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.: 2011CV003774
CASE CODE: 30701

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

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY

I. INTRODUCTION.

The Defendants (hereafter "the State") open their brief by declaring that Act 10 is "one of the most significant, and challenged, pieces of legislation in the history of this State." Undeniably, the legislation was radical in its scope and effect, and it has been challenged for good reason. The Legislature, after a pro forma public debate on Act 10's terms and potential effects, pushed through the legislation on a partisan vote, amending a variety of statutes to drastically alter fifty years of settled labor law.

Under the guise of helping municipalities to balance their budgets, Act 10 created provisions actually calculated to squeeze the life out of public sector labor

unions. Given the missionary zeal of Act 10's proponents, the haste with which the law was enacted, and its true purpose, it is no wonder that Act 10 was found by this Court and the federal district court to be constitutionally defective.

The burden that Act 10 placed on the associational activity of municipal employees was not a mere by-product of the legislature's decision to limit the scope of collective bargaining under the Municipal Employment Relations Act (MERA) to wages only. The legislature did not merely redefine collective bargaining and eliminate interest arbitration, the procedure used for decades to resolve negotiation impasses and impose an agreement on the parties. The legislature went well beyond those things in Act 10. It barred municipal employers from offering represented employees any more than a cost of living increase on the base wage, mandating a costly and cumbersome referendum to offer a greater base wage increase. At the same time, it imposed no similar restrictions on municipal employers increasing the salaries of non-represented employees. On top of that, Act 10 barred municipal employers from deducting union dues from salary, while not prohibiting deductions for any other voluntary organizations; and required unions to negotiate on behalf of individuals in the bargaining unit who are not dues-paying members, allowing them to receive the union's services for free. It also imposed costly, burdensome, and unnecessary annual recertification election procedures, requiring public sector labor unions to obtain an unprecedented supermajority approval in order to continue representing bargaining units and imposing the full costs of the process on unions and their members.

The Court correctly determined that these draconian provisions of Act 10

violated the fundamental right of municipal employees to associate, to engage in free speech and to receive the equal protection of the law. In other words, the legislature and Governor, in their desire to suffocate public employee unions existing under the MERA, went too far.

It is not a surprise that the State has, without providing any evidentiary support in the form of affidavits or otherwise, tried to portray the court's decision as potentially wreaking havoc around the state.

But there will be no havoc. The Court's decision will cause municipalities to negotiate in good faith over wages, albeit now with the ability, if impasse is reached, to implement their final offers without worrying about interest arbitrations imposing contracts on them. Some municipalities may need to consult their lawyers. The WERC might have to process some prohibited practice complaints alleging a failure to bargain in good faith. So what? Municipalities and the WERC have done these things for years.

The State's argument for a stay should not be rejected merely because it fails to persuade the Court that the sky has fallen on innocent municipalities and the WERC. It must be rejected also because the State has failed to show: (1) why it has a reasonable probability of success on the merits of its claims; (2) that it will be irreparably harmed if a stay is not granted; (3) that no substantial harm will come to other interested parties if the stay is granted; and, (4) that the public interest will not be harmed if the stay is granted. In Section II below, we address the merits of the associational, free speech and equal protection claims. In Section III, we address the harms analysis in connection with the State's motion to stay the Court's ruling as to those claims. In Section IV, we

address both the merits and the harms analysis relative to the Home Rule and impairment of contract claims and ruling.

The parties agree that the standards for the consideration of motion for stay are set out in *Leggett v. Leggett,* 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986) and are also described in *State v. Gudenschwager,* 191 Wis. 2d 431, 529 N.W.2d 225 (1995). This brief will explain why, when the Court applies those standards, the State's motion for stay must be denied.

II. THE STATE FAILED TO MAKE A STRONG SHOWING THAT IT IS LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL WITH REGARD TO THE ASSOCIATIONAL, SPEECH AND EQUAL PROTECTION CLAIMS.

A. The State Cannot Meet Its Burden.

The State correctly states the first part of the test for determining whether a stay pending appeal is warranted: with respect to the merits, the State has the burden to make a strong showing that it is likely to succeed on the merits of the appeal. *Leggett v. Leggett,* 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986). (Defendants' Brief in Support of Motion to Stay ("Brief") at 3)

However, in its effort to make this strong showing, the State incorrectly relies on a presumption of constitutionality for that purpose (Brief at 4) because this case involves Act 10's restriction of fundamental rights. Once a court has found a restraint on a fundamental right, the presumption that a statute is constitutional disappears, leaving the state with an actual burden of proof and persuasion on its claims that it has a reasonable probability of success of the merits of its claim on appeal. *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816, (2000) ("When the Government restricts speech, the

Government bears the burden of proving the constitutionality of its actions").

Without the presumption of constitutionality, the State also gets no free pass under the first factor in *Gundenschwager*. The State is required to show that it has a strong likelihood of success on the merits of the appeal on its motion to stay. Such showing can only be accomplished by demonstrating that the constitutional infringements found by the Court are justified by a compelling governmental interest and that the law is narrowly tailored to serve that interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *Gard v. Wisconsin State Elections Board*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990). The State has utterly failed to do that.

B. The Court Accurately Found That The Challenged Provisions Violate Associational and Free Speech Rights.

As amended by Act 10, MERA (1) prohibits collective bargaining on any subject other than base wages capped at the annual cost of living increase but there is no similar prohibition on individual bargaining; (2) requires a referendum to collectively bargain base wage increases beyond that amount but imposes no similar requirement for individual bargaining; (3) requires annual recertification elections; (4) prohibits fair share agreements, and (5) prohibits payroll deductions for union membership dues but there is no similar prohibition on other payroll deductions. This Court found that these provisions are encumbrances on the rights of those employees who chose union membership and representation, due to that membership and representation, and thus infringe on the rights of free speech and association guaranteed by the Wisconsin and United States Constitutions.

The State claims that the Court incorrectly found such infringement, arguing that MERA does not penalize general employees and their collective bargaining agents based on union membership and representation. The State's arguments in support of its motion are largely the same positions it presented, unsuccessfully, in the briefing on the Plaintiffs' Motion for Summary Judgment and the State's cross Motion for Judgment on the Pleadings. Rehashing the same arguments the court has already rejected is a far cry from the requisite standard of making a "strong showing" that the State will prevail on the merits in its appeal.

For example, the State repeats the unremarkable proposition that there is no constitutional right to collective bargaining. (Brief at 5-7) Yet it ignores the legal principle, which was fundamental to the court's decision, that once the state extends a limited statutory privilege, such as the ability to collectively bargain, it cannot condition the use of that privilege on a consent to the infringement of one's constitutional rights:

> 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 v. Housing Authority of City of Milwaukee, 270 Wis. 269, 276, 70 N.W.2d 605 (1955), *quoting Frost & Frost Trucking Co. v. Railroad Comm.*, 271 U.S. 583, 593 (1926).

Ignoring that settled law, the State calls this Court's reasoning "incomplete" (Brief at 10-11) because individuals outside of a certified collective bargaining unit have no right to good faith bargaining by the employer and enforced by the WERC. The State

thus continues to elide two distinct concepts: the constitutionally protected right of association, that is, the right to affiliate oneself with others; and, collective bargaining, that is, a statutory guarantee that a government employer must negotiate in good faith on specified topics with a particular bargaining agent on behalf of a group of employees. No associational or speech rights are implicated when a municipal employer refuses to bargain with an individual employee .

The State also argues, again (Brief at 6-7, 16-17), that the Court's decision is in direct conflict with other decisions which dealt with prohibitions on dues deductions and fair share agreements. This Court has already heard these arguments and rejected them. In particular, the statute at issue in *Ysursa* was an evenhanded ban on payroll deductions, and was viewpoint neutral, applying to all employees and not singling out any one viewpoint or speaker. *Ysursa v. Pocatello Educ. Ass'n.*, 555 U.S. 353, 361, n. 3 (2009). That is not the case in Act 10, where the only ban on payroll deductions, and the other provisions found unconstitutional, negatively affect and apply only to represented municipal employees and their collective bargaining agents, and do not affect those municipal employees who are unrepresented. Given the uneven application of the challenged provisions of Act 10, the Court properly applied strict scrutiny, which is consistent with *Ysursa,* as well as *United Food and Commercial Workers Local 99 v. Brewer,* 817 F. Supp. 2d 1118 (D. Ariz. 2011), where the court also applied strict scrutiny.

The State further claims that no other court has ever applied what it calls a "penalty" theory to find that the provisions challenged here violate constitutional protections of free speech and association. (Brief at 7). That is not true. While the type

of attacks on public employee unions found in Act 10 are new to Wisconsin, they are also being attempted elsewhere. Michigan's new ban on union dues deductions by school districts was found likely to be in violation of the First Amendment to the United States Constitution earlier this summer by the United State District Court for the Eastern District of Michigan:

> Act 53, by its application, not by its terms, affects speech. A union by its very nature is in existence to engage in expressive speech. Payroll deductions are the most convenient way to raise funds to support the Unions' expressive activities. . . . The amendment by its application would burden speech for school unions and no other. The Unions would have to divert resources designated to the collection of dues in order to keep the Unions' speech efforts alive. Defendants are essentially targeting only one viewpoint and one set of speakers for discrimination. . . . Plaintiffs have shown that they are likely to succeed on the merits of their first amendment claim.

Bailey, et al. v. Callaghan, et al., ___ F. Supp. 2d ___, 2012 WL 2115300 (E.D. Mich. 2012); *see also United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz. 2011).

The provisions of Act 10 at issue in this case are both "carrot" and "stick," to use the State's terms: On the one hand, they encourage employees to disassociate from their unions and become unrepresented by limiting the unions' ability to collectively bargain, as compared to the ability of individuals to bargain with employers (both in terms of scale and scope of what can be bargained), or, if a majority votes to retain the union, to at least not belong to the union but still benefit from its work by prohibiting fair share agreements. On the other hand, they punish those who choose to retain a collective bargaining agent and be a union member by severely limiting what can be

collectively bargained, requiring annual recertification votes, prohibiting fair share arrangements and prohibiting payroll deductions for union dues, thus making union members pay for their own representation as well as those who are in the bargaining unit but do not elect to be union members ("free riders"), and making it difficult for the unions to collect dues when other organizations that employees belong to are not similarly hindered.

The State complains that the Court did not "articulate a standard" for measuring the penalties of the challenged provisions. (Brief at 11). Yet the State offers no such standard because no such standard exists in the case law. The function of this Court, and all other courts faced with association and speech constitutional challenges, is to determine whether the challenged statutes curtail or encumber such rights, and if so, subject the statutes to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 25, 64 (1976); *see also Katzman v. State Ethics Board*, 228 Wis. 2d 282, 596 N.W.2d 861 (Ct. App. 1999). The State's challenge to the court to develop a ruler or scale by which to measure the penalties associated with the challenged provisions, in order to determine what level of scrutiny to apply, is a red herring. Balancing occurs after the infringement is identified, and after the government offers what it contends is a compelling governmental interest and shows how the law is narrowly tailored to serve that interest. Only after those two weights are placed on the scale does a court balance the infringements against the government's interests. Here, the State chose to argue that the statutes did not infringe on the Plaintiffs' constitutional rights to association and free speech at all, and never

offered any compelling governmental interest or demonstration of narrow tailoring to serve that interest. As the Court correctly determined:

> Because defendants contend there is no infringement of the rights of speech and association, they offer no evidence or argument of the substantial evil the government seeks to prevent by the infringing provisions. Without any evidence or argument that the infringement serves to prevent an evil in the operation of the bargaining system created by the statutes, the court must find the infringement to be excessive and to violate the constitutional rights of free speech and association.

Decision and Order at 16.

Continuing in its failed attempt to meet its burden, the State asserts that Plaintiffs "abandoned" their association and free speech challenge to the prohibition on collective bargaining on any topic other than base wages. (Brief at 9) That is simply false.

In its first brief on the merits, the State asserted that under the post-Act 10 MERA, represented employees and unrepresented employees could equally bargain individually on all topics other than base wages. (Defendants' Joint Brief in Support of Judgment on the Pleadings and Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 33). In response, Plaintiffs noted that MERA is at least ambiguous on that point, but that if the Court accepted this construction of MERA, then the Plaintiffs dropped that portion of their associational claim. (Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Summary Judgment and Response Brief in Opposition to Defendants' Motion for Judgment on the Pleadings at 23 n. 7) The Court did not accept the State's construction of post-Act 10 MERA, and found the constitutional violation described in its opinion.

The State now claims that the Court's decision mandates fair-share agreements (Brief at 14), misconstruing the Court's finding that the prohibition on bargaining over fair-share agreements is unconstitutional to mean that such agreements "are constitutionally required." That is not what the Plaintiffs claim, nor is it the Court's ruling. Rather, with the ban lifted, collective bargaining agents and municipal employers are now free to negotiate on that topic. That is all. That holding is consistent with longstanding precedent that fair share agreements are constitutionally permissible, and the United States Supreme Court's decision in *Knox v. SEIU, Local 1000,* 102 S. Ct. 2277, 2289 (2012).

The State also argues that under Court's reasoning, any collective bargaining law that has prohibited subjects of bargaining for unions, without a counterpart for individuals, violates union/member First Amendment rights. (Brief at 10) The State misreads the Court's decision. The decision does not find Act 10 provisions unconstitutional because they prohibit certain subjects in collective bargaining. Rather, as the decision expressly states, the provisions are unconstitutional because they impose "significant and burdensome restrictions on employees who choose to associate in a labor organization" by permitting employees to associate for that purpose "only if they give up the right to negotiate and receive wage increases greater than the cost of living." (Decision and Order at 15.)

As to the State's other complaints about the Court's rulings on the specific portions of Act 10 found to impermissibly burden the Plaintiffs' associational and free speech rights (Brief at 9-17), the Plaintiffs' primary response is this: the Court has already carefully considered the parties' arguments and the case law bearing on them and has correctly applied the law to the facts and circumstances of this dispute. The State has now raised some wholly unpersuasive new arguments, not based on any case law, critiquing the Court's decision and claiming that challenged provisions of Act 10 should not be subject to strict scrutiny. Courts do not consider arguments unsupported by legal authority. *See Racine Steel Castings v. Hardy*, 139 Wis. 2d 232, 240, 407 N.W.2d 299, 302 (Ct. App. 1987), *rev'd on other grounds*, 144 Wis. 2d 553, 426 N.W.2d 33 (1988); *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct.App.1980).

Finally, the State did not even attempt to present a strict scrutiny argument in support of its claim that it has a reasonable probability of success on appeal.

C. The Court Accurately Found That The Challenged Provisions Violate Equal Protection Rights.

The State offers less than a page of discussion about the Court's ruling on Plaintiffs' Equal Protection claims. It merely relies on its claim that that if the Plaintiffs' rights to free speech and association were not infringed, then the Equal Protection claims should be analyzed under the rational basis standard. While this is an accurate statement of the law, the State has offered nothing to demonstrate that the Court of Appeals is likely to reverse this Court on the free speech and association claims, i.e., that the State has a strong likelihood of success on the merits of the appeal of those

claims. Specifically, the State has not demonstrated that the Plaintiffs' free speech and association rights were not infringed by the challenged provisions, and thus should have been analyzed under the rational basis standard.

III. THE STATE HAS FAILED TO SHOW THAT THE HARMS ANALYSIS FAVORS A STAY AS TO THE COURT'S ASSOCIATIONAL, FREE SPEECH AND EQUAL PROTECTION RULINGS IF A STAY IS NOT GRANTED IN THIS CASE.

Fundamentally, the question on the remaining *Gundenschwager* factors is this: how is the State irreparably harmed if a stay is not granted, and who would be harmed if a stay were granted?

First, it is important to note that the State's argument focuses on the alleged harms that it claims will be suffered by non-parties if a stay is *not* granted, arguing that a stay is in the public interest. That is wrong. The factors, as articulated in *Gudenschwager*, require the State to prove that the ***grant*** of a stay will ***not*** substantially harm other interested parties or the public interest.

The State has not demonstrated that it will be irreparably injured in the event that a stay is ***not*** granted, that interested parties will not be substantially harmed if a stay is granted, or that there will be no harm to the public interest if the court's decision is stayed.

A. The State Has Failed To Demonstrate That It Will Be Irreparably Harmed If A Stay Is Not Granted.

When analyzing the State's claim of irreparable harm, "[t]he harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant." *Gudenschwager*, 191 Wis. 2d at 441-442. The State claims that

it will be irreparably harmed if a stay is not granted for two reasons.

First, it argues that "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." (Brief at 27) Second, it argues that it will be irreparably injured because the Wisconsin Employment Relations Commission "faces the prospect of processing a significant number of prohibited practice complaints." (Brief at 28) Neither of these reasons demonstrates that the state will be irreparably injured if the court's decision remains in effect pending appeal.

In arguing that the State is irreparably injured when a court declares one of its enactments to be in violation of the Wisconsin and U.S. Constitution, the State relies on a decision by Justice Rehnquist, sitting as Circuit Justice, granting a motion to stay an injunction issued by a federal district court. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (J. Rehnquist, *in chambers*, 1977).[1] To be understood, the language extracted from the decision by the State must be viewed in context.

Justice Rehnquist first concluded that the decision would likely be reversed on appeal. *Id.* 1347. He then discussed the *specific harm* to the government caused by the injunction at issue, following which he noted that "[i]t also seems to me that any time a state is enjoined from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Id* at 1351. His point only follows, however, if, as

[1] The duties of a Circuit Justice are generally confined to receiving and deciding requests for stays in cases coming from the appeals Circuit to which they are assigned, and clerical tasks. As such, despite the citation and author, this is not a decision of the United States Supreme Court.

he had found likely, the enactment was constitutional to begin with. As shown in Section II, however, the State has failed in its burden to demonstrate a strong likelihood of success on the merits. Thus, *New Motor Vehicle Board* has no bearing here. Rather, as the Seventh Circuit has observed:

> there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because 'it is always in the public interest to protect First Amendment liberties.'

Joelner v. Vill. of Wash. Park, 378 F.3d 613, 620 (7th Cir. 2004).[2]

The State likewise acknowledges that the harm it alleges is conditional, i.e., it follows only "in the event an appellate court determines that any of the subject MERA provisions is lawful." (Brief at 27) Thus, the State is actually bootstrapping its claim of irreparable harm to its argument that it is likely to succeed on the merits. As explained above, the State has failed to demonstrate its likelihood of success on the merits. Its allegation that it is harmed by the decision also necessarily falls short.

The State also asserts that it will be irreparably harmed by the administrative burdens that it speculates will result from the decision, arguing that the decision "could result in WERC unnecessarily processing a multitude of prohibited practice claims." (Brief at 28) Notably, these speculated outcomes are "unnecessary" only if this Court's decision is reversed on appeal, which the State has failed to show is likely. Further, the State presents no proof of this claim, but bases its allegation purely on speculation.

The State likewise does not allege that the WERC has insufficient staff to handle

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[2] "Rule 809.12 is based on Fed.R.App.P. 8(a). It is well established that federal cases may provide persuasive guidance to the proper application of state law copied from federal law." *Gudenschwager*, 191 Wis. 2d at 439.

an increase in prohibited practice claims, should they occur. Moreover, this Court's decision, in declaring Wis. Stat. § 111.70(4)(d)3 null and void, relieves the WERC of its unconstitutional obligation to administer annual recertification elections for every municipal collective bargaining representative in the state.[3] Thus, if there is an increase in prohibited practice claims, as the State speculates, that administrative burden will be offset by the discharge of WERC's administrative burden to conduct annual recertification elections.

Finally, given the relatively narrow scope of the decision and the numerous provisions of Act 10 that are untouched by the decision (as discussed further below in subsection C), it is not likely that a burdensome number of prohibited practice claims will follow if the decision is not stayed. The State's claim that it will be irreparably harmed by an increased administrative burden in handling prohibited practice claims is not substantial, is not likely to occur, is not supported by any proof and, in any case, is not irreparable harm.

Thus, the "irreparable injury to the State" factor weighs against the grant of a stay.

B. The State Fails To Demonstrate That No Substantial Harm Will Come To Other Interested Parties If A Stay Is Granted.

The State argues that the Plaintiffs will not be harmed if a stay is granted, noting that MTI is covered by "a contract entered into under the previous MERA provisions

[3] The State notes that there are 1,257 towns, 404 villages, 190 cities, 425 school districts, and 72 counties in the State of Wisconsin and that this does not represent the entire universe of municipal employers subject to MERA. Brief at 21, ¶6 (citing Wisconsin Blue Book, pp. 230-31 (2011-12)). Thus, WERC's administrative duties are considerably reduced if is not required to administer thousands of annual recertification elections.

and which runs until June 2013." (Brief at 28.) Thus, the State argues that "a stay of this Court's decision could not possibly cause any harm in the near term." (Brief at 29)

This argument rests on the doubtful proposition that this case will be fully resolved on appeal before the current MTI contract expires in approximately nine months, on June 30, 2013. That is statistically unlikely, especially if this case is taken up by the Wisconsin Supreme Court following a decision on the merits by the Court of Appeals.[4]

Additionally, negotiations of a successor contract typically begin at least several months before the current contract expires. A stay of the decision would prohibit the school district from offering MTI anything more than a cost-of-living base wage increase, unless it submits the proposal for approval in a public referendum, in accordance with Wis. Stat. 111.70(4)(mb), and from bargaining other terms relating to wages, hours and conditions of employment for inclusion in the next contract.

Importantly, the State overlooks the status of Plaintiff Local 61's contract, which expired on December 31, 2011. Local 61 is not operating under the status quo as it existed on August 18, 2011, contrary to the State's assertion. (Brief at 28). Immediately upon the expiration of Local 61's contract, on January 1, 2012, the City of Milwaukee unilaterally and without discussion changed significant terms and conditions of employment. The constitutionally infirm provisions of Act 10 prevented Local 61 from even discussing these changes with the City of Milwaukee.

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[4] On average, it took 347 days from the filing of a notice of appeal for a case to reach a decision in the Court of Appeals, Dist. IV, in 2011. *See* Court of Appeals Annual Report (2011), at http://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=78349.

The Court's decision now allows Local 61 to meet with the City of Milwaukee at the bargaining table to discuss wages, hours and working conditions, even if the City has no obligation to accept Local 61's proposals. This Court's decision merely gives Local 61 the right to good faith negotiations around the impact of these changes on wages, and the ability to discuss the other changes to conditions of employment.

For example, on January 1, 2012, the City: (1) significantly modified work rules to the disadvantage of Local 61 members, (2) significantly modified the Sick Leave Control Policy to the disadvantage of Local 61 members, (3) unilaterally altered the vacation schedule and reduced vacation benefits, (4) eliminated ten annual pay steps that increase wages based on years of service, (5) modified disciplinary procedures and eliminated the right to a meaningful grievance process with a neutral arbitrator, and (6) eliminated the grievance processor position, a member who often resolved safety issues, job assignments, potential disciplinary matters and other work issues, thereby avoiding a formal grievance process. (Madlock Aff. at ¶4). Had the Court's ruling been in effect when the City implemented these modifications, Local 61 would have had the opportunity to discuss these changes with the City and the right to negotiate in good faith their impact on wages. Now, the Court's decision allows such discussion and negotiation with Local 61. The mere ability of the City and Local 61 to discuss these changes and negotiate in good faith does not harm the State or the City of Milwaukee, and restores meaningful participation to Local 61.

Until December 31, 2011, Local 61's terms and conditions of employment had been codified through fifty years of negotiations and collective bargaining. These terms

and conditions were often obtained through concessions in wage increases or the exchange of other benefits. Local 61 members with many years of service have lost benefits that provided for a safe working environment, job security and fair compensation. If this decision had been in effect on January 1, 2012, Local 61's input may have caused the City to modify or scale back the changes, improving the hours and working conditions of Local 61 members and the delivery of services.

Enabling the City of Milwaukee and Local 61 to negotiate hours and conditions of employment results in no harm to the City or the State. To the contrary, such discussions between an employer and a bargaining unit working together to achieve reasonable conditions of employment and reforms can result in safer working conditions and improved delivery of services—even if the City is not obligated to adopt the collective bargaining proposals.

Local 61 members have been extraordinarily affected by changes the City of Milwaukee implemented as of January 1, 2012. As a result of the constitutionally infirm provisions of Act 10, Local 61 has been powerless to discuss the City's unilateral modification and elimination of beneficial wages, hours and conditions of employment. Local 61's inability to provide meaningful representation has diminished its support and the support among its members will further erode with every passing day if this Court grants the defendant's request for stay. *See NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1572-73 (7th Cir. 1996) ("The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable."); *see also Lineback v. Spurlino Materials*, LLC, 546 F. 3d 491, 501-02 (7th Cir. 2008); *Bloedorn v. Francisco Foods,*

Inc., 276 F.3d 270, 297-300 (7th Cir. 2001).

With respect to other portions of the Court's decision, the prohibition on the deduction of union dues from general municipal employee wages and the annual recertification election requirements currently are enjoined under a federal court decision.[5] However, the state has appealed the federal district court's decision. If this Court's decision is stayed and the federal court decision is overturned on appeal, the municipal employee unions would face substantial economic harm from these provisions, both in time and money. Likewise, the loss of payroll dues deduction and fair-share payments from non-member represented employees would substantially harm municipal employee unions and their members.

Finally, the State ignores the fact that, even absent these economic harms, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Joelner*, 378 F.3d at 620.

A stay of the decision in this case would permit the provisions deemed unconstitutional by this Court to continue to infringe the freedoms of association and speech of the municipal employees who have chosen to associate together and speak with one voice through a certified collective bargaining agent, as well as their constitutional right to equal protection under the law.

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[5] *See* Opinion and Order, April 27, 2012 (order denying in part and granting in part defendants' motion for stay pending appeal) and Order, May 18, 2012 (order clarifying stay decision), in *Wisconsin Education Association Council, et al. v. Scott Walker, et al.*, case no. 11-cv-428-wmc (W.D. Wis.), currently on appeal as *Wisconsin Education Association Council, et al. v. Scott Walker, et al.*, Appeal No. 12-2058 (7th Cir.). The Plaintiffs do not mean to suggest or imply that the federal court's decision is likely to be overturned on appeal, but only point out that possibility in light of the pending appeal.

C. The Grant of a Stay Would Harm the Public Interest.

The State inverts the "public interest" factor articulated in *Gudenschwager* by arguing that the grant of a stay is in the public interest, rather than arguing that the grant of a stay will do no harm to the public interest. It thus misapplies this factor. It does not argue, much less prove, that the public interest will not be harmed by the grant of a stay.

The grant of a stay will indeed do substantial harm to the public interest. Act 10 did not only drastically rewrite longstanding public sector labor law in this state. By stripping away the legal tools that have promoted and facilitated the peaceful resolution of labor-management disputes for over fifty years, it also upended the plethora of mutually respectful labor-management relationships that have developed over decades in hundreds of municipalities and school districts across the state. This Court found that several of Act 10's provisions destroyed that long-existing status quo at the expense of the free speech, associational, and equal protection rights of represented employees and their labor organizations. By declining to stay the decision, this Court ensures that the constitutional rights of those citizens and organizations are protected during the pendency of the appeal.

By contrast, granting the stay would create a real and substantial risk that the constitutional rights of general municipal employees and labor unions will be subject to ongoing violation and infringement. Permitting government officials to violate the constitutional rights of thousands of citizens is not in the public interest. "It is always in the public interest to prevent violation of a party's constitutional rights." *Bailey, et al. v.*

Callaghan, et al., ___ F. Supp. 2d ___, 2012 WL 2115300 (E.D. Mich. 2012), *quoting Bays v. City of Fairborn*, 668 F.3d 814, 825 (6th Cir. 2012).

Against this real risk of violating the constitutional rights of thousands of citizens, the State posits an array of speculative harms to municipalities and their governing authorities if a stay is not granted. It protests that municipal employee labor organizations will make demands to bargain, that "disputes over a number of issues" may arise, that municipal employers and employees will be "confused," and that the decision will affect the ability of municipal employers to balance their budgets. (Brief at 22-23).[6] The State's enumeration of potential harms to the public does not survive close examination.

The State's contention that the decision will sow confusion and chaos across the land as municipal employers struggle to implement the decision is highly exaggerated. The State cites a number of media reports made immediately after the decision was issued, which quoted city and school district officials who expressed uncertainty about what the decision meant for their workforces. This is not surprising. The employers

[6] Recent actions taken by Dane County, the City of Madison, and the Madison School Board demonstrate exactly the opposite effect. These municipal governments seized the opportunity under the decision to negotiate wages, terms, and conditions with the representatives of their employees for the mutual benefit of both the municipality and the represented employees. Both the City of Madison and Dane County reached new agreements with their employees' unions days later, announcing that the collective bargaining agreements reached by the parties would result in savings of up to $5 million to the County and $2 million to the City. *See* "City of Madison, Employees Union Strike Deal," Wisconsin State Journal, Sept. 22, 2012, http://host.madison.com/wsj/news/local/govt-and-politics/city-of-madison-employees-union-strike-deal/article_8b6bcd8c-052f-11e2-868b-0019bb2963f4.html; "Dane County Board approves new union contracts," Wisconsin State Journal, Sept. 21, 2012, http://host.madison.com/wsj/news/local/govt-and-politics/dane-county-board-approves-new-union-contracts/article_1043b170-0385-11e2-841f-001a4bcf887a.html. The Madison School Board likewise announced that it would commence collective bargaining with MTI. *See* "Madison School Board to Negotiate Contract with Union," Wisconsin State Journal, Sept. 25, 2012, http://m.host.madison.com/wsj/news/local/education/local_schools/madison-school-board-to-negotiate-contract-with-union/article_97dd640c-06b2-11e2-8d8a-0019bb2963f4.html.

would barely have had a chance to have read the 27-page-long decision, let along consult with their legal counsel about the scope of the decision and appropriate next steps. As discussed below, the decision is very clear with respect to the specific provisions of Act 10 deemed unconstitutional, and the scope of the decision is relatively narrow.[7]

The State's primary argument is that the denial of a stay would financially burden municipalities, which faced budgetary reductions at the same time Acts 10 went into effect. The State' "parade of horribles" dramatically overstates the impact of this Court's decision.

The decision in this case did not overturn Act 10 in its entirety. Rather, the majority of its provisions were left standing. The decision declared a handful of provisions to be unconstitutional, and therefore null and void:

- §§111.70(4)(mb), 66.0506, and 118.245, which prohibit municipal employers from offering general municipal employees, in collective bargaining, a base wage increase greater than the cost of living (as measured by the annual increase in the consumer price index), unless the proposal is submitted to the public and approved in a referendum.

- §111.70(1)(f), which prohibits the municipal employer from entering an agreement with the labor organization to withhold "fair share" payments from the wages of non-union employees in the

[7] Interestingly, the second round of media reports issued several days later reported that the scope of the decision was relatively narrow and left substantial authority in the hands of municipal employers, as discussed below. *See* "Management Still Holds Clout Following Collective Bargaining Reversal," Wisconsin State Journal, Sept. 18, 2012, http://host.madison.com/wsj/news/local/crime_and_courts/management-still-holds-clout-following-collective-bargaining-reversal/article_d3a9b92a-012d-11e2-af92-0019bb2963f4.html. Additionally, employer-side labor lawyers have issued legal opinions publicly explaining the narrow scope of the decision and advising municipal employers that "your ability to manage and control your work environments largely remains intact." *See* http://www.vonbriesen.com/resourcelibrary/articles/act_10_9-12.html.

bargaining unit to cover the expenses incurred in collective bargaining and contract administration.

- § 111.70(3g), which prohibits the municipal employer from deducting labor organization dues from the wages of general municipal employees.

- §111.70(4)(d)3, which requires a labor organization representing general municipal employees to undergo a mandatory, automatic annual recertification election, at the union's expense, and which requires a super-majority vote for recertification.

As to the last two items, the dues deduction provisions and the annual recertification election requirements are currently enjoined under the federal court's order. A stay of those provisions by this Court will have absolutely no impact. Thus, the State cannot show that the public interest will be harmed if this Court does not stay its decision with respect to the dues deduction and annual recertification provisions.

The decision left intact two very significant changes to MERA enacted by Act 10: first, the amended definition of collective bargaining found in Wis. Stat. §111.70(1)(a), and second, the repeal of binding interest arbitration, formerly found at Wis. Stat. §111.70. These two provisions preclude the possibility that any municipality or school district will be forced to agree to contracts that increase wages beyond the municipality's or district's ability to pay.

Under the pre-Act 10 provisions of MERA, the binding interest arbitration provisions provided substantial leverage to labor organizations in collective bargaining. If the parties reached an impasse in bargaining, the final offers of both sides were submitted to an independent arbitrator, who reviewed both proposals in light of statutorily defined factors and made a ruling selecting the offer the arbitrator believed

to be the most fair, in light of the statutory factors and the current economic and market conditions. The repeal of binding interest arbitration by Act 10 permits the general municipal employer to implement its last and best final offer, after the parties have reached impasse.

Thus, if this Court's decision is allowed to stand while the appeal is pending, the law requires only that the municipal employer negotiate in good faith to reach an agreement with the collective bargaining representative. There is no mechanism in the law that would require a municipal employer to implement terms to which it did not agree after engaging in good-faith bargaining, either prospectively or retroactively.

Likewise, the narrower definition of "collective bargaining" found in Wis. Stat. § 111.70(1)(a) applicable to general municipal employees was not declared null and void by the decision. Under the amended definition,

> 'Collective bargaining' means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement, ... with respect to ***wages*** for general municipal employees.

Stat. § 111.70(1)(a). Thus, municipal employers are required to negotiate only wages with general municipal employees. The municipal employer is not obligated to negotiate hours and conditions of employment, although it is no longer prohibited from doing so, under the Court's decision.

As a result, if this Court's decision stands while the appeal is pending, a municipal employer will be authorized to implement its last, best, and final offer if the

parties reach impasse after negotiating in good faith. Issues that do not impact wages are permissive subjects of bargaining, which the municipal employer may choose not to negotiate at all. No legal means exists by which a municipal employer can be forced to implement wage terms to which it does not agree, so long as it has bargained in good faith on those terms. It is difficult to fathom any public interest that is harmed by requiring municipal employers to engage in good-faith negotiations on wages with the representative selected by their employees while the appeal in this case is pending.

Thus, contrary to the State' claim, the public interest weighs in favor of not granting a stay pending appeal. This Court's decision, in effect, excised the provisions of Act 10 that unconstitutionally burdened the rights of general municipal employees to associate for the purpose of engaging in collective bargaining with their employer and their right to equal protection under the law. The decision left in place the key provisions that provide municipal employers greater control over their workplaces and budgets. Allowing the decision to remain in effect while the appeal is pending protects the rights of general municipal employees and labor organizations from further constitutional harm, while imposing no significant injury or harm on the State or municipal employers.

IV. THIS COURT SHOULD NOT IMPOSE A STAY OF ITS DECISION THAT STRIKES DOWN WISCONSIN STATUTE §62.623.

A. The State Fails To Show It Has A Strong Likelihood Of Success On The Merits.

The State must show that it has a strong likelihood to succeed on the merits for this Court to grant its request for stay. *In re Marriage of Leggett v. Leggett*, 134 Wis. 2d

384, 385, 396 N.W.2d 787, 788 (Ct. App. 1986). The State relies on its initial arguments and fails to address the reasoning in the Court's decision that §62.623 is an unconstitutional violation of the Wisconsin Constitution's Home Rule Amendment and that §62.623 is an unconstitutional impairment of contract under both the Wisconsin State and the Federal constitutions.

1. The State fails to show that §62.623 does not violate the Wisconsin Home Rule Amendment.

The State relies on its initial argument that any statewide legislative enactment automatically preempts a local charter ordinance. The State fails to explain how the Court's decision finding a two-part test requiring both (1) uniformity and (2) statewide concern, is legally infirm. The State further fails to demonstrate how the regulation of Milwaukee's ERS is a matter of statewide concern.

The Home Rule Amendment states that local affairs and government are "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). The Home Rule Amendment facially requires that municipal affairs are subject only to state legislation that is both (1) of statewide concern, and (2) operates with uniformity. *Id. See also State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526-527, 253 N.W.2d 505, 507 (1977). The framers' use of the words "of statewide concern" in conjunction with the phrase "as with uniformity" is instructive. Had the framers intended that municipal Home Rule could be supplanted by a state law merely because it is uniform, then the words "of statewide concern" would have been unnecessary.

The State relies on *Van Gilder v. City of Madison*, 267 N.W. 25, 268 N.W. 108 (1936), *West Allis v. Milwaukee County*, 39 Wis. 2d 356, 366, 159 N.W.2d 36 (1968), and *Thompson v. Kenosha County*, 64 Wis. 2d 673, 687, 221 N.W.2d 845 (1974), to assert that state law may preempt any municipal ordinance so long as the regulation "affects with uniformity every city." (Brief at 19) In *Van Gilder*, the Court established a balancing test to determine whether a municipal affair could be understood as a matter of purely of statewide concern, purely of local concern, or an affair of mixed concern. The State fails to appreciate that the entire purpose of the Court's opinion in *Van Gilder* was to determine whether the municipality's ordinance was not of statewide concern, and in turn thereby protected by Home Rule (had uniformity been the only requirement, the Court would not have had to fashion such an opinion). The *Van Gilder* Court employed a balancing test and ultimately determined that the state regulation at issue was a matter of statewide concern because it affected public safety, which is generally regarded as a matter of statewide concern. *Van Gilder*, 267 N.W. at 35.

The State argues that *West Allis* and *Thompson* stand for the proposition that matters of primarily local concern may be preempted by the state so long as the enactment applies with uniformity. (Brief at 45); *see West Allis*, 39 Wis. 2d. at 366. The Court's decisions in both *West Allis* and *Thompson* presupposed that the regulation at issue touched on statewide concern. Neither case went so far as to hold that the state can preempt a matter that is paramountly a local affair. Neither case contains an unequivocal declaration from the legislature that the issues should be construed as matter of local concern.

The Wisconsin Supreme Court clarified Wisconsin's Home Rule test only three years after it decided *Thompson* in *State ex rel. 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."

State ex rel. Michalek v. LeGrand, 77 Wis.2d 520, 526-527, 253 N.W.2d 505, 507 (Wis. 1977) (footnotes and citations omitted).

Michalek went on to hold without qualification that state legislation purporting to preempt a municipal charter ordinance regulating a paramountly local affair is unconstitutional. *State ex rel. Michalek v. LeGrand*, 253 N.W.2d 505, 77 Wis.2d 520 (Wis. 1977) ("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."). Significantly, *Michalek* (1977) was decided subsequent to *Van Gilder* (1936), *West Allis* (1968) and *Thompson* (1974). The *Michalek* Court's opinion was a unanimous decision. Five of the justices participating in the *Michalek* opinion also participated in the prior *West Allis* decision; six of the *Michalek* justices participated in the *Thompson* decision. *See* Wisconsin Court System's former Supreme Court Justices dates of service, *available at* http://www.wicourts.gov/courts/supreme/justices/retired/index.htm.

The *Michalek* Court recognized that the framers of the Home Rule Amendment created a two part test: (1) uniformity and (2) statewide concern. The framers did not intend for Home Rule to be rendered a nullity simply by operation of a uniform state law. Both the Home Rule Amendment and the Supreme Court in *Michalek* mandate that state legislation purporting to regulate an issue that is not a matter of statewide concern is unconstitutional, regardless of whether the state law is enacted with uniformity.

The State's brief merely reasserts its initial position and arguments. The State fails to show why this Court's decision is legally infirm. It has thus failed to show it is likely to succeed on the merits of the appeal.

2. The State fails to show that §62.623 does not constitute an unconstitutional impairment of contract.

The State relies on its initial position that the charter ordinance language in Section 36-13-2-d must be interpreted to find that employer paid contributions are not a benefit of the plan. The State has not responded to the Court's finding that contributions must be considered a benefit on the basis that increasing employee required contributions diminishes the present value of the retirement benefits.

Section 36-13-2d does not imply that contributions are not to be construed as a term and condition of retirement benefits. In fact, it does just the opposite. Section 36-13-2d affirms that contributions made by the employer on behalf of the employee are not to be considered a gratuity and are a term and condition of the benefit of which the participants have a contractual property right. This section of the ordinance prevents

the City from reducing retirement benefits by failing to fulfill its funding obligations.

Act 10's §62.623 mandates that all Milwaukee employees immediately begin making pension contributions in the amount of 5.5% of their wages. Requiring these contributions would result in an immediate 5.5% reduction in salary for employees of the City of Milwaukee. Courts have repeatedly found that smaller decreases in salary constitute a substantial impairment. *See, e.g., Buffalo Teachers Federation v. Tobe*, 446 F. Supp. 2d 134, 143-145 (W.D.N.Y. 2005) (finding a 2% wage cut constitutes a substantial impairment).

The State asserts that "the burden of proving a substantial impairment is often insurmountable when the contract deals with a subject matter that is heavily regulated." (Brief at 20). The State relies on *Energy Reserves Group, Inc. v. Kansas Power and Light Co*, 459 U.S. 400 (1983). *Energy Reserves Group* involved a contract between two private parties to a purchase and sale agreement for natural gas. That agreement became burdened by state and federal regulation controlling the cost of natural gas. This case does not support the State's assertion as it involved a contract for commodities that were historically regulated by government. Further, the regulation at issue in *Energy Reserves* was not targeted to address specific terms in the parties' contract. The case before this Court involves a component of the contractual relationship between an employer and its employees that was specifically targeted by the state legislature.

The state legislature passed a specifically tailored law that directly conflicts with the City of Milwaukee's contractual obligation to its employees. Section 62.623 does not merely burden a contractual relationship of private parties in a heavily regulated

industry. Importantly, the City of Milwaukee's ERS has not historically been "heavily regulated" by the State, contrary to the State's assertion. The City of Milwaukee's ERS has historically remained within the exclusive control of the City of Milwaukee. In fact, because the City of Milwaukee's ERS is a public contract, the State has the burden to show the impairment was reasonable and necessary. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 & n. 15 (1978) (citation omitted) (The impairment of public contracts "must be more scrupulously examined" than the impairment of private contracts, because "'the State's self-interest is at stake.'").

Wisconsin courts employ a heightened reasonable and necessary standard when public employee pensions are at issue. "[T]he legislature should retain a limited power to adjust or amend a retirement plan in certain situations, such as when it is necessary to preserve the actuarial soundness of a plan or to salvage financially troubled funds." *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 563, 544 N.W.2d 888, 893 (1996). "Necessity is to be judged on two levels: 1) whether a less drastic modification could have been implemented; and 2) whether, even without modification, the State could have achieved its stated goals." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29-30 (1977).

Section 62.623 has amended the Milwaukee ERS retirement plan without showing the amendment is "necessary to preserve the actuarial soundness" of the plan or "salvage" the Milwaukee ERS. The Milwaukee ERS is fully funded and not in imminent financial ruin. The State did not need to modify the Milwaukee ERS to preserve the actuarial soundness. *Id.*

The State merely reasserted its initial position and failed to show why the Court's decision is legally infirm. The defendant has failed to show any likelihood that it will succeed on the merits in its appeal on this issue.

B. The State Will Not Suffer Any Harm If This Court Does Not Impose A Stay.

The State must show that it will suffer irreparable injury if this Court does not impose a stay on its ruling. *In re Marriage of Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787, 788 (Ct. App. 1986). The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant. *In Re Marriage of Faust v. Faust*, 178 Wis. 2d 599, 602 (1993). The State has made no affirmative showing of any harm it will suffer if this Court does not issue a stay of its decision concerning §62.623. The State has failed to carry its burden as a matter of law. *Id.*

Even if it tried, the State cannot show it will suffer any harm if a stay is not imposed. The State is not a party to the City of Milwaukee ERS and is not affected by its operation. The State will not be harmed if the City of Milwaukee continues to make employer required contributions. This Court's decision affirms that the City of Milwaukee Employee Retirement System is a matter of local concern and that finding in itself demonstrates that the operation/function of the Milwaukee ERS does not impact the State.

C. A Stay Of The Court's Decision Will Harm Local 61 And The Public Interest.

The State must show that no harm will come to other interested parties and show that a stay is in the public interest. *In re Marriage of Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787, 788 (Ct. App. 1986). The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant. *In Re Marriage of Faust v. Faust*, 178 Wis.2d 599, 602 (1993). The State has made no assertions regarding the harm that will fall upon Local 61 if this Court issues a stay of its decision concerning §62.63. The State has failed to carry its burden as a matter of law. *Id.*

The City of Milwaukee has a conflict between Act 10 and its obligations under City of Milwaukee Employee Retirement System. If this Court issues a stay, the City of Milwaukee could immediately cease employer contributions on behalf of the employees and deduct 5.5% of its employees' base salary from each weekly paycheck. City of Milwaukee employees bargained for and relied on this benefit in prior contract negotiations, in the decision to continue employment with the City of Milwaukee, and also in planning the financial affairs of their daily lives. Local 61 members have tailored their living expenses, auto loans, mortgage payments and/or other debt obligations to their salary. An immediate 5.5% pay cut would cause irreparable harm to those who have relied on their full salary to satisfy their living expenses and debt obligations.

Local 61 members are not alone in their concern that a potential 5.5% wage cut looms over their heads. Approximately 2700 City of Milwaukee general civilian

employees who are not part of Local 61's bargaining unit face the same imminent wage cut. In the event these wage cuts are implemented, the economic harm would be felt deeply in Milwaukee, as all City of Milwaukee employees are required to maintain their residence in the City of Milwaukee.

This Court's ruling has resolved the conflict between Act 10 and the Milwaukee ERS, and the ruling has relieved thousands of Milwaukee employees from the potential burden of an immediate 5.5% wage cut implemented at the discretion of the City of Milwaukee. A stay is not in the public's interest as it would perpetuate the conflict between §62.623 and the City of Milwaukee's obligations to its employees under its ERS. A stay would renew the uncertainty pervading over approximately 3000 City of Milwaukee general employees who face the possibility of a substantial economic loss under §62.623.

V. CONCLUSION.

This Court reviewed expansive briefs, deliberated the constitutionality of Act 10 over a six month period and then issued a thoughtful and well-reasoned decision. In contrast, the legislature not only failed to perform its duty to evaluate the constitutionality of Act 10, it rushed the law through the legislative process in a fashion that precluded input, review and the type of evaluation that such a law of this magnitude requires. The legislative process resulted in the constitutional infirmities found by this Court, and as such, there is little likelihood of success on appeal. The balance of harms also strongly weighs against a stay.

For these reasons, the State's motion for stay should be denied in all respects.

Dated this 26th day of September, 2012.

Respectfully submitted,

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