

3 MADISON TEACHERS INC.,
4 PEGGY COYNE, PUBLIC
5 EMPLOYEES LOCAL 61, AFL-CIO,
6 and JOHN WEIGMAN,

7 Plaintiffs, TRANSCRIPT OF PROCEEDINGS

8 vs. Case No. 11-CV-3774

9 SCOTT WALKER, JAMES R. SCOTT,
10 JUDITH NEUMANN, and
11 RODNEY G. PASCH,

12 Defendants.

COPY

13 DATE: October 21, 2013;
14 Madison, Wisconsin;

15 PRESIDING: The Honorable JUAN B. COLÁS,
16 Circuit Court Judge;

17 APPEARANCES: The Plaintiffs, Madison Teachers
18 Incorporated and Peggy Coyne, appear
19 by LESTER PINES, Attorney, Madison,
20 Wisconsin, who also appears on behalf
21 of the Kenosha Education Association;
22
23 TIMOTHY HAWKS, Attorney, Milwaukee,
24 Wisconsin, appears on behalf of the
25 Wisconsin Education Association Council,
American Federation of Teachers Wisconsin,
SEIU Healthcare Wisconsin, Wisconsin
Federation of Nurses and Health Care
Professionals and District Council 40 of
AFSCME;

The Plaintiffs, Public Employees Local
61 and John Weigman, appear by M. NICOL
PADWAY, Attorney, Milwaukee, Wisconsin;

The Defendants, James Scott and Rodney
Pasch, appear by STEVEN KILPATRICK,
Assistant Attorney General, Madison,
Wisconsin;

1 Also appearing, PETER DAVIS, Chief Legal
2 Counsel for the Wisconsin Employment
3 Relations Commission, and BRIAN HAGEDORN,
4 Chief Legal Counsel for Governor Walker;

5 PROCEEDINGS: Motion Hearing.

6 DEBORAH MANKE, RPR
7 Official Court Reporter
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1 PROCEEDINGS

2 THE COURT: This is 2011-CV-3774, Madison
3 Teachers Incorporated, et al vs. Scott Walker, et al, and
4 the appearances?

5 MR. PINES: The plaintiffs, Madison Teachers
6 Incorporated and Peggy Coyne, appear by Lester Pines of
7 Cullen, Westin Pines & Bach, LLP. I also appear on
8 behalf of the aggrieved party and movant, Kenosha
9 Education Association. Also present in court on behalf
10 of Madison Teachers Incorporated is John Matthews, its
11 executive director, and on behalf of the Kenosha
12 Education Association Joe Kiriaki, that's K-I-R-I-A-K-I,
13 its executive director.

14 MR. HAWKS: The Wisconsin Education
15 Association Council, American Federation of Teachers
16 Wisconsin, SEIU Healthcare Wisconsin, Wisconsin
17 Federation of Nurses and Health Care Professionals and
18 District Council 40 of AFSCME appear today by counsel,
19 Timothy E. Hawks and the law firm of Hawks Quindel, S.C.

20 MR. PADWAY: Public Employees Union Local 61
21 and John Weigman appear by Attorney M. Nicol Padway of
22 the law firm of Padway & Padway, Limited, Your Honor.

23 MR. KILPATRICK: On behalf of the defendant
24 commissioners James Scott and Rodney Pasch, my name is
25 Steven Kilpatrick. I'm an assistant attorney general

1 with the Wisconsin Department of Justice. To my
2 immediate left is Peter Davis, chief legal counsel for
3 the Wisconsin Employment Relations Commission, and to his
4 left is Brian Hagedorn, chief legal counsel for Governor
5 Walker.

6 THE COURT: Okay, thank you. And we're here
7 today on motions filed -- motions for contempt filed by
8 non-moving parties -- by non-party movants. And the
9 first thing I wanted to address is the media request for
10 cameras in the courtroom. I think shortly before lunch
11 all counsel were notified that we have a media request
12 and there was no objection to it so I permitted the
13 cameras to be present.

14 The second matter that I haven't yet
15 addressed, there were requests to file *amicus* brief and
16 one was on behalf of several public school teachers filed
17 by the Wisconsin Institute for Law & Liberty. The other
18 was on behalf of Wisconsin County Mutual Insurance
19 Corporation and Community Insurance Corporation. Is
20 there any objection to allowing those briefs to be
21 received?

22 MR. HAWKS: No.

23 MR. PADWAY: No, Your Honor.

24 MR. PINES: No objection.

25 MR. KILPATRICK: No, Your Honor.

1 THE COURT: All right. I'll go ahead and
2 allow the briefs to be received. I'm not going to
3 receive oral argument by the *amici* but I will docket
4 their briefs and I have reviewed them as part of my
5 determination of whether to receive them or not. So with
6 that I think we're ready to move on to the substance of
7 the motion that's before me. And Mr. Pines?

8 MR. PINES: Well, I'd like Mr. Hawks to take
9 the lead on this and I will have argument after
10 Mr. Hawks.

11 THE COURT: Sure. Mr. Hawks?

12 MR. HAWKS: Your Honor, the Wisconsin
13 Education Association Council and other movants in this
14 proceeding are statewide labor organizations representing
15 a large number of public sector employees throughout
16 Wisconsin. The organizations exist for the purpose of
17 coordinating and advancing their affiliated individual
18 local unions' interest in collective bargaining in
19 advancing the interests of teachers' wages, hours and
20 conditions of employment, and they are directly affected
21 by this court's order, both of September of 2012 and 2014
22 (sic).

23 As you are aware by virtue of the pleadings in
24 July of 2013 the Wisconsin Employment Relations
25 Commission issued an emergency rule requiring the public

1 sector labor organizations representing school employees
2 to file petitions for a certification election not later
3 than August 31st, 2013 for an election to commence on
4 November 1, 2013. This emergency rule is the first
5 action taken by the WERC, among others, but the first to
6 have a practical consequence in derogation of your order
7 of September of 2012.

8 The parties to this case sought an injunction
9 which was denied by this court on the ground that there
10 was not irreparable harm, but this court also found that
11 the defendant -- that the defendant -- the defendant
12 commissioners were bound not to under any circumstances
13 enforce any aspect of the statute that you found -- this
14 court found unconstitutional to anybody.

15 In this case the movants in this motion for
16 contempt rely on Chapter 785 of the Wisconsin Statutes.
17 That chapter, 785.01 in particular, defines contempt as a
18 disobedience, resistance or obstruction of the authority
19 process, or order of a court. The procedure for -- the
20 procedure for bringing a motion for contempt under
21 Chapter 785, section 785.03, provides specifically that a
22 person aggrieved by a contempt of court may seek
23 imposition of a remedial sanction.

24 A person -- the statute was carefully drafted
25 to make it clear or to distinguish from a party

1 aggrieved. In this case the petitioner -- the movants
2 are all persons aggrieved by the commissioners' refusal
3 to comply with this court's order of September 2012.

4 The petitioners seek not a punitive sanction
5 but rather a remedial sanction which has as its purpose
6 the compliance by a party defendant with the court's
7 order. As the court called to the council's attention,
8 the comments of 1979 made it quite clear that the -- that
9 the phrase "a person aggrieved" was intended to allow
10 non-parties to bring a contempt of court proceeding.

11 The election that's scheduled on November 1 is
12 going to involve nearly 70,000 public school employees in
13 the State of Wisconsin. The petitioners who filed for
14 the certification election following the WERC's emergency
15 order spent more than a hundred thousand dollars in order
16 to obtain the opportunity to maintain their certification
17 as the exclusive bargaining agent for employees in public
18 schools in Wisconsin, wages, total base wages and
19 negotiations under Act 10.

20 Now, we do want to take some care though not
21 to suggest that the case or the scope of this decision is
22 limited just to the elections that are to be conducted on
23 the -- beginning November 1. Those same emergency rules
24 will apply to public sector employees of municipal
25 governments throughout Wisconsin, but the employees of

1 county, city and other municipal governments, those
2 elections will be held after the -- after the beginning
3 of the new year. Petitions will be filed prior to that
4 time.

5 In addition, Your Honor, the scope of
6 collective bargaining at the bargaining table throughout
7 the state, as Mr. Pines will point out with regard to the
8 specific situation of the Kenosha Education Association,
9 Kenosha was severely limited by Act 10, and in your order
10 of September 2012 that limitation on the scope of
11 collective bargaining was also struck down.

12 As this court noted in its decision of
13 September 2013 and order, this is a case not involving
14 the decision of this court as precedent for other courts,
15 it is a case involving the obligation of defendants who
16 appear and are subject to the personal jurisdiction in
17 their official capacity of this court to obey the order
18 of the court. Notably, the Wisconsin Employment
19 Relations Commission is not a body well or appropriately
20 constituted to interpret or apply the state's
21 constitution to the -- to this case to Act 10 or to the
22 -- or to the Municipal Employment Relations Act
23 generally. That is a role for the courts.

24 As the Wisconsin Supreme Court pointed out as
25 recently as the *Helgeland* decision, *Marbury v. Madison* is

1 good law in this state and elsewhere in the country.
2 This court has the jurisdiction to determine the
3 constitutionality of the state and the courts in general
4 do, not the executive branch or the legislative branch.
5 There has been no other court decision in Wisconsin that
6 has found in conflict or entered an order that's
7 inconsistent with this court's decision.

8 There is an appeal pending but a request by
9 the defendant commissioners and defendant Walker has been
10 denied by the court of appeals. There's been no -- I
11 should say, the request for a stay of this court's order
12 has been denied by the court of appeals. There has been
13 no subsequent request for a stay of this court's order
14 submitted to the Wisconsin Supreme Court.

15 As a consequence, this court's decision is the
16 only judicial interpretation of Act 10 and the
17 constitutionality of Act 10. The movants respectfully
18 submit that the defendant commissioners are bound by this
19 court's order and they are not free to, as we noted in
20 our reply brief, apply to the citizens of the State of
21 Wisconsin not one, but two constitutions, one applicable
22 to the 3,000 employees in the Madison Metropolitan School
23 District and to certain employees of the City of
24 Milwaukee and a separate constitution to the remaining
25 five million employees of the state. This reality cannot

1 stand. Movants respectfully request that the court grant
2 the remedial sanctions that they have prayed for in their
3 motion. Thank you, Your Honor.

4 THE COURT: Okay. Mr. Pines?

5 MR. PINES: Thank you, Your Honor. I appear
6 on behalf of the Kenosha Education Association and
7 Madison Teachers Incorporated and Peggy Coyne. I want to
8 address the court primarily on behalf of the Kenosha
9 Education Association. Kenosha Education Association was
10 the certified collective bargaining agent for the
11 employees of the Kenosha School District.

12 As a result of the actions of the
13 commissioners to enforce administrative rules which were
14 proposed by the commissioners and approved by the
15 Governor, the Kenosha Education Association, that is the
16 Kenosha School District, was informed through Peter
17 Davis, acting on behalf of the Wisconsin Employment
18 Relations Commission which is governed by the two
19 commissioners who appeared in this case in their official
20 capacities, the school district was informed that as a
21 result of the Kenosha Education Association not seeking
22 an election, seeking a re-certification election under a
23 law which this court told the two commissioners, Pasch
24 and Scott, was unconstitutional; nevertheless,
25 nevertheless, the Kenosha Education Association was

1 decertified and is no longer allowed to act as the
2 certified collective bargaining agent and act on behalf
3 of its members.

4 When the court ruled in September of 2012 that
5 this law was unconstitutional, the court did so as a
6 court of general jurisdiction and as a court that had
7 concurrent jurisdiction with the Supreme Court of
8 Wisconsin on matters *publici juris*. This was a matter
9 *publici juris*. This was a matter that involved the
10 entire state. The supreme court had said repeatedly that
11 circuit courts have concurrent jurisdiction over matters
12 *publici juris*. The supreme court has repeated and the
13 constitution affirms that circuit courts are well within
14 their rights to consider the constitutionality of
15 statutes. This court did so. This court found the
16 statutes, parts of Act 10, to be facially
17 unconstitutional.

18 Since that time there has been a tremendous
19 amount of discussion, and I would say to a certain extent
20 propaganda, about what the court meant and what the
21 court's powers were, but it's indisputable, absolutely
22 indisputable, that the court was well within its
23 authority to declare those portions of the statute
24 unconstitutional, which it did.

25 It is also indisputable that the defendants,

1 Pasch and Scott, were bound by that decision. They were
2 parties to the case. They had every opportunity to argue
3 the case. They were represented by the Attorney General
4 of the State of Wisconsin who acted on behalf of all the
5 citizens of the state to argue in favor of the
6 constitutionality, and this court ruled against them and
7 told them that this law is unconstitutional in the parts
8 that the court direct.

9 And as the court rightly noted, the defendants
10 in this case when they came before the court on the
11 injunction request that MTI made, that they focused on
12 the effect on the plaintiffs in the case. And what the
13 court said on September 17th of this year was in effect,
14 they say, that is the two commissioners and the other
15 defendant, Governor Walker, they say, any ruling that a
16 statute is facially unconstitutional is only a ruling
17 that is unconstitutional as applied to the parties who
18 sued.

19 This emphasis on the identity of the
20 plaintiffs ignores that the declaratory judgment binds
21 the defendants. The defendants do not identify any case
22 holding that state officials who are defendants in an
23 action in which a statute was found to be
24 unconstitutional on its face may continue executing that
25 statute, and in fact, Judge, there is no case, there is

1 no statute, there is no such law.

2 The defendants were well aware that they were
3 bound by the decision, and in a case in which the statute
4 was found facially unconstitutional, as the court pointed
5 out, they may not enforce it under any circumstances
6 against anyone. Yet that is precisely what they did.
7 And the court cited from a 1998 case, *State v. Conrad*.
8 This was not new law, *State v. Conrad*, nor was it the
9 first time that this law was cited to the defendants. It
10 was cited to defendants in filings with the court of
11 appeals, and even if it wasn't cited by anyone, they were
12 represented by the attorney general's office who very
13 well knew that that was the law of this state.

14 So the circumstances that we find ourselves in
15 are this. A lawsuit was brought to you, a court with
16 competent jurisdiction, concurrent jurisdiction with the
17 supreme court in a case *publici juris* in which the court
18 found the statutes to be facially unconstitutional. That
19 court's ruling was binding on these defendants. The
20 defendants have nevertheless ignored you. They had
21 ignored your order, they had ignored your ruling, and
22 that cannot stand.

23 Our tripartite system of government is fragile
24 and it depends on respect and comedy between the branches
25 of government, but in particular with regard to the

1 judiciary, the judiciary which is the weakest branch.
2 What maintains the rule of law is that the legislative
3 branch and the executive branch respect the decisions of
4 the courts. If they do not respect the decisions of the
5 courts, then the rule of law is meaningless. If the
6 executive feels free -- if the executive branch feels
7 free to do whatever it wants to do even when it has been
8 told by a court that a law is unconstitutional, the
9 executive branch continues to enforce that law, that not
10 only is contemptuous of the court, it's contemptuous of
11 the process and it fundamentally undermines the rule of
12 law.

13 That's why the court should act and should
14 hold the commissioners in contempt because failing to do
15 so would be to allow the executive branch to ignore a
16 legitimate order of the judicial branch which is in
17 effect and has not been stayed and has not been
18 overruled. That's not -- that's not how the executive
19 branch is supposed to work.

20 And finally, Your Honor, there really is no
21 justification that has been put forward here for this
22 behavior. And I think it is fair to say that the
23 behavior is an expression of a desire on these
24 commissioners to do what they want. And I will quote
25 from Exhibit 2 to my affidavit, an e-mail from Mr. Davis.

1 "I note the obvious caveat. The WERC commissioners make
2 the law, not me." And I responded to him and I said,
3 "The commissioners do not make the law, they are supposed
4 to follow the law." And that is what they were supposed
5 to do. They are not laws unto themselves and they must
6 be held in contempt. Thank you.

7 THE COURT: Thank you. Mr. Padway? If you
8 would swivel the microphone over please. Thanks.

9 MR. PADWAY: Briefly, Your Honor. Local 61
10 takes the position that your order must be enforced. And
11 we raise somewhat of a rhetorical question to the
12 commissioners and to the Governor and that is if they did
13 not feel they were not bound by your order, then why did
14 they seek a stay of your order in the first place in this
15 court and a stay in the court of appeals? They obviously
16 knew from the very outset that they were bound and
17 obligated to follow this court's order. The fact that
18 they are now engaging in the conduct that is before this
19 court demonstrates an egregious disregard of the court's
20 order and you must enforce it, Your Honor. Thank you.

21 THE COURT: Thank you. Mr. Kilpatrick?

22 MR. KILPATRICK: Thank you, Your Honor. I'd
23 like to not take up too much of your time but I'm aware
24 that you've read our brief, our response brief. So I
25 just want to make a few more points that weren't made

1 there. But first and foremost, I want to say that the
2 commissioners are not in contempt of court. They did not
3 intentionally disobey any order of this court.

4 The movants here still have not pointed to any
5 case law that stands for the proposition that a
6 declaratory judgment without an injunction can be
7 enforced through contempt. Indeed, the movants, the
8 non-party movants here, are attempting to obtain an order
9 through contempt by way of a sanction that the plaintiffs
10 in this case were unable to obtain through post-judgment
11 injunctive relief.

12 THE COURT: Let me -- if it can't be enforced
13 through contempt, then how can it be enforced? What are
14 the mechanisms for enforcement?

15 MR. KILPATRICK: For the declaratory judgment?

16 THE COURT: Right.

17 MR. KILPATRICK: That has been appealed, Your
18 Honor.

19 THE COURT: What's the mechanism for enforcing
20 that declaratory judgment?

21 MR. KILPATRICK: By the plaintiffs or by
22 non-party movants?

23 THE COURT: By the court. What's the
24 mechanism? You say it's not contempt. So is it purely
25 an advisory opinion and not actually a judicial judgment?

1 MR. KILPATRICK: No, it certainly is a
2 judicial judgment and that is why the defendants
3 respected the declaratory judgment of the court with
4 regard to the plaintiffs who brought the suit, with
5 regard to MTI and the other union from Milwaukee.

6 THE COURT: So with respect to the plaintiffs
7 you believe it would be enforceable as a -- through
8 contempt even though it's not an injunction?

9 MR. KILPATRICK: It is a -- it's a final order
10 of the court construed as a declaratory judgment. And
11 again, the plaintiffs simply are not being injured here
12 and that was -- that was decided by this court
13 previously.

14 THE COURT: You think that with respect to the
15 plaintiffs, if the WERC had not carved out an exception
16 for the plaintiffs, that the plaintiffs could have
17 brought this motion for contempt and that it would be an
18 enforceable judgment?

19 MR. KILPATRICK: No, Your Honor, and I direct
20 you to the note that you made counsel aware of in regard
21 to Chapter 785, I believe it was note one, where you had
22 said the note says a person must -- well, actually, what
23 you had -- I believe maybe had directed us to was whether
24 a non-party could bring a contempt motion.

25 THE COURT: Correct.

1 MR. KILPATRICK: And the commissioners concede
2 that yes, a non-party can bring a contempt motion, but
3 still that does not make them persons aggrieved under the
4 statute, and I point to the note that says a person must
5 be aggrieved by the contempt to have standing to file the
6 motion.

7 THE COURT: Right.

8 MR. KILPATRICK: This incorporates the concept
9 contained in prior Wis. Stat. 295.01 and 295.03(1) from
10 1997 that a contempt must in some way impair or prejudice
11 the rights or remedies of the persons in the original
12 proceeding. So in this sense, that the plaintiffs in the
13 original proceeding, their rights have not been impaired
14 at all. And there's no basis for non-parties to bring a
15 contempt motion because they're certainly not persons
16 aggrieved. If the plaintiffs themselves are not
17 aggrieved, there's nothing here that shows that
18 non-parties can bring contempt.

19 THE COURT: I read that language a little bit
20 differently. That language to me just seems to mean not
21 that the original parties must be aggrieved in order for
22 a non-moving party to be aggrieved, but that a non-moving
23 party must be aggrieved in the same sense as a party
24 would have had to suffer some impairment or prejudice for
25 them to bring a contempt action.

1 MR. KILPATRICK: Well, pulling the statute
2 that's referenced from 1977, 295.01 does read: Every
3 court of record may find in contempt any person who
4 disobeys any process or lawful order of the court by
5 which -- by which act the rights or remedies of a party
6 in an action or proceeding may be impaired, impeded,
7 defeated or prejudiced.

8 So what the commissioners interpret that as to
9 say that plaintiffs must -- plaintiffs' rights or
10 remedies must be impaired before a non-party may bring a
11 motion for contempt against, in this case, the
12 defendants.

13 THE COURT: Okay. And then to get back if I
14 could to my original question, your position then is that
15 a declaratory judgment by itself which does not have an
16 injunction as part of the relief is unenforceable.

17 MR. KILPATRICK: No, did not say that.

18 THE COURT: Then I did misunderstand.

19 MR. KILPATRICK: It simply -- in this case
20 that question doesn't need to be answered because the
21 commissioners and defendant Walker are respecting the
22 court's declaratory judgment as to the plaintiffs who
23 brought the suit.

24 THE COURT: That brings me -- let's pause
25 right there then so I can take this in piece by piece.

1 So your position is that the declaratory judgment is only
2 controlling of the defendants' conduct as it relates to
3 the plaintiffs in the original case.

4 MR. KILPATRICK: Yes, that's right, Your
5 Honor, but in support I point as I did in the brief to
6 the court of appeals' orders and there were two orders:
7 One, the first one, noted that the plaintiffs had been
8 citing case law that says when a statute has been
9 declared unconstitutional on its face it is to be treated
10 as null and void from its conception.

11 And then the court of appeals went on to say
12 but none of the cases brought to our attention involve
13 the question whether this proposition means that a
14 decision of a circuit court has binding effect on
15 non-parties or for that matter on a party with respect to
16 other controversies.

17 In sum, none of the authority cited by the
18 unions for these two propositions directly addressed the
19 questions of which if any non-parties are bound and to
20 what extent parties are bound in other controversies by a
21 circuit court decision declaring a statute void *ab initio*
22 on the grounds that it's facially unconstitutional.

23 THE COURT: And in this case it was
24 represented by the moving parties' counsel that there are
25 no other controversies, using that term in the legal

1 sense, no other cases in which this court's decision has
2 sought to be applied, is that right?

3 MR. KILPATRICK: In -- that's correct.

4 THE COURT: There are no other controversies.

5 MR. KILPATRICK: In state court.

6 THE COURT: So even if I accept my decision,
7 the decision of this court is not binding on other
8 circuit courts in controversies that may be before them.
9 That doesn't really apply here; that doesn't really
10 matter.

11 MR. KILPATRICK: No, I think the way we read
12 that is that the other controversies as to the WERC or
13 the commissioners acting in their quasi-judicial capacity
14 as to other controversies brought before them applying --
15 they're not bound by a non-precedential decision of a
16 circuit court in applying a statute as to those
17 non-parties in other controversies.

18 THE COURT: So one of the cases I think that
19 was cited in your brief for a different proposition than
20 what I'm about to mention, I think you cited to *Jelke*,
21 J-E-L-K-E.

22 MR. KILPATRICK: I believe so.

23 THE COURT: And one of the things that I read
24 in that case is an unconstitutional act of the
25 legislature is not a law, it confers no rights, imposes

1 no penalty, affords no protection, is not operative and
2 in legal contemplation has no existence. And as I'm
3 understanding your argument, there should be added to
4 that a little sentence that says as to the parties in the
5 action, a little qualifier, is that what you're saying?

6 MR. KILPATRICK: No, Your Honor. The position
7 is that a declaratory judgment alone of a circuit court
8 in Wisconsin does not mean that the statutes declared
9 unconstitutional apply statewide, have binding effect
10 statewide. And for the proposition we cite several cases
11 that talk about, that hold that questions of
12 constitutionality are not final until decided in a
13 published appellate decision or by the supreme court.

14 THE COURT: Well, nothing that a circuit court
15 does is final until -- if it's appealed until the court
16 of appeals and the supreme court have their say, right?
17 That's nothing --

18 MR. KILPATRICK: That's right but -- but what
19 the -- what the issue here is, is what I believe is, is
20 the breadth of a decision of a circuit court declaring
21 statutes to be unconstitutional. The commissioners' and
22 the defendants' position is, and we believe it was
23 supported by the court of appeals, is the simple
24 declaration of a circuit court does not mean that the
25 statutes declared unconstitutional are null and void as

1 to everybody and everywhere within the state.

2 THE COURT: Let me just pose a hypothetical
3 that moves it away from this particular act. Suppose
4 that a circuit court had declared unconstitutional an act
5 that provided a particular tax exemption, some property
6 tax exemption, and it violated that provision of the
7 constitution that requires equality in taxation and the
8 circuit court had ruled that. And the department,
9 whoever it was that would be administering that statute,
10 took the position well, that's true only as it applies to
11 the taxpayer who brought that lawsuit. It doesn't apply
12 to any of the other property taxpayers in Wisconsin so
13 we're going to continue affording this exemption that has
14 been deemed unconstitutional to taxpayers in other
15 taxation districts. Is that where you'd say that's
16 correct, the Department of Revenue or whoever is applying
17 that exemption would be entitled to do that?

18 MR. KILPATRICK: I believe that whatever state
19 agency would be required to apply the decision of the
20 circuit court to the parties or party who brought the
21 suit, but it would be free until there's a published
22 decision of a court of appeals or the supreme court not
23 to apply it to non-parties.

24 THE COURT: So let's take another example.
25 Suppose that the City of Madison enacts an ordinance that

1 violates the right of citizens to bear their arms, to
2 carry weapons, and a circuit court rules in an action
3 brought by a particular citizen that that ordinance
4 violates the constitution. Your position then is that
5 the city may continue to enforce that ordinance against
6 non-parties to the lawsuit, is that right?

7 MR. KILPATRICK: If the court simply declared
8 the statute or ordinance unconstitutional without an
9 injunction, then yes. And I believe that's supported
10 again by the court of appeals where they say generally
11 the reach of a circuit court is extended on a statewide
12 basis through an injunction.

13 THE COURT: So your position then, let me
14 refine it a little further, is that in the first instance
15 I could have issued an injunction that extended beyond
16 the application of this law to the plaintiffs but now I
17 can no longer do that?

18 MR. KILPATRICK: If the plaintiffs had
19 fulfilled the requirements for injunctive relief. Again,
20 the plaintiffs brought --

21 THE COURT: Well, but I'm not talking about
22 relief for the plaintiffs, I'm talking about relief for
23 these other people who weren't in the lawsuit, the other
24 person who wants to carry his gun and is now prohibited
25 from doing it by a Madison ordinance. So could I have

1 issued an injunction at the time that I issued the
2 declaratory judgment finding that ordinance
3 unconstitutional, then issued an injunction that
4 prohibited the City of Madison from enforcing that
5 ordinance against anyone?

6 MR. KILPATRICK: I would say yes, if the
7 plaintiffs had fulfilled the requirement that this court
8 had also pointed out in the order denying the injunction
9 brought by the plaintiffs here, that to obtain an
10 injunction you need to show the irreparable harm before
11 an injunction can be issued the plaintiffs have some
12 burden.

13 THE COURT: So if the city came back into
14 court and said we're going to enforce it against
15 everybody except the plaintiff, then I would be barred
16 from issuing an injunction protecting the non-party
17 persons who wanted to carry their weapons?

18 MR. KILPATRICK: Well, at that point maybe the
19 plaintiffs would move to amend the judgment. Here the
20 plaintiffs did amend -- move to amend the judgment but
21 did not ask the court to amend the judgment to include
22 any injunction, and that is what was appealed and that's
23 what's pending before the supreme court, a simple
24 declaratory judgment without an injunction.

25 THE COURT: But it is a declaratory judgment

1 that has declared that this act is unconstitutional, and
2 according to *Jelke* the equivalent of that, the meaning of
3 that, it is not a law, not operative, has no existence.

4 MR. KILPATRICK: Again, I respectfully
5 disagree with that because of the case law that says
6 questions of constitutionality are not final until a
7 published decision by the court of appeals or the supreme
8 court.

9 THE COURT: How's that different from a stay
10 then? The -- 808.07(1) says that an appeal does not stay
11 the judgment appealed from, but you're saying that in
12 effect it is until the court of appeals. If the court of
13 appeals were to uphold a finding of unconstitutionality,
14 then the law is inapplicable to anybody.

15 MR. KILPATRICK: No, Your Honor. With respect
16 to the parties then yes, an appeal -- the appeal by the
17 defendants in this case according to the statute did not
18 stay this court's declaratory judgment. For that reason
19 the defendants sought a stay before this court and before
20 the court of appeals. And I believe the court of appeals
21 recognized that this court's declaratory judgment without
22 an injunction did not have binding statewide effect.

23 THE COURT: But once the court of appeals
24 affirms the judgment of this court, then the judgment of
25 this court then does have binding statewide effect.

1 MR. KILPATRICK: Yes, Your Honor.

2 THE COURT: But not up until then.

3 MR. KILPATRICK: That is correct. That's our
4 position, Your Honor.

5 THE COURT: Okay.

6 MR. KILPATRICK: And for this reason, if I
7 may, and because of the case law and because of what the
8 court of appeals has written in its two orders, I do want
9 to make it clear that I do not think the commissioners --
10 the commissioners are not in contempt of court because to
11 be in contempt of court there has to be an intentional
12 disobedience of a court order, and I submit that there
13 was no intent to disobey any order of the court. Indeed,
14 as was argued and cited by the defendants in the motion
15 by the plaintiffs for injunctive relief there's been
16 respect for the declaratory judgment by the defendants
17 and by the commissioners.

18 THE COURT: So this law is in existence for
19 some people but not others. It's void as to the
20 commissioners' ability to enforce it against the
21 plaintiffs, unconstitutional for them but constitutional
22 for everybody else.

23 MR. KILPATRICK: That's right, Your Honor,
24 because -- again because of the reach or the lack of the
25 reach -- a statewide reach of a circuit court in

1 Wisconsin. Again, this case is not about disrespect or
2 disobedience to this court's authority, it is a belief
3 that a declaration without an injunction of any circuit
4 court in Wisconsin does not have statewide reach binding
5 the commissioners from applying the statute or statutes
6 that were passed as to non-parties.

7 THE COURT: And why isn't -- I'm still not
8 clear on why it's not binding on the defendants. I
9 understand that other persons out there might complain
10 hey, we never got a chance to be heard, but the
11 defendants got a chance to be heard and the ruling went
12 against them and it said the law you're trying to enforce
13 is unconstitutional, it's void, it has no effect, it's
14 inoperative, however you want to phrase it.

15 MR. KILPATRICK: Well, again, I keep pointing
16 back to the court of appeals but in their original --
17 their slip opinion December 28th, 2012, the court of
18 appeals said: We observe that circuit court-ordered
19 injunctions against a state agency or official often have
20 statewide effect because the injunction directs the
21 agency or officials to take action or refrain from taking
22 action and in doing so may direct action or prohibit
23 action statewide.

24 It is not immediately apparent, however, why
25 an agency like the WERC is necessarily bound to apply a

1 non-precedential circuit court decision declaring a
2 statute unconstitutional to parties other than those
3 involved in the case in which the decision arose. That
4 was in the order for a supplemental briefing. Then in a
5 subsequent decision denying the stay it didn't backtrack
6 on that language at all and in fact referenced the
7 footnote that we cite.

8 THE COURT: What seems peculiar in your
9 argument, especially as you read that language to me, is
10 that what you're saying is that I could have issued an
11 injunction that had statewide effect, not just for these
12 two unions that were plaintiffs but for all unions, all
13 municipal unions around the state, but I could only issue
14 that injunction that would cover all those other unions
15 if the unions that were plaintiffs had suffered some
16 harm.

17 I don't see the link between those two. I
18 would understand your argument better I guess or find it
19 more consistent if what you're telling me is that even if
20 I were to issue -- have issued an injunction I could only
21 have issued it with respect to these plaintiffs, but
22 you're saying that the triggering event or condition that
23 has to exist for a trial court to issue a statewide
24 injunction is harm to one of the plaintiffs.

25 MR. KILPATRICK: That's correct. So that when

1 the plaintiffs brought this suit, they brought a suit for
2 declaratory and injunctive relief. And this court as you
3 know provided the declaratory relief, not the injunctive
4 relief in its original 2012 order. The plaintiffs then
5 moved to amend the judgment, no reference was made, it
6 wasn't asked to include an injunction. And then again, a
7 year later around that time the plaintiffs moved for
8 injunctive relief and again it was denied.

9 So the commissioners are not stating that this
10 court or any circuit court does not have the power to
11 issue an injunction against defendant state officials
12 that would effectively bind them as to non-parties.
13 Again, the --

14 THE COURT: But I can only do that or a court
15 can only do that if the parties are harmed.

16 MR. KILPATRICK: That's correct, and that was
17 the plaintiffs' burden we submit in the original lawsuit
18 and in their subsequent motions which was then denied.

19 THE COURT: Okay. Anything else then?

20 MR. KILPATRICK: Yes, Your Honor. Just
21 quickly, I think we got into why we believe that the
22 non-party movants are not aggrieved persons. It's not
23 because they're not parties. The commissioners again
24 concede that non-parties can file a contempt motion, but
25 they're not aggrieved persons because from the history,

1 the note and the history of this statute contemplates
2 that there still has to be some injury or impairment of
3 the rights of the plaintiffs.

4 Put another way, if the plaintiffs are not
5 injured, it is unreasonable for non-parties to seek
6 contempt on and subsequent injury, and again, goes back
7 to the original status that these non-party movants are
8 not aggrieved because the original declaratory judgment
9 did not apply to them in the first place.

10 And then we also still stand by the arguments
11 raised in the brief that the legislature has created an
12 exhaustive list of motions or actions that can be brought
13 while a case is pending, while an appeal is pending, and
14 this was not listed as one of them.

15 THE COURT: But 808.07(1), first of all, says
16 that an appeal does not stay the execution or enforcement
17 of a judgment or order appealed from. And then also (2),
18 808.07(2)(a)3 says that the court may make any order
19 appropriate to preserve the existing state of affairs or
20 the effectiveness of the judgment subsequently to be
21 entered. And then 808.075 which includes the exhaustive
22 list of specific statutes under which a court can act in
23 (1) refers right back to 808.07(1) and (2). So it seems
24 that 808.07(1) and (2) are included in the specific
25 statutes that a court is authorized to act under while an

1 appeal is pending, right?

2 MR. KILPATRICK: Well, yes, but again
3 808.07(2)(a)3 talks about an order appropriate to
4 preserve the existing state of affairs and then again
5 gets back to the original declaratory judgment that
6 applied not to the non-party movants but to the
7 plaintiffs, and the effectiveness of the judgment again
8 was the declaratory judgment brought by plaintiffs that
9 has been applied to the plaintiffs.

10 THE COURT: So really that's -- the
11 fundamental issue that underlies all of this is whether
12 that declaratory judgment had application to these
13 defendants as it relates to their conduct toward
14 non-parties. And if I conclude that in fact it did have
15 an effect barring them from implementing this act against
16 anyone, then this motion is properly before me under
17 808.07(2)(a)3.

18 MR. KILPATRICK: Well, again, I think if you
19 made that determination, Your Honor, that it would
20 effectively be amending the judgment because the original
21 judgment, the final order was declaratory relief only, it
22 was not injunctive relief. So if there was now this
23 court stating that there is now a judgment that is both
24 declaratory and injunctive, that that would be a new
25 judgment that the defendants would be able to appeal.

1 But again, there already is an appeal. The defendants
2 have appealed the judgment, the original final order of
3 this court, and it's sitting before the supreme court,
4 and so we believe that it would not be proper to do that
5 at this point.

6 THE COURT: Because you think that that would
7 be an amendment.

8 MR. KILPATRICK: Right, because the original
9 final order was a declaratory judgment effectively. It
10 was an order that declared the statutes unconstitutional.
11 It did not enjoin the defendants from applying this
12 statute that's at issue here or any others as to
13 non-parties.

14 THE COURT: And because it did not
15 specifically enjoin them, then they were unaware that
16 this statute had no existence, was not operative, was
17 void.

18 MR. KILPATRICK: Again, yes, because as to the
19 plaintiffs that would apply, but again the case law we
20 believe is clear that a circuit court, any circuit court
21 in Wisconsin simply doesn't have the authority by
22 declaratory judgment only to bind the state officials and
23 prohibit them from applying statutes as to non-parties in
24 other controversies.

25 So again, it's the position that if an

1 injunction were issued even -- or an order, even if not
2 using the words "injunction" or "enjoined" but an order
3 that actually directed the commissioners or the
4 defendants from taking action or refraining from taking
5 action, that would be an order that would be subject to
6 contempt. That would be an order that the commissioners
7 would have complied with just as they did in the western
8 district case that some of the non-movants are well aware
9 of.

10 Judge Conley again issued a declaratory
11 judgment and an injunction specifically enjoining them
12 from taking certain action as to non-parties, and they
13 did that for several months. There were no elections.
14 Once the seventh circuit lifted that injunction, then the
15 commissioners proceeded.

16 So again, and it gets back to contempt, is
17 that there has to be an intentional disobedience of a
18 court order, and without an order that specifically
19 directs the commissioners from taking action or refrain
20 from taking action there cannot be contempt. Again, I
21 point to no -- movants point to no case law that talks
22 about a declaratory judgment alone being the basis for a
23 contempt action.

24 THE COURT: And there's no case law that holds
25 it can't be.

1 MR. KILPATRICK: Well, again, we point to all
2 the case law that talks about a declaratory judgment by a
3 circuit court does not have the statewide reach of a
4 published decision of the court of appeals or --

5 THE COURT: With respect to other
6 controversies and so on.

7 MR. KILPATRICK: With respect to other parties
8 and other controversies.

9 THE COURT: How about with respect to
10 defendant parties who continue to enforce a law when
11 faced with a court judgment in litigation that says that
12 law is void?

13 MR. KILPATRICK: Well, again, it -- I sound
14 like a broken record but it goes back to the defendant
15 commissioners respecting the declaratory judgment of this
16 court as to the parties who brought the lawsuit. And as
17 the court of appeals stated in its decision, a circuit
18 court's order, a circuit court's judgment, can have
19 binding statewide effect when there is an injunction
20 prohibiting state officers from enforcing it, and in this
21 case there simply was not.

22 THE COURT: An injunction which can't be
23 issued as long as the state officers exclude from their
24 actions the plaintiffs to the suit, even though they
25 continue to apply the void law to other persons.

1 MR. KILPATRICK: Well, when the plaintiffs
2 brought the suit, the defendant commissioners were
3 applying the law to them and to everyone else. At that
4 point was their chance, and they brought the suit as a
5 suit for declaratory and injunctive relief, that was
6 their opportunity to convince the court that there was a
7 need for injunctive relief. Again, this court didn't
8 grant the injunctive relief, the plaintiffs sought to
9 amend the judgment, again no mention of a lack of an
10 injunction, and finally they brought again under
11 supplemental relief request an injunction that was again
12 denied.

13 THE COURT: Okay.

14 MR. KILPATRICK: So if I may?

15 THE COURT: Go ahead.

16 MR. KILPATRICK: And I guess in closing, again
17 I may have said this before, but it is unreasonable that
18 the commissioners submit that non-party movants who
19 weren't parties or even in privity with the plaintiffs
20 can bring a motion for contempt against the commissioners
21 post-judgment while there's an appeal pending and seek an
22 order from this court in the form of a sanction after a
23 finding of contempt that would be in effect equal to an
24 injunction that they two or three times sought and were
25 denied by this court.

1 THE COURT: Well, the non-moving parties
2 haven't sought it.

3 MR. KILPATRICK: No, they have not, but again,
4 they were not parties to begin with. They had no rights;
5 they had no expectation without an injunction that this
6 law would not be applied to them.

7 THE COURT: Okay. Thank you. Mr. Hawks?

8 MR. HAWKS: We have several responses.
9 Mr. Pines will respond with regard to issues regarding
10 the court of appeals' slip opinion on the procedural
11 issues it discussed. A couple points I think require a
12 response.

13 On several points during the commissioners'
14 argument just now the counsel emphasized that for
15 contempt to exist it must be intentional and that is not
16 the law in Wisconsin. Our citation in our original brief
17 makes that crystal clear. You do not have to engage in
18 intentional contempt or intend contempt in order to be
19 found in contempt.

20 As a matter of fact, although I don't have the
21 cite at my fingertips, Judge Franke in the Milwaukee
22 County Circuit Court found a defendant not to be in
23 contempt because the defendant's conduct was more along
24 the lines of negligent or incompetence, not intentional
25 violation of the court's orders. The court of appeals in

1 a published decision reversed the court -- the trial
2 court in that case on the ground that that contempt need
3 not be intentional, and indeed on the face of the statute
4 itself what needs to be shown is disobedience.
5 Disobedience need not be intentional. It's simply a
6 question of whether or not the defendants are obeying the
7 court's order.

8 To illustrate the absurdity, I'd ask the court
9 to take a hypothetical for a moment and assume, for
10 example, that Judge Flanagan had issued a declaratory
11 judgment rather than an injunction in the case involving
12 Voces de la Frontera and the NAACP Milwaukee Chapter.
13 And in that case, and if counsel's argument was true or
14 if it is accepted, then the Government Accountability
15 Board could have ordered the elections commissioners from
16 around the state to not require photo IDs only for the
17 members of Voces and the NAACP Milwaukee Chapter while
18 still requiring them for every other or from every other
19 citizen of the State of Wisconsin; that we submit simply
20 that that's a ludicrous result with regard to the
21 Declaratory Judgments Act.

22 The Uniform Declaratory Judgments Act of
23 Wisconsin specifically says that a judgment that is
24 issued is to be given the same force and effect as any
25 other judgment under law. That cannot be overlooked

1 here. That particular section we cite in our responsive
2 brief and I emphasize it again. The *Steffel v. Thompson*
3 line of cases cited by the attorney general is a case
4 involving the Federal Declaratory Judgments Act, not the
5 Uniform Declaratory Judgments Act adopted by the several
6 states, and its holding is in context of a case involving
7 the non -- the plaintiff in the case had been attempting
8 to circulate anti-Vietnam literature in a mall. The
9 police authorities had twice approached him and told him
10 that he was subject to prosecution for doing so but they
11 did not prosecute.

12 He brought the action in federal courts to
13 enjoin this state, wherein this case the local
14 authorities, for being able to enforce a no solicitation
15 with potential criminal sanctions even though no criminal
16 sanctions had in fact occurred. In that case the federal
17 courts, particularly Judge Brennan in his concurrence,
18 emphasized the role of comedy and abstention and
19 particularly federalism as it relates to the Federal
20 Declaratory Judgments Act, none of which are present in
21 this case. We're in the enforcement of a -- by state
22 government of the uniform or the state courts of the
23 Uniform Declaratory Judgments Act.

24 With regard to the discussion on 808.075(3),
25 the attorney general hangs the commissioners' head on

1 that peg which reads: The circuit court retains the
2 power to act on all issues until the record has been
3 transmitted to the court of appeals. Thereafter, the
4 circuit court make act only as provided in subs. (1)
5 through (4). The problem with the argument that the
6 attorney general makes is that very section of the
7 statute has been declared itself to be general in nature
8 and therefore subject to other statutory provisions which
9 are specific in nature.

10 So in *Roberta Jo W. v. LeRoy W.*, the question
11 came up as to whether or not specific provisions relating
12 to the judgment -- post-judgment treatment of divorce
13 proceedings and custody proceedings were therefore -- was
14 subject to this prohibition of the issuance of a
15 declaratory judgment or injunction subsequent to the
16 appeal and the record going up. And the Wisconsin
17 Supreme Court made it clear that the more specific
18 provisions of the statutes trumped 808.075(3). In this
19 case the uniform -- excuse me, in this case Chapter 785
20 regulating contempt is the more specific section;
21 therefore it trumps 808.075(3) and permits this court to
22 move ahead with the contempt proceeding.

23 At that point I'd turn it over to Mr. Pines to
24 discuss the court of appeals' decision.

25 MR. PINES: Let me comment on the court of

1 appeals' decision but before I do that let me comment on
2 something else. The one thing that the attorney
3 general -- assistant attorney general did not say and
4 that the commissioners do not address and have not
5 addressed is *State v. Conrad*. In the entire argument
6 that you heard this afternoon there's no mention of why
7 the holding in *State v. Conrad* which this court cited in
8 its September 17th decision is meaningless because the
9 state's position is it's meaningless; the commissioners'
10 position is it's meaningless. It doesn't matter that in
11 1998 the Wisconsin Supreme Court says that when a
12 statute's found facially unconstitutional it may not be
13 enforced under any circumstances against anyone. From
14 the commissioners' point of view that law doesn't exist.

15 Now, the commissioners' argument is nothing
16 more than a *post hoc* rationalization for their desire to
17 enforce this law regardless of what this court told them
18 about it and that's why they're in contempt. Now, the
19 point is, their position is, that they as officials
20 appointed in this state who take an oath to uphold and
21 defend the Constitution of Wisconsin, and after they take
22 that oath and then when they are sued in their official
23 capacity, they come before a court represented by the
24 attorney general, they fully argue the case. They have
25 every opportunity to make every argument they want about

1 whether the statute's constitutional and they lose and
2 they are told by a court these sections of the statute
3 are unconstitutional; therefore, they are void *ab initio*.

4 And their position is even though they're
5 supposed to uphold the constitution and even though
6 they've been told something is unconstitutional, they
7 don't have to do that unless you issue another order that
8 says and don't violate my order. I'm enjoining you from
9 violating the order. They say until you tell us that,
10 Judge, we don't have to follow it. We're just like
11 school children who have to be told don't run out in the
12 street or you're going to be punished. That's their
13 position.

14 They're like babes in the woods. Gee, you
15 should have told us not to do it, Judge. That's their
16 position. And because you didn't tell us not to do it
17 and because we went ahead and violated your order and
18 enforced this law you told us was unconstitutional,
19 there's nothing you can do about it, Judge. That's their
20 position. Actually that and the notion that officials
21 suing in their official capacity as the enforcers of the
22 statutes who are told by a court with jurisdiction that
23 the statute's unconstitutional, that they can on their
24 own make this interpretation that it only applies to the
25 plaintiff when there's not a single item of law that

1 suggests that that's true, not a statute, not a case, not
2 nothing. They just say hey, that's just what we think,
3 Judge.

4 And then they rely on the court of appeals.
5 The court of appeals -- they quote this court of appeals'
6 order for supplemental briefing which is not a decision
7 of the court of appeals. First of all, that order or a
8 supplemental briefing asked a bunch of questions. It
9 didn't make a decision. It said hey, this is what we're
10 thinking. It's not readily apparent this, it's not
11 readily apparent that, what do you think? And the court
12 of appeals asked six questions that the party extensively
13 briefed, extensively briefed.

14 At the end of the process after the parties
15 had answered all six questions, the court of appeals did
16 not decide the issue that it said it was ruminating about
17 in the first place and it just said, you know what
18 everybody, take your chances. That's what it said.

19 But the court of appeals was asking questions
20 about whether there was a statewide effect of a circuit
21 court decision. But that was not really the fundamental
22 issue there and it's not really the fundamental issue
23 here. It doesn't matter whether this court's decision
24 has statewide precedential effect or not. That's not the
25 issue. The issue is does it have an effect on the

1 commissioners who were the defendants and the Governor
2 for that matter who was a defendant, but the
3 commissioners who were defendants. Their position is it
4 doesn't really mean anything, Judge, it doesn't really
5 mean anything.

6 You know, you told us what the law is, you
7 told us that it's unconstitutional, but you know what,
8 you didn't tell us we couldn't keep enforcing it so
9 therefore it doesn't really matter what you said. That
10 is the essence of contempt and this is unprecedented in
11 this state. It is unprecedented. Thank you.

12 THE COURT: Mr. Padway, anything you'd like to
13 add? If you would swing the microphone over please.

14 MR. PADWAY: I would like to remind the
15 commissioners and the Governor of what they said to this
16 court at the time they applied for the stay. At page two
17 of their motion they specifically stated, quote, because
18 of the public importance of the interests at issue,
19 defendants respectfully request that this motion be taken
20 up and decided by the court on an expedited basis and at
21 the earliest possible opportunity. They are saying in
22 their motion for the stay that this case was of public
23 importance, not a private issue between Local 61 and MTI
24 and the commissioners and the Governor.

25 They went on to state in their brief at page

1 20: There are literally thousands of non-party local
2 government employers in Wisconsin that are governed by
3 the statutory provisions affected by the court's order.
4 This is a tacit acknowledgment by the commissioners and
5 the Governor that your ruling affected -- by invalidating
6 the statute affected everyone in the state. Otherwise,
7 if it was just this little party between Local 61, MTI,
8 the governors and the commissioners, why request the
9 stay.

10 THE COURT: Okay, thank you. Mr. Kilpatrick,
11 I'll give you one more opportunity.

12 MR. KILPATRICK: Okay, thank you, Your Honor.
13 I believe I heard the movants state that there doesn't
14 need to be any intent to find contempt and that flies in
15 the face of the statute. The statute says there needs to
16 be intentional disobedience of a court order. You can't
17 read a word out of a statute because it fits your legal
18 argument. Intent needs to be there. It's required in
19 order to find contempt. And again, the commissioners
20 submit that there has been no intentional disobedience of
21 any court order in this case.

22 Also, the --

23 THE COURT: Well, can I just get a little
24 clarification on that because it seems to me their
25 conduct is not unintentional, they just believe that

1 their conduct is not disobedience. But the conduct is
2 intentional. They considered what they believe the order
3 meant and then concluded that it was inapplicable to what
4 they were doing and intentionally then continued what
5 they were doing.

6 MR. KILPATRICK: But I believe the statute
7 says there needs to be intentional disobedience.
8 Intentional contempt of court means intentional
9 disobedience of an order of the court, and again, the
10 order of the court was a declaratory judgment. It was
11 not an injunction or an order enjoining the defendants.
12 And I want to bring up the difference. I mean, there are
13 differences between injunctions and declaratory
14 judgments.

15 As we pointed out before, irreparable injury
16 must be shown in a suit for an injunction but not in an
17 action for declaratory relief. As Justice Brennan said,
18 declaratory judgment is less coercive because it is
19 merely a declaration of legal status or right; whereas,
20 an injunction either mandates or prohibits particular
21 conduct and paralyzes the state's enforcement machinery
22 and it cannot be subject to contempt.

23 The supreme court said the Declaratory
24 Judgments Act, the Federal Declaratory Judgments Act is a
25 much milder form of relief than an injunction. Though it

1 may be persuasive is not ultimately coercive.
2 Noncompliance with it may be inappropriate but it is not
3 contempt. It is not contempt because there is no
4 intentional disobedience of the declaratory order, the
5 judgment, and there has been compliance as to the parties
6 who brought the suit.

7 And the Wisconsin Supreme Court even
8 recognizes the difference between declaratory judgments
9 and injunctions. Judicial remedies, it said, fall into
10 four major categories: Damages remedies, restitution
11 remedies, coercive remedies such as injunctions that are
12 backed by the court's contempt power, and separately
13 declaratory remedies. That was in our brief.

14 And also in regard to the court of appeals'
15 decision, the order included that I believe in my
16 affidavit that accompanied the brief, and I urge the
17 court to read that if it hasn't already, but the court of
18 appeals from the commissioners' position denied the stay
19 because there was no statewide effect. There was a claim
20 of confusion and the court of appeals said if you're
21 right that there is no statewide effect, there should be
22 no confusion.

23 THE COURT: That's not to say that there is no
24 statewide effect. That's to say that if your argument is
25 accepted that there is no statewide effect, if the

1 argument of the parties seeking the stay that this
2 judgment is meaningless, then you don't need a stay if
3 that's accepted. Isn't that what they were saying?

4 MR. KILPATRICK: Well, again, Your Honor, and
5 we're not saying that the original declaratory judgment
6 was meaningless, it was -- had meaning between the
7 litigants. And again the movants, they cite cases that
8 talk about statutes not having or being declared null and
9 void from its inception, but as the court of appeals
10 pointed out, they cite no cases that says a circuit
11 court's declaration does that. The movants' argument, if
12 it is correct, would mean there is no difference
13 whatsoever between an injunction and a declaration and
14 there would be no difference between a circuit court
15 decision and a published decision of the court of appeals
16 or the supreme court.

17 And the case law shows that there clearly is
18 and it goes back then to the original statement that I
19 made at the beginning is that these commissioners are not
20 in contempt because there is no intentional disobedience
21 of a declaratory judgment. Again, without an injunction
22 there is no disobedience of any directive of this court
23 and under case law they cannot be found in contempt
24 without intentional disobedience.

25 THE COURT: Okay. Let me just say, first of

1 all, what this is not because there were some hints that
2 the briefs -- in some of the briefing that this was
3 perhaps a motion that really amounted to a motion for
4 reconsideration and that the court should somehow take
5 into account intervening federal court decisions and in a
6 way -- and the fact that the appeal is pending before the
7 supreme court in effect to reconsider its original
8 finding of the unconstitutionality of the statute, but
9 this is not a motion for reconsideration. It is possible
10 that the initial ruling of this court was in error and
11 that's what the supreme court will be deciding, but it is
12 nonetheless the ruling of this court and we're not here
13 today on a motion for reconsideration of that ruling.

14 So the question is what was the effect of that
15 ruling, that judgment, and have the defendants acted in
16 disregard or disobedience of that judgment, intentionally
17 acted in disregard or disobedience of that judgment.

18 First, the material facts are undisputed as I
19 understand it from the submissions of the parties. The
20 commissioners did indeed take action to implement
21 provisions of the law that were found unconstitutional by
22 adopting the rule, by requiring the -- imposing the new
23 certification requirements and so on. So
24 there's -- those facts are not at all in dispute in this
25 case.

1 My conclusion with respect to the standing of
2 non-parties to bring a motion for contempt is that it is
3 permitted as the state now concedes for a non-party to
4 move for contempt if they are an aggrieved person. My
5 reading of the note to 1979 Wisconsin Act 257 is
6 different than the state's reading. I think correctly
7 read it does not require that a party also be an
8 aggrieved person by some action, only that the non-moving
9 -- the non-party movant be aggrieved.

10 I think it's also undisputed in this case that
11 in that sense they are aggrieved by the actions of the
12 commissioners in implementing the statute. I understand
13 the commissioners argue that they're not aggrieved
14 because this doesn't -- the judgment of the court is
15 inapplicable to the actions of the commissioners against
16 those parties, but in a factual sense they are aggrieved
17 and the commissioners' position assumes the correctness
18 of their conclusion that they are not barred from acting
19 against the non-party movants with respect to
20 implementing the statute.

21 I think the court has jurisdiction under
22 808.07 to hear this motion pending appeal. I think the
23 statute authorizes the court to make any order
24 appropriate to preserve the existing state of affairs or
25 the effectiveness of the judgment, and in this case the

1 existing state of affairs is that this court declared
2 that law unconstitutional, null, void, inoperative to use
3 the terminology in the case cited by the state.

4 The statute also makes clear that an appeal is
5 not a stay. And I think the effect of the commissioners'
6 position in this case would be that the appeal serves as
7 a stay of the decision if in fact a motion for contempt
8 can't be brought before the trial court. So my
9 conclusion is that indeed it can and is properly before
10 this court.

11 That takes us I think to the fundamental
12 question here which is whether this court's declaration
13 that the statute was unconstitutional on its face in a
14 case in which the commissioners were parties bars the
15 commissioners from executing that statute against anyone.

16 And I think the law is actually clear on that.
17 I think that it does. The effect of a circuit court
18 finding a statute unconstitutional and declaring it to be
19 unconstitutional is exactly what *Jelke* said. It is
20 unconstitutional, confers no rights, imposes no penalty,
21 affords no protection, is not operative, and in legal
22 contemplation has no existence. Doesn't mean it just has
23 no existence with respect to the parties who brought the
24 suit that resulted in the judgment, it means that it has
25 no existence. That language is not qualified in any of

1 the cases that refer to it and I don't think can
2 reasonably be read that way.

3 The defendants hypothesize situations in which
4 there might be other courts facing related litigation and
5 the commissioners then might not know what to do if one
6 of those other courts, for example, ordered them to go
7 ahead with the election and the implementation of the
8 act. But that's pure speculation because it's
9 acknowledged that there are no other such cases pending
10 in any of the circuit courts or at least none that either
11 party is aware of.

12 So I think the judgment plainly has statewide
13 effect with respect to the actions of the defendants who
14 were parties. It bars these defendants from doing
15 anything to implement that law with respect to anyone.
16 And I think that the requirement of intentionality here
17 is satisfied. The commissioners considered the judgment
18 of the court and made a decision that they would
19 disregard it because I think the law is clear about what
20 the effect of that judgment was and I think that is
21 contempt. That's an intentional disregard of the court's
22 order. They may feel their reasons were defensible but
23 it's clearly an intentional disregard of the court's
24 judgment.

25 So they're in contempt. And the remedy

1 sought, the primary remedy sought is to issue an
2 injunction at this point to bar them from doing or
3 continuing to do what they ought not have done in the
4 first place. And I'm going to grant that request. So
5 that if it was not clear before, it ought to be clear to
6 them now, by "them" I mean the commissioners, that they
7 may not enforce a law that has no legal existence against
8 anyone. And so they are -- I guess, Mr. Kilpatrick, you
9 tell me how specific they need it.

10 MR. KILPATRICK: Do we have the ability to
11 confer with my clients and submit something in writing
12 or --

13 THE COURT: Well, I imagine there's going to
14 be a written order but they are barred or put it as a
15 purge condition, if you will, to purge the contempt they
16 must cease implementing any of the provisions that this
17 court found unconstitutional anywhere in the state
18 against anyone. If you want to work out precise language
19 with Mr. Pines about exactly what that tells them or if
20 Mr. Pines thinks that or Mr. Hawks that or Mr. Padway
21 that I've left another loophole that might be exploited,
22 I'll be happy to make language as tight as it needs to be
23 because I think this conduct was nothing more than an
24 attempt to elude the application of a law that the -- of
25 a judgment of the court that the commissioners knew full

1 well applied. So --

2 MR. KILPATRICK: Then I would ask, Your Honor,
3 what the court believes is necessary, is required
4 to -- from the commissioners to show that they're in
5 compliance with this order.

6 THE COURT: Well, I'm not sure exactly what
7 they need to show that they're in compliance. I
8 understand there's -- from the undisputed facts there are
9 elections that are scheduled. If those elections go
10 forward, that's not in compliance. So I don't know how
11 many actions that takes in terms of orders the commission
12 must issue in order to be in compliance. So that's why I
13 can't answer.

14 (Pause in proceedings)

15 MR. KILPATRICK: Your Honor, the commissioners
16 certainly will abide by this order. I'm not sure if you
17 need anything more in writing, some sort of a statement
18 or a vote taken, but the commissioners will comply with
19 the order that this court entered.

20 THE COURT: I don't know if they need to take
21 a vote or not.

22 MR. KILPATRICK: I'm not sure either, I'm
23 sorry.

24 THE COURT: They ought to do whatever it
25 takes.

1 MR. KILPATRICK: But also that would happen
2 while an appeal is pending, that the commissioners would
3 respect the order that this court just issued.

4 MR. HAWKS: Your Honor, if I may be heard on
5 that on behalf of the movants. There are 70,000
6 employees engaged in campaigns across the state right now
7 for an election. We need a clear public statement from
8 the commission that that election is canceled pending
9 appeal. We would need a clear public statement from the
10 commission that no other provision of Act 10 that you
11 declared unconstitutional will be enforced by the
12 commission pending appeal.

13 THE COURT: Mr. Kilpatrick?

14 MR. KILPATRICK: Your Honor, if this court
15 believes that is necessary, I'd simply ask that there be
16 a time frame given so that the commissioners can submit
17 that --

18 THE COURT: Okay.

19 MR. KILPATRICK: -- to the court.

20 THE COURT: Well, that is my intention is to
21 say that those efforts to execute, to implement the
22 provisions that I declared unconstitutional last year
23 cease, and to the extent that they need to be reversed,
24 be reversed.

25 MR. HAWKS: Your Honor, there is also the

1 matter of the filing fees that have been filed and which
2 the agency has kept despite your order.

3 MR. KILPATRICK: Your Honor, I'm not sure if
4 that's going to be possible to return that amount -- that
5 money, especially if the supreme court eventually
6 reverses this court. I'm not sure if they can be held
7 pending a supreme court decision or whether the court
8 expects that they be returned. I believe there probably
9 has been some small administrative costs because the
10 commissioners themselves don't conduct the election,
11 there is a third party that is being paid to tally the
12 votes, but I'm just wondering if that's something that
13 can be not included in any order, and especially given
14 the fact that from the *amici* that there are unions who
15 may indeed want to go forward with elections.

16 MR. HAWKS: Indications from amici -- of the
17 *amici* to that effect are not to be relied upon. I can
18 say with some confidence we are not aware of any local
19 labor organization affiliated with movants that are
20 desirous of having an election conducted.

21 THE COURT: Well, let me take that issue of
22 the funds that -- the fees that have been assessed, just
23 hold a decision on that in abeyance on exactly what is to
24 happen with those funds as well as any additional relief
25 and allow the parties an opportunity to come up with a

1 written order that implements my decision today and see
2 if you can reach agreement on those other issues as well,
3 and if not, then I'll address those.

4 MR. HAWKS: Does the court want to establish a
5 deadline to complete this process?

6 THE COURT: Well, I assume that the
7 commissioners will begin taking whatever action they need
8 to take to undo these elections in terms of the conduct
9 of the elections themselves, right?

10 MR. KILPATRICK: Well, again, they aren't
11 scheduled until November.

12 THE COURT: Right.

13 MR. KILPATRICK: First, I believe so. I'm not
14 sure if there's anything to undo. Again, fees have been
15 paid.

16 THE COURT: I mean, to cancel them, to notify,
17 whatever procedure has to be done so that they don't take
18 place on November 1st, right?

19 MR. HAWKS: Yeah, and the fact that the
20 election isn't scheduled to be commenced until November 1
21 does not speak to the fact that the work that is required
22 to organize and campaign to be successful in an election,
23 that work is undergoing, is underway now. So I mean,
24 time is of the essence on this.

25 THE COURT: Right.

1 MR. PINES: Your Honor, on behalf of the
2 Kenosha Education Association, I would ask that the court
3 specifically order that the commission inform the Kenosha
4 School District that the Kenosha Education Association is
5 still the certified representative of the employees of
6 the Kenosha School District.

7 THE COURT: Okay. Mr. Kilpatrick?

8 MR. KILPATRICK: I would disagree with that,
9 Your Honor, and not get into specifics in that sense.
10 Again, the commissioners do intend to appeal this court's
11 ruling and possibly seek a stay of this court's ruling.
12 We would not intend to get so specific.

13 MR. PINES: Well, that may be all well and
14 good but my client has specifically been injured by the
15 actions of these commissioners, and as I quoted earlier,
16 Mr. Davis on behalf of the commission informed the
17 Kenosha School District that the Kenosha Education
18 Association because of its failure to have -- he said, "I
19 have advised all who have inquired that per WERC
20 administrative rules, the absence of a timely filed
21 petition equals loss of status as a collective bargaining
22 representative as of 4:31 p.m., August 30th."

23 In other words, the commission enforced the
24 rules which were in violation of this court's declaratory
25 judgment. And I think it is certainly appropriate for

1 the commission to tell the Kenosha School District that
2 the communication that they received on September 16th
3 informing them that as of 4:31 p.m. on August 30th that
4 the Kenosha Education Association was no longer the
5 certified representative is appropriate, and again to say
6 well, we can't get into specifics, isn't that what we're
7 here about?

8 THE COURT: Mr. Kilpatrick?

9 MR. KILPATRICK: Your Honor, I don't believe
10 that the commissioners have any authority to go back and
11 reverse any of their -- any of their actions.

12 MR. PINES: I mean, Your Honor, that's really
13 an outrageous position.

14 THE COURT: I'll tell you what. If they don't
15 have authority, I'll vacate those actions because they
16 were in contravention of this court's judgment. So
17 figure out, consult with them if you wish, you can decide
18 whether you think they have the authority to do it, and
19 if not, then let me know and I'll issue an order to show
20 cause why I should not simply vacate all of the
21 commissions' actions that in any way implemented this
22 act.

23 MR. KILPATRICK: Your Honor, the commission --
24 in regard to the Kenosha Education Association, the
25 commission's position has been that as a matter of law

1 under the statute, as a matter of law, if a petition
2 hasn't been filed then --

3 THE COURT: As a matter of law under the
4 unconstitutional statute?

5 MR. KILPATRICK: Right. So there hasn't been
6 any vote or any official document that says the
7 commission hereby does not recognize X certified
8 bargaining agent as --

9 THE COURT: Instead there was a statement or
10 opinion expressed to the school district that they were
11 no longer -- so was that just a casual informal sort of
12 opinion?

13 MR. KILPATRICK: No. My point is, Your Honor,
14 that there haven't been any specific votes or documents
15 or actions taken specifically to each and every certified
16 bargaining agent that didn't file a petition. Nothing
17 was provided to them or to the employers stating
18 officially the WERC does not recognize you as the
19 certified bargaining agent.

20 THE COURT: I'm not clear on this. Tell me
21 what it was that Mr. Pines was reading from then.

22 MR. KILPATRICK: No, that was -- that was an
23 e-mail, yes. That was -- I believe that was the
24 Education Association wanted confirmation that it was no
25 longer the certified bargaining agent, and there was an

1 e-mail stating yes, that's the case, but my point is
2 there never was or isn't any documents or actions taken
3 by the commission not recognizing certain bargaining, so
4 I'm not quite sure how they can be vacated if --

5 THE COURT: I understand that. It seems then
6 that what would be appropriate would be for the
7 commission to send that school district a communication
8 with equal force saying that their previous opinion is
9 retracted and was in error.

10 MR. KILPATRICK: The Kenosha --

11 THE COURT: Kenosha and anybody else that got
12 one like that.

13 MR. KILPATRICK: Okay.

14 MR. PINES: Just -- if I can make just a
15 record on this, Your Honor.

16 THE COURT: Sure, go ahead.

17 MR. PINES: Exhibit 2 to my affidavit in this
18 case indicates that Mr. Kiriaki, the executive director
19 of the Kenosha Education Association, on September 16th,
20 2013, at 5:19 p.m. sent an e-mail to Peter Davis who
21 appeared here today as the chief legal counsel of the
22 Wisconsin Employment Relations Commission. And
23 Mr. Kiriaki inquired, he said: Some media outlets have
24 indicated that they have received confirmation from the
25 WERC that the KEA, that's the Kenosha Education

1 Association, is decertified. Please confirm whether the
2 WERC has been contacted by the media for comment.

3 And further, it is the position of the KEA
4 that regardless of whether the KEA is the certified
5 bargaining representative, the KEA and district may
6 lawfully meet and confer on any subject they desire and
7 that doing so does not violate Act 10. Mr. Davis
8 responded by saying: A person who is authorized to speak
9 on behalf of a party does so. Mr. Davis as the chief
10 legal counsel was speaking on behalf of these
11 commissioners. And it's very easy for the commissioners
12 to communicate with the Kenosha School District which, by
13 the way, has informed the Kenosha Education Association
14 that they no longer recognize the KEA because of what the
15 commission has said to them, that they be informed that
16 that opinion was incorrect.

17 It's very simple, it's not complicated, and
18 we're not asking that Mr. Davis or whomever or the
19 commissioners tell everybody who may be in the situation
20 of the KEA. In this instance the KEA specifically is
21 aggrieved by the actions of the commission through their
22 representative, Mr. Davis, who was authorized to speak on
23 their behalf, unless this is some kind of sleight of
24 hand. And they're trying to avoid responsibility by
25 letting Mr. Davis speak for them, and to say that there

1 was no order, when the chief legal counsel says you're
2 decertified, that's pretty clear he's speaking on behalf
3 of the commissioners to say you're decertified. It's not
4 that hard to say that's not correct.

5 MR. KILPATRICK: Your Honor, I think that the
6 best course of action is to consult with my clients and
7 Mr. Davis and see what the best way would be to inform
8 certain certified bargaining agents, unions that have
9 contacted the commission because, frankly, I don't know
10 right now. I'm sure there may be those that Attorney
11 Pines referenced but there may be others, I just don't
12 know.

13 MR. PINES: I really am only asking about this
14 on behalf of my client and I would suggest there are two
15 ways it can be done, actually three ways: Telephone
16 would be the least effective, e-mail would be the second
17 least effective, and a letter would be the most effective
18 and a certified letter would be really effective.

19 THE COURT: Well, I think it seems to me that
20 Mr. Pines is correct, while there may be complications in
21 notifying other persons who may have been given similar
22 direction with respect to his client, the way to reverse
23 it seems obvious which is a communication from legal
24 counsel or the commission. And I agree that a letter
25 would be more formal and better than an e-mail

1 withdrawing that earlier communication and stating that
2 it was in error and that I think could be done. How
3 quickly do you think, Mr. Kilpatrick?

4 MR. KILPATRICK: I could do it later --

5 THE COURT: Okay.

6 MR. KILPATRICK: -- today.

7 THE COURT: I'll assume that will be done
8 quickly then. But I do ask counsel to confer on the
9 wording of any order so that I think there ought to be an
10 order here. With respect to my reasons and the factual
11 basis I think the order can just refer to the facts and
12 reasons stated upon the record so that you're not trying
13 to reconstruct my reasoning in the order and having
14 unnecessary discussions about that. So it should just be
15 limited to exactly what -- what language is necessary to
16 accomplish what I've ordered today with some precision.

17 MR. KILPATRICK: We'll be in contact with
18 counsel, opposing counsel.

19 THE COURT: And when do you think that can be
20 submitted then?

21 MR. HAWKS: Tomorrow morning?

22 THE COURT: Proposed order.

23 MR. HAWKS: By tomorrow morning.

24 THE COURT: Okay. And if you can submit one
25 that you can represent is agreed to as to form, I

1 understand the commissioners disagree with my conclusion,
2 but as to the form of the order then that will make the
3 approval quicker and I can sign it right away. And then
4 you'll have a written order that can be the basis for
5 your appeal.

6 MR. KILPATRICK: Thank you, Your Honor.

7 THE COURT: All right, thanks.

8 (Proceedings concluded)


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1 STATE OF WISCONSIN)
2 COUNTY OF DANE) ss:
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3 I, DEBORAH MANKE, Registered Professional
4 Reporter, certify that the foregoing is a true and
5 accurate record of the proceedings held on the 21st day
6 of October, 2013, before the Honorable Juan B. Colás,
7 Circuit Court Judge, Branch 10, Madison, Wisconsin, in my
8 presence and reduced to writing in accordance with my
9 stenographic notes, made at said time and place.

10 Dated at Madison, Wisconsin, this 24th day of
11 October, 2013.

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Deborah Manke, RPR
Official Court Reporter

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