Appeal No. 2012AP2067 **Cir. Ct. No. 2011CV3774**

WISCONSIN COURT OF APPEALS
DISTRICT IV

MADISON TEACHERS, INC., PEGGY COYNE, PUBLIC EMPLOYEES LOCAL 61, AFL-CIO AND JOHN WEIGMAN,

PLAINTIFFS-RESPONDENTS,

V.

SCOTT WALKER, JAMES R. SCOTT, JUDITH NEUMANN AND RODNEY G. PASCH,

DEFENDANTS-APPELLANTS.

FILED

APR 25, 2013

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

We certify this appeal because of its sweeping statewide impact and the pressing need for a final resolution. At issue are several statutory changes accomplished by the passage of 2011 Wis. Act 10 and 2011 Wis. Act 32 that fundamentally alter the balance of power between municipal employees and their municipal employers with respect to wages and conditions of employment.

This appeal involves municipal employees, but the statutory provisions at issue here have direct counterparts in a separate statutory subchapter that applies to state employees. Thus, a decision on the provisions affecting municipal employees would appear to be dispositive with respect to state employees.

We also certify this appeal because its resolution requires more than the application of settled law to a new set of facts. Rather, as explained below, law development and the clarification of supreme court decisions are necessary to resolve the parties' disputes with respect to constitutional associational rights and Wisconsin's Home Rule Amendment.

In this case, elected collective bargaining representatives and two represented individuals brought an action for declaratory judgment and injunctive relief. Madison Teachers, Inc. represents Madison public school teachers, and Public Employees Local 61 represents certain City of Milwaukee employees. We will refer to these representatives and the two named individuals, collectively, as the "representatives."

The defendant Scott Walker is the Governor of Wisconsin, and the remaining named defendants are commissioners on the Wisconsin Employment Relations Commission. We will refer to the defendants, collectively, as the "state officials."

The representatives contend that specific provisions of the Municipal Employment Relations Act (MERA), as amended by 2011 Wis. Act 10 and 2011 Wis. Act 32, are unconstitutional. For ease of discussion, we will refer to the newly amended version of MERA as Act 10.[1]

[1] The Municipal Employment Relations Act is Subchapter IV of WIS. STAT. ch. 111 and is comprised of WIS. STAT. §§ 111.70–111.77. The counterpart legislation affecting state employees is found in Subchapter V of ch. 111 and is comprised of WIS. STAT. §§ 111.81–111.94.

The representatives contend that the following provisions of Act 10 are unconstitutional:

1. The provision prohibiting collective bargaining between municipal employers and the certified representatives for municipal general employee bargaining units on all subjects except base wages. WIS. STAT. § 111.70(4)(mb)1.

2. The provisions limiting negotiated base wage increases to the increase in the Consumer Price Index, unless a higher increase is approved by voter referendum. WIS. STAT. §§ 111.70(4)(mb)2., 66.0506, and 118.245.

3. The provisions prohibiting "fair share" agreements that previously required all represented employees to pay a proportionate share of the costs of collective bargaining and contract administration. WIS. STAT. § 111.70(1)(f) and the third sentence of WIS. STAT. § 111.70(2).

4. The provision prohibiting municipal employers from deducting union dues from the wages of municipal employees. WIS. STAT. § 111.70(3g).

5. The provision requiring annual recertification elections of the representatives of all bargaining units, requiring 51% of the votes of the bargaining unit members (regardless of the number of members who vote), and requiring the commission to assess costs of such elections. WIS. STAT. § 111.70(4)(d)3.

The representatives contend that these Act 10 provisions violate the constitutional associational and equal protection rights of the employees they represent.[2] According to the representatives, the circuit court correctly determined

[2] The representatives sometimes refer to their right to engage in free speech, but their focus is on associational rights protected by the Wisconsin and United States Constitutions. Frequently, the representatives speak solely in terms of their associational rights. We do not perceive an independent argument based on free speech rights.

(continued)

that the provisions, individually and cumulatively, burden "the associational rights of municipal employees who choose to negotiate with their employer as a unit with one certified agent representing their interests." The representatives contend that Act 10 violates their members' right to equal protection under the law by creating similarly situated, but differently treated, classes of employees, namely, municipal employees who choose to associate with a certified agent and municipal employees who do not.

The state officials argue that, because public employees have no constitutional right to collectively bargain, it makes no sense to say that Act 10 unconstitutionally burdens the right of public employees who choose to participate in statutory collective bargaining. According to the state officials, Act 10 does not impose any restrictions on any public employee's right to speak, assemble, or petition government and, therefore, does not infringe on any associational rights of public employees. As to the equal protection claim, the state officials take the position that there is no violation because all public employees are treated equally with respect to constitutionally protected associational rights.

Prompt resolution of the dispute we describe above is the compelling reason why the supreme court should grant this certification. But there is an additional distinct issue with substantial statewide implications. Based on the parties' arguments and our own research, we conclude that there is a need to clarify the test for determining whether a state statute violates Wisconsin's Home

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In addition, as to both associational rights and equal protection rights, the representatives assert that the Wisconsin Constitution may be interpreted to provide greater protection than its federal counterpart. The representatives do not, however, present developed arguments supporting the conclusion that there should be more expansive protection under the Wisconsin Constitution under the particular facts in this case.

Rule Amendment. In this regard, the parties dispute whether WIS. STAT. § 62.623, a statute prohibiting the City of Milwaukee from paying its employees' contributions to the Milwaukee Retirement System, violates the Home Rule Amendment, WIS. CONST. art. XI, § 3(1). This dispute has statewide implications because the legal test used to resolve whether a state statute does or does not violate the Home Rule Amendment applies, at a minimum, to all cities and villages in Wisconsin.

If WIS. STAT. § 62.623 survives scrutiny under the Home Rule Amendment, the question arises whether the statute violates the constitutionally protected right of parties to contract with each other. This does not appear to be a complicated issue and, if it was the only issue, we would not certify it. Nonetheless, we provide a summary of the parties' arguments on this topic.

In sum, we certify this appeal because of its sweeping statewide effect on public employers, public employees, and taxpayers and because of the need to clarify and develop law relating to associational rights and the home-rule authority of municipalities.

Procedural Background

Following the effective dates of Act 10 and Act 32, the representatives filed their complaint on August 18, 2011, and an amended complaint on August 24, 2011. The amended complaint sought declaratory and injunctive relief. The state officials filed their answer on October 7, 2011.

The representatives moved for summary judgment, and the state officials moved for judgment on the pleadings. On September 14, 2012, the circuit court issued an order granting the representatives' motion and denying the

state officials' motion. With the exception of a provision that was the subject of a subsequent motion to clarify, the circuit court declared the challenged statutory provisions (listed above in this certification) unconstitutional. The circuit court concluded that these provisions violate the constitutionally protected associational and equal protection rights of municipal employees. The circuit court also declared that WIS. STAT. § 62.623 violates Wisconsin's Home Rule Amendment and is an unconstitutional impairment of contracts. The circuit court's decision did not address the representatives' request that the court enter "an order enjoining the [state officials] from implementing the unconstitutional provisions of Act 10 and Act 32."

On September 18, 2012, the state officials filed a notice of appeal and, simultaneously, a motion in the circuit court seeking a stay of the circuit court's order pending appeal.

On September 28, 2012, the representatives filed a motion to amend the circuit court's order to clarify that the third sentence of WIS. STAT. § 111.70(2) is among the statutory provisions declared unconstitutional. On October 10, 2012, the circuit court issued an amended order "to add the third sentence of § 111.70(2) to the statutes found unconstitutional and therefore void."

On October 22, 2012, the circuit court denied the state officials' request for a stay of the court's order. The state officials then filed a motion with the court of appeals seeking relief from the circuit court's denial of the stay request. The representatives moved to dismiss that motion on procedural grounds and, later, responded to the motion on its merits. On March 12, 2013, after dealing with the procedural motion, and ordering and reviewing additional briefing on the merits of the stay issue, we issued an order in which we concluded that the state

officials failed to demonstrate that the circuit court erred in denying the stay motion.

Terminology

We begin our more detailed summary of the issues by clarifying our use of the term "collective bargaining" and explaining why we largely avoid using the term "union." Both terms are problematic because they can be used when discussing activity that plainly enjoys constitutional protection *and* when discussing the challenged collective bargaining provisions, which may or may not implicate constitutional protections.

With respect to "collective bargaining," we are hard pressed to improve on the explanation provided by an amicus:

> Historically, in the United States the term "collective bargaining" has been used to describe two legally different things. The first way in which the term has been used has been to describe an activity that is an element of the right of individual citizens to associate together for the purpose of advocating regarding matters of mutual interest or concern, in particular, matters concerning wages and employment conditions. When used in this [context] the term "collective bargaining" is descriptive of a collective effort and refers to an activity where the party that is the object of the advocacy, the employer, has no legal obligation to respond affirmatively to the advocacy, but may do so voluntarily.
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> ....
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> ... [This type of "collective bargaining"] is a fundamental right that constitutionally is protected.
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> The second way in which the term "collective bargaining" has been used is to identify and refer to a statutorily established relationship between an association of employees and their employer, by the terms of which an employer and its employees legally are obligated to negotiate, in "good faith," for the purpose of reaching an agreement regarding the employees' wages and conditions

> of employment. See, e.g., Sec. 111.70(1)(a), Wis. Stat. Such statutorily defined "collective bargaining" is subject to legislative modification, for the purpose, at least heretofore, of protecting the employees' right to bargain with their employer.

Amici Curiae Brief for Laborer's Local 236 and AFSCME Local 60 at 3, 6-7 (some citations omitted). In this certification, we use the term "collective bargaining" to refer to the "second way," that is, statutorily defined collective bargaining. The parties dispute whether infringing on this "way" of collective bargaining implicates constitutional protections.

Similarly, the term "union" is used by the parties in two ways. As with "collective bargaining," references to a "union" might be to what the parties here agree is a constitutionally protected association that public employees are free to form and that local governments are free to ignore. However, both parties sometimes use the term "union" as a shorthand reference to plaintiffs Madison Teachers, Inc. and Public Employees Local 61.

In this certification, we generally avoid use of the term "union." We refer to Madison Teachers, Inc. and Public Employees Local 61 using the statutory term "representative" because these organizations identify themselves with reference to this status in their amended complaint. While it is also accurate to describe these organizations as unions, for clarity sake we use the statutory term "representative" because the organizations are appearing in their capacity as the statutory representatives of their respective members.

Whether Act 10 Impermissibly Infringes On The Associational Rights Of Municipal Employees

The parties agree, as they must, that public employers have no constitutional obligation to bargain with employees, either individually or

collectively. As the representatives readily concede: "[G]roups of [public] employees do not have a constitutional right to compel their employers to negotiate employment terms with them in good faith." *See* ***DOA v. WERC***, 90 Wis. 2d 426, 430, 280 N.W.2d 150 (1979) ("There is no constitutional right of state employees to bargain collectively.").

The United States Supreme Court, in ***Smith v. Arkansas State Highway Employees, Local 1315***, 441 U.S. 463 (1979), explained:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Id. at 465 (citations omitted). Accordingly, the parties agree that municipal employees have no constitutionally protected right to a system requiring local governments to engage in good faith bargaining with representatives of the municipal employees and, thus, the legislature could have abolished all collective bargaining.[3]

The parties also agree that, when public employees engage in constitutionally protected associational activities, government employers may not penalize this activity by, for example, treating employees who choose to associate differently than employees who choose not to associate. To take a concrete example, we understand the state officials to agree that, if public employees

[3] Statutory collective bargaining rights were stripped away from some public employees entirely, for example, employees in the classified service employed by the University of Wisconsin Hospitals and Clinics. *See* Martin H. Malin, *Life After Act 10?: Is There A Future For Collective Representation Of Wisconsin Public Employees?*, 96 MARQ. L. REV. 623, 630-31 (2012).

choose to exercise their constitutionally protected associational rights to collectively petition for higher wages, there could not be in place a law that limits wage increases for such employees while imposing no such limitation on employees who choose not to associate. According to the state officials, that is not the situation here because participation in statutorily defined collective bargaining is not a constitutionally protected activity.

Although the parties dispute *the degree to which* the challenged provisions of Act 10, individually and cumulatively, interfere with the ability of municipal employees to effectively organize and bargain, this dispute does not appear to affect the outcome. Rather, as we explain next, the associational rights issue in this case appears to turn on whether the challenged provisions do or do not infringe on constitutionally protected associational rights.

If the challenged provisions of Act 10 infringe on a constitutionally protected associational right of the municipal employees, then those provisions must be subjected to the exacting strict scrutiny standard. *See* ***Buckley v. Valeo***, 424 U.S. 1, 25 (1976) (governmental action affecting right to associate "'is subject to the closest scrutiny'" (cited source omitted)); *see also* ***Citizens United v. Federal Election Comm'n***, 558 U.S. 310, 130 S. Ct. 876, 898 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'").

But if, on the other hand, the challenged provisions do not infringe on a constitutionally protected associational right, then review is limited to the legislature-friendly rational basis standard. *See* ***Ysursa v. Pocatello Educ. Ass'n***, 555 U.S. 353, 129 S. Ct. 1093, 1098 (2009) (because state did not infringe on a

unions' First Amendment rights, the state needed only to satisfy the rational basis standard).

The state officials do not contend that the challenged provisions survive strict scrutiny. And, both parties agree that, if review of Act 10 is limited to the rational basis standard, the challenged provisions are constitutional. Accordingly, as it pertains to the associational rights of municipal employees, the crux of this case is whether the representatives have demonstrated that the challenged provisions infringe on such rights. If they do, then strict scrutiny applies and the parties agree the challenged provisions of Act 10 are unconstitutional. If they do not, then there is agreement that the associational rights arguments made by the representatives fail. Accordingly, we turn our attention to the parties' dispute as to whether Act 10 infringes on constitutionally protected associational rights.

According to the representatives, absent a compelling state interest, once the state establishes a legal framework within which municipal employers and employees may engage in collective bargaining, penalizing employees for choosing to "engage in concerted activities for their mutual benefit" within that framework violates the constitutional right of free association.

The representatives deny the state officials' assertion that the associational claim here is based on the proposition that municipal employees have a constitutional right to engage in collective bargaining. The representatives summarize their claim as follows:

> [Municipal employees] have a right to associate in a bargaining unit and select a single agent to represent them and ... Act 10's multiple provisions heavily penalize municipal employees who make that associational choice, and also penalize those who choose to join a union.

The representatives assert that Act 10 "penalizes" by severely limiting what can be *collectively* bargained, but not what can be *individually* bargained. Relying on cases such as ***Smith***, 441 U.S. 463, and ***National Labor Relations Board v. Jones & Laughlin Steel Corp.***, 301 U.S. 1 (1937), the representatives state that the legislature is free to "statutorily restrict [a local government's] obligation to collectively bargain with its employees in good faith, but [the legislature] may not constitutionally withhold benefits or penalize public employees for exercising their ***associational*** rights."

Turning to the arguments of the state officials, they contend that Act 10 is a proper exercise of authority because it affects only *statutory* rights, not *constitutionally* protected rights. According to the state officials, Act 10 does not "impose a single restriction on [public employees' rights] to speak, assemble or petition their government."

In the words of the state officials, the representatives "conflate the changes brought about by Act 10, with an impairment of their right to associate together in the first instance." As we understand the state officials' position, it proceeds as follows:

1. Act 10 leaves untouched municipal employees' constitutionally protected right to engage in associational activities, that is, protected associational activities that government officials are free to ignore.

2. Act 10 deals solely with a statutory right to collective bargaining, which is *different* and *purely statutory* because it allows employees who opt to comply with the statutory requirements, and under the parameters set by the statutes, to force government employers to listen to their demands and bargain in good faith.

3. Thus, the legislature was free, in Act 10, to make changes to the requirements and parameters relating to statutory collective bargaining.

A specific example is illustrative. In the view of the state officials, the legislative decision to prohibit municipal employers from deducting union dues from the wages of municipal employees, *see* WIS. STAT. § 111.70(3g), does not implicate constitutionally protected associational rights because municipal employers have no obligation to provide a dues collection system to employees in the first instance.

The state officials' position seems best summed up in their contention that the representatives' argument is "nothing more than an attempt to constitutionalize public sector collective bargaining."

It may shed additional light on the parties' dispute to discuss the circuit court's reliance on ***Lawson v. Housing Authority of City of Milwaukee***, 270 Wis. 269, 274, 70 N.W.2d 605 (1955). The parties sharply disagree on whether that reliance was appropriate.

The 1955 ***Lawson*** decision addressed the constitutionality of a housing regulation. The regulation conditioned occupancy of federally subsidized housing on the requirement that tenants certify that they were not members of specified "subversive" organizations. ***Id.*** at 270-71. The ***Lawson*** court seemingly assumed that the tenants had a constitutionally protected right to associate with the specified organizations. *See* ***id.*** at 274-75, 287-88. The court observed that, while the tenants had no right to federally subsidized housing, ***id.*** at 273, the withholding of such housing "upon condition of [forfeiting the right to membership] in certain organizations is a ... way of encroaching upon constitutionally protected liberties

[and may be] violative of the constitution." ***Id.*** at 275. The ***Lawson*** court gleaned from case law that "Congress may impinge upon the freedoms guaranteed by the First amendment in order to prevent a substantial evil," but the court concluded that no such evil had been demonstrated. ***Id.*** at 286-88. There was no indication that "the occupation of ... a federally aided housing project by tenants who may be members of a subversive organization threatens the successful operation of such housing projects." ***Id.*** at 287. The ***Lawson*** court concluded that the "possible harm which might result in suppressing the freedoms of the First amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally aided housing projects." ***Id.*** at 287-88.

In the representatives' view, ***Lawson*** presents a situation parallel to the one here. Like the tenants in ***Lawson*** who had *no* right to federally subsidized housing, the municipal employees here have *no* right to participate in a collective bargaining scheme that requires government employers to bargain in good faith with represented employees. However, as in ***Lawson***, "[e]ven when citizens have no constitutional right to a legislatively-conferred benefit, they cannot be required as a condition of receiving that benefit to surrender constitutional rights 'unrelated to the purpose of the benefit' or be required 'to comply with unconstitutional requirements.'" (Representatives' responsive brief at 22, quoting ***Lawson***, 270 Wis. at 277-78.) As we understand the representatives' argument, they contend that Act 10 runs afoul of the teaching of ***Lawson*** by extending the benefit of limited collective bargaining, but then penalizing only employees who opt into the benefit by, for example, imposing limitations on wage increases only on those who opt in.

The state officials respond that ***Lawson*** has no application here. The state officials do not dispute the starting point—that both the tenants in ***Lawson***

and the municipal employees here have been extended the opportunity of a benefit not required by law. But the state officials argue that, unlike the housing regulation, Act 10 does not require the relinquishment of any *protected* associational activity. As we understand the state officials' argument, they contend that the so-called "penalizing" is nothing more than the parameters of the statutory collective bargaining opportunity that the legislature has, in its discretion, conferred on the employees.

To summarize, the question here, as it relates to associational rights, is whether Act 10 unconstitutionally penalizes municipal employees who opt to collectively bargain under the statutory framework. The answer to this question would seem to control with respect to all public employees covered by Act 10.

Whether Act 10 Impermissibly Infringes On The Equal Protection Rights Of Municipal Employees

The representatives contend that Act 10 violates the Wisconsin and United States constitutional rights to equal protection under the law. The representatives argue that Act 10 creates similarly situated, but differently treated, classes of employees: municipal employees who choose to associate with a certified agent and municipal employees who do not. Act 10 then treats these two categories differently based solely on the choice of one group to exercise a constitutionally protected right to associate for the purpose of exercising the statutory right of collective bargaining. In particular, Act 10 disadvantages persons who choose to associate by imposing wage increase limitations that do not apply to persons who choose not to associate. According to the representatives, because this disparate treatment implicates the constitutionally protected associational rights of municipal employees, strict scrutiny review applies.

The state officials respond that the equal protection claim has no life apart from the representatives' claimed violation of municipal employees' associational rights. The state officials argue that the equal protection claim fails because there is no infringement on municipal employees' associational rights, the topic of the representatives' first claim. And, because there is no associational rights violation, the representatives' equal protection claim is subject to mere rational basis review. Finally, the state officials point out that the representatives concede that Act 10 survives rational basis scrutiny.

So far as we can tell, the state officials are correct that the merit of the representatives' equal protection claim hinges on the merit of their associational claim.

Whether WIS. STAT. § 62.623 Violates The Home Rule Amendment

Act 10 and Act 32 created WIS. STAT. § 62.623. This statute is directed solely at contributions to the City of Milwaukee Employee Retirement System (Milwaukee Retirement System). The representatives contend that § 62.623, which prohibits the city from paying the employee share of contributions to the Milwaukee Retirement System, violates the Home Rule Amendment, WIS. CONST. art. XI, § 3(1).[4]

[4] WISCONSIN CONST. art. XI, § 3(1) provides:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

The primary dispute over WIS. STAT. § 62.623 is not over the meaning of the statute or its application to particular facts. Rather, the parties dispute the legal test used to resolve whether a state statute does or does not violate the Home Rule Amendment. As described more fully below, the parties disagree as to whether the test has a distinct local concern component that must be met regardless whether the state statute applies with uniformity state-wide.

The state officials explain that WIS. STAT. § 62.623 is part of a group of statutory changes that prohibit, state-wide, governmental employers from paying the employee contribution to a pension or other retirement plan. The representatives do not dispute the state officials' allegation of statewide uniformity and, therefore, effectively concede that § 62.623 meets any uniformity requirement imposed by the Home Rule Amendment. According to the state officials' interpretation of Home Rule case law, this statewide uniformity is dispositive.

According to the state officials, a state statute that affects what is otherwise a purely local matter is valid under the Home Rule Amendment if it uniformly applies state-wide. The state officials cite ***Van Gilder v. City of Madison***, 222 Wis. 58, 267 N.W. 25, 268 N.W. 108 (1936), for the proposition that the *only* limitation on legislative regulation of local affairs is a requirement that the regulation be made "'by an act which affects with uniformity every city.'" (State officials' brief-in-chief at 43, quoting ***Van Gilder***, 222 Wis. at 80-81.) The state officials assert that ***City of West Allis v. Milwaukee County***, 39 Wis. 2d 356, 366, 159 N.W.2d 36 (1968), and ***Thompson v. Kenosha County***, 64 Wis. 2d 673, 686, 221 N.W.2d 845 (1974), are examples showing that the supreme court has consistently taken the position that the only limitation is uniformity.

The representatives respond that the state officials present an inaccurate reading of controlling case law. According to the representatives, ***Van Gilder*** contains the holding that, to comport with the Home Rule Amendment, a law must both apply with uniformity state-wide *and* affect a matter of statewide concern.[5] In keeping with this take on ***Van Gilder***, the representatives assert that, if a topic is purely a matter of local concern, the two-pronged test cannot be met and contrary state legislation must be deemed unconstitutional.

To the extent the state officials point to case law suggesting that the public benefits of all public employees are a matter of statewide concern, the representatives respond that the cases the state officials rely on involve the benefits of law enforcement personnel, not the benefits of public employees generally. And, even then, the representatives assert, the case law applies only to statewide prohibitions on *diminishing* the benefits of law enforcement personnel based on the statewide interest in public safety. According to the representatives, ***Van Gilder*** shows that the legislature may restrict a city's ability to reduce police officer benefits because there is a statewide concern in having "an efficient,

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[5] Although we do not find in ***Van Gilder v. City of Madison***, 222 Wis. 58, 267 N.W 25, 268 N.W. 108 (1936), a clear affirmative statement of law matching the representatives' legal assertion of a distinct "statewide concern" requirement, we note that ***Thompson v. Kenosha County***, 64 Wis. 2d 673, 221 N.W.2d 845 (1974), does seemingly contain such language:

> Art. XI, sec. 3 of the constitution places two limitations on the legislature's power to enact statutes interfering with city and village affairs: (1) The subject of such statutes must be a matter of statewide concern; *and* (2) such statutes must uniformly affect all cities and villages. *These two limitations will be separately considered.*

Id. at 683 (emphasis added).

dependable police force [that] is functioning in all parts of the state." *See* ***Van Gilder***, 222 Wis. at 89. And, ***Welter v. City of Milwaukee***, 214 Wis. 2d 485, 571 N.W.2d 459 (Ct. App. 1997), similarly demonstrates that the legislature may restrict a city's ability to reduce police officer benefits because there is a statewide concern in having a dependable police force and in attracting "men and women of the highest caliber." ***Id.*** at 492-94. In contrast, according to the representatives, in ***State ex rel. Brelsford v. Retirement Board of Policemen's Annuity & Benefit Fund of Milwaukee***, 41 Wis. 2d 77, 163 N.W.2d 153 (1968), the court held that Milwaukee's decision not to enforce a statewide pension plan restriction on retired police officers affected only local taxpayers and was purely a matter of local concern.

In sum, the parties appear to agree that, apart from the Home Rule uniformity issue, a local decision to expend city funds to pay for public employee benefits is not a matter of statewide concern. Rather, it seems that the dispute here arises because of a lack of clarity in prior supreme court decisions as to whether statewide uniformity alone is sufficient to satisfy the Home Rule Amendment.

Before leaving this topic, we comment on one aspect of the parties' dispute. Both parties assume that a legislative determination as to whether contributions to the Milwaukee Retirement System is a local matter or instead one of statewide concern is a pertinent consideration. And, that assumption finds clear support in ***Van Gilder***. *See* ***Van Gilder***, 222 Wis. at 73-74 (holding that disputes over whether a matter is a local affair must be resolved by courts, but also stating that legislative determinations on the topic are "entitled to great weight"). What requires clarification is whether courts should give weight to arguably implicit legislative determinations.

For example, the state officials contend that, although Act 10 does not contain an express legislative determination that the apportionment of local contributions to the Milwaukee Retirement System are a matter of statewide concern, such a legislative determination is implicit in the very fact that the legislature imposed the restriction in WIS. STAT. § 62.623. We find no guidance in the parties' briefs or in the case law as to whether this type of implicit legislative "determination" carries any weight. Thus, this case presents an opportunity to clarify prior supreme court pronouncements on this topic.

Whether WIS. STAT. § 62.623 Violates Contractual Rights

If WIS. STAT. § 62.623 survives scrutiny under the Home Rule Amendment, the question arises whether the statute violates the constitutionally protected right of parties to contract with each other. We briefly summarize the two key parts of this dispute.

The existence of a contractual right. A threshold question is whether, as a matter of ordinance construction, the City of Milwaukee ordinance language at issue here contains a contractual guarantee that the city will pay employees' contributions to the Milwaukee Retirement System. The parties tell us that the pertinent ordinance subsections, and the pertinent language within those subsections, are as follows:

> § 36-08-7-a-1: "[T]he city shall contribute on behalf of general city employes 5.5% of such member's earnable compensation."
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> § 36-13-2-a: "Every such member ... shall thereby have a benefit contract in ... all ... benefits in the amounts and upon the terms and conditions and in all other respects as provided under this [ordinance] ... and each member and beneficiary having such a benefit contract shall have a vested right to such ... benefits and they shall not be diminished or

> impaired by subsequent legislation or by any other means without his consent."
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> § 36-13-2-c: "Every person who shall become a member of this retirement system ... shall have a similar benefit contract and vested right in ... all ... benefits in the amounts and on the terms and conditions and in all other respects as ... in effect at the date of the commencement of his membership."
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> § 36-13-2-d: "Contributions which are made to this fund ... by the city ... as contributions for members of this system shall not in any manner whatsoever affect, alter or impair any member's rights, benefits, or allowances, to which such member under this [ordinance] is or may be entitled …."
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> § 36-13-2-g: "Every member, retired member, survivor and beneficiary who participates in the combined fund shall have a vested and contractual right to the benefits in the amount and on the terms and conditions as provided in the law on the date the combined fund is created."

The state officials contend that the sole subsection that creates contractual rights is § 36-13-2-g and that this subsection creates no contractual right to contributions by the city because there is no mention of contributions.[6] And, according to the state officials, § 36-13-2-d demonstrates that contributions to the Milwaukee Retirement System are not "benefits" or "terms and conditions" as those terms are used in the ordinance. The state officials contend that § 36-13-2-d makes this clear by using the term "contributions" differently than the terms "rights, benefits, and allowances." Finally, the state officials contend that the representatives' contrary interpretation of the ordinance is absurd because it would prevent the city from making larger contributions.

[6] The state officials tell us that a different ordinance subsection contains language that is nearly identical to that in § 36-13-2-g, but neither party suggests that an independent analysis of that other subsection affects the outcome here.

The representatives read the provisions differently. First, the representatives point out that § 36-13-2 is titled "Contracts To Assure Benefits" and that § 36-13-2-a clearly provides that every retirement system member shall have a "benefit contract" concerning "all ... benefits in the amounts and upon the terms and conditions and in all other respects as provided under [the ordinance that] ... shall not be diminished or impaired by subsequent legislation or by any other means." According to the representatives, the words "upon the terms and conditions and in all other respects as provided under this [ordinance]" clearly incorporate § 36-08-7a-1, which requires the city to make the 5.5% employee contribution to the Milwaukee Retirement System. The representatives argue that WIS. STAT. § 62.623, by eliminating the 5.5% employer contribution, diminishes the defined benefit without a commensurate offsetting benefit and, thereby, diminishes the "benefit," something § 36-13-2-a plainly prohibits. As to the state officials' absurdity argument, the representatives respond that § 36-13-2-a contains "shall not be diminished" language that prohibits diminishing benefits, but does not prohibit increasing benefits.

Resolving the meaning of the ordinance would appear to involve a straightforward application of statutory construction principles. *See* ***Bruno v. Milwaukee County***, 2003 WI 28, ¶6, 260 Wis. 2d 633, 660 N.W.2d 656 (the rules of statutory construction are applicable to ordinances).

The impairment of a contractual right. If city employees have a contractual right to have the city pay the 5.5% contribution, the question becomes whether there has been an impermissible impairment of the contract.

Both the Wisconsin and United States Constitutions protect the right of parties to contract. ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107,

¶51, 295 Wis. 2d 1, 719 N.W.2d 408. The parties agree that the three-step method for evaluating an impairment of contract claim set forth in ***Energy Reserves Group, Inc. v. Kansas Power & Light Co.***, 459 U.S. 400 (1983), applies here. The three steps are as follows: first, the complaining party must establish that the legislature changed the law after the formation of the contract and that the contract is substantially impaired by the legislative change; second, the court determines whether there is a significant and legitimate public purpose for the legislation; and, third, if a significant and legitimate public purpose exists, the court determines whether the law is reasonable and necessary to serve that purpose. *See* ***id.*** at 411-12; *see also* ***Dairyland***, 295 Wis. 2d 1, ¶¶55-57.

Under the first step, the parties dispute whether WIS. STAT. § 62.623 substantially impairs the contract. The dispute here is over whether the increased cost to employees is a substantial impairment.

The parties' arguments with respect to the second and third steps overlap. The state officials contend that WIS. STAT. § 62.623 serves a significant and legitimate purpose because it is designed to equip the local governments with the ability to absorb the impact of the economic downturn. And, according to the state officials, because the state is not a party to the contract, courts must defer to the legislature's judgment as to the reasonableness and necessity of the impairment. The representatives respond that an economic downturn is, standing alone, an insufficient public purpose and that case law supports the proposition that the legislature may amend a retirement plan *only* when the amendment is necessary to preserve the actuarial soundness of the plan.

Conclusion

With respect to the public employee collective bargaining rights issue in this appeal, it is hard to imagine a dispute with greater statewide effect or with a greater need for a final resolution by the supreme court. Although the parties do not address the topic, news accounts suggest that several municipal employers are engaged in legal disputes relating to this topic, and many more are left in limbo wondering whether they are better off engaging in some type of tentative bargaining or refusing to engage with employee representatives. We urge the supreme court to accept this certification and put these legal issues to rest.