ASTATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2012-AP-002067

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 B. Colas Presiding
Circuit Court Case No. 2011-CV-003774

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

STATUTES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

ISSUES PRESENTED

1. Courts have uniformly held that public employees do not have a constitutionally protected right to collectively bargain, and that such privileges, when granted are a matter of legislative grace. Through 2011 Wisconsin Act 10 the legislature modified the various privileges granted to Wisconsin's municipal employees. Specifically:

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

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

- Wisconsin Statutes §§ 111.70(1)(f) and 111.70(2)(in relevant part) eliminate the ability of general municipal employee unions to negotiate "fair share" agreements, which require non-union members to pay union dues;

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

- Wisconsin Statutes § 111.70(3g) prohibits municipal employers from deducting union

dues from general municipal employee earnings.

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

The Circuit Court answered: Yes.

2. Do the statutes listed above violate the equal protection rights of those general municipal employees who wish to have a union collectively bargain with their employers vis-a-vis those general municipal employees who wish to forgo union representation?

The Circuit Court answered: Yes.

3. Does Wisconsin Statutes § 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 Statutes § 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

Oral argument and publication are warranted because of the large number of individuals and governmental units affected by the laws at issue.

STATEMENT OF THE CASE

Having failed to achieve their public policy goals through the political process, Plaintiffs have crafted a new and unprecedented theory of additional constitutional rights which, they hope, will convince a court to overturn the will of the representatives elected – and in many cases reelected – by the voters of this state.

On appeal, this case focuses on whether certain features of the Municipal Employment Relations Act (Wis. Stat. §§ 111.70 – 111.77, hereafter "MERA"), as amended, violate general municipal employees' and their unions' constitutional rights of association, free speech, and equal protection, and whether the Wisconsin Legislature exceeded

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

This case is not about the right of employees or unions to speak out on issues of public policy, vote for and support candidates of their choice, engage in public protests, or criticize laws and decisions with which they disagree. All those rights have been, and will surely be, exercised stridently and aggressively. Rather, Plaintiffs seek to remake constitutional law by asserting they have a constitutional right to associate for the purpose of collective bargaining, and argue that the Legislature's changes to the collective bargaining system violate those rights by reducing the power of the collective bargaining agent and making collective bargaining less attractive to employees.

This claim is nothing short of a surreptitious attempt to constitutionalize the previous version of the collective bargaining system. The Court must resist Plaintiffs' overtures to overturn legislative policy choices through judicial decree without any legal foundation for doing so. Rather, the Court should apply the relevant precedent, defer to the policy-making branch of state government, and uphold MERA.

The relevant facts are undisputed. Plaintiffs-Respondents (hereafter, "Plaintiffs") are Madison Teachers, Inc. ("MTI"), a union representing Madison public school teachers, an individual member of MTI, Local 61 AFL-CIO, a union representing certain City of Milwaukee employees, and an individual member of Local 61. (R. 3, ¶¶9-14.) Defendants are state officials whose duties involve the implementation of certain parts of Act 10. (*Id.* at ¶¶ 15-17.) Act 10 was enacted by the Wisconsin Legislature, signed by the Governor and is now the law of Wisconsin. (*Id.* at ¶¶ 28-29.) Act 10 made various changes to the collective bargaining and labor relations system in place for local government employees codified in chapter 111 of Wisconsin Statutes.

Plaintiffs filed their Complaint in this action on August 18, 2011, and on August 24 they filed an Amended Complaint, seeking declaratory and injunctive relief. (R. 2, 3.) On October 7, 2011, Appellants filed their Answer and Defenses. (R. 12.)

On November 29, 2011, Plaintiffs filed a Motion for Summary Judgment (R. 18), seeking a declaration that certain sections of MERA are unconstitutional because they violate

municipal general employees' rights of association, free speech, and equal protection. They challenged MERA's sections prohibiting collective bargaining on any subject other than the single issue of total base wages, requiring a local referendum to authorize an increase in total base wages that exceeds the CPI increase, requiring mandatory annual recertification elections, prohibiting the forced payment of dues from non-member employees and prohibiting payroll deductions for union dues. Plaintiffs also challenged Wis. Stat. § 62.623, which prohibits the City of Milwaukee from paying the employee share of required pension contributions to the City of Milwaukee's retirement system. Plaintiffs also challenged Act 10 in its entirety as being improperly considered during a special legislative session.

Appellants filed a Motion for Judgment on the Pleadings on January 31, 2012. (R. 38.) On September 14, 2012, the Circuit Court decided both dispositive motions and issued and entered its Decision and Order on Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings (hereafter the "Order"). (App. 001-027.)

The Circuit Court held that the provisions of MERA prohibiting collective bargaining on any subject other than the single issue of total base wages, requiring a local referendum to authorize an increase in total base wages that exceeds the CPI increase, requiring mandatory annual certification elections, prohibiting the forced payment of dues from non-member employees and prohibiting payroll deductions for union dues, violate municipal employees' rights of association and free speech under both the state and federal constitutions. On the basis of its conclusion that MERA violates general municipal employees' and their unions' rights of association and free speech, the Circuit Court applied strict scrutiny to Plaintiffs' equal protection claims and held that the challenged sections of MERA unconstitutionally deprive Plaintiffs of equal protection. (App. 018-019.)

With respect to the City of Milwaukee pension provisions, the Circuit Court concluded that "the allocation of responsibility for contributions to the Milwaukee E[mployee] R[etirement] S[ystem] between the City and its employees is a 'local affair' for purposes of the Home Rule Amendment" to the Wisconsin Constitution. Accordingly, it concluded that

the Legislature's adoption of a statutory provision "that alters it is an unconstitutional intrusion into a matter reserved to the City of Milwaukee." (App. 022.) The Circuit Court also concluded that the statutory provision prohibiting the City of Milwaukee from paying the employee share of pension contributions works an unconstitutional impairment of contracts. (App. 026.)

Accordingly, the Circuit Court declared "Wis. Stat. §§ 66.0506, 118.245, 111.70(1)(f), 111.70(3g), 111.70(4)(mb) and 111.70(4)(d)(3) violate the Wisconsin and United States Constitutions, and Wis. Stat. § 62.623 violates the Wisconsin Constitution, and [are] all null and void." (App. 027.)[1]

On September 18, 2012, Appellants filed a notice of appeal. (R. 54.) Simultaneously, Appellants filed with the Circuit Court a motion seeking a stay of the Order pending appeal. (R. 55, 56.) On September 28, 2012, Plaintiffs filed a motion to amend the Order to include a part of Wis. Stat. § 111.70(2) in the enumerated statutes found unconstitutional. On October 10, 2012, the Circuit Court issued its "Amendment Clarifying September 14, 2012 Decision and

[1] The text of all relevant statutory sections are included in the appendix.

Order," by which it amended the Order "to add the third sentence of § 111.70(2) to the statutes found unconstitutional and therefore void." (App. 030.) That sentence states: "A general municipal employee has the right to refrain from paying dues while remaining a member of a collective bargaining unit."

On October 22, 2012, the Circuit Court denied Appellants' stay motion. (App. 031-039.) On October 25, 2012, Appellants filed with this Court a motion seeking a stay of the Order pending appeal, which remains pending.

ARGUMENT

The challenged provisions of MERA are constitutional. To state an association claim, Plaintiffs must demonstrate that MERA infringes their "right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). MERA does not impose a single restriction on Plaintiffs' right to speak, assemble or petition their government. Accordingly, Plaintiffs' claims fail.

Plaintiffs' First Amendment claim is based on the false premise that collective bargaining falls within these constitutionally protected activities. The law is clear, however, that no such constitutional right exists and that the recognition of any public employee collective bargaining is an act of legislative grace, not a constitutional command. For this reason, courts have squarely rejected arguments that changes to collective bargaining systems, such as the elimination of dues deductions and fair share agreements, violate associational and speech rights.

In an attempt to avoid the cases addressing these issues, Plaintiffs advocate a novel theory modeled on *Lawson v. Housing Authority of City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605 (1955), a case having nothing to do with collective bargaining. *Lawson* held "[s]tatutes that burden the exercise of a constitutional right for a lawful purpose and reward the abandonment of that right infringe upon the right." (App. 016.) This penalty theory, however, has never been applied in the public employee collective bargaining context.

Indeed, the theory is inapplicable because the act of collective bargaining is not a constitutionally protected activity and the law does not make distinctions between

employees based on whether they have joined a union or voted in favor of having a collective bargaining agent. Moreover, even if this Court were to apply the *Lawson* theory to this case, the challenged provisions of MERA do not penalize or withhold any benefit based on an employee's choice to associate.

Additionally, Plaintiffs' equal protection claim fails. Plaintiffs have conceded that the challenged statutes survive rational basis review, and argued that strict scrutiny applied because the *Lawson* theory applied to this case. Because no fundamental right is impaired, the claim cannot be reviewed under the rational basis standard; a standard that Plaintiffs have conceded MERA easily satisfies.

Finally, the Home Rule Amendment does not render Wis. Stat. § 62.623, which prohibits the City of Milwaukee from making its employees' pension contributions, unconstitutional and a proper reading of the City's Charter makes clear that no contractual rights have been impaired.

I. STANDARD OF REVIEW.

This Court reviews the constitutionality of statutes *de novo*, without deference to the circuit court. *Larson v. Burmaster*, 2006 WI App 142, ¶ 24, 295 Wis. 2d 333, 720

N.W.2d 134. Likewise, this Court reviews *de novo* any "questions of constitutional fact;" that is, any fact "whose determination is decisive of constitutional rights." *State v. Martwick*, 2000 WI 5, ¶¶ 17-18, 231 Wis. 2d 801, 604 N.W.2d 552. Regularly enacted statutes are presumed constitutional and this Court "review[s] them so as to preserve their constitutionality." *Larson*, 295 Wis. 2d 333, ¶ 24. Plaintiffs must demonstrate that MERA is unconstitutional "beyond a reasonable doubt." *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

II. THE CHANGES TO THE COLLECTIVE BARGAINING SYSTEM DO NOT INFRINGE ON THE CONSTITUTIONAL RIGHTS OF SPEECH OR ASSOCIATION.

Plaintiffs claim that the challenged alterations to the previous collective bargaining system infringe their speech and associational rights. Indeed, Plaintiffs expressed their claim in terms of an infringement on their right to "associate for the purpose of participating in collective bargaining." (App. 262.) Such claims are necessarily premised on the notion that there is a constitutionally protected right to engage in collective bargaining. This is, however, directly at odds

with the clear pronouncements of Wisconsin and federal courts.[2]

Collective bargaining in the public employee context is not free speech or an association of individuals advocating for political change, protected by the constitutions of the United States and Wisconsin. It is a policy choice made by legislatures to share the decision-making authority with respect to public employment with employee representatives. How much decision-making authority to share (if any), and with whom, are legislative choices. This is what this Court meant when it stated, "The right of state employees to bargain collectively with the state is an act of legislative grace." *Board of Regents v. Wisconsin Personnel Comm'n,* 103 Wis. 2d 545, 556, 309 N.W.2d 366 (Ct. App. 1981)

All Act 10 does is change the scope of what decision-making authority the state chooses to share with collective bargaining agents. The Wisconsin Legislature has chosen to share less subject matter, limiting bargaining to base wages. By providing for annual certification by a vote of the majority

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

of employees in a collective bargaining unit, the legislature has chosen to define certified bargaining agents in a manner that more definitely and regularly establishes that employees wish to have an agent and who that agent will be. By requiring a referendum to make base wage changes above a certain amount, the legislature is merely choosing to share with the people, by direct vote, as well as the collective bargaining agent, decision-making over base wage adjustments. There is no doubt the government is free to "choose its advisers" in this way. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984)(and noting that "[a] person's right to speak is not infringed when government simply ignores that person while listening to others").

These policy choices are significant, but they are not of a constitutional moment. Setting these rules in state law is a policy question for legislatures, not courts. To hold otherwise is to effectively overturn decisions of the Supreme Court of Wisconsin and the Supreme Court of the United States. *See, e.g., Dept. of Admin. v. Wis. Employment Relations Comm'n,* 90 Wis. 2d 426, 430, 280 N.W.2d 150 (1979)("There is no constitutional right of state employees to

bargain collectively"); *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979)("the First Amendment does not impose any affirmative obligation on the government to listen, to respond or . . . to recognize [a public employee] association and bargain with it"); *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071, 2072 (7th Cir. 1969)(public employers have "no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute").

Indeed, the State could lawfully determine that sound public policy compelled it to end all collective bargaining for public employees. Plaintiffs conceded this point below (App. 147), while paradoxically challenging the State's decision to afford public employees a collective bargaining system that is less robust than it once was.

There is no doubt that the Wisconsin and federal constitutions recognize Plaintiffs' right to associate and to petition their government. However, neither constitution provides any corollary obligation requiring the government to act on their petitions or deal with them collectively. The Seventh Circuit Court of Appeals squarely acknowledged this in *Lewallen*, 72 L.R.R.M. 2071.

In *Lewallen*, three individual teachers and their union alleged that a school district violated their First Amendment rights of free speech, association and petition, as well as their Fourteenth Amendment rights to equal protection and due process of law by refusing to bargain in good faith with the union, unilaterally adopting a salary schedule and seeking to enter into employment contracts with individual teachers. *Id.* at 2071. The Seventh Circuit squarely rejected the notion that the allegations raised a *constitutional* claim, stating:

> there is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of the [school district] to bargain in good faith does not equal a constitutional violation of plaintiffs-appellees' positive rights of association, free speech, petition, equal protection, or due process. Nor does the fact that the [school district's prior] agreement to collectively bargain may be enforceable against a state elevate a contractual right to a constitutional right.

Id.; see also Hanover Twp. Fed. of Teachers Local 1954 v. Hanover Community Sch. Corp., 457 F.2d 456, 461 (7th Cir. 1972).

In *Hanover*, the Seventh Circuit noted that the school district's alleged conduct (mailing individual contracts to district teachers rather than negotiating with the union) may have "deprived the teachers of benefits they sought to obtain by exercising their First Amendment rights" to advocate

through a collective association. 457 F.2d at 461. Yet, the court concluded that the First Amendment "provides no guarantee that a speech will persuade or that advocacy will be effective" and held that in determining that the plaintiffs' allegation did not present any federal question "[t]he district court correctly relied on our holding in [*Lewallen*] that '. . . there is no constitutional duty to bargain collectively with an exclusive bargaining agent.'" *Id.*

Moreover, in *Winston-Salem/Forsyth County Unit of N.C. Ass'n of Educ. v. Phillips*, 381 F. Supp. 644 (M.D.N.C. 1974), a teachers union challenged a North Carolina statute that voided all contracts between municipalities and employee unions on a theory identical to Plaintiffs:

> Plaintiffs allege that the statute is unconstitutional because of the detrimental effect it has on their ability to associate in a labor organization. They contend the statute renders nugatory their right to associate since it voids any contract obtained by that association. Thus, they say, it becomes fruitless for the organization to discuss matters with the school …

Id. at 646. The court rejected this theory stating, "[a]ccepting those consequences as true, we cannot accept the premise that plaintiffs' alleged right of association requires that the state governmental units negotiate and enter into contracts with them." *Id.* The court clearly distinguished between what is

protected by the right of association and what is not: "All citizens have the right to associate in groups in order to advocate their special interests to the government. It is something entirely different to grant any one interest group special status and access to the decision-making process." *Id.* at 648. The court concluded by making clear that collective bargaining is not First Amendment activity but rather a decision by the government to share decision making authority with public employees:

> [t]he actual decision of how to accommodate the public employees in the decision-making process without denying the right of association to others is a legislative decision. Both legally and logically that decision is the prerogative of the legislature, which is much better suited to make it than are federal courts….. *Id.*

In *Smith*, the United States Supreme Court considered allegations that the Arkansas State Highway Commission improperly refused to consider grievances filed by a union representative on behalf of represented employees. *Smith*, 441 U.S. 463. Notably, the Court identified the critical distinction between the employees' First Amendment rights and the public employer's freedom to ignore the employees' selected representative:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation from doing so. But

> the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Id. at 465.

Plaintiffs' claims ignore this settled law and conflate the changes brought about by Act 10, with an impairment of their right to associate together in the first instance. When the Constitutional rights of association, speech and petition are properly understood, it is clear that none of the challenged statutes impair such right. To hold otherwise would be to constitutionalize all activities any group of people engage in simply because they have associated for that purpose. This is not the law. *Jaycees*, 468 U.S. at 618 (right of association protects those who "associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.").

For example, there is no doubt that a group of individuals may associate for the purpose of forming a corporation and, as the United States Supreme Court has reminded, government cannot interfere with that association's legitimate First Amendment activities. *See Citizens United v. Federal Elections Comm'n*, 130 S.Ct. 876, 899 (2010). This,

however, does not mean that a state cannot make changes to the law that might make associating as a corporation less attractive. For instance, a state might decide to modify or end the limitations on corporate liability, one of the primary motivations for forming a corporation. Such a decision would be of no constitutional moment. The First Amendment is not a guarantee of particular collective bargaining rights and processes any more than it is a permanent guarantor of corporate limited liability and organization as presently defined by Wisconsin statutes.

The provisions Plaintiffs challenge do not impact First Amendment activities; instead, they are merely legislative determinations of how decision making should be shared between public employers and their employees. *See Phillips*, 381 F. Supp. at 648. Accordingly, Plaintiffs have failed to articulate a cognizable speech or association claim and this Court should review MERA under the deferential rational basis standard. *Jaycees*, 468 U.S. at 618; *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009)(applying rational basis review because plaintiffs failed to articulate a cognizable First Amendment claim); *SCEA v. Campbell*, 883 F.2d 1251, 1257-63 (4th Cir. 1989) ("*SCEA*") (refusing to apply strict scrutiny

when the statute "does not deny [union] members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views").

Plaintiffs have conceded that MERA survives a rational basis review, therefore their claims fail. (App. 263)("Defendants devote a significant portion of their Brief to arguing that the statutes in question survive rational basis scrutiny. Plaintiffs do not contend otherwise.")

III. THE FIRST AMENDMENT DOES NOT REQUIRE DUES DEDUCTIONS OR MANDATORY DUES TO SUPPORT COLLECTIVE BARGAINING.

A. Plaintiffs Have No First Amendment Right To Access Municipal Payroll Systems For The Purpose Of Dues Collection

The State of Wisconsin is not constitutionally required to permit public sector unions access to municipal payroll systems. The argument that eliminating such dues-paying opportunities infringes on employees' associational rights has been considered and repeatedly rejected.

The United States Supreme Court recently addressed this issue and concluded that a state's decision to no longer allow public employee unions to utilize payroll deductions as a dues-paying mechanism "is not an abridgment of the

unions' speech" because they remain "free to engage in such speech as they see fit." *Ysursa*, 555 U.S. at 359-60.

The Fourth Circuit reached the same conclusion when evaluating South Carolina's payroll deduction scheme which allowed the deduction of union dues for some – but not all – public sector unions. The Court held that such a system raises "no cognizable constitutional claim pursuant to the First Amendment." *SCEA*, 883 F.2d at1257. The *SCEA* Court reached this conclusion because, as here, "[t]he state's failure to authorize payroll deductions for the [union] does not deny [union] members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *Id.*

The Sixth Circuit has also considered this issue and found no constitutional violation in prohibiting payroll deductions for public sector unions, even when they were allowed for private sector unions. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998). And the Eighth Circuit rejected a claim that the Constitution compels public employers to continue providing payroll deductions for union dues when they "continued to withhold items other than

union dues." *Arkansas State Highway Employees Local 1315 v. Kell*, 628 F.2d 1099, 1102-04 (8th Cir. 1980).

The foundation underlying all of these decisions is the unremarkable premise that the Constitution does not require the government to subsidize unions' or their members' First Amendment associational activity. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983)("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"). Furthermore, the First Amendment does not compel the State *to continue* to provide unions access to public payroll systems in perpetuity. *Ysursa*, 555 U.S. at 359, 360 n.2 (noting that previously "available deductions do not have tenure.").

B. Plaintiffs Have No First Amendment Right To Compel Nonmembers To Pay Union Dues

Plaintiffs' claim that they are constitutionally entitled to negotiate fair-share agreements, which require public employees who choose not to join the union to pay dues, similarly fails. The Supreme Court recently rejected this theory in *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007). After noting that fair-share agreements grant unions

an "extraordinary power" that is "in essence, [the power] to tax government employees," the *Davenport* Court reiterated that "unions have no constitutional entitlement to the fees of nonmember employees" and noted that there is no constitutional impediment to states eliminating fair-share payments entirely. *Id.* at 184 (citing *Lincoln Fed. Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 529-31 (1949)).

Furthermore, the existence of a public sector fair-share agreement has been recognized as an "impingement" if not an outright infringement of the associational rights of those who do not wish to bargain through an association. The Supreme Court recognized this impingement when it first concluded that fair-share agreements were constitutionally permissible. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests."). And it expressed serious doubt about the constitutionality of the practice as recently as this summer. *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289-91 (2012) ("By authorizing a union to collect fees from nonmembers … our prior decisions

approach, if they do not cross, the limit of what the First Amendment can tolerate.").

Plaintiffs' assertion that the Constitution requires the state to allow fair-share agreements simply cannot be squared with the *Knox* Court's skepticism about the constitutionality of such forced dues:

> When a State establishes an "agency shop" that exacts compulsory union fees as a condition of public employment, "[t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree." [*Ellis v. Railway Clerks*, 466 U.S. 435, 455]. Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences . . . the compulsory fees constitute a form of compelled speech and association that imposes a "significant impingement on First Amendment rights." *Ellis, supra,* at 455. Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.
>
> "The primary purpose" of permitting unions to collect fees from nonmembers, we have said, is "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred." *Davenport*, 551 U.S. at 181. Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections.

Knox, 132 S. Ct. at 2289-91. While *Knox* and *Abood* have hesitantly concluded that fair-share agreements are not unconstitutional, they also make clear that there is no constitutional mandate. The First Amendment does not

require the state to force nonmembers to financially support public employee unions.

Finally, the constitutional analysis does not change simply because the State of Wisconsin *formerly* allowed municipal general employee unions to negotiate fair-share agreements. *Abood*, 431 U.S. at 225 n.20 (noting that it is not the court's role to "judge the wisdom" of a state's collective bargaining scheme because society's needs "vary from age to age" and "[w]hat would be needful one decade might be anathema the next").

IV. PLAINTIFFS' ATTEMPT TO OVERLAY *LAWSON'S* "PENALTY" THEORY ON THIS CASE FAILS.

In an effort to avoid the clear and settled law discussed above, Plaintiffs argued that the challenged provisions of MERA penalized them for exercising their constitutional rights. Plaintiffs relied on *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), to support their claims. In *Lawson*, a 1950's Red Scare era case, the Wisconsin Supreme Court declared a federal housing regulation unconstitutional because it required tenants to relinquish their right to associate with "subversive organizations" in order to remain eligible to continue living in subsidized housing. There was

no dispute that an individual's right to be a member of a subversive organization was protected by the First Amendment. It was this requirement that Lawson give up his right to associate or lose his housing subsidy that led the Court to strike down the law. *Lawson*, 270 Wis. at 275.

This penalty theory has never been applied in a published decision dealing with collective bargaining, and it does not apply here. First, as explained above, public employee collective bargaining is not a First Amendment activity. Accordingly, the creation of a bargaining framework does not implicate the First Amendment rights of public employees or their unions. Thus, unlike the situation in *Lawson*, MERA does not require Plaintiffs to forgo any protected associational activity.

Moreover, *Lawson* involved the receipt of a government benefit; this case involves sharing governmental decision-making authority with an agent of public employees. *See Phillips*, 381 F. Supp. at 648. The government has "significantly greater leeway in its dealings with citizen employees than . . . [with] citizens at large." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008).

Further, unlike *Lawson*, the choice to associate with an entity or group does not trigger different treatment under the law. In *Lawson*, the constitutionally protected act of joining an organization directly led to the loss of a benefit that was otherwise available. That is not the case here. MERA is silent with regard to membership in a union or other association. Instead, the action that determines whether the collective bargaining system outlined in MERA applies to a group of employees is the electoral decision of whether the employees will have a certified bargaining agent. Wis. Stat. § 111.70(4)(d). Just as one need not be a Democrat to have voted for President Obama or a Republican to have voted for Governor Romney, this election has nothing to do with membership in a union. Indeed, it is WERC, not the employees, that determines which employees are grouped together in a "bargaining unit" for this election. Wis. Stat. § 111.70(1)(b). MERA does not require that the certified bargaining agent be a union or other employee association; the employees could elect an individual. And nothing in the law requires that those who vote in the election must join the union or association if it is elected as the certified bargaining

agent. Instead, each employee is at all times left free to associate, or not.

Most importantly, this case is unlike *Lawson* because, here, individuals are not discriminated against by virtue of their associational memberships. MERA applies evenly to all employees in a bargaining unit regardless of how they vote or whether they decide to join a union. Under MERA, the bargaining agent needs to secure the support of 51% of the employees in the bargaining unit to be certified. However, MERA applies equally to all 100% of the employees in that unit regardless of how they vote and regardless of whether they join a union. If the bargaining agent prevails and is certified, then all of the employees, even those who voted no, must bargain all mandatory subjects through that agent. Accordingly, this case is nothing like *Lawson*.

Finally, the *Lawson* penalty theory is unworkable in the context of collective bargaining because the design of a collective bargaining system always requires a balancing of the rights of the individual employees against the rights of the association. *Cf. Knox*, 132 S. Ct. at 2289. Assuming, *arguendo*, that Plaintiffs are correct that the inability to negotiate over a particular subject constitutes the impairment

of a represented employee's speech and associational rights, it necessarily follows that MERA's allowance of collective bargaining on *any* subject works a corollary infringement on the associational and speech rights of those employees who do not wish to bargain collectively. Once a certified bargaining agent is elected by the bargaining unit, the employer is prohibited from negotiating with individual employees over wages. The *Lawson* Court did not have to navigate these competing rights and interests and its theory is inapplicable to the present case.

V. EMPLOYEES WHO CHOOSE TO ASSOCIATE FOR THE PURPOSE OF COLLECTIVELY BARGAINING ARE NOT PENALIZED OR BURDENED.

As explained above, *Lawson* does not apply to the collective bargaining context. Moreover, MERA does not treat employees who are members of a union differently from those who are not members of a union. Nevertheless, Plaintiffs argue that *Lawson* applies because MERA penalizes members of a collective bargaining unit who have certified a collective bargaining agent.

But even *Lawson*-without-discrimination-based-on-membership would not apply to invalidate any portion of

MERA. The crux of *Lawson* is that Mr. Lawson had to relinquish his right to associate in order to remain eligible to continue receiving subsidized housing. It was this requirement that Lawson give up his right to associate or lose a tangible benefit that led the Court to strike down the law. *Lawson*, 270 Wis. at 275. Here, employees who collectively bargain do not lose any actual benefit.

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

Plaintiffs assert they are required to give up their ability to negotiate and receive base wage increases greater than the cost of living if they want to collectively bargain. (App. 261.) This is factually incorrect. MERA does not prevent unions and employers from collectively bargaining base wage increases that exceed the cost of living. Instead, MERA simply requires that such base wage increase be ratified by the people. Wis. Stat. §§ 111.70(4)(mb)2., 66.0506 & 118.245 Thus, Plaintiffs' complaint is little more than a disagreement with the mechanics of bargaining and the Legislature's choice to allow the citizens a limited role in the shared decision making, in the event covered employees are also given an affirmative voice through a bargaining agent.

Moreover, no individual employee has any constitutional or statutory right to negotiate or receive wage increases, let alone increases greater than a cost of living adjustment. Instead, a municipal employer is at all times free to ignore any such demands from any employee. *Knight*, 465 U.S. 271, 287 (recognizing that an employer is free to refuse to bargain with individual employees). Accordingly, foregoing collective bargaining does not entitle an employee to force negotiations over, or to receive, base wage increases exceeding the cost of living. Thus, unlike *Lawson*, the Plaintiffs are not forced to choose between their constitutional right to associate and any tangible benefit.

Instead, this case presents the inverse of *Lawson*, as those employees who do collectively bargain gain a real, tangible benefit not available to those who do not. They gain the statutory right to force their employer to "meet and confer at reasonable times, in good faith, with the intention of reaching an agreement . . . with respect to wages . . . ." Wis. Stat. § 111.70(1)(a). Individual employees have no similar right to compel their employer to meet and confer over wages. Thus, MERA (even as amended by Act 10) provides

a benefit to only those employees who bargain collectively. Accordingly, Plaintiffs' reliance on *Lawson* is misplaced.

Furthermore, if accepted, Plaintiffs' arguments would effect a sea change in public sector labor law by concluding that the First Amendment precludes the State of Wisconsin from identifying a subset of issues (in this case, total base wages) that can be collectively bargained and prohibiting collective bargaining over other subjects. This position cannot be squared with the State's ability to declare *all* subjects prohibited subjects of bargaining. *Board of Regents,* 103 Wis. 2d at 556 (allowance of any form of collective bargaining is an act of legislative grace).

The logical extension of this reasoning is that every federal and state public sector bargaining law that identifies *any* prohibited subject of bargaining violates the employees' rights of association and free speech. For example, prior to Act 10, MERA specified certain prohibited subjects of bargaining. Wis. Stat. § 111.70(4)(m) (2009-10). The state-employee counterpart to MERA continues to specify a lengthy list of prohibited subjects of bargaining. Wis. Stat. § 111.91(2). Prohibited subjects of bargaining are a common scheme of such laws. Under Plaintiffs' reasoning, all of these

laws violate the respective employees' First Amendment rights. Far from proving MERA unconstitutional "beyond a reasonable doubt," Plaintiffs' assertions produce an absurd result that in fact confirms MERA's constitutional soundness.

B. Annual Certification Elections Do Not Burden Public Employees' First Amendment Rights.

Certification provisions have been a staple of MERA for decades. *See e.g.*, Wis. Stat. § 111.70(4)(d) (1971-72). Without some legislatively imposed certification system, neither employees nor employers would know if a specific agent legitimately speaks for a bargaining unit. It is necessarily the Legislature's prerogative to define the contours of those provisions. *Phillips*, 381 F. Supp. at 648 ("how to accommodate public employees in the decision-making process without denying the right of association to others is a legislative decision. Both legally and logically that decision is the prerogative of the legislature …").

Plaintiffs erroneously assert that MERA's mandatory recertification provision burdens and penalizes their First Amendment activity. However, Plaintiffs fail to address the distinction between the *right of employees* to choose to associate and the *right of the bargaining agent* to exclusively

negotiate on behalf of all bargaining unit employees – including those employees that do not want the agent's representation. This distinction is critical. MERA requires – as a precondition to negotiations – that the *bargaining agent* confirm that it has the support of a majority of the employees it seeks to represent. Wis. Stat. § 111.70(4)(d)3. This requirement reflects a legislative choice to modify the balance between the associational rights of those employees who wish to bargain collectively against those employees who do not.

Furthermore, MERA does not require individual employees to bear the costs of annual certification; it requires the bargaining agent – the entity that seeks the privilege of exclusivity – to bear those costs. How that cost is covered or shared is not mandated by MERA. The idea that government charges a fee to cover its administrative costs is neither novel nor constitutionally infirm. *See Sauk County v. Gumz*, 2003 WI App 165, ¶ 49, 266 Wis. 2d 758, 669 N.W.2d 509 (noting in the context of an allegation that certain permit fees imposed an impermissible financial burden on First Amendment activity that "[i]t is well established that the government may charge a fee" to cover the government's expense of administering the activity).

Finally, the annual certification requirement is not a punishment for associating. No one is required to bear any state imposed costs *in exchange for* the right to join a union. Instead, as explained above, MERA says nothing about the choice to join a union, or not. Rather, the certification process is a mechanism designed to help the state and municipal employers determine whether a putative bargaining agent has demonstrated a level of support sufficient to justify (a) prohibiting an employer from negotiating with individual employees; and (b) forcing representation on employees who do not want it.

C. The Elimination of Forced Payments from Those Who Do Not Want Collective Representation Does Not Penalize Public Employees.

Likewise, the prohibition of fair-share agreements does not create any inequality between those who choose to bargain through their association and those who do not. Instead, the prohibition creates parity. Non-represented employees have never had the right to compel others to pay for any portion of their bargaining costs.

Furthermore, as described above, Plaintiffs' reasoning that the free-rider concern creates a constitutional mandate is

directly at odds with controlling United States Supreme Court precedent. *See Knox*, 132 S. Ct. 2277; *Regan*, 461 U.S. at 549 (state is not required to subsidize the exercise of a fundamental right).

D. The Elimination of Payroll Deductions As A Dues-paying Mechanism Does Not Penalize Public Employees.

Similarly, MERA's prohibition on payroll deductions does not constitute the denial of a benefit to those employees who choose to bargain through an association because the non-associated employees do not enjoy any affirmative right under MERA to payroll dues deductions of any kind. All employees are in the same position. Thus, the prohibition of dues deductions is another example of the leveling of the playing field between represented and non-represented employees. Prior to Act 10, an employee who bargained through a certified bargaining agent could force his employer to bargain over payroll deductions; an individual employee could not. Following Act 10, the allowance of payroll deductions for any non-union activity or organization is a matter unaddressed by MERA and left to the individual municipal employers. Presumably such opportunities would

be available to any general municipal employee, whether represented or not.

VI. ANALYZED UNDER THE CORRECT STANDARD, PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS.

Plaintiffs argued that strict scrutiny should apply based on their belief that MERA interferes with the exercise of their fundamental right of association. (App. 152-153.) Indeed, the Circuit Court applied strict scrutiny solely on its finding that MERA violated the Plaintiffs' associational rights under its erroneous application of *Lawson*. (App. 017.) As explained above, MERA does not infringe Plaintiffs' First Amendment rights; therefore, Plaintiffs' equal protection claim should be analyzed under the rational basis standard. *State v. Annala*, 168 Wis. 2d 453, 468, 484 N.W.2d 138 (1992) (strict scrutiny applies only when a challenged statute "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class"); *see also SCEA*, 883 F.2d at 1257 (analyzing union claims that the state's failure to allow payroll deductions for union dues violated its First Amendment rights and its right to equal protection, and applying the rational basis standard to Plaintiffs' equal protection claim after first determining that

the First Amendment claim lacked merit). MERA easily survives that standard.

Under rational basis review, MERA is presumed constitutional and this Court must "sustain [the] statute against attack if there is any reasonable basis for the exercise of legislative power." *State v. McManus*, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989)(citation omitted). Furthermore, "[e]very presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to [its] constitutionality, it must be resolved in favor of constitutionality." *State ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). The rational basis test reflects important constitutional principles involving the separation of powers doctrine. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) (describing rational basis review as a "paradigm of judicial restraint" based on separation of powers principles).

To give effect to the strength of this presumption of validity, Plaintiffs cannot prevail unless they can establish that Act 10 is unconstitutional beyond a reasonable doubt. *McManus*, 152 Wis. 2d at 129 (citing *Mulder v. Acme-*

Cleveland Corp., 95 Wis. 2d 173, 187, 290 N.W.2d 276 (1980)):

> Equal protection does not deny a state the power to treat persons within its jurisdiction differently; rather, the state retains broad discretion to create classifications so long as the classifications have a reasonable basis. *Graham v. Richardson*, 403 U.S. 365, 371 (1971). The fact a statutory classification results in some inequity, however, does not provide sufficient grounds for invalidating a legislative enactment. *Lalli v. Lalli*, 439 U.S. 259, 273 (1978).

Id. at 131.

Importantly, as part of rational basis review, a court "does not evaluate the merits of the legislature's economic, social, or political policy choices, but is limited to considering whether the statute violates some specific constitutional provision." *State v. Dennis H.*, 2002 WI 104, ¶ 12, 255 Wis. 2d 359, 647 N.W.2d 851 (citing *Hammermill Paper*, 58 Wis. 2d at 46-47). In fact, rational basis review does not even require that the Legislature articulate its reasoning; the challenged provisions of MERA must "survive a constitutional challenge if this court can *conceive of* a rational basis for the law." *State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis. 2d 13, 657 N.W.2d 66 (emphasis added). Finally, the burden is on Plaintiffs to "'negative every conceivable basis which might support it,' whether or not the basis has a foundation in

the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citation omitted).

In the face of this burden, Plaintiffs conceded that the challenged provisions of MERA would survive a rational basis review. (App. 263)("Defendants devote a significant portion of their Brief to arguing that the statutes in question survive rational basis scrutiny. Plaintiffs do not contend otherwise.") This concession should not surprise this Court. Plaintiffs' Equal Protection Claim is based on the notion that MERA, as amended by Acts 10 and 32, impermissibly created two distinct classes of public employees – those employees who are represented by a union and non-represented employees. The fact that MERA establishes two different negotiating environments that employees can self-select by choosing to collectively bargain or not, does not deny those employees equal protection of the law.[3] In fact, if Plaintiffs were correct, then every public sector collective bargaining scheme that results in different treatment for

[3] This is no different than state laws that allow people to self-select from a number of different corporate forms (i.e., corporation, limited liability company, partnership, unincorporated association) – each with its own set of benefits and burdens.

represented and non-represented employees, as they all must, would be unconstitutional.

Plaintiffs failed to prove beyond a reasonable doubt that the challenged provisions of MERA violate the First Amendment or the Equal Protection clause. Accordingly, this Court should declare MERA constitutional. *Pitman*, 174 Wis. 2d at 276.

VII. WIS. STAT. § 62.623 DOES NOT VIOLATE THE HOME RULE AMENDMENT.

Plaintiffs claim that Wis. Stat. § 62.623 violates the Home Rule Amendment, Wis. Const. art. XI, sec. 3(1), and is therefore invalid. Section 62.623 prohibits the City of Milwaukee from paying the employee share of contributions to the City of Milwaukee Employee Retirement System ("Milwaukee ERS"). Plaintiffs' argument is incorrect for two reasons. First, the City's payment of its employees' pension contributions is a matter of statewide concern. Second, even if section 62.623 regulates a matter of local concern, it survives the Home Rule Amendment because it is part of an act that uniformly affects every city and village.

A. Because Section 62.623 Is Uniform, It Does Not Violate The Home Rule Amendment.

Plaintiffs' arguments are based on a misunderstanding of what the Home Rule Amendment prohibits. Plaintiffs' position is that if a matter is a determined to be a local affair, the Legislature is forever barred from regulating the subject. This, however, is not the law. The Home Rule Amendment:

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

Van Gilder v. City of Madison, 222 Wis. 58, 81, 267 N.W.2d 25 (1936). Indeed, the only limitation on legislative regulation of local affairs is a requirement that the regulation be made "by an act which affects with uniformity every city." *Id.* at 80-81.

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

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

Id. at 84. The Wisconsin Supreme Court has been consistent on this point. *See City of West Allis v. Milwaukee County*, 39 Wis. 2d 356, 366, 159 N.W.2d 36 (1968)("If, however, the

matter enacted by the legislature is primarily of local concern, a municipality can escape the strictures of the legislative enactment unless the enactment applies with uniformity to every city and village."); *Thompson v. Kenosha County*, 64 Wis. 2d 673, 686, 221 N.W.2d 845 (1974)("In view of art. XI, sec. 3 of the Wisconsin Constitution, statutes affecting the right of cities and villages to determine their own affairs must affect all cities and villages uniformly."); *see also* C. Silverman, Legal Comment, *Municipal Home Rule*, The Municipality, at 241 (July 2009) ("Finally, if the legislature elects to deal with the local affairs and government of a city or village, its act is subordinate to a charter ordinance unless the legislature's act uniformly affects every city or village across the state.").

While section 62.623 applies to first class cities (i.e. Milwaukee), it must be read together with each of Act 10's changes relating to employee contributions. Those changes create a single, uniform rule prohibiting all governmental employers from paying the employee contribution to a pension or other retirement plan. *See* 2011 Wis. Act 10, § 167 (creating Wis. Stat. § 62.623, applicable to first class cities, stating "[t]he employer may not pay on behalf of an

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

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

B. Section 62.623 Is A Matter Of Statewide Concern.

As noted above section 62.623 is part of a uniform regulation and, therefore, survives the Home Rule Amendment. However, because the provision of benefits to public employees is a matter of statewide concern, the Home Rule Amendment has no application to this case in the first instance. *Van Gilder*, 222 Wis. at 84 ("When the legislature deals with matters which are primarily matters of state-wide concern, it may deal with them free from any restriction contained in the home-rule amendment. The home-rule amendment did not withdraw from the legislature its power to deal with matters primarily of state-wide concern …"); *West Allis*, 39 Wis. 2d. at 366 ("The home-rule amendment does not limit the right of the legislature to deal with matters of statewide concern …").

The Plaintiffs argued that the Legislature's 1947 pronouncement that "future amendments and alterations to [the Milwaukee ERS] are matters of local affair and government and shall not be construed as an enactment of state-wide concern" foreclosed any argument that the issue was one of statewide concern. While the Legislature's prior

statement is entitled to some deference, "it should not be held to be absolutely controlling …". *Van Gilder*, 222 Wis. at 73-74. Here, there is no doubt that the regulation of pensions is a matter of statewide concern.

1. The 1947 Legislative declaration means only what it says.

The 1947 legislative statement must be taken as a whole:

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

1947 Wis. Laws ch. 441, § 31(1). It is true that the final clause indicates that the 1947 Legislature considered future amendments to the Milwaukee ERS a matter of local concern, the entire statement makes clear that this was not an unqualified grant of control. Instead, this increased control is subject to the "constitution and general law." *Id.*

According to Black's the phrase "general law" means a "Law that is neither local nor confined in application to particular persons." *Black's Law Dictionary*, 890 (7th ed. 1999). Here, as shown above section 62.623 is part of a

uniform regulation that is applicable to all governmental employers in the state. Thus, it is a matter of general law and the 1947 statement does not stand as an obstacle to section 62.623.

Additionally, understanding "general law" as synonymous with uniform law is consistent with the proper scope of the Home Rule Amendment. As noted above, the Home Rule Amendment allows the state to regulate matters of local concern as long as it regulates the matter uniformly. Thus, the 1947 declaration simply says the ERS is within the control of the City unless: (1) The City's regulation of the ERS runs afoul of the constitution or (2) a future uniform law regulates in the area. This is consistent with the principle that the Legislature's authority is cabined by the Constitution, not by the actions of prior legislatures.

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

The Legislature has determined that regulation of the Milwaukee ERS is a matter of state-wide concern at least two other times; once in 1937 when it first created the Milwaukee ERS (Wis. Stat. ch. 396 (1937)) and again in 2011 when it amended it via Act 10. The Circuit Court incorrectly

discounted these legislative determinations because the Legislature did not expressly state the Milwaukee ERS is a matter of statewide concern in either instance. With regard to the 1937 law creating the Milwaukee ERS in the first instance, the absence of an express statement is irrelevant. Indeed, if the Legislature did not think the regulation of pensions was a matter of statewide concern it would not have created the Milwaukee ERS. Instead, it would have left the City free to decide whether to create an ERS.

More importantly, the lack of an express statement in Act 10 is of no moment. This Court is required, as a matter of law, to hold that the enactment of a uniform law is dispositive that the matter is of statewide concern. This Court made this clear just last year:

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

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

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

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

3. Past cases and state action supports a finding that the issue is a matter of statewide concern

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

Section 62.623 does not contravene the Home Rule Amendment. *Van Gilder*, 222 Wis. at 84; *West Allis*, 39 Wis. 2d. at 366.

VIII. WIS. STAT. § 62.623 DOES NOT UNCONSTITUTIONALLY IMPAIR ANY CONTRACTUAL RIGHTS.

Plaintiffs also alleged that section 62.623 unconstitutionally impaired Milwaukee's General Municipal Employees' contractual rights to have the City pay their employee pension contributions. This is incorrect for two reasons. First, chapter 36 of the Milwaukee Charter

Ordinance does not create a contractual right to have the City pay the employee contribution. Second, even if it did, any impairment of that right passes constitutional muster. Additionally, even if this Court were to find an impermissible impairment, section 62.623 should not be stricken but instead should be held unconstitutional only as applied to employees hired before 2010.

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

Chapter 36 of the Milwaukee Charter Ordinance establishes the Milwaukee ERS. As such it defines the contribution levels, the benefit levels and other mechanical aspects of the Milwaukee ERS. In its current form, Chapter 36 states that the City will make the employee contribution. Ch. Ord. § 36-08-7-a-1.

Plaintiffs claim that section 36-13-2-g turns section 36-08-7-a-1 into a contractual right to have the City pay the employee contribution. The plain language of the Charter demonstrates that this argument fails. Section 36-13-2-g states:

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

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

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

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

This provision is significant for two reasons. First, it draws a clear distinction between "contributions" and "rights,

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

This reading also comports with the express listing of benefits found in chapter 36. Section 36-05, entitled "Benefits," gives specific meaning to the word for purposes of Chapter 36. Section 36-05 lists each and every benefit of the plan and the terms and conditions of those benefits. *See* Charter §§ 36-05-1 (service retirement allowance); 36-05-2 (ordinary disability retirement allowance); 36-05-3 (duty disability retirement allowance); 36-05-5 (accidental death benefit); 36-05-6 (separation benefits); 36-05-7 (optional benefits); 36-05-8 (survivorship benefits); 36-05-10 (ordinary

death benefit); 36-05-11 (lump sum bonus). A requirement that the City make the employee contribution is nowhere in § 36-05.

Plaintiffs' interpretation also creates an absurd result. Under Plaintiffs' reading, if the City attempted to make a larger contribution on its employees' behalf, it would have to be considered an impermissible alteration of the employees' rights/benefits. Plaintiffs' reading would bar the City from making larger contributions in the future. This absurd reading must be rejected. *Kalal*, 271 Wis. 2d 633, ¶¶ 45-46.

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

Assuming *arguendo*, that Plaintiffs do have a contractual right to a continuing contribution, section 62.623 does not unconstitutionally impair it. The Contract Clause is not absolute. It "cannot be read literally to proscribe any impairment of preexisting contracts." *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 554, 331 N.W.2d 369 (1983); *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983)(the "prohibition must be accommodated to the inherent police powers of the state to safeguard the vital interests of its people").

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

1. <u>There is no substantial impairment.</u>

Plaintiffs argued that there was a substantial impairment because the employees would be forced to pay for the cost of their own contributions. Increased cost alone, however, is not enough to prove substantiality. *See Chrysler*

Corp. v. Kolosso Auto Sales, Inc., 148 F.3d 892, 894 (7th Cir. 1998)("[T]he fact that a state makes a contract more costly to one to the parties does not establish a violation.").

Plaintiffs also argued that Act 10 failed under *Kolosso* because the changes to the Milwaukee ERS were not foreseeable. Specifically, they argued that the state has not historically regulated the Milwaukee ERS and that the plain language of Chapter 36 guarantees that their will be no changes. (App. 289-290). These arguments fail. The argument based on the language of Chapter 36 fails because, as explained above, there is no guarantee to a continuing contribution.

Their argument that the state does not have a history of regulating the Milwaukee ERS also fails. Indeed, the Milwaukee ERS was created by the state in 1937 and the State has been regulating public employee pensions systems since 1891. *See Lightbourn*, 243 Wis. 2d 512, ¶¶ 7-10. Moreover, the City itself has made various changes to the Milwaukee ERS – including ending the practice of making the employee contributions for employees hired after various dates in 2010. Section 36-08-7-a-2.

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

2. Section 62.623 serves a legitimate public purpose.

The purpose of this prong of the analysis is to ensure that the government is legitimately using its police power "rather than providing a benefit to special interests." *Energy Reserves*, 459 U.S. at 412. Here, any suggestion that there is not a legitimate public interest fails. The various changes to public employee collective bargaining made by Act 10 were made to equip the local governments with the ability to absorb the impact of the economic downturn and the state's financial situation. Plaintiffs have recognized this purpose. (App. 169) (noting that the purpose of section 62.623 is to help keep property taxes under control).

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

Unless the government is both the regulating entity and a party to the contract, courts must defer to the Legislature's judgment as to the necessity and reasonableness

of the statute. *Energy Reserves*, 459 U.S. at 412-13; *Chappy v. LIRC*, 136 Wis. 2d 172, 188, 401 N.W.2d 568 (1987). Here, the State is not a party to any contract between the Plaintiffs and the City.

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

Assuming *arguendo,* that section 62.623 does unconstitutionally impair a contractual right, it does so only as to employees hired before various dates in 2010. Chapter 36 states that City employees hired after various dates in 2010 are required to make their own employee contributions. *See* section 36-08-7-a-2. Thus, section 62.623 does not impair any contractual rights of employees hired after the listed dates.

CONCLUSION

For all the forgoing reasons, this Court should reverse the Circuit Court and declare the challenged sections of MERA constitutional.

Dated this 20th day of November, 2012.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

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

Dated: November 20, 2012

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CERTIFICATE OF COMPLIANCE WITH 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 § 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: November 20, 2012

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