STATE OF WISCONSIN
EMPLOYMENT RELATIONS COMMISSION

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE WISCONSIN and UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,

Joint Petitioners.

Case No. _____

REPLY BRIEF OF SEIU HEALTHCARE WISCONSIN

INTRODUCTION

As detailed in SEIU's Opening Brief, the analysis of the question presented must begin, and ordinarily ends, with the plain language of the Peace Act itself. UWHCA violates this long-established rule of statutory interpretation by presenting in its Opening Brief[1] an argument-filled "Background" that blends an incomplete description of facts and select portions of legislative history to set the stage for its equally incomplete and misinformed legal analysis. As shown below, UWHCA is an unreliable storyteller and its legal conclusions are faulty.

UWHCA appears to advocate that it should be allowed, and its employees be compelled, to reside in a "no man's land" where no law protects the rights of either its employees or itself when its employees seek to exercise their "fundamental" and "constitutionally protected" right to engage in collective bargaining. *See MTI. v. Walker*,

[1] Formally, "Opening Brief of the University of Wisconsin Hospital and Clinics Authority," dated and filed September 23, 2022. (Br. at ___.)

2014 WI 99, ¶ 18, 358 Wis. 2d 1. Decades ago, by enacting the Wisconsin Employment Peace Act ("Peace Act" or "Act"), the State of Wisconsin sought to ensure that there was "labor peace" by protecting and regulating that fundamental right through the Act.

As this brief will explain, the WERC should find that UWHCA, its employees, and their chosen representatives are governed and protected by the Peace Act.

ARGUMENT

I. UWHCA is a "person" under the plain language of the Peace Act.

A. Corporations, including political corporations like UWHCA, are "persons" under the Peace Act.

In its only attempt at addressing any of the actual language of the Peace Act (or any other relevant statute), the UWHCA argues that it is not a "person" under the plain language of the Act, and therefore cannot be an "employer" governed by it. (Br. at 10-14.) That is incorrect. It also specifically claims that the definition of the term "person" includes "*private* but not *public* entities." (Br. at 12.) That too is incorrect. Wis. Stat. § 111.02(10) provides: "The term 'person' includes one or more individuals, partnerships, associations, **corporations**, limited liability companies, legal representatives, trustees or receivers." (Emphasis added.) Clearly, there is no such limitation on private versus public entities or corporations in the Peace Act.

In Wisconsin, corporations come in many flavors (and combinations), including domestic, foreign, business, service, nonprofit, nonstock, statutory close, public, housing, charitable, community union, public utility, public service, school, political, benefit, business development credit, and more. There are similarly multiple varieties of

partnerships (general, limited, limited liability, limited liability limited, registered limited liability limited), associations (general, general cooperative, limited cooperative, nonprofit, unincorporated, savings and loan, building and loan, savings, foreign, investment), and limited liability companies (foreign, domestic, member-managed). *See, e.g., Wis. Stat. Chs. 180, 181, 182, 201, 204, 215, 216.* The Peace Act encompasses them all in the definition of "person" by describing the general type of entity (corporation, association, limited liability company), but not further detailing any subtypes (domestic corporation, public corporation, nonstock corporation, etc.) in the definition itself.

As the Wisconsin Supreme Court noted in 2007, UWHCA is a "political corporation." *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 2, 302 Wis. 2d 358, 735 N.W.2d 30. UWHCA embraces this description. (Br. at 12.) However, it does not and cannot cite to any statute or case that holds or suggests that "political corporations" are excluded from the Peace Act's definitions of "person" or "employer," or by any other section of the Peace Act.

Instead, UWHCA wants the WERC to add words to the statutory definition of "person" to make "corporation" mean only "private" corporations, and/or not "political" corporations. Thus, UWHCA asks the WERC to interpret the Peace Act to find exclusions that are not present in the Act's plain language. Previously, the WERC rejected efforts to write certain kinds of corporations out of Peace Act coverage and must do so again here.

Most notably, almost fifty years ago in *Hope, Inc.*, Dec. No. 11468 (WERC Dec. 1972), the WERC refused to write "non-stock, non-profit, nonmembership and charitable corporations" out of the statute. The definition of "person" includes "corporations," and does not otherwise specify the inclusion or exclusion of any types of corporations, either in the definition of "person" or anywhere else in the Peace Act. As the non-Peace Act statutes cited by UWHCA demonstrate, the legislature has the ability to use narrower terms when it wishes, such as "domestic corporation," "foreign corporation," and the like. It chose not to do that in the Peace Act.

Consequently, the UWHCA, a "political corporation," is a "corporation," therefore a "person," and therefore an "employer" governed by the Peace Act.

B. All persons are employers under the Peace Act unless excluded.

UWHCA claims that passing references to the Peace Act as the labor relations law that governs the private sector establishes that the Peace Act does not apply here. (Br. 2, 13.) That argument is incorrect. The issue in the case relied upon by UWHCA, *State ex rel. Teaching Assistants Ass'n. v Univ. of Wisconsin-Madison,* 96 Wis. 2d 492, 292 N.W.2d 657 (Ct. App. 1980), was whether the State's Arbitration Act, Wis. Stat. Ch. 298, was available to the TAA to enforce an arbitrator's decision. The court concluded based on the plain language of the statute, which explicitly excluded unclassified State employees like the teaching assistants from coverage, that the Arbitration Act was not available to them. *Id.* at 505. The TAA never claimed to be protected by the Peace Act.

Thus, that case did not address whether the employer and employees at issue here, or any similar parties, were governed by the Act, and consequently has no bearing here.

The same is true for the WERC decision referenced by UWHCA, *Ardagh Group,* Dec. No. 38977-A (WERC July 21, 2021). In that case, a *pro se* private sector employee filed an unfair labor practice complaint with the WERC, averring that his employer violated all three labor relations laws enforced by the Commission. The hearing examiner merely identified the Peace Act as the one that applied, if any did: "The first two statutes [SELRA and MERA] apply to Wisconsin's public sector and are inapplicable here because the Company is not a public sector employer and Schenck is not a public sector employee. Instead, the Company is a private sector employer and Schenck is a private sector employee. The last statute referenced (WEPA) applies to private sector employers and employees." *Id.* at 3.

While UWHCA is correct that "as a general matter" (Br. at 2) the Peace Act governs private sector labor relations, that is only because most public sector employers are excluded from coverage by the Peace Act by explicit exclusion from the category of "employer," stating: "Employer does not include any of the following: 1. The state or any political subdivision thereof." *Wis. Stat. § 111.02(7)(b).* State and municipal employers and employees comprise the vast majority of the public sector. Absent such exclusions, the Peace Act would govern **all** persons who engage the services of employees: public, private, and everywhere in between. The fact that the drafters chose to exclude those categories of employers from coverage under the Peace Act through

their exclusion from the statute's definition of "employer" demonstrates that they are initially ***included*** within the definition of "person," and only ***excluded*** at the next level of analysis—in determining whether the "person" is an "employer."

There are employers and employees who are neither state or municipal—who are governed by neither SELRA nor MERA—and also are not in private for-profit industry. They must be covered by the Peace Act by its terms, as shown above. Any other interpretation would leave the UWHCA, its employees, and their chosen representatives in a "no-man's land," where "the only resort is to strikes and picketing." *See Wisconsin Empl. Rel. Comm. V. Atlantic Richfield Co.,* 52 Wis. 2d 126, 135, 187 N.W.2d 805 (1971).

The purpose of the Peace Act, like the National Labor Relations Act (NLRA), is "to seek the peaceful adjustment of labor-management disputes as a 'substitute for industrial strife.'" *Id.* In finding Peace Act coverage here, just as it did with one-man bargaining units not covered by the NLRA, the WERC would "properly act in seeking to substitute collective bargaining for sidewalk settlement of disputes" involving UWHCA and its employees. *See id.* And, importantly, it would be applying the plain language of the statute.

II. The legislative history cannot be used to contradict the plain text of the Peace Act and confirms that the Peace Act governs the UWHCA.

A. Sources beyond the text of the statute may be considered only to confirm the plain text reading or resolve an ambiguity in the text.

As detailed in SEIU's Opening Brief, the primary, and typically sole, resource for determining the meaning of a statute are the words of the statute itself. The Wisconsin Supreme Court has held that:

> 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 it is not the primary focus of inquiry. **It is the enacted law, not the unenacted intent, that is binding on the public.**

State ex rel. Kalal v. Cir. Ct. of Dane Cty., 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. (Emphasis added.)

If the review of the statute's language, interpreted in context of surrounding and closely-related statutes, "yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of meaning.…Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.* at ¶ 46 (internal citation omitted).

Resorting to interpretive resources outside the statutory text is typically "not appropriate" in the absence of a finding of ambiguity, though such sources may be consulted to "confirm or verify" a plain meaning interpretation. *Id.* at ¶¶ 50-51. This rule is intended to prevent "the use of extrinsic sources of interpretation to vary or

contradict the plain meaning of a statute, ascertained by application of the foregoing principles of interpretation." *Id.* at ¶ 51.

Moreover, when a decisionmaker chooses to consult other sources to "**confirm or verify"** a plain meaning interpretation of a statute's text, there is a hierarchy of acceptable sources. While consideration of statutory history, which involves comparing current statutory text with earlier versions, is more commonly used to fortify a reading of a statute's current text (see Section B below), other legislative history—documentation that was never enacted[2]—"should rarely be permitted to supplant the statutory words as they are ordinarily understood." *Brey v. State Farm Mut. Auto. Ins. Co.,* 2022 WI 7, ¶ 21, 400 Wis. 2d 417, 970 N.W.2d 1 (quoting *Kalal,* 2004 WI 58, ¶ 52). Such sources become relevant "**only to confirm plain meaning or when a statute remains ambiguous even after 'the primary intrinsic analysis has been exhausted**.'" *Id.* (Citation omitted, emphasis added.)

Despite these very clear directions from the Wisconsin Supreme Court about how to conduct statutory interpretation, the UWHCA asks the WERC to ignore them and do the opposite. It asks the Commission to consider statutory and legislative history sources of interpretation **to vary or contradict** the plain meaning of the words of the Peace Act. Because there is no legal authority to support that approach, the

[2] Never enacted legislative history includes memoranda and language preceding a bill from the Legislative Reference Bureau, fiscal estimates, legislative committee reports and records, and the like. It is not the statute and cannot be read as such, as advocated by SEIU.

Commission should ignore the UWHCA's invitation to do so. Instead, it should find that the Peace Act applies to UWHCA, its employees and their chosen representatives.

B. Statutory history cannot be used to vary or contradict the plain language of a statute.

UWHCA's assertion that an interpretation of the Peace Act must include a review of statutory history is mistaken. (Br. at 11.) Where, as here, the plain language of the statute is clear, no consideration of anything further is required. Moreover, while a review of statutory history may be performed to confirm a reading of the plain text of a statute, UWHCA incorrectly asserts that a "statutory history" reading of the Peace Act and Chapter 233 unmoored to any consideration of the actual words in the Act, which contradicts the statutory text, and which relies on unenacted legislative history to interpret the statutory history, is appropriate. (Br. at 9-11, 2-6.) UWHCA skips the first step of statutory interpretation: a reading of the statutes themselves. In doing so it impermissibly reaches an interpretation that neither confirms a plain text reading, nor resolves an ambiguity in that reading, but instead conflicts with the statutory language, as shown in Section C, below.

UWHCA cites to *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, 400 Wis. 2d 417, 970 N.W.2d 1 to support its use of statutory history to determine the plain meaning of the existing statutory text. (Br. at 11.) Neither *Brey* nor any other case endorses any such thing. In fact, *Brey,* like numerous other decisions from the Wisconsin Supreme Court since *Kalal* (including *Kalal*), simply acknowledges that reviewing the statutory history and other resources can be *part of* the plain meaning analysis. *Brey*, 400 Wis.2d 417, ¶ 20;

see also Kalal, 271 Wis.2d 633,¶¶ 50-51. *Brey*, like so many other cases, simply confirms that the first, and often only, step is to read and interpret the words of the statute. *Brey*, 400 Wis.2d 417, ¶ 11. Only after completing a "plain-meaning analysis" of the words in the statute *may* a court (or agency) turn to review prior versions of the statute at issue to "fortify" that analysis to discern the statute's plain meaning. *Brey*, 400 Wis.2d 417,¶ 20.

It is not necessary for such step to be taken, however. In *James v. Heinrich,* 2021 WI 58, ¶ 26, 397 Wis. 2d 517, 960 N.W.2d 350, after finding that the plain text of the statute was clear, the Court observed, "our analysis of the statute could end there." The Wisconsin Supreme Court has, over and over, dictated this approach to statutory interpretation: read the words of the statute. If the meaning is clear, the work is ordinarily done, though a review of statutory history may (but need not) be undertaken to confirm or verify that analysis. *See, e.g., Crown Castle USA, Inc. v. Orion Const. Grp., LLC,* 2012 WI 29, ¶ 32, 339 Wis. 2d 252, 811 N.W.2d 332; *Legue v. City of Racine,* 2014 WI 92, ¶ 71, 357 Wis. 2d 250, 849 N.W.2d 837; *Fabick v. Evers,* 2021 WI 28, ¶ 30, 396 Wis. 2d 231, 956 N.W.2d 856; *State ex rel. Nudo Holdings, LLC v. Bd. of Rev. for City of Kenosha,* 2022 WI 17, ¶ 23, 401 Wis. 2d 27, 972 N.W.2d 544; *State v. Green,* 2022 WI 30, ¶ 44, 401 Wis. 2d 542, 973 N.W.2d 770; *Becker v. Dane County,* 2022 WI 63, ¶ 15, 403 Wis. 2d 424, 977 N.W.2d 390. Statutory history may also be used to resolve an ambiguity in the language of the statute to "discern the statute's plain meaning." *See State v. Williams,* 2014 WI 64, ¶ 21, 355 Wis. 2d 581, 852 N.W.2d 467. There is simply no legal authority to

skip reading and interpreting the words of the statute to discern a statute's plain meaning (or identify ambiguity) before considering other sources.

There is also no legal authority to substitute a plain-meaning analysis of the words in the statute with a review of the statutory and other legislative history in order to discern a statute's plain meaning that contradicts the text of the statute. Rather, decisionmakers "may not view [a statute's] legislative history to contradict or vary our interpretation of the statute's plain meaning. *Justmann v. Portage Cnty.,* 2005 WI App 9, ¶ 10, 278 Wis. 2d 487, 692 N.W.2d 273. "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). While consideration of a statute's purpose may be helpful, "the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires." *Id*. Importantly, the purpose of a statute "cannot be used to contradict text or to supplement it." *Id*. at 57. Yet that is what UWHCA invites the WERC to do. The Commission should reject that invitation.

C. An honest review of the statutory and other legislative history confirms SEIU's interpretation of the plain language of the Peace Act.

Based on statutory and other legislative history, but not any actual statutory text, UWHCA tells an interesting tale about the creation and development of UWHCA and its interaction with the Peace Act. While this tale includes some accurate statements about the history of the Peace Act and the Act that first created Wis. Stat. Ch. 233 and the UWHCA itself, 1995 Wis. Act 27, it is incomplete, impermissibly conflicts with the

actual text of both the Peace Act and Chapter 233, and is simply untrue in its assertion that, contrary to the Peace Act's current text, the Act does not cover the UWHCA, its employees, and their chosen representatives.

The plain text of the Peace Act, and particularly the definitions of "employer," "employee," and "person," as enunciated in SEIU's Opening Brief and in Section I above, clearly demonstrates that UWHCA, its employees, and their chosen representatives are governed by the Act. The WERC's analysis could, and should, end there.

Nevertheless, the statutory and other legislative history of the Peace Act, going back to 1995, and of the creation of UWHCA at the same time, as well as facts about how the hospitals and clinics at the University of Wisconsin were run and by whom before UWHCA was created, confirms Peace Act coverage, as shown below. To reiterate, as described in Section B above, resorting to statutory and other legislative history is entirely appropriate to ***confirm or verify*** a plain text reading of a statute, as SEIU does here, but such history cannot be used to ***contradict*** such a reading, as UWHCA urges.

1. 1995 Wis. Act 27 began a process of moving management of the hospitals and clinics at the University of Wisconsin away from state control and oversight, toward a private sector model.

UWHCA was created "a public body corporate and politic" as part of the 1995-1997 biennial budget, 1995 Wis. Act 27, § 6301 (Act 27). As detailed below, the aim was to move operational control over the hospitals and clinics of the University of

Wisconsin-Madison from the state and toward a private-sector-like entity. Act 27 began that process,[3] and, as shown in the following subsection, 2011 Wis. Act. 10 moved it further along. There are several sections of Act 27 pertinent to the question before the WERC:

- Act 27, § 6301 created Wisconsin Chapter 233, establishing the University of Wisconsin Hospitals and Clinics Authority.

- Act 27, § 224m created Wis. Stat. § 15.96, establishing the UWHC Board.

- Act 27, § 9159(4)(c) made all people who worked at the hospitals and clinics, and who were previously University of Wisconsin employees (and therefore state employees), into UWHC Board employees—a state Board, separate from the University of Wisconsin, but which maintained those employees' status as state employees.

- Act 27, § 9159(4)(a) carved out certain hospitals and clinics employees from being UWHC Board employees and made them UWHCA employees. The affected positions included professional employees (including nurses and allied health professionals), nonprofessional supervisory employees, management employees, and confidential employees.

- Act 27, § 3782g amended the definition of "employer" in the Peace Act, Wis. Stat. § 111.02(7), to expressly include UWHCA as an employer under the Act.

[3] The Wisconsin Supreme Court has characterized UWHCA as a "political corporation" with "some features…shared with private entities" including the fact that it does not receive general purpose revenue from the state; it can sue and be sued; and it can buy and sell real estate. *Rouse v. Theda Clark Med. Center, Inc.,* 2007 WI 87, ¶¶ 31-32, 302 Wis. 2d 358, 735 N.W.2d 30. It has characteristics in common with an "independent going concern." *Mayhugh v. State,* 2015 WI 77, ¶ 13, 364 Wis. 2d 208, 867 N.W.2d 754. It cannot invoke Wisconsin's sovereign immunity which protects any "arm of the state." *Takle v. Univ. of Wis. Hosp. & Clinics Auth.,* 402 F.3d 768, 770 (7th Cir. 2005). Rather than an arm of the state, the Seventh Circuit described UWHCA as having the nature of an "independent, nonprofit entity," which "Wisconsin's own courts would classify…as private" because of its "financial autonomy and the authority to sue and be sued in its own name." *Id.*

Prior to Act 27, the hospitals and clinics at the University of Wisconsin were operated by the University of Wisconsin-Madison. Wis. Legis. Fiscal Bureau, *Restructuring of UW Hospitals and Clinics: Overview*, Issue Paper No. 945 to J. Comm. On Fin., at 2, 7 (May 2, 1995) (available in drafting file for 1995 Wis. Act 27, Wis. Legis. Reference Bureau, Madison, Wis.) (*Issue Paper 945)*, attached as **Exhibit A**. As such, the operations of the hospitals and clinics were subject to University Board of Regents as well as executive branch and legislative oversight, which could be slow-moving and burdensome. *Id.* at 4, 7. In 1995, Governor Thompson proposed to restructure operational control of the hospitals and clinics. His proposal was described in AB 150, which, with modifications, became Act 27.[4] The purpose of restructuring the operation of the hospitals and clinics was to address "the perception that the administrative review and approval process faced by [the hospitals and clinics] is burdensome and will (or has) negatively affect its teaching, research and patient care missions." *Id* at 4. The restructuring peeled away the operational control of the hospital and clinics from the University and placed that control in the hands of two distinct entities: the newly created UWHC Board, and the newly created UWHCA.

Governor Tommy Thompson described his vision for restructuring in his budget address:

[4] Nearly 100 revisions to AB 150 were proposed by the University—i.e., the then-current operators of the hospitals and clinics—UWHCA's predecessors. *See* Legislative Audit Bureau, *Memorandum provided with letter to Senator Leean and Rep. Brancel,* at 1 of the letter (April. 25, 1995) (available in drafting file for 1995 Wis. Act 27, Wis. Legis. Reference Bureau, Madison, Wis.), attached as **Exhibit C.**

> [T]he truth of the matter is that university hospital is going to have problems surviving as it is now. It simply cannot survive as another department of the UW.
>
> We are unshackling our education system to compete in a new world. We need to do the same for the university hospital.
>
> We are proposing to make the university hospital a public-private partnership, creating a University of Wisconsin Hospital and Clinics Authority effective July 1, 1996.
>
> This will continue state partnership with the hospital, but also allow it the freedom and flexibility to expand and compete in an increasingly competitive health care market.

Governor Thompson's 1995-97 Budget Address, (February 14, 1995) (available in the Tommy G. Thompson Collection, Marquette Univ., Milwaukee, Wis.), excerpts attached as **Exhibit B**.

With restructuring, as it concerned employees, it was believed that the "effectiveness and efficiency [of the hospitals and clinics] would improve if it were freed from the rules and regulations governing the State's civil service system." Legislative Audit Bureau, *Memorandum provided with letter to Senator Leean and Rep. Brancel,* at 3 (April. 25, 1995) (available in drafting file for 1995 Wis. Act 27, Wis. Legis. Reference Bureau, Madison, Wis.), attached as **Exhibit C.** Replacing compliance with the civil service system, Act 27 provided UWHCA with the authority to select and hire its own employees, assign their duties and positions, and fix their pay and benefits. *Wis. Stat. § 233.10(1) & (2).* With respect to its employees, as with all other aspects of its operations, it was explicitly envisioned that even though UWHCA's governing body would be comprised of various governmental appointees and officers, "for all practical purposes, [it would] be able to operate independent of Regent or legislative control."

Exhibit A (*Issue Paper 945)* at 21. While it would be subject to auditing by the Legislative Audit Bureau and there would be some requirements to make reports to the Legislature and Governor, those bodies would have no ability to remedy a perceived problem short of eliminating UWHCA. *Id.*

With respect to unionized workers at the hospitals and clinics in particular, which included the registered nurses and other allied professionals, it was recognized that under the Governor's original proposal, employees of UWHCA "would no longer have the right to bargain collectively under state laws applicable to state employees, **although the employees could continue to organize and join labor unions under federal law**." **Exhibit C**. at 4 (emphasis added). While the parties currently debate whether federal law (i.e., the National Labor Relations Act) governs their relationship, this discussion acknowledges that even without explicit inclusion in the Peace Act, UWHCA would be considered a private sector employer, and its unionized employees like the nurses would continue to have collective bargaining rights after moving from State employment. In an effort to avoid a workforce organized under federal labor law, the University proposed an amendment explicitly providing for Peace Act coverage of UWHCA and its employees, instead. *Id.* As we now know, that amendment was included and became law through Act 27.

UWHCA makes much ado about what it refers to as "special provisions" in Act 27; amendments to the Peace Act that were specific to UWHCA and its employees. It speculates that the reason for these "special provisions" was because "the legislature

did not wish to treat the Authority, a public body, identically to the private employers for whom the Peace Act was designed." (Br. at 3, 10) It offers no authority to support that claim, which is simply false.

In fact, the "Authority-specific" provisions added to the Peace Act with Act 27 were intended to provide continuity in transition from State employment to UWHCA employment of the existing relationships with unionized employees already working at the hospitals and clinics and already organized into specific bargaining units with existing collective bargaining agreements governed by the State Employment Labor Relations Act, 111.825, et seq. (SELRA), some of which had existing fairshare agreements. Motion No. 819, at 3-4, Wis. Legis. Reference Bureau, (May 29, 1995) (available in drafting file for 1995 Act 27, Wis. Legis. Reference Bureau, Madison, Wis.) Motion No. 667 at 1, Wis. Legis. Reference Bureau, (May 29, 1995) (available in drafting file for 1995 Act 27, Wis. Legis. Reference Bureau, Madison, Wis.) attached hereto as **Exhibit D**. As State employees governed by SELRA, their rights to engage in strikes were already restricted, and those requirements were similarly carried over when the labor relationships were changed to governance under the Peace Act upon transition to UWHCA as the employer. *See* Act 27 § 3789r, *compare to* Wis. Stat. § 111.89 (2009-2010).[5] Thus, the "Authority-specific" inclusions in Act 27 were meant to establish clarity and

[5] It should also be remembered that like UWHCA, the newly-formed UWHC Board also inherited an already-existing unionized workforce who would retain their State employee status and SELRA coverage. All of these employees, of UWHCA and UWHC Board alike, would continue to work together at the hospitals and clinics, as they had in the past, albeit with different formal employers. From a practical point of view, the more the regulation of those labor relations across the two employers in the same facilities could be made identical, the simpler the various relationships would be to administer.

continuity to labor peace. Their inclusions and later removal cannot be read to overcome the plain meaning of the text of the Peace Act today.

2. *2011 Wis. Act 10 moved the management structure further toward privatization.*

The UWHCA is correct that with 2011 Wis. Act 10 (Act 10), all of the Authority-specific provisions in the Peace Act were removed. That is irrelevant to UWHCA's governance by the Act. As previously shown, the plain words of the Peace Act capture UWHCA, its employees, and their chosen representatives within its coverage. UWHCA seeks to convince the WERC that because its obligation to collectively bargain under the Peace Act is no longer specifically stated in Chapter 233, it no longer must. (Br. at 5.) Just as in *State v. Yakich*, 2022 WI 8, ¶ 35, 400 Wis. 2d 549, 970 N.W.2d 12, removal of a cross-reference to another statute that applies independently does not eliminate the application of that statute: "When the explicit cross reference was removed…the legislature could have accompanied [those] changes with an express statement" that the Peace Act no longer governed UWHCA. The legislature did not add such an "express statement."

Act 10's removal of all special references to UWHCA from the Peace Act likewise did not remove its obligations under the Act, as argued by UWHCA. (Br. at 11.) Indeed, as the Wisconsin Attorney General observed, "If the Legislature meant to do more—for the Authority to be uniquely exempt from coverage under the Peace Act—one would expect the text of the statute to say so." Opinion of Wis. Att'y Gen. to Governor Tony Evers, OAG-01-22 ¶ 19 (2022), https://www.doj.state.wi.us/opinions /ag-opinions

(select link to OAG-01-22).[6] The Legislature previously demonstrated its ability to specifically exempt certain employers from Peace Act coverage: Wis. Stat. § 111.02(7)(b) is a list of such employers. It would have taken virtually no effort to add "the University of Wisconsin Hospitals and Clinics Authority" to that list. Having not done that, we "must respect the text" as written. *Milwaukee J. Sentinel v. City of Milwaukee,* 2012 WI 65, ¶¶ 36-37, 341 Wis. 2d 607, 815 N.W.2d 367; *see also United Am., LLC v. DOT*, 2021 WI 44, ¶¶ 15-16, 397 Wis. 2d 42, 959 N.W.2d 317.

The statutory history supports the plain text reading of the Peace Act to still govern UWHCA. And far from Act 10's removal of UWHCA references from the Peace Act being "inexplicable" if the legislature did not intend to remove it from Peace Act coverage (Br. at 11), there is a perfectly good explanation that is consistent with the plain text of the statute: At the same time Act 10 removed references to UWHCA from the Peace Act, all of those who worked at the hospitals and clinics who had been employed by the UWHC Board became employees of the UWHCA. The mixture of UWHC Board and UWHCA employees working at the hospitals and clinics ended. *Act 10, §§ 12, 377.* As the Wisconsin Attorney General observed, this unified employer state "meant that the language clarifying whether the Authority fell under the Peace Act was no longer needed." *OAG-01-22* ¶ 19. Likewise, the transition of existing bargaining units

[6] UWHCA spends four pages of its brief arguing that Wisconsin Attorney General opinions are persuasive, not binding (which SEIU does not dispute), and criticizing this Opinion. As shown in this Reply Brief, as well as in SEIU's Opening Brief, Attorney General Kaul's analysis was correct. While that analysis did not reach a conclusion on Peace Act coverage (because that was not what the Governor requested), the legal framework and observations provided SEIU with a springboard from which to demonstrate fully that UWHCA is governed by the Peace Act. The accuracy of the Attorney General's initial impressions is borne out upon further development.

from a SELRA-regulated environment to a Peace Act-regulated environment was no longer needed, and similarly parity of labor regulation between the employees of two separate entities working in the same facilities was also no longer needed. Consequently, the "Authority-specific provisions" in the Peace Act were no longer relevant and it was appropriate to remove them.

The statutory and legislative history of both Act 27 and Act 10 confirm and verify the plain text reading of the Peace Act: that UWHCA, its employees, and their chosen representatives are governed by it. UWHCA's effort to use legislative history to contradict the plain language of the Peace Act is impermissible and the Commission should reject it.

D. UWHCA's non-legislative history resources are similarly unavailing.

UWHCA attempts to bring in the nonaction of the Legislature in 2021 to amend the Peace Act to demonstrate a legislative intent in 2011 to exclude UWHCA from coverage under the Act. It offers no authority to support its approach and there is none. Instead, at best, the recent effort to make such coverage explicit is a demonstration of some legislators' desire to address the current dispute. To paraphrase the Wisconsin Supreme Court, such a "nonaction of the legislature…cannot be construed as an expression of legislative intent…The most that can be gleaned from these abortive attempts at amending the statute is the desire of some legislators to express with greater clarity than does the present statute" the rights and obligations of UWHCA, its employees, and their chosen representatives under the Peace Act. *City of Madison v.*

Hyland, Hall & Co., 73 Wis. 2d 364, 372, 243 N.W.2d 422 (1976). "Such doubts of the present effect of the law have no bearing upon our interpretation under the clear guidelines of the Wisconsin law. They are irrelevant to the legislature's intention when the Wisconsin" Peace Act was amended more than 10 years ago. *Id.;see also Sims v. Mason*, 25 Wis. 2d 110, 130 N.W. 200 (1964) ("The failure of a bill to become enacted is in no way suggestive as to the state of the law in the absence of such legislation.").

Finally, UWHCA references legal assertions made by SEIU and others in 2011 litigation that the Peace Act no longer protects UWHCA employees, and implies that such assertions are an admission that now binds SEIU. (Br. at 6-7.) It makes no explicit claim that SEIU is so bound, perhaps because there is no legal authority to support such a claim. The WERC should disregard this line of argument.

The fact is that after Act 10's enactment, the state of the UWHCA employees' bargaining rights was unclear, and opinions varied. What was clear was that UWHCA told SEIU and its employees represented by SEIU that it would no longer bargain. SEIU chose to not fight with UWHCA at that time. But at the same time, it did not decertify as the representative of the nurses employed by UWHCA. Nor did UWHCA force a decertification election. Consequently, SEIU continues in its elected role as the certified representative of the nurses employed by UWHCA. It stands ready to immediately resume bargaining with UWHCA upon declaration that the Peace Act governs these parties, without need for an election.

III. Even if the UWHCA as it existed in 2011 was removed from Peace Act coverage, its transformation since that time has put it squarely back in.

In 2015, SwedishAmerican Health System Corporation, an Illinois-based non-profit organization that owns and operates various medical facilities in Illinois, became a wholly owned subsidiary of UWHCA, i.e., a "division" of UWHCA. *State of Illinois Health Facilities and Services Review Board Staff Report re Change of Ownership Exemption* (prepared for 12/16/14 Board meeting), available at _____ and attached hereto as **Exhibit E**; *New Year Marks One Year Since SwedishAmerican, UW Health Merger* (1/4/16), available at https://web.archive.org/web/20201128071518/ https://www.swedishamerican.org/about-us/news/new-year-marks-one-year-swedishamerican-uw-health-merger and attached hereto as **Exhibit F.** SwedishAmerican Health System Corporation facilities acquired in the merger include SwedishAmerican Hospital, a hospital in Rockford, Illinois; a medical center in Belvidere, Illinois; a regional cancer center; and more than 30 clinics, all in Illinois. *Illinois-based SwedishAmerican Health System announces name and brand change; joins UW Health* (9/9/21), available at https://www.uwhealth.org/news/swedishamerican-health-system-announces-name-brand-change-joins-uw-health and attached hereto as **Exhibit G.** All of these Illinois facilities are now called "UW Health" facilities, just as UWHCA facilities in Wisconsin are called "UW Health" facilities. *Id.*

With the acquisition of the SwedishAmerican Health System and facilities, UWHCA is virtually indistinguishable from any private sector health care provider

operating in Wisconsin. Consequently, it should not be treated differently from any other private sector health care provider operating in Wisconsin.

CONCLUSION

For the reasons stated in SEIU's Opening Brief and this Reply Brief, SEIU respectfully requests the Wisconsin Employment Relations Commission to declare that the Peace Act applies to the University of Wisconsin Hospitals and Clinics Authority, its employees, and their chosen representatives.

Respectfully submitted this 30th day of September 2022.

PINES BACH LLP

__/s/ Tamara Packard_____
Tamara B. Packard (SBN 1023111)
Lester A. Pines (SBN 1016543)
122 West Washington Ave., Ste. 900
Madison, WI 53703
(608) 251-0101
tpackard@pinesbach.com
lpines@pinesbach.com