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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2012AP2067

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 11-CV-3774, The Honorable Juan B. Colas, Presiding.

BRIEF OF *AMICUS CURIAE* CITY OF MADISON

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INTRODUCTION

The City of Madison ("City"), as an employer of over 3,400 employees, three-fourths of whom were members of a union prior to the passage of 2011 Wisconsin Act 10, as modified by Act 32 (referred to collectively as "Act 10"), asks this Court to affirm the ruling of the Circuit Court in its entirety.

ARGUMENT

I. THE COURT SHOULD APPLY STRICT SCRUTINY WHEN REVIEWING PLAINTIFFS' CONSTITUTIONAL CLAIMS.

The challenged provisions of Act 10[1] are clearly articulated by the parties in their briefs. The ultimate and arguably intended effect of these provisions is that employees who choose to join a union stand to get paid less, owe more, and get little to nothing in return as compared to their non-union counterparts.

Plaintiffs' allege that this classification violates the First Amendment and Equal Protection Clauses of the Wisconsin Constitution. The State disagrees and urges this

[1] *See* Wis. Stats. §§ 111.70(4)(mb)1.-2 (limiting wage negotiations for unionized employees); Wis. Stats. §§ 111.70(4)(d)3.b. (requiring union employees to annually re-certify their bargaining agent); Wis. Stat. § 111.70(3g) (prohibiting automatic dues deductions); Wis. Stat. §§ 111.70(1)(f) and 111.70(2) (eliminating fair share agreements).

Court to review Plaintiffs' constitutional challenges using the deferential rational basis standard. *See* States' Br. at 38.

The City believes Judge Colas properly applied strict scrutiny because the challenged classification illegally penalizes a public employee's constitutional right to freely associate and thereby treats two distinct classes of similarly situated employees unequally.

A. Act 10 Implicates a Public Employee's Freedom to Associate.

The State does not dispute that the First Amendment protects the right of individuals to associate with like-minded persons to advance common goals. *See Runyon v. McCrary*, 427 U.S. 160 (1976). Nor does it dispute that this protection specifically extends to the right to unionize. *See Thomas v. Collins*, 323 U.S. 516 (1945). Instead, the State argues that while public employees in Wisconsin are free to associate, speak, and advocate on behalf of themselves, the government is under no constitutional obligation to listen to them or their union representatives. *See States' Br.* at 13-14. In the States' words, collective bargaining is an act of legislative grace, and there is nothing unconstitutional about providing collective bargaining rights that are simply less robust than they once

were. *See id*. On this premise, the State argues that this Court must necessarily conclude that the challenged classification at issue in this case deserves only a rational basis review.

The States' analysis fails to acknowledge that governments such as the City are public bodies and that First Amendment protections are often triggered by the government's voluntary actions, including those actions taken as an employer. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976)(stating that while government has no duty to employ its citizens, once it chooses to do so it cannot grant or deny such employment because of a citizen's affiliation with a particular political party); *Perry v. Sindermann,* 408 U.S. 593 (1972)(stating that while state college has no duty to provide unemployment benefits, it may not cut off such benefits on the basis of a citizen's exercise of her religious faith); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946)(although government need not establish postal service, once it does, it may not condition grant of mailing permit on promise that certain ideas not be disseminated). Thus, once public employers afford public employees such a right, privilege, or

benefit in employment, the First Amendment necessarily defines what limits, if any, the State may place on that right.

In this case, State acknowledges that it chose to afford certain collective bargaining rights to public employees, including the right to bargain over conditions of employment. Accordingly, the City agrees with Judge Colas that it is insufficient and inaccurate for the State to assert that because collective bargaining is an act of legislative grace, it commits no constitutional violation by discriminating against members of a bargaining unit. In short, while all may agree that the government has no constitutional obligation to allow its employees to collectively bargain, once the government determines to provide for such bargaining, no matter how robust, it must do so in a manner that passes constitutional muster.

B. Act 10 Penalizes Employees who Choose to Exercise Their Freedom to Associate.

The State argues that nothing in Act 10 directly bars public employees from joining a union and, therefore, that the legislation does not impact an employee's right to associate. However, courts have long held that a specific prohibition of a fundamental right is not necessary to trigger a strict scrutiny

analysis. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), The Supreme Court held that an Arizona statute requiring a year's residence in a county as a condition to receiving nonemergency hospitalization or medical care significantly interfered with the right to interstate travel even though the statute did not expressly prohibit interstate travel. The Court held that the "compelling-state-interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right" *Id.* at 258 (quoting *Shapiro v. Thompson*, 394 U.S. 618 (1969)(Emphasis in original)).

As in *Maricopa*, the Defendants' argument that Act 10 does not directly bar union membership should fail. Thus, the inquiry is whether the challenged provisions significantly interfere with an employee's right to associate. A classification significantly interferes with a fundamental right if, considering the importance of the benefit withheld or the penalty imposed to those subject to the classification, it is likely to significantly burden the ability of those subject to the classification to exercise that fundamental right. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-387 (1978).

From the City's perspective, there can be no doubt that challenged provisions are likely to significantly burden the

ability of those subject to the classification to exercise their fundamental right to associate with a union.

1. Act 10's wage provision, standing alone, penalizes an employee's right to associate.

First, there can be no doubt that the provision prohibiting union employees from receiving total base wage increases exceeding the CPI is a penalty against those employees choosing to join a union. In the City's experience, wages – and in particular wage increases – are the most important condition of employment to its employees. Any possible limit on what employees will be able to earn is likely to deter them from joining a union.

The State argues this provision is not a penalty because it allows unionized employees to receive wage increases similar to their non-union counterparts through the use of a referendum. *See* State's Br. at 31. This is no saving grace and, if anything, illustrates just how differently unionized and non-unionized employees are treated under Act 10.

Wis. Stat. § 66.0506(2) states: "if any local governmental unit wishes to increase the total base wages of its general municipal employees…*who are part of a collective bargaining unit*…in an amount that exceeds [the

CPI], the governing body shall adopt a resolution to that effect…the resolution may not take effect unless it is approved in a referendum called for that purpose." (emphasis added). Wis. Stat. § 66.0506(3) goes on to state exactly how local government's like the City must pose the referendum question to its voters: "Shall the … [general municipal employees] in the … [local governmental unit] receive a total increase in wages from $ … [current total base wages to $... [proposed total base wages], *which is a percentage wage increase that is [x] percent higher than the percent of the consumer price index increase*…"(emphasis added).[2] Thus, in order to give wage increases exceeding the CPI to unionized employees, the City would first have to have its Common Council adopt a resolution, then put that resolution to a voter referendum. In the City's experience, this subjects a unionized employee wage increase to a very complex and unpredictable political process that, even under the best circumstances, often fails.

This already unpredictable process is made even more unpredictable by the phrasing required by the statute. By

[2] Provisions identical to these are contained in Wis. Stat. §118.245 relative to school district employee wage increases.

including the interjectory phrase emphasized above, which highlights that the percentage sought is higher than the CPI, the question unnecessarily implies to the reader that the proposed increase may be more than it should be. Based on its experience with referenda, the City believes this phrasing creates a biased question, thus increasing the likelihood the referendum would fail. To the City, there appears to be no logical reason to require that language other than to try to influence the voter to vote against the referendum. Similarly, there would appear to be no logical reason to constrain how the City worded the question on any referendum.

The State also tries to pose the wage provision as a benefit to unionized employees that non-unionized employees do not receive, *see* State's Br. at 32, suggesting that local governments can just ignore non-unionized employee wage requests. This is nonsense and flies in the face of common sense employee relations and the history of success of public sector collective bargaining in Wisconsin.

In the more than four decades that the City's employees have enjoyed the statutory right to collectively bargain, the City's residents, employees and managers have enjoyed labor peace and successfully managed budgets. But

even before there was a statutory obligation to collectively bargain, the City long recognized the efficacy of collective bargaining as a managerial and budgetary tool. For example, prior to 1959, the City collectively bargained with its employees on all manner of workplace benefits, including wages, through the use of Collective Bargaining Committees. This was no coincidence. Whether through common sense or by statutory right, public employers have long recognized collective bargaining as an effective tool to effectively and efficiently manage budgets while preserving a happy and productive workforce. Allowing employees to bargain with management over issues like wages allows buy-in to management problems, gives employees a voice and stake in the City's success, and increases employee morale. *See* Appendix, Affidavit of Paul Soglin, ¶ 4. For recent proof, one need look no further than in the short time after Judge Colas struck down parts of Act 10, when the City was able to reach agreements with its largest general employee union, and two other general employee unions. *See* id., ¶ 7. These Agreements gave the City the authority to impose wage decreases in the future. This was accomplished within a system of collective bargaining where employers were able to

bargain over more – not fewer – factors of employment. Against this backdrop, the State cannot seriously propose that the Act 10's wage provision is constitutional because local governments could choose to ignore their non-unionized employee's wage requests. To do so would alienate employees and cause significant employee relations problems that no responsible manager would invite.

Put simply, as it relates to wages, non-unionized employees are subjected to none of the onerous restrictions contained in Act 10. In the City's view, this clearly illustrates the type of unequal treatment between unionized and non-unionized employees outlined in Judge Colas' decision. The arguments proffered by the State to save this provision must fail.

2. The cumulative effect of Act 10's challenged provisions penalize an employee's right to associate.

The State's brief tries to isolate each challenged provision and argue that each one, standing alone, is not a penalty on an employees' freedom to associate. From the City's perspective, such an approach is unpractical, unrealistic, and improper. As an employer, one cannot expect employees to evaluate employment benefits individually.

Instead, employees evaluate the entire package of benefits. It is the cumulative evaluation of these benefits, wages, insurance, vacation, sick time, etc., which influence an employee's decision to accept – or leave - a job.

In the same way, it is unreasonable to expect an employee evaluating whether to join a union to evaluate Act 10's provisions individually. While the City believes the wage provision, standing alone, will cause its employees to disassociate with unions, if there is any doubt, the cumulative effect of each challenged provision definitely will. As stated above, employees choosing to join a union stand to get paid less, owe more, and get little to no benefit. The City does not believe its employees would choose that fate and, therefore, believe Act 10 clearly penalizes employees who choose to associate with a union.

For these reasons, the City submits that this Court is obligated to review Plaintiff's first amendment challenges using strict scrutiny.

C. Act 10 Violates an Employee's Constitutional Right to Equal Protection.

The City will not repeat the standard for equal protection analysis ably set out by Plaintiffs. *See* Plaintiffs'

Br. at 37-38. As Judge Colas put so simply, "equal protection is the constitutional obligation government has to treat people equally when they are similarly situated, unless it has a reason not to." *See* Decision and Order, p. 16.

As an employer of over 3,400 represented and non-represented municipal employees, the City submits there is no difference between a municipal employee who chooses to associate with a union and one who does not. Within the City of Madison, general municipal employees are all subject to the same work conditions, benefit packages, and conditions of employment. Within individual departments one can find both union and non-union employees a nearly every level of responsibility. In the City's view, the only difference between these employees is their choice to join a union. Thus, there can be little dispute that Act 10 creates two distinct classes of similarly situated employees.

Nor does the City believe there can be dispute that Act 10 violates these employee's equal protection rights by seizing on this choice and, as argued above, treating each class differently in terms of the wages and benefits each can bargain over. In doing so, Act 10 effectively forces the local governments to discriminate between its employees based

solely on their decision to join a union. To maintain a workplace environment free from discrimination, Act 10 might leave the City with no choice but to provide its unrepresented employees with the same total base wage increases negotiated for by unions.

II. THE STATE CONCEDES THE CHALLENGED STATUTES CANNOT WITHSTAND STRICT SCRUTINY REVIEW.

A. The State Offers no Rationale for the Challenged Classifications.

As Judge Colas recognized, the State offers no asserted rationale for the challenged classification and thus concedes that the disparate treatment is unconstitutional when subjected to strict scrutiny. Decision and Order, p. 18-19. Thus, this Court should affirm the Circuit Court's ruling in its entirety.

B. The City Questions Whether the Challenged Wage Provision Could Even Withstand a Rational Basis Review.

Based on the State's filings in the Circuit Court matter, the City believes the challenged classifications, and in particular the challenged wage provision, are arbitrary and irrationally discriminatory. *See Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 73, 284 Wis. 2d 573, 701 N.W.2d 440.

In evaluating whether a legislative classification rationally advances the legislative objective, the court is obligated to identify a rationale that might have influenced the Legislature's decision. *Id.* at ¶ 74. Once the Court identifies a rational basis, the court must assume the legislature passed the act on that basis. *Id.* at ¶ 75. While a rational basis review is the lowest standard of constitutional review, it is not a free pass. As our Supreme Court has held, "the rational basis test is not a toothless one…[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at ¶ 78.

The City believes the challenged provisions, and especially the wage provision, fail a rational basis review. The State provided its rationale for the challenged wage classification in its brief to the Circuit Court:

> "…there is a rational basis for the state to limit collectively bargained wage increases, without similarly placing an inflation-based ceiling on individual employee wage increases….[t]here is a critical difference between represented and non-represented employees with respect to the budgetary impacts of wage increases. When a public employer negotiates with its employees on an individualized basis, it can easily manage the overall budget impact of wage increases by offsetting higher wage increases for well-

> performing employees with lower wage increases for other employees. When the employer is negotiating with a bargaining representative, its ability to offset higher-than-average wage increases with corresponding lower-than-average increases is constrained, if not eliminated, by i) the substantially reduced number of wage classifications at issue, in comparison to the total number of individual employees, and ii) the bargaining representative's obligation to represent the interests of the entire bargaining unit."

See Defs. Joint Br. in Support of Judgment on the Pleadings and Response to Plaintiffs' Motion for Summary Judgment at 29-30 (R. Document 53).

The City has reviewed this asserted rationale many times. There are only three possible interpretations of this rationale:

First, the language is gibberish. Despite reading the words over and over again, the City is unsure what rationale is offered because the words don't parse.

Second, the assertion may be that the City can better handle budgeting when it must engage in individual bargaining with each employee.[3] But if that is the assertion, it is also nonsense. The time and effort to negotiate and reach agreement with over 3,000 City employees would be not only

[3] It is critical to note that Act 10 did not simply affect the employees' right to bargain. The Legislature explicitly took away the City's right to bargain outside the rules set up in Act. 10. *See* Wis. Stat. § 66.0508(1) (2011).

be vastly more expensive for the City, but there is no reason to think it will save money. If the City has x dollars that it can spend on salary increases, it cannot go above x dollars whether it negotiates with a group or individually. It simply becomes an administrative nightmare and exponentially more expensive for the City to engage in individual negotiations.

Third, perhaps Defendants are suggesting that the rationale is to encourage merit pay plans for municipal employees. That also provides no basis for the law, because using pay differentials does not impact the total dollars available for pay increases. It also fails to recognize that nothing in collective bargaining limits the City and its unions from employing a merit pay system in a bargaining agreement. Accordingly, the City believes the State's rationale for the wage provision is irrational and arbitrary and therefore would even fail a rational basis review.

CONCLUSION

Based on the foregoing, the City asks the court to

affirm the Circuit Court ruling in its entirety.

Dated this 25th day of January, 2013.

CITY OF MADISON

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief produced in a proportional serif font.

The length of this brief is 2,996 words, exclusive of the caption, Table of Contents and Authorities and the Certifications.

Dated this 25th day of January, 2013.

CITY OF MADISON

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ELECTRONIC FILING CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of January, 2013

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