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STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP2067

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 62, AFL-CIO, AND JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMANN, AND RODNEY G. PASCH,

Defendants-Appellants.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JUAN B. COLAS, PRESIDING, CIRCUIT COURT CASE NO. 2011-CV-003774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

CORRECTED BRIEF OF DEFENDANTS-APPELLANTS

J.B. VAN HOLLEN
Attorney General

Kevin M. St. John, SBN 1054815
Deputy Attorney General
Steven P. Means, SBN 1011355
Executive Assistant Attorney General
Steven C. Kilpatrick,
SBN 1025452
Assistant Attorney General
Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792
(608) 267-8906 (Fax)
kilpatricksc@doj.state.wi.us

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CORRECTED BRIEF OF DEFENDANTS-APPELLANTS

ISSUES PRESENTED

1. Courts have uniformly held that public employees do not have a constitutionally protected right to collectively bargain, and that such statutory rights, when

granted, are a matter of legislative grace. Through 2011 Wisconsin Act 10 the Wisconsin Legislature modified the various statutory rights granted to Wisconsin's municipal employees. Specifically:

- Wis. Stat. § 111.70(4)(mb)1., limits collective bargaining between general municipal employees and employers to the single issue of base wages;

- Wis. Stat. §§ 111.70(4)(mb)2., 66.0506 and 118.245, require that collectively bargained for base wage increases that exceed an increase in the Consumer Price Index be approved by referendum;

- Wis. Stat. §§ 111.70(1)(f) and 111.70(2)(in relevant part), eliminate the ability of general municipal employee unions to negotiate "fair share" agreements, which require non-union members to pay the proportional share of the cost of collective bargaining and contract administration;

- Wis. Stat. § 111.70(4)(d)3.b., requires that entities that wish to be the certified bargaining agent of a collective bargaining unit containing general municipal employees demonstrate on an annual basis that a majority of bargaining unit members want such collective representation and pay the cost of administering the related certification elections; and

- Wis. Stat. § 111.70(3g), prohibits municipal employers from deducting union dues from general municipal employee earnings.

Do these modifications of the collective bargaining system infringe the rights of association and speech of general municipal employees and their unions?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

2. Do the statutes listed above violate the equal protection rights of those general municipal employees represented by a collective bargaining agent vis-a-vis those general municipal employees who are not?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

3. Does Wis. Stat. § 62.623, prohibiting the City of Milwaukee from paying contributions to the Milwaukee Employee Retirement System for its general employees, violate the Home Rule Amendment, art. XI, § 3(1) of the Wisconsin Constitution?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

4. Does Wis. Stat. § 62.623, prohibiting the City of Milwaukee from paying contributions to the Milwaukee Employee Retirement System for its general employees, unconstitutionally impair the contractual rights of these employees?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted because of the public importance and statewide impact of the laws at issue.

STATEMENT OF THE CASE

This case focuses on whether certain features of the Municipal Employment Relations Act, Wis. Stat. §§ 111.70 – 111.77, as amended by 2011 Wisconsin Acts 10 and 32 and other related statutes (hereafter "MERA"), violate the state constitutional rights of association, free speech, and equal protection of general municipal employees and their unions, and whether the Legislature

exceeded its authority by requiring that City of Milwaukee employees pay the employee share of pension contributions.

The relevant facts are undisputed. Plaintiffs-Respondents are Madison Teachers, Inc., a union representing Madison public school teachers, Local 62 AFL-CIO, a union representing certain City of Milwaukee employees, and individual members of each union (hereafter, "the challengers"). (R. 3, ¶¶ 9-14.) Defendants-Appellants (hereafter "the state officials") are the Governor of Wisconsin and the Commissioners of the Wisconsin Employment Relations Commission, whose duties involve the implementation of certain parts of Act 10. (R. 3, ¶¶ 15-17.)

On November 29, 2011, the challengers filed a Motion for Summary Judgment (R. 18), seeking a declaration that certain sections of MERA, as outlined in the Statement of Issues, violated their rights of association, free speech, and equal protection under the Wisconsin Constitution. They also challenged Wis. Stat. § 62.623, which prohibits a 1st class city from paying the

employee share of required pension contributions. Finally, they challenged Act 10 as being improperly considered during a special legislative session.

The state officials filed a Motion for Judgment on the Pleadings on January 31, 2012. (R. 38.) On September 14, 2012, the Circuit Court decided both dispositive motions and issued its Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings. (R. 53; App. 124-50.) It held that municipal employees' and their unions' rights of association and free speech under both the state and federal[1] constitutions were violated by MERA's ban on collective bargaining for issues other than base wages, the annual certification requirements, and the prohibitions on forced payment of "fair-share" contributions from non-member employees, and payroll deductions for union dues. (R. 53; App. 134-39.) Based on those conclusions, the Circuit Court then analyzed the

[1] Despite the challengers not claiming any violation of the federal constitution, the Circuit Court declared certain provisions of MERA unconstitutional under both the state *and* federal constitutions.

challenged sections under strict scrutiny and held that they violated equal protection. (R. 53; App. 139-42.)

With respect to the 1st class city pension provisions, the Circuit Court concluded that "the allocation of responsibility for contributions to the Milwaukee ERS … is a 'local affair' for purposes of the Home Rule Amendment" to the Wisconsin Constitution and that the adoption of a statutory provision "that alters it is an unconstitutional intrusion into a matter reserved to the City of Milwaukee." (R. 53; App. 145.) Finally, the Circuit Court also concluded that the prohibition on paying the employee share of pension contributions was an unconstitutional impairment of contracts. (R. 53; App. 149.)

Accordingly, the Circuit Court declared "Wis. Stat. §§ 66.0506, 118.245, 111.70(1)(f), 111.70(3g), 111.70(4)(mb) and 111.70(4)(d)3 violate the Wisconsin and United States Constitutions, and Wis. Stat. § 62.623

violates the Wisconsin Constitution, and [are] all null and void." (R. 53; App. 150.)[2]

On September 18, 2012, the state officials filed a notice of appeal. (R. 54.) On October 10, 2012, in response to a motion by the challengers, the Circuit Court's "Amendment Clarifying September 14, 2012 Decision and Order," amended the Order "to add the third sentence of § 111.70(2) to the statutes found unconstitutional and therefore void." (R. 65; App.153.) That sentence states: "A general municipal employee has the right to refrain from paying dues while remaining a member of a collective bargaining unit."[3]

On April 25, 2013, the Court of Appeals certified the case to this Court. (Certification; App. 100-23.) On June 14, 2013, this Court granted the certification.

STANDARD OF REVIEW

This Court reviews the constitutionality of state statutes *de novo*, without deference to the lower courts.

[2] All relevant statutory sections are included in the appendix.

[3] Proceedings related to the state officials' efforts to obtain a stay and an April 22, 2013, petition for supplemental injunctive relief filed by the challengers are not addressed in the Statement of the Case as they are not relevant to this appeal.

State v. McManus, 152 Wis.2d 113, 129, 447 N.W.2d 654 (1989).

ARGUMENT

To the challengers, every debate over Act 10 is an endless policy debate. Their tactics shift and the forums change but the goal is the same: to prevent reform. Opponents of Act 10 have fought the changes to public sector collective bargaining through persuasion, protest, public information campaigns, teacher "sick-outs," recall threats, and public "shaming." Legislative opponents even fled the State to try and block a quorum of the Senate. When those efforts failed, and Act 10 became law, opponents challenged the measure in court, again and again.

But courts are not public policy salons. They decide cases on the law. So when opponents of Act 10 challenged the legislative procedure by which the law was enacted, they lost. *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis.2d 70, 798 N.W.2d 436. When they brought a constitutional challenge in federal court, they

lost. *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 642 (7th Cir. 2013).

And they should lose here. This case merely repackages arguments already rejected by the Seventh Circuit and is nothing more than the latest effort to impose a public policy result that could not be achieved through the democratic process. These claims simply have no basis in law.

I. THE ACT 10 CHANGES TO MERA DO NOT INFRINGE RIGHTS OF ASSOCIATION OR SPEECH.

The challengers characterize their associational and speech claim under the Wisconsin Constitution as an infringement on their right to "associate for the purpose of participating in collective bargaining." (R. 44:24.) They frame their argument in this manner because the right to associate is protected only if it is for the purpose of "engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

However, their argument fails because pronouncements of this Court and the United States Supreme Court[4] make it abundantly clear that collective bargaining in the public employee context is not a constitutional right. *See, e.g., Dep't of Admin. v. Wis. Emp. Rel. Comm'n*, 90 Wis.2d 426, 430, 280 N.W.2d 150 (1979)("There is no constitutional right of state employees to bargain collectively"); *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979)("the First Amendment does not impose any affirmative obligation on the government to listen, to respond or ... to recognize [a public employee] association and bargain with it").

Instead, it is a policy choice made by the Legislature to share decision-making authority with employee representatives. How much decision-making authority to share (if any), and with whom, are legislative choices. This is what the Court of Appeals meant when it

[4] The rights of free speech and assembly and the guarantee of equal protection of the Wisconsin and U.S. Constitutions are coextensive. *County of Kenosha v. C & S Management Inc.*, 223 Wis.2d 373, 389, 588 N.W.2d 236 (1999); *State v. McManus*, 152 Wis.2d 113, 130, 447 N.W.2d 654 (1989).

stated, "The right of state employees to bargain collectively with the state is an act of legislative grace." *Bd. of Regents v. Wis. Per. Comm'n,*103 Wis.2d 545, 556, 309 N.W.2d 366 (Ct. App. 1981).

Act 10 merely changed the scope of decision-making authority the State chooses to share through collective bargaining. These policy choices in Act 10 are undoubtedly significant, but they are not of a constitutional moment. Indeed, it is undisputed that the State could end *all* collective bargaining for public employees. The Court of Appeals recognized this power in its certification. (Certification, p. 9; App. 108)("[T]he parties agree that … the legislature could have abolished all collective bargaining.") Since the challengers concede this point, it is peculiar, therefore, that they continue to try and cloak their policy views with constitutional dress.

The Wisconsin and federal constitutions clearly recognize the challengers' right to associate to exercise their right to petition government. However, neither grants the right to associate for the purpose of collective

bargaining. Such right is merely statutory,[5] and the Legislature may grant and withdraw that right as it sees fit.

In *Smith*, the United States Supreme Court rejected allegations that the Arkansas State Highway Commission improperly refused to consider employee grievances filed by union representatives, noting the critical distinction between the employees' First Amendment rights and the public employer's freedom to ignore the employees' selected representative:

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

441 U.S. at 465 (emphasis added)(citation omitted).

The Seventh Circuit understood this distinction when, in *Wis. Educ. Ass'n Council*, 705 F.3d at 642, it soundly rejected constitutional challenges to post-Act 10 MERA, and its state government counterpart, the State

[5] Wisconsin Stat. § 111.70(2) reads, in part: "Municipal employees have the right ... to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities **for the purpose of collective bargaining**."

Employment Labor Relations Act, Wis. Stat. §§ 111.81 – 111.94, as amended ("SELRA"). The Seventh Circuit reviewed the same issues presented in this case and held that nothing in Act 10[6] violates the First Amendment and that "Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject." *Id.* at 645-46. As a result, the Seventh Circuit upheld Act 10 "in its entirety." *Id.* at 642.

The challengers' claims ignore this settled law. Instead, they confuse the right to associate for constitutional purposes with a right to associate to engage in pre-Act 10 collective bargaining, which was always, and only, a statutory process. The right of association only protects those who "associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Jaycees*, 468 U.S. at 618. Were the law otherwise, it would

[6] Act 10 amended both MERA and SELRA. This Court has held that the identical rights in these laws merit the same legal analysis. *Dep't of Emp. Rel. v. Wis. Emp. Rel. Comm'n*, 122 Wis.2d 132, 143, 361 N.W.2d 660 (1985).

constitutionalize all activities that any group of people wants to engage in simply because they have associated for that purpose.

Nor does it matter that a labor union might engage in protected First Amendment activities in addition to collective bargaining. For example, individuals may associate to form a corporation and government cannot interfere with that corporation's legitimate First Amendment activity. *See Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 340-41 (2010). This, however, does not preclude laws that might make associating as a corporation less attractive. For instance, a state might decide to modify or end the limitations on corporate liability, one of the primary motivations for forming a corporation. The First Amendment and art. I, §§ 3, 4 of the Wisconsin Constitution are not guarantees of particular collective bargaining rights and processes any more than they are a permanent guarantor of limited corporate liability as presently defined under Wisconsin law.

The MERA provisions at issue do not implicate constitutionally-protected association or speech activities; instead, they are merely legislative determinations of how decision-making should be shared between municipal employers and their employees. And, notably, neither Act 10 nor MERA place any limits on any conduct outside the narrow sphere of collective bargaining. In fact, the manner in which the labor unions, their members, and other aligned interests have associated, engaged in speech, and petitioned the government on the specific issue of Act 10, clearly shows how their rights continue to exist and be exercised.

Because no associational or speech rights are implicated by Act 10, this Court should review the challenged MERA statutes under the deferential rational basis standard. *Wis. Educ. Ass'n Council,* 705 F.3d at 652-53 (applying rational basis review because plaintiffs failed to articulate a cognizable First Amendment claim). MERA easily survives under this analysis, and the challengers agree. (R. 44:25 n.8; App. 115.)

II. WISCONSIN CONST. ART. I, §§ 3, 4, DO NOT REQUIRE DUES DEDUCTIONS OR MANDATORY "FAIR-SHARE" CONTRIBUTIONS.

A. No State Constitutional Right Exists For Employees And Labor Unions To Access Payroll Systems For The Purpose Of Dues Collection.

Public sector unions have no constitutional right to access government payroll systems for dues deductions. In fact, the United States Supreme Court recently concluded that a state's decision to end payroll deductions as a dues-paying mechanism "is not an abridgment of the unions' speech" because they remain "free to engage in such speech as they see fit." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359-60 (2009).

Relying on *Ysursa* and *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), the Seventh Circuit, in *Wis. Educ. Ass'n Council*, explained:

> The Bill of Rights enshrines negative liberties. It directs what government may not do to its citizens, rather than what it must do for them. *See Smith v. City of Chi.*, 457 F.3d 643, 655–56 (7th Cir. 2006). While the First Amendment prohibits "plac[ing] obstacles in the path" of speech, *Regan*, 461 U.S. at 549, 103 S.Ct. 1997 (citation omitted), nothing requires government to "assist others in funding the expression of particular ideas, including political

> ones," *Ysursa*, 555 U.S. at 358, 129 S.Ct. 1093; *see also Harris v. McRae*, 448 U.S. 297, 318, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (noting that Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of" a constitutional right). **Thus, even though "publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, [states are] under no obligation to aid the unions in their political activities.**" *Ysursa*, 555 U.S. at 359, 129 S.Ct. 1093.
>
> In *Ysursa*, the Supreme Court squarely held that the use of a state payroll system to collect union dues from public sector employees is a state subsidy of speech. *Id.* As the Court explained, "**the State's decision not to [allow payroll deduction of union dues] is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit.**" *Id.* Other circuits have reached the same conclusion. Like the statutes in these cases, **Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject.** Thus, *Ysursa* controls, and we analyze Act 10 under the Supreme Court's speech subsidy cases.

750 F.3d at 645-46 (emphasis added)(citations omitted).

In *Wis. Educ. Ass'n Council*, it was claimed that the State's decision to allow dues deductions for only some groups burdened the rights of others. However, the Seventh Circuit rejected the argument for two reasons. First, "Act 10 does not present a situation where the state itself actively erected an obstacle to speech. Thus, nothing supports treating the selective prohibition of payroll deductions as a burden on or obstacle to the speech of

general employee unions. Instead, Act 10 simply subsidizes the speech of one group, while refraining from doing so for another." *Id.* at 646 (footnote omitted). Second, "speaker-based distinctions are permissible when the state subsidizes speech. Nothing in the Constitution requires the government to subsidize all speech equally." *Id.* at 646-47. The Seventh Circuit's holding could not be clearer: "Act 10's payroll deduction prohibitions do not violate the First Amendment." *Id.* at 645.

The Sixth Circuit Court of Appeals even more recently upheld a prohibition on payroll deductions for certain public sector unions, even when allowed for others. In *Bailey v. Callaghan*, 715 F.3d 956 (6th Cir. 2013), the Sixth Circuit vacated an injunction prohibiting Michigan state officials from enforcing a statute that prohibited union dues deductions. It held:

> The theory behind their First Amendment claim runs as follows: unions engage in speech (among many other activities); they need membership dues to engage in speech; if the public schools do not collect the unions' membership dues for them, the unions will have a hard time collecting the dues themselves; and thus Public Act 53 violates the unions' right to free speech.
>
> **The problem with this theory is that the Supreme Court has already rejected it.** "The First

> Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." *Ysursa v. Pocatello Educ. Assn*, 555 U.S. 353, 355, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009). Here, Public Act 53 does not restrict the unions' speech at all: they remain free to speak about whatever they wish. Moreover, "nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions" for union activities, *id.;* and payroll deductions are all that Public Act 53 denies the unions here. Seldom is precedent more binding than *Ysursa* is in this case.

Id. at 958 (emphasis added). The Sixth Circuit found that "the Act says nothing about speech of any kind. The Act is therefore facially neutral as to viewpoint, which goes a long ways towards defeating the plaintiffs' facial challenge." *Id.* at 959 (citing *Wis. Educ. Ass'n Council*, 705 F.3d at 648); *see also S. Car. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256–57 (4th Cir. 1989)(while the "loss of payroll deductions may economically burden the [union] and thereby impair its effectiveness, such a burden is not constitutionally impermissible").

The foundation of all these decisions is the unremarkable premise that the Constitution does not require the government to subsidize unions' or their members' First Amendment associational activity.

Furthermore, the Constitution does not compel the State *to continue* to provide unions access to public payroll systems in perpetuity. *Ysursa*, 555 U.S. at 359, 360 n.2 (noting that previously "available deductions do not have tenure").

B. No State Constitutional Right Exists To Compel Nonmembers To Pay "Fair-Share" Contributions.

The challengers' claim that they are constitutionally entitled to negotiate "fair-share" agreements, which require public employees who choose not to join the union — and even those who oppose the union — to pay a proportional share of the cost of collective bargaining and contract administration, similarly fails. The Supreme Court rejected *this* theory in *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007). After noting that "fair-share" agreements grant unions an "extraordinary power" that is "in essence, [the power] to tax government employees," *id.* at 184, the *Davenport* Court reiterated that "unions have no constitutional entitlement to the fees of nonmember

employees" and noted that there is no constitutional impediment to states eliminating fair-share payments entirely. *Id.* at 185.

Furthermore, public sector fair-share agreements are an "impingement" if not an outright infringement of the associational rights of those who do *not* wish to bargain through an association. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977)("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."); *Knox v. Service Employees Int'l Union, Local 1000*, ___ U.S. ___, 132 S. Ct. 2277, 2289-91 (2012)("By authorizing a union to collect fees from nonmembers … our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate."). While *Knox* and *Abood* hesitantly concluded that fair-share agreements are not unconstitutional, they, like *Davenport*, also make it very clear that *there is no constitutional mandate*. Thus, Wis. Const. art. I, §§ 3, 4, do not require the State to force non-union members in a

collective bargaining unit to financially support municipal employee unions.

Finally, the constitutional analysis does not change simply because the State *formerly* allowed municipal general employee unions, acting as exclusive collective bargaining representatives, to negotiate fair-share agreements. *Abood*, 431 U.S. at 225 (it is not the court's role to "judge the wisdom" of a state's collective bargaining scheme).

III. THE CHALLENGERS' ATTEMPT TO OVERLAY *LAWSON'S* "PENALTY" THEORY ON THIS CASE FAILS, AND THUS, MERA DOES NOT VIOLATE WIS. CONST. ART. I, §§ 3, 4.

In the courts below, the challengers sought to avoid the established law discussed above by relying on *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955). *Lawson*, however, does not save their claims.

In *Lawson*, a 1950's Red Scare era case, this Court declared a federal housing regulation unconstitutional because it required tenants to relinquish their right to

associate with "subversive organizations" in order to remain eligible to continue living in subsidized housing. It was not disputed that an individual's right to be a member of a subversive organization was protected by the First Amendment and Wis. Const. art. I, §§ 3 and/or 4, nor was it disputed that access to public housing was a "privilege," not a right. However, the Court concluded that the "privilege" of subsidized housing could not be conditioned on the relinquishment of the constitutionally-protected right to associate. *Lawson*, 270 Wis. at 275.

The challengers claim that, like *Lawson*, MERA penalizes represented employees and their bargaining agents. There are three fundamental reasons why *Lawson* is inapplicable to the present case: First, *Lawson* is not a public employment case. The government has "significantly greater leeway in its dealings with citizen employees than . . . [with] citizens at large." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008). Second, as explained above, associating for statutorily-provided collective bargaining is not a constitutionally protected right. Third, as will be explained below, no

"penalty" results from associating for statutory collective bargaining. Moreover, this "penalty theory" has never been applied in the numerous published decisions challenging changes to collective bargaining laws.

To understand why MERA does not create any penalties, it is essential to understand the difference between a union or labor organization[7] on the one hand and a collective bargaining unit and collective bargaining representative on the other hand. For public employees, a "bargaining unit" is a group of employees designated by the Wisconsin Employment Relations Commission, for purposes of electing a collective bargaining representative. Wis. Stat. § 111.70(1)(b). Statutory collective bargaining obligations under MERA are only triggered if a bargaining unit elects a bargaining representative. Wis. Stat. § 111.70(4)(d). While a bargaining unit *may* elect a union to act as the bargaining representative, unions have no status under MERA apart from such an election and a bargaining unit could always elect a different

[7] Wisconsin Stat. § 111.70(1)(h), defines the term "labor organization" in a way that would include, but not be limited to, unions seeking to be elected as a collective bargaining representative.

representative. Similarly, election of a union to act as a bargaining representative is not at all dependent on whether any members of the bargaining unit are also members of the union. Nothing in the law requires those who vote in the election to join a union if it is elected as the certified bargaining agent. Instead, each employee is at all times left free to associate, or not.

Importantly, even if a bargaining representative is elected, MERA applies evenly to all employees in the bargaining unit regardless of how they vote or whether they decide to join the union that has been elected as the representative. If the bargaining representative is certified, all of the employees in the unit, even those who voted no, must collectively bargain all mandatory subjects through that representative.

Put differently, collective bargaining under MERA is exclusively a statutory process and the elected bargaining representative has only those statutory rights and duties created by statute. Neither a union that is elected as a bargaining representative, nor an individual employee who is part of a bargaining unit, loses any right

or ability to associate or engage in protected speech, because their ability to do so outside the narrow context of statutory collective bargaining is not impaired.

With or without MERA and Act 10, every avenue for petitioning the government other than collective bargaining remains open and unrestricted to both represented and unrepresented employees, and to unions whether or not they are certified as bargaining agents.

Moreover, MERA does not prevent employees in the collective bargaining unit who are members of a union from doing anything outside the narrow context of statutory collective bargaining. Represented and unrepresented employees can employ the exact same steps, and engage in the exact same advocacy, to promote better wages outside the narrow realm of statutory collective bargaining. The state constitution does not prevent an employer from responding to these pleas by providing wage increases outside of a collective bargaining agreement.

A. MERA Provides A Benefit, Not A Burden, By Compelling Employers To Negotiate Over Total Base Wages.

The challengers contend that represented employees and their bargaining agents are penalized by Wis. Stat. §§ 111.70(4)(mb)2., 66.0506, and 118.245, which require a referendum for base wage increases above the cost-of-living. A referendum is not required for non-represented employees. However, this difference in process is of no significance. The whole point of collective bargaining is to establish a different process for represented employees. The difference in this case simply reflects the Legislature's choice to allow local citizens a limited role in the shared decision-making.

Moreover, and importantly, an unrepresented employee has no constitutional or statutory right to receive or compel negotiation over wage increases, let alone increases greater than a cost of living adjustment. Instead, a municipal employer is at all times free to ignore any such demands from any employee. *Minnesota State*

Bd. for Cmmty. Colleges v. Knight, 465 U.S. 271, 287 (1984).

Thus, unlike *Lawson*, employees are not forced to choose between their constitutional right to associate and any tangible benefit. Instead, MERA and Act 10 present the inverse of *Lawson*, as employees who collectively bargain *gain* the statutory right to force their employer to "meet and confer at reasonable times, in good faith, with the intention of reaching an agreement ... with respect to wages ...." Wis. Stat. § 111.70(1)(a). Unrepresented employees don't have this right to force their municipal employer to a bargaining table. While both groups can engage in all other forms of speech and association, and petition the government outside of collective bargaining, MERA provides this additional benefit – and a significant one —only to those employees who have elected an exclusive representative.

If accepted, the challengers' arguments would affect a sea change in public sector labor law by concluding that Wis. Const. art. I, §§ 3, 4, preclude the State from identifying a subset of issues (in this case, total

base wages) that can be collectively bargained and prohibiting collective bargaining over other subjects. This position cannot be squared with the State's ability to declare *all* subjects prohibited subjects of bargaining. *Bd. of Regents*, 103 Wis.2d at 556. The logical extension of this reasoning is that every public sector bargaining law that identifies *any* prohibited subject of bargaining violates the employees' rights of association and free speech. Hence, pre-Act 10 MERA would have been unconstitutional because it too was a labor code that treated "represented" employees differently than "non-represented" ones. Indeed, no public sector labor code in the nation would survive the challengers' reasoning. This cannot be. Far from proving MERA unconstitutional "beyond a reasonable doubt," the challengers' argument produces an absurd result that in fact confirms its constitutional soundness.

B. Annual Certification Requirements Do Not Burden The Association And Speech Rights Of Municipal Employees Or Labor Unions.

The challengers also assert that MERA's new mandatory annual certification provision burdens and penalizes their speech and association activity. This is wrong for several reasons.

First, certification provisions have been a staple of MERA for decades. *See, e.g.*, Wis. Stat. § 111.70(4)(d) (1971-72). Without some legislatively-imposed system to recognize collective bargaining representatives, neither employees nor employers would know if a specific agent legitimately speaks for a bargaining unit. It is necessarily the Legislature's prerogative to define the contours of those provisions.

Second, the imposition of annual certification elections on represented employees but not on non-represented employees is certainly not a penalty, because non-representatives have no need for a representative's certification in the first place.

Third, this penalty theory in the annual certification context ignores the distinction between the *right of employees* to associate for protected activities and the *right of the bargaining agent* to exclusively negotiate on behalf of all bargaining unit employees – including those employees that do not want the agent's representation. This distinction is critical. MERA requires – as a precondition to negotiations – that the *bargaining agent* confirm that it has the support of a majority of the employees it seeks to represent. Wis. Stat. § 111.70(4)(d)3. This requirement reflects a legislative choice to modify the balance between the associational rights of employees who are subject to collective bargaining and those who are not. While the majority threshold is certainly *different* than what it was before Act 10, this does not make it *unconstitutional*.

Fourth, MERA does not require individual employees to bear the costs of annual certification; it requires the labor organization – the entity that seeks the privilege of exclusive representation – to bear those costs. How that cost is covered or shared is not mandated by

MERA. The idea that government charges a fee to cover its administrative costs is neither novel nor constitutionally infirm. *See Sauk County v. Gumz*, 2003 WI App 165, ¶ 49, 266 Wis.2d 758, 669 N.W.2d 509 ("It is well established that the government may charge a fee" to cover the government's expense of administering an activity without violating the First Amendment).

Finally, the annual certification requirement is not a penalty for associating because no one is required to bear any state-imposed costs *in exchange for* the right to join a union. Instead, as explained above, MERA is completely silent about the choice to join a union. A certification election has no bearing on whether an employee may join a union or whether the union may petition the government on behalf of its members outside of collective bargaining. Likewise, a failure to garner a majority does not dissolve the union. Instead, the election determines only who, if anyone, is granted the unique power to compel the governmental employer to engage in statutory collective bargaining.

C. Elimination of Forced "Fair-Share" Payments Does Not Penalize Municipal Employees Or Labor Unions.

Prohibition of "fair-share" agreements does not burden or penalize represented employees, or any union acting as their exclusive bargaining agent versus those who are not represented. Non-represented employees have never had the right to compel others to pay for any portion of their bargaining costs. Indeed, as explained above, these employees have no right – statutory or constitutional – to bargain with public employers. Thus, in the context of "fair-share" agreements, the challengers' application of the *Lawson* penalty theory makes little, if any, sense.

Furthermore, as described above, the challengers' reasoning that a "free-rider" concern creates a constitutional mandate is directly at odds with United States Supreme Court precedent. *See generally Knox*, 132 S. Ct. 2277.

D. The Elimination Of Payroll Deductions As A Dues-Paying Mechanism Does Not Burden Or Penalize Municipal Employees Or Labor Unions.

Similarly, MERA's prohibition on payroll dues deductions does not penalize represented employees, because no employee has a constitutional right to payroll dues deductions to support membership in a voluntary organization. Similarly, labor unions do not have a constitutional right to conscript the State into administering their dues collection. As the Seventh Circuit explained,

> In *Ysursa*, the Supreme Court squarely held that the use of a state payroll system to collect union dues from public sector employees is a state subsidy of speech. *Id.* As the Court explained, "the State's decision not to [allow payroll deduction of union dues] is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit." ... Like the statutes in these cases, Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject.

Wis. Educ. Ass'n Council, 705 F.3d at 645-46 (citations omitted). The court further rejected the plaintiff unions' argument that *Ysursa* could be distinguished because the dues deduction prohibition in that case applied across the board, unlike in Act 10. *Id.* at 646 ("the Unions'

reasoning falters for two reasons: Act 10 erects no barrier to speech, and speaker-based discrimination is permissible when the state subsidizes speech").

E. *Lawson* Is Inapplicable To The Present Case, And Thus, The Challengers' Association And Speech Claims Fail.

For the reasons discussed above, *Lawson* is a different case that has no bearing on the present dispute. Mr. Lawson had to relinquish a constitutional right to receive subsidized housing, even though the associational activities had no relation to the subsidized housing privilege that was being offered. Here, employees who collectively bargain do not lose any association or speech rights. On the contrary, a collective bargaining system always confers *additional* rights on represented employees.

If any legitimate analogy is to be drawn between MERA's restrictions on statutory collective bargaining and *Lawson*, it would require a change of the *Lawson* facts. If, in *Lawson*, the housing regulation had prohibited residents from operating any corporation or non-profit

organization in their units—rather than mere membership in organizations—there is no reason the law would have been struck down. While individuals certainly have a right to join organizations, they do not have the right to compel government to support their activities by providing subsidized housing. MERA does not, like the policy considered in *Lawson*, prohibit or penalize membership in an organization, nor does it prohibit or penalize any type of protected speech or associational activity. While MERA does set rules for those general employees in collective bargaining units, those rules do not govern outside that narrow, statutorily-created context.

In summary, the challengers' association and speech claim fails because associating for the purpose of statutory collective bargaining is not a constitutional right, and Act 10's changes to MERA do not burden or penalize any association or speech rights under the state constitution.

IV. ANALYZED UNDER RATIONAL BASIS REVIEW, MERA DOES NOT VIOLATE EQUAL PROTECTION.

The Circuit Court addressed the challengers' equal protection claim based on its finding that MERA violated their associational rights. (R. 53; App.140.) As explained above, however, MERA does not infringe their association and speech rights under the Wisconsin Constitution; therefore, their equal protection claim should be analyzed under the rational basis standard. *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 61, 284 Wis.2d 573, 701 N.W.2d 440 (strict scrutiny applies only when a challenged statute "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class").

The burden of establishing that MERA is unconstitutional is a heavy burden indeed. MERA is presumed constitutional, and under rational basis review, this Court must "sustain [the] statute against attack if there is any reasonable basis for the exercise of legislative

power." *McManus*, 152 Wis.2d at 129. "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to [its] constitutionality, it must be resolved in favor of constitutionality." *State ex. rel. Hammermill Paper Co. v. LaPlante*, 58 Wis.2d 32, 46, 205 N.W.2d 784 (1973). To give effect to the strength of this presumption of validity, the challengers cannot prevail unless they can establish that MERA is unconstitutional "beyond a reasonable doubt." *Id.*

Importantly, as part of rational basis review, this Court "does not evaluate the merits of the legislature's economic, social, or political policy choices, but is limited to considering whether the statute violates some specific constitutional provision." *State v. Dennis H.*, 2002 WI 104, ¶ 12, 255 Wis.2d 359, 647 N.W.2d 851. In fact, rational basis review does not even require that the Legislature articulate its reasoning; the challenged provisions of MERA must "survive a constitutional challenge if this court can *conceive of* a rational basis for the law." *State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis.2d 13,

657 N.W.2d 66 (emphasis added). Finally, the burden is on the challenger to "'negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citation omitted).

In the face of this heavy burden, the challengers have conceded that the MERA provisions at issue would survive a rational basis review. This concession should come as no surprise. As explained above, the Seventh Circuit upheld Act 10 under rational basis review. *Wis. Educ. Ass'n Council*, 705 F.3d at 653-57. Also, the challengers' equal protection claim is based on the notion that MERA impermissibly created two distinct classes of public employees – those employees who are represented by a union and non-represented employees. The fact that MERA establishes two different negotiating environments that employees can self-select by choosing to collectively bargain or not, does not deny those employees equal protection of the law. Indeed, the Seventh Circuit described its conclusion that the State can constitutionally create distinctions between employee groups with similar

classifications as "uncontroversial." *Id.* at 655. In fact, if the challengers were correct, then every public sector collective bargaining scheme that results in different treatment for represented and non-represented employees, as they all must, would be unconstitutional.

The challengers failed to prove beyond a reasonable doubt that the challenged MERA provisions violate Wis. Const. art. I, §§ 1, 3, 4. Accordingly, this Court should declare MERA constitutional.

V. WISCONSIN STAT. § 62.623 DOES NOT VIOLATE THE HOME RULE AMENDMENT.

Section 62.623 of the Wisconsin Statutes prohibits a 1st class city, that is, the City of Milwaukee, from paying the employee share of contributions to the City of Milwaukee Employee Retirement System ("Milwaukee ERS"). The challengers' claim that § 62.623 violates the Home Rule Amendment to the Wisconsin Constitution, art. XI, § 3(1), which states:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every

> village. The method of such determination shall be prescribed by the legislature.

They are incorrect because § 62.623 is part of an act that uniformly affects every city and village. Moreover, it is clear that a city's payment of its employees' pension contributions is a matter of statewide concern.

A. Because § 62.623 Is Part Of A Uniform Act, It Does Not Violate The Home Rule Amendment.

The challengers argue that if a matter is determined to be a local affair, the Legislature is forever barred from regulating the subject. This, however, is not the law. The Home Rule Amendment:

> clearly contemplates legislative regulation of municipal affairs, and **there was no intention on the part of the people in adopting the home-rule amendment to create a state within a state**, an *imperium in imperio.*

Van Gilder v. City of Madison, 222 Wis. 58, 81, 267 N.W. 25 (1936)(emphasis added). Indeed, the only limitation on legislative regulation of local affairs is that the regulation be "an act which affects with uniformity every city." *Id.* at 80-81.

After discussing the scope of the Home Rule Amendment in great detail, the *Van Gilder* court left no doubt as to its holding:

> When the legislature deals with local affairs and government of a city, if its act is not to be subordinate to a charter ordinance, the act must be one which affects with uniformity every city.

Id. at 84. The Wisconsin Supreme Court has been consistent on this point. *See City of West Allis v. Milwaukee County*, 39 Wis.2d 356, 366, 159 N.W.2d 36 (1968)("If, however, the matter enacted by the legislature is primarily of local concern, a municipality can escape the strictures of the legislative enactment unless the enactment applies with uniformity to every city and village."); *Thompson v. Kenosha County*, 64 Wis.2d 673, 686, 221 N.W.2d 845 (1974)("statutes affecting the right of cities and villages to determine their own affairs must affect all cities and villages uniformly").

Act 10, through the creation of § 62.623 and other statutes, uniformly prohibited *all* governmental employers from paying the employee contribution to a pension or other retirement plan. *See* 2011 Wis. Act 10, § 167 (creating Wis. Stat. § 62.623, applicable to 1st class cities,

stating "[t]he employer may not pay on behalf of an employee any of the employee's share of the required contributions"); *Id.* § 74 (repealing and recreating Wis. Stat. § 40.05(1)(b), applicable to all employers, including "any county, city, village, town," participating in the Wisconsin Employee Retirement System, stating "an employer may not pay, on behalf of a participating employee, any of the contributions required by par (a)"); *Id.* § 171 (creating Wis. Stat. § 66.0518, applicable to all local government units (defined to include all political subdivisions of the state) that choose to create a defined benefit plan, stating that such plan must "prohibit[] the local governmental unit from paying on behalf of an employee any of the employee's share of the actuarially required contributions"); *Id.* § 166 (creating Wis. Stat. § 59.875, applicable to populous counties, stating, "[t]he employer may not pay on behalf of an employee any of the employee's share of the actuarially required contributions").[8]

[8] Act 10 can be viewed in its entirety at https://docs.legis.wisconsin.gov/2011/related/acts/10 (last visited July 14, 2013).

Section 62.623 and the other relevant provisions of Act 10 create a uniform rule for all cities and villages (and all other governmental employers), not just the City of Milwaukee, that the employer may not pay any portion of the employee contribution to the retirement system or pension plan. Accordingly, Act 10 does not violate the Home Rule Amendment.

B. Public Sector Employee Benefits Are A Matter of Statewide Concern.

The state officials believe that uniformity is the only hurdle that must be passed to survive a Home Rule challenge. Because § 62.623 is part of a uniform regulation it must be upheld without further analysis of whether it regulates a matter of statewide concern. However, if the Court chooses to consider whether § 62.623 addresses a matter of statewide concern, it should conclude that it does.

The text of Act 10, together with the context in which it was enacted, leads to the inevitable conclusion that the Legislature believed that the State as a whole—

including its municipal instrumentalities—was in financial crisis and that reining in the costs of public employees was an essential tool to confront that crises. The Act was introduced during an emergency session of the legislature, called immediately after hotly-contested gubernatorial and legislative elections where the state's economy was a top issue. In addition to collective bargaining by municipalities, Act 10 addressed collective bargaining by state employees, retirement contributions by both represented and unrepresented public employees statewide, health insurance premiums, changes to the earned income tax credit, and additional budget lapses exceeding $10 million.

The idea that local spending raises statewide concerns makes perfect sense, particularly when state-generated revenues are distributed to local governments pursuant to the State's "shared revenue" program. *See, e.g.*, Wis. ch. 79. In 2011, the amount set aside for distribution to counties and municipalities was approximately $1.5 billion. *See* Wis. Stat. § 79.01(2). In addition to "shared revenue," municipal and county

budgets are supported by numerous other state aids and payments. As such, the Legislature has a clear interest in making sure that municipalities spend money wisely and in accordance with statewide public policy.

1. A 1947 Legislative Policy Statement on Milwaukee's Employee Retirement System does not establish public sector employee benefits are matters of statewide concern.

The clear nexus between Act 10 and the State's current fiscal health has forced the challengers to go back 66 years, to a 1947 legislative pronouncement, to argue that the manner in which the State's largest city uses public funds is not a matter of statewide concern. That pronouncement, which may have had some relevance in the years immediately following World War II, states that "all future amendments and alterations to [the Milwaukee ERS] are matters of local affair and government and shall not be construed as an enactment of statewide concern." Laws of 1947, ch. 441, § 31(1).

The Legislature's statement on what is or is not a matter of local concern is not "absolutely controlling," although it may be entitled to some deference. *Van Gilder*, 222 Wis. at 73-74. However, the deference accorded to a 1947 legislative statement in 2013, should be slight at best. First, the Legislature in 1947 obviously had no knowledge of the specific concerns or reasons that motivated Act 10. While it may have wanted to block future legislatures from seeking to regulate local pension funds, it clearly lacked that power through direct legislative action, and should not be afforded that power by reliance on a non-binding statement of policy.

Just as importantly, the world in 2013 is much different than the world that existed in 1947. State aids to municipalities have changed, economies are not local, and no credible argument can be made that local spending decisions have only local consequences. Those purporting to speak for the City of Milwaukee in the present action may argue that Milwaukee finances are "local," however, the extent to which Milwaukee seeks and relies upon state aid and state resources belies that claim.

2. On its terms, the 1947 Legislative declaration does not support an interpretation that § 62.623 upsets home rule.

If, for some reason, the Court chooses to consider the 1947 legislative statement, it must be read as a whole:

> For the purpose of giving cities of the first class the largest measure of self-governance with respect to pension annuity and retirement systems compatible with the constitution and general law, it is hereby declared to be the legislative policy that all future amendments and alterations to this act are matters of local affair and government and shall not be construed to be an act of statewide concern.

Laws of 1947, ch. 441, § 31(1). While the final clause indicates that the 1947 Legislature sought to predict the future by declaring that any amendments to the Milwaukee ERS would be a matter of local concern, the entire statement makes clear that this was not an unqualified grant of control. Instead, local control was subject to the "constitution **and general law**." *Id.*

According to *Black's* the phrase "general law" means a "Law that is neither local nor confined in application to particular persons." *BLACK'S LAW DICTIONARY*, 890 (7th ed. 1999). Here, as shown above,

§ 62.623 is part of a uniform law applicable to all governmental employers. Thus, it is a matter of general law and the 1947 statement does not stand as an obstacle to § 62.623.

Additionally, understanding "general law" as synonymous with uniform law is consistent with the proper scope of the Home Rule Amendment. As noted above, the Home Rule Amendment allows the State to regulate matters of local concern as long as it regulates the matter uniformly. Thus, the 1947 declaration simply says the ERS is within the control of the City unless: (1) the City's regulation of the ERS runs afoul of the Constitution; or (2) a future uniform law regulates in the area. This is consistent with the principle that the Legislature's authority is cabined by the Constitution, not by the actions of prior legislatures. Indeed, case law is clear that no legislature can bind future legislatures through the passage of a statute. *Flynn v. Dep't of Admin.*, 216 Wis.2d 521, 543, 576 N.W.2d 245 (1998). ("One legislature may not bind a future legislature's flexibility to address changing needs. Thus, one legislature may not

enact a statute which has implications of control over the final deliberations or actions of future legislatures.")(internal citations omitted).

3. The fact that Act 10 uniformly regulated the subject requires a holding that it is a matter of statewide concern.

The Legislature has determined that regulation of the Milwaukee ERS is a matter of statewide concern at least two other times; once in 1937 when it first created the Milwaukee ERS (Wis. ch. 396 (1937)) and again in 2011 when it amended it via Act 10. The Circuit Court incorrectly discounted these legislative determinations because the Legislature did not expressly state the Milwaukee ERS is a matter of statewide concern in either instance. With regard to the 1937 law creating the Milwaukee ERS in the first instance, the absence of an express statement is irrelevant. Indeed, if the Legislature did not think the regulation of pensions was a matter of statewide concern it would not have created the

Milwaukee ERS. Instead, it would have left the City free to decide whether to create an ERS.

More importantly, the lack of an express statement in Act 10 is of no moment. The enactment of a uniform law is dispositive that the matter is of statewide concern. The Court of Appeals made this clear:

> Also, the County seems to suggest that there is a "statewide concern" analysis that is distinct from a "uniformly affects every county" analysis. However, if the County means to make that argument, it is foreclosed by *Jackson County v. DNR*, 2006 WI 96, 293 Wis.2d 497, 717 N.W.2d 713, which states, in reference to Wis. Stat. § 59.03(1): "When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern." *Id.*, ¶19. **This language teaches that, if a legislative enactment "uniformly affects every county," then it is a matter of "statewide concern."** Thus, we do not address arguments made by the County that appear targeted solely at whether Wis. Stat. § 63.14(3) is a matter of statewide concern.

Roberson v. Milwaukee County, 2011 WI App 50, ¶ 21, 332 Wis.2d 787, 798 N.W.2d 256 (emphasis added). Any attempt by the challengers to ignore the clear holding of *Roberson* on the grounds that it construed the language of a home rule statute applicable to counties and not the Home Rule Amendment applicable to cities and villages fails:

> As the following explains, we conclude that the plaintiffs' reading of the statutes is correct because it is consistent with our supreme court's interpretation of similar constitutional language and we discern no reason why the two provisions should be interpreted differently.
>
> ****
>
> It is not happenstance that the statewide concern and uniformity language in the county home rule statute tracks language in article XI, section 3(1). The county home rule statute is patterned after article XI, section 3(1). *See* Committee Comment, 1973, Wis. Stat. Ann. § 59.025 (West Supp. 1977-78) (addressing a previous version of Wis. Stat. § 59.03(1) containing similar uniformity language and stating that the provision was "patterned after the constitutional and statutory provisions granting home rule to cities and villages"); *see also State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶37, 269 Wis.2d 549, 676 N.W.2d 401 (stating that county home rule authority in § 59.03 is "consistent with the general rule of limitation on the constitutionally-based home rule authority of other local units of *government*"). Thus, *Thompson's* interpretation of the language is arguably controlling and, at a minimum, highly persuasive.

Id. ¶¶ 14, 16. Indeed, a review of the language demonstrates it is identical in all material respects. *Compare* Wis. Const. art. XI, § 3(1), and Wis. Stat. § 59.03(1).

4. Past cases and state action support a finding that public sector employee benefits are a matter of statewide concern.

Public sector employee benefits have been held to be a matter of statewide concern. *Van Gilder*, 222 Wis. at 84 (compensation of police officers was a matter of statewide concern); *Welter v. City of Milwaukee*, 214 Wis.2d 485, 571 N.W.2d 459 (Ct. App. 1997)(law enforcement officers duty disability was a matter of statewide concern). And, the Legislature has been creating and amending public employee retirement systems since 1891. *See Wis. Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶¶ 7-10, 243 Wis.2d 512, 627 N.W.2d 807.

Section 62.623 does not contravene the Home Rule Amendment. *Van Gilder*, 222 Wis. at 84.

VI. WISCONSIN STAT. § 62.623 DOES NOT UNCONSTITUTIONALLY IMPAIR ANY CONTRACTUAL RIGHTS.

The challengers also alleged that § 62.623 unconstitutionally impaired the contractual rights of Milwaukee's general employees to have the City pay their employee pension contributions. This is incorrect for two reasons. First, Chapter 36 of the Milwaukee Charter Ordinance does not forever bind the City to pay the employee contribution. Second, even if it did, any impairment of contract rights passes constitutional muster. Additionally, even if this Court were to find an impermissible impairment, § 62.623 should not be stricken but instead should be held unconstitutional only as applied to employees hired before Act 10.

A. Chapter 36 Does Not Create A Contractual Right To Have The City Pay The Employee Contribution.

Chapter 36 of the Milwaukee Charter Ordinance establishes the Milwaukee ERS. (App. 184-248.) As such it defines the contribution levels, the benefit levels

and other mechanical aspects of the Milwaukee ERS. In its current form, Chapter 36 states that the City will make the employee contribution. Ch. Ord. § 36-08-7-a-1. (App. 231.)

The challengers claim that § 36-13-2-g turns § 36-08-7-a-1 into a contractual right to have the City pay the employee contribution forever. (R. 19:32.)

The Circuit Court assumed that a city ordinance can be a "contract" that binds a city—and is beyond the reach of the legislature—if the language of the ordinance so provides. That assumption, however, is not supported by law. Moreover, even if an ordinance is a contract, it is a contract that incorporates and is subject to changes in state law.

In *City of Kenosha v. Kenosha Home Tele. Co.*, 149 Wis. 338, 135 N.W. 848, 850 (1912), this Court held that a municipality has no power to enter into a contract that is not subject to amendment by the general laws passed by the Legislature. In that case, the City of Kenosha adopted an ordinance granting a telephone franchise to a telephone company in exchange for free service. The Court first

held that the City lacked power to grant the franchise, but went on to hold that even if the initial grant was valid, that power was subsequently repealed and voided by statute. *Id*. It stated, "As a state agency [the City] had no power to enter into a contract not subject to amendment by the public utility law." *Id*.

The principle established in *City of Kenosha* was directly applied to the public employment context in *State ex rel. McKenna v. District No. 8 of the Town of Milwaukee*, 243 Wis. 324, 10 N.W.2d 155 (1943). There, the Court held that a public school teacher with tenure under a prior statute could have that tenure taken away by a subsequent statute requiring mandatory retirement at age 65. *Id*. at 327-28.

In *Madison Metropolitan Sewerage Dist. v. Comm. on Water Pollution*, 260 Wis. 229, 50 N.W.2d 424 (1951), this Court also recognized that municipal powers are subject to subsequent legislative action. That case involved a claim by a sewerage district that preexisting statutory power to operate a sewage treatment plant exempted it from subsequent legislation seeking to

regulate the discharge from existing plants. In rejecting the sewerage district's claim that the original statute created a contractual right to operate free of the new regulations, the Court stated:

> A municipal corporation being a governmental agency whose powers are derived from and subordinate to the state, a municipal charter or other legislation affecting a municipal corporation is not a contract within the contemplation of a constitutional prohibition against the impairment of the obligations of a contract and the legislature retains the power to amend or repeal such charter and to enlarge or curtail the powers granted thereby.
>
> 'The municipality itself, which is a mere creature of the Legislature, is in no position to complain of the action of that body in reassuming powers previously delegated. The obligation of no existing contract is impaired by such an act, and no vested rights are thereby disturbed.'

Id. at 246 (citations omitted).[9]

These cases teach that parties who rely on an ordinance for contractual rights have a different set of expectations than may arise in other contexts. In the present case, as will be discussed more fully below, City of Milwaukee employees had no reason to expect that their "contract" with the City would bind the City, in

[9] Although this case no longer reflects current law on taxpayer standing, *City of Appleton v. Town of Menasha*, 142 Wis.2d 870, 877-78, 419 N.W.2d 249 (1988), it remains valid for the propositions cited.

perpetuity, to pay the "employee share" of pension contributions.[10]

In fact, the prospect of future legislation was expressly addressed in section 20-13 of the ordinance:

> **20-13. Charter Not Affected by General Law Except When So Expressed.** No general law of this state, contravening the provisions of this act [Ch. 184, L. 1874], shall be considered as repealing, amending or modifying the same, except such purpose be expressly set forth in such law. *(S. 14, Subch. 20, Ch. 184, L. 1874.)*

Ch. Ord. § 20-13.[11] Because the provisions of Act 10 that prevent Milwaukee from making the "employee contributions" to the ERS could not be more express, any "contract" anticipated and allows the Act 10 changes. *See* Wis. Stat. § 62.623(1).

Even if the Court were to discount § 20-13 and those cases which make municipal obligations subject to state laws, other plain language of the Charter defeats the challengers' argument. Section 36-13-2-g states:

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[10] Wisconsin Stat. § 241.02, Wisconsin's "statute of frauds," requires that any promise to pay another person's obligation must be reduced to writing and subscribed by the obligated party. If not, the promise is void. While neither the Circuit Court nor the parties addressed this issue below, it likewise is relevant to determining the intent of the Milwaukee ordinance at issue.

[11] Chapter 20 of the Charter Ordinance can be found at http://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/Ordinances/City-Charter/CH20.pdf (last visited July 14, 2013).

> Every member, retired member, survivor and beneficiary who participates in the combined fund shall have a vested and contractual right to the benefits in the amounts and on the terms and conditions as provided in the law on the date the combined fund was created.

See also Ch. Ord. § 16-32-2-c (containing language that is identical in all material respects). These two sections contain the only language that purports to create any contractual rights. *See Dunn v. Milwaukee County*, 2005 WI App 27, ¶¶ 8-9, 279 Wis.2d 370, 693 N.W.2d 82 ("legislative acts are presumed not to create contractual rights" and any contractual rights that are created are defined by the express language of the ordinance). Noticeably absent from this language, however, is any mention of contributions. The section certainly does not specify that contributions to the ERS are part of the "benefits" or "terms and conditions" of the ERS.

Whether contributions to the system are "benefits" or "terms and conditions" is answered by § 36-13-2-d. And the answer is, No. Section 36-13-2-d is clear:

> Contributions which are made to this fund under this act by the city or by an agency which is covered by this act, as contributions for members of this system shall not in any manner whatsoever affect, alter or impair any member's rights, benefits, or allowances,

> to which such member under this act is or may be entitled ….

This provision is significant for two reasons. First, it draws a clear distinction between "contributions" and "rights, benefits, and allowances" under the system. Second, § 36-13-2-d expressly provides that a contribution made by the City on behalf of an employee cannot "affect, alter or impair" an employee's "rights, benefits, and allowances" in any manner whatsoever. The challengers' claim is based on the concept that the contribution alters the benefit. Thus, reading § 36-13-2-g in connection with § 36-13-2-d makes clear that this suggested reading is not permissible. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶¶ 45-46, 271 Wis.2d 633, 681 N.W.2d 110 ("statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole"). *Contributions* are not part of the contractual rights.

This reading also comports with the express listing of benefits found in Chapter 36. Section 36-05, entitled "Benefits," gives specific meaning to the word for purposes of Chapter 36. Section 36-05 lists each and every benefit of the plan and the terms and conditions of

those benefits. *See* Ch. Ord. §§ 36-05-1 (service retirement allowance); 36-05-2 (ordinary disability retirement allowance); 36-05-3 (duty disability retirement allowance); 36-05-5 (accidental death benefit); 36-05-6 (separation benefits); 36-05-7 (optional benefits); 36-05-8 (survivorship benefits); 36-05-10 (ordinary death benefit); 36-05-11 (lump sum bonus). Because a requirement that the City make the employee contribution is nowhere in § 36-05, such a requirement can't be considered a "benefit."

B. Assuming There Is A Contractual Right, § 62.623 Does Not Impermissibly Impair It.

Assuming *arguendo*, that the City employees do have a contractual right to a continuing contribution, § 62.623 does not unconstitutionally impair it. The Contract Clause "cannot be read literally to proscribe any impairment of preexisting contracts." *State ex rel. Cannon v. Moran*, 111 Wis.2d 544, 554, 331 N.W.2d 369 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983).

This Court uses a three-step inquiry to determine whether an ordinance impermissibly impairs an existing contract. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶ 54, 55, 295 Wis.2d 1, 719 N.W.2d 408; *Energy Reserves*, 459 U.S. at 410. *First*, a party must show that the law changed after the formation of the contract and that the change substantially impaired the contractual relationship. *Energy Reserves, supra*, at 411; *Dairyland*, 295 Wis.2d 1, ¶ 55. *Second*, if a substantial impairment has been found, a court must determine whether there is a significant and legitimate public purpose for the law. *Energy Reserves*, 459 U.S. at 411-12; *Dairyland*, 295 Wis.2d 1, ¶ 56. *Third*, if there is a significant and legitimate public purpose, the question becomes whether the impairment of the contract is reasonable and necessary to serve the State's public purpose. *Energy Reserves*, 459 U.S. at 412; *Dairyland*, 295 Wis.2d 1, ¶ 57. Section 62.623 clearly survives this analysis.

1. There is no substantial impairment.

The challengers argued that there was a substantial impairment because the employees would be forced to pay for the cost of their own contributions. Increased cost alone, however, is not enough to prove substantiality. *See Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998)("[T]he fact that a state makes a contract more costly to one of the parties does not establish a violation."). This is particularly true when the increased costs are merely a reinstatement of the proper responsibility for the "employee contribution."

The challengers also argued that Act 10 fails under *Kolosso* because the changes to the Milwaukee ERS were not foreseeable because the State has not historically regulated the Milwaukee ERS and because Chapter 36 guarantees no changes. (R. 44:51-52.) These arguments fail. As shown above, Chapter 36 does not guarantee a continuing contribution, particularly when read in light of § 20-13, which contemplates future legislative action. The argument that the State does not have a history of

regulating the Milwaukee ERS also fails. The State created the Milwaukee ERS in 1937 and has been regulating public employee pensions systems since 1891. *See Lightbourn*, 243 Wis.2d 512, ¶¶ 7-10.

There is no doubt that public employee pensions are heavily regulated. Thus, new regulation was foreseeable and, therefore, not a substantial impairment. *Kolosso*, 148 F.2d at 894-95.

2. Section 62.623 serves a legitimate public purpose.

This prong of the analysis ensures that government is legitimately using its police power "rather than providing a benefit to special interests." *Energy Reserves*, 459 U.S. at 412. Here, any suggestion that there is not a legitimate public interest is unpersuasive. The various changes to public employee collective bargaining made by Act 10 were made to equip the local governments with the ability to absorb the impact of the economic downturn and the State's financial situation. The challengers have recognized this purpose. (R.19:36) (noting that the

purpose of § 62.623 is to help keep property taxes under control).

3. This Court must defer to the Legislature's determination that any impairment is reasonable and necessary to serve the public purpose.

Unless the government is both the regulating entity and a party to the contract, courts must defer to the Legislature's judgment as to the necessity and reasonableness of the statute. *Energy Reserves*, 459 U.S. at 412-13; *Chappy v. Labor and Industry Review Comm'n*, 136 Wis.2d 172, 188, 401 N.W.2d 568 (1987). Here, the State is not a party to any contract between the City and their employees.

C. Even If § 62.623 Does Unconstitutionally Impair A Contractual Right, The Statute Is Not Facially Invalid.

Assuming *arguendo,* that § 62.623 does unconstitutionally impair a contractual right, it does so only as to employees hired before various dates in 2010. Chapter 36 states that City employees hired after various

dates in 2010 are required to make their own employee contributions. *See* § 36-08-7-a-2. Thus, § 62.623 does not impair any contractual rights of employees hired after the listed dates.

CONCLUSION

For all the forgoing reasons, this Court should reverse the declaratory judgment of the Circuit Court.

Dated this 24th day of July, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

By:_____
Kevin M. St. John, SBN 1054815
Deputy Attorney General
Steven P. Means, SBN 1011355
Executive Assistant Attorney General
Steven C. Kilpatrick,
SBN 1025452
Assistant Attorney General

Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (Kilpatrick)
(608) 264-6362 (St. John)
(608) 266-3860 (Means)
(608) 267-8906 (Fax)
kilpatricksc@doj.state.wi.us
stjohnkm@doj.state.wi.us
meanssp@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,961 words.

Dated this 24th day of July, 2013.

_____
Steven C. Kilpatrick
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of July, 2013.

_____
Steven C. Kilpatrick
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of July, 2013.

_____

Steven C. Kilpatrick
Assistant Attorney General

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STATE OF WISCONSIN
IN SUPREME COURT

No. 2012AP2067

MADISON TEACHERS, INC.
PEGGY COYNE, PUBLIC
EMPLOYEES LOCAL 62,
AFL-CIO, AND JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R.
SCOTT, JUDITH NEUMANN
AND RODNEY G. PASCH,

Defendants-Appellants.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JUAN B. COLAS, PRESIDING, CIRCUIT COURT CASE NO. 2011-CV-003774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

BRIEF OF PLAINTIFFS-RESPONDENTS

CULLEN WESTON PINES & BACH LLP
Attorneys for Plaintiffs-Respondents
Madison Teachers Inc. and Peggy Coyne
Lester A. Pines, SBN 1016543
Lee Cullen, SBN 1014859
Tamara B. Packard, SBN 1023111
Susan M. Crawford, SBN 1030716
122 W. Washington Avenue, Suite 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

PADWAY & PADWAY, LTD
Attorneys for Plaintiffs-Respondents
Public Employees Local 61, AFL-CIO
and John Weigman
M. Nicol Padway, SBN 1016666
Aaron A. DeKosky, SBN 1081404
633 West Wisconsin Avenue
Suite 1900
Milwaukee, Wisconsin 53203
Telephone: (414) 277-9800
Facsimile: (414) 277-0189

Dated: August 15, 2013.

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STATEMENT OF THE ISSUES

1. Do certain provisions of 2011 Wisconsin Act 10 and 2011 Wisconsin Act 32, amending Wisconsin's Municipal Employment Relations Act ("MERA") and related statutes violate the Plaintiffs-Respondents' ("Plaintiffs") associational rights under Article I, §§3 and 4 of the Wisconsin Constitution because they:

    a. prohibit municipal employers from collectively bargaining with the certified exclusive agents of municipal general employees ("certified agents" or "representatives") on any subject other than base wages and prohibit negotiations for a wage increase in excess of the annual increase in the Consumer Price Index unless approved in a municipal voter referendum (Wis. Stat. §§111.70(4)(mb), 66.0506, and 118.245);

    b. prohibit municipal employers from deducting union dues from the wages of municipal general employees as authorized by the employees (Wis. Stat. §111.70(3g));

    c. prohibit municipal employers from entering into agreements with certified agents which require all represented employees to pay their share of the costs of collective bargaining and contract administration, while still mandating that the certified agents provide those services to all employees in the bargaining unit (Wis. Stats. §111.70(1)(f) and, in part, Wis. Stat. §111.70(2)); and

    d. require certified agents to undergo mandatory annual certification elections, for which the agents are forced to bear the full costs, and require at least 51% of all employees in the bargaining unit to vote in favor of the agent in order to achieve certification (Wis. Stat. §111.70(4)(d)3.b.).

The Circuit Court answered yes.

2. Do sections of 2011 Wisconsin Act 10 and 2011 Wisconsin Act 32, amending MERA and related statutes, violate the Plaintiffs' rights to equal protection of the laws guaranteed by Article I, §1 of the Wisconsin Constitution, by creating classifications based on represented employees' exercise of their fundamental right of freedom of association and penalizing such employees based on that exercise, by:

    a. imposing limitations on base wage increases for represented employees that are not imposed on non-represented employees (Wis. Stat. §111.70 (4)(mb));

    b. prohibiting municipal employers from collectively bargaining with represented employees on any subject except total base wages, while allowing municipal employers to negotiate any and all subjects with non-represented employees (Wis. Stat. §111.70(4)(mb)); and

    c. prohibiting municipal employers from deducting union dues from the wages of general municipal employees as authorized by the employees, while not prohibiting municipal employers from deducting membership dues for other organizations from general municipal employee wages with the employees' authorization (Wis. Stat. §111.70(3g)).

The Circuit Court answered yes.

3. Does Wisconsin Statute §62.623 prohibiting the City of Milwaukee from paying its employees' contribution to the Milwaukee Employee Retirement System violate the Home rule amendment, Article XI, sec. 3(1) of the Wisconsin Constitution?

The Circuit Court answered yes.

4. Does Wisconsin Statute §62.623 prohibiting the City of Milwaukee from paying its employees' contribution to the Milwaukee Employee Retirement System unconstitutionally impair the contractual rights of Milwaukee's employees?

The Circuit Court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case challenges the constitutionality of certain provisions of 2011 Wisconsin Acts 10 and 32 ("Act 10"),[1] which amended the Municipal Employment Relations Act ("MERA"), Wis. Stat. §111.70 *et seq.*, and related statutes. Act 10 radically altered, both in scope and effect, core provisions of the Wisconsin statutes enacted over 50 years ago to foster peaceful public sector labor relations. Given the complexity of this case and the public interest in it, oral argument is warranted.

Publication of this Court's decision is warranted in light of the importance of citizens' rights to associate and speak collectively without unconstitutional interference, and to receive equal treatment under the law regardless of their affiliations. Publication is also warranted in light of the important home rule and impairment of contract issues which affect the hundreds of thousands of people who work for and live in the City of Milwaukee.

[1] Certain provisions of Act 10 were reenacted without amendment in 2011 Wisconsin Act 32, the biennial budget act. Act 32 also amended Act 10 in ways not material to this case, such as by exempting municipal transit employees from the category of "general municipal employees" to which the Act 10 provisions generally apply. *See, e.g.*, Wis. Stat. §111.70(1)(fm).

STATEMENT OF THE CASE

In this action for declaratory judgment, Plaintiffs-Respondents ("Plaintiffs") contend that the following provisions of Act 10, through their cumulative impact and effect, violate their constitutional rights of association and equal protection:

- Wis. Stats. §§111.70(4)(mb), 66.0506 and 118.245, which prohibit collective bargaining between municipal employers and the certified agents of municipal general employee bargaining units on any subject other than base wages and limit negotiated wage increases to the annual increase in the Consumer Price Index absent a voter referendum approving greater wage increases;

- Wis. Stat. §111.70(1)(f) and the third sentence of Wis. Stat. §111.70(2), which prohibit employers and agents from negotiating agreements to require all represented employees to pay a proportionate share of the costs of collective bargaining and contract administration, while mandating that the agents provide services to all employees in the unit;

- Wis. Stat. §111.70(3g), which prohibits employers from deducting union dues from the wages of general employees as authorized by the employees; and

- Wis. Stat. §111.70(4)(d)3, which requires agents annually to undergo a recertification election at their cost and requires at least 51% of all employees of the bargaining unit to vote in favor of the agent for it to be certified.

Public Employees Local 61, AFL-CIO, and its member, John Weigman, also challenge Wis. Stat. §62.623, as amended by Act 10, which prohibits the City of Milwaukee from making the employee's share of pension fund contributions, contending that the provision

unconstitutionally interferes with Milwaukee's Home Rule Authority over its pension plan and unconstitutionally impairs their contract rights.

The procedural history provided by the Defendants-Appellants ("the State") at pages 4 to 8 of their Brief is adequate. As this is a facial constitutional challenge to certain statutory provisions, there are no disputed facts.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law that this Court reviews *de novo*, yet benefits from the Circuit Court's analysis. *State v. Quintana*, 2008 WI 33, ¶¶11-12, 308 Wis.2d 615, 748 N.W.2d 447.

A party who challenges the constitutionality of a statute must demonstrate that the statute is unconstitutional "beyond a reasonable doubt." *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶68, 284 Wis.2d 573, 701 N.W.2d 440. This standard is an expression of deference to the legislature. Yet "when a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." *Ferdon,* 2005 WI 125 at ¶69. Neither "respect for the legislature nor the presumption of constitutionality allows for the absolute judicial acquiescence to the legislature's statutory enactments." *Id.* "Since *Marbury*

v. Madison, it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is." *State ex rel. Wis. Senate v. Thompson*, 144 Wis.2d 429, 436, 424 N.W.2d 385 (1988).

As to the claims that Act 10 violates Plaintiffs' associational and equal protection rights guaranteed by the Wisconsin Constitution, once the Plaintiffs show a restraint on a fundamental right, the presumption of constitutionality falls away and the burden shifts to the State. Unlike most legal disputes, in cases involving governmental restriction of fundamental rights the defendant carries the burden of proof and persuasion. *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). The State's association and equal protection infringements are subject to strict scrutiny. The burden is on the State to present a compelling State interest for the infringement and show that the legislation was narrowly tailored to accomplish that interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *Police Department of the City of Chicago, et al. v. Mosley*, 408 U.S. 92, 96 (1972).

ARGUMENT

I. INTRODUCTION

A. Response to State's Introductory Statements

It is disturbing that in a case about the freedom of association the Attorney General begins his argument by disparaging Wisconsin citizens for participating in constitutionally protected expressive activities and showing annoyance at their request that the courts determine the constitutional validity of Act 10. He complains that "the challengers" have engaged in "endless policy debate" about Act 10; that their goal is to "prevent reform"; that they have "fought the changes to public sector collective bargaining through persuasion, protest, [and] public information campaigns" and that they have "challenged the measure in court, again and again."[2]

By framing this case as nothing more than a "policy debate," the Attorney General shows disdain for the judges who, in this and other challenges to Act 10, have identified significant constitutional infirmities. Here and in an unrelated federal lawsuit challenging Act 10, the Circuit

[2] The Plaintiffs brought only this case. Apparently, the State is aggrieved by the fact that other citizens and orgnizations sought relief in other venues.

Court and District Court ruled ***in favor of the challengers***.[3] The State "prolonged" the litigation by filing post-judgment motions and appeals "again and again."

Although the District Court's ruling was reversed on appeal, that decision was two-to-one. *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) *(*Hamilton, C.J., concurring in part and dissenting in part). Thus, of the five judges who have heard constitutional challenges to Act 10, three have found it constitutionally defective and two have found it constitutionally sound.

Those outcomes show that this case presents close constitutional questions that need careful consideration. As the Court of Appeals said in its Certification, this appeal "requires more than the application of settled law to a new set of facts. . . . [L]aw development and the clarification of supreme court decisions are necessary to resolve the parties' disputes with respect to constitutional associational rights and Wisconsin's Home Rule Amendment."

[3] *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir.), *reversing Wis. Educ. Ass'n Council v. Walker*, 824 F.Supp.2d 856 (W.D. Wis. 2013).

B. Introduction of the Merits

Act 10 unconstitutionally burdens the Plaintiffs' associational rights and violates their rights to equal protection under the law. The Circuit Court summarized the cumulative burdens that Act 10 imposes on the rights of employees who choose to associate for the purpose of collective bargaining:

> Although the statutes do not prohibit speech or associational activities, the statutes do impose burdens on employees' exercise of those rights when they do so for the purpose of recognition of their association as an exclusive bargaining agent....[T]he state has imposed significant and burdensome restrictions on employees who choose to associate in a labor organization. The statutes limit what local governments may offer employees who are represented by a union, solely because of that association. It has prohibited general municipal employees from paying union dues by payroll deductions, solely because the dues go to a labor organization ….Employees may associate for the purpose of being the exclusive agent in collective bargaining only if they give up the right to negotiate and receive wage increases greater than the cost of living. Conversely, employees who do not associate for collective bargaining are rewarded by being permitted to negotiate for and receive wage increases without limitation. The prohibition on fair share agreements means that employees in a bargaining unit who join the union that bargains collectively for them are required to bear the full costs of collective bargaining for the entire bargaining unit, including employees in the unit who do not belong to the union but receive the benefits of the bargaining. Unions are required to be recertified annually, even if there has been no request for recertification and the full costs of the election are borne by the employees in the bargaining unit who are members of the union. Statutes that burden the exercise of a constitutional right for a lawful purpose and reward the abandonment of that right infringe upon the right just as did the prohibition in *Lawson* against members of certain associations residing in public housing.

Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings ("Decision and Order"), pp. 15-16; APP00138-139.

The State mischaracterizes Act 10's cumulative burdens as "policy choices" regarding "how much decision-making authority to share" with public employee representatives. State's Brief, pp. 11-12. These laws are not policies which bolster management prerogatives. Act 10 does not expand municipal employers' authority to manage labor relations at all; rather, it restricts it. Moreover, Act 10 operates to legislate public employee unions out of existence by so burdening and penalizing employees who exercise their associational rights to collectively select a representative to engage in statutory collective bargaining that the employees and unions themselves will eventually surrender the exercise of their associational rights rather than suffer the burdens placed upon them.

Act 10 requires general municipal employees who want the option of negotiating anything beyond capped wages to surrender their association with a certified bargaining agent. It also causes unions and their members who, along with all bargaining unit members, choose the statutory privilege of collective bargaining by associating with a certified agent, to suffer financial and organizational penalties for making that choice, thus making their association difficult to maintain. Under the

doctrine of unconstitutional conditions, described and explained in Section II below, the Circuit Court correctly found that those provisions of Act 10 violate Plaintiffs' rights of association guaranteed by the Wisconsin Constitution. Decision and Order, p. 16; APP00139.

The Circuit Court also found that Act 10 creates two similarly situated but unequally treated classes of employees: general municipal employees represented by a certified agent, and general municipal employees who are non-represented. Decision and Order, pp. 17-18; APP00140-141. Because the differential treatment is based on fundamental associational choices, and given the State's failure to offer a defense of Act 10 that would survive strict scrutiny, the Circuit Court concluded that Act 10 violates Plaintiffs' constitutional rights to equal protection. Decision and Order, p. 8; APP00141. Plaintiffs demonstrate in Section III that this was the right conclusion.

Sections IV and V explain why Act 10 also violates Wis. Const. Art. XI, §3(1), Wisconsin's Home Rule Amendment, and constitutes an unconstitutional impairment of contract by requiring Milwaukee's employees to contribute the "employee share" of payments into the Milwaukee Employee Retirement System.

II. ACT 10 VIOLATES THE ASSOCIATIONAL RIGHTS OF PLAINTIFFS.

A. Plaintiffs Have a Constitutional Right to Associate With a Certified Agent; They Do Not Assert a Constitutional Right to Collective Bargaining.

The State argues that the challenged provisions do not infringe on Plaintiffs' constitutionally protected right to freedom of association because "collective bargaining in the public employee context is not a constitutional right." State's Brief, p. 11. It then reasons that because collective bargaining "is a policy choice made by the Legislature to share decision-making authority with employee representatives," id., the State may disregard public employees' associational interests when they participate in this statutory process. The State's logic is flawed.

First, Plaintiffs do not contend that municipal employees have a constitutional right to force their employers to negotiate collectively with them. Rather, they claim a constitutional right to self-organization and to associate with a union, including for collective bargaining purposes. "[T]he right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer….is a fundamental right." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *see also Railroad Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964). "Such collective action would

be a mockery if representation were made futile by interferences with freedom of choice." *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930). *See also Thomas v. Collins*, 323 U.S. 516 (1945).

While a governmental employer is free to refuse to negotiate with a public employee union (absent a statutory guarantee), the government violates employees' fundamental rights of association when it "tak[es] steps to prohibit or discourage union membership or ***association***." *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 466 (1979) (emphasis added). The State may statutorily restrict the obligation to collectively bargain in good faith, but it may not constitutionally withhold benefits or penalize public employees for exercising their ***associational*** rights to organize or select a representative. *See Smith*, 441 U.S. at 465. Thus, governmental acts such as retaliation, discrimination, suppression or censorship restricting municipal employees' ability to associate for their common interests and to petition and advocate their positions have been found to violate the fundamental right to associate. *See Brown v. Alexander*, 718 F.2d 1417, 1429 (6th Cir. 1983), *reh'g en banc denied, citing Smith*, 441 U.S. 463.

Article I, Sections 3 and 4 of the Wisconsin Constitution protect citizens' associational rights at least to the same extent as the First

Amendment to the U.S. Constitution does. *Lawson v. Housing Authority of City of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955); *see also State v. Bagley*, 164 Wis.2d 255, 474 N.W.2d 761 (Ct. App. 1991). Indeed, the Wisconsin Constitution may provide even stronger associational protections than the U.S. Constitution if "the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *State v. Jennings*, 2002 WI 44, ¶38, 252 Wis.2d 228, 647 N.W.2d 142, *quoting State v. Doe*, 78 Wis.2d 161, 171-72, 254 N.W.2d 210 (1977).

This Court, in construing the Wisconsin Constitution, has held that "[n]ecessarily included within such constitutionally guaranteed incidents of liberty is the right to exercise the same in union with others through membership in organizations seeking political or economic change." *Lawson*, 270 Wis. at 274, *citing American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209 (1921) (discussing freedom of association as exercised by membership in union).

Plaintiffs exercise constitutionally protected rights of association when they choose to collectively bargain, when they choose a union to represent them (or are chosen) as a bargaining agent, and when they choose to associate as members of that union. As shown in the following

sections, it is those constitutionally protected choices upon which Act 10 unconstitutionally infringes.

B. The Bargaining Limitations of Act 10 Unconstitutionally Burden Plaintiffs' Associational Rights.

The Wisconsin Supreme Court has explained that:

> The holding out of a privilege to citizens by an agency of government upon condition of non-membership in certain organizations is a more subtle way of encroaching upon constitutionally protected liberties than a direct criminal statute, but it may be equally violative of the constitution.

Lawson v. Housing Authority, 270 Wis. 269, 275, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955).

Act 10 penalizes municipal employees who choose to be represented by a certified agent by limiting what that agent may negotiate for them to a capped annual base wage increase, unless a higher wage increase is approved by referendum, while imposing no restrictions on the terms that non-represented employees may negotiate with their employers.[4] Wis. Stat. §§111.70(4)(mb), 66.0506 and 118.245. Because these provisions require employees who want the possibility of negotiating anything beyond wages that are severely capped or subject to increase only at the

[4] As shown in Section III, Act 10's bargaining limitations also violate equal protection principles.

caprice of the electorate to surrender their association with a certified agent, they unconstitutionally burden the employees' associational rights.

The State dismisses the authority of *Lawson* as merely a "1950's Red Scare era" case, implying that it should be ignored. State's Brief, p. 23. Yet *Lawson* is part of a larger body of law applying the doctrine of unconstitutional conditions, which was recognized well before the "Red Scare era" and continues to this day. Under this doctrine, "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011), *aff'd sub nom. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013); *see also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006).

In the language of the doctrine, the "benefit," as applied here, is the potential for an employee or group of employees to negotiate all issues with the employer, including all matters affecting wages, hours and working conditions. The "unconstitutional condition" is the requirement that to be able to access that benefit (albeit at the employer's discretion),

employees may not choose to have a sole and exclusive certified bargaining agent act on their behalf.

Indeed, in light of the State's contentions regarding state regulation of corporations and First Amendment activities, State's Brief, p. 15, it is ironic that early cases through which the doctrine of unconstitutional conditions developed involved unconstitutional limitations on corporate constitutional rights. In *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910), the Court recognized that a state could outright prohibit a corporation from operating within its borders, but could not grant the privilege to operate on a condition that amounted to a tax on out-of-state property without violating due process and imposing an unconstitutional restraint on interstate commerce. *See also Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 400-401 (1928) ("The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the federal Constitution.").

By the 1960's, the recognition that government cannot condition privileges on the forfeiture of constitutional rights incorporated such diverse areas as unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); welfare funds, *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260,

425 P.2d 223, 230 (1967); public housing, *Lawson, supra*; tax exemptions, *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958); public education, *Dixon v. Alabama Bd. of Educ.*, 294 F.2d 150, 156 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) and use of the United States Postal Service, *Lamont v. Postmaster General*, 381 U.S. 301, 309-10 (1965). The doctrine was largely implicated in the context of First Amendment expressive and associational rights. The doctrine continues to have primary application in the First Amendment arena today, in the context of restrictions tied to federal funds. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328-2330 (2013) and cases cited therein.

The State claims that the law underlying *Lawson* cannot apply in this case because *Lawson* is not a public employment case, and the government has more leeway to interfere with the constitutional rights of its employees than citizens at large. State's Brief, p. 24. Yet the doctrine of unconstitutional conditions has been applied in public employment cases. For instance, in *Wieman v. Updegraff*, 344 U.S. 183 (1952), an Oklahoma statute that required state employees take a loyalty oath of non-affiliation with certain organizations violated employees' constitutional rights to due process based on the following reasoning:

> To draw from [*United Public Workers v. Mitchell*, 330 U.S. 75 (1947)] the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United Public Workers,* though we held that the Federal Government through the Hatch Act…could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'....We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Id. at 191-92 (citations omitted).

Indeed, of all of the unconstitutional conditions doctrine cases, those involving loyalty oaths and requirements of non-membership in communist organizations may be the most analogous to this one. In those cases, courts generally held as unconstitutional laws requiring an oath of loyalty or non-membership in certain groups as a condition for receiving a privilege, such as delivery of mail, a job, or publicly-subsidized housing. *See Lamont v. Postmaster General*, 381 U.S. 301, 309-10 (1965), *Wieman v. Updegraff*, 344 U.S. 183, 191-92, (1952), *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955). Here, the law requires non-association with a collective bargaining agent as a condition for negotiating anything other than capped base wages: even if an employer and its employees wish to engage in broader negotiations, Act 10

forbids such negotiations unless the employees give up their constitutionally protected association with the collective bargaining agent.

In *Speiser v. Randall*, the Supreme Court found a requirement that taxpayers swear to a loyalty oath in order to obtain a tax deduction was an unconstitutional infringement on First Amendment rights. It reasoned:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech.…It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional.

Speiser v. Randall, 357 U.S. 513, 518-19 (1958).

The same is true here: to deny workers who have engaged in constitutionally protected association with a collective bargaining agent any opportunity to negotiate wages, hours, and working conditions beyond capped base wages penalizes them for that association. Its deterrent effect is the same as if the State were to fine them for that association.

Had the State repealed MERA entirely, municipal employees would have retained their constitutional associational rights to self-organize and select representatives of their own choosing to advocate for their collective

employment interests, unimpeded by the State. In the absence of statutory collective bargaining, it would be unlawful for the State to impose a penalty or additional costs on municipal employees based on their participation in a labor organization. As the *Lawson* court explained:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Lawson, 270 Wis. at 276.

The bargaining limitations of Act 10 effectively strip municipal employees of their rights to associate with a certified agent for the purpose of collective bargaining by requiring them to surrender those rights in exchange for the potential to negotiate more than capped wages. They should be struck down as unconstitutional.

C. The Financial and Operational Penalties in Act 10 Unconstitutionally Burden Unions and Employees Who Choose to be Union Members.

A municipal employee in a bargaining unit that has collectively chosen a union to serve as its certified bargaining agent may choose to become a member of the union, or may choose to decline such membership. Membership in a labor organization is a protected right of association. *See American Steel Foundries*, 257 U.S. at 209. Should the

bargaining limitations discussed in the previous subsection alone fail to dissuade employees from association with a certified agent, Act 10 imposes three significant financial and operational penalties on certified agent unions and those who choose to be members of those unions.

These three burdens fall uniquely on the unions and on those employees who additionally exercise the associational right to become members of the labor union elected by bargaining unit employees to represent them. First, Act 10 requires the agent to undergo, at its and its members' cost, an annual recertification election, and to receive the votes of a supermajority of bargaining unit employees, regardless of whether any represented employee has requested such an election. Wis. Stat. §111.70(4)(d)3.b. Second, it prohibits municipal employers from negotiating fair share arrangements with certified agents to cover the agent's costs of providing collective bargaining and other agreed-upon services to *all* bargaining unit employees. Wis. Stat. §111.70(1)(f) & (2).[5] Third, it prohibits municipal employers from withholding payroll

[5] At the same time, the law only permits employees to be represented by a labor organization certified as the *exclusive* representative of all employees in the bargaining unit. The state WERC defines the parameters of the bargaining unit. Wis. Stat. §111.70(4)(d)1 & 2.

deductions for union dues, even if authorized by union members. Wis. Stat. §111.70(3g).

Thus, Act 10 forces a union and its members to bear the full costs of collective bargaining for the benefit of all employees of the bargaining unit, while allowing non-union employees in the bargaining unit to enjoy the benefits of representation as "free riders." That burden on unions and their members is exacerbated by the organizational demands of the mandatory annual certification election required by Act 10. The law requires the agent to be recertified annually in an election in which the agent receives the votes of least 51% of all employees in the bargaining unit, regardless of how many employees choose to vote in the election.[6] Wis. Stat. §111.70(4)(d)3. Additionally, the agent and its members are forced to fund the administrative costs of the annual election – even if *no* employee in the bargaining unit seeks decertification of the union. The law further forbids the agent from obtaining a fair share of the cost of the elections from the municipal employer or non-union member employees in the bargaining unit, regardless of the outcome of the election. *Id.* Finally, further hampering the unions both organizationally and

[6] Thus, for example, if 75% of the unit employees vote in a recertification election, 68% of the votes must be in favor of recertification.

financially, Act 10 bans municipal employers from withholding union dues from employees' wages. Wis. Stat. §111.70(3g). This ban applies regardless of the employee's wishes, and forces the unions to expend resources to collect those dues through less reliable avenues.

These aspects of Act 10 impose unconstitutional conditions on unions and their members in a way different from and in addition to the bargaining limitations discussed in the previous subsection. Viewed in the unconstitutional conditions framework, these aspects provide that if employees collectively choose the statutory "privilege" of requiring the employer to bargain in good faith on base wages, the union and its members must accept organizational and financial penalties as a condition on their associational choices to serve as a certified agent and to belong to the union.

These burdens, exacted in exchange for the privilege of statutory collective bargaining, have the effect of dissuading unions from becoming certified agents, and dissuading employees from becoming members of the union that serves as their certified agent, and are therefore unconstitutional.

In *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958), the Supreme Court found that

Alabama's requirement that the NAACP provide its membership list to the state in connection with its application to operate within the state was an unconstitutional infringement on the organization's members' First Amendment freedom of association because it would have the effect of discouraging such membership. The fact that the state had not directly restricted member rights to associate was irrelevant: "abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id.* at 461.

The provisions of Act 10 that (1) mandate annual certification elections with a supermajority needed to recertify, (2) allow the State to assess fees for the costs of the elections exclusively on the union and its members, (3) make the union the exclusive bargaining agent for all employees within the bargaining unit including non-union employees, while forbidding the union from seeking a fair share of costs from non-members (including recertification election costs), and (4) ban authorized dues deductions from union member wages, systematically undermine the union's effectiveness, exact penalties on employees who are members of a union elected as the certified bargaining agent, and, ultimately, induce municipal employees to abandon their association as members of the labor union and induce unions to abandon their association with employees as

their certified agent. Taken together these provisions operate to burden the constitutionally protected choice of union membership and punish unions for seeking to associate with municipal employees as their certified agents. Under the doctrine of unconstitutional conditions, such burdens call for strict scrutiny.

D. Act 10 Fails Under Strict Scrutiny.

"In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley v. Valeo*, 424 U.S. 1, 25, 64 (1976). *See also Katzman v. State Ethics Bd.*, 228 Wis.2d 282, 596 N.W.2d 861 (Ct. App. 1999). A law that curtails association can only survive strict scrutiny if it is shown to serve a compelling governmental interest and is narrowly tailored to serve that interest. *Buckley*, 424 U.S. at 44-45; *Gard v. Wisconsin State Elections Bd.*, 156 Wis.2d 28, 456 N.W.2d 809 (1990).

The Sixth Circuit subjected to strict scrutiny a Tennessee law that proscribed a labor organization that was affiliated with any national labor organization from accessing payroll deductions. It explained:

> To be affiliated with a group or organization is to be associated with, attached to, or identified with that organization. We believe this subsection directly limits freedom of association between labor organizations, and their members or members of other such

> organizations, and thus it could restrain or restrict freedom of association, a fundamental first amendment right. The advocacy of particular policies and practices of parent or affiliated organizations may well be directly affected by this limitation, and thus it requires strict scrutiny; equal protection concerns in this respect are related to the first amendment rights asserted by plaintiffs.
>
> * * *
>
> [T]he requirement that an organization be "independent" and non-affiliated with another labor organization strikes at the heart of freedom of association. Therefore we construe subsection (6) to require stricter scrutiny, that the state demonstrate a compelling interest to justify the limitation.

Brown v. Alexander, 718 F.2d 1417, 1425-26 (6th Cir. 1983), *reh'g en banc denied.*

Act 10 curtails the same associational and equal protection rights.[7] Just as in *Brown* "independent" unions were treated more favorably than those affiliated with national unions, subjecting the law to strict scrutiny, here, employees without a collective bargaining agent are treated more favorably than those with one, in that they have the option to negotiate a broad range of matters with their employer. Likewise, employees in a bargaining unit with a certified agent but who are not members of the union are not financially and organizationally penalized like the unions and their members. Thus, strict scrutiny applies to Plaintiffs' claims that

[7]The legal principles and framework for strict scrutiny discussed in this section apply to both the freedom of association claims discussed herein and the equal protection claims discussed below.

their associational and equal protection rights are violated by the MERA amendments.

Act 10 does not outright ban public sector employees from forming associations to speak and act collectively. Yet "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Associational freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id*. Once so stifled, that governmental act can only be allowed if it "serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

The State has no compelling reason to curtail municipal employees' rights to choose a labor organization to represent their collective interests. It has no compelling reason to penalize those employees' constitutional choice to become members of such a labor organization. And it has no compelling reason to punish unions for associating with municipal employees as their certified agents. The Legislature could easily have amended MERA in a manner that limited collective bargaining between municipal employers and employees, while preserving constitutional rights. It did not do so.

The State has not offered any compelling State interest justifying the burdens it has placed on the associational rights of municipal employees and unions. Nor does any such compelling interest exist. As such, the State fails in its burden. This Court should hold that the Act 10 provisions discussed herein violate the right to freedom of association protected by the Wisconsin and U.S. Constitutions.

III. ACT 10 VIOLATES THE PLAINTIFFS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION.

A. The Wisconsin Constitution Guarantees Plaintiffs Equal Protection Under the Law.

Article I, §1 of the Wisconsin Constitution states:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

This provision is Wisconsin's Equal Protection clause, and has been "interpreted to afford substantially the same protections as its federal counterpart." *GTE Sprint Comm. Corp. v. Wisconsin Bell, Inc.*, 155 Wis.2d 184, 192, 454 N.W.2d 797 (1990); *see Jackson v. Benson*, 218 Wis.2d 835, 901, n. 28, 578 N.W.2d 602 (1998). An equal protection claim arises when statutes provide for different treatment of people who are similarly situated. *See Wisconsin Prof. Police Assn. v. Lightbourn*, 2001 WI 59, ¶ 221, 243 Wis.2d 512, 627 N.W.2d 807.

It is beyond contention that the "equal protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *Ferdon v. Wis. Patients Compensation Fund*, 2005 WI 125, ¶61, 284 Wis.2d 573, 701 N.W.2d 440; *see also Romer v. Evans*, 517 U.S. 620, 631 (1996).

As elaborated below, Act 10 violates Plaintiffs' rights to equal protection because (1) the challenged provisions treat similarly-situated employees differently, thus implicating their constitutional rights to equal protection, and (2) the disparate treatment is based on the exercise of associational choices which the Plaintiffs have a fundamental right to make. Act 10, by imposing a classification that impermissibly interferes with a fundamental right, cannot withstand strict scrutiny.

The State does not contest that the right to associate is a fundamental right. Rather, it rests its defense to Plaintiffs' equal protection claims on its arguments that Plaintiffs' constitutional rights to free association are not infringed by Act 10, and defends Act 10 only under a rational basis standard. The State dedicates a significant portion of its Brief to arguing that the statutes in question survive rational basis scrutiny. This discussion is irrelevant because the statutes must be analyzed under strict

scrutiny. The State cannot meet its burden to demonstrate a compelling interest to justify the infringement on Plaintiffs' rights to equal protection.

B. Represented And Non-Represented Employees Are Treated Differently But Are Similarly Situated. Likewise, Members of Labor Unions And Members of Other Voluntary Organizations Of Employees Are Treated Differently But Are Similarly Situated.

A municipal employee who is represented by a certified agent is similarly situated to a municipal employee who is not represented. A represented teacher or sanitation worker differs from a non-represented teacher or sanitation worker only in that the represented employees have exercised their constitutional rights to associate by choosing to self-organize for the purpose of exercising the statutory right of collective bargaining.

While Act 10 restricts represented employees to negotiate only base wages, and caps the wage increase available absent approval in a referendum, no statute limits the subjects on which non-represented employees may negotiate. Likewise, no statute caps the base wage increase that an employer may give a non-represented employee, or requires the approval of the municipal voters of any pay increase in excess of the cost of living for non-represented employees.

Act 10 also treats employees differently based on their association with a certified agent, commonly a labor union. Members of a labor union are treated differently from members of any other voluntary organizations to which municipal employees may wish to belong. Wis. Stat. §111.70 (3g) provides that "A municipal employer may not deduct labor organization dues from the earnings of a general municipal employee or supervisor."

Thus, while this provision bars employers from deducting labor organization dues from the wages of employees who are members of labor organizations, it does not similarly ban deductions of membership dues of other associations and organizations with which employees voluntarily associate, for example, the National Rifle Association, the League of Women Voters, or the Toastmasters.

Recently, the Arizona United States District Court considered a challenge to an Arizona statute which, among other things, prohibited some unionized state employees but not others from authorizing payroll deductions to pay union dues, and also allowed all state employees to authorize payroll deductions to pay for other things, including insurance premiums, investments, and charitable donations. *See United Food and Commercial Workers Local 99, et al. v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz.

2011). That court determined that "the burdens imposed by the law do not fall equally on similarly-situated groups." *Id.* at 1124.

This Court should likewise find that the provisions of Act 10 challenged here impose burdens that do not fall equally on similarly situated groups. The provisions restricting the subjects of bargaining and restricting the base wage increases available to employees who choose to associate with unions do not apply to those employees who choose not to associate for the purpose of collective bargaining. Likewise, with regard to payroll deductions, employees who are dues-paying members of unions are subject to a burden not shared by employees who pay dues to other voluntary membership organizations.

C. Plaintiffs' Fundamental Rights Are Infringed and the Classifications Fail Under Strict Scrutiny.

When faced with an equal protection challenge, a court first determines the level of scrutiny to employ. *State v. Lynch*, 2006 WI App 231, ¶12, 297 Wis.2d 51, 724 N.W.2d 656. "Strict scrutiny" applies when a classification interferes with the exercise of a fundamental right for one class, but not for the other. *Id; State v. Post*, 197 Wis.2d 279, 319, 541 N.W.2d 115 (1995). "[U]nder the Equal Protection Clause…government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more

controversial views." *Police Department of the City of Chicago et al. v. Mosley*, 408 U.S. 92, 96 (1972). Laws that "merely" burden or abridge a fundamental right, such as the right to associate freely, are equally subject to strict scrutiny as those that outright ban the exercise of such right. *See, e.g., Citizens United v. F.E.C.*, 558 U.S. 50, 130 S.Ct. 876, 898 (2010); *Healy*, 408 U.S. at 183.

Act 10 treats similarly situated employees differently based on employees' choices to be represented or not represented by a certified agent, and whether or not to join a union, i.e., based on their exercise of fundamental rights of association. Once it is shown that a statute or classification infringes on fundamental rights, the burden shifts to the State to prove that the classification, i.e., the differential treatment of those who are similarly situated, is precisely tailored to promote a compelling governmental interest. *Mosley*, 408 U.S. at 96.

The State has no compelling reason to curtail municipal employees' rights to choose a certified agent to represent their collective interests, and to become members of a labor organization. The Legislature could easily have amended MERA in a manner that limited collective bargaining between municipal employers and employees, while protecting the equal protection rights of employees. It did not do so. The State cannot and has

not carried its burden of proving that the classifications challenged by the Plaintiffs are narrowly tailored to promote a compelling governmental interest.

IV. WISCONSIN STATUTE §62.623 VIOLATES WISCONSIN'S HOME RULE AMENDMENT.

Wisconsin Statute §62.623 violates the Wisconsin Constitution's Home Rule Amendment, Article XI, §3(1), by regulating the City of Milwaukee's ERS, a matter that is not a statewide concern.

A. Section 62.623 Attempts to Regulate a Matter That Is Not of Statewide Concern.

The Wisconsin Constitution's Home Rule Amendment prevents the State legislature from meddling in local municipal affairs. It prevents State legislators who represent distant districts and are unfamiliar with local concerns from deciding what is best for a municipality regarding matters of local concern. Home rule favors policymaking concerning local matters by local, informed officials, rather than distant, unaffected State legislators.

The plain language of Wisconsin's Home Rule Amendment supports this policy:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.

WIS. CONST. Art. XI, §3(1) (emphasis added).

A municipality can invoke home rule protection by adopting a charter ordinance that speaks to a local issue. Wis. Stat. §66.01. In order for a State law to preempt a charter ordinance, it must satisfy a two-prong test: the law must (1) touch on a matter of statewide concern, and (2) apply with uniformity to every city or village. *Thompson v. Kenosha County*, 64 Wis. 2d 673, 683, 221 N.W.2d 845 (Wis. 1974). If a state law regulates a purely local affair, the legislation is unconstitutional. *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520, 526-527, 253 N.W.2d 505 (1977).

Wisconsin Statute §62.623 unconstitutionally regulates Milwaukee's Employee Retirement System ("Milwaukee ERS") by abrogating pension benefits guaranteed to Milwaukee employees in Milwaukee's charter ordinance. Municipal expenditures for employment compensation and benefits is undoubtedly a local concern. *Van Gilder v. Madison*, 222 Wis. 58, 81-82, 267 N.W. 25 (Wis. 1936) (quoting C.J. Cardozo, "There are some affairs intimately connected with the exercise by the city of its corporate functions, which are city affairs only . . . Most important of all perhaps is the control of the locality over payments from the local purse.").

1. Milwaukee's ERS does not impact the State's purported financial crisis.

The State argues preempting Milwaukee's municipal charter ordinance is justified because of a purported Statewide financial crisis.

The record lacks any evidence to support the State's assertion that Milwaukee's ERS has any affect on the State's financial condition. The State's budget is separate and distinct from Milwaukee's budget.

Shared revenue is determined by a factor of local revenue, population and property values. Wis. Stat. §79.02. A municipality cannot increase expenditures to gain a greater 'share.' In fact, Wisconsin's expenditure restraint program *diminishes* a municipality's shared revenue in the event the municipality's budget exceeds inflation. Wis. Stat. §79.05. Other state aid is appropriated to address specific projects as determined by the State, such as roadways or a University budget.

Ironically, the State argues that its finances are in dire circumstances, yet at the same time, argues the State legislature, the body responsible for the State's budgetary woes, should impose its wisdom upon municipalities to ensure they spend money wisely. The City of Milwaukee's fiscal affairs are intelligently managed and Milwaukee has long had strong bond and credit ratings without State intervention.

2. The 1947 legislature declared Milwaukee's ERS is a not a matter of statewide concern.

The State Legislature in 1947 unequivocally declared Milwaukee's ERS is not a matter of statewide concern:

> For the purpose of giving to cities of the first class the largest measure of self-government with respect to pension annuity and retirement systems compatible with the constitution and general law, it is hereby declared to be the legislative policy that all future amendments and alterations to this act are matters of local affair and government and shall not be construed as an enactment of state-wide concern.

Laws of 1947 ch. 441 §31(1).

The State argues §31(1)'s clause "compatible with the constitution and general law" was intended to preserve the legislature's right to enact subsequent state-wide legislation that could supersede Milwaukee's ERS. Construing the term "general law" to mean any future uniform legislation automatically supersedes Milwaukee's authority to direct the affairs of its ERS contradicts the 1947 Legislature's declaration that "all future amendments and alterations" to Milwaukee's ERS are matters of local affair. Such construction renders §31(1) devoid of purpose.

The logical reading of the phrase "compatible with the constitution and general law" is that it imposes an obligation upon Milwaukee to self-govern its ERS without violating rights guaranteed to its employees under the State constitution and the general law. *See Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶50, 748 N.W.2d 154 ("A municipality may not disregard the state's antitrust laws simply because it possesses broad home rule authority."). For example, Milwaukee cannot

provide disparate benefits to an employee on the basis of race or sex in violation of Wisconsin's equal rights laws.

The 1947 Legislature *preserved* the rights of Milwaukee's ERS participants by precluding Milwaukee from regulating its ERS in a manner that violates the participants' constitutional or other rights protected by "general law."

3. The Legislature has never declared Milwaukee's ERS is a matter of statewide concern.

The State asserts the legislature declared Milwaukee's ERS to be a matter of statewide concern twice, first in 1937 when the legislature created the ERS, and now with §62.623. However, the Legislature's creation of Milwaukee's ERS was a clear acknowledgment that Milwaukee needed its own ERS that could be locally controlled and funded, and operate independently of the State. This was an implicit declaration that Milwaukee's ERS is a local concern. A mere 10 years later, the 1947 legislature unequivocally declared Milwaukee's ERS to be not a statewide concern.

Neither the 1937 Legislature nor Act 10 declared Milwaukee's ERS is a statewide concern. The 1947 Legislature's declaration that Milwaukee's ERS is a local affair stands as the only declaration and is therefore entitled

to great weight. *State ex rel. v. Brelsford*, 41 Wis.2d 77, 85, 163 N.W.2d 153 (1968).

4. Modifying Milwaukee's ERS is not a matter of statewide concern.

The State relies on *Van Gilder* and *Welter v. City of Milwaukee*, 214 Wis. 2d 485, 571 N.W.2d 459 (1997) to assert public employee benefits are a matter of statewide concern. *Van Gilder* and *Welter* deal exclusively with law enforcement benefits. The holdings in both *Van Gilder* and *Welter* rested on the concept that regulation of law enforcement benefits concerns public health and safety, a matter of statewide concern. *Van Gilder*, 267 N.W. at 32; *Welter*, 214 Wis.2d at 492-493.

Importantly, both *Van Gilder* and *Welter* struck down municipal ordinances attempting to *diminish* benefits. Both opinions determined that *diminishing* law enforcement benefits has a detrimental effect on public safety. *See Welter*, 214 Wis.2d at 492-493.

In *State ex rel. v. Brelsford*, the Court addressed whether a municipal ordinance providing *greater* benefits to public safety employees than those mandated by State law was protected under Home Rule. *Brelsford* recognized a difference in the State's concern over municipal ordinances that make it more difficult to attract quality personnel and ordinances that make it less difficult to attract quality personnel. *Brelsford* determined that

ordinances designed to attract quality personnel cannot be overruled by the State. It held Milwaukee's refusal to enforce a statewide pension-plan restriction affects only local taxpayers and was a purely local concern. *Brelsford*, 41 Wis.2d at 86-87.

Section 62.623 wrests control over Milwaukee's discretionary use of funds for the financing of Milwaukee's ERS in a manner that *diminishes* and *divests* employee benefits. As noted above, a municipality's discretionary use of funds is not a statewide concern. *Van Gilder*, 267 N.W. at 34. The Court recognized in both *Brelsford* and *Welter* that diminishing public employee benefits detrimentally impacts the quality of public services by making it more difficult for a municipality to attract quality personnel, contrary to the State's interest. *See also* Laws of 1947 Ch. 441 §31(1) ("The purpose of this act is to strengthen the public service in cities of the first class by establishing the security of such retirement and death benefits.").

Wis. Stat. §62.623 unconstitutionally removes a "tool" Milwaukee has used for over 60 years to attract and retain a qualified workforce.

B. A State Law Purporting to Preempt a Purely Local Affair is Unconstitutional Regardless of Uniformity.

Wisconsin's Home Rule Amendment cannot be superseded merely by the passage of a uniform state law.[8] The Amendment declares municipal affairs are subject only to state legislation that is both (1) of statewide concern, and (2) operates with uniformity. *Thompson*, 64 Wis. 2d at 683. The framers' use of the words "of statewide concern" in the Home Rule Amendment is instructive. Had the framers intended to allow municipal Home Rule be subverted by a statute merely because it is uniform, the words "of statewide concern" would have been superfluous.

The State relies on *Van Gilder*, *West Allis v. County of Milwaukee*, 39 Wis.2d 356, 159 N.W.2d 36 (1968), and *Thompson*, to assert a state law may preempt any municipal ordinance so long as the law "affects with uniformity every city." The State isolates passages from these opinions to fashion an argument unsupported by authority and well-reasoned policy.

Van Gilder determined a statute must be uniform for it to supersede a municipal ordinance. But *Van Gilder* did not hold that a statute automatically supersedes a municipal charter simply because it is uniform.

[8] Wis. Stat. § 62.623 is not a "uniform" law, it is specific to cities of the first class.

That is, while a law must be uniform to be valid, not all uniform laws supersede a municipal charter.

The uniformity requirement is a municipal safeguard to ensure equal protection for municipalities. Uniformity requires that the consequences of legislation apply to all.

The *Van Gilder* Court employed a balancing test to determine whether the municipal affair at issue was a matter of statewide concern. It determined the statute at issue, law enforcement compensation, was a matter of statewide concern. *Van Gilder*, 267 N.W. at 35. The purpose of the *Van Gilder* opinion was to explain whether the ordinance was of statewide concern, and if not, thereby protected by home rule. Had uniformity been the only requirement, the Court would not have fashioned such an opinion.

Van Gilder recognized home rule could not weigh too heavily in favor of the municipality because the State would be powerless to legislate issues that touch on statewide concern. *Id*. But it also recognized municipalities must be afforded autonomy when the issue is purely local. *Van Gilder* 267 N.W. at 34-35; s*ee also*, *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 209 N.W. 860 (1926).

Thirty-two years after *Van Gilder*, in *West Allis*, the Court reviewed legislation permitting Counties to asses a tax on municipalities in order to fund County-wide refuse disposal systems. The Court held the issue was not of purely local concern because garbage disposal was both a city and county concern. *West Allis*, 39 Wis.2d at 366. Importantly, the Court noted West Allis had not adopted a charter ordinance on the issue, and that it must do so to invoke the full protection of home rule. *Id*. at 367-368. Here, Milwaukee adopted a charter ordinance directly on the issue.

In *Thompson*, the Court reviewed legislation establishing a county assessor system that overrides the assessment powers of municipalities within such counties. *Thompson* reiterated *West Allis*, holding uniform state regulation may preempt issues of local concern. But both *West Allis* and *Thompson* involved issues of local concern that were also interrelated with other local governments. Neither case held that the State can preempt a purely local affair. Specifically, *Thompson* noted the distinction between primarily local affairs ("mixed" category) and those that are "entirely local;" making clear that "statewide concern" is a distinct analysis that cannot be overcome with mere uniformity. *Thompson*, 64 Wis. 2d at 683-686.

Notably, neither *Thompson* nor *West Allis* dealt with the State's attempt to preempt a municipal charter ordinance, as here. And neither law at issue in *Thompson* or *West Allis* involved an earlier legislative declaration that the subject was an entirely local affair.

The Wisconsin Supreme Court clarified Wisconsin's Home Rule test only three years after *Thompson* in *Michalek v. LeGrand*:

> In defining what is or is not a matter for such empowerment, which is constitutionally granted to cities and villages in this state "to determine their local affairs and government," our court has outlined three areas of legislative enactment: (1) Those that are "exclusively of state-wide concern;" (2) those that "may be fairly classified as entirely of local character;" and (3) those which "it is not possible to fit . . . exclusively into one or the other of these two categories."

Michalek, 77 Wis.2d at 526 (citations omitted).

Michalek held that state legislation purporting to preempt a municipal charter ordinance of purely local concern is unconstitutional: "As to an area solely or paramountly in the constitutionally protected area of 'local affairs and government,' the state legislature's delegation of authority to legislate is unnecessary and its preemption or ban on local legislative action would be unconstitutional." *Michalek*, 77 Wis.2d at 529.

Significantly, *Michalek* was decided in 1977, subsequent to *Van Gilder* (1968), *West Allis* (1968) and *Thompson* (1974), and was a unanimous decision. Five *Michalek* justices participated in *West Allis*; Six *Michalek*

justices participated in *Thompson*. *See* Wisconsin Supreme Court Justices dates of service, *available at* http://www.wicourts.gov/courts/supreme/justices/retired/index.htm.

The State also relies on *Roberson v. Milwaukee County*, 2011 WI App 50, 798 N.W.2d 256, to argue enactment of a uniform law is dispositive that the matter is of statewide concern. *Roberson* involved a state law requiring Counties to pay all personnel of equivalent rank and tenure the same wage. First, *Roberson* concerned public safety, a well-recognized statewide concern. Second, *Roberson* reviewed statutory county home rule, rather than constitutional municipal home rule.

Although *Roberson* noted the analysis under county and municipal home rule are similar,they are not identical. Rather, *Roberson* relied on *Jackson County v. DNR*, 2006 WI 96, 717 N.W.2d 713, to declare the State legislature can overcome county home rule by passing a uniform law. *Jackson County* distinguished county home rule as being much weaker than municipal home rule:

> Wisconsin courts consistently have interpreted counties' powers as arising solely from the statutes. . . A county's home rule power is more limited than the home rule power that is afforded to cities . . . [due to] to the direct and expansive delegation of power to municipalities under [constitutional home rule].

Jackson County, 2006 WI 96, ¶16-17.

The municipal home rule analysis is distinct from that of county home rule; especially when a city's charter ordinance governs the issue. *West Allis*, 39 Wis.2d at 367-368. Because the legislature adopted county home rule by statute, the legislature has implied authority to overrule itself by passing a uniform law. *Jackson County*, 2006 WI 96, ¶19. In contrast, municipal home rule is a constitutional "expression of the will of the people," and the legislature cannot supersede it without first amending Wisconsin's Constitution. *Michalek*, 77 Wis.2d at 526. Moreover, County ordinances differ from municipal charters generally because, while County ordinances affect multiple municipal jurisdictions, municipal charters affect only residents within a single municipality. Milwaukee's ERS is a clear example of a purely local charter ordinance.

Wis. Stat. §62.623 attempts to supersede a municipal charter ordinance of local concern, violating the Home Rule Amendment to Wisconsin's Constitution.

V. WISCONSIN STATUTE §62.623 UNCONSTITUTIONALLY IMPAIRS VESTED CONTRACTUAL PROPERTY RIGHTS OF MILWAUKEE EMPLOYEES.

Wisconsin Statute §62.623 impairs vested contractual rights of Milwaukee employees by eliminating employer funded contributions for

employees hired before January 1, 2010; a violation of Wisconsin's Constitution, Article I, §12.

A. Milwaukee Employees Have A Contractual Right To Employer-Funded Contributions.

Milwaukee's Charter Ordinance Chapter 36 contractually guarantees Milwaukee employees hired prior to January 2010 that the City will pay the employees' ERS contributions:

> [T]he city shall contribute on behalf of general city employes 5.5% of such member's earnable compensation. §36-08-7a-1.
>
> Every such member . . . shall thereby have a benefit contract in . . . the annuities and all other benefits in the amounts and upon the terms and conditions and in all other respects as provided under this act . . . and each member and beneficiary having such a benefit contract shall have a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation or by any other means without his consent. §36-13-2a.
>
> Every person who shall become a member of this retirement system . . . shall have a similar benefit contract and vested right in the annuities and all other benefits in the amounts and on the terms and conditions and in all other respects as . . . in effect at the date of the commencement of his membership. §36-13-2c.

The State absurdly argues municipal employers cannot contractually vest rights in public employees. The state fails to distinguish between a mere contract and one that creates vested property rights. *State ex rel. Mckenna v. District No. 8*, 243 Wis. 324, 328, 10 N.W.2d 155 (1943) ("the repeal of a statute will not operate to impair rights vested under it"); *cf.*

Board of Regents v. Roth, 408 U.S. 564 (1972). Both the United States and Wisconsin Constitutions prohibit the state from enacting laws which impair obligations to public employees. *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 553-554, 331 N.W.2d 369 (1983). Moreover, Milwaukee's ERS must be liberally construed in favor of Milwaukee's employees. *Rehrauer v. City of Milwaukee*, 2001 WI App 151, ¶15, 631 N.W.2d 644.

The State argues Milwaukee's Charter ordinance does not provide participants a contractual right to employer-funded contributions. Chapter 36 unequivocally guarantees as a term and condition of the plan that "[T]he city shall contribute on behalf of general city employes 5.5% of such member's earnable compensation." §36-08-7a-1.

Section §36-13-2, entitled "Contracts To Assure Benefits," guarantees that every member shall have a benefit contract and vested right concerning "[t]he annuities and all other benefits <u>in the amounts</u> and <u>upon the terms and conditions and in all other respects</u> as provided under this act [which] <u>shall not be diminished or impaired by subsequent legislation or by any other means</u>." §36-13-2a. The words, "upon the terms and conditions and in all other respects as provided under this act," incorporate every section of Milwaukee's ERS, including the City's

obligation under §36-08-7a-1 to contribute 5.5% of each employee's earnable compensation to the fund.

The State argues contributions are not a "benefit" pursuant to §36-05 and not a "term and condition" pursuant to §36-13-2d. Milwaukee's ERS is a defined benefit plan, the benefits are calculated based on years of service multiplied by a fixed percentage of base salary. *See* Mil. Charter Ord. §36. Section 62.623 mandates that Milwaukee employees pay 5.5% of their earnable compensation to receive the same defined benefit, thereby diminishing the value of the benefit without providing a commensurate benefit. The State's argument that contributions are not a "term and condition" of the plan excludes *the cost of the plan* to the employee as a "term and condition," an absurd result.

The purpose of §36-13-2d is unmistakable when examining the section's date of enactment. This section was adopted at the same time (1971) as §36-08-7a-1 (requiring that the employer make the employee contributions). The City adopted §36-13-2d to ensure participants that the City would not reduce retirement benefits in the future on grounds that the employee did not contribute to the fund, or on grounds that the City failed to make contributions on behalf of the employee despite its obligation set forth in §36-08-7a-1.

Section 36-13-2d unequivocally affirms that employer paid contributions are characteristic of deferred compensation, a property right, and that the City cannot collaterally attack the defined benefit by asserting that the employee's failure to contribute to the fund renders the defined benefit a mere gratuity.

Importantly, the State's construction of Milwaukee's ERS ordinance is unduly strict. Milwaukee's ERS must be liberally construed in favor of Milwaukee's employees. *Rehrauer*, 2001 WI App 151, ¶15.

B. Act 10 Unconstitutionally Impairs City of Milwaukee Employees' Contractual Rights.

The key issue in determining whether contractual rights have been unconstitutionally impaired is whether the law affected the value of the agreement. *Moran*, 111 Wis.2d at 555 ("a contract is impaired when the consideration agreed upon is altered by legislation.").

Courts use a three-step inquiry to determine whether a statute impairs a contractual right. *Energy Reserves Group v. Kansas P. & L. Co.*, 459 U.S. 400 (1983). First, the law must change after the formation of the contract and the change must substantially impair the contract. Second, a Court must decide whether the law serves a significant and legitimate public purpose. Finally, even if the law serves a significant and legitimate

public purpose, for the law to be valid, the public purpose must outweigh the severity of the impairment.

Wisconsin prohibits legislative amendments to a retirement plan unless the amendment is necessary to preserve the actuarial soundness of the plan. *Ass'n of State Prosecutors v. Milwaukee County*, 199 Wis.2d 549, 563, 544 N.W.2d 888 (1996). Section 62.623 was not intended to, nor is it necessary, to preserve the financial stability of the Milwaukee ERS, and the State does not contend otherwise.

1. Section 62.623 substantially impairs the plaintiffs' contractual rights.

Section 62.623 requires general employees to begin contributing 5.5% of their earnable compensation to the Milwaukee ERS fund. This causes an immediate corresponding 5.5% reduction in wage, substantially impairing the contract. *See Abbott v. Los Angeles*, 50 Cal.2d 438, 451, 326 P.2d 484, 491 (Cal. 1958) (finding substantial impairment when legislation required employees to contribute 4% of their salary to the pension fund because City was required to do so by Charter); *Strunk v. Public Employees Retirement Board*, 338 Or. 145, 205, 108 P.3d 1058, 1094 (Or. 2005) (striking down a pension provision purporting to relieve employer of its obligation to credit pension accounts); *Int'l Ass'n of Firefighters v. San Diego* 193 Cal. Rptr. 871, 876, 34 Cal.3d 292, 302 (Cal. 1983) (noting if City had guaranteed

employee contribution levels would remain constant, requiring employees to increase their contribution amount constitutes impairment of contract).

The State relies on *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892 (7th Cir. 1998) to assert an increase in cost is insufficient to impair contractual rights. The issue in *Kolosso* concerned state regulation of automobile franchise agreements. The court determined that interpreting the Contract Clause literally would impede governmental efforts to regulate commercial activity. *Id*. at 893-895. Significantly, *Kolosso* held foreseeability is an important consideration when determining whether a law violates the contract clause. *Id*. at 895. Here, Milwaukee ERS participants could not have reasonably contemplated legislative changes to the terms and conditions of Milwaukee's ERS after their commencement date.

The State asserts Milwaukee Charter §20.13 contemplates future changes to Milwaukee's ERS. First, §20.13 applies only to the provisions of Chapter 184, Laws of 1874. Second, §20.13 was enacted decades prior to the inception of constitutional home rule and the charter ordinance establishing Milwaukee's ERS.

Milwaukee's ERS has been regulated exclusively by the City of Milwaukee since 1947. The charter ordinance guarantees that all terms

and conditions take effect as of the employee's commencement date and they cannot be impaired by subsequent legislation. §36-13-2. The Milwaukee Circuit Court ratified the charter's inalterability in 2000. *In Re Global Pension Settlement Litigation*, Case No. 00-CV-3439. The City received significant consideration in the Global Pension Settlement and adopted §36-13-2g for the purpose of codifying the terms of the Settlement. In 2009, before the State's implementation of §62.623, Milwaukee acknowledged the vested contractual property rights and the inalterability of its ERS benefits for current employees when it amended contribution terms for only employees hired after the date of the amendment. §36-08-7-a2.

The State relies on *Wisconsin Professional Police Ass'n v. Lightbourn*, 2001 WI 59, 627 N.W.2d 807, to assert Wisconsin has historically regulated public employee benefits. However, *Lightbourn* acknowledged that Milwaukee's ERS is not regulated by the State. *Lightbourn*, 2001 WI 59, ¶9.

2. Wisconsin Statute §62.623 does not serve a legitimate public purpose and its impairment is not reasonable or necessary.

The State relies on *Energy Reserves* to assert it is using its police power to avoid payments that would otherwise benefit a special interest. Public employees are a varied and diverse group, including politicians,

engineers, nurses and sanitation workers. They are not a "special interest." They are a "public interest."

The legislature declared in 1947 that deferred compensation in the form of retirement annuities *attracts* and *retains* public service employees despite higher prevailing wage rates in the private sector. Laws of 1947 ch. 441 §31(1). Wisconsin Statute §62.623 reduces retirement benefits and is thereby contrary to a purpose the Wisconsin legislature declared both significant and legitimate.

Importantly, the legislature can amend a retirement plan to serve the public interest only when the amendment is necessary to preserve the actuarial soundness of the plan. *Ass'n of State Prosecutors*, 199 Wis.2d at 563. Milwaukee's ERS is sound, and §62.623 does not alter the funding formula to address actuarial infirmities, it merely changes the contributor.

3. Only Milwaukee can amend its ERS by amending its charter ordinance.

Although Milwaukee's ERS cannot be altered by legislation for incumbent employees, Milwaukee can adopt charter amendments modifying its ERS for employees hired after the amendment date. Milwaukee has adhered to this process and courts have respected it for more than six decades. *See*, *e.g.*, Mil. Charter Ord. §36-08-7-a2 and §36-13-2h.

Only Milwaukee has the power to amend its ERS. Section 62.623 divests benefits guaranteed by Milwaukee's ERS, unconstitutionally impairing Milwaukee's contract with its employees.

VI. CONCLUSION.

The Court should find the challenged provisions of 2011 Wisconsin Acts 10 and 32 to be unconstitutional, and enjoin enforcement of those provisions.

Respectfully submitted this 15th day of August, 2013.

CULLEN WESTON PINES & BACH LLP

/s/ Lester A. Pines .
Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Susan Crawford, SBN 1030716
122 West Washington Avenue, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

Attorneys for Madison Teachers Inc. and Peggy Coyne

PADWAY & PADWAY, LTD.

/s/ Aaron A. DeKosky .
M. Nicol Padway, SBN 1016666
Aaron A. DeKosky, SBN 1081404
633 West Wisconsin Avenue, Suite 1900
Milwaukee, WI 53203

Attorneys for Public Employees Local 61, AFL-CIO and John Weigman

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,985 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 15th day of August, 2013.

/s/ Lester A. Pines .
Lester A. Pines, SBN 1016543

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IN SUPREME COURT

No. 2012AP2067

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 62, AFL-CIO, AND JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMAN, AND RODNEY G. PASCH,

Defendants-Appellants.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JUAN B. COLAS, PRESIDING, CIRCUIT COURT CASE NO. 2011-CV-3774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

REPLY BRIEF OF DEFENDANTS-APPELLANTS

J.B. VAN HOLLEN
Attorney General

Kevin M. St. John, SBN 1054815
Deputy Attorney General
Steven P. Means, SBN 1011355
Executive Assistant Attorney General
Steven C. Kilpatrick, SBN 1025452
Assistant Attorney General

Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (Kilpatrick)
(608) 267-8906 (Fax)
kilpatricksc@doj.state.wi.us

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ARGUMENT

I. THE ACT 10 CHANGES TO MERA DO NOT INFRINGE ON ASSOCIATIONAL RIGHTS.

A. There Is No Constitutional Right To Associate For The Purposes Of Collective Bargaining Through A Certified Agent Or Otherwise.

The challengers acknowledge that municipal employees have no constitutional right to force collective bargaining, but claim a constitutional right "to self-organization and to associate with a union for collective bargaining purposes" and "to [a]ssociate [w]ith a [c]ertified [a]gent." (Brief of Plaintiffs-Respondents ("Pl. Br.") 13.) No matter how the challengers spin their argument, they cannot avoid the settled law that there is no constitutional right to state-sanctioned collective bargaining. The right to associate is protected only if it is for the purpose of "engaging in those activities protected by the First Amendment–speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Because statutory collective bargaining does not

involve the exercise of a constitutional right of speech or association, the challengers' entire case is without legal foundation.

In Wisconsin, "collective bargaining" means the *statutorily-created* "mutual obligation" of a governmental employer, and a bargaining unit representative to negotiate a labor agreement. *See* Wis. Stat. § 111.70(1)(a). Outside of statutory collective bargaining, employees have a separate constitutional right to associate and to petition a municipal employer regarding employment. However, the municipality has no constitutional duty to listen, respond, or bargain. *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465 (1979). Therefore, there is no *constitutional* right to require a municipal employer to engage in "collective bargaining" because there is no "mutual obligation." *Dep't of Admin. v. Wis. Emp. Rel. Comm'n,* 90 Wis.2d 426, 430, 280 N.W.2d 150 (1979).

Further, the certified representative (or "agent") is a creature *of statute* with a single role: collective bargaining under MERA. The state constitution does not create this

relationship between bargaining unit employees and representative, nor is the relationship voluntary. Once the representative is elected, representation is imposed on *all* employees in the unit, even those who did not vote for the representative. Additionally, if a labor union is chosen as the representative, bargaining unit employees may, but need not, join that union. In fact, a labor union may be elected as a bargaining unit representative even if none of the employees is a member of that union.

The challengers also claim that Act 10 interferes with their "freedom of choice" and "discourage[s] union membership or association." (Pl. Br. 14.) But Act 10 does not affect employees' right to associate with a labor union for constitutional expression, even if the union is also the certified agent. This voluntarily relationship—which exists independent of statutory collective bargaining—is the constitutionally-protected right of association discussed in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), and other cases cited by the challengers, not the privilege of being represented

by an agent for collective bargaining purposes in a statutorily-created labor code.

The dispositive issue in this case is whether the challenged MERA provisions infringe on the challengers' *constitutionally-protected* associational rights. Because association with, or membership in, a labor organization is not affected by Act 10, the challengers' entire case fails, and the Court need not engage in any further inquiry.

B. MERA's Bargaining Limitations Do Not Burden The Challengers' Associational Rights.

Armed with the faulty assumption that constitutional associational rights are at stake, the challengers argue that MERA "penalizes municipal employees who choose to be represented by a certified agent by limiting what that agent may negotiate for them to a capped annual base wage increase," absent a referendum. (Pl. Br. 16.) They claim that MERA forces them to forego collective bargaining -the condition- to gain the potential benefit of negotiating "all issues with the employer, including … wages, hours and working

conditions" –the benefit. They call this the "doctrine of unconstitutional conditions." (Pl. Br. 17-18.)

However, the theory is flawed because there is no unconstitutional condition. As explained directly above, general employees surrender no constitutional rights of association under MERA.

Furthermore, unlike the plaintiff in *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), MERA does not discriminate against employees based on membership in a voluntary organization, here, a labor union. Nor, unlike the state employees in *Wieman v. Updegraff*, 344 U.S. 183 (1952), or the taxpayers in *Speiser v. Randall*, 357 U.S. 513 (1958), does MERA require any loyalty oath or oath of non-association, to gain the statutory right to collectively bargain or receive any other benefit. Neither does MERA force employees to adopt any opinion. *Cf. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, ___ U.S. ___, 133 S. Ct. 2321, 2332 (2013). If, as the challengers claim, the decisions concerning loyalty oaths and requirements of non-membership in communist organizations are the most

analogous to the present case (Pl. Br. 20), their constitutional challenge surely must be denied, because they are inapposite.

The challengers' unconstitutional conditions theory — never applied to collective bargaining — further fails because any lost opportunity to negotiate with a municipal employer over "all matters," like non-represented employees, is at best only a possibility, since non-represented employees have no right *at all* to "negotiate" with their municipal employers on *any* subject. *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 287 (1984). In fact, under MERA, it is the represented employee who gains a benefit — the right to force bargaining on wages, unlike non-represented employees, and they lose no speech or associational rights in the process.

Finally, even if there is an associational right implicated (which there is not), it is not burdened, because represented employees *can* bargain for base wages above the consumer price index increase. If successful, they may obtain the increase by referendum, while still

retaining a statutory relationship with the certified agent. Moreover, they can engage in all manners of association, speech, and advocacy to encourage voters to support the increase, without any limits under MERA.

In sum, the challengers' argument fails, because the State of Wisconsin may make statutory collective bargaining less meaningful, and thus, less attractive, by setting the subjects and their limits without burdening associational rights. This is a permissible policy choice. *See generally Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013). Therefore, Act 10's amendments limiting the scope of bargaining under MERA are constitutional.

C. Annual Recertification Elections And Prohibition Of "Fair-Share" Agreements And Payroll Dues Deductions Do Not Violate Associational Rights.

The challengers next argue that if MERA's limits on subjects of bargaining are not unconstitutional, the Act 10 amendments violate the state constitution when joined cumulatively with the requirement for annual

recertification and the prohibitions on "fair-share" agreements and payroll dues deductions. (Pl. Br. 5, 22-23, 27.) They complain that these MERA provisions "have the effect of dissuading unions from becoming certified agents, and dissuading employees from becoming members of the union that serves as their certified agent." (Pl. Br. 25.)

Notably, the challengers do not respond to the legal authorities, such as the Seventh Circuit's recent decision upholding Act 10, showing that the annual recertification and dues deduction provisions do not violate any associational rights. *See, e.g., Wis. Educ. Ass'n Council*, 705 F.3d 640. To be sure, there is no constitutional requirement that the State subsidize associational rights of labor unions through payroll dues deductions, *id.* at 645-46 (citing *Ysursa v. Pocatello Educ. Ass'n,* 555 U.S. 353, 359-60 (2009)), and "it is permissible for Wisconsin to rationally conclude that the [general employee] union is not worth maintaining through an automatic recertification process—or, at least, Wisconsin does not want to incur the cost of unions which have uncommitted members." *Id*. at

657. And, because there is no "constitutional entitlement to the fees of nonmember employees," states may eliminate fair-share payments entirely. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007).

Instead, they cite *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460-63 (1958), which is about compelled disclosure of group membership from which violence and retaliation could follow, not collective bargaining. It does not support the challengers' contention that MERA is unconstitutional merely because union membership might seem less attractive for public employees who already enjoy civil service and other protection.

This "cumulative effect" argument is also flawed because the parameters are wholly undefined. Under the challengers' logic, any combination of limitations would be an impermissible constraint on associational rights. Indeed, even pre-Act 10 MERA would have violated Wis. Const. art. I, §§ 3, 4. Taking this reasoning to its logical end, *any* public sector collective bargaining system with limited subjects of bargaining would infringe on

constitutional rights. Not surprisingly, the challengers cite *not one* published decision supporting this novel position. On the other hand, the Seventh Circuit has already upheld MERA entirely. *Wis. Educ. Ass'n Council*, 705 F.3d at 642.

D. Under The Rational Basis Standard, The Challenged MERA Provisions Are Constitutional.

Because no constitutional associational rights are implicated, the challenged MERA provisions need only survive rational basis review. *Wis. Educ. Ass'n Council*, 705 F.3d at 653. The challengers conceded below that MERA survives under rational basis (R. 44:25 n.8), and because they make no argument here (Pl. Br. 31-32), they have waived any argument to the contrary. *Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, the Court may reject their associational claim.

II. THE CHALLENGERS' EQUAL PROTECTION CLAIM FAILS.

The equal protection claim is also reviewed under rational basis, rather than strict scrutiny because, as shown above, there is no fundamental right at stake in this litigation. *State v. Annala*, 168 Wis.2d 453, 468, 484 N.W.2d 138 (1992). Therefore, the challengers' equal protection claim also fails as they have conceded that the MERA changes meet this standard, and for good reason.

The claim of disparate treatment is that the ban on dues deductions applies only to labor organizations and not other voluntary organizations. Wis. Stat. § 111.70(3g). Certified agents have a substantially reduced role under post-Act 10 MERA. They no longer meet and confer with management to negotiate working conditions or employment policies and have no role in the disciplinary process. On the other hand, dues deductions cost employers time, money and effort. In light of the agents' reduced role, the Legislature could rationally conclude that the burdens of dues deductions outweigh

any limited public benefit that dues checkoffs might have previously provided. *Wis. Educ. Ass'n Council*, 705 F.3d at 646-48, 657.

Because the challengers cannot prove that MERA violates their associational rights under the Wisconsin Constitution "beyond a reasonable doubt," this Court must reject their associational and equal protection claims, and uphold the Act 10 amendments.

III. WISCONSIN STAT. § 62.623 DOES NOT VIOLATE THE HOME RULE AMENDMENT.

A. Section 62.623 Is Part Of A Uniform Legislative Action.

The state officials contend that uniformity is the only requirement necessary to survive a home rule challenge. Footnote 8 of the challengers' brief suggests that § 62.623 is not part of a uniform legislative action. This is incorrect. Section 62.623 applies to all 1st class cities, which makes it uniform for home rule purposes. *See Van Gilder v. City of Madison*, 222 Wis. 58, 70, 267 N.W. 25 (1936) ("what the [home rule] amendment means is that any law … shall affect with uniformity

every city of class"). *Van Gilder* also makes clear that an "act" must be uniform, not individual statutes created or amended by the "act." *Id*. at 80-81.

B. Act 10 Addresses A Matter Of Statewide Concern.

Should the Court conclude that "statewide concern" is an additional requirement under the home rule amendment, there is no question that it is met.

Wisconsin Stat. § 62.63, the permissive state law that authorizes the Milwaukee ERS, provides significant tax benefits for ERS members, exempts ERS accounts from garnishment and execution, and directs how abandoned funds are used. It is illogical to argue that ERS contributions are strictly a local concern when the ERS is a state-authorized fund providing significant benefits that can only be conferred by the State.

The challengers' reliance on the 1947 legislative statement ignores an important point made in the state officials' initial brief, which is that the 1947 Legislature simply lacked the power to define what is or is not a matter of statewide concern for the 2011 Legislature.

Flynn v. Dep't of Admin., 216 Wis.2d 521, 543, 576 N.W.2d 245 (1998).

The challengers cite *State ex rel. Brelsford v. Retirement Bd. of Policemen's Annuity and Benefit Fund of Milwaukee*, 41 Wis.2d 77, 85, 163 N.W.2d 153 (1968), to argue that the 1947 statement is entitled to "great weight." However, in *Brelsford*, this Court said that only "*relevant* declarations of the legislature" should be given great weight. *Id*. (emphasis added). It then concluded that previous legislative statements that a matter was of statewide concern were superseded by later statements that the matter was of local concern. *Id*. at 85-86.

Even if the 1947 statement is relevant, the challengers misread it. It says that the ERS is to be "compatible with … general law." Laws of 1947, ch. 441, § 31(1). Citing *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 50, 308 Wis.2d 684, 748 N.W.2d 154, they argue that "general law" refers only to statutory rights guaranteed to employees. That is wrong.

Statutory language is to be given its plain meaning. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. BLACK'S LAW DICTIONARY, 900 (8th ed. 2004), defines a "general law" as one which "is neither local nor confined in application to particular persons." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 945 (1986), defines it similarly as a law that applies "to all persons in the same class in the same situation."

Wisconsin law also defines a "general law" by distinguishing it from a "special" or "private" law. This Court, in *Libertarian Party of Wis. v. State,* 199 Wis.2d 790, 803, 546 N.W.2d 424 (1996), held that a law which is not special or private is a general law. *See also, City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 144 Wis.2d 896, 907-08, 426 N.W.2d 591 (1988) .

The 1947 statement, read according to the proper meaning of "general law," does not purport to exempt the ERS from laws of statewide application but, in fact, recognizes that such laws will take precedence.

Challengers discount the argument that Act 10 was, itself, a declaration that municipal employee pensions are a statewide concern. However, this Court must assume that the Legislature intended to act constitutionally. *See American Family Mut. Ins. Co. v. Wis.n Dep't of Revenue*, 222 Wis.2d 650, 667, 586 N.W.2d 872 (1998). If the Legislature is presumed to have intended Act 10 to be consistent with the home rule amendment, enactment itself is, in fact, a powerful statement that the legislation addresses a statewide concern.

The 1937 creation of the ERS is also a strong statement of statewide concern. Laws of 1937, ch. 134 § 2, is a nonstatutory provision which expressly states that any existing charter which is "in conflict with or inconsistent with [the new law] is hereby repealed." Certainly, this is not the act of a legislature that viewed the ERS as purely local.

The argument that § 62.623 only addresses local concerns dodges the fact that significant state funds support Milwaukee through shared revenue and other payments. As this Court held in *Thompson v. Kenosha*

Cnty, 64 Wis.2d 673, 684, 221 N.W.2d 845 (1974), "the whole subject of taxation" including "the purposes to which [tax revenues are] devoted" are matters in which the state has "an overriding interest."

Finally, the challengers' argument that the issue of statewide concern turns on whether legislation diminishes or enhances employee benefits is both illogical and unsupported by any cases.

IV. WISCONSIN STAT. § 62.623 DOES NOT UNCONSTITUTIONALLY IMPAIR ANY CONTRACTUAL RIGHTS.

The illogical notion that Milwaukee—a creature of the State that receives significant money from the State—can permanently assume an obligation to pay the "employee share" of pension contributions, regardless of state law and policy, must be rejected. The state officials' opening brief showed that a municipality lacks the legal power to create contracts that are not subject to amendment by general laws of the legislature. Because the challengers do not address or respond to this

argument, they have conceded the issue. *Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d at 109.

Section 20-13 of the Milwaukee Charter Ordinance also recognizes that a general state law trumps contrary provisions of the ordinance. The challengers claim that § 20-13 only applies to language contained in the original 1874 enactment, rather than the entire ordinance, as amended. Though not developed, the argument appears to rely on bracketed text in the published version of section 20-13—"[Ch. 184, L. 1874]"—which appears after the term "this act." However, this is a non-legislative, editorial insertion that was not part of the original enactment. Laws of 1874, ch. 184, subch. 20, § 14.

The claim that § 20-13's reference to "this act" does not include the entire ordinance, as amended, also fails because when a statute (or ordinance) is amended, it must be read from the beginning as a single enactment. *State ex rel. Dep't of Agriculture v. Marriott*, 237 Wis. 607, 296 N.W. 622, 625 (1941); *Superior Water, Light & Power Co. v. City of Superior*, 174 Wis. 257, 181 N.W. 113, 116 (1921).

CONCLUSION

This Court should reverse the Circuit Court's Orders and declare the challenged laws constitutional.

Dated this 28th day of August, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

By:_____
Kevin M. St. John, SBN 1054815
Deputy Attorney General
Steven P. Means, SBN 1011355
Executive Assistant Attorney General
Steven C. Kilpatrick, SBN 1025452
Assistant Attorney General

Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (Kilpatrick)
(608) 267-8906 (Fax)
kilpatricksc@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,936 words.

Dated this 28th day of August, 2013.

_____
Steven C. Kilpatrick
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of August, 2013.

_____
Steven C. Kilpatrick
Assistant Attorney General

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STATE OF WISCONSIN
IN SUPREME COURT

No. 2012-AP-2067

MADISON TEACHERS, INC.
PEGGY COYNE, PUBLIC
EMPLOYEES LOCAL 61,
AFL-CIO, AND JOHN WEIGMAN,
Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R.
SCOTT, JUDITH NEUMANN
AND RODNEY G. PASCH,
Defendants-Appellants.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JUAN B. COLAS, PRESIDING, CIRCUIT COURT CASE NO. 2011-CV-3774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

RESPONDENTS' SURREPLY BRIEF TO APPELLANTS' ARGUMENT REGARDING WIS. STAT. §62.63

CULLEN WESTON PINES & BACH LLP
Attorneys for Plaintiffs-Respondents Madison Teachers Inc. and Peggy Coyne
Lester A. Pines, SBN 1016543
Lee Cullen, SBN 1014859
Tamara B. Packard, SBN 1023111
Susan M. Crawford, SBN 1030716
122 W. Washington Avenue, Suite 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

PADWAY & PADWAY, LTD
Attorneys for Plaintiffs-Respondents Public Employees Local 61, AFL-CIO and John Weigman
M. Nicol Padway, SBN 1016666
Aaron A. DeKosky, SBN 1081404
633 West Wisconsin Avenue
Suite 1900
Milwaukee, Wisconsin 53203
Telephone: (414) 277-9800
Facsimile: (414) 277-0189

Dated: October 18, 2013.

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INTRODUCTION

The appellant's reply brief, filed with the Court on August 28, 2013, asserts that the Milwaukee Employes' Retirement System ("Milwaukee ERS") falls within the purview of Wis. Stat. §62.63 and therefore constitutes a matter of statewide concern.

This argument is erroneous given that Wis. Stat. §62.63 does not control Milwaukee's ERS.

ARGUMENT

A. The appellants' reliance on Wis. Stat. §62.63 is fundamentally flawed because Milwaukee's ERS was not established under Wis. Stat. §62.63.

The appellants' reliance on Wis. Stat. §62.63 (hereinafter "§62.63" or "Section 62.63") is fundamentally flawed because Milwaukee's ERS was not established under the authority of Wis. Stat. §62.63. The City of Milwaukee's ERS was established under Chapter 396 of the Laws of 1937 (hereinafter "Chapter 396"), and then adopted by the City of Milwaukee into its municipal charter ordinance.

Section 62.63 was enacted on May 14, 1937 as Wis. Stat. §62.69 under Chapter 134, Laws of 1937. It has been renumbered numerous times: From 1937 to 1957 it was known as Wis. Stat. §62.29; from 1957 to 2000 it was known as Wis. Stat. §66.80; and from 2000 to present it has been known as Wis. Stat. §62.63.

Section 62.63 is a permissive enabling statute that allows the common council of a 1st class city, at its discretion, to establish and maintain annuity and

benefit funds for city officers and employees and to establish a retirement board to administer such funds. Section 62.63 has no application here because the Common Council of the City of Milwaukee never exercised its discretionary authority to create an annuity and benefit fund or to create a retirement board under the authority of §62.63.

In contrast to §62.63, Chapter 396 is/was not an enabling provision. Chapter 396 was enacted on July 15, 1937, subsequent to the enactment of §62.63, and established Milwaukee's ERS. Chapter 396 is entirely unrelated to §62.63 and the provisions are distinct for several reasons.

The first distinction lies in the fact that §62.63 has remained as a published state law since 1937 (though renumbered several times), whereas Chapter 396 established Milwaukee's ERS by private session law. Chapter 396 has never been a part of the published Wisconsin State Statutes. Second, Chapter 396 and §62.63 differ in their manner of operation. Section 62.63 is an enabling statute that merely allows a 1st class city's pension board to establish an annuity fund. Chapter 396 actually created an entire retirement system specifically designed for the City of Milwaukee and mandated that it be implemented. Third, §62.63 and Chapter 396 differ substantively with regard to both the scope of the plan and the beneficiaries. Section 62.63 provides statutory authority to establish a "pension and annuity fund," whereas Chapter 396 creates a "retirement system." Section 62.63 grants statutory authority for the board to create a fund for only "officers and employees." Chapter 396 expands coverage to ensure that

"widows and children" of employees are included as beneficiaries in the "retirement system." Fourth, the provisions differ in the composition of the entity administering the plan. Section 62.63 mandates that the pension and annuity board consist of city employees and mayoral appointments. Chapter 396 provides that the board consist of the city comptroller, city employees and common council appointments. Milwaukee's ERS now requires that at least one retiree member serve on the board. In contrast to §62.63, Milwaukee's ERS ensures that retirees have a say in changes that affect the "retirement system."

Importantly, §62.63 was established prior to Chapter 396. Had statutory authority in §62.63 been sufficient to establish a complete retirement system the legislature would have had no reason to adopt Chapter 396 and create Milwaukee's "retirement system." The legislature enacted Chapter 396 to create a fully inclusive retirement system to assure that both public servants and their families would be financially secure in the future.

B. Milwaukee's ERS was established by Chapter 396 and has remained under the control of the City of Milwaukee since 1937.

Milwaukee's ERS was established by Chapter 396, Laws of 1937. It has been maintained and administered continuously since 1937 under the authority of Chapter 396 and two succeeding enactments.

The first succeeding enactment was the City of Milwaukee's adoption of Chapter 396 into Milwaukee's charter ordinance. Mil. Charter Ord. §36-02-2 (A-App. p. 184). Milwaukee's charter ordinance defines the "act" pursuant to which

Milwaukee's ERS was created as: "the employees' retirement act as created by the provisions of **ch. 396, laws of 1937**, and as amended thereafter, including amendments enacted by the common council **under its home rule powers.**" Mil. Charter §36-02-2 (emphasis added) (A-App. p. 184). Importantly, Milwaukee's charter ordinance makes clear that Milwaukee adopted the provisions of Chapter 396 and amended its ERS under its Home Rule powers. Milwaukee's ERS was not created under the authority of §62.63.

The second succeeding enactment of Milwaukee's ERS occurred in 1947, when the State Legislature declared that Milwaukee's ERS should be controlled exclusively by the City of Milwaukee. Ch. 441, L. 1947. The legislature also sought to protect Milwaukee's ERS under home rule by declaring unequivocally that Milwaukee's ERS is not a matter of Statewide concern. Ch. 441, L. 1947.

Milwaukee's ERS has remained under the City of Milwaukee's exclusive control since it was created in 1937.

The City of Milwaukee has adopted numerous amendments to its ERS since that time, including the provision at issue here: employer funded contributions. Milwaukee's ERS provision requiring employer funded contributions was negotiated in the early 1970s as a quid pro quo for a reduction in base wage increases. The results of the negotiation were adopted by the City of Milwaukee on December 7, 1971 as §36-08-07-a-1 of its municipal charter ordinance. Milwaukee's ERS employer funded contribution requirement was

enacted long after the State ceded control of Milwaukee's ERS to the City of Milwaukee.

Importantly, the adoption of Milwaukee's ERS and its ensuing municipal charter amendments were extensions of Chapter 396. The amendments were not made under the mechanism provided under §62.63.

A review of Wisconsin's Constitutional Home Rule Amendment will help to explain why the establishment of Milwaukee's ERS by private law, and the City of Milwaukee's subsequent adoption of Milwaukee's ERS as a municipal charter ordinance, prevents the State from interfering with Milwaukee's ERS.

Wisconsin's Home Rule Amendment was adopted in 1924 to create a two-part test to determine whether state legislation can supersede a municipal charter ordinance: the law must be (1) of statewide concern and (2) affect all cities and villages uniformly. *See* WIS. CONST. ART. XI, §3(1). The 1924 Home Rule Amendment was adopted specifically to add the statewide concern requirement to the analysis.

At the time the Home Rule Amendment was adopted in 1924, Wisconsin's Constitution already required that laws operate uniformly to supersede a municipal charter ordinance. In 1871, Wisconsin had adopted Wis. Const. Article IV, sections 31 and 32. These sections prohibited State legislation from superseding a municipal charter unless the law operated uniformly. Article IV, §31 prohibited the legislature from "enacting any special or private laws" to amend a municipal charter. *See* Art. IV, §31(9). Article IV, §32 provided the State

legislature with authority to amend a municipal charter if the law was "uniform in operation throughout the state." These sections make no mention of statewide concern.

The Home Rule Amendment was adopted in 1924, more than fifty years after Article IV §§31-32, and created a new, two-part test that required both (1) statewide concern and (2) uniformity. The 1924 Home Rule Amendment was adopted for the specific purpose of adding statewide concern to the analysis. Had the framers of the Home Rule Amendment intended that legislation be merely uniform to supersede a municipal charter, there would have been no reason to adopt the 1924 amendment.

Wisconsin's Home Rule Amendment protects Milwaukee's ERS because Milwaukee's ERS was established by a "private law" in Chapter 396, Laws of 1937 and then adopted by the City of Milwaukee into its municipal charter ordinance. The legislature then transferred full control of Milwaukee's ERS to the City of Milwaukee in 1947 under Chapter 441, Laws of 1947 and declared that Milwaukee's ERS was not a matter of statewide concern. Milwaukee's ERS was not enacted under the pretense of a "general law" such as §62.63.

The Legislature created Milwaukee's ERS as a private law in Chapter 396 to ensure that full power and control could be transferred to the City of Milwaukee. Milwaukee then adopted its ERS as a municipal charter ordinance to forever protect Milwaukee's ERS under Wisconsin's Constitutional Home Rule Amendment.

C. The appellants waived their argument regarding §62.63 because they failed to raise the argument at any point earlier in these proceedings.

The appellants raised Wis. Stat. §62.63 for the first time in their reply brief. An issue not raised in circuit court and raised for the first time on appeal is deemed waived.

"One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal." *Cappon v. O'Day*, 165 Wis. 486, 490, 162 N.W. 655 (1917). "The practice of this court is not to consider an issue raised for the first time on appeal." *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). The Supreme Court set forth the reasoning behind the rule in *State v. Huebner*:

> It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court.
>
> We have described this rule as the "waiver rule," in the sense that issues that are not preserved are deemed waived. The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. The rule promotes both efficiency and fairness, and "go[es] to the heart of the common law tradition and the adversary system."

Huebner, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, ¶¶10-11 (citations omitted). The *Huebner Court* explained how the rule accomplishes many objectives crucial to the efficient functioning of a fair judicial system:

> Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

Id. at ¶12 (citations omitted).

The appellants raised Wis. Stat. §62.63 for the first time in their reply brief and any argument relating to Wis. Stat. §62.63 has been waived. *Cappon*, 165 Wis. at 490.

CONCLUSION

Stated simply, Wis. Stat. §62.63 has never had any relationship to Milwaukee's ERS and is of no consequence to this proceeding.

For the foregoing reasons, the plaintiff-respondents respectfully request that the Court (1) disregard the appellants' argument relying on Wis. Stat. §62.63 as set forth at page 14 of the appellants' reply brief filed with the Court on August 28, 2013; or in the alternative (2) accept the arguments set forth in sections one and two of this brief as the respondents' surreply brief demonstrating that Wis. Stat. §62.63 has no applicability to the matter before this Court.

Dated at Milwaukee, Wisconsin this 18 day of October, 2013.

PADWAY & PADWAY, LTD.
Attorneys for Plaintiffs

By: M. Nicol Padway
M. Nicol Padway
SBN: 1016666
Aaron A. DeKosky
SBN: 1081404

P.O. ADDRESS
Padway & Padway, Ltd.
633 W. Wisconsin Avenue
Suite 1900
Milwaukee, WI 53203
www.padwaylaw.net

Phone: 414-277-9800
Fax: 414-277-0189
adekosky@padwaylaw.net
mnpadway@padwaylaw.net

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1,966 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §8019.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 18th day of October, 2013.

M. Nicol Padway

M. Nicol Padway
SBN: 1016666

CERTIFICATE OF MAILING

Rachel Boylan herein certifies that she is employed by Padway & Padway, Ltd., located at 633 West Wisconsin Avenue, Suite 1900, Milwaukee, Wisconsin 53203; that on the 18th day of October, 2013, she filed 22 copies of the *Respondents' Surreply Brief to Appellants' Argument Regarding Wis. Stat. §62.63,* in the above-entitled case, addressed to: Ms. Diane M. Fremgen, Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

Steven C. Kilpatrick
Joseph L. Olson
Michael P. Schrenock
Steven P. Means
Kevin M. St. John
Office of the Attorney General
PO Box 7857
Madison, WI 53707-7857

Grant F. Langley
Rudolph M. Konrad
Stuart S. Mukamal
Donald Schriefer
City of Milwaukee
841 North Broadway, Suite 716
Milwaukee, WI 53202

Lester A. Pines
Tamara Packard
Susan M. Crawford
Cullen, Weston, Pines & Bach, LLP
122 West Washington Avenue
Suite 900
Madison, WI 53703

Richard M. Esenberg
Wisconsin Institute for Law & Liberty, Inc.
1139 E. Knapp Street
Milwaukee, WI 53202

Michael P. May
John W. Strange, Jr.
Office of the Madison City Attorney
210 Martin Luther King Jr. Blvd
County Building, #401
Madison, WI 53703-3345

Timothy E. Hawks
Barbara Zack Quindel
Jeffrey Sweetland
Hawks Quindel, S.C.
P.O. Box 442
Milwaukee, WI 53201-0442

Bruce F. Ehlke
Kathleen Meter Lounsbury
Ehlke, Bero-Lehmann & Lounsbury SC
6502 Grand Teton Plz., Ste. 202
Madison, WI 53719-1047

Bruce N. Cameron
Regent University School of Law
Robertson Hall #353
1000 Regent University Drive
Virginia Beach, VA 23464

Daniel J. Borowski
Andrew T. Phillips
Phillips, Borowski, SC
10140 N. Pt. Washington Rd.
Mequon, WI 53092

Milton L. Chappell
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, #600
Springfield, VA 22160

RECEIVED
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OF WISCONSIN

STATE OF WISCONSIN
IN THE SUPREME COURT

Appeal No. 2012AP2067
Circuit Court Case No. 2011CV003774

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

On Appeal from the Decision and Final Order dated September 14, 2012 in Dane County Circuit Court Case 11-CV-3774, The Honorable Juan B. Colas, Presiding, and on Certification from the Court of Appeals (District IV).

BRIEF OF *AMICUS CURIAE* CITY OF MADISON

CITY OF MADISON
Michael P. May, City Attorney
State Bar No. 1011610
mmay@cityofmadison.com
John W. Strange, Assistant City Attorney
State Bar No. 1068817
jstrange@cityofmadison.com
Room 401, City-County Building
210 Martin Luther King, Jr. Blvd.
Madison, Wisconsin 53703
Phone: 608-266-4511
Fax: 608-267-8715

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INTRODUCTION

The City of Madison ("City"), as an employer of over 3,400 employees, three-fourths of whom were members of a union prior to the passage of 2011 Wisconsin Act 10, as modified by Act 32 (referred to collectively as "Act 10"), asks this Court to affirm the ruling of the Circuit Court in its entirety.

ARGUMENT

I. THE COURT SHOULD APPLY STRICT SCRUTINY WHEN REVIEWING PLAINTIFFS' CONSTITUTIONAL CLAIMS.

The challenged provisions of Act 10[1] have been clearly articulated by the parties. The ultimate and arguably intended effect of these provisions is that employees who choose to join a union stand to get paid less, owe more, and get little to nothing in return as compared to their non-union counterparts.

Plaintiffs' allege that this classification violates the First Amendment and Equal Protection Clauses of the Wisconsin Constitution. The State disagrees and urges this

[1] *See* Wis. Stats. §§ 111.70(4)(mb)1.-2 (limiting wage negotiations for unionized employees); Wis. Stats. §§ 111.70(4)(d)3.b. (requiring union employees to annually re-certify their bargaining agent); Wis. Stat. § 111.70(3g) (prohibiting automatic dues deductions); Wis. Stat. §§ 111.70(1)(f) and 111.70(2) (eliminating fair share agreements).

Court to review Plaintiffs' constitutional challenges using the deferential rational basis standard. *See* States' Br. at 38.

The City believes Judge Colas properly applied strict scrutiny because the challenged classification illegally penalizes a public employee's constitutional right to freely associate and thereby treats two distinct classes of similarly situated employees unequally.

A. Act 10 Implicates a Public Employee's Freedom to Associate.

The State does not dispute that the First Amendment protects the right of individuals to associate with like-minded persons to advance common goals. *See Runyon v. McCrary*, 427 U.S. 160 (1976). Nor does it dispute that this protection specifically extends to the right to unionize. *See Thomas v. Collins*, 323 U.S. 516 (1945). Instead, the State argues that while public employees in Wisconsin are free to associate, speak, and advocate on behalf of themselves, the government is under no constitutional obligation to listen to them or their union representatives. *See States' Br.* at 13-14. In the States' words, collective bargaining is an act of legislative grace, and there is nothing unconstitutional about providing collective

bargaining rights that are simply less robust than they once were. *See id*.

The States' analysis fails to acknowledge that governments such as the City are public bodies and that First Amendment protections are often triggered by the government's voluntary actions, including those actions taken as an employer. *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976)(stating that while government has no duty to employ its citizens, once it chooses to do so it cannot grant or deny such employment because of a citizen's affiliation with a particular political party); *Perry v. Sindermann*, 408 U.S. 593 (1972)(stating that while state college has no duty to provide unemployment benefits, it may not cut off such benefits on the basis of a citizen's exercise of her religious faith); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946)(although government need not establish postal service, once it does, it may not condition grant of mailing permit on promise that certain ideas not be disseminated). Thus, once public employers afford public employees such a right, privilege, or benefit in employment, the First Amendment necessarily defines what limits, if any, the State may place on that right.

In this case, the State acknowledges that it chose to afford certain collective bargaining rights to public employees, including the right to bargain over conditions of employment. Accordingly, the City agrees with Judge Colas that it is insufficient and inaccurate for the State to assert that because collective bargaining is an act of legislative grace, it commits no constitutional violation by discriminating against members of a bargaining unit. In short, while all may agree that the government has no constitutional obligation to allow its employees to collectively bargain, once the government determines to provide for such bargaining, no matter how robust, it must do so in a manner that passes constitutional muster.

B. Act 10 Penalizes Employees who Choose to Exercise Their Freedom to Associate.

Courts have long held that a specific prohibition of a fundamental right is not necessary to trigger a strict scrutiny analysis. In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), The Supreme Court held that an Arizona statute requiring a year's residence in a county as a condition to receiving nonemergency hospitalization or medical care significantly interfered with the right to interstate travel even

though the statute did not expressly prohibit interstate travel. The Court held that the "compelling-state-interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right" *Id.* at 258 (quoting *Shapiro v. Thompson*, 394 U.S. 618 (1969)(Emphasis in original)).

As in *Maricopa*, the Defendants' argument that Act 10 does not directly bar union membership should fail. Thus, the inquiry is whether the challenged provisions significantly interfere with an employee's right to associate. A classification significantly interferes with a fundamental right if, considering the importance of the benefit withheld or the penalty imposed to those subject to the classification, it is likely to significantly burden the ability of those subject to the classification to exercise that fundamental right. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383-387 (1978).

From the City's perspective as a municipal employer, the challenged provisions are likely to significantly burden the ability of those subject to the classification to exercise their fundamental right to associate with a union.

1. Act 10's wage provision, standing alone, penalizes an employee's right to associate.

First, the provision prohibiting union employees from receiving total base wage increases exceeding the CPI is a penalty against those employees who choose to join a union. In the City's experience, an employee's salary or wage is the most important condition of employment. Thus, any possible limit on what employees will be able to earn is likely to deter them from joining a union.

The State argues this provision is not a penalty because it allows unionized employees to receive wage increases similar to their non-union counterparts through the use of a referendum. *See* State's Br. at 28. This is no saving grace and, if anything, illustrates just how differently unionized and non-unionized employees are treated under Act 10.

Wis. Stat. § 66.0506(2) states: "if any local governmental unit wishes to increase the total base wages of its general municipal employees…*who are part of a collective bargaining unit*…in an amount that exceeds [the CPI], the governing body shall adopt a resolution to that effect…the resolution may not take effect unless it is approved in a referendum called for that purpose." (emphasis

added). Wis. Stat. § 66.0506(3) goes on to state exactly how local government's like the City must pose the referendum question to its voters: "Shall the … [general municipal employees] in the … [local governmental unit] receive a total increase in wages from $ … [current total base wages to $... [proposed total base wages], *which is a percentage wage increase that is [x] percent higher than the percent of the consumer price index increase*…"(emphasis added). Thus, in order to give wage increases exceeding the CPI to unionized employees, the City would first have to have its Common Council adopt a resolution, then put that resolution to a voter referendum. Make no mistake, this subjects a unionized employee's wage increase to a very complex and unpredictable political process that, even under the best circumstances, often fails. There is no such requirement for non-unionized employees.

This already unpredictable process is made even more difficult by the phrasing required by the statute. The interjectory phrase emphasized above, which highlights that the percentage sought is higher than the CPI, unnecessarily implies that the proposed increase may be more than it should be. The City can see no logical reason to require that specific

language, or for the legislature to in any way dictate how a municipality words its own referendum, other than to try and unfairly influence the voters to reject the referendum.

The State also tries to pose the wage provision as a benefit to unionized employees that non-unionized employees do not receive, *see* State's Br. at 28, suggesting that local governments can just ignore non-unionized employee wage requests. This is nonsense and flies in the face of common sense employee relations and the history of success of public sector collective bargaining in Wisconsin.

In the more than four decades that the City's employees have enjoyed the statutory right to collectively bargain, the City's residents, employees and managers have successfully managed budgets and enjoyed labor peace. But even before there was a statutory obligation to collectively bargain, the City long recognized the efficacy of collective bargaining as a managerial and budgetary tool. For example, prior to 1959, the City collectively bargained with its employees on all manner of workplace benefits, including wages, through the use of Collective Bargaining Committees. This was no coincidence. Whether through common sense or by statutory right, public employers have long recognized

collective bargaining as an effective tool to effectively and efficiently manage budgets while preserving a happy and productive workforce.

Allowing employees to bargain with management over issues like wages allows buy-in to management problems, gives employees a voice and stake in the City's success, and increases employee morale. *See* Appendix, Affidavit of Paul Soglin, ¶ 4. For recent proof, one need look no further than in the short time after Judge Colas struck down parts of Act 10, when the City was able to reach agreements with its largest general employee union, and two other general employee unions. *See* id., ¶ 7. These Agreements gave the City the authority to impose wage decreases in the future. This was accomplished within a system of collective bargaining where employers were able to bargain over more – not fewer – factors of employment. Against this backdrop, the State cannot seriously propose that Act 10's wage provision is constitutional because local governments could choose to ignore their non-unionized employee's wage requests. To do so would alienate employees and cause significant employee relations problems that no responsible manager would invite.

Put simply, as it relates to wages, non-unionized employees are subjected to none of the onerous restrictions contained in Act 10. The arguments proffered by the State to save this provision must fail.

2. The cumulative effect of Act 10's challenged provisions penalize an employee's right to associate.

The State's brief tries to isolate each challenged provision and argue that each one, standing alone, is not a penalty on an employees' freedom to associate. From the City's perspective, such an approach is unpractical, unrealistic, and improper. As an employer, one cannot expect employees to evaluate employment benefits individually. Instead, employees evaluate the entire package of benefits. It is the cumulative evaluation of these benefits, wages, insurance, vacation, sick time, etc., which influence an employee's decision to accept or leave a job.

In the same way, it is unreasonable to expect an employee evaluating whether to join a union to evaluate Act 10's provisions individually. While the City believes the wage provision, standing alone, will cause its employees to disassociate with unions, if there is any doubt, the cumulative effect of each challenged provision definitely will. As stated

above, employees choosing to join a union stand to get paid less, owe more, and get little to no benefit. The City does not believe its employees would choose that fate and, therefore, believe Act 10 clearly penalizes employees who choose to associate with a union.

For these reasons, the City submits that this Court is obligated to review Plaintiff's first amendment challenges using strict scrutiny.

C. Act 10 Violates an Employee's Constitutional Right to Equal Protection.

The City will not repeat the standard for equal protection analysis ably set out by the Plaintiffs and the Court. As Judge Colas put so simply, "equal protection is the constitutional obligation government has to treat people equally when they are similarly situated, unless it has a reason not to." *See* Decision and Order, p. 16.

As an employer of over 3,400 represented and non-represented municipal employees, the City submits there is no difference between a municipal employee who chooses to associate with a union and one who does not. Within the City of Madison, general municipal employees are all subject to the same work conditions, benefit packages, and conditions of

employment. Within individual departments one can find both union and non-union employees a nearly every level of responsibility. The only difference between these employees is their choice to join a union. Thus, there can be little dispute that Act 10 creates two distinct classes of similarly situated employees.

Act 10 violates these employees' equal protection rights by seizing on this choice and, as argued above, treating each class differently in terms of the wages and benefits each can bargain over. In doing so, Act 10 effectively forces the local governments to discriminate between its employees based solely on their decision to join a union. To maintain a workplace environment free from discrimination, Act 10 might leave the City with no choice but to provide its unrepresented employees with the same total base wage increases negotiated for by unions.

II. THE STATE CONCEDES THE CHALLENGED STATUTES CANNOT WITHSTAND STRICT SCRUTINY REVIEW.

A. The State Offers no Rationale for the Challenged Classifications.

As Judge Colas recognized, the State offers no asserted rationale for the challenged classification and thus concedes

that the disparate treatment is unconstitutional when subjected to strict scrutiny. Decision and Order, p. 18-19. Thus, this Court should affirm the Circuit Court's ruling in its entirety.

B. The City Questions Whether the Challenged Wage Provision Could Even Withstand a Rational Basis Review.

Based on the State's filings in the Circuit Court matter, the City believes the challenged classifications, and in particular the challenged wage provision, are arbitrary and irrationally discriminatory. *See Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 73, 284 Wis. 2d 573, 701 N.W.2d 440.

In evaluating whether a legislative classification rationally advances the legislative objective, the court is obligated to identify a rationale that might have influenced the Legislature's decision. *Id.* at ¶ 74. Once the Court identifies a rational basis, the court must assume the legislature passed the act on that basis. *Id.* at ¶ 75. While a rational basis review is the lowest standard of constitutional review, it is not a free pass. As our Supreme Court has held, "the rational basis test is not a toothless one…[t]he State may not rely on a classification whose relationship to an asserted

goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at ¶ 78.

The City believes the challenged provisions, and especially the wage provision, fail a rational basis review. The State provided its rationale for the challenged wage classification in its brief to the Circuit Court:

> "…there is a rational basis for the state to limit collectively bargained wage increases, without similarly placing an inflation-based ceiling on individual employee wage increases….[t]here is a critical difference between represented and non-represented employees with respect to the budgetary impacts of wage increases. When a public employer negotiates with its employees on an individualized basis, it can easily manage the overall budget impact of wage increases by offsetting higher wage increases for well-performing employees with lower wage increases for other employees. When the employer is negotiating with a bargaining representative, its ability to offset higher-than-average wage increases with corresponding lower-than-average increases is constrained, if not eliminated, by i) the substantially reduced number of wage classifications at issue, in comparison to the total number of individual employees, and ii) the bargaining representative's obligation to represent the interests of the entire bargaining unit."

See Defs. Joint Br. in Support of Judgment on the Pleadings and Response to Plaintiffs' Motion for Summary Judgment at 29-30.

The City has reviewed this asserted rationale many times. There are only three possible interpretations of this rationale:

First, the language is gibberish. Despite reading the words over and over again, the City is unsure what rationale is offered because the words don't parse.

Second, the assertion may be that the City can better handle budgeting when it must engage in individual bargaining with each employee.[2] But if that is the assertion, it is also nonsense. The time and effort to negotiate and reach agreement with over 3,000 City employees would be not only be vastly more expensive for the City, but there is no reason to think it will save money. If the City has x dollars that it can spend on salary increases, it cannot go above x dollars whether it negotiates with a group or individually. It simply becomes an administrative nightmare and exponentially more expensive for the City to engage in individual negotiations.

Third, perhaps Defendants are suggesting that the rationale is to encourage merit pay plans for municipal employees. That also provides no basis for the law, because

[2] It is critical to note that Act 10 did not simply affect the employees' right to bargain. The Legislature explicitly took away the City's right to bargain outside the rules set up in Act. 10. *See* Wis. Stat. § 66.0508(1) (2011).

using pay differentials does not impact the total dollars available for pay increases. It also fails to recognize that nothing in collective bargaining limits the City and its unions from employing a merit pay system in a bargaining agreement. Accordingly, the City believes the State's rationale for the wage provision is irrational and arbitrary and therefore would even fail a rational basis review.

CONCLUSION

Based on the foregoing, the City asks the Court to affirm the Circuit Court ruling in its entirety.

Dated this 14th day of August, 2013.

CITY OF MADISON

/s/
Michael P. May, City Attorney
State Bar No. 1011610
John W. Strange, Assistant City Attorney
State Bar No. 1068817

Room 401, City-County Building
210 Martin Luther King, Jr. Blvd., Room 401
Madison, Wisconsin 53703
Phone: (608)266-4511
Fax: (608) 267-8715
Attorneys for City of Madison *for Non-Party Amicus*

CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief produced in a proportional serif font.

The length of this brief is 2,941 words, exclusive of the caption, Table of Contents and Authorities and the Certifications.

Dated this 14th day of August, 2013.

CITY OF MADISON

/s/
Michael P. May, City Attorney
John W. Strange, Assistant City Attorney

ELECTRONIC FILING CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of August, 2013

CITY OF MADISON

/s/
Michael P. May, City Attorney
John W. Strange, Assistant City Attorney

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STATE OF WISCONSIN

IN THE SUPREME COURT

(Court of Appeals District IV)

Appeal No. 2012AP002067

Circuit Court Case No. 2011CV003774

MADISON TEACHERS, INC. PEGGY COYNE, PUBLIC EMPLOYEES, LOCAL 61, AFL-CIO AND JOHN WEIGMAN,

Plaintiffs-Respondents,

-vs-

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMANN AND RODNEY G. PASCH,

Defendants-Co-Appellants.

APPEAL FROM THE STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE JUAN B. COLAS,
CIRCUIT JUDGE PRESIDING

AMICI CURIAE BRIEF FOR LABORER'S LOCAL 236 AND AFSCME LOCAL 60

Dated: August 15, 2013

Respectfully Submitted,

EHLKE, BERO-LEHMANN & LOUNSBURY, S.C.
Bruce F. Ehlke
State Bar No. 1011270
Katy Lounsbury
State Bar No. 1041107
6502 Grand Teton Plaza, Suite 202
Madison, WI 53719
Telephone 608-827-9750
Attorneys for Laborers Local 236 and AFSCME Local 60

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CERTIFICATION

I hereby certify that this Amici Curiae Brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a Brief and appendix produced with a proportional serif font. The length of this brief is 2,970 words, exclusive of the case caption and signature block.

Dated: August 15, 2013.

_____
BRUCE F. EHLKE

ELECTRONIC BRIEF CERTIFICATION

The text of the electronic copy of this Amici Curiae Brief is identical to the text of the paper copy of the Brief.

Dated: August 15, 2013.

_____
BRUCE F. EHLKE

STATE OF WISCONSIN

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INTRODUCTION

Labor unions, including public sector labor unions, exist for two reasons. They exist in order to bargain, collectively, with the employers of the employees who they represent, regarding the wages and other conditions of employment of those employees; and they exist to provide a collective voice for the employees regarding matters of public interest. Both reasons for the existence of labor unions involve an exercise, by the employees who they represent, of the rights of association and petition that constitutionally are secured to the employees by the Ist Amendment to the United States Constitution and Article I of the Wisconsin Constitution.

The instant appeal concerns 2011 Wisconsin Act 10, which, as is well known, made significant changes in the statutory provisions that had been enacted over the past fifty years or so to protect the right of public employees collectively to bargain with their employers concerning their wages and other conditions of employment, and to speak collectively regarding matters of public interest. In an action challenging the constitutionality of the indicated statutory changes, the Circuit Court below determined that a number of the provisions of 2011 Wisconsin Act 10, which had amended Sec. 111.70, Wis. Stat., which also is known as the Municipal Employment Relations Act or MERA, impermissibly had impaired the "general" public employees' exercise of rights secured at Article I of the Wisconsin Constitution and the Ist and XIVth Amendments to the United States Constitution. It is the Defendants' appeal from that determination that now is before the Supreme Court of Wisconsin.

Laborers Local 236 and AFSCME Local 60 submit that the Circuit Court's determination regarding the unconstitutionality of certain provisions of 2011 Wisconsin Act 10 is solidly supported by a long line of appellate court decisions, both Federal and State. Beyond this, however, based on their observations and experience during the past 24 months, they also have concluded that, regardless of the unconstitutionality of this or that particular provision of Act 10, the cumulative effect of all of the Municipal Employment Relations Act changes made by Act 10 effectively has been to single out and substantially impair the ability of general public employees to associate together for the purpose of petitioning their employers concerning their wages and other conditions of employment, and to speak out collectively regarding matters of public interest, in derogation of the those employees' rights secured at Article I of the Wisconsin Constitution and the Ist and XIVth Amendments to the United States Constitution.

ARGUMENT

I. THE ACTIVITY OF BARGAINING COLLECTIVELY AND THE STATUTORY RIGHT TO "COLLECTIVELY BARGAIN".

Historically, in the United States the term "collective bargaining" has been used to describe two legally different activities, oftentimes without any effort being made to identify in what sense the term was being used or which activity was being described. The first way in which the term has been used has been to describe an activity that is an element of the right of individual citizens to associate together for the purpose of advocating regarding matters of mutual interest or concern, including matters concerning wages and employment conditions. When used in this way the term "collective bargaining" is descriptive of a collective effort and refers to an activity where the party that is the object of the advocacy, the employer, has no legal obligation to respond affirmatively to the advocacy, but may do so voluntarily.

At common law individuals had a recognized right to associate together for the purpose of engaging in any activity that it was lawful for an individual to engage in as an individual. This included the right to associate with others for the purpose of bargaining with their employer regarding wages and other conditions of employment. E.g., Carew v. Rutherford, 106 Mass. 1, 14 (1870); Commonwealth v. Hunt, 45 Mass. 111, 129 (1842). This right has been recognized in Wisconsin as an "inherent liberty", State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 534- 535, 90 N.W. 1098 (1902); and it is a "fundamental" and constitutionally secured right, e.g., Thomas v. Collins, 323 U.S. 516, 534 (1945); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (l937); AFSCME, AFL-CIO v. Woodward, 406 F. 2d 137, 139 (8th Cir. 1969); McLaughlin v. Tilendis, 398 F. 2d 288, 288-289 (7th Cir. 1968). Where employees, including public employees, engage in such collective bargaining with their employer incidental to their

constitutionally secured right to associate together for the purpose of petitioning their employer regarding their wages and conditions of employment, e.g., AFSCME, AFL-CIO v. Woodward, 406 F.2d at 139, the employer is not constitutionally obligated to reach an agreement with them regarding those matters, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-465 (1979), although it may do so voluntarily, as often occurred in the case of public sector employees, prior to when the public sector collective bargaining statutes in Wisconsin were enacted.

For example, Laborers local 236, AFL-CIO, was chartered by the Laborers International Union of North America in 1934. It is an organization of employees of the City of Madison, Wisconsin who have associated together in order to bargain collectively with their employer, to engage in legislative and other activities to promote and advance the general welfare, and in order to engage in other lawful activities.

As it concerns the American Federation of State, County and Municipal Employees, or AFSCME, AFSCME Local 1 was established in May, 1932, in Wisconsin. The nation-wide AFSCME, which was affiliated with the then AFL union, was established four years later, in September, 1936. The first President of the national union was Arnold Zander, a Wisconsin State government employee, who served in this position for almost three decades. D. Holter, Workers and Unions in Wisconsin at 161 (1999); R. W. Ozanne, the Labor Movement in Wisconsin at 74-77 (1984).

In 1936, the same year in which the national AFSCME Union was established, AFSCME Local 60 was chartered as an AFSCME Local Union. AFSCME Local 60 is an organization of employees of the City of Madison, the Madison Metropolitan School District and other municipalities in Dane County, Wisconsin who have associated together in order to bargain collectively with their respective employers, to foster and

promote a progressive attitude toward public administration, and to engage in political and other lawful activities.

Both Laborers Local 236 and AFSCME Local 60 collectively bargained with the City of Madison and the other governmental employers who employed the employees who they represent, on behalf of those employees, before there was any statute in place protecting their right to do so. See, e.g., Madison City Council Minutes at attached Addendum. The agreements that were reached as a result of that collective bargaining were enforceable at law, without regard to whether there was a statute confirming their lawfulness. See, e.g., AFSCME Local 1226 v. City of Rhinelander, 35 Wis. 2d 209, 215-216, 151 N.W. 2d 30 (1967).

In short, the activity of bargaining collectively is nothing more than two or more employees acting together to discuss proposals with their employer regarding their wages and conditions of employment, with the hope, and possibility, that they might reach an agreement with the employer regarding the same. This is one of those ordinary activities that is so widely accepted in our democratic society that we tend to take it for granted, like talking over the fence with the neighbor, or walking the dog around the neighborhood or taking the family to a municipal park for a picnic. It is a fundamental right that constitutionally is protected.

The second way in which the term "collective bargaining" has been used is to refer to a statutorily mandated relationship between an association of employees and their employer, by the terms of which an employer and its employees are obligated to negotiate, in "good faith", for the purpose of reaching an agreement regarding the employees' wages and conditions of employment.

Such statutorily recognized "collective bargaining" is subject to legislative modification, for the purpose, at least heretofore, of protecting the employees' fundamental right to bargain with their employer. E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 33-34 ; Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 263-264 (1940). There is, however, no constitutionally secured right to such statutory protection. See, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. at 464-467.

In sum, the term "collective bargaining" describes the activity where an association of individuals, acting in concert with each other, on the one hand, exchange proposals regarding a possible agreement with their employer concerning matters of mutual concern, when the parties' involvement in the process is not based on any statute and is voluntary. Engaging in this activity is a fundamental right. The term also refers to a statutorily established procedure where a bargaining obligation, and related requirements, may be imposed on the parties by law, in order to protect the exercise of the fundamental right in question.

Whether invoked as a statutorily protected right or as an activity that has been recognized as a fundamental right -- "collective bargaining" or engaging in the activity of bargaining collectively, if bargaining in either sense of that term is an element of the employees' association for the purpose of seeking to maintain or improve their wages and conditions of employment in a relationship with their employer, it is an essential attribute of the association, one that inextricably is intertwined with the employees' freedoms of association and expression. The imposing of penalties on the exercise of the bargaining activity or the withholding of benefits from an association that has been established for

the purpose of engaging in such activity, necessarily impairs the employees' exercise of the freedoms in question.

II. THE CONSTITUTIONALLY SECURED RIGHT OF INDIVIDUALS TO ASSOCIATE TOGETHER FOR THE PURPOSE OF EXPRESSING THEIR VIEWS REGARDING MATTERS OF MUTUAL CONCERN, INCLUDING MATTERS RELATED TO THEIR EMPLOYMENT, MAY NOT BE DIRECTLY, NOR INDIRECTLY, IMPERMISSIBLY BURDENED.

The United States Supreme Court has discussed the importance of the constitutionally secured right of individuals to associate, and to act in concert with each other for the purpose of petitioning their government regarding matters that are of mutual interest and concern, as follows:

> This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments, N.A.A.C.P. v. Alabama, 357 U.S. 559, …. as was said in N.A.A.C.P. v. Alabama, supra, "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech" 357 U.S., at 460 ….
>
> The First and Fourteenth Amendment rights of free speech and free association are fundamental and highly prized, and "need breathing space to survive." N.A.A.C.P. v. Button, 371 U.S. 415, 433, 405 "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. Little Rock, supra, 361 U.S., at 523 …. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 543-544 (1963).

This proposition repeatedly has been affirmed by the courts. E.g., Rutan v. Republican Party of Illinois, 497 U.S. 62, 77-78 (1990); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981) ("... by collective effort individuals can make their views known, when individually, their voices would be faint or lost. …"); Christian Legal Society v. Walker, 453 F. 3d 853, 861 (7th Cir. 2006).

> … Necessarily included with such constitutionally guaranteed incidents of liberty is the right to exercise the same in union with others through member membership in organizations seeking political or economic change. …
>
> …The holding out of a privilege to citizens by an agency of government upon condition of non-membership in certain organizations is a more subtle way of encroaching upon constitutionally protected liberties than a direct criminal statute, but it may be equally violative of the constitution. Lawson v. Housing Authority of City of Milwaukee, 270 Wis. 269, 274-275, 70 N.W.2d 605 (1955)
>
> …Government action may impermissibly burden the freedom to associate in a variety of ways; two of them are "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and "interfer[ing] with the internal organization or affairs of the group." Roberts, 468 U.S. at 623 ….
> …
> …The protections of the Constitution … are not limited to direct interference with First Amendment freedoms. …The Constitution also protects against indirect interference. … Christian Legal Society v. Walker, 453 F. 3d at 861, 865, 867.

III. ACT 10 IMPAIRS THE EXERCISE OF FUNDAMENTAL RIGHTS THAT ARE SECURED AT ARTICLE I OF THE WISCONSIN CONSTITUTION AND AT THE IST AND XIVTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

To begin with, Act 10, at Section 169, bars municipalities and their employees from engaging in the historically recognized and heretofore protected activity of voluntarily bargaining, collectively, except as provided for at the amended Sec. 111.70, Wis. Stat., and it declares that any local ordinance or resolution to the contrary may not be enforced. This provision does two things.

First, it abolishes altogether the common law right of employees to engage in the voluntary activity of bargaining collectively with their employers, while, at the same time, Act 10 permits individual employees to bargain with their municipal employers regarding their wages and conditions of employment, without any limitation. Second, as indicated, it forces the employees, if they want to exercise their right to associate together for the purpose of petitioning their employer regarding their wages and conditions of

employment, to do so only within the limitations of the amended Sec. 111.70, Wis. Stat., which limitations render such activity effectively meaningless.

The limitations of the amended Sec. 111.70, Wis. Stat., render the ability of the employees collectively to bargain with their municipal employers effectively meaningless in a number of ways. For one thing, the amended Sec. 111.70, Wis. Stat., limits "collective bargaining" to bargaining simply to maintain the employees' current base wage, plus or minus the CPI. Bargaining concerning conditions of employment is prohibited and declared to be unlawful. Act 10 at Sections 210, 245. At the same time that Act 10 limits collective bargaining to an effectively meaningless exercise, it eliminates any procedure for the resolution of an impasse in the bargaining, should that occur, and it limits the term of any agreement, if one somehow should be reached, to a term not to exceed one year, at Sections 237, 238.

While imposing these severe restrictions on what the labor organization can do for those who it represents, Act 10 imposes conditions on such an association that seriously impair the ability of the organization to function. As a starter, the Act requires the organization to run for re-election every year, and to "win" by obtaining the votes of not less than 51% of the eligible voters, regardless of the number who vote (which effectively creates a presumption of a vote against representation on the part of those who do not vote, regardless of their reason for not voting), at section 242. This has a debilitating effect on the ability of the labor organization to be re-elected. Almost 150 years ago the Wisconsin Supreme Court declared such a procedure to be "a thing unknown in the history of constitutional law". Gillespie v. Palmer, 20 Wis. 544, 555 (1866).

In addition to imposing the foregoing burdens on the ability of the employees to associate and act in concert with each other as it concerns their relationship with their

municipal employer, Act 10, at Section 227, bars municipal employers from permitting payroll deductions for the payment of labor organization dues. (This is the only payroll deduction that the Wisconsin Statutes do not allow municipalities to make for their employees.) At the same time, Act 10 expressly permits "free riders" to claim labor organization representation, without paying anything for the services provided, at Sections 213, 219, and without foregoing their right to demand "fair representation" by the labor organization, see, e.g., Gray v. Marinette County, 200 Wis.2d 426, 411-422, 546 N.W. 2d 553 (Ct. App. 1996), should they require assistance related to their employment, Act 10 at Section 170. These measures, too, have a negative impact on the ability of the labor organization to continue to function.

Act 10 encourages individual employee dealings with their employers, in which situation there apparently is no limit on the wages and conditions of employment that can be negotiated by an individual, while at the same time discouraging any employee association, by substantially limiting, if not eliminating altogether, any benefit to be derived from the association and by impairing the ability of any representative organization to function. Having eliminated the historically recognized "fundamental right" of employees to bargain collectively with their employers, leaving them only the statutory provisions of a wholly emasculated MERA, the provisions of Act 10 impose a substantial burden on and impair the exercise by general municipal employees of their constitutionally secured right to associate and to express their views in concert with one another and to petition their State and local governments regarding matters that are of mutual concern to them. In short, the provisions of Act 10, in their cumulative effect, impose burdens on and discourage the exercise of the constitutionally secured freedoms of association and expression by the general municipal employees.

CONCLUSION

This case concerns the constitutionality of the provisions of a law that apply to certain public employees, but not others. Given their cumulative effect, the provisions of 2011 Wisconsin Act 10 that relate to collective bargaining in the public sector impair the general public employees' exercise of the rights secured at Article I of the Wisconsin Constitution and at the Ist and XIVth Amendments to the United States Constitution.

Dated: August 15, 2013

Respectfully Submitted,

EHLKE, BERO-LEHMANN & LOUNSBURY, S.C.

Bruce F. Ehlke
State Bar No. 1011270
Katy Lounsbury
State Bar No. 1041107
6502 Grand Teton Plaza, Suite 202
Madison, Wis. 53719
Telephone 608-827-9750
Attorneys for Laborers Local 236 and AFSCME Local 60

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STATE OF WISCONSIN
IN SUPREME COURT

No. 2012-AP-2067

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Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY THE HONORABLE JUAN COLAS, PRESIDING CIRCUIT COURT CASE NO. 2011-CV-003774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

BRIEF OF *AMICUS CURIAE* CITY OF MILWAUKEE

GRANT F. LANGLEY
City Attorney (SB #01013700)
RUDOLPH M. KONRAD
Deputy City Attorney (SB #01015041)
STUART S. MUKAMAL
Assistant City Attorney (SB #01016992)
DONALD L. SCHRIEFER
Assistant City Attorney (SB #01010693)
Attorney for *Amicus Curiae* City of Milwaukee

ADDRESS:
200 E. Wells Street #800
Milwaukee, WI 53202
Telephone: 414-286-2601
Fax: 414-286-8550

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STATEMENT OF FACTS[1]

This Brief concerns the constitutionality of Wis. Stat. § 62.623(1) as created by 2011 Wis. Act 10 § 167. It requires that City employees pay "employee-required" contributions for benefits payable under the Milwaukee Employes' Retirement System ("ERS") and that the City cannot pay such contributions.

ERS was established by ch. 396 L. 1937; its governance, funding and administration were transferred to exclusive control by the City in ch. 441 L. 1947. The 1947 enactment *expressly*: (1) brought the governance, funding and administration of ERS within the City's constitutional home rule authority as established by Art. XI § 3(1) of the Wisconsin Constitution; and (2) provided that all pension benefits and the terms and conditions under which such benefits are provided constitute vested "benefit contracts" inuring to the benefit of each individual employee/member as of their initial dates of employment.

The City exercised its constitutional home rule authority per Wis. Stat. § 66.0101 by enacting Charter ch. 36

[1] References to the Brief of the Appellants are denoted as "A-Br. p. __" and references to the attached Appendix are denoted as "A-App. p. __."

(A-App. pp. 184-248), which serves as ERS's governing law. At no time until enactment of Wis. Stat. § 62.623(1), did the State attempt to interfere with the City's governance of ERS, the benefits afforded to ERS members, or the terms and conditions under which such benefits were afforded.

ARGUMENT

1. Introduction

The City supports the argument advanced by the Respondents at pp. 36-57 of their Brief regarding Wis. Stat. § 62.623(1). This statute: (1) unconstitutionally interferes with the City's home-rule authority over ERS, given certain vested rights and benefits that have accrued to City employees who are members of ERS; and (2) clearly constitutes an unconstitutional impairment of contract rights under the Wisconsin Constitution.

2. Wisconsin Stat. § 62.623(1) Violates the City of Milwaukee's Constitutional Home Rule Authority.

The adoption of Article XI, § 3(1) of the Wisconsin Constitution established municipal home rule:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method

> of such determination shall be prescribed by the legislature.

This Home Rule Amendment ("Amendment") limits the powers of the Legislature in dealing with the local affairs and government of cities and villages. *Van Gilder v. City of Madison*, 222 Wis. 58, 83-84, 267 N.W. 25 (1936). Our courts have repeatedly held that the breadth of constitutional home rule shall be liberally construed. *Local Union No. 487, IAFF-CIO v. City of Eau Claire,* 147 Wis. 2d 519, 522, 433 N.W.2d 578 (1989); *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526, 253 N.W.2d 505 (1977); *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 639, 209 N.W. 860 (1926).

Given the origin of home rule in the Constitution, the Legislature's power to modify or abrogate municipal enactments falling within its ambit is constrained. If the subject matter of a municipal ordinance pertains to local affairs and government, the Legislature cannot interfere with the enactment unless it: (a) contravenes the constitution itself; or (b) contravenes a legislative enactment of "state-wide concern as with uniformity shall affect every city or every village." The former is not at issue. To satisfy the latter, the

legislative enactment must meet *two* tests—"state-wide concern" *and* "uniformity." *Thompson v. Kenosha County*, 64 Wis. 2d 673, 683, 221 N.W.2d 845 (1974), cited in the Court of Appeals' certification (A-App. p. 117, n. 5). "Uniformity" alone *is not sufficient.*

ERS was created in ch. 396, L. 1937. In 1947, the Legislature enacted § 31(1) of ch. 441, L. 1947, to transfer authority over ERS from the Legislature to the City, declaring:

> For the purpose of giving to cities of the first class the largest measure of self-government with respect to pension annuity and retirement systems compatible with the constitution and general law, it is hereby declared to be the legislative policy that all future amendments and alterations to this act are matters of local affair and government and shall not be construed as an enactment of state-wide concern.

Charter § 36-14 ("Home Rule") contains the same language (A-App. p. 244). This declaration (an acknowledgement of the City's constitutional home rule authority over ERS) is unambiguous and applies to "all future amendments."

The broad declaration that pension systems of first-class cities are *purely matters of local concern* is entitled to *great weight* (not merely "some deference" as the appellants

contend). *State ex rel. Brelsford v. Retirement Bd. of the Policemen's Annuity and Benefit Fund of Milwaukee*, 41 Wis. 2d 77, 86, 163 N.W.2d 153 (1968); *Van Gilder*, 222 Wis. at 73-74.[2] The Legislature cannot now re-characterize the right it expressly acknowledged in ch. 441, L. 1947, and codified in Charter § 36-14, of first class cities to operate and maintain their pension systems as matters of local affairs and government. *Van Gilder* held that "when a power is conferred by the home-rule amendment, it is within the protection of the Constitution and cannot be withdrawn by legislative act." 222 Wis. at 72. In *State ex rel. Michalek v. LeGrand*, the Court stated: "as to an area solely or paramountly in the constitutionally protected area of "local affairs and government, the state legislature's delegation of authority to legislate is unnecessary and its preemption or ban on local legislative action would be unconstitutional." 77 Wis. 2d at 529.

Appellants' argument that Wis. Stat. § 62.623(1) overcomes the City's constitutional home rule powers because it is part of a "uniform enactment" (2011 Wis. Act

[2] The appellants' reliance upon *Roberson v. Milwaukee County*, 2011 WI App 50, 332 Wis. 2d 787, 798 N.W.2d 256 is misplaced, as that case did not involve an enactment expressly declared by the Legislature to be a matter of "local affair and government."

10) is misplaced. It assumes the Legislature can override *constitutional* home rule, even with respect to matters securely within the ambit of "local affairs and government," merely by enacting measures of uniform state-wide applicability. This conclusion contravenes the literal text of the Amendment and would largely nullify the concept of constitutional home rule. This proceeding concerns a subject that is clearly a matter of local concern that has been *expressly acknowledged and declared* to be such by the Legislature. This declaration may not be withdrawn by an attempted subsequent legislative enactment such as Wis. Stat. § 62.623(1). *Van Gilder*, 222 Wis. at 74.

The appellants also focus upon the phrase, "compatible with the Constitution and general law," in the 1947 enactment, and claim this phrase constitutes a significant limitation upon that enactment. (A-Br. pp. 49-51). This was properly rejected by the Circuit Court (A-App. p. 144), which noted that such an interpretation would render the Amendment a nullity by empowering the Legislature to enact *any* "general law" that would override matters otherwise clearly within the Amendment's purview. (*Id.*). The phrase

"Constitution and general law" is an explanation of the *purpose* of the enactment and *not* a limitation upon its scope.

The contention that the State's budgetary situation and its impact on State shared-revenue distributions to municipalities somehow transforms the governance of ERS into a matter of state-wide concern is equally unpersuasive. ERS is a purely local pension system covering *only* employees of the City and certain employees of "city agencies" defined in Charter § 36-02-8. Its funding is entirely local; it receives no direct State funding. Among the local affairs squarely within the purview of constitutional home rule, the "most important of all perhaps is the control of the locality over payments from the local purse." *Van Gilder, supra,* 222 Wis at 81-82, *quoting Adler v. Degan,* 251 N.Y. 467, 167 N.E. 705,713 (1929) (concurring op. by C.J. Cardozo).

Finally, Appellants contend, citing *Wisconsin Professional Police Association v. Lightbourn,* 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807, that the governance, funding and administration of ERS constitute matters of state-wide concern because the State has been "creating and amending public employee retirement systems since 1891." (A-Br. p. 54, 65). ERS, however, is *distinct* from every other

public pension system in Wisconsin. The Legislature transferred full control of ERS, including its governance, finances and administration, to the City in 1947. *Lightbourn* itself expressly notes that the State *only* regulates and administers "non-Milwaukee pension plans," *id.* at ¶ 9, 243 Wis. 2d at 532.

The City's payment of "employee required contributions" to ERS is a proper exercise of the City's constitutional home rule powers under Wis. Const. Art. XI, § 3(1). The Legislature cannot modify or withdraw that power by subsequent legislative enactment. Wisconsin Stat. § 62.623(1) attempts to do just that.

3. Wisconsin Stat. § 62.623(1) Unlawfully Infringes Upon ERS Members' Vested Contractual Rights.

As noted, ch. 396, Laws of 1937, as amended by ch. 441, Laws of 1947 created the contractual relationships and vested rights at issue here. Of significance here are §§ 30 and 31(1) of the 1947 session law.

Section 30 of ch. 441, Laws of 1947, added new § 14(2) of ch. 396, Laws of 1937, entitled "CONTRACTS TO ASSURE BENEFITS," which *repeatedly* describes ERS member benefits as constituting "*benefit contracts*" and

"*vested rights*" inuring to each ERS member upon the terms and conditions prevailing *as of the commencement of each member's employment.*

This provision now appears in Charter §§ 36-13-2-a, 2-b and (with some modifications not material here) 2-c. (A-App. p. 240). To the same effect are: Charter § 36-13-2-e (A-App. p. 241), which protects "rights, benefits or allowances" earned by ERS members from alteration, modification, reduction, change, cancellation, revocation or impairment to the disadvantage of members and their beneficiaries, by (among other things) subsequent legislation; and Charter § 36-13-2-g, pertaining to members of the "Combined Fund,"[3] established as a consequence of the 2000 Global Pension Settlement, ("GPS"). These guarantees and vested rights are a defining feature of ERS. The Wisconsin Retirement System ("WRS") has nothing comparable: it expressly reserves the right to modify benefits on a prospective basis. Wis. Stat. § 40.19(1). The Charter has no such "reservation" applicable to any City employee hired before November 23, 2011.

[3] The label "Combined Fund" derives from one of the issues resolved by the GPS: the merger of the City's former disability fund into the ERS retirement fund.

Of equal significance are provisions in the 1947 enactment and Charter ch. 36 that unequivocally *fix* and *vest* the contractual rights of ERS members and beneficiaries *as of the date of the member's initial employment*. *See* § 30(2)(c) and § 31(1) of ch. 441, Laws of 1947; Charter §§ 36-13-2-a, 36-13-2-c, 36-13-2-g, 36-14 (A-App. 240-241, 244); *see also, Welter v. City of Milwaukee ("Welter")*, 214 Wis. 2d 485, 488, 494-95, 571 N.W.2d 459 (Ct. App. 1997). These rights are not limited to benefits alone, but are identified to include "benefits," *"terms and conditions"* of those benefits, and *all "other rights"* of ERS members. The City's payment of the employee share of contributions to ERS plainly qualifies as a benefit, a "term and condition" of the benefit contract, *and* a right (these categories are not mutually exclusive) accruing to each member, and is protected from any alteration, impairment or diminution without the member's individual consent. Ch. 441, L. 1947 §§ 30(2)(a) and (c) and § 31(1); Charter §§ 36-13-2-a, 2-c, 2-e and 2-g, and 36-14. "Pension laws should be liberally construed in favor of the persons intended to be benefited thereby." *Di Dio v. Board of Trustees of the Milwaukee Public School Teachers Annuity and Retirement Fund*, 38 Wis. 2d 261, 268-269, 156 N.W.2d

418 (1968). Requiring ERS members to pay the "member contributions" specified in Charter § 36-08-7 (A-App. pp. 231-234) substantially diminishes their rights and the value of their benefits.

The language in Charter § 36-08-7 is not ambiguous. The payment of "employee required contributions" by the City for employees hired before January 1, 2010 is expressed in mandatory language ("the city shall contribute"). As noted in *Milwaukee Police Association v. City of Milwaukee*, 222 Wis. 2d 259, 267-68, 588 N.W.2d 636 (Ct. App. 1998), and *Welter, supra,* rights and benefits in effect on the date an employee becomes a member of the ERS vest and cannot thereafter be taken away. The City's payment of pension contributions is just such a right and benefit. It cannot be divested absent an employee's consent.

The appellants' citation of Charter § 20-13 for their contention that ERS members' vested rights are subject to divestment by subsequent state legislation is puzzling. Charter § 20-13 *only* applies to the provisions of Ch. 184, L. 1874, which was adopted decades before the inception of both constitutional home rule and ERS, and is irrelevant here. The governing provisions on this point are the Amendment

itself, §§ 30(2)(a), (2)(c) and 31(1), Ch. 441, L. 1947, and Charter §§ 36-13-2-a, 2-c, 2-e and 2-g and 36-14. The purpose of constitutional home rule and of the subsequent enactments of the legislature and of the City (in enacting ch. 36 of the Charter) was to *preclude* the State from accomplishing what the appellants suggest.

The GPS further confirms that payment by the City of certain members' pension contributions is a vested right. It was approved by the Milwaukee County Circuit Court on November 16, 2000 in *In Re Global Pension Settlement Litigation*, Case No. 00-CV-003439, and was adopted in City Charter Ordinance No. 991585. Its provisions apply to all ERS-member City employees in active service on or after January 1, 2000 who participate in the Combined Fund (all incumbent employees who individually consented to the GPS). Charter § 36-08-9. (A-App. pp. 234-235). As part of the settlement, the following provision (in Charter § 36-13-2-g (A-App. p. 241)) was included in the implementation ordinance:

> Every member, retired member, survivor and beneficiary who participates in the combined fund *shall have a vested and contractual right to the benefits in the amount and on the terms and conditions* as provided in the law on the

> date the combined fund is created. [Emphasis added.]

Among the benefits, terms and conditions, and rights in effect on the effective date of the GPS were the provisions of Charter ch. 36 discussed above obligating the City to pay the employee share of members' pension contributions.

4. Wisconsin Stat. § 62.623(1) Unconstitutionally Impairs the Obligation of Contracts in Violation of the Contracts Clause of the Wisconsin Constitution.

The analytical framework for considering an impairment of contract claim under Art. I, § 12, of the Wisconsin Constitution is the same standard applicable to claims under Art. I, § 10, clause 1 of the U.S. Constitution:

> . . . the legislation must impair an existing contractual relationship; the impairment must be substantial; and if the impairment is substantial, the purpose of the state legislation must be examined to determine whether the impairment is justified.

Reserve Life Insurance Company v. LaFollette, 108 Wis. 2d 637, 644, 323 N.W.2d 173 (Ct. App. 1982), *citing Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 244-45, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).

As discussed, most current members of ERS have a vested right to continued City payment of the employee share of their contributions—the first criterion for an

unconstitutional impairment of contract. As to the second and third criteria, case law establishes that even impairments of public-sector employee contract rights considerably less substantial than the impairment here[4] are "substantial," and that even the existence of extreme economic circumstances are rarely sufficient to provide a constitutionally sufficient justification for such impairments. *See, e.g., University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1099, 1106-1107 (9th Cir. 1999); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F.2d 766, 769, 772-774 (2nd Cir. 1991); *Fraternal Order of Police v. Prince George's County*, 645 F.Supp. 2d 492, 500-501, 510-518 (D. Md. 2009), *rev'd on other grounds*, 608 F.3d 183 (4th Cir. 2010); *Massachusetts Community College v. Commonwealth of Massachussetts*, 420 Mass. 126, 130, 131-32, 140, 649 N.E.2d 708 (Mass. 1995); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 79 N.Y.2d 39, 43, 46 (N.Y. Ct. App. 1992); *cf. Baltimore Teachers Union v. Mayor and City of Baltimore*, 6

[4] An employee-member ERS contribution of 5.5 percent (7 percent for elected officials) involves a loss of 114.4 hours of pay equivalent to 14.3 days of pay for an employee working a 2,080-hour work year.

F.3d 1012, 1015, 1016-22 (4th Cir. 1993),[5] *reh. en banc den.* 6 F.3d 1012 at 1026, *cert. denied*, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed. 2d 435 (1994).

5. The Constitutionally Proper Method of Amending ERS Benefits and Benefit Terms and Conditions.

Under § 31(1) L. 1947 and Charter § 36-14 (A-App. p. 244), there is a proper way to amend Charter Ch. 36: through a Charter amendment affecting new employees hired after the effective date of the amendment in question. The City has done this through: (1) creation of Charter § 36-08-7-a-2 (A-App. p. 231), requiring employees hired on or after January 1, 2010 to contribute 5.5% of "earnable compensation" as a required contribution to ERS; and (2) creation of Charter § 36-13-2-h (A-App. p. 241), incorporating a "reservation of rights" similar to Wis. Stat. § 40.19(1), entitling the City to amend benefits and benefit terms and conditions on an ongoing basis for all City employees hired on or after November 23, 2011.

[5] *City of Baltimore* is *very* much an outlier; its holding has been "severely criticized." *See University of Hawaii Professional Assembly, supra,* 183 F.3d at 1105, fn 6 (and authorities cited therein).

CONCLUSION

The City of Milwaukee respectfully submits that the Court should find Wis. Stat. § 62.623(1) violative of the Home Rule Amendment and the Contract Clause of the Wisconsin Constitution.

Dated and signed at Milwaukee, Wisconsin this 19th day of August, 2013.

GRANT F. LANGLEY
City Attorney

_____

RUDOLPH M. KONRAD
Deputy City Attorney
State Bar No. 01015041
STUART S. MUKAMAL
Assistant City Attorney
State Bar No. 01016992
DONALD L. SCHRIEFER
Assistant City Attorney
State Bar No. 01010693
Attorney for *Amicus Curiae*
City of Milwaukee

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 2,971 words.

I further certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12), and that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I further certify that the required number of copies of the brief and appendix correctly addressed have been submitted for delivery to the Wisconsin Supreme Court on August 19, 2013.

GRANT F. LANGLEY
City Attorney

_____

RUDOLPH M. KONRAD
Deputy City Attorney (SB 01015041)
STUART S. MUKAMAL
Assistant City Attorney (SB #01016992)
DONALD L. SCHRIEFER
Assistant City Attorney (SB #01010693)
Attorney for *Amicus Curiae* City of Milwaukee

CERTIFICATE OF MAILING

Laura M. Bergner herein certifies that she is employed by the City of Milwaukee, assigned to duty in the office of the City Attorney, which is located at 841 North Broadway, Suite 716, Milwaukee, Wisconsin 53202; that on the 19th day of August, 2013, she filed 22 copies of the Brief of *Amicus Curiae* City of Milwaukee, in the above-entitled case, addressed to: Ms. Diane M. Fremgen, Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

Steven C. Kilpatrick
Joseph L. Olson
Michael P. Schrenock
Steven P. Means
Kevin M. St. John
Office of the Attorney General
PO Box 7857
Madison, WI 53707-7857

Lester A. Pines
Tamara Packard
Susan M. Crawford
Cullen, Weston, Pines & Bach, LLP
122 West Washington Avenue
Suite 900
Madison, WI 53703

M. Nicol Padway
Padway & Padway, Ltd.
633 West Wisconsin Avenue
Suite 1900
Milwaukee, WI 53203-1918

Richard M. Esenberg
Wisconsin Institute for Law & Liberty, Inc.
1139 E. Knapp Street
Milwaukee, WI 53202

Michael P. May
John W. Strange, Jr.
Office of the Madison City Attorney
210 Martin Luther King Jr. Blvd
County Building, #401
Madison, WI 53703-3345

Bruce F. Ehlke
Kathleen Meter Lounsbury
Ehlke, Bero-Lehmann & Lounsbury SC
6502 Grand Teton Plz., Ste. 202
Madison, WI 53719-1047

Daniel J. Borowski
Andrew T. Phillips
Phillips, Borowski, SC
10140 N. Pt. Washington Rd.
Mequon, WI 53092

Bruce N. Cameron
Reed Larson Professor of Labor Law
Regent University School of Law
Robertson Hall #353
1000 Regent University Drive
Virginia Beach, VA 23464

Milton L. Chappell
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, #600
Springfield, VA 22160

Aaron N. Halstead
Barbara Z. Quindel
Timothy E. Hawks
Hawks Quindel, S.C.
P.O. Box 442
Milwaukee, WI 53201-0442

Kurt C. Kobelt
Wisconsin Education Association
P.O. Box 8003
Madison, WI 53708

Peggy A. Lautenschlager
Bauer & Bach, LLC
123 East Main Street, #300
Madison, WI 53703

Marianne G. Robbins
Previant, Goldberg, Uelman, Gratz, Miller
1555 N. Rivercenter Drive, #303
Milwaukee, WI 53212

_____

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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2012-AP-2067

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 61, AFL-CIO, AND JOHN WEIGMAN,

Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMANN, AND RODNEY G. PASCH,

Defendants-Appellants.

On Appeal from the Decision and Final Order dated September 14, 2012
Dane County Circuit Court Case No. 11-CV-3774
The Honorable Juan B. Colas, and on Certification
from the Court of Appeals (District IV)

AMICI CURIAE BRIEF FOR ELIJAH GRAJKOWSKI, KRISTI LACROIX, AND NATHAN BERISH

Milton L. Chappell (*pro hac*)
Nathan J. McGrath (*pro hac*)
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160

Richard M. Esenberg, WBN 1005622
Thomas C. Kamenick, WBN 1063682
Brian W. McGrath, WBN 1016840
Wisconsin Institute for Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202

Bruce N. Cameron (*pro hac*)
Regent University School of Law, RH # 353
1000 Regent University Drive
Virginia Beach, VA 23464

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INTRODUCTION

Elijah Grajkowski, Kristi Lacroix, and Nathan Berish ("*Amici*") are current or former nonunion public employees who will be affected both in principle and economically by the outcome of this case. *Amici* filed briefs in *Wisconsin Education Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012), *aff'd in part, rev'd in part*, 705 F.3d 640 (7th Cir. 2013), and participated in oral argument before the United States Court of Appeals for the Seventh Circuit.

Amici now file this brief in support of the Defendants-Appellants' ("the State") position on the constitutionality of 2011 Wisconsin Act 10 ("Act 10").

ARGUMENT

I. PUBLIC EMPLOYEES HAVE NO CONSTITUTIONAL RIGHT TO COLLECTIVELY BARGAIN.

The argument of the Unions and the decision of the circuit court rest on a faulty premise. Act 10 does *not* treat individual—or groups of—public employees differently based on the exercise of their freedom of association. Public

employees in Wisconsin remain free to join civic associations, political parties, and unions to advocate for changes in the law or in their terms and conditions of employment. They can even join unions for the purpose of seeking to have that entity certified as an exclusive collective bargaining agent.

What Act 10 does is establish the rules that apply when Unions seek and obtain the statutory privilege of exclusive representation of *all* employees. In other words, Act 10 defines how much collective bargaining the State will permit and specifies the rules for choosing and maintaining an exclusive representative. Even a cursory reading of Act 10 reveals that all of its distinctions turn, not on the act of association, but on the decision to accept the burdens and benefits of exclusive representation.

And exclusive representation for purposes of collective bargaining is a privilege that the State may extend, withdraw, or limit at will. As the circuit court noted in its decision, "[i]t is undisputed that there is no constitutional right to collective

bargaining." (App. at 137.) The court of appeals reaffirmed this in its Certification Decision, stating, "[t]he parties agree, as they must, that public employers have no constitutional obligation to bargain with employees, either individually or collectively." (App. at 107-08.)

Two decisions of the United States Supreme Court make this clear, holding unequivocally that the state is not obligated to speak, or even to listen, equally to all of its citizens in the context of public employment. In *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), the Supreme Court determined that the state had no constitutional obligation to consider or discuss grievances filed by a union of state employees, but could instead consider only those filed by individual employees. The Supreme Court noted that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or in this context, to recognize the association and bargain with it." *Id.* at 465.

In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the state took the opposite

approach. It decided that, as an employer, it would bargain and confer exclusively with the *union* rather than the *individual*. This, too, was held constitutional. The Supreme Court stated that "[in *Smith*] the government listened only to individual employees and not to the union. Here the government 'meets and confers' with the union and not with individual employees. The applicable constitutional principles are identical . . . ." *Id.* at 286-87.

Smith and *Knight* establish conclusively that the state may pick and choose with whom it will bargain when it comes to employment matters. There is no constitutional right to collective bargaining. Nor is there a constitutional right to be free from collective bargaining. Thus, the Unions' claim that their First Amendment rights are violated by Act 10's changes to the statutory rules for exclusive representation and collective bargaining is baseless.

Not surprisingly, the United States Court of Appeals for the Seventh Circuit rejected the Unions' First Amendment claim in *Wisconsin Education Ass'n Council v. Walker*, 705

F.3d 640, 645-48 (7th Cir. 2013). Although the equal protection theory advanced by the unions there was slightly different, the Seventh Circuit recognized the clear difference between the constitutional right of free association and the mere statutory privilege of collective bargaining. Citing *Smith* and *Knight*, the court recognized that there is no right to collectively bargain and that "Wisconsin was free to impose any of Act 10's restrictions on all unions." *WEAC v. Walker*, 705 F.3d at 653. In other words, the Seventh Circuit rejected the very proposition that the Unions advance here.

Finally, it is noteworthy that the Unions challenging Act 10 in *WEAC v. Walker* declined to seek *certiorari*.

II. THE STATE IS FREE TO RESTRICT THE SCOPE OF COLLECTIVE BARGAINING.

Realizing that the Unions' First Amendment claims could not survive a direct constitutional analysis, the circuit court below used an indirect approach to strike down Act 10. It relied on *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), a case holding that a public housing authority could not condition eligibility for public housing on

whether applicants had exercised their constitutional right to associate with specified "subversive" organizations. *Lawson* held that, while there is no right to public housing, the government may not condition its availability on whether tenants choose to exercise their constitutionally protected freedom of association. *Lawson, 270 Wis. at 287-288*, 70 N.W.2d at 615.

In the eyes of the circuit court, this case is comparable to *Lawson*. In its view, Act 10 "penalizes" employees who associate "for the purpose of recognition of their association as an exclusive bargaining agent." (App. at 138.) Thus, while acknowledging that there is no right to bargain collectively, the circuit court concluded that limiting the scope of bargaining discriminates against represented employees because, in theory, unrepresented employees could negotiate pay raises without limitation or bargain on any conceivable subject. This, in the circuit court's view, constitutes an "unconstitutional condition" similar to that imposed on the tenants in *Lawson*. It is no overstatement to say that the

circuit court's decision depends completely on its analogy to *Lawson*. But if the analogy is inapt, its decision falls. With respect, the analogy is unequivocally inapt.

A. Act 10 Imposes No Penalty Based on the Exercise of Constitutionally Protected Rights.

The circuit court's analogy to *Lawson* is a category error. The limitations of Act 10 are not triggered by the exercise of the constitutionally protected right to associate. Rather, employees are absolutely free to associate and none of the limitations complained of here are conditioned on such association. Indeed, a non-represented employee could join a union—even one trying to gain the power of exclusive representation—and bargain for anything he or she wanted. It is only if employees are successful in obtaining the statutory privilege of exclusive bargaining representation that their agent is bound by the legislature's limitations on that privilege.

Recognizing this, the Unions' brief is full of awkward circumlocutions designed to blur the critical distinction between free association and mandatory exclusive

representation over *all* employees. The Unions say that Act 10 penalizes municipal government's "association with a certified agent" (Unions' Br. at 11) or employees' "fundamental associational approach" to be "represented." (*Id*. at 12.) It places burdens, they say, on those "who choose the statutory privilege of collective bargaining by association with a certified agent." (*Id*. at 11.)

The circuit court's decision is similar. It complains of burdens imposed because employees "associate for the purpose of being the exclusive agent" or for joining a union "that bargains collectively for them." (App. 138-39.) But the Unions cannot conjure a right to compulsory exclusive representation and collective bargaining by recasting it as a right to "associate with a representative" or "to associate to bargain collectively." Choosing and exercising the statutory privileges of collective bargaining and exclusive representation are not exercises of the right of free association. If they were, employees would possess a

constitutional right to collectively bargain, something that even the circuit court concedes they do not have.

It is not an "unconstitutional condition" for the State to define a statutory privilege (the power of exclusive representation) in a narrow way. Indeed, Wisconsin has repeatedly changed the scope of collective bargaining (see *infra* pp. 15-19) and the federal government itself (along with many states) limits the scope of collective bargaining for public employees. *See* Civil Service Reform Act, 5 U.S.C. § 7117 (significantly limiting the scope of bargaining for federal sector employee unions). To elide the distinction between association and representation is inconsistent with the very notion that there is no constitutional right to collectively bargain.

Moreover, the Unions' argument that there is a constitutional right to choose to be exclusively represented is nonsensical because it ignores the right of employees *not* to be represented. As the Michigan Court of Appeals recently noted in upholding that state's elimination of compulsory

union dues and "fair share" agreements, "[f]or more than 35 years, from *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) to *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), the United States Supreme Court has reiterated that compulsory funding of unions by public sector employees raises critical First Amendment concerns." *UAW v. Green*, No. 314781, 2013 WL 4404430, slip op. at 16 (Mich. Ct. App. Aug. 15, 2013) (parallel citations omitted), *available at* http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/COA/20130815_C314781_29_314781.OPN.PDF (last visited Aug. 26, 2013).

The Michigan court further recognized the state's "power, indeed the duty, to protect and insure the personal freedoms of all citizens, including the rights of free speech and political association." *Id.* at 17. Of necessity, if there are constitutional rights at stake, as opposed to statutory privileges, then this includes protecting the rights of individual employees to refrain from being forced into exclusive representation by a union. Like Wisconsin, the Michigan legislature decided to

pass legislation protecting the rights of individual employees, which the Michigan appellate court recognized was permitted under the constitution.

B. Act 10 Contains No Penalty At All.

It is wrong to say that Act 10's limits on what a union can bargain for constitute a "penalty" because the scope of bargaining is not as broad as it might be. If the circuit court were correct in finding Act 10's limitations on bargaining to be a penalty, then *any* limitation on collective bargaining would be a "penalty." But recognition of an exclusive collective bargaining agent has always involved a package of benefits traded for limitations and restrictions on the scope of bargaining.

While it is certainly true that an individual employee can ask for a bigger raise, the public employer is entitled to tell that nonunion employee to "pound sand." The employer has no duty to negotiate with the individual employee. On the other hand, represented employees have the right, through their bargaining agent, to compel the employer to bargain on

a good faith basis, albeit on a limited amount of topics. Who is better off? That is a decision for each employee to make. Act 10 simply allows each employee to make the choice for individual or collective bargaining.

C. Even if the Exercise of Associational Rights Triggered a Penalty, There is No Unconstitutional Condition.

Finally, the circuit court's *Lawson* analysis fails to acknowledge oft-accepted limits on the "unconstitutional conditions" doctrine upon which *Lawson* itself is based. The two limitations that apply directly here are that: (1) a restriction on rights that is germane to the underlying statute is more likely to be permissible, while restrictions that are not germane are problematic, and (2) the government is not required to subsidize anyone's exercise of a right.

In *Lawson*, the penalizing condition, i.e., non-association with certain subversive organizations, was not germane to the benefit of public housing. But when a public benefit is contingent on forbearance from the exercise of a constitutional right that is germane to provision of the benefit,

it makes no sense to call it a penalty, and the condition is likely to be upheld. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), illustrates this point. There, the Supreme Court upheld a Puerto Rican statute that prohibited casinos from advertising. The Court majority concluded that the statute was germane to the law allowing the existence of casinos, because it directly reduced the negative impact of casinos by reducing demand for gambling. As a result, the Court upheld the law despite the First Amendment limitations. *Id.* at 340-44.

Here, unlike *Lawson*, the alleged restrictions on collective bargaining are directly related to the underlying law. Limiting the subjects of collective bargaining is directly related to a statute allowing collective bargaining to exist at all.

Further, it cannot be an "unconstitutional condition" for the government to decline to extend subsidies or advantages such as "fair share agreements" or "dues deductions" to unions (i.e., associations that are recognized and granted a

statutory privilege). In *Lyng v. UAW*, 485 U.S. 360 (1988), the Supreme Court held that a federal statute denying food stamps to strikers and their families was constitutional. While the law made it harder for employees to maintain a strike and may have pressured them to abandon the union, the government was not required to subsidize the exercise of that right and, therefore, the law did not impair the freedom of association or place an unconstitutional condition on its exercise. *Id.* at 366; *see also Cal. Corr. Peace Officers' Ass'n v. Gilb*, No. A128189, 2011 WL 828659 (Cal. App. Mar. 10, 2011) (the state's providing a smaller monetary contribution for dental benefits to union employees than nonunion employees did not violate the union's First Amendment rights because it did not prohibit employees from associating in any way for any purpose).

III. THE STATE HAS HISTORICALLY CHANGED WITH WHOM IT WILL NEGOTIATE FROM AN EMPLOYMENT STANDPOINT, WITHOUT VIOLATING THE U.S. OR WISCONSIN CONSTITUTIONS.

The Unions may contend that reliance on U.S. Supreme Court decisions is not persuasive because *Lawson* is a

decision by this Court, which may interpret the Wisconsin Constitution different from the U.S. Constitution. But *Lawson* itself holds that "Secs. 3 and 4, art. I, of the Wisconsin constitution, guarantee the same freedom of speech and right of assembly and petition as do the First and Fourteenth amendments of the United States constitution." 270 Wis. at 274, 70 N.W.2d at 608. The holding in *Lawson* regarding unconstitutional conditions is based not upon any unique aspect of Wisconsin law, but rather on the U.S. Supreme Court cases cited therein. *Id.* at 276-77, 70 N.W.2d at 609.

In fact, Act 10 is nothing more than the latest iteration in Wisconsin's long history of legislative changes to the rules for collective bargaining. No court has ever held—and it is unclear that anyone has ever seriously suggested—that this history of qualifications and limitations on collective bargaining is unconstitutional.

The Wisconsin Labor Relations Act of 1937 granted collective bargaining rights only to private-sector employees. Joseph E. Slater, *Public Workers: Government Employee*

Unions, the Law, and the State, 1900-1962, 167 (2004) ("Slater").

In 1959, Wisconsin started to shift from negotiations with individual public employees toward negotiations with unions. In that year, certain municipal employees, but not public safety employees, were granted limited collective bargaining privileges. The 1959 statute, 1959 Wis. Laws, ch. 509, § 1, however, limited the scope of collective bargaining to only wages, hours, and conditions of employment, and did not require Wisconsin public employers to negotiate in good faith. Wis. Stat. § 111.70(2) (1959); *see also* Charles C. Mulcahy & Gary M. Ruesch, *Wisconsin's Municipal Labor Law: A Need for Change*, 64 Marq. L. Rev. 103, 107 (1980). No one contended that it was unconstitutional for public-sector employees' bargaining privileges to differ from private-sector employees', nor for some public employees, including police, to have no bargaining privileges at all. Slater, *supra* at 181-84. Importantly, no one suggested that

limiting the subjects for collective bargaining by public-employee unions was unconstitutional.

In 1962, Wisconsin enacted Bill 336-A, which strengthened public-employee collective bargaining. But it neither provided state employees with bargaining, nor permitted compulsory union fees. 1962 Wis. Laws, ch. 663; Slater, *supra* at 189-91. No one seriously suggested that the absence of compulsory dues was an unconstitutional burden. And despite the 1962 changes, the scope of bargaining remained limited. *Id.* at 191; Gregory M. Saltzman, *A Progressive Experiment: The Evolution of Wisconsin's Collective Bargaining Legislation for Local Government Employees*, 15 J. of Collective Negotiations in the Pub. Sector 1, 11 (1986) ("Saltzman").

Wisconsin state employees were first given limited bargaining rights in 1965. Slater, *supra* at 191. However, not until 1971 were police granted the privileges of exclusive representation and collective bargaining. Concurrently, public

employers were forced, for the first time, to bargain in good faith. Saltzman, *supra* at 11.

This historical recitation shows that Act 10 fits comfortably in Wisconsin's tradition of changing attitudes toward public-employee collective bargaining. It revives greater dialog between individual employees and public employers, and reestablishes a lesser form of dialog between the State and unions, by limiting the scope of mandatory bargaining.

If the circuit court is correct that the First Amendment limits the State's ability to determine its level of dealings with public employees, then all of the bargaining laws Wisconsin has passed since 1937 have violated the First Amendment. If the circuit court is correct that the Equal Protection Clause is violated when bargaining laws do not apply equally to all employees—represented by unions or not—then the State has a long history of equal protection violations. But, of course, the circuit court is not correct. The State's decision to make these changes over time, including the changes in Act 10, is a

matter of concern for the citizens and their legislature, not for the constitution and the courts.

CONCLUSION

For these reasons, the circuit court's holding that Act 10 is unconstitutional should be reversed and the constitutionality of Act 10 upheld.

Respectfully submitted,

Dated: 8/27/2013 /s/ RICHARD M. ESENBERG

Richard M. Esenberg, WBN 1005622
Brian W. McGrath, WBN 1016840
Thomas C. Kamenick, WBN 1063682
Wisconsin Institute for Law & Liberty
1139 East Knapp Street
Milwaukee, WI 53202
Telephone: (414) 727-9455
Email: rick@will-law.org
brian@will-law.org
tom@will-law.org

Milton L. Chappell (*pro hac*)
Nathan J. McGrath (*pro hac*)
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Telephone: (703) 321-8510
Facsimile: (703) 321-9319
Email: mlc@nrtw.org
njm@nrtw.org

Bruce N. Cameron (*pro hac*)
Reed Larson Professor of Labor Law
Regent University School of Law
Robertson Hall # 353
1000 Regent University Drive
Virginia Beach, VA 23464
Telephone: (757) 352-4522
Facsimile: (757) 352-4571
Email: bcameron@regent.edu

Attorneys for Amici

CERTIFICATE OF COMPLIANCE WITH
RULE 809.19(8)(b) AND (c)

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with proportional serif font. This brief is 2,974 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: August 27, 2013 /s/ RICHARD M. ESENBERG
RICHARD ESENBERG

CERTIFICATE OF COMPLIANCE
WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: August 27, 2013 /s/ RICHARD M. ESENBERG
RICHARD ESENBERG

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SUPREME COURT

Case No. 2012 AP 2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

On Appeal from the Decision and Final Order dated
September 14, 2012 in Dane County Circuit Court
Case No. 2011 CV 3774, The Honorable
Juan B. Colas, Presiding, and on Certification from the
Court of Appeals (District IV)

BRIEF OF AMICI CURIAE WISCONSIN EDUCATION ASSOCIATION COUNCIL, AFSCME DISTRICT COUNCILS 24, 40 and 48, AFT-WISCONSIN, SEIU HEALTHCARE WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS AND STATE OF WISCONSIN AFL-CIO

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
thawks@hq-law.com

Marianne Goldstein Robbins
SBN 1015168
Attorney for Wisconsin State AFL-CIO
The Previant Law Firm, S.C.
PO Box 12993
Milwaukee, WI 53212-0993
(414) 223-0433
(414) 271-6308 Fax
mgr@previant.com

Stephen Pieroni, SBN 1015275
Attorney for WEAC
Wisconsin Education Ass'n Council
PO Box 8003
Madison, WI 53708-8003
(608) 276-7711
(608) 276-8203 Fax
pieronis@weac.org

Peggy A. Lautenschlager
SBN 1002188
Attorney for AFSCME Council 24
Bauer & Bach, LLC
123 East Main Street, Suite 300
Madison, WI 53703-3360
(608) 260-0292
(608) 260-0002 Fax
lautenschlager@bauer-bach.com

Aaron N. Halstead, SBN 1001507
Attorney for AFSCME Council 40
Hawks Quindel, S.C.
PO Box 2155
Madison, WI 53701-2155
(608) 257-0040
(608) 256-0236 Fax
ahalstead@hq-law.com

Barbara Zack Quindel, SBN 1009431
Attorney for SEIU Healthcare Wisconsin
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
bquindel@hq-law.com

Jeffrey P. Sweetland, SBN 1001737
Attorney for the Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
jsweetland@hq-law.com

Mark A. Sweet, SBN 1024320
Attorney for AFSCME Council 48
Sweet and Associates, LLC
2510 East Capitol Drive
Milwaukee, WI 53211
(414) 332-2255
(414) 332-2275 Fax
msweet@unionyeslaw.com

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Amici curiae Wisconsin Education Association Council; Wisconsin State Employees Union, AFSCME District Council 24, AFL-CIO; Wisconsin Council of County and Municipal Employees, AFSCME District Council 40, AFL-CIO; AFT–Wisconsin, AFL-CIO; Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO; the Wisconsin State AFL-CIO; SEIU-Healthcare Wisconsin, CTW, CLC; and AFSCME District Council 48, AFL-CIO are statewide or regional labor organizations that represent, either directly or through their local affiliates, approximately 100,000 public employees. They file this Brief in support of affirmance of the trial court's decision.

INTRODUCTION

Cooperation among people who hold a common goal improves their prospect of achieving it. For public employees seeking to improve conditions of employment and advance their economic and employment security, their choice is to negotiate with their employers individually or cooperatively, in association with fellow employees. Before enactment of the Municipal Employment Relations Act (MERA), local governments voluntarily recognized and negotiated with their employees' associations, reducing their agreements to writing. AFSCME locals and District Councils, local affiliates of WEAC, the Wisconsin AFL-CIO, AFT and SEIU, representing tens of thousands of Wisconsin public sector employees, were first chartered in the three decades preceding Wisconsin's first public sector bargaining law. JOSEPH E. SLATER, PUBLIC WORKERS 165 (2004).

Act 10 constitutionally burdens employees' right to associate with one another to improve their employment conditions by making illegal: collective negotiation with employers as existed pre-MERA on virtually all matters of importance to employees; retention of selected

representatives; support of representatives through the nearly universal practice of voluntary payroll deduction of union dues and the payment of fair share fees to cover the cost to negotiate and enforce a bargaining agreement. Act 10 has thus reduced MERA to an instrument which destroys constitutional rights.

Notably, this Court has recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Elections Bd. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 664, 597 N.W.2d 721 (1999) (citations omitted). This association is a constitutionally protected freedom, and it extends to labor union activities. *State Emp. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126 (2d Cir. 2013). Nevertheless, after Act 10, in order for employees to address the full range of bargaining issues with their public employer, they must relinquish their right to join a union.

Amici curiae here distinguish *Wisconsin Educ. Ass'n Council v. Walker,* 705 F.3d 630 (7th Cir. 2013), and show that three components of Act 10 violate the Wisconsin and U.S. Constitutions.

I. THE SEVENTH CIRCUIT'S DECISION IN *WISCONSIN EDUC. ASS'N COUNCIL v. WALKER* ADDRESSED DIFFERENT CONSTITUTIONAL ISSUES AND IS DISTINGUISHABLE FROM THIS MATTER

The decision in *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 630 (7th Cir. 2013), is not binding on this litigation because it addressed constitutional claims not addressed here. That case raised an equal protection claim based on the legislative gerrymandering of classes of public employees. Specifically, it addressed the peculiar coincidence of the state employees who performed public safety functions,

but were excluded from or included in the definition of "public safety employee" in exact coincidence with their labor organizations' endorsement or lack of endorsement of the administration in the prior election. There, plaintiffs agreed that the constitutional inquiry was subject to a rational basis test. The court concluded that the administration's defense – that but for the discriminatory classification, public safety employees might engage in unlawful work stoppages – was sufficient to survive a rational basis challenge.

In contrast, Plaintiffs in this litigation challenge the constitutionality of Act 10 in a dramatically different way. Here Plaintiffs challenge Act 10 as violating the constitutional rights of employees who choose to associate with one another to advance their wages and employment conditions and choose a governmentally-granted power to bargain with their employers. This matter presents a unique inquiry: do the federal and Wisconsin constitutions allow Act 10 to treat employees who have a right to engage in collective bargaining, however circumscribed, differently from employees who are not represented? This is a unique issue that was not addressed by the federal courts in *Wisconsin Educ. Ass'n Council v. Walker* and is subject to the highest level of scrutiny.

The discriminatory effect of Act 10 on employees who choose representation is real. For example, prior to Act 10, public employers could retain nursing staff by increasing the salaries of AFT- and SEIU-represented nurses above the consumer price index (CPI), whether or not they selected union representation. Act 10 now penalizes the same nurses if they choose to associate for collective bargaining by limiting their wage increases to the CPI, unless there is a referendum, while any non-represented nurses may receive unlimited pay raises without a referendum. The union nurse also owes more for that association: she must pay a proportionate share of the filing fee for Act 10's annual recertification election, costs associated with the election and any challenges to it, even if

no employee requested the election. If her union is recertified, it can bargain only total base wages; it is prohibited from bargaining additional compensation for experience or any other term or condition of employment, even with a willing employer.

Defendants take great pains to reconstruct and redefine the Plaintiffs' claims to fit jurisprudence holding that collective bargaining is not a fundamental right, thereby removing the Plaintiffs' claims from this Court's strict scrutiny. However, as *amici* argue below, Act 10 discriminates against employees based on whether they select union representation. Act 10 burdens their right to associate and is subject to this Court's most stringent scrutiny.

II. ACT 10 INFRINGES EMPLOYEES' FREEDOM OF ASSOCIATION

In the First Amendment, the federal Constitution protects the right to petition the government for redress of grievances, including the right of an association. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). Employees have a constitutional right to associate *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (finding an implicit right of association in the First Amendment). And the right of association includes right to unionize, *Thomas v. Collins*, 323 U.S. 516 (1945). "[I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the due-process clause of the Fourteenth amendment from invasion of the states." *Lathrop v. Donohue*, 10 Wis.2d 230, 236, 102 N.W.2d 404 (1960) (citing *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958), *Lawson v. Housing Authority*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955)).

Under the Wisconsin Constitution, "[t]he right of the people…to consult for the common good, and to petition the government, or any department thereof, shall never be

abridged." Wis. Const. art. I, §4. "The right of petition may be conceded to be an inherent right of the citizen under all free governments." *In re Stolen*, 193 Wis. 602, 631, 214 N.W. 379 (1927). *See also Jacobs v. Major*, 139 Wis.2d 492, 506, 407 N.W.2d 832 (1987) ("State constitution Bills of Rights set the limit beyond which 'no human legislation should be suffered to conflict with the rights declared to be inherent and inalienable'"). What is guaranteed is that the State will pass no law "abridging" this fundamental freedom. *In re Stolen*, 193 Wis. at 631.

"[T]he constitutional basis for the freedom of association appears to be several constitutional guarantees, including the various rights of free speech, free press, petition, assembly, and voting." *Weber v. Cedarburg*, 129 Wis.2d 57, 68, 384 N.W.2d 333 (1986). In Wisconsin, consideration of one's association as a negative factor in a legal proceeding constitutes an infringement of that right. *See Helling v. Lambert*, 2004 WI App 93, ¶8, 272 Wis.2d 796, 801, 681 N.W.2d 552 (mother's rights to freedom of association abridged by taking into account her non-marital association, absent proof of harm to the child). Association thus cannot be even "a factor" in determining the rights of citizens.

While a government may ignore a public sector union, it may not penalize participation or withhold a benefit because the petitioner associated in an organization or petitioned through an organization. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979). "Plainly efforts of public employees to associate together for the purpose of collective bargaining involve associational interests which the First Amendment protects from hostile state action." *Labov v. Lalley*, 809 F.2d 220, 222-223 (3rd Cir. 1987).

> Not only does the First Amendment freedom of association protect public employees from retaliation for participation in a union with which their employers have signed a collective-bargaining agreement,…but …"[t]he

> unconstitutionality of retaliating against an employee for participating in a union [is] clearly established."

Shrum v. City of Coweta, 449 F.3d 1132, 1139 (10th Cir. 2006).

Public employees may not be punished merely because they associate in or petition through a union:

> [A] governing body… may not deny a representative of a public employees association the opportunity to be heard on employment matters, absent compelling justification. Such discrimination without a compelling interest on the part of the government offends the Constitution under both First Amendment and equal protection analyses.

Hickory Fire Fighters Ass'n v. Hickory, 656 F.2d 917, 920 (4th Cir. 1981). In *Hickory*, the governmental body permitted non-union speakers but prohibited speakers who were representatives or members of labor organizations. As *Hickory* indicates, the state's interest to burden these rights must be "compelling," not merely "rational."

Act 10 abridges general municipal employees' right to petition in this forbidden way. It prohibits union-represented workers from bargaining a base wage increase above the CPI unless their employer submits the issue to referendum. Wis. Stat. §111.70(4)(mb). Their right to petition is burdened because of their association, and because of that association, the governmental body is affirmatively prohibited by statute from listening to and acting upon the petition.

Act 10 does not limit non-represented employees' demands or the municipal governmental authorities' response to such petitions. Non-union-represented employees can demand any wage increase, regardless of the CPI, and the authority may agree without a referendum. Non-union-represented workers are not prohibited from petitioning upon any other lawful subjects, for example, working hours, shift preference, or any topics traditionally subject to collective

bargaining. Identical demands are prohibited subjects of collective bargaining, and therefore illegal, if made by a union representing general employees. Wis. Stat. §111.70(4)(mb)1.

It is not sufficient that unionized public employees are permitted to express their views if the employers, by statute, are prohibited from making a meaningful response. The essence of the right to petition the government and to associate with others for that purpose is to plead to an authority with the power to redress the grievance. The petition clause is not a mere safety valve. By making it impossible for the decision maker to grant the petition, Act 10 violates the First Amendment and Wis. Const. art. I, §§3-4.

It is no answer to say that union members can obtain the right to petition individually by declining representation. Requiring the employee to drop his association with the union to be heard is exactly the evil the freedom of association was designed to prohibit. The mother in *Helling v. Lambert*, *supra*, was given the unconstitutional option of ceasing her relationship with her non-marital partner to have custody of her children. It is precisely this requirement that constitutes the infringement of the right.

Act 10 unconstitutionally penalizes participation in unions. It closes off the right to petition local governmental bodies for the airing of grievances. The differential treatment of non-union and union employees exposes this legislation as one designed to erect barriers to the right to petition and to burden the freedom of association for a disfavored class. To justify such infringement, the State must show a compelling interest. There is none.

III. ACT 10'S ELIMINATION OF VOLUNTARY PAYROLL DEDUCTIONS FOR UNION DUES VIOLATES THE FREEDOM OF EXPRESSION AND ASSOCIATION OF REPRESENTED EMPLOYEES

Act 10 prohibits voluntary dues deduction for "general" employees, but allows payroll deduction for union dues of "public safety" employees and for any other type of employee organization. Wis. Stat. §§20.921(1)(a)2; 111.70(3g). This prohibition violates the Wisconsin Constitution.

The Wisconsin Constitution, Article I, Section 3, protects free speech. "Every person may freely speak, write and publish his sentiments on all subjects...and no laws shall be passed to restrain or abridge the liberty of speech...." The Wisconsin Supreme Court has specifically recognized the importance of allowing equal access to dues deduction where dues deduction is allowed. "While the majority representative may negotiate for check off, he is negotiating for all the employees, and if check off is granted for any, it must be granted for all." *Board of School Directors v. WERC*, 42 Wis.2d 637, 649, 168 N.W.2d 92 (1969).

Access to payroll deduction implicates the right to free speech. *See, UFCW Local 99 v. Brewer*, 817 F.Supp.2d 1118 (D.Ariz. 2011) (law excluding union deductions for political purposes violates First Amendment); *see also, Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 490 (1981) (voluntary contributions to group engaged in political activity is expression protected by First Amendment). Act 10 is distinguishable from the regulations in *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358-59 (2009), since it specifically carves out one type of expressive association, "general" employee unions, to exclude from payroll deduction.

The use of payroll deduction systems implicates access to nonpublic forums. *See e.g. Pilsen Neighbors Community*

Council v. National Consumers Foundation, 960 F.2d 676 (7th Cir. 1992) (use of state's payroll deduction system); *United Black Community Fund v. City of St. Louis*, 800 F.2d 758, 759 (8th Cir. 1986) (use of city's payroll deduction system).

When the law discriminates against payroll deduction by an identifiable group that is engaged in the business of speech, heightened or strict scrutiny is applied to determine whether a challenged regulation violates the right to free speech. *UFCW Local 99 v. Brewer*, 817 F. Supp.2d at 1123-27 (applying strict scrutiny).

Thus, where a law places restrictions on an employee's ability to donate through payroll deductions to an organization depending upon the organization's identity, it infringes on a fundamental right. It therefore violates the Wisconsin Constitution's provisions protecting its citizen's rights of expression and equal treatment under the law.

IV. ACT 10'S RECERTIFICATION PROVISIONS BURDEN FIRST AMENDMENT RIGHTS AND VIOLATE EMPLOYEES' RIGHT TO EQUAL PROTECTION

Where the State has provided public employees the right to select a representative, the ability to exercise that right is an exercise of freedom of association which cannot be penalized. The Act 10 annual recertification election requirement does just that.

Under Wis. Stat. §111.70(4)(d)3.b, recertification elections must be held annually or "general" employees' representatives are automatically decertified. The statute requires that the Commission "assess and collect a certification fee for each election conducted," to be credited "to the appropriation account under section 20.425(1)(i), not to administer elections." Only "general" employees must

annually expend resources on an election process to exercise their right to select a representative.

Moreover, Act 10 skews the elections against employees favoring union representation. The representative union loses recertification unless it receives the vote of 51% "of all of the general municipal employees in the collective bargaining unit." If 70% of employees vote and 70% of those voting select the certified representative, it is decertified. Under these provisions, virtually no president or member of Congress would have been elected.

Because the freedom of association is at stake, the annual recertification provisions can only be justified on the basis of a compelling state interest. Where election procedures differ to deprive certain citizens of fundamental rights, the election procedures violate the Fourteenth Amendment of the United States Constitution. "Making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation...was 'no more permissible than [is denying members of a racial minority] the vote, on an equal basis with others." *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) (emphasis in original); *see also Hunter v. Erickson*, 393 U.S. 385 (1969).

When a state chooses to confer the right of referendum on its citizens, it is "obligated to do so in a manner consistent with the constitution." *Meyer v. Grant*, 486 U.S. 414 (1988). *See Gray v. Sanders*, 372 U.S. 368, 379 (1963)(although Georgia is not obliged to adopt a state primary procedure, once it has done so the state was required to give "all who participated in the election. . .an equal vote. . . ." *See also, Cipriano v. Houma*, 395 U.S. 701 (1969).

Here, Act 10 provides that general employees' selected representatives may be removed annually even if no employee seeks an election and the vast majority reaffirms their selection. If 70% of the 70% voting select union

representation, they will be defeated by a 30% vote against representation. Stated otherwise, the recertification procedure of Act 10 discriminates against any employee voting for union representation by counting his vote as less determinative of outcome than a vote against union representation or even a decision not to vote. This result runs afoul of basic voting rights:

> In effect, the political-process doctrine hews to the unremarkable notion that when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner's course.

Coalition To Defend Affirmative Action v. Regents of University of Michigan, 701 F.3d 466, 474 (6th Cir. 2012).

Having provided for selection of representatives, Act 10's separate and discriminatory requirements for voting to select a collective bargaining representative violate employees' rights to free association and equal protection of the laws of Wisconsin.

CONCLUSION

Act 10's array of bargaining prohibitions and mandatory annual elections cannot stand against the rights of free association and free speech secured to citizens by the federal and Wisconsin Constitutions.

Dated this 28th day of August, 2013.

Respectfully submitted,

S/_____

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442

(414) 271-8650
(414) 271-8442 Fax
thawks@hq-law.com

S/_____
Marianne Goldstein Robbins, SBN 1015168
Attorney for Wisconsin State AFL-CIO
The Previant Law Firm, S.C.
PO Box 12993
Milwaukee, WI 53212-0993
(414) 223-0433
(414) 271-6308 Fax
mgr@previant.com

Stephen Pieroni, SBN 1015275
Attorney for Wisconsin Education
Association Council
PO Box 8003
Madison, WI 53708-8003
(608) 276-7711
(608) 276-8203 Fax
pieronis@weac.org

Peggy A. Lautenschlager, SBN 1002188
Attorney for AFSCME Council 24
Bauer & Bach, LLC
123 East Main Street, Suite 300
Madison, WI 53703-3360
(608) 260-0292
(608) 260-0002 Fax
lautenschlager@bauer-bach.com

Aaron N. Halstead, SBN 1001507
Attorney for AFSCME Council 40
Hawks Quindel, S.C.
PO Box 2155
Madison, WI 53701-2155
(608) 257-0040

(608) 256-0236 Fax
ahalstead@hq-law.com

Barbara Zack Quindel, SBN 1009431
Attorney for SEIU Healthcare Wisconsin
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
bquindel@hq-law.com

Jeffrey P. Sweetland, SBN 1001737
Attorney for the Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
jsweetland@hq-law.com

Mark A. Sweet, SBN 1024320
Attorney for AFSCME District Council 48
Sweet and Associates, LLC
2510 East Capitol Drive
Milwaukee, WI 53211
(414) 332-2255
(414) 332-2275 Fax
msweet@unionyeslaw.com

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2939 words.

Dated this 28th day of August, 2013.

Signed:

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442 Fax
thawks@hq-law.com

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Dated this 28th day of August, 2013.

Signed:

Timothy E. Hawks, SBN 1005646
Attorney for AFT-Wisconsin, AFL-CIO
Hawks Quindel, S.C.
PO Box 442
Milwaukee, WI 53201-0442
(414) 271-8650
(414) 271-8442
thawks@hq-law.com

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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2012-AP-2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

On Appeal from the Decision and Final Order Dated September 14, 2012 in Dane County Circuit Court Case 11-CV-3774, The Honorable Juan B. Colas, Presiding, on Certification From the Court of Appeals, District IV

AMICI CURIAE BRIEF FOR WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION AND COMMUNITY INSURANCE CORPORATION

Phillips Borowski S.C.
Andrew T. Phillips, WBN 1022232
Daniel J. Borowski, WBN 1011636
Jacob J. Curtis, WBN 1072735

10140 N. Port Washington Road
Mequon, WI 53092

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INTRODUCTION

Before this Court is the constitutionality of Act 10 which was enacted by the legislature to provide economic and workplace management relief to municipal employers. Act 10 fundamentally altered municipal employee relations by eliminating all but total base wage bargaining for general municipal employee groups thereby freeing municipal employers to make needed economic and operational changes in a declining economic environment without having to bargain those changes with employee union groups. Act 10 further increased regulations on general municipal employee collective bargaining by requiring annual union recertification elections for general municipal employees and prohibiting union due withdrawals and fair share agreements.

The Circuit Court and the opponents of Act 10 have impermissibly portrayed the legislation as something it plainly is not: unconstitutional. Public sector collective bargaining is a creature of legislative grace and may be granted, regulated and eliminated at the will of the legislature without running afoul of constitutional principles. The Circuit Court's conclusion that Act 10 unconstitutionally "discriminates" against represented general municipal employees over their non-represented counterparts by restricting

bargaining to total base wages, placing a cap on what increases can be bargained without a referendum and imposing regulations on union elections and payroll deductions is flawed. Non-represented employees do not have *any* bargaining rights and, subject to federal and state employment laws, are at-will employees whose employment may be terminated at any time. By *preserving* the collective bargaining for general municipal employees, albeit on a limited basis, Act 10 left general municipal employees with bargaining privileges that are entirely unavailable to non-represented employees.

Assertions that Act 10 impermissibly impinges on the fundamental free speech, association and equal protection rights of general municipal employees have already been expressly rejected by the Seventh Circuit federal court of appeals. The Seventh Circuit upheld Act 10 against claims that Act 10 unconstitutionally imposed limitations on the permissible subjects of collective bargaining, imposed stricter recertification requirements and prohibited payroll deductions for union dues for general municipal employees. In upholding Act 10 "in its entirety," the Seventh Circuit ruled that Act 10 did not impair any fundamental First Amendment right—the union employees were free to speak as they saw fit, and by necessary extension, to associate with each other notwithstanding any of Act

10's limitations. Moreover, because no fundamental rights were impacted, the Court applied a rational basis test to Act 10's provisions which created two classes of employees with bargaining privileges and upheld these classifications under an equal protection challenge.

Any deviation from the constitutional analysis employed by the Seventh Circuit will have devastating financial consequences to municipal employers who have been utilizing the provisions of Act 10 to meet their financial obligations and to maintain service levels in light of reductions in state revenues and declining economic conditions. The Circuit Court's unprecedented constitutional analysis and rewrite of Act 10 imposes collective bargaining and financial obligations on municipal employers for which they have no money to pay. The decision represents an unfunded mandate which, in the absence of further appropriations from the legislature or an increase in the property tax levy, will put many municipal governments on the brink of insolvency with only the choice of cutting needed services to survive.

Act 10 is in all respects constitutional. This Court should reverse the decision of the Circuit Court and uphold Act 10 "in its entirety."

ARGUMENT

I. THE CIRCUIT COURT'S ANALYSIS IS BASED ON THE FLAWED ASSUMPTION THAT NON-REPRESENTED PUBLIC EMPLOYEES HAVE BARGAINING PRIVILEGES.

The Circuit Court's constitutional analysis rests on its finding that Act 10 penalizes general municipal employees for seeking to remain represented. As the story adopted by the Circuit Court goes, Act 10 required general municipal employees to "surrender" negotiating "rights" otherwise available to them as non-represented employees in order "choose to associate" in a labor organization and exercise the privilege to collectively bargain with their municipal employers. In reaching this conclusion, the Circuit Court took specific issue with Act 10's cap on the permissible increase in total base wages that can be bargained without a referendum, the prohibition on union due deductions and fair share agreements and the union recertification election requirements.

The Circuit Court's analysis is based on a fundamental misunderstanding of employment law in Wisconsin and the "rights" of non-represented employees and is simply wrong. Under Wisconsin law, non-represented employees are at-will employees who have *no rights* to negotiate or receive any level of wages or benefits, much less one that is capped by the

CPIU. *See Dunn v. Milwaukee County*, 2005 WI App 27, ¶¶ 10-11, 279 Wis.2d 370, 693 N.W.2d 82. A municipal employer correspondingly has absolutely no duty to bargain with a non-represented employee over total base wages or any other matter.

Rather than requiring general municipal employees to "surrender" benefits as the Circuit Court contends, Act 10 actually provides benefits to employees who decide to join a union which are unavailable to non-represented employees. These include the ability to require their municipal employers to: (1) meet and confer at reasonable times; (2) in good faith; (3) with the intention of reaching an agreement or to resolve questions arising under an agreement; (4) with respect to total base wages. *See Wis. Stat. § 111.70(1)(a).* General municipal employees further have recourse through the WERC and/or the circuit courts to compel a municipal employer in the event that a municipal employer refuses to bargain.

Act 10 further provides general municipal employees with the benefits of both the represented and non-represented employee worlds. In this regard, Act 10 only prohibits general municipal employees from *collectively bargaining* base wages increases beyond the CPIU without a referendum. Act 10 does not prohibit general municipal employees from individually

receiving (through negotiation or unilateral employer action) any other form of compensation, such as overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions which could result in increases greater than the CPIU. General municipal employees therefore get to compel their municipal employers to collectively bargain while at the same time maintain the ability to individually negotiate total compensation increases above the CPIU.

General municipal employees also are in the same level as their non-represented counterparts as it relates to prohibition of dues deductions and fair share agreements as well as recertification elections. In this respect, non-represented employees have *no* ability to compel their employers to subsidize any groups to which they belong, to compel the government to collect dues from employees who are not part of a particular non-represented employee group or to enjoy any lesser restrictions on collective bargaining in the event they decide to unionize.

The Circuit Court's finding that Act 10 is unconstitutional because it requires employees who wish to remain in a union to surrender certain rights is groundless. Accordingly, the Circuit Court's decision should be reversed.

II. THE CLASSIFICATIONS AND REGULATIONS IMPOSED BY THE LEGISLATURE IN ENACTING ACT 10 ARE CONSTITUTIONAL.

A. The Seventh Circuit Applied Traditional Constitutional Analysis to Find Act 10 Constitutional in its Entirety.

The Seventh Circuit found Act 10 constitutional based upon the fundamental premise that "Wisconsin was free to impose any of Act 10's restrictions on all unions." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 653 (7th Cir. 2013). The Court recognized that public employees have no constitutional right to collectively bargain—any privilege granted to do so is created by statute. *Id.* Because collective bargaining privileges are statutory in nature, the Court found that the legislature could constitutionally extend, regulate and limit the ability of public employees to collectively bargain in accordance with the budgetary and other needs of the State. *Id.*

In upholding Act 10, the Court first found that Act 10's payroll deductions limitations did not violate employees' First Amendment speech or association rights. *Id.* at 645. The Court found use of the state's payroll systems to collect union dues is a state subsidy of speech that only requires viewpoint neutrality. *Id.* Applying this rule, the Court proceeded to determine that that the challenged payroll provisions of Act 10 were

viewpoint neutral because they did not place any obstacles in the way of expressing any particular viewpoint and were not a façade for invidious discrimination. *Id.* at 646-652. Because the payroll provisions did not impact any fundamental First Amendment right, the Court determined that rational basis review of Act 10 was appropriate. *Id.* at 645, 652-653.

The Court proceeded to analyze whether the legislature's decision to provide different collective bargaining privileges to general municipal and public safety employees passed constitutional muster. Applying a rational basis review, the Court concluded that the different levels of privileges provided to general municipal and public safety employees were in all respects constitutional. *Id.* at 653-656. The Court recognized that the legislature could have rationally determined that it was necessary to differentiate and provide greater bargaining rights to public safety employees in order to avoid labor unrest among public safety employees. *Id.* at 655. The Court refused to second guess the line drawn by the legislature between general municipal and public safety groups because it was for the legislature, not the courts, to establish such classifications. *Id.*

The Court also upheld Act 10's recertification requirements. *Id.* at 656-657. The Court found that the State had a rational basis in requiring

general municipal unions to annually recertify (rather than allowing automatic recertification) in order to ensure that union employees remained committed to the union cause. *Id.*

Finally, the Court upheld Act 10's provisions prohibiting payroll deductions for union dues for general municipal employees. *Id.* at 657. The Court found that nothing constitutionally required the State of Wisconsin to assist general municipal unions in funding the expression of their ideas through payroll deductions. *Id.* at 657. The Court emphasized that the First Amendment only prohibits the government from imposing obstacles on the exercise of First Amendment Rights – it does not require the government to subsidize speech. *Id.* at 647-648, 657.

B. This Court Should Uphold the Constitutionality of Act 10 Based on the Seventh Circuit's Decision.

Act 10's provisions do not run afoul of the United States or Wisconsin constitutions. Rather, they reflect the legislature's policy decision to strictly regulate the subject matter which may be collectively bargained, the rules under which bargaining may take place, the union activities which may be subsidized and the monetary obligations which a municipal employer may undertake in a collective bargaining agreement.

The Circuit Court's conclusion that Act 10 burdened the exercise of free speech and associational rights by imposing regulations on the ability of general municipal employees to organize, bargain and subsidize their operations was in all respects rejected by the Seventh Circuit. The Seventh Circuit correctly found that Act 10 constitutionally regulated collective bargaining and placed regulations on subsidizing general municipal unions through payroll deductions because none of these provisions place obstacles in the way of free speech or associational rights.

The classifications of employees drawn by Act 10 and the restrictions imposed on general municipal employee bargaining privileges pass constitutional muster under a rational basis test. At the time Act 10 was passed, the State of Wisconsin had a deficit in excess of three billion dollars and local governments were financially in no better position. The legislature determined that the cost of collective bargaining was prohibitive and unsustainable – the costs of employee wages and benefits as reflected in long-term collective bargaining agreements engulfed local government budgets and jeopardized the ability of governments to provide needed services to citizens. The legislature made changes to the statutory scheme of collective bargaining to enhance local governments' ability to manage

budgets and achieve financial stability, to ensure that union activities were no longer subsidized by the government and unwilling bargaining unit participants and to certify that general municipal unions have the support of the majority of the bargaining unit members.

The Seventh Circuit upheld the constitutionality of Act 10 in its entirety. Based on the Seventh Circuit's decision, this Court should uphold Act 10 as well.

III. THE CIRCUIT COURT'S FLAWED ANALYSIS HAS DEVASTATING ECONOMIC CONSEQUENCES TO MUNICIPAL EMPLOYERS.

A. The Impact of Restored Bargaining.

Since its passage, municipal employers have relied on the changes codified in Act 10, as they were required to do, and have made system-wide changes to create efficiencies to counteract the dramatic cuts in state aid and levy limits that accompanied Act 10 as well as struggling local economies. Act 10 has allowed municipal employers to move forward with necessary financial and operational changes without asking unions for permission to do so. The flexibility provided by the legislation has allowed local governments to maintain service and employment levels in a difficult, if not impossible, economic environment.

If the Circuit Court's unprecedented constitutional analysis is affirmed by this Court, the flexibility provided by Act 10 will be lost and the consequences to municipal employers in terms of money and resources will be devastating. Municipal employers will be faced with immediate demands and litigation to restore any "wages" lost by general municipal employees as a result of changes made under Act 10. Municipal employers simply do not have the financial resources to pay or litigate such claims—the reason municipal employers made changes to wages and benefits after Act 10 is because they did not have the resources to fund them in the first instance.

Moreover, under the "Act 10" drafted by the Circuit Court, municipal employers will be precluded from making any future changes required to sustain necessary services unless and until they bargain the changes in "good faith" with general municipal employee unions. Anyone remotely familiar with the bargaining process understands that the foregoing steps, even in the absence of interest arbitration, could take more than a year to accomplish and cost thousands of dollars in the bargaining process alone. These costs do not include inevitable costs and delays that will be incurred litigating issues such as good faith bargaining, the proper scope of the duty to bargain and the

definitions of "wages" or "hours and conditions of employment" under the Circuit Court's new law.

Equally important, while municipal employers are waiting for the bargaining process to be completed and litigation to be resolved, they will be required to fund existing levels of benefits under a "dynamic status quo" which they cannot afford. An additional tier of cost will be incurred once, if ever, agreements over wages, hours and conditions of employment are reached. Under Act 10, employers were free to make fiscal and operational changes (other than to total base wages) as often as they pleased. Under the Circuit Court's decision, however, this flexibility is gone. Municipal employers are tied into any deal for at least one year and, more importantly, have no ability to fix or cure detrimental financial consequences of a bargain without union permission—the purported duty to bargain over "wages" is forever present.

B. The Circuit Court's Decision Represents an Unfunded Mandate.

The Circuit Court did not provide municipal employers with any corresponding funding or ability to increase tax revenues to offset the costs of the bargaining process. As a natural result of the additional bargaining requirements and the costs associated with them, municipal employers will

be forced to take steps to either cut service levels or lay off employees until the required bargaining process necessary to make the changes can, if ever, be completed. If municipal employers still cannot pay their bills despite these efforts, they may be forced to consider bankruptcy which is an all too common occurrence among financially strapped municipal governments today. The cost of adopting the Circuit Court's unprecedented constitutional analysis of Act 10 is prohibitive and, accordingly, this Court should reject it.

CONCLUSION

For these reasons, the Circuit Court's holding that Act 10 is unconstitutional should be reversed and Act 10 upheld in its entirety.

Respectfully submitted this 4th day of September, 2013.

PHILLIPS BOROWSKI, S.C.
Attorneys for *Amici* County Mutual and CIC

By: /s/ Daniel J. Borowski
Andrew T. Phillips
State Bar No. 1022232
Daniel J. Borowski
State Bar No. 1011636
Jacob J. Curtis
State Bar No. 1072735

P.O. ADDRESS
10140 N. Port Washington Road
Mequon, WI 53092
Phone: (262) 241-7788
Fax: (262) 241-7779
Email: atp@phillipsborowski.com
djb@ phillipsborowski.com
jjc@phillipsborowski.com

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,629 words, calculated using the Word Count feature of the word processing system used to prepare this brief.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copes of this brief filed with the court and served on opposing parties.

I further certify that the required number of copies of the brief and appendix correctly addressed have been submitted for delivery to the Supreme Court on September 4, 2013.

Dated this 4th day of September, 2013.

By: /s/ Jacob J. Curtis
Jacob J. Curtis
State Bar No. 1072735

CERTIFICATE OF MAILING

Stacie Eric herein certifies that she is employed by Phillips Borowski, S.C., which is located at 10140 N. Port Washington Road, Mequon, WI 53092, assigned to the duties of Administrative Assistant; that on the 4th day of September, 2013, she caused to be filed twenty-two copies of the Brief of *Amici Curiae* Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation, in the above-entiled case with the Clerk of Wisconsin Supreme Court, 110 East Main, Suite 215, Madison, WI 53701-1688; and deposited in the U.S. mail, one copy of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

/s/ Stacie L. Eric

Stacie L. Eric

Bruce N. Cameron
Regent University School of Law
Robertson Hall #353
1000 Regent University Drive
Virginia Beach, VA 23464

Bruce F. Ehlke
Kathleen Meter Lounsbury
Ehlke, Bero-Lehmann & Lounsbury, S.C.
6502 Grand Teton Plz., Ste 202
Madison, WI 53719-1047

Aaron Halstead
Hawks Quindel S.C.
P.O. Box 2155
Madison, WI 53701

Stephen Pieroni
Kurt C. Kobelt
Wisconsin Education Association
P.O. Box 8003
Madison, WI 53708

Milton L. Chappell
Nathan J. McGrath
National Right to Work Legal Defense Foundation, Inc
8001 Braddock Rd, Suite 600
Springfield, Virginia 22160

Peggy A. Lautenschlager
Bauer & Bach LLC
123 E. Main Street, Suite 300
Madison, WI 53703

Marianne G. Robbins
Previant, Goldberg, Uelman, Gratz, Miller
1555 N. Rivercenter Drive, Suite 202
Milwaukee, WI 53212

Kevin M. St. John, Deputy Atty. General
Steven C. Kilpatrick, Steven P. Means
P.O. Box 7857, Madison, WI 53707-7857

N. Nicol Padway
Padway & Padway, Ltd.
633 W. Wisconsin Ave., #1900
Milwaukee, WI 53203-1908

Rudolph M. Konrad, Deputy City Atty.
Stuart S. Mukamal, Asst. City Atty.
200 E. Wells St., #800
Milwaukee, WI 53202-3515

Richard M. Esenberg
Thomas Claire Kamenick
WI Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, WI 53202-2828

Timothy E. Hawks
Barbara Z. Quindel
Hawks Quindel, S.C.
P.O. Box 442
Milwaukee, WI 53201-0442

Joseph Louis Olson
Michael Best & Friedrich LLP
100 E. Wisconsin Ave., Suite 3300
Milwaukee, WI 53202-4124

Michael P. Screnock
Michael Best & Friedrich LLP
P.O. Box 1806
Madison, WI 53202-4124

Lester A. Pines
Tamara Packard
Susan M. Crawford
122 W. Washington Ave., #900
Madison, WI 53703-2718

Michael P. May
City County Building, Rm. 401
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3345

John W. Strange, Jr
Asst. City Attorney
210 Martin Luther King, Jr. Blvd., #401
Madison, WI 53703-334