UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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; AFSCME DISTRICT COUNCIL 48, AFL-CIO; AFT-WISCONSIN, AFL-CIO; SEIU HEALTHCARE WISCONSIN, CTW, CLC; WISCONSIN STATE AFL-CIO,

Plaintiffs,

v.

SCOTT WALKER, Governor of the State of Wisconsin; MICHAEL HUEBSCH, Secretary, Department of Administration; GREGORY L. GRACZ, Director, Office of State Employee Relations; JAMES R. SCOTT, Chair, Wisconsin Employment Relations Commission; JUDITH NEUMANN, Member, Wisconsin Employment Relations Commission; RODNEY G. PASCH, Member, Wisconsin Employment Relations Commission,

Defendants.

Case No. 11-CV-428

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A

TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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Plaintiffs, seven labor organizations representing members who work for state and local government entities in Wisconsin, submit this brief in support of their motion for a temporary restraining order and/or preliminary injunction, filed herewith, against Defendants Scott Walker and other Wisconsin state officials in their official capacities.

STATEMENT OF FACTS

A. Overview

On March 11, 2011 Governor Walker signed into law an act commonly known as the "Budget Repair Bill" and officially titled "2011 Wisconsin Act 10" (hereinafter "Act 10" or "Act"). Movants' Facts ¶¶17, 20.[1] The Act's publication and implementation were enjoined on state-law grounds by a Wisconsin circuit court judge from shortly after its enactment through June 14, 2011, when the Wisconsin Supreme Court lifted that injunction. Movants' Facts ¶¶17-18. The Act will now take effect on June 29, the day after its June 28 publication date.

Although the stated purpose of Act 10 is to address the state's projected budget deficit during a temporary economic downturn by providing public employers in Wisconsin with greater flexibility to reduce costs, the vast majority of the Act's provisions operate to achieve three permanent and fundamental changes to Wisconsin's decades-old system of labor relations in the public sector. The first is to eliminate or reduce to a shell the existing collective bargaining rights of a disfavored class of state

[1] This and all references herein to the Statement of Record Facts Proposed by Movants in Support of Their Motion for a Temporary Restraining Order And/Or Preliminary Injunction are abbreviated as "Movants' Facts ¶x."

and municipal workers, while maintaining the robust bargaining rights of a favored class falling within a newly-created "public safety" category. The favored class consists of some fire fighters and some police personnel, whereas the disfavored class consists of all other public workers who had been covered by Wisconsin's collective bargaining laws. The second permanent and fundamental change is to make it prohibitively difficult for the disfavored class of employees, and only the disfavored class, to retain a union as its bargaining representative. The third change is to weaken materially the ability of employees in the disfavored class, and only the disfavored class, to support financially the union's activities, including, importantly, its First Amendment-protected political speech activities.

B. For Half a Century, Wisconsin Public Sector Employees Have Had the Right to Unionize and Bargain Collectively With Their Employers Over Wages, Hours, and Other Terms of Employment

Prior to the passage of Act 10, all non-supervisory, non-confidential municipal and State employees enjoyed collective bargaining rights under one of the State's labor-relations statutes, the two most important of which are the Municipal Employment Relations Act (MERA) and the State Employee Labor Relations Act (SELRA).[2] Common to those statutes were the right of employees to select a union that would remain their bargaining representative until they petitioned for the representative's removal; to

[2] For the Court's convenience, we have submitted copies of Act 10, MERA, and SELRA as exhibits B, O and P, respectively, to the Affidavit of Timothy E. Hawks, filed herewith.

bargain collectively over a broad spectrum of working conditions; to enter agreements providing that all represented employees contribute financially to support the representational activities of the bargaining representative; and to have union membership dues and nonmember representation (or "fair-share") fees deducted from payroll.

Municipal employees—including the employees of cities, counties, villages, towns, metropolitan sewerage districts, school districts, long-term care districts, transit authorities, and other political subdivisions of the state—had the right to unionize and collectively bargain with their municipal employers under MERA. Wis. Stat. §111.70 *et seq*. Under MERA, municipal employees could petition the Wisconsin Employment Relations Commission (WERC) to hold an election in which "a majority of the municipal employees voting in a collective bargaining unit" may select a union as "the exclusive representative of all employees in the unit for the purpose of collective bargaining." §111.70(4)(d)(1). Once certified, the union remained the bargaining representative unless it was removed in a new election prompted by a decertification petition initiated by at least thirty percent of the employees. §§111.70(3)(a)4, (4)(d)5; Wis. Admin. Code §ERC 11.02(3)(2006).

Under MERA, an employer was obligated to bargain in good faith with the certified bargaining representative regarding "wages, hours, and conditions of employment" and to reduce any agreement reached to a written collective bargaining agreement. §§111.70(1)(a), (3)(a)4. Bargainable conditions of employment included

fringe benefits, as well as the payment of any employee required contributions to a public retirement system. A collective bargaining agreement negotiated under MERA could provide for arbitration of disputes arising under the agreement. §§111.70(3)(a)5, 8. If negotiations between the parties over the terms of a new agreement reached an impasse, municipal employers could not unilaterally implement their own bargaining proposals; instead, they were required to submit disputed bargaining items to binding interest arbitration. §§111.70(3)(a)7, (4)(cm), (4)(jm); 111.77. Except under specific circumstances relating to the withdrawal of bargaining proposals prior to an interest arbitration proceeding, municipal employees and their unions were prohibited from striking and could be fined and enjoined for engaging in such strikes. §§111.70(4)(L), (7), (7m).[3]

Unions are subject to a duty of fair representation, which includes the duty to negotiate contracts on behalf of and otherwise represent all employees in a bargaining unit, including those who exercise their right not to join the union, without discrimination. *See Mahnke v. WERC*, 66 Wis. 2d 524, 534, 225 N.W. 2d 617 (1975). In order to distribute fairly the cost of representing all employees in the bargaining unit, MERA allowed the bargaining representative to negotiate a "fair-share" agreement requiring represented nonmember employees to pay "their proportionate share of the cost of the collective bargaining process and contract administration." §§111.70(1)(f), (2).

[3] Law enforcement and fire fighting personnel were, and continue to be, flatly prohibited by MERA from engaging in strikes. Wis. Stat. §111.77.

MERA also allowed municipal employers to enter into agreements with unions requiring the employer to deduct membership dues and nonmember fair-share fees from employees' earnings and remit them to the bargaining representative. *Id.* Any fair-share agreement was subject to rescission if thirty percent of the employees in the bargaining unit submitted a petition opposing the agreement and a majority of employees in the unit voted to rescind it in a WERC-conducted referendum. *Id.*

State employees—including employees of the University of Wisconsin (UW) Hospitals and Clinics Board, assistant district attorneys, attorneys in the public defender's office, UW teaching assistants and research assistants, and home care providers—enjoyed the right to unionize and bargain collectively under the State Employment Labor Relations Act (SELRA). §111.80 *et seq.* Under SELRA, a unit of State employees could petition for a WERC-conducted election to select a union as its exclusive bargaining representative, and that union would remain the representative unless removed in a new election prompted by a petition by at least thirty percent of the unit employees. §111.83(6). Subject to certain specified limitations, SELRA required the State to bargain in good faith with the exclusive representative over wages and other specified pay matters, fringe benefits, and hours and conditions of employment.[4] §§111.84(1)(d), 111.91. The parties could also agree to binding arbitration for disputes

[4] Due to the unique employment circumstances of home care providers, who work in a patient's home and not under the supervision or control of a State-employed manager, SELRA limited bargaining on their behalf to wages and fringe benefits. §§111.905, 111.91.

arising out of a collective bargaining agreement. §§111.84(1)(c), 111.86. If negotiations over the terms of a new agreement reached an impasse, the bargaining representative could invoke a fact-finding proceeding to assist the parties in breaking a deadlock. §111.88. State employees and their unions were prohibited from striking and could be fined and enjoined for engaging in such an unlawful strike. §111.89.

Under SELRA, a bargaining representative could have a fair-share agreement included in its collective bargaining agreement, if two-thirds of employees voting in a referendum approved the fair-share agreement. §111.85. Pursuant to a fair-share agreement, the State was required to deduct dues and fair-share fees from employees' earnings and remit them to the bargaining representative. *Id.* Any fair-share agreement was subject to rescission if thirty percent of the employees in the bargaining unit submitted a petition opposing the agreement and more than a third of employees in the unit voted to rescind it in a WERC-conducted referendum. *Id.*

Members of the UW faculty and staff had collective bargaining rights under the UW System Faculty and Academic Staff Labor Relations Act (FASLRA). §111.95 *et seq*. Those rights were essentially the same as those afforded to State employees under SELRA. *Id.* Child care providers and employees of the UW Hospitals and Clinics Authority enjoyed similar collective bargaining rights under amendments to the Wisconsin Employment Peace Act (WEPA). §111.01 *et seq*.

C. Act 10 Strips Most Public Sector Employees of All or Nearly All Collective Bargaining Rights, while Maintaining Those Rights for a Newly-Created Subgroup of Certain Fire Fighters and Certain Police

Act 10 jettisons the broad protection of collective bargaining for most public employees and, in its place, creates new classifications of employees who have widely divergent rights.

1. "Public Safety" Employees

Prior to the passage of Act 10, fire fighters, police officers, and many other employees in protective services occupations were subject to the same basic framework for collective bargaining under MERA and SELRA as other municipal and State employees. *See* Wis. Stat. §§111.70(4)(c), (4)(jm), 111.77, 111.825(1)(cm). Act 10 ends that parity.

The Act creates a new category of "public safety employees," who will retain virtually all of the collective bargaining rights they enjoyed under MERA and SELRA. Act §§210, 216, 262, 272. Movants' Facts ¶24. The new "public safety employee" classification created by Act 10 does not correspond to any classification of employees in any previous Wisconsin law. For example, of the twenty-two job categories that were and remain classified as "protective occupation employees" under the statute governing the Wisconsin Public Employee Trust Fund, Wis. Stat. §40.02(48)(am), only five—police officers, deputy sheriffs, fire fighters, county traffic police officers, and village employees who perform both police protection and fire protection services—are now "public safety" employees under MERA; and only two—troopers and motor

vehicle inspectors in the State Patrol—are "public safety employees" under SELRA. Act §§216, 272; Wis. Stat. §§40.02(48)(am)7, 8, 9, 10, 13, 15, 22. Movants' Facts ¶25.

What is more, the Act, without explanation, excludes "police officers" who work for the State, specifically those in the Capitol Police and the UW Campus Police, from the category of "public safety" employees under SELRA, despite their designation as sworn "police" officers with full arrest powers and hence "protective occupation employees" under Wis. Stat. §40.02(48)(am)(9). Movants' Facts ¶26. That is so, even though the Act treats patrol troopers who work for the State as favored "public safety" employees, as it does police officers who work for municipalities. Movants' Facts ¶25. Likewise without explanation, the Act deems fire fighters who work for the State, including, for example, Fire/Crash Rescue Specialists, to be "general" employees despite their designation as "fire fighter" and hence as "protective occupation employees" under Wis. Stat. §40.02(48)(am)(10). Movants' Facts¶27.

The "public safety employee" category indeed has been gerrymandered such that employees represented by the Wisconsin Law Enforcement Association ("WLEA") will be divided up, with some law enforcement officers (notably the state troopers and others working for the Wisconsin State Patrol) being accorded the favored "public safety" status, while other law enforcement officers (for example, the Capitol Police and

UW Campus Police) are excluded from that status and are disfavored.[5] Movants' Facts ¶37.

While Act 10 does not explain these distinctions, the history of the 2010 gubernatorial campaign does point to an explanation. Only five organizations representing public sector employees endorsed Scott Walker in that campaign: (i) the Wisconsin Troopers Association (WTA),[6] whose constituency happens to be the *only* component of the WLEA's many "protective services" constituencies to which the Act gives the favored "public safety" designation;[7] (ii) the Milwaukee Police Association (MPA), whose members are *municipal* police officers and thus accorded the "public safety" designation; (iii) the Milwaukee Professional Fire Fighters Association (MPFFA), whose members are *municipal* fire fighters and thus accorded the "public safety" designation; (iv) the West Allis Professional Police Association (WAPPA), whose

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[5] The Act's drafting records, maintained by the Legislative Reference Bureau, describe that splitting of the WLEA unit as follows:

o Carve out a new bargaining unit from WLEA for the State Troopers Movants' Facts ¶41.

[6] WTA is an advocacy and lobbying organization, but not collective bargaining representative, for the troopers and inspectors (both sworn "protective occupation" classifications) employed by the State in the Wisconsin State Patrol as well as certain non-sworn, non-protective police communications operators attached to the State Patrol. Movants' Facts ¶38.

[7] WLEA represents the Capitol Police and the UW Police, who, despite being sworn law enforcement officers within the "protective occupation employee" designation, are excluded from the favored "public safety" category. Movants' Facts ¶37.

members are likewise *municipal* police officers;[8] and (v) the Wisconsin Sheriffs and Deputy Sheriffs Association Political Action Committee, which also represents the interests of municipal employees in the new, favored "public safety" classification. Movants' Facts ¶¶35-36, 38-39. Thus, all of the public sector labor organizations that endorsed Governor Walker—but *not* all of the public sector employees within the "protective services" category—have been placed by the Act in the favored "public safety employee" classification. Movants' Facts ¶42. *Cf*. Movants' Facts ¶40.

2. "General" Employees

The Act places the vast majority of other State and municipal employees in a new category called "general employees," and dramatically curtails their collective bargaining rights. Act §§168, 210, 214, 245, 262, 268, 314, 327. Movants' Facts ¶¶28, 29. [9] This category covers several classes of protective-occupation employees in State service that are not within the Act's definition of "public safety" employees, including, as

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[8] The MPA, which represents the Milwaukee police officers, and the MPFFA Local 215, which represents the Milwaukee fire fighters, are the two largest locals of police and fire employees in the State. Both endorsed Governor Walker and jointly ran television advertisements supporting his candidacy in the 2010 general election. Movants' Facts ¶¶33, 35.

[9] The Act strips *all* rights to engage in collective bargaining from a class of public employees that includes employees of the UW Hospitals and Clinics Authority, the UW Hospitals and Clinics Board, the UW System faculty and academic staff, home care providers, and child care providers. Act §§186-197, 265, 269, 279, 281, 283, 291, 292, 304, 307, 313, 317, 318, 323. Although the Act treats those employees differently (and worse) than "general employees," for purposes of the arguments in this brief, the distinctions between their status and that of general employees need not be considered. For ease of exposition, we therefore will use the term "general employees" to encompass these employees. Movants' Facts ¶¶63-65.

previously noted, members of the Capitol police force and UW campus police officers, as well as correctional officers (prison guards), probation and parole officers, conservation patrol officers, conservation wardens, and forest rangers. *Compare* Act §272 *with* Wis. Stat. §40.02(48)(am). *See also* Declaration of Martin Beil ¶14.

Under Act 10, unions representing general employees are no longer permitted to bargain collectively over a broad array of topics related to wages, hours, and conditions of employment. Instead, collective bargaining is limited to the single topic of "wages," which the Act defines as "only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions." Act §§168, 210, 245, 262, 314, 327. Movants' Facts¶29. Bargaining over any other "factor or condition of employment" is prohibited, including such basic matters as just cause protections from discipline and discharge. §§210, 245, 262, 314. Movants' Facts ¶¶55, 57. Moreover, bargaining over wages can only occur within narrow confines: if the negotiated wages in a new agreement exceed the wages in the prior agreement by a percentage greater than the annual increase or decrease in the Consumer Price Index (CPI), the new wage amount must be approved in a statewide referendum (in the case of State employees) or local referendum (in the case of municipal employees). §§168, 245, 314. Under the Act, interest arbitration is no longer available to general municipal employees to resolve impasses in bargaining; instead, municipal employers can implement their final offers whenever impasse is reached. §237. In addition, because the

Act abolishes the (very limited) right to strike that municipal employees did have under MERA, a municipal union now has no recourse whatsoever in the event of a unilateral employer implementation of a base wage. Wis. Stat. §§111.70(4)(L), 111.84(2)(e), 111.89. Movants' Facts ¶56.

The Act also contains numerous provisions aimed at limiting general employees' ability to retain a union as their bargaining representative and to support the union's activities financially. Under the Act, a union representing general employees whose collective bargaining agreement has expired or terminated is required to submit to a newly devised, WERC-supervised "re-certification" election once every year, in which it will have to receive "at least 51 percent of the votes of all of the general employees in the collective bargaining unit" (as opposed to a majority of those actually voting) to retain its certification as the bargaining unit's representative. Act §§242, 289, 9132, 9155. Movants' Facts ¶30. In addition, unions representing general employees will be prohibited from negotiating for fair-share agreements. §§190-192, 198, 200, 203, 213, 217, 219, 223, 225, 295, 299. Movants' Facts ¶31. And, employers will be prohibited from deducting union dues or fair-share fees, even for general employees who desire the deductions. §§58, 227, 298, 299. Movants' Facts ¶32.

D. The Stated Justification for the Act and for the Classifications That It Creates

From the time the Act was first introduced, it has been presented and justified as a measure to balance the State's budget and to provide public employers with greater flexibility to reduce costs during this time of economic crisis, even though the Act's

employee-rights changes are permanent and largely non-budgetary. The Act was introduced to the Legislature on February 14 and 15, 2011, in a special session called by the Governor to address what he termed an "economic emergency," with the accompanying statement of emergency required by Wis. Stat. §16.47(2), stating in pertinent part, as follows:

> Special Session Senate Bill 11 relates to state finances, collective bargaining for public employees, compensation and fringe benefits of public employees, the state civil service system, the Medical Assistance program, sale of certain facilities, granting bonding authority, and making an appropriation.

Movants' Facts ¶¶17, 19. Upon introduction of the Act, on February 14, the Wisconsin Legislative Fiscal Bureau described it as "Budget Adjustment Legislation." Movants' Facts ¶22.

In his public statements, Governor Walker has said that the Act is "needed to balance the state budget and give government the tools to manage during economic crisis." Movants' Facts ¶21.

In response to the introduction of the Act, public sector unions were quick to agree to accede to the few financial aspects of the legislation—those that increase employee contributions to health insurance and pension funds. Movants' Facts ¶¶45, 46. Accordingly, this litigation does not challenge those increases; rather, Plaintiffs challenge only the provisions of the Act that target employees' rights to bargain collectively and to support their respective unions.

Since introducing the legislation, Governor Walker's only stated justification for carving out "public safety" employees for preferential treatment has been the professed need to discourage those employees from engaging in strikes or other work stoppages—work stoppages that law enforcement and fire fighting personnel already were prohibited from engaging in under prior law, Wis. Stat. §§111.77, 111.89, and that they remain prohibited from engaging in under the Act. Movants' Facts ¶43. There are no legislative findings that purport to explain the preferential treatment afforded the newly-created class of "public safety" employees.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction, "the moving party must first demonstrate that it has a reasonable likelihood of success on the merits, lacks an adequate remedy at law, and will suffer irreparable harm." *River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F.3d 364, 369 (7th Cir. 2009), *reheard en banc on other issues and aff'd,* 611 F.3d 367 (2010). "The court must then balance, on a sliding scale, the irreparable harm to the moving party with the harm an injunction would cause to the opposing party," and "must also consider whether the public interest will be harmed sufficiently that the injunction should be denied." *Id.* (citations and internal quotation marks omitted). Put another way, there "must be a plausible claim on the merits, and the injunction must do more good than harm (which is to say that the 'balance of equities' favors the plaintiff)." *Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th

Cir. 2009). "How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Id.*

Here, the Plaintiffs easily satisfy the preliminary injunction standard. As set forth in Part II, *infra*, Plaintiffs have at least a reasonable likelihood of success on the merits. As set forth in Part III, *infra*, Plaintiffs will suffer immediate and severe irreparable harm should injunctive relief be denied, and the balance of equities tips overwhelmingly in Plaintiffs' favor.

II. PLAINTIFFS HAVE ESTABLISHED THE REQUISITE LIKELIHOOD OF SUCCESS ON THE MERITS TO WARRANT PRELIMINARY RELIEF

A. The Act's Differential Treatment of Favored and Disfavored Classes of Public Employees Violates the Equal Protection Guarantee of the Federal Constitution

1. Act 10 Subjects General Employees to a Panoply of Burdens and Deprivations while Exempting "Public Safety" Employees from Its Injurious Provisions

One of the most striking features of Act 10, and the feature that is central to the arguments Plaintiffs make here, is that the Act separates public employees into two classes—the newly-created "public safety" category and the residual category of "general" employees—and subjects the second class to a panoply of burdens and deprivations of rights while exempting the first class from these injurious provisions.

As detailed above, under the Act, "general" employees lose the right to bargain, except over total base wages; in bargaining over base wages, upon impasse the employer may unilaterally impose whatever wage terms it pleases without recourse,

because general employees have been stripped of their right to invoke interest arbitration to respond to such unilateral employer action; and even if the employer *agrees* to a base wage proposal, the agreement cannot be implemented if it provides for an increase greater than the CPI unless the agreement is approved in a referendum. "Public safety" employees, in contrast, retain full rights, including not only the right to bargain over all aspects of compensation, but also the right to bargain for protection against outsourcing; to bargain for protection against arbitrary or unfair shift, overtime, and weekend assignments; to bargain for protection against discipline or discharge imposed without just cause; and to have impasses in bargaining resolved by interest arbitration rather than by unilateral employer fiat.

On top of that, general employees who are represented by a union lose their union representation unless, every single year, the union wins the votes of at least 51 percent of *all employees in the unit*—not just 51 percent of all *voters*—in automatic "re-certification" elections that are to be held annually regardless of whether any employee or significant group of employees in the unit requests an election. By way of example, in such elections, if 70 percent of the unit employees vote and 70 percent of those casting ballots vote for the union, the employees lose their union representation. In contrast, unions representing the new, favored class of "public safety" employees need not stand for re-certification every year, but instead only when at least 30 percent of the represented employees request a decertification election. Wis. Stat. §§111.70(3)(a)4, (4)(d)5, 111.83(6); Wis. Admin. Code §§ERC 11.02(3)(2006), 21.02(2010). When and if a

"public safety" union ever is subjected to a decertification election, it need only obtain a majority of the votes of the actual voters, not of all employees in the unit. Wis. Stat. §§111.70(4)(d)(1), 111.89.

The Act also provides that general employees cannot pay union dues by payroll deduction, but that "public safety" employees may do so. And unions of general employees cannot negotiate "fair-share" agreements under which all employees are required to pay their proportionate share of the cost of the collective bargaining process and contract administration; only "public safety" unions are allowed to negotiate such agreements.

2. The Equal Protection Clause Requires That Statutory Classifications Be Rationally Related to a Legitimate Governmental Objective

The Act's pervasive distinction between "public safety" employees and all other employees directly and sharply implicates the question whether this legislative classification satisfies the Equal Protection Clause of the Fourteenth Amendment, which requires that, where a statute makes classifications among those subject to the legislation, "the classification itself [must be] rationally related to a legitimate governmental interest." *United States Dep't of Agric. v. Moreno,* 413 U.S. 528, 533 (1973) (striking down, for lack of a rational relation to the legislation's objective, a statutory provision denying eligibility for Food Stamps to any household containing unrelated members). *See also*, *e.g., Romer v. Evans*, 517 U.S. 620 (1996) (striking down, under rational relation test, amendment to state constitution prohibiting government action

designed to protect homosexuals from discrimination); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (striking down, under same test, state statute prohibiting the sale of caskets by any person not licensed as a funeral director). *See generally Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008) ("When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'") (quoting *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887)); *Moran v. Beyer*, 734 F.2d 1245, 1247 (7th Cir. 1984) (striking down state law where it had a legitimate purpose but made a classification that was not "rationally related" to that purpose). *See also In re Warden of Wis. State Prison*, 541 F.2d 177 (7th Cir. 1976).

The Government cannot satisfy this standard by mere *ipse dixit*. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. "The search for the link between classification and objective gives substance to the Equal Protection Clause." *Id.* "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.*

This standard is not highly exacting, but it is not toothless either. It does not, for example, bar laws that deny to *all* unions a benefit that is provided only to non-

membership entities, since there is a relevant distinction between unions and such entities. *See City of Charlotte v. Local 660, Int'l Ass'n of Firefighters,* 426 U.S. 283, 288 (1976). Nor does the standard require a state to apply all provisions of its labor laws to all employee groups without regard to distinctions between them that are *relevant* to the type of differential treatment in question. *See Central State Univ.* v. *American Ass'n of Univ. Professors*, 526 U.S. 124 (1999). The Equal Protection Clause unquestionably *is* violated, however, if a state grants rights or benefits to certain employee groups or unions while denying them to other similarly situated groups or unions without a reason for the differential treatment that is linked to a legitimate state interest. Numerous cases so hold. *See, e.g., Truck Drivers and Helpers Local 728 v. City of Atlanta*, 468 F. Supp. 620, 623 (N.D. Ga. 1979) (city violated Equal Protection Clause by denying payroll deduction of dues to the police union while granting it to the fire fighters union, notwithstanding the city's argument that the distinction was "based on differences in the functions which the two departments perform," as the differing functions did not relate to the particular matter of payroll deduction); *State ex rel. Dayton Fraternal Order of Police Lodge 44 v. State Employment Relations Bd.*, 488 N.E.2d 181, 186 (Ohio 1986) (striking down amendment to Ohio Public Employees Collective Bargaining Act that "exempt[ed] Dayton employees from the rights enjoyed by all others," where no legitimate reason for the distinction was "contained in the record of th[e] case"); *International Ass'n of Firefighters Local 3858 v. City of Germantown,* 98 F. Supp. 2d 939, 948 (W.D. Tenn. 2000) (where state statute required dues deductions for fire fighters in

some counties but not others, "[f]inding that the statute … violates the equal protection guarantees [of the federal and state constitutions] is not even a close call").

3. The Classifications That Act 10 Uses to Impose its Multiple Burdens on General Employees, but Not "Public Safety" Employees, Violate Equal Protection, Because They Lack a Rational Relation to the Governmental Objectives That Act 10's Proponents Have Invoked on the Act's Behalf

In this case the "search for the link between classification" and "legitimate legislative end" that the Equal Protection Clause requires, *Romer*, 517 U.S. at 632, comes up empty.

Act 10 was proposed as a "budget repair" bill, and addressing the State's budgetary problems by providing public employers with increased budgetary flexibility is the only objective that the Act's proponents have advanced. *See supra* at page 13.[10] Yet none of the *distinctions* the Act draws between the favored "public safety" employee class and the disfavored "general employee" class have any discernable connection to that budgetary objective, let alone a rational connection.

To begin, consider the provisions in the Act under which unions representing "public safety" employees are subject to a decertification election only where 30 percent of the represented employees so petition, whereas unions representing "general"

[10] While equal protection "does not demand for purposes of rational basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification," *Nordlinger v. Hahn*, 505 U. S. 1, 15 (1992), here the budgetary objective is not merely the only purpose indicated in the formal legislative materials, but the only purpose that has been articulated by the Act's proponents in any forum of which we are aware.

employees must undergo an automatic decertification election every year and regardless of any showing of member sentiment in favor of decertification. That distinction lacks any rational connection to the Act's stated objectives, because the degree to which imposition of an annual decertification election advances budgetary objectives is the same in the case of general employee unions as in the case of "public safety" unions; indeed in both cases, there is *zero* connection.

The same is true of the Act's provisions specifying that, in a decertification election held in a unit of "public safety" employees, the union prevails if it secures the votes of a majority of those who *actually vote*, whereas in a decertification election held in a unit of "general" employees, the union prevails in its annual "re-certification" election only if it secures the votes of 51 percent of those who are *eligible* to vote—a requirement tantamount to a supermajority requirement in all but the vanishingly rare circumstance where 100 percent of those eligible to vote do so.[11] There is no rational basis linked to the Act's stated budgetary objective or to any other conceivable objective for applying an anti-democratic supermajority requirement to one class of employees but not to the other.

[11] As already noted, under the Act's regime, in an election where 70 percent of unit members vote, and 70 percent of those voting favor the union, the union is decertified. Indeed, on a literal reading of the Act, even if 100 percent of the unit's members vote and a majority short of "51%" votes for the union (for example, 504 out of 1000 or 50.4%), the union still is decertified.

In fact, a wide window into the true purpose of the Act opens when one pauses to examine the legislature's decision to subject general employee unions to elections run under a rigid and unusual supermajority requirement that the elected officials responsible for the legislation are not required to satisfy, and with a frequency—once a year—that is contrary not only to established norms governing elections in our society generally, but to those governing labor relations elections particularly, for there is no precedent in the annals of labor relations regulation for requiring unions to submit to automatic annual re-certification elections. Movants' Facts ¶53.

What the open window reveals is an Act that is marked by provisions that, far from addressing budgetary concerns, instead impose unusual punitive measures whose only apparent purpose is gratuitously to harass general employee unions and to weaken their ability to represent employees. Under rational basis equal protection jurisprudence, "[t]he absence of precedent for [the enactment] is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer*, 517 U.S. at 633 (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

The Act's provision prohibiting "general" employees, but not "public safety" employees, from paying their union dues by payroll deduction is another example of a punitive measure that makes an unusual and irrational distinction between the two classes of employees. Indeed, under pre-Act law, denial of dues deduction was literally a punishment and was imposed only where a union engaged in an unlawful strike. Wis.

Stat. §111.70(7)(c). Under Act 10, "general employee" unions receive that penalty for simply existing lawfully, whereas "public safety" employee unions do not.

There is quite simply no justification for depriving "general" employees and their unions of the well-established and efficient payroll deduction system as a means of securing dues payments where the same means of securing dues payments is accorded to the favored "public safety" unions.[12] Thus, the Act's distinction between general unions and "public safety" unions in connection with dues deduction appears to have been "drawn for the purpose of disadvantaging the group burdened by the law"—a purpose that is not legitimate under rational basis equal protection jurisprudence. *Romer*, 517 U.S. at 632.

The same is true of the Act's refusal to allow fair-share agreements in the case of "general" employees. Such agreements do not impose costs on the government; and forcing general unions but not "public safety" unions to represent free riders who gain the benefit of union representation without paying their fair share serves, again, only to disadvantage general unions for the sake of doing so, by depriving those unions of resources needed to represent their bargaining unit employees.[13]

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[12] Indeed, as explained in Part II. B *infra*, because union dues can lawfully be used to finance, and are used by plaintiff unions to finance, protected political activities on behalf of union members in furtherance of their right to associate, the Act's disparate treatment of general and "public safety" unions in this regard constitutes a speaker-based and viewpoint-based discrimination that violates the First Amendment as well as the Equal Protection Clause.

[13] As the Supreme Court has explained:

(*continued . . .*)

While the foregoing provisions of the Act – those addressed to re-certification elections, voting requirements, member dues deduction, and fair-share fees – are irrational both because they draw distinctions bearing no rational connection to budgetary objectives and because their underlying substance bears no such connection either, the Act does contain certain provisions that, in their substance, appear to pertain to the budget. But as to these as well, the Act's *distinction* between "public safety" employees and all other employees is irrational and therefore denies equal protection.

The provisions that most directly relate to the budget are the ones requiring increased employee contributions to pension and health benefits. Although Plaintiffs are not challenging the Act in that respect, it is instructive that "public safety" employees are spared from having to shoulder the burden of increased benefit costs. That exemption runs directly counter to the stated purpose of the legislation.

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money . . . . The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged fairly and equitably to represent all employees . . . , union and non-union, within the relevant unit . . . . A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit and it counteracts the incentive that employees might otherwise have to become "free riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221-22 (1977) (citations and internal quotation marks omitted).

According to Milwaukee Mayor Barrett, "the city would miss out on $19 million in savings because police and firefighters are spared the cuts other workers would have to make under the bills," and the lost savings greatly exceed $19 million when other "public safety" units are included in the tally. Movants' Facts ¶34. In this area, where the Act directly addresses budget problems, there is no rational reason why only general employees, and not the favored group of "public safety" employees, should be part of the solution.

This brings us to the Act's provisions eliminating virtually all bargaining rights. And here, again, it is apparent that the Act runs afoul of the Equal Protection Clause. There is no rational basis for subjecting all State and municipal employees, other than the newly-favored subgroup of "public safety" employees, to those provisions. Governor Walker has not even pretended that collective bargaining in non-public-safety contexts presents any budget–related concerns that are not present in the context of "public safety" unions. Rather, the Governor has asserted that "public safety" employees and their unions were exempted from the anti-bargaining provisions of the Act so that those employees would not strike in response to the legislation and thereby endanger the public. *See supra* at page 14. This attempt at an explanation fails the test of rationality, because the law already prohibits strikes by law enforcement and fire fighting personnel. Wis. Stat §111.77 (barring strikes by municipal law enforcement and fire fighting personnel); §§111.84(2)(e), 111.89 (barring strikes by all State employees). The Act cannot be sustained by "ignor[ing] the fact that those employees lack the right

to strike" and by acting "on the assumption that police officers and firefighters will disobey the law." *County of Sonoma v. Superior Court*, 93 Cal.Rptr.3d 39, 51 n. 8 (Cal. Ct. App. 2009). *See also Moreno,* 413 U.S. at 536-37 (where Government attempted to justify certain classifications made in a 1971 amendment to the Food Stamp statute as related to preventing certain types of fraud on the program, court held that the fact that the types of fraud posited were already directly prohibited by the pre-amendment law cast "considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses").

Even less may the Act be sustained on the additional unfounded and insupportable premise that police officers and other protective service employees would decide to strike in violation of law and endanger the public's safety unless they were permitted to keep each of the many forms of preferential treatment that are afforded to them under the Act. It simply defies credibility to assert that "public safety" employees would strike and endanger the public if, for example, Act 10 had applied to them the same re-certification requirements that it applies to "general" employees. As the Seventh Circuit has held, where the link between a classification and objective can only be discovered through "the exercise of strained imagination," the statute in question fails rational basis scrutiny. *Moran*, 734 F.2d at 1247 (citation and internal quotation marks omitted).

While it is irrational enough that Act 10's distinctions are being justified based on the unwarranted premise that employees charged with protecting the public would

imperil the public absent the Act's host of special exemptions, what makes Act 10's constitutional deficiencies even more glaring is that Act 10 is not even faithful to *that* premise. For, as set out above, Act 10 does not exempt from its numerous burdens all classes of employees charged with protecting the public safety; indeed it does not even exempt all police officers and all fire fighters.

Instead, after making reference to a statute of long-standing that designates twenty-two classes of public employees as "protective occupation" employees, Wis. Stat. §40.02(48)(am), Act 10 proceeds to exclude, wholesale, seventeen of those classifications from the new category of "public safety" employees, such as prison guards and probation officers, and proceeds further to gerrymander even the remaining five classifications, including "police" and "fire fighter," §§40.02(48)(am)(9. & 10.), by excluding the Capitol Police and the UW police as well as certain fire fighters from the "public safety" exemption. *See supra* at pages 7-10. This crazy-quilt patchwork of inclusions and exclusions negates the already implausible notion that the reason for according favored "public safety" treatment to the Act's chosen categories of employees was to prevent the specter that employees engaged in occupations essential to protecting the public safety would abandon their duties if they were treated in the same manner that the Act treats "general" employees. For if that specter existed at all, surely it would exist in the case of prison guards, yet they are deemed "general" employees.

The sum of the matter is this: the Act's numerous provisions that accord "general" employees and their unions second-class status by imposing on them the

various burdens just discussed, while exempting "public safety" employees and their unions from those same burdens, simply cannot be explained as provisions rationally aimed at addressing the objective of budgetary flexibility, or, indeed, at addressing any other conceivable legitimate objective. As such, the provisions subjecting general employees to those burdens are unconstitutional under the Equal Protection Clause.[14]

4. Act 10's Classification Scheme Also Violates Equal Protection Because the Only Objective That the Scheme Rationally Does Advance – Favoring Political Allies of the Legislation's Sponsors for its Own Sake – Is Not a "Legitimate" Governmental Objective

While the provisions of the Act according second-class status to "general" employees and first-class status to "public safety" employees can *not* be explained in rational public policy terms as a means to the end of budgetary flexibility and are constitutionally defective on that ground alone, it reinforces that conclusion to recognize that the provisions in question *can* be explained as the means to achieving a raw political end. *Cf. Herman v. Local 1011, United Steelworkers*, 207 F.3d 924, 928 (7th Cir. 2000) ("the means are not adapted to the end, suggesting that the real end may be different"). Indeed, they can *only* be explained in such terms, as the provisions

[14] A recent amendment to Act 10, passed by both houses of the Legislature and awaiting the Governor's signature, would exempt "transit employees" from Act 10's restrictions on collective bargaining where those restrictions would cause the governmental body employing such employees to lose federal funding under the federal Transit Act, 49 U.S.C. §5333(b). *See* Assembly Amend. 1 to Assembly Amend. 1 to Assembly Sub. Amend. 1 to 2011 Assembly Bill 40 §§2406cr and 2407bt *available at* https://docs.legis.wisconsin.gov/2011/related/amendments/ab40/aa1_aa1_asa1_ab40. That exemption well illustrates what constitutes a *rational* exemption, and it stands in stark contrast to the irrational "public safety" exemption challenged here.

constitute nothing more than an effort to harm unions generally while protecting a favored class of unions—a class that did not exist under prior law and that the Act's authors carved out in such a way as to include all of the unions that supported Governor Walker in his recent campaign, including the politically powerful Milwaukee police and fire unions which ran television advertisements on the Governor's behalf. *See supra* at pages 7-10 (explaining how the new "public safety" class was carved out of the pre-existing class of "protective service" workers); *supra* at pages 8-10 & note 8 (identifying the unions and employee associations that endorsed the Governor).

As the Supreme Court observed in *Moreno,* "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 535 (emphasis in original). *See also Craigmiles*, 312 F.3d at 224 (a bare desire to bestow economic benefits on a politically favored group while excluding all others likewise fails to comport with equal protection).

It is true of course that the mere fact that a piece of legislation happens to disfavor a group that campaigned against—or to favor a group that campaigned for—the legislation's proponents is not a *sufficient* ground for invalidating the legislation under the equal protection clause. *See Hearne v. Board of Educ. Of Chicago*, 185 F.3d 770, 775 (7th Cir. 1998). But it is also true that where the legislation draws distinctions that appear to lack any reasonable relation to a legitimate state purpose, the recognition that

the distinctions *do* bear a very close relation to the *illegitimate* state purpose of disfavoring a politically unpopular group, as was true of the legislation in *Moreno* and *Romer,* provides a confirmatory reason for striking down such legislation on equal protection grounds. *See Moreno*, 413 U.S. at 534 (where only purpose of amendment to Food Stamp law appeared to be to disfavor "hippies," law struck down for lack of a rational connection to a legitimate governmental purpose); *Romer*, 517 U.S. at 632 (invalidating under rational basis test a law that "seems inexplicable by anything but animus toward the class it affects").

Act 10 bears these precise hallmarks of an invalid law: the distinctions drawn bear no discernable relation to a legitimate governmental interest and bear a remarkably close relation to the illegitimate end of using legislation as a vehicle to indulge in rank political favoritism.[15] The challenged provisions of Act 10 therefore should be struck down on equal protection grounds.

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[15] The combination of the complete irrationality of the Act's distinctions, as measured by reference to the Act's stated goals, and the cold rationality of those distinctions, as measured by reference to the unstated goal of indulging in political favoritism, speaks for itself and renders extrinsic evidence of legislative purpose unnecessary. Nevertheless, it bears noting that, in a recent letter sent by Republican Assemblyman Chris Kapenga to a constituent who had asked Kapenga to explain the basis for the Act's "public safety" carve-out, Kapenga said that the carve out had been "bought" by political support from the police and fire unions. Hawks Aff. ¶33, Ex. EE. Kapenga also explained that he had unsuccessfully tried to enlist his colleagues to repeal the exception because "municipalities have told him that the provision would restrict their ability to balance their budgets since public-safety salaries make up a large percentage of their expenses." *Id.* Kapenga's letter thus confirms that the special treatment accorded "public safety" unions is not rationally related to advancing the

(*continued . . .*)

B. By Providing the Favored Class of "Public Safety" Unions with Access to Public Employers' Payroll Deduction Systems for Dues Purposes, while Denying Access to General Employee Unions, the Act Discriminates Against Classes of Speakers in Violation of the First Amendment

Union members finance their unions' First Amendment activities—including core political speech activities such as issue advocacy, membership political education, and get-out-the-vote drives—by joining the union, contributing periodic membership dues to the union, and authorizing dues collection through the employer's payroll system. The provisions in the Act that authorize employees in "public safety" unions, but not those in general unions, to finance their unions' activities through payroll deduction therefore implicate not only the Equal Protection rights of the Plaintiffs and their members, but their First Amendment rights as well. The Act's creation of a system of access to payroll deduction that discriminates on the basis of the identity of the speaker under these circumstances constitutes a serious violation of the First Amendment.

1. Union Members' Dues Contributions Are an Expression of Their First Amendment Rights to Freedom of Speech and Association

A union member's payment of voluntary dues to support the activities of his or her union is an exercise of the rights of association and free expression protected by the First Amendment. As the Supreme Court has observed, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably

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stated purpose of the Act but only to advancing the illegitimate interest in political favoritism.

enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). And contributing financial support to an association—whether it is a political organization, labor union, or social welfare league—serves to affiliate a person with the association and "enables like-minded persons to pool their resources in furtherance of common . . . goals." *Buckley v. Valeo*, 424 U.S. 1, 23 (1976).

Indeed, "a union appears to be the archetype of an expressive association," and as such, the expenditure by unions of their members' dues contributions on political and social causes repeatedly has been held to constitute expressive activity within the protection of the First Amendment. *Kidwell v. Transportation Commc'ns Int'l Union*, 946 F.2d 283, 301 (4th Cir. 1991); *Liegmann v. California Teachers Ass'n*, 395 F. Supp. 2d 922, 926 (N.D. Cal. 2005). More specifically, the law has long permitted unions to use membership dues for legislative and issue advocacy,[16] get-out-the-vote efforts,[17] voter guides,[18] candidate endorsements,[19] ballot measure advocacy,[20] and member

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[16] *Buckley*, 424 U.S. at 80; *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Bd.*, 231 Wis. 2d 670, 679, 605 N.W.2d 654, 658-659 (Ct. App. 1999).

[17] 11 C.F.R. §§114.3(c)(4), 114.4(c)(2); Wis. Stat. §11.04.

[18] 11 C.F.R. §114.4(c)(5); *Wisconsin Coalition for Voter Participation*, 231 Wis. 2d at 679, 604 N.W.2d at 658-659.

[19] 11 C.F.R. §114.4(c)(6).

[20] *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 292-94 (1981) (limitation on contributions to committees formed to support or oppose ballot measures held unconstitutional); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978) (limitation on expenditures to support or oppose ballot measure held unconstitutional).

communications advocating the election or defeat of political candidates.[21] More recently, the Supreme Court recognized that the First Amendment affords unions and other associations the right to communicate directly with the public regarding politics by making independent expenditures of dues income that advocate the election or defeat of political candidates. *See Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 911-13 (2010). All of this being so, union members' contribution of dues to support action by their union is "a very significant" form of expression protected by the First Amendment. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981).

2. Act 10's Disparate Treatment of "Public Safety" and General Employee Unions with Respect to Access to Dues Deduction Violates the First Amendment, Because There is No Viewpoint-Neutral Justification for the Discrimination

It is axiomatic that "government regulation may not favor one speaker over another," and that such viewpoint discrimination is "an egregious form of content discrimination" prohibited by the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (citation omitted). *See also Citizens United,* 130 S.Ct. at 898-99 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content.") (citation omitted). Wisconsin Act 10's unequal treatment of general and "public safety"

[21] *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 123-24 (1948); 2 U.S.C. §441b(b)(2)(A); Wis. Stat. §11.29(1).

employees in their respective ability to use payroll contributions to support financially a union of which they are members accomplishes precisely the sort of speaker-based and viewpoint-based discrimination that the First Amendment prohibits. Under the Act, a favored class of "public safety" employees may financially support the union to which they belong, along with its political program, by utilizing automatic payroll deductions for payment of membership dues. Meanwhile, members of the disfavored class of "general" employees are forbidden by the Act from doing the precise same thing to express support for their union and its political program. This discriminatory treatment of one group of employees over another constitutes viewpoint discrimination in violation of the First Amendment.

The government, of course, is not constitutionally required to facilitate or subsidize private organizations' First Amendment activities by allowing payroll deductions. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 129 S.Ct. 1093, 1098 (2009) (upholding Idaho's viewpoint-neutral ban on payroll deductions for "political activities"). And we can assume for purposes of the present motion that Act 10's allowance of payroll deduction to "public safety" unions may be characterized as a "subsidy" and that its scheme of granting access to the payroll deduction system to those unions and denying access to other unions is a scheme of regulation that operates solely through the granting and withholding of "subsidies."[22] For even where the

[22] Regardless whether the provision of payroll deductions is analyzed as a

(*continued . . .*)

government chooses to subsidize the ability of private speakers to communicate their own political and social ideas, the First Amendment still bars the government from discriminating based on the identity of the speaker rather than on the general subject matter of the speech. *See Rosenberger*, 515 U.S. at 834 ("Although acknowledging that the Government is not required to subsidize the exercise of fundamental rights, we reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits.…") (citations omitted). *See also National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (where government makes subsidies available so that private speakers may express their own views, it may not engage in viewpoint discrimination).

Indeed, as the *Ysursa* Court itself recognized, a payroll deduction ban will be vulnerable to challenge on First Amendment grounds if it is not "evenhanded[]," such as a law that allows "deductions for some political activities but not for those of unions." 129 S.Ct. at 1099 n.3 (citing *Finley*, 524 U.S. at 587).

Act 10 is precisely the kind of regulation "favor[ing] one speaker over another" that the First Amendment forbids. *Rosenberger*, 515 U.S. at 828. On its face, the Act creates a speaker-based distinction that allows "public safety" employees to support their union financially through government-provided payroll deductions for

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government subsidy for speech or as a government-created forum of speech, the result is the same. That is because the First Amendment's ban on viewpoint discrimination applies with equal force in either event. *See DeBoer v. Village of Oak Park*, 267 F.3d 558, 567 (7th Cir. 2001).

membership dues, while denying that same benefit to "general" employees and their unions. The unions for both categories of employees are the exclusive representatives for purposes of collective bargaining. As such, they both have the same need for the financial support of their members and the same purpose in seeking access to the government's payroll deduction system. There are no reasonable, viewpoint-neutral grounds for giving public safety employees this favored status. All that the Act accomplishes is the impermissible goal of declaring one set of unions worthy of that support, while the other set is not. *See Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 55 (1983) ("When speakers and subjects are similarly situated, the state may not pick and choose."). The Act's distinction is hence both an instance of facial speaker-based discrimination of the kind condemned in *Rosenberger* and *Citizens United* and "a facade for viewpoint-based discrimination" aimed at suppressing support for the ideas and causes associated with the disfavored class of speakers. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

The lack of any viewpoint-neutral grounds for making the distinction between the favored "public safety" employee unions and the disfavored "general" employee unions is reason enough to condemn the Act's facially speaker-based discrimination as a façade for viewpoint discrimination. And, though no further elaboration is necessary, that conclusion is buttressed by the fact, noted *supra* at pages 8-10, that the Act places *all* of the public sector labor organizations that endorsed Governor Walker in the favored "public safety" classification that qualifies for receipt of the financial support of their

members through payroll deduction, while placing *none* in the disfavored "general" classification that is disabled from receiving such support. Movants' Facts ¶42.

The conclusion that viewpoint discrimination is afoot is further reinforced by the statements of State Senate Majority Leader Scott Fitzgerald, who confirmed the obvious purpose behind the Act in an interview with Fox News on the very day the Act passed the Senate. Fitzgerald stated,

> If we win this battle [over the passage of the Act], and the money is not there under the auspices of the unions, certainly what you're going to find is President Obama is going to have a . . . much more difficult time getting elected and winning the state of Wisconsin.

Movants' Facts ¶47. It is difficult to imagine a more concise confirmation that the Act's aim is *not* to accomplish any viewpoint-neutral policy objectives but is rather to "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Indeed, even if the government were to attempt to justify the Act on viewpoint-neutral grounds, no such justification could succeed. We already have shown that the government cannot fit this case within the holding of *Ysursa*, because in that case the government addressed a general category of entities—political action funds—and flatly barred the use of payroll deduction to finance all such funds; no distinctions were drawn among such funds, let alone were distinctions drawn between unions or other entities sponsoring such funds. Nor can the government find solace in *City of Charlotte,* where the Supreme Court upheld a city's decision to refuse to deduct dues necessary to

join or maintain membership in *any* membership associations, including unions, while permitting deductions to be used for employee contributions to "retirement-insurance programs, savings programs, and certain charitable organizations." 426 U.S. at 287. The Court noted that unions, unlike the other supported activities, were membership associations and concluded that the city's payroll deduction policy was justified by the city's interest in providing deductions for "programs of general interest" to all city employees as opposed to membership or "special interest" groups. *Id.* at 288. Here, the Act's treatment of payroll deductions clearly cannot be sustained on that ground, for the Act accomplishes the precise opposite of the payroll system authorized by the Court in *City of Charlotte* by discriminating *within* the class of unions, or what the Court termed "special interest" groups, and picking and choosing *which* special interest groups it prefers to assist.

In sum, while it is clear that the First Amendment does not require the government to open its payroll system to facilitate its employees' payment of voluntary membership dues to their unions, it is equally clear that, if the government decides to make that option available to employees, it must observe one rule scrupulously: it may not operate its system in a way that favors one speaker over another when there is no difference between the speakers, save for the viewpoints with which they are associated. *See Rosenberger*, 515 U.S. at 828.

III. THE PLAINTIFF UNIONS AND THEIR MEMBERS WILL BE IRREPARABLY HARMED ABSENT AN INJUNCTION, AND THE BALANCE OF EQUITIES IS IN THEIR FAVOR

As is apparent from the foregoing, the merits issues in this case—the constitutionality of Act 10 under the Equal Protection Clause and the First Amendment—turn on questions of law. There should be no genuine dispute as to material issues of fact, and accordingly it is to be expected that the litigation can be resolved on cross-motions for summary judgment. Given the importance of the matter, briefing of summary judgment motions can and should be expedited, and it is therefore to be expected this matter could be fully submitted and ready for a final decision on the merits within a time frame of perhaps ten to fourteen weeks.

That being the case, the relevant issue with regard to the balance of equities is whether the irreparable injury suffered by the unions and their members, should Act 10 be allowed to take effect during this period of weeks until the Court can rule on the merits, outweighs any harm to the State from maintaining the *status quo* during that brief period of time.

For the reasons we set forth in more detail below, that question virtually answers itself. If, on one hand, the *status quo* is not maintained and the law takes effect:

- the immediate cessation of dues and fair-share fee deductions would cause the plaintiff unions to suffer severe to catastrophic losses in revenue, preventing them from properly representing their members—and, in some cases, from even meeting their mortgages and other basic operating expenses—during the interim period when they attempted to arrange for alternate means of dues collection;
- the same group of unions would face imminent loss of their status as bargaining representatives, because they would be immediately subject to the first of the

Act's annual "re-certification" elections, which will be run under the Act's onerous 51 percent-of-all-*members* (not all *voters*) rule that requires the affected unions to carry out massive and costly get-out-the-vote campaigns in order to prevail; and

- union members would be subject to unilateral changes in their terms and conditions of employment, including the loss of protection against unjust dismissal or discipline, the loss of protection against having their work outsourced, the loss of fair procedures governing the allocation of overtime work, shift work, and weekend work, and a host of other similar workplace rights.

If, after all of this, the law is later struck down as unconstitutional, this damage would be irreparable.

On the other hand, if implementation of the challenged provisions of Act 10 is temporarily enjoined for a short period until the case can be decided on the merits, the "harm" to the State would be relatively minimal: the cost savings generated by the increased health and pension contribution requirements would be fully preserved, as those requirements are not being challenged; and the only "harm" to the State would be the maintenance in effect, for perhaps two or three additional months after the Act would otherwise have taken effect, of the other terms and conditions of employment that previously were freely agreed to by public employers or were determined by neutral arbitrators to be fair and reasonable. In short, the balance of equities clearly tips in favor of maintaining the *status quo* by enjoining implementation of the challenged provisions of Act 10 during the period between now and the time when the constitutional questions presented can be resolved on the merits.

A. The Unions and Their Members Will Be Irreparably Harmed by the Immediate Consequences of a Precipitous and Severe Loss of Income from Dues and Agency Fees, as Well as by the Added Expense of Setting Up an Alternative Dues Collection System

Under the terms of Act 10, payroll deduction of union dues and fair-share fees—the revenues upon which unions depend to represent and advocate on behalf of their bargaining unit employees (as well as to pay their mortgages, rents, salaries and other operating costs)—will no longer be permitted. Movants' Facts ¶75. The consequence of these losses will include reductions in staff and a concomitant reduction in the basic services the Plaintiffs will be able to provide to their members, all harms that cannot be undone should the Act subsequently be declared unconstitutional. Movants' Facts ¶¶68, 75-79.

The automatic payroll deduction of dues is a standard feature of nearly all collective bargaining agreements. Movants' Facts ¶67. Under the Act, dues deduction will immediately cease in all bargaining units with open contracts, causing severe harm to every plaintiff and particularly catastrophic harm to plaintiff AFSCME District Council 24, nearly 90 percent of whose approximately 24,000 members are working under open contracts with the State of Wisconsin. Movants' Facts ¶¶5, 7, 9, 11, 13, 15, 66, 68. The loss of dues deductions will have at least three consequences that will irreparably injure the plaintiff unions and their members.

The first will be the precipitous and drastic loss in income that the unions will suffer for the period of months that it will take for them to set up and implement an alternative dues collection system, such as securing the consent of members for

electronic funds transfers through periodic credit card charges. Movants' Facts ¶¶68-69, 72. The sudden interruption of the unions' income streams would in itself irreparably harm the unions and their members, as it will force the Plaintiffs either to lay off staff who service their members or to reduce their pay sharply and thereby risk triggering resignations or retirements. Movants' Facts ¶¶75-76. That, in turn, will severely impair the unions' ability to represent their members adequately and otherwise function in the period immediately following the effective date of the Act. Movants' Facts ¶75. Many laid-off union staff representatives are apt to find other employment and their years of valuable experience will be lost permanently, not just in the immediate period following implementation of the Act. Movants' Facts ¶77.

Compounding the harm is that the period immediately following implementation of the Act promises to be a particularly critical period for the unions given that they will be required to prepare for the Act's unprecedented "re-certification" elections and to fight for their very survival in those elections. *See infra* Part III.B. Movants' Facts ¶¶48-52.

Moreover, experience demonstrates that there likely will be significant and ongoing net income losses even once an alternative dues collection system is in place, likely amounting to 25 percent or more of the union's net dues income. Movants' Facts ¶74. Prudent preparations for that long-term drop-off must take place immediately to avoid bankruptcy, as Plaintiffs anticipate not being able to pay the mortgages on their buildings or to meet other operating expenses. Movants' Facts ¶78.

The reductions in the unions' dues income would, by causing reductions in force and depletion of assets, weaken the unions' ability to provide basic representational services and thereby cause unions to experience an inevitable loss of goodwill that could not be repaired immediately—if at all—upon reestablishment of collective bargaining rights. Movants' Facts ¶79. As the Seventh Circuit has explained in a recent and instructive case involving injuries to a nonprofit organization caused by a reduction in its jurisdiction, "[t]hese harms" from "the potential loss of property, employees, or [their] entire business, as well as damage to [the unions'] goodwill . . . are both real and irreparable." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A., Inc.,* 549 F.3d 1079, 1090 (7th Cir. 2008); *see generally id.* at 1088-90.

The dues and fee revenue losses to the unions will not only imperil the unions' ability to provide services to their members and their ability to maintain their goodwill, they will also severely limit the unions' ability to engage in First Amendment protected advocacy on political and social issues. Movants' Facts ¶¶80-82. This will result in a partial silencing of "general employee" unions that, as noted *supra* at page 37, Senate Majority Leader Fitzgerald publicly stated was, from his point of view, an immediate and salient benefit of the Act. Movants' Facts ¶47. WEAC, for example, estimates that it will lose $375,000 annually in the portion of its dues contributions it sets aside exclusively for certain types of political action, as well as $5.4 million in general dues income (which it can draw upon for other types of First Amendment expression); that these income losses will diminish the union's ability to make independent expenditures

for political candidates and will require it to lay off four lobbyists from its staff; and that the result will be a serious impairment of its ability to represent the interests of its members before local, state, and federal legislative and regulatory bodies. Movants' Facts ¶¶81-82.

This diminished ability to exercise First Amendment freedoms is itself irreparable harm, even without an accompanying demonstration of economic harm such as the demonstration Plaintiffs have made here. *See Christian Legal Soc'y v. Walker,* 453 F.3d 853, 867 (7th Cir. 2006) ("violations of the First Amendment right are presumed to constitute irreparable injury") (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)); *see also Lac Du Flambeau Indians v. Stop Treaty Abuse-Wis.,* 759 F. Supp. 339 (W.D. Wis. 1991) ("When deprivation of a constitutional right is shown, most courts require no further showing of irreparable harm before issuing a preliminary injunction.") (citing *Goldie's Bookstore Inc. v. Superior Court of California*, 739 F.2d 466, 472 (9th Cir. 1984)); *Winnig v. Sellen*, No. 10-cv-362-wmc, 2010 WL 4116977, at *1 (W.D. Wis. Oct. 19, 2010) (same).

A second irreparable consequence of the loss of payroll dues deduction will be the cost of developing and implementing an alternative dues collection system. Movants' Facts ¶¶69-74. For example, plaintiff AFSCME District Council 40 estimates that collecting dues through pre-authorized credit card payments would initially cost it approximately $4,100 per month in credit card fees, for the 4,100 members for whom payroll deduction would immediately be cut off under the Act, with this expense increasing as more contracts expire and payroll deductions are terminated. *See*

Declaration of Richard Badger ¶14.a.iii. The other unions would incur similar costs. *See* Burkhalter Decl. ¶14 (dues payment through electronic funds transfer program would require two additional full-time employees and $50,000 in bank fees annually); Declaration of Gary Frank ¶¶19-22 (discussing costs of organizing campaign to secure EFT authorizations, as well as transaction fees for such a system); Declaration of Dian Palmer ¶28.

These are deadweight losses that the unions will not be able to recover should the Act subsequently be held unconstitutional and automatic dues deduction from payrolls be restored, because the State enjoys Eleventh Amendment immunity from damages. *See Edelman v. Jordan*, 415 U.S. 651, 665 (1974).

In addition to the loss of dues income from union members and the costs of developing an alternative collection system, if the Act is not enjoined, the unions will immediately lose *all* of the income they currently receive from nonmember fair-share fee payers (also referred to as "agency fee payers") in those bargaining units with open contracts, and this loss of income could never be recouped even if the Act were subsequently struck down as unconstitutional. Movants' Facts ¶70. As noted, agency fee payers are members of the bargaining units represented by the union who have elected not to become union members, but who, under the terms of current law and collective bargaining agreements, are required as a condition of employment to pay a "fair-share" fee to help cover the unions' costs of collective bargaining and related

activities that benefit union members and nonmembers alike. *See*, *e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 225 (1977).

While far smaller than their dues income from members, the unions nonetheless receive a significant amount of revenue from agency fee payments, which will be cut off in all bargaining units with open contracts under the Act. For example, AFT-Wisconsin anticipates a loss of $574,000 annually in agency fee payments. Movants' Facts ¶68. This immediate loss of agency fee revenue, during the time in which the prohibition of Act 10 is in effect, could never be recovered and thus constitutes irreparable injury to the unions. While the deduction of agency fees could resume prospectively if the Act were held unconstitutional, there would be no way for the unions to recover from the nonmembers the agency fees that were not withheld during the time the Act was in effect. Movants' Facts ¶70.

B. The Unions and Their Members Will Be Irreparably Harmed by the Act's Costly and Unprecedented Provision That Automatically Decertifies the Unions Unless They Prevail in Annual "Re-Certification" Elections

Under the terms of Act 10 the Plaintiff unions and their local affiliates were required, in order to maintain their existence as collective bargaining representatives, to submit to immediate re-certification elections in all bargaining units with expired contracts, and, if re-certified, to submit to annual re-certification elections perennially thereafter.

The first of those elections originally were originally to take place in April 2011,[23] but the state-court injunction precluded elections at that time, and now, under a recent amendment to Act 10 that has passed both houses of the Wisconsin legislature, the recertification elections will take place in October 2011. Assembly Amend. 1 to Assembly Amend. 1 to Assembly Sub. Amend. 1 to 2011 Assembly Bill 40 §§3570f and 3570h *available at* https://docs.legis.wisconsin.gov/2011/related/amendments/ab40/aa1_aa1_asa1_ab40.

For WEAC, implementation of the Act would mean immediate re-certification elections in some 354 bargaining units with approximately 34,700 members. Movants' Facts ¶5. WEAC would therefore have to begin to campaign *immediately* in order to contest those elections and maintain its status as bargaining representatives. The same is true of the three AFSCME-affiliated District Council Plaintiffs, who will be subject to imminent elections among tens of thousands of their represented employees, as well as of Plaintiffs AFT-W and SEIU Healthcare WI. Movants' Facts ¶¶7, 9, 11, 13, 15.

The Act's re-certification election provision will result in immediate and irreparable harm to these unions, for at least the following reasons.

[23] Sections 9132(1)(b) and 9155(1)(b) of Act 10, enacted on March 11, 2011, required that in all bargaining units whose contracts have expired, *i.e.*, which have no current collective bargaining agreement in place, "the [first] vote shall be held in April 2011." *See* Movants' Facts ¶¶5, 7, 9, 11, 13, 15.

First, in order to maintain their very existence as collective bargaining representatives in those bargaining units in which imminent re-certification elections are required, the unions would immediately have to begin incurring enormous expenses that they would never be able to recoup if the Act were subsequently invalidated, in mounting campaigns to mobilize their members, get out the vote, and attempt to prevail in these elections. Movants' Facts ¶¶48-52.

The amount of time, effort and expense unions will have to expend to retain their roles as exclusive bargaining representatives is particularly extraordinary because of the Act's draconian requirement that a union obtain not just a majority of the votes cast, but rather the votes of 51 percent of the members of the entire bargaining unit, in order to maintain its existence as collective bargaining representative. In other words, every member of the bargaining unit who does not make it to the polling place or cast a ballot, for whatever reason, is counted as a vote *against* continuing the union's certification. Under these circumstances, it is obvious that no matter how strong the union's support among the members of the bargaining unit, it could not expect to prevail in the election without devoting significant resources to ensure that nearly all of its supporters actually got to the polls and voted. *See supra* at page 16 (noting that, if "only" 70 percent of the bargaining unit participates in the election, an overwhelming 70 percent vote for continued union representation would result in decertification).

Accordingly, unions would be required to devote very considerable resources to electoral campaigns on very short notice. *See* Frank Decl. ¶¶9-15; Badger Decl. ¶14.c;

Palmer Decl. ¶¶20-22; Burkhalter Decl. ¶29; Movants' Facts ¶¶48-52. The expense of this effort would only be magnified by the inordinate number of such elections that would have to be conducted within a compressed time period, outstripping the unions' in-house resources and requiring massive expenditures on outside personnel. Movants' Facts ¶52.

These expenditures, we stress, would have to be made *immediately*, and well before the Court could adjudicate the merits of this case even on an expedited schedule. And, given the State's Eleventh Amendment immunity to suits for damages, *see Edelman, supra*, these expenditures could never be recouped even if the Court subsequently were to strike down the Act as unconstitutional.[24] Thus, the unions could be forced to exhaust their treasuries on unconstitutional elections and never recover that loss. This is the very definition of irreparable injury.

The only alternative to undertaking this Herculean expenditure of the union's resources would be accepting without a contest the termination of the union's existence

[24] Adding insult to injury, a recent amendment to Act 10, passed by both houses of the Wisconsin legislature, would tax unions, and hence their members, with a fee in order to finance the WERC's cost of running the elections. Assembly Amend. 1 to Assembly Amend. 1 to Assembly Sub. Amend. 1 to 2011 Assembly Bill 40 §§2408ch and 2410oe *available at* https://docs.legis.wisconsin.gov/2011/related/amendments/ab40/aa1_aa1_asa1_ab40. This would require union members to pay for elections that they have not sought, despite their right to do so under existing law by submitting a petition signed by 30% of the unit's members. The taxed fees, moreover, will not be recoverable from the State if the Act is struck down after the fee is assessed, because of the State's Eleventh Amendment immunity under *Edelman.*

as collective bargaining representative. And the harm caused by that course of action will be irreparable for the same reasons that losing an unconstitutional re-certification election after contesting it would be irreparable—reasons we set forth *infra*.

Second, because of the onerous 51 percent-of-membership terms under which re-certification elections must be conducted and because of the prospect that WERC will cluster multiple elections together so as to spread unions' campaign resources impossibly thin, it is likely that the unions will fail to secure the necessary votes in some of the bargaining units they currently represent, and that the unions thus will be decertified as collective bargaining representative in some units before the Court issues a final ruling on the merits.

Beyond the irreparable injury that will be suffered by the union's members upon being deprived of union representation and the right to bargain collectively with their employer (which we discuss at greater length in the next section), the union's decertification in a particular bargaining unit will result in irreparable harm to the union that cannot be fully remedied by a subsequent order of the Court holding the re-certification election invalid. A union that had failed to prevail in an election would be stigmatized by the "no" vote and could be weakened in the eyes of the members of its bargaining unit—and in the eyes of the employer—as a bargaining agent, in a way that could not be fully undone by a subsequent ruling overturning the election. As Justice Scalia has observed in a related context, "Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic

stability requires." *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in order granting stay). Decertifying a union through an immediate election held under the 51 percent rule mandated by Act 10, even if subsequently overturned, would harm the union irreparably by "casting a cloud upon . . . the legitimacy of" its position as bargaining representative. *Id.*

In this regard, the "irreparable injury" issue is similar to that addressed by the Seventh Circuit in *Girl Scouts, supra,* 549 F.3d 1079. In that case, the plaintiff Girl Scouts council's parent body had eliminated a large portion of the council's jurisdiction. Reversing the district court, the Seventh Circuit held that this action should have been preliminarily enjoined, in part because of its irreversible impact on the council's "goodwill": "[R]emoving [the council's] jurisdiction . . . poses a serious risk to the organization's significant goodwill. Manitou, like all Girl Scout councils, relies heavily on goodwill to advance its mission. For fifty-eight years, Manitou has developed relationships within its community that are vital to its continued existence." 549 F.3d at 1089 (citations omitted). The same is true here. As in *Girl Scouts*, members of the unions' bargaining units that are decertified "may become disillusioned … [and] believe that [the unions] ha[ve] done something wrong that warrants [their decertification]." *Id.*

And quite apart from casting doubts on the union's legitimacy and diminishing its support among the bargaining unit, the decertification cannot simply be undone even if it subsequently is ruled illegal and of no effect. A union that has been decertified pursuant to an Act 10 "re-certification" election will not be able simply to reconstitute

its bargaining unit and resume bargaining where it left off, even if the union is still in existence. If it has had to lay off professional staff in order to remain solvent and viable, it will likely not be able to bring them all back. As the Seventh Circuit put it in *Girl Scouts*:

> Simply returning the territory to Manitou following trial will not account for the incalculable losses Manitou risks in the interim – namely, the potential loss of property, employees, or its entire business, as well as damage to its goodwill. These harms are both real and irreparable.

Id. at 1090.

And, for just these reasons, the Seventh Circuit has repeatedly recognized, in cases decided under federal labor law, that when employees are unlawfully deprived of union representation, even temporarily, the loss of collective bargaining rights is irreparable. *See NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1572-73 (7th Cir. 1996) ("The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable."); *see also Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 501-02 (7th Cir. 2008); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 297-300 (7th Cir. 2001). The same is true here.

Thus, the requirement that the unions submit to immediate re-certification elections in their bargaining units whose contracts have expired will result in severe and irreparable injury.

C. The Unions and Their Members Will Be Irreparably Harmed by the Immediate Loss of Bargaining Rights and Contractual Protections

Should Act 10 be implemented, the plaintiff unions would immediately be stripped of their rights under existing Wisconsin law to bargain over the terms and conditions of employment (other than "total base wages") applicable to employees in those bargaining units that currently have open contracts (or whose contracts will expire while the terms of the Act are in effect). In and of itself, that loss would constitute irreparable injury for the unions and the employees they represent during the time in which they were precluded from engaging in collective bargaining. If subsequently the Act were struck down as unconstitutional, it would be impossible for the unions and their members to recover whatever benefits or noneconomic protections would have been provided under a collective bargaining agreement that would otherwise have been negotiated in the interim.

Even more significant, however, is a related consideration. Under current law, employers in the bargaining units in question—those whose contracts have expired—are required to maintain in effect those terms and conditions set forth in the expired agreement that are deemed mandatory subjects of bargaining. *Dodgeland Sch. Dist.*, Dec. No. 31098-C (WERC Feb. 14, 2007). Movants' Facts ¶54. But if the Act takes effect, the public employers will be free, entirely at their own discretion, to disregard and impose unilateral changes with respect to any of these terms in units of "general" employees.[25]

[25] "Public safety" employees will remain protected from such unilateral changes.

Movants' Facts ¶¶55, 57. Indeed, some employers have already announced their intention, as soon as the Act takes effect, to begin treating members of "general employee" union bargaining units as non-represented. Movant's Facts ¶58.

The terms and conditions of employment that will be subject to immediate unilateral change at the whim of the employer, if the Act takes effect, involve numerous working conditions regulated by existing contracts, examples of which are exhibits to the declarations accompanying Plaintiffs' motion. Movant's Facts ¶¶55, 59-60. For example, if the Act takes effect, most municipal employees under open contracts will immediately be subject to termination without just cause and will be treated as at-will employees.[26] Movant's Facts ¶57. And all public employees under open contracts also will immediately lose their rights to be protected from job loss because of subcontracting; to have their seniority considered in such matters as layoffs, overtime, shift and weekend assignments; to accumulate unused sick leave; to be accorded reasonable break periods during the work day; to have disputes resolved through arbitration; and to have union representation in connection with disciplinary matters. Movants' Facts ¶¶55, 57, 60-61.

[26] Although Act 10 requires municipalities to enact ordinances providing civil service protections within four months of its effective date, *see* Act §170, most municipal employees in the interim will have *no* protection against arbitrary or unfair employer action, and even after four months the minimum protections in these prospective civil service ordinances will be inferior to collectively bargained protections. For example, under these civil service procedures, grievances filed by disciplined employees may be decided by the same employer that imposed the discipline, unlike collective bargaining agreements, which provide for binding arbitration by neutral arbitrators.

Many unilateral employer decisions in these and other areas, made during the time that Act 10 is in effect, will be impossible to reverse or otherwise remedy upon a subsequent ruling by this Court that the Act was unconstitutional. For example, decisions made unilaterally by the employer, in contravention of the previously existing contractual terms, to terminate or lay off employees, reassign employees to different job duties or to different shifts, demote employees, deny promotions, eliminate and contract out jobs, or any of a myriad of other large and small job decisions, will either be irreversible or will require considerable "unscrambling the egg" in the form of numerous workplace grievances once collective bargaining rights were restored. And if employers resisted restoring the *status quo* on the ground that their actions were permissible when taken, years of arbitration and litigation would be assured, all at considerable expense. In addition, if newly-hired or reassigned employees were given the jobs of those who were terminated or transferred, restoring the latter employees to the positions they would have had under the contract would be extraordinarily difficult and disruptive of the lives and jobs of the former employees as well. Movants' Facts ¶61. The same is true on an even larger scale in the case of employer decisions, during the time Act 10 is in effect, to eliminate bargaining unit jobs and contract them out. Movants' Facts ¶55.

In short, the loss of collective bargaining rights, even for the relatively short period of time that will be required for the Court to render a final ruling on the

constitutionality of Act 10, will result in severe and irreparable injury to the unions and to the public employees they represent.

D. This Irreparable Harm to the Plaintiff Unions and Their Members Far Outweighs Any Harm to the State That Would Result from an Injunction

Against these severe and irreparable harms to the unions and their members, any potential harm to the State that might arise from maintaining the *status quo* would be relatively insignificant.

As noted above, the relevant question is whether, during the roughly ten to fourteen week period that would likely be necessary for this case to be submitted for a final merits decision, the harm to the unions and their members from allowing the Act to take effect (if it subsequently is struck down as unconstitutional) would outweigh the potential harm to the State from maintaining the *status quo* during this period of time (on the assumption that the Act is then upheld and allowed to take effect).

The potential irreparable harm to the unions and their members is, as we have seen above, enormous. The most that could be placed on the other side of the scales, by contrast, would be the maintenance in effect, for an additional period of perhaps two or three months, of the existing terms and conditions of employment in those bargaining units with expired collective bargaining agreements, as well as the postponement of re-certification elections in those bargaining units for the same period of time. Because the terms and conditions of employment that would remain in effect are those to which the public employers previously have agreed—or in some cases those an independent

arbitrator has determined to be fair and reasonable—it would be difficult for the State to argue seriously that requiring the public employers to honor these terms and conditions for another two or three months would constitute any significant harm. And it is impossible to imagine how the State could contend that a modest delay in conducting the first wave of re-certification elections could result in any cognizable injury of such magnitude as to outweigh the concrete and irreparable injuries that would be suffered by the unions and their members in the absence of an injunction.

It bears emphasis in this regard that Plaintiffs do not seek to enjoin—either temporarily or permanently—those terms of Act 10 that would indeed be of immediate financial significance for the public employers, *i.e.*, those involving employee contributions to health insurance and pension funds. What Plaintiffs do ask the Court to enjoin are those provisions of Act 10 that purport to reorder Wisconsin's decades-old rules governing the collective representation of public employees. The delay of, at most, a three to four months in implementation of this fundamental restructuring of employment relations in the public sector, while the Court determines the constitutionality of these changes, does not weigh so heavily in the balance as to require that the plaintiff unions and their members suffer the severe and irreparable injury that would surely result from immediate implementation of the Act's provisions.

E. The Public Interest Favors Preliminary Relief

Where, as here, the balance of equities weighs in favor of preliminary relief, the court must also consider "whether the public interest will be harmed sufficiently that

the injunction should be denied." *River of Life Kingdom Ministries,* 585 F.3d at 369. Here, the public interest would not be harmed were preliminary relief to be granted. To the contrary, the public interest lies in avoiding the massive deadweight losses, burdens, and disruptions that would occur if Act 10 were permitted to take immediate effect only to be struck down after it was too late to undo the bulk of the harm. Whatever one's view of the provisions in Act 10 that strip away collective bargaining rights of general employees and require automatic re-certification elections for general employee unions, there is no colorable argument that any serious detriment to the public interest would be caused by a brief delay in implementing those provisions while laws that have been in place for decades in Wisconsin—and that Act 10 itself leaves undisturbed as to "public safety" employees—continue to govern public sector labor relations as to all classes of Wisconsin public employees.

CONCLUSION

For the foregoing reasons, the Court should enter a TRO or preliminary injunction against enforcement of the Act 10 provisions that deprive non-"public safety" employees and their unions of the protections accorded their "public safety" counterparts in the areas of the right to bargain over terms and conditions of employment; the permissibility of agreements on payroll dues deduction and fair-share fees; and the circumstances under which an exclusive bargaining representative may lose its certification, including the rules governing "re-certification" elections.

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