STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

ABBOTSFORD EDUCATION ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 47, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1215, BEN GRUBER, BEAVER DAM EDUCATION ASSOCIATION, MATTHEW ZIEBARTH, SEIU WISCONSIN, TEACHING ASSISTANTS' ASSOCIATION, LOCAL 3220, AMERICAN FEDERATION OF TEACHERS, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 695,

Plaintiffs,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, JAMES J. DALEY, DEPARTMENT OF ADMINISTRATION, KATHY BLUMENFELD, DIVISION OF PERSONNEL MANAGEMENT, and JEN FLOGEL,

Defendants.

Case No. 23CV3152

Declaratory Judgment 30701

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

The Court has ruled that the differential treatment between "general" and "public safety" employees created by 2011 Wisconsin Act 10 ("Act 10") violates the equal protection guarantee in Article I, Section 1 of the Wisconsin Constitution. *See* Dkt. 118. To move this case to judgment, the Court ordered the parties to identify "what sections of Act 10 must be severed and struck under [its] ruling." *Id.* at 24. Plaintiffs and the State Defendants—the government officials who administer Wisconsin's collective bargaining laws—have done so, and largely agree on which provisions the Court should strike to remedy the fact that Act 10's distinction between "general" and "public safety" employees violates the Constitution on its face. *See infra* Part I.

The Legislature, in contrast, advances a breathtaking proposal. After spending more than 20 pages asking the Court to reconsider its decision on the merits, the Legislature contends that, if the Court adheres to its determination that Act 10 violates the Constitution, it should allow Act 10's unconstitutional provisions to stand statewide. In the alternative, the Legislature argues that the Court should rewrite Wisconsin labor law by deleting Act 10's definition of "public safety employees" and then delegating the decision of which employees fall within that now-undefined "public safety" group to an administrative agency—without any standard to guide it. This approach violates not only the core remedial principle that the pre-amendment statute must be restored as the last valid expression of legislative will, but also the core separation-of-powers principle that administrative agencies derive authority from the Legislature—not from a court. To implement its ruling that Act 10's collective bargaining modifications are unconstitutional, then, the Court must declare those modifications unconstitutional and enjoin their enforcement. *See infra* Part II.

Finally, the Court should reject the Legislature's reprised merits arguments, which fare no better than its earlier renditions. *See infra* Part III.

ARGUMENT

I. Plaintiffs and the State Defendants Largely Agree on the Provisions the Court Should Declare Unconstitutional and Enjoin as a Remedy.

In its opinion denying Defendants' motions to dismiss, the Court "declare[d] those provisions of [Act 10] relating to collective bargaining modifications unconstitutional and void." Dkt. 118 at 24. It followed from that declaration that the Court had to "strike all aspects of Act 10 that relate to the improper unequal treatment of public safety and general employees, meaning [it] must strike all of the collective bargaining changes in the Act." *Id.* To assist in determining that remedy, the Court ordered the parties to "address what sections of Act 10 must be severed and struck under [its] ruling." *Id.*

Plaintiff and the State Defendants—contrary to the Legislature, *see infra* Parts II & III—have done as the Court asked. Indeed, the state officials charged with administering Wisconsin's collective bargaining system under the Municipal Employment Relations Act ("MERA") and the State Employment Labor Relations Act ("SELRA") largely agree with Plaintiffs on which provisions the Court should strike: 2011 Wisconsin Act 10 ("Act 10") §§ 58, 95, 168–169, 182, 210, 221–223, 227, 231–236, 238–240, 242, 244–247, 250–252, 259, 262, 270, 288–290, 293–295, 298, 303, 305–306, 308–309, 311–312, 314–315, 319–322, 324–327, 329–330, 332–334.

The State Defendants also ask the Court to strike a number of additional provisions. Though Plaintiffs do not view those provisions as integral to Act 10's constitutional defect, Plaintiffs have no objection to the Court striking those provisions as well. Those provisions are: Act 10 §§ 211, 213, 215, 217–220, 225, 230, 241, 255, 260–261, 265, 267, 271, 273, 276, 283–284, 296, 299, 310, 328, 331, 366, 387–388.[1]

[1] Plaintiffs note, however, that many of these provisions relate to fair-share agreements, which are no longer enforceable following *Janus v. AFSCME Council 31*, 585 U.S. 878 (2018). *See* Act 10 §§ 213, 217, 219–220, 225, 267, 271, 273, 276, 299.

There are, however, a few areas of disagreement. *First*, the State Defendants ask to strike certain provisions that Plaintiffs did not ask the Court to strike—namely, the provisions that create statewide bargaining units, extend collective bargaining rights to university research assistants, and define certain terms. *See* Act 10 §§ 178, 212, 214, 216, 264, 266, 268, 272, 278, 285–286. Plaintiffs do not believe that the Court should strike those provisions. Striking the provisions that dictate statewide bargaining units, *id.* §§ 272, 278, 285–286, or extend collective bargaining rights to university research assistants, *id.* § 266, has the potential to result in unintended consequences for existing bargaining units and their collective bargaining agreements. *See infra* p. 15. Out of a similar abundance of caution, the Court should not strike several definitions that Act 10 amended or created in MERA and SELRA, Act 10 §§ 178, 212, 214, 216, 264, 268, so as to avoid the potential consequence of leaving undefined terms that may appear elsewhere in Wisconsin law. Accordingly, Plaintiffs propose that the Court strike only those provisions that substantively implement the differential treatment between "general" and "public safety" employees. *See* Dkt. 130 at 1–9.

Second, the State Defendants ask the Court not to strike certain provisions that Plaintiffs included on their list. These provisions fall into three groups: (1) a provision eliminating certain mandatory bargaining subjects for school-district employees, who are characterized as "general" employees under Act 10, *see* Act 10 § 248; (2) provisions eliminating interest arbitration and related remedies only for "general" employees, *see id.* §§ 224, 226, 237, 243, 253–254, 256–258; and (3) provisions in 2015 Wisconsin Act 55 ("Act 55") that entrenched Act 10's discrimination between "general" and "public safety" employees by extending its anti-democratic recertification standards to initial certification elections, *see* Act 55 §§ 3138g, 3161r, 3162t–v.

Beginning with the school-district provision, the State Defendants agree that *all other* amendments specific to the collective bargaining rights of school district employees fall within the Court's ruling and, therefore, must be declared unconstitutional and enjoined. *See* Act 10 §§ 182, 324–327, 329–330, 332–334. Yet they provide no reason why § 248, which eliminated non-instructional time during the school day and teacher-evaluation plans as a mandatory subject of bargaining, is not one of the "modification of collective bargaining rights provisions" that the Court must sever and strike. Dkt. 118 at 24. And indeed, all of these provisions are intertwined with the Legislature's unconstitutional determination to eliminate the ability for only "general" employees, including teachers, to bargain over subjects other than total base wages. Accordingly, § 248 of Act 10 falls within the Court's ruling and must be struck.

Turning next to the interest-arbitration provisions, the State Defendants likewise provide no reason for excluding those provisions from their proposed remedy. Act 10 eliminated interest arbitration as a means of resolving deadlocks in negotiations *only* for "general" employees, while preserving it for "public safety" employees. *Compare* Act 10 § 237 (repealing Wis. Stat. § 111.70(4)(cm)5.–8.), *with id.* § 259 (amending Wis. Stat. § 111.77). Those provisions thus fall squarely within the Court's ruling that it must strike "the modification of collective bargaining provisions" that "relate to the improper unequal treatment of public safety and general employees." Dkt. 118 at 24. Under the State Defendants' proposal, however, interest arbitration would remain for law enforcement and firefighters, but no other public employees. *See* Dkt. 133 at 6 (proposing to strike § 259, which amended Wis. Stat. § 111.77). That is indefensible.

Before Act 10, Wisconsin law barred all public employees from striking, save in very narrow circumstances. Interest arbitration is the recognized public-sector substitute for strikes as a means of dispute resolution; without it, employers would be free to implement their final

proposals against employees who are powerless to strike. *See* Dkt. 97 at 8 (explaining purpose of interest arbitration). To eliminate interest arbitration only for "general" employees is not only contrary to the text of the pre-Act 10 statutory scheme, which allowed interest arbitration for *all* public employees, *see* Wis. Stat. §§ 111.70(4)(cm)5.–8. & 111.77 (2009–10), it is also inconsistent with an essential attribute of that scheme, which ensured that employers could not unilaterally impose their bargaining proposals against employees who were powerless to strike. As Plaintiffs explained in their opening brief, the state of the law immediately before Act 10 is the "valid expression of the legislative intent" to which the law must return after the Court's ruling. Dkt. 129 at 9 (quoting *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 630 (2020) (plurality opinion)). Accordingly, the "core" provision eliminating interest arbitration only for "general" employees, Act 10 § 237, and the "clean-up" provisions implementing that differential treatment, *id.* §§ 224, 226, 243, 253–254, 256–258, should all be struck.

Third, and contrary to the State Defendants' arguments, the Court is fully within its power to strike the provisions of Act 55 extending Act 10's discrimination between "general" and "public safety" employees to initial union certification elections. This Court recognized Act 10's recertification requirement and its anti-democratic standard requiring the votes of 51 percent of the entire bargaining unit (instead of a simple majority of voters) as "examples of the limits put on general employees but not public safety employees." Dkt. 118 at 3. But striking those recertification provisions of Act 10 without striking the parallel provisions of Act 55 that extended the same anti-democratic voting standard to initial certification elections—but *only* to "general" employee unions—would produce an absurd result: It would ensure that *some* of the discrimination this Court has ruled unconstitutional would stand. That is because "general" employees would still have to overcome Act 10's anti-democratic standard to obtain union

representation, while "public safety" employees would not. Moreover, the State Defendants are incorrect that they had no notice that these provisions fell within the scope of Plaintiffs' equal protection claim. As noted in Plaintiffs' opening brief, the Complaint cites the provisions in MERA and SELRA pertaining to initial certification elections that Act 55 amended to conform with Act 10. *See* Dkt. 7, ¶65 (citing Wis. Stat. §§ 111.70(4)(d)1. & 111.83(1)).

In sum, the Court has ruled that the differential treatment between "general" and "public safety" employees "violates the[] rights to equal protection under the law." Dkt. 118 at 24. It should grant all relief necessary to remedy that violation.

II. Contrary to the Legislature's Arguments, the Court Should Enjoin the State Defendants from Enforcing the Unconstitutional Provisions of Act 10, and the Court Cannot Rewrite Act 10 To Create a New, Undefined Category of "Public Safety" Employees that Was Never Enacted into Law.

The Court has already determined that it must "strike all aspects of Act 10 that relate to the improper unequal treatment of public safety and general employees, meaning [it] must strike all of the collective bargaining changes in the Act." Dkt. 118 at 24. That determination was plainly correct: As the Wisconsin Supreme Court has made clear, "it is the duty of the judiciary to interpret the law and to strike any law whose substance violates the constitution." *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶36, 387 Wis. 2d 511, 929 N.W.2d 209.

The Legislature urges the Court to disregard that duty and strike *zero* provisions of Act 10; instead, the Legislature contends, the Court should issue only a declaratory judgment that (unspecified provisions of) Act 10 are unconstitutional as to "some of Plaintiffs' particular employee groups." Dkt. 134 at 29. The Legislature is wrong on all counts: Now that the Court has determined that Act 10 is facially unconstitutional because its differential treatment between "general" and "public safety" employees lacks a rational basis, the Court has a duty to declare the provisions implementing that differential treatment void and to enjoin the State Defendants

from enforcing them. Nor is the Legislature correct that the Court can rewrite Act 10 by deleting the definition of "public safety employee" from MERA and SELRA, thereby instituting differential treatment between "general" and "public safety" employees that has never been codified into law. Such a rewrite of Act 10 is "a task that is within the Legislature's purview"—not the Court's. *Back v. State*, 902 N.W.2d 23, 33 (Minn. 2017); *accord State ex rel. Badtke v. Sch. Bd. of Joint Common Sch. Dist. No. 1, City of Ripon*, 1 Wis. 2d 208, 213, 83 N.W.2d 724 (1957) ("If . . . the legislature meant something other than it said, the remedy is not in the courts which can deal only with the legislative mandate as that body gave it. Modifications of the statute . . . must be obtained through legislative, not judicial action.").

A. The Court Should Enjoin the State Defendants from Enforcing the Unconstitutional Provisions of Act 10, in Addition to Issuing a Declaratory Judgment.

The Legislature argues at length that the Court should only issue a declaratory judgment, rather than an injunction. Dkt. 134 at 29–35. As a result, all parties agree that if the Court adheres to its conclusion that "Act 10 does not survive rational basis review and violates the Equal Protection Clause of the Wisconsin Constitution," Dkt. 118 at 11 (capitals altered), the Court must issue a declaratory judgment against the State Defendants.

In a circumstance such as this, where a plaintiff sues government officials on the ground that provisions of a state statute are unconstitutional on their face,[2] a declaratory judgment against the defendants ensures that "the state may not enforce [the statutory provisions] *under any circumstances*." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶44 n.9, 309 Wis. 2d 365, 749

[2] Plaintiffs' challenge is facial since they are "attack[ing] the law itself as drafted by the legislature," rather than arguing that "the statute has been enforced in an unconstitutional manner." *Society Ins. v. LIRC*, 2010 WI 68, ¶¶26–27, 326 Wis. 2d 444, 786 N.W.2d 385; *accord Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶29, 376 Wis. 2d 147, 897 N.W.2d 384 (plaintiff's claim categorized as facial, rather than as applied, because "it is not limited to [plaintiff]'s specific circumstances, but more broadly challenges all applications of those provisions").

N.W.2d 211 (emphasis added); *see also, e.g.*, *Wis. Legislature v. Palm*, 2020 WI 42, ¶64, 391 Wis. 2d 497, 942 N.W.2d 900 (Roggensack, C.J., concurring) ("[T]he oft-stated, oft-repeated legal maxim is clear: declaratory judgments are treated functionally as injunctions, when applied to governmental parties who are bound by the force and meaning of judgments under the law." (cleaned up) (quoting *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶43, 351 Wis. 2d 237, 839 N.W.2d 388 (Abrahamson, C.J. and A.W. Bradley, J., dissenting))). Thus, so long as the Court declares the provisions of Act 10 set forth in Plaintiffs' opening brief unconstitutional, the State Defendants—including the Wisconsin Employment Relations Commission ("WERC")—will be prohibited from enforcing those provisions in any circumstance.

Contrary to the Legislature's contentions, nothing prevents the Court from entering an injunction to accompany that declaratory judgment. The Legislature is correct that Plaintiffs' motion for judgment on the pleadings did not in terms "argu[e] that the equities require an injunction." Dkt. 134 at 30. That is because, as the Court implicitly recognized in holding that it "must strike all of the collective bargaining changes in the Act," Dkt. 118 at 24, a permanent injunction follows as a matter of course where a court conclusively determines that a state statute or other document purporting to have the force of law violates the Wisconsin Constitution. Otherwise, there would be circumstances in which "a law . . . declared unconstitutional should nevertheless be enforced." *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶118, 393 Wis. 2d 38, 946 N.W.2d 35. "[S]uch a result would be anomalous and contrary to law." *Id.*[3]

Unsurprisingly, therefore, the Wisconsin Supreme Court has not weighed the equitable factors in cases where it concludes, at the final-judgment stage, that a statute or other document

[3] The question of whether to enjoin the State Defendants from enforcing the unconstitutional provisions of Act 10 is distinct from the question of whether the Court's judgment should be stayed in whole or in part pending a potential appeal. *See Waity v. LeMahieu*, 2022 WI 6, ¶58, 400 Wis. 2d 356, 969 N.W.2d 263.

purporting to have the force of law is unconstitutional. In *James v. Heinrich*, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350, for example, the petitioners challenged an order preventing schools from holding in-person instruction during the COVID-19 pandemic. After the Court concluded that the order was "statutorily and constitutionally unlawful," the Court summarily "vacated" the order without analyzing any of the equitable factors—even though the defendants would have had a serious argument that the balance of hardships did not favor equitable relief. *Id.*, ¶49. Indeed, the Legislature cites no case suggesting that, in a non-election-related[4] challenge to the constitutionality of a statute or order, the equitable factors must be weighed if the court ultimately agrees with the plaintiff on the merits. *Cf. Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (plaintiff must satisfy equitable factors to obtain permanent injunction in non-constitutional case between two private parties where damages remedy was potentially available).[5]

But even if the equitable factors could come into play in a situation like this, they unequivocally militate in favor of injunctive relief. The defendants' briefs do not contest that Plaintiffs (1) are unions that represent or seek to represent employees classified as "general" employees under Act 10, or individual "general" employees themselves; and (2) are harmed by

[4] Election challenges are different from other constitutional challenges in this respect because "the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results." *Trump v. Biden*, 2020 WI 91, ¶11, 394 Wis. 2d 629, 951 N.W.2d 568 (quotation omitted).

[5] The Legislature also flatly misstates the Wisconsin Supreme Court's holding in *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). That case did *not* "reject[ ] injunctive relief because suit was filed too late," as the Legislature asserts. Dkt. 134 at 31; *see also id.* at 33 (again citing *Zimmerman* for this proposition). On the contrary, after holding that the Legislature's use of a joint resolution to apportion state-legislative districts was unconstitutional, the Court announced: "The respondent is enjoined from calling the 1964 Wisconsin legislative elections." 22 Wis. 2d at 572. The actual holding of *Zimmerman* thus provides no support whatsoever for the Legislature's arguments.

In any event, the Legislature's argument that Plaintiffs' "delay" in filing suit weighs against an injunction is a replay of the laches defense the Court has rejected. Dkt. 118 at 10–11.

the fact that Act 10 restricts their collective-bargaining rights vis-à-vis "public safety" unions and employees. *See* Dkt. 7, ¶¶18–24, 26–27. Indeed, it is a matter of public record that four of the Plaintiff unions are currently certified as collective bargaining representatives of "general" public employee units in Wisconsin.[6] Under Act 10, therefore, these unions cannot bargain about any subjects other than total base wages (capped at any increase to the consumer price index); they are subject to annual recertification elections after which they are decertified unless 51 percent of employees in the entire bargaining unit support recertification; and they cannot receive payroll dues deductions from their members. Dkt. 118 at 3–4. Enjoining Act 10's unconstitutionally discriminatory provisions would alleviate all of those harms, which cannot otherwise be remedied. *See Conn. Dep't of Env't Prot. v. OSHA*, 356 F.3d 226, 231 (2d Cir. 2004) ("violation of a constitutional right triggers a finding of irreparable injury"). No "evidence" or "affidavit[s]" are needed to confirm what is indisputable as a matter of fact and of law. Dkt. 134 at 31.

Finally, the Legislature argues that the balance of harms tilts in its favor, primarily relying on the alleged fact that "Act 10's overall aim was cost savings." Dkt. 134 at 32. It should go without saying that supposed "cost savings" cannot bless ongoing violations of the Wisconsin Constitution. *See generally, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (government "cannot suffer harm from an injunction that merely ends an unlawful practice"). And while the Legislature suggests that an injunction could harm employees like Amicus Curiae "who avoid paying union dues or associating or supporting union activities," Dkt. 134 at 32–33,

[6] Plaintiffs Beaver Dam Education Association, SEIU Wisconsin, and Teamsters Local 695 all won recertification elections in November 2023. *See* Nov. 2023 Annual Certification Election Results, WERC (Nov. 27, 2023), http://werc.wi.gov/doaroot/fall2023electionfinalresults.pdf. Plaintiff Abbotsford Education Association lost recertification in November 2022 by winning the votes of 50.8% of all eligible voters (rather than 51%), Dkt. 7, ¶18, but successfully obtained certification again in February 2024, after the Complaint in this case was filed. *See* Ex. A. The Court can take judicial notice of these government documents and others, *see infra* nn. 9 & 10, as the Legislature acknowledges, Dkt. 134 at 2 n.1.

it neglects to mention that state and federal law ensure that no public employee is required to provide monetary or other support to a labor organization. Wis. Stat. §§ 111.70(2) & 111.82; *Janus*, 585 U.S. at 930. Eliminating Act 10's unconstitutional discrimination between "general" and "public safety" employees thus would have no effect on the rights of employees like Amicus Curiae who prefer not to associate with a union.[7]

In sum, the Court should declare unconstitutional the provisions set forth in Plaintiffs' motion for judgment on the pleadings and enjoin Defendants from enforcing those provisions.

B. The Court Cannot Cure the Legislature's Unconstitutional Discrimination Between "General" and "Public Safety" Employees by Deleting the Definition of "Public Safety Employee" in MERA and SELRA and Delegating this Legislative Determination to WERC.

The Legislature's final argument—that the Court can simply eliminate the definition of "public safety employee" from MERA and SELRA, thereby delegating the question of which employee groups are "public safety" employees to WERC—is an astounding argument for any party to make, much less the Wisconsin Legislature. The Legislature's proposed remedy would violate the blackletter rule that, when a court declares a statutory amendment unconstitutional, it should restore the version of the statute in place before the unconstitutional amendment was passed. It would violate the core separation-of-powers principle that administrative agencies, as creatures of the Legislature, can exercise only those powers delegated by the Legislature—not powers delegated by a court. And it would leave WERC without any standard to use in

[7] The Legislature's contention that restoring the availability of payroll dues deduction for union members who are "general" employees "could offend First Amendment rights," Dkt. 134 at 34, miscomprehends the statutory provisions at issue in this case. Under pre- and post-Act 10 law, an employer can deduct union dues from a public employee only if the employer is given an authorization for dues deductions "signed by the employee personally." Wis. Stat. § 111.70(3)(a)6. Such voluntary dues deductions do not violate the First Amendment, as courts uniformly have held in the wake of the U.S. Supreme Court's decision in *Janus*. *See, e.g.*, *Bennett v. AFSCME Council 31*, 991 F.3d 724, 732 (7th Cir. 2021) ("*Janus* said nothing about union members who . . . freely chose to join a union and voluntarily authorized the deduction of union dues, and who thus consented to subsidizing a union.").

determining which employees are "public safety" and which are "general" under Act 10. For these reasons, the Court correctly noted that, in light of its ruling on the merits, it "must strike all of the collective bargaining changes in the Act" and restore the status quo ante. Dkt. 118 at 24.

1. Plaintiffs' opening brief showed that, when a court determines a statutory amendment is unconstitutional, it must restore the version of the law that existed before the amendment was passed. Dkt. 129 at 8–9. The Legislature does not lay a glove on this well-established legal proposition. The Legislature's mantra-like insistence that Act 10 is somehow different from the cases cited in Plaintiffs' opening brief because it "repealed" certain provisions of existing law, *see* Dkt. 134 at 28–40 (using variation of word "repeal" ten times), is mere semantics. Act 10 no more repealed existing law than the amendment at issue in *Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717, repealed the ability of all municipal taxpayers to receive *de novo* review of property-tax assessments in circuit court, or the amendment at issue in *Barr*, 591 U.S. 610, repealed the restriction on robocalls for government debt collectors. Indeed, in *Frost v. Corp. Commission of Oklahoma*, 278 U.S. 515 (1929) (cited in Dkt. 129 at 8, 9), the U.S. Supreme Court described an amendment to a preexisting statute as a "repeal by implication" for certain affected parties. *Id.* at 526. The Court found the amendment unconstitutional, and, as a remedy, restored the pre-amendment statute "as the only valid expression of the legislative intent." *Id.* at 527. So too, here: Because Act 10's amendments to the collective-bargaining rights for "general" employees are unconstitutional, they must be struck, restoring the pre-Act 10 provisions.[8]

[8] The Legislature suggests in passing that the Court could remedy the constitutional violation by "leveling down" and eviscerating *all* public sector bargaining in Wisconsin. *See, e.g.*, Dkt. 134 at 36, 39–40. But the Court has already rejected the idea of "uphold[ing] Act 10 as an across the board reduction of collective bargaining rights for all public employees equally" because that approach would "enact[] what the Legislature imperfectly attempted to avoid." Dkt. 118 at 23–24; *accord Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Lab. & Indus. Rels.*, 623 S.W.3d 585, 596 (Mo. 2021) (en banc) (rejecting "leveling down"

Also contrary to the Legislature's arguments, the Court's observation that *the Legislature* could have crafted a "general employee category" that survived the rational-basis test, Dkt. 118 at 14, does not allow *the Court* to craft such a category by changing the definition of "public safety employee" to one that the Legislature never enacted. Courts are not permitted to "speculat[e] as to what the Legislature could have done"; they must instead "rely on what the Legislature actually did" and invalidate the law if it violates the Constitution. *Back*, 902 N.W.2d at 33; *accord Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, ¶ 34, 267 Wis. 2d 59, 671 N.W.2d 633 (courts "must apply the statute as written, not interpret it as [courts] think it should have been written"). Were the law otherwise, the Wisconsin Supreme Court would have tweaked the unconstitutionally under-inclusive statute at issue in *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975), to continue to allow builders—a group the Legislature unequivocally wanted to protect from liability—to avoid suit. Instead, the Court declared the statute unconstitutional in its entirety.

The Legislature's related contention that the Court should tailor the remedy to comport with the Legislature's alleged "manifest intent . . . to maximize cost-savings," Dkt. 134 at 38 (quotation omitted), is just another guise for arguing that the Court should reconsider the merits. *See infra* Part III (explaining why the Legislature's arguments for reconsideration fail). That is because the Court held that the classification between "general" and "public safety" employees in Act 10 did not rationally further *any* legitimate state purpose—"cost-savings" or otherwise. The Court cannot rewrite Act 10 by pretending that the Legislature had a legitimate purpose when it enacted an unconstitutional statute. And the remedial approach proposed by the Legislature would provide no deterrence against passing laws for an entirely *illegitimate*

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remedy in similar case because "far more labor organizations would be burdened with restrictions than the legislature intended, which would cause great disruption to the statutory scheme").

purpose—such as a legislature's rewarding its political friends and punishing its enemies—if the only consequence would be a slightly-tweaked law that accomplished 99% of the illegitimate law's aims.

None of this is to say that enjoining the unconstitutional provisions of Act 10 leaves the Legislature powerless. It can enact amendments to MERA and SELRA that do not violate the Wisconsin Constitution. But that is not a task for the Court. *See* Wis. Const. art. IV, § 1.

2. The Legislature's proposed remedy has yet another fatal separation-of-powers flaw: It would have the Court delegate authority to interpret Wisconsin labor law to WERC, an administrative agency. "[A]dministrative agencies are the creatures of the Legislature and are responsible to it." *State ex rel. Wis. Insp. Bureau v. Whitman*, 196 Wis. 472, 508, 220 N.W. 929 (1928), *quoted in Evers v. Marklein*, 2024 WI 31, ¶30, 412 Wis. 2d 525, 8 N.W.3d 395. As a result, an agency's "powers, duties and scope of authority are fixed and circumscribed by the *legislature* and subject to *legislative* change." *Martinez v. DILHR*, 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992) (emphases added) (quoting *Schmidt v. Local Affairs & Dev. Dep't*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968)). The *Legislature* thus could have passed a law delegating to WERC the authority "to decide on a case-by-case basis who qualifies as a 'public safety' employee," Dkt. 134 at 37, so long as it provided the agency with adequate standards to make that determination. But the *Court* cannot delegate such authority to WERC, consistent with the separation of powers established in the Wisconsin Constitution. Again, if the Legislature believed that WERC is best positioned to classify employees under MERA and SELRA, it could have passed a statute to that effect. It did not do so.

3. The Legislature also ignores obvious legal and practical problems with having WERC determine whether different employee groups should be classified as "general" or "public

safety" employees. For one, there would be no standard or guidance for WERC to apply to make this determination. For an administrative agency to lawfully exercise legislative power, there must be "adequate standards for conducting the allocated power." *Martinez*, 165 Wis. 2d at 697. On what basis, for example, would WERC determine whether conservation wardens are "public safety" employees under Act 10? What about motor vehicle inspectors? What about correctional officers, who, at the time Act 10 was passed, were not "protective occupation participants?" *See* Wis. Stat. § 42.02(48)(am) (2010). Were Act 10 to be stripped of its "public safety" definition, WERC would lack *any* standard on which to re-define this term, and the judiciary would lack any standard on which to review the lawfulness of WERC's determinations.

The Legislature also entirely ignores the confusion that would result from a "case-by-case" determination of which employees are "public safety" employees under Act 10. Dkt. 134 at 37. For state employees, for example, all "public safety" employees must be in a single statewide bargaining unit under Act 10. Wis. Stat. § 111.825(1)(g). As a result, as the Legislature would have it, an untold number of additional job classifications would need to be added to the "public safety" bargaining unit and subtracted from the other statewide bargaining units, such as the "law enforcement" and the "security and public safety" bargaining units. *Id.* § 111.825(1)(cm), (1)(d). How this would happen—and what would happen to the existing collective bargaining agreements for these statewide units—is left unanswered by the Legislature.

More fundamentally, this example illustrates why courts have adhered to the rule that "where [a legislature] added an unconstitutional amendment to a prior law . . . the Court has treated the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *Barr*, 591 U.S. at 630 (quoting *Frost*, 278 U.S. at 526–27). No one can know whether the Legislature would have enacted an alternative to Act 10 that left the definition of "public safety"

employees up to WERC, notwithstanding the cascading effects that such uncertainty would have had on collective bargaining across Wisconsin. But the Legislature *did* pass MERA and SELRA, and those statutes were constitutional until Act 10 amended them. The Court must restore those constitutional statutes until the Legislature can decide whether to pass new amendments that comport with the Wisconsin Constitution.

III. The Legislature's Fourth Attempt to Proffer a Rational Basis for Act 10's "Public Safety" Category Fares No Better than Its First Three Attempts.

Though not styled as such, much of the Legislature's brief is effectively a motion for reconsideration of this Court's decision that Act 10's differential treatment between "general" and "public safety" employees lacks a rational basis and therefore violates the equal protection guarantee of the Wisconsin Constitution. *See* Dkt. 134 at 4–28. Although "a circuit court possesses inherent discretion to entertain motions to reconsider 'nonfinal' pre-trial rulings," such a request must present "more than disappointment or umbrage with the [Court's] ruling; it requires a heightened showing of wholesale disregard, misapplication, or failure to recognize controlling precedent." *Bauer v. Wis. Energy Corp.*, 2022 WI 11, ¶¶13–14, 400 Wis. 2d 592, 970 N.W.2d 243 (quotations omitted). Reconsideration is not justified by "new arguments or . . . new evidentiary materials that could have been submitted" earlier. *Id.* ¶14 (brackets omitted).

That is exactly what the Legislature attempts here. The Legislature filed a motion to dismiss Plaintiffs' equal protection claim, arguing that "Act 10's distinction between 'general' employees and 'public safety' employees . . . easily satisfies the rational-basis test." Dkt. 65 at 23–24. It submitted a second brief in support of its motion, Dkt. 102, and it then requested oral argument on the motion, Dkt. 103—during which it raised yet more grounds that purportedly showed a rational basis for Act 10's distinction. *See* Dkt. 118 at 17 (discussing those additional arguments). This Court considered each of those arguments and rejected them—indeed, it "ran

through every explanation that was offered by the parties and every one it could come up with to justify why the 7 groups the Legislature selected are in the public safety group and all others are excluded." *Id.* at 19. "No explanation with[stood] rational basis review." *Id.*

Despite all this, the Legislature now tries for a fourth time to argue that Act 10's "public safety" group reflects a rational selection of employees that would "keep core fire and policing services at a time when Act 10 was anticipated to result in widespread labor unrest." Dkt. 134 at 8 (quotation omitted). The Legislature's arguments do not come close to making the required "heightened showing" that this Court committed "wholesale disregard, misapplication, or failure to recognize controlling precedent," *Bauer*, 2022 WI 11, ¶14 (quotation omitted); these arguments can be rejected on this basis alone. Regardless, they fail on their own terms.

The Legislature's reiteration of its "fear of illegal strike" rationale runs headfirst into the Court's ruling, which held that such fears are *not* a rational basis for Act 10's "public safety" group. As the Court noted in its ruling, "Wisconsin already makes it illegal for public employees to strike," Dkt. 118 at 21 (citing Wis. Stat. §§ 111.70(4)(L) & 111.89), subjecting them to daily penalties, and even criminal contempt if they continue to strike in violation of a judicial injunction, *see* Dkt. 97 at 26–27 (discussing Wis. Stat. §§ 111.70(7m) & 111.89). And "where a law already bars the conduct at issue, another law duplicating that bar is not rationally intended to prevent that same conduct." Dkt. 118 at 21 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536–37 (1973)). Indeed, Wisconsin's equal-protection guarantee would be eviscerated if otherwise unconstitutional discrimination could be justified by pointing to a hypothesized fear of illegal protest *in response to the legislation itself*, as the Legislature posits.

The Wisconsin Supreme Court's decision in *Hortonville Education Ass'n v. Hortonville Joint School District No. 1*, 66 Wis. 2d 469, 225 N.W. 2d 658 (1975), is not to the contrary. In

Hortonville, the Court observed that, in general, there may be rational reasons to treat police and firefighters differently from other public employees to avoid those employees going on strike. 66 Wis. 2d at 484–85. The Court in no way suggested that hypothesized illegal protest in response to the allegedly unconstitutional legislation itself could justify such differential treatment, as the Legislature argues here. In any case, *Hortonville* involved a claim under the federal equal protection clause, *id.* at 478–79, and subsequent U.S. Supreme Court precedent cuts the legs out from *Hortonville*'s reasoning. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985) (rejecting "vague, undifferentiated fears" of illegal action as a rationale that can "validate what would otherwise be an equal protection violation").

Even if fear of an illegal strike could justify the discriminatory "public safety" group—which it cannot—it is not rationally related to the *particular* "public safety" group that Act 10 created. While rational-basis review is deferential, a "remote, fanciful, or speculative" rationale is insufficient. *Milwaukee Brewers Baseball Club v. Wis. DHHS*, 130 Wis. 2d 79, 103, 387 N.W.2d 254 (1986). The Legislature's strained rationale, layering speculation upon speculation, creates far more weight than the Wisconsin Constitution can bear.

To recap, the Legislature's rationale begins from the speculative premise that Act 10 could cause police officers and firefighters across the state to engage in an illegal mass work stoppage. Thus, the Legislature contends, it had to craft Act 10 in such a way as to preserve those employees' collective bargaining rights to ensure they would not break the law and walk off the job. It then opines, for the first time since Act 10 was passed 13 years ago, that the resulting "public safety" group—*in*cluding local police and firefighters, deputy sheriffs, county traffic officers, state traffic patrol officers, and state motor vehicle inspectors, while *ex*cluding Capitol Police, UW Police, state correctional officers, and conservation wardens—reflects a specific

legislative judgment to ensure a sufficient number of local police and fire services during such an illegal mass strike, as well as sufficient "state law enforcement with the broadest jurisdiction, arrest authority, presence, and interaction with the public." Dkt. 134 at 15.

The Legislature's newfound gloss on how it selected the "public safety" group fares no better than its prior efforts. It is fanciful that a rational legislature concerned with "maximizing cost savings while insulating sufficient law enforcement from work stoppages," Dkt. 134 at 23, would have preserved collective bargaining rights for *state motor vehicle inspectors*—a group of approximately 100 employees "who may not wear the uniform of the state patrol" and "whose duties shall be to enforce and assist in administering" certain vehicle and traffic-related laws and "inspection requirements," Wis. Stat. § 110.07(3)—but would not have preserved collective bargaining rights for the *Capitol Police*, a specialized police force with "statewide jurisdiction" that "provides police and security services to the Governor, Lieutenant Governor, legislators, Supreme Court justices, visiting dignitaries, state employees, and the public." Legis. Audit Bureau, *Wisconsin State Capitol Police* 3 (Apr. 2024). It is fanciful that a rational legislature concerned with a mass illegal work stoppage would have shrugged its shoulders at the possibility that the state's *4,500* correctional officers would walk off the job simply because the Wisconsin National Guard had stepped in during a work stoppage in 1977, *see* Dkt. 134 at 14, 22–23, when the state's prison population was 18.6% of what it was in the beginning of 2011.[9] It is fanciful that a rational legislature concerned with a mass illegal work stoppage would have risked leaving Wisconsin's 1.6 million acres of DNR-owned and -managed lands without the sworn officers

[9] *Compare* 1978 Calendar Year Summary of Population Development, *Wis. Div. of Corr.* 2, https://www.ojp.gov/pdffiles1/Digitization/66736NCJRS.pdf (noting average daily incarcerated population of 4,080 in 1977), *with* Prison Point-in-Time Population Dashboards, *Wis. Dep't of Corrections*, https://doc.wi.gov/Pages/DataResearch/PrisonPointInTime.aspx (noting total incarcerated population of 21,867 on December 31, 2010).

who enforce *all* state laws on those lands, Wis. Stat. § 23.11(4),[10] not just laws against "poaching," as the Legislature incorrectly implies, *see* Dkt. 134 at 15. And it is fanciful that a rational legislature concerned with a mass illegal work stoppage in protest of Act 10 would have classified the Capitol Police and UW Police as "general" employees, given that Madison plainly would be the locus of any protest activity regarding Act 10.

In any event, the Court already considered and rejected the reasons the Legislature has put forth for selecting its "public safety" group: arrest authority, statewide jurisdiction, and widespread presence. As the Court explained, arrest authority cannot justify the group because "Capitol Police and UW Police and conservation wardens," who all possess such authority, "are excluded." Dkt. 118 at 17. Nor can statewide jurisdiction justify the group because it "does not explain why Capitol Police and conservation wardens," who have such jurisdiction, "are excluded." *Id.* at 17–18. As well, limited size and interaction with the public cannot justify the group because those factors "would apply equally to UW police as [they] do[] to small police or sheriff offices"—yet the latter is included while the former is not. *Id.* at 18. Under Wisconsin law, "[a]ll classification[s] must be based upon substantial distinctions which make one class really different from another." *Metro Assocs.*, 2011 WI 20, ¶64. Because the Legislature cannot proffer a rational reason why Act 10 treats employees differently who "perform the same types of work, suffer the same risks, and have the same sort of authority," Dkt. 118 at 17, the Act's differential treatment flunks rational basis review, as this Court has already ruled.

CONCLUSION

The Court should grant Plaintiffs' motion for judgment on the pleadings and requested relief.

[10] *See* About Property Planning, *Wis. Dep't of Nat. Res.*, https://dnr.wisconsin.gov/topic/fl/PropertyPlanning/About.

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Respectfully submitted,

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