Appeal No. 2024AP002429

SUPREME COURT OF WISCONSIN

ABBOTSFORD EDUCATION ASSOCIATION, AFSCME, LOCAL 47, AFSCME, LOCAL 1215, BEN GRUBER, BEAVER DAM EDUCATION ASSOCIATION, MATTHEW ZIEBARTH, SEIU WISCONSIN, TEACHING ASSISTANTS' ASSN., LOCAL 3220, AFT, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 695,

Plaintiffs-Respondents-Petitioners,

v.

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

Defendants-Co-Appellants,

WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant-Appellant.

On Appeal from the Circuit Court for Dane County
The Honorable Jacob B. Frost, Presiding
Circuit Court Case 2023CV003152

PETITION FOR BYPASS

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STATEMENT OF THE ISSUES

1. Does 2011 Wisconsin Act 10's classification between "public safety" and "general" employees concerning their respective rights to collective bargaining violate the equal protection guarantee enshrined in Article I, Section 1 of the Wisconsin Constitution?
2. If so, is the proper remedy to declare unconstitutional the provisions of Act 10 that distinguish between "public safety" and "general" employees, as well as the clean-up provisions in 2015 Wisconsin Act 55 that do the same?

The Dane County Circuit Court entered a declaratory judgment that Act 10 and Act 55's amendments to the Municipal Employment Relations Act ("MERA"), Wis. Stat. §§ 111.70 *et seq.*, and the State Employment Labor Relations Act ("SELRA"), Wis. Stat. §§ 111.81 *et seq.*, distinguishing between "public safety" and "general" employees violated Article I, Section 1 of the Wisconsin Constitution.[1] Accordingly, the Circuit Court severed those provisions and declared them unconstitutional. The Circuit Court thereby entered judgment for Plaintiffs, a group of labor organizations that represent "general" employees, as well as individual public servants classified as "general" employees.

The Defendant-Co-Appellant state agencies and officials responsible for administering MERA and SELRA ("State Defendants"), as well as the Intervenor-Defendant-Appellant Wisconsin State Legislature, have appealed the Circuit Court's judgment. The appeal is being briefed in District II. The Circuit Court has temporarily stayed its judgment while it considers the Legislature's motion for a stay pending appeal.

[1] Because the provisions of Act 55 at issue are clean-up provisions that extend Act 10's disparate procedures for recertification union-representation elections to initial union-representation elections, Plaintiffs will refer to the collective bargaining amendments of Act 10 and Act 55 collectively as having been made by "Act 10" for purposes of this petition.

INTRODUCTION

There is no question that the constitutionality of Act 10's collective bargaining provisions is a matter of great statewide importance. Indeed, in both prior instances where a constitutional challenge was raised to Act 10, this Court took immediate appellate jurisdiction over the case: first, in a procedural challenge to the enactment of the law, *see State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436 (per curiam), where this Court granted a petition for a supervisory writ and exercised original jurisdiction; and second, in a substantive challenge raising several claims under the United States and Wisconsin Constitutions, *see Madison Tchrs., Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 ("*MTI*"), where this Court accepted certification from the Court of Appeals.

This Court has not, however, considered the challenge to Act 10 that Plaintiffs have brought in this case, which contends that Act 10's distinction between "public safety" and "general" employees violates the equal protection guarantee in Article I, Section 1 of the Wisconsin Constitution. Applying this Court's equal-protection caselaw to that challenge, the Dane County Circuit Court held Act 10's collective bargaining provisions unconstitutional. The collective bargaining rights of all public employees in the state, and the constitutionality of a law of undisputed statewide significance, are thus once again at issue. Given that this Court ultimately will have the final say in determining whether the collective bargaining provisions of Act 10 violate Article I, Section 1 of this state's constitution, it should bypass the Court of Appeals and review the Circuit Court's decision in the first instance, as it did in *Ozanne* and *MTI*.

The Court, moreover, should ensure that it hears and decides the appeal yet this Term. Every day, hundreds of thousands of public employees across the state labor under a regime that the Circuit Court has declared unconstitutional. And hundreds of collective bargaining agreements between unions and state/municipal governments are set to expire in the summer. Absent a prompt ruling from this

Court, the Circuit Court's decision will leave unions and governments in legal limbo about how negotiations for successor agreements should proceed, as well as what the status of any contract would be if this Court affirmed the Circuit Court's judgment in the middle of a contract term.

These and other thorny issues—many of which would lead to collateral litigation—will be avoided if this Court accepts jurisdiction of this case for decision by the summer.

CRITERIA SUPPORTING BYPASS

Wisconsin law allows a party to request that the Supreme Court "take jurisdiction of an appeal . . . pending in the court of appeals" in a procedure known as "bypass." Wis. Stat. § 808.05(1); *accord* Wis. Stat. § (Rule) 809.60. According to this Court's Internal Operating Procedures, a "matter appropriate for bypass is usually one which meets one or more of the criteria for review, and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues." Sup. Ct. IOP § III.B.2 (citation omitted). Additionally, "at times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision." *Id.*

This case satisfies at least two of the criteria for review contained in Wis. Stat. § (Rule) 809.62(1r). This case presents "[a] real and significant question of . . . state constitutional law." *Id.* § 809.62(1r)(a). And a decision by this Court "will help develop, clarify or harmonize the law" in this state because the question presented is undoubtedly "a novel one, the resolution of which will have statewide impact," and it is "not factual in nature but rather is a question of law . . . that is likely to recur unless resolved by the supreme court." *Id.* § 809.62(1r)(c)2.–3. Moreover, this case satisfies both of the additional criteria contained in this Court's Internal Operating Procedures—namely, that this Court is extremely likely to ultimately consider this case "regardless of how the Court of Appeals might decide the issues," and "there is a clear need to hasten the ultimate appellate decision," Sup. Ct. IOP § III.B.2.

All told, it is imperative for this Court to clarify the rights and obligations of public employees, municipal governments, and the State as soon as possible—particularly given that, by law, almost all collective bargaining agreements covering state and municipal employees will be up for renegotiation this summer, and the process for annual recertification elections for the significant majority of "general" employee unions will begin in September.

STATEMENT OF THE CASE

Act 10 fundamentally changed the landscape of Wisconsin's system of public-sector labor relations, upending the framework by which municipal and state employees join together to form labor unions and collectively bargain with their employers. It did so by dividing Wisconsin public servants into two groups: a disfavored class of "general" employees and a favored class of so-called "public safety" employees. The Act imposed severe burdens on "general" employees while allowing "public safety" employees to effectively proceed as though Act 10 had never become law.

Before Act 10, MERA and SELRA applied equally to all municipal and state employees, regardless of the employees' job duties. Employees could organize together and seek union representation by majority vote. Wis. Stat. §§ 111.70(4)(d)1., 111.83(1) (2009–10). Once certified, a union had the right to bargain over economic and non-economic terms and conditions of employment, including wages, health insurance and pension benefits, and procedures for resolving employment-related disputes. *See id.* §§ 111.70(1)(a), 111.81(1), 111.91 (2009–10). A union could not lose its certification unless 30 percent of the represented bargaining unit first petitioned for a decertification election, and then, in such an election, a majority of voters favored decertification. *See id.* § 111.83(6) (2009–10). These provisions of MERA and SELRA generally tracked those applicable to private-sector employees under the National Labor Relations Act, passed by Congress in 1935. *See* 29 U.S.C. §§ 151 *et seq.*

Act 10 changed all of that. It did so by classifying certain public employees as "public safety" employees, while relegating all other public employees to a lesser status as "general" employees. To create the "public safety" category, the Legislature made peculiar use of an existing list of employees designated by statute as "protective occupation participants" for purposes of the Wisconsin Retirement System ("WRS"). The 22 occupations then-designated under that statute each "involve active law enforcement or active fire suppression or prevention," which expose the employee to a "high degree of danger or peril" and "require a high degree of physical conditioning." Wis. Stat. § 40.02(48)(a)–(am) (2009–10).

But the Legislature did *not* include all, or even most, of the WRS "protective occupations" as part of Act 10's favored "public safety" category. Instead, and without explanation, the Legislature cherry-picked seven of the 22 WRS occupations to qualify as "public safety" employees. *See* Wis. Stat. §§ 111.70(1)(mm), 111.81(15r). The result is a classification with no discernible rhyme or reason—a "public safety" category that *in*cludes local police and firefighters, deputy sheriffs, county traffic officers, state traffic patrol officers, and state motor vehicle inspectors, but *ex*cludes Capitol Police, University of Wisconsin Police, state correctional officers, conservation wardens, and prison guards. All of these employees perform public-safety functions under any rational definition. But only some of them fall within Act 10's unprecedented "public safety" classification.[2]

[2] While there is no legislative history to explain why the Legislature snaked through the WRS occupations to define "public safety" employees, the campaign season immediately preceding Act 10's passage suggests a clear explanation: Members of every labor organization that endorsed Scott Walker's 2010 gubernatorial campaign were classified as "public safety" employees when Governor Walker pushed Act 10 through the Legislature just months later.

Of particular note, state troopers and state motor vehicle inspectors in the Wisconsin State Patrol were represented at the time of the 2010 gubernatorial campaign by the Wisconsin Law Enforcement Association ("WLEA"). While WLEA did not endorse a gubernatorial candidate in 2010, a separate lobbying group specifically for state troopers and state motor vehicle inspectors called the Wisconsin Troopers Association ("WTA") did endorse Walker. (continued…)

Act 10 severely curtails the bargaining rights of "general" employees—and only "general" employees—while leaving the bargaining rights of "public safety" employees unaffected. Consider:

1. Act 10 restricts the collective bargaining rights of "general" employees to the point of virtual elimination. It prohibits bargaining on any subject except for base wages—with even that subject capped by changes in the consumer price index. *See, e.g.*, *id.* §§ 111.70(1)(a), 111.70(4)(mb), 111.81(1), 111.91(3). It eliminates the typical process for resolving impasses in public-sector negotiations, thereby effectively allowing employers to unilaterally implement their proposals. *Id.* § 111.70(4)(cm). And even where employers and "general" employee unions reach agreement on base wages, Act 10 limits the duration of such an agreement to one year. *Id.* §§ 111.70(4)(cm)8m., 111.92(3)(b). None of these limits apply to unions representing "public safety" employees, which may continue to bargain over all pre-Act 10 terms and conditions of employment—economic and noneconomic.

2. Act 10 erects an unprecedented hurdle for the disfavored class of "general" employees to engage in collective bargaining. It does by subjecting any union representing "general" employees to an annual recertification election. In such an election, a "general" employee union must receive the support of 51 percent of all employees *eligible* to vote, rather than a majority of all *voters*, as is the norm in American democratic elections. *Id.* §§ 111.70(4)(d)3.b., 111.83(3)(b). The same undemocratic rules apply to a "general" employee union's attempt to obtain initial

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Act 10's treatment of WLEA-represented police officers tracks the distinction between the WLEA and WTA's endorsement decisions exactly. Those police constituencies in WLEA who were also represented by WTA, namely the state troopers and state motor vehicle inspectors, are classified as favored "public safety" employees under the statute, while the members of every police constituency in WLEA that was not also represented by WTA, such as the Capitol Police and University of Wisconsin Police, are classified as disfavored "general" employees.

certification to represent a unit of employees. *See, e.g.*, *id.* §§ 111.70(4)(d)1., 111.83(1). Unions representing "public safety" employees, meanwhile, are not subject to any recertification elections, nor are they subject to the same undemocratic voting standards for either initial certification elections or recertification elections.

3. Act 10 substantially burdens the ability of "general" employees to provide financial support for their union's activities. It does so by prohibiting employers from deducting union membership dues for "general" employees from those employees' paychecks and sending that money directly to the union. Although public employers and unions could previously negotiate provisions allowing for such payroll dues deduction, Act 10 prohibits this practice for all "general" employees, even when an employee requests such a deduction. *Id.* §§ 111.70(3g), 111.845. But "public safety" employees still may pay union membership dues through payroll dues deduction. *Id.* §§ 111.70(3)(a)6., 111.84(1)(f).

* * *

Plaintiffs-Respondents are a group of labor organizations representing "general" employees under Act 10 and certain individual "general" employees:

- Plaintiff Abbotsford Education Association is the certified bargaining representative for teachers in the Abbotsford School District.
- Plaintiff American Federation of State, County, and Municipal Employees ("AFSCME"), Local 1215, and its President, Plaintiff Ben Gruber, advocate for conservation wardens in the Department of Natural Resources. Conservation wardens, including Gruber, are credentialed law enforcement officers with statewide jurisdiction and arrest authority. *See* Wis. Stat. § 23.11(4).
- Plaintiff AFSCME Local 42 advocates for workers in the City of Milwaukee Department of Public Works and Department of Neighborhood Services.

- Plaintiff Beaver Dam Education Association is the certified bargaining representative for teachers in the Beaver Dam Unified School District, and its Chief Negotiator, Plaintiff Matthew Ziebarth, represents those teachers in collective bargaining.
- Plaintiff Service Employees International Union Wisconsin ("SEIU Wisconsin") is the certified bargaining representative for maintenance employees in the Racine Unified School District.
- Plaintiff Teaching Assistants' Association advocates for graduate student workers at the University of Wisconsin-Madison.
- Plaintiff International Brotherhood of Teamsters, Local 695, is the certified bargaining representatives for units of municipal employees in southwestern Wisconsin, including public-school support staff in the La Crosse School District.

Plaintiffs brought a lawsuit in Dane County Circuit Court (Frost, J., presiding) challenging Act 10's discriminatory and arbitrary classification between "public safety" and "general" employees as a violation of the equal protection guarantee enshrined in Article I, Section 1 of the Wisconsin Constitution. The lawsuit named as Defendants the state agencies and officials charged with administering MERA and SELRA. The Wisconsin State Legislature intervened as a Defendant under Wis. Stat. § 803.09(2m).

Both the State Defendants and the Legislature moved to dismiss Plaintiffs' complaint for failure to state a claim, arguing that Act 10's collective bargaining modifications were constitutional as a matter of law.[3] After briefing and oral argument, the Circuit Court denied the motions to dismiss on July 3, 2024, finding that Plaintiffs stated a claim that Act 10's collective bargaining provisions violated the Wisconsin Constitution. *See* R. 118; App. 4–28. Specifically, the Circuit Court

[3] Plaintiffs refer to Act 10's collective bargaining provisions as encompassing all of the provisions discussed above, as did the Circuit Court in its opinion. *See* R. 118 at 24; App. 27.

considered Act 10's "public safety" and "general" employee classifications and all the rationales proffered by the State Defendants and the Legislature for creating those groups, holding that "Act 10's division of public employees into public safety and general employee categories lacks a rational basis" under this Court's well-established five-factor test for determining whether a legislative classification withstands rational-basis review. R. 118 at 11; App. 14. Accordingly, the Court concluded that "Act 10 does not survive rational basis review and violates the equal protection clause of the Wisconsin Constitution," *id.* (capitals altered), such that the court "declare[d] those provisions of the Act relating to collective bargaining modifications unconstitutional and void," R. 118 at 24; App. 27.

Plaintiffs subsequently moved for judgment on the pleadings, identifying the specific provisions of Act 10 and associated provisions of 2015 Wisconsin Act 55 that the Circuit Court should declare unconstitutional under its ruling. On December 2, 2024, the Circuit Court granted Plaintiffs' motion for judgment on the pleadings. R. 142; App. 29–46. On December 17, 2024, the court implemented that decision by entering a declaratory judgment that Act 10 and Act 55's collective bargaining provisions violate the Wisconsin Constitution. R. 175; App. 49–50.[4]

The Legislature filed notices of appeal both after the Circuit Court's December 2 decision and after the Circuit Court entered the declaratory judgment, designating District II of the Wisconsin Court of Appeals as the appellate venue.

[4] It should be noted that nothing about Plaintiffs' claim or the Circuit Court's judgment requires state or local governments to spend *any* amount of money, including on public employee healthcare insurance premiums or pension contributions. Rather, this case concerns Act 10's limitations on the subjects of bargaining for "general" employees, which includes—among many subjects—the amount of health care and pension contributions that employees and employers each cover, respectively. Whatever those respective contributions may be in the future (if this Court affirms the Circuit Court's judgment) will be the result of the collective bargaining process and eventual agreements between state and municipal governments and unions representing public employees all across the state.

R. 145 & 176; App. 47–48, 51–52.[5] In between the two notices of appeal, the Legislature moved to stay the Circuit Court's judgment pending appeal. Although that motion is pending decision, the Circuit Court has entered a temporary stay of its judgment until it resolves the Legislature's motion for a stay. R. 181; App. 53. The State Defendants filed a co-appeal. R. 183; App. 54–56. Under Wis. Stat. § (Rule) 809.19, the Legislature's and the State Defendants' opening briefs in the Court of Appeals are due on February 17, 2025; Plaintiffs' response brief is due no later than March 19, 2025; and reply briefs are due within two weeks of the filing date for Plaintiffs' response brief.

Plaintiffs now move to bypass the Court of Appeals and respectfully request that this Court—which will have the final say on the constitutionality of Act 10's collective bargaining provisions—directly review the Circuit Court's judgment and hold argument on the appeal yet this Term.

ARGUMENT

Act 10's collective bargaining modifications constituted a seismic change to the labor laws of Wisconsin. This Court has deemed prior challenges to Act 10's collective bargaining provisions sufficiently important to require immediate consideration. While those challenges—*Ozanne* and *MTI*—raised distinct claims from the one here, they establish that Act 10's constitutionality is a question of statewide importance that demands this Court's prompt attention. Indeed, the Legislature has reiterated throughout this litigation that this case presents "grave issues of statewide importance." R. 109; *see also infra* pp. 17–18.

What is more, the particular constitutional issue presented by this case—whether Act 10's distinction between "public safety" and "general" employees is

[5] Because the Circuit Court's December 2 decision was not final for purposes of appeal, the Legislature's first notice of appeal, filed on December 2, 2024 (R. 145; App. 47–48), was premature. *See* Wis. Stat. § 808.03(1) (allowing appeal as of right from a "final judgment or a final order of a circuit court"); *Wambolt v. W. Bend Mut. Ins. Co.*, 2007 WI 35, ¶44, 299 Wis. 2d 723, 728 N.W.2d 670 (requiring "that final orders and final judgments state that they are final for purposes of appeal"). This is immaterial, however, as the Legislature's second notice of appeal was proper, and the two appeals have been consolidated.

consistent with the Wisconsin Constitution's equal protection guarantee—provides this Court the opportunity to reaffirm that the Wisconsin Constitution does not allow courts to rubber stamp any legislative classification, no matter how arbitrary or irrational.

This Court should thus grant bypass and take jurisdiction of this case immediately. In particular, the Court should ensure that the case proceed on a briefing schedule to allow for oral argument and decision this Term.[6] Public employees and government actors alike labor under and enforce a law that the Circuit Court has declared unconstitutional. Collective bargaining agreements across the state are set to expire in June, prompting negotiations for successor agreements that will occur under a cloud of legal uncertainty absent this Court's definitive resolution on the constitutionality of Act 10's collective bargaining provisions before then. Accordingly, Wisconsin's public employees, their municipal and state government employers, the Legislature, and Wisconsin's citizens writ large all share an interest in this Court's ultimate and prompt decision on the constitutionality of Act 10's collective bargaining provisions.

I. Whether Act 10's Distinction Between "Public Safety" and "General" Employees Violates the Wisconsin Constitution Is a Question of Immense Statewide Significance.

Whether represented by a labor organization or not, Act 10 affects all public employees in the state by setting the legal framework by which they may join together to form a union, as well as the legal framework for them to collectively bargain with their employer over terms and conditions of employment. Act 10 also affects municipal and state governments' respective

[6] This Court should grant bypass before the merits briefing in the Court of Appeals has been completed, as this Court has done on numerous previous occasions. *See, e.g.*, App. 57–58 (Order, *Waity v. LeMahieu*, No. 2021AP802 (Wis. July 15, 2021) (record transmitted to court of appeals on June 7, 2021; bypass petition granted on July 15, 2021); App. 59–64 (Order, *Teigen v. Wis. Elections Comm'n*, No. 2022AP91 (Wis. Jan. 28, 2022) (bypass petition granted on January 28, 2022, before the record was transmitted to the court of appeals)).

administration of MERA and SELRA every single day. In short, Act 10's constitutionality is a question of immense importance to the State of Wisconsin.

This Court has twice previously recognized Act 10's statewide importance by considering the Act's constitutionality on an immediate basis. Indeed, when this Court first considered Act 10's constitutionality in *Ozanne*, 2011 WI 43, it recognized that the case was of such paramount statewide importance that it took the extraordinary step of granting a petition for supervisory writ and exercising original jurisdiction to definitively resolve the issue presented less than three months after the Circuit Court had enjoined the law. *See generally In re Zabel*, 219 Wis. 49, 261 N.W. 669, 670 (1935) (holding that Supreme Court's exclusive jurisdiction "is a power that should be sparingly and cautiously exercised" and "invoked only in cases where the exercise of that extraordinary power is clearly warranted" (quoting *State ex rel. Time Ins. Co. v. Smith*, 184 Wis. 455, 200 N.W. 65, 70 (1924))). Then, in *MTI*, 2014 WI 99, ¶¶12–13, this Court accepted certification from the Court of Appeals and rendered the first and final appellate decision on the challenge at issue in that case. *See* Sup. Ct. IOP § III.B.2 (noting that "[c]ertifications [from the Court of Appeals] are granted on the basis of the same criteria as petitions to bypass"). In both *Ozanne* and *MTI*, then, this Court already has concluded that issues surrounding Act 10's collective bargaining provisions merit immediate attention and an expedited ultimate decision, all but confirming that this case is one the Court "ultimately will choose to consider regardless of how the Court of Appeals might decide the issues." Sup. Ct. IOP § III.B.2.

But this Court need not take Plaintiffs' word that this is a significant case. At almost every turn in this litigation, the Legislature has repeatedly emphasized the "grave" and "significant" issues of "statewide importance" that this case presents. *See, e.g.*, R. 103 at 2, 4. The Legislature invoked Act 10's statewide significance when it first moved to intervene in this case, R. 38 at 13 ("This case directly challenges the constitutionality of a state statute that is vital to the

balancing of the State's budget and the sufficiency of the State's income."); when it requested oral argument on the motions to dismiss before the Circuit Court, R. 103 at 2, 4–5 (emphasizing on five separation occasions the "grave," "significant," and "particular" issues of "statewide importance" raised by this case); when it requested that oral argument occur in-person before the Circuit Court rather than by Zoom, R. 109 (justifying its request by again invoking "the grave issues of statewide importance in this case"); and again when it moved to stay the Circuit Court's judgment, R. 159 at 22–24 (arguing that the Circuit Court's judgment effected a "sovereign, irreparable harm to the State" given the "importance" and "centrality of Act 10 to the State's fiscal health"). Without doubt, then, this case presents "[a] real and significant question of . . . state constitutional law" that this Court should resolve immediately. Wis. Stat. § (Rule) 809.62(1r)(a).

While the immense, statewide significance of Act 10's collective bargaining provisions is more than sufficient to satisfy this Court's first criterion for bypass, the issue in this case—whether Act 10's discrimination between "public safety" and "general" employees violates the equal protection guarantee enshrined in Article I, Section 1 of the Wisconsin Constitution—has importance that extends beyond Wisconsin *labor law* to Wisconsin *constitutional law* more broadly.

Under this Court's equal protection jurisprudence, Act 10's classification of "public safety" and "general" employees is reviewed under a rational-basis standard that asks whether "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." *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶61, 332 Wis. 2d 85, 796 N.W.2d 717 (quotation omitted). To satisfy such rational-basis review, a legislative classification must meet the following five criteria:

> (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; and
>
> (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.

Id., ¶64 (brackets in original); *accord Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶42, 383 Wis. 2d 1, 914 N.W.2d 678 (applying same five-part test).

The ultimate application of these five criteria in this case will determine whether rational-basis review in fact requires a classification to "have a fair and substantial relation to the purpose of the enactment," *GTE Sprint Commc'ns Corp. v. Wis. Bell, Inc.*, 155 Wis. 2d 184, 193, 454 N.W.2d 797 (1990), or instead is a rubber stamp for any legislative enactment, as Appellants have effectively argued. In particular, Appellants have posited that the Legislature's purpose for creating a "public safety" classification was to ensure that the state's public safety was not threatened by an illegal public strike in protest of Act 10. R. 118 at 21; App. 24. Even accepting that it is permissible for a legislature to treat particular individuals more favorably because of a hypothesized fear that those individuals otherwise would illegally protest the enactment of the statute, *but see id.*, no rational legislature could have created a "public safety" group that *in*cludes state motor vehicle inspectors but *ex*cludes, among others, the Capitol Police—the very law enforcement officers tasked with ensuring the continuity of government and protecting legislative and executive officials. *See* Wis. Stat. § 16.84(2).

This Court has recognized the importance of deciding whether a state statute can satisfy rational-basis review given the number of cases it has heard challenging state statutes on this basis, including many challenges to laws of far less statewide significance than Act 10. *See, e.g., Metro. Assocs.*, 2011 WI 20 (law allowed different municipalities to set different procedures for challenging

property tax assessments); *Nankin v. Vill. of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141 (similar classification); *GTE Sprint*, 155 Wis. 2d 184 (law assessed retail sales tax on only some telephone service carriers). Indeed, on numerous occasions, this Court has struck down a legislative classification on rational-basis review for failing at least one of the five criteria outlined above.[7] This case potentially presents another such occasion because the Circuit Court has determined that Act 10's collective bargaining provisions do not satisfy the first, second, or fifth criteria, and thus lack a rational basis, violating the Wisconsin Constitution. R. 118; App. 4–28. That decision directly mirrors this Court's decisions in *Metropolitan Associates* and *Nankin*, both of which struck down a state statute for failing to satisfy these same three criteria. *Metro. Assocs.*, 2011 WI 20, ¶64; *Nankin*, 2001 WI 92, ¶39.

In sum, to avoid rational-basis review becoming a rubber stamp for all legislative classifications no matter how arbitrary or irrational, this Court must take up the "real and significant question of . . . state constitutional law" presented by this case. Wis. Stat. § (Rule) 809.62(1r)(a).

Relatedly, a decision by this Court "will help develop, clarify or harmonize the law" because this case presents a "novel" question, "the resolution of which will have statewide impact." *Id.* § 809.62(1r)(c)2. The claim presented by Plaintiffs' lawsuit has never been presented to this Court. Although this Court previously considered an equal protection challenge to Act 10, *see MTI*, 2014 WI 99, the plaintiffs in that case brought a different claim than the one brought here. The *MTI* plaintiffs were *not* claiming, as are Plaintiffs in this case, that Act 10 unconstitutionally treats "public safety" employees more favorably than "general" employees. Rather, the *MTI* plaintiffs focused solely on a distinction between two

[7] *See Metro. Assocs.*, 2011 WI 20; *Nankin*, 2001 WI 92; *GTE Sprint*, 155 Wis. 2d 184; *Funk v. Wollin Silo & Equip., Inc.*, 148 Wis. 2d 59, 435 N.W.2d 244 (1989); *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs.*, 130 Wis. 2d 79, 387 N.W.2d 254 (1986); *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 313 N.W.2d 805 (1982); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

subgroups of "general" employees: namely, that Act 10 treats "general" employees who do not associate with a certified union more favorably than "general" employees who do so associate. *See* 2014 WI 99, ¶74. In considering that distinction—and that distinction only—this Court held that Act 10's creation of "two classes of public employees by whether they elect to have a certified representative for collective bargaining purposes denies no employee equal protection under the law." 2014 WI 99, ¶81. *MTI* did *not* consider whether Act 10's separate classification between "public safety" and "general" employees violates the Wisconsin Constitution. Indeed, this Court expressly reserved judgment on that issue because that "public employee classification[] [was] not at issue" in the case. *Id.*, ¶4 n.4. Accordingly, as the Circuit Court recognized, this Court has "never addressed whether Act 10's classification of and different treatment of public safety and general employees withstands review under the State Constitution." R. 118 at 10; App. 13. The claim here is a novel one, which will undoubtedly have statewide impact.

In addition, a decision by this Court will further "help develop, clarify or harmonize the law" because "[t]he question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the Supreme Court." Wis. Stat. § (Rule) 809.62(1r)(c)3. As the Circuit Court explained in granting Plaintiffs' motion for judgment on the pleadings, "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." R. 142 at 5; App. 33.

For all these reasons, it is difficult to imagine a stronger case for bypass than this one.

II. It Is Imperative for This Court To Assume Jurisdiction and Decide This Appeal Yet This Term.

For all the reasons outlined above, this Court should grant bypass and assume jurisdiction of this case from the Court of Appeals. Upon granting bypass,

this Court should proceed to resolve the merits as quickly as possible to ensure a decision by the end of this Term.

Although the Circuit Court has temporarily stayed its judgment, it has issued a judgment unequivocally declaring that Act 10's collective bargaining modifications violate the Wisconsin Constitution. Plaintiffs and all public sector employees in Wisconsin suffer substantial harm every day that they continue to labor under Act 10's unconstitutional collective bargaining scheme.[8] Likewise, the Legislature has argued that it "suffer[s] a substantial and irreparable harm of the first magnitude when a statute . . . is declared unenforceable." R. 159 at 21 (quoting Order, *SEIU, Local 1 v. Vos*, No. 2019AP622 (Wis. June 11, 2019)). All parties therefore agree that the people of Wisconsin are suffering irreparable harm every day until this Court conclusively rules on Act 10's constitutionality. And contrary to what Appellants may posit in response to this Petition, the fact that Act 10 has been in effect for more than a decade does not lessen the urgency of this Petition. As this Court has emphasized—and as the Circuit Court held when it rejected the Legislature's affirmative defense of laches against the Plaintiffs' claim—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." *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶42, 410 Wis. 2d 1, 998 N.W.2d 370 (quotations omitted); *accord* R. 118 at 11; App. 14 (relying on *Clarke*).

[8] Although Plaintiffs suffer a daily harm from Act 10's continued enforcement, they have not opposed the Legislature's motion to stay the Circuit Court's judgment pending appeal. The reasons for not doing so are twofold. *First*, under this Court's precedents, a movant for a stay pending appeal of a circuit court's judgment that a statute is unconstitutional can likely justify such a stay simply because of (1) the de novo standard of review on appeal and (2) the presumption of constitutionality that attaches to enacted statutes. *See Waity v. LeMahieu*, 2022 WI 6, ¶¶52–53, 400 Wis. 2d 356, 969 N.W.2d 263; *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995) (per curiam). *Second*, Plaintiffs recognize a significant risk that the state of public-sector collective bargaining law could become confused during the appellate process if Act 10's collective bargaining provisions are toggled off and on depending on how different courts balance the stay factors at different junctures.

Beyond the exigency of promptly deciding whether a law of statewide importance violates the Wisconsin Constitution, there are three concrete reasons why this Court should not only decide this case but do so by the end of this Term.

First, under current law, collective bargaining agreements covering all state public employees will expire this summer. Current law requires that agreements covering state "public safety" employees "shall coincide with the fiscal year or biennium," Wis. Stat. § 111.92(3)(a), while agreements covering state "general" employees "must coincide with the fiscal year," *id.* § 111.92(3)(b). The two-year biennium in Wisconsin and the fiscal year both end on June 30, 2025.[9] Likewise, the vast majority of municipal collective bargaining agreements also will expire on June 30, 2025. Accordingly, governmental employers and both "public safety" and "general" employee unions will negotiate new collective bargaining agreements this summer and early fall. Whether Act 10's collective bargaining modifications violate the Wisconsin Constitution is of paramount importance to the framework for those negotiations—most significantly, whether the parties are required to discuss only base wages (under Act 10) or all economic and noneconomic terms and conditions of employment (under the Circuit Court's decision). What happens if during the summer, for example, a union of "general" employees and their government employer negotiate a collective bargaining agreement that only covers base wages, and this Court then issues a decision next winter affirming the Circuit Court's decision that the collective bargaining provisions of Act 10 must be struck? This Court can avoid all such confusion and uncertainty—much of which would lead to collateral litigation—by granting bypass and making clear that it will decide the constitutionality of Act 10's collective bargaining provisions this

[9] *See* The Budget Process, *Wisconsin Legislative Council Information Memorandum*, IM-2020-17 (Nov. 16, 2020), https://docs.legis.wisconsin.gov/misc/lc/information_memos/2020/im_2020_17.

Term, before negotiations for successor collective bargaining agreements have been completed.[10]

Second, and relatedly, the Circuit Court's ruling affects the employees that comprise certain statewide bargaining units, creating further uncertainty for the imminent collective bargaining negotiations. Among other provisions, the Circuit Court has declared unconstitutional the section of Act 10 creating a statewide bargaining unit reserved only for "public safety" employees. R. 142 at 14–15; App. 42–43 (declaring unconstitutional Section 278 of Act 10, which created Wis. Stat. § 111.825(1)(g)). The Circuit Court's ruling therefore would require current "public safety" employees be re-sorted into a bargaining unit with all other state "law enforcement" employees. Wis. Stat. § 111.825(1)(cm). A definitive ruling from this Court during this Term would clearly delineate the appropriate statewide bargaining units ahead of negotiations that must occur this summer and fall. By contrast, a delayed ruling would inject tremendous uncertainty into the bargaining process, as both unions and governmental employers would enter those negotiations unsure of the employees on whose behalf they will be negotiating—leaving any resulting collective bargaining agreements in legal limbo.

Third, hundreds of recertification elections for unions representing "general" employees will occur this fall, as required by statute and state regulations. In particular, recertification elections for school district employees and state employees must take place by December 1, and unions representing those employees must file a recertification petition by September 15 in order to trigger an election; otherwise, the union is automatically decertified. Wis. Admin. Code ERC §§ 70.01, 80.01; *see generally Wis. Ass'n of State Prosecutors v.*

[10] While some unions and employers likely will start negotiations for successor collective bargaining agreements before June 30, if this Court grants bypass promptly, unions and employers can forestall further negotiations while awaiting this Court's decision. Under Wisconsin labor law, the terms of any expired collective bargaining agreement would remain in effect until the parties sign a successor agreement. *See, e.g.*, *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶¶15–16, 385 Wis. 2d 748, 924 N.W.2d 153 (citing Wis. Stat. §§ 111.70(1)(a), (3)(a)4.).

WERC, 2018 WI 17, 380 Wis. 2d 1, 907 N.W.2d 425.[11] If this Court affirms the Circuit Court's ruling but waits until next winter to do so, it is likely that multiple unions of "general" employees will be decertified as a result of Act 10's unconstitutional election regime. This is the fate that befell Plaintiff Abbotsford Education Association, which, after winning nine consecutive recertification elections from 2013 to 2021, was decertified in 2022 because it received "yes" votes from every voter, but those voters comprised only 50.8 percent of the bargaining unit—rather than the 51 percent of "yes" votes required under Act 10. A prompt decision from this Court is necessary to ensure that unions like Abbotsford Education Association do not suffer any additional constitutional harm this fall.

Accordingly, "there is a clear need to hasten the ultimate appellate decision" in this case. Sup. Ct. IOP § III.B.2. And a decision by this Court also will immediately "help develop, clarify or harmonize the law" in this state because the questions presented are "question[s] of law" that are "likely to recur unless resolved by the supreme court." Wis. Stat. § (Rule) 809.62(1r)(c)3. Absent definitive resolution from this Court this Term, every public employee collective bargaining agreement negotiated this summer, and every recertification election conducted this fall, could spawn a lawsuit by a union or individual employee seeking to vindicate the rights recognized by the Circuit Court's judgment. Municipal governments also could bring lawsuits seeking to define their bargaining obligations in the interregnum between the Circuit Court's ruling and this Court's ultimate resolution. That type of litigation could metastasize as workers and employers live under a cloud of legal uncertainty until this Court issues a decision.

[11] In 2023, there were 246 recertification elections in the fall—approximately two-thirds of the annual total in Wisconsin. *See* November 2024 Annual Certification Elections Results, WERC (Nov. 27, 2024), https://werc.wi.gov/doaroot/nov2024finalelectionresults.pdf; *see also* April 2024 Annual Certification Election Results, WERC (Apr. 30, 2024), https://werc.wi.gov/doaroot/finalresultsapril2024.pdf.

A decision from the Court this Term, however, would prevent such an onslaught of litigation.

* * *

As Justice Prosser wrote in his concurrence in *Ozanne*, which this Court decided on June 14, 2011, "[w]hether the case is decided now or months from now at the height of the fall colors, the court would be required to answer the same difficult questions." *Ozanne*, 2011 WI 43, ¶20. "Delaying the inevitable would be an abdication of judicial responsibility; it would not advance the public interest." *Id.* So too here. All parties agree that the collective bargaining provisions of Act 10 are of great statewide importance. While this Court has upheld these provisions against earlier challenges, the Circuit Court has now ruled them unconstitutional after considering Plaintiffs' novel equal protection claim. It is therefore all but certain that this Court ultimately will have to consider this case. It should do so this Term and conclusively settle the issue.

CONCLUSION

This case satisfies the necessary criteria for bypass. The Court should grant this petition and assume jurisdiction, setting the case for argument and decision yet this Term.

Dated: January 17, 2025

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH
WIS. STAT. § (RULE) 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief, as well as this Court's Order regarding page length. The length of this brief is 6,893 words.

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