STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Service Employees International Union Healthcare Wisconsin,

Petitioner-Appellant,

University of Wisconsin Hospitals & Clinics Authority,

Other Party-Respondent,

v.

Wisconsin Employment Relations Commission,

Respondent-Respondent.

Appeal No. 2024-AP-717
Dane County Case No. 2022-CV-3199

BRIEF FOR THE UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY

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ISSUE PRESENTED FOR REVIEW

Does the Wisconsin Employment Peace Act, Wis. Stat. ch. 111 subch. 1 (the "**Peace Act**") apply to the University of Wisconsin Hospitals and Clinics Authority (the "**Authority**") and the Authority's employees and their chosen representatives, if any?

Answer by the Wisconsin Employment Relations Commission ("**WERC**"): No.

Answer by the circuit court on review: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Authority does not request oral argument because this appeal meets the criteria for submission on the briefs under Wis. Stat. §§ (Rules) 809.22(2)(a)1. and (2)(b).

The Authority also does not request publication. The issue in this appeal can be decided on the basis of controlling precedent about statutory interpretation, and there is no reason to question or qualify that precedent. *See* Wis. Stat. § 809.23(1)(b)3.

INTRODUCTION

The legislature removed the Authority from the Peace Act in 2011 Wisconsin Act 10 ("**Act 10**"). It did so through a multitude of Act 10's sections. In Act 10, the legislature repealed statutory text that formerly defined the Authority as a "person who engages the services of an employee" for purposes of the Peace Act. It also repealed text that imposed on the Authority a "duty to engage in collective bargaining" under the Peace Act. It made many other changes, too, all designed to terminate the Authority's status as a Peace Act "employer." And the legislature made its intent publicly known. Indeed, it enacted Act 10 by

passing a bill that stated on its second page: "This bill eliminates the rights of [the Authority's] employees to collectively bargain."

This case is the second attempt by Service Employees International Union Healthcare Wisconsin ("**SEIU**") to nullify the legislature's decision to eliminate Peace Act coverage for the Authority. After Act 10 passed in 2011, SEIU filed a federal lawsuit challenging, on constitutional grounds, the Act 10 provisions that—as SEIU put it—"extinguishe[d] collective bargaining rights" for the Authority's employees by "removing [the Authority's] employees . . . from [the Peace Act]." That 2011 constitutional challenge failed. Now, more than a decade later, SEIU has reversed course, claiming that, on second thought, Act 10 had no effect on the Authority after all.

WERC gave effect to Act 10, as it must. Relying especially on *Brey v. State Farm Mutual Automobile Insurance Company*, 2022 WI 7, 400 Wis. 2d 417, 970 N.W.2d 1, WERC refused to construe the Peace Act as if Act 10 never happened. This Court must do the same and affirm.

STATEMENT OF THE CASE

I. The legislature puts the Authority under the Peace Act.

The Wisconsin Legislature created the Authority in 1995 Wisconsin Act 27 ("**Act 27**"). 1995 Wis. Act 27 § 6301. It created the Authority as a "public body corporate and politic" governed by Chapter 233 of the Wisconsin Statutes. Wis. Stat. § 233.02(1).

The Authority operates the University of Wisconsin Hospitals and Clinics. Wis. Stat. § 233.04(3)(b). Its board of directors consists of public officials or their appointees. Wis. Stat. § 233.02(1). Its board members and chief executive officer also are "state public officials" under Chapter 19. Wis. Stat. §§ 19.42(13)(m) & (14).

The legislature placed the Authority under the Peace Act in Act 27. As a general matter, the Peace Act covers "employers and employees in the private sector only." *State ex rel. Teaching Assistants Ass'n v. U of Wisconsin-Madison*, 96 Wis. 2d 492, 504–05, 292 N.W.2d 657 (Ct. App. 1980); *Schenck v. Ardagh Grp.*, WI Emp. Rel. Com. Dec. No. 38977-A, 2021 WL 3661670, at *1 (July 21, 2021) ("[The Peace Act] applies to private sector employers and employees."). Wisconsin's two other principal employment relations laws, the Municipal Employment Relations Act ("**MERA**," Subchapter IV of Chapter 111) and the State Employment Labor Relations Act ("**SELRA**," Subchapter V of Chapter 111), respectively cover municipal and state employees.

To put the Authority under the Peace Act, the legislature enacted many necessary provisions within (1) the Peace Act, (2) Chapter 233, and (3) Chapter 40, the latter of which governs the Public Employee Trust Fund. Those provisions are detailed in Section II.A of the Argument below. Among other things, the legislature amended the Peace Act's definition of "employer" to provide that "[f]or purposes of [that definition], a person who engages the services of an employe includes the University of Wisconsin Hospitals and Clinics Authority." *See* p. 24, *infra*; 1995 Wis. Act 27 § 3782g (amending Wis. Stat. § 111.02(7)). Additionally, the legislature created provisions in Chapter 233 imposing a "duty to engage in collective bargaining" under the Peace Act and reserving a nonvoting seat on the Authority's board of directors for the labor organization that would represent the Authority's employees under the Peace Act. *See* pp. 25–26, *infra*; 1995 Wis. Act 27 § 6301 (creating Wis. Stat. §§ 233.02(1)(h), 233.03(7), & 233.10(2)).

Act 27's legislative history is discussed in Section III.A of the Argument below. That history documents that Act 27's proponents made the noted amendments (and others) because they understood that otherwise, "no employment relations act would [have] appl[ied] to [the Authority's] employees." R.8:4 (WERC R.94); *see* p. 41, *infra*.

II. The legislature ends collective bargaining at the Authority.

The legislature removed the Authority from the Peace Act in Act 10. To do so, it did not merely strike one isolated reference; it undid *all* the enactments that put the Authority under the Peace Act in Act 27.

Act 10's changes are detailed in Section II.A of the Argument below. Among other things, the legislature repealed the statutory text that defined the Authority as a "person who engages the services of an employee" for purposes of the Peace Act. *See* p. 25, *infra*; 2011 Wis. Act 10 § 188. It also repealed the language in Chapter 233 that imposed a "duty to engage in collective bargaining," as well as the provision reserving a nonvoting board seat for the labor organization formerly representing the Authority's employees. *See* pp. 26–27, *infra*; 2011 Wis. Act 10 §§ 370, 372, & 378.

Act 10's legislative history is discussed in Sections III and III.B of the Argument below. It documents the legislature's intent with uncommon clarity. For example, the Legislative Reference Bureau analysis printed atop the bill that became Act 10 stated: "This bill eliminates the rights of [the Authority's] employees to collectively bargain." 2011 A.B. 11 at 2; *see* pp. 40 & 42, *infra*.

After Act 10 passed, SEIU itself confirmed what it now professes never happened: Act 10 ended the Authority's tenure under the Peace Act. SEIU pleaded in a 2011 federal court complaint that Act 10 "extinguishe[d] collective bargaining rights for certain employees of the

UW Hospitals Authority and UW Hospitals Board" by "removing UW Hospitals Authority employees . . . from WEPA [the Peace Act]." R.26:17–18, Compl. ¶ 44; *see* pp. 42–43, *infra*.

III. This appeal's procedural history

In 2022, pursuant to a Memorandum of Understanding the Authority entered into to avert a strike planned by SEIU, the Authority and SEIU jointly petitioned WERC for a declaratory ruling on whether the Peace Act still applies to the Authority and its employees. R.6:1–10 (WERC R.1–10).

WERC declared the Peace Act does not so apply. R.12:36–38 (WERC R.174–76), A-App.3–5. It reasoned that relevant statutory history must be considered when seeking a statute's "plain meaning" and that the history in Acts 27 and 10 "clearly establishes that the [Authority] is not an 'employer' within the plain meaning of Wis. Stat. § 111.02(7)." R.12:39–40 (WERC R.177–78), A-App.6–7. Alternatively, it ruled that legislative history would yield the same answer if WERC's review of statutory text and history had left any ambiguity. R.12:40 n.2 (WERC R.178), A-App.7.

SEIU petitioned for judicial review under Chapter 227. R.2. The circuit court affirmed. R.39, A-App.39–40. It offered two reasons for doing so. First, although neither side had raised or argued the issue, it concluded the Authority is a "political subdivision of the state" for purposes of the Peace Act, and thus excluded from its definition of "employer." R.42, Tr. 17:4–20:20, A-App.24–27. This part of the circuit court's reasoning departed from WERC's reasoning (and created a new issue the parties had not addressed). Second, the circuit court concluded that statutory history and legislative history in any event both confirm the legislature's "intent to remove the rights of [Authority] employees to

collectively bargain under the Peace Act." R.42, Tr. 20:21–29:12, A-App.27–36. Like WERC, the circuit court ruled that statutory history must be considered in determining the Peace Act's plain meaning, and that "the statutory history is clear": the legislature explicitly added the Authority to the Peace Act in Act 27, then explicitly removed it in Act 10. R.42, Tr. 13:1–14, 21:25–22:20, & 24:21–26:7, A-App.20, 28–29, & 31–33. The circuit court also joined WERC in ruling that, if ambiguity exists, "the legislative history could not be more clear" that the legislature intended to remove the Authority from the Peace Act in Act 10. R.42, Tr. 21:14–23, 22:20–24:20, & 26:8–28:12, A-App.28–31, & 33–35.

STANDARD OF REVIEW

"When an appeal is taken from a circuit court order reviewing an agency decision, [this Court] reviews the decision of the agency, not the circuit court." *Clean Wisconsin, Inc. v. Wisconsin Dep't of Nat. Res.*, 2021 WI 71, ¶ 14, 398 Wis. 2d 386, 961 N.W.2d 346 (quotation marks omitted). As relevant here, the Court may set aside WERC's decision only "if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." Wis. Stat. § 227.57(5). The Court reviews WERC's interpretation of law without deference. Wis. Stat. § 227.57(11).

ARGUMENT

I. SEIU cannot avoid the statutory history.

WERC and the circuit court both relied on *Brey v. State Farm Mutual Automobile Insurance Company*, 2022 WI 7, 400 Wis. 2d 417, 970 N.W.2d 1, to conclude that relevant statutory history must be considered when determining the Peace Act's "plain meaning." R.12:39 (WERC R.177), A-App.6; R.42, Tr. 13:1–14, A-App.20. SEIU claims this Court

must decide whether a statute's text is plain or ambiguous *before* considering statutory history—and that absent facial ambiguity, the Court may consult statutory history *only* to "support," "reinforce," or "confirm" a meaning derived from the statute's face alone. SEIU Br. at 23–25, 33. But WERC and the circuit court got *Brey* exactly right.

Brey (which post-dates all of SEIU's cases on this point) clarified that statutory history and legislative history play different roles in statutory interpretation. As the Supreme Court acknowledged, many of its earlier opinions had discussed "statutory and legislative history jointly," as if their roles did not differ. *Brey*, 2022 WI 7, ¶ 21. *Brey* clarified that, in fact, statutory history and legislative history "each . . . serves a distinct role in statutory interpretation." *Id.* ("We have long recognized a distinction between statutory and legislative history.").

The Supreme Court's familiar rules about *legislative* history needed no clarification in *Brey*. Legislative history is used precisely as SEIU now claims the courts must use statutory history. "Legislative history, as the byproduct of legislation, is *extrinsic* evidence of a law's meaning." *Id.* (emphasis added). So it "becomes relevant only to confirm plain meaning or when a statute remains ambiguous even after the primary *intrinsic* analysis has been exhausted." *Id.* (emphasis added; quotation marks omitted). These are the same rules summarized in the well-known case *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 50–51, 271 Wis. 2d 633, 681 N.W.2d 110.

It was what *Brey* said about *statutory* history that defeats SEIU's argument on appeal. In *Brey*—which SEIU does not even cite—the Supreme Court put it beyond doubt that, in contrast to legislative history, statutory history is *intrinsic* to the meaning of statutory text and

must be consulted as part of—not after—a "plain meaning" analysis. "Unlike legislative history, prior versions of statutory provisions were enacted law; as such, statutory history constitutes an intrinsic source that is part of the context in which we interpret the words used in a statute." *Brey*, 2022 WI 7,¶ 20 (quotation marks omitted). So unlike legislative history, statutory history is used "as part of 'plain meaning analysis.'" *Id.* (quotation marks omitted).

As "part of the context in which" courts "interpret the words used in a statute," *id.*, statutory history is no less important to statutory interpretation than are surrounding and related statutes. "A statute's context and structure are critical to a proper plain-meaning analysis." *Id.* ¶ 11. Courts must consider context "when"—not after—"deciding whether language is plain," because "oftentimes the meaning *or ambiguity* of certain words or phrases may only become evident when placed in context." *Id.* (emphasis added; quotation marks omitted)). Statutory history, like surrounding and related statutes, is part of that critical context. *Id.* ¶ 20.

The Supreme Court confirmed *Brey*'s holding during its following term. In *Banuelos v. University of Wisconsin Hospitals and Clinics Authority*, the legislature had made significant revisions to the statute the Court was interpreting. 2023 WI 25, ¶¶ 26–29, 406 Wis. 2d 439, 988 N.W.2d 627. The Court reviewed "statutory history [as] part of [its] plain meaning analysis." *Id.* ¶ 17; *see also id.* ¶ 25 ("Prior versions of a statute were enacted law and constitute an intrinsic source, part and parcel of a plain meaning interpretation."). It concluded it "could not interpret [a] subsequently amended statute [in a manner that] would require us to read language back into the statute that is no longer there." *Id.* ¶ 29.

Brey was clearest on this point, but its holding was not new. In earlier cases, too, the Supreme Court treated statutory history as an "intrinsic" source integral to a plain-meaning analysis, not an "extrinsic" source on par with legislative history. For example, in *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467, the Court found a conflict between statutory history (among other factors) and the statute's current text. On the one hand, "the statutory history, structure, context, and contextually manifest purposes all militate[d] in favor of an interpretation that [the statute] require[d] courts to impose a bifurcated sentence with a minimum period of initial confinement." *Id.* ¶ 39. On the other hand, a nearby subdivision's text clearly required a mandatory minimum period of confinement while the subdivision at issue lacked such text. *Id.* Faced with this conflict, the Court did not conclude that one intrinsic source trumped others. It held the overall plain-meaning analysis, which incorporated statutory history, left it "not unreasonable for well-informed people to disagree" about the statute's meaning. *Id.* Then it turned to legislative history to resolve the ambiguity. *Id.*

Richards v. Badger Mutual Insurance Company, which *Brey* and *Banuelos* both cite favorably, is also instructive. The *Richards* Court *began* its analysis of a statue by reviewing statutory history—before examining the statute's current text, and before concluding the statute was ambiguous. 2008 WI 52, ¶¶ 22–28, 309 Wis. 2d 541, 749 N.W.2d 581; *contrast* SEIU Br. at 33 (incorrectly arguing that "in no case should a court (or agency) ***start*** interpreting the statute by reviewing its history" (emphasis in original)). In fact, the Court found the statute ambiguous largely *because* "the statutory history underlying [the statute] [did] not resolve the meaning of the terms" at issue. *Richards*, 2008 WI 52, ¶ 27.

In arguing that courts may not use statutory history "to create ambiguity or reach a conclusion contrary to a plain-text reading" (SEIU Br. at 25), SEIU misses the point. Its distinction between "statutory history" and "a plain-text reading" is false. Relevant statutory history is part and parcel of a "plain-text reading." *Banuelos*, 2023 WI 25, ¶ 25. So properly treated, it cannot conflict with a statute's "plain meaning." It is part of that meaning in the first place.

Brey and *Banuelos* are precedential whether or not SEIU finds them persuasive, but they are also clearly right. Examining a statute's "history" largely means considering legislative acts that materially changed its text. *See, e.g., Banuelos*, 2023 WI 25, ¶¶ 26–29. And legislative acts are *laws*, not unenacted "legislative history." Acts are the laws the legislature enacts under Article IV, Section 17 of the Wisconsin Constitution. *See* Wis. Const. art. IV, § 17 ("Enactment of laws"). They are published as the "Laws of Wisconsin," in the "Class 1" public printing category. Wis. Stat. §§ 35.01(1) & 35.15. The Wisconsin Statutes, an example of "Class 2" public printing, Wis. Stat. §§ 35.01(2) & 35.18, are "codifications of Wisconsin law, not the original form of the laws themselves . . . [which] are passed and published in 'Acts.'" *Petersen v. Paquin*, No. 12-C-0937, 2013 WL 1704914, at *1 (E.D. Wis. Apr. 19, 2013) (explaining why the statutes need not contain the enactment clause that Wis. Const. art. IV, § 17(1) requires in "all laws"); *State v. Weidman*, 2007 WI App 258, ¶¶ 5–6, 306 Wis. 2d 723, 743 N.W.2d 854 (same).

The courts would turn the constitutional order upside down if they limited their consideration of legislative acts—the legislature's original, enacted laws—when interpreting statutes codifying those acts. And, as *Banuelos* demonstrates, reviewing the legislature's acts is necessary

when they contain significant amendments. *Accord State v. Cox*, 2018 WI 67, ¶ 10, 382 Wis. 2d 338, 913 N.W.2d 780 (Where "the legislature has amended the part of the statute in which we are interested, we may have recourse to that history to assist us in discovering the statute's plain meaning."); *State ex rel. Dep't Nat. Res.*, 2018 WI 25, ¶ 15, 380 Wis. 2d 354, 909 N.W.2d 114 ("We may also look to the statute's history where, as here, there has been a significant revision to the language in which we are interested.")

SEIU abandons any argument that WERC and the circuit court erred in relying on *Brey*. It avoids discussing *Brey* at all in its brief, even though WERC and the circuit court both found it controlling. And it mentions *Brey*'s central distinction between "intrinsic" and "extrinsic" sources only once, in a footnote conceding that it is *legislative* history, not statutory history, that "'becomes relevant only to confirm plain meaning or when a statute remains ambiguous even after the primary intrinsic analysis has been exhausted.'" SEIU Br. at 23 n.3 (quoting *Banuelos*).

SEIU principally relies on *State ex rel. Girouard v. Circuit Court for Jackson County*, a 1990 case, for its statement that "a court cannot resort to statutory history for the purpose of rendering an otherwise clear statute ambiguous." 155 Wis. 2d 148, 156, 454 N.W.2d 792 (1990). But *Girouard* simply reflects the Court's acknowledged, older practice of "sometimes discuss[ing] statutory and legislative history jointly." *Brey*, 2022 WI 7, ¶ 21. The Court clarified in *Brey*, and confirmed in *Banuelos*, that statutory history and legislative history in fact are distinct.

The only case *Girouard* cited in support of its statement was *State ex rel. Smith v. City of Oak Creek*, 139 Wis. 2d 788, 407 N.W.2d 901

(1987), which analyzed *legislative* history, not statutory history. *Girouard* emphasized that the lower courts had inappropriately looked to *"legislative history*" despite finding no ambiguity in the statute's text. *Girouard*, 155 Wis. 2d at 154, 157 (emphasis added). Thus, *Girouard*'s main holding was that the lower courts' reliance on legislative history "was incorrect unless there was evidence of ambiguity in the statute presently being construed." *Id.* at 157.

That holding does not conflict with the Court's clarification in *Brey* and *Banuelos*—the latter of which cites *Girouard* for an unrelated proposition—that statutory history, as an intrinsic source, is distinct from legislative history and part of a plain-meaning analysis. Indeed, *Girouard* reversed a Court of Appeals decision that would have enforced the terms of a "prior statute" based on the Court of Appeals' conclusion that, in enacting a "newly amended statute," the legislature failed to make changes "sufficient to compel a different conclusion" than the "earlier statute" would have compelled. *Id.* at 156. As shown in Part II below, SEIU similarly seeks to enforce the Peace Act's prior terms and to render the legislature's amendments ineffective—the same result the Supreme Court would not accept in *Girouard*.

Further, even if it conflicted with *Brey* and *Banuelos*, *Girouard* would not control. *See Purtell v. Tehan*, 29 Wis. 2d 631, 636, 139 N.W.2d 655, 658 (1966) ("Ordinarily, where there is a conflict in our past decisions, we prefer to adhere to the more recent cases."); *Midland Funding, LLC v. Mizinski*, 2014 WI App 82, ¶ 16, 355 Wis. 2d 475, 854 N.W. 2d 371, 376 ("Where decisions of the supreme court appear to be inconsistent, or in conflict, we follow the court's most recent

pronouncement.") (cleaned up). *Girouard* can be harmonized with *Brey* and *Banuelos*, but if it cannot, *Brey* and *Banuelos* prevail.

Nor does the concurring opinion (joined by a majority of the Court) in *Anderson v. Aul* state that statutory history may be used *only* to confirm a prior plain-meaning analysis. Rather, *Anderson* acknowledges that "analysis of statutory history is part of a plain-meaning analysis." 2015 WI 19, ¶ 111, 361 Wis. 2d 63, 862 N.W.2d 304. Further, the *Anderson* concurrence critiqued the lead opinion's discussion of several decades of case law and a fully-repealed historical statute, all of which preceded enactment of the statutes the Court interpreted. *See id.* ¶¶ 64–73 & 111. That "statutory history" was broader than "statutory history" as *Brey* and *Banuelos* define it: "previously enacted versions of the statute which have subsequently been amended by the legislature." *Banuelos*, 2023 WI 25, ¶ 25; *see also Brey*, 2022 WI 7, ¶ 20 ("Statutory history . . . involves comparing the statute with its prior versions.").

Similar to *Girouard*, SEIU's other cases spoke interchangeably about statutory and legislative history as if both were *extrinsic* sources, contradicting the more recent and clearer statements in *Brey* and *Banuelos*. A footnote in *State v. Martin* referred to "legislative history" and "statutory history" synonymously, without addressing whether they are distinct. 162 Wis. 2d 883, 897 n.5, 470 N.W.2d 900 (1991) ("While legislative history cannot be used to demonstrate that a statute unambiguous on its face is ambiguous, there is no converse rule that statutory history cannot be used to reinforce and demonstrate that a statute plain on its face, when viewed historically, is indeed unambiguous."). *Seider v. O'Connell* also conflated statutory and legislative history, quoting *Martin*'s footnote as it did. *See* 2000 WI 76,

¶¶ 49–52, 236 Wis. 2d 211, 612 N.W.2d 65. In its actual analysis, the *Seider* Court examined not "statutory history" as defined in *Brey* and *Banuelos*, but "extrinsic sources" including "materials pertaining to the passage of a statute [*i.e.*, "legislative history"], historical events that occurred at the time of enactment, and information generated after the statute's passage." *Id.* ¶¶ 50, 53. As construed in later decisions, *Seider* merely confirms that the Court "relies primarily on intrinsic sources of statutory meaning and confines resort to extrinsic sources of legislative intent to cases in which the statutory language is ambiguous." *Kalal*, 2004 WI 58, ¶ 43 (citing *Seider*). That point works against SEIU, because "[u]nlike legislative history . . . statutory history constitutes an intrinsic source." *Brey*, 2022 WI 7, ¶ 20.

The remaining cases SEIU relies on all cite *Seider* and similarly address *legislative* history. None supports SEIU's argument that *statutory* history may be used only to resolve ambiguity or to confirm a plain meaning derived before statutory history is consulted. *See Hamilton v. Hamilton*, 2003 WI 50, ¶ 37, 261 Wis. 2d 458, 661 N.W.2d 832 ("If we go beyond unambiguous text and inquire into *legislative* history, our investigation should serve the purpose of showing how the *legislative* history supports our interpretation of a statute that is clear on its face." (emphasis added; citing *Seider*)); *Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, ¶ 31 n.13, 335 Wis. 2d 566, 799 N.W.2d 815 ("While we do not rely on *legislative* history when a statute is unambiguous on its face, this court, on occasion, will consult *legislative* history to show how that history supports our interpretation of a statute otherwise clear on its face" (emphasis added; quoting *Seider*; quotation marks omitted); *Chippewa Cty. Dept. of Human Services v. Bush*, 2007

WI App 184, ¶ 18 n.11, 305 Wis. 2d 181, 738 N.W.2d 562 ("We may consult the *legislative* history of a statute to demonstrate that history supports our interpretation of a statute otherwise clear on its face." (emphasis added; quoting *Seider*; quotation marks omitted).

In short, SEIU identifies no controlling authority establishing that it is legal error for an agency to interpret plain meaning using statutory history precisely as WERC did here. That alone defeats SEIU's appeal.

II. The Peace Act has not applied to the Authority since Act 10.

There being no error in WERC's use of statutory history to determine plain meaning, the only remaining question is whether WERC correctly interpreted the Peace Act as amended by Act 10. The remaining sections of the argument explain why WERC's interpretation is correct (Section II), as confirmed by legislative history (Section III), and why the Attorney General was mistaken on this point (Section IV).

The Peace Act defines "employer" as "a person who engages the services of an employee," Wis. Stat. § 111.02(7)(a), and defines "person" to include "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees or receivers," Wis. Stat. § 111.02(10). SEIU claims the Authority is a "corporation" for purposes of Section 111.02(10) and thus "a person who engages the services of an employee" under Section 111.02(7)(a). But as shown above, Section 111.02's text must be read in context, including the laws that it codifies as well as related statutes in Chapters 233 and 40. *See* Section I, *supra*; *Brey*, 2022 WI 7, ¶¶ 11 & 20; *Banuelos*, 2023 WI 25, ¶¶ 17, 25, & 29; *Kalal*, 2004 WI 58, ¶ 46. Those intrinsic sources confirm that since Act 10, the Authority has not been "a person who engages the services of an employee" for purposes of the Peace Act's definition of "employer."

A. The legislature's laws

In five different ways, Act 27 and Act 10 make clear that the Authority once was, but no longer is, "a person who engages the services of an employee" for purposes of the Peace Act.

First, the legislature added in Act 27—then deleted in Act 10—statutory text that explicitly defined the Authority as a "person who engages the services of an employee" for purposes of Section 111.02(7).

The legislature amended Section 111.02(7) as follows in Act 27:

> 111.02 (7) of the statutes is amended to read:
>
> The term "employer" means a person who engages the services of an employe and includes any person acting on behalf of an employer within the scope of his or her authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact. For purposes of this subsection, a person who engages the services of an employe includes the University of Wisconsin Hospitals and Clinics Authority.

1995 Wis. Act 27 § 3782g.

On its own, this shows that but for the legislature's amendment, the Authority would not have been "a person who engages the services of an employe" for purposes of Section 111.02(7). If it had, there would have been no need to add new text deeming the Authority a "person who engages the services of an employe" "*[f]or the purposes of this subsection*." *Id.* (emphasis added). And that text would have to be construed as having no effect, violating the canon that "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage," *Kalal*, 2004 WI 58, ¶ 46, as well as the "presumption that the legislature intends to change the law by creating a new right or

withdrawing an existing right when it amends a statute," *Lang v. Lang*, 161 Wis. 2d 210, 220, 467 N.W.2d 772 (1991).[1]

In Act 10, the legislature repealed the text defining the Authority as a "person who engages the services of an employee" for purposes of the Peace Act. *See* 2011 Wis. Act 10 § 188 (repealing Wis. Stat. § 111.02(7)(a)2.); *see also* Wis. Stat. § 111.02(7)(a)2. (2009–10) ("'Employer' means a person who engages the services of an employee, and includes . . . [the Authority]."). So, SEIU's argument asks this Court to "interpret [a] subsequently amended statute" to impermissibly "read language back into the statute that is no longer there." *Banuelos*, 2023 WI 25, ¶ 29.

Second, the legislature also added (in Act 27)— then repealed (in Act 10)—provisions in Chapter 233 that formerly enabled the Authority to collectively bargain under the Peace Act.

When creating Chapter 233, the legislature included two types of provisions allowing the Authority to function as a Peace Act "employer." First, it reserved a nonvoting seat on the Authority's board of directors for the labor organization that would represent the Authority's employees under the Peace Act, along with a second seat for the

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[1] *See also id.* ("[W]e must conclude that the legislature, by adding the words 'bequest' and 'devise' to sec. 767.255, was adding types of transactions not included in the preexisting term of 'inheritance.' To conclude otherwise would make 'bequest' and 'devise' surplusage . . . ."); *In re Nottingham's Est.*, 46 Wis. 2d 580, 590, 175 N.W.2d 640 (1970) ("We can only conclude that by the legislature's change of the statute it intended to include what had previously been omitted."); *Green Bay Drop Forge Co. v. Indus. Comm'n*, 265 Wis. 38, 50, 60 N.W.2d 409 (1953) ("[I]f the law before the enactment of ch. 328 . . . was the same as provided in such chapter, there would have been no occasion for enacting the same. If any presumption applies, it is that the legislature by reason of the amending enactment sought to change the existing law.").

organization representing the employees of a related entity—the University of Wisconsin Hospitals and Clinics *Board*—under SELRA.[2] *See* 1995 Wis. Act 27 § 6301 (creating Wis. Stat. § 233.02(1)(h)). Second, it expressly qualified the Authority's power and duty to establish its employees' compensation and benefits with a countervailing "duty to engage in collective bargaining" under the Peace Act. *See* 1995 Wis. Act 27 § 6301 (creating Wis. Stat. 233.03(7) & 233.10(2)).

The legislature then removed these provisions in Act 10. It repealed the subsection reserving nonvoting board seats for the labor organizations representing the Authority's employees under the Peace Act and the Board's employees under SELRA. 2011 Wis. Act 10 § 370 (repealing Wis. Stat. § 233.02(1)(h)). Its repeal of the seat for the Board's employees can be attributed to Act 10's wholesale elimination of the Board, but not so for the seat that—until Act 10—was held by the organization (*i.e.*, SEIU) that represented the Authority's employees under the Peace Act. Second, the legislature struck out all the language that, in Act 27, it had included to impose a "duty to engage in collective bargaining" under the Peace Act:

> 233.03 (7) of the statutes is amended to read:
>
> Subject to s. 233.10 and ch. 40 and 1995 Wisconsin Act 27, section 9159 (4) ~~and the duty to engage in collective bargaining with employees in a collective bargaining unit for which a representative is recognized or certified under subch. I of ch. 111~~, employ any agent, employee or special advisor that the authority finds necessary and fix his or her compensation and provide any employee benefits, including an employee pension plan.
>
> . . .

[2] The University of Wisconsin Hospitals and Clinics Board is discussed further below. The legislature created the Board and its enabling statute in Act 27. 1995 Wis. Act 27 § 224m (creating Wis. Stat. § 15.96). It eliminated the Board by repealing its enabling statute in Act 10. 2011 Wis. Act 10 § 12.

> 233.10 (2) (intro.) of the statutes is amended to read:
>
> Subject to subs. (3), ~~(3m),~~ (3r) and (3t) and ch. 40 ~~and the duty to engage in collective bar- gaining with employees in a collective bargaining unit for which a representative is recognized or certified under subch. I of ch. 111~~, the authority shall establish any of the following:

2011 Wis. Act 10 §§ 372 & 378.

Again, this change confirms the legislature's intent, even standing on its own. There is only one plausible explanation for the legislature's decision to repeal the Authority's statutory "duty to engage in collective bargaining": the legislature eliminated that duty in Act 10. Just as with Section 111.02(7), SEIU asks this Court to interpret Sections 233.03(7) and 233.10(2) in a way that would "read language back into the statute that is no longer there." *Banuelos*, 2023 WI 25, ¶ 29.

Third, the legislature created, then repealed, numerous provisions reconciling the Authority's unusual former role as an "employer" under *both* the Peace Act *and* Chapter 40 of the Wisconsin Statutes.[3] In Act 27, the legislature added a subsection to Chapter 233, and amended many provisions in Chapter 40, to define when the Authority could collectively bargain under the Peace Act regarding fringe benefits that Chapter 40 authorized or required. *See* 1995 Wis. Act 27 § 3789r (creating Wis. Stat. § 111.17(2)); *id.* §§ 1949m, 1957r, 1959g, 1959r, 1960m, & 1963m (repealing and recreating Wis. Stat. §§ 40.02(25)(b)8., 40.05(4)(b), 40.05(5)(intro.), 40.05(5)(b)4., 40.05(6)(a), & 40.62(2) to authorize that certain fringe benefits be addressed either in collective bargaining agreements pursuant to the Peace Act or under

[3] Chapter 40 defines the Authority as a "state agency" and thus an "employer" for its purposes. Wis. Stat. §§ 40.02(28) & (54)(h). The Authority's employees also are "state employees" under Chapter 40. Wis. Stat. § 40.02(54t).

Wis. Stat. § 233.10). Then it undid every one of those changes in Act 10. It repealed the Peace Act subsection addressing the Authority's role as a Public Employee Trust Fund employer. 2011 Wis. Act 10 § 209 (repealing Wis. Stat. § 111.17(2)). And in modifying corresponding provisions in Chapter 40, it preserved references to Wis. Stat. § 233.10 while systematically deleting references to collective bargaining under the Peace Act. 2011 Wis. Act 10 §§ 66, 79, 83–85, & 90 (amending Wis. Stat. §§ 40.02(25)(b)8., 40.05(4)(b), 40.05(5)(intro.), 40.05(5)(b)4., 40.05(6)(a), & 40.62(2)).[4]

Fourth, the legislature used Act 27 to add—and Act 10 to remove—other Peace Act provisions that once applied specifically to the Authority. For example, it added, then repealed, a special Peace Act provision entitling the Authority's "fiscal and staff services," "patient care," and "science" employees each to organize their own collective bargaining units. 1995 Wis. Act 27 § 3782m & 2011 Wis. Act 10 § 195 (creating and repealing Wis. Stat. § 111.05(5)). In addition, it added and then repealed special notice requirements for lockouts and strikes by the Authority and its employees. 1995 Wis. Act 27 § 3789bc & 2011 Wis. Act 10 § 207 (creating and repealing Wis. Stat. § 111.115(2)).

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[4] The legislature did not repeal or amend Section 40.95(1)(a)3., which governs health insurance premium credits for Authority employees who were compensated with such credits in a collective bargaining agreement negotiated under the Peace Act. Likely this is because Act 10 did not itself terminate the collective bargaining agreement then in effect for the Authority's employees. *See* R.2:3 (¶ 8) (the Authority's collective bargaining agreement with SEIU expired in 2014). For over a decade, the official annotation for Section 40.95(1)(a) has read: "NOTE: Collective bargaining under subch. I of ch. 111 for employees of the University of Wisconsin Hospitals and Clinics Authority was eliminated by 2011 Wis. Act 10." Wis. Stat. Ann. § 40.95(1)(a); *see also* Wis. Stat. Ann. § 40.95(1)(a) (2013–14) (showing the same annotation).

Finally, the legislature directed that in dealing with former employees of the Wisconsin Hospitals and Clinics *Board*, which Act 10 eliminated, the Authority should set those employees' compensation and benefits without reference to *any* employment relations law, once their SELRA collective bargaining agreements expired. Act 10 transferred the Board's employees to the Authority. 2011 Wis. Act 10 § 9151(2). Until then, the Board and its employees were covered by SELRA. Wis. Stat. § 15.96 (2009–10); Wis. Stat. §§ 111.815(1), 111.825(1m), & 111.92(1)(b) (2009–10). In Act 10, the legislature instructed the Authority to "adhere to the terms of any collective bargaining agreement covering the [Board's] employees [under SELRA] that [was] in force" when the act took effect. 2011 Wis. Act 10 § 9151(2). But "[u]pon termination" of the SELRA agreement, it told the Authority to "establish the compensation and benefits of the [Board's former] employees," not under the Peace Act, but under *section 233.10 (2) of the statutes*." *Id.* (emphasis added). As discussed above, Section 233.10(2) is one of the provisions that, in Act 10, the legislature amended to remove language imposing a "duty to engage in collective bargaining" under the Peace Act. *See* 2011 Wis. Act 10 § 378. In combination, Sections 378 and 9151(2) of Act 10 made clear: the Board's former employees would *not* collectively bargain with the Authority once their SELRA agreements expired.

As both WERC and the circuit court ruled, this wealth of statutory history "provides clear determinative evidence of the Wisconsin Legislature's intent." R.12:39 (WERC R.177), A-App.6; R.42, Tr. 22:8–9, A-App.29 ("[T]he statutory history is clear."). The legislature "intentionally br[ought] [the Authority] within the umbrella of the Peace Act" in Act 27, and in Act 10, it "removed all of those statutes," repealing

not only the "language that said the [Authority] is considered an employer for purposes of the Peace Act," but also "the language limiting [the Authority's] power to set employee benefits and compensation by the duty to collectively bargain," as well as many other provisions that "explained how [the Authority] was supposed to go about collectively bargaining." R. 42:24–26, Tr. 24:21–26:1, A-App.31–33. "The removal of all this language, as shown by statutory history, does itself reveal an intent to no longer put under the Peace Act the [Authority], where it otherwise does not fit." R.42, Tr. 26:2–5, A-App.33. "It shows and it was an intent to remove the affirmative duty to collectively bargain pursuant to the Peace Act." *Id.* at Tr. 26:5–7, A-App.33; *see also* R.12:39–40 (WERC R.177–78), A-App.6–7 ("Act 10's specific deletion of all statutory references related to the [Authority] as a Peace Act 'employer' clearly establishes that the [Authority] is not an 'employer' within the plain meaning of Wis. Stat. § 111.02(7).").

"Contrary to the argument of SEIU, there are no plausible alternative explanations for the legislative deletions reflected in Act 10." R.12:40 (WERC R.178), A-App.7. SEIU feints at a counter-explanation, SEIU Br. at 36–42, but fails even to acknowledge, let alone explain, most of the material enactments in Acts 27 and 10. SEIU never addresses the legislature's decision to enact, then repeal, Chapter 233's text imposing a "duty to engage in collective bargaining" under the Peace Act. 1995 Wis. Act 27 § 6301; 2011 Wis. Act 10 §§ 372 & 378. It never addresses the legislature's decision to create, then eliminate, a nonvoting board seat for the labor organization that once represented the Authority's employees under the Peace Act. *See* 1995 Wis. Act 27 § 6301; 2011 Wis. Act 10 § 370. It never addresses the numerous provisions the legislature

enacted, then repealed, to reconcile the Authority's dual roles as an "employer" under both the Peace Act and Chapter 40. *See* 1995 Wis. Act 27 §§ 1949m, 1957r, 1959g, 1959r, 1960m, 1963m, & § 3789r; 2011 Wis. Act 10 §§ 66, 79, 83–85, 90, & 209. And it never addresses the legislature's direction requiring the Authority to determine compensation and benefits for the Board's former employees solely under Wis. Stat. § 233.10(2), not pursuant to collective bargaining under the Peace Act. *See* 2011 Wis. Act 10 §§ 378 & 9151(2).

Nor does SEIU plausibly explain the minority of enactments it *does* address. SEIU speculates—contrary to legislative history covered in Section III below—that in Act 27, the legislature added the Authority to Section 111.02(7)'s text solely as a temporary "effort to make clear that [the Authority's] workers would be governed by the Peace Act—not the federal NLRA or SELRA." SEIU Br. at 39. That explanation contradicts SEIU's (incorrect) argument that the *current* text of Section 111.02(7) "plainly" covers the Authority. It also reduces to surplusage the text that, in Act 27, the legislature added to define the Authority as "person who engages the services of an employe" "[f]or the purposes of" Section 111.02(7). *See* p. 24, *supra*. Further the legislature already was using *Chapter 233* to make abundantly clear that the Authority would be governed by the Peace Act. As discussed above, it memorialized the Authority's "duty to engage in collective bargaining [under the Peace Act]" in two different provisions of Chapter 233. 1995 Wis. Act 27 § 6301 (creating Wis. Stat. 233.03(7) & 233.10(2)). Having done so, it had no reason to add *unnecessary* text to Section 111.02(7) to further "clarify" that the Authority was covered. The legislature amended Section 111.02(7) in Act 27 because it needed to substantively change the law.

SEIU also fails to plausibly explain the legislature's decision, in Act 10, to repeal the Peace Act provision entitling the Authority's "fiscal and staff services," "patient care," and "science" employees each to organize their own collective bargaining unit, as well as its special notice requirements for lockouts and strikes by the Authority and its employees. SEIU speculates those provisions already had served a supposed purpose of covering a "transition period when some hospitals and clinics workers were moved from a SELRA-regulated labor relations relationship to a Peace Act labor relations relationship" after Act 27. SEIU Br. at 39–41. But that explanation clashes with Act 27's structure. If the provisions were merely transitional, the legislature likely would have—but did not—put them in Section 9159(2) of Act 27. *See* 1995 Wis. Act 27 § 9159(2) ("UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY; TRANSITIONAL PROVISIONS"). Further, if SEIU were correct that Act 10 left the Authority in the Peace Act, Act 10 would have inaugurated a *second* transition period from SELRA to the Peace Act—one for the former Board employees who joined the Authority after Act 10. *S*ee p. 29, *supra*. The legislature would have addressed that transition if SEIU were right about Act 10's effect. Instead, as discussed above, it directed the Authority to determine compensation and benefits for the Board's former employees solely under Wis. Stat. § 233.10(2), not under the Peace Act or any other employment relations law. 2011 Wis. Act 10 §§ 378 & 9151(2).

SEIU claims the legislature should have done *more* to remove the Authority from the Peace Act, *see* SEIU Br. at 41, but the legislature spoke with more clarity than needed when enacting the laws discussed above. Nor is *State v. Yakich* to the contrary. There, all the legislature

removed from the statute at issue was a cross-reference to another statute that applied independently (with or without the cross-reference) by virtue of longstanding Wisconsin case law. 2022 WI 8, ¶ 35, 400 Wis. 2d 549, 970 N.W.2d 12. The question was whether, in eliminating the cross-reference, the legislature also intended to override that line of cases. The Supreme Court said no. Citing the presumption that "[w]hen the legislature enacts a statute, it is presumed to act with full knowledge of the existing laws," the Court concluded that if the legislature had wanted to "override decades of accepted Wisconsin jurisprudence," it needed to do more than eliminate an extraneous cross-reference. *Id.* That is, as the U.S. Supreme Court has said in another context, the legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

Here, there may be an elephant, but there is no mousehole: the legislature's elimination of every provision tying the Authority to the Peace Act leaves no mistake as to its intent. And if SEIU really contends those amendments could be read in some other, less obvious way, then it has opened the argument to the very ambiguity it claims doesn't exist—and so to legislative history, which is addressed in Section III below.

B. Related statutes in Chapters 233 and 40

The Court must also interpret Section 111.02's text "in relation to the language of surrounding or closely-related statutes." *Kalal*, 2004 WI 58, ¶ 46. Like the statutory history found in Acts 27 and 10, related statutes in Chapters 233 and 40 show the Authority cannot be construed as a "person who engages the services of an employee" for purposes of the Peace Act.

As currently written, due to Act 10's changes, Sections 233.03(7) and 233.10(2) make the Authority's power and duty to set compensation and benefits "subject to" several enumerated statutes and laws—but not to the Peace Act. *See* Wis. Stat. § 233.03(7) ("Subject to s. 233.10 and ch. 40 and 1995 Wisconsin Act 27, section 9159(4) . . . ."); Wis. Stat. § 233.10(2) ("Subject to subs. (3), (3r) and (3t) and ch. 40, the authority shall establish . . . ."). This precludes any interpretation that would make the Authority's power and duty to set compensation and benefits subject to the Peace Act, as it was before Act 10. *See Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 3, 411 Wis. 2d 389, 5 N.W.3d 238 ("Under the doctrine of expressio unius est exclusio alterius, the express mention of one matter excludes other similar matters that are not mentioned." (quotation marks and brackets omitted)).

Chapter 233 also never refers to the Authority as a "corporation," contradicting SEIU's position that it must be deemed a "corporation" for purposes of Section 111.02(10). Chapter 233 uses the word "corporation," *see* Wis. Stat. §§ 233.03(9) and 233.04(7m)(c), but never in reference to the Authority. Rather, it calls the Authority a "public body corporate and politic," Wis. Stat. § 233.02(1), a phrase appearing nowhere in the Peace Act. True, *Rouse* found the Authority qualifies as a "*political* corporation" for purposes of Wis. Stat. § 893.80, which governs notice requirements for claims against public bodies. *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 2, 302 Wis. 2d 358, 735 N.W.2d 30 (emphasis added). But unlike Section 893.80, the Peace Act does not refer to "political" corporations, and Chapter 233 does not classify the Authority as a "corporation" for all purposes. Surely the legislature would have called the Authority a "corporation" in Chapter 233—or alternatively would

have added the phrase "public body corporate and politic" to Section 111.02—if it had wanted the Peace Act's plain language to cover the Authority. Instead, it added—then later repealed—the former statutory text stating that "[f]or purposes of [the Peace Act], a person who engages the services of an employe includes the University of Wisconsin Hospitals and Clinics Authority." 1995 Wis. Act 27 § 3782g.

In addition, due also to Act 10's changes, Chapter 40 currently contains numerous provisions that reconcile Chapter 40 with Wis. Stat. § 233.10—and with collective bargaining agreements negotiated by state or municipal employers under SELRA or MERA—but no such provisions that would enable the Authority to collectively bargain as a Chapter 40 "employer." *See* Wis. Stat. §§ 40.02(25)(b)8., 40.05(1)(b)1., 40.05(4)(b), 40.05(5)(intro.), 40.05(5)(b)4., 40.05(6)(a), 40.51(7)(a), 40.62(2), 40.80(3), & 40.81(3). For example, Section 40.80 governs the deferred compensation board's administration of deferred compensation plans used by state agencies. Wis. Stat. § 40.80(1); *see also* Wis. Stat. § 40.02(54)(h) (the Authority is a "state agency" for purposes of Chapter 40). The board's actions under Section 40.80 explicitly apply to collective bargaining agreements that other agencies negotiate under SELRA—but not to any agreement the Authority might negotiate under the Peace Act. Wis. Stat. § 40.80(3). The only plausible inference is that the Authority no longer *can* bargain collectively under the Peace Act. In fact, post-Act 10, the only Chapter 40 provision even referring to the Peace Act is § 40.95(1)(a)3. Again, the official annotation for that paragraph is: "NOTE: Collective bargaining under subch. I of ch. 111 for employees of the University of Wisconsin Hospitals and Clinics Authority was eliminated by 2011 Wis. Act 10." Wis. Stat. Ann. § 40.95(1)(a).

The Peace Act's definition of "employer" thus cannot be read to include the Authority, even considering nothing beyond current statutory text, improperly shorn of its historical context. Construing the Peace Act to cover the Authority would put Section 111.02 in conflict with Chapters 233 and 40, violating the canon that the "provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *In re T.L.E.-C.*, 2021 WI 56, ¶ 30, 397 Wis. 2d 462, 960 N.W.2d 391 (quotation marks omitted).

C. SEIU's blinkered interpretation in untenable.

SEIU urges this Court to limit its consideration solely to the intrinsic sources SEIU believes supports its position: Section 111.02's current definitions of "employer" and "person" as well as the text of Section 990.01(26), which offers a different definition of "person." *See* SEIU Br. at 19–22 & 25–28. That approach would be mistaken, as shown in Section I above. "[A]scertaining the plain meaning of a statute requires more than focusing on a single sentence or portion thereof." *Brey*, 2022 WI 7, ¶ 11 (quotation marks omitted)). "Statutory interpretation centers on the ascertainment of meaning, not the recitation of words in isolation." *Id.* ¶ 13 (quotation marks omitted). Thus, in *Brey*, the Supreme Court held that "[b]y declining to address statutory context, the court of appeals erroneously confined its statutory analysis to [a] definition in Wis. Stat. § 632.32(2)(d)," when it "should have instead "interpreted the definition in the context in which it is used," including relevant statutory history. *Id.* (brackets omitted)); *see also id.* ¶ 20. SEIU invites the Court to make the same error here.

The cases SEIU relies upon also belie its claim that Section 990.01(26)'s definition of "person"—which "includes all . . . bodies politic or corporate"—applies to and indirectly brings the Authority under the

Peace Act. The legislature directed that, before construing a statute's text consistent with Section 990.01, a court must examine whether "such construction would produce a result inconsistent with the manifest intent of the legislature." Wis. Stat. § 990.01(intro.). The Supreme Court did exactly that in *City of Madison v. Hyland, Hall & Company* and *Benson v. City of Madison* before concluding that cities and counties are "corporations" for purposes of Wisconsin's antitrust act and fair dealership law. *See Hyland*, 73 Wis. 2d 364, 369–71, 243 N.W.2d 422 (1976); *Benson*, 2017 WI 65, ¶¶ 24–33, 376 Wis. 2d 35, 897 N.W.2d 16.

Here, it could hardly be clearer that relying on Section 990.01(26) to deem the Authority a "corporation" and thus an "employer" for purposes of the Peace Act "would produce a result inconsistent with the manifest intent of the legislature." Wis. Stat. § 990.01(intro.). The legislature manifested its contrary intent when it enacted Act 10, which itself undid earlier changes wrought by Act 27, and in the current text of Chapters 233 and 40, as detailed in Sections II.A and II.B above.

The circumstances in *Hyland* and *Benson* were quite different. There, the legislature had enacted no laws manifesting intent to remove cities or counties from Wisconsin's antitrust act or fair dealership law. Absent such manifest intent, treating cities and counties as "corporations" for purposes of those laws was an easy call. The legislature directs cities to "incorporate" under Sections 66.0201–66.0213, and Chapter 66 explicitly calls incorporated cities municipal "corporations." *See* Wis. Stat. §§ 66.0201(1), 66.0203, 66.0213(1); *Hyland*, 73 Wis. 2d at 370; *Benson*, 2017 WI 65, ¶¶ 24, 27, & 29. And while "a county is not, strictly speaking, a municipal corporation, [the Supreme

Court] has held that it is a 'quasi-municipal corporation'" in cases dating back to 1920. *Hyland*, 73 Wis. 2d at 370 (collecting cases).

More than anything else, *Benson* confirms the folly of SEIU's attempt to evade the intent manifested so clearly in Acts 27 and 10. "What is of paramount importance is that the legislature be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Benson*, 2017 WI 65, ¶ 30 (brackets omitted). Here, the legislature must be able to rely on litigants and the courts to follow the Supreme Court's rules requiring them to consider—and to objectively construe and honor—Acts 27 and 10 when interpreting the Authority's role, if any, in the Peace Act. Refusing to give effect to the laws that the legislature enacted in Acts 27 and 10 would upend the legislature's legitimate expectations and undermine the legitimacy of the courts.

D. The Authority is not a "political subdivision" of the state for purposes of the Peace Act.

The Authority concurs, however, with SEIU's conclusion (without endorsing all its reasoning) that the Authority is not a "political subdivision" of the state for purposes of the Peace Act. *See* SEIU Br. at 28–32. The term "political subdivision" takes on varied meanings in state and federal law, but it does not cover the Authority as it is used in the Peace Act. That part of the circuit court's reasoning was mistaken. (WERC, which this Court directly reviews, did not make the same error.)

As detailed above, Acts 27 and 10 show that the legislature first added the Authority to, then later subtracted it from, the Peace Act's category of *persons who engage the services of employees*. *See* 1995 Wis. Act 27 § 3782g; 2011 Wis. Act 10 § 188. The legislature did not subtract the Authority from, then add it back to, the Peace Act's exclusion of

"political subdivisions" of the state. *See id.* It made no material amendments to that part of Section 111.02(7) in Acts 27 or 10. *See* 1995 Wis. Act 27, § 3782g; 2011 Wis. Act 10, §§ 188–189. This demonstrates that it never regarded the Authority as a "political subdivision" of the state for purposes of the Peace Act.

In fact, the legislature's amendment of Section 111.02(7) in Act 27—and the prior version of Section 111.02(7) itself—would have been incoherent if the Authority were a "political subdivision" of the state for purposes of the Peace Act. In that case, as amended by Act 27, the statutory text would have *included* the Authority as a "person who engages the services of an employee" while simultaneously *excluding* it as a "political subdivision" of the state:

> 111.02 (7) of the statutes is amended to read:
>
> The term "employer" *means a person who engages the services of an employe* and includes any person acting on behalf of an employer within the scope of his or her authority, express or implied, *but shall not include the state or any political subdivision thereof*, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact. *For purposes of this subsection, a person who engages the services of an employe includes the University of Wisconsin Hospitals and Clinics Authority*.

1995 Wis. Act 27 § 3782g (emphasis added).

In the context of MERA, WERC construes the term "political subdivision" of the state as limited to "entities with territorial boundaries which are able to levy taxes and were created to perform essential governmental services for its citizens." *Wisconsin Hous. & Econ. Dev. Auth.*, WI Emp. Rel. Com. Dec. No. 21780 at 5 (WERC June 12, 1984). That is also the best construction of "political subdivision" as

the term is used in the Peace Act. As Acts 27 and 10 confirm, it does not cover the Authority.

III. Legislative history confirms the legislature's intent.

The Court must consult legislative history if its plain-meaning analysis of intrinsic sources, including Acts 27 and 10, leaves ambiguity. *See Brey*, 2022 WI 7, ¶ 21; *Kalal*, 2004 WI 58, ¶¶ 50–51. And as the circuit court put it, "the legislative history could not be more clear." R.42, Tr. 21:16–17, A-App.28; *accord* R.12:40 (WERC R.178) at n.2, A-App.7. The legislative history confirms "the very clear and publicly announced intent of the legislature when enacting Act 10 to remove the collective bargaining rights of [Authority] employees." R.42, Tr. 26:11–13, A-App.33.

Most clearly, the Legislative Reference Bureau analysis atop the bill that passed as Act 10 told the voting legislators that the bill "eliminate[d] the rights of [the Authority's] employees to collectively bargain." 2011 A.B. 11 at 2. That plain and public statement "is indicative of legislative intent" because it was "printed with and displayed on the bill when it [was] introduced in the Legislature." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 32, 295 Wis. 2d 1, 719 N.W.2d 408; *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995) (the LRB's analysis is "attached to the bill when it [is] considered by lawmakers" and thus "is significant in determining legislative intent").

Nor does the evidence end with the unusually clear and on-point text printed on the 2011 bill. The history behind Acts 27 and 10, and even after Act 10, all confirms the same thing: the legislature amended the Peace Act in Act 27 to bring the Authority under its terms, then intentionally ended collective bargaining at the Authority in Act 10.

A. Act 27

Act 27's legislative history shows that the legislature amended Section 111.02(7)'s text because otherwise, the Authority would not have been "a person who engages the services of an employe" for purposes of that subsection. The circuit court cited this legislative history in its ruling. *See* R.42, Tr. 22:18–24:1, A-App.29–31. Under the initial bill drafted to create the Authority, SELRA coverage for certain Authority employees was extended to July 1, 1997, but the drafters understood that "[a]fter that date, no employment relations act would apply to [the Authority's] employees." R.8:4 (WERC R.94), Wis. Legis. Fiscal Bureau, *Restructuring of UW Hospitals and Clinics: Overview*, Issue Paper No. 945 to J. Comm. on Fin. at 16 (May 2, 1995) (*Issue Paper 945)* (available in drafting file for 1995 Wis. Act 27, Wis. Legis. Ref. Bureau, Madison, Wis.). The drafters saw that under the initial bill, after SELRA coverage expired, the Authority's employees "would no longer have the right to bargain collectively under state laws applicable to state employes." R.9:9 (WERC R.110), Legislative Audit Bureau, *Proposal provided with letter to Senator Leean and Rep. Brancel* at 4 (Apr. 25, 1995) (available in the drafting file for 1995 Wis. Act 27). Therefore, they introduced an amendment "allowing the Hospitals Authority and its employes to bargain under the Wisconsin Employment Peace Act" and "subjecting the Hospitals Authority's power to determine employe compensation and benefits . . . to its duty to engage in collective bargaining." *Id.*

This confirms why, in Act 27, the legislature amended Section 111.02(7) to state that "[f]or purposes of this subsection, a person who engages the services of an employe includes the [Authority]," 1995 Wis. Act 27 § 3782g—and why it modified its draft of Chapter 233 to impose a "duty to engage in collective bargaining" under the Peace Act, *id.*

§ 6301 (creating Wis. Stat. 233.03(7) & 233.10(2)). Were it not for those enactments, the Authority would not have been "a person who engages the services of an employe" for purposes of Section 111.02(7). "[T]he legislature felt a need to be very explicit in saying [the Authority] is going to fall under the Peace Act. . . . They did that because, as they read the Peace Act, [the Authority] would otherwise not fall under it." *See* R.42, Tr. 22:18–23, A-App.29.

B. Act 10

As noted above, the bill enacted as Act 10 declared on its face that it "eliminate[d] the rights of [the Authority's] employees to collectively bargain." 2011 A.B. 11 at 2. The Department of Administration's fiscal estimate also confirmed that the bill "eliminates collective bargaining for the University of Wisconsin Hospitals and Clinics Authority." Wis. Dept. of Administration, Div. of Executive Budget and Finance, *Fiscal Estimate – 2011 Session: AB-0011 (JR1)* (Feb. 15, 2011) at 2. The Legislative Council confirmed this, too, when Act 10 took effect. Its Act Memo said: "Act 10 eliminates collective bargaining for . . . employees of the UW Hospitals and Clinics Authority." Wis. Legislative Council, *Act Memo: 2011 Wisconsin Act 10* (May 9, 2011) at 9; *see also State v. Jensen*, 2010 WI 38, ¶ 48–49, 324 Wis. 2d 586, 782 N.W.2d 415 (considering amendment memo and act memo prepared by the Legislative Council).

C. Post-Act 10

After Act 10 passed, SEIU itself confirmed the public's knowledge that the legislature had ended collective bargaining at the Authority. SEIU joined a federal lawsuit in 2011 and pleaded in the complaint that Act 10 "extinguishes collective bargaining rights for certain employees of the UW Hospitals Authority and UW Hospitals Board" by "removing UW Hospitals Authority employees . . . from WEPA [the Peace Act]." R.26:17–

18, Compl. ¶ 44. SEIU also told the federal court that Act 10 "strips *all* rights to engage in collective bargaining from a class of public employees that includes employees of the UW Hospitals and Clinics Authority [and] the UW Hospitals and Clinics Board." R.27:19, Br. at p.10 n.9) (emphasis in original).

More recently, Wisconsin legislators further confirmed the public's understanding that Act 10 ended collective bargaining at the Authority. Over forty senators and assemblypersons introduced twin bills proposing to restore collective bargaining at the Authority. *See* 2021 S.B. 404 (June 10, 2021); 2021 A.B. 438 (July 1, 2021). The legislators proposed to again define the Authority as a "person who engages the services of an employee" for purposes of Section 111.02(7). 2021 S.B. 404 § 13; 2021 A.B. 438 § 13. They also sought to reverse the other relevant changes that Act 10 wrought to Chapters 40, 111, and 233. *See, e.g.*, 2021 S.B. 404 §§ 2–8, 14–15, 22, 30, 34, 37–38, 42; 2021 A.B. 438 §§ 2–8, 14–15, 22, 30, 34, 37–38, 42. The top of each bill read:

> This bill allows employees of the [Authority] to collectively bargain over wages, hours, and conditions of employment. Under current law, employers and employees are prohibited from collective bargaining except as expressly provided in the statutes. Prior to changes made by 2011 Wisconsin Act 10, employees of the [Authority] had the right to collectively bargain over wages, hours and conditions of employment, and [the Authority] was required to bargain over those subjects. The bill restores those rights . . .

2021 S.B. 404 at 1–2; 2021 A.B. 438 at 1–2. Both bills failed, establishing that the legislature *still* intends that the Authority not bargain collectively under the Peace Act. *See In re Gwenevere T.*, 2011 WI 30, ¶ 27, 333 Wis. 2d 273, 797 N.W.2d 854 (considering for purposes of statutory interpretation the legislature's rejection of proposed changes to a statute).

IV. The Attorney General's analysis was mistaken.

It was a 2022 Attorney General's opinion that gave SEIU the idea to recant its public admission (in its federal lawsuit) that Act 10 removed the Authority from the Peace Act. SEIU continues to rely on that opinion here. *See* SEIU Br. at 22–23, 28, 31, 36–37, 40–41; A-App.41–51. "An Attorney General's opinion is only entitled to such persuasive effects as the court deems the opinion warrants." *De La Trinidad v. Capitol Indem. Corp.*, 2009 WI 8, ¶ 15, 315 Wis. 2d 324, 759 N.W.2d 586 (quotation marks omitted). Neither WERC nor the circuit court relied on the Attorney General's opinion at all. This Court should not either.

Notably, the Attorney General did "not reach a conclusion" on whether the Peace Act covers the Authority. Wis. Op. Att'y Gen. OAG-01-22, ¶ 2 (June 2, 2022). He was not asked to. He was responding to a request where the Governor in fact acknowledged that Act 10 removed the Authority from the Peace Act's definition of "employer." Office of the Governor Tony Evers, *Request for a formal opinion of the attorney general* (Mar. 21, 2022) at 1.

Nor did the Attorney General carefully examine—or benefit from briefing on—the question at hand. He assumed without analysis that the Authority is a "person who engages the services of an employee" for purposes of Section 111.02(7), OAG-01-22, ¶ 6. He devoted most of his attention to the point that the Authority is neither the state nor a "political subdivision" of the state for purposes of the Peace Act. *Id.* ¶¶ 7–14. He also conflated statutory history and legislative history in his approach to statutory interpretation. *Id.* ¶¶ 16–17. His scant discussion of statutory history further reveals that he did not consider, and likely was unaware of, nearly all the relevant enactments in Acts 27 and 10. *Compare* Sections II.A & II.B, *supra*, *with* OAG-01-22, ¶¶ 18–19. And he

missed nearly all the material legislative history too, including the LRB's advice to voting legislators that the bill they were about to enact "eliminates the rights of [the Authority's] employees to collectively bargain." 2011 A.B. 11 at 2. *Compare* Section III, *supra*, *with* OAG-01-22, ¶ 20.

Further, the Attorney General, a partisan official, must be distinguished from the non-partisan judiciary. Here, before responding to the Governor's request for an opinion letter, the Attorney General joined other leaders of his political party in publicly advocating for unionization at the Authority. *See* Wisconsin Examiner, *At Capitol rally, nurses raise their voices for union rights*, https://wisconsinexaminer.com/2021/05/10/at-capitol-rally-nurses-raise-their-voices-for-union-rights/. Nothing barred that advocacy, but it highlights that the Attorney General is not required to be impartial regarding partisan issues, in contrast to judges. Likely this is one reason why the Attorney General's office cautions parties not to request opinions on issues subject to "reasonably imminent" litigation—advising that "the court's decision" should answer such questions and that "opinions of the Attorney General should not be utilized for the purpose of briefing current litigation." 62 Op. Att'y Gen. Preface ¶ 7 (1973).

CONCLUSION

Ruling for SEIU would require this Court to negate the legislature's enactments in Act 10 by "read[ing] language back into" the statutes "that is no longer there." *Banuelos*, 2023 WI 25, ¶ 29. The Court instead should affirm WERC's decision.

Dated this 28th day of August, 2024.

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,973 words.

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