

FILED
12-02-2024
CIRCUIT COURT
DANE COUNTY, WI
2023CV003152

STATE OF WISCONSIN, CIRCUIT COURT, DANE COUNTY, COUNTY

Case Caption (Case Name)

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; Wayne Rasmussen; 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, in his official capacity as Chair and Sole Commissioner of the Wisconsin Employment Relations Commission; Department of Administration; Kathy Blumenfeld, in her official capacity as Secretary of the Department of Administration; Division of Personnel Management; and Jen Flögel, in her official capacity as Administrator of the Division of Personnel Management, Defendants,

and

Wisconsin State Legislature, Intervenor-Defendant.

DOCKETING STATEMENT

Circuit Court Case No. 2023CV3152

Case Number Issued by Court of Appeals

Appellant(s) (Cross-Applicant)

Wisconsin State Legislature

Attorney's Name and Address

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Respondent(s) (Cross-Respondent)

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; Wayne Rasmussen; Teaching Assistants' Association, Local 3220, American Federation of Teachers; and International Brother of Teamsters Local No. 695

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CRITERIA FOR EXPEDITED APPEALS

- This Docketing Statement is used solely to determine whether an appeal should be placed on the expedited appeal calendar. The respondent is not required to respond to the Docketing Statement. Generally, an appeal is appropriate for the expedited appeal calendar if:
 1. no more than 3 issues are raised;
 2. the parties' briefs will not exceed 15 pages in length; and
 3. the briefs can be filed in a shorter time than normally allowed.

These requirements can be modified somewhat in appropriate cases.

- Parties should assume that the appeal will proceed under regular appellate procedure unless the court notifies them that the appeal is being considered for placement on the expedited appeals calendar.

JURISDICTION

Has judgment or order appealed from been "entered" (filed with the clerk of circuit court)?

Yes No If yes, date of entry December 2, 2024.

Is appeal timely? (See §808.04, Wisconsin Statutes)

Yes No

Is judgment or order final (does it dispose of the entire matter in litigation as to one or more of the parties)?

Yes No (If "no", explain jurisdiction basis for appeal on separate sheet.)

NATURE OF ACTION – Briefly describe the nature of action and the result in circuit court:

Plaintiffs brought this action against the Wisconsin Employment Relations Commission, et al., challenging the constitutionality of Act 10's collective bargaining reforms, codified at Wis. Stat. §§ 111.70(1)(a), (fm), (mm), (3g), (4)(cm)8m, (4)(d)3.b, (4)(mb), 111.81(1), 111.83(3)(b), 111.845, 111.91(3), and 111.92(3)(b), with regard to public employees who are not considered "public safety" employees under Act 10. Plaintiffs seek a declaration that certain provisions of Act 10 violate Article I, Section 1 of the Wisconsin Constitution, and an injunction against Defendants from implementing or enforcing these provisions. The Wisconsin State Legislature successfully intervened as a Defendant.

On July 3, 2024, the Circuit Court denied Intervenor-Defendant the Wisconsin State Legislature's motion to dismiss Plaintiffs' operative complaint in full.

On December 2, 2024, the Circuit Court granted Plaintiffs' motion for judgment on the pleadings and issued certain declaratory and/or injunctive relief.

ISSUES – Specify the issues to be raised on appeal: (Attach separate sheet if necessary.)

(Failure to include any matter in the docketing statement does not constitute waiver of that issue on appeal.

The court may impose sanctions if it appears available information was withheld. Court of Appeals Internal Operating Procedures, sec. VII(2)(b).)

1. Whether Act 10's different treatment of "public safety" and "general employees" satisfies rational basis review.
2. Whether, if Act 10's different treatment of "public safety" and "general employees" does not satisfy rational basis review, Plaintiffs are entitled only to a limited declaratory judgment and not statewide injunctive relief.
3. Whether if Act 10's different treatment of "public safety" and "general employees" does not satisfy rational basis review, any remedy should be limited to invalidating the Act's definition of "public safety" employees.

STANDARD OF REVIEW – Specify the proper standard of review for each issue to be raised, citing relevant authority:

The Court of Appeals reviews the Circuit Court's order on a judgment on the pleadings de novo. See Southport Commons, LLC v. Wisconsin Dep't of Transportation, 2021 WI 52, ¶ 62, 397 Wis. 2d 362, 960 N.W.2d 17.

The Court of Appeals reviews the Circuit Court's order on a motion to dismiss de novo. See Serv. Emps. Int'l Union, Loc. 1 ("SEIU") v. Vos, 2020 WI 67, ¶ 7, 393 Wis. 2d 38, 946 N.W.2d 35; State ex rel. Zecchino v. Dane County, 2018 WI App 19, ¶ 8, 380 Wis. 2d 453, 909 N.W.2d 203.

Finally, because the foregoing issue(s) raise questions of statutory and/or constitutional interpretation, which are questions of law, this Court's standard of review for such issue(s) is de novo. State v. Alexander, 2013 WI 70, ¶ 18, 349 Wis. 2d 327, 833 N.W.2d 126.

Do you wish to have this appeal placed on the expedited appeals calendar? (See *Criteria For Expedited Appeals*.)

Yes No If "no", explain : This appeal involves significant legal issues that will require more than 15 pages of briefing to adequately address.

Will a decision in this appeal meet the criteria for publication in Rule 809.23(1)?

Yes No

Will you request oral argument?

Yes No

List all parties in trial court action who will not participate in this appeal:

<u>Party</u>	<u>Attorney's Name and Telephone Number</u>	<u>Reason for not Participating</u>
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Are you aware of any pending or completed appeal arising out of the same or a companion trial court case that involves the same facts and the same or related issue?

Yes No Name of Case _____

Appeal Number _____

Electronically signed by Misha Tseytlin

Signature of Person Preparing Docketing Statement

Misha Tseytlin

Name Printed or Typed

misha.tseytlin@troutman.com

Email Address (if any)

December 2, 2024

Date

Appellant Note:

You MUST file this form and attachments with the Clerk of the Circuit Court.

You MUST attach a copy of the following trial court documents to this form:

1. Trial court's judgment or order and findings of fact.
2. Conclusions of law.
3. Memorandum decision or opinion upon which the judgment or order is based.

You MUST also serve all parties with a copy of this completed Docketing Statement and attached trial court documents.

The clerk of circuit court shall forward this form to the Court of Appeals.

FILED
07-03-2024
CIRCUIT COURT
DANE COUNTY, WI
2023CV003152

BY THE COURT:

STATE OF WISCONSIN CIRCUIT COURT

DANE COUNTY

BRANCH 9

Electronically signed by Jacob B. Frost
Circuit Court Judge

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; WAYNE RASMUSSEN; TEACHING
ASSISTANTS' ASSOCIATION, LOCAL 3220
AMERICAN FEDERATION OF TEACHERS; and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL NO. 695,

Plaintiffs,

Case No.
2023CV3152

vs.

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

Defendants,

and

KRISTI KOSCHKEE; and WISCONSIN STATE
LEGISLATURE,

Intervenor.

DECISION ON MOTION TO DISMISS

2011 Wisconsin Act 10 ("Act 10") dramatically changed collective bargaining for public employees in Wisconsin. Relevant to the case before me, Act 10 created two classes of public employees - "public safety employees" and "general employees."

Plaintiffs are public employees in the general employee group and labor organizations who represent or wish to represent public employees in that group. Plaintiffs assert that the different classifications Act 10 created violate the equal protection clause in the Wisconsin Constitution, Article I, section 1.

Defendants are state agencies and officials responsible for enforcing the challenged provisions of Act 10. Defendants filed a Motion to Dismiss for failure to state a claim upon which relief may be granted. Defendants' seek a ruling that Plaintiffs' equal protection claims fail on the merits, because they argue Act 10's classifications of public safety employees and general employees survives rational basis review.

The Wisconsin State Legislature moved to intervene and the Court approved its intervention.¹ The Legislature separately moved to dismiss. In addition to joining Defendants' arguments for dismissal on the merits, the Legislature asserted that the Court should dismiss Plaintiffs' case on the affirmative defenses of claim preclusion and laches. More specifically, the Legislature argues that Plaintiffs' claims are precluded because of the decisions in *Madison Teachers, Inc. v. Walker* ("MTI"), 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337, and *Wisconsin Education Association Council v. Walker* ("WEAC"), 705 F.3d 640 (7th Cir. 2013). They argue that those two cases finally resolved the issues and these parties should not be allowed to bring claims now that could have been raised in those lawsuits. As for laches, the Legislature argues that the 13-year time lapse since Act 10 took effect renders this lawsuit too late, such that it must be dismissed without resolving the merits due to the unfair prejudice caused by the delay.

For the reasons that follow, I deny the Motions to Dismiss.

STANDARD OF REVIEW

Whether a complaint states a claim upon which relief can be granted is a question of law. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 17, 356 Wis. 2d 665, 675, 849 N.W.2d 693, 698. On a motion to dismiss the Court must accept as true all well-

¹ The Court also received and considered the brief of amicus curiae Kristi Koschke.

pleaded facts in the complaint and take all reasonable inferences therefrom in favor of Plaintiffs. *Id.*, ¶ 19. A complaint must contain “[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.” Wis. Stat. § 802.02(1)(a). Bare legal conclusions are not sufficient. “Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law.” *Data Key*, 2014 WI 86, ¶ 21. Nobody disputes the facts alleged. All arguments relate to the legal issues.

DECISION

I. Factual Background to Act 10.

In 2011, Act 10, among other things, changed Wisconsin collective bargaining law for public employees and employers. Public sector collective bargaining is subject to the Municipal Employment Relations Act (“MERA”) for municipal employees and the State Employment Labor Relations Act (“SELRA”) for state employees. Relevant here, Act 10 amended MERA and SELRA by creating two classifications of public employees and then treating those categories differently for collective bargaining purposes. Specifically, Act 10 placed public employees into “public safety employees” whose collective bargaining rights were largely unchanged and “general employees” whose collective bargaining rights were sharply limited. As examples of the limits put on general employees but not public safety employees, Act 10 narrowly limited the employment terms employers and general employees could collectively bargain over. Collective bargaining units representing general employees were now required to obtain annual approval through recertification elections. Further, the number of votes needed for recertification was changed. Public employers were prohibited from collecting dues from members’ paychecks and providing them directly to the bargaining unit. Also, when a collective bargaining agreement is reached, the law limited each agreement to a one-year term. Act 10 also required general employees to pay the full employee-required contribution towards the Wisconsin Retirement System (“WRS”) and imposed a cap on employer contributions towards health insurance premiums for general employees, issues that were

previously a frequent subject of collective bargaining. These same limits and requirements were not applied to public safety employees or their labor organizations.

Act 10 does not define the public safety group with words or descriptions. Rather, it refers to portions of Wis. Stat. §40.02(48) and identifies specific groups of employees who are in the public safety group with no further explanation. All other public employees go into the general employee group. Act 10 defined the public safety group as municipal police officers, municipal fire fighters, deputy sheriffs, county traffic police officers, employees of municipal combined protective services departments, state traffic patrol and state motor vehicle inspectors. Wis. Stat. §111.70(1)(mm); Wis. Stat. § 111.81(15r). All other municipal and state employees were now general employees. Wis. Stat. §40.02(48)², the WRS statute, designated 22 job categories as “protective occupation employees.” Wis. Stat. §40.02(48)(am) (2009-2010).³ Act 10 selected only 7 of those categories as public safety employees, excluding the rest, including Capitol Police, University of Wisconsin Police and conservation wardens, among others.

II. Claim Preclusion Does Not Bar Plaintiffs’ Action.

The Legislature argues that Plaintiffs’ claim is barred by claim preclusion. Specifically, the Legislature argues that *WEAC* and *MTI* bar Plaintiffs from challenging Act 10. The Wisconsin Supreme Court explains claim preclusion as follows:

The doctrine of claim preclusion states that “a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters

² Wis. Stat. 111.70(1)(mm) “Public safety employee” means any municipal employee who is employed in a position that, on July 1, 2011, is one of the following:

1. Classified as a protective occupation participant under any of the following:
 - a. Section 40.02 (48) (am) 9., 10., 13., 15., or 22.
 - b. A provision that is comparable to a provision under subd. 1. a. that is in a county or city retirement system.
2. An emergency medical service provider for emergency medical services departments.’

Wis. Stat. 111.81(15r) “Public safety employee” means any individual under s. 40.02 (48) (am) 7. or 8.’

³ Wis. Stat. 40.02(48)(am) includes 23 job categories as of June 2024. “County jailer” was added by 2023 Wisconsin Act 4, sec. 4.

which were litigated or which might have been litigated in the former proceedings.” *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 310, 334 N.W.2d 883 (1983). Before an earlier proceeding will act to preclude a claim in another action, three factors must be present: “(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction.” *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 551, 525 N.W.2d 723, 727 (1995).

This case turns on the first prong of the analysis, that is, whether there was an identity between the parties or their privies in the first and second suits....Privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved....The burden of proving claim preclusion is upon the party asserting its applicability.

Pasko v. City of Milwaukee, 2002 WI 33, ¶¶ 14-16, 252 Wis. 2d 1, 643 N.W.2d 72 (some citations omitted). The Supreme Court further explained the limited circumstance where parties in one suit are in privity with parties from a prior suit:

“[i]n order to be in privity with a party to a judgment, [a nonparty] must have such absolute identity of interests that the party to the earlier action represented the same legal interest as the non-party to that first action.” In other words, privity compares the interests of a party to a first action with a nonparty to determine whether the interests of the nonparty were represented in the first action.

Id. ¶ 18 (citations omitted).

Neither *WEAC* or *MTI* preclude Plaintiffs’ current lawsuit.

A. Plaintiffs’ claims are not precluded by WEAC.

In *WEAC* the Seventh Circuit Court of Appeals held that Act 10 did not violate certain aspects of the Federal Constitution. 705 F.3d 640 (7th Cir. 2013). Several labor organizations claimed that: (1) three provisions of Act 10 violated the Equal Protection Clause of the United States Constitution because the division of public safety and general employees was irrational; and (2) one of those provisions also violated the First Amendment because of the effect of prohibiting payroll deductions on some labor organizations’ speech. *Id.* at 642. The Court also considered whether a group of non-represented “general employees” could intervene. *Id.* at 657. Relying on federal law only,

the Court rejected all of the labor organizations' claims and affirmed the district court's denial of the motion to intervene. *Id.* at 659.

The labor organizations argued that three of Act 10's provisions – the collective bargaining limitations, the recertification requirements, and the payroll deduction prohibition – violated the United States Constitution's Equal Protection clause because the different treatment of “public safety employees” and “general employees” does not rationally advance a legitimate government interest. *Id.* at 653-55. The Court held that rational basis review applied. *Id.* at 653-54. Under federal precedent “a law avoids constitutional scrutiny as long as it bears a rational relationship to a legitimate government interest” and “the law is presumed constitutional,” placing the burden on the one challenging the law to negate “every basis which might support the law because [the Court] will uphold it if there is any reasonably conceivable state of facts supporting the classification.” *Id.* at 653.

The *WEAC* Court held that the State's interest in promoting budget flexibility was insufficient to justify the differential treatment of public safety employees and general employees. However, the State could rationally have a greater interest in preserving labor peace among public safety employees because their roles were too critical to risk disruption over labor unrest. *Id.* at 655-56. The Court upheld all challenged provisions of Act 10 as not violating equal protection because they were all based on a “rational belief that public sector unions [were] too costly” and that the “differential treatment [. . .] [was] supported by [the state's] concern for labor peace among the public safety employees.” *Id.* at 656, 658. Of critical importance here, *WEAC* never applied Wisconsin principles regarding equal protection and did not address whether Act 10 violates Wisconsin's Constitution.

Plaintiffs' claims are not precluded by *WEAC*. One, there is no privity between them and the parties in *WEAC*. The Legislature argues that two of Plaintiffs, SEIU Wisconsin and TAA, are in privity with parties in *WEAC* because the former is a successor organization to “SEIU Healthcare Wisconsin, CTW, CLC,” a plaintiff in *WEAC*, and the latter was represented by “AFT-Wisconsin, AFL-CIO” in *WEAC*, as that party stated it was

representing all of its local affiliates (which TAA was) in *WEAC*. The Legislature also argues that the other eight Plaintiffs are in privity with the plaintiffs from the prior lawsuits because they had the same “incentive and opportunity” to pursue their claims in those actions Dkt. 65 at 24.

There might be privity as against SEIU Wisconsin and TAA. However, there is plainly not privity as against any other Plaintiff here who were not parties or directly connected to any party in *WEAC*. I do not find the Legislature’s argument that these other Plaintiffs are barred from bringing their claims solely because they had the “incentive and opportunity” to participate in those prior cases supported by law or fact. To begin, the Legislature offers no evidence that any of these eight Plaintiffs actually an opportunity to participate in that lawsuit a decade ago. That they might have held or even wanted to take a position on the issues raised in *WEAC* or *MTI* does not mean that these Plaintiffs actually had an opportunity to do so. That other unconnected parties held similar interests in challenging a law in a prior lawsuit does not forever foreclose anyone else from raising new claims in the future. If that were true, the privity analysis would become practically meaningless, especially as it relates to challenges to a statute.

Two, *WEAC* is not preclusive because the federal court lacked jurisdiction to definitively decide the equal protection claim under the Wisconsin Constitution that Plaintiffs present here. *WEAC* is not binding as to the issues before me. Though *WEAC* certainly holds precedential value in the federal courts of the Seventh Circuit for its application of federal law to Act 10, it is not precedential as to Wisconsin courts’ interpretation of the Wisconsin Constitution as it relates to Act 10. To hold these Plaintiffs bound by the ruling in *WEAC* would stretch the concept of claim preclusion far too far when it is not precedent on the issues before me.

This also confirms there is not an identity of claims. The claim here differs from that in *WEAC*. There plaintiffs claimed that Act 10’s classifications of “general employee” versus “public safety employee” violated the U.S. Constitution’s Fourteenth Amendment’s Equal Protection Clause. *WEAC*, 705 F.3d at 642. Here Plaintiffs argue that those classifications violate the equal protection guarantee in Article I, section 1 of the

Wisconsin Constitution. Though the state and federal arguments surely have similarities, they are not the same. As addressed in rejecting the merits of the motion to dismiss below, Wisconsin's Supreme Court has developed a 5 factor test to apply to certain equal protection challenges. The Seventh Circuit never discussed or applied that test, as it differs from the review performed under federal law. This renders *WEAC* unpersuasive.

Indeed, *WEAC* could not have resolved the claim I am deciding. Claim preclusion does not apply if the court in the prior action would not have had jurisdiction to hear the related claim. Restatement (Second) of Judgments § 25 cmt. e (1982). The Eleventh Amendment bars federal courts from enjoining state officials for a violation of state law. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). As such, had they brought a state law claim in *WEAC*, it would have been dismissed as that court lacked jurisdiction to provide the requested relief. Wisconsin courts have applied this claim preclusion exception to hold that a federal court decision does not preclude subsequent state court litigation that would not have been allowed to proceed before the federal court. *E.g. Aldrich v. Lab. & Indus. Rev. Comm'n*, 2008 WI App 63, ¶ 10, 310 Wis. 2d 796, 751 N.W.2d 866.

For all these reasons, Plaintiffs' claim is not precluded by *WEAC*.

B. Plaintiffs' claims are not precluded by *MTI*.

In *MTI* the Wisconsin Supreme Court upheld Act 10 against several claims by labor organizations. *MTI*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337. There select labor organizations claimed that (1) Act 10 violated the associational rights of general employees and their collective bargaining representatives, (2) Act 10 violated the equal protection provisions of the Wisconsin and United States Constitutions because it treats represented general employees differently from non-represented general employees, (3) Act 10 violated the "home rule" amendment to the Wisconsin Constitution by prohibiting the City of Milwaukee from making certain contributions to the City of Milwaukee Employees' Retirement System, and (4) this same prohibition also violated the Contract Clause of the Wisconsin Constitution by impairing City of Milwaukee employees'

contractual rights. *Id.* at ¶¶ 9, 15. The Court rejected each of these claims. *Id.* at ¶¶ 160-63.

As I face only equal protection challenges, I focus on the equal protection claim in *MTI*. There the labor organizations argued that Act 10 violated the equal protection clause in two respects: (a) Act 10 limited represented general employees to negotiating only on base wages, while non-represented general employees were not similarly limited, and (b) Act 10 prohibited employers from deducting labor organization dues from represented general employees paychecks, but placed no similar restriction on deducting dues for any other organization other than a labor organization. *Id.* at ¶ 78. They argued this was not rational.

The *MTI* Court only addressed whether the equal protection clause barred different treatment for those general employees who chose union representation versus the other general employees who could be in their same union but chose not to be. The *MTI* Court found that the different treatment of represented and non-represented general employees rationally advanced the State's interest in reducing public expenditures. *Id.* at ¶¶ 82, 85. Thus, at best *MTI* confirms that some different treatment of certain employees can survive an equal protection challenge.

However, Plaintiffs' claims are clearly not precluded by *MTI*. There is no identity between the plaintiffs or the claims. The plaintiffs in *MTI* were Madison Teachers, Inc. and Public Employees Local 61, AFL-CIO, and their individual representatives. None of those parties appear in this lawsuit. The Legislature asks this Court to expand claim preclusion to apply and bar subsequent lawsuits filed by different parties simply because they share a similar interest with parties to a prior lawsuit, but otherwise share no legal connection. I will not do so. Privity requires something far more than merely holding similar interests or legal positions as others. It requires an absolute identity of interests. No such identity is shown here.

Further, there is no identity between the causes of action in *MTI* and here. Plaintiffs' claim that Act 10's classification of public safety employees and general employees violates the equal protection guarantee in Article I, section 1 of the Wisconsin

Constitution. This is entirely different from the issue of represented general employees versus unrepresented general employees in *MTI*. Indeed, the Supreme Court specifically noted in *MTI* that it was not addressing the issue before me: “The public employee classifications are not at issue in this appeal.” *MTI*, 2014 WI 99, ¶4 n.4. Thus the Wisconsin Supreme Court never addressed whether Act 10’s classification of and different treatment of public safety and general employees withstands review under the State Constitution. Plaintiffs’ claim is not precluded by *MTI*.

III. Laches Does Not Apply.

The Legislature also argues that Plaintiffs’ claim is barred by laches. Laches has three elements: “(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay.” *Clarke v. Wisconsin Elections Comm’n*, 2023 WI 79, ¶ 41, 410 Wis. 2d 1, 998 N.W.2d 370. The party asserting laches has the burden of proving each element. *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 12, 393 Wis. 2d 308, 946 N.W.2d 101. Laches is an equitable bar, such that the Court must exercise its discretion whether to apply laches even if the elements are met. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 15, 389 Wis. 2d 516, 936 N.W.2d 587.

The Legislature fails to demonstrate any prejudice caused by the timing of this lawsuit. The only prejudices put forth would have existed no matter when a lawsuit was brought. Specifically, they allege prejudice from the cost of litigation and the potential impact to the budget if the status quo is disrupted. “[L]itigation costs alone cannot constitute prejudice for laches purposes.” *Clarke v. Wisconsin Elections Comm’n*, 2023 WI 79, ¶ 43. Those costs also would exist no matter when the law was brought. Similarly, if Act 10 were overturned, the effect on budgets would have occurred right after the law’s passing the same as it does now. Likewise, the Supreme Court in *Clarke* also rejected the argument that disrupting the status quo, despite a constitutional violation, is not a prejudice for laches purposes. Disruption is necessary to ensure constitutional compliance.

Further the Wisconsin Supreme Court rejected laches as a defense to substantive constitutional challenges because the “overriding responsibility” of Wisconsin courts is “to the Wisconsin Constitution ... no matter how late it may be that a violation of the Constitution is found to exist.” *Id.* at ¶ 42 (quoted source omitted). Were that not the case, constitutional violations could endure perpetually with no possible remedy as long as they go unchallenged for a sufficient period to make laches a defense. Even extremely old statutes have been overturned on equal protection grounds. In *Nankin v. Village of Shorewood*, the Wisconsin Supreme Court in 2001 held that a statutory provision was unconstitutional under the rational basis test despite being on the books since 1955. 2001 WI 92, ¶¶ 15, 50, 410 Wis. 2d 1, 998 N.W.2d 370. Surely the much more recently enacted Act 10 can still be reviewed for constitutional infirmities despite the passage of time.

Trying to avoid these harmful precedents, the Legislature tries to paint Plaintiffs’ challenge as one of the process by which Act 10 was passed. Laches can more freely apply to such a challenge. They rely on *Wisconsin Small Business United, Inc. v. Brennan*, in which laches barred a challenge to the constitutionality of the governor’s procedure in partially vetoing a bill. 2020 WI 69, ¶¶ 17, 32, 393 Wis. 2d 308, 946 N.W.2d 101. Here Plaintiffs only challenge the substance of Act 10, not the process by which it was drafted, passed or signed. Laches does not bar this action.

IV. Act 10 Does Not Survive Rational Basis Review and Violates the Equal Protection Clause of the Wisconsin Constitution.

Defendants and the Legislature move to dismiss this case on the basis that Act 10 survives rational basis review and is constitutional. I deny the Motions to Dismiss. Plaintiffs’ state a claim that Act 10 is unconstitutional. While the Legislature surely holds the right to classify and treat different groups of public employees differently under our Constitution, any such classifications must survive rational basis review. Act 10’s division of public employees into public safety and general employee categories lacks a rational basis as explained below.

A. Act 10's Public Safety Group Does Not Pass Rational Basis Review.

There is no dispute that Act 10 treats members of the public safety group far differently from the general employee group. The question is whether that different treatment is rational. I start by reciting the standards I must apply:

A statute violates equal protection only when “the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy.” Any doubts must be resolved in favor of the reasonableness of the classification.

“The fact [that] a statutory classification results in some inequity ... does not provide sufficient grounds for invalidating a legislative enactment.” Indeed, “[e]qual protection does not deny a state the power to treat persons within its jurisdiction differently....” However, “[t]he basic test is not whether some inequality results from the classification but whether there exists a rational basis to justify the inequality of the classification.” In determining whether a rational basis exists, we look first to determine whether the legislature articulated a rationale for its determination. If we cannot identify any such articulated rationale, it is the court's obligation to construct one.

....

Under our case law, a statute must meet five criteria in order to have a rational basis:

- (1) All classification[s] must be based upon substantial distinctions which make one class really different from another;
- (2) The classification adopted must be germane to the purpose of the law;
- (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within the class];
- (4) To whatever class a law may apply, it must apply equally to each member thereof;
- (5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Nankin, 245 Wis.2d 86, ¶ 39, 630 N.W.2d 141 (citing *Aicher*, 2000 WI 98, ¶ 58, 237 Wis.2d 99, 613 N.W.2d 849) (alterations in original).

Metro. Assocs. v. City of Milwaukee, 2011 WI 20, ¶¶ 61-63, 332 Wis. 2d 85, 796 N.W.2d 717 (cleaned up).

When applying these standards to Act 10, I keep in mind the high burden Plaintiffs bear to prove that the statute is unconstitutional. The Supreme Court explains:

All legislative acts are presumed constitutional and we must indulge every presumption to sustain the law. Any doubt that exists regarding the constitutionality of the statute must be resolved in favor of its constitutionality. Consequently, it is insufficient for a party to demonstrate “that the statute's constitutionality is doubtful or that the statute is probably unconstitutional.” Instead, the presumption can be overcome only if the party establishes the statute's unconstitutionality beyond a reasonable doubt.

MTI, 2014 WI 99, ¶ 13 (cleaned up).

The law violates the equal protection clause if “the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy.” *Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health & Soc. Servs.* (“MBBC”), 130 Wis. 2d 79, 99, 387 N.W.2d 254, 263 (1986). As further set forth:

We will uphold a statute against an equal protection challenge if the classification bears a rational relationship to some legitimate government interest. Notably, this requires no declaration by the State about the law's purpose, nor evidence supporting the law's rationality. The actual motivations of the enacting governmental body are irrelevant. Instead, “[i]n evaluating whether a legislative classification rationally advances the legislative objective, ‘we are obligated to locate or, in the alternative, construct a rationale that might have influenced the legislative determination.’ ”

MTI, 2014 WI 99, ¶ 77.

Though rational basis review affords significant deference to the Legislature's enactments, the Court must still carefully consider the challenged law. At times Defendants and the Legislature effectively argue that the Legislature gets to choose where to draw policy lines and the Court cannot ever question that line drawing. Specifically, in the context of selecting who is a public safety employee, Defendants and the Legislature argue that the Legislature holds the authority to define that group and Courts cannot second guess those policy decisions. If they only want to put 7 categories of the protective employment classes in and exclude the rest, that is their choice and the Court cannot second guess it.

Though true I do not weigh the wisdom of the policy choices the Legislature made, I must review whether that decision is rational. If the mere fact that the Legislature chose the select 7 groups of employees to put in the public safety group meant its choice was rational, rational basis review would be no review at all. The whole point of equal protection and rational basis review is to ensure that the Legislature had a rational reason for its choice, that its choice was not arbitrary.

The Wisconsin Supreme Court explained this point long ago.

What the legislature believes is not determinative; the test is not whether the legislature had a rationale. It will always have a rationale for anything it does. The test is whether the rationale is rational. If the concept of equal protection is to be meaningful, equal protection cannot be interpreted so as to allow the legislature to exercise its will on a minority of citizens anytime it desires so long as there is any rationale to do so, regardless of how remote, fanciful, or speculative the rationale may be. To be rational for the purpose of equal protection analysis, the legislative rationale must be reasonable. Put another way, "... in application to policies, projects, or acts, RATIONAL implies satisfactory to the reason or chiefly actuated by reason...." Webster's Third New International Dictionary 1885 (1961).

MBBC, 130 Wis. 2d 79, 103–04, 387 N.W.2d 254, 265 (1986).

Act 10 fails to satisfy the first, second, and fifth prongs of the test as between the public safety group and those employees in the general employee group who should be in the public safety group. The Court can come up with no rational basis for excluding some police and fire employees from the public safety group while including all others and motor vehicle inspectors.

To be clear, I reject Plaintiffs arguments that there is no rational basis for creating any general employee category. A rational basis exists for the distinction between most of the general employee group versus the public safety group. The equal protection defect lies in the selective exclusion of certain employees that should be, but inexplicably are not, in the public safety group.

As noted in *MTI*, the overall purpose of Act 10 was to create budget flexibility for public employers. The purpose of separating out the public safety group and maintaining

their collective bargaining rights virtually unchanged was to preserve labor peace among employees deemed too vital to risk labor unrest with. There are rational reasons to want to maintain additional benefits for police officers or fire fighters, as their jobs are highly dangerous and the need for recruiting and maintaining quality employees in these categories is significant and unique from many other, less or non-dangerous public positions. The Legislature, however, needed to define the public safety group in a way that makes rational sense. As explained, it fails to do so.

1. The Classifications Are Not Based Upon Substantial Distinctions

The first element of the test I apply is “(1) All classification[s] must be based upon substantial distinctions which make one class really different from another.” Plaintiffs prove that the classification of general employees versus public safety employees is not based on substantial distinctions beyond a reasonable doubt. Rather, many employees in the general employee group should, under any rational review, be in the public safety group.

As a reminder, Act 10 relies on Wis. Stat. § 40.02(48)(am) defining “protective occupation participants” for state benefit purposes to specify who is the Act 10 public safety group. Thus, clearly the Legislature intended these statutes to be considered together. When Act 10 passed, Wis. Stat. §40.02(48)(am) defined the following as “protective occupation participants”:

1. A conservation warden.
2. A conservation patrol boat captain.
3. A conservation patrol boat engineer.
4. A conservation pilot.
5. A conservation patrol officer.
6. A forest fire control assistant.
7. A member of the state traffic patrol.
8. A state motor vehicle inspector.
9. A police officer.
10. A fire fighter.
11. A sheriff.
12. An undersheriff.
13. A deputy sheriff.
14. A state probation and parole officer.
15. A county traffic police officer.
16. A state forest ranger.

17. A fire watcher employed at Wisconsin veterans facilities.
18. A state correctional-psychiatric officer.
19. An excise tax investigator employed by the department of revenue.
20. A special criminal investigation agent in the department of justice.
21. An assistant or deputy fire marshal.
22. A person employed under s. 61.66 (1).

Wis. Stat. § 40.02(48)(am) (emphasis added).

The underlined groups are the only employees Act 10 placed in the public safety category under Wis. Stats. §§ 111.70(mm) and 111.81(15r). As the list shows, the Legislature selected less than 1/3 of the positions included as protective occupation participants. Further, the selected groups cover a variety of categories of work – law enforcement, fire fighters, and, oddly, motor vehicle inspectors. To determine if these 7 selections are rational, I must come up with some reason that explains why these employees were selected yet the others were excluded. I must come up with the explanation because the Legislature provided none. The Legislature is not required to provide any explanation, but if it does, I start with that explanation.

At first glance, excluding motor vehicle inspectors, the other selected groups all reflect a policy of exempting law enforcement, fire suppression or prevention and emergency services employees from Act 10's collective bargaining changes. The Court easily conceives of reasons for exempting this group, including the reasons the Seventh Circuit identified in *WEAC*. The loss of these employees' services even for a day could result in death, destruction and crime going unchecked. This risk makes these employees different from most other positions placed in the general employee category. For example, if teachers, administration, or sanitation workers face labor unrest and their work goes unperformed for a day or a week, the chances of their absence from work causing death or great harm is small or nonexistent. Another reason to treat this group of emergency service employees different is to offer them additional benefits to attract quality employees, and retain those currently employed, to fill this jobs that are both important to the public safety but also jobs that involve putting yourself in harms way.

These rationales explain why the 7 categories of employees put in the public safety group are there. It does not explain why the other employees who meet those same criteria are excluded from this public safety employee category. For example, the Capitol

and University of Wisconsin Police provide law enforcement just like local police and the State Patrol. So, too, conservation wardens provide both law enforcement (the enforcement of State laws on state land, for example), and fire prevention and suppression. This matches what police and firefighters do. These excluded employees perform the same types of work, suffer the same risks, and have the same sort of authority (such as to make arrests and enforce the laws), yet are placed into the general employee group with employees with whom they share no similarity.

The Court strove to conceive of justifications for excluding these employees from the public safety group. At oral argument, the Court pushed counsel for Defendants and the Legislature to share reasons for this exclusion. No rational reasons were provided that withstand further scrutiny and the Court cannot find any. For example, counsel argued that motor vehicle inspectors receive the same law enforcement training as State Patrol officers and can be called upon to fill in when needed. Though that might explain why motor vehicle inspectors are included as public safety employees, it does not explain why Capitol Police and UW Police and conservation wardens are excluded. Again, if having law enforcement training is a reason to include motor vehicle inspectors, to be a rational classification, that rationale would have to apply across the board – all public employees with law enforcement training should be in the public safety group.

An argument was also made that State Patrol and motor vehicle inspectors have statewide jurisdiction, making them different from UW Police. True, but that still does not explain why Capitol Police and conservation wardens are excluded from the public safety group. This therefore not a valid reason for the class as created by the Legislature. Though perhaps not widely known, conservation wardens have authority to make arrests related to their field of work (such as for dangerous use or transportation of weapons), to execute warrants and subpoenas, and are specifically authorized to make arrests for felonies committed in their presence and to work with other law enforcement agencies to make arrests for felony crimes. See Wis. Stat. §29.921. Conservation wardens also have statewide jurisdiction.

Capitol police are likewise authorized with broad authority to act as both peace officers and law enforcement with a statewide reach:

The governor or the department may, to the extent it is necessary, authorize police officers employed by the department to safeguard state officers, state employees, or other persons. A police officer who is employed by the department and who is performing duties that are within the scope of his or her employment as a police officer has the powers of a peace officer under s. 59.28, except that the officer has the arrest powers of a law enforcement officer under s. 968.07 regardless of whether the violation is punishable by forfeiture or criminal penalty. The officer may exercise the powers of a peace officer and the arrest powers of a law enforcement officer while located anywhere within this state.

Wis. Stat. §16.84(2) (emphasis added). Therefore, if having statewide authority is a reason to include State Troopers and motor vehicle inspectors, it would also require the inclusion of conservation wardens and Capitol Police.

The Court also considered whether the fact that UW Police have a smaller sphere of jurisdiction is a relevant difference. Though this surely makes UW Police unlike State Troopers and the police departments of larger cities, Act 10 includes in the public safety group all municipal police officers and sheriff's deputies, as well as county traffic police. For many communities in rural Wisconsin, the local police and county sheriff's departments are small. Surely many are quite comparable to or even smaller than some of the University police departments. The size of the department and limited jurisdictional reach therefore would apply equally to UW police as it does to small police or sheriff offices, yet the local police and sheriffs are included as public safety employees under Act 10 and UW Police are not.

Likewise, if the reason for including the groups defined as the public safety group is the risk of them striking poses too great a threat to the public good and order, surely that same policy requires state correctional officers working in the prison system be in the public safety group. What greater threat is there to public safety than the escape of the persons that those in the public safety group arrested and brought to justice? If the need to apprehend criminals is so great as to treat law enforcement differently, surely the same rational applies to treat the prison staff equally to ensure that those convicted of crimes stay incarcerated. Yet, the correctional officers are excluded from the public safety group.

Again, this Court can conceive of no reason to include law enforcement yet exclude correctional officers other than their lack of arrest power. But as explained above, having

arrest power cannot justify the current public safety group, as it excludes multiple categories of employees who hold that power. Thus, that cannot be the rationale.

In sum, the Court 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. No explanation withstands rational basis review. No explanation presented to or thought of by the Court can explain why those 7 groups are in but the other public safety type groups are put in the general employee category. This is the purpose of rational basis review – to ensure there is an explanation that makes rational sense as to why a group is treated differently and who is in the group.

The Legislature absolutely has authority to define the public safety group and set the bounds of who is included as long as there is a rationale for it and the bounds apply fairly to all who fall within them. Here the Legislature did not define the bounds of who is in the public safety group with words or explanation. It only did so by naming the specific employees put into the public safety group. Because the Court cannot come up with any policy that explains why these 7 groups of employees are included but other similar employees are excluded, the classification lacks a rational basis.

I realize I am disagreeing with the Seventh Circuit in *WEAC*. I must do so because *WEAC* is only useful for its persuasive value and is unpersuasive as to Wisconsin's 5 factor test for reviewing whether a statute has a rational basis. *Water Quality Store, LLC v. Dynasty Spas, Inc.*, 2010 WI App 112, ¶¶17–18, 328 Wis. 2d 717, 789 N.W.2d 595 (declining to follow Seventh Circuit analysis that conflicted with Wisconsin Supreme Court precedent). The Seventh Circuit never mentioned, much less applied the five-factor test used in Wisconsin equal protection analysis. I must apply Wisconsin case law, and therefore *WEAC* lacks persuasive power for its failure to use the five-factor test as I must.

Furthermore, the *WEAC* court and Defendants lean on line-drawing cases where the laws involved drawing a line within a numerical spectrum, such as age or the number of people in a household. *WEAC*, 705 F.3d 640, 655-56. For example, *WEAC* discussed *Vill. of Belle Terre v. Boraas*. There the challenged and upheld zoning regulation permitted 2 unrelated people living together but barred more than 2 from doing so. 416

U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974). *Vance v. Bradley* addressed the requirement that those in the Foreign service retire at age sixty but those in Civil service to retire at age seventy. 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979).

Selecting a number is inherently different than what we have under Act 10, defining a group. A number is a number. Those outside of the number are clearly defined and different from those in the group. People under a certain age or over it are clearly categorized. The pronouncements of the Seventh Circuit in *WEAC* and the U.S. Supreme Court in the referenced cases make good sense when selecting a number. It is for the Legislature to decide whether it is better for the Foreign Service to retire at age 60 versus 55, 65, or any other number. The Court does not review the wisdom of that choice.

Here the Legislature did not pick a number. It selected specific employee categories to provide favored treatment. The Court must determine that there was a rationale for that, and that all similar employees were treated the same. Under Act 10, they were not. The Legislature also points to the *WEAC* Court's reliance on "*Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483 (1955), a seminal U.S. Supreme Court precedent that upheld a law benefiting 'ophthalmologists and optometrists,' to the exclusion of 'opticians,' although they 'possessed similar skills.'" Dkt. 102 at 9. That case is easily distinguished. First, as the Supreme Court explained in the *Williamson* decision, there are real differences between ophthalmologists and optometrists versus opticians. The first two can diagnose eye issues and issue prescriptions for glasses. Opticians cannot diagnose or issue prescriptions, but only fill prescriptions and fix glasses. The Court found ample rational explanations justifying the different treatment of opticians. This Court cannot identify any such reason to justify Act 10's public safety group. The other cases Defendants cite about drawing lines and the extreme deference provided to the Legislature when drawing lines are not persuasive. They are all federal cases and none of them apply Wisconsin's 5 factor test for rational basis review.

This is not to say that none of Act 10 satisfies rational basis review. The different treatment of office and administrative staff, teachers, sanitation workers, etc. versus police, fire and emergency services public workers have rational differences. These employee groups are distinctly different. The Constitutional defect in Act 10 lies in its

exclusion of multiple employee groups from the public safety group that should be in it under every explanation the Court can come up with.

2. The Classifications Are Not Germane to the Purpose of the Law.

One basis Defendants and the Legislature posit to uphold Act 10 is not germane to the law's purpose. Specifically they argue that the different treatment of essential public safety employees was necessary to avoid a potential strike. However, Wisconsin already makes it illegal for public employees to strike. Wis. Stat. §§ 111.70(4)(L), 111.89. Striking public employees incur daily penalties, forfeit their compensation, and their employers can terminate them with a bar on reinstatement. *Id.* §§ 111.70(7m), 111.89, 111.89(2). Wisconsin law allows employers and citizens alike to "petition the circuit court for an injunction to immediately terminate the strike." *Id.* §§ 111.70(7m), 111.89. As explained in *U.S. Dep't of Agric. v. Moreno*, where a law already bars the conduct at issue, another law duplicating that bar is not rationally intended to prevent that same conduct. 413 U.S. 528, 536–37, 93 S. Ct. 2821, 2826–27, 37 L. Ed. 2d 782 (1973) ("The existence of [existing provisions to prevent food stamp fraud] necessarily casts considerable doubt upon the proposition that the [later] amendment could rationally have been intended to prevent those very same abuses.")

If this were the only policy that Act 10 supports, I would reject the law, as the law does not rationally address unlawful strikes. Further, maintaining collective bargaining rights for public safety workers does not rationally help avoid strikes anyway. A strike is the result of failed negotiations. Why would public safety workers strike over issues Act 10 prohibits bargaining over if they were restricted the same as general employees? The strike could not result in any concession on those prohibited issues an employer cannot make concessions on. Thus, maintaining bargaining rights on more topics for public safety workers actually gives more potential for striking, as more issues can be bargained over and disagreed upon.

This factor ends up being irrelevant, though, as Act 10 also reflects the policies of maintaining the quality of these public safety jobs for recruiting and maintaining qualified employees. That the argument about the law being needed to deter illegal strikes is not actually supported by Act 10 does not matter when it does advance these other policies.

3. The Class Characteristics Are Not So Different So that Substantially Different Legislation Still Serves the Public Good.

Finally, on the fifth prong “we examine whether the characteristics of each class are so far different as to reasonably suggest the propriety, as to the public good, of substantially different legislation.” *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 73, 332 Wis. 2d 85, 796 N.W.2d 717 (citation omitted).

As explained above, I find no discernible and consistent difference between the public safety group and the law enforcement/fire suppression employees irrationally put in the general employee group in Act 10. As explained, I tried to conceive of differences between the different types of law enforcement and fire fighters who are in the public safety group and those in the general employee group, but could not come up with any explanation that explained why the groups put in the general employee category would not fit properly in the public safety group. As such, there is no public good served by treating similar law enforcement and fire fighters substantially different from the favored public safety group.

The sole reason cannot be that this choice is rational because it is the Legislature’s to make.

4. The third and fourth prongs of rational basis review are met by Act 10.

As for the third and fourth prongs of the test, I reject Plaintiffs’ arguments that Act 10 fails on these. Again, those prongs are:

- (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within the class];
- (4) To whatever class a law may apply, it must apply equally to each member thereof;

Concerning the third prong, Plaintiffs asked me to deem the purpose of Act 10 as a political reward to campaign supporters of Governor Scott Walker and find that because the group of supporters is frozen in time, no new persons can be added to the group. Though true that the unions that endorsed Governor Walker in the 2010 election cannot

be added to, that is not what this factor looks at. It looks at the groups included as public safety workers and whether their numbers/makeup can be added to. They can. New employees are hired by police, sheriff's departments, fire departments and the State Patrol regularly. Thus, element 3 is satisfied by Act 10.

Regarding the fourth prong, Plaintiffs conflate the Act 10 classification scheme with the previously mentioned "protective occupation" list in Wis. Stat. § 40.02(48)(am). The fourth prong of the test asks whether the law applies equally to each member within a challenged class – for example, does every member of the State Patrol and of local municipal police and fire receive similar treatment under Act 10? They do. That Act 10 excluded employees who are virtually identical to those included in the public safety group is not what this element addresses. This element is also satisfied by Act 10.

5. I Cannot Sever the Portions of Act 10 that Violate Equal Protection.

Wisconsin law provides that "If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications *which can be given effect without the invalid provision or application.*" Wis. Stat. § 990.001(11) (emphasis added). "We have long held that 'the presumption is in favor of severability.'" *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 76 (citation omitted). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability.' 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *State v. Janssen*, 219 Wis. 2d 362, 379, ¶ 37, 580 N.W.2d 260 (1998) (citations omitted).

The Legislature made clear that they would not strip away the collective bargaining rights of public safety employees for fear of the danger to society this might cause. The problematic provision of Act 10 is its definition of the public safety group. I could strike only that group and uphold Act 10 as an across the board reduction of collective bargaining rights for all public employees equally. However, that is exactly what the Legislature avoided doing. I must not sever the law in a way that enacts what the

Legislature imperfectly attempted to avoid. It is clear that the Legislature would not have enacted Act 10 with the same reductions as applied to the rights of general employees also applied to public safety employees. I therefore must strike all aspects of Act 10 that relate to the improper unequal treatment of public safety and general employees, meaning I must strike all of the collective bargaining changes in the Act.

However, as 2011 Act 10 also made changes to a variety of other statutes on other issues, I can and must sever the modification of collective bargaining rights provisions which I am striking from those sections of the Act relating to other issues.

CONCLUSION

Rational basis review provides a simple premise. Can you explain a law's differing treatment of different groups in a way that makes sense and supports a public policy? If not, the different treatment is irrational and violates the right to equal protection of the laws. Because nobody could provide this Court an explanation that reasonably showed why municipal police and fire and State Troopers are considered public safety employees, but Capitol Police, UW Police and conservation wardens, who have the same authority and do the same work, are not. Thus, Capitol Police, UW Police, and conservation wardens are treated unequally with no rational basis for that difference. Act 10 therefore violates their rights to equal protection under the law and I declare those provisions of the Act relating to collective bargaining modifications unconstitutional and void.

ORDER

1. I deny the Motions to Dismiss.
2. As my decision appears to resolve all issues, I order the parties to file a letter or memorandum to the Court as to whether the Court should issue judgment on the pleadings in light of this Decision or take some other action to bring this action to a final judgment. As part of that discussion, Plaintiffs should address what sections of Act 10 must be severed and struck under my ruling and Defendants shall respond on this issue as well.

3. Plaintiffs should file their submissions under paragraph 2 within 14 days. Defendants and the Legislature shall file their response within 14 days thereafter. Plaintiffs shall file a reply within 7 days later.

FILED
12-02-2024
CIRCUIT COURT
DANE COUNTY, WI
2023CV003152

BY THE COURT:

DATE SIGNED: December 2, 2024

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN

**CIRCUIT COURT
BRANCH 9**

DANE COUNTY

ABBOTSFORD EDUCATION ASSOCIATION, et al,
Plaintiffs,

Case No. 2023CV3152

vs.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION, et al,
Defendants,

and

KRISTI KOSCHKEE; and WISCONSIN STATE
LEGISLATURE,

Intervenors.

**DECISION AND ORDER GRANTING MOTION
FOR JUDGMENT ON THE PLEADINGS**

Previously the Court decided Motions to Dismiss Plaintiffs’ lawsuit challenging the constitutionality of Act 10. In my Decision and Order entered on July 3, 2024 (the “July Decision”), the Court denied the motions to dismiss and resolved the legal issue whether Plaintiffs stated a claim that Act 10 is unconstitutional under the Wisconsin Constitution. I held it is. The only issue remaining was, procedurally, how to bring this lawsuit to a final judgment, and what relief Plaintiffs are entitled to in light of the July Decision. I do not repeat the reasoning set forth in my July Decision in this decision, but rely on and incorporate it here.

As the July Decision resulted from motions to dismiss, the Defendants and Intervenor had never answered the Complaint prior to that Decision. Therefore, those parties filed Answers after the July Decision. Plaintiffs then moved for judgment on the pleadings. The parties fully briefed that motion. No party requested oral argument and the Court does not need any. I grant the Motion for Judgment on the Pleadings as follows.

I. I DO NOT CONSIDER THE LEGISLATURE'S ADDITIONAL ARGUMENTS WHETHER ACT 10 IS CONSTITUTIONAL, AS THE JULY DECISION FULLY RESOLVED THOSE ISSUES AND THE LEGISLATURE IS NOT ENTITLED TO BRING FURTHER DEVELOPED ARGUMENTS TO TRY TO AVOID THAT DECISION.

In opposing Plaintiffs' Motion for Judgment on the Pleadings, the Defendants and the Intervenor Wisconsin State Legislature take very different approaches. As a reminder, Defendants are the state agencies and officials responsible for enforcing the challenged provisions of Act 10. Defendants make a one paragraph argument that incorporates the arguments they lodged on the Motion to Dismiss and preserves for appeal the issue whether Act 10 is unconstitutional. They do not rehash those arguments or attempt to add to them. The remainder of the Defendants' brief focuses on the issues the Court must yet resolve.

Taking a drastically different approach, the Legislature devotes the lion's share of its Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings to rearguing whether Act 10 violates the equal protection cause. The Legislature repeats the arguments made on the Motions to Dismiss and adds to certain of them with new details in the apparent attempt to get me to reconsider my July Decision. The Legislature never moved for reconsideration and never explains why reconsideration is appropriate here.

Whether Act 10 survived Plaintiffs' equal protection challenge was a legal issue to be decided without evidence based on thought experiments, the statutes and case law. Indeed, the Court engaged in significant discussion at oral argument regarding the process the Court must apply when trying to identify any possible rational basis for Act 10 to include the groups it placed in the public safety group while excluding similar employees. As was discussed and agreed upon by all parties at oral argument, the Court is prohibited from taking evidence to add in its thought experiments, but must rely on the mental exercise of the court with the benefit of the statutes, the parties' arguments and potentially the legislative history.

At oral argument on the Motions to Dismiss, the Court pressed Defendants and the Legislature on each of the reasons they put forth as providing a rational basis for the law's distinction between general employees and the select few public safety employees. I asked for more details on some arguments and engaged in questions, answers, and discussion with counsel to try to justify any rational basis for the law. No party requested additional time to try to identify additional relevant information before I decided the legal issues.

The Legislature now tries to take a second bite at the apple. A party cannot present some arguments, wait for a decision on the merits, then try to further develop its prior arguments with details never presented on the Motion to Dismiss. The Legislature does not hide its effort to reargue the issues. It attacks the reasoning I set forth in the July Decision, often referring to that Decision and arguing where I erred. Despite that, the Legislature never points to any error of fact or law in my July Decision and never uses those terms that form the basis of a motion for reconsideration. Instead, the Legislature repeats its disagreement with the July Decision. This is entirely inappropriate.

This is in reality an argument for reconsideration of the July Decision. However, the Legislature never calls it a motion for reconsideration and never explains why it should be allowed to present additional arguments on the issues previously decided. The Wisconsin Supreme Court recently explained the standards applicable to a request to reconsider a non-final order. It stated:

In our first review of the merits of a circuit court's reconsideration decision, we agree with the approach developed by the court of appeals. As that court has explained, a circuit court possesses inherent discretion to entertain motions to reconsider “nonfinal” pre-trial rulings. *See, e.g., Fritsche v. Ford Motor Credit Co.*, 171 Wis. 2d 280, 294-95, 491 N.W.2d 119 (Ct. App. 1992). To succeed, a reconsideration movant must either present “newly discovered evidence or establish a manifest error of law or fact.” *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (*citing Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)).

Newly discovered evidence is not “new evidence that could have been introduced at the original summary judgment phase.” *Id.*, ¶46. Similarly, a “manifest error” must be more than disappointment or umbrage with the ruling; it requires a heightened showing of “wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Id.*, ¶44 (quoting *Oto*, 224 F.3d at 606). Simply stated, “a motion for reconsideration is not a vehicle for making new arguments or submitting new evidentiary materials [that could have been submitted earlier] after

the court has decided a motion for summary judgment.” *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶23, 275 Wis. 2d 171, 684 N.W.2d 141.

....Applying the law set forth above to the relevant facts before it, the circuit court reasonably concluded that Bauer lacked necessary factual predicates on both constitutional claims and offered no newly discovered evidence warranting reconsideration. *See Borreson*, 292 Wis. 2d 231, ¶6, 713 N.W.2d 656. Because the circuit court permissibly declined to accept additional evidence and legal arguments via Bauer's reconsideration motion, we disregard that material in reviewing the underlying summary-judgment decision.

Bauer v. Wisconsin Energy Corp., 2022 WI 11, ¶¶13-16, 400 Wis. 2d 592, 970 N.W.2d 243.

The Legislature never explained why it satisfies the requirements for reconsideration. It never explained whether any evidence is newly discovered. How could it be, I was not allowed to take evidence on rational basis review. It never explained if or how the Court made a manifest error of law or fact. In short, the Legislature never developed an argument for reconsideration. Because it never shows grounds to proceed with reconsideration, I refuse to consider the additional arguments the Legislature makes in opposition to the Motion for Judgment on the Pleadings.

There is no reason to allow the Legislature a second bite at the apple. The Legislature had its day in court. A party cannot try out new arguments or better arguments after failing to convince the Court the first time, this second time with the benefit of knowing the Court's complete decision. The judicial system gives parties one chance to present their case. Many rules of law incentivize parties to put their best foot forward the first time by penalizing parties for failing to do so. Parties are not allowed to hold back facts and legal arguments to use only if their first wave of evidence and argument fails. That is why a party can only seek reconsideration based on newly discovered evidence that could not have been presented the first time around. The law bars a party from introducing evidence a party could have, but failed, to present at trial. Similarly, a party cannot raise an argument for the first time on a reply brief that should have been raised in the opening brief. *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998)(“The grounds for such a rule are fundamental fairness. It is inherently unfair for an appellant to withhold an argument from its main brief and argue it in its reply brief because such conduct would prevent any response from the opposing party.”)

Similarly, a party generally cannot present a new argument on appeal that it never raised with the trial court, but must make and preserve the argument to the trial court first. *See Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 306, 592 N.W.2d 5 (Ct. App. 1998).

As the Legislature does not present any argument on this Motion for Judgment on the Pleadings which it was unable to present on the Motion to Dismiss, I find the further developed arguments waived. I deny its indirect request that I reconsider the July Decision based on these arguments the Legislature should have, but failed, to advance on the Motion to Dismiss. I do not further discuss those arguments.

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE PLEADINGS.

On a Motion for Judgment on the Pleadings, Wis. Stat. § 802.06(3) directs that I must “first consider whether the complaint states a claim.” *Wagner v. Allen Media Broad.*, 2024 WI App 9, ¶17, 410 Wis. 2d 666, 3 N.W.3d 758. As I explained in denying the Motions to Dismiss, the Complaint states a claim that Act 10 is unconstitutional.

I then “examine the responsive pleading[s] to ascertain the existence of disputed issues of material fact.” *Id.* “If a claim for relief has been stated,” and “no genuine issue of material fact exists,” then “the court may determine that the moving party is entitled to a judgment as a matter of law.” *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988). Here the Answers do not create any genuine issue of material fact. Rather, this lawsuit involves the Court’s review of the challenged statutes and specifically prohibits the Court from fact finding when assessing whether Act 10 rests on a rational basis.

As the Complaint states a claim and no genuine issues of material fact exist, for the reasons explained in the July Decision, I grant Plaintiffs’ Motion for Judgment on the Pleadings. I grant judgment in favor of Plaintiffs.

The rest of this decision addresses what portions of Act 10 and 2015 Act 55 are struck as unconstitutional.

III. UPON FINDING ASPECTS OF ACT 10 UNCONSTITUTIONAL, THE COURT MUST STRIKE THE UNCONSTITUTIONAL PROVISIONS OF ACT 10 AND RELATED LAWS THAT CANNOT BE SEVERED.

The Legislature argues that the Court should not strike or enjoin enforcement of the unconstitutional provisions of Act 10, but can only declare the law unconstitutional. In

reality, the Legislature argues that the Court can only render an empty judgment declaring parts of Act 10 unconstitutional, but can provide no remedy to stop enforcement of those unconstitutional provisions. The Legislature is wrong on the law and blissfully ignores the abundant, controlling case law Plaintiffs cite to. The Legislature never distinguishes that precedent, but relies on quotes pulled from decisions in contexts that are not applicable here to try to argue that the judiciary does not write the laws or modify the laws, and, therefore, I must leave in place any law the Legislature enacts, no matter its constitutional infirmities.

If that were true, the judiciary would not be a co-equal branch of government. Judicial decisions must have meaning and effect. The judiciary cannot be a check on the Legislature if it cannot, through declaring a statute unconstitutional and void, stop the enforcement of that statute. Instead, to uphold the role of the judicial branch, I must strike unconstitutional statutes and restore the statutes to a constitutional basis. The Legislature may then take up the work of drafting a new, constitutional framework for collective bargaining of public employees, if it so desires.

I turn to the mountain of precedent that confirms that a court can and must declare an unconstitutional law invalid. As the Legislature never attempts to distinguish the case law Plaintiffs cite declaring the duty and authority of the Court to strike the unconstitutional provisions of Act 10, I need not address the issue in detail. However, I will recite some of the case law. As our Supreme Court so aptly held in 1943:

Many cases are cited to the proposition that the court has power to declare invalid an act of the legislature which contravenes constitutional provisions. That principle was established in 1803 in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60, and has been reaffirmed in hundreds of cases and is no longer open to debate.

Goodland v. Zimmerman, 243 Wis. 459, 470–71, 10 N.W.2d 180 (1943).

Our Supreme Court recently cited *Goodland* approvingly and expanded on what the Court must do when it declares a legislative act invalid. As Justice R. Bradley explained in her binding majority opinion: ‘While it is the duty of the judiciary to interpret the law and to strike any law whose substance violates the constitution, the judiciary has no authority “to interfere with the right of the legislature to enact and put in force a law.”’ *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶36, 387 Wis. 2d 511, 929 N.W.2d 209 (quoting *Goodland*). In other words, the courts cannot interfere with the

process by which the Legislature enacts the laws. However, once a law is enacted, the courts must then interpret and strike down any unconstitutional law.

In another relatively recent decision from the Wisconsin Supreme Court, the Court explained how to apply the rules regarding severability and what a court should do when it declares a statute unconstitutional. Our Supreme Court stated:

Wisconsin Stat. § 990.001(11) provides that “[i]f any provision of the statutes or of a session law is invalid ... such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.” We have long held that “the presumption is in favor of severability.” *Nankin*, ¶ 49 (quoting *State v. Janssen*, 219 Wis.2d 362, ¶ 37, 580 N.W.2d 260 (1998)). “Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” *Id.*

The legislature has expressed no intent in Act 86 that is contrary to the general presumption of severability. Further, the remaining sections of Wis. Stat. §§ 70.47, 73.03, and 74.37 remain fully operative as a law when the modifications from Act 86 which create the enhanced Board of Review procedure and the enhanced certiorari procedure are severed. As a result, we hold that the provisions of Act 86 which create the enhanced Board of Review procedure and the enhanced certiorari procedure are severable.

The circuit court severed only the specific subsections of § 74.37 that restrict taxpayers in opt out municipalities from seeking de novo review. The statutes creating the enhanced Board of Review and enhanced certiorari procedures were not affected by the circuit court order.

As a result, under the circuit court's order, taxpayers in opt out municipalities would have access to three separate assessment review procedures: the enhanced Board of Review procedure, enhanced certiorari procedure, and de novo review. By contrast, under the circuit court's order, taxpayers in all other municipalities would have access to traditional certiorari review and de novo review. In enacting Act 86, the legislature clearly did not intend to create a situation where enhanced board of review and enhanced certiorari procedures would be available in a municipality where de novo review was also available. Therefore, we conclude that all of Act 86's modifications to Wis. Stat. §§ 70.47, 73.03, and 74.37 are unconstitutional.

It is important to note that our holding today simply returns the Board of Review procedures in all counties to the procedures which existed before Act 86 was approved. It also returns the procedure for challenging Board of Review assessment determinations to the procedure which existed before Act 86 was

approved—allowing all taxpayers the choice between traditional certiorari review and de novo review.

Metro. Assocs. v. City of Milwaukee, 2011 WI 20, ¶¶ 76-80, 332 Wis. 2d 85, 796 N.W.2d 717.

The approach used in *Metropolitan Associates* mirrors the law as has long existed in the federal courts. Nearly a century ago, the US Supreme Court declared an amendment to an existing law unconstitutional and explained the proper action for the Court to take as to the unconstitutional law:

Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the Legislature which enacted it. Without an express repeal, a different Legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent.

Frost v. Corp. Comm'n, 278 U.S. 515, 526–27, 49 S. Ct. 235 (1929).

Wisconsin precedent is equally clear as to the effect a declaratory judgment that portions of Act 10 and related laws are unconstitutional has. That declaration in itself enjoins the State of Wisconsin and its agents from enforcing the unconstitutional provisions. The Defendants cannot enforce an unconstitutional law after the courts declare it unconstitutional. No injunction is needed. As former Chief Justice Roggensack explained in her concurrence in 2020:

Declaratory judgment is a legal remedy; however, it is analogous to an injunction, which is an equitable remedy. *Samuels v. Mackell*, 401 U.S. 66, 70–71, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). In *Samuels*, The United States Supreme Court stated:

Although the declaratory judgment sought by the plaintiffs [in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943)] was a statutory remedy rather than a traditional form of equitable relief, the Court made clear that a suit for declaratory judgment was nevertheless ‘essentially an equitable cause of action,’ and was ‘analogous to the equity jurisdiction in suits *quia timet* or for decree quieting title.’ ... [T]he Court held that in an action for a declaratory judgment, ‘the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds.’

Samuels, 401 U.S. at 70-71, 91 S.Ct. 764 (internal citations omitted). The Court emphasized the “continuing validity” of its analogy between declaratory judgments and injunctive relief. *Id.* at 71, 91 S.Ct. 764.

The analogy between declaratory judgment and injunctive relief is particularly strong in the context of this case. As then-Chief Justice Abrahamson and Justice Ann Walsh Bradley said, “[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.” *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶43, 351 Wis. 2d 237, 839 N.W.2d. 388 (Abrahamson, C.J., & A.W. Bradley, J., dissenting).

Wisconsin Legislature v. Palm, 2020 WI 42, ¶¶63-64, 391 Wis. 2d 497, 942 N.W.2d 900. Therefore, as in *Palm*, I need not evaluate Plaintiffs’ lawsuit as a request for an injunction. This Court’s declaring parts of Act 10 and Act 55 invalid and unenforceable prohibits Defendants from enforcing those statutes. I therefore do not address the factors applicable to when injunctive relief is appropriate.

The Legislature provides no law directly relevant to this issue. They never cite a case saying that, after a court declares a statute unconstitutional, it still must assess whether to enjoin the government from enforcing the statute. If such was the case, a court’s declaration that a statute is unconstitutional would be meaningless unless the court also determined that an injunction was warranted. The Legislature in effect asks the Court to overrule the precedent that an unconstitutional act or statute is void and a nullity. How can a void statute continue to have effect unless an injunction is issued prohibiting its enforcement? If a law is void it has no effect. I cannot overrule the Wisconsin Supreme Court decisions providing that my declaratory judgment itself bars the State from enforcing the struck unconstitutional provisions of law.

The only precedent the Legislature cites that comes remotely close to addressing this issue involve requests for a preliminary injunctions enjoining enforcement of a statute while the court is yet to decide an action for declaratory judgment. Nobody here requested a preliminary injunction enjoining Defendants from enforcing Act 10 prior to my entry of a final judgment. Rather, I now issue final judgment declaring parts of Act 10 unconstitutional. Though the Legislature cites to it as supporting their position, *John F. Jelke Co. v. Hill*, 208 Wis. 650, 242 N.W. 576, 581 (1932), confirms that the unconstitutional statutes will have no further effect going forward. The Wisconsin Supreme

Court explained: “An unconstitutional act of the Legislature is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and, in legal contemplation, has no existence.” *Id.* The *Jelke* court addressed why the circuit court had authority to issue a preliminary injunction to maintain the status quo and could then enforce violations of that preliminary injunction through the contempt power. *See id.* It never held that the circuit court declaring a statute unconstitutional has no effect in stopping the State from enforcing that statute.

The Legislature also cites *Serv. Emps. Int'l Union, Loc. 1 v. Vos*. It is not controlling here. There the Supreme Court addressed the factors applicable to a temporary injunction, not a final judgment declaring a law unconstitutional. 2020 WI 67, ¶ 116, 393 Wis. 2d 38, 112, 946 N.W.2d 35. In dicta, the majority criticizes Justice Hagedorn’s insistence that the Supreme Court consider all of the temporary injunction factors and explains why that would make no sense. The majority’s dicta discusses that, though the circuit court or court of appeals may need to address all the temporary injunction factors, as their decisions are subject to further judicial review, once the Supreme Court rules, the legal issue is finally resolved. In other words, if the Supreme Court grants a temporary injunction declaring a law unconstitutional, no further permanent injunction is needed, as the high court’s decision on the temporary injunction is now the definitive statement of the law. The *Vos* decision in no way provides that a circuit court must decide whether injunctive relief barring enforcement of an unconstitutional law is appropriate when issuing a final determination that a law is unconstitutional.

Therefore, once I render judgment that parts of Act 10 are unconstitutional, that judgment is effective against the State, and requires the State and its officers to not enforce those unconstitutional portions of the law. If the Legislature wants this Court’s decision to not yet have effect, it must move this Court to stay enforcement of its decision pending appeal. That has not yet been requested, so I do not address it.

IV. THE COURT CANNOT SEVER ACT 10'S DEFINITION OF "PUBLIC SAFETY EMPLOYEE," YET LEAVE IN PLACE THE REST OF THE LAW.

The Legislature argues that I should strike only two provisions of Act 10 – the definitions of “public safety employee” under MERA and SELRA. Wis. Stat. §§111.70(1)(mm); 111.81(15r). The result would be that the term “public safety employee” would still exist in MERA and SELRA, but would no longer be defined. It would lack any legislative direction in the statutes as to the intended meaning of the term. The Legislature then argues that it will fall to WERC to interpret this newly undefined phrase, subject to Court review. In other words, the Legislature proposes that I reject the Legislature’s definition of public safety employees and leave it to a state agency and future courts to rewrite that definition at a later date based on the agency’s and court’s determination of what the term should mean. This is exactly what the Legislature vehemently argued the courts cannot do – decide the policy and define a term the Legislature already defined.

Neither this Court, the Court of Appeals nor the Supreme Court can decide how we believe the Legislature should have, but did not, define the “public safety employee” group. We cannot decide who should be included or excluded, absent guidance from the Legislature as to its lawful policy choices. As our Supreme Court declared:

“This court has long held that it is the province of the legislature, not the courts, to determine public policy.” *Flynn v. DOA*, 216 Wis.2d 521, 539, 576 N.W.2d 245 (1998). Under our tripartite system of government, it is the duty of this court to apply the policy the legislature has codified in the statutes, not impose our own policy choices—to do otherwise would render this court little more than a super-legislature. *Id.* at 529, 576 N.W.2d 245. Thus, we must apply the statute as written, not interpret it as we think it should have been written.

Columbus Park Hous. Corp. v. City of Kenosha, 2003 WI 143, ¶ 34, 267 Wis. 2d 59, 671 N.W.2d 633.

Further, case law discusses the role of courts in interpreting statutes. As the Wisconsin Supreme Court explained:

It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory

language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.

Act 10 as written by the Legislature specifically and narrowly defines “public safety employee.” It is that definition which is unconstitutional. The Legislature cites no precedent for this bold argument that I should simply strike the unlawful definition but leave it to an agency and the courts to later define as they see fit. I am unaware of any such precedent, and indeed this argument seems directly contrary to the law quoted above requiring courts to start and end with the statutory language as enacted and to not rewrite a statute based on how the court believes it should have been written.

Interpreting “public safety employee” after striking the legislated definition would be an exercise in the absurd. This term would be ambiguous, as it would not be statutorily defined and is not an otherwise generally defined or ordinarily understood term. Because the term would now be ambiguous, statutory interpretation rules would direct WERC and the courts to analyze the statutes and legislative history to determine the meaning of “public safety employee.” *Kalal*, 2004 WI 58, ¶50.

To consider legislative history would be absurd and futile. The legislative history will demonstrate the intent of the Legislature to enact Act 10 with the previously enacted definition of “public safety employee.” However, WERC or a court cannot use that definition, as it is what I held violated the constitution. Therefore, the court would lack any guidance from the legislative history except the history supporting the unconstitutional definition the Legislature enacted.

Even if the court focused on the legislative history solely as showing the general policy idea that the Legislature believed some public employees must be exempted from Act 10’s restrictions on collective bargaining, the court would have to create policy as to which employees deserve this protection. That would be impermissible, as the Legislature decides and enacts policy for the state, not the judiciary. Therefore, the courts could not

create a new definition for “public safety employee” without further policy declarations from the Legislature that do not exist.

This proposal to let WERC define the term also fails. Plaintiffs correctly note that an agency can only lawfully be allocated power if it is also given adequate standards with which to do so. Dkt. 140 at 14-16 and case law cited by Plaintiffs. The Legislature never explains what standards Act 10 provides to guide WERC in defining this term. It provides none, as the law did not envision or want WERC defining this term. Indeed, the argument fails because it’s built on the false idea that the Legislature allocated authority to WERC to define “Public safety employee.” It did not allocate any such authority. Rather, the Legislature defined “public safety employee” in Act 10, conclusively showing that the Legislature did not want WERC or the courts to define this term. As enacted by the Legislature, the definition was unambiguous, leaving no room for WERC or the courts to define this term.

For these reasons, I cannot solve Act 10’s constitutional problems by striking the definition of “public safety employee,” leaving the term undefined and leaving the remainder of the law in place.

V. I STRIKE THE FOLLOWING PROVISIONS OF ACT 10 AND ACT 55.

I turn at last to identifying which provisions of 2011 Wisconsin Act 10 and 2015 Wisconsin Act 55 I must strike. The Legislature waived its right to argue what specific provisions should be struck by never addressing this in its brief. As I explained in the July Decision, the unconstitutional provisions of Act 10 are severable from the non-collective bargaining related provisions of that law.

A. Stricken Provisions of Act 10.

Plaintiffs and Defendants agree on many provisions of Act 10 that I must strike as relating to the unconstitutional creation of the public safety employee group. Those sections are 2011 Wisconsin Act 10 §§ 58, 95, 168–169, 182, 210, 211, 213, 215, 217–223, 225, 227, 230–236, 238–241, 242, 244–247, 250–252, 255, 259-262, 265, 267, 270-271, 273, 276, 283-284, 288–290, 293–296, 298-299, 303, 305–306, 308–312, 314–315, 319–322, 324–334, 366, 387-388. I strike each of these sections as unconstitutional.

Plaintiffs and Defendants disagree as to whether a handful of other sections should be struck. I identify each disputed section and then address my decision on whether it must be struck.

- Section 178. This section creates Wis. Stat. §73.03(68) and grants authority to the Department of Revenue as follows, in relevant part: “At the request of the Wisconsin Employment Relations Commission, as provided under s. 111.91(3q)...” Section 111.91(3q) directly relates to actions provided for under §111.91(3). Both §§111.91(3q) and (3) were created by Act 10 in Sections 314 and 315. Plaintiffs and Defendants agree I should strike Sections 314 and 315. Therefore, I also strike Section 178, as it is reliant on and intertwined with the unconstitutional Sections 314 and 315. It grants authority to do something that I then make irrelevant by striking Sections 314 and 315.
- Sections 212, 214, 216, 264, 268. Defendants propose to strike these sections of Act 10. Plaintiffs’ only argument not to do so is “out of an abundance of caution....so as to avoid the potential consequence of leaving undefined terms that may appear elsewhere in Wisconsin law.”

These sections create new terms that relate to the unconstitutional public safety group Act 10 created. These sections are directly related to other sections of Act 10 that Plaintiffs and Defendants agree I should strike. As such, I should strike these sections as well.

Perhaps had Plaintiffs identified specific examples of statutes that were lawfully enacted that rely on these new terms Act 10 created, the argument to leave the definitions in place for the sake of those other laws could have merit. However, Plaintiffs do not point to any existing statute that relies on these defined terms. That something might exist is not enough. I strike these sections.

- Sections 272, 278, and 285-286. These sections create definitions of “public safety employee” and designate circumstances for when and in what units public safety employees may be assigned. This gets to the heart of the Court’s July Decision – the unconstitutional creation of the “public safety employee” group and differential treatment of it without a rational basis – so I strike these sections.

I do not understand the point Plaintiffs make against striking these sections. Plaintiffs argue that striking these provisions could result in unintended consequences for existing bargaining units and their collective bargaining agreements. True, but that is exactly the result Plaintiffs argued for in this lawsuit – to undo the unconstitutional unequal treatment Act 10 provides by restoring the collective bargaining provisions of Act 10 to their form pre-Act 10. In short, Plaintiffs asked to upset the current situation with public employee collective bargaining. That removing them will impact state employees is no reason to leave in place an unconstitutional law.

As Plaintiffs argued elsewhere, and I agreed, an unconstitutional law is null and void. Striking it will of course impact some people in the State. If that were a reason not to strike otherwise constitutionally infirm sections from Act 10, I should not strike any of the law. However, I rejected that argument as made by the Legislature and equally reject it coming from Plaintiffs. I strike Act 10 Sections 272, 278, and 285-286.

- Section 266. This section adds to the definition section of SELRA by adding certain university research assistants to the definition of “employee.” This has no direct relation to the unconstitutionally different treatment of “public safety employees.” I see no reason to strike this provision. Defendants offered no explanation beyond generally identifying this section. I do not strike Act 10 Section 266.
- Sections 248, 224, 226, 237, 243, 253–254, 256–258. Defendants identify these sections as ones they believe do not need to be struck, disagreeing with Plaintiffs. Defendants never presented any argument why these should not be struck.

Plaintiffs explained why they included these sections of Act 10 as needing to be struck. I find those reasons persuasive and my review confirms these sections address some of the very issues and distinctions I declared unconstitutional, I strike these sections of Act 10.

B. Stricken Provisions of Act 55.

Plaintiffs argued that the Court must strike 2015 Wisconsin Act 55 (“Act 55”) §§ 3138g, 3161r, 3162t–v. Their argument is that these sections, though not part of Act 10, modify the provisions of Act 10 that the Court is striking down and

would not lawfully exist outside of the context of Act 10. The Defendants and Legislature disagree and argue that, because the Complaint did not specifically identify these provisions as being challenged, the Court must not strike them.

I see no issue with the fact that Plaintiffs did not identify the specific sections of Act 55 that they would ask to have struck, if I found Act 10 unconstitutional. The Complaint properly stated a claim that Act 10's unequal treatment of general employees and public employees is unconstitutional. Plaintiffs did not need to include in the Complaint a complete list of every item of relief they would request in a final judgment. They could simply inform Defendants of the challenge to Act 10 and the request for any necessary relief flowing therefrom. A party does not need to thoroughly plead every potential remedy it will seek in its Complaint, especially on a declaratory judgment claim. Wis. Stat. § 806.01(1)(c).

Plaintiffs do not challenge the identified sections of Act 55 as unconstitutional on their own, but as an extension of the unconstitutional provisions of Act 10. Plaintiffs are correct that my decision striking Act 10 in substantial part requires that I also strike any challenged portions of Act 55 that are inextricably built on the unconstitutional aspects of Act 10.

Turning to Act 55, I consider the standards I must apply in my review whether to strike these provisions of a related law. As the Wisconsin Supreme Court long ago explained:

It is well established that the elimination of even material provisions in an act as enacted, because of the invalidity of such provisions, does not render the remaining valid provisions thereof ineffective, if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the Legislature intended it to be effective only as an entirety and would not have enacted the valid part alone. So we said in *State ex rel. Reynolds v. Sande*, 205 Wis. 495, 503, 238 N. W. 504, 507: "If a statute consists of separable parts, and the offending portions can be eliminated and still leave a living, complete law, capable of being carried into effect, 'consistent with the intention of the Legislature which enacted it in connection with the void part,' the valid portions must stand. This is the rule, and it has been consistently followed."

State ex rel. Wisconsin Tel. Co. v. Henry, 218 Wis. 302, 260 N.W. 486, 492–93 (1935).

Each section of Act 55 that Plaintiffs' ask the Court to strike directly relate to Act 10's different treatment for public safety employees. Act 55 Section 3138g amended Wis. Stat. §111.70(4)(d)1. to treat differently the general employee and public safety employee groups' term I am striking from Act 10. Act 55 Section 3161r does the same to Wis. Stat. §111.83(1). As there no longer exists separate general employee and public safety employee groups for purposes of collective bargaining in light of my decision, Act 55 Sections 3138g and 3161r create changes to the statutes that cannot stand without Act 10. I must therefore strike them.

Another reason I must do so is because sections 3138g and 3161r by their enacted language prove that the Legislature would not have enacted these changes absent Act 10's distinction between general and public safety employees. In other words, these changes under Act 55 are not changes the Legislature would have independently made regardless of Act 10. Looking at the language of Act 55, these changes revised Wis. Stat. §§111.70(4)(d) and 1111.83(1) to require general employees to secure 51% of the votes of all general employees in a collective bargaining unit to initially certify a bargaining representative for general employees, but left the requirement for public safety employees requiring a representative to secure the vote of a majority of those members who voted to secure initial certification. This distinction between general and public safety employees is meaningless without Act 10's creation of these two categories. As I strike down Act 10's different treatment of general and public safety employees, Act 55 cannot have meaningful effect without Act 10.

Further, as I held in the July Decision, the Legislature's carve out for public safety employees from the restrictions placed on all other public employees demonstrates the Legislature's indisputable intent that it would not have implemented these restrictions against public safety employees. If I strike Act 10's provisions creating the separate public safety employee groups, but leave in place Act 55's provisions that Plaintiffs ask me to strike, the result will be to subject the public safety employees to the exact limitations on collective bargaining that the Legislature specifically refused to subject them to. As the Legislature made clear it would not have done this, I must strike the challenged portions of Act 55

Therefore, I strike Act 55 §§ 3138g, 3161r, 3162t–v.

ORDERS

I grant Plaintiffs' Motion for Judgment on the Pleadings. Within 7 days, Plaintiffs shall submit a Judgment consistent with this decision indicating it is a final order for purposes of appeal.