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RECEIVED 9/20/12

September 18, 2012

RECEIVED SEP 18

VIA HAND DELIVERY
The Honorable Juan B Colas
Circuit Court Judge, Br 10
Dane County Courthouse
215 S Hamilton Street
Madison, WI 53703-3285

Re: Madison Teachers Inc. et al v. Walker, et al
Dane County Case No: 11CV3774

Dear Judge Colas:

Enclosed please find for filing Defendants' Notice of Motion and Motion for Stay of the Court's Order Granting Summary Judgment, and Defendants' Brief in Support of Motion to Stay in the above-mentioned case. Copies are provided on this date to all other parties.

Thank you for your consideration.

Sincerely,

Steven C. Kilpatrick
Assistant Attorney General

SCK:mb
Enclosure
c w/enc.: Lester A Pines (*via E-mail & Hand Delivery)*
M. Nicol Padway (*via E-mail & U.S. Mail)*
Thomas C Kamenick (*via E-mail & U.S. Mail)*
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STATE OF WISCONSIN CIRCUIT COURT Branch 10 DANE COUNTY

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

Plaintiffs,

v.

Case No. 11CV3774

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

Defendants.

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR STAY OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT

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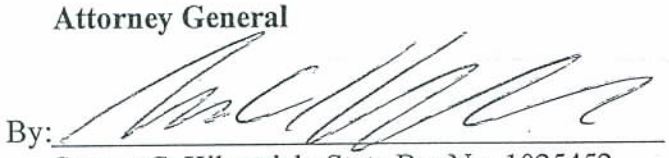
PLEASE TAKE NOTICE that at a time to be determined by the Court Defendants Scott Walker, James R. Scott, Judith Neumann and Rodney G. Pasch, by and through their attorneys, J.B. Van Hollen, Attorney General and Steven C. Kilpatrick, Assistant Attorney General, and Michael Best & Friedrich LLP, shall appear and move the Court for an order staying its Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings in the above matter, entered on September 14, 2012, pending Defendants' appeal of the Order. This motion will be heard at the Dane County Courthouse, 215 S. Hamilton Street, Madison, Wisconsin at a time and place to be set by the Court. Because of the public importance of the interests at issue, Defendants respectfully request that this motion be taken up and decided by the Court on an expedited basis and at the earliest possible opportunity. The motion and grounds therefore are set forth below and in the accompanying Brief in Support of Motion to Stay.

MOTION TO STAY

Defendants Scott Walker, James R. Scott, Judith Neumann and Rodney G. Pasch, by and through their attorneys, J.B. Van Hollen, Attorney General and Steven C. Kilpatrick, Assistant Attorney General, and Michael Best & Friedrich LLP, hereby respectfully move the Court pursuant to Wis. Stat. §§ 808.07 and 808.075(1) for an order staying its Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings in the above matter, entered on September 14, 2012, pending Defendants' appeal of the Order. The grounds for this motion are set forth in the accompanying Brief in Support of Motion to Stay. Because of the public importance of the interests at issue, Defendants respectfully request that this motion be taken up and decided by the Court on an expedited basis and at the earliest possible opportunity.

Dated this 18th day of September, 2012.

J.B. VAN HOLLEN
Attorney General

By: 

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STATE OF WISCONSIN CIRCUIT COURT
Branch 10

DANE COUNTY

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

Plaintiffs,

v.

Case No. 11CV3774

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

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STAY

Defendants Scott Walker, James R. Scott, Judith Neumann, and Rodney G. Pasch, by and through their attorneys, submit this brief in support of their motion for a stay of the Court's September 14, 2012 Order, pending Defendants' forthcoming appeal of the Order.

INTRODUCTION

2011 Wisconsin Act 10 is one of the most significant, and challenged, pieces of legislation in the history of this State. Act 10 offers flexibility to local governments to continue to provide governmental services, without increasing state aid, without raising taxes, and without large-scale layoffs. It also enhances the First Amendment interests of employees who do not wish to join or support a union as a condition of employment. These policy decisions generated unprecedented political debate. Unions frustrated by their less significant role in public employee-employer relations have launched an extraordinary legal effort by multiple plaintiffs in

multiple courts challenging Act 10 on multiple grounds. Until now, those attempts have been largely unsuccessful.

Now, over a year since Act 10 has been in effect and become the status quo of state and municipal public employee labor relations in Wisconsin, its status is uncertain. At some point, the litigation over Act 10 will be over and there will be a definitive answer as to whether it meets the requirements of state and federal constitutions. In the meantime, it does not serve the public interest for parts of the law to be invalidated only to have them restored on appeal. A stay would ensure that municipalities and school districts can determine employee compensation, design workplace policies, and plan their budgets without having the rug pulled out from under them if this Court's decision is reversed. Certainty – which is only possible once this case has made it through the appeals process – is what units of government, unions, government employees, and taxpayers need, especially when the ramifications are so consequential. A stay would ensure that the law of this state is followed – as it has been for over a year – unless and until it has been invalidated by our state's appellate courts after full consideration.

The proprietary of a stay is even greater as Defendants have a high probability of success on the merits. Indeed, the United States District Court for the Western District of Wisconsin has already upheld all but a few provisions against similar challenges. Moreover, the "right of state employees to bargain collectively with the state is an act of legislative grace." *Board of Regents v. Wisconsin Personnel Comm'n*, 103 Wis. 2d 545, 556, 309 N.W.2d 366 (Ct. App. 1981). It so follows that the Legislature can define the scope of a collective bargaining agent's power. Yet the Circuit Court's ruling applies novel theories of law that effectively converts a limited, statutory collective bargaining process, into labor code that cannot be altered without infringing

on fundamental constitutional rights. This theory, however, has no support in the federal or state constitutions or decisions interpreting those constitutions.

After weighing all of these factors, the Court should maintain the status quo and stay the Order until the Wisconsin appellate courts have ruled.

ARGUMENT

I. THE APPLICABLE STANDARD FOR ISSUING A STAY PENDING APPEAL

Wisconsin's civil procedure statutes permit the Court to stay the execution or enforcement of its Order, or make any other order appropriate to preserve the existing state of affairs, pending appeal. Wis. Stat. § 808.07(2). The Court may act on a stay motion prior to the initiation of an appeal. Wis. Stat. § 808.075(1). The party requesting a stay must make: (1) a strong showing that it is likely to succeed on the merits of its appeal; (2) a showing that, unless a stay is granted, the moving party will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that the stay will do no harm to the public interest. *Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986). These four factors are interrelated such that more of one may excuse less of another. *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995). Moreover, the likelihood of success is weighed along with the other factors and the degree of likelihood of success that justifies a stay in a particular case will depend on the relative strength of the other factors. *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶ 18 n.14, 237 Wis. 2d 498, 614 N.W.2d 565.

II. DEFENDANTS HAVE A SIGNIFICANT LIKELIHOOD OF SUCCESS ON APPEAL

The first factor, "success on the merits," requires a flexible application because any circuit court believing the party seeking the stay has a probability of success on appeal would

have denied all of Plaintiffs' claims in the first place. *See, e.g., Scullion*, 2000 WI App 120, ¶ 18 (noting that "it is not to be expected that a circuit court will often conclude there is a high probability that it has just erred"); see also *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977) ("Tribunals may properly stay their own orders when they have ruled on admittedly difficult legal questions and when the equities of the case suggest that the status quo should be maintained").

Furthermore, properly enacted statutes are presumed constitutional. *See, e.g., State v. Johnson*, 2001 WI 52, ¶ 10, 243 Wis. 2d 365, 627 N.W.2d 455 (citing *State v. Borrell*, 167 Wis. 2d 749, 762, 482 N.W.2d 883 (1992)). This presumptive validity – standing alone – creates an adequately strong showing of likely success on the merits for purposes of granting a stay pending appeal. *See Gudenschwager*, 191 Wis. 2d at 441 (finding that despite the circuit court's determination that Wis. Stat. ch. 980 was unconstitutional, "the State has made a strong showing that it is likely to succeed on the merits" precisely because "regularly enacted statutes are presumed to be constitutional"). A stay is even more appropriate where, as here, the Court has relied on a novel First Amendment analysis to invalidate portions of a duly enacted state law and the appellate courts will review Plaintiffs' claims (and the Court's analysis) *de novo*. *See Coulee Catholic Schools v. LIRC*, 2009 WI 88, ¶ 31, 320 Wis. 2d 275, 768 N.W.2d 868 (noting that issues of constitutional law are reviewed *de novo*).

A. The Court's Determination That Wisconsin's Collective Bargaining Statute Violates The First Amendment Because It Penalizes Public Employees Is Unprecedented

To its credit, the Court correctly held that there is no constitutional right to collective bargaining. However, it then took the dramatic step of holding that the provisions of the Municipal Employment Relations Act (Wis. Stat. §§ 111.70 – 111.77, hereafter "MERA") prohibiting collective bargaining on any subject other than the single issue of total base wages,

requiring a local referendum to authorize the negotiation of an increase in total base wages that exceeds the CPI increase, requiring mandatory annual recertification elections, prohibiting the forced payment of dues from non-member employees and prohibiting payroll deductions for union dues, all violate municipal employees' rights of association and free speech under both the state and federal constitutions. To support its holding, the Court relied primarily on a single decision, *Lawson v. Housing Authority of City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605 (1955), to articulate a constitutional theory that "[s]tatutes that burden the exercise of a constitutional right for a lawful purpose and reward the abandonment of that right infringe upon the right." Order at 16. It then applied this theory to find that MERA "single[s] out and encumber[s] the rights of those employees who choose union membership and representation solely because of that association and therefore infringe[s] upon the rights of free speech and association guaranteed by both the Wisconsin and United States Constitution." *Id.*

An appellate court is likely to reject this penalty theory in light of the settled law that employees have no constitutional guarantee to *any level or type* of collective bargaining. *See, e.g.*, *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979) (noting that "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"); *Dept. of Admin. v. Wis. Employment Relations Comm'n*, 90 Wis. 2d 426, 430, 280 N.W.2d 150 (1979) ("There is no constitutional right of state employees to bargain collectively"); *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071, 2072 (7th Cir. 1969) (acknowledging that public employers have "no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute"); *Board of Regents v. Wisconsin Personnel Comm'n*, 103 Wis. 2d 545, 556, 309 N.W.2d 366 (Ct. App. 1981) ("[t]he right of state employees to

bargain collectively with the state is an act of legislative grace"). And the Supreme Court has upheld the converse decision to negotiate only with unionized employees and not the individual employees. *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 287 (1984). Indeed, this basic understanding permeates the field, as nearly all public sector bargaining laws include provisions that could be construed as imposing a burden or penalty on those employees that choose to bargain collectively and forego individual negotiation. These cases stand for the proposition that the government as employer is free to grant collective bargaining privileges in varying degrees over various subjects, as the policymakers see fit.

Moreover, by finding that MERA's prohibition on dues deductions and fair share agreements violates the First Amendment of the United States Constitution, the Court's Order is directly at odds with controlling federal decisions that have addressed these very same issues. See *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (finding that a state's decision to no longer allow public employee unions to utilize payroll deductions as a dues-paying mechanism "is not an abridgment of the unions' speech"); *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007) (holding that "unions have no constitutional entitlement to the fees of nonmember employees" and noting that there is no constitutional impediment to states eliminating union fair-share payments); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) (noting that the state's elimination of payroll deductions as a method of paying union dues – even when other unions had access to payroll deductions – raises "no cognizable constitutional claim pursuant to the First Amendment"); *Brown v. Alexander*, 718 F.2d 1417, 1423 (6th Cir. 1983) (analyzing many facets

of a Tennessee statute relating to dues checkoff for public employee unions and concluding that the statute at issue "neither on its face nor in its effect deprives plaintiffs of first amendment protections of free speech, advocacy, and association" – even though i) other unions had access to payroll deductions, and ii) one facet of the law did violate the constitutional guarantee of equal protection).

Additionally, this Court's decision failed to even address *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008), which recognized that government is given "significantly greater leeway in its dealings with citizen employees than it does . . . [with] citizens at large." Accordingly, while the penalty theory may be applicable to the subsidized housing context, it is not and has not been applied in the context of public sector labor relations.

In light of this uniform and significant battalion of precedent that the Order declines to follow, it is highly likely that an appellate court will not uphold this Court's reasoning or decision.

Moreover, even if an appellate court does adopt some form of a penalty theory, it is likely to overturn the Court's application of it in this case, in light of the fact that MERA does not create any direct cause and effect between associational choice (i.e., refuse to join the union) and benefits or rewards (i.e., no free healthcare), and that federal courts have consistently found that the collective bargaining provisions at issue in this case do not support viable First Amendment claims.

Despite the availability of hundreds, if not thousands, of judicial decisions interpreting federal and state public sector collective bargaining laws, neither Plaintiffs nor the Court identified a single decision that purported to apply such a "penalty" theory to find that a state or federal public sector bargaining regime violates employees' First Amendment protections. The

City of Madison filed an amicus brief in which it identified a federal district court case, *Lloyd v. Philadelphia*, 1990 U.S. Dist. LEXIS 8073 (E.D. Pa. 1990), that did relate to a penalty in the employment context, which the City suggested could provide guidance in articulating a First Amendment "no penalty" standard. Defendants analyzed *Lawson* and *Lloyd* and explained that, to the extent any cogent "no penalty" standard can be derived from these cases, they "provide examples of both the 'carrot' and the 'stick' approach to impermissible infringement" and taken together "show that in order to establish the presence of an unconstitutional penalty, Plaintiffs need to identify a direct cause and effect relationship between associational choice (i.e. refuse to join the union) and a result (i.e., no free healthcare)." Defs.' Reply Br. (Mar. 19, 2012) at 13-14. Defendants then proceeded to describe that "the types of 'penalties' Plaintiffs claim [MERA] imposes on public employees are completely devoid of the direct connection between proscribed (or encouraged) conduct and individual associational freedom that was central to *Lloyd* and *Lawson*." *Id.* at 14.

Nevertheless, the Court did not discuss *Lloyd* in its decision, did not address Defendants' observation that impermissible infringement takes either a "carrot" or "stick" approach to creating direct causal connections between proscribed or encouraged conduct and associational freedom, and did not articulate any meaningful standard by which the State, a citizen, or a court could analyze a concern that a statutory scheme unconstitutionally "burdens" a public employee's decision to engage in protected First Amendment activity.

As noted above, the appellate courts will review Plaintiffs' claims *de novo*. *Coulee Catholic Schools*, 2009 WI 88, ¶ 31. In light of the "heavy burden" Plaintiffs bear to invalidate an otherwise valid statute on constitutional grounds, Defendants have a high probability of success on the merits on appeal. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d

32, 45-46, 205 N.W.2d 784 (1973) ("The [Plaintiff] carries a heavy burden if he is to prevail in his attack upon the constitutionality of [the statute]. It is not enough that [Plaintiff] establish doubt as to the act's constitutionality nor is it sufficient that [Plaintiff] establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated *beyond a reasonable doubt*. Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality.") (emphasis added); see also *Norquist v. Zeuske,* 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997) ("Constitutional challenges to a statute must overcome a strong presumption of constitutionality"). As explained next, even applying a penalty analysis, Defendants have a high probability of success on appeal as to the Court's First Amendment analysis.

1. MERA's prohibition on collective bargaining over any issue other than total base wages does not burden public employees' First Amendment rights.

The Court determined that MERA violates public employees' rights of association and free speech by prohibiting collective bargaining over any subjects other than total base wages. This holding is surprising considering that Plaintiffs abandoned this claim during briefing. As Defendants noted in their initial brief, "with respect to all subjects other than base wages, the law makes absolutely no distinction between represented and non-represented employees." Defs.' Joint Br. (Jan. 31, 2012) at 33. In support of this assertion, Defendants noted that "Plaintiffs have not identified any provision of [MERA] that prohibits any employee from negotiating individually with his or her government employer" outside of the "permissive subjects on which public employers and collective bargaining agents may negotiate." *Id.* Rather than identifying any such provisions in response, Plaintiffs abandoned this claim. See Pls.' Response & Reply Br. (Mar. 5, 2012) at 27-28 (noting that "MERA penalizes employees with a collective

bargaining agent by preventing them from collectively bargaining base wage increases beyond the rate of inflation" and that "the law's new explicit prohibition on labor organization payroll dues deductions . . . treats employees who choose to associate with a labor organization differently"); Defs.' Reply Br. at 10 ("Defendants note that Plaintiffs have abandoned their assertion that [MERA] prohibits represented employees from bargaining individually over subjects other than base wages").

Even if Plaintiffs had not abandoned this claim, the Court's determination that the First Amendment precludes the State of Wisconsin from identifying a narrow subset of issues (in this case, total base wages) that can be collectively bargained and prohibiting collective bargaining over all other subjects works a sea change in public sector labor law. Indeed, the logical extension of the Court's ruling is that every federal and state public sector bargaining law that identifies any prohibited subject of bargaining violates the employees' First Amendment rights of association and free speech. For example, prior to Act 10, MERA specified certain prohibited subjects of bargaining. Wis. Stat. § 111.70(4)(m) (2009-10). The state-employee counterpart to MERA continues to specify a lengthy list of prohibited subjects of bargaining. Wis. Stat. § 111.91(2). Prohibited subjects of bargaining are a common scheme of such laws. Under the Court's reasoning, all of these state laws violate the respective employees' First Amendment rights unless they also explicitly prohibit individual negotiation over these same subjects.

The Court's reasoning is incomplete for the further reason that it ignores the limited "right" that individuals have to bargain with public employers. No individual public employee has *any* guarantee that his or her employer will bargain or negotiate over anything – including base wages. Moreover, no individual public employee can petition the Wisconsin Employment Relations Commission ("WERC") to investigate the employee's claim that a municipal employer

has refused to bargain in good faith. Because the Court did not address the fact that individual employees have no "right" to compel public employers to engage in individual bargaining, it is unclear how those provisions of MERA that grant this "right" to employees who associate for the purpose of collective bargaining – and compel public employers to respond and bargain in good faith – penalizes them for making that choice.

2. MERA's requirement that a local referendum be conducted prior to authorizing total base wages in excess of inflation does not burden public employees' First Amendment rights.

The Court struck down the CPI provisions of MERA because it believed that MERA requires employees "to *give up the right* to negotiate and receive wage increases greater than the cost of living" if those employees "associate for the purpose of being the exclusive agent in collective bargaining." Order at 15 (emphasis added). As an initial matter, the very premise is wrong. MERA does not require those employees to give up the right to seek excessive wage increases, it simply provides an additional procedural mechanism – the local referendum – that must be followed to achieve that result. Furthermore, the only specific evidence in the record regarding represented and non-represented employee wage increases came from a non-party – the City of Madison – which represented to the Court that as a matter of policy the City endeavors to provide commensurate wage increases to represented and non-represented employees alike. (City Br. at 13.)

As noted above, the Court did not articulate a standard for reviewing Plaintiffs' claim that MERA "burdens" or "penalizes" employees for their associational choices. Thus, the Court did not explore the extent to which the panoply of benefits of collectively bargaining wages (including, presumably, the ability to secure higher wage increases than the individuals could hope to obtain individually) counterbalances the mere hope that a group of employees might have been able to individually negotiate larger-than-inflation wage increases in the event they

decided to forego associating for the purpose of collective bargaining. Of course, this risk/reward calculus needs to account for the fact that public employers have no duty to bargain with unrepresented individual employees at all. The Court did not consider whether a reasonable employee would always view this balancing of risks and rewards as "penalizing" the decision to pursue collective bargaining. Certainly, City of Madison employees could not reasonably view the CPI provision as a penalty, since the City has always endeavored to provide commensurate wage increases to represented and non-represented employees alike.

3. MERA's requirement of mandatory annual recertification elections does not burden public employees' First Amendment rights.

The Court also invalidated on First Amendment grounds that provision of MERA that "require[s] [unions] 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." Order at 16. In explaining this decision, the Court did not address the distinction between the *rights of employees* to choose to associate together for the purpose of collective bargaining (or not) and the *right of the bargaining agent* to exclusively negotiate with the public employer on behalf of all bargaining unit employees – including those employees that do not want the agent's representation. This distinction is critical.

First, MERA simply requires – in effect, as a precondition to negotiations over the next contract – that the *bargaining agent* confirm that it continues to have the support of a majority of the employees it seeks to represent. This requirement balances the associational rights of those employees who wish to bargain collectively against those employees who wish not to bargain collectively. It is unclear how the Court determined that this provision of MERA violates the associational rights of the first group of employees without even considering the impact on the associational rights of the second group.

The Court impliedly agrees that the State can impose some procedure for determining whether the exclusive bargaining agent retains the support of those employees it seeks to represent. Nevertheless, its Order omits any consideration of the reality that MERA's annual recertification requirement – in the eyes of the legislature – meaningfully recognizes the associational rights of those employees that do not want collective representation.

Second, MERA does not require the "employees in the bargaining unit who are members of the union" to bear the costs of annual recertification, it requires the bargaining agent – the entity that seeks the privilege of exclusivity – to bear those costs.[1] 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 (noting in the context of an allegation that certain permit fees imposed an impermissible financial burden on First Amendment activity that "it is well established that the government may charge a fee" to cover the government's expense of administering the activity). The Court did not address this issue at all or explain how the Order can be squared with prior precedent upholding the imposition of administrative fees.

In light of Plaintiffs' heavy burden of showing that this feature of MERA is unconstitutional beyond a reasonable doubt, Defendant's have a high probability of success on appeal.

4. MERA's prohibition on the continued forced payment of dues from non-member employees does not burden public employees' First Amendment rights.

The Court found that MERA's prohibition on fair-share agreements for general employees violated union members' First Amendment rights because without fair-share

[1] Defendants note that this case involves a facial challenge to MERA. There is nothing in the record to suggest that in every instance under MERA the collective membership dues paid by employees of a local bargaining unit cover the entire respective costs incurred by the union with which it is affiliated.

agreements "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."[2] Order at 15-16. This "free-rider" concern certainly is the unions' position in the decades-old policy debate over the propriety of fair-share agreements. However, neither Plaintiffs nor the Court identified any appellate court that has held that fair-share agreements are constitutionally required.

Rather, Defendants informed the Court that the United States Supreme Court has within the past five years described such agreements as granting unions an "extraordinary power" that is "in essence, [the power] to tax government employees." Defs.' Reply Br. at 17, quoting *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007). In direct contrast to the Court's decision in this case, the United States Supreme Court stated 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. *Davenport*, 551 U.S. at 184, citing *Lincoln Fed. Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 529-31 (1949). The Court did not address *Davenport* in its Order or explain how the Order can be squared with the U.S. Supreme Court's treatment of this issue. Importantly, pronouncements of the U.S. Supreme Court are binding on the Court's interpretation of federal constitutional principles and the Wisconsin Supreme Court has explained that with respect to the interpretation of the Wisconsin Constitution, it looks to federal courts' interpretation of corollary provisions of the United States Constitution in the area of First Amendment challenges. *See County of Kenosha v. C & S Management Inc.*, 223 Wis. 2d 373, 389, 588 N.W.2d 236 (1999) (noting in the context of a

[2] The Court left unaltered Wis. Stat. § 111.70(2), which gives employees "the right to refrain from paying dues while remaining a member of a collective bargaining unit," so the unions' ability to force nonmembers to pay dues is uncertain.

speech regulation that "no greater protection exists under the Wisconsin Constitution than under the First Amendment").

Defendants' likelihood of success on appeal is strengthened further by more recent U.S. Supreme Court review of this issue. In a decision issued June 21, 2012, the U.S. Supreme Court expressed uneasiness with the proposition that public sector fair-share agreements are even constitutionally *permissible*, but left for another day whether such agreements should be barred altogether. *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012). The Court's Order finding that fair-share agreements are constitutionally required cannot be squared with the following excerpts from the Supreme Court's discussion of fair-share agreements in *Knox*:

> When a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." [*Ellis v. Railway Clerks*, 466 U.S. 435, 455]. Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . the compulsory fees constitute a form of compelled speech and association that imposes a "significant impingement on First Amendment rights." *Ellis, supra,* at 455. Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.
>
> "The primary purpose" of permitting unions to collect fees from nonmembers, we have said, is "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 551 U.S., at 181. Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections.
>
> . . .
>
> Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly--one that we have found to be justified by the interest in furthering "labor peace." [*Teachers v. Hudson*, 475 U.S. 292, 303]. But it is an anomaly nevertheless.
>
> . . .
>
> By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior

> decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.

Knox, 132 S. Ct. at 2289-91. The Supreme Court may soon clarify that fair share agreements in the public sector are unconstitutional, as this discussion from *Knox* shows. Nevertheless, existing Supreme Court precedent confirms that they are not constitutionally *required* of public employers. It also confirms that the First Amendment associational interests of some individuals are burdened by fair share agreements.

5. MERA's provision that ends the former system of government-subsidized dues checkoff does not burden public employees' First Amendment rights.

The Court determined that MERA violates the First Amendment guarantees of free speech and association by "prohibit[ing] general municipal employees from paying union dues by payroll deduction, solely because the dues go to a labor organization." Order at 15. This holding is directly at odds with nearly every dues deduction case[3] cited by the parties and amici, including: *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (finding that a state's decision to no longer allow public employee unions to utilize payroll deductions as a dues-paying mechanism "is not an abridgment of the unions' speech"); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998) (finding no constitutional violation to prohibit payroll deductions for public sector unions when they were allowed for private sector unions); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) (noting that the state's elimination of payroll deductions as a method of paying union dues – even when other unions had access to payroll deductions – raises "no

[3] The lone exception is the recent decision of the federal court in the Western District of Wisconsin, addressed next.

cognizable constitutional claim pursuant to the First Amendment"); *Brown v. Alexander*, 718 F.2d 1417, 1423 (6th Cir. 1983) (analyzing many facets of a Tennessee statute relating to dues checkoff for public employee unions and concluding that the statute at issue "neither on its face nor in its effect deprives plaintiffs of first amendment protections of free speech, advocacy, and association" – even though i) other unions had access to payroll deductions, and ii) one facet of the law did violate the constitutional guarantee of equal protection); *Arkansas State Highway Emp. Local 1315 v. Kell*, 628 F.2d 1099, 1103-03 (8th Cir. 1980) (rejecting a claim that the public employer must continue to provide payroll deductions for union dues when it "continued to withhold items other than union dues").

The lone exception is the March 30, 2012 decision issued by the United States District Court for the Western District of Wisconsin, in *Wisconsin Educ. Ass'n Council et al. v. Walker et al.*, case no. 11-cv-00428-wmc. Judge Conley did invalidate MERA's dues deduction prohibition on First Amendment grounds;[4] however, that determination is the subject of a pending appeal, in which the Seventh Circuit will conduct oral argument within the next week. Furthermore, Judge Conley refused to review the dues deduction provision against a strict scrutiny standard.[5] If the Court had followed Judge Conley's lead and applied rational basis review, it would have reached a different result, as Plaintiffs conceded that the provision would survive rational basis review. (Pls.' Response & Reply Br. at 25 n.8.)

The Court's First Amendment holdings are unprecedented and will be reviewed *de novo* on appeal. Accordingly, it is entirely appropriate that the effect of the Order be stayed pending appellate review of these difficult legal questions.

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[4] Defendants note that Judge Conley subsequently stayed the effectiveness of his ruling as to all unions that were decertified following the implementation of Act 10.

[5] Defendants also note that Judge Conley upheld the vast majority of Act 10's collective bargaining provisions, such as the elimination of mandatory dues and fair share fees and the limitation of collective bargaining to total base wages for general employees.

B. Defendants' Success On Plaintiffs' First Amendment Claim Will Compel A Reversal Of The Court's Equal Protection Ruling As Well

Based on its unprecedented First Amendment conclusions, the Court applied strict scrutiny to Plaintiffs' equal protection claims. Order at 17-18 (noting that "[s]trict scrutiny applies . . . because the court has found [First Amendment] infringement"). Thus, Defendants will prevail on appeal with respect to those claims if an appellate court determines there is no First Amendment infringement and applies rational basis review, as the federal courts did in *Ysursa*, *South Carolina Education Association* and *Brown*. The reviewing court will be required to uphold MERA if it can conceive of any rational basis to support the challenged provisions. Indeed, the rational basis standard places upon Plaintiffs "[t]he burden . . . to negative every conceivable basis which might support [MERA], whether or not the basis has a foundation in the record" and thus the reviewing court must uphold MERA "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993). This is true even if that state of facts is the product of "speculation unsupported by evidence or empirical data." *Id.*

Accordingly, Defendants have a high probability of success on the merits of Plaintiffs' equal protection claims.

C. The Milwaukee Pension System Provisions Of Act 10 Are Constitutional

Defendants are likely to prevail on their appeal of that portion of the Order that invalidates Wis. Stat. § 62.623, which prohibits the City of Milwaukee from paying the employee contribution to the City of Milwaukee Retirement System. At the outset, Defendants note that the Court correctly denied Plaintiffs' claim that the prohibition deprived them of a property right without due process. (Order pp. 26-27). However, the Court incorrectly analyzed

the constitutionality of sec. 62.623 under the Home Rule Amendment and misconstrued the nature of the Plaintiffs' rights under the Milwaukee Charter Ordinance.

With regard to the Home Rule Amendment analysis, the Court simply omitted a critical part of the analysis. The Court found (incorrectly) that the contribution to the Milwaukee ERS is a "local affair" and ended its analysis. However, as Defendants explained, that is not the end of the analysis. Instead, if the matter at issue is a local affair, the Home Rule Amendment requires only that any state level regulation be uniform. *See Van Gilder v. City of Madison*, 222 Wis. 58, 81, 267 N.W.2d 25 (1936) ("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."); *see also West Allis v. Milwaukee Cnty.*, 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 Cnty.*, 64 Wis. 2d 673, 686 221 N.W.2d 845 (1974) ("In view of art. XI, sec. 3 of the Wisconsin Constitution, statutes affecting the right of cities and villages to determine their own affairs must affect all cities and villages uniformly."); *see also* C. Silverman, Legal Comment, Municipal Home Rule, The Municipality, July 2009, at 241 ("Finally, if the legislature elects to deal with the local affairs and government of a city or village, its act is subordinate to a charter ordinance unless the legislature's act uniformly affects every city or village across the state.") Here, there is no doubt that the prohibition of an employer paying an employee's contribution is uniform across all levels of government. Thus, this Court's ruling on the Home Rule Amendment is incomplete and incorrect and will almost certainly be overturned on appeal.

Likewise, the Court's analysis of Plaintiffs' impairment of contract claim is likely to be overturned. The Court's analysis is dependent on its misinterpretation of the employees' rights under Charter Ordinance sec. 36. The interpretation of an ordinance is a matter of law that the appellate court will review *de novo*. *State ex. rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. In doing so, the appellate court is almost certain to correct the Court's erroneous holding that the employees' guaranteed level of benefits includes a right to the employer contribution in light of the plain language of sec. 36-13-2-d, which states that contributions "shall not in any manner whatsoever affect, alter or impair any member's rights, benefits or allowances" under sec. 36.

Moreover, even if the appellate court does not overturn this Court's construction of the ordinance, it is likely that it will overturn this Court's erroneous holding that an impairment of that right is substantial. Indeed, courts have long held that the burden of proving a substantial impairment is often insurmountable when the contract deals with a subject matter that is heavily regulated. *See Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983) (citing *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S. Ct. 529, 531 (1908)); *Chicago Board of Realtors v. City of Chicago*, 189 F.2d 732, 736 (7th Cir. 1987); *American Federation of State, County, and Mun. Employees, Council No. 65 v. State, Public Employment Relations Bd.*, 372 N.W.2d 786, 791 (Minn. App., 1985) (applying the general principle in the field of employment regulation).

III. A STAY WILL BE IN THE PUBLIC INTEREST

In the absence of a stay, public employers all across Wisconsin will face a confusing array of changing bargaining environments in the event the reviewing court determines that MERA is valid. There are literally thousands of non-party local government employers in

Wisconsin that are governed by the statutory provisions affected by the Court's Order.[6] Each local government employer has a unique set of circumstances that will determine the impact to it and its employees of a shifting and confusing legal landscape in the event the reviewing court determines MERA's provisions are valid. All of this can be avoided by a stay pending appeal.

There is no doubt that union leaders across the state will demand that local municipal employers immediately begin new negotiations pursuant to those provisions of MERA that remain undisturbed by the Order. Indeed, the head of the lead plaintiff in this case, MTI, has already publicly announced that MTI intends to demand that the Madison School District return to the bargaining table despite the fact that MTI's current labor contract remains in full force.[7] While it is uncertain how these discussions will play out, it is easy to anticipate disputes over a number of issues, including whether municipal employers must bargain over issues other than total base wages, the status of formerly certified bargaining agents that were decertified since Act 10 went into effect, and the status of municipal employers' duty to provide dues checkoff.

1. Many municipal budgets across the State depend on the flexibility municipal employers were given to manage their workforces.

The primary driver of Act 10 was the financial crisis facing government. The changes to MERA effected by Act 10 gave municipal employers the freedom to implement operational changes without resorting to negotiations with employees. Governor Walker identified this flexibility as a significant factor in allowing local governments to absorb cuts in state aid when

[6] There are 1,257 towns, 404 villages, 190 cities, 425 school districts and 72 counties in the State of Wisconsin. Wisconsin Blue Book, pp. 230-31 (2011-2012), available at http://legis.wisconsin.gov/lrb/bb/11bb/ (last visited Sept. 16, 2012). This does not even represent the entire universe of municipal employers subject to MERA. See Wis. Stat. § 111.70(1)(j).

[7] http://host.madison.com/news/local/govt-and-politics/state-seeks-stay-during-appeal-of-collective-bargaining-law-ruling/article_16392934-ff7f-11e1-b0fb-0019bb2963f4.html?comment_form=true

he first introduced the Budget Repair Bill in February 2011.[8] The Court's decision and Order means that the workable fix crafted by the Governor and the Legislature is at risk of being derailed at a cost of millions of dollars that these local governments don't have. If the Wisconsin Supreme Court invalidates the law, that is a consequence that the government will have to deal with. However, to impose that fiscal burden on local governments now, prior to review by any appellate court, will cause a great deal of harm and, if the Court is wrong, there will be no remedy for that harm.

Amid the confusion, and absent a stay, many local governments may be compelled to give in to union demands to return to a pre-Act 10 frame of reference. Some may also be pressured to compensate employees for wages and benefits that were not provided while Act 10 was in effect. However, the Court's decision provides no means to pay for these additional obligations. Because local governments have had no opportunity to raise revenue and budget for these expenses, the consequences are likely to be significant.

A few examples of how things changed since the implementation of Act 10 will help demonstrate what may needlessly occur if a stay is not entered. Before Act 10, unions resisted any changes to health coverage without a corresponding concession from the employer. Since Act 10, employers have been able to deal with the increasing costs of health insurance through modest increases in employee premium contributions, deductibles and co-pays, modification of drug plans and changes in health insurance carriers. Similarly, before Act 10, overtime was largely governed by union contracts meaning that employers were unable to effectively manage the use of overtime in an efficient manner. Under Act 10, employees can decide when overtime should be performed and who can perform the overtime work most efficiently.

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[8] Governor Walker repeatedly explained this at the initial press conference announcing his submission of the bill that became Act 10 to the legislature.
http://www.wiseye.org/Programming/VideoArchive/EventDetail.aspx?evhdid=3710

Act 10 was adopted by the legislature, and was supported by local governments, because it helped address a real and significant problem. If Act 10 is not stayed pending appeal, local governments will feel compelled to resort to the old solutions for dealing with budget shortfalls – lay-offs, furloughs and hiring freezes. This will not only harm affected employees, but will also result in a loss of service to everyone. A return to the pre-Act 10 way of doing things may result in collective bargaining agreements that will handcuff local governments for years to come.

Furthermore, local governments are currently in the midst of crafting their 2013 operating budgets, in order to set the appropriate tax levy in just a few months. Demands from the unions to roll back workplace rule revisions will place these reforms in doubt and throw local budgeting into a tailspin. Municipal employers that refuse to give in to unions' demands to negotiate over workplace rules will face the prospect of defending against a prohibited practice claim. The resultant expense and strain on municipal budgets will be completely unnecessary in the event the reviewing court determines MERA's prohibition on bargaining over anything other than total base wages is valid.

2. Municipal employers and their employees will endure substantial confusion over the status of decertified bargaining agents.

It is reasonable to assume that some unions that were decertified since Act 10 was implemented will demand a seat at the bargaining table. They will likely predicate their demands on the idea that the Court's Order has retroactive application and, therefore, the process by which they were decertified is of no effect and they each once again retain their status as a certified bargaining representative.

In the absence of a stay, municipal employers across the state will be pressured by the unions to negotiate with these decertified bargaining representatives and will face the possibility of litigation before the WERC if the employers determine they are not required to bargain. Some

employers may enter into new contracts. A subsequent appellate determination that MERA's annual recertification provision is valid will cast doubt on the validity of those new agreements.

Furthermore, in the absence of a certified bargaining agent, municipal employers have been free to establish wage adjustments without resorting to negotiations with employees. Demands from the unions to negotiate base wages will place previously established wages in doubt and further hinder local budgeting efforts. The prospect of negotiating retroactive wages that reach back more than a year will strain local government budgets, often past the breaking point. The unions and municipalities in this situation may attempt to bargain over wages on a prospective basis only; however, this would still subject the municipality to a claim that it exceeded its authority by granting individual wage increases in the first instance.

Additionally, local municipal employers who do agree to negotiate face the prospect of defending against an unfair labor practice claim if it interprets the effect of the Court's Order differently than the unions. For example, a municipality that seeks to negotiate base wages on a prospective basis only may subject itself to a claim of engaging in a prohibited practice because that municipality unilaterally established wages following the union's decertification. A municipality that refuses to bargain over more broad subjects of hours and working conditions could also face a prohibited practice claim. Because state courts and WERC have concurrent jurisdiction over unfair labor practice complaints (see Wis. Stat. §§ 111.70(4)(a); 111.07(1)), the potential impact on administrative and judicial resources is magnified.

The critical point is that the thousands of non-party local government employers in Wisconsin that are governed by the affected statutory provisions will face unnecessary expense, uncertainty and chaos.[9] All of which can be completely avoided by the grant of a stay.

3. The potential nullification of previously conducted recertification elections will infringe the rights of individual employees.

There are additional, and unique, public interests at play for those unions that sought recertification under Act 10 and failed. In those instances, a sufficient number of individual employees consciously chose through the recertification election process to decertify their respective bargaining representatives. Nevertheless, faced with the uncertainty of this Court's Order, their employers may decide to bargain with the formerly certified bargaining agents. In such cases, the associational rights of the individual employees to *not* affiliate with a union will be infringed.

4. It is unclear how the Court's dues checkoff ruling will impact local government employers across the state.

In addition to the confusion created by an interim suspension of MERA's recertification provisions, the impact of the dues checkoff aspect of the Court's Order on municipal employers is uncertain. The Court's Opinion suggests that any local government employer that refuses to provide unions dues checkoff privileges will violate their employees' First Amendment rights. However, implementation of dues checkoff under MERA (as amended by the Court's Order) is problematic for local government employers for numerous reasons. First, the former systems did

[9] That municipal employers will be thrown into a state of chaos is not hyperbole. Instead, it is the reasoned opinion of respected jurists and law professors. *See* http://www.fox11online.com/dpp/news/wisconsin/marquette-university-labor-law-professor-paul-secunda-says-act-10-ruling-unlikely-to-stand and http://www.fox11online.com/dpp/news/wisconsin/wisconsin-school-superintendents-confused-over-act-10-ruling . It has also been widely reported. *See* http://brookfield-wi.patch.com/articles/teacher-negotiations-on-hold-after-judge-strikes-down-collective-bargaining-law; http://www.greenbaypressgazette.com/article/20120915/GPG010405/309150394/Court-ruling-throws-labor-negotiations-curve; http://www.wuwm.com/news/wuwm_news.php?articleid=11167. (All last visited Sept. 18, 2012.)

not involve individual decision-making by union members. Instead, dues deductions were a subject of bargaining and were established under the terms of negotiated labor agreements. Thus, municipal employers were able to establish a payroll system that simply deducted dues from all represented employees' wages with attendant procedures and protections for the municipal employer. Now, employers must take direction from each individual employee because MERA specifically provides that the employees cannot be compelled to pay union membership dues. Wis. Stat. § 111.70(2). Any employer who attempts to withhold wages without clear authorization from the individual will be subject to a prohibited practice complaint pursuant to Wis. Stat. § 111.70(3)(a) in addition to potential legal action by the Department of Workforce Development and/or the individual employee pursuant to Wisconsin Statutes Chapter 109.

Second, based on the reasoning of the Court's Opinion, not all government employers should be required to implement a dues checkoff system. Indeed, the basis of the Court's holding appears to be an assumption that dues deductions are afforded other organizations, or perhaps public safety and transit unions. Thus, any employer who does not employ public safety employees or transit employees (i.e. school districts) presumably could determine not to allow dues checkoff without running afoul of the reasoning of Court's Opinion or the state or federal constitutions. Again, it is reasonable to assume that there will be significant confusion as to what, exactly, individual local government employers are obligated to do, and individual municipal employers face the prospect of a prohibited practice claim if it interprets the Court's Order differently than the local union.

All of these consequences will be avoided in the event the Court stays its Order and a reviewing court determines that MERA is constitutionally valid.

IV. THE IRREPARABLE HARM FACTOR WEIGHS IN FAVOR OF A STAY

The two factors outlined above – likelihood of success on appeal and the public interest factor – are sufficient justification for a stay of the Court's Order pending appeal. *Gudenschwager*, 191 Wis. 2d at 441 (noting that the four stay factors are interrelated such that more of one may excuse less of another). The balancing of harms further justifies the issuance of a stay.

A. The State Will Suffer Irreparable Harm In The Absence Of A Stay

The Court's Order nullifying a duly enacted legislative act, in and of itself, constitutes a form of irreparable harm to the State justifying a stay for appellate review. Furthermore, the challenged provisions of MERA were implemented in early- to mid-2011 and have been in effect for over a year. A return to the prior state of affairs with respect to those provisions before the reviewing court addresses these issues could result in WERC unnecessarily processing a multitude of prohibited practice claims due to the confusion and uncertainty regarding the state of labor relations until the validity of these statutory provisions is finally resolved.

1. The Very Act of Enjoining a State's Legislative Act Constitutes Irreparable Injury

In the event an appellate court determines that any of the subject MERA provisions is lawful, the Court's act of voiding those provisions while the appeal is pending, standing alone, would do irreparable harm to the State. "[A]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice). Thus, the same principles that militate against granting a preliminary injunction counsel for granting a stay pending appeal. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, Circuit Justice) (citation omitted) (refusing to enjoin enforcement

of a presumptively constitutional statute even where the Supreme Court would later declare the act in violation of the First Amendment to the United States Constitution); *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919) ("no such injunction ought to be granted unless in a case reasonably free from doubt, and when necessary to prevent great and irreparable injury") (citation omitted).

2. The Wisconsin Employment Relations Commission faces the prospect of processing a significant number of prohibited practice complaints.

Defendant WERC Commissioners face the prospect of a multitude of prohibited practice complaints in the event individual local municipal employers and the unions that represent their employees disagree as to the proper interpretation of MERA, with §§ 111.70(1)(f), 111.70(3g), 111.70(4)(mb) and 111.70(4)(d)3 excised, or the consequences of the shifting regulatory environment described above. Such complaints will result in the unnecessary expenditure of significant resources (time, money, and otherwise) by WERC, local governments and the unions.

B. Any Harm Plaintiffs May Suffer Due To A Stay Does Not Compel The Denial Of A Stay

MERA, as amended by Acts 10 and 32, has been the governing law of municipal public sector bargaining since early- to mid-2011. Thus, a stay of this Court's decision will preserve the status quo that existed as of August 18, 2011, the date Plaintiffs filed this case. Accordingly, when considering the potential that a stay may harm Plaintiffs, this Court should be mindful that Plaintiffs did not seek preliminary injunctive relief to prevent Acts 10 and 32 from becoming effective and instead waited until months after the effective dates of Acts 10 and 32 to file suit. Had Plaintiffs believed that the harm they would suffer from Act 10 and Act 32's amendments to MERA were substantial they would have filed sooner and sought immediate injunctive relief. That they did not is not surprising as lead plaintiff, MTI, is covered by a contract entered into under the previous MERA provisions and which runs until June 2013. (A copy of the contract is available on MTI's website at: http://www.madisonteachers.org/wp-

content/uploads/2011/07/Teacher-CBA-11-13.pdf, last visited Sept. 17, 2012). Thus, with regard to MTI, a stay of this Court's decision could not possibly cause any harm in the near term. Moreover, MTI's contract expressly states that its terms will continue to govern the relationship between the school district and the teachers post-expiration until such time as a new contract is settled. (See MTI Contract, p. 3 (specifying that the contract "shall continue in force until changed by later agreement").) Accordingly, it is improbable that MTI will be faced with negotiating a contract under MERA as amended before this case is decided on appeal. Any potential harm to plaintiffs does not overcome the harm to the Defendants or the public at large.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant Defendants' Motion for Stay of the Court's Order Granting Summary Judgment.

Dated this 18th day of September, 2012.

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