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CIRCUIT COURT
DANE COUNTY, WI
2023CV003152

BY THE COURT:

DATE SIGNED: December 2, 2024

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

ABBOTSFORD EDUCATION ASSOCIATION, et al,
Plaintiffs,

Case No. 2023CV3152

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, et al,
Defendants,

and

KRISTI KOSCHKEE; and WISCONSIN STATE LEGISLATURE,

Intervenors.

DECISION AND ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

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

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

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

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

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

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

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

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

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

> In our first review of the merits of a circuit court's reconsideration decision, we agree with the approach developed by the court of appeals. As that court has explained, a circuit court possesses inherent discretion to entertain motions to reconsider "nonfinal" pre-trial rulings. *See, e.g.*, *Fritsche v. Ford Motor Credit Co.*, 171 Wis. 2d 280, 294-95, 491 N.W.2d 119 (Ct. App. 1992). To succeed, a reconsideration movant must either present "newly discovered evidence or establish a manifest error of law or fact." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (*citing Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)).
>
> Newly discovered evidence is not "new evidence that could have been introduced at the original summary judgment phase." *Id.*, ¶46. Similarly, a "manifest error" must be more than disappointment or umbrage with the ruling; it requires a heightened showing of "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.*, ¶44 (quoting *Oto*, 224 F.3d at 606). Simply stated, "a motion for reconsideration is not a vehicle for making new arguments or submitting new evidentiary materials [that could have been submitted earlier] after

> the court has decided a motion for summary judgment." *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶23, 275 Wis. 2d 171, 684 N.W.2d 141.
>
> ….Applying the law set forth above to the relevant facts before it, the circuit court reasonably concluded that Bauer lacked necessary factual predicates on both constitutional claims and offered no newly discovered evidence warranting reconsideration. *See Borreson*, 292 Wis. 2d 231, ¶6, 713 N.W.2d 656. Because the circuit court permissibly declined to accept additional evidence and legal arguments via Bauer's reconsideration motion, we disregard that material in reviewing the underlying summary-judgment decision.

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

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

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

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

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

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE PLEADINGS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Wisconsin Stat. § 990.001(11) provides that "[i]f any provision of the statutes or of a session law is invalid ... such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application." We have long held that "the presumption is in favor of severability." *Nankin*, ¶ 49 (quoting *State v. Janssen*, 219 Wis.2d 362, ¶ 37, 580 N.W.2d 260 (1998)). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.*
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> The legislature has expressed no intent in Act 86 that is contrary to the general presumption of severability. Further, the remaining sections of Wis. Stat. §§ 70.47, 73.03, and 74.37 remain fully operative as a law when the modifications from Act 86 which create the enhanced Board of Review procedure and the enhanced certiorari procedure are severed. As a result, we hold that the provisions of Act 86 which create the enhanced Board of Review procedure and the enhanced certiorari procedure are severable.
>
> The circuit court severed only the specific subsections of § 74.37 that restrict taxpayers in opt out municipalities from seeking de novo review. The statutes creating the enhanced Board of Review and enhanced certiorari procedures were not affected by the circuit court order.
>
> As a result, under the circuit court's order, taxpayers in opt out municipalities would have access to three separate assessment review procedures: the enhanced Board of Review procedure, enhanced certiorari procedure, and de novo review. By contrast, under the circuit court's order, taxpayers in all other municipalities would have access to traditional certiorari review and de novo review. In enacting Act 86, the legislature clearly did not intend to create a situation where enhanced board of review and enhanced certiorari procedures would be available in a municipality where de novo review was also available. Therefore, we conclude that all of Act 86's modifications to Wis. Stat. §§ 70.47, 73.03, and 74.37 are unconstitutional.
>
> It is important to note that our holding today simply returns the Board of Review procedures in all counties to the procedures which existed before Act 86 was approved. It also returns the procedure for challenging Board of Review assessment determinations to the procedure which existed before Act 86 was

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

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

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

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

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

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

> Declaratory judgment is a legal remedy; however, it is analogous to an injunction, which is an equitable remedy. *Samuels v. Mackell*, 401 U.S. 66, 70–71, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). In *Samuels*, The United States Supreme Court stated:
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> > Although the declaratory judgment sought by the plaintiffs [in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943)] was a statutory remedy rather than a traditional form of equitable relief, the Court made clear that a suit for declaratory judgment was nevertheless 'essentially an equitable cause of action,' and was 'analogous to the equity jurisdiction in suits *quia timet* or for decree quieting title.' ... [T]he Court held that in an action for a declaratory judgment, 'the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds.'

> *Samuels*, 401 U.S. at 70-71, 91 S.Ct. 764 (internal citations omitted). The Court emphasized the "continuing validity" of its analogy between declaratory judgments and injunctive relief. *Id.* at 71, 91 S.Ct. 764.
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> The analogy between declaratory judgment and injunctive relief is particularly strong in the context of this case. As then-Chief Justice Abrahamson and Justice Ann Walsh Bradley said, "[t]he oft-stated, oft-repeated legal maxim is clear: declaratory judgments are treated functionally as injunctions, when applied to governmental parties who are bound by the force and meaning of judgments under the law." *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶43, 351 Wis. 2d 237, 839 N.W.2d. 388 (Abrahamson, C.J., & A.W. Bradley, J., dissenting).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Stricken Provisions of Act 10.

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

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

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

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

  Perhaps had Plaintiffs identified specific examples of statutes that were lawfully enacted that rely on these new terms Act 10 created, the argument to leave the definitions in place for the sake of those other laws could have merit. However, Plaintiffs do not point to any existing statute that relies on these defined terms. That something might exist is not enough. I strike these sections.
- Sections 272, 278, and 285-286. These sections create definitions of "public safety employee" and designate circumstances for when and in what units public safety employees may be assigned. This gets to the heart of the Court's July Decision – the unconstitutional creation of the "public safety employee" group and differential treatment of it without a rational basis – so I strike these sections.

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

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

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

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

B. Stricken Provisions of Act 55.

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

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

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

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

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

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

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

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

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

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

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

ORDERS

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