STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4
Case No. 12AP2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE DECISION AND FINAL ORDER DATED SEPTEMBER 14, 2012 IN DANE COUNTY CIRCUIT COURT CASE 2011-CV-3774, THE HONORABLE JUAN B. COLAS, PRESIDING

BRIEF OF PLAINTIFFS-RESPONDENTS

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

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

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STATEMENT OF THE ISSUES

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

(a) prohibit municipal employers from collectively bargaining with the certified exclusive agents of municipal general employees ("certified agents" or "representatives") on anything other than base wages, which may not exceed the annual increase in the Consumer Price Index unless approved in a municipal voter referendum (Wis. Stat. §§ 111.70(4)(mb), 66.0506, and 118.245);

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

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

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

The circuit court answered yes.

2. Do certain provisions of 2011 Wisconsin Act 10 and 2011 Wisconsin Act 32, which amend MERA and related

statutes, violate the Plaintiffs' rights to equal protection of the laws guaranteed by Article I, §1 of the Wisconsin Constitution and corresponding provisions of the United States Constitution, by impermissibly creating classifications based on represented employees' exercise of their fundamental right of freedom of association and penalizing such employees based on that exercise, by:

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

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

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

The circuit court answered yes.

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

The circuit court answered yes.

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

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

2011 Wisconsin Act 10, which amended MERA, Wis. Stat. § 111.70 et seq., and related statutes, was a radical piece of legislation, both in scope and effect, changing over 50 years of Wisconsin labor law. The law has attracted tremendous public attention and incited strong emotions both in Wisconsin and nationally. The Wisconsin court system's handling of an earlier challenge to the law, *State ex rel. Ozanne v. Fitzgerald, et al.*, 2011 WI 43, led to widespread claims that the circuit court and the Wisconsin supreme court lacked impartiality and made their decisions based on political rather than legal considerations.

Given the complexity of this case and the public interest in it, holding oral argument will accomplish two things: (a) allow the parties to fully explore any questions and concerns that the Court of Appeals panel may have about the issues presented; and (b) mitigate any concern by members of the public that the Court may be biased in favor of one side or the other, or is inclined to rule based on improper considerations, by allowing the public to watch and listen to the Court and

counsel grapple with the issues presented by this case.

Publication of this Court's decision is warranted in light of the importance of workers' rights to associate and speak collectively without unconstitutional interference, and to receive equal treatment under the law regardless of their affiliations. Publication is also warranted in light of the important home rule and impairment of contract issues which affect the hundreds of thousands of people who work for and live in the City of Milwaukee. The decision should also be published due to the large number of other Wisconsin citizens directly as well as indirectly affected by Act 10's challenged provisions.

STATEMENT OF THE CASE

This is an action for declaratory judgment brought by two labor unions which have been the certified agents for municipal bargaining units and two individual members of those unions who contend that specific provisions of 2011 Wisconsin Acts 10 and 32, which amended MERA and related statutes (hereinafter "Act 10"), through their cumulative impact and effect, violate their constitutional rights of association and equal protection. Specifically, the statutes challenged on these bases are as follows:

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

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

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[1] Throughout its Brief (formally titled "Brief of Defendants-Appellants," hereinafter "State's Brief") the State consistently and misleadingly characterizes these provisions as "prohibiting the forced payment of dues from non-member employees." *See, e.g., Def. Brief at pp. 6, 7.*

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

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

Public Employees Local 61, AFL-CIO, and its member, John Weigman, also contend that certain provisions of those Acts unconstitutionally interfere with Milwaukee's Home Rule Authority over its pension plan, and unconstitutionally impair their contract rights. They challenge Wis. Stat. § 62.623, as amended by Acts 10 and 32, which prohibits the City of Milwaukee from making the employee's share of pension fund contributions.

The relevant procedural history provided by the Defendants-Appellants (hereinafter "the State") at pages 5 to 9 of their Brief is adequately stated, although they failed to mention that the circuit court ruled in their favor on two significant issues which the Plaintiffs did not appeal to this Court.

Because this is a facial challenge to certain statutory changes, the few facts forming the foundation for the case are undisputed, as the State notes. However, the balance of the State's Statement of the Case is largely improper argument, to which Plaintiffs will respond in their Argument section.

ARGUMENT

I. INTRODUCTION

On March 11, 2011, Governor Scott Walker signed 2011 Wisconsin Act 10, which, among other things, virtually eliminated the statutory rights and obligations of most municipal employees and employers in Wisconsin to engage in collective bargaining. Act 10 became effective on June 30, 2011.[2]

In his summary judgment decision, Judge Colas analyzed the cumulative burdens that Act 10 imposes on the associational rights of municipal employees who choose to negotiate with their employer as a unit with one certified agent representing their interests:

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[2] Some of the provisions of Act 10 were reenacted in 2011 Wisconsin Act 32, which became law on July 1, 2011.

> Although the statutes do not prohibit speech or associational activities, the statutes do impose burdens on employees' exercise of those rights when they do so for the purpose of recognition of their association as an exclusive bargaining agent. . . [I]n the statutes at issue, the state has imposed significant and burdensome restrictions on employees who choose to associate in a labor organization. The statutes limit what local governments may offer employees who are represented by a union, solely because of that association. It has prohibited general municipal employees from paying union dues by payroll deductions, solely because the dues go to a labor organization (unlike the restrictions found constitutional in *Ysursa v. Pocatello Educ. Assn.*, 555 U.S. 353, 129 S.Ct. 1093 (2009), which prohibited payroll deduction of dues for any political activities of any organization, regardless of viewpoint, identity or purpose). Employees may associate for the purpose of being the exclusive agent in collective bargaining only if they give up the right to negotiate and receive wage increases greater than the cost of living. Conversely, employees who do not associate for collective bargaining are rewarded by being permitted to negotiate for and receive wage increases without limitation. The prohibition on fair share agreements means that employees in a bargaining unit who join the union that bargains collectively for them are required to bear the full costs of collective bargaining for the entire bargaining unit, including employees in the unit who do not belong to the union but receive the benefits of the bargaining. Unions are required to be recertified annually, even if there has been no request for recertification and the full costs of the election are borne by the employees in the bargaining unit who are members of the union. Statutes that burden the exercise of a constitutional right for a lawful purpose and reward the abandonment of that right infringe upon the right just as did the prohibition in *Lawson* against members of certain associations residing in public housing.

Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings ("Decision and Order"), pp. 15-16; App. 015-016.

The State characterizes Act 10's onerous cumulative restrictions as mere "policy choices" regarding "how much

decision-making authority to share" with public employee representatives. *State's Brief, p. 13-14.* These were not mere policy choices designed to bolster the management prerogatives of municipal employers. Rather, Act 10 was an effort to legislate public employee unions out of existence by so burdening and penalizing municipal employees who exercise their associational right to collectively select a representative to engage in activities for their mutual benefit, including statutory collective bargaining, that the employees themselves would surrender the exercise of their associational rights.

The State evades an analysis of what Act 10 actually does by repeatedly asserting that there is no constitutional right to collectively bargain. That assertion is true: groups of employees do not have a constitutional right to compel their employers to negotiate employment terms with them in good faith. But, as shown in Section III below, it is also true that the State, having established a legal framework within which municipal employers and employees may engage in collective bargaining, is prohibited under the Wisconsin and United

States Constitutions from imposing penalties or withholding benefits within that framework in a manner that undermines the decision of municipal employees to engage in concerted activities for their mutual benefit, absent a compelling state interest in such infringements. Act 10 does just that, and the State has offered no compelling interest to justify the infringements. Judge Colas thus correctly found that Act 10 violates Plaintiffs' fundamental rights of free speech and association guaranteed by both the Wisconsin and United States Constitutions. *Decision and Order, p. 16; App. 016.*

Having found Plaintiffs' associational rights were infringed by Act 10, Judge Colas also found that Act 10 creates two similarly situated but unequally treated classes: general municipal employees who are represented by a certified agent, and those who are unrepresented. *Decision and Order, pp. 17-18; App. at 017-018.* In light of the State's failure to offer a defense of Act 10 that would survive strict scrutiny, Judge Colas concluded that Act 10 violates municipal employees' constitutional rights to equal protection. *Decision and Order,*

p. 8; App. at 018. Plaintiffs demonstrate in Section IV that this was the right conclusion.

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

II. STANDARD OF REVIEW

The constitutionality of a statute is a question of law that this Court reviews *de novo* on appeal, yet benefits from the analysis of the circuit court. *State v. Quintana*, 2008 WI 33, ¶¶11-12, 308 Wis. 2d 615, 748 N.W.2d 447; *State v. Radke*, 2003 WI 7, ¶11, 259 Wis. 2d 13, 657 N.W.2d 66.

A party who challenges the constitutionality of a statute must demonstrate that the statute is unconstitutional "beyond a reasonable doubt." *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶68, 284 Wis. 2d 573, 701 N.W.2d 440. This standard is not an evidentiary one, but rather an expression of deference to the legislature. "[A]

court's degree of certainty about the unconstitutionality results from the persuasive force of legal argument." *Id.* at ¶68, n. 71. Put another way, the reasonable doubt standard "establishes the force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute can be set aside." *Id.* at ¶324 *(Roggensack, dissenting); see also Guzman v. St. Francis Hosp., Inc.*, 2001 WI App 21, ¶4, n. 3, 240 Wis. 2d 559, 623 N.W.2d 776.

However, "when a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." *Ferdon*, 2005 WI 125 at ¶69. Neither "respect for the legislature nor the presumption of constitutionality allows for the absolute judicial acquiescence to the legislature's statutory enactments." *Id.* "Since *Marbury v. Madison*, it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is." *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 436, 424 N.W.2d 385 (1988).

Importantly, as to the claims that Act 10 violates Plaintiffs' associational and equal protection rights guaranteed by the Wisconsin and U.S. Constitutions, once the Plaintiffs show a restraint on a fundamental right, the presumption of constitutionality falls away and the burden shifts to the State. Unlike most legal disputes, in cases involving governmental restriction of fundamental rights the defendant carries the burden of proof and persuasion. *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816, (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (citations omitted). As discussed below, the State's association and equal protection infringements are subject to strict scrutiny. Under strict scrutiny, the burden of proof is on the State to present a compelling interest for the infringement on Plaintiffs' fundamental rights and to show that the legislation was narrowly tailored to accomplish that interest.

III. ACT 10 VIOLATES THE PLAINTIFFS' ASSOCIATIONAL RIGHTS.

A. The State Misstates Plaintiffs' Associational Claim.

The State argues that Plaintiffs' associational claim is "necessarily premised on the notion that there is a constitutionally protected right to engage in collective bargaining." *State's Brief, p. 12.* It claims, in essence, that Plaintiffs have no right to associate with a certified agent because the State's obligation to engage in collective bargaining is a creature of statute, a mere "policy choice." *State's Brief, p. 14.* It reasons that because the State has agreed, out of legislative grace, to engage in collective bargaining with public employees, the State may interfere as much as it likes with public employees' associational interests when they participate in this statutory process. The State is wrong.

The State elides two distinct concepts: one, the constitutionally protected right of association, that is, the right to affiliate with others, including by forming and joining a union to speak with a unified voice; and the other, collective bargaining, which is a statutory guarantee that an employer

will negotiate in good faith with a particular representative of a group of employees.

The Plaintiffs' association claim is not based on the contention that municipal employees have an associational right to engage in collective bargaining. Rather, Plaintiffs claim that they have a right to associate in a bargaining unit and select a single agent to represent them and that Act 10's multiple provisions heavily penalize municipal employees who make that associational choice, and also penalize those who choose to join a union. Act 10 does so by severely limiting what can be collectively (but not individually) bargained, requiring annual recertification votes, prohibiting fair share arrangements and prohibiting payroll deductions for union dues, while simultaneously encouraging employees to vote against certification in order to have a wider choice of bargaining subjects, and to not join the union even if the bargaining unit chooses to have a certified agent, and thus receive the benefits of representation without contributing toward the costs.

The State also argues that municipal employees who choose to be represented by a collective bargaining agent exercise no associational right at all, because the WERC, not employees, determines the bargaining unit of employees that is to be represented, and by which agent. *State's Brief, p. 28.* That is absurd. The WERC has no role in deciding, on behalf of employees, whether they will be collectively represented or not. Nor does the WERC decide, on behalf of employees, what entity will represent them. Those decisions are fundamentally associational activities that are constitutionally reserved to the employees. *See N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

The private-sector workers discussed by the Court in *Jones & Laughlin* had no more ability to "choose" their fellow workers than do the municipal employees in this case. Yet the Court recognized that those workers, in self-organizing for their collective benefit as employees, exercised fundamental constitutional rights. The associational rights recognized in *Jones & Laughlin* were not individual decisions to form relationships, but rather the collective decisions to self-

organize as employees for the purpose of collective bargaining and other concerted action for their mutual employment benefit, without restraint or coercion by their employer. This same right to self-organize and select a representative of their own choosing, without restraint or coercion by the State, is at stake in this case.

B. The Rights To Self-Organize and To Associate With A Union Are Fundamental Rights Protected by the U.S. and Wisconsin Constitutions and Penalizing or Placing Conditions on the Exercise of such Rights is an Infringement.

Municipal employees' associational right to self-organize for the purpose of statutory collective bargaining and other lawful collective action, and their associational right to select a representative to engage in statutory collective bargaining and other lawful action on their behalf, are constitutionally protected and may not be infringed by the State. It has long been recognized that the right of employees to self-organize and associate with a union is a fundamental right protected by the U.S. Constitution. "[T]he right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual

protection without restraint or coercion by their employer....is a fundamental right." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *see also Railroad Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964). "Such collective action would be a mockery if representation were made futile by interferences with freedom of choice." *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930). *See also Thomas v. Collins*, 323 U.S. 516 (1945).

While a governmental employer is free to refuse to negotiate with a public employee union (absent statutory guarantee), it violates employees' fundamental rights of association when it "tak[es] steps to prohibit or discourage union membership or ***association***." (emphasis added.) *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 466 (1979). The State may statutorily restrict its obligation to collectively bargain with its employees in good faith, but it may not constitutionally withhold benefits or penalize public employees for exercising their ***associational*** rights. *See Smith*, 441 U.S. at 465.

Citing *Smith,* the United States Court of Appeals for the Sixth Circuit described several kinds of restrictions that would constitute a violation of the fundamental right to associate: retaliation, discrimination, suppression or censorship by the government of municipal employees' ability to associate together for their common interests and to petition and advocate their positions. *Brown v. Alexander,* 718 F.2d 1417, 1429 (6th Cir. 1983), *reh'g en banc denied.*

Article I, Sections 3 and 4 of the Wisconsin Constitution protect citizens' associational rights at least to the same extent as the U.S. Constitution does. Those provisions guarantee the same freedom of speech and right of assembly and to petition as does the First Amendment of the United States Constitution. *Lawson v. Housing Authority of City of Milwaukee,* 270 Wis. 269, 274, 70 N.W.2d 605 (1955); *see also State v. Bagley,* 164 Wis. 2d 255, 474 N.W.2d 761 (Ct. App. 1991). Indeed, the Wisconsin Constitution may provide even stronger associational protections than the U.S. Constitution.

The Wisconsin Supreme Court has repeatedly stated when interpreting other Wisconsin Constitutional protections

with U.S. Constitution counterparts that it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if . . . the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *State v. Jennings*, 2002 WI 44, ¶38, 252 Wis. 2d 228, 647 N.W.2d 142 *quoting State v. Doe*, 78 Wis. 2d 161, 171-72, 254 N.W.2d 210 (1977).

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

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

Lawson, 270 Wis. at 275.

While *Lawson* involved a law that prohibited members of "subversive organizations" from being tenants in federally subsidized housing, and not labor unions or collective bargaining, that is a distinction without a difference, contrary to the State's strenuous efforts to limit *Lawson* to its facts. *See State's Brief, pp. 27-28.* The underlying constitutional principles are the same regardless of the fact pattern. Even when citizens have no constitutional right to a legislatively-conferred benefit, they cannot be required as a condition of receiving that benefit to surrender constitutional rights "unrelated to the purpose of the benefit" or be required "to comply with unconstitutional requirements." *Lawson*, 270 Wis. at 277-78.

It is also widely recognized that burdening or placing conditions on the exercise of a constitutional right has the same effect as directly penalizing its exercise. Indeed, among the many ways government may unconstitutionally infringe on associational rights, "government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group." *Roberts v. United*

States Jaycees, 468 U.S. 609, 623 (1984), *citing Healy v. James*, 408 U.S. 169, 180-84 (1972).

In *Healy*, the U.S. Supreme Court held that a college's denial of recognition and access to campus facilities to a student organization, solely on grounds of its perceived affiliation with a national organization, infringed on the students' associational rights under the U.S. Constitution, even though the organization could claim no constitutional right to college recognition *per se*.

Moreover, both the U.S. Supreme Court and Wisconsin courts have recognized the broader principle prohibiting unconstitutional conditions in the context of public employment. For example, if the State confers on a public employee a property right to continued employment through just cause protections or otherwise, it may not deprive the employee of that property right without constitutional due process. *See, e.g., Wis. Stat.* § 230.23(1)(a) *and Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.'"). And in *Garrity v. New Jersey*, 385

U.S. 493 (1967), the U.S. Supreme Court held that "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity*, 385 U.S. at 500. *See also, Oddsen v. Board of Fire and Police Com'rs for City of Milwaukee*, 108 Wis. 2d 143, 161-62, 321 N.W.2d 161 (1982).

Consequently, when municipal employees exercise the associational right to be represented, the State may not "exact a price" in the form of restrictions on represented employees' wage increases. Or, to put it the other way, the State may not require municipal employees to surrender their associational right to be represented in order to avoid the restrictions that Act 10 imposes exclusively on represented employees.

C. Act 10 Coerces And Interferes With The Associational Rights Of Public Employees Who (1) Choose To Be Represented By A Collective Bargaining Agent And (2) Choose To Associate As Members Of A Union Certified As The Exclusive Bargaining Agent.

Through Act 10, the State has effectively "prohibited or discouraged" municipal employees from union membership and from associating with a certified agent, *see Smith*, 441 U.S. at 466, by enacting a statutory scheme that

(a) restricts the annual base wage increases available to represented employees, while not similarly restricting the wage increases available to non-represented employees;

(b) prohibits authorized wage deductions for union dues;

(c) prohibits municipal employers from entering agreements with certified agents to require all employees in the bargaining unit to contribute a fair share of the cost of collective bargaining activities, while still mandating that the certified agents provide services to all such employees; and

(d) mandates the union to undergo and bear the costs of annual elections with an unreasonably high threshold for recertification: a majority of all eligible voters not just those who vote, even if not a single represented employee sought decertification.

This restrictive framework for municipal employee collective bargaining as a whole imposes substantial deterrents on municipal employees who choose to be collectively represented, and also those who choose to join the certified agent union. It forces employees who exercise their associational rights to accept restrictions on their employment that would not apply if they remained unrepresented. The cumulative effect of the framework unconstitutionally burdens and penalizes municipal employees who exercise their right to self-organize for purposes of statutory collective

bargaining, who chose a particular representative as their certified agent, and who chose to be members of a union.

Had the State repealed MERA entirely, the municipal employees now covered by MERA would have retained their constitutional associational rights to self-organize and select representatives of their own choosing to advocate for their collective employment interests. In the complete absence of statutory collective bargaining, it would be unlawful for the State to impose any term or condition of employment on municipal employees based on their participation in a labor organization, or to impose additional costs on employees who chose to organize or to become members of a labor union.

The fact that the State has extended a limited statutory right to municipal employees to engage in collective bargaining with their employers does not give the State the right to then also restrict the employees' exercise of their constitutional associational rights. As described in subsection B above, the State may not grant a privilege to citizens on the condition that they consent to the infringement of their constitutional rights. The *Lawson* court explained this concept:

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

Lawson, 270 Wis. at 276, *quoting Frost & Frost Trucking Co. v. Railroad Comm.*, 271 U.S. 583, 593 (1926).

1. Act 10 financially burdens and penalizes employees who choose to be represented as part of a collective bargaining unit.

As shown in subsection B above, municipal employees have a constitutional right to freely exercise their choice to self-organize for the purpose of engaging in statutory collective bargaining with their employer, and to select a labor organization to represent their bargaining unit in those negotiations. Act 10 coerces and interferes with the exercise of those associational rights by cumulatively, through multiple restrictions and requirements, significantly penalizing their exercise.

If a group of employees chooses to be represented for the purpose of collective bargaining, Act 10 ***bars their employer*** from offering them a base wage increase that exceeds the increase in the cost of living, as measured by the

CPI, unless the employer first obtains the approval of the increase by voters in a municipal or school district referendum. Wis. Stat. §§111.70(4)(mb); 66.0506, 118.245. The law does not, however, restrict the level of base wage increases from the same employer to *non*-represented employees. Likewise, wage increases to non-represented employees that exceed annual CPI increases are *not* required to be approved by voters in a referendum. *See* Wis. Stat. §§ 66.0506, 118.245. Thus, municipal employees who choose to be represented do so under penalty of the base wage limitations, to their detriment.[3]

2. Act 10 further burdens represented employees who also choose to be members of the union.

Separate and apart from the burdens Act 10 places on all represented municipal employees, regardless of their union affiliation, particularly regarding wages, Act 10 places additional burdens on those employees who additionally exercise the associational right to become members of the

[3] As argued below, Act 10's provisions restricting base wage increases for represented employees also violate equal protection principles. The base wage provisions thus are unconstitutional under two distinct legal theories.

labor union selected as their bargaining unit representative.[4] Membership in a labor organization is a protected right of association. *See American Steel Foundries*, 257 U.S. at 209.

Specifically, under Act 10, if a union is certified as the exclusive representative of a bargaining unit, the employees who are members of the union bear the union's full costs of representing the entire bargaining unit--which may include employees who are not union members. Act 10 prohibits the labor organization from entering into an agreement with the employer to require non-union employees of the bargaining unit to pay their proportionate share for the collective bargaining and contract administration services they receive. Wis. Stat. §§111.70(1)(f); 111.70(4)(mb). At the same time, the law only permits municipal employees to be represented by a labor organization that is the *exclusive* representative of all employees in the bargaining unit, and empowers the state WERC to define the parameters of the bargaining unit. Wis. Stat. §11.70(4)(d)1 & 2.

[4] An individual may exercise the associational right to be represented, but decline to join the labor union selected as the collective bargaining agent.

Thus, Act 10 forces a union of municipal employees and its members to bear the full costs of serving all employees in the state-defined bargaining unit, while allowing non-union employees of the bargaining unit to enjoy the benefits of representation as "free riders." Non-union employees in the bargaining unit enjoy the benefits of representation while shouldering none of their costs. In this way, state law unfairly burdens the employees who choose to associate as members of the labor organization certified as the exclusive representative of their bargaining unit. The combined effect of mandatory exclusive representation of a state-defined collective bargaining unit, and the prohibition of fair share agreements, operates to burden and restrain municipal employees' freedom to associate with a labor union.

The burden placed on those who choose to associate as labor union members is exacerbated by the mandatory annual certification election provisions of Act 10. The law requires that each year the bargaining agent must be recertified by a majority vote of all members of the unit, whether a member

votes or not. That is an extraordinary burden. Wis. Stat. § 111.70(4)(d)3.

Moreover, the chosen bargaining agent and its members are forced to fund the administrative costs of the annual union recertification election – even if *no* employee in the bargaining unit seeks decertification of the union – to maintain the union's status as the representative of the collective bargaining unit. The law imposes these administrative costs only on the labor organization, and forbids the labor organization from obtaining a fair share of the costs of the recertification elections from the employer or the non-union employees in the unit, regardless of the outcome of the election. *Id.* Thus, even if the union wins annual recertification, it must undertake its collective bargaining and contract administration obligations with depleted financial resources.

Further strangling the ability of the union to operate, and thus infringing on Plaintiffs' rights to associate, is the ban in Wis. Stat. § 111.70(3g) on dues deductions from wages. On a motion for preliminary injunction, Michigan's new ban on

union dues wage 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 success 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). This same logic applies here.

The provisions of Act 10 that (1) mandate annual certification elections with a supermajority needed to recertify, (2) allow the State to assess fees for the costs of the elections exclusively on the union and its members, (3) make the union the exclusive bargaining agent for all employees within the bargaining unit including non-union employees while forbidding the union from seeking a fair share of costs from

non-members (including recertification election costs), and (4) ban authorized dues deductions from union member wages, are a systematic effort to weaken and undermine the union's financial resources and effectiveness in representing municipal employees, and to induce represented employees to abandon their association as members of the labor union. Taken together, along with the restriction on wage increases allowed for bargaining unit members, these provisions **cumulatively** operate to severely curtail municipal employees' freedom to associate with an exclusive bargaining agent, and to become members of the labor union acting as that agent.[5]

D. Act 10 Fails Under Strict Scrutiny.

"In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley v. Valeo*, 424 U.S. 1, 25, 64, (1976). *See also Katzman v. State Ethics Bd.*, 228 Wis. 2d 282, 596 N.W.2d 861 (Ct. App. 1999) (quoting *Buckley* and construing state lobbying

[5] The State never addresses the cumulative nature of these onerous requirements, preferring, instead, to discuss them as if they have no connection to one another.

law in a manner that avoided infringement of right to association). A law that curtails the freedom of association can only survive strict scrutiny if it is shown that it serves a compelling governmental interest and that the law is narrowly tailored to serve that interest. *Buckley*, 424 U.S. at 44-45; *Gard v. Wisconsin State Elections Bd.*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990).

The Sixth Circuit subjected to strict scrutiny a Tennessee law that proscribed a labor organization that was affiliated with any national labor organization from accessing dues check-off benefits (i.e., access to payroll deductions). It explained:

> To be affiliated with a group or organization is to be associated with, attached to, or identified with that organization. We believe this subsection directly limits freedom of association between labor organizations, and their members or members of other such organizations, and thus it could restrain or restrict freedom of association, a fundamental first amendment right. The advocacy of particular policies and practices of parent or affiliated organizations may well be directly affected by this limitation, and thus it requires strict scrutiny; equal protection concerns in this respect are related to the first amendment rights asserted by plaintiffs.
>
> * * *
>
> [T]he requirement that an organization be "independent" and non-affiliated with another labor organization strikes at the heart of freedom of association. Therefore we

> construe subsection (6) to require stricter scrutiny, that the state demonstrate a compelling interest to justify the limitation.

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

Act 10 implicates the same associational and equal protection rights.[6] Just as "independent" unions were treated more favorably than those affiliated with national unions in *Brown*, thus subjecting the law to strict scrutiny, here, "independent" employees or independent groups of employees are treated more favorably than those who are associated with a certified agent. Thus, strict scrutiny applies to this court's consideration of the Plaintiffs' claims that their associational and equal protection rights are violated by the MERA amendments.

To paraphrase the *Healy* court, we may concede that Act 10 does not outright ban public sector employees from forming associations to speak and act collectively. *See Healy*, 408 U.S. at 183. Yet "the Constitution's protection is not limited to direct interference with fundamental rights." *Id.*

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

Associational freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id., quoting Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Once so stifled, that governmental act can only be allowed if it "serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

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

The State at no time offered any compelling State interest. Nor does any such compelling interest exist. As such, the State fails in its burden and the Court should rule in Plaintiffs' favor on their association claim.

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

A. The Wisconsin Constitution and the U.S. Constitution Guarantee Plaintiffs Equal Protection Under the Law.

Article I, §1 of the Wisconsin Constitution states:

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

This provision is described as Wisconsin's Equal Protection clause, and in the past has been "interpreted to afford substantially the same protections as its federal counterpart." *GTE Sprint Comm. Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 192, 454 N.W.2d 797 (1990). Consequently, this provision is equivalent to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See Jackson v. Benson*, 218 Wis. 2d 835, 901, n. 28, 578 N.W.2d 602 (1998). As noted in Section III, however, Wisconsin courts are free to interpret the Wisconsin Constitution as providing more protections than the Federal Constitution.

An equal protection claim arises when the statutes provide for different treatment of people who are similarly

situated. *See Wisconsin Prof. Police Assn. v. Lightbourn*, 2001 WI 59, ¶ 221, 243 Wis. 2d 512, 627 N.W.2d 807. Different levels of scrutiny apply depending whether the classifications disadvantage a suspect class, impermissibly interfere with the exercise of a fundamental right, or not. *See Romer v. Evans*, 517 U.S. 620, 631 (1996).

It is beyond contention that the "equal protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *Ferdon v. Wis. Patients Compensation Fund*, 2005 WI 125, ¶ 61, 284 Wis. 2d 573, 701 N.W.2d 440; *See also Def. Brief, p. 38.*

As elaborated in the subsections below, Act 10 violates Plaintiffs' rights to equal protection because (1) the challenged provisions treat similarly-situated employees differently, thus implicating their constitutional rights to equal protection, and (2) the differential treatment, i.e., classification, is based on and penalizes the Plaintiffs for associational choices which the

Plaintiffs have a fundamental right to make, and cannot withstand strict scrutiny.

The State does not contest that the right to associate is a fundamental right. Rather, it rests its defense to Plaintiffs' equal protection claims on its arguments that Plaintiffs' constitutional rights to free association are not infringed by Act 10, and proceeds to engage in a rational basis standard discussion. The State states, correctly, that when rational basis scrutiny applies, the burden remains on the Plaintiffs. *State's Brief, p. 39.* The State devotes a significant portion of its Brief to arguing that the statutes in question survive rational basis scrutiny. Plaintiffs do not contend otherwise. Rather, this discussion is irrelevant because the classifications must be analyzed under strict scrutiny. The State cannot meet its burden to demonstrate a compelling interest to justify the infringement on Plaintiffs' rights to equal protection.

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

A municipal employee who is within a certified bargaining unit is similarly situated to a municipal employee who is not: there is no characteristic of municipal employees who choose to associate with a certified agent that makes such employees different from municipal employees who do not. A represented teacher or sanitation worker is no different from a nonrepresented teacher or sanitation worker; they differ only in that the represented employees have exercised their constitutional rights to associate by choosing to self-organize for the purpose of exercising the statutory right of collective bargaining and selecting a representative.

While Act 10 restricts the ability of represented municipal employees to negotiate only as to base wages, and caps the wage increase available absent voter approval, no statute limits the subjects on which a municipal employer may negotiate with a municipal employee or group of municipal employees who are not a part of a certified collective

bargaining unit. Likewise, no statute caps the base wage pay increase that a municipal employer may give a non-represented municipal employee, or requires any proposed pay increase for non-represented employees to be put to the approval of the municipal voters to become effective.

Another provision of Act 10 also treats municipal employees differently based on their association with a certified agent, commonly a labor union. The provision treats members of a labor union differently from members of other dues-collecting voluntary organizations to which municipal employees may wish to belong. Wis. Stat. §111.70 (3g) provides as follows:

> A municipal employer may not deduct labor organization dues from the earnings of a general municipal employee or supervisor.

The only municipal employees who might request deduction of labor organization dues from their earnings are those who are members of a union. There is no similar ban on employees who choose membership in other organizations. The statutes do not prohibit municipal employers from allowing use of the payroll deduction forum for dues to other

organizations with which municipal employees voluntarily associate, for example, the National Rifle Association, the League of Women Voters, or the Toastmasters.

Recently, the United States District Court for the District of Arizona considered a challenge to an Arizona statute which, among other things, prohibited some unionized state employees but not others from authorizing payroll deductions to pay union dues, and also allowed all state employees to authorize payroll deductions to pay for other things, including insurance premiums, investments, and charitable donations. *See United Food and Commercial Workers Local 99, et al. v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz. 2011). That court determined that "the burdens imposed by the law do not fall equally on similarly-situated groups." *Id.* at 1124. This court should likewise find that the provisions of Act 10 challenged here impose burdens that do not fall equally on similarly-situated groups: municipal employees who choose to associate with labor unions compared to those who choose not to, and, with regard to payroll deductions, municipal employees who are dues-paying members of unions

compared to municipal employees who are members of other voluntary membership organizations which charge dues.

C. Plaintiffs' Fundamental Rights Are Infringed And The Classifications Fail Under Strict Scrutiny.

When faced with an equal protection challenge, a court first determines the level of scrutiny to employ. *State v. Lynch,* 2006 WI App 231, ¶12, 297 Wis. 2d 51, 724 N.W.2d 656. "Strict scrutiny" applies when a classification interferes with the exercise of a fundamental right for one class, but not for the other. *Id; State v. Post,* 197 Wis. 2d 279, 319, 541 N.W.2d 115 (1995). "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of the City of Chicago et al. v. Mosley,* 408 U.S. 92, 96 (1972). Laws that "merely" burden or abridge a fundamental right, such as the right to associate freely, are equally subject to strict scrutiny as those which outright ban the exercise of such right. *See, e.g., Citizens*

United v. F.E.C., 558 U.S. 50, 130 S.Ct. 876, 898 (2010); *Healy v. James*, 408 U.S. 169, 183 (1972).

As shown above, Act 10 treats similarly situated employees differently based on employees' choices to be represented or not represented by a certified agent, and whether or not to join a union, i.e., based on their exercise of fundamental rights of association. Once it is shown that a statute or classification infringes on fundamental rights, the burden shifts to the State to prove that the classification, i.e., the differential treatment of those who are similarly-situated, is precisely tailored to promote a compelling governmental interest. *Police Department of the City of Chicago et al. v. Mosley*, 408 U.S. 92, 96 (1972). The State has no compelling reason to curtail municipal employees' rights to choose a certified agent to represent their collective interests and to become members of a labor organization. The Legislature could easily have amended MERA in a manner that limited collective bargaining between municipal employers and employees, while protecting the equal protection rights of municipal employees. It did not do so. The State cannot and has not

carried its burden of proving that the classifications challenged by the Plaintiffs are narrowly tailored to promote a compelling governmental interest.

V. ACT 10 INTERFERES WITH MILWAUKEE'S EMPLOYEE RETIREMENT SYSTEM IN VIOLATION OF WISCONSIN CONSTITUTION ART. XI, §3(1).

The plain language of Wisconsin's Home Rule Amendment is clear and unequivocal:

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

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

A law must satisfy a two-prong test in order to preempt a municipal ordinance: the law must (1) touch on a matter of statewide concern, and (2) apply with uniformity to every city or village. *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25 (1936). If a court finds that a state law regulates a purely local affair, the inquiry ends and the legislation is deemed unconstitutional. *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526-527 (1977).

Wisconsin Statute §62.623 unconstitutionally regulates Milwaukee's Employee Retirement System ("Milwaukee ERS") by abrogating rights of general Milwaukee employees in violation of constitutional home-rule.

A. Regulation Of Milwaukee's ERS Is Not A Matter Of Statewide Concern.

1. The 1947 Legislature declared that Milwaukee's ERS is a not a matter of statewide concern.

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

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

Laws of 1947 ch. 441 §31(1).

The State argues that §31(1)'s clause "compatible with the constitution and general law" was intended to preserve the legislature's right to enact subsequent state-wide legislation that could supersede Milwaukee's ERS.[7]

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[7] Wisconsin Statute §62.623 is not a "general law" as it applies only to cities of the first class.

Construing the term "general law" to mean simply that any future legislation of uniform application could control Milwaukee's ERS would contradict the 1947 Legislature's declaration that future amendments to Milwaukee's ERS are matters of local affair, rendering the entire declaration in §31(1) entirely devoid of purpose.

The logical reading of the term "compatible with the constitution and general law" is a limitation on the right of Milwaukee to self-govern its ERS in violation of rights guaranteed to its employees under the Wisconsin State constitution and the general law. *See Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶50, 308 Wis. 2d 684, 748 N.W.2d 154 ("A municipality may not disregard the state's antitrust laws simply because it possesses broad home rule authority."). The 1947 Legislature intended to *preserve* the rights of Milwaukee's ERS participants by precluding Milwaukee from regulating its ERS in a manner that violates the participants' constitutional or other lawful rights as expressed through "general law."

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

The State asserts that the legislature declared the Milwaukee ERS to be a matter of state-wide concern at least twice, first in 1937 when the legislature created the ERS, and now with Act 10. The 1937 Legislature's creation of the Milwaukee ERS acknowledged that Milwaukee needed its own ERS that could be locally controlled and operate independently of the State, implicitly declaring that Milwaukee's ERS was a matter of local concern. A mere 10 years later, the legislature unequivocally declared that Milwaukee's ERS is not a matter of statewide concern.

Neither the 1937 Legislature nor the Act 10 Legislature declared that Milwaukee's ERS is a matter of statewide concern. The 1947 Legislature's declaration that Milwaukee's ERS is a local affair stands as the only relevant declaration and is therefore entitled to great weight. *State ex rel. Brelsford v. Retirement Board*, 41 Wis. 2d 77, 85, 163 N.W.2d 153 (1968).

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

The State relies on *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W.2d 25 (1936), and *Welter v. City of Milwaukee*, 214 Wis. 2d 485, 571 N.W.2d 459 (Ct. App. 1997), as authority to support its assertion that all public employee benefits are a matter of statewide concern. *Van Gilder* and *Welter* deal exclusively with law enforcement benefits. The holdings in *Van Gilder* and *Welter* rested on the concept that the regulation of law enforcement benefits concerns public health and safety, which is a matter of statewide concern. *Van Gilder*, 267 N.W. at 32; *Welter*, 214 Wis. 2d at 492-493. Importantly, *Van Gilder* and *Welter* struck down municipal ordinances attempting to *diminish* benefits. Both courts asserted that *diminishing* law enforcement benefits has a detrimental effect on public safety, a matter of statewide concern. *See Welter*, 214 Wis. 2d at 492-493.

In *State ex rel. Brelsford v. Retirement Board*, 41 Wis. 2d 77, 163 N.W.2d 153 (1968), the court addressed whether a municipal ordinance providing *greater* benefits to public safety employees than those mandated by State law was protected

under Home Rule. *Brelsford* held that Milwaukee's decision not to enforce a statewide pension-plan restriction on retired police officers affected only local taxpayers and was purely a matter of local concern. *Brelsford*, 41 Wis. 2d at 86-87.

The *Van Gilder* court clearly declared that a municipality's discretionary use of funds is not a matter of statewide concern. *Van Gilder*, 267 N.W. at 34 (quoting C.J. Cardozo, "Most important of all perhaps is the control of the locality over payments from the local purse."). Thus, state restrictions on a municipality's use of discretionary funds for purposes of attracting and retaining a qualified workforce invades a matter of local concern, and is contrary to the State's interest. On the other hand, state regulations seeking to *preserve* the benefits of public employees is a statewide concern. *Welter*, 214 Wis. 2d at 492-493; Laws of 1947 ch. 441 §31(1).

The Act 10 Legislature attempts to override Milwaukee's discretionary use of funds in order to *diminish* and divest general public employee benefits. As recognized

in *Brelsford* and *Welter*, this divestiture detrimentally impacts the quality of Milwaukee's public services.

B. A State Law Purporting To Preempt A Purely Local Affair Is Unconstitutional Regardless Of Uniformity.

Wisconsin's Home Rule Amendment requires that municipal affairs are subject only to state legislation that is both (1) of statewide concern, and (2) operates with uniformity. *Van Gilder*, 267 N.W. at 29-33. The framers' use of the words "of statewide concern" is instructive. Had the framers intended that municipal Home Rule could be subverted 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*, *West Allis v. Milwaukee County*, 39 Wis. 2d 356, 159 N.W.2d 36 (1968), and *Thompson v. Kenosha County*, 64 Wis. 2d 673, 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." In *Van Gilder*, the court set out to establish a balancing test to determine whether the municipal affair at issue was a matter of statewide concern. The State fails to appreciate that the

purpose of the *Van Gilder* decision was to determine whether the ordinance was of statewide concern, and if not, thereby protected by Home Rule.

The *Van Gilder* court recognized that home-rule could not weigh too heavily in favor of the municipality because the State would be powerless to legislate issues that touched on statewide concern. *Id.* It also recognized that municipalities must be afforded autonomy when the issue is a purely local affair. *Van Gilder* 267 N.W. at 34-35 ("There are some affairs intimately connected with the exercise by the city of its corporate functions . . . Most important of all perhaps is the control of the locality over payments from the local purse."); *see also, State ex rel. Ekern v. Milwaukee,* 190 Wis. 633 (1926).

Thirty-two years later, the court in *West Allis* reviewed legislation allowing Milwaukee County to collect taxes in the City of West Allis for a garbage incinerator and held that matters of primarily local concern not protected by a local charter may be preempted by the state, so long as the enactment applies with uniformity. *West Allis,* 39 Wis. 2d at 366. However, the *West Allis* court made clear "[w]e do not

herein determine that no home-rule powers exist" and clarified that a municipality must pass a charter ordinance in order to invoke the full protection of home-rule. *Id.* at 367-368.

The court in *Thompson* reviewed legislation authorizing a county assessor tax system and reiterated *West Allis's* holding that uniform state regulation can preempt issues of primarily local affair. But both the *West Allis* and *Thompson* Courts involved issues that, despite being primarily of local concern, also touched on statewide concern. Neither case went so far as to hold that the State can preempt a purely local affair. Specifically, *Thompson* noted the distinction between primarily local affairs ("mixed" category) and those that are "entirely local." *Thompson*, 64 Wis. 2d at 683-684.[8] Neither *Thompson* nor *West Allis* concerned a municipal charter ordinance, as here. And neither had a legislative declaration that the subject was an entirely local affair, as here.

[8] The distinction in the analysis between issues of primarily statewide concern and primarily local concern is that legislation regulating matters of primarily statewide concern need not be uniform in its application to defeat home-rule, whereas legislation regulating primarily local concerns must be uniform to defeat home-rule.

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

> 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, 253 N.W.2d 505 (1977) (footnotes and citations omitted).

Michalek went on to state without qualification that state legislation purporting to preempt a municipal charter ordinance regulating a purely local affair is unconstitutional. *Michalek*, 77 Wis. 2d at 529 ("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* opinion was a unanimous decision and five of the *Michalek* justices 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 State also relies on *Roberson v. Milwaukee County*, 2011 WI App 50, 332 Wis. 2d 787, 798 N.W.2d 256. *Roberson* is distinguished for two important reasons. First, the issue in *Roberson* concerned public safety. Second, the Home Rule analysis in *Roberson* concerned statutory County Home Rule, rather than the constitutional municipal Home Rule at issue here.

Although *Roberson* noted that the "statewide concern" analysis under county and municipal home-rule are equivalent, *Roberson* involved a public safety regulation. Because public safety is a well-recognized statewide concern, the analysis under county and municipal home-rule regarding public safety is equivalent. However, Wisconsin courts have repeatedly recognized that the home-rule analysis concerning entirely local affairs is distinct, especially when a municipal

charter ordinance is involved. *West Allis*, 39 Wis. 2d at 367-368.

County home-rule is distinct from municipal home-rule because county home-rule was statutorily adopted by the legislature. In contrast, municipal home-rule is a constitutional "expression of the will of the people," and the legislature cannot supersede that declaration without an amendment to the Wisconsin Constitution. *Michalek*, 77 Wis. 2d at 526; *Van Gilder*, 267 N.W. at 30 ("when a power is conferred by the home-rule amendment, it is within the protection of the Constitution and cannot be withdrawn by legislative act"). Additionally, County ordinances are differentiated from municipal charters generally, because while County ordinances affect multiple municipalities, municipal charters affect only residents within a single municipality—rendering certain municipal charter ordinances of concern only to its residents. Milwaukee's ERS is a clear example of a charter ordinance that is entirely local.

VI. ACT 10 IMPAIRS THE CONTRACTUAL PROPERTY RIGHTS OF MILWAUKEE ERS PARTICIPANTS.

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

Milwaukee's ERS must be liberally construed in favor of Milwaukee's employees. *Rehrauer v. City of Milwaukee*, 2001 WI App 151, ¶15. Milwaukee's Charter Ordinance cannot be more clear:

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

1. Employer-paid contributions are a benefit and term and condition of the plan.

The State argues that Milwaukee's Charter ordinance does not provide participants a contractual right to have the

City pay the employee contributions. Chapter 36 unequivocally guarantees as a term and condition of the plan that "[T]he city shall contribute on behalf of general city employes 5.5% of such member's earnable compensation." §36-08-7a-1.

Section 36-13-2, entitled "Contracts To Assure Benefits," sets forth clearly that every member shall have a benefit contract and vested right concerning: "[t]he annuities and all other benefits in the amounts and upon the terms and conditions and in all other respects as provided under this act [which] shall not be diminished or impaired by subsequent legislation or by any other means." §36-13-2a. The words, "upon the terms and conditions and in all other respects as provided under this act," clearly incorporate every section of Milwaukee's ERS, including §36-08-7a-1 which requires the City to contribute 5.5% of each employee's earnable compensation to the fund.

The State argues that §36-13-2g does not proscribe the required contribution levels or who must make the

contributions.[9] However, §36-08-7a-1 expressly requires the City to make the employees' contribution of 5.5% of earnable compensation.

The State further argues that contributions are not a "benefit" pursuant to §36-05 and not a "term and condition" pursuant to §36-13-2d. The Milwaukee ERS is a defined benefit plan, that is, the benefits are calculated based on years of service multiplied by a fixed percentage of base salary. *See* Mil. Charter Ord. §36. Act 10 mandates that Milwaukee employees pay 5.5% of their earnable compensation to receive the same defined benefit, thereby diminishing the value of the benefit without providing a commensurate benefit. The State's exclusion of contributions as a "term and condition" of the plan excludes *the cost of the plan* as a "term and condition."

The purpose of §36-13-2d is unmistakable when examining the date that the section was adopted. Section 36-13-2d was adopted in 1971 at the same time as §36-08-7a-1 (requiring that the employer make the employee

[9] Section 36-13-2g was adopted in 2000 for the purpose of codifying the terms of Milwaukee's Global Pension settlement. *In Re Global Pension Settlement Litigation*, Case No. 00-CV-3439.

contributions). The City adopted §36-13-2d to ensure participants that the City would not in the future reduce retirement benefits on the grounds that the employee did not contribute to the fund. Section 36-13-2d affirms unequivocally that employer paid contributions are characteristic of deferred compensation, a property right, and that the City cannot collaterally attack the defined benefit by asserting that the employee's failure to contribute to the fund renders the defined benefit a mere gratuity. In addition, §36-13-2d prevents the City from reducing retirement benefits on the grounds the City failed to make contributions on behalf of the employee despite its obligation as set forth in §36-08-7a-1.

The State also contends that construing contributions as a "term and condition" or "benefit" creates an absurd result because the City would be barred from increasing the benefit or making larger contributions. The ordinance prevents the City only from diminishing benefits; the City has a right to increase them. §36-13-2a.

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

The question to be asked when determining whether contractual rights have been impaired is whether the imposed change will affect the value of the agreement. *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 555, 331 N.W.2d 369 (1983) ("This court has recognized that a contract is impaired when the consideration agreed upon is altered by legislation."). Milwaukee's ERS must be liberally construed in favor of its participants. *Rehrauer*, 2001 WI App 151, ¶15.

Courts use a three-step inquiry to determine whether a statute impermissibly impairs a contractual right. *Energy Reserves Group v. Kansas P. & L. Co.*, 459 U.S. 400 (1983). First, the plaintiff must show the law changed after the formation of the contract and that the change substantially impaired the contract. Second, this Court must determine whether a significant and legitimate public purpose for the law exists. And finally, even if this court determines that Wisconsin Statute §62.623 serves a significant and legitimate public

purpose, the Court must weigh the severity of the impairment against the public purpose.

Wisconsin courts limit the legislature's right to amend a retirement plan to situations where the amendment is necessary to preserve the actuarial soundness of the plan. *Assn. of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 563 (1996). The State does not assert that Wisconsin Statute §62.623 seeks to preserve the financial stability of the Milwaukee ERS in any respect.

1. Act 10 substantially impairs the plaintiffs' contractual rights.

Wisconsin Statute §62.623 requires general employees to begin contributing 5.5% of their earnable compensation to the Milwaukee ERS fund. This causes an immediate corresponding 5.5% reduction in wage. *See Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 451 (Cal. 1958) (finding substantial impairment when legislation required employees to contribute 4% salary to their pension fund when the City was required to do so by Charter); *Strunk v. Public Employees Retirement Board*, 338 Or. 145, 205, 108 P.3d 1058, 1094 (Or. 2005) (striking down a pension provision that purported to

relieve the employer of its obligation to credit pension accounts); *International Association of Firefighters v. City of San Diego* 193 Cal. Rptr. 871, 876, 34 Cal. 3d 292, 302 (Cal. 1983) (noting that if the City had guaranteed that employee contribution levels would remain constant, requiring employees to increase their contribution amount would constitute an impairment of contract).

The State relies on *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892 (7th Cir. 1998), to assert that an increase in cost is insufficient to impair contractual rights. The issue in *Kolosso* concerned state regulation of automobile franchise agreements and the court determined that interpreting the Contract Clause literally would impede governmental efforts to regulate commercial activity. *Id.* at 893-895. Significantly, *Kolosso* held that an important determination of whether a law violates the contract clause is foreseeability. *Id.* at 895.

The State also relies on *Wisconsin Professional Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, to supports its assertion that Wisconsin has historically regulated pension benefits for public employees, and therefore changes to Milwaukee's ERS

were foreseeable. However, *Lightbourn* specifically noted that Milwaukee's ERS was not regulated by the State. *Lightbourn*, 2001 WI 59, ¶9.

Milwaukee's ERS has been regulated exclusively by the City of Milwaukee since 1947 and its participants could not have reasonably foreseen unconstitutional state intervention. By charter ordinance, all terms and conditions are guaranteed as of the employee's commencement date and cannot be impaired by subsequent legislation. §36-13-2. The Global Pension Settlement in 2000 ratified this inalterability. *Global Pension Settlement*, Case No. 00-CV-3439. In 2010, the City of Milwaukee acknowledged this inalterability when it amended terms only for participants hired after the date of the amendment. §36-08-7-a-2. Milwaukee ERS participants could not reasonably have contemplated legislative changes to their terms and conditions after their commencement date.

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

The State relies on *Energy Reserves* to assert that the State is using its police power to avoid payments that would

otherwise benefit a special interest. General public employees are a varied and diverse group, including politicians, engineers, nurses and sanitation workers. They do not constitute a "special interest."

The legislature declared in 1947 that deferred compensation in the form of retirement annuities *attracts* and *retains* public service employees despite higher prevailing wage rates in the private sector. Laws of 1947 ch. 441 §30(1). Wisconsin Statute §62.623 reduces retirement benefits and is therefore contrary to a purpose the Wisconsin legislature has declared is significant and legitimate.

More importantly, the State cannot assert that an economic downturn and the *State's* financial situation constitutes legal grounds to modify Milwaukee's ERS. The legislature can amend a retirement plan only when the amendment is necessary to preserve the actuarial soundness of the plan. *Ass'n of State Prosecutors*, 199 Wis. 2d at 563. Milwaukee's ERS is not unsound, and Act 10 does not alter the funding formula to address any actuarial infirmities, it

merely changes the contributor. In so doing, Act 10 unconstitutionally impairs a contract right.

3. The State's argument ignores the constitutionally proper method of amending ERS benefits and benefit terms and conditions.

Neither constitutional home rule nor proper observance of ERS members' contractual and property rights requires that ERS benefits, terms and conditions remain frozen and inflexible for all time. Change must be made via properly adopted Charter Amendments and applicable to new employees thereby honoring the contractual obligations to incumbent employees. The City has continuously observed this constitutional process and the courts have respected it for more than six decades. Recent Charter amendments (A-App. P. 116 and A-App. P. 126) affecting City employees hired after the amendments' effective dates demonstrates the proper methodology and the inherent flexibility while respecting the contractual obligations to existing employees.

CONCLUSION

The Court should find the challenged provisions of 2011 Wisconsin Acts 10 and 32 to be unconstitutional for the reasons described herein, and AFFIRM the Circuit Court's rulings in Plaintiffs' favor.

Dated this 26th day of December, 2012.

Respectfully submitted,

CULLEN WESTON PINES & BACH LLP

Lester A. Pines, SBN 1016543
Lee Cullen, SBN 1014859
Tamara B. Packard, SBN 1023111
Susan Crawford, SBN 1030716
122 West Washington Avenue, Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

Attorneys for Madison Teachers Inc. and Peggy Coyne

PADWAY & PADWAY, LTD.

M. Nicol Padway, SBN 1016666
Aaron A. DeKosky, SBN 1081404
633 West Wisconsin Avenue, Suite 1900
Milwaukee, WI 53203
Attorneys for Public Employees Local 61, AFL-CIO and John Weigman

CERTIFICATION

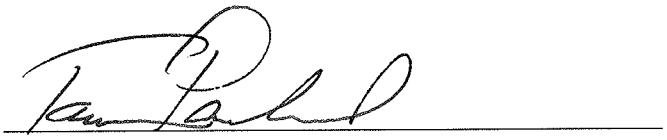
I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,892 words.

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

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

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

Dated this 26th day of December, 2012.



Tamara B. Packard, SBN 1023111