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DANE COUNTY, WI
2023CV003152

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

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

Plaintiffs,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION; JAMES J. DALEY, *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 FLOGEL, *in her official capacity as Administrator of the Division of Personnel Management*,

Defendants.

Case No. 2023CV3152

INTERVENOR-DEFENDANT THE WISCONSIN STATE LEGISLATURE'S MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Thirteen years ago, the Wisconsin State Legislature ("Legislature") enacted 2011 Wis. Act 10 ("Act 10") to reform public-sector collective bargaining and drastically improve the State's fiscal health. Immediately following Act 10's passage, many parties challenged it in both state and federal court, on a variety of grounds, including that certain of Act 10's provisions violated the equal-protection guarantees of the Wisconsin Constitution and of the coextensive federal Constitution. All of those challenges failed. Most notably, in *Wisconsin Education Association Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) ("*WEAC*"), the Seventh Circuit rejected the exact same equal-protection challenge to Act 10 that Plaintiffs bring here, under the analogous federal constitutional equal-protection guarantee: a challenge to "the legislature's decision to subject *general* employees but not *public safety* employees to Act 10's restrictions on union activity." *Id.* at 642 (emphases added). And in *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 ("*MTI*"), the Wisconsin Supreme Court rejected an equal-protection challenge to Act 10's application to represented, but not unrepresented, "general" employees because Act 10 "promote[d] flexibility in . . . government budgets" and "improv[ed] Wisconsin's fiscal health," *id.* ¶ 82—binding reasoning that applies with full force here.

Nevertheless, in this Court's Decision And Order Granting Motion For Judgment On The Pleadings, which expressly incorporated the Court's prior Decision On Motions To Dismiss, this Court declared that Act 10's distinction between "general" employees and its "public safety" carve-out violated the Wisconsin

Constitution's equal-protection guarantees, Dkt.142 at 1, and "struck as unconstitutional" numerous provisions of Act 10 and 2015 Act 55, Dkt.142 at 5–18—all the while "realiz[ing]" that the Court is "disagreeing with the Seventh Circuit in *WEAC*," Dkt.118 at 19.

This Court should grant the Legislature's Motion To Stay the Court's Decision And Order pending resolution of the Legislature's already filed appeal, under the standards articulated by the Wisconsin Supreme Court in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263.

To begin, the Legislature has a strong likelihood of success on the merits of its appeal, for multiple reasons. Most prominently, the appellate courts will review the core issues presented by the Legislature's appeal here—whether Act 10's distinction between "general" employees and the "public safety" carve-out violates equal-protection guarantees—under a *de novo* standard of review and with the presumption of constitutionality. Under *Waity* and other Wisconsin Supreme Court precedent, those considerations alone demonstrate the Legislature's likelihood of success on the merits on appeal, as they powerfully show, without more, that reasonable appellate jurists may disagree with this Court's own judgment. Indeed, this Court conceded as much in its Decision On Motions To Dismiss, when it stated, "*I realize I am disagreeing with the Seventh Circuit in WEAC*." Dkt.118 at 19 (emphasis added).

All equitable considerations also powerfully support this Court staying its judgment pending resolution of the Legislature's appeal. The Legislature will suffer irreparable harm absent a stay, for two independently sufficient reasons. This

Court's order declares invalid numerous provisions of Act 10, a duly enacted law, which alone is an irreparable, sovereign harm to the Legislature that supports a stay. Separately, by "striking" all of Act 10's vital collective-bargaining reforms—*which reforms have saved the State over $31 billion*—this Court's order threatens to return the State to the very fiscal crisis that precipitated Act 10's passage in the first place, with no way for the State to undo any damage suffered even if the Legislature prevails on appeal here. Plaintiffs, for their part, can claim no irreparable harm from a stay pending appeal, especially considering that they delayed bringing this challenge to Act 10 for *over thirteen years*. As for the public interest, it powerfully weighs in favor of a stay pending appeal both for the same reasons that the Legislature suffers irreparable harm and because Act 10 provides vital protections to public-sector employees who do not wish to affiliate with a public-sector union. Finally, considerations of preserving the status quo are at their zenith here, given that Act 10 has governed public-sector employer/employee relationships across Wisconsin for the past *thirteen years*, while surviving multiple state- and federal-court challenges. There is simply no reason to significantly and abruptly unsettle those relationships now, before any appellate review of this Court's decision can occur.

This Court should grant the Legislature's Motion For Stay Pending Appeal.

LEGAL STANDARD

Section 808.07 of the Wisconsin Statutes empowers this Court to "[s]tay execution or enforcement of a judgment or order" pending appeal. Wis. Stat. § (Rule) 808.07(1). In deciding whether to grant such a stay, the Court must weigh several factors: (1) whether the movant demonstrates a strong likelihood of success

on the merits of the appeal; (2) whether the movant will "suffer irreparable injury" absent a stay; (3) whether granting the stay will "substantial[ly] harm . . . other interested parties"; and (4) whether the "stay will do no harm to the public interest." *Waity*, 2022 WI 6, ¶ 49. Courts have also considered whether a stay is "necessary to preserve the status quo." *Id.* (quoting *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)). The four relevant factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 255 (1995).

ARGUMENT

I. The Legislature Is Likely To Succeed On The Merits Of Its Appeal

A. *Waity* Conclusively Establishes The Legislature's Likelihood Of Success On Appeal, Especially Considering That The Seventh Circuit Has Already Rejected Plaintiffs' Equal-Protection Claim

1. In *Waity*, the Wisconsin Supreme Court explained the proper analytical approach for a Circuit Court's assessment of the likelihood-of-success-on-appeal factor of the stay-pending appeal analysis, given the somewhat unusual posture that, when considering whether a movant has a likelihood of success on appeal, the Circuit Court has already ruled against the movant on the merits. *See Waity*, 2022 WI 6, ¶¶ 51–54. *Waity* explains that, in evaluating the likelihood of success on merits for purposes of stays pending appeal, the Circuit Court may not "simply input its own judgment on the merits of the case and conclude that a stay is not warranted." *Id.* ¶ 52. Instead, "[t]he relevant inquiry is whether the movant ma[kes] a strong showing of success *on appeal*." *Id.* "If the circuit court were asked to merely repeat and reapply legal conclusions already made, the first factor would rarely if ever side

in favor of the movant," making stays pending appeal effectively impossible to obtain. *Id.* That is because "almost no circuit court judge would admit on the record that he or she could have reached a wrong interpretation of the law." *Id.* (brackets omitted).

To evaluate "the likelihood of success *on appeal*," two considerations are especially important. *Id.* ¶ 53 (emphasis added).

First, the Circuit Court "must consider the standard of review, along with the possibility that the appellate courts may reasonably disagree with [the Circuit Court's] legal analysis." *Id.* That is, the Circuit Court must confront the reality that "other reasonable jurists on appeal may [ ] interpret[ ] the relevant law and . . . come to a different conclusion" than the Circuit Court. *Id.* This is especially so when the standard of review is *de novo*—such as for issues of constitutional or statutory interpretation—as "reasonable judges on appeal could easily [ ] disagree[ ] with the circuit court's holdings" on such issues. *Id.*; *see generally Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶ 28, 393 Wis. 2d 38, 946 N.W.2d 35 *("SEIU")* (explaining that "questions requiring interpretation of constitutional and statutory provisions" are "questions of law [appellate courts] review de novo"). What is more, the presence of a *de novo* standard of review on appeal alone establishes a movant's strong likelihood of success on appeal under *Waity*, for the stay-pending-appeal analysis. *See Waity*, 2022 WI 6, ¶¶ 51–53.

Second, when the Circuit Court's decision on the merits results in declaring or enjoining a "regularly enacted statute[ ]" as unconstitutional, even only in certain applications to categories of cases, "the presumption of constitutionality, by itself, is

sufficient to satisfy" the likelihood-of-success-on-appeal factor. Second Aff. of Kevin M. LeRoy, Dated Dec. 11, 2024 ("Second LeRoy Aff."), Ex.1 at 7 ("*SEIU* Stay Order"). "[R]egularly enacted statutes are presumed constitutional," so for that reason alone, a stay movant is "likely to succeed on the merits of its appeal" where the Circuit Court's order declares that a statute "is unconstitutional." *Gudenschwager*, 191 Wis. 2d at 441.

2. Here, the Legislature's appeal seeks to overturn this Court's judgment that numerous provisions of Act 10 are unconstitutional, thus the Legislature's appeal both raises questions of law reviewed *de novo* by the appellate courts and implicates the presumption of constitutionality that applies to statutes. "[R]easonable judges on appeal could easily [ ] disagree[ ] with the circuit court's holdings" on such issues, *Waity*, 2022 WI 6, ¶ 53, which is more than sufficient alone to establish the Legislature's likelihood of success on the merits on appeal here, *id.* ¶¶ 51–53 (*de novo* standard of review on question of law sufficient alone); *SEIU* Stay Order at 7 (presumption of constitutionality sufficient alone); *Gudenschwager*, 191 Wis. 2d at 441 (same).

It is hard to imagine a more compelling case for the application of *Waity* than this one. In *WEAC*, 705 F.3d 640, the Seventh Circuit rejected the same equal-protection challenge to Act 10's distinction between "general" employees and the "public safety" carve-out that is at issue here, under the federal Equal Protection Clause, *see id.* at 657, which is "coextensive" with the Wisconsin Constitution's equal-protection standards, *MTI*, 2014 WI 99, ¶ 74 n.19. In issuing its Decision On Motions

To Dismiss, subsequently incorporated into the Court's Decision And Order Granting Motion For Judgment On The Pleadings, this Court explicitly "realize[d]" that it was "disagreeing with the Seventh Circuit in *WEAC*" on the constitutionality of Act 10's distinction between "general" employees and the "public safety" carve-out. Dkt.118 at 19. Thus, as this Court itself expressly recognized, "reasonable judges on appeal could easily [ ] disagree[ ] with [this Court's] holdings" on these issues, *Waity*, 2022 WI 6, ¶ 53, given the Court's own disagreement with the Seventh Circuit in *WEAC*, Dkt.118 at 19.

Other cases considering Act 10's compliance with equal-protection principles further demonstrate that "reasonable jurists" may reach "different conclusion[s]" than this Court on these important issues. *Waity*, 2022 WI 6, ¶ 53. For example, in *Madison Teachers*, the Wisconsin Supreme Court rejected a similar equal-protection challenge to Act 10's prohibition on payroll deductions for union-membership dues but not dues for other organizations, explaining that "labor organizations are costly" and the State has "a legitimate interest . . . in curtailing costs" by reducing "the influence of labor organizations over general employees," *MTI*, 2014 WI 99, ¶¶ 74 n.19, 83, 85—reasoning that likewise applies here, Dkt.65 at 24–25; Dkt.102 at 6; Dkt.134 at 6–7. And another Circuit Court has also addressed the exact same Act 10 classification at issue here and, like the Seventh Circuit, concluded that it survived rational-basis review. *See* Second LeRoy Aff., Ex.2 at 42–44 (Order, *Wis. Law Enf't Ass'n v. Walker*, No. 12CV4474 (Dane Cnty. Cir. Ct., Oct. 23, 2013)).

B. *Waity* Aside, The Legislature Respectfully Submits That It Is Likely To Succeed On Its Appeal Of This Court's Judgment

1. The Legislature Is Likely To Succeed On The Merits Of Plaintiffs' Equal-Protection Claim

a. The Appellate Courts Will Likely Conclude That Act 10's Distinction Between "General" Employees And Its "Public Safety" Carve-Out Satisfies Rational-Basis Review

Even putting the *Waity* presumption aside, the Legislature is likely to demonstrate on appeal, *Waity*, 2022 WI 6, ¶ 52, that Plaintiffs' equal-protection challenge to Act 10's distinction between "general" employees (to whom Act 10 applies) and the "public safety" employee carve-out (to whom Act 10 does not apply) fails on the merits, Dkt.65 at 19–29; Dkt. 102 at 1–7; Dkt.134 at 4–27. In *Madison Teachers,* as noted above, the Wisconsin Supreme Court rejected an equal-protection challenge to Act 10's application to represented "general" employees, but not unrepresented "general" employees, because this rationally relates to the State's legitimate interests in "'promot[ing] flexibility in . . . government budgets,'" 2014 WI 99, ¶ 82 (quoting *WEAC,* 705 F.3d at 654), and "improv[ing] Wisconsin's fiscal health," *id.; see also id.* ¶ 85. Appellate courts will likely conclude, *Waity*, 2022 WI 6, ¶ 52, that *Madison Teachers*' rationale defeats Plaintiffs' challenge to Act 10 here, because application of the challenged Act 10 provisions to "general" employees likewise furthers the State's legitimate interests in cost-savings and fiscal health, even as these provisions do not cover "public safety" employees, Dkt.65 at 24; Dkt.102 at 2; Dkt.134 at 6–7. Similarly, in *WEAC*, as already discussed, the Seventh Circuit rejected the *same* equal-protection argument that Plaintiffs bring here, under the

analogous federal Equal Protection Clause, holding that Act 10's distinction between "general" and "public safety" employees furthered the State's rational belief that Act 10 would cause "widespread labor unrest" and the State "could not withstand that unrest with respect to public safety employees." *WEAC*, 705 F.3d at 654–55; *see generally MTI,* 2014 WI 99, ¶ 74 & n.19 (explaining that the Wisconsin Constitution's equal-protection guarantees are "coextensive" with the federal Constitution's standard). Again, appellate courts are likely to conclude, *Waity*, 2022 WI 6, ¶ 52, that this rationale applies in full to defeat Plaintiffs' challenge, Dkt.65 at 23–24; Dkt.102 at 1; Dkt.134 at 6–7, 9–10.

Further, the appellate courts are likely to conclude, *Waity*, 2022 WI 6, ¶ 52, that Act 10's carve-out for "public safety" employees does not alter this rational-basis analysis. Rational-basis review is a "relatively relaxed standard" that "recognizes the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 13, 411 Wis. 2d 389, 5 N.W.3d 238 (citations omitted). With Act 10, the Legislature reasonably concluded that its concern with keeping core fire and policing services at a time when Act 10 was anticipated to "result in widespread labor unrest" justified carving out those particular fire and policing services, notwithstanding the potential costs savings that would come from applying Act 10 to those employees. *WEAC,* 705 F.3d at 655; Dkt.65 at 25–26; Dkt.102 at 4–5; Dkt.134 at 8. Rational-basis review permits such "differential treatment," *WEAC,* 705 F.3d at 657, as part of the Legislature's "unavoidable" legislative line-drawing task, *M.M.C.*, 2024 WI 18, ¶ 13; *accord FCC v.*

Beach Commc'ns Inc., 508 U.S. 307, 316 (1993) ("[T]he legislature must be allowed leeway to approach a perceived problem incrementally."); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (holding that a legislature may apply statutory reforms "one step at a time," "select[ing] one phase of one field and apply[ing] a remedy there, neglecting the others").

A very recent decision from the Wisconsin Court of Appeals—decided after the close of briefing on the Legislature's Motion To Dismiss and Plaintiffs' Motion For Judgment On The Pleadings—supports this conclusion, further emphasizing the Legislature's likelihood of success on appeal. *Waity*, 2022 WI 6, ¶ 52. In *Wisconsin Cottage Food Association v. Wisconsin Department of Agriculture, Trade and Consumer Protection*, No.2023AP367, 2024 WL 4824662 (Ct. App. Nov. 19, 2024),[1] the Court of Appeals rejected an equal-protection challenge to distinctions made within Wisconsin's "retail food establishment laws," after applying rational-basis review. *Id.* ¶¶ 22–38. The Court of Appeals concluded that, under the rational-basis test, a party may not "seek[ ] an exemption from [a generally applicable law] that the legislature has not seen fit to enact"—notwithstanding the presence of other exemptions—as "it is not for the courts to second guess the legislature's line drawing when there is a conceivable, legitimate basis for the line the legislature drew." *Id.* ¶ 23 (describing and expressly "agree[ing] with" this argument from a party). Thus,

[1] The Court of Appeals decided *Wisconsin Cottage Food Association* by a three-judge panel and recommended this decision for publication. As of the date of this filing, the Court of Appeals' final publication decision is pending. *See* Wis. Stat. § (Rule) 809.23(3)(a)–(b). The Legislature has submitted a copy of this opinion at Ex.3 to the Second LeRoy Aff.

to "determine the relevant class for the equal protection analysis," a court must "look no further than the generally applicable law," rather than the law's existing "exemptions." *Id.* ¶ 25; *see also id.* ¶ 27.

While this Court disagreed with the Legislature on the merits of this issue, that does not undermine the Legislature's powerful showing that it has a likelihood of success *on appeal*. *Waity*, 2022 WI 6, ¶ 52. Further, and with respect, this Court's merits conclusions were incorrect on various grounds, three of which grounds the Legislature describes immediately below.

First, this Court applied a far more searching version of the rational-basis test than Wisconsin law allows by analyzing in granular detail each of the categories of employees in the "public safety" carve-out, asking "who is a public safety employee," Dkt.118 at 13, and "who should be in the public safety group," Dkt.118 at 14, even after rejecting Plaintiffs argument "that there is no rational basis for creating any general employee category," Dkt.118 at 14. That more stringent form of review is akin to "rational basis with teeth," which the Wisconsin Supreme Court has expressly disavowed because it has "no standards for application, usurps the policy forming role of the legislature[,] and creates uncertainty under the law." *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶¶ 30–32, 383 Wis. 2d 1, 914 N.W.2d 678; Dkt.134 at 11. Or, as the Court of Appeals even more recently explained, "[r]ational basis with teeth (or bite) has since been explicitly repudiated by our supreme court." *Wisconsin Cottage Food Ass'n*, 2024 WL 4824662, ¶ 33 (citing *Mayo*, 2018 WI

78, ¶ 32); *but see infra* Part I.B.1.b (arguing that the Legislature has a likelihood of success on appeal even under this Court's more searching approach).

Second, this Court applied the five-factor test that is sometimes used to operational the rational-basis test in Wisconsin in its Decision On Motions To Dismiss, Dkt.118 at 6–8, but application of that test alone does nothing to undermine the rationality of Act 10's distinction between "general" employees and the "public safety" employee carve-out, Dkt.102 at 5–6; Dkt.134 at 11–12. That is because that five-factor test is a "mere[ ] aid[ ]" and "not *per se* determinative," *Milwaukee Brewers Baseball Club v. Wis. Dep't Health & Soc. Servs.*, 130 Wis. 2d 79, 98, 387 N.W.2d 254 (1986) ("*MBBC*"), which explains both why *Madison Teachers* itself did not apply it and why the Wisconsin Supreme Court's most recent (and unanimous) rational-basis-review case did not apply it either, *M.M.C.*, 2024 WI 18, ¶¶ 1, 25–34. In any event, Act 10 survives rational-basis review under this five-factor framework as well. Dkt.102 at 5–7; Dkt.134 at 13–14.

Third, this Court's attempts to distinguish certain other rational-basis precedent were likewise incorrect. For example, notwithstanding factual differences between the law at issue in *Williamson* and Act 10, *see* Dkt.118 at 20, *Williamson* applies because, there, the U.S. Supreme Court held that rational-basis review allows the Legislature to regulate "one step at a time," "select[ing] *one phase of one field* and apply[ing] a remedy there, neglecting the others," *Williamson,* 348 U.S. at 489 (emphasis added); *see also Racine Steel Castings v. Hardy,* 144 Wis. 2d 553, 570–72, 426 N.W.2d 33 (1988). Further, rational-basis cases involving the Legislature

"pick[ing] a number," Dkt.118 at 20, are fully applicable here, as the same rational-basis test applies to any law that "create[s] distinctions," *M.M.C.,* 2024 WI 18, ¶ 13, whether numerically or descriptively, Dkt.134 at 12–13. And, in any event, Act 10 does embody numerical distinctions, in that part of the rationale for the Legislature's definition of the "public safety" carve-out was its concern for ensuring an adequate number of core fire and policing services, in the event that Act 10's passage resulted in "widespread labor unrest." *WEAC,* 705 F.3d at 655; *see* Dkt.134 at 12–13.

b. The Appellate Courts Would Likely Conclude That Act 10 Reasonably Defined Its "Public Safety" Carve-Out, Even Under This Court's More Granular Rational-Basis Review

Even under this Court's more granular rational-basis standard, the Legislature has a strong chance of prevailing on the merits of its appeal because the appellate courts are likely to conclude that the Legislature sufficiently tailored Act 10's "public safety" carve-out, as the Legislature explained in its Opposition to Plaintiffs' Motion For Judgment On The Pleadings. Dkt.134 at 13–28. In defining Act 10's "public safety" carve-out, the Legislature rationally maximized its cost-saving goal without sacrificing public safety by excepting a sufficient number of local- and state-level law enforcement and fire fighters for whom the State reasonably believed it could not withstand work stoppages. *Id.* at 13–15. Those public-safety employees comprised, in the Legislature's judgment, core fire suppression services, all core local law enforcement services, and state law enforcement with the broadest jurisdiction, arrest authority, presence, and interaction with the public. *Id.* at 13–15. Then, for all other public employees—including other categories of law-enforcement

employees with fewer personnel or with limited jurisdiction—the State included them within Act 10's reforms, thus realizing Act 10's significant cost savings, *Id.* at 15–28—upwards of $31 billion or more, as explained below, *infra* Part II. This unquestionably legitimate rationale explains why Act 10 categorized *all* of public-sector employees that this Court and Plaintiffs have discussed in this litigation as either "general" employees or part of the "public safety" carve-out. *See* Dkt.134 at 15–19 (explaining rationality of categorizing "fire fighters," "deputy sheriffs," "county traffic officers," "police officers," "state patrol officers," "motor vehicle inspectors" within the "public safety" carve-out); *id.* at 16, 19–28 (explaining rationality of categorizing "fire marshals," "fire watchers," "Capitol Police," "conservation wardens," "University of Wisconsin police," "state correctional officers," and "Department of Revenue and Department of Justice criminal investigators" as "general" employees).

In the Decision And Order Granting Motion For Judgment On The Pleadings, this Court refused to consider the Legislature's arguments that Act 10's treatment of "general" employees and the "public safety" carve-out would satisfy the Court's more granular rational-basis standard, concluding that the Legislature waived these arguments by not raising them at the motion-to-dismiss stage. Dkt.142 at 2–5. Respectfully, this is incorrect for two independently sufficient reasons, further demonstrating the Legislature's likelihood of success on appeal here. *Waity*, 2022 WI 6, ¶ 52.

As a threshold matter, this Court refused to consider arguments raised in the Legislature's opposition to Plaintiffs' motion for judgment on the pleadings because it considered them an "indirect request that [the Court] reconsider the July Decision" on the motion to dismiss, Dkt.142 at 5, but this was legal error. A motion to dismiss and a motion for judgment on the pleadings are two different motions with different standards and requirements. At the motion-to-dismiss stage, the Court considered whether Plaintiffs' complaint "states a claim upon which relief can be granted," *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86 ¶ 17, 356 Wis. 2d 665, 849 N.W.2d 693, while at the motion-for-judgment-on-the-pleadings stage, Plaintiffs had the burden of proving that "no disputed issues of material fact remain to be resolved by a jury and" that they are "entitled to judgment as a matter of law," *Wagner v. Allen Media Broad.*, 2024 WI App 9, ¶ 17, 410 Wis. 2d 666, 3 N.W.3d 758. In defending against the motion for judgment on the pleadings, the Legislature could present any reason why Plaintiffs' motion fails, including additional reasons why their Complaint fails as a matter of law. *See Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015); *Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a . . . claim is properly presented, a party can make any argument in support of [or in opposition to] that claim."); *see also Schwittay v. Sheboygan Falls Mut. Ins. Co.*, 2001 WI App 140, ¶ 16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 (explaining that a party need only "raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling"). Indeed, the Legislature was not required to bring a motion to dismiss at all, *see* Wis. Stat. § 802.06(2)(a) ("[T]he following defenses may at the

option of the pleader be made by motion: . . . Failure to state a claim upon which relief can be granted."), and so the Legislature did not waive any argument that Plaintiffs' Complaint failed as a matter of law based on anything it did not say in the motion to dismiss. Put simply, presenting reasons why Plaintiffs' motion for judgment on the pleadings failed was not akin to requesting reconsideration of the Court's earlier order denying the motion to dismiss.

In any event, this Court was obligated to consider these arguments and any other potential arguments, given the nature of rational-basis review. When conducting rational-basis review, this Court must "locate or [ ] construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination"—*sua sponte*, if necessary. *M.M.C.*, 2024 WI 18, ¶ 25; *accord Sambs v. City of Brookfield*, 97 Wis. 2d 356, 371, 293 N.W.2d 504 (1980). In other words, this Court should have considered *any and all* rational bases for Act 10's constitutionality, necessarily including the arguments the Legislature made in response to Plaintiffs' Motion For Judgment On The Pleadings.

2. Even If The Legislature Did Not Have A Likelihood Of Success On The Merits Of Plaintiffs' Claim, The Legislature Is Likely To Succeed As To The Proper Limits On Any Remedy

Appellate courts may also reasonably disagree with this Court's remedy, for at least two reasons, providing an independent basis for the Legislature's likelihood of success on its appeal here, *Waity*, 2022 WI 6, ¶ 53, separate from the actual merits of Plaintiffs' equal-protection claim, *supra* Part I.B.1.

First, if this Court could issue a statewide remedy against the enforcement of Act 10, the *only* appropriate statewide remedy would be to sever Act 10's specific definitions of the categories of employees who fall within the "public safety" carve-out. *See* Wis. Stat. § 990.001(11) (codifying presumption that "invalidity" of one provision "shall not affect other provisions or applications which can be given effect without the invalid provision or application"); *Burlington N., Inc. v. City of Superior*, 131 Wis. 2d 564, 579–80, 388 N.W.2d 916 (1986). Were that remedy to apply, Act 10 would no longer make the supposedly irrational distinctions that Plaintiffs have complained of here. Dkt.134 at 35–38. That is because, as this Court recognized, there is a "rational basis for creating a[ ] general employee category" apart from a "public safety" carve-out; the issue with Act 10, in this Court's view, "is its definition of the public safety group." Dkt.134 at 36. This limited severing of Act 10 is far more "[ ]consistent with the manifest intent of the legislature," *Burlington N.*, 131 Wis. 2d at 579–80, as it would allow the State to experience the cost-savings benefits of Act 10 in substantial part, especially as compared to the Court's remedy of functionally blocking Act 10's reforms to public sector collective-bargaining in their entirety. And if the "public safety" definition were severed, the Wisconsin Employment Relations Commission and, ultimately, the Wisconsin courts, would determine which particular categories of employees fall within the "public safety" carve-out on a case-by-case basis. Dkt.134 at 36–38. This is how agencies and courts regularly operationalize undefined terms in the law, *see generally State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is given its

common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.").

While this Court refused to sever Act 10's "public safety" definition, reasonable jurists are likely to disagree with that remedial decision on appeal. *Waity*, 2022 WI 6, ¶ 53. In rejecting the Legislature's severability argument, this Court explained its view that "strik[ing] the unlawful definition" would "leave it to an agency and the courts to later define [the 'public-safety' carve-out] as they see fit," Dkt.142 at 12, "lack[ing] any legislative direction in the statutes as to the intended meaning of the term," *id.* at 11; *accord id.* ("rewrite that definition"). Respectfully, this is not how WERC and, ultimately, the Wisconsin courts, would approach this issue. Instead, WERC and the Wisconsin courts would define the "public safety" exception according to its "common, ordinary, and accepted meaning," which is how agencies and courts must approach *all* statutory language not comprising "technical or specifically-defined words or phrases." *Kalal*, 2004 WI 58, ¶ 45. And while this Court also believed that the "public safety" carve-out is "not an . . . ordinarily understood term," Dkt.142 at 12, that too is incorrect. To take just one example, *Black's Law Dictionary* defines "public safety" as "[t]he welfare and protection of the general public, usu. expressed as a governmental responsibility." "Public Safety," *Black's Law Dictionary* (12th ed. 2024); *see also* "Employee," *Black's Law Dictionary*, *supra* ("Someone who works in the service of another person (the employer)[.]").

Second, the Court went beyond the judicial power by striking down all of Act 10 and parts of Act 55 related to public employee collective bargaining. Dkt.142 at 14–

18. By doing this, the Court purported to resurrect the pre-Act 10 regime. Dkt.142 at 15. But the Declaratory Judgment Act only allows the Court to declare the rights *between parties*, not between one party and the rest of the State, and not to erase a duly enacted statute from the statute books. *See* Wis. Stat. § 806.04(1); *Steffel v. Thompson*, 415 U.S. 452, 469 (1974) ("Of course, a favorable declaratory judgment . . . cannot make even an unconstitutional statute disappear."); Dkt.134 at 34. And declaratory relief does not purport to revive old laws that legislators long ago repealed. *See, e.g.*, *State ex rel. Badtke v. Sch. Bd. of Joint Common Sch. Dist. No. 1*, 1 Wis. 2d 208, 213, 83 N.W.2d 724 (1957) ("Modifications of the statute if it works badly or in unexpected and undesirable ways must be obtained through legislative, not judicial action."); *see also, e.g.*, *Workers' Comp. Fund v. State*, 2005 UT 52, ¶22, 125 P.3d 852 (The "court . . . has [no] power to resurrect statutory language that has been repealed."); Dkt.134 at 35. This Court thus has no power to restore the State to the pre-Act 10 regime that the Legislature repealed. Dkt.134 at 35.

This Court's justifications for its extremely broad relief are incorrect.

For example, this Court cited several cases from the Wisconsin Supreme Court using similar language to its own decision, but those are *appellate* cases. Dkt.142 at 6–8 (citing *Goodland v. Zimmerman*, 243 Wis. 459, 10 N.W.2d 180 (1943); *League of Women Voters of Wis. v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209; *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, 332 Wis. 2d 85, 796 N.W.2d 717; *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900 (Roggensack, C.J., concurring)). The function of the appellate courts is fundamentally different than the

function of the Circuit Court, as the binding, precedential nature of appellate decisions means that, in effect, the State cannot enforce a law against any party in the State once an appellate court declares that law unconstitutional. *E.g.*, *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997) (noting that "officially published opinions of the court of appeals shall have statewide precedential effect"); *see also id.* at 189 ("The supreme court [is] a law-declaring court."). Circuit-court decisions, on the other hand, have no precedential value. *Wis. Patients Comp. Fund v. Wis. Health Care Liab. Ins. Plan*, 200 Wis. 2d 599, 606 n.3, 547 N.W.2d 578 (1996). Accordingly, the appellate decisions upon which this Court relied do not endorse "strik[ing]" unconstitutional provisions, Dkt.142 at 13–18, but instead describe the practical effect of an appellate-court declaration that a law is unconstitutional, such that the State could not enforce it as to anyone consistent with precedent.

Separately, the Court did not limit itself to declaring unconstitutional those laws identified by Plaintiffs in their pleadings, which is inconsistent with the "judicial restraint and constitutional principles" appropriate in the remedies context. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 9, 78–79, 357 Wis. 2d 469, 851 N.W.2d 262. This Court also "str[u]ck down" provisions of Act 55 that went beyond the requests in Plaintiffs' pleadings, thus granting "judgment on the pleadings" for provisions not even mentioned in the pleadings. Dkt.142 at 15–18. "[R]easonable judges on appeal could easily . . . disagree[ ]" with this Court's decision to issue declarations that are far broader than necessary to provide Plaintiffs relief and beyond the judicial role. *Waity*, 2022 WI 6, ¶ 53.

II. Considerations Of Irreparable Harm, The Balancing Of The Equities, And The Preservation Of The Status Quo All Support A Stay

A. This Court must also balance equitable considerations when deciding whether a stay pending appeal is appropriate. *See Waity*, 2022 WI 6, ¶ 49. Specifically, the Court must consider the risk of irreparable harm to the movant in the absence of a stay—that is, whether denying the stay will cause the movant to "suffer irreparable injury" that "can[not] be undone" if the moving party prevails on appeal and "the circuit court's decision is reversed." *Id.* ¶¶ 49, 57. Harm that cannot be "mitigated or remedied upon conclusion of the appeal . . . must weigh in favor of the movant." *Id.* ¶ 57 (citation omitted). Importantly, the State and the Legislature always "suffer a substantial and irreparable harm of the first magnitude when a statute . . . is declared unenforceable and enjoined before any appellate review can occur," as the Wisconsin Supreme Court has recognized. *SEIU* Stay Order at 8; *see Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 8, 394 Wis. 2d 33, 949 N.W.2d 423; *accord Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The Court must also consider the harm to the non-movant during "the period of time that the case is on appeal," evaluating whether "the non-movant will experience" "substantial harm" if a stay is granted "but the non-movant is ultimately successful" on appeal. *Waity*, 2022 WI 6, ¶¶ 49, 58 (citation omitted). Likewise, the Court must consider whether a stay would harm the public interest. *Id.* ¶ 49. Finally, this Court may consider the effect of the underlying order on the status quo when deciding if a stay is appropriate. *Id.*

B. Here, all equitable considerations, as well as considerations of the status quo, powerfully weigh in favor of granting a stay pending appeal.

1. Beginning with irreparable harm, the Legislature will "suffer a substantial and irreparable harm of the first magnitude" without a stay pending appeal here, as this Court's order has "declared unenforceable and enjoined [numerous provisions of Act 10 and Act 55] before any appellate review can occur." *SEIU* Stay Order at 8; *see Bostelmann*, 2020 WI 80, ¶ 8; *accord King*, 567 U.S. at 1303 (Roberts, C.J., in chambers). That harm is especially acute here, given the breadth of the Court's order, the importance of Act 10, *see infra* pp.23–24, and the fact that the Court "str[u]ck down" provisions of Act 55 that were not even a subject of Plaintiffs' Complaint, *see* Dkt.142 at 15–18. The only way to avoid that sovereign, irreparable harm to the State, as represented by Legislature, is for this Court to enter a stay pending appeal. *See Bostelmann*, 2020 WI 80, ¶ 8; *accord King*, 567 U.S. at 1303 (Roberts, C.J., in chambers).

Additionally, this Court's order threatens crippling and irreparable financial harm upon the State, given the centrality of Act 10 to the State's fiscal health. In 2011, prior to Act 10, Wisconsin faced a "$127 million budget shortfall," with a looming "$3 billion structural deficit" for the following year. Second LeRoy Aff. Ex.4 (MacIver Institute, *Act 10's True Savings to Taxpayers: $31 Billion* (Mar. 18, 2024)[2]). Given that the Wisconsin Constitution requires the Legislature to maintain a

[2] Available at https://www.maciverinstitute.com/news/act-10%E2%80%99s-true-savings-to-taxpayers-$31-billion (all websites last visited December 11, 2024).

balanced budget, legislative action was mandatory to avoid this fiscal cliff. Wis. Const. art. VIII, § 5.

The Legislature's answer to this crisis was Act 10, with its crucial reforms to public-sector unions. In particular, Act 10 restricts collective bargaining for "general" employees to changes in base wages, and caps raises on the base wage to the Consumer Price Index, absent a referendum. Wis. Stat. § 111.70(1)(a), (4)(mb)1–2 (municipal employees); *id.* § 111.91(3)(a)–(b) (state employees). Act 10 also limits collective-bargaining agreements for "general" employees to one-year terms, *id.* §§ 111.70(4)(cm)8m, 111.92(3)(b), and requires annual elections for "general" employee collective-bargaining units, *id.* §§ 111.70(4)(d)3(b), 111.83(3)(b). Finally, Act 10 prevents "general" employee unions from collecting dues through paycheck deductions. *Id.* §§ 111.70(3g), 111.845.

The savings that the State experienced after Act 10 from these reforms were massive—measured in the *billions* of dollars. Specifically, according to the MacIver Institute, which has been measuring Act 10's fiscal impacts on Wisconsin since its enactment, *Act 10 has saved Wisconsin taxpayers over $31 billion since its inception*. Second LeRoy Aff, Ex.4 (MacIver Institute, *Act 10's True Savings to Taxpayers: $31 Billion*, *supra*). State estimates at the time suggested that the annualized fiscal impact of Act 10 would be to reduce the budget by $286 million statewide and $481

million locally. *See* Second LeRoy Aff, Ex.5 (Wis. Dep't of Admin., Fiscal Estimate 3–4 (Feb. 15, 2011)[3]).

This Court's order, if not stayed pending appeal, will imminently begin to nullify these essential costs savings by eliminating Act 10's reforms across the entire State, given that the Court "struck" all of Act 10's collective-bargaining reforms for everyone in the State, not just for Plaintiffs and their members. Dkt.142 at 10. That is, this Court's order will begin to return Wisconsin to the fiscal calamity that existed immediately prior to Act 10's passage. For example, eliminating Act 10's reforms now would allow unions to bargain for wages above Act 10's limitations, and negotiate collective-bargaining agreements that may have multi-year terms, causing a potentially disastrous situation. These are not the types of costs that may simply be recouped following the appeal, because they are not costs that will be paid to Plaintiffs alone. They will involve all general employees in the State, and therefore cannot "be recovered through a disgorgement remedy." *Waity*, 2022 WI 6, ¶ 59.

These harms are on the horizon. In the wake of this Court's order, Madison Teachers, Inc. has already demanded a new collective-bargaining agreement with the Madison Metropolitan School District, covering wage schedules, hours, and conditions of employment, in addition to base wages. Second LeRoy Aff. Ex.7 (J.T. Cestkowski, *Madison Teachers 'Demand' Union Contract In Wake Of Act 10 Decision*,

[3] Available at https://docs.legis.wisconsin.gov/2011/related/fe/jr1_ab11/jr1_ab11_doa.pdf.

WKOW.com (Dec. 9, 2024)[4]; *see also* Second LeRoy Aff. Ex.8 (Benjamin Yount, *Madison Teachers' Union Wants post-Act 10 Contract*, MacIver Institute (Dec. 10, 2024)[5]).

Separate costs will be borne by the State and public-sector unions whose agreements may be unwound if the Legislature wins on appeal, absent a stay. Public-sector unions may already start seeking new agreements with public-sector employers without the reforms of Act 10, in light of this Court's judgment, as Madison Teachers, Inc., has. If the Legislature wins on appeal, it would make such agreements unlawful and force the State and these unions to start bargaining from square one. Indeed, Madison Teachers, Inc., itself, for example, is "concerned that the ongoing legal proceedings" in this case "could upend any negotiations the union may be able to initiate with the district." Second LeRoy Aff. Ex.7 (J.T. Cestkowski, *supra*). This needlessly puts every public-employment contract in flux. Additionally, if the Court allows public-sector union governance to change now after *thirteen years* of Act 10, it will ensure disruption if the Legislature prevails on appeal. Public-sector employers would face significant expense in implementing paycheck deductions for dues, and if the Legislature wins on appeal, those expenses are not recoverable. And because it would take time to unwind such deductions, paychecks might be issued following the appellate courts' favorable decision for the Legislature that incorrectly

[4] Available at https://www.wkow.com/news/education/madison-teachers-demand-union-contract-in-wake-of-act-10-decision/article_6b8329c4-b67b-11ef-a2ef-8b9f2e6433ac.html.

[5] Available at https://www.maciverinstitute.com/news/madison-teachers%E2%80%99-union-wants-post-act-10-contract.

deduct dues, placing additional burdens on public-sector employers to somehow claw back funds from the unions to compensate their employees. Additionally, a public-sector union that holds an election for multi-year terms would potentially require a special election if the Legislature wins on appeal.

2. Moving to considerations of Plaintiffs' potential harm, Plaintiffs will suffer no irreparable harm by a stay pending appeal, especially given their *thirteen-year delay* in their filing their Complaint against Act 10 here.

In their Reply In Support Of Their Motion For Judgment On The Pleadings, Plaintiffs claimed that Act 10 harms them "by the fact that [it] restricts their collective-bargaining rights vis-à-vis 'public safety' unions and employees." Dkt.140 at 9–10. That is, the currently certified Union-Plaintiffs are not able to bargain over more than base wages, are subject to Act 10's annual recertification requirements, and are unable to collect dues via payroll deductions. *Id.* All of these are the conditions that applied to Union-Plaintiffs since Act 10's inception—beginning thirteen years ago—yet Plaintiffs did not challenge them until now. Plaintiffs cannot sleep on their rights for over a decade and then claim harm during the time it takes to finally adjudicate their case on appeal. *See, e.g.*, *Trump v. Biden*, 2020 WI 91, ¶ 10, 394 Wis. 2d 629, 951 N.W.2d 568 ("[E]quity aids the vigilant, and not those who sleep on their rights."); *Hall v. Gregory A. Liebovich Living Tr.*, 2007 WI App 112, ¶ 14, 300 Wis. 2d 725, 731 N.W.2d 649 (court may consider "delay in objecting to a violation as a factor when deciding whether to issue an injunction"); *Adventist Health Sys./SunBelt, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 17 F.4th 793, 805 (8th Cir.

2021) ("[A] long delay by plaintiff . . . may be taken as an indication that the harm would not be serious enough.").

Additionally, Union-Plaintiffs have alleged that Act 10 harms them monetarily because they cannot receive payroll dues deductions from their employees. Dkt. 7, ¶¶ 5, 25. That harm is obviously *not* irreparable: that Union-Plaintiffs cannot receive dues through payroll deductions does not mean they are unable to receive dues at all. Union-Plaintiffs' members still owe them dues, and presumably Union-Plaintiffs have found a way to collect those dues for the past thirteen years. In any event, whatever monetary harm the Union-Plaintiffs may suffer from a stay during the pendency of this appeal pales in comparison to the calamitous financial harm to the State, *Waity*, 2022 WI 6, ¶ 59 (noting that the plaintiffs' harm must be tailored only to the specific plaintiffs and only to the time on appeal), as already described above.

3. The public interest and weighing of the harms also decidedly favor a stay pending appeal. Specially, the public faces substantial harm pending appeal because, like the Legislature, "the public suffer[s] a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." *SEIU* Stay Order at 8.

In addition, striking Act 10 harms its certain public-sector employees who do not wish to associate with a public-sector union, such as Ms. Kristi Koschkee, as she explains in her already filed declaration. Ms. Koschkee specifically avoids paying union dues or associating with union activities. Dkt.153 at ¶¶ 2, 8–11. Ms. Koschkee

does not support her local union negotiating for items she may not want and is concerned that she will be pressured by unions to make contributions through payroll deductions. *Id.* at ¶¶ 10–11, 19. Ms. Koschkee also raised concerns that her local union would "interfere with [her] relationship with [her] employer." *Id.* at ¶¶ 10, 15. Wisconsinites like Ms. Koschkee may also be forced to participate in activities they oppose if this Court's order is not stayed pending appeal, including by making payroll contributions that they cannot later recoup if Act 10 is upheld on appeal. *Id.* at ¶¶ 20–22.

4. Finally, and particularly importantly here, granting a stay pending appeal will maintain the status quo. *See Waity*, 2022 WI 6, ¶ 49. Act 10 has governed public-sector employer/employee relationships across the State for over a decade, contributing vitally to the State's fiscal health in the process. *Supra* pp.23–24. Over that same time, Act 10 has survived numerous state- and federal-court challenges, strengthening the State's continued reliance on the validity of this law. *Supra* pp.6–7. This Court's order radically upends this longstanding status quo, and there is simply no sufficient justification to subject the State to that upheaval before appellate review has occurred. *See Waity*, 2022 WI 6, ¶ 49.

CONCLUSION

This Court should grant the Legislature's Motion For Stay Pending Appeal.

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Respectfully submitted,

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