STATE OF WISCONSIN

IN SUPREME COURT

No. 2012AP2067

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 62, 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 CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JUAN B. COLAS, PRESIDING, CIRCUIT COURT CASE NO. 2011-CV-003774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

CORRECTED BRIEF OF DEFENDANTS-APPELLANTS

J.B. VAN HOLLEN
Attorney General

Kevin M. St. John, SBN 1054815
Deputy Attorney General
Steven P. Means, SBN 1011355
Executive Assistant Attorney General
Steven C. Kilpatrick,
SBN 1025452
Assistant Attorney General
Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792
(608) 267-8906 (Fax)
kilpatricksc@doj.state.wi.us

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ISSUES PRESENTED

1. Courts have uniformly held that public employees do not have a constitutionally protected right to collectively bargain, and that such statutory rights, when

granted, are a matter of legislative grace. Through 2011 Wisconsin Act 10 the Wisconsin Legislature modified the various statutory rights granted to Wisconsin's municipal employees. Specifically:

- Wis. Stat. § 111.70(4)(mb)1., limits collective bargaining between general municipal employees and employers to the single issue of base wages;

- Wis. Stat. §§ 111.70(4)(mb)2., 66.0506 and 118.245, require that collectively bargained for base wage increases that exceed an increase in the Consumer Price Index be approved by referendum;

- Wis. Stat. §§ 111.70(1)(f) and 111.70(2)(in relevant part), eliminate the ability of general municipal employee unions to negotiate "fair share" agreements, which require non-union members to pay the proportional share of the cost of collective bargaining and contract administration;

- Wis. Stat. § 111.70(4)(d)3.b., requires that entities that wish to be the certified bargaining agent of a collective bargaining unit containing general municipal employees demonstrate on an annual basis that a majority of bargaining unit members want such collective representation and pay the cost of administering the related certification elections; and

- Wis. Stat. § 111.70(3g), prohibits municipal employers from deducting union dues from general municipal employee earnings.

Do these modifications of the collective bargaining system infringe the rights of association and speech of general municipal employees and their unions?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

2. Do the statutes listed above violate the equal protection rights of those general municipal employees represented by a collective bargaining agent vis-a-vis those general municipal employees who are not?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

3. Does Wis. Stat. § 62.623, prohibiting the City of Milwaukee from paying contributions to the Milwaukee Employee Retirement System for its general employees, violate the Home Rule Amendment, art. XI, § 3(1) of the Wisconsin Constitution?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

4. Does Wis. Stat. § 62.623, prohibiting the City of Milwaukee from paying contributions to the Milwaukee Employee Retirement System for its general employees, unconstitutionally impair the contractual rights of these employees?

The Circuit Court answered: Yes.

The Court of Appeals did not answer but instead certified the appeal to this Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted because of the public importance and statewide impact of the laws at issue.

STATEMENT OF THE CASE

This case focuses on whether certain features of the Municipal Employment Relations Act, Wis. Stat. §§ 111.70 – 111.77, as amended by 2011 Wisconsin Acts 10 and 32 and other related statutes (hereafter "MERA"), violate the state constitutional rights of association, free speech, and equal protection of general municipal employees and their unions, and whether the Legislature

exceeded its authority by requiring that City of Milwaukee employees pay the employee share of pension contributions.

The relevant facts are undisputed. Plaintiffs-Respondents are Madison Teachers, Inc., a union representing Madison public school teachers, Local 62 AFL-CIO, a union representing certain City of Milwaukee employees, and individual members of each union (hereafter, "the challengers"). (R. 3, ¶¶ 9-14.) Defendants-Appellants (hereafter "the state officials") are the Governor of Wisconsin and the Commissioners of the Wisconsin Employment Relations Commission, whose duties involve the implementation of certain parts of Act 10. (R. 3, ¶¶ 15-17.)

On November 29, 2011, the challengers filed a Motion for Summary Judgment (R. 18), seeking a declaration that certain sections of MERA, as outlined in the Statement of Issues, violated their rights of association, free speech, and equal protection under the Wisconsin Constitution. They also challenged Wis. Stat. § 62.623, which prohibits a 1st class city from paying the

employee share of required pension contributions. Finally, they challenged Act 10 as being improperly considered during a special legislative session.

The state officials filed a Motion for Judgment on the Pleadings on January 31, 2012. (R. 38.) On September 14, 2012, the Circuit Court decided both dispositive motions and issued its Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings. (R. 53; App. 124-50.) It held that municipal employees' and their unions' rights of association and free speech under both the state and federal[1] constitutions were violated by MERA's ban on collective bargaining for issues other than base wages, the annual certification requirements, and the prohibitions on forced payment of "fair-share" contributions from non-member employees, and payroll deductions for union dues. (R. 53; App. 134-39.) Based on those conclusions, the Circuit Court then analyzed the

[1] Despite the challengers not claiming any violation of the federal constitution, the Circuit Court declared certain provisions of MERA unconstitutional under both the state *and* federal constitutions.

challenged sections under strict scrutiny and held that they violated equal protection. (R. 53; App. 139-42.)

With respect to the 1st class city pension provisions, the Circuit Court concluded that "the allocation of responsibility for contributions to the Milwaukee ERS … is a 'local affair' for purposes of the Home Rule Amendment" to the Wisconsin Constitution and that the adoption of a statutory provision "that alters it is an unconstitutional intrusion into a matter reserved to the City of Milwaukee." (R. 53; App. 145.) Finally, the Circuit Court also concluded that the prohibition on paying the employee share of pension contributions was an unconstitutional impairment of contracts. (R. 53; App. 149.)

Accordingly, the Circuit Court declared "Wis. Stat. §§ 66.0506, 118.245, 111.70(1)(f), 111.70(3g), 111.70(4)(mb) and 111.70(4)(d)3 violate the Wisconsin and United States Constitutions, and Wis. Stat. § 62.623

violates the Wisconsin Constitution, and [are] all null and void." (R. 53; App. 150.)[2]

On September 18, 2012, the state officials filed a notice of appeal. (R. 54.) On October 10, 2012, in response to a motion by the challengers, the Circuit Court's "Amendment Clarifying September 14, 2012 Decision and Order," amended the Order "to add the third sentence of § 111.70(2) to the statutes found unconstitutional and therefore void." (R. 65; App.153.) That sentence states: "A general municipal employee has the right to refrain from paying dues while remaining a member of a collective bargaining unit."[3]

On April 25, 2013, the Court of Appeals certified the case to this Court. (Certification; App. 100-23.) On June 14, 2013, this Court granted the certification.

STANDARD OF REVIEW

This Court reviews the constitutionality of state statutes *de novo*, without deference to the lower courts.

[2] All relevant statutory sections are included in the appendix.

[3] Proceedings related to the state officials' efforts to obtain a stay and an April 22, 2013, petition for supplemental injunctive relief filed by the challengers are not addressed in the Statement of the Case as they are not relevant to this appeal.

State v. McManus, 152 Wis.2d 113, 129, 447 N.W.2d 654 (1989).

ARGUMENT

To the challengers, every debate over Act 10 is an endless policy debate. Their tactics shift and the forums change but the goal is the same: to prevent reform. Opponents of Act 10 have fought the changes to public sector collective bargaining through persuasion, protest, public information campaigns, teacher "sick-outs," recall threats, and public "shaming." Legislative opponents even fled the State to try and block a quorum of the Senate. When those efforts failed, and Act 10 became law, opponents challenged the measure in court, again and again.

But courts are not public policy salons. They decide cases on the law. So when opponents of Act 10 challenged the legislative procedure by which the law was enacted, they lost. *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis.2d 70, 798 N.W.2d 436. When they brought a constitutional challenge in federal court, they

lost. *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 642 (7th Cir. 2013).

And they should lose here. This case merely repackages arguments already rejected by the Seventh Circuit and is nothing more than the latest effort to impose a public policy result that could not be achieved through the democratic process. These claims simply have no basis in law.

I. THE ACT 10 CHANGES TO MERA DO NOT INFRINGE RIGHTS OF ASSOCIATION OR SPEECH.

The challengers characterize their associational and speech claim under the Wisconsin Constitution as an infringement on their right to "associate for the purpose of participating in collective bargaining." (R. 44:24.) They frame their argument in this manner because the right to associate is protected only if it is for the purpose of "engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

However, their argument fails because pronouncements of this Court and the United States Supreme Court[4] make it abundantly clear that collective bargaining in the public employee context is not a constitutional right. *See, e.g., Dep't of Admin. v. Wis. Emp. Rel. Comm'n*, 90 Wis.2d 426, 430, 280 N.W.2d 150 (1979)("There is no constitutional right of state employees to bargain collectively"); *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979)("the First Amendment does not impose any affirmative obligation on the government to listen, to respond or ... to recognize [a public employee] association and bargain with it").

Instead, it is a policy choice made by the Legislature to share decision-making authority with employee representatives. How much decision-making authority to share (if any), and with whom, are legislative choices. This is what the Court of Appeals meant when it

[4] The rights of free speech and assembly and the guarantee of equal protection of the Wisconsin and U.S. Constitutions are coextensive. *County of Kenosha v. C & S Management Inc.*, 223 Wis.2d 373, 389, 588 N.W.2d 236 (1999); *State v. McManus*, 152 Wis.2d 113, 130, 447 N.W.2d 654 (1989).

stated, "The right of state employees to bargain collectively with the state is an act of legislative grace." *Bd. of Regents v. Wis. Per. Comm'n,*103 Wis.2d 545, 556, 309 N.W.2d 366 (Ct. App. 1981).

Act 10 merely changed the scope of decision-making authority the State chooses to share through collective bargaining. These policy choices in Act 10 are undoubtedly significant, but they are not of a constitutional moment. Indeed, it is undisputed that the State could end *all* collective bargaining for public employees. The Court of Appeals recognized this power in its certification. (Certification, p. 9; App. 108)("[T]he parties agree that … the legislature could have abolished all collective bargaining.") Since the challengers concede this point, it is peculiar, therefore, that they continue to try and cloak their policy views with constitutional dress.

The Wisconsin and federal constitutions clearly recognize the challengers' right to associate to exercise their right to petition government. However, neither grants the right to associate for the purpose of collective

bargaining. Such right is merely statutory,[5] and the Legislature may grant and withdraw that right as it sees fit.

In *Smith*, the United States Supreme Court rejected allegations that the Arkansas State Highway Commission improperly refused to consider employee grievances filed by union representatives, noting the critical distinction between the employees' First Amendment rights and the public employer's freedom to ignore the employees' selected representative:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation from doing so. But **the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.**

441 U.S. at 465 (emphasis added)(citation omitted).

The Seventh Circuit understood this distinction when, in *Wis. Educ. Ass'n Council*, 705 F.3d at 642, it soundly rejected constitutional challenges to post-Act 10 MERA, and its state government counterpart, the State

[5] Wisconsin Stat. § 111.70(2) reads, in part: "Municipal employees have the right ... to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities **for the purpose of collective bargaining**."

Employment Labor Relations Act, Wis. Stat. §§ 111.81 – 111.94, as amended ("SELRA"). The Seventh Circuit reviewed the same issues presented in this case and held that nothing in Act 10[6] violates the First Amendment and that "Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject." *Id.* at 645-46. As a result, the Seventh Circuit upheld Act 10 "in its entirety." *Id.* at 642.

The challengers' claims ignore this settled law. Instead, they confuse the right to associate for constitutional purposes with a right to associate to engage in pre-Act 10 collective bargaining, which was always, and only, a statutory process. The right of association only protects those who "associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Jaycees*, 468 U.S. at 618. Were the law otherwise, it would

[6] Act 10 amended both MERA and SELRA. This Court has held that the identical rights in these laws merit the same legal analysis. *Dep't of Emp. Rel. v. Wis. Emp. Rel. Comm'n*, 122 Wis.2d 132, 143, 361 N.W.2d 660 (1985).

constitutionalize all activities that any group of people wants to engage in simply because they have associated for that purpose.

Nor does it matter that a labor union might engage in protected First Amendment activities in addition to collective bargaining. For example, individuals may associate to form a corporation and government cannot interfere with that corporation's legitimate First Amendment activity. *See Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 340-41 (2010). This, however, does not preclude laws that might make associating as a corporation less attractive. For instance, a state might decide to modify or end the limitations on corporate liability, one of the primary motivations for forming a corporation. The First Amendment and art. I, §§ 3, 4 of the Wisconsin Constitution are not guarantees of particular collective bargaining rights and processes any more than they are a permanent guarantor of limited corporate liability as presently defined under Wisconsin law.

The MERA provisions at issue do not implicate constitutionally-protected association or speech activities; instead, they are merely legislative determinations of how decision-making should be shared between municipal employers and their employees. And, notably, neither Act 10 nor MERA place any limits on any conduct outside the narrow sphere of collective bargaining. In fact, the manner in which the labor unions, their members, and other aligned interests have associated, engaged in speech, and petitioned the government on the specific issue of Act 10, clearly shows how their rights continue to exist and be exercised.

Because no associational or speech rights are implicated by Act 10, this Court should review the challenged MERA statutes under the deferential rational basis standard. *Wis. Educ. Ass'n Council,* 705 F.3d at 652-53 (applying rational basis review because plaintiffs failed to articulate a cognizable First Amendment claim). MERA easily survives under this analysis, and the challengers agree. (R. 44:25 n.8; App. 115.)

II. WISCONSIN CONST. ART. I, §§ 3, 4, DO NOT REQUIRE DUES DEDUCTIONS OR MANDATORY "FAIR-SHARE" CONTRIBUTIONS.

A. No State Constitutional Right Exists For Employees And Labor Unions To Access Payroll Systems For The Purpose Of Dues Collection.

Public sector unions have no constitutional right to access government payroll systems for dues deductions. In fact, the United States Supreme Court recently concluded that a state's decision to end payroll deductions as a dues-paying mechanism "is not an abridgment of the unions' speech" because they remain "free to engage in such speech as they see fit." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359-60 (2009).

Relying on *Ysursa* and *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), the Seventh Circuit, in *Wis. Educ. Ass'n Council*, explained:

> The Bill of Rights enshrines negative liberties. It directs what government may not do to its citizens, rather than what it must do for them. *See Smith v. City of Chi.*, 457 F.3d 643, 655–56 (7th Cir. 2006). While the First Amendment prohibits "plac[ing] obstacles in the path" of speech, *Regan*, 461 U.S. at 549, 103 S.Ct. 1997 (citation omitted), nothing requires government to "assist others in funding the expression of particular ideas, including political

> ones," *Ysursa*, 555 U.S. at 358, 129 S.Ct. 1093; *see also Harris v. McRae*, 448 U.S. 297, 318, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (noting that Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of" a constitutional right). **Thus, even though "publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, [states are] under no obligation to aid the unions in their political activities.**" *Ysursa*, 555 U.S. at 359, 129 S.Ct. 1093.
>
> In *Ysursa*, the Supreme Court squarely held that the use of a state payroll system to collect union dues from public sector employees is a state subsidy of speech. *Id.* As the Court explained, "**the State's decision not to [allow payroll deduction of union dues] is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit.**" *Id.* Other circuits have reached the same conclusion. Like the statutes in these cases, **Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject.** Thus, *Ysursa* controls, and we analyze Act 10 under the Supreme Court's speech subsidy cases.

750 F.3d at 645-46 (emphasis added)(citations omitted).

In *Wis. Educ. Ass'n Council*, it was claimed that the State's decision to allow dues deductions for only some groups burdened the rights of others. However, the Seventh Circuit rejected the argument for two reasons. First, "Act 10 does not present a situation where the state itself actively erected an obstacle to speech. Thus, nothing supports treating the selective prohibition of payroll deductions as a burden on or obstacle to the speech of

general employee unions. Instead, Act 10 simply subsidizes the speech of one group, while refraining from doing so for another." *Id.* at 646 (footnote omitted). Second, "speaker-based distinctions are permissible when the state subsidizes speech. Nothing in the Constitution requires the government to subsidize all speech equally." *Id.* at 646-47. The Seventh Circuit's holding could not be clearer: "Act 10's payroll deduction prohibitions do not violate the First Amendment." *Id.* at 645.

The Sixth Circuit Court of Appeals even more recently upheld a prohibition on payroll deductions for certain public sector unions, even when allowed for others. In *Bailey v. Callaghan*, 715 F.3d 956 (6th Cir. 2013), the Sixth Circuit vacated an injunction prohibiting Michigan state officials from enforcing a statute that prohibited union dues deductions. It held:

> The theory behind their First Amendment claim runs as follows: unions engage in speech (among many other activities); they need membership dues to engage in speech; if the public schools do not collect the unions' membership dues for them, the unions will have a hard time collecting the dues themselves; and thus Public Act 53 violates the unions' right to free speech.
>
> **The problem with this theory is that the Supreme Court has already rejected it.** "The First

> Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." *Ysursa v. Pocatello Educ. Assn*, 555 U.S. 353, 355, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009). Here, Public Act 53 does not restrict the unions' speech at all: they remain free to speak about whatever they wish. Moreover, "nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions" for union activities, *id.;* and payroll deductions are all that Public Act 53 denies the unions here. Seldom is precedent more binding than *Ysursa* is in this case.

Id. at 958 (emphasis added). The Sixth Circuit found that "the Act says nothing about speech of any kind. The Act is therefore facially neutral as to viewpoint, which goes a long ways towards defeating the plaintiffs' facial challenge." *Id.* at 959 (citing *Wis. Educ. Ass'n Council*, 705 F.3d at 648); *see also S. Car. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1256–57 (4th Cir. 1989)(while the "loss of payroll deductions may economically burden the [union] and thereby impair its effectiveness, such a burden is not constitutionally impermissible").

The foundation of all these decisions is the unremarkable premise that the Constitution does not require the government to subsidize unions' or their members' First Amendment associational activity.

Furthermore, the Constitution does not compel the State *to continue* to provide unions access to public payroll systems in perpetuity. *Ysursa*, 555 U.S. at 359, 360 n.2 (noting that previously "available deductions do not have tenure").

B. No State Constitutional Right Exists To Compel Nonmembers To Pay "Fair-Share" Contributions.

The challengers' claim that they are constitutionally entitled to negotiate "fair-share" agreements, which require public employees who choose not to join the union — and even those who oppose the union — to pay a proportional share of the cost of collective bargaining and contract administration, similarly fails. The Supreme Court rejected *this* theory in *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007). After noting that "fair-share" agreements grant unions an "extraordinary power" that is "in essence, [the power] to tax government employees," *id.* at 184, the *Davenport* Court reiterated that "unions have no constitutional entitlement to the fees of nonmember

employees" and noted that there is no constitutional impediment to states eliminating fair-share payments entirely. *Id.* at 185.

Furthermore, public sector fair-share agreements are an "impingement" if not an outright infringement of the associational rights of those who do *not* wish to bargain through an association. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977)("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."); *Knox v. Service Employees Int'l Union, Local 1000*, ___ U.S. ___, 132 S. Ct. 2277, 2289-91 (2012)("By authorizing a union to collect fees from nonmembers … our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate."). While *Knox* and *Abood* hesitantly concluded that fair-share agreements are not unconstitutional, they, like *Davenport*, also make it very clear that *there is no constitutional mandate*. Thus, Wis. Const. art. I, §§ 3, 4, do not require the State to force non-union members in a

collective bargaining unit to financially support municipal employee unions.

Finally, the constitutional analysis does not change simply because the State *formerly* allowed municipal general employee unions, acting as exclusive collective bargaining representatives, to negotiate fair-share agreements. *Abood*, 431 U.S. at 225 (it is not the court's role to "judge the wisdom" of a state's collective bargaining scheme).

III. THE CHALLENGERS' ATTEMPT TO OVERLAY *LAWSON'S* "PENALTY" THEORY ON THIS CASE FAILS, AND THUS, MERA DOES NOT VIOLATE WIS. CONST. ART. I, §§ 3, 4.

In the courts below, the challengers sought to avoid the established law discussed above by relying on *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955). *Lawson*, however, does not save their claims.

In *Lawson*, a 1950's Red Scare era case, this Court declared a federal housing regulation unconstitutional because it required tenants to relinquish their right to

associate with "subversive organizations" in order to remain eligible to continue living in subsidized housing. It was not disputed that an individual's right to be a member of a subversive organization was protected by the First Amendment and Wis. Const. art. I, §§ 3 and/or 4, nor was it disputed that access to public housing was a "privilege," not a right. However, the Court concluded that the "privilege" of subsidized housing could not be conditioned on the relinquishment of the constitutionally-protected right to associate. *Lawson*, 270 Wis. at 275.

The challengers claim that, like *Lawson*, MERA penalizes represented employees and their bargaining agents. There are three fundamental reasons why *Lawson* is inapplicable to the present case: First, *Lawson* is not a public employment case. The government has "significantly greater leeway in its dealings with citizen employees than . . . [with] citizens at large." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008). Second, as explained above, associating for statutorily-provided collective bargaining is not a constitutionally protected right. Third, as will be explained below, no

"penalty" results from associating for statutory collective bargaining. Moreover, this "penalty theory" has never been applied in the numerous published decisions challenging changes to collective bargaining laws.

To understand why MERA does not create any penalties, it is essential to understand the difference between a union or labor organization[7] on the one hand and a collective bargaining unit and collective bargaining representative on the other hand. For public employees, a "bargaining unit" is a group of employees designated by the Wisconsin Employment Relations Commission, for purposes of electing a collective bargaining representative. Wis. Stat. § 111.70(1)(b). Statutory collective bargaining obligations under MERA are only triggered if a bargaining unit elects a bargaining representative. Wis. Stat. § 111.70(4)(d). While a bargaining unit *may* elect a union to act as the bargaining representative, unions have no status under MERA apart from such an election and a bargaining unit could always elect a different

[7] Wisconsin Stat. § 111.70(1)(h), defines the term "labor organization" in a way that would include, but not be limited to, unions seeking to be elected as a collective bargaining representative.

representative. Similarly, election of a union to act as a bargaining representative is not at all dependent on whether any members of the bargaining unit are also members of the union. Nothing in the law requires those who vote in the election to join a union if it is elected as the certified bargaining agent. Instead, each employee is at all times left free to associate, or not.

Importantly, even if a bargaining representative is elected, MERA applies evenly to all employees in the bargaining unit regardless of how they vote or whether they decide to join the union that has been elected as the representative. If the bargaining representative is certified, all of the employees in the unit, even those who voted no, must collectively bargain all mandatory subjects through that representative.

Put differently, collective bargaining under MERA is exclusively a statutory process and the elected bargaining representative has only those statutory rights and duties created by statute. Neither a union that is elected as a bargaining representative, nor an individual employee who is part of a bargaining unit, loses any right

or ability to associate or engage in protected speech, because their ability to do so outside the narrow context of statutory collective bargaining is not impaired.

With or without MERA and Act 10, every avenue for petitioning the government other than collective bargaining remains open and unrestricted to both represented and unrepresented employees, and to unions whether or not they are certified as bargaining agents.

Moreover, MERA does not prevent employees in the collective bargaining unit who are members of a union from doing anything outside the narrow context of statutory collective bargaining. Represented and unrepresented employees can employ the exact same steps, and engage in the exact same advocacy, to promote better wages outside the narrow realm of statutory collective bargaining. The state constitution does not prevent an employer from responding to these pleas by providing wage increases outside of a collective bargaining agreement.

A. MERA Provides A Benefit, Not A Burden, By Compelling Employers To Negotiate Over Total Base Wages.

The challengers contend that represented employees and their bargaining agents are penalized by Wis. Stat. §§ 111.70(4)(mb)2., 66.0506, and 118.245, which require a referendum for base wage increases above the cost-of-living. A referendum is not required for non-represented employees. However, this difference in process is of no significance. The whole point of collective bargaining is to establish a different process for represented employees. The difference in this case simply reflects the Legislature's choice to allow local citizens a limited role in the shared decision-making.

Moreover, and importantly, an unrepresented employee has no constitutional or statutory right to receive or compel negotiation over wage increases, let alone increases greater than a cost of living adjustment. Instead, a municipal employer is at all times free to ignore any such demands from any employee. *Minnesota State*

Bd. for Cmmty. Colleges v. Knight, 465 U.S. 271, 287 (1984).

Thus, unlike *Lawson*, employees are not forced to choose between their constitutional right to associate and any tangible benefit. Instead, MERA and Act 10 present the inverse of *Lawson*, as employees who collectively bargain *gain* the statutory right to force their employer to "meet and confer at reasonable times, in good faith, with the intention of reaching an agreement ... with respect to wages ...." Wis. Stat. § 111.70(1)(a). Unrepresented employees don't have this right to force their municipal employer to a bargaining table. While both groups can engage in all other forms of speech and association, and petition the government outside of collective bargaining, MERA provides this additional benefit – and a significant one —only to those employees who have elected an exclusive representative.

If accepted, the challengers' arguments would affect a sea change in public sector labor law by concluding that Wis. Const. art. I, §§ 3, 4, preclude the State from identifying a subset of issues (in this case, total

base wages) that can be collectively bargained and prohibiting collective bargaining over other subjects. This position cannot be squared with the State's ability to declare *all* subjects prohibited subjects of bargaining. *Bd. of Regents*, 103 Wis.2d at 556. The logical extension of this reasoning is that every public sector bargaining law that identifies *any* prohibited subject of bargaining violates the employees' rights of association and free speech. Hence, pre-Act 10 MERA would have been unconstitutional because it too was a labor code that treated "represented" employees differently than "non-represented" ones. Indeed, no public sector labor code in the nation would survive the challengers' reasoning. This cannot be. Far from proving MERA unconstitutional "beyond a reasonable doubt," the challengers' argument produces an absurd result that in fact confirms its constitutional soundness.

B. Annual Certification Requirements Do Not Burden The Association And Speech Rights Of Municipal Employees Or Labor Unions.

The challengers also assert that MERA's new mandatory annual certification provision burdens and penalizes their speech and association activity. This is wrong for several reasons.

First, certification provisions have been a staple of MERA for decades. *See, e.g.*, Wis. Stat. § 111.70(4)(d) (1971-72). Without some legislatively-imposed system to recognize collective bargaining representatives, neither employees nor employers would know if a specific agent legitimately speaks for a bargaining unit. It is necessarily the Legislature's prerogative to define the contours of those provisions.

Second, the imposition of annual certification elections on represented employees but not on non-represented employees is certainly not a penalty, because non-representatives have no need for a representative's certification in the first place.

Third, this penalty theory in the annual certification context ignores the distinction between the *right of employees* to associate for protected activities and the *right of the bargaining agent* to exclusively negotiate on behalf of all bargaining unit employees – including those employees that do not want the agent's representation. This distinction is critical. MERA requires – as a precondition to negotiations – that the *bargaining agent* confirm that it has the support of a majority of the employees it seeks to represent. Wis. Stat. § 111.70(4)(d)3. This requirement reflects a legislative choice to modify the balance between the associational rights of employees who are subject to collective bargaining and those who are not. While the majority threshold is certainly *different* than what it was before Act 10, this does not make it *unconstitutional*.

Fourth, MERA does not require individual employees to bear the costs of annual certification; it requires the labor organization – the entity that seeks the privilege of exclusive representation – to bear those costs. How that cost is covered or shared is not mandated by

MERA. The idea that government charges a fee to cover its administrative costs is neither novel nor constitutionally infirm. *See Sauk County v. Gumz*, 2003 WI App 165, ¶ 49, 266 Wis.2d 758, 669 N.W.2d 509 ("It is well established that the government may charge a fee" to cover the government's expense of administering an activity without violating the First Amendment).

Finally, the annual certification requirement is not a penalty for associating because no one is required to bear any state-imposed costs *in exchange for* the right to join a union. Instead, as explained above, MERA is completely silent about the choice to join a union. A certification election has no bearing on whether an employee may join a union or whether the union may petition the government on behalf of its members outside of collective bargaining. Likewise, a failure to garner a majority does not dissolve the union. Instead, the election determines only who, if anyone, is granted the unique power to compel the governmental employer to engage in statutory collective bargaining.

C. Elimination of Forced "Fair-Share" Payments Does Not Penalize Municipal Employees Or Labor Unions.

Prohibition of "fair-share" agreements does not burden or penalize represented employees, or any union acting as their exclusive bargaining agent versus those who are not represented. Non-represented employees have never had the right to compel others to pay for any portion of their bargaining costs. Indeed, as explained above, these employees have no right – statutory or constitutional – to bargain with public employers. Thus, in the context of "fair-share" agreements, the challengers' application of the *Lawson* penalty theory makes little, if any, sense.

Furthermore, as described above, the challengers' reasoning that a "free-rider" concern creates a constitutional mandate is directly at odds with United States Supreme Court precedent. *See generally Knox*, 132 S. Ct. 2277.

D. The Elimination Of Payroll Deductions As A Dues-Paying Mechanism Does Not Burden Or Penalize Municipal Employees Or Labor Unions.

Similarly, MERA's prohibition on payroll dues deductions does not penalize represented employees, because no employee has a constitutional right to payroll dues deductions to support membership in a voluntary organization. Similarly, labor unions do not have a constitutional right to conscript the State into administering their dues collection. As the Seventh Circuit explained,

> In *Ysursa*, the Supreme Court squarely held that the use of a state payroll system to collect union dues from public sector employees is a state subsidy of speech. *Id.* As the Court explained, "the State's decision not to [allow payroll deduction of union dues] is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit." ... Like the statutes in these cases, Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject.

Wis. Educ. Ass'n Council, 705 F.3d at 645-46 (citations omitted). The court further rejected the plaintiff unions' argument that *Ysursa* could be distinguished because the dues deduction prohibition in that case applied across the board, unlike in Act 10. *Id.* at 646 ("the Unions'

reasoning falters for two reasons: Act 10 erects no barrier to speech, and speaker-based discrimination is permissible when the state subsidizes speech").

E. *Lawson* Is Inapplicable To The Present Case, And Thus, The Challengers' Association And Speech Claims Fail.

For the reasons discussed above, *Lawson* is a different case that has no bearing on the present dispute. Mr. Lawson had to relinquish a constitutional right to receive subsidized housing, even though the associational activities had no relation to the subsidized housing privilege that was being offered. Here, employees who collectively bargain do not lose any association or speech rights. On the contrary, a collective bargaining system always confers *additional* rights on represented employees.

If any legitimate analogy is to be drawn between MERA's restrictions on statutory collective bargaining and *Lawson*, it would require a change of the *Lawson* facts. If, in *Lawson*, the housing regulation had prohibited residents from operating any corporation or non-profit

organization in their units—rather than mere membership in organizations—there is no reason the law would have been struck down. While individuals certainly have a right to join organizations, they do not have the right to compel government to support their activities by providing subsidized housing. MERA does not, like the policy considered in *Lawson*, prohibit or penalize membership in an organization, nor does it prohibit or penalize any type of protected speech or associational activity. While MERA does set rules for those general employees in collective bargaining units, those rules do not govern outside that narrow, statutorily-created context.

In summary, the challengers' association and speech claim fails because associating for the purpose of statutory collective bargaining is not a constitutional right, and Act 10's changes to MERA do not burden or penalize any association or speech rights under the state constitution.

IV. ANALYZED UNDER RATIONAL BASIS REVIEW, MERA DOES NOT VIOLATE EQUAL PROTECTION.

The Circuit Court addressed the challengers' equal protection claim based on its finding that MERA violated their associational rights. (R. 53; App.140.) As explained above, however, MERA does not infringe their association and speech rights under the Wisconsin Constitution; therefore, their equal protection claim should be analyzed under the rational basis standard. *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 61, 284 Wis.2d 573, 701 N.W.2d 440 (strict scrutiny applies only when a challenged statute "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class").

The burden of establishing that MERA is unconstitutional is a heavy burden indeed. MERA is presumed constitutional, and under rational basis review, this Court must "sustain [the] statute against attack if there is any reasonable basis for the exercise of legislative

power." *McManus*, 152 Wis.2d at 129. "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to [its] constitutionality, it must be resolved in favor of constitutionality." *State ex. rel. Hammermill Paper Co. v. LaPlante*, 58 Wis.2d 32, 46, 205 N.W.2d 784 (1973). To give effect to the strength of this presumption of validity, the challengers cannot prevail unless they can establish that MERA is unconstitutional "beyond a reasonable doubt." *Id.*

Importantly, as part of rational basis review, this Court "does not evaluate the merits of the legislature's economic, social, or political policy choices, but is limited to considering whether the statute violates some specific constitutional provision." *State v. Dennis H.*, 2002 WI 104, ¶ 12, 255 Wis.2d 359, 647 N.W.2d 851. In fact, rational basis review does not even require that the Legislature articulate its reasoning; the challenged provisions of MERA must "survive a constitutional challenge if this court can *conceive of* a rational basis for the law." *State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis.2d 13,

657 N.W.2d 66 (emphasis added). Finally, the burden is on the challenger to "'negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citation omitted).

In the face of this heavy burden, the challengers have conceded that the MERA provisions at issue would survive a rational basis review. This concession should come as no surprise. As explained above, the Seventh Circuit upheld Act 10 under rational basis review. *Wis. Educ. Ass'n Council*, 705 F.3d at 653-57. Also, the challengers' equal protection claim is based on the notion that MERA impermissibly created two distinct classes of public employees – those employees who are represented by a union and non-represented employees. The fact that MERA establishes two different negotiating environments that employees can self-select by choosing to collectively bargain or not, does not deny those employees equal protection of the law. Indeed, the Seventh Circuit described its conclusion that the State can constitutionally create distinctions between employee groups with similar

classifications as "uncontroversial." *Id.* at 655. In fact, if the challengers were correct, then every public sector collective bargaining scheme that results in different treatment for represented and non-represented employees, as they all must, would be unconstitutional.

The challengers failed to prove beyond a reasonable doubt that the challenged MERA provisions violate Wis. Const. art. I, §§ 1, 3, 4. Accordingly, this Court should declare MERA constitutional.

V. WISCONSIN STAT. § 62.623 DOES NOT VIOLATE THE HOME RULE AMENDMENT.

Section 62.623 of the Wisconsin Statutes prohibits a 1st class city, that is, the City of Milwaukee, from paying the employee share of contributions to the City of Milwaukee Employee Retirement System ("Milwaukee ERS"). The challengers' claim that § 62.623 violates the Home Rule Amendment to the Wisconsin Constitution, art. XI, § 3(1), which states:

> 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. The method of such determination shall be prescribed by the legislature.

They are incorrect because § 62.623 is part of an act that uniformly affects every city and village. Moreover, it is clear that a city's payment of its employees' pension contributions is a matter of statewide concern.

A. Because § 62.623 Is Part Of A Uniform Act, It Does Not Violate The Home Rule Amendment.

The challengers argue that if a matter is determined to be a local affair, the Legislature is forever barred from regulating the subject. This, however, is not the law. The Home Rule Amendment:

> clearly contemplates legislative regulation of municipal affairs, and **there was no intention on the part of the people in adopting the home-rule amendment to create a state within a state**, an *imperium in imperio.*

Van Gilder v. City of Madison, 222 Wis. 58, 81, 267 N.W. 25 (1936)(emphasis added). Indeed, the only limitation on legislative regulation of local affairs is that the regulation be "an act which affects with uniformity every city." *Id.* at 80-81.

After discussing the scope of the Home Rule Amendment in great detail, the *Van Gilder* court left no doubt as to its holding:

> When the legislature deals with local affairs and government of a city, if its act is not to be subordinate to a charter ordinance, the act must be one which affects with uniformity every city.

Id. at 84. The Wisconsin Supreme Court has been consistent on this point. *See City of West Allis v. Milwaukee County*, 39 Wis.2d 356, 366, 159 N.W.2d 36 (1968)("If, however, the matter enacted by the legislature is primarily of local concern, a municipality can escape the strictures of the legislative enactment unless the enactment applies with uniformity to every city and village."); *Thompson v. Kenosha County*, 64 Wis.2d 673, 686, 221 N.W.2d 845 (1974)("statutes affecting the right of cities and villages to determine their own affairs must affect all cities and villages uniformly").

Act 10, through the creation of § 62.623 and other statutes, uniformly prohibited *all* governmental employers from paying the employee contribution to a pension or other retirement plan. *See* 2011 Wis. Act 10, § 167 (creating Wis. Stat. § 62.623, applicable to 1st class cities,

stating "[t]he employer may not pay on behalf of an employee any of the employee's share of the required contributions"); *Id.* § 74 (repealing and recreating Wis. Stat. § 40.05(1)(b), applicable to all employers, including "any county, city, village, town," participating in the Wisconsin Employee Retirement System, stating "an employer may not pay, on behalf of a participating employee, any of the contributions required by par (a)"); *Id.* § 171 (creating Wis. Stat. § 66.0518, applicable to all local government units (defined to include all political subdivisions of the state) that choose to create a defined benefit plan, stating that such plan must "prohibit[] the local governmental unit from paying on behalf of an employee any of the employee's share of the actuarially required contributions"); *Id.* § 166 (creating Wis. Stat. § 59.875, applicable to populous counties, stating, "[t]he employer may not pay on behalf of an employee any of the employee's share of the actuarially required contributions").[8]

[8] Act 10 can be viewed in its entirety at https://docs.legis.wisconsin.gov/2011/related/acts/10 (last visited July 14, 2013).

Section 62.623 and the other relevant provisions of Act 10 create a uniform rule for all cities and villages (and all other governmental employers), not just the City of Milwaukee, that the employer may not pay any portion of the employee contribution to the retirement system or pension plan. Accordingly, Act 10 does not violate the Home Rule Amendment.

B. Public Sector Employee Benefits Are A Matter of Statewide Concern.

The state officials believe that uniformity is the only hurdle that must be passed to survive a Home Rule challenge. Because § 62.623 is part of a uniform regulation it must be upheld without further analysis of whether it regulates a matter of statewide concern. However, if the Court chooses to consider whether § 62.623 addresses a matter of statewide concern, it should conclude that it does.

The text of Act 10, together with the context in which it was enacted, leads to the inevitable conclusion that the Legislature believed that the State as a whole—

including its municipal instrumentalities—was in financial crisis and that reining in the costs of public employees was an essential tool to confront that crises. The Act was introduced during an emergency session of the legislature, called immediately after hotly-contested gubernatorial and legislative elections where the state's economy was a top issue. In addition to collective bargaining by municipalities, Act 10 addressed collective bargaining by state employees, retirement contributions by both represented and unrepresented public employees statewide, health insurance premiums, changes to the earned income tax credit, and additional budget lapses exceeding $10 million.

The idea that local spending raises statewide concerns makes perfect sense, particularly when state-generated revenues are distributed to local governments pursuant to the State's "shared revenue" program. *See, e.g.*, Wis. ch. 79. In 2011, the amount set aside for distribution to counties and municipalities was approximately $1.5 billion. *See* Wis. Stat. § 79.01(2). In addition to "shared revenue," municipal and county

budgets are supported by numerous other state aids and payments. As such, the Legislature has a clear interest in making sure that municipalities spend money wisely and in accordance with statewide public policy.

1. A 1947 Legislative Policy Statement on Milwaukee's Employee Retirement System does not establish public sector employee benefits are matters of statewide concern.

The clear nexus between Act 10 and the State's current fiscal health has forced the challengers to go back 66 years, to a 1947 legislative pronouncement, to argue that the manner in which the State's largest city uses public funds is not a matter of statewide concern. That pronouncement, which may have had some relevance in the years immediately following World War II, states that "all future amendments and alterations to [the Milwaukee ERS] are matters of local affair and government and shall not be construed as an enactment of statewide concern." Laws of 1947, ch. 441, § 31(1).

The Legislature's statement on what is or is not a matter of local concern is not "absolutely controlling," although it may be entitled to some deference. *Van Gilder*, 222 Wis. at 73-74. However, the deference accorded to a 1947 legislative statement in 2013, should be slight at best. First, the Legislature in 1947 obviously had no knowledge of the specific concerns or reasons that motivated Act 10. While it may have wanted to block future legislatures from seeking to regulate local pension funds, it clearly lacked that power through direct legislative action, and should not be afforded that power by reliance on a non-binding statement of policy.

Just as importantly, the world in 2013 is much different than the world that existed in 1947. State aids to municipalities have changed, economies are not local, and no credible argument can be made that local spending decisions have only local consequences. Those purporting to speak for the City of Milwaukee in the present action may argue that Milwaukee finances are "local," however, the extent to which Milwaukee seeks and relies upon state aid and state resources belies that claim.

2. On its terms, the 1947 Legislative declaration does not support an interpretation that § 62.623 upsets home rule.

If, for some reason, the Court chooses to consider the 1947 legislative statement, it must be read as a whole:

> For the purpose of giving cities of the first class the largest measure of self-governance 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 to be an act of statewide concern.

Laws of 1947, ch. 441, § 31(1). While the final clause indicates that the 1947 Legislature sought to predict the future by declaring that any amendments to the Milwaukee ERS would be a matter of local concern, the entire statement makes clear that this was not an unqualified grant of control. Instead, local control was subject to the "constitution **and general law**." *Id.*

According to *Black's* the phrase "general law" means a "Law that is neither local nor confined in application to particular persons." *BLACK'S LAW DICTIONARY*, 890 (7th ed. 1999). Here, as shown above,

§ 62.623 is part of a uniform law applicable to all governmental employers. Thus, it is a matter of general law and the 1947 statement does not stand as an obstacle to § 62.623.

Additionally, understanding "general law" as synonymous with uniform law is consistent with the proper scope of the Home Rule Amendment. As noted above, the Home Rule Amendment allows the State to regulate matters of local concern as long as it regulates the matter uniformly. Thus, the 1947 declaration simply says the ERS is within the control of the City unless: (1) the City's regulation of the ERS runs afoul of the Constitution; or (2) a future uniform law regulates in the area. This is consistent with the principle that the Legislature's authority is cabined by the Constitution, not by the actions of prior legislatures. Indeed, case law is clear that no legislature can bind future legislatures through the passage of a statute. *Flynn v. Dep't of Admin.*, 216 Wis.2d 521, 543, 576 N.W.2d 245 (1998). ("One legislature may not bind a future legislature's flexibility to address changing needs. Thus, one legislature may not

enact a statute which has implications of control over the final deliberations or actions of future legislatures.")(internal citations omitted).

3. The fact that Act 10 uniformly regulated the subject requires a holding that it is a matter of statewide concern.

The Legislature has determined that regulation of the Milwaukee ERS is a matter of statewide concern at least two other times; once in 1937 when it first created the Milwaukee ERS (Wis. ch. 396 (1937)) and again in 2011 when it amended it via Act 10. The Circuit Court incorrectly discounted these legislative determinations because the Legislature did not expressly state the Milwaukee ERS is a matter of statewide concern in either instance. With regard to the 1937 law creating the Milwaukee ERS in the first instance, the absence of an express statement is irrelevant. Indeed, if the Legislature did not think the regulation of pensions was a matter of statewide concern it would not have created the

Milwaukee ERS. Instead, it would have left the City free to decide whether to create an ERS.

More importantly, the lack of an express statement in Act 10 is of no moment. The enactment of a uniform law is dispositive that the matter is of statewide concern. The Court of Appeals made this clear:

> Also, the County seems to suggest that there is a "statewide concern" analysis that is distinct from a "uniformly affects every county" analysis. However, if the County means to make that argument, it is foreclosed by *Jackson County v. DNR*, 2006 WI 96, 293 Wis.2d 497, 717 N.W.2d 713, which states, in reference to Wis. Stat. § 59.03(1): "When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern." *Id.*, ¶19. **This language teaches that, if a legislative enactment "uniformly affects every county," then it is a matter of "statewide concern."** Thus, we do not address arguments made by the County that appear targeted solely at whether Wis. Stat. § 63.14(3) is a matter of statewide concern.

Roberson v. Milwaukee County, 2011 WI App 50, ¶ 21, 332 Wis.2d 787, 798 N.W.2d 256 (emphasis added). Any attempt by the challengers to ignore the clear holding of *Roberson* on the grounds that it construed the language of a home rule statute applicable to counties and not the Home Rule Amendment applicable to cities and villages fails:

> As the following explains, we conclude that the plaintiffs' reading of the statutes is correct because it is consistent with our supreme court's interpretation of similar constitutional language and we discern no reason why the two provisions should be interpreted differently.
>
> ****
>
> It is not happenstance that the statewide concern and uniformity language in the county home rule statute tracks language in article XI, section 3(1). The county home rule statute is patterned after article XI, section 3(1). *See* Committee Comment, 1973, Wis. Stat. Ann. § 59.025 (West Supp. 1977-78) (addressing a previous version of Wis. Stat. § 59.03(1) containing similar uniformity language and stating that the provision was "patterned after the constitutional and statutory provisions granting home rule to cities and villages"); *see also State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶37, 269 Wis.2d 549, 676 N.W.2d 401 (stating that county home rule authority in § 59.03 is "consistent with the general rule of limitation on the constitutionally-based home rule authority of other local units of *government*"). Thus, *Thompson's* interpretation of the language is arguably controlling and, at a minimum, highly persuasive.

Id. ¶¶ 14, 16. Indeed, a review of the language demonstrates it is identical in all material respects. *Compare* Wis. Const. art. XI, § 3(1), and Wis. Stat. § 59.03(1).

4. Past cases and state action support a finding that public sector employee benefits are a matter of statewide concern.

Public sector employee benefits have been held to be a matter of statewide concern. *Van Gilder*, 222 Wis. at 84 (compensation of police officers was a matter of statewide concern); *Welter v. City of Milwaukee*, 214 Wis.2d 485, 571 N.W.2d 459 (Ct. App. 1997)(law enforcement officers duty disability was a matter of statewide concern). And, the Legislature has been creating and amending public employee retirement systems since 1891. *See Wis. Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶¶ 7-10, 243 Wis.2d 512, 627 N.W.2d 807.

Section 62.623 does not contravene the Home Rule Amendment. *Van Gilder*, 222 Wis. at 84.

VI. WISCONSIN STAT. § 62.623 DOES NOT UNCONSTITUTIONALLY IMPAIR ANY CONTRACTUAL RIGHTS.

The challengers also alleged that § 62.623 unconstitutionally impaired the contractual rights of Milwaukee's general employees to have the City pay their employee pension contributions. This is incorrect for two reasons. First, Chapter 36 of the Milwaukee Charter Ordinance does not forever bind the City to pay the employee contribution. Second, even if it did, any impairment of contract rights passes constitutional muster. Additionally, even if this Court were to find an impermissible impairment, § 62.623 should not be stricken but instead should be held unconstitutional only as applied to employees hired before Act 10.

A. Chapter 36 Does Not Create A Contractual Right To Have The City Pay The Employee Contribution.

Chapter 36 of the Milwaukee Charter Ordinance establishes the Milwaukee ERS. (App. 184-248.) As such it defines the contribution levels, the benefit levels

and other mechanical aspects of the Milwaukee ERS. In its current form, Chapter 36 states that the City will make the employee contribution. Ch. Ord. § 36-08-7-a-1. (App. 231.)

The challengers claim that § 36-13-2-g turns § 36-08-7-a-1 into a contractual right to have the City pay the employee contribution forever. (R. 19:32.)

The Circuit Court assumed that a city ordinance can be a "contract" that binds a city—and is beyond the reach of the legislature—if the language of the ordinance so provides. That assumption, however, is not supported by law. Moreover, even if an ordinance is a contract, it is a contract that incorporates and is subject to changes in state law.

In *City of Kenosha v. Kenosha Home Tele. Co.*, 149 Wis. 338, 135 N.W. 848, 850 (1912), this Court held that a municipality has no power to enter into a contract that is not subject to amendment by the general laws passed by the Legislature. In that case, the City of Kenosha adopted an ordinance granting a telephone franchise to a telephone company in exchange for free service. The Court first

held that the City lacked power to grant the franchise, but went on to hold that even if the initial grant was valid, that power was subsequently repealed and voided by statute. *Id*. It stated, "As a state agency [the City] had no power to enter into a contract not subject to amendment by the public utility law." *Id*.

The principle established in *City of Kenosha* was directly applied to the public employment context in *State ex rel. McKenna v. District No. 8 of the Town of Milwaukee*, 243 Wis. 324, 10 N.W.2d 155 (1943). There, the Court held that a public school teacher with tenure under a prior statute could have that tenure taken away by a subsequent statute requiring mandatory retirement at age 65. *Id*. at 327-28.

In *Madison Metropolitan Sewerage Dist. v. Comm. on Water Pollution*, 260 Wis. 229, 50 N.W.2d 424 (1951), this Court also recognized that municipal powers are subject to subsequent legislative action. That case involved a claim by a sewerage district that preexisting statutory power to operate a sewage treatment plant exempted it from subsequent legislation seeking to

regulate the discharge from existing plants. In rejecting the sewerage district's claim that the original statute created a contractual right to operate free of the new regulations, the Court stated:

> A municipal corporation being a governmental agency whose powers are derived from and subordinate to the state, a municipal charter or other legislation affecting a municipal corporation is not a contract within the contemplation of a constitutional prohibition against the impairment of the obligations of a contract and the legislature retains the power to amend or repeal such charter and to enlarge or curtail the powers granted thereby.
>
> 'The municipality itself, which is a mere creature of the Legislature, is in no position to complain of the action of that body in reassuming powers previously delegated. The obligation of no existing contract is impaired by such an act, and no vested rights are thereby disturbed.'

Id. at 246 (citations omitted).[9]

These cases teach that parties who rely on an ordinance for contractual rights have a different set of expectations than may arise in other contexts. In the present case, as will be discussed more fully below, City of Milwaukee employees had no reason to expect that their "contract" with the City would bind the City, in

[9] Although this case no longer reflects current law on taxpayer standing, *City of Appleton v. Town of Menasha*, 142 Wis.2d 870, 877-78, 419 N.W.2d 249 (1988), it remains valid for the propositions cited.

perpetuity, to pay the "employee share" of pension contributions.[10]

In fact, the prospect of future legislation was expressly addressed in section 20-13 of the ordinance:

> **20-13. Charter Not Affected by General Law Except When So Expressed.** No general law of this state, contravening the provisions of this act [Ch. 184, L. 1874], shall be considered as repealing, amending or modifying the same, except such purpose be expressly set forth in such law. *(S. 14, Subch. 20, Ch. 184, L. 1874.)*

Ch. Ord. § 20-13.[11] Because the provisions of Act 10 that prevent Milwaukee from making the "employee contributions" to the ERS could not be more express, any "contract" anticipated and allows the Act 10 changes. *See* Wis. Stat. § 62.623(1).

Even if the Court were to discount § 20-13 and those cases which make municipal obligations subject to state laws, other plain language of the Charter defeats the challengers' argument. Section 36-13-2-g states:

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[10] Wisconsin Stat. § 241.02, Wisconsin's "statute of frauds," requires that any promise to pay another person's obligation must be reduced to writing and subscribed by the obligated party. If not, the promise is void. While neither the Circuit Court nor the parties addressed this issue below, it likewise is relevant to determining the intent of the Milwaukee ordinance at issue.

[11] Chapter 20 of the Charter Ordinance can be found at http://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/Ordinances/City-Charter/CH20.pdf (last visited July 14, 2013).

> Every member, retired member, survivor and beneficiary who participates in the combined fund shall have a vested and contractual right to the benefits in the amounts and on the terms and conditions as provided in the law on the date the combined fund was created.

See also Ch. Ord. § 16-32-2-c (containing language that is identical in all material respects). These two sections contain the only language that purports to create any contractual rights. *See Dunn v. Milwaukee County*, 2005 WI App 27, ¶¶ 8-9, 279 Wis.2d 370, 693 N.W.2d 82 ("legislative acts are presumed not to create contractual rights" and any contractual rights that are created are defined by the express language of the ordinance). Noticeably absent from this language, however, is any mention of contributions. The section certainly does not specify that contributions to the ERS are part of the "benefits" or "terms and conditions" of the ERS.

Whether contributions to the system are "benefits" or "terms and conditions" is answered by § 36-13-2-d. And the answer is, No. Section 36-13-2-d is clear:

> Contributions which are made to this fund under this act by the city or by an agency which is covered by this act, as contributions for members of this system shall not in any manner whatsoever affect, alter or impair any member's rights, benefits, or allowances,

> to which such member under this act is or may be entitled ….

This provision is significant for two reasons. First, it draws a clear distinction between "contributions" and "rights, benefits, and allowances" under the system. Second, § 36-13-2-d expressly provides that a contribution made by the City on behalf of an employee cannot "affect, alter or impair" an employee's "rights, benefits, and allowances" in any manner whatsoever. The challengers' claim is based on the concept that the contribution alters the benefit. Thus, reading § 36-13-2-g in connection with § 36-13-2-d makes clear that this suggested reading is not permissible. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶¶ 45-46, 271 Wis.2d 633, 681 N.W.2d 110 ("statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole"). *Contributions* are not part of the contractual rights.

This reading also comports with the express listing of benefits found in Chapter 36. Section 36-05, entitled "Benefits," gives specific meaning to the word for purposes of Chapter 36. Section 36-05 lists each and every benefit of the plan and the terms and conditions of

those benefits. *See* Ch. Ord. §§ 36-05-1 (service retirement allowance); 36-05-2 (ordinary disability retirement allowance); 36-05-3 (duty disability retirement allowance); 36-05-5 (accidental death benefit); 36-05-6 (separation benefits); 36-05-7 (optional benefits); 36-05-8 (survivorship benefits); 36-05-10 (ordinary death benefit); 36-05-11 (lump sum bonus). Because a requirement that the City make the employee contribution is nowhere in § 36-05, such a requirement can't be considered a "benefit."

B. Assuming There Is A Contractual Right, § 62.623 Does Not Impermissibly Impair It.

Assuming *arguendo*, that the City employees do have a contractual right to a continuing contribution, § 62.623 does not unconstitutionally impair it. The Contract Clause "cannot be read literally to proscribe any impairment of preexisting contracts." *State ex rel. Cannon v. Moran*, 111 Wis.2d 544, 554, 331 N.W.2d 369 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983).

This Court uses a three-step inquiry to determine whether an ordinance impermissibly impairs an existing contract. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶¶ 54, 55, 295 Wis.2d 1, 719 N.W.2d 408; *Energy Reserves*, 459 U.S. at 410. *First*, a party must show that the law changed after the formation of the contract and that the change substantially impaired the contractual relationship. *Energy Reserves, supra*, at 411; *Dairyland*, 295 Wis.2d 1, ¶ 55. *Second*, if a substantial impairment has been found, a court must determine whether there is a significant and legitimate public purpose for the law. *Energy Reserves*, 459 U.S. at 411-12; *Dairyland*, 295 Wis.2d 1, ¶ 56. *Third*, if there is a significant and legitimate public purpose, the question becomes whether the impairment of the contract is reasonable and necessary to serve the State's public purpose. *Energy Reserves*, 459 U.S. at 412; *Dairyland*, 295 Wis.2d 1, ¶ 57. Section 62.623 clearly survives this analysis.

1. There is no substantial impairment.

The challengers argued that there was a substantial impairment because the employees would be forced to pay for the cost of their own contributions. Increased cost alone, however, is not enough to prove substantiality. *See Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998)("[T]he fact that a state makes a contract more costly to one of the parties does not establish a violation."). This is particularly true when the increased costs are merely a reinstatement of the proper responsibility for the "employee contribution."

The challengers also argued that Act 10 fails under *Kolosso* because the changes to the Milwaukee ERS were not foreseeable because the State has not historically regulated the Milwaukee ERS and because Chapter 36 guarantees no changes. (R. 44:51-52.) These arguments fail. As shown above, Chapter 36 does not guarantee a continuing contribution, particularly when read in light of § 20-13, which contemplates future legislative action. The argument that the State does not have a history of

regulating the Milwaukee ERS also fails. The State created the Milwaukee ERS in 1937 and has been regulating public employee pensions systems since 1891. *See Lightbourn*, 243 Wis.2d 512, ¶¶ 7-10.

There is no doubt that public employee pensions are heavily regulated. Thus, new regulation was foreseeable and, therefore, not a substantial impairment. *Kolosso*, 148 F.2d at 894-95.

2. Section 62.623 serves a legitimate public purpose.

This prong of the analysis ensures that government is legitimately using its police power "rather than providing a benefit to special interests." *Energy Reserves*, 459 U.S. at 412. Here, any suggestion that there is not a legitimate public interest is unpersuasive. The various changes to public employee collective bargaining made by Act 10 were made to equip the local governments with the ability to absorb the impact of the economic downturn and the State's financial situation. The challengers have recognized this purpose. (R.19:36) (noting that the

purpose of § 62.623 is to help keep property taxes under control).

3. This Court must defer to the Legislature's determination that any impairment is reasonable and necessary to serve the public purpose.

Unless the government is both the regulating entity and a party to the contract, courts must defer to the Legislature's judgment as to the necessity and reasonableness of the statute. *Energy Reserves*, 459 U.S. at 412-13; *Chappy v. Labor and Industry Review Comm'n*, 136 Wis.2d 172, 188, 401 N.W.2d 568 (1987). Here, the State is not a party to any contract between the City and their employees.

C. Even If § 62.623 Does Unconstitutionally Impair A Contractual Right, The Statute Is Not Facially Invalid.

Assuming *arguendo,* that § 62.623 does unconstitutionally impair a contractual right, it does so only as to employees hired before various dates in 2010. Chapter 36 states that City employees hired after various

dates in 2010 are required to make their own employee contributions. *See* § 36-08-7-a-2. Thus, § 62.623 does not impair any contractual rights of employees hired after the listed dates.

CONCLUSION

For all the forgoing reasons, this Court should reverse the declaratory judgment of the Circuit Court.

Dated this 24th day of July, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

By:_____
Kevin M. St. John, SBN 1054815
Deputy Attorney General
Steven P. Means, SBN 1011355
Executive Assistant Attorney General
Steven C. Kilpatrick,
SBN 1025452
Assistant Attorney General

Attorneys for Defendants-Appellants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (Kilpatrick)
(608) 264-6362 (St. John)
(608) 266-3860 (Means)
(608) 267-8906 (Fax)
kilpatricksc@doj.state.wi.us
stjohnkm@doj.state.wi.us
meanssp@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,961 words.

Dated this 24th day of July, 2013.

_____
Steven C. Kilpatrick
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 24th day of July, 2013.

_____
Steven C. Kilpatrick
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of July, 2013.

_____

Steven C. Kilpatrick
Assistant Attorney General