STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ABBOTSFORD EDUCATION ASSOCIATION, *et al.*,

Plaintiffs,

v. Case No. 2023-cv-3152

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, *et al.*,

Defendants.

AMICUS CURIAE KRISTI KOSCHKEE'S BRIEF IN SUPPORT OF DEFENDANTS' AND INTERVENOR-DEFENDANT'S MOTIONS TO DISMISS

INTRODUCTION

As the Defendants and Intervenor-Defendant thoroughly demonstrate in their briefs, the Plaintiffs' equal protection challenge to select provisions of Act 10 is dead on arrival: rational basis review applies, that test is "highly deferential," and the Legislature's reasons for creating the classifications it did under the law are reasonable. R. 63:21 (quoting *Laborers Loc. 236, AFL-CIO v. Walker*, 749 F.3d 628, 640 (7th Cir. 2014)).

Amicus curiae Kristi Koschkee writes in support of the motions to dismiss to make three additional, brief points about the modest nature of this lawsuit.

First, this Court must conduct an even more forgiving than usual rational basis review of Act 10 (to the extent that is even possible) because the State of Wisconsin was acting in its capacity as employer, rather than regulator, when it enacted the law. The Supreme Court of the United States has repeatedly stressed "that there is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation,'" such that "the

government as employer indeed has far broader powers than does the government as sovereign." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 598 (2008) (first quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961), then quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)) (alteration in original). Act 10 controls internal employer-employee matters and thus falls into the former category.[1]

Second, the Plaintiffs' only claim in this lawsuit is that the Legislature's distinction between "general" and "public safety" employees is irrational. That is, there is no contention in this lawsuit that the Legislature's employment-related decisions on collective bargaining, healthcare and pension contributions, annual recertification elections, and dues deductions are unconstitutional if they apply to all employees. And indeed, the Legislature had numerous rational bases for these changes in Wisconsin labor law (as several courts have ruled), not least of which is to balance the interests of employees like Ms. Koschkee (who wish to represent themselves) and the interests of unions which want the power of exclusive bargaining.

These first two points lead to a third: even if this Court were to conclude that the Legislature's general/public safety distinction were irrational (and it should not, for all of the reasons the Defendants have explained), the Plaintiffs are quite wrong that the remedy would be "permanent orders enjoining Defendants, their successors, and all those acting in concert with them or at their direction from implementing or enforcing" the challenged Act 10 provisions. R. 7:32. The remedy would instead be for this Court to eliminate the invalid distinction and extend the law's requirements to public safety employees. *See, e.g., Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020) (curing unconstitutional exception in statutory prohibition by eliminating exception rather than eliminating prohibition). Of all the possible outcomes in this

[1] Wisconsin courts interpret the federal and state equal protection guarantees identically. *See, e.g.*, *Tomczak v. Bailey*, 218 Wis. 2d 245, 261, 578 N.W.2d 166 (1998)

lawsuit, as a matter of law, the Plaintiffs' request that this Court strike down Act 10 is not one of them.

For the reasons stated herein, Ms. Koschkee respectfully requests this Court grant the motions to dismiss.

INTEREST OF AMICUS

Amicus curiae Kristi Koschkee is a public school teacher at LakeView Technology Academy in Pleasant Prairie who values the many benefits 2011 Wisconsin Act 10 has provided her. R. 73:1. In particular, Act 10's legal rules protect Ms. Koschkee from being required to join or pay dues to her local union. They also help Ms. Koschkee achieve her goal of not associating with or supporting union activities; and allow her do more of what she loves without interference, namely teaching students. *Id.* at 2. If the Plaintiffs are successful in invalidating the challenged provisions of Act 10, Ms. Koschkee will suffer significant injuries. *Id.*

On January 29th, 2024, this Court granted Ms. Koschkee amicus curiae status and authorized her to file a brief on any dispositive motion. *See* R. 76. This brief is filed pursuant to that order.

ARGUMENT

I. The State of Wisconsin has even greater leeway than usual under Article I, Section 1 of the Wisconsin Constitution when, as in the case of Act 10, it is classifying its own employees.

A fundamental rule of constitutional law is that courts assess the validity of the government's actions in light of the capacity in which the government was acting at the time. *See, e.g.*, *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 148-49 (2011). One well-known example of this rule is the market participant doctrine. The Commerce Clause prohibits a state government, in its capacity as "market regulator," from enacting certain protectionist legislation

favoring its own citizens at the expense of citizens of other states and thereby "impeding free private trade in the national marketplace." *White v. Massachusetts Council of Const. Emps., Inc.*, 460 U.S. 204, 207 (1983) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)). But the same restriction does not apply when the state is acting in its capacity as a *participant* in that national market, such as when it is choosing with whom it will do business. *See id.* In other words, assessment of the State's discriminatory actions "must take into account the context in which they arise." *NASA*, 562 U.S. at 148.

An analogous distinction, and one highly relevant to this case, arises with respect to the government's role as an employer. "Time and again" the Supreme Court's "cases have recognized that the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'" *Id.* (quoting *Engquist*, 553 U.S. at 598). The distinction arises from the "'common-sense realization' that if every 'employment decision became a constitutional matter,' the Government could not function." *Id.* at 148-49 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

Thus the Supreme Court has afforded the government-as-employer "significantly greater leeway" in the context of several constitutional provisions including the Fourth Amendment, *O'Connor v. Ortega*, 480 U.S. 709 (1987) (warrantless searches of public employee offices), the Due Process Clause, *Bishop v. Wood*, 426 U.S. 341 (1976) (improper discharge of public employee) and the First Amendment, *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968) (restrictions on public employee speech); *see generally Engquist*, 553 U.S. at 599-600 (discussing these cases).

Most applicable here, the Court categorically barred class-of-one equal protection challenges in the public employment context—"that is, a claim that the State treated an employee

differently from others for a bad reason, or for no reason at all"—as "contrary to the concept of at-will employment." *Id.* at 606. In declining to "subject[] the government to equal protection review for every allegedly arbitrary employment action," the *Engquist* Court noted that a contrary ruling "could jeopardize the delicate balance governments have struck between the rights of public employees and "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'" *Id.* at 607 (quoting *Connick*, 461 U.S. at 150-51) (alterations in original).

As an example of "Congress's (and the States') careful work," the Court observed that Congress has excluded from Civil Service Reform Act coverage certain types of public employees like those belonging to the FBI, CIA, and DIA. *Id.* This, of course, is analogous to the distinction between general employees and public safety employees in Act 10.

This "significantly greater leeway" with respect to employee categorization further dooms the Plaintiffs' already-doomed claim. To be sure, this case does not feature a class-of-one equal protection challenge. But Wisconsin's role as employer (with respect to both its direct employees and those who report to the employers it created and manages) still factors in the analysis in several ways.

First, the government's capacity as employer affects how conceivable interests in passing a law are weighed, such that interests that may not suffice in the regulatory context will suffice in the employment context. *See Engquist*, 553 U.S. at 598 ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." (quoting *Waters,* 511 U.S. at 675 (plurality opinion)).

Indeed, the Plaintiffs appear to premise much of their argument on alleged political favoritism underlying Act 10's general/public safety distinction. But even granting the double assumptions that this is true and that there is no other conceivable explanation that renders the favoritism irrelevant—a concession the Defendants demonstrate is not warranted—it is not at all clear that "favoritism" is grounds for striking down an employment-related decision in the first place. Employers are allowed to and frequently do favor certain employees or categories of employees over others in the assignment of necessary burdens and benefits. *Cf. id.* at 604 ("[E]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify."). Under the Plaintiffs' theory there would be an equal protection claim any time the Legislature provides raises to employees of one agency and not another or shutters a certain sector of the executive branch and not one similarly situated. That is not the law and never has been.

Second, given the government's "significant," to say nothing of rational, interest in efficient operations and the frequently "[in]articula[ble]" and "subjective" nature of factors relevant to employment decisions, *Engquist*, 553 U.S. at 598, 604, the state-as-employer must be given discretion to categorize occupations broadly, even sloppily. This disposes of the Plaintiffs' arguments that the line the Legislature drew in determining who was a public safety employee and who was not somehow supports the Plaintiffs' rational basis claim.

There is no case law support outside of the strict scrutiny context for the Plaintiffs' punctilious sifting of employee types, faulting the Legislature for excluding conservation wardens and university police from a "public safety" category, for instance. Even assuming for the sake of argument that Act 10's categories have rough edges, the Legislature need not justify itself as the Plaintiffs demand. *Cf. Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955)

(under the Equal Protection Clause, a "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." (citation omitted)).

Similarly, in *Matthews v. Diaz*, 426 U.S. 67, 83-84 (1976) the Supreme Court held that "[t]he task of classifying persons for medical benefits, like the task of drawing lines for federal tax purposes, inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment."

Finally, to the extent this Court applies the Plaintiffs' requested 5-factor rational basis test, *but see, e.g.*, *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 181 n.17, 370 Wis. 2d 500, 881 N.W.2d 702 (Ziegler, J., concurring) (characterizing the test as "perhaps a useful tool in certain contexts" but "unnecessary" where a "rational basis is clearly present"), it will need to adapt the test to the employment context. The fifth factor, for instance, asks whether "the characteristics of each class" are "so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation." *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 58, 237 Wis. 2d 99, 613 N.W.2d 849. But "the public good" is a consideration for the government when it is regulating "the public," not its own staff. The state's interests as to its employees are decidedly more private in nature. *Engquist*, 553 U.S. at 598 (discussing state in its capacity "as proprietor, to manage [its] internal operation" (quoting *Cafeteria & Restaurant Workers*, 367 U.S. at 896) (alteration in original)).

Because the Plaintiffs' claim so clearly fails rational basis review even without regard to the capacity in which the State of Wisconsin was acting when it enacted Act 10, Ms. Koschkee expects the Plaintiffs to use whatever creative means they can to convince the Court that some form of "rational basis plus" standard is appropriate. *See* 7:10 (suggesting that Act 10 "adhere[s]" insufficiently "firm[ly]" to "justice, moderation, frugality, and virtue" within the meaning of the Wisconsin Constitution). But the government's status as employer in this case dictates that, if anything, the opposite is true: this Court must apply "rational basis minus."

The State is entitled to "significantly greater leeway" when managing its workplace and balancing the interests of individual employees, unions and the State, itself, as employer.

II. No party disputes that the challenged provisions of Act 10 are constitutional if applied to general employees and public safety employees.

Act 10 is one of the most exhaustively-litigated pieces of legislation in Wisconsin history. *See Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013); *Madison Teachers, Inc. v. Walker,* 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337; *Int'l Union of Operating Engineers, Loc. 139, AFL-CIO v. Daley*, 983 F.3d 287 (7th Cir. 2020). And since these challenges have invariably resulted in failure, the Plaintiffs have of necessity drawn their constitutional claim narrowly: they challenge only Act 10's classification of employees as "general" or "public safety," and that distinction only under the Wisconsin Constitution's equal protection guarantee. *See* R. 7:29 (claim citing Wis. Const. art. I, § 1).

For purposes of this lawsuit, then, there is no dispute that the Legislature had a rational basis generally to reduce collective bargaining privileges, modify recertification requirements, prohibit automatic dues deductions, or require employees to contribute more substantially to their benefits. Nor have the Plaintiffs argued that any constitutional provisions are independently violated by these provisions. Such a challenge would have had to contend with the prior Act 10

precedent cited. *See, e.g.*, *WEAC*, 705 F.3d at 653 ("Wisconsin was free to impose any of Act 10's restrictions on all unions."); *Madison Teachers*, 358 Wis. 2d 1, ¶¶74-86.

To take just one example, it is by now well-settled that Act 10's collective bargaining limitations do not interfere with the Plaintiffs' First Amendment rights, as they "remain free to advance *any* position, on *any* topic, either individually or in concert, through any channels that are open to the public"; the Plaintiffs simply may not force their employer to negotiate back. *Madison Teachers*, 358 Wis. 2d 1, ¶42; *WEAC*, 705 F.3d at 653. By the same token, there are numerous conceivable rational bases for limiting unions' collective bargaining abilities, whether to "provid[e] public employers more leverage in negotiations," *WEAC*, 705 F.3d at 654, or to ensure that the voices of non-represented employees like Ms. Koschkee are heard.

There is no need to discuss the constitutionality of each other Act 10 provision under various other constitutional safeguards because that is exactly the point: such questions are not at issue here. The *only* legal question before this Court is whether the Legislature could rationally divide state and municipal employees into "general" and "public safety" groups. For all of the reasons already explained by the Defendants, it could.

The lines do not need to be perfect and it does not matter if this Court, itself, agrees with the distinction or where the lines are drawn. As the Seventh Circuit noted:

> Thus, we cannot, as the Unions request, determine precisely which occupations would jeopardize public safety with a strike. Even if we accept that Wisconsin imprudently characterized motor vehicle inspectors as public safety employees or the Capitol Police as general employees, invalidating the legislation on that ground would elevate the judiciary to the impermissible role of supra-legislature.

WEAC, 705 F.3d at 656. The Seventh Circuit then observed that "[d]istinguishing between public safety unions and general employee unions may have been a poor choice, but it is not unconstitutional." *Id*.

III. If the Plaintiffs' claim is successful, the remedy is to invalidate the allegedly irrational distinction, not the indisputably rational law.

These first two points—that the Legislature has a relatively free hand in managing its own workplace and that the constitutionality of Act 10's provisions are not in issue save for the limited context of the general/public safety distinction—lead to a third and equally critical one. Because Act 10 is within the Legislature's power, any conclusion that the exemption of select employees from the law is unconstitutional leads only to invalidation of the exemption, not of the entire law.

The Supreme Court's recent decision in *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020) is instructive. That case involved a constitutional challenge to an exception in the Telephone Consumer Protection Act of 1991. *See Barr*, 140 S. Ct. at at 2343. Although the TCPA prohibits robocalls, a 2015 amendment exempted calls "made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts." *Id.* Political and nonprofit groups sued under the First Amendment and asked for invalidation of the robocall ban, arguing that the government was favoring some speech over others. *Id.*

Although the Court agreed that the exception violated the First Amendment, seven justices concluded that the appropriate remedy was invalidation of the exception alone, not the entire law. *See id.* at 2348-55 (plurality opinion); *id.* at 2357 (Sotomayor, J., concurring in judgment); *id.* at 2362-63 (Breyer, J., concurring in judgment with respect to severability and dissenting in part). This same conclusion applies straightforwardly here.

The Plaintiffs' entire allegation of harm is that Act 10 subjects general employees to a panoply of burdens while exempting public safety employees from these same burdens. R. 7:29. This is an unequal treatment claim and, should this Court conclude that the distinction is

unconstitutional, it can simply strike the exception and extend the provisions to cover public safety employees. There is no logical or legal reason to strike the entire law.

Consequently, if the Plaintiffs prevail, the burdens (or benefits, in Ms. Koschkee's telling) of Act 10 should simply be extended to public safety employees. Just as in *Barr*, there are no independent constitutional barriers for the reasons discussed in Section II of this brief and the Plaintiffs themselves demonstrate that the distinction between rule and exception in Act 10 is clear. *See, e.g.*, R. 7:29-30 (repeatedly referring to Act 10's "exempt[ion]" for public safety employees)

CONCLUSION

For the foregoing reasons, amicus curiae Kristi Koschkee respectfully requests that this Court grant the Defendants' motion to dismiss the Plaintiffs' complaint.

Dated this 28th day of February, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY
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