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 NEUMAN, 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-3774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ARGUMENT

I. THE ACT 10 CHANGES TO MERA DO NOT INFRINGE ON ASSOCIATIONAL RIGHTS.

A. There Is No Constitutional Right To Associate For The Purposes Of Collective Bargaining Through A Certified Agent Or Otherwise.

The challengers acknowledge that municipal employees have no constitutional right to force collective bargaining, but claim a constitutional right "to self-organization and to associate with a union for collective bargaining purposes" and "to [a]ssociate [w]ith a [c]ertified [a]gent." (Brief of Plaintiffs-Respondents ("Pl. Br.") 13.) No matter how the challengers spin their argument, they cannot avoid the settled law that there is no constitutional right to state-sanctioned collective bargaining. The right to associate is protected only if it is for the purpose of "engaging in those activities protected by the First Amendment–speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Because statutory collective bargaining does not

involve the exercise of a constitutional right of speech or association, the challengers' entire case is without legal foundation.

In Wisconsin, "collective bargaining" means the *statutorily-created* "mutual obligation" of a governmental employer, and a bargaining unit representative to negotiate a labor agreement. *See* Wis. Stat. § 111.70(1)(a). Outside of statutory collective bargaining, employees have a separate constitutional right to associate and to petition a municipal employer regarding employment. However, the municipality has no constitutional duty to listen, respond, or bargain. *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465 (1979). Therefore, there is no *constitutional* right to require a municipal employer to engage in "collective bargaining" because there is no "mutual obligation." *Dep't of Admin. v. Wis. Emp. Rel. Comm'n,* 90 Wis.2d 426, 430, 280 N.W.2d 150 (1979).

Further, the certified representative (or "agent") is a creature *of statute* with a single role: collective bargaining under MERA. The state constitution does not create this

relationship between bargaining unit employees and representative, nor is the relationship voluntary. Once the representative is elected, representation is imposed on *all* employees in the unit, even those who did not vote for the representative. Additionally, if a labor union is chosen as the representative, bargaining unit employees may, but need not, join that union. In fact, a labor union may be elected as a bargaining unit representative even if none of the employees is a member of that union.

The challengers also claim that Act 10 interferes with their "freedom of choice" and "discourage[s] union membership or association." (Pl. Br. 14.) But Act 10 does not affect employees' right to associate with a labor union for constitutional expression, even if the union is also the certified agent. This voluntarily relationship—which exists independent of statutory collective bargaining—is the constitutionally-protected right of association discussed in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), and other cases cited by the challengers, not the privilege of being represented

by an agent for collective bargaining purposes in a statutorily-created labor code.

The dispositive issue in this case is whether the challenged MERA provisions infringe on the challengers' *constitutionally-protected* associational rights. Because association with, or membership in, a labor organization is not affected by Act 10, the challengers' entire case fails, and the Court need not engage in any further inquiry.

B. MERA's Bargaining Limitations Do Not Burden The Challengers' Associational Rights.

Armed with the faulty assumption that constitutional associational rights are at stake, the challengers argue that MERA "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," absent a referendum. (Pl. Br. 16.) They claim that MERA forces them to forego collective bargaining -the condition- to gain the potential benefit of negotiating "all issues with the employer, including … wages, hours and working

conditions" –the benefit. They call this the "doctrine of unconstitutional conditions." (Pl. Br. 17-18.)

However, the theory is flawed because there is no unconstitutional condition. As explained directly above, general employees surrender no constitutional rights of association under MERA.

Furthermore, unlike the plaintiff in *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), MERA does not discriminate against employees based on membership in a voluntary organization, here, a labor union. Nor, unlike the state employees in *Wieman v. Updegraff*, 344 U.S. 183 (1952), or the taxpayers in *Speiser v. Randall*, 357 U.S. 513 (1958), does MERA require any loyalty oath or oath of non-association, to gain the statutory right to collectively bargain or receive any other benefit. Neither does MERA force employees to adopt any opinion. *Cf. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, ___ U.S. ___, 133 S. Ct. 2321, 2332 (2013). If, as the challengers claim, the decisions concerning loyalty oaths and requirements of non-membership in communist organizations are the most

analogous to the present case (Pl. Br. 20), their constitutional challenge surely must be denied, because they are inapposite.

The challengers' unconstitutional conditions theory — never applied to collective bargaining — further fails because any lost opportunity to negotiate with a municipal employer over "all matters," like non-represented employees, is at best only a possibility, since non-represented employees have no right *at all* to "negotiate" with their municipal employers on *any* subject. *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 287 (1984). In fact, under MERA, it is the represented employee who gains a benefit — the right to force bargaining on wages, unlike non-represented employees, and they lose no speech or associational rights in the process.

Finally, even if there is an associational right implicated (which there is not), it is not burdened, because represented employees *can* bargain for base wages above the consumer price index increase. If successful, they may obtain the increase by referendum, while still

retaining a statutory relationship with the certified agent. Moreover, they can engage in all manners of association, speech, and advocacy to encourage voters to support the increase, without any limits under MERA.

In sum, the challengers' argument fails, because the State of Wisconsin may make statutory collective bargaining less meaningful, and thus, less attractive, by setting the subjects and their limits without burdening associational rights. This is a permissible policy choice. *See generally Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013). Therefore, Act 10's amendments limiting the scope of bargaining under MERA are constitutional.

C. Annual Recertification Elections And Prohibition Of "Fair-Share" Agreements And Payroll Dues Deductions Do Not Violate Associational Rights.

The challengers next argue that if MERA's limits on subjects of bargaining are not unconstitutional, the Act 10 amendments violate the state constitution when joined cumulatively with the requirement for annual

recertification and the prohibitions on "fair-share" agreements and payroll dues deductions. (Pl. Br. 5, 22-23, 27.) They complain that these MERA provisions "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." (Pl. Br. 25.)

Notably, the challengers do not respond to the legal authorities, such as the Seventh Circuit's recent decision upholding Act 10, showing that the annual recertification and dues deduction provisions do not violate any associational rights. *See, e.g., Wis. Educ. Ass'n Council*, 705 F.3d 640. To be sure, there is no constitutional requirement that the State subsidize associational rights of labor unions through payroll dues deductions, *id.* at 645-46 (citing *Ysursa v. Pocatello Educ. Ass'n,* 555 U.S. 353, 359-60 (2009)), and "it is permissible for Wisconsin to rationally conclude that the [general employee] union is not worth maintaining through an automatic recertification process—or, at least, Wisconsin does not want to incur the cost of unions which have uncommitted members." *Id*. at

657. And, because there is no "constitutional entitlement to the fees of nonmember employees," states may eliminate fair-share payments entirely. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007).

Instead, they cite *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460-63 (1958), which is about compelled disclosure of group membership from which violence and retaliation could follow, not collective bargaining. It does not support the challengers' contention that MERA is unconstitutional merely because union membership might seem less attractive for public employees who already enjoy civil service and other protection.

This "cumulative effect" argument is also flawed because the parameters are wholly undefined. Under the challengers' logic, any combination of limitations would be an impermissible constraint on associational rights. Indeed, even pre-Act 10 MERA would have violated Wis. Const. art. I, §§ 3, 4. Taking this reasoning to its logical end, *any* public sector collective bargaining system with limited subjects of bargaining would infringe on

constitutional rights. Not surprisingly, the challengers cite *not one* published decision supporting this novel position. On the other hand, the Seventh Circuit has already upheld MERA entirely. *Wis. Educ. Ass'n Council*, 705 F.3d at 642.

D. Under The Rational Basis Standard, The Challenged MERA Provisions Are Constitutional.

Because no constitutional associational rights are implicated, the challenged MERA provisions need only survive rational basis review. *Wis. Educ. Ass'n Council*, 705 F.3d at 653. The challengers conceded below that MERA survives under rational basis (R. 44:25 n.8), and because they make no argument here (Pl. Br. 31-32), they have waived any argument to the contrary. *Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, the Court may reject their associational claim.

II. THE CHALLENGERS' EQUAL PROTECTION CLAIM FAILS.

The equal protection claim is also reviewed under rational basis, rather than strict scrutiny because, as shown above, there is no fundamental right at stake in this litigation. *State v. Annala*, 168 Wis.2d 453, 468, 484 N.W.2d 138 (1992). Therefore, the challengers' equal protection claim also fails as they have conceded that the MERA changes meet this standard, and for good reason.

The claim of disparate treatment is that the ban on dues deductions applies only to labor organizations and not other voluntary organizations. Wis. Stat. § 111.70(3g). Certified agents have a substantially reduced role under post-Act 10 MERA. They no longer meet and confer with management to negotiate working conditions or employment policies and have no role in the disciplinary process. On the other hand, dues deductions cost employers time, money and effort. In light of the agents' reduced role, the Legislature could rationally conclude that the burdens of dues deductions outweigh

any limited public benefit that dues checkoffs might have previously provided. *Wis. Educ. Ass'n Council*, 705 F.3d at 646-48, 657.

Because the challengers cannot prove that MERA violates their associational rights under the Wisconsin Constitution "beyond a reasonable doubt," this Court must reject their associational and equal protection claims, and uphold the Act 10 amendments.

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

A. Section 62.623 Is Part Of A Uniform Legislative Action.

The state officials contend that uniformity is the only requirement necessary to survive a home rule challenge. Footnote 8 of the challengers' brief suggests that § 62.623 is not part of a uniform legislative action. This is incorrect. Section 62.623 applies to all 1st class cities, which makes it uniform for home rule purposes. *See Van Gilder v. City of Madison*, 222 Wis. 58, 70, 267 N.W. 25 (1936) ("what the [home rule] amendment means is that any law … shall affect with uniformity

every city of class"). *Van Gilder* also makes clear that an "act" must be uniform, not individual statutes created or amended by the "act." *Id*. at 80-81.

B. Act 10 Addresses A Matter Of Statewide Concern.

Should the Court conclude that "statewide concern" is an additional requirement under the home rule amendment, there is no question that it is met.

Wisconsin Stat. § 62.63, the permissive state law that authorizes the Milwaukee ERS, provides significant tax benefits for ERS members, exempts ERS accounts from garnishment and execution, and directs how abandoned funds are used. It is illogical to argue that ERS contributions are strictly a local concern when the ERS is a state-authorized fund providing significant benefits that can only be conferred by the State.

The challengers' reliance on the 1947 legislative statement ignores an important point made in the state officials' initial brief, which is that the 1947 Legislature simply lacked the power to define what is or is not a matter of statewide concern for the 2011 Legislature.

Flynn v. Dep't of Admin., 216 Wis.2d 521, 543, 576 N.W.2d 245 (1998).

The challengers cite *State ex rel. Brelsford v. Retirement Bd. of Policemen's Annuity and Benefit Fund of Milwaukee*, 41 Wis.2d 77, 85, 163 N.W.2d 153 (1968), to argue that the 1947 statement is entitled to "great weight." However, in *Brelsford*, this Court said that only "*relevant* declarations of the legislature" should be given great weight. *Id*. (emphasis added). It then concluded that previous legislative statements that a matter was of statewide concern were superseded by later statements that the matter was of local concern. *Id*. at 85-86.

Even if the 1947 statement is relevant, the challengers misread it. It says that the ERS is to be "compatible with … general law." Laws of 1947, ch. 441, § 31(1). Citing *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 50, 308 Wis.2d 684, 748 N.W.2d 154, they argue that "general law" refers only to statutory rights guaranteed to employees. That is wrong.

Statutory language is to be given its plain meaning. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. BLACK'S LAW DICTIONARY, 900 (8th ed. 2004), defines a "general law" as one which "is neither local nor confined in application to particular persons." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 945 (1986), defines it similarly as a law that applies "to all persons in the same class in the same situation."

Wisconsin law also defines a "general law" by distinguishing it from a "special" or "private" law. This Court, in *Libertarian Party of Wis. v. State,* 199 Wis.2d 790, 803, 546 N.W.2d 424 (1996), held that a law which is not special or private is a general law. *See also, City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 144 Wis.2d 896, 907-08, 426 N.W.2d 591 (1988) .

The 1947 statement, read according to the proper meaning of "general law," does not purport to exempt the ERS from laws of statewide application but, in fact, recognizes that such laws will take precedence.

Challengers discount the argument that Act 10 was, itself, a declaration that municipal employee pensions are a statewide concern. However, this Court must assume that the Legislature intended to act constitutionally. *See American Family Mut. Ins. Co. v. Wis.n Dep't of Revenue*, 222 Wis.2d 650, 667, 586 N.W.2d 872 (1998). If the Legislature is presumed to have intended Act 10 to be consistent with the home rule amendment, enactment itself is, in fact, a powerful statement that the legislation addresses a statewide concern.

The 1937 creation of the ERS is also a strong statement of statewide concern. Laws of 1937, ch. 134 § 2, is a nonstatutory provision which expressly states that any existing charter which is "in conflict with or inconsistent with [the new law] is hereby repealed." Certainly, this is not the act of a legislature that viewed the ERS as purely local.

The argument that § 62.623 only addresses local concerns dodges the fact that significant state funds support Milwaukee through shared revenue and other payments. As this Court held in *Thompson v. Kenosha*

Cnty, 64 Wis.2d 673, 684, 221 N.W.2d 845 (1974), "the whole subject of taxation" including "the purposes to which [tax revenues are] devoted" are matters in which the state has "an overriding interest."

Finally, the challengers' argument that the issue of statewide concern turns on whether legislation diminishes or enhances employee benefits is both illogical and unsupported by any cases.

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

The illogical notion that Milwaukee—a creature of the State that receives significant money from the State—can permanently assume an obligation to pay the "employee share" of pension contributions, regardless of state law and policy, must be rejected. The state officials' opening brief showed that a municipality lacks the legal power to create contracts that are not subject to amendment by general laws of the legislature. Because the challengers do not address or respond to this

argument, they have conceded the issue. *Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d at 109.

Section 20-13 of the Milwaukee Charter Ordinance also recognizes that a general state law trumps contrary provisions of the ordinance. The challengers claim that § 20-13 only applies to language contained in the original 1874 enactment, rather than the entire ordinance, as amended. Though not developed, the argument appears to rely on bracketed text in the published version of section 20-13—"[Ch. 184, L. 1874]"—which appears after the term "this act." However, this is a non-legislative, editorial insertion that was not part of the original enactment. Laws of 1874, ch. 184, subch. 20, § 14.

The claim that § 20-13's reference to "this act" does not include the entire ordinance, as amended, also fails because when a statute (or ordinance) is amended, it must be read from the beginning as a single enactment. *State ex rel. Dep't of Agriculture v. Marriott*, 237 Wis. 607, 296 N.W. 622, 625 (1941); *Superior Water, Light & Power Co. v. City of Superior*, 174 Wis. 257, 181 N.W. 113, 116 (1921).

CONCLUSION

This Court should reverse the Circuit Court's Orders and declare the challenged laws constitutional.

Dated this 28th day of August, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,936 words.

Dated this 28th day of August, 2013.

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

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 28th day of August, 2013.

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