STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 1

Wisconsin Law Enforcement Association, et al.,
Plaintiffs,

DECISION AND ORDER ON DISPOSITIVE MOTIONS

vs. Case No. 12CV4474

Scott Walker, et al.,
Defendants.

INTRODUCTION

This case is one of several challenging the constitutionality of 2011 Wisconsin Act 10 and 2011 Wisconsin Act 32 (collectively referred to herein as Act 10).

Act 10 significantly changed Wisconsin's public sector labor law. It created two classes of public employees. The Act prohibited so-called "general employees" from collectively bargaining on issues other than base wages, and even established limitations on that. It prohibited payroll deductions for their union dues. It prohibited agreements requiring non-union members to make "fair-share" contributions to unions. It imposed demanding union recertification requirements. The Act exempted so-called "public safety employees" from these changes; these employees retained the same rights they had before Act 10.

One of the plaintiffs in this case, Wisconsin Law Enforcement Association (WLEA) was uniquely affected by the legislation because two of the three locals comprising WLEA were classified as units of "general employees" while one was given favored "public safety" status. Thus, Act 10 forced the reorganization of WLEA.

WLEA brought this action on November 3, 2012. Also joined as plaintiffs are three individual members of WLEA who are now classified as general employees subject to Act 10's restrictions. The complaint names the governor and three Wisconsin Employment Relations Commission members as defendants, all in their official capacities.

Plaintiffs seek a declaration that Act 10 violates their rights under the Wisconsin Constitution to freely speak and associate (Article I, Sections 3 and 4) and to equal protection (Article I, Section 1). Defendants deny that the Act is unconstitutional in any respect.

This is not the first case to challenge the constitutionality of Act 10. The challenges have not fared well in the federal courts. In Wis. Educ. Ass'n Council v. Walker, 705 F.3d 640 (7th Cir. 2013),[1] the court held that Act 10's

[1] All the challenges to Act 10 name Governor Walker as a defendant. For simplicity, I will refer to this federal court case as "Walker,"

limitations on collective bargaining, prohibition of payroll deduction of dues, and recertification requirements did not violate the Equal Protection Clause of the U.S. Constitution, and that the payroll deduction prohibition did not violate the First Amendment.[2] One judge dissented as to the First Amendment holding, but the dissenting judge joined the majority in upholding the Act against the other challenges.

The Seventh Circuit Walker case was an appeal from the decision of the U.S. District Court for the Western District of Wisconsin, 824 F. Supp. 2d 856, which invalidated Act 10's recertification provision under the Equal Protection Clause[3] and invalidated the payroll deduction provision under the First Amendment. The district court upheld the limitation on collective bargaining against an equal protection challenge.

In Laborers Local 236 AFL-CIO, et al. v. Scott Walker, et al., no. 11-cv-462 (W.D. Wis., September 11, 2013) (hereinafter "Laborers") the court rejected the plaintiffs' arguments that Act

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and may use other shorthand designations for the other cases.

[2] While the prohibition on fair-share contributions was not articulated as a separate constitutional challenge, the court noted it in its description of the limits Act 10 imposed on collective bargaining. 705 F. 3d at 643.

[3] The court noted that the recertification provision "would typically pass the . . . low bar of rational basis review, but for" the defendant's failure to proffer an explanation. Id. at 869. Similarly, the defendants offered no justification for the ban on dues deductions. Id. at 875. On appeal, the defendants remedied these omissions, and the court sustained Act 10 against the challenges.

10's restrictions on collective bargaining impermissibly burdened municipal employees' right to associate under the U.S. Constitution, and that Act 10 violated the Equal Protection Clause by treating individuals represented by a collective bargaining unit differently from unrepresented individuals.

However, in state court, the challengers have thus far prevailed. Madison Teachers, Inc., et al. v. Scott Walker, et al., (Dane County Circuit Court no. 2011CV3774). That case was brought by municipal employees who argued that the statutory municipal counterparts to the provisions at issue here were unconstitutional. The court concluded that Act 10 violated the plaintiffs' rights to free speech and association and equal protection guaranteed by the Wisconsin and U.S. Constitutions.[4] The court also held that the legislation violated Wisconsin's Home Rule Amendment and impaired the right to contract. The circuit court decided the case before the Seventh Circuit Court's Walker decision. The state court of appeals certified the case to the Wisconsin Supreme Court, appeal no. 2012 AP 2067, and on June 14, 2013, the supreme court accepted certification. The case is now pending there and will be argued next month.

The procedural background in our case is simple. I rejected

[4] Similar to the Walker matter before the district court, the defendants offered no evidence or argument justifying Act 10; instead they argued only that the Act did not infringe upon the plaintiffs' constitutional rights. Slip op. at 16.

two motions brought by defendants seeking a stay pending appellate resolution of the Madison Teachers case. I set a briefing schedule that, with some stipulated adjustments, concluded the briefing on dispositive motions by September 25.

We took a short detour recently to address one of the issues raised by the defendants. Defendants asserted that plaintiffs' failure to serve the complaint on the Joint Committee on Legislative Organization (JCLO) deprived the court of subject matter jurisdiction. Following briefing, I rejected the defendants' argument in a written decision dated August 23, 2013. I did give the committee an opportunity to intervene if it wished, and it did not avail itself of that.

Now pending are reciprocal dispositive motions. Plaintiffs move for summary judgment. Defendants move for judgment on the pleadings. The approach to resolving such dispositive motions is well-established and will not be repeated. There are no material facts in dispute. The motions present solely issues of law as to whether Act 10 violates the plaintiffs' rights to free association and equal protection guaranteed by the Wisconsin Constitution.

FACTS

The following facts are taken from the complaint and are not

in dispute:

1) The plaintiff WLEA is a labor organization as defined in Wisconsin's State Employment Labor Relations Act (SELRA), sec. 111.81, et seq., Stats. See sec. 111.81(12). It is the exclusive bargaining agent for law enforcement under sec. 111.825(1)(cm), and for the public safety employees under sec. 111.825(1)(g). Members of WLEA are state employees. Complaint ¶¶ 8,23

2) The named individual plaintiffs are members of WLEA. Two are protective occupation participants under sec. 40.02(48)(am)9, Stats. One of those is a Capitol Police officer, and the other a University of Wisconsin System–Milwaukee Police officer. The third is an employee of the Department of Transportation. All three are general employees under Act 10. ¶¶ 10-12

3) The named defendants are the governor, the Wisconsin Employment Relations Commission (WERC), and its commissioners. The individuals are sued in their official capacities. The defendants are responsible for administering SELRA and enforcing the provisions of Act 10. ¶¶ 13-15

4) In the 2010 governor election, WLEA did not endorse a

candidate. The Wisconsin Troopers Association (WTA), a lobbying organization of current and retired members of the State Patrol, including some public safety WLEA members, endorsed Scott Walker. ¶ 16

5) On March 11, 2011, Governor Walker signed into law the bill now known as Act 10, which went into effect June 29, 2011. Act 10 significantly changed SELRA. ¶¶ 18-20

6) Two days before Governor Walker signed Act 10, then-Senate Majority Leader Scott Fitzgerald, a Republican, "publicly stated that the changes made to the collective bargaining laws were about eliminating unions so that 'the money is not there' for the labor movement and to make it 'much more difficult' for President Obama to win Wisconsin's electoral votes." ¶ 17

7) Three days before the effective date of Act 10, Governor Walker signed the biennial budget bill, Act 32, which made further changes to SELRA. ¶¶ 21-22

8) Prior to Act 10, WLEA was organized into three locals. Local 1 comprised certain employees of the Wisconsin Department of Transportation (DOT), Division of the State Patrol, including state troopers and motor vehicle inspectors, as well as police communication operators.

Local 2 comprised University of Wisconsin Campus Police Departments and the Department of Administration Capitol Police Department who were employed as police communication operators, detectives, and police officers. Local 3 comprised certain field services employees of the DOT. ¶ 23

9) As a result of Act 10, WLEA had to be reorganized into two parts: state troopers and inspectors (public safety), and the remaining employees (law enforcement). ¶¶ 24-25

10) The only state employees exempted from the Act 10 changes were the state troopers and inspectors. They were represented for lobbying purposes by the Wisconsin Troopers Association, which endorsed Scott Walker in the 2010 election. The other law enforcement employees represented by WLEA, which did not endorse a candidate in the 2010 election, were placed in the general employee category, and were subject to the Act 10 changes. ¶¶ 26,27

11) The Legislative Reference Bureau's drafting records for Act 10 contains a note entitled, "Alternative Approach to Collective Bargaining," which states in part: "Carve out a new bargaining unit from WLEA for the State Troopers." ¶ 28

12) WLEA's last collective bargaining agreement expired in

July, 2009. ¶ 29

13) The challenged aspects of Act 10 are described in paragraphs 33-55 of the complaint. There are four[5] changes that are the subject of this case:

(a) Prohibited subjects of bargaining.

Sec. 111.91(3) Stats., prohibits the state from engaging in collective bargaining with respect to "any factor or condition of employment" except "total base wages." The prohibition includes "such matters as job security, hours of work, workplace health and safety, grievance resolution procedures, and work assignments." ¶ 33. Subsection (b) of sec. 111.93(3) specifically prohibits the state from engaging in collective bargaining on a proposal to increase base wages in an amount exceeding the consumer price index unless approved by a statewide referendum. ¶ 34

(b) Payroll deduction for dues.

Sec. 111.845, Stats., prohibits the state from collecting union membership dues from a general

[5] The complaint alleges a fifth: that collective bargaining agreements for general employees must coincide with the fiscal year only, while public safety agreements may coincide with either the fiscal year or biennium. Sec. 111.92(3)(a), Stats. Before Act 10, all agreements had to coincide with the state's biennial budget. ¶¶ 54-55 In their motion, plaintiffs do not develop an argument that this aspect of the law is unconstitutional, so I will not address it.

employee's earnings. ¶ 41

(c) Fair-share agreements.

A fair-share agreement is one that requires those choosing not to join a union to pay their "fair share" for the benefits received from the union's representation. The purpose is to prevent "free riders." ¶ 45. Under sec. 111.85, Stats., only public safety members of WLEA are permitted to request a fair-share referendum; unions without fair-share approval prior to July 1, 2013 are foreclosed from fair-share status. That includes the WLEA law enforcement employees. Under sec. 111.82, general law enforcement employees have "the right to refrain from paying dues while remaining a member of a collective bargaining unit." ¶ 47

(d) Annual recertification elections.

Sec. 111.83, Stats., requires annual certification elections for unions of general employees, and requires a fee from the union for each election. ¶51 In a certification election, if a union receives less than 51% support from all general employees eligible to vote (not just ballots cast) the union is decertified. ¶52 If a union is decertified, the affected general employees may not be included in a similar unit and may

not elect a new collective bargaining agent for at least twelve months. ¶ 53

14) Each of the challenged provisions applies only to general employees, not public safety employees. Each represents a significant change in the rights of those employees under SELRA. Public safety employees generally retain the same rights they had under SELRA before Act 10. Prior to Act 10:

(a) The state had a statutory obligation to bargain with respect to wages, hours, and conditions of employment. ¶ 32

(b) The state was permitted to negotiate for the deduction of union dues from employee earnings with the written authorization of the employee. ¶ 38

(c) State employees always had a right to refrain from union membership or paying membership dues, but the state could agree to fair-share agreement when a majority of the members of a collective bargaining unit voted in favor of such an agreement. ¶¶ 42-43

(d) While a collective bargaining agreement was in effect, the union could only be decertified in an election

supported by a petition that 30% of the members of the bargaining unit seeking to discontinue or change agreement status filed by October 31 in even-numbered years. If no collective bargaining agreement was in effect, the union could only be decertified in an election triggered by a petition of members of the bargaining unit seeking to discontinue or change representatives. There was no waiting period to change representatives. ¶¶ 49-50

15) Plaintiffs allege that these four changes have significantly affected their advocacy activities. Before Act 10:

(a) The unions engaged in "not just bargaining wages, hours, and working conditions, but also advocacy with state and local governments regarding matters of public policy." ¶30

(b) The payroll deduction of union dues was a "longstanding and effective way" for unions to carry out their work, including political speech. ¶¶ 39,40

(c) The fair-share agreements prevented free-riders; the cost of representation was not shifted entirely onto the union and its members. ¶¶ 45,48

(d) It was easier for a union to remain certified.

¶¶ 49-53

Defendants acknowledge the changes made by Act 10, but deny they infringe on any constitutionally protected rights.

Additional facts may be stated below.

DISCUSSION

I. Associational Rights.[6]

A. State and Federal Constitutional Protections.

Plaintiffs first challenge Act 10 as violating their

[6] Plaintiffs argue Act 10 infringes their rights of free speech and association. These two rights are, together, part of the First Amendment. In the Wisconsin Constitution, the right of free speech is preserved in Art. I, Sec. 3, and the right of association is protected in Sec. 4, ". . . to assemble, to consult for the common good, and to petition the government. . ." The parties make no distinction between the two rights, and they are, of course, closely related. As the court observed in Lawson v. Housing Authority of City of Milwaukee, 270 Wis. 269,274 (1955):

> "Necessarily included within such constitutionally guaranteed incidents of liberty [as free speech and the right of assembly and petition] is the right to exercise the same in union with others through membership in organizations seeking political or economic change."

Accordingly, I follow the parties' lead in addressing the rights to free speech and association together, and will generally refer to them as "associational rights."

associational rights under the Wisconsin Constitution.

Article I, Section 3 of the Wisconsin Constitution provides in relevant part:

> "Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press . . ."

Article I, Section 4 provides:

> "Right to assemble and petition. Section 4. The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

Plaintiffs note that they bring this case exclusively under the Wisconsin Constitution, not the U.S. Constitution. See Brief at 2, n.1. At the same time, they note that they rely on federal constitutional precedent because it is significantly more developed than the Wisconsin constitutional precedent.

There is an important threshold issue as to whether the state constitutional guarantees of free speech and association provide greater protection to the plaintiffs than do their federal counterparts, with respect to the facts in this case. This issue becomes especially significant because both the Seventh Circuit Court of Appeals and the U.S. District Court for the Western District of Wisconsin have recently upheld Act 10 against federal constitutional challenges presenting the same sort of issues raised here. These courts considered the issues

carefully and their decisions bear close attention.

In construing the Wisconsin Constitution, our supreme court is not bound by the minimums imposed by the U.S. Supreme Court in its interpretation of the federal constitution; our supreme court has acknowledged its duty to examine our state constitution independently. State v. Jennings, 252 Wis. 2d 228, 247 (2002). However, when the court makes "an upward departure" from the federal constitutional standard it must be "grounded in requirements found in our state constitution or laws." Id.

Whether our constitution provides greater protection, of course, has nothing to do with whether the court believes one outcome or the other to be better public policy. See, e.g., Jacobs v. Major, 132 Wis. 2d 82, 124 (Ct.App. 1986) (Gartzke, P.J., concurring), modified and affirmed in part, reversed in part at 139 Wis. 2d 492 (1987).

Without question, our state and federal constitutions are different. In the preamble to the Wisconsin Constitution, preservation of liberty is given precedence over the establishment of government. State ex rel. Zillmer v. Krutzberg, 114 Wis. 530 (1902). Our Wisconsin constitutional convention considered a provision similar to the First Amendment to the U.S. Constitution, but rejected it as too indefinite. Instead our state framers chose to set forth the constitutional right of free

speech "more broadly and more definitely than the First Amendment." Jacobs, 139 Wis. 2d at 534 (Abrahamson, J., concurring). In Jacobs there was a thorough debate, both among the justices of the supreme court and also the judges of the court of appeals, as to whether the broader language of the state constitution extended its protection beyond state action, to include private restriction of speech.

Wisconsin has a proud history of protecting the civil rights of its citizens based on Wisconsin constitutional guarantees before the United States Supreme Court extended federal constitutional protections to the states through the Fourteenth Amendment. See N.S. Heffernan, "The New Federalism" at 2-5 (attached as tab B to appendix to plaintiff's brief).

All that said, the question presented here is whether the Wisconsin Constitution provides different protection for the associational rights of the plaintiffs in any meaningful way that is relevant to the issues raised here. Plaintiffs have not made that case. Neither legal precedent nor history discloses any meaningful difference between the scope of protection afforded by Sections 3 and 4 of Article I of the Wisconsin Constitution and the First Amendment to the U.S. Constitution, as applied to this case. Plaintiffs cite no cases suggesting that the associational rights asserted here are entitled to any broader protection under our Wisconsin Constitution. When we are faced with a question of

state constitutional interpretation, our supreme court has outlined the process we must follow:

> "The analysis requires a court first to examine the plain meaning of the words in the context used. If the meaning is not plain, the court then makes an historical analysis of the constitutional debate and of the practices in 1848 which may be reasonably presumed were known to the framers of the 1848 Constitution. The next step is to examine the earliest legislative interpretation of the provision as manifested in the first law passed following adoption of the constitution. . . . If these rules of constitutional interpretation do not provide an answer, the court may look to the objectives of the framers in adopting the provision."

Jacobs, 132 Wis. 2d at 126 (Gartzke, P.J., concurring) (internal quotation marks and citations omitted); see also League of Women Voters v. Walker, 348 Wis. 2d 714,731 (Ct.App. 2013) (summarizing constitutional interpretation methodology).

Plaintiffs do not invite me to undertake such an analysis. Instead, in curious phrasing, plaintiffs urge that "it is not a certainty that the application of the Wisconsin Constitution will not dictate a different outcome than in [the Seventh Circuit Walker case]," and "it is not a certainty that [as argued by defendants] 'the Wisconsin Supreme Court recognizes no difference between the federal and state constitutions with regard to First Amendment and equal protection issues.'" Response Brief at 2-4. Further, in their reply brief, at 2, plaintiffs:

> ". . . assert this court has the opportunity to find that Wisconsin citizens are entitled to certain rights under the Wisconsin Constitution, which historically has been construed to give its citizens more expansive freedoms, and, thus, this court may rule contrary to the Seventh Circuit Court [Walker case]."

That is not enough. If I am to take the opportunity to find

that application of our state constitution should yield a different outcome from the application of the federal constitution, the plaintiffs must provide some basis for that apart from their belief that the law does not represent good public policy. If there are meaningful differences, they must be identified in legal precedent or historical facts. Until they are, absent any contrary authority, and particularly where both parties argue federal precedent, I cannot find that application of the Wisconsin constitutional guarantees should produce any different outcome from an analysis of associational rights protected under the federal constitution.

I note that plaintiffs rely heavily on Lawson v. Housing Authority of City of Milwaukee, 270 Wis. 269 (1955), for their assertion that Act 10 violates their associational rights. I will address the application of Lawson to our case below. What is significant to the discussion here is that the court in Lawson stated:

> "Secs. 3 and 4 of Art. I of the Wisconsin Constitution guarantee the same freedom of speech and right of assembly and petition as do the first and fourteenth amendments of the United States Constitution."

Id. at 274.

Later, the court observed that if the rule at issue violated the First Amendment, it "follows as a necessary corollary thereof that it also violates either Sec. 3 or 4 of Art. I of the Wisconsin Constitution or both." Id. at 282. Accordingly,

Lawson does not help plaintiffs in their assertion that the Wisconsin Constitution should be deemed to provide greater protections from the federal one.

Perhaps an argument might have been developed around language in Article I, Section 4 that adds to the purpose for assembling stated in the First Amendment - - petitioning the government - - the additional purpose of consulting for the common good. See J. Stark, The Wisconsin State Constitution: A Reference Guide at 42 (attached as tab F to appendix to plaintiffs' brief). As Stark notes:

> "One could thus infer that the framers of the constitution intended that this addition cover instances in which the government has failed to make sufficient efforts to promote the public good, so that citizens must respond to that deficiency. Thus, like the preamble and several other portions of the Wisconsin constitution, that part of this section emphasizes that the ultimate power in this state rests in the people, not the government."

However, in the next sentence, Stark says, "The right to assemble that this section grants is the same right that the U.S. Constitution grants," citing Lawson.

Stark also notes that the Wisconsin constitutional right to assemble as well as the right to petition the government are "not unbounded and may be reasonably regulated and circumscribed." Id.

I also respectfully reject the plaintiffs' suggestion that Wisconsin's being the first state to pass a public-sector

employee collective bargaining statute in 1959, and our history of providing workers "robust collective bargaining rights," Response Brief at 2, is relevant to constitutional interpretation. That assertion is based on the dubious premise that legislative acts taken more than a century after adoption of the constitution should be given significance in determining the meaning of the constitution. It also characterizes the legislative history too broadly. That history is succinctly described in defendants' brief at 30-31, and is fairly summarized as extending (by statute, of course) different collective bargaining rights to different groups of government employees at different times.

For their part, defendants assert that the Wisconsin court has consistently viewed the protection of free speech as being co-extensive under the state and federal constitutions, and indeed, in the context of obscenity, the court has concluded that "no greater protection exists under the Wisconsin Constitution than under the First Amendment." County of Kenosha v. C&S Management, Inc., 223 Wis. 2d 373, 389 (1999).

I am not prepared to say that the contours of the two guarantees are necessarily the same, and it may be that in a different case, the state constitution would provide greater protection. However, because plaintiffs do not develop any argument based on law or history that the Wisconsin provisions

should lead to any different result than an application of the First Amendment in the context of this case, I must rely, as do the parties, substantially on federal precedent to resolve the associational rights issue.

Plaintiffs argue that Act 10 burdens the associational rights of state employees who choose to be members of a union versus those who don't. They also argue that Act 10 burdens the associational rights of general employees, but not public safety employees, by engaging in "viewpoint discrimination."

B. Represented versus non-represented employees.

Plaintiffs' first argument rests heavily on Lawson. In Lawson, 270 Wis. 269, the plaintiffs rented an apartment in a federally-assisted project administered by the defendant, Housing Authority of City of Milwaukee. The Authority adopted a resolution implementing a federal statute that precluded occupancy by a person who was a member of an organization designated as subversive by the U.S. Attorney General. One of the plaintiffs was a member of such an organization; as a result the Authority began an eviction action against the Lawsons.

The Lawsons sued, seeking a declaratory judgment that the resolution adopted by the Authority pursuant to the federal statute was unconstitutional. The trial court sustained the

Authority's demurrer, but the supreme court reversed.

The court reasoned that if the state were to prohibit a person from belonging to an organization advocating for political change, that would "at once be held unconstitutional as violative of the liberties of citizens guaranteed by the First and Fourteenth Amendments to the United States Constitution." Id. at 274-75. The court continued:

> "The holding out of a privilege to citizens by an agency of government upon condition of non-membership in certain organizations is a more subtle way of encroaching upon constitutionally-protected liberties than a direct criminal statute, but it may be equally violative of the constitution. Surely a citizen, to whom such a privilege is denied on the sole basis of membership in some organization, should be accorded the right to test the constitutionality of such a regulation in court. If a precedent should be established, that a governmental agency whose regulation is attacked by court action can successfully defend such an action on the ground that the plaintiff is being deprived thereby only of a privilege, and not a vested right, there is extreme danger that the liberties of any minority group in our population large or small might be swept away without the power of the power of the courts to afford any protection."

Id. at 275.

Thus, while the Lawsons had no right to federally-assisted housing, once the government extended that privilege, it could not condition it in a manner that infringes on constitutionally-protected liberties.

Plaintiffs argue that Lawson is on all fours with our case. They acknowledge that the state has no constitutional obligation

to bargain with its employees, individually or collectively. See Department of Administration v. WERC, 90 Wis. 2d 426, 430 (1979) ("There is no constitutional right of state employees to bargain collectively. This right exists by virtue of the State Employment Labor Relations Act (SELRA). . ."); see also Board of Regents v. Wisconsin Pers. Comm., 103 Wis. 2d 545, 556 (Ct.App. 1981) ("The right of state employees to bargain collectively with the state is an act of legislative grace.") However, having extended a privilege to collectively bargain, plaintiffs argue, the state cannot condition or restrict their right to advocate for that purpose because it infringes on the employees' exercise of associational rights.

The problem with plaintiffs' argument is that it conflates the right to collectively bargain, a statutory right, with freedom of association, a constitutional right. They are not the same. The legislature can limit (indeed it could abolish altogether) the statutory right to collectively bargain without infringing on the constitutional right of public employees to freely associate. See WERC, 90 Wis. 2d at 430, and Board of Regents, 103 Wis. 2d at 556.

As the federal district court observed in Laborers, the right of employees to bargain collectively has long been subject to limitation under federal antitrust and labor law. Slip op. (cited on p. 3 above) at 7-8. More than 22 states continue to

prohibit collective bargaining without running afoul of the First Amendment. Workers retain the right to associate and speak on subjects of public policy, but the right of association does not include the right to bargain collectively. Id. at 8.

In Laborers, the court relied on Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979):

> "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it."

Id. at 465 (citations omitted)

The court also observed, "Whatever rights public employees have to associate and petition their public employers on wages and conditions of employment, this right certainly does *not* compel the employer to listen." Laborers at 8. (emphasis in original).

The Laborers court concluded that Act 10 did not abrogate the municipal employees' right to associate and to bargain collectively; rather it prohibited the municipal employer from engaging in collective bargaining. Slip op. at 9.

Similarly, under SELRA, even as amended by Act 10:

> "Employees have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their

> own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .”

Sec. 111.82, Stats.

Thus, Act 10 does not prevent state employees from associating. It does not prohibit them from “forming, joining, or assisting labor organizations,” from bargaining collectively (subject to the limitations of SELRA), or from engaging in “lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

As observed by the Seventh Circuit Court in Walker, 705 F.3d at 646, “Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject.”

That makes this case very different from Lawson. In Lawson, the government conditioned the privilege of assisted housing on a tenant’s relinquishing the constitutional right to freely associate with a group expressing political speech. Act 10 contains no such restriction.

Plaintiffs also cite Thomas v. Collins, 323 U.S. 516 (1945), but that is not on point. Unlike the law considered there, Act 10 does not restrict anyone from speaking to solicit union membership.

The background facts in our case actually provide an example of the differences between the statutory right to collectively bargain and the constitutional right to associate and speak freely. The state troopers were a part of the WLEA for collective bargaining purposes. The WLEA endorsed no candidate in the governor's race in 2010. The troopers also had a separate lobbying group that endorsed Scott Walker. The fact that the troopers were in a bargaining unit that made no endorsement had nothing to do with their associating in a lobbying group and exercising their right to endorse a political candidate.

Similarly, there is no reason, after Act 10, that groups of employees cannot associate, form a lobbying group if they wish, and advocate for whatever they want.[7]

None of the provisions of Act 10 challenged here implicate plaintiffs' constitutional associational rights.

Plaintiffs contend that their associational rights are infringed by Act 10's limitation on collective bargaining to base wage increases capped at the consumer price index increase, absent a statewide referendum. Plaintiffs argue that it burdens

[7] That includes speaking out against the changes brought by Act 10, and endorsing whatever candidates they would like to see in public office in the next election.

their right to associate because the Act does not specifically prohibit the state from offering higher base wage increases to non-represented employees.

If, as is well-established, see WERC, 90 Wis. 2d at 430, and Board of Regents, 103 Wis. 2d at 556, there is no constitutional right to collectively bargain and no obligation that the state "listen" to represented employees, it is difficult to understand how a limitation on the scope of the statutorily-created right to collectively bargain offends plaintiffs' associational rights. Clearly the legislature could prohibit collective bargaining for public employees altogether. Why can't it limit something it could prohibit entirely?[8]

It might also be observed that the state is not required to listen to non-represented employees either. See Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 283-87 (1984) ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.").

Thus, the collective bargaining limitations in Act 10 do not infringe on the employees' freedom of association. Rather, having extended the right to collectively bargain as a matter of

[8] The issue of viewpoint discrimination - - which, of course, is prohibited - - is addressed below.

statute, the state is permitted to set limitations on what may be bargained for and how. Put differently, Act 10 does not take away anything to which represented employees are constitutionally entitled.

Plaintiffs also complain that prohibition of fair-share agreements and the requirement of annual certification elections violate their associational rights.[9] This is so, they argue, because employees who choose to belong to a union support the union's full cost of representation even when the bargaining unit includes people who choose not to pay dues. This burden is magnified by the cost of the annual recertification election being shifted to the union, which is unable to seek fair-share payments from non-members.

This argument runs into the same problem as the one about the scope of collective bargaining: the state may define the scope of, and place limits on, collective bargaining. If workers choose to form or belong to a union, why can't the state require them to bear the costs of that?

[9] The argument about prohibiting payroll dues deductions is addressed in the next section; it appears plaintiffs do not assert that this burdens their associational rights compared with those of unrepresented employees (see brief at 16-20). This issue is not really a matter of burdening a right so much as it is about providing a subsidy, which is discussed below. To the extent that it is alleged to impermissibly burden the right of represented versus non-represented employees, the same considerations discussed here apply, and the same result follows.

Plaintiffs do not provide any authority establishing that if the state chooses to engage in collective bargaining, it is required to sanction fair-share contributions from employees who choose not to belong to the union. In fact, the law appears to be to the contrary. See Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 184-85 (2007) (". . . unions have no constitutional entitlement to the fees of nonmember-employees.").

Accordingly, plaintiffs fail to establish that Act 10 infringes on their right to association by establishing burdens on employees who choose to be represented by a union versus those who do not.[10]

C. General Employees Versus Public Safety Employees.

Plaintiffs also argue that Act 10's treatment of general employees versus public safety employees infringes on their associational rights. Act 10 establishes two groups of bargaining units, subjecting one – general employees – to limitations and requirements from which the other – public safety employees – is exempt. There are equal protection implications to the creation of these classifications. These are discussed

[10] WLEA notes that Act 10 has fractured it, forcing it to reorganize. See complaint at ¶¶ 25, 27, and brief at 37-39. Whether or not that is a consequence of Act 10 doesn't matter. The union does not have any constitutional right to exist in the form it did before Act 10, and the Act's effect on the WLEA is of no independent constitutional significance.

below. Here, plaintiffs claim that these classifications constitute "speaker-based" discrimination and therefore violate their associational rights.

Plaintiffs' argument that Act 10 creates impermissible viewpoint discrimination centers largely on the prohibition of payroll deductions for dues. See brief at 25-35. They mention exclusive representation mandates,[11] fair-share agreements, and yearly recertification election procedures, which, they argue, drain the funds that unions would otherwise put towards expressive activity. Because plaintiffs focus primarily on the payroll dues deduction, I will do likewise; to the extent that plaintiffs' arguments about the other issues assert that the classifications impose a greater financial burden on general employees, the considerations are similar, and the result is the same.

I should note that this is the most difficult issue raised in this case. The well-established principle that there is no constitutional right to collectively bargain makes it hard to argue that setting statutory limits on bargaining somehow impermissibly burdens the rights of those who choose to join a bargaining unit as opposed to those who don't. Moreover, once it is determined that Act 10 does not implicate plaintiffs'

[11] I am not sure what plaintiffs mean by this, and they do not develop any argument that the creation of an exclusive representation unit, which has long been in place, is somehow unconstitutional, so I do not

associational rights, application of the rational-basis test puts to rest the equal protection claim.

However, the argument asserted here - - that aspects of Act 10, principally the prohibition on payroll deductions for dues, constitute impermissible viewpoint-discrimination - - requires close analysis. It was this issue, alone, that caused the dissenting opinion in Walker. Undeniably, Act 10's "subsidy" of speech by allowing payroll deductions for the dues of some unions but not of others is not applied even-handedly. It benefits one group of employees. Does the manner in which the legislature drew the line constitute viewpoint-discrimination? If it does, the First Amendment is implicated, and Act 10 faces strict-scrutiny; if not, it requires only rational-basis review. Walker, 705 F. 3d at 653-54.

Plaintiffs' argument was the subject of extensive analysis by the Seventh Circuit Court in Walker, 705 F.3d 640. The court concluded that Act 10's prohibition on dues deductions was not viewpoint-discriminatory and therefore did not implicate the First Amendment. Id. at 648-654.

In Walker, the court directly addressed the challenge made by the plaintiffs here that the difference in treatment between general employee and public safety employees with respect to

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address it.

payroll dues deductions constitutes impermissible viewpoint discrimination. The court summarized the law as follows:

> "The Bill of Rights enshrines negative liberties. It directs what government may not do to its citizens, rather than what it must do for them. While the First Amendment prohibits placing obstacles in the path of speech, nothing requires government to assist others in funding the expression of particular ideas, including political ones. . . . Thus, even though publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, states are under no obligation to aid the unions in their political activities."

Id. at 645 (internal quotation marks and citations omitted).

The governing precedent applied by the court is Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009). In Ysursa, the Supreme Court characterized the use of a state's payroll deduction system to collect union dues as a subsidy of speech. It does not abridge speech; employees and their unions may continue to speak about whatever they want. Id. at 359.

In Walker, plaintiffs tried to distinguish Ysursa, because there, the prohibition applied evenhandedly to all public employees, and was justified on the basis of the state interest in separating public employment from political activity. 705 F. 3d at 646; see Ysursa, 555 U.S. at 361. The plaintiffs in Walker argued that allowing public safety employees to benefit from payroll deduction of dues while denying that benefit to general employees distinguishes this case from Ysursa.

While speaker-based distinctions are permissible when the

state subsidizes speech, the subsidy cannot "individually discriminate on the basis of viewpoint." 705 F. 3d at 648. Plaintiffs in Walker, and plaintiffs here, argue that Act 10 does. Two other courts have accepted such an argument and found a First Amendment violation in such a classification. 705 F. 3d at 646 (citing Bailey v. Callaghan, 873 F. Supp. 2d 879 (E. D. Mich. 2012); United Food & Commercial Workers Local 99 v. Brewer, 817 F. Supp. 2d 1118 (D. Ariz. 2011)).

The issue as analyzed by the Walker court thus turns on whether Act 10 invidiously discriminates on the basis of viewpoint. The court concluded it did not.

The court first observed that on its face, Act 10 is viewpoint neutral. The general employee/public safety distinction "has no inherent connection to a particular viewpoint." A union's political views "do not inhere in its status as a public safety union." Id. at 649.

The only remaining question is whether the classification is a façade for invidious discrimination. This is the position plaintiffs take here.

Plaintiffs argue that the fact that all the public sector labor organizations that endorsed Governor Walker were placed in the favored public safety classification while none were placed

in the disfavored general classification, suggests that the Act was simply a façade for discrimination based on whether the organization supported Governor Walker.

However, the Walker court squarely rejected that same argument. That Act 10 disproportionately affects groups with a particular viewpoint does not transform its facially-neutral character into one of invidious discrimination. The court also observed that, as a factual matter, the public safety category included several unions that did not endorse Governor Walker. Id. at 651.

The court rejected the idea that the Act's under-inclusivity[12] – - it applies to some workers who provide critical safety services but not others – - establishes viewpoint discrimination. The court observed that only content-based or viewpoint-based exemptions implicate concerns of under-inclusivity, and that Act 10 differentiates on the basis of speaker without reference to whatever viewpoint the speaker may hold. Id. at 651-53.

Finally, the court rejected consideration of the comment of Senator Fitzgerald who, from the Senate floor, spoke in favor of

[12] Arguably the Act is also over-inclusive in that the favored public safety classification includes employees whose services, while important, are not generally considered critical, e.g., motor vehicle inspectors.

Act 10, saying, "If we win this battle 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." Id. at 652. Plaintiffs here cite that statement and a comment by Governor Walker that his strategy for making Wisconsin "a completely red state" was to begin by a "divide and conquer" public employee unions strategy. Affidavit of Sally Stix, 6/25/13, Ex. F. Plaintiffs argue that these comments demonstrate Act 10 was a façade for viewpoint discrimination.

However, as the Walker court ultimately concluded, well-settled case law prevents us from ascribing the personal position of an individual legislator or the governor to the entire legislative process. Id. at 652-53.

In sum, the Walker court concluded the payroll dues deduction prohibition does not invidiously discriminate on the basis of viewpoint and therefore does not implicate the First Amendment.

Plaintiffs invite me to place greater weight on the Walker dissent on the viewpoint-discrimination issue.[13] Plaintiffs

[13] It is worth noting this was the only point of dissent in Walker; the dissenting judge, albeit with some reluctance, agreed with the majority that Act 10 was constitutional in all respects except for the dues deduction prohibition.

argue the dissenting judge's views on this single issue are more in line with the greater protection they argue is provided by our state constitution. I respectfully decline to follow the Walker dissent on this point.

First, as noted above, plaintiffs have not shown any principled basis to conclude application of our state constitution should yield a different result from an analysis under the First Amendment.

Second, while not controlling, the Walker majority opinion precedent is highly persuasive. The federal constitutional law on which it is based is well-developed. The analysis was thorough and the issue was carefully considered by the court, even resulting in a thoughtful dissenting opinion on one point. Plaintiffs advance no reason in legal or historical precedent why I should follow the dissent as to this single point. They make no argument on this point that was not considered by the court. Therefore, I follow the majority's carefully reasoned opinion.

As noted above, plaintiffs' argument for viewpoint-discrimination is made primarily with respect to payroll dues deductions, but extends to the financial burdens imposed by the fair-share prohibition and the annual election procedures. Plaintiffs argue that all of these drain the union's treasury and therefore prevent general employee unions from having money to

spend on expressive activities.

It is not clear to me that these aspects of Act 10 are properly analyzed under Ysursa, which addresses speech subsidy. The other aspects of Act 10 do not involve a state subsidy of speech. The real concern seems to be whether those aspects impermissibly burden the union's right to free association, and, as demonstrated above, they do not. If the argument is that, by allowing fair-share arrangements and less onerous recertification procedures for public safety unions, the state may be effectively "subsidizing" their speech, then, to the extent that these other aspects of the challenge here may be properly analyzed under Ysursa, these challenges would fail for the same reasons the payroll dues deduction challenge fails.

Because Act 10 does not implicate plaintiffs' associational rights, I review the challenged provisions to determine whether they have a rational basis. See 705 F. 3d at 652-53. I do that below, where I discuss the equal protection challenge, and I conclude they do.

II. Equal Protection.

Article I, Section 1 of the Wisconsin Constitution states:

> "Equality; Inherent Rights. Section 1. All people are born equally free and independent, and have certain

> inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

Plaintiffs' equal protection argument seems to track the structure of their argument about associational rights. They argue that Act 10 violates equal protection in creating the two sets of classifications described above: represented versus non-represented state employees, and general employees versus public safety employees.[14]

As to the first, Act 10 restricts the ability of the state to negotiate with represented employees, limiting the subject of negotiation to base wages, and capping the wage increase available, absent a voter appeal. Those limitations do not apply to unrepresented employees. The Act also places the burden of financing union activities on union members, leaving unrepresented employees out of it. Plaintiffs also observe that while the Act prevents employees who choose to belong to labor unions from having their dues deducted from their earnings, it does not prevent employees who wish to contribute to other organizations from having dues deducted from their pay.

The second classification challenged by the plaintiffs is

[14] Unlike their argument in support of the associational rights challenge, plaintiffs do not seem to make any specific assertion that the Wisconsin constitutional guarantee of equal protection is broader than the Fourteenth Amendment.

that of general employees versus public safety employees. The difference in treatment of those two groups has been detailed above. Only general employees are subject to the restrictions imposed by Act 10; public safety employees are unaffected, meaning they are not subject to the restrictions on bargaining, the prohibition on dues deductions, fair-share agreements, and the annual recertification election requirement.

The threshold question in an equal protection analysis is the level of scrutiny the court applies to the legislation. I have determined above that Act 10 does not implicate plaintiffs' associational rights. Because the Act does not affect a fundamental right and does not create classifications along suspect lines, the equal protection claim is subject to rational-basis review. See Walker, 705 F.3d at 652-53.

The rational-basis test is familiar. The statute is presumed constitutional, and the burden is on the plaintiffs to prove its unconstitutionality beyond a reasonable doubt. State v. McManus, 152 Wis. 2d 113, 129 (1989). The statute will be sustained if there is any reasonable basis for the exercise of legislative power. Id. The reasonable basis need not be expressed by the legislature. If the court can conceive of facts on which the legislation could reasonably be based, it must uphold the legislation. State v. Radtke, 259 Wis. 2d 13, 22-23 (2003).

The rational-basis test was described exhaustively by the U.S. Supreme Court in Heller v. Doe, 509 U.S. 312, 319-21 (1993): It is not for the court "to judge the wisdom, fairness, or logic of legislative choices." The court does not "sit as a super-legislature to judge the . . . desirability of legislative policy determinations. . ." The legislature "need not actually articulate at any time the purpose or rationale supporting its classification." The burden is on plaintiffs "to negative any conceivable basis which might support [the legislation]." Courts must accept a legislature's generalization even if "there is an imperfect fit between means and ends." The fact that the legislative classification results in some inequality is not grounds for invalidating the statute. Finally, "the problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical it may be, and unscientific." (internal quotation marks and citations omitted)

This principle of deference to the legislature is deeply rooted in American jurisprudence. It is fundamental to the separation of powers. It is also fundamental to federalism. Among other things, it reflects the principle that state legislatures should have flexibility to experiment to find solutions to current problems. San Antonio School District v. Rodriguez, 411 U.S. 1, 43 (1973). In the oft-quoted observation of Justice Brandeis, restricting the state's ability to

experiment:

> "in things social and economic is a grave responsibility ... fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and by novel social and economic experiments without risk to the rest of the country."

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

While plaintiffs here to do not concede it (as did the plaintiffs in Madison Teachers, see Certification by Wisconsin Court of Appeals at 11, 16), it is clear that Act 10 survives rational-basis scrutiny.

As to the claim that the Act treats represented employees differently from unrepresented employees, the court in Laborers answered that as follows, quoting from the defendants' reply brief:

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

Slip op. (cited at p. 3 above) at 10-11. (internal quotes and

citations omitted)

The court also noted that the different treatment between represented and unrepresented employees was justified by the purpose of giving governments "the tools necessary to manage impending revenue reductions." Id. at 11 (internal quotation marks omitted, again citing defendants' reply brief).

Plaintiffs dispute the wisdom of these policies, citing evidence from social science that there is no real correlation between state employees' collective bargaining rights and budget deficits, and that unions generally increase productivity. See Response Brief at 37, n. 20. That may be true, but that is exactly the sort of issue that, under rational-basis analysis, is for the legislature to resolve, not the courts.

As to the general versus public safety employee distinction, the Act also passes muster. Defendants posit that the purpose of Act 10 was to provide the state with flexibility to absorb reductions in funding due to the state's financial condition. At the same time, it was important to avoid a public safety employee strike. Thus the legislature could rationally balance those considerations by sharply curtailing collective bargaining rights for employees whose services are not critical to public safety, and leaving in place the statutory rights of those whose services are. It is one thing for a state office worker to strike; it is

another for police or firefighters to strike. This meets the rational-basis test. See Walker, 705 F.3d at 655-56; see also Joint Sch. Dist. No 1 v. Wisconsin Rapids Educ. Ass'n, 70 Wis. 2d 292, 312 (1975); Hortonville Educ. Ass'n V. Hortonville Joint Sch. Dist. No. 1, 66 Wis. 2d 469, 485 (1975).

Admittedly, the line drawn by the legislature is imperfect if the goal is to avoid a strike of employees whose services are critical to public protection. How is that goal furthered by excluding motor vehicle inspectors from the Act 10 changes, but treating University of Wisconsin and Capitol Police as general employees subject to Act 10? It is a good question, but, under a rational-basis review, it is one for the legislature, not the courts. The observation of the Walker court, answering this concern, is worth quoting at length:

> "The Supreme Court has continually rejected this sort of argument, stating "[d]efining the class of persons subject to a regulatory requirement . . . requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line . . . [and this] is a matter for legislative, rather than judicial, consideration." . . . Thus, we cannot, as the unions request, determine precisely which occupations would jeopardize public safety with a strike. Even if we accept that Wisconsin imprudently characterized motor vehicle inspectors as public safety employees, invalidating the legislation on that ground would elevate the judiciary to the impermissible role of supra-legislature. The judiciary's refusal to take on this role explains why, applying rational basis review in *City of New Orleans v. Dukes,* the Supreme Court hypothesized reasons for upholding the preferential treatment of pushcart vendors that worked for longer than eight years even without showing that they were more qualified than newer vendors. Further, it explains why the Court, in *Lee Optical*, upheld a law

> allowing only ophthalmologists and optometrists to install prescription eye lenses, even though opticians possessed similar skills. Distinguishing between public safety unions and general employee unions may have been a poor choice, but is not unconstitutional.

705 F.3d at 655-56 (internal quotation marks and citations omitted).

Each of the specific changes plaintiffs challenge here is rationally related to the goal of avoiding a public safety work stoppage. If the goal is discouraging public safety employees from striking, then allowing broader collective bargaining for public safety employees, giving them access to payroll dues deductions, allowing fair-share agreements, and giving them an easier path to recertify their union are all rationally related to that goal. These things make it easier for public safety unions to carry on, and hence, reduce the likelihood of a strike.

Providing more favorable treatment to public safety unions makes it more likely that the state "will have a familiar and stable entity across the bargaining table." Defendants' brief at 37. That is not as important if the only subject of bargaining is base wages, as is the case for general employee unions. Encouraging continuity in the relationship between the state and public safety employees' unions may make a work stoppage less likely.

Whether or not one agrees with these decisions as a matter of policy is not the issue. There can be no question that the

means chosen bear some rational relationship to the underlying policies.

Finally, there is the question of motive. Was it rank political favoritism that resulted in the preferential treatment for the state troopers (although several unions that did not endorse Governor Walker were also included in the public safety category)? Perhaps it was, and it seems it surely was at least for some, and if so, that is a shame, but if the law passes the rational-basis test, it is also irrelevant:

> "As unfortunate as it may be, political favoritism is a frequent aspect of legislative action . . .indeed one might think that this is what election campaigns are all about: candidates run a certain platform, political promises made in the campaign are kept (sometimes), and the winners get to write the laws. These sorts of decisions are left for the next election. Accordingly, we must resist the temptation to search for the legislature's motivation for the Act's classifications."

Walker, 705 F.3d at 654 (internal quotes and citations omitted).

Or, in the familiar observation, repeated by the dissenting judge in Walker, 705 F. 3d at 659, 672, "Elections have consequences, as this case reminds us." They do, and the consequences of this one were big for public sector employees. However, the remedy is at the polls, not in the courts.

CONCLUSION

Act 10 does not implicate plaintiffs' associational rights. The challenge to the constitutionality of Act 10 must be decided according to rational-basis review. Under that highly deferential standard, Act 10 passes muster against both the associational rights and equal protection challenges.

Plaintiffs' motion for summary judgment is denied. Defendants' motion for judgment on the pleadings is granted, and the complaint is dismissed.

This order is final for purposes of appeal.

Dated: October 23, 2013

BY THE COURT

_____
John W. Markson
Circuit Court Judge

cc: Attorney Sally A. Stix
AAG David A. Rice
AAG Steven C. Kilpatrick