STATE OF WISCONSIN
EMPLOYMENT RELATIONS COMMISSION

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

Case No. _____

Joint Petitioners.

OPENING BRIEF OF SEIU HEALTHCARE WISCONSIN

INTRODUCTION

The Service Employees International Union Healthcare Wisconsin (SEIU) and the University of Wisconsin Hospitals and Clinics Authority (UWHCA) have jointly petitioned the Wisconsin Employment Relations Commission (WERC) for a declaratory ruling on whether the Wisconsin Employment Peace Act (Peace Act or Act) applies to UWHCA and its employees and their chosen representatives. The plain language of that Act demonstrates that it does. As shown below, the WERC should therefore declare that the Act applies to UWHCA, its employees, and their chosen representatives.

ARGUMENT

I. The WERC need look only at the plain language of the Peace Act.

A. The statutory language central to answering the question posed are the definitions of "employee" and "employer" in the Peace Act.

The rights, responsibilities, and protections of the Wisconsin Employment Peace Act belong to all workers defined as "employees" by the Act. That definition, in relevant part, is as follows:

> (6)(a) "Employee" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonconfidential, nonmanagerial, nonexecutive and nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise.
>
> (b) …
>
> (c) "Employee" shall not include any individual employed in the domestic service of a family or person at the person's home or any individual employed by his or her parent or spouse or any employee who is subject to the federal railway act.

Similarly, the rights, responsibilities, and protections of the Peace Act also belong to all of those defined as "employers" by the Act. That definition is as follows:

> (7)(a) "Employer" means a person who engages the services of an employee, and includes a person acting on behalf of an employer within the scope of his or her authority, express or implied.
>
> (b) "Employer" does not include any of the following:
> 1. The state or any political subdivision thereof.
> 2. Any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

To declare whether the Peace Act applies to UWHCA, its employees and their chosen representatives, the WERC is called upon to interpret the Act. This task involves statutory interpretation, which applies the language of the statute to the question at hand. *See State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. As discussed further below, the WERC must apply a textualist approach to this task.

B. A textualist approach governs Wisconsin statutory interpretation.

In interpreting the Peace Act, WERC must apply a textualist approach. Wisconsin courts have consistently found that a textualist approach to statutory interpretation is required: "We assume that the legislature's intent is expressed in the statutory language.…it is the enacted law, not the unenacted intent, that is binding on the public." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.,* 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.* at ¶ 45. Indeed, not only does statutory interpretation "begin" with the language of the statute; as the Wisconsin Supreme Court recently confirmed, if the meaning of the statute is plain from its language, that is also ordinarily where the inquiry ends. *Waity v. LeMahieu*, 2022 WI 6, ¶ 18, 400 Wis. 2d 356, 370-71, 969 N.W.2d 263 (*quoting Kalal, supra).*

The Wisconsin Attorney General summarized the applicable key rules of statutory interpretation in his June 2, 2022 opinion when he addressed the same question about Peace Act coverage of the UWHCA and its employees as does this brief:

> "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, Wis. 2d 633. The statutory language is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. If this textual analysis "yields a plain, clear statutory meaning, then there is no ambiguity," and the statute should be applied according to that plain meaning. *Id.* Courts may not "disregard the plain, clear words of the statute." *Id.* (quoting *State v. Pratt,* 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967). Similarly, a court cannot "read into the statute

> words the legislature did not see fit to write." *Dawson v. Town of Jackson,* 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316.

Opinion of Wis. Att'y Gen. to Governor Tony Evers, OAG-01-22 (6/2/22), pp. 1-2, https://www.doj.state.wi.us/opinions/ag-opinions (select link to OAG-01-22).

The Wisconsin Supreme Court has repeatedly emphasized that resort to extrinsic sources, such as legislative history, "is not appropriate in the absence of a finding of ambiguity." *Kalal* at ¶ 51; *see also, Sewell v. Racine Unified Sch. Dist. Bd. of Canvassers,* 2022 WI 18, ¶ 19, 401 Wis. 2d 58, 972 N.W.2d 155 (*citing Kalal at* ¶¶ 45, 46). As the *Kalal* Court explained, "the test for ambiguity examines the language of the statute to determine whether well-informed persons should have become confused, that is, whether the statutory . . . language reasonably gives rise to different meanings….Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." *Kalal* at ¶ 47 (internal quotation marks and citations omitted). The Wisconsin Supreme Court underscored this textural approach to determining statutory meaning with the following words of Supreme Court Justice Scalia:

> Ours is "a government of laws not men," and "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated." Antonin Scalia, A MATTER OF INTERPRETATION, at 17 (Princeton University Press, 1997). "**It is the law that governs, not the intent of the lawgiver**. . . . Men may intend what they will; but it is only the laws that they enact which bind us." *Id*.

Kalal at ¶ 52 (emphasis added).

As shown below, the language of the Peace Act is clear, plain, and unambiguous. There is no reason, or ability, to resort to any other source to interpret the Act. Based on the plain language, the WERC should find that UWHCA falls within the statutory

definition of "employer" in the Peace Act, and likewise UWHCA employees, including the registered nurses and other allied health care professionals employed by UWHCA (nurses), fall within the statutory definition of "employees." It should then conclude and declare that the Peace Act applies to the UWHCA, its employees, and their chosen representatives.

II. The plain language of the Peace Act covers UWHCA and its employees.

The plain language of the Peace Act clearly governs UWHCA and its employees. As articulated further below, the nurses fall within the definition of "employee" under the Peace Act and do not fall within any exception to that definition. Likewise, the UWHCA falls within the definition of "employer" under the Peace Act and does not fall within any exception to that definition. Therefore, as argued more fully below, the Peace Act governs UWHCA, its employees, and their chosen representatives.

A. The nurses are "employees" as defined by the Peace Act.

The nurses fall within the definition of "employee" under the Peace Act. The Peace Act protects the right of "employees" to engage in "self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Wis. Stat. § 111.04(1)*. The WERC need not resort to a "common" meaning of the word "employee," for it is specifically defined by the Peace Act: "Employee" "include[s] any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonconfidential, nonmanagerial, nonexecutive and nonsupervisory capacity…"

Wis. Stat. § 111.02(6)(a). Underscoring the breadth of this definition, the statute states that the term "employee" "shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise." *Id.* The statute then specifically excludes from its coverage of "employees" three small categories of workers: domestic workers, those employed by a parent or spouse, and those subject to the federal railway labor act. *Wis. Stat. § 111.02(6)(c).*

Both the Wisconsin Court of Appeals and the Supreme Court have held that where a statute contains specific exclusions, additional exclusions are presumed to not exist. That is, where a statute provides a "specific exclusion," the presumption is that "the legislature intended to exclude other exceptions." *Town of Clayton v. Cardinal Constr. Co.*, 2009 WI App 54, ¶ 16, 317 Wis. 2d 424, 767 N.W.2d 605 (citation omitted). Or, as the Supreme Court put it, "if [a] statute specifies one exception to a general rule…, other exceptions or effects are excluded." *Georgiana G. v. Terry M.*, 184 Wis. 2d 492, 512, 516 N.W.2d 678 (1994) (first alteration in original) (citation omitted). It has long been held that "We should not read into the statute language that the legislature did not put in." *Brauneis v. LIRC*, 2000 WI 69, ¶ 27, 236 Wis. 2d 27, 612 N.W.2d 635 (*citing In the Interest of G. & L.P.*, 119 Wis. 2d 349, 354, 349 N.W.2d 743 (1984).).

The nurses are "person[s]. . . working for [UWHCA] for hire in the state of Wisconsin in a nonconfidential, nonmanagerial, nonexecutive and nonsupervisory capacity." They are not in the three groups of workers explicitly excluded from coverage, nor is there anything identifiable from the context of the statute that otherwise excludes them from being "employees" protected by and obliged under the

Peace Act. There is no ambiguity to the language used to define "employee," including the language used to describe those workers excluded from that definition. Thus, the plain language of the statute is clear that the nurses are "employees" under the Peace Act, which protects their rights to organize and bargain collectively with their employer through representatives of their choosing.

B. UWHCA is an "employer" as defined by the Peace Act.

Similarly, UWHCA falls within the definition of "employer" under the Peace Act and therefore is required to recognize the chosen representative of its employees and bargain with it. Among other things, the Peace Act requires "employers" to engage in collective bargaining with a majority of employees within a bargaining unit, through their chosen representative. *See Wis. Stat. §§ 111.02(2)(3), 111.05, 111.06(1)(a) and (d).* Just as with the term "employee," the WERC need not resort to any "common" meaning of "employer," for this term too is specifically and broadly defined in the Peace Act. It means, simply, "a person who engages the services of an employee," including those acting on behalf of such a person. *Wis. Stat. § 111.02(7)(a).* As with the definition of "employee," the legislature explicitly excluded a small group of potential employers from the Peace Act's definition of "employer:" (1) the "state or any political subdivision thereof" and (2) any "labor organization." *Wis. Stat. § 111.02(7)(b)*.[1]

[1] Labor relations involving the State as an employer are regulated by the State Employment Labor Relations Act. *Wis. Stat. § 111.81 et seq.* Labor relations involving political subdivisions of the state as employers are regulated by the Municipal Employment Labor Relations Act. *Wis. Stat. § 111.70, et seq.* UWHCA is not and does not claim to be the state or a political subdivision thereof. It also is not and does not claim to be a labor organization.

As with the definition of "employee," under the controlling statutory interpretation case law cited and discussed above, given the specific exclusions from the definition of "employer," no other exclusions can be inferred or read into the statute. Consequently, the UWHCA is not excluded from the broad definition of employer. Instead, it is included within that definition, and the Peace Act governs UWHCA, its employees, and their chosen representatives.

The legislature knows how to exclude certain employers and certain employees from coverage of the Peace Act, as shown by the enumerated exclusions in the statute. Neither UWHCA nor the nurses are described in the statutory exclusions. Instead, they fall within the broadly and unambiguously worded definitions of "employer" and "employee." The WERC must conclude from the plain and clear language of the Peace Act that these parties, and the employees, are governed by the Peace Act.

C. The Court and the WERC have consistently applied the statute's plain language in answering similar coverage challenges for the last 80 years.

The Wisconsin Supreme Court considered a challenge by an employer to its coverage by the Peace Act nearly 80 years ago and determined, based on the plain language of the Act, that the Act governed that employer. In *Wisconsin Emp. Rels. Bd. v. Evangelical Deaconess Soc.*, 242 Wis. 78, 7 N.W.2d 590 (1943) employees of the Evangelical Deaconess Society of Wisconsin (Society), sought the protections of the Peace Act, to collectively bargain with their employer. The Society, which operated a hospital, contended that it was not subject to the provisions of Act because it was a charitable institution. Although charitable institutions were not named in the exceptions to

coverage in the Peace Act, the Society urged that an exception be read in by the Court "because of claimed legislative intent." *Id.* at 80.

The Wisconsin Supreme Court reviewed the plain language of the statute and upheld the Employment Relations Board's (WERB) ruling, finding no basis to read in the exception alleged by the Society, and holding that the Act covered the Society: "There is nothing in the wording or nature of the named exemptions to indicate that the legislature intended an exception for charitable institutions." *Id.* at 81. Indeed, the Court explained that all places of employment, charitable as well as industrial, have a "similar need…for methods of arriving at a peaceful settlement of differences." *Id.* There the Court continued, stating:

> The employer-employe problem is more far-reaching and to impute to the legislature a purpose to provide means for the adjustment of labor relations in industry only would be artificial. We are all aware that thousands are performing duties as employes in hospitals such as plaintiff which are the same as those done by employes in private industry. The position and rights of employes in a hospital are as important to the well-being of the whole community as that of a technical industrial employe. The simple fact is that employes are dependent upon their positions for a livelihood. This is true whether the employer is a charitable hospital or an automobile manufacturer.

Id. at 81–82 (quoting *Northwestern Hospital v. Public Building Serv. Employes' Union*, 208 Minn. 389, 294 N.W. 215, 217, 218.).

Thus, the Court affirmed the WERB and held that the plain language of the Act clearly covered the Society and its employees. The WERC and its predecessor agency, the WERB, have reached the same conclusion, applying the same plain language methodology, on numerous occasions since that time. *See St. Francis Hospital,* WERB

Decision No. 4340 (8/56); *St. Anthony's Hospital,* WERB Decision No. 4762-A (7/58); *Hope, Inc.*, WERC Decision No. 11468 (12/72).

The *Hope, Inc.* decision is particularly instructive here, In that case, the WERC held that because the language of statute does not exclude "non-stock, non-profit, non-membership and charitable corporations" from the definition of "employer," Hope, Inc. was an "employer" under and governed by the Peace Act. *Hope, Inc.*, WERC Decision No. 11468 (12/72), p. 4. The *Hope, Inc.* decision drew from the Commission's earlier decision in *Goodwill Indus. of Wis., Inc.*, WERC Decision No. 7446, where the Commission "concluded that it was precluded from exempting an employer from the coverage of the Wisconsin Employment Peace Act because there is no statutory provision in said Act authorizing the Commission to grant exceptions to any employer except those enumerated" in the Act. "To do so without any legislative mandate, the Commission concluded, would be administratively amending the statute." *Id*.

Now, eighty years after workers at the Evangelical Deaconess Society of Wisconsin sought Peace Act protections of union recognition and mandatory collective bargaining with their hospital employer under the Peace Act, another group of employees, the nurses employed by UWHCA, wish for their health care employer to recognize their chosen representative and collectively bargain. Just as the Society tried and failed eighty years ago, and as numerous other employers have tried and failed since, UWHCA asks to be read out of Peace Act coverage in order to avoid the obligation to collectively bargain, despite there being no exemption written in the statute. Just as it was eighty years ago, the purpose of the Peace Act continues to be to

facilitate peace in employment relations. The well-being of health care workers, patients, and the entire community still depend on a means for the adjustment of labor relations in the health care setting. The WERC must conclude from the plain and clear language of the Peace Act that UWHCA, its employees, and the employees' chosen representatives, are governed by the Peace Act.

CONCLUSION

The plain language of the Peace Act establishes that the Act applies to UWHCA, its employees and their chosen representatives. The WERC should reach the same conclusion in this case as it and its predecessor agency, and the Wisconsin Supreme Court, have reached in every case for the last 80 years where an employer sought exclusion from Peace Act coverage absent explicit exclusion. Based on the plain language of the Peace Act, the WERC should find that the nurses are "employees" under the Act, and UWHCA is an "employer" under the Act. As such, the parties are obligated to follow the Peace Act, including engaging in good faith collective bargaining between UWHCA and the nurses' certified collective bargaining agent, to mutually reach a fair agreement to achieve labor peace. As the Wisconsin Supreme Court observed nearly 80 years ago:

> Collective bargaining in institutions whose operation is so intimately connected with human life places a great responsibility on the parties thereto…but there is no reason to suppose that if each enters into negotiations ready to co-operate and appreciating the problems of the other party to the negotiation, there may not be a fair, friendly and mutually satisfactory adjustment of whatever controversies may arise, as contemplated by the statute.

Wisconsin Emp. Rels. Bd. v. Evangelical Deaconess Soc., 242 Wis. 78, 82, 7 N.W.2d 590, 592–93 (1943).

Respectfully Submitted this 23rd day of September 2022.

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