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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE

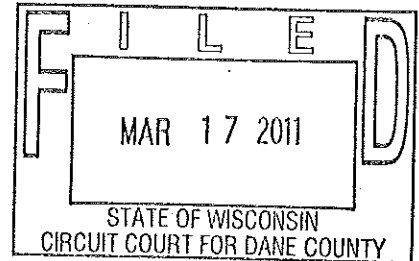
Plaintiff,

vs.

Case No: 11 CV 1244

JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS,
SCOTT SUDER and
DOUGLAS LA FOLLETTE

Defendants.



**STATE'S AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER
PENDING HEARING ON MOTION FOR TEMPORARY INJUNCTION**

NOW COMES the State of Wisconsin, by its attorney, Dane County District Attorney Ismael Ozanne, and, pursuant to Wis. Stat. § 813.02 and other authority, hereby moves this Court for an Order temporarily restraining defendant Douglas La Follette, Secretary of State for the State of Wisconsin, from publishing 2011 Wisconsin Act 10, pursuant to Wis. Stat. § 35.095(3)(b), pending a hearing on the State's motion for a temporary injunction seeking the same remedy.

As grounds for this Motion, the State asserts as follows:

BACKGROUND

1. This is an action that alleges that Defendants Senators Scott Fitzgerald and Michael Ellis, and Representatives Jeff Fitzgerald and Scott Suder, Members of the Wisconsin Legislature, violated the requirements of the Wisconsin Open Meetings Law,

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Wis. Stat. §§ 19.81, *et seq.*, when they convened a meeting of the Legislature's Joint Committee of Conference on March 9, 2011, at or about 6:00 p.m., to consider Governor Scott Walker's Budget Repair Bill, introduced in the Legislature and 2011 Assembly Bill 11 and 2011 Senate Bill 11, without providing sufficient prior notice of this meeting, without prior sufficient notice of the subject matter of this meeting and without providing reasonable access to the meeting by members of the public, all as required by the Open Meetings Law. *See generally*, Wis. Stat. § 19.84(2) and (3). Complaint, ¶¶ 15-41.

2. Through the Open Meetings Law, the Legislature has declared as the policy of Wisconsin that "the public shall be entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1).

3. "To implement and ensure" that this policy is achieved, the Legislature through the Open Meetings Law has also provided that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise provided by law." Wis. Stat. § 19.81(2).

4. Invoking the constitutional imperative that "[t]he doors of each house shall be kept open except when the public welfare shall require secrecy[.]" Wis. Const. art. IV, § 10, the Legislature through the Open Meetings Law declared its own intent "to comply to the fullest extent with [the Open Meetings Law]."

5. The Legislature also provided that, in interpreting and applying the Open Meetings Law, its provisions "shall be liberally construed to achieve the purposes set forth in [§ 19.81]."

6. Among other requirements, the Open Meetings Law requires that public notice of all meetings of a governmental body shall be given at least 24 hours prior to the commencement of the meeting unless for good cause such notice is impossible or impracticable, and in that event shorter notice may be given, but in no case shall the notice be less than two hours in advance. Wis. Stat. § 19.84(3).

7. The Open Meetings Law further requires that “[e]very meeting of a governmental body . . . shall be held in open session” and that “all discussion shall be held and all action of any kind, formal and informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.” Wis. Stat. § 19.83(1).

8. Wisconsin’s Open Meetings Law, as applied to members of the Legislature, is a codification of the mandates expressly provided for in the Wisconsin Constitution to the effect that “[t]he 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,” Wis. Const. art. I, § 4, and that “[t]he doors of each house shall be kept open except when the public welfare shall require secrecy,” Wis. Const. art. IV, § 10.

FACTS SUPPORTING VIOLATION OF
OPEN MEETINGS LAW
(LIKELIHOOD OF SUCCESS)

9. Senators Scott Fitzgerald, Michael Ellis and Mark Miller, and Representatives Jeff Fitzgerald, Scott Suder and Peter Barca, were appointed Members of the Joint Committee of Conference. Senate Journal (March 9, 2011) at 3-4 (Ozanne

Affidavit, Exhibit 1); History of January 2011 Special Session Assembly Bill 11 at 13 (Ozanne Affidavit, Exhibit 2).

10. Wisconsin's Open Meetings Law applies to members of the Wisconsin Legislature, including Senator Scott Fitzgerald, Senator Michael Ellis, Representative Jeff Fitzgerald and Representative Scott Suder. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 681-82, 699, 239 N.W.2d 313 (1976).

11. As provided for in the Joint Rules, the purpose and function of the Joint Committee of Conference is to attempt to resolve differences in legislation passed by the Assembly and by the Senate. Joint Rule 3 (Ozanne Affidavit, Exhibit 3 at 5).

12. The requirements of the Open Meeting Law apply to meetings of committees of the Legislature unless, by a rule of the Senate, the Assembly or joint rule of the Legislature a conflicting rule applies. Wis. Stat. § 19.87(2).

13. Nothing in the Joint Rules, which apply to govern the proceedings the Joint Committee on Conference, is in conflict with the requirements of the Open Meetings law insofar as the violations alleged here are concerned. Joint Rules (Ozanne Affidavit, Exhibit 3).

14. Public notice of the March 9, 2011, meeting of the Joint Committee of Conference was not posted at least 24 hours prior to the commencement of the meeting. Verified Complaint of Peter Barca, ¶ 16; Complaint, Attachment 6.

15. There was no emergency or other good cause making 24-hour minimum notice impossible or impracticable. *Id.*, ¶ 17; Complaint, Attachment 6.

16. At the March 9, 2011, meeting of the Joint Committee of Conference, Representative Peter Barca objected in person to the convening of the meeting and the

conducting of business at the meeting on the ground that the meeting was convened and conducted in violation of the Open Meetings Law. *Id.*, ¶ 22; Complaint, Attachment 6.

17. Despite Representative Peter Barca's objections, Senators Scott Fitzgerald and Michael Ellis, and Representatives Jeff Fitzgerald and Scott Suder continued to conduct business as the Joint Committee of Conference. *Id.*, ¶ 24; Complaint, Attachment 6; Senate Journal (March 9, 2011) at 4-5 (Ozanne Affidavit, Exhibit 1 at 4-5).

18. The business conducted by the Joint Committee of Conference consisted of removing from Governor Walker's Budget Repair Bill the so-called "fiscal items" and, as codified in Conference Substitute Amendment 1, adopting and concurring in the Budget Repair Bill as amended and offering the same to the Senate and the Assembly. Senate Journal (March 9, 2011) at 5 (Ozanne Affidavit, Exhibit 1 at 5); History of January 2011 Special Session Assembly Bill 11 at 13 (Ozanne Affidavit, Exhibit 2 at 13).

19. The public notice for said meeting was insufficient as to reasonably likely apprise the public and the news media that the Joint Committee of Conference would consider, discuss, debate and act on a new version of said Bill consisting of only those items denominated "non-fiscal," which had not been previously passed by the Senate, in violation of Sec. 19.84(2) of the Wisconsin Statutes.

20. The subject matter of January 2011 Special Assembly Bill 11 included, but was not limited to, state finances, collective bargaining for public employees, compensation and fringe benefits of public employees, the state civil service system, and the Medical Assistance program all of which subjects are of high public interest and

which have generated not only public debate, but also thousands of Wisconsin citizens demonstrating at the State Capitol for several weeks.

21. The meeting of Joint Committee of Conference was held in the Wisconsin Senate Parlor in the State Capitol, located in Madison, Dane County, Wisconsin; that said Parlor is a small room with very limited space and was not reasonably accessible to members of the public or all citizens in violation of Sec. 19.81(2) and 19.82(3) of the Wisconsin Statutes.

22. The State Capitol building where said meeting was held had restricted access to the general public before the meeting, preventing citizens who wished to attend the meeting from entering the building, in violation of Wis. Stat. §§ 19.81(2), 19.82(3), and 19.96 and of Wis. Const. art. I, § 4 and Wis. Const. art. IV, § 10.

23. In reliance on the action by the Joint Committee of Conference, the Senate on March 9, 2011, and the Assembly on March 10, 2011, then convened, considered and passed the Budget Repair Bill as amended by Conference Substitute Amendment 1. History of January 2011 Special Session Assembly Bill 11 at 14 (Ozanne Affidavit, Exhibit 2 at 14).

24. The same was then enrolled, presented to Governor Walker and approved by him on March 11, 2011. As approved, the enrolled bill has been numbered 2011 Wisconsin Act 10. History of January 2011 Special Session Assembly Bill 11 at 14 (Ozanne Affidavit, Exhibit 2 at 14); 2011 Wisconsin Act 10 (Ozanne Affidavit, Exhibit 4).

IRREPARABLE HARM

25. 2011 Wisconsin Act 10 provides that, as to state employees who are covered by a collective bargaining agreement that has expired or which is terminated, its provisions apply immediately. 2011 Wisconsin Act 10, § 9355(1)(a) and (1)(b) (Ozanne Affidavit, Exhibit 4 at 45-46).

26. 2011 Wisconsin Act 10 provides that, as to municipal employees who are covered by a collective bargaining agreement that has expired or which is terminated, its provisions apply immediately. 2011 Wisconsin Act 10, § 9332(1) (Ozanne Affidavit, Exhibit 4 at 45).

27. In 2008, there were approximately 32,670 state employees who were represented by a labor union. *State of Wisconsin Workforce Planning & Affirmative Action Report* vii (Fiscal Year 2008) (Ozanne Affidavit, Exhibit 7 at 7).

28. All of the contracts between the State of Wisconsin and each of the labor unions representing state employees expired effective June 30, 2009, and an attempt to approve contracts for some of these employees failed in December 2010. *Wisconsin State Journal*, "Dems end lame duck session after failure to pass union contracts" (December 16, 2010) (Ozanne Affidavit, Exhibit 8); *Milwaukee Journal Sentinel*, "Walker calls for cuts or big layoffs" (February 11, 2011) (Ozanne Affidavit, Exhibit 9).

29. On February 11, 2011, Governor Walker's administration gave a written 30-day notice to each union representing state employees of the termination of contracts for those employees. *Milwaukee Journal Sentinel*, "Walker calls for cuts or big layoffs" (February 11, 2011) (Ozanne Affidavit, Exhibit 9).

30. On the first day that 2011 Wisconsin Act 10 becomes effective as law, if it does, tens of thousands of represented state and municipal employees whose contracts have expired or been terminated will lose many of the rights to collectively organize and to bargain on mandatory subjects. 2011 Wisconsin Act 10, § 9332(1), 9355(1)(a) and 9355(1)(b) (Ozanne Affidavit, Exhibit 4 at 45-46).

31. The public has a vital interest in ensuring that legislation, which will have a substantial impact on the lives of the citizens of Wisconsin, is enacted in full conformity with the statutes and Constitution of this State. If the Court determines that the Complaint in this matter has a likelihood of success on the merits, then failure to grant the relief requested here would serve to erode the faith of the citizenry in its own government by allowing a law of such consequence, illegally enacted, to become effective. See: ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986); Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984) [citing public interest as a traditional element in the determination to grant a preliminary injunction]

32. There is no harm to the defendants if the State's motion for a temporary restraining order is granted. At all times now and in the future, the Legislature may reconvene, either in regular session or in another special session upon the call of the Governor, to consider and act upon legislation that is exactly the same as 2011 Wisconsin Act 10, but to do so in full compliance with the requirements of the Open Meetings Law and of the Wisconsin constitution.

THE ABSENCE OF FULL RELIEF
WITHOUT A TEMPORARY RESTRAINING ORDER

33. Actions taken at a meeting of a governmental body held in violation of the Open Meetings Law are voidable, pursuant to Wis. Stat. § 19.97(3), if a court determines that the public interest in the enforcement of the Open Meetings Law outweighs any public interest in sustaining the validity of the action taken.

34. The public interest in enforcing the Open Meetings Law by voiding the actions taken by the Joint Committee of Conference, and thereafter the actions of the Senate, Assembly and Governor that took place in reliance on the actions of the Joint Committee of Conference (namely, the passage, enrollment and approval of 2011 Wisconsin Act 10), under the circumstances presented here, are substantial. These interests include, though are not limited to, the following:

a) The vindication of the rights and duties created and imposed by the Open Meetings Law beyond the mere imposition of a forfeiture of no more than \$300 for a violation.

b) The statewide impact of the Conference Substitute Amendment 1, as codified in 2011 Wisconsin Act 10, including the repeal of rights to collectively organize and to bargain on mandatory subjects enjoyed for decades by tens of thousands of Wisconsin state, municipal and district employees.

c) The dubious precedent that would be set for sustaining the passage of significant legislation on subjects of great public interest and concern despite the demonstrated violation of the Open Meetings Law.

35. The Wisconsin Constitution, art. IV, § 17(2), provides that “[n]o law shall be in force unless published.” Pursuant to Wis. Stat. § 35.095(3)(b), the Secretary of

State is required to publish each Act enacted at a legislative session and approved by the Governor no more than ten working days after the date of enactment.

36. Thus, Secretary of State Douglas La Follette must publish 2011 Wisconsin Act 10 no later than March 25, 2011, which is ten working days after approval by Governor Walker.

37. Secretary of State La Follette has publicly announced his intention to publish 2011 Wisconsin Act 10 on the tenth working day following its enactment. *Wisconsin State Journal*, "Secretary of state won't publish bargaining law until March 25" (March 11, 2011) (Ozanne Affidavit, Exhibit 8).

38. However, the designation of the date of publication is a decision wholly within the discretion of the Secretary of State, and he may, at any time and for any reason, decide to publish 2011 Wisconsin Act 10 prior to the tenth day following its enactment. Wis. Stat. § 35.095(3)(b).

39. Absent a temporary restraining order pending a hearing on the State's motion for temporary injunction, the State, as plaintiff in this lawsuit to enforce the requirements of the Open Meetings Law, and notwithstanding the likelihood of success on the merits, as described above, will be without recourse to prevent 2011 Wisconsin Act 10 from becoming effective as law in Wisconsin in the event Secretary of State La Follette exercises his absolute discretion and decides to publish 2011 Wisconsin Act 10 on a date prior to March 25, 2011.

40. In that event, the State may be deprived of the full relief to which it may be entitled, namely, that of having the actions of the Joint Committee of Conference

voided and the results of its actions never having the full force and effect of law in Wisconsin.

41. Furthermore, the State's right to seek to, and the Court's power to declare as, void, actions taken by a governmental body in violation of the Open Meetings Law, pursuant to Wis. Stat. § 19.97(3), would be ineffective and severely curtailed, or even constitute a nullity, where, although a violation occurs during a necessary step in the legislative process, such as in respect to the March 9, 2011, meeting of the Joint Committee of Conference, the end product of that process, namely 2011 Wisconsin Act 10, is not itself subject to being voided before it becomes effective as law.

42. The defects in process set forth above are curable by the Legislature.

43. If the Court issues a temporary restraining order pending a hearing on the State's motion for temporary injunctive relief, then the State will be able to preserve the full range of remedies available to it under the Open Meetings Law without concern that 2011 Wisconsin Act 10 may be published on a date prior to March 25, 2011, and before the Court can hear and decide the State's motion for temporary injunction.

44. Additionally, Senators Scott Fitzgerald and Ellis and Representatives Fitzgerald and Suder enjoy a constitutional privilege from being subject to civil process during each session of the Legislature as well as for fifteen days before the commencement and after the termination of each session, pursuant to Wis. Const. art. IV, § 15.

45. The most recent floor period for the Senate and the Assembly concluded on March 10, 2011. The next floor period does not commence until April 5, 2011, and is

scheduled to last until April 14, 2011. 2011 Senate Joint Resolution 1 at 1 and 3, § 1(2)(f) and (h) (Ozanne Affidavit, Exhibit 6 at 1 and 3).

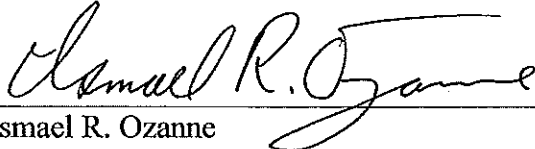
46. Absent a waiver of their constitutional privilege, which is wholly within their discretion whether or not to do, effective service of process on Senators Scott Fitzgerald and Ellis and Representatives Fitzgerald and Suder, to bring them within the jurisdiction of this Court, is not possible until some time after March 25, 2011, which is the Secretary of State's announced date for publishing 2011 Wisconsin Act 10, and for several months thereafter,.

47. Senator Scott Fitzgerald resides at N4692 Maple Road, Juneau, Wisconsin 53039. Senator Michael Ellis resides at 1752 County Road GG, Neenah, Wisconsin, Wisconsin 54956. Representative Jeff Fitzgerald resides at 910 Sunset, Horicon, Wisconsin 53032. Representative Scott Suder resides at 102 South 4th Avenue, Abbotsford, Wisconsin 54405. Secretary of State Douglas La Follette resides at 1211 Rutledge Street # 3, Madison, Wisconsin 53703. This information is provided in order to comply with the requirements of Wis. Stat. § 813.02(4).

48. A copy of this Motion, together with other supporting materials, will promptly be served on Defendant Secretary of State Douglas La Follette and a courtesy copy of the same will be provided to Defendants Senators Scott Fitzgerald and Michael Ellis and Representatives Jeff Fitzgerald and Scott Suder.

WHEREFORE, the State requests that this Court issue a temporary restraining order prohibiting Secretary of State Douglas La Follette from publishing 2011 Wisconsin Act 10 pending a hearing on the State's motion for a temporary injunction.

Dated at Madison, Wisconsin, this 17th day of March, 2011.



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