UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WISCONSIN EDUCATION ASSOCIATION COUNCIL, et al.,

Plaintiffs,

vs.

SCOTT WALKER, Governor of the State of Wisconsin, et al.,

Defendants.

Case No. 11-CV-00428

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS' COMBINED REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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CORPORATE AND FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, I declare that Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, strict construction of the Constitution and individual rights and appears on its own behalf. Landmark is not a publicly owned corporation, has issued no stock, and has no parent corporations, master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to Landmark's participation.

None of the parties' counsel authored this brief in whole or in part; additionally, none of the parties' counsel, nor any other person, other than amicus curiae, its members, or its counsel, contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

/s/Richard P. Hutchison
Richard P. Hutchison

Dated: November 16, 2011

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STATEMENT OF INTEREST

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, strict construction of the Constitution and individual rights. Specializing in constitutional history and litigation, Landmark presents herein a unique perspective concerning the proper judicial standard for evaluating Act 10. Landmark also provides an in depth analysis of a significant ruling in the Fourth Circuit based on nearly identical facts, which will aid the Court in its consideration of Plaintiffs' motion for summary judgment.

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INTRODUCTION

This case is about whether the state of Wisconsin can regulate public employees who protect public safety differently than other public employees to prevent dangerous strikes and work stoppages. Plaintiff unions and union members claim that Act 10, the statute at issue, has denied them equal protection of the laws and has violated their freedom of speech. Yet none of the Plaintiffs' fundamental constitutional rights has been violated by Act 10.

Plaintiffs have no fundamental right to collective bargaining. They have no right to automatic payroll deductions for contributions to their PACs. They even have no right to automatic payroll deductions of their dues. Furthermore, Plaintiffs' rights of free speech have in no way been restricted by Act 10.

Not only does it fail to restrict any constitutional rights, Act 10 does not apply to race, sex or any suspect class. In fact, far from being a disfavored class with no recourse in the public sphere, Plaintiff unions are political powerhouses. Since no fundamental right has been impinged and no suspect class has been targeted, Act 10 warrants only the lowest form of judicial scrutiny. Thus, the only possible issue in this case is whether the state of Wisconsin's decision to regulate public safety workers differently than other public employees has a rational basis.

Even though the Act's declared reason is clearly rational (the prevention of strikes extremely harmful to public safety), the statute passes muster if this Court

can merely hypothesize a legitimate reason on its own. Plaintiffs have attempted to distract the Court's attention by raising the red herring of political motivations- as if any valid law is enacted wholly separate from the political process. Judicial inquiry into legislative motivation is improper in this case, however, as provided by a case on nearly identical facts in the Fourth Circuit Court of Appeals. Accordingly, the Plaintiffs' motion for summary judgment should be denied and Defendants' motion for judgment on the pleadings should be granted.

Landmark Legal Foundation (Landmark) respectfully submits this brief to present arguments and issues not discussed in the parties' respective briefs.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show "that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party has the initial burden of proving that no genuine issue of material fact exists." *Id.* The court must draw all reasonable inferences in the light most favorable to the nonmoving party. *Tindle v. Pulte Home Corp.*, 607 F.3d 494, 496 (7th Cir. 2010). A mere scintilla of evidence in support of the nonmovant's position is insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, when a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case, then summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this case, the Plaintiffs have not met the standard for summary judgment. Indeed, they have failed to demonstrate that Act 10 (herein referred to as "Act 10" or "the Act") lacks a rational basis and have also failed to show that their First Amendment rights have been violated. Accordingly, Plaintiffs' motion for summary judgment should be denied and Defendant's motion for judgment should be granted.

II. WISCONSIN'S DECISION TO REGULATE PUBLIC SAFETY EMPLOYEES DIFFERENTLY THAN OTHER PUBLIC EMPLOYEES DOES NOT IMPINGE PLAINTIFFS' FUNDAMENTAL RIGHTS TO FREE SPEECH AND EQUAL PROTECTION.

The Plaintiffs allege that Act 10 has created two classes of public employees- public safety employees and general employees. The statute creates five major distinctions between the two groups: 1) general employees and their representatives are prevented from collectively bargaining over everything but "total base wages"; 2) public employers and the collective bargaining representatives of general employees cannot enter into collective bargaining agreements longer than one year; 3) general employees must undergo annual re-certification elections; 4) public employers cannot enter into fair share agreements with general employees and their unions; and 5) public employers cannot collect dues from general employees. Plaintiffs' Complaint, Dkt. 1 (hereafter "Pls. Complaint") at ¶¶ 83-87.

By creating two groups with these five differences, the Plaintiffs allege, Wisconsin has violated their right to equal protection under U.S. Const. Amend. XIV, § 1. Items 1, 2, 3 and 4 are easily disposed since they impinge no fundamental constitutional right. The Plaintiffs have conflated Item 5, the collection of union dues, with their second major allegation- that Act 10 violates their right to freedom of speech under U.S. Const. Amend. I. Plaintiffs claim that

the statute "adopts a speaker-based and viewpoint based classification to distinguish between those unions who may secure dues check-off arrangements and those who may not do so." Pls. Complaint at ¶ 93. This claim is similarly meritless, but requires further analysis below to address their allegation of viewpoint discrimination.

It must be emphasized at the outset that Wisconsin's regulation of its own public employees, including state and local employees, is a matter of state and not federal statutory authority. The National Labor Relations Act (NLRA), 29 U.S.C. Sec. 151 *et seq.*, does not apply since Act 10 covers Wisconsin's public, and not private, employees. Furthermore, Plaintiffs' claimed "rights" to collective bargaining are not even rights under Wisconsin's state constitution. Their putative "rights" were merely benefits conferred by statute that could be changed at any time. *See, e.g., Board of Regents v. Wisconsin Personnel Comm'n*, 103 Wis.2d 545, 556, 309 N.W.2d 366 (Ct. App. 1981). Act 10 enacts such changes to the public employment system that are entirely within Wisconsin's discretion.

Moreover, Plaintiffs have not shown any violation of their federal constitutional rights. Broadly speaking, the constitutional guarantee of equal protection requires that the state treat similarly situated persons alike under the law. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). However, as the Supreme Court has explained, this guarantee "must coexist with the practical necessity that most

legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996). As a result, if a law neither burdens a fundamental right nor targets a suspect class, the legislative classification will be upheld if it "bears a rational relation to some legitimate end." *Id.* A classification that targets a "suspect class" or that "impinges upon the exercise of a fundamental right," however, will be strictly scrutinized and upheld only if it is "precisely tailored to serve a compelling government interest." *Plyler*, 457 U.S. at 216-17.

Turning to the first four statutory distinctions at issue, not one of them impinges fundamental constitutional rights or targets suspect classes. Collective bargaining with the state is not a fundamental right. As the Supreme Court stated in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (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 [a labor] association and bargain with it.
> (internal citations omitted) *Id*.

In other words, workers may have the right to associate as a union under the First Amendment, but the State of Wisconsin is under no obligation to bargain with them collectively. Act 10's limitations on the terms and conditions of collective bargaining are entirely within the State's discretion.

Act 10 also prohibits "fair share" agreements. Fair share agreements between employer and union stipulate that union membership is not a condition of employment, but require nonmembers to pay the cost of collective bargaining. There is no federal constitutional or statutory right impinged by the state prohibition of fair share agreements. Pursuant to the Taft-Hartley Act of 1947, 29 U.S.C. Sec. 141 *et seq.*,[1] nearly half the states are "Right to Work" states that allow individual workers to decide whether to support a union financially. *See, e.g.*, Virginia Code § 40.1-62 (prohibiting employers from requiring payment of union dues). Act 10 merely follows a legitimate policy adopted by many other states, a policy which was upheld by the Supreme Court in *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963) (holding that states may prohibit "agency shop" agreements). Plaintiffs complain that their statutory privileges have existed for "half a century." Yet, for the past sixty-five years, states have had the explicit right to ban fair share agreements. None of the Plaintiffs' fundamental rights are affected by Wisconsin's decision to change its policy.

Plaintiffs also list the annual certification requirement as an unfair burden. Pls. Complaint at ¶¶ 83-87. Once again, no federal constitutional or even statutory

[1] The relevant section states: "Nothing in this Act [29 U.S.C. §§ 151-158, 159-169] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. Sec. 164 (2010).

right is impinged by the requirement that a union periodically establish the consent of the workers. The Plaintiffs cannot claim otherwise. The yearly recertification requirement of Act 10 is a legitimate application of state authority.

The final major statutory provision at issue is Act 10's prohibition of the collection of dues- in effect an end of payroll deductions for general employees' dues. There is no fundamental right impinged, despite Plaintiffs' claim of viewpoint discrimination. The Supreme Court has ruled that there is no constitutional right to payroll deductions. *City of Charlotte v. Local 660 International Ass'n of Firefighters,* 426 U.S. 283 (1976). Recently, the Supreme Court has even specifically ruled that there is no "right to government payroll mechanisms for the purpose of obtaining funds for expression" under the First Amendment. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009). A key element of Plaintiffs' First Amendment claim is that their ability to finance their "lawful and protected political advocacy and speech" has been curtailed. Pls. Complaint at ¶ 92. Yet *Ysursa* establishes that they do not have a constitutional right to have such speech supported by the state.

A. Plaintiffs' Free Speech Rights Were Not Violated When Wisconsin Decided To Discontinue Collection Of Their Union Dues.

Even though *Ysursa* is clear authority that their First Amendment rights have not been violated, Plaintiffs have attempted to bootstrap dues collection into a

viewpoint-based First Amendment violation since public employees retain payroll deduction privileges. The Plaintiffs allege that Act 10 "adopts a speaker-based and viewpoint based classification to distinguish between those unions who may secure dues check-off arrangements and those who may not do so" in violation of the First Amendment. Pls. Complaint at ¶ 93. To support its argument that Wisconsin is engaging in viewpoint based classification, Plaintiff's note Act 10 permits "public safety" employees to "negotiate provisions for deduction of labor organization dues" but "prohibits State and municipal employers from deducting union dues for general employees…" Pls. Complaint at ¶¶ 56, 57. This formulates the basis of Plaintiff's claim that the Act violates both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Pls. Complaint at ¶ 93. Yet this effort fails as a matter of law after *Ysursa* because there is no underlying First Amendment violation.

Even if *Ysursa* is distinguished because there are multiple political speakers in the instant case, case law still does not support the Plaintiffs. In a case directly on point, the Fourth Circuit has held that a state could limit payroll deductions to specified public sector unions and prohibit deductions from other public sector unions. *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989). *South Carolina Educ. Ass'n's* facts and allegations are remarkably similar to the present case. South Carolina passed a law foreclosing payroll deduction services

to "all professional associations representing state employees." *Id*. at 1254. After South Carolina discontinued deducting dues, the South Carolina Education Association ("SCEA") alleged the "sudden and uniform loss of payroll deductions across the State had a devastating effect upon [its] membership, financial standing and advocacy program." *Id*. at 1255. Several years after enactment of the ban, however, South Carolina granted an exemption to another labor organization, the State Employees Association. SCEA initiated a suit alleging the state's decision to grant this exemption "confirmed the legislature's unlawful intention to retaliate against SCEA for its speech-related activities and constituted a denial of equal protection under the Fourteenth Amendment, and also a denial of SCEA's First Amendment rights." *Id.* SCEA argued South Carolina's failure to permit payroll deductions resulted in loss of dues resulting in a loss of revenue that would have otherwise been available to further its speech-related activities. *Id.* at 1256.

Beginning its analysis, the court initially noted that there is no constitutional right to payroll deductions. *Id.* (citing *City of Charlotte v. Local 660 Int'l Ass'n of Firefighters,* 426 U.S. 283 (1976)). The court then examined the specifics of the legislation, noting "[it] does not prohibit, regulate, or restrict the right of the SCEA or any other organization to associate, to solicit members, to express its views, to publish or disseminate material, to engage in political activities or to affiliate or cooperate with other groups." *South Carolina Educ. Ass'n*, at 1256. The burden

resulting in a loss of revenue to further speech-related activities is not constitutionally impermissible. Furthermore, the court acknowledged the First Amendment protects the "right to associate with others and the right of an association to engage in advocacy on behalf of its members." However, the court noted the First Amendment "does not impose any duty on a public employer to assist affirmatively – by granting payroll deductions – or recognize a union, even if failure to do so impairs the unions' effectiveness." *Id.* (citing *Local 995 Int'l Ass'n of Firefighters v. City of Richmond*, 415 F.Supp. 325 (E.D.Va. 1976)). The court thus concluded that the "loss of payroll deductions, it is true, may tend to impair the effectiveness of the SCEA in representing its members, but we hold such 'impairment' is not one that the First Amendment proscribes." *Id.* at 1256. Thus, in an opinion predating *Ysursa,* the Fourth Circuit adopted similar reasoning and discounted any First Amendment violation.

In the instant case, Plaintiff's First Amendment rights are not violated by Wisconsin's decision to prohibit payroll deductions to finance union activity. On its face, Act 10 does not "prohibit, regulate, or restrict" the right of WEAC or any other Wisconsin public sector union from soliciting members, expressing views, publishing or disseminating material or engaging in political activities. Thus, Act 10 does not run afoul of the First Amendment's prohibitions on directly regulating

free speech or association. In fact, Act 10 does not impinge any of the Plaintiffs' fundamental constitutional rights.

B. Plaintiffs Are Not Members Of A Suspect Class, But Are Politically Powerful.

Furthermore, Act 10 does not target any suspect class. Courts have concluded that classifications based on union membership "must meet only [the] relatively relaxed" standard of *reasonableness* to survive constitutional scrutiny. *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 286 (1976); *see also Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990) (citing *Hoke Co. v. Tenn. Valley Auth.*, 854 F.2d 820, 828 (6th Cir. 1988)). Unions do not meet the threshold of a suspect class. The Supreme Court has observed that a suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Far from political powerlessness, Plaintiff unions are some of the most powerful political actors in the state and even national arenas.

For example, Wisconsin's Government Accountability Board recently released a report demonstrating the scope of Plaintiff Wisconsin Education Association Council's (WEAC) recent lobbying expenditures. WEAC led the state in spending on lobbying in 2009 and 2010, before the political battle over Act 10.

WEAC spent $2.5 million on lobbying in 2009 and 2010, years in which the Democrats were in control of all of state government. Associated Press, "WEAC Leads in Lobbying Spending," Aug. 11, 2011, available at http://www.jsonline.com/news/statepolitics/127545113.html. "WEAC is always one of the top spending lobbyists in the Capitol and they took a central role this year fighting Gov. Scott Walker's plan..." *Id.* Furthermore, for 2009 and 2010, "WEAC spent 12,364 hours lobbying, which averages to 17 hours a day every day for two years." *Id.* Note that this only addresses WEAC's lobbying expenditures and not the political expenditures from their PAC or their general treasury.[2]

Furthermore, while Plaintiff unions may be located in Wisconsin, they are affiliates of the nation's largest unions. As a result, they have extraordinary resources in the form of money and manpower at their disposal for political activity. "We are Wisconsin," for example, a coalition of Wisconsin and national labor unions, provided "thousands of volunteers, tens of thousands of demonstrators and hundreds of thousands of petition signatures" in Wisconsin's recall drive. Jason Stein, "Groups Have Local Names, But National Money,"

[2] Amicus Curiae Landmark Legal Foundation has had many years of experience tracking WEAC's political expenditures. After Landmark's referral to the IRS of evidence that WEAC gave $430,000 to the Democratic Legislative Campaign Committee, apparently out of general treasury funds, WEAC paid an additional $171,091 in federal taxes. *See* Alan J. Borsuk, "Union Pays Campaign Taxes; Foundation Had Asked IRS to Investigate Teacher Organization," Milwaukee Journal Sentinel, Jul. 29, 2006, p. B4.

Journal Sentinel, Sep. 10, 2011, available at http://www.jsonline.com/news/statepolitics/129597138.html. According to the Wisconsin Democracy Project, "We are Wisconsin" reported more than $11 million in contributions of which "about $10 million of it came from three different national unions: $5.8 million from the AFL-CIO, $3 million from AFSCME and $1.3 million from SEIU." *Id.* By any objective standard, therefore, Plaintiffs do not constitute a suspect class.

Since no fundamental rights have been impinged and no suspect class has been targeted by Act 10, the proper standard for this statute is the rational basis test.

III. ACT 10 MUST BE ANALYZED UNDER THE RATIONAL BASIS STANDARD.

Since Act 10 neither burdens a fundamental right nor targets a suspect class, it should be analyzed under the "rational basis" standard. Act 10 must be upheld if it "bears a rational relation to some legitimate end." *Romer*, at 631. The Supreme Court has stated:

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification*... Where there are 'plausible reasons' for [the legislature's] action, 'our inquiry is at an end.'…This standard of review is a paradigm of judicial restraint.

> *FCC v. Beach Communications*, 508 U.S. 307, 313-314 (1993) (emphasis added and internal citations omitted).

Furthermore, statutes such as Act 10 come to the court under rational basis review "bearing a strong presumption of validity." *Id.* Those challenging the rationality of such statutes must "negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). The Supreme Court has further ruled that, "when conducting rational basis review 'we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.'" *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

Plaintiffs claim that Act 10 lacks a rational relation to the objectives its "proponents" have invoked on its behalf. Specifically, they state that Act 10 was a budget repair bill and that it was designed to provide "public employers with the increased budget flexibility." Plaintiffs Brief in Support of for a TRO/Preliminary Injunction, Dkt 14 (hereafter "Pls. Brief") at p. 20. Since the classifications at issue do not save money, they argue, they possess no rational relation to their intended goals. (Plaintiffs' pleadings do, however, acknowledge a reason asserted by Defendant Governor Walker- that public safety employees and their unions

were exempted from the "anti-bargaining" provisions of Act 10 so that they would not strike and endanger the public. Pls. Brief at 25.) Plaintiffs further state that the only end that Act 10 does promote is an illegitimate one: favoring political allies of the legislation's sponsors. Pls. Brief at 28.

A. Courts Must Avoid Judicial Inquiry Into Legislative Motivation.

The *South Carolina Educ. Ass'n* opinion is once again instructive on the issue of political motive behind allegations of freedom of speech and equal protection violations. Even where a state has granted legislative exemptions to certain, but not all, unions permitting payroll deductions, courts are to avoid "judicial inquiries into legislative motivation" and only examine motive in "limited and well defined" situations.

As stated above, several years after South Carolina banned payroll deductions, a union petitioned for and was awarded an exemption from the ban on payroll deductions. The state, however, did not extend the exemption to the SCEA. The district court later concluded that the South Carolina legislature "denied payroll deduction benefits to *retaliate against the SCEA from its controversial positions and political activities*." *South Carolina Educ. Ass'n*. at 1257 (emphasis added). The Fourth Circuit however, determined the district court exceeded its authority and *should not* have inquired into the motives of the legislature in awarding such an exemption.

Citing the precedent set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Fourth Circuit noted, "The Supreme Court has long recognized that judicial inquiries into legislative motivation are to be avoided. Such inquiries endanger the separation of powers doctrine, representing a substantial judicial 'intrusion into the working of other branches of government.'" *Id.* at 1257 (citing *Village of Arlington Heights* at 268, n. 18). The Fourth Circuit relied on additional Supreme Court precedent, *United States v. O'Brien*, 391 U.S. 367 (1968), where Chief Justice Warren stated, "It is an entirely different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it." *Id.* at 1258 (citing *O'Brien*, at 383-384). Moreover, courts "must look only to the face of the regulation and the identifiable interest advanced to justify the regulation." *Id.* at 1259 (citing *Wall Distributors, Inc. v. City of Newport News, Virginia*, 782 F.2d 1165, 1170 (4th Cir. 1986)).

Motive of the legislature is only relevant in cases where courts "have expressly deemed it a substantive element of the test of constitutionality." *Id.* at 1259. The Supreme Court has shown that it will consider the motive of the legislature in constitutional challenges to state actions in race or sex cases, (*see, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977)) cases involving establishment of religion (*Lemon v.*

Kurtzman, 403 U.S. 602, 612-613 (1971)) and cases involving restrictions on freedom of speech. In such cases, the Fourth Circuit stated, "Legislative motive, in the context of First Amendment controversies, may be relevant when the challenged legislation has *on its face some content-based, direct inhibiting effect* on freedom of speech or some other expressive activity or enterprise." *South Carolina Educ. Ass'n*, at 1259 (emphasis added).

The speech cases cited by the Fourth Circuit where legislative motive was appropriate involved direct speech restrictions easily distinguished from the instant case: *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985) (executive order specifically prohibited legal defense and political advocacy organizations from soliciting donations from federal employees in charity drive); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 224 (1987) (state created a content-based sales tax exemption, applicable only to religious, professional, trade and sports journals); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 577 (1983) (state imposed a "use tax" on the cost of paper and ink products consumed in the production of newspapers); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (statute banned editorializing by federally funded public broadcasting stations); and *Bd. of Educ. v. Pico*, 457 U.S. 853, 856 (1982) (local school board removed books from the school library). These cases all involve direct restrictions on the press and free speech. In

the instant case, the relation between the regulation and the alleged restriction of speech is greatly attenuated. The state of Wisconsin is in no way restricting the Plaintiffs' freedom of speech; it is merely declining to assist in their dues collection.

The Fourth Circuit concluded that the legislation banning SCEA from utilizing payroll deductions was not among the "limited and defined exceptions to the principle discouraging judicial inquiry into legislative motive." *Id.* at 1259. It stated:

> [the] legislation only defines the types of deductions the state will authorize from the paychecks of state employees and does not restrict, on its face, the First Amendment rights of the SCEA to solicit members, to speak in open fora, to associate with any other organization, to engage in political activities, or to otherwise represent its members.
> *Id.* at 1259-1260.

The district court thus "erred in admitting, over appellants' objections, the testimony of present and past members of the General Assembly as to legislative motive." *Id*. at 1260.

Much like the labor unions in *South Carolina Educ. Ass'n*, Plaintiffs ask this court to rely on the motivation of, among others, Governor Walker to overturn Act 10. Plaintiffs state that Act 10's distinction between "public safety" employees and other unions "bear a remarkably close connection to the illegitimate objective of punishing the political opponents and rewarding the political supporters of the

Governor." Pls. Complaint at ¶ 4. However, as Act 10 does not facially impair Plaintiff's freedom of speech, this Court should refrain from inquiring into the Wisconsin legislature's motivation for crafting an exemption for "public safety" unions. The allegations proffered by Plaintiff's that the exemption was politically motivated are not relevant to this Court's inquiry. This Court looks only to whether Act 10 bears a "rational basis" to a legitimate government interest.

Turning again to the Fourth Circuit's opinion in *South Carolina Educ. Ass'n v. Campbell*, The SCEA, like WEAC, alleged that its equal protection rights were violated "by the granting of statutory authorization for payroll deduction benefits to a 'similarly situated' employee organization." *South Carolina Educ. Association*, at 1262-1263. The SCEA argued that this treatment rendered "the law irrational under the equal protection clause." *Id.* The Court noted that the Supreme Court "has specifically rejected an inquiry into motive in an equal protection claim" and that the legislation at issue "was not targeted solely at the SCEA." *Id.* at 1263, *citing Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

Furthermore, in *City of Charlotte v. Local 660*, the Supreme Court held that disparate treatment in permitting payroll deductions "must meet only a relaxed standard of reasonableness in order to survive constitutional scrutiny." *City of Charlotte v. Local 660*, 426 U.S. 283, 286 (1976). Thus, "those challenging the legislative judgment must convince the court that the legislative facts on which the

classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

To summarize, the inquiry into legislative motivation is inappropriate for both the Free Speech and Equal Protection counts of Plaintiffs' complaint. Indeed, as Justice Scalia wrote, determining subjective legislative motivation is a nearly impossible task:

> [D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite. . . . [The legislator] may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fund-raising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly unmotivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.
>
> *Edwards v. Aguillard*, 482 U.S. 578, 636-637 (1987) (J. Scalia, dissenting).

Legislative motivation is nearly impossible to determine because individual legislators rarely, if ever, vote for a single reason alone. This raises yet another problem with Plaintiffs' argument. Whose motivation is the controlling one?

Plaintiffs have spoken of the legislation's "sponsors" generally and of the Governor specifically in their efforts to establish an improper motive. Yet there were dozens of legislators who voted to pass Act 10. At what point does the motive behind a bill become improper- when a majority of the legislators rely on politics as their deciding factor or just one of many? This illustrates why inquiry into legislative motive should be avoided.

B. Defendants' Proffered Rationale For Treating Public Safety Employees Differently Than Other Public Employees Is Rationally Related To A Legitimate End And Should Be Upheld.

Act 10 should be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification" without engaging in an improper inquiry into legislative motivation. The reason proffered by Defendants is the most logical, rational, and appealing to common sense. Public safety employees should be treated differently and granted privileges not provided other public employees so that the public could be protected from the consequences of strikes.

CONCLUSION

Plaintiffs have failed as a matter of law to establish a violation of their First Amendment rights. They have failed to show that Act 10 warrants strict scrutiny, so only the relaxed standards of the rational basis test applies to the alleged violation of their rights to Equal Protection. Furthermore, this Court must avoid an improper inquiry into legislative motive. As a result, Act 10 must be upheld if this Court can determine any conceivable set of facts that could provide a rational basis for treating public safety employees differently than other public employees. Using this exceptionally deferential standard, Act 10 should be upheld.

November 16, 2011

Respectfully Submitted,

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