STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2024AP0717

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE WISCONSIN,

Petitioner-Appellant,

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY,

Other Party-Respondent,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent-Respondent.

# REPLY BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE WISCONSIN

PINES BACH LLP
Tamara B. Packard, SBN 1023111
Elizabeth M. Pierson, SBN 1115866
122 West Washington Ave., Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
tpackard@pinesbach.com
epierson@pinesbach.com

*Attorneys for Petitioner Service Employees International Union Healthcare Wisconsin*

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## INTRODUCTION

UWHCA has lost track of one crucial thing: the Peace Act's text. Under the plain language of the statute, UWHCA is a person and therefore an employer and thus subject to the Act's requirements, including collective bargaining. UWHCA's answer to SEIU's textual arguments is to point in a dozen different directions: past versions of the Act, other statutes, comments from legislative staffers, and even previous statements made by SEIU. But none of these can defeat the language of the statute, under which UWHCA is an employer required to engage in collective bargaining.[1]

## ARGUMENT

### I. UWHCA ignores the text of the statute.

UWHCA is so focused on its interpretation of the statutory history of the Act, it ignores the text of the statute. "'Employer' means a person who engages the services of an employee…." Wis. Stat. §111.02(7)(a). As explained in SEIU's opening brief, this plainly includes UWHCA. (Br. 19–22.) UWHCA does not and cannot argue that this text is ambiguous or does not encompass UWHCA as an employer. Nor does WERC.[2]

As explained below, UWHCA's arguments about statutory and legislative history cannot overcome the fundamental reality of the current statutory text.

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[1] WERC filed a short non-substantive response to SEIU's Brief ("WERC Br."). This reply primarily addresses UWHCA's Response Brief ("Resp.").

[2] Contrary to the dicta cited by UWHCA (Resp. 11), this includes **all** Wisconsin employers unless statutorily excluded or preempted by the NLRA. *See* Br. 36-37.

## II. The statutory history does not and cannot contradict the text.

UWHCA seeks to elevate its interpretation of the statutory history above the actual text of the statute, but this is not viable. UWHCA overreads the cases it cites on statutory history.[3] An accurate reading of those cases and the Act's statutory history confirms the plain meaning of the text.

### A. The text of the present statute comes first.

*Brey v. State Farm Mutual Automobile Insurance Company* and *Banuelos v. UWHCA* are both consistent with *State ex rel. Girouard v. Jackson County Circuit Court*, and neither stands for the proposition that statutory history can *override* statutory text. SEIU agrees that courts can consider statutory history as part of a plain meaning analysis. (Br. 23.) UWHCA errs in elevating statutory history over current statutory text. In *Brey v. State Farm Mutual Automobile Insurance Company*, the Court began by examining the plain text of the statute, including provisions surrounding the *then-current* statute. 2022 WI 7, ¶¶11–19, 400 Wis.2d 417, 970 N.W.2d 1. Then it turned to the statutory history, which "fortifie[d] [the Court's] plain-meaning analysis." *Id.* ¶20. The Court in *Banuelos v. UWHCA* followed the same path: "we examine first the text…Next we look to…statutory history," 2023 WI 25, ¶15, 406 Wis.2d 439, 988 N.W.2d 627. UWHCA misconstrues the Court's refusal in *Banuelos* to allow charges for medical records after the statute was amended to remove that authority. (Resp. 17.) The Court did not arrive at its ruling based on that history, as UWHCA would have

[3] UWHCA also misrepresents the circuit court's reasoning on statutory history. The circuit court never ruled that "statutory history *must* be considered in determining the Peace Act's plain meaning." (Resp. 14, emphasis added.) It simply conducted a statutory history analysis.

it. Rather, the plain language did not allow charges for medical records and the Court refused to read such allowance in. 2023 WI 40, ¶¶24, 29.

Nor do *Richards v. Badger Mut. Ins. Co.* or *State v. Williams* meaningfully change the state of play, because both involved statutes with ambiguous text. *Richards* did indeed begin its analysis by discussing statutory history, but it did not privilege this analysis above the statutory text. Instead, it noted that the current text of the statute was ambiguous, and the statutory history did not resolve the ambiguity. 2008 WI 52, ¶27, 309 Wis.2d 541, 749 N.W.2d 581. The causal link UWHCA seeks to draw—arguing that the Court used statutory history to create ambiguity in a clear statute (Resp. 17)—is absent from the Court's decision. Rather, although the opinion begins with a discussion of statutory history, it in fact looked to that history to clarify ambiguities existing in the *present text*, consistent with the Court's treatment of statutory analysis in other cases. In *Williams*, too, the Court began by reviewing the statutory text and acknowledging its ambiguity. *State v. Williams*, 2014 WI 64, ¶21, 355 Wis.2d 581, 852 N.W.2d 467. No party claims the Peace Act is ambiguous, so these cases fail to offer an analytical model applicable here.

UWHCA newly urges the Court to analyze "legislative acts" on par with statutes, but this argument also fails. (Resp. 18-19.) In UWHCA's examples, the Court looked at how legislative acts changed *the statute*. *Banuelos*, 2023 WI 25, ¶¶26–29; *State v. Cox,* 2018 WI 67, ¶10, 382 Wis.2d 338, 913 N.W.2d 780 ("[Statutory] history 'encompasses the previously enacted and repealed provisions of a statute.'" (citing *Richards*, 2008 WI 52, ¶22)). Indeed, 1995 Wisconsin Act 27 and 2011 Wisconsin Act 10, like all other legislative acts, simply describe changes made to existing statutes. Although courts do consider the effect of legislative acts, they specifically

consider their effect *on the statutes*; and practically speaking, there is no difference between looking at these changes in the Act, versus in the statute. There is no basis in statute or case law to import elements of legislative history of these acts into the statutory history analysis as UWHCA seeks to do. Ultimately, even if UWHCA is right that legislative acts, contrasted to statutes, have the effect of law, this is irrelevant because Acts 27 and 10 added nothing beyond revised statutory language, and more importantly, past legislative acts cannot supersede present statutory text.

UWHCA's analysis ignores the key first step in all the statutory history cases it cites: identifying an ambiguity in the statutory text--this step comes first in importance and analysis, if not in the drafting of the opinion. None of the cases it cites contradict or overturn the Court's earlier, directly-on-point pronouncement that "a court cannot resort to statutory history for the purpose of rendering an otherwise clear statute ambiguous." *State ex rel. Girouard v. Cir. Ct. for Jackson Cnty.*, 155 Wis.2d 148, 454 N.W.2d 792 (1990). Contrary to UWHCA's claim that the Court in *Girouard* intended to refer to legislative history, it specifically explained that the court of appeals had erred by hunting for ambiguity in *statutory* history. *Id.* Yet that is exactly what UWHCA asks the court to do here. Nothing in Supreme Court precedent allows it.

### B. UWHCA cannot overcome the reality that as a corporation and a body corporate and politic, it is a person covered by the Act.

In its effort to evade its collective bargaining responsibilities under the Peace Act, UWHCA tries unsuccessfully to write off statutory text and context and two controlling Supreme Court cases. These interpretive gymnastics fail.

UWHCA offers no reason why this court should defy the Supreme Court's ruling in *Rouse v. Theda Clark Med. Ctr., Inc.* that UWHCA is a political corporation. 2007 WI 87, ¶2, 302 Wis.2d 358, 735 N.W.2d 30. The Supreme Court reached that determination by examining the text of Wis. Stat. Ch. 233, from which UWHCA now tries to draw the opposite conclusion. *Id.* ¶¶2, 23–31; *contra* Resp. at 34–35. But UWHCA's statutory interpretation does not bind this court; the Supreme Court's does. UWHCA notes Ch. 233 does not use the word "corporation" in reference to UWHCA. (Resp. 34.) True enough, but not dispositive: the Supreme Court analyzed the statute and found that its "power and structure" showed it was a "political corporation." *Rouse*, 2007 WI 87, ¶31. And UWHCA cites no authority for its surprising assertion that because the Peace Act does not specifically name political corporations, they are not covered under its definition of "person." (Resp. 34.) Wisconsin law recognizes many types of corporations, partnerships, and companies, and the Peace Act need not name each sub-type to include them as employers. (*See* Br. 19-21, 25-28.) Moreover, one of the statutory provisions UWHCA cites refers to UWHCA's power to establish corporations or partnerships "[w]ith any *other person*[.]" Wis. Stat. §233.03(9)(a) (emphasis added). This provides yet more evidence that UWHCA is a person and thus an employer covered by the Peace Act.

### C. Statutory history can be used to interpret the text, but not to explore legislative intent, as part of a plain-meaning analysis.

To the extent that statutory history is relevant, its purpose is to help ascertain the meaning of the text of the statute, not the intent of the legislature in passing the statute. *State ex rel. Kalal v. Circuit Court for Dane*

*County*, 2004 WI 58, ¶¶38–44, 271 Wis.2d 633, 681 N.W.2d 815; *Banuelos,* 2023 WI 25, ¶¶16–17; *Brey,* 2022 WI 7, ¶11. Yet UWHCA primarily argues from statutory history that the Legislature *intended* to eliminate collective bargaining rights for UWHCA employees, not that it actually did so. (Resp. at 29–30.) While UWHCA claims to analyze "statutory history," it is actually talking about legislative intent. Where statutory text is unambiguous, legislative intent is irrelevant. *State ex rel. Kalal*, 2004 WI 58, ¶¶44–46.

**D. The statutory history supports SEIU's position.**

Even if the court considers statutory history, that history confirms that the Peace Act governs UWHCA, its employees and their chosen representatives. UWHCA seems to confuse what it believes was the legislative intent with the actual statutory history, claiming that there are "no plausible alternative explanations" of the statutory history besides its own. (Resp. 30.) But as shown in SEIU's Brief at 36–42, the statutory history simply shows that once UWHCA was explicitly listed under the definition of "employer" and later the reference was removed. That history does not change the plain meaning of the current Peace Act definition of "employer" and that UWHCA falls within that definition.

UWHCA argues five ways that Act 27 and Act 10 show why it is not subject to the Act (Resp. 24–29), but all five arguments fail. SEIU has already shown that provisions added by Act 27 but deleted by Act 10, which explicitly discuss the collective bargaining rights of UWHCA employees, are explained as having once been necessary for clarity during a transitional period, which ended when the Board was eliminated and all employees working in the hospitals and clinics became UWHCA

employees. (Br. 37–41.) This alone disposes of all five of UWHCA's arguments.

In addition, UWHCA fixates on the removal of language about collective bargaining in UWHCA's authorizing statute, and in Chapter 40 of the statutes, which governs the Wisconsin Retirement System. (Resp. 25–30, 33–36.) UWHCA's argument about removing employee representatives from the UWHCA's board of directors is particularly puzzling, unmoored as it is from any argument that collective bargaining units cannot be recognized unless they have a seat on the employer's board—which would be untrue. (Resp. 25–26.) UWHCA seeks the need for explicit collective bargaining obligations in statutes where such obligation simply does not belong. The Peace Act, by its plain text, applies to UWHCA and its employees. That is where the statutory collective bargaining obligation exists, and it need not appear elsewhere. Again, the fact that it briefly did can be explained by the confusion generated by changes made by Act 27. UWHCA explores the changes effected by Act 10 in exhaustive detail, but none of this detail changes the meaning of "employer" in the Act or the obligation for employers to collectively bargain, or undercuts SEIU's explanation for the changes.

What matters is not the Legislature's motivations when writing laws, but the laws it actually writes. "It is the enacted law, not the unenacted intent, that is binding on the public." *State ex rel. Kalal*, 2004 WI 58, ¶44. Put differently: "It is the *law* that governs, not the intent of the lawgiver.... Men may intend what they will; but it is only the laws that they enact which bind us." *Id.* ¶53, citing Antonin Scalia, *A Matter of Interpretation,* at 17 (Princeton University Press, 1997).

If the Legislature intended to eliminate collective bargaining rights for UWHCA employees, but failed to do so through Act 10, it has a remedy: it can pass a new law that accomplishes its goal.

**E. Legislative history has no place in this case.**

Because the statute is unambiguous, there is no need to consult legislative history, and legislative intent is irrelevant. *State ex rel. Kalal*, 2004 WI 58, ¶¶44-46. When a statute is unambiguous, a court *may* analyze legislative history, but only to "show[] how the legislative history supports our interpretation of a statute that is clear on its face." *Hamilton v. Hamilton,* 2003 WI 50, ¶37, 261 Wis.2d 458, 661 N.W.2d 832 (citation omitted).

Should this court consider legislative history, it contains ample evidence to confirm SEIU's plain text reading of the Peace Act. When the Legislature created UWHCA with 1995 Wis. Act 27, its aim was to move operational control over the hospitals and clinics at the University of Wisconsin toward a private-sector-like entity. Act 27 began that process, Act 10 moved it further along. First, Act 27 transferred operational control of the hospital and clinics from the University to two new entities, the UWHC Board and UWHCA, to create "a public-private partnership" that would "allow it the freedom and flexibility to expand and compete in an increasingly competitive health care market." (R.9:2-3.)

It was recognized that in doing so, some then-unionized employees would no longer be State employees subject to SELRA but *would* be able to "**continue to organize and join labor unions under federal law [the**

**NLRA]**." (R.9:9, emphasis added,[4] *see also* Br. 14-16.) To avoid a workforce partially organized under the NLRA and partially under SELRA, the University proposed, and the Legislature adopted, an amendment explicitly providing that UWHCA and its employees would be covered by the Peace Act, administered, as SELRA was, by WERC. *Id.*

With Act 10, the workers previously employed by the UWHC Board became UWHCA employees. 2011 Wis. Act 10, §§12, 377. Likewise, the transition period when some hospitals and clinics workers were moved from a SELRA-regulated environment to a Peace Act-regulated environment had passed, making obsolete the "Authority-specific provisions" of the Peace Act to aid that transition. In context, Act 10's deletion of the Peace Act's specific references to the UWHCA makes sense as the removal of no-longer-necessary terms.

UWHCA overreads the legislative history. It claims Act 10 "declared on its face" that it eliminated UWHCA employees' collective bargaining rights. (Resp. 42, *see also* Resp. 10.) But the bill made no such declaration; the analysis by the Legislative Reference Bureau did. Next, UWHCA says the Department of Administration's fiscal estimate "also confirmed" the elimination of these rights. *Id.* To the contrary, the fiscal estimate simply listed its "Assumptions Used in Arriving at Fiscal Estimate," of which one was the elimination of collective bargaining rights. Wis. Dept. of Administration, Div. of Executive Budget and Finance, *Fiscal Estimate* –

[4] UWHCA cites this document to note that SELRA would no longer apply to its employees, but ignores the second half of the very same sentence, noting the expected applicability of the NLRA. (Resp. 41.)

*2011 Session: AB-0011 (JR1)* (Feb. 15, 2011) at 2. An assumption is not a confirmation.

**F. Prior incorrect assumptions and analyses do not bind this court.**

A broader point must be made here: this court is not bound by previous mistaken assumptions, analyses, or arguments about Act 10 and the collective bargaining rights of UWHCA employees. That includes previous arguments made by SEIU. Without arguing any form of estoppel or laches, UWHCA seems to imply that because many people initially thought that Act 10 had eliminated collective bargaining rights for UWHCA employees, that must be right. (Resp. 42–43.) But courts and other adjudicative bodies can and do strike down laws, and reach other findings, that contradict past belief and practice, based on new arguments. This is how our judicial system works: sometimes the right interpretation does not appear immediately, but when it does, the court may not ignore it. *See, e.g.*, *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, 410 Wis.2d 1, 998 N.W.2d 370, *reconsideration denied* (Jan. 11, 2024) (striking down legislative maps for violating contiguity requirements); *Evers v. Marklein*, 2024 WI 31, 412 Wis.2d 525, 8 N.W.3d 395 (finding unconstitutional statutory provision passed in 2011 due to separation of powers concerns); *Univ. of Vermont*, 297 NLRB 291 (1989) (reversing a decades-old decision that NLRB had jurisdiction over an employer, based on new arguments).

Likewise, failed legislative efforts to amend the Act in 2021 to make UWHCA coverage again explicit offers nothing to the analysis. A "nonaction of the legislature…cannot be construed as an expression of legislative intent…The most that can be gleaned from these abortive attempts at amending the statute is the desire of some legislators to

express with greater clarity than does the present statute" the rights and obligations of UWHCA under the Peace Act. *City of Madison v. Hyland, Hall & Co.*, 73 Wis.2d 364, 372, 243 N.W.2d 422 (1976). "The failure of a bill to become enacted is in no way suggestive as to the state of the law in the absence of such legislation." *Sims v. Mason,* 25 Wis.2d 110, 130 N.W. 200 (1964).

### III. WERC has conceded SEIU's arguments.

WERC's response brief raised no new arguments in response to SEIU's opening brief, resting instead on its prior reasoning and pointing out that SEIU did not, in its opening brief, address *Brey v. State Farm Mut. Automobile Ins. Co.* (WERC Br. 8.) SEIU was not obliged to anticipate the respondents' arguments, and has now addressed *Brey* in section II.A. above. By failing to address SEIU's arguments, WERC has conceded them. *Reetz v. Advocate Aurora Health, Inc.,* 2022 WI App 59, ¶15, 405 Wis.2d 298, 983 N.W.2d 669.

## CONCLUSION

For the reasons above, Service Employees International Union Healthcare Wisconsin respectfully requests that the court reverse the Wisconsin Employment Relations Commission's declaratory ruling and remand it to the agency for specific further proceedings.

Respectfully submitted this 12th day of September 2024.

PINES BACH LLP

*Electronically signed by Tamara B. Packard*
Tamara B. Packard, SBN 1023111
Elizabeth M. Pierson, SBN 1115866
122 West Washington Ave., Suite 900

Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
tpackard@pinesbach.com
epierson@pinesbach.com

*Attorneys for Petitioner Service Employees International Union Healthcare Wisconsin*

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

Respectfully submitted this 12th day of September 2024.

PINES BACH LLP

*Electronically signed by Tamara B. Packard*
Tamara B. Packard, SBN 1023111
Elizabeth M. Pierson, SBN 1115866
122 West Washington Ave., Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
tpackard@pinesbach.com
epierson@pinesbach.com

*Attorneys for Petitioner Service Employees International Union Healthcare Wisconsin*