STATE OF WISCONSIN
IN SUPREME COURT

No. 2012-AP-2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY THE HONORABLE JUAN COLAS, PRESIDING CIRCUIT COURT CASE NO. 2011-CV-003774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

BRIEF OF *AMICUS CURIAE* CITY OF MILWAUKEE

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STATEMENT OF FACTS[1]

This Brief concerns the constitutionality of Wis. Stat. § 62.623(1) as created by 2011 Wis. Act 10 § 167. It requires that City employees pay "employee-required" contributions for benefits payable under the Milwaukee Employes' Retirement System ("ERS") and that the City cannot pay such contributions.

ERS was established by ch. 396 L. 1937; its governance, funding and administration were transferred to exclusive control by the City in ch. 441 L. 1947. The 1947 enactment *expressly*: (1) brought the governance, funding and administration of ERS within the City's constitutional home rule authority as established by Art. XI § 3(1) of the Wisconsin Constitution; and (2) provided that all pension benefits and the terms and conditions under which such benefits are provided constitute vested "benefit contracts" inuring to the benefit of each individual employee/member as of their initial dates of employment.

The City exercised its constitutional home rule authority per Wis. Stat. § 66.0101 by enacting Charter ch. 36

[1] References to the Brief of the Appellants are denoted as "A-Br. p. __" and references to the attached Appendix are denoted as "A-App. p. __."

(A-App. pp. 184-248), which serves as ERS's governing law. At no time until enactment of Wis. Stat. § 62.623(1), did the State attempt to interfere with the City's governance of ERS, the benefits afforded to ERS members, or the terms and conditions under which such benefits were afforded.

ARGUMENT

1. Introduction

The City supports the argument advanced by the Respondents at pp. 36-57 of their Brief regarding Wis. Stat. § 62.623(1). This statute: (1) unconstitutionally interferes with the City's home-rule authority over ERS, given certain vested rights and benefits that have accrued to City employees who are members of ERS; and (2) clearly constitutes an unconstitutional impairment of contract rights under the Wisconsin Constitution.

2. Wisconsin Stat. § 62.623(1) Violates the City of Milwaukee's Constitutional Home Rule Authority.

The adoption of Article XI, § 3(1) of the Wisconsin Constitution established municipal home rule:

> 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.

This Home Rule Amendment ("Amendment") limits the powers of the Legislature in dealing with the local affairs and government of cities and villages. *Van Gilder v. City of Madison*, 222 Wis. 58, 83-84, 267 N.W. 25 (1936). Our courts have repeatedly held that the breadth of constitutional home rule shall be liberally construed. *Local Union No. 487, IAFF-CIO v. City of Eau Claire,* 147 Wis. 2d 519, 522, 433 N.W.2d 578 (1989); *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526, 253 N.W.2d 505 (1977); *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 639, 209 N.W. 860 (1926).

Given the origin of home rule in the Constitution, the Legislature's power to modify or abrogate municipal enactments falling within its ambit is constrained. If the subject matter of a municipal ordinance pertains to local affairs and government, the Legislature cannot interfere with the enactment unless it: (a) contravenes the constitution itself; or (b) contravenes a legislative enactment of "state-wide concern as with uniformity shall affect every city or every village." The former is not at issue. To satisfy the latter, the

legislative enactment must meet *two* tests—"state-wide concern" *and* "uniformity." *Thompson v. Kenosha County*, 64 Wis. 2d 673, 683, 221 N.W.2d 845 (1974), cited in the Court of Appeals' certification (A-App. p. 117, n. 5). "Uniformity" alone *is not sufficient.*

ERS was created in ch. 396, L. 1937. In 1947, the Legislature enacted § 31(1) of ch. 441, L. 1947, to transfer authority over ERS from the Legislature to the City, declaring:

> 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.

Charter § 36-14 ("Home Rule") contains the same language (A-App. p. 244). This declaration (an acknowledgement of the City's constitutional home rule authority over ERS) is unambiguous and applies to "all future amendments."

The broad declaration that pension systems of first-class cities are *purely matters of local concern* is entitled to *great weight* (not merely "some deference" as the appellants

contend). *State ex rel. Brelsford v. Retirement Bd. of the Policemen's Annuity and Benefit Fund of Milwaukee*, 41 Wis. 2d 77, 86, 163 N.W.2d 153 (1968); *Van Gilder*, 222 Wis. at 73-74.[2] The Legislature cannot now re-characterize the right it expressly acknowledged in ch. 441, L. 1947, and codified in Charter § 36-14, of first class cities to operate and maintain their pension systems as matters of local affairs and government. *Van Gilder* held that "when a power is conferred by the home-rule amendment, it is within the protection of the Constitution and cannot be withdrawn by legislative act." 222 Wis. at 72. In *State ex rel. Michalek v. LeGrand*, the Court stated: "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." 77 Wis. 2d at 529.

Appellants' argument that Wis. Stat. § 62.623(1) overcomes the City's constitutional home rule powers because it is part of a "uniform enactment" (2011 Wis. Act

[2] The appellants' reliance upon *Roberson v. Milwaukee County*, 2011 WI App 50, 332 Wis. 2d 787, 798 N.W.2d 256 is misplaced, as that case did not involve an enactment expressly declared by the Legislature to be a matter of "local affair and government."

10) is misplaced. It assumes the Legislature can override *constitutional* home rule, even with respect to matters securely within the ambit of "local affairs and government," merely by enacting measures of uniform state-wide applicability. This conclusion contravenes the literal text of the Amendment and would largely nullify the concept of constitutional home rule. This proceeding concerns a subject that is clearly a matter of local concern that has been *expressly acknowledged and declared* to be such by the Legislature. This declaration may not be withdrawn by an attempted subsequent legislative enactment such as Wis. Stat. § 62.623(1). *Van Gilder*, 222 Wis. at 74.

The appellants also focus upon the phrase, "compatible with the Constitution and general law," in the 1947 enactment, and claim this phrase constitutes a significant limitation upon that enactment. (A-Br. pp. 49-51). This was properly rejected by the Circuit Court (A-App. p. 144), which noted that such an interpretation would render the Amendment a nullity by empowering the Legislature to enact *any* "general law" that would override matters otherwise clearly within the Amendment's purview. (*Id.*). The phrase

"Constitution and general law" is an explanation of the *purpose* of the enactment and *not* a limitation upon its scope.

The contention that the State's budgetary situation and its impact on State shared-revenue distributions to municipalities somehow transforms the governance of ERS into a matter of state-wide concern is equally unpersuasive. ERS is a purely local pension system covering *only* employees of the City and certain employees of "city agencies" defined in Charter § 36-02-8. Its funding is entirely local; it receives no direct State funding. Among the local affairs squarely within the purview of constitutional home rule, the "most important of all perhaps is the control of the locality over payments from the local purse." *Van Gilder, supra,* 222 Wis at 81-82, *quoting Adler v. Degan,* 251 N.Y. 467, 167 N.E. 705,713 (1929) (concurring op. by C.J. Cardozo).

Finally, Appellants contend, citing *Wisconsin Professional Police Association v. Lightbourn,* 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807, that the governance, funding and administration of ERS constitute matters of state-wide concern because the State has been "creating and amending public employee retirement systems since 1891." (A-Br. p. 54, 65). ERS, however, is *distinct* from every other

public pension system in Wisconsin. The Legislature transferred full control of ERS, including its governance, finances and administration, to the City in 1947. *Lightbourn* itself expressly notes that the State *only* regulates and administers "non-Milwaukee pension plans," *id.* at ¶ 9, 243 Wis. 2d at 532.

The City's payment of "employee required contributions" to ERS is a proper exercise of the City's constitutional home rule powers under Wis. Const. Art. XI, § 3(1). The Legislature cannot modify or withdraw that power by subsequent legislative enactment. Wisconsin Stat. § 62.623(1) attempts to do just that.

3. Wisconsin Stat. § 62.623(1) Unlawfully Infringes Upon ERS Members' Vested Contractual Rights.

As noted, ch. 396, Laws of 1937, as amended by ch. 441, Laws of 1947 created the contractual relationships and vested rights at issue here. Of significance here are §§ 30 and 31(1) of the 1947 session law.

Section 30 of ch. 441, Laws of 1947, added new § 14(2) of ch. 396, Laws of 1937, entitled "CONTRACTS TO ASSURE BENEFITS," which *repeatedly* describes ERS member benefits as constituting "*benefit contracts*" and

"*vested rights*" inuring to each ERS member upon the terms and conditions prevailing *as of the commencement of each member's employment.*

This provision now appears in Charter §§ 36-13-2-a, 2-b and (with some modifications not material here) 2-c. (A-App. p. 240). To the same effect are: Charter § 36-13-2-e (A-App. p. 241), which protects "rights, benefits or allowances" earned by ERS members from alteration, modification, reduction, change, cancellation, revocation or impairment to the disadvantage of members and their beneficiaries, by (among other things) subsequent legislation; and Charter § 36-13-2-g, pertaining to members of the "Combined Fund,"[3] established as a consequence of the 2000 Global Pension Settlement, ("GPS"). These guarantees and vested rights are a defining feature of ERS. The Wisconsin Retirement System ("WRS") has nothing comparable: it expressly reserves the right to modify benefits on a prospective basis. Wis. Stat. § 40.19(1). The Charter has no such "reservation" applicable to any City employee hired before November 23, 2011.

[3] The label "Combined Fund" derives from one of the issues resolved by the GPS: the merger of the City's former disability fund into the ERS retirement fund.

Of equal significance are provisions in the 1947 enactment and Charter ch. 36 that unequivocally *fix* and *vest* the contractual rights of ERS members and beneficiaries *as of the date of the member's initial employment*. *See* § 30(2)(c) and § 31(1) of ch. 441, Laws of 1947; Charter §§ 36-13-2-a, 36-13-2-c, 36-13-2-g, 36-14 (A-App. 240-241, 244); *see also, Welter v. City of Milwaukee ("Welter")*, 214 Wis. 2d 485, 488, 494-95, 571 N.W.2d 459 (Ct. App. 1997). These rights are not limited to benefits alone, but are identified to include "benefits," *"terms and conditions"* of those benefits, and *all "other rights"* of ERS members. The City's payment of the employee share of contributions to ERS plainly qualifies as a benefit, a "term and condition" of the benefit contract, *and* a right (these categories are not mutually exclusive) accruing to each member, and is protected from any alteration, impairment or diminution without the member's individual consent. Ch. 441, L. 1947 §§ 30(2)(a) and (c) and § 31(1); Charter §§ 36-13-2-a, 2-c, 2-e and 2-g, and 36-14. "Pension laws should be liberally construed in favor of the persons intended to be benefited thereby." *Di Dio v. Board of Trustees of the Milwaukee Public School Teachers Annuity and Retirement Fund*, 38 Wis. 2d 261, 268-269, 156 N.W.2d

418 (1968). Requiring ERS members to pay the "member contributions" specified in Charter § 36-08-7 (A-App. pp. 231-234) substantially diminishes their rights and the value of their benefits.

The language in Charter § 36-08-7 is not ambiguous. The payment of "employee required contributions" by the City for employees hired before January 1, 2010 is expressed in mandatory language ("the city shall contribute"). As noted in *Milwaukee Police Association v. City of Milwaukee*, 222 Wis. 2d 259, 267-68, 588 N.W.2d 636 (Ct. App. 1998), and *Welter, supra,* rights and benefits in effect on the date an employee becomes a member of the ERS vest and cannot thereafter be taken away. The City's payment of pension contributions is just such a right and benefit. It cannot be divested absent an employee's consent.

The appellants' citation of Charter § 20-13 for their contention that ERS members' vested rights are subject to divestment by subsequent state legislation is puzzling. Charter § 20-13 *only* applies to the provisions of Ch. 184, L. 1874, which was adopted decades before the inception of both constitutional home rule and ERS, and is irrelevant here. The governing provisions on this point are the Amendment

itself, §§ 30(2)(a), (2)(c) and 31(1), Ch. 441, L. 1947, and Charter §§ 36-13-2-a, 2-c, 2-e and 2-g and 36-14. The purpose of constitutional home rule and of the subsequent enactments of the legislature and of the City (in enacting ch. 36 of the Charter) was to *preclude* the State from accomplishing what the appellants suggest.

The GPS further confirms that payment by the City of certain members' pension contributions is a vested right. It was approved by the Milwaukee County Circuit Court on November 16, 2000 in *In Re Global Pension Settlement Litigation*, Case No. 00-CV-003439, and was adopted in City Charter Ordinance No. 991585. Its provisions apply to all ERS-member City employees in active service on or after January 1, 2000 who participate in the Combined Fund (all incumbent employees who individually consented to the GPS). Charter § 36-08-9. (A-App. pp. 234-235). As part of the settlement, the following provision (in Charter § 36-13-2-g (A-App. p. 241)) was included in the implementation ordinance:

> 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 amount and on the terms and conditions* as provided in the law on the

> date the combined fund is created. [Emphasis added.]

Among the benefits, terms and conditions, and rights in effect on the effective date of the GPS were the provisions of Charter ch. 36 discussed above obligating the City to pay the employee share of members' pension contributions.

4. Wisconsin Stat. § 62.623(1) Unconstitutionally Impairs the Obligation of Contracts in Violation of the Contracts Clause of the Wisconsin Constitution.

The analytical framework for considering an impairment of contract claim under Art. I, § 12, of the Wisconsin Constitution is the same standard applicable to claims under Art. I, § 10, clause 1 of the U.S. Constitution:

> . . . the legislation must impair an existing contractual relationship; the impairment must be substantial; and if the impairment is substantial, the purpose of the state legislation must be examined to determine whether the impairment is justified.

Reserve Life Insurance Company v. LaFollette, 108 Wis. 2d 637, 644, 323 N.W.2d 173 (Ct. App. 1982), *citing Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 244-45, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).

As discussed, most current members of ERS have a vested right to continued City payment of the employee share of their contributions—the first criterion for an

unconstitutional impairment of contract. As to the second and third criteria, case law establishes that even impairments of public-sector employee contract rights considerably less substantial than the impairment here[4] are "substantial," and that even the existence of extreme economic circumstances are rarely sufficient to provide a constitutionally sufficient justification for such impairments. *See, e.g., University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1099, 1106-1107 (9th Cir. 1999); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F.2d 766, 769, 772-774 (2nd Cir. 1991); *Fraternal Order of Police v. Prince George's County*, 645 F.Supp. 2d 492, 500-501, 510-518 (D. Md. 2009), *rev'd on other grounds*, 608 F.3d 183 (4th Cir. 2010); *Massachusetts Community College v. Commonwealth of Massachussetts*, 420 Mass. 126, 130, 131-32, 140, 649 N.E.2d 708 (Mass. 1995); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 79 N.Y.2d 39, 43, 46 (N.Y. Ct. App. 1992); *cf. Baltimore Teachers Union v. Mayor and City of Baltimore*, 6

[4] An employee-member ERS contribution of 5.5 percent (7 percent for elected officials) involves a loss of 114.4 hours of pay equivalent to 14.3 days of pay for an employee working a 2,080-hour work year.

F.3d 1012, 1015, 1016-22 (4th Cir. 1993),[5] *reh. en banc den.* 6 F.3d 1012 at 1026, *cert. denied*, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed. 2d 435 (1994).

5. The Constitutionally Proper Method of Amending ERS Benefits and Benefit Terms and Conditions.

Under § 31(1) L. 1947 and Charter § 36-14 (A-App. p. 244), there is a proper way to amend Charter Ch. 36: through a Charter amendment affecting new employees hired after the effective date of the amendment in question. The City has done this through: (1) creation of Charter § 36-08-7-a-2 (A-App. p. 231), requiring employees hired on or after January 1, 2010 to contribute 5.5% of "earnable compensation" as a required contribution to ERS; and (2) creation of Charter § 36-13-2-h (A-App. p. 241), incorporating a "reservation of rights" similar to Wis. Stat. § 40.19(1), entitling the City to amend benefits and benefit terms and conditions on an ongoing basis for all City employees hired on or after November 23, 2011.

[5] *City of Baltimore* is *very* much an outlier; its holding has been "severely criticized." *See University of Hawaii Professional Assembly, supra,* 183 F.3d at 1105, fn 6 (and authorities cited therein).

CONCLUSION

The City of Milwaukee respectfully submits that the Court should find Wis. Stat. § 62.623(1) violative of the Home Rule Amendment and the Contract Clause of the Wisconsin Constitution.

Dated and signed at Milwaukee, Wisconsin this 19th day of August, 2013.

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CERTIFICATIONS

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 2,971 words.

I further certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12), and that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I further certify that the required number of copies of the brief and appendix correctly addressed have been submitted for delivery to the Wisconsin Supreme Court on August 19, 2013.

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CERTIFICATE OF MAILING

Laura M. Bergner herein certifies that she is employed by the City of Milwaukee, assigned to duty in the office of the City Attorney, which is located at 841 North Broadway, Suite 716, Milwaukee, Wisconsin 53202; that on the 19th day of August, 2013, she filed 22 copies of the Brief of *Amicus Curiae* City of Milwaukee, in the above-entitled case, addressed to: Ms. Diane M. Fremgen, Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

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