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

SUPPLEMENTAL MEMORANDUM OF PLAINTIFFS-RESPONDENTS

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I. THE CIRCUIT COURT DID NOT EXPRESSLY ENJOIN THE STATE, NOR WAS AN INJUNCTION NECESSARY.

A. An Injunction Was Implicit.

The circuit court declared provisions of Act 10 facially unconstitutional and therefore null and void. It neither expressly enjoined the State from enforcing the provisions or otherwise taking action inconsistent with the decision, nor denied such injunction. R. 53:27. Regardless, such an injunction was implicit.

Plaintiffs requested "an order enjoining the Defendants from implementing the unconstitutional provisions of Act 10 and Act 32." R. 3:26; *see also* R. 19:38, 44:63. The State defended solely on the merits of the constitutional issues and did not argue that injunctive relief should not be granted if the circuit court declared any provision unconstitutional. There was no real dispute as to whether the State should be enjoined from enforcing any provision found unconstitutional.

Given this lack of dispute and Plaintiffs' specific request for injunctive relief, it is reasonable to infer that the circuit court intended the State to refrain from enforcing the

unconstitutional provisions. It is not reasonable to infer that the circuit court intended to allow the State to enforce provisions declared null and void, especially in light of its denial of a motion for stay. This Court should construe the circuit court's decision as implicitly enjoining the State from enforcing the provisions declared null and void.

B. An Injunction Would Be Redundant.

It was unnecessary to expressly enjoin the State from taking action inconsistent with the judgment declaring Act 10 provisions null and void on grounds of unconstitutionality. "An unconstitutional act of the Legislature is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and, in legal contemplation, has no existence." *Jelke v. Hill*, 208 Wis. 650, 242 N.W. 576, 581 (1932). "An unconstitutional law imposes no enforceable legal duty, but the duties of the office remain defined by existing valid law, and as if such unconstitutional law had never been enacted." *State ex rel. Ballard v. Goodland*, 159 Wis. 393, 150 N.W. 488, 489 (1915). As the U.S. Supreme Court observed:

> If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a

> stay, he must comply promptly with the order pending appeal....[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.

Maness v. Meyers, 419 U.S. 449, 458-59 (1975) (citations and quotations omitted).

Thus, an order or judgment need not contain a specific injunction against a particular action in order for contempt sanctions to be applied. *Carney v. CNH Health & Welfare Plan*, 2007 WI App 205, ¶16, 305 Wis.2d 443, 740 N.W. 2d 625. "Neither the [contempt] statute...nor case law requires that an order contain the specific term 'enjoin' or 'injunction' to allow the court to use contempt powers to enforce its orders." *Id.*, ¶17. Thus, "[a]n order or judgment which requires specific conduct (either to do, or to refrain from, specific actions) can be enforced by contempt." *Id. See also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (rejecting party's argument that it could not be held in contempt of a court order because its conduct was not specifically enjoined, noting that "such a rule would give tremendous impetus to the program of experimentation with disobedience of the law").

Declarations made under the Uniform Declaratory Judgment Act "may be either affirmative or negative in form and effect." Wis. Stat. §806.04(1). The court need not expressly declare that the state cannot enforce that which has been declared unconstitutional. *See PRN Associates vs. State DOA*, 2009 WI 53, ¶¶53-54, 317 Wis.2d 656, 766 N.W.2d 559 (declaratory judgment provides remedy which is primarily anticipatory and preventive, similar to injunctive relief).

Likewise, a court having jurisdiction may grant further relief based on a declaratory judgment "whenever necessary and proper," and the burden is on "any adverse party whose rights have been adjudicated" to show cause why such relief should not be granted. Wis. Stat. §806.04(8). The statute does not limit such further relief to the plaintiffs nor the power to give such relief to the court issuing the declaratory judgment.

Any act by the State to enforce the unconstitutional provisions would necessarily violate the court's judgment. An express injunction is not required to compel the State to act in compliance with the order.

II. THE CIRCUIT COURT'S RULING BINDS NON-PARTIES BECAUSE OF THE CIRCUIT COURT'S JURISDICTION AND NATURE OF THE RULING.

A. The Circuit Court's Jurisdiction.

Judicial power in Wisconsin is "vested in a unified court system consisting of one supreme court, a court of appeals, [and] a circuit court." Wis. Const. Art. VII, §2. The circuit court's jurisdiction is statewide and extends to all matters. *In Matter of Guardianship of Eberhardy*, 102 Wis.2d 539, 550-551, 307 N.W.2d 881 (1981); *see also* Wis. Const. Art. VII, §8; *Committee to Retain Judge Byers v. Elections Board*, 95 Wis.2d 632, 638-39, 291 N.W.2d 616 (Ct. App. 1980); 15 Wis. Practice Series §5:3.

Unlike in the federal court system, Wisconsin's "judicial circuits" are not separate courts, but are branches of a statewide circuit court within a unified system. *See* Wis. Stat. §753.06, Wis. Const. Art. VII, §6. *See also State v. Williams*, 2012 WI 59, ¶48, 341 Wis.2d 191, 814 N.W.2d 460 (Article VII amendments were aimed at "the efficiency of the State's courts and the promotion of uniformity within the court system"). Thus, circuit court judges, unlike U.S. district court

judges, cannot issue conflicting declaratory rulings on the facial constitutionality of a statute.

B. Effect of Facial Unconstitutionality.

While most disputes decided by the circuit court require the application of law to specific facts, this case litigated the facial constitutionality of statutory provisions. "A statute, unconstitutional on its face, is void from its beginning to the end; but a statute unconstitutional in an application is only void as applied in certain time and to the specific circumstances." *State ex rel. Commissioners of Public Lands v. Anderson*, 56 Wis.2d 666, 672, 203 N.W.2d 84 (1973). Thus, a ruling finding a statute facially unconstitutional necessarily is not limited to the statute's application to a party or set of facts.

"When a statute is declared unconstitutional, it falls because it must yield to the basic, superior law. Broadly, an unconstitutional statute is void...and its invalidity must be recognized or acknowledged as applied to ***any state of facts***." 16 C.J.S. Constitutional Law §208 (emphasis added, citations omitted). "[A] legislative act contrary to the constitution is not law..." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). For an

unconstitutional act to still bind the courts would be "an absurdity too gross to be insisted on." *Id.* "It would declare, that if the legislature shall do what is expressly forbidden, such act, not withstanding the express prohibition, is in reality effectual." It would "reduce[] to nothing what we have deemed the greatest improvement on political institutions-a written constitution." *Id.* at 178.

These principles are foundational to constitutional jurisprudence. "If a statute is unconstitutional on its face, ***any action*** premised upon that statute fails to present any civil or criminal matter in the first instance." *In re the Commitment of Bush*, 2005 WI 80, ¶17, 283 Wis.2d 90, 699 N.W.2d 80 (emphasis added). Thus, a criminal complaint based on violation of a facially unconstitutional statute fails to allege an offense known at law and therefore is jurisdictionally defective and void. *Id.*, ¶18. Likewise, once a civil statute has been adjudged facially unconstitutional, it cannot be relied upon in any forum, by anyone, until or unless that judgment is altered. A finding of facial invalidity deprives courts and

agencies of subject matter jurisdiction over actions based upon the invalid statute. *See id.*

C. The Circuit Court's Declaration of Unconstitutionality Is Effective Pending Appeal.

The circuit court's judicial power is "extremely broad" and "all encompassing, subject only to the appellate and supervisory powers" of the appellate courts. *Eberhardy*, 102 Wis.2d at 549, 553. The circuit court's powers include the powers necessary to fully administer justice and carry into effect a circuit court judgment on a statewide basis. Wis. Stat. §753.03.

It is well established that the circuit court has the authority to declare statutes unconstitutional. Wis. Stat. §806.04(2); *Just v. Marinette County*, 56 Wis.2d 7, 26, 201 N.W.2d 761 (1972).

> [T]he teaching of *Just* is that all courts in which constitutional questions are raised should decide them.... determination of constitutionality reasonably cannot abide initial adjudication by the appellate court at a time long subsequent to the onerous imposition of the strictures of an unconstitutional legislative act...whenever a constitutional question is raised, it should be decided.

City of Milwaukee v. Wroten, 160 Wis.2d 207, 466 N.W.2d 861 (1991).

While such questions "cannot finally be laid to rest until decided by final appellate adjudication," *id.*, that does not mean a circuit court's judgment is not in effect while it is on appeal. Rather, "optimum utilization of our court facilities requires that all courts have the authority to decide constitutionality." *Id.*

The controlling principle is this: "A statute held unconstitutional remains inoperative as long as the decision holding it invalid is maintained, and as long as the decision stands, the statute is dormant but not dead. If the decision that a statute is unconstitutional is subsequently reversed or overruled, the statute will ordinarily be treated as valid and effective from the date of its enactment, or from its first effective date..." 16 C.J.S. Constitutional Law §208 (citations omitted). The Wisconsin Supreme Court has recognized this principle:

> The difference between challenging the constitutionality of a statute on its face and challenging it as applied is important. "If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances."

State v. Konrath, 218 Wis.2d 290, 304, n. 13, 577 N.W.2d 601 (1998).

Once the question of the constitutionality of a statute has been raised and decided by a lower court with jurisdiction, that determination is final but it is open to direct review on appeal. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377-378 (1940); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923) (state court's ruling on a federal constitutional question is effective and conclusive adjudication, unless and until reversed or modified by Supreme Court).

Here, the circuit court decided that the challenged provisions are unconstitutional, and therefore are not law. It issued a declaratory judgment to that effect against the state officials charged with enforcing the law, and it had the jurisdiction and power to do so. The provisions cannot be enforced against anyone. This is not to say that circuit court rulings are binding precedent; rather, when a circuit court (1) renders a judgment, (2) declaring that a statute is facially unconstitutional, (3) in a case where the state officials charged

with enforcing the law are parties, that judgment resolves the issue until and unless a higher court decides otherwise.

III. WERC MUST APPLY MERA CONSISTENT WITH THE COURT'S ORDER.

Following the circuit court's decision, disputes may arise between municipal employers and municipal employee bargaining agents concerning the duty to bargain. Such disputes are properly brought to WERC for adjudication. Wis. Stat. §111.70(4)(b). Likewise, WERC is authorized to adjudicate prohibited practice complaints brought by municipal employers or unions, including the refusal to bargain. Wis. Stat. §§111.70(4)(a), (3)(a)4, (b)3.

If a petition for declaratory ruling regarding the obligation to bargain under MERA were filed with WERC, WERC would be bound to follow the circuit court's determination that certain MERA provisions are null and void. *See Madison Teachers, Inc. v. Madison Metropolitan School District*, 197 Wis.2d 731, 541 N.W.2d 786 (Ct. App. 1995) (circuit court's decision interpreting a MERA provision binds WERC where it is required to apply the statutory law: "That decision supplies the meaning of the term which WERC must

apply"). WERC may not ignore a court's decision finding MERA provisions to be null and void as a matter of constitutional law. The State more or less concedes that WERC would be bound by the circuit court's judgment in adjudicating prohibited practice complaints or petitions for declaratory rulings under Wis. Stat. §11.70(4)(a). (Def. Memo., p. 11.)[1]

The State points out that the circuit court has concurrent jurisdiction to interpret MERA by way of declaratory relief. That is true. *Madison Teachers, Inc.*, 197 Wis.2d at 744. However, the State overlooks the doctrine of primary jurisdiction. When both the circuit court and an administrative agency have power to resolve a dispute, the question is which forum has primary jurisdiction. *Id.*

The purpose of the primary jurisdiction doctrine is to promote the proper relationship between agencies and the courts. *Id.* at 746. While the circuit court has discretion

[1] Several municipalities recently filed a petition for declaratory ruling at WERC seeking a declaration of their obligations to collectively bargain. Because WERC is bound by the circuit court's decision, it is obligated to declare the rights and obligations of municipalities under MERA consistent with the circuit court's decision.

whether to retain jurisdiction, *id.* at 746, the question is whether it should. This Court summarized the doctrine as follows:

> [W]hen factual issues are significant, the better course may be for the court to decline jurisdiction; when statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings. We have cautioned the circuit court to exercise its discretion with the understanding that the legislature created the agency in order to afford a systematic method of fact finding and policymaking and that the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention.
>
> Administrative agencies are designed to provide uniformity and consistency in the fields of their specialized knowledge. When an issue falls squarely in the very area for which the agency was created, it is sensible to require prior administrative recourse before a court decides the issue.

Id. at 746. Thus, when the issue before the circuit court was the meaning of a new statute that WERC had never interpreted, presenting a pure question of law, the circuit court's exercise of jurisdiction was an appropriate exercise of discretion. *Id.*

In contrast, if an employer or union wanted a declaratory ruling to resolve a dispute regarding the scope of the duty to bargain under MERA, that dispute would properly be brought before WERC. The constitutionality of

the Act 10 provisions would not require adjudication by WERC; that issue has already been adjudicated by a court of law in a case in which WERC was a party. Resolving the scope of the duty to bargain would simply require WERC to apply MERA, excluding the null and void provisions, to the particular facts of the case. Thus, if a municipal employer or employee union filed a lawsuit to resolve a dispute about the duty to bargain under MERA, the court should dismiss it on grounds that WERC has primary jurisdiction.

The State protests that the circuit court's decision is unpublished and other circuit court judges may be unaware of it. This seems unlikely. Moreover, one of the parties would surely bring the decision to the circuit court's attention in moving to dismiss under the primary jurisdiction doctrine. Likewise, a party filing another declaratory judgment action raising the same constitutional questions resolved here would be obliged to name the WERC commissioners as defendants, and inform the Attorney General. [2] *See Lister v. Board of*

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[2] As Defendants admitted in their Answer, "the Wisconsin Employment Relations Commission and its Commissioners are the executive agency and executive officials, respectively, responsible for administering MERA

Regents, 72 Wis.2d 282, 302-03, 240 N.W.2d 610 (1976) (doctrine of sovereign immunity requires declaratory judgment actions challenging the constitutionality of a statute to be brought against the officer or agency charged with administering the statute); Wis. Stat. §806.04(11).

The State also suggests that "WERC commissioners could not be bound by the circuit court's order when exercising their quasi-judicial powers in other cases," based on separation of powers principles. (Def. Memo., p. 12.) An administrative agency, in the exercise of its quasi-judicial function, has no authority to overrule or ignore a court's interpretation of a statute, let alone a court's determination that a statute is unconstitutional. *See Madison Teachers, Inc.*, 197 Wis.2d at 762. Moreover, WERC cannot adjudicate the constitutionality of a state statute: that is strictly a judicial duty. *Wendlandt v. Industrial Comm'n*, 256 Wis. 62, 67, 39 N.W.2d 854 (1949); *see also Browne v. Milwaukee Bd. of School Directors*, 69 Wis. 2d 169, 177, 230 N.W.2d 704 (1975). WERC is

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and other labor relations statutes, as modified by Act 10 and Act 32." R. 12:4, ¶17.

bound by the circuit court's ruling when it exercises its quasi-judicial function.

IV. THE CIRCUIT COURT'S RULING SHOULD BIND NON-PARTIES UNDER THE DOCTRINE OF ISSUE PRECLUSION.

Issue preclusion operates to foreclose a court from reconsidering an issue of law or fact that has already been decided in another proceeding and reduced to judgment. *Jensen v. Milwaukee Mut. Ins. Co.*, 204 Wis.2d 231, 235, 554 N.W.2d 232, 233-34 (Ct. App. 1996). The doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue, in certain circumstances, and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Identity of parties is not required. *Michelle T. v. Crozier*, 173 Wis.2d 681, 687-88, 495 N.W.2d 327 (1993). When identity of parties is not present, a court first determines whether the litigant against whom issue preclusion is asserted had sufficient identity of *interest* with a party to the prior proceedings. *Jensen*, 204 Wis.2d at 237. Second, a five-part fundamental fairness test is applied. *Id.* at 237-238. The

ultimate determination of whether issue preclusion should be applied is made on a case-by-case basis. *Michelle T. v. Crozier*, 173 Wis.2d 681, 692, 495 N.W.2d 327 (1993).

The State concedes at pages 5-10 that the circuit court could apply the doctrine in a hypothetical future case to preclude reconsideration of the legal issues decided by the circuit court in this case. The State nevertheless argues that "it is most likely that potential future litigants are not in privity with these parties." (Def. Memo., pp. 8-9) The State's assumption is incorrect; it is highly likely that such hypothetical litigation would be brought by or against a municipality defending the constitutionality of Act 10 and thus in privity with the State.[3]

Municipalities wishing to defend the constitutionality of Act 10 are aligned with the Defendants and Attorney General for issue preclusion purposes. The Attorney General is charged by law with the duty to defend the constitutionality of Wisconsin statutes "on behalf of the people." *State v. City of*

[3] If a municipality was *not* aligned with the State, it would be acting in accordance with the circuit court's judgment in this case and thus highly unlikely to be involved in such litigation.

Oak Creek, 2000 WI 9, ¶35, 232 Wis.2d 612, 605 N.W.2d 526; Wis. Stat. §806.04(11). When the Attorney General defends a statute against a claim of unconstitutionality, he is acting on behalf of all persons, citizens and political subdivisions of the state alike, having an interest in upholding the validity of the statute under attack. *See White House Milk Co. v. Thomson,* 275 Wis. 243, 247, 81 N.W.2d 725 (1957); *Helgeland v. Wisconsin Municipalities,* 2008 WI 9, ¶91, 307 Wis.2d 1, 745 N.W.2d 1. For this reason, service on the Attorney General is jurisdictional in a declaratory action attacking the constitutionality of a statute. *Helgeland,* ¶96. The state official Defendants here have a parallel duty. *See Helgeland,* ¶108.

If the Attorney General and other state officials did not serve in this representative capacity in a declaratory judgment action challenging the constitutionality of a statute, the joinder rules would require that all municipalities, employees, and collective bargaining agents affected by the statute be parties. If that were required, "the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative

enactments, either state or local, since such enactments commonly affect the interests of large numbers of people." *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 334, 81 N.W.2d 713 (1957), quoted in *Helgeland,* ¶140. Thus, as to those who would defend the constitutionality of the challenged provisions of Act 10 in some future case, identity of interests should be found. *See Helgeland,* ¶¶91-108 (holding that the Attorney General and DETF adequately represent the interests of municipalities seeking to intervene, as a matter of right, to defend constitutionality of challenged statute).[4]

While formal privity is only necessary for application of claim preclusion, not issue preclusion, it may exist when an official is vested by law with authority to represent a person's (or municipality's) interests. RESTATEMENT (SECOND) JUDGMENTS §41(1)(d). Just such a conclusion was reached in *Beyer v. Verizon North, Inc.*, 715 N.W.2d 328, (Mich. Ct. App. 2006), where the court found that an action by utility

[4] The State also claims that there is "nothing in the record" to support a conclusion that non-party municipalities would be sufficiently aligned with the State for issue preclusion to apply. Plaintiffs direct the Court's attention to the Affidavits from municipal officials submitted with the State's Reply Brief in Support of Motion to Stay, R. 63.

customers against utilities was barred by claim preclusion because the Attorney General and other public officials were in privity with the customers in a prior action brought by the utilities.

The State questions whether this appeal makes the circuit court's judgment final "for preclusion purposes." While some states have found that a pending appeal renders a judgment nonfinal for preclusion purposes, the "dominant" as well as "better view is that a judgment otherwise final remains so despite the taking of an appeal..." RESTATEMENT (SECOND) JUDGMENTS §13, *comment f; Dickie v. City of Tomah*, 999 F. 2d 252, 254 (7th Cir. 1993). The Eastern District of Wisconsin believes that Wisconsin has adopted this view: "the fact that an appeal is pending in the first case does not deprive the judgment of its conclusive effect." *Luebke v. Marine National Bank of Neenah*, 567 F. Supp. 1460, 1461-62 (E.D. Wis. 1983), *citing Slabosheske v. Chikowske*, 273 Wis. 144, 77 N.W.2d 497 (1956).

Considerations of waste of judicial and litigant resources mitigate against the circuit court taking up these

same legal issues in a second action, and also against waiting to decide them until after the appeal for the first action is complete. In these circumstances, "the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment." RESTATEMENT (SECOND) JUDGMENTS §13, *comment g.*[5]

V. THE CIRCUIT COURT'S RULING SHOULD BIND NON-PARTIES UNDER THE PRINCIPLE OF STARE DECISIS.

Non-parties may also be obliged to follow the circuit court's judgment in this case under the doctrine of stare decisis.[6] *See Helgeland*, ¶¶80-84. Strong reasons of principle and policy support courts abiding by or adhering to decided questions of law, even when not compelled to follow a prior decision. *See* MOORE §134.01[1]. It is the preferred course, for "it promotes the evenhanded, predictable, and consistent

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[5] If despite these doctrines another circuit court judge takes up these questions, the Court of Appeals may, and should, exercise its superintending authority to prevent duplicative efforts at the circuit court and in protection of its own jurisdiction pending its decision on the merits in this case. Wis. Stat. §§752.01, 752.02.

[6] The doctrines of stare decisis and issue preclusion are very similar when questions of law are at issue. The primary difference is that stare decisis may be applied regardless of who the parties are in the second action; they need not have identity of interest with the parties in the first action. *James William Moore, et al.*, MOORE'S FEDERAL PRACTICE ("MOORE") §134.01[5].

development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The doctrine may protect a judgment on an issue of general interest yet to be resolved by the highest appellate court. RESTATEMENT (SECOND) JUDGMENTS, §29, comment i. Indeed, "[t]he import of stare decisis is neatly presented by novel issues of statutory construction," and this case, like *Helgeland*, is a "classic example." *See Helgeland* (dissenting opinion), ¶198, *citing* MOORE, *supra*, §24.03[3][b].

In *Helgeland*, plaintiffs sought declaratory judgment against the Wisconsin Department of Employee Trust Funds ("DETF"), challenging the constitutionality of statutes administered by DETF. Several municipalities filed an interlocutory appeal from an order denying their intervention in the circuit court as a matter of right. The Attorney General, representing DETF, conceded that if judgment were entered finding the challenged statute unconstitutional, "by operation of stare decisis, other government employers, such as the municipalities," would be obliged to act consistent with that

judgment. *Helgeland*, ¶82. The Wisconsin Supreme Court acknowledged "that judgment in favor of Helgeland might expose the municipalities to the adverse effect of stare decisis." *Id.*, ¶84. The dissent was more certain, noting that "a decision for the plaintiffs will 'impair or impede' the municipalities' ability to protect their interests. As 'a practical matter,' this suit is equivalent to a class action." *Id.*, ¶167.

Thus, if non-parties attempt to re-litigate the constitutionality of the same statutes in circuit court, the circuit court should defer to the judgment in this case under the principle of *stare decisis*.[7]

In addition, courts will, as a matter of comity, defer to the assertion of jurisdiction by another court of competent jurisdiction. "The orderly administration of justice requires that there be some rule for avoiding the conflicting exercise of jurisdiction by two courts both of which are competent to decide the issues. Ordinarily, a court should not exercise jurisdiction over subject matter over which another court of

[7] Any party seeking to litigate the facial constitutionality of the statutes would be required to give notice to the Attorney General so that it could represent the state's interests. Wis. Stat. §806.04(11).

competent jurisdiction has commenced to exercise it." *Sheridan v. Sheridan*, 65 Wis.2d 504, 510, 223 N.W.2d 557, 560 (1974). *See also Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, 261 Wis.2d 598, 609, 660 N.W.2d 705, 711 (courts will, as a matter of discretion, give effect to judgment of another state or sovereign).

VI. THE PARTIES AGREE ON THE ANSWERS TO QUESTIONS 6(a) AND (b).

Plaintiffs agree with the State that non-party municipal employers and employees could bargain for wages and benefits retroactively if the circuit court's decision is stayed but is upheld on appeal (question 6(a)). However, this Court should not assume that wages and benefits that might be negotiated retroactively would restore or compensate municipal employees for the constitutional injuries they would suffer while the appeal is pending. The infringement of their constitutional rights is irreparable harm.

Plaintiffs also fundamentally agree with the State that if a stay is not ordered and the circuit court's order is reversed, non-party municipalities could hold employees retroactively liable for negotiated wages and benefits exceeding what is

permitted under the contested portions of Act 10, if the collective bargaining agreement reserved such rights (question 6(b)). Thus, if a stay is not ordered, municipal employers can fully protect their interests without subjecting municipal employees to ongoing constitutional injury.

These questions reveal the nature of the potential harms that the Court must weigh. Granting a stay would implicitly assign greater value to municipal employers' interests under a statute that has been found unconstitutional than to the constitutional rights of thousands of municipal employees. Likewise, denying a stay would place greater weight on protecting the constitutional rights of municipal employees than on protecting the interests of municipal employers under a statute that a court has found unconstitutional. The administrative inconvenience to municipal employers in resuming collective bargaining under longstanding prior law is not a significant harm when measured against infringing the constitutional rights of thousands of municipal employees.

VII. CONCLUSION.

The Court should affirm the circuit court's denial of the State's Motion for Stay.

Dated this 30th day of January, 2013.

Respectfully submitted,

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