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)

BRIEF OF PLAINTIFFS-RESPONDENTS

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STATEMENT OF THE ISSUES

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

    a. prohibit municipal employers from collectively bargaining with the certified exclusive agents of municipal general employees ("certified agents" or "representatives") on any subject other than base wages and prohibit negotiations for a wage increase in excess of the annual increase in the Consumer Price Index unless approved in a municipal voter referendum (Wis. Stat. §§111.70(4)(mb), 66.0506, and 118.245);

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

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

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

The Circuit Court answered yes.

2. Do sections of 2011 Wisconsin Act 10 and 2011 Wisconsin Act 32, amending MERA and related statutes, violate the Plaintiffs' rights to equal protection of the laws guaranteed by Article I, §1 of the Wisconsin Constitution, by creating classifications based on represented employees' exercise of their fundamental right of freedom of association and penalizing such employees based on that exercise, by:

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

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

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

The Circuit Court answered yes.

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

The Circuit Court answered yes.

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

The Circuit Court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case challenges the constitutionality of certain provisions of 2011 Wisconsin Acts 10 and 32 ("Act 10"),[1] which amended the Municipal Employment Relations Act ("MERA"), Wis. Stat. §111.70 *et seq.*, and related statutes. Act 10 radically altered, both in scope and effect, core provisions of the Wisconsin statutes enacted over 50 years ago to foster peaceful public sector labor relations. Given the complexity of this case and the public interest in it, oral argument is warranted.

Publication of this Court's decision is warranted in light of the importance of citizens' rights to associate and speak collectively without unconstitutional interference, and to receive equal treatment under the law regardless of their affiliations. Publication is also warranted in light of the important home rule and impairment of contract issues which affect the hundreds of thousands of people who work for and live in the City of Milwaukee.

[1] Certain provisions of Act 10 were reenacted without amendment in 2011 Wisconsin Act 32, the biennial budget act. Act 32 also amended Act 10 in ways not material to this case, such as by exempting municipal transit employees from the category of "general municipal employees" to which the Act 10 provisions generally apply. *See, e.g.*, Wis. Stat. §111.70(1)(fm).

STATEMENT OF THE CASE

In this action for declaratory judgment, Plaintiffs-Respondents ("Plaintiffs") contend that the following provisions of Act 10, through their cumulative impact and effect, violate their constitutional rights of association and equal protection:

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

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

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

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

Public Employees Local 61, AFL-CIO, and its member, John Weigman, also challenge Wis. Stat. §62.623, as amended by Act 10, which prohibits the City of Milwaukee from making the employee's share of pension fund contributions, contending that the provision

unconstitutionally interferes with Milwaukee's Home Rule Authority over its pension plan and unconstitutionally impairs their contract rights.

The procedural history provided by the Defendants-Appellants ("the State") at pages 4 to 8 of their Brief is adequate. As this is a facial constitutional challenge to certain statutory provisions, there are no disputed facts.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law that this Court reviews *de novo*, yet benefits from the Circuit Court's analysis. *State v. Quintana*, 2008 WI 33, ¶¶11-12, 308 Wis.2d 615, 748 N.W.2d 447.

A party who challenges the constitutionality of a statute must demonstrate that the statute is unconstitutional "beyond a reasonable doubt." *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶68, 284 Wis.2d 573, 701 N.W.2d 440. This standard is an expression of deference to the legislature. Yet "when a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." *Ferdon,* 2005 WI 125 at ¶69. Neither "respect for the legislature nor the presumption of constitutionality allows for the absolute judicial acquiescence to the legislature's statutory enactments." *Id.* "Since *Marbury*

v. Madison, it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is." *State ex rel. Wis. Senate v. Thompson*, 144 Wis.2d 429, 436, 424 N.W.2d 385 (1988).

As to the claims that Act 10 violates Plaintiffs' associational and equal protection rights guaranteed by the Wisconsin Constitution, once the Plaintiffs show a restraint on a fundamental right, the presumption of constitutionality falls away and the burden shifts to the State. Unlike most legal disputes, in cases involving governmental restriction of fundamental rights the defendant carries the burden of proof and persuasion. *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). The State's association and equal protection infringements are subject to strict scrutiny. The burden is on the State to present a compelling State interest for the infringement and show that the legislation was narrowly tailored to accomplish that interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *Police Department of the City of Chicago, et al. v. Mosley*, 408 U.S. 92, 96 (1972).

ARGUMENT

I. INTRODUCTION

A. Response to State's Introductory Statements

It is disturbing that in a case about the freedom of association the Attorney General begins his argument by disparaging Wisconsin citizens for participating in constitutionally protected expressive activities and showing annoyance at their request that the courts determine the constitutional validity of Act 10. He complains that "the challengers" have engaged in "endless policy debate" about Act 10; that their goal is to "prevent reform"; that they have "fought the changes to public sector collective bargaining through persuasion, protest, [and] public information campaigns" and that they have "challenged the measure in court, again and again."[2]

By framing this case as nothing more than a "policy debate," the Attorney General shows disdain for the judges who, in this and other challenges to Act 10, have identified significant constitutional infirmities. Here and in an unrelated federal lawsuit challenging Act 10, the Circuit

[2] The Plaintiffs brought only this case. Apparently, the State is aggrieved by the fact that other citizens and orgnizations sought relief in other venues.

Court and District Court ruled ***in favor of the challengers***.[3] The State "prolonged" the litigation by filing post-judgment motions and appeals "again and again."

Although the District Court's ruling was reversed on appeal, that decision was two-to-one. *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) *(*Hamilton, C.J., concurring in part and dissenting in part). Thus, of the five judges who have heard constitutional challenges to Act 10, three have found it constitutionally defective and two have found it constitutionally sound.

Those outcomes show that this case presents close constitutional questions that need careful consideration. As the Court of Appeals said in its Certification, this appeal "requires more than the application of settled law to a new set of facts. . . . [L]aw development and the clarification of supreme court decisions are necessary to resolve the parties' disputes with respect to constitutional associational rights and Wisconsin's Home Rule Amendment."

[3] *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir.), *reversing Wis. Educ. Ass'n Council v. Walker*, 824 F.Supp.2d 856 (W.D. Wis. 2013).

B. Introduction of the Merits

Act 10 unconstitutionally burdens the Plaintiffs' associational rights and violates their rights to equal protection under the law. The Circuit Court summarized the cumulative burdens that Act 10 imposes on the rights of employees who choose to associate for the purpose of collective bargaining:

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

Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings ("Decision and Order"), pp. 15-16; APP00138-139.

The State mischaracterizes Act 10's cumulative burdens as "policy choices" regarding "how much decision-making authority to share" with public employee representatives. State's Brief, pp. 11-12. These laws are not policies which bolster management prerogatives. Act 10 does not expand municipal employers' authority to manage labor relations at all; rather, it restricts it. Moreover, Act 10 operates to legislate public employee unions out of existence by so burdening and penalizing employees who exercise their associational rights to collectively select a representative to engage in statutory collective bargaining that the employees and unions themselves will eventually surrender the exercise of their associational rights rather than suffer the burdens placed upon them.

Act 10 requires general municipal employees who want the option of negotiating anything beyond capped wages to surrender their association with a certified bargaining agent. It also causes unions and their members who, along with all bargaining unit members, choose the statutory privilege of collective bargaining by associating with a certified agent, to suffer financial and organizational penalties for making that choice, thus making their association difficult to maintain. Under the

doctrine of unconstitutional conditions, described and explained in Section II below, the Circuit Court correctly found that those provisions of Act 10 violate Plaintiffs' rights of association guaranteed by the Wisconsin Constitution. Decision and Order, p. 16; APP00139.

The Circuit Court also found that Act 10 creates two similarly situated but unequally treated classes of employees: general municipal employees represented by a certified agent, and general municipal employees who are non-represented. Decision and Order, pp. 17-18; APP00140-141. Because the differential treatment is based on fundamental associational choices, and given the State's failure to offer a defense of Act 10 that would survive strict scrutiny, the Circuit Court concluded that Act 10 violates Plaintiffs' constitutional rights to equal protection. Decision and Order, p. 8; APP00141. Plaintiffs demonstrate in Section III that this was the right conclusion.

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

II. ACT 10 VIOLATES THE ASSOCIATIONAL RIGHTS OF PLAINTIFFS.

A. Plaintiffs Have a Constitutional Right to Associate With a Certified Agent; They Do Not Assert a Constitutional Right to Collective Bargaining.

The State argues that the challenged provisions do not infringe on Plaintiffs' constitutionally protected right to freedom of association because "collective bargaining in the public employee context is not a constitutional right." State's Brief, p. 11. It then reasons that because collective bargaining "is a policy choice made by the Legislature to share decision-making authority with employee representatives," id., the State may disregard public employees' associational interests when they participate in this statutory process. The State's logic is flawed.

First, Plaintiffs do not contend that municipal employees have a constitutional right to force their employers to negotiate collectively with them. Rather, they claim a constitutional right to self-organization and to associate with a union, including for collective bargaining purposes. "[T]he right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer….is a fundamental right." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *see also Railroad Trainmen v. Virginia*, 377 U.S. 1, 5-6 (1964). "Such collective action would

be a mockery if representation were made futile by interferences with freedom of choice." *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930). *See also Thomas v. Collins*, 323 U.S. 516 (1945).

While a governmental employer is free to refuse to negotiate with a public employee union (absent a statutory guarantee), the government violates employees' fundamental rights of association when it "tak[es] steps to prohibit or discourage union membership or ***association***." *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 466 (1979) (emphasis added). The State may statutorily restrict the obligation to collectively bargain in good faith, but it may not constitutionally withhold benefits or penalize public employees for exercising their ***associational*** rights to organize or select a representative. *See Smith*, 441 U.S. at 465. Thus, governmental acts such as retaliation, discrimination, suppression or censorship restricting municipal employees' ability to associate for their common interests and to petition and advocate their positions have been found to violate the fundamental right to associate. *See Brown v. Alexander*, 718 F.2d 1417, 1429 (6th Cir. 1983), *reh'g en banc denied, citing Smith*, 441 U.S. 463.

Article I, Sections 3 and 4 of the Wisconsin Constitution protect citizens' associational rights at least to the same extent as the First

Amendment to the U.S. Constitution does. *Lawson v. Housing Authority of City of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955); *see also State v. Bagley*, 164 Wis.2d 255, 474 N.W.2d 761 (Ct. App. 1991). Indeed, the Wisconsin Constitution may provide even stronger associational protections than the U.S. Constitution if "the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *State v. Jennings*, 2002 WI 44, ¶38, 252 Wis.2d 228, 647 N.W.2d 142, *quoting State v. Doe*, 78 Wis.2d 161, 171-72, 254 N.W.2d 210 (1977).

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

Plaintiffs exercise constitutionally protected rights of association when they choose to collectively bargain, when they choose a union to represent them (or are chosen) as a bargaining agent, and when they choose to associate as members of that union. As shown in the following

sections, it is those constitutionally protected choices upon which Act 10 unconstitutionally infringes.

B. The Bargaining Limitations of Act 10 Unconstitutionally Burden Plaintiffs' Associational Rights.

The Wisconsin Supreme Court has explained that:

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

Lawson v. Housing Authority, 270 Wis. 269, 275, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955).

Act 10 penalizes municipal employees who choose to be represented by a certified agent by limiting what that agent may negotiate for them to a capped annual base wage increase, unless a higher wage increase is approved by referendum, while imposing no restrictions on the terms that non-represented employees may negotiate with their employers.[4] Wis. Stat. §§111.70(4)(mb), 66.0506 and 118.245. Because these provisions require employees who want the possibility of negotiating anything beyond wages that are severely capped or subject to increase only at the

[4] As shown in Section III, Act 10's bargaining limitations also violate equal protection principles.

caprice of the electorate to surrender their association with a certified agent, they unconstitutionally burden the employees' associational rights.

The State dismisses the authority of *Lawson* as merely a "1950's Red Scare era" case, implying that it should be ignored. State's Brief, p. 23. Yet *Lawson* is part of a larger body of law applying the doctrine of unconstitutional conditions, which was recognized well before the "Red Scare era" and continues to this day. Under this doctrine, "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011), *aff'd sub nom. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013); *see also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006).

In the language of the doctrine, the "benefit," as applied here, is the potential for an employee or group of employees to negotiate all issues with the employer, including all matters affecting wages, hours and working conditions. The "unconstitutional condition" is the requirement that to be able to access that benefit (albeit at the employer's discretion),

employees may not choose to have a sole and exclusive certified bargaining agent act on their behalf.

Indeed, in light of the State's contentions regarding state regulation of corporations and First Amendment activities, State's Brief, p. 15, it is ironic that early cases through which the doctrine of unconstitutional conditions developed involved unconstitutional limitations on corporate constitutional rights. In *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910), the Court recognized that a state could outright prohibit a corporation from operating within its borders, but could not grant the privilege to operate on a condition that amounted to a tax on out-of-state property without violating due process and imposing an unconstitutional restraint on interstate commerce. *See also Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 400-401 (1928) ("The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the federal Constitution.").

By the 1960's, the recognition that government cannot condition privileges on the forfeiture of constitutional rights incorporated such diverse areas as unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); welfare funds, *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260,

425 P.2d 223, 230 (1967); public housing, *Lawson, supra*; tax exemptions, *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958); public education, *Dixon v. Alabama Bd. of Educ.*, 294 F.2d 150, 156 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) and use of the United States Postal Service, *Lamont v. Postmaster General*, 381 U.S. 301, 309-10 (1965). The doctrine was largely implicated in the context of First Amendment expressive and associational rights. The doctrine continues to have primary application in the First Amendment arena today, in the context of restrictions tied to federal funds. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328-2330 (2013) and cases cited therein.

The State claims that the law underlying *Lawson* cannot apply in this case because *Lawson* is not a public employment case, and the government has more leeway to interfere with the constitutional rights of its employees than citizens at large. State's Brief, p. 24. Yet the doctrine of unconstitutional conditions has been applied in public employment cases. For instance, in *Wieman v. Updegraff*, 344 U.S. 183 (1952), an Oklahoma statute that required state employees take a loyalty oath of non-affiliation with certain organizations violated employees' constitutional rights to due process based on the following reasoning:

> To draw from [*United Public Workers v. Mitchell*, 330 U.S. 75 (1947)] the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in *United Public Workers,* though we held that the Federal Government through the Hatch Act…could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'....We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Id. at 191-92 (citations omitted).

Indeed, of all of the unconstitutional conditions doctrine cases, those involving loyalty oaths and requirements of non-membership in communist organizations may be the most analogous to this one. In those cases, courts generally held as unconstitutional laws requiring an oath of loyalty or non-membership in certain groups as a condition for receiving a privilege, such as delivery of mail, a job, or publicly-subsidized housing. *See Lamont v. Postmaster General*, 381 U.S. 301, 309-10 (1965), *Wieman v. Updegraff*, 344 U.S. 183, 191-92, (1952), *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, *cert. denied*, 350 U.S. 882 (1955). Here, the law requires non-association with a collective bargaining agent as a condition for negotiating anything other than capped base wages: even if an employer and its employees wish to engage in broader negotiations, Act 10

forbids such negotiations unless the employees give up their constitutionally protected association with the collective bargaining agent.

In *Speiser v. Randall*, the Supreme Court found a requirement that taxpayers swear to a loyalty oath in order to obtain a tax deduction was an unconstitutional infringement on First Amendment rights. It reasoned:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech.…It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional.

Speiser v. Randall, 357 U.S. 513, 518-19 (1958).

The same is true here: to deny workers who have engaged in constitutionally protected association with a collective bargaining agent any opportunity to negotiate wages, hours, and working conditions beyond capped base wages penalizes them for that association. Its deterrent effect is the same as if the State were to fine them for that association.

Had the State repealed MERA entirely, municipal employees would have retained their constitutional associational rights to self-organize and select representatives of their own choosing to advocate for their collective

employment interests, unimpeded by the State. In the absence of statutory collective bargaining, it would be unlawful for the State to impose a penalty or additional costs on municipal employees based on their participation in a labor organization. As the *Lawson* court explained:

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

Lawson, 270 Wis. at 276.

The bargaining limitations of Act 10 effectively strip municipal employees of their rights to associate with a certified agent for the purpose of collective bargaining by requiring them to surrender those rights in exchange for the potential to negotiate more than capped wages. They should be struck down as unconstitutional.

C. The Financial and Operational Penalties in Act 10 Unconstitutionally Burden Unions and Employees Who Choose to be Union Members.

A municipal employee in a bargaining unit that has collectively chosen a union to serve as its certified bargaining agent may choose to become a member of the union, or may choose to decline such membership. Membership in a labor organization is a protected right of association. *See American Steel Foundries*, 257 U.S. at 209. Should the

bargaining limitations discussed in the previous subsection alone fail to dissuade employees from association with a certified agent, Act 10 imposes three significant financial and operational penalties on certified agent unions and those who choose to be members of those unions.

These three burdens fall uniquely on the unions and on those employees who additionally exercise the associational right to become members of the labor union elected by bargaining unit employees to represent them. First, Act 10 requires the agent to undergo, at its and its members' cost, an annual recertification election, and to receive the votes of a supermajority of bargaining unit employees, regardless of whether any represented employee has requested such an election. Wis. Stat. §111.70(4)(d)3.b. Second, it prohibits municipal employers from negotiating fair share arrangements with certified agents to cover the agent's costs of providing collective bargaining and other agreed-upon services to *all* bargaining unit employees. Wis. Stat. §111.70(1)(f) & (2).[5] Third, it prohibits municipal employers from withholding payroll

[5] At the same time, the law only permits employees to be represented by a labor organization certified as the *exclusive* representative of all employees in the bargaining unit. The state WERC defines the parameters of the bargaining unit. Wis. Stat. §111.70(4)(d)1 & 2.

deductions for union dues, even if authorized by union members. Wis. Stat. §111.70(3g).

Thus, Act 10 forces a union and its members to bear the full costs of collective bargaining for the benefit of all employees of the bargaining unit, while allowing non-union employees in the bargaining unit to enjoy the benefits of representation as "free riders." That burden on unions and their members is exacerbated by the organizational demands of the mandatory annual certification election required by Act 10. The law requires the agent to be recertified annually in an election in which the agent receives the votes of least 51% of all employees in the bargaining unit, regardless of how many employees choose to vote in the election.[6] Wis. Stat. §111.70(4)(d)3. Additionally, the agent and its members are forced to fund the administrative costs of the annual election – even if *no* employee in the bargaining unit seeks decertification of the union. The law further forbids the agent from obtaining a fair share of the cost of the elections from the municipal employer or non-union member employees in the bargaining unit, regardless of the outcome of the election. *Id.* Finally, further hampering the unions both organizationally and

[6] Thus, for example, if 75% of the unit employees vote in a recertification election, 68% of the votes must be in favor of recertification.

financially, Act 10 bans municipal employers from withholding union dues from employees' wages. Wis. Stat. §111.70(3g). This ban applies regardless of the employee's wishes, and forces the unions to expend resources to collect those dues through less reliable avenues.

These aspects of Act 10 impose unconstitutional conditions on unions and their members in a way different from and in addition to the bargaining limitations discussed in the previous subsection. Viewed in the unconstitutional conditions framework, these aspects provide that if employees collectively choose the statutory "privilege" of requiring the employer to bargain in good faith on base wages, the union and its members must accept organizational and financial penalties as a condition on their associational choices to serve as a certified agent and to belong to the union.

These burdens, exacted in exchange for the privilege of statutory collective bargaining, have the effect of dissuading unions from becoming certified agents, and dissuading employees from becoming members of the union that serves as their certified agent, and are therefore unconstitutional.

In *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958), the Supreme Court found that

Alabama's requirement that the NAACP provide its membership list to the state in connection with its application to operate within the state was an unconstitutional infringement on the organization's members' First Amendment freedom of association because it would have the effect of discouraging such membership. The fact that the state had not directly restricted member rights to associate was irrelevant: "abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id.* at 461.

The provisions of Act 10 that (1) mandate annual certification elections with a supermajority needed to recertify, (2) allow the State to assess fees for the costs of the elections exclusively on the union and its members, (3) make the union the exclusive bargaining agent for all employees within the bargaining unit including non-union employees, while forbidding the union from seeking a fair share of costs from non-members (including recertification election costs), and (4) ban authorized dues deductions from union member wages, systematically undermine the union's effectiveness, exact penalties on employees who are members of a union elected as the certified bargaining agent, and, ultimately, induce municipal employees to abandon their association as members of the labor union and induce unions to abandon their association with employees as

their certified agent. Taken together these provisions operate to burden the constitutionally protected choice of union membership and punish unions for seeking to associate with municipal employees as their certified agents. Under the doctrine of unconstitutional conditions, such burdens call for strict scrutiny.

D. Act 10 Fails Under Strict Scrutiny.

"In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley v. Valeo*, 424 U.S. 1, 25, 64 (1976). *See also Katzman v. State Ethics Bd.*, 228 Wis.2d 282, 596 N.W.2d 861 (Ct. App. 1999). A law that curtails association can only survive strict scrutiny if it is shown to serve a compelling governmental interest and is narrowly tailored to serve that interest. *Buckley*, 424 U.S. at 44-45; *Gard v. Wisconsin State Elections Bd.*, 156 Wis.2d 28, 456 N.W.2d 809 (1990).

The Sixth Circuit subjected to strict scrutiny a Tennessee law that proscribed a labor organization that was affiliated with any national labor organization from accessing payroll deductions. It explained:

> To be affiliated with a group or organization is to be associated with, attached to, or identified with that organization. We believe this subsection directly limits freedom of association between labor organizations, and their members or members of other such

> organizations, and thus it could restrain or restrict freedom of association, a fundamental first amendment right. The advocacy of particular policies and practices of parent or affiliated organizations may well be directly affected by this limitation, and thus it requires strict scrutiny; equal protection concerns in this respect are related to the first amendment rights asserted by plaintiffs.
>
> * * *
>
> [T]he requirement that an organization be "independent" and non-affiliated with another labor organization strikes at the heart of freedom of association. Therefore we construe subsection (6) to require stricter scrutiny, that the state demonstrate a compelling interest to justify the limitation.

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

Act 10 curtails the same associational and equal protection rights.[7] Just as in *Brown* "independent" unions were treated more favorably than those affiliated with national unions, subjecting the law to strict scrutiny, here, employees without a collective bargaining agent are treated more favorably than those with one, in that they have the option to negotiate a broad range of matters with their employer. Likewise, employees in a bargaining unit with a certified agent but who are not members of the union are not financially and organizationally penalized like the unions and their members. Thus, strict scrutiny applies to Plaintiffs' claims that

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

their associational and equal protection rights are violated by the MERA amendments.

Act 10 does not outright ban public sector employees from forming associations to speak and act collectively. Yet "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972). Associational freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id*. Once so stifled, that governmental act can only be allowed if it "serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

The State has no compelling reason to curtail municipal employees' rights to choose a labor organization to represent their collective interests. It has no compelling reason to penalize those employees' constitutional choice to become members of such a labor organization. And it has no compelling reason to punish unions for associating with municipal employees as their certified agents. The Legislature could easily have amended MERA in a manner that limited collective bargaining between municipal employers and employees, while preserving constitutional rights. It did not do so.

The State has not offered any compelling State interest justifying the burdens it has placed on the associational rights of municipal employees and unions. Nor does any such compelling interest exist. As such, the State fails in its burden. This Court should hold that the Act 10 provisions discussed herein violate the right to freedom of association protected by the Wisconsin and U.S. Constitutions.

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

A. The Wisconsin Constitution Guarantees Plaintiffs Equal Protection Under the Law.

Article I, §1 of the Wisconsin Constitution states:

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

This provision is Wisconsin's Equal Protection clause, and has been "interpreted to afford substantially the same protections as its federal counterpart." *GTE Sprint Comm. Corp. v. Wisconsin Bell, Inc.*, 155 Wis.2d 184, 192, 454 N.W.2d 797 (1990); *see Jackson v. Benson*, 218 Wis.2d 835, 901, n. 28, 578 N.W.2d 602 (1998). An equal protection claim arises when statutes provide for different treatment of people who are similarly situated. *See Wisconsin Prof. Police Assn. v. Lightbourn*, 2001 WI 59, ¶ 221, 243 Wis.2d 512, 627 N.W.2d 807.

It is beyond contention that the "equal protection analysis requires strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *Ferdon v. Wis. Patients Compensation Fund*, 2005 WI 125, ¶61, 284 Wis.2d 573, 701 N.W.2d 440; *see also Romer v. Evans*, 517 U.S. 620, 631 (1996).

As elaborated below, Act 10 violates Plaintiffs' rights to equal protection because (1) the challenged provisions treat similarly-situated employees differently, thus implicating their constitutional rights to equal protection, and (2) the disparate treatment is based on the exercise of associational choices which the Plaintiffs have a fundamental right to make. Act 10, by imposing a classification that impermissibly interferes with a fundamental right, cannot withstand strict scrutiny.

The State does not contest that the right to associate is a fundamental right. Rather, it rests its defense to Plaintiffs' equal protection claims on its arguments that Plaintiffs' constitutional rights to free association are not infringed by Act 10, and defends Act 10 only under a rational basis standard. The State dedicates a significant portion of its Brief to arguing that the statutes in question survive rational basis scrutiny. This discussion is irrelevant because the statutes must be analyzed under strict

scrutiny. The State cannot meet its burden to demonstrate a compelling interest to justify the infringement on Plaintiffs' rights to equal protection.

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

A municipal employee who is represented by a certified agent is similarly situated to a municipal employee who is not represented. A represented teacher or sanitation worker differs from a non-represented teacher or sanitation worker only in that the represented employees have exercised their constitutional rights to associate by choosing to self-organize for the purpose of exercising the statutory right of collective bargaining.

While Act 10 restricts represented employees to negotiate only base wages, and caps the wage increase available absent approval in a referendum, no statute limits the subjects on which non-represented employees may negotiate. Likewise, no statute caps the base wage increase that an employer may give a non-represented employee, or requires the approval of the municipal voters of any pay increase in excess of the cost of living for non-represented employees.

Act 10 also treats employees differently based on their association with a certified agent, commonly a labor union. Members of a labor union are treated differently from members of any other voluntary organizations to which municipal employees may wish to belong. Wis. Stat. §111.70 (3g) provides that "A municipal employer may not deduct labor organization dues from the earnings of a general municipal employee or supervisor."

Thus, while this provision bars employers from deducting labor organization dues from the wages of employees who are members of labor organizations, it does not similarly ban deductions of membership dues of other associations and organizations with which employees voluntarily associate, for example, the National Rifle Association, the League of Women Voters, or the Toastmasters.

Recently, the Arizona United States District Court considered a challenge to an Arizona statute which, among other things, prohibited some unionized state employees but not others from authorizing payroll deductions to pay union dues, and also allowed all state employees to authorize payroll deductions to pay for other things, including insurance premiums, investments, and charitable donations. *See United Food and Commercial Workers Local 99, et al. v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz.

2011). That court determined that "the burdens imposed by the law do not fall equally on similarly-situated groups." *Id.* at 1124.

This Court should likewise find that the provisions of Act 10 challenged here impose burdens that do not fall equally on similarly situated groups. The provisions restricting the subjects of bargaining and restricting the base wage increases available to employees who choose to associate with unions do not apply to those employees who choose not to associate for the purpose of collective bargaining. Likewise, with regard to payroll deductions, employees who are dues-paying members of unions are subject to a burden not shared by employees who pay dues to other voluntary membership organizations.

C. Plaintiffs' Fundamental Rights Are Infringed and the Classifications Fail Under Strict Scrutiny.

When faced with an equal protection challenge, a court first determines the level of scrutiny to employ. *State v. Lynch*, 2006 WI App 231, ¶12, 297 Wis.2d 51, 724 N.W.2d 656. "Strict scrutiny" applies when a classification interferes with the exercise of a fundamental right for one class, but not for the other. *Id; State v. Post*, 197 Wis.2d 279, 319, 541 N.W.2d 115 (1995). "[U]nder the Equal Protection Clause…government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more

controversial views." *Police Department of the City of Chicago et al. v. Mosley*, 408 U.S. 92, 96 (1972). Laws that "merely" burden or abridge a fundamental right, such as the right to associate freely, are equally subject to strict scrutiny as those that outright ban the exercise of such right. *See, e.g., Citizens United v. F.E.C.*, 558 U.S. 50, 130 S.Ct. 876, 898 (2010); *Healy*, 408 U.S. at 183.

Act 10 treats similarly situated employees differently based on employees' choices to be represented or not represented by a certified agent, and whether or not to join a union, i.e., based on their exercise of fundamental rights of association. Once it is shown that a statute or classification infringes on fundamental rights, the burden shifts to the State to prove that the classification, i.e., the differential treatment of those who are similarly situated, is precisely tailored to promote a compelling governmental interest. *Mosley*, 408 U.S. at 96.

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

not carried its burden of proving that the classifications challenged by the Plaintiffs are narrowly tailored to promote a compelling governmental interest.

IV. WISCONSIN STATUTE §62.623 VIOLATES WISCONSIN'S HOME RULE AMENDMENT.

Wisconsin Statute §62.623 violates the Wisconsin Constitution's Home Rule Amendment, Article XI, §3(1), by regulating the City of Milwaukee's ERS, a matter that is not a statewide concern.

A. Section 62.623 Attempts to Regulate a Matter That Is Not of Statewide Concern.

The Wisconsin Constitution's Home Rule Amendment prevents the State legislature from meddling in local municipal affairs. It prevents State legislators who represent distant districts and are unfamiliar with local concerns from deciding what is best for a municipality regarding matters of local concern. Home rule favors policymaking concerning local matters by local, informed officials, rather than distant, unaffected State legislators.

The plain language of Wisconsin's Home Rule Amendment supports this policy:

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

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

A municipality can invoke home rule protection by adopting a charter ordinance that speaks to a local issue. Wis. Stat. §66.01. In order for a State law to preempt a charter ordinance, it must satisfy a two-prong test: the law must (1) touch on a matter of statewide concern, and (2) apply with uniformity to every city or village. *Thompson v. Kenosha County*, 64 Wis. 2d 673, 683, 221 N.W.2d 845 (Wis. 1974). If a state law regulates a purely local affair, the legislation is unconstitutional. *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520, 526-527, 253 N.W.2d 505 (1977).

Wisconsin Statute §62.623 unconstitutionally regulates Milwaukee's Employee Retirement System ("Milwaukee ERS") by abrogating pension benefits guaranteed to Milwaukee employees in Milwaukee's charter ordinance. Municipal expenditures for employment compensation and benefits is undoubtedly a local concern. *Van Gilder v. Madison*, 222 Wis. 58, 81-82, 267 N.W. 25 (Wis. 1936) (quoting C.J. Cardozo, "There are some affairs intimately connected with the exercise by the city of its corporate functions, which are city affairs only . . . Most important of all perhaps is the control of the locality over payments from the local purse.").

1. Milwaukee's ERS does not impact the State's purported financial crisis.

The State argues preempting Milwaukee's municipal charter ordinance is justified because of a purported Statewide financial crisis.

The record lacks any evidence to support the State's assertion that Milwaukee's ERS has any affect on the State's financial condition. The State's budget is separate and distinct from Milwaukee's budget.

Shared revenue is determined by a factor of local revenue, population and property values. Wis. Stat. §79.02. A municipality cannot increase expenditures to gain a greater 'share.' In fact, Wisconsin's expenditure restraint program *diminishes* a municipality's shared revenue in the event the municipality's budget exceeds inflation. Wis. Stat. §79.05. Other state aid is appropriated to address specific projects as determined by the State, such as roadways or a University budget.

Ironically, the State argues that its finances are in dire circumstances, yet at the same time, argues the State legislature, the body responsible for the State's budgetary woes, should impose its wisdom upon municipalities to ensure they spend money wisely. The City of Milwaukee's fiscal affairs are intelligently managed and Milwaukee has long had strong bond and credit ratings without State intervention.

2. The 1947 legislature declared Milwaukee's ERS is a not a matter of statewide concern.

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

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

Laws of 1947 ch. 441 §31(1).

The State argues §31(1)'s clause "compatible with the constitution and general law" was intended to preserve the legislature's right to enact subsequent state-wide legislation that could supersede Milwaukee's ERS. Construing the term "general law" to mean any future uniform legislation automatically supersedes Milwaukee's authority to direct the affairs of its ERS contradicts the 1947 Legislature's declaration that "all future amendments and alterations" to Milwaukee's ERS are matters of local affair. Such construction renders §31(1) devoid of purpose.

The logical reading of the phrase "compatible with the constitution and general law" is that it imposes an obligation upon Milwaukee to self-govern its ERS without violating rights guaranteed to its employees under the State constitution and the general law. *See Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶50, 748 N.W.2d 154 ("A municipality may not disregard the state's antitrust laws simply because it possesses broad home rule authority."). For example, Milwaukee cannot

provide disparate benefits to an employee on the basis of race or sex in violation of Wisconsin's equal rights laws.

The 1947 Legislature *preserved* the rights of Milwaukee's ERS participants by precluding Milwaukee from regulating its ERS in a manner that violates the participants' constitutional or other rights protected by "general law."

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

The State asserts the legislature declared Milwaukee's ERS to be a matter of statewide concern twice, first in 1937 when the legislature created the ERS, and now with §62.623. However, the Legislature's creation of Milwaukee's ERS was a clear acknowledgment that Milwaukee needed its own ERS that could be locally controlled and funded, and operate independently of the State. This was an implicit declaration that Milwaukee's ERS is a local concern. A mere 10 years later, the 1947 legislature unequivocally declared Milwaukee's ERS to be not a statewide concern.

Neither the 1937 Legislature nor Act 10 declared Milwaukee's ERS is a statewide concern. The 1947 Legislature's declaration that Milwaukee's ERS is a local affair stands as the only declaration and is therefore entitled

to great weight. *State ex rel. v. Brelsford*, 41 Wis.2d 77, 85, 163 N.W.2d 153 (1968).

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

The State relies on *Van Gilder* and *Welter v. City of Milwaukee*, 214 Wis. 2d 485, 571 N.W.2d 459 (1997) to assert public employee benefits are a matter of statewide concern. *Van Gilder* and *Welter* deal exclusively with law enforcement benefits. The holdings in both *Van Gilder* and *Welter* rested on the concept that regulation of law enforcement benefits concerns public health and safety, a matter of statewide concern. *Van Gilder*, 267 N.W. at 32; *Welter*, 214 Wis.2d at 492-493.

Importantly, both *Van Gilder* and *Welter* struck down municipal ordinances attempting to *diminish* benefits. Both opinions determined that *diminishing* law enforcement benefits has a detrimental effect on public safety. *See Welter*, 214 Wis.2d at 492-493.

In *State ex rel. v. Brelsford*, the Court addressed whether a municipal ordinance providing *greater* benefits to public safety employees than those mandated by State law was protected under Home Rule. *Brelsford* recognized a difference in the State's concern over municipal ordinances that make it more difficult to attract quality personnel and ordinances that make it less difficult to attract quality personnel. *Brelsford* determined that

ordinances designed to attract quality personnel cannot be overruled by the State. It held Milwaukee's refusal to enforce a statewide pension-plan restriction affects only local taxpayers and was a purely local concern. *Brelsford*, 41 Wis.2d at 86-87.

Section 62.623 wrests control over Milwaukee's discretionary use of funds for the financing of Milwaukee's ERS in a manner that *diminishes* and *divests* employee benefits. As noted above, a municipality's discretionary use of funds is not a statewide concern. *Van Gilder*, 267 N.W. at 34. The Court recognized in both *Brelsford* and *Welter* that diminishing public employee benefits detrimentally impacts the quality of public services by making it more difficult for a municipality to attract quality personnel, contrary to the State's interest. *See also* Laws of 1947 Ch. 441 §31(1) ("The purpose of this act is to strengthen the public service in cities of the first class by establishing the security of such retirement and death benefits.").

Wis. Stat. §62.623 unconstitutionally removes a "tool" Milwaukee has used for over 60 years to attract and retain a qualified workforce.

B. A State Law Purporting to Preempt a Purely Local Affair is Unconstitutional Regardless of Uniformity.

Wisconsin's Home Rule Amendment cannot be superseded merely by the passage of a uniform state law.[8] The Amendment declares municipal affairs are subject only to state legislation that is both (1) of statewide concern, and (2) operates with uniformity. *Thompson*, 64 Wis. 2d at 683. The framers' use of the words "of statewide concern" in the Home Rule Amendment is instructive. Had the framers intended to allow municipal Home Rule be subverted by a statute merely because it is uniform, the words "of statewide concern" would have been superfluous.

The State relies on *Van Gilder*, *West Allis v. County of Milwaukee*, 39 Wis.2d 356, 159 N.W.2d 36 (1968), and *Thompson*, to assert a state law may preempt any municipal ordinance so long as the law "affects with uniformity every city." The State isolates passages from these opinions to fashion an argument unsupported by authority and well-reasoned policy.

Van Gilder determined a statute must be uniform for it to supersede a municipal ordinance. But *Van Gilder* did not hold that a statute automatically supersedes a municipal charter simply because it is uniform.

[8] Wis. Stat. § 62.623 is not a "uniform" law, it is specific to cities of the first class.

That is, while a law must be uniform to be valid, not all uniform laws supersede a municipal charter.

The uniformity requirement is a municipal safeguard to ensure equal protection for municipalities. Uniformity requires that the consequences of legislation apply to all.

The *Van Gilder* Court employed a balancing test to determine whether the municipal affair at issue was a matter of statewide concern. It determined the statute at issue, law enforcement compensation, was a matter of statewide concern. *Van Gilder*, 267 N.W. at 35. The purpose of the *Van Gilder* opinion was to explain whether the ordinance was of statewide concern, and if not, thereby protected by home rule. Had uniformity been the only requirement, the Court would not have fashioned such an opinion.

Van Gilder recognized home rule could not weigh too heavily in favor of the municipality because the State would be powerless to legislate issues that touch on statewide concern. *Id*. But it also recognized municipalities must be afforded autonomy when the issue is purely local. *Van Gilder* 267 N.W. at 34-35; s*ee also*, *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 209 N.W. 860 (1926).

Thirty-two years after *Van Gilder*, in *West Allis*, the Court reviewed legislation permitting Counties to asses a tax on municipalities in order to fund County-wide refuse disposal systems. The Court held the issue was not of purely local concern because garbage disposal was both a city and county concern. *West Allis*, 39 Wis.2d at 366. Importantly, the Court noted West Allis had not adopted a charter ordinance on the issue, and that it must do so to invoke the full protection of home rule. *Id*. at 367-368. Here, Milwaukee adopted a charter ordinance directly on the issue.

In *Thompson*, the Court reviewed legislation establishing a county assessor system that overrides the assessment powers of municipalities within such counties. *Thompson* reiterated *West Allis*, holding uniform state regulation may preempt issues of local concern. But both *West Allis* and *Thompson* involved issues of local concern that were also interrelated with other local governments. Neither case held that the State can preempt a purely local affair. Specifically, *Thompson* noted the distinction between primarily local affairs ("mixed" category) and those that are "entirely local;" making clear that "statewide concern" is a distinct analysis that cannot be overcome with mere uniformity. *Thompson*, 64 Wis. 2d at 683-686.

Notably, neither *Thompson* nor *West Allis* dealt with the State's attempt to preempt a municipal charter ordinance, as here. And neither law at issue in *Thompson* or *West Allis* involved an earlier legislative declaration that the subject was an entirely local affair.

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

> In defining what is or is not a matter for such empowerment, which is constitutionally granted to cities and villages in this state "to determine their local affairs and government," our court has outlined three areas of legislative enactment: (1) Those that are "exclusively of state-wide concern;" (2) those that "may be fairly classified as entirely of local character;" and (3) those which "it is not possible to fit . . . exclusively into one or the other of these two categories."

Michalek, 77 Wis.2d at 526 (citations omitted).

Michalek held that state legislation purporting to preempt a municipal charter ordinance of purely local concern is unconstitutional: "As to an area solely or paramountly in the constitutionally protected area of 'local affairs and government,' the state legislature's delegation of authority to legislate is unnecessary and its preemption or ban on local legislative action would be unconstitutional." *Michalek*, 77 Wis.2d at 529.

Significantly, *Michalek* was decided in 1977, subsequent to *Van Gilder* (1968), *West Allis* (1968) and *Thompson* (1974), and was a unanimous decision. Five *Michalek* justices participated in *West Allis*; Six *Michalek*

justices participated in *Thompson*. *See* Wisconsin Supreme Court Justices dates of service, *available at* http://www.wicourts.gov/courts/supreme/justices/retired/index.htm.

The State also relies on *Roberson v. Milwaukee County*, 2011 WI App 50, 798 N.W.2d 256, to argue enactment of a uniform law is dispositive that the matter is of statewide concern. *Roberson* involved a state law requiring Counties to pay all personnel of equivalent rank and tenure the same wage. First, *Roberson* concerned public safety, a well-recognized statewide concern. Second, *Roberson* reviewed statutory county home rule, rather than constitutional municipal home rule.

Although *Roberson* noted the analysis under county and municipal home rule are similar,they are not identical. Rather, *Roberson* relied on *Jackson County v. DNR*, 2006 WI 96, 717 N.W.2d 713, to declare the State legislature can overcome county home rule by passing a uniform law. *Jackson County* distinguished county home rule as being much weaker than municipal home rule:

> Wisconsin courts consistently have interpreted counties' powers as arising solely from the statutes. . . A county's home rule power is more limited than the home rule power that is afforded to cities . . . [due to] to the direct and expansive delegation of power to municipalities under [constitutional home rule].

Jackson County, 2006 WI 96, ¶16-17.

The municipal home rule analysis is distinct from that of county home rule; especially when a city's charter ordinance governs the issue. *West Allis*, 39 Wis.2d at 367-368. Because the legislature adopted county home rule by statute, the legislature has implied authority to overrule itself by passing a uniform law. *Jackson County*, 2006 WI 96, ¶19. In contrast, municipal home rule is a constitutional "expression of the will of the people," and the legislature cannot supersede it without first amending Wisconsin's Constitution. *Michalek*, 77 Wis.2d at 526. Moreover, County ordinances differ from municipal charters generally because, while County ordinances affect multiple municipal jurisdictions, municipal charters affect only residents within a single municipality. Milwaukee's ERS is a clear example of a purely local charter ordinance.

Wis. Stat. §62.623 attempts to supersede a municipal charter ordinance of local concern, violating the Home Rule Amendment to Wisconsin's Constitution.

V. WISCONSIN STATUTE §62.623 UNCONSTITUTIONALLY IMPAIRS VESTED CONTRACTUAL PROPERTY RIGHTS OF MILWAUKEE EMPLOYEES.

Wisconsin Statute §62.623 impairs vested contractual rights of Milwaukee employees by eliminating employer funded contributions for

employees hired before January 1, 2010; a violation of Wisconsin's Constitution, Article I, §12.

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

Milwaukee's Charter Ordinance Chapter 36 contractually guarantees Milwaukee employees hired prior to January 2010 that the City will pay the employees' ERS contributions:

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

The State absurdly argues municipal employers cannot contractually vest rights in public employees. The state fails to distinguish between a mere contract and one that creates vested property rights. *State ex rel. Mckenna v. District No. 8*, 243 Wis. 324, 328, 10 N.W.2d 155 (1943) ("the repeal of a statute will not operate to impair rights vested under it"); *cf.*

Board of Regents v. Roth, 408 U.S. 564 (1972). Both the United States and Wisconsin Constitutions prohibit the state from enacting laws which impair obligations to public employees. *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 553-554, 331 N.W.2d 369 (1983). Moreover, Milwaukee's ERS must be liberally construed in favor of Milwaukee's employees. *Rehrauer v. City of Milwaukee*, 2001 WI App 151, ¶15, 631 N.W.2d 644.

The State argues Milwaukee's Charter ordinance does not provide participants a contractual right to employer-funded contributions. Chapter 36 unequivocally guarantees as a term and condition of the plan that "[T]he city shall contribute on behalf of general city employes 5.5% of such member's earnable compensation." §36-08-7a-1.

Section §36-13-2, entitled "Contracts To Assure Benefits," guarantees that every member shall have a benefit contract and vested right concerning "[t]he annuities and all other benefits <u>in the amounts</u> and <u>upon the terms and conditions and in all other respects</u> as provided under this act [which] <u>shall not be diminished or impaired by subsequent legislation or by any other means</u>." §36-13-2a. The words, "upon the terms and conditions and in all other respects as provided under this act," incorporate every section of Milwaukee's ERS, including the City's

obligation under §36-08-7a-1 to contribute 5.5% of each employee's earnable compensation to the fund.

The State argues contributions are not a "benefit" pursuant to §36-05 and not a "term and condition" pursuant to §36-13-2d. Milwaukee's ERS is a defined benefit plan, the benefits are calculated based on years of service multiplied by a fixed percentage of base salary. *See* Mil. Charter Ord. §36. Section 62.623 mandates that Milwaukee employees pay 5.5% of their earnable compensation to receive the same defined benefit, thereby diminishing the value of the benefit without providing a commensurate benefit. The State's argument that contributions are not a "term and condition" of the plan excludes *the cost of the plan* to the employee as a "term and condition," an absurd result.

The purpose of §36-13-2d is unmistakable when examining the section's date of enactment. This section was adopted at the same time (1971) as §36-08-7a-1 (requiring that the employer make the employee contributions). The City adopted §36-13-2d to ensure participants that the City would not reduce retirement benefits in the future on grounds that the employee did not contribute to the fund, or on grounds that the City failed to make contributions on behalf of the employee despite its obligation set forth in §36-08-7a-1.

Section 36-13-2d unequivocally affirms that employer paid contributions are characteristic of deferred compensation, a property right, and that the City cannot collaterally attack the defined benefit by asserting that the employee's failure to contribute to the fund renders the defined benefit a mere gratuity.

Importantly, the State's construction of Milwaukee's ERS ordinance is unduly strict. Milwaukee's ERS must be liberally construed in favor of Milwaukee's employees. *Rehrauer*, 2001 WI App 151, ¶15.

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

The key issue in determining whether contractual rights have been unconstitutionally impaired is whether the law affected the value of the agreement. *Moran*, 111 Wis.2d at 555 ("a contract is impaired when the consideration agreed upon is altered by legislation.").

Courts use a three-step inquiry to determine whether a statute impairs a contractual right. *Energy Reserves Group v. Kansas P. & L. Co.*, 459 U.S. 400 (1983). First, the law must change after the formation of the contract and the change must substantially impair the contract. Second, a Court must decide whether the law serves a significant and legitimate public purpose. Finally, even if the law serves a significant and legitimate

public purpose, for the law to be valid, the public purpose must outweigh the severity of the impairment.

Wisconsin prohibits legislative amendments to a retirement plan unless the amendment is necessary to preserve the actuarial soundness of the plan. *Ass'n of State Prosecutors v. Milwaukee County*, 199 Wis.2d 549, 563, 544 N.W.2d 888 (1996). Section 62.623 was not intended to, nor is it necessary, to preserve the financial stability of the Milwaukee ERS, and the State does not contend otherwise.

1. Section 62.623 substantially impairs the plaintiffs' contractual rights.

Section 62.623 requires general employees to begin contributing 5.5% of their earnable compensation to the Milwaukee ERS fund. This causes an immediate corresponding 5.5% reduction in wage, substantially impairing the contract. *See Abbott v. Los Angeles*, 50 Cal.2d 438, 451, 326 P.2d 484, 491 (Cal. 1958) (finding substantial impairment when legislation required employees to contribute 4% of their salary to the pension fund because City was required to do so by Charter); *Strunk v. Public Employees Retirement Board*, 338 Or. 145, 205, 108 P.3d 1058, 1094 (Or. 2005) (striking down a pension provision purporting to relieve employer of its obligation to credit pension accounts); *Int'l Ass'n of Firefighters v. San Diego* 193 Cal. Rptr. 871, 876, 34 Cal.3d 292, 302 (Cal. 1983) (noting if City had guaranteed

employee contribution levels would remain constant, requiring employees to increase their contribution amount constitutes impairment of contract).

The State relies on *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892 (7th Cir. 1998) to assert an increase in cost is insufficient to impair contractual rights. The issue in *Kolosso* concerned state regulation of automobile franchise agreements. The court determined that interpreting the Contract Clause literally would impede governmental efforts to regulate commercial activity. *Id*. at 893-895. Significantly, *Kolosso* held foreseeability is an important consideration when determining whether a law violates the contract clause. *Id*. at 895. Here, Milwaukee ERS participants could not have reasonably contemplated legislative changes to the terms and conditions of Milwaukee's ERS after their commencement date.

The State asserts Milwaukee Charter §20.13 contemplates future changes to Milwaukee's ERS. First, §20.13 applies only to the provisions of Chapter 184, Laws of 1874. Second, §20.13 was enacted decades prior to the inception of constitutional home rule and the charter ordinance establishing Milwaukee's ERS.

Milwaukee's ERS has been regulated exclusively by the City of Milwaukee since 1947. The charter ordinance guarantees that all terms

and conditions take effect as of the employee's commencement date and they cannot be impaired by subsequent legislation. §36-13-2. The Milwaukee Circuit Court ratified the charter's inalterability in 2000. *In Re Global Pension Settlement Litigation*, Case No. 00-CV-3439. The City received significant consideration in the Global Pension Settlement and adopted §36-13-2g for the purpose of codifying the terms of the Settlement. In 2009, before the State's implementation of §62.623, Milwaukee acknowledged the vested contractual property rights and the inalterability of its ERS benefits for current employees when it amended contribution terms for only employees hired after the date of the amendment. §36-08-7-a2.

The State relies on *Wisconsin Professional Police Ass'n v. Lightbourn*, 2001 WI 59, 627 N.W.2d 807, to assert Wisconsin has historically regulated public employee benefits. However, *Lightbourn* acknowledged that Milwaukee's ERS is not regulated by the State. *Lightbourn*, 2001 WI 59, ¶9.

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

The State relies on *Energy Reserves* to assert it is using its police power to avoid payments that would otherwise benefit a special interest. Public employees are a varied and diverse group, including politicians,

engineers, nurses and sanitation workers. They are not a "special interest." They are a "public interest."

The legislature declared in 1947 that deferred compensation in the form of retirement annuities *attracts* and *retains* public service employees despite higher prevailing wage rates in the private sector. Laws of 1947 ch. 441 §31(1). Wisconsin Statute §62.623 reduces retirement benefits and is thereby contrary to a purpose the Wisconsin legislature declared both significant and legitimate.

Importantly, the legislature can amend a retirement plan to serve the public interest only when the amendment is necessary to preserve the actuarial soundness of the plan. *Ass'n of State Prosecutors*, 199 Wis.2d at 563. Milwaukee's ERS is sound, and §62.623 does not alter the funding formula to address actuarial infirmities, it merely changes the contributor.

3. Only Milwaukee can amend its ERS by amending its charter ordinance.

Although Milwaukee's ERS cannot be altered by legislation for incumbent employees, Milwaukee can adopt charter amendments modifying its ERS for employees hired after the amendment date. Milwaukee has adhered to this process and courts have respected it for more than six decades. *See*, *e.g.*, Mil. Charter Ord. §36-08-7-a2 and §36-13-2h.

Only Milwaukee has the power to amend its ERS. Section 62.623 divests benefits guaranteed by Milwaukee's ERS, unconstitutionally impairing Milwaukee's contract with its employees.

VI. CONCLUSION.

The Court should find the challenged provisions of 2011 Wisconsin Acts 10 and 32 to be unconstitutional, and enjoin enforcement of those provisions.

Respectfully submitted this 15th day of August, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,985 words.

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

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

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

Dated this 15th day of August, 2013.

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