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CIRCUIT COURT
DANE COUNTY, WI
2023CV003152

BY THE COURT:

DATE SIGNED: July 3, 2024

Electronically signed by Jacob B. Frost
Circuit Court Judge

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

Plaintiffs,

Case No. 2023CV3152

vs.

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

Defendants,

and

KRISTI KOSCHKEE; and WISCONSIN STATE LEGISLATURE,

Intervenor.

DECISION ON MOTION TO DISMISS

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

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

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

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

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

STANDARD OF REVIEW

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

[1] The Court also received and considered the brief of amicus curiae Kristi Koschkee.

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

DECISION

I. Factual Background to Act 10.

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

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

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

II. Claim Preclusion Does Not Bar Plaintiffs' Action.

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

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

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

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

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

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

> which were litigated or which might have been litigated in the former proceedings." *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 310, 334 N.W.2d 883 (1983). Before an earlier proceeding will act to preclude a claim in another action, three factors must be present: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 551, 525 N.W.2d 723, 727 (1995).
>
> This case turns on the first prong of the analysis, that is, whether there was an identity between the parties or their privies in the first and second suits….Privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved.…The burden of proving claim preclusion is upon the party asserting its applicability.

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

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

Id. ¶ 18 (citations omitted).

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

A. Plaintiffs' claims are not precluded by WEAC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Laches Does Not Apply.

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

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

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

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

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

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

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

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

> A statute violates equal protection only when "the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy." Any doubts must be resolved in favor of the reasonableness of the classification.
>
> "'The fact [that] a statutory classification results in some inequity ... does not provide sufficient grounds for invalidating a legislative enactment.'" Indeed, "'[e]qual protection does not deny a state the power to treat persons within its jurisdiction differently....'" However, "[t]he basic test is not whether some inequality results from the classification but whether there exists a rational basis to justify the inequality of the classification." In determining whether a rational basis exists, we look first to determine whether the legislature articulated a rationale for its determination. If we cannot identify any such articulated rationale, it is the court's obligation to construct one.
>
> ….
>
> Under our case law, a statute must meet five criteria in order to have a rational basis:
>
> > (1) All classification[s] must be based upon substantial distinctions which make one class really different from another;
> >
> > (2) The classification adopted must be germane to the purpose of the law;
> >
> > (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within the class];
> >
> > (4) To whatever class a law may apply, it must apply equally to each member thereof;
> >
> > (5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.
>
> *Nankin*, 245 Wis.2d 86, ¶ 39, 630 N.W.2d 141 (citing *Aicher*, 2000 WI 98, ¶ 58, 237 Wis.2d 99, 613 N.W.2d 849) (alterations in original).

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

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

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

MTI, 2014 WI 99, ¶ 13 (cleaned up).

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

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

MTI, 2014 WI 99, ¶ 77.

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

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

The Wisconsin Supreme Court explained this point long ago.

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

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

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

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

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

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

1. The Classifications Are Not Based Upon Substantial Distinctions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In sum, the Court ran through every explanation that was offered by the parties and every one it could come up with to justify why the 7 groups the Legislature selected are in the public safety group and all others are excluded. No explanation withstands rational basis review. No explanation presented to or thought of by the Court can explain why those 7 groups are in but the other public safety type groups are put in the general employee category. This is the purpose of rational basis review – to ensure there is an explanation that makes rational sense as to why a group is treated differently and who is in the group.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

ORDER

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

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