

Amici curiae here distinguish *Wisconsin Educ. Ass'n Council v. Walker,* 705 F.3d 630 (7th Cir. 2013), and show that three components of Act 10 violate the Wisconsin and U.S. Constitutions.

I. THE SEVENTH CIRCUIT'S DECISION IN *WISCONSIN EDUC. ASS'N COUNCIL v. WALKER* ADDRESSED DIFFERENT CONSTITUTIONAL ISSUES AND IS DISTINGUISHABLE FROM THIS MATTER

The decision in *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 630 (7th Cir. 2013), is not binding on this litigation because it addressed constitutional claims not addressed here. That case raised an equal protection claim based on the legislative gerrymandering of classes of public employees. Specifically, it addressed the peculiar coincidence of the state employees who performed public safety functions,

but were excluded from or included in the definition of "public safety employee" in exact coincidence with their labor organizations' endorsement or lack of endorsement of the administration in the prior election. There, plaintiffs agreed that the constitutional inquiry was subject to a rational basis test. The court concluded that the administration's defense – that but for the discriminatory classification, public safety employees might engage in unlawful work stoppages – was sufficient to survive a rational basis challenge.

In contrast, Plaintiffs in this litigation challenge the constitutionality of Act 10 in a dramatically different way. Here Plaintiffs challenge Act 10 as violating the constitutional rights of employees who choose to associate with one another to advance their wages and employment conditions and choose a governmentally-granted power to bargain with their employers. This matter presents a unique inquiry: do the federal and Wisconsin constitutions allow Act 10 to treat employees who have a right to engage in collective bargaining, however circumscribed, differently from employees who are not represented? This is a unique issue that was not addressed by the federal courts in *Wisconsin Educ. Ass'n Council v. Walker* and is subject to the highest level of scrutiny.

The discriminatory effect of Act 10 on employees who choose representation is real. For example, prior to Act 10, public employers could retain nursing staff by increasing the salaries of AFT- and SEIU-represented nurses above the consumer price index (CPI), whether or not they selected union representation. Act 10 now penalizes the same nurses if they choose to associate for collective bargaining by limiting their wage increases to the CPI, unless there is a referendum, while any non-represented nurses may receive unlimited pay raises without a referendum. The union nurse also owes more for that association: she must pay a proportionate share of the filing fee for Act 10's annual recertification election, costs associated with the election and any challenges to it, even if

no employee requested the election. If her union is recertified, it can bargain only total base wages; it is prohibited from bargaining additional compensation for experience or any other term or condition of employment, even with a willing employer.

Defendants take great pains to reconstruct and redefine the Plaintiffs' claims to fit jurisprudence holding that collective bargaining is not a fundamental right, thereby removing the Plaintiffs' claims from this Court's strict scrutiny. However, as *amici* argue below, Act 10 discriminates against employees based on whether they select union representation. Act 10 burdens their right to associate and is subject to this Court's most stringent scrutiny.

II. ACT 10 INFRINGES EMPLOYEES' FREEDOM OF ASSOCIATION

In the First Amendment, the federal Constitution protects the right to petition the government for redress of grievances, including the right of an association. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). Employees have a constitutional right to associate *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (finding an implicit right of association in the First Amendment). And the right of association includes right to unionize, *Thomas v. Collins*, 323 U.S. 516 (1945). "[I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the due-process clause of the Fourteenth amendment from invasion of the states." *Lathrop v. Donohue*, 10 Wis.2d 230, 236, 102 N.W.2d 404 (1960) (citing *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958), *Lawson v. Housing Authority*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955)).

Under the Wisconsin Constitution, "[t]he right of the people…to consult for the common good, and to petition the government, or any department thereof, shall never be

abridged." Wis. Const. art. I, §4. "The right of petition may be conceded to be an inherent right of the citizen under all free governments." *In re Stolen*, 193 Wis. 602, 631, 214 N.W. 379 (1927). *See also Jacobs v. Major*, 139 Wis.2d 492, 506, 407 N.W.2d 832 (1987) ("State constitution Bills of Rights set the limit beyond which 'no human legislation should be suffered to conflict with the rights declared to be inherent and inalienable'"). What is guaranteed is that the State will pass no law "abridging" this fundamental freedom. *In re Stolen*, 193 Wis. at 631.

"[T]he constitutional basis for the freedom of association appears to be several constitutional guarantees, including the various rights of free speech, free press, petition, assembly, and voting." *Weber v. Cedarburg*, 129 Wis.2d 57, 68, 384 N.W.2d 333 (1986). In Wisconsin, consideration of one's association as a negative factor in a legal proceeding constitutes an infringement of that right. *See Helling v. Lambert*, 2004 WI App 93, ¶8, 272 Wis.2d 796, 801, 681 N.W.2d 552 (mother's rights to freedom of association abridged by taking into account her non-marital association, absent proof of harm to the child). Association thus cannot be even "a factor" in determining the rights of citizens.

While a government may ignore a public sector union, it may not penalize participation or withhold a benefit because the petitioner associated in an organization or petitioned through an organization. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979). "Plainly efforts of public employees to associate together for the purpose of collective bargaining involve associational interests which the First Amendment protects from hostile state action." *Labov v. Lalley*, 809 F.2d 220, 222-223 (3rd Cir. 1987).

> Not only does the First Amendment freedom of association protect public employees from retaliation for participation in a union with which their employers have signed a collective-bargaining agreement,…but …"[t]he

> unconstitutionality of retaliating against an employee for participating in a union [is] clearly established."

Shrum v. City of Coweta, 449 F.3d 1132, 1139 (10th Cir. 2006).

Public employees may not be punished merely because they associate in or petition through a union:

> [A] governing body… may not deny a representative of a public employees association the opportunity to be heard on employment matters, absent compelling justification. Such discrimination without a compelling interest on the part of the government offends the Constitution under both First Amendment and equal protection analyses.

Hickory Fire Fighters Ass'n v. Hickory, 656 F.2d 917, 920 (4th Cir. 1981). In *Hickory*, the governmental body permitted non-union speakers but prohibited speakers who were representatives or members of labor organizations. As *Hickory* indicates, the state's interest to burden these rights must be "compelling," not merely "rational."

Act 10 abridges general municipal employees' right to petition in this forbidden way. It prohibits union-represented workers from bargaining a base wage increase above the CPI unless their employer submits the issue to referendum. Wis. Stat. §111.70(4)(mb). Their right to petition is burdened because of their association, and because of that association, the governmental body is affirmatively prohibited by statute from listening to and acting upon the petition.

Act 10 does not limit non-represented employees' demands or the municipal governmental authorities' response to such petitions. Non-union-represented employees can demand any wage increase, regardless of the CPI, and the authority may agree without a referendum. Non-union-represented workers are not prohibited from petitioning upon any other lawful subjects, for example, working hours, shift preference, or any topics traditionally subject to collective

bargaining. Identical demands are prohibited subjects of collective bargaining, and therefore illegal, if made by a union representing general employees. Wis. Stat. §111.70(4)(mb)1.

It is not sufficient that unionized public employees are permitted to express their views if the employers, by statute, are prohibited from making a meaningful response. The essence of the right to petition the government and to associate with others for that purpose is to plead to an authority with the power to redress the grievance. The petition clause is not a mere safety valve. By making it impossible for the decision maker to grant the petition, Act 10 violates the First Amendment and Wis. Const. art. I, §§3-4.

It is no answer to say that union members can obtain the right to petition individually by declining representation. Requiring the employee to drop his association with the union to be heard is exactly the evil the freedom of association was designed to prohibit. The mother in *Helling v. Lambert*, *supra*, was given the unconstitutional option of ceasing her relationship with her non-marital partner to have custody of her children. It is precisely this requirement that constitutes the infringement of the right.

Act 10 unconstitutionally penalizes participation in unions. It closes off the right to petition local governmental bodies for the airing of grievances. The differential treatment of non-union and union employees exposes this legislation as one designed to erect barriers to the right to petition and to burden the freedom of association for a disfavored class. To justify such infringement, the State must show a compelling interest. There is none.

III. ACT 10'S ELIMINATION OF VOLUNTARY PAYROLL DEDUCTIONS FOR UNION DUES VIOLATES THE FREEDOM OF EXPRESSION AND ASSOCIATION OF REPRESENTED EMPLOYEES

Act 10 prohibits voluntary dues deduction for "general" employees, but allows payroll deduction for union dues of "public safety" employees and for any other type of employee organization. Wis. Stat. §§20.921(1)(a)2; 111.70(3g). This prohibition violates the Wisconsin Constitution.

The Wisconsin Constitution, Article I, Section 3, protects free speech. "Every person may freely speak, write and publish his sentiments on all subjects...and no laws shall be passed to restrain or abridge the liberty of speech...." The Wisconsin Supreme Court has specifically recognized the importance of allowing equal access to dues deduction where dues deduction is allowed. "While the majority representative may negotiate for check off, he is negotiating for all the employees, and if check off is granted for any, it must be granted for all." *Board of School Directors v. WERC*, 42 Wis.2d 637, 649, 168 N.W.2d 92 (1969).

Access to payroll deduction implicates the right to free speech. *See, UFCW Local 99 v. Brewer*, 817 F.Supp.2d 1118 (D.Ariz. 2011) (law excluding union deductions for political purposes violates First Amendment); *see also, Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 490 (1981) (voluntary contributions to group engaged in political activity is expression protected by First Amendment). Act 10 is distinguishable from the regulations in *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358-59 (2009), since it specifically carves out one type of expressive association, "general" employee unions, to exclude from payroll deduction.

The use of payroll deduction systems implicates access to nonpublic forums. *See e.g. Pilsen Neighbors Community*

Council v. National Consumers Foundation, 960 F.2d 676 (7th Cir. 1992) (use of state's payroll deduction system); *United Black Community Fund v. City of St. Louis*, 800 F.2d 758, 759 (8th Cir. 1986) (use of city's payroll deduction system).

When the law discriminates against payroll deduction by an identifiable group that is engaged in the business of speech, heightened or strict scrutiny is applied to determine whether a challenged regulation violates the right to free speech. *UFCW Local 99 v. Brewer*, 817 F. Supp.2d at 1123-27 (applying strict scrutiny).

Thus, where a law places restrictions on an employee's ability to donate through payroll deductions to an organization depending upon the organization's identity, it infringes on a fundamental right. It therefore violates the Wisconsin Constitution's provisions protecting its citizen's rights of expression and equal treatment under the law.

IV. ACT 10'S RECERTIFICATION PROVISIONS BURDEN FIRST AMENDMENT RIGHTS AND VIOLATE EMPLOYEES' RIGHT TO EQUAL PROTECTION

Where the State has provided public employees the right to select a representative, the ability to exercise that right is an exercise of freedom of association which cannot be penalized. The Act 10 annual recertification election requirement does just that.

Under Wis. Stat. §111.70(4)(d)3.b, recertification elections must be held annually or "general" employees' representatives are automatically decertified. The statute requires that the Commission "assess and collect a certification fee for each election conducted," to be credited "to the appropriation account under section 20.425(1)(i), not to administer elections." Only "general" employees must

annually expend resources on an election process to exercise their right to select a representative.

Moreover, Act 10 skews the elections against employees favoring union representation. The representative union loses recertification unless it receives the vote of 51% "of all of the general municipal employees in the collective bargaining unit." If 70% of employees vote and 70% of those voting select the certified representative, it is decertified. Under these provisions, virtually no president or member of Congress would have been elected.

Because the freedom of association is at stake, the annual recertification provisions can only be justified on the basis of a compelling state interest. Where election procedures differ to deprive certain citizens of fundamental rights, the election procedures violate the Fourteenth Amendment of the United States Constitution. "Making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation...was 'no more permissible than [is denying members of a racial minority] the vote, on an equal basis with others." *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) (emphasis in original); *see also Hunter v. Erickson*, 393 U.S. 385 (1969).

When a state chooses to confer the right of referendum on its citizens, it is "obligated to do so in a manner consistent with the constitution." *Meyer v. Grant*, 486 U.S. 414 (1988). *See Gray v. Sanders*, 372 U.S. 368, 379 (1963)(although Georgia is not obliged to adopt a state primary procedure, once it has done so the state was required to give "all who participated in the election. . .an equal vote. . . ." *See also, Cipriano v. Houma*, 395 U.S. 701 (1969).

Here, Act 10 provides that general employees' selected representatives may be removed annually even if no employee seeks an election and the vast majority reaffirms their selection. If 70% of the 70% voting select union

representation, they will be defeated by a 30% vote against representation. Stated otherwise, the recertification procedure of Act 10 discriminates against any employee voting for union representation by counting his vote as less determinative of outcome than a vote against union representation or even a decision not to vote. This result runs afoul of basic voting rights:

> In effect, the political-process doctrine hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course.

Coalition To Defend Affirmative Action v. Regents of University of Michigan, 701 F.3d 466, 474 (6th Cir. 2012).

Having provided for selection of representatives, Act 10's separate and discriminatory requirements for voting to select a collective bargaining representative violate employees' rights to free association and equal protection of the laws of Wisconsin.

CONCLUSION

Act 10's array of bargaining prohibitions and mandatory annual elections cannot stand against the rights of free association and free speech secured to citizens by the federal and Wisconsin Constitutions.

Dated this 28th day of August, 2013.

Respectfully submitted,

S/_____

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442

(414) 271-8650
(414) 271-8442 Fax
thawks@hq-law.com

S/_____
Marianne Goldstein Robbins, SBN 1015168
Attorney for Wisconsin State AFL-CIO
The Previant Law Firm, S.C.
PO Box 12993
Milwaukee, WI 53212-0993
(414) 223-0433
(414) 271-6308 Fax
mgr@previant.com

Stephen Pieroni, SBN 1015275
Attorney for Wisconsin Education
Association Council
PO Box 8003
Madison, WI 53708-8003
(608) 276-7711
(608) 276-8203 Fax
pieronis@weac.org

Peggy A. Lautenschlager, SBN 1002188
Attorney for AFSCME Council 24
Bauer & Bach, LLC
123 East Main Street, Suite 300
Madison, WI 53703-3360
(608) 260-0292
(608) 260-0002 Fax
lautenschlager@bauer-bach.com

Aaron N. Halstead, SBN 1001507
Attorney for AFSCME Council 40
Hawks Quindel, S.C.
PO Box 2155
Madison, WI 53701-2155
(608) 257-0040

(608) 256-0236 Fax
ahalstead@hq-law.com

Barbara Zack Quindel, SBN 1009431
Attorney for SEIU Healthcare Wisconsin
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
bquindel@hq-law.com

Jeffrey P. Sweetland, SBN 1001737
Attorney for the Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
jsweetland@hq-law.com

Mark A. Sweet, SBN 1024320
Attorney for AFSCME District Council 48
Sweet and Associates, LLC
2510 East Capitol Drive
Milwaukee, WI 53211
(414) 332-2255
(414) 332-2275 Fax
msweet@unionyeslaw.com

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2939 words.

Dated this 28th day of August, 2013.

Signed:

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
thawks@hq-law.com

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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Dated this 28th day of August, 2013.

Signed:

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442
thawks@hq-law.com