

STATE OF WISCONSIN  
EMPLOYMENT RELATIONS COMMISSION

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

Case No. \_\_\_\_\_

Joint Petitioners.

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**OPENING BRIEF OF THE UNIVERSITY OF WISCONSIN  
HOSPITALS AND CLINICS AUTHORITY**

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James Goldschmidt  
State Bar No. 1090060  
Nathan Oesch  
State Bar No. 1101380  
Hannah Schwartz  
State Bar No. 1118503

QUARLES & BRADY LLP  
411 East Wisconsin Avenue  
Suite 2400  
Milwaukee, Wisconsin 53202  
(414) 277-5000

Matthew Splitek  
State Bar No. 1045592

33 East Main Street, Suite 900  
Madison, Wisconsin 53713

*Attorneys for the University of Wisconsin  
Hospitals and Clinics Authority*

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## INTRODUCTION

Act 10 “removed” employees of the University of Wisconsin Hospitals and Clinics Authority (the “Authority”) from coverage under Wisconsin’s Employment Peace Act (the “Peace Act”), thus eliminating all those employees’ former “rights to engage in collective bargaining.” So wrote the Service Employees International Union Healthcare Wisconsin (“SEIU”) when trying to enjoin Act 10 eleven years ago. (See p. 7 below.) SEIU’s contemporaneous account of Act 10’s effect was correct. The clashing position it takes now is not. Because of Act 10, the Peace Act does not apply to the Authority or its employees. The Commission should so declare.

## BACKGROUND

### A. The Legislature Creates the Authority

The Wisconsin legislature created the Authority in 1995. See [1995 Wisconsin Act 27](#) § 6301. The Authority is a “public body corporate and politic” existing under and governed by Chapter 233 of the Wisconsin Statutes. Wis. Stat. § 233.02(1). It operates the University of Wisconsin Hospitals and Clinics, Wis. Stat. § 233.04(3)(b), and is governed by a board of directors composed of public officials or their appointees, Wis. Stat. § 233.02(1). The chief executive officer and members of the board of directors of the Authority are “state public officials” subject to the general duties of public officials as detailed in Chapter 19 of the Wisconsin Statutes. Wis. Stat. §§ 19.42(13)(m), (14).

## **B. The Peace Act Applies to the Authority until 2011**

Three principal statutes govern collective bargaining in Wisconsin: the Municipal Employment Relations Act (“MERA”), Wis. Stat. §§ 111.70 to 111.77; the State Employment Labor Relations Act (“SELRA”), Wis. Stat. §§ 111.81 to 111.94; and the Peace Act, Wis. Stat. §§ 111.02 to 111.19. MERA governs municipal employees, SELRA governs state employees, and as a general matter, the Peace Act applies to “employers and employees in the private sector only.” *State ex rel. Teaching Assistants Ass’n v. U. of Wisconsin-Madison*, 96 Wis. 2d 492, 504–05, 292 N.W.2d 657 (Ct. App. 1980); *Schenck v. Ardagh Group*, WI. Emp. Rel. Com. Decision No. 38977-A, 2021 WL 3661670, at \*1 (WERC July 21, 2021) (“[The Peace Act] applies to private sector employers and employees.”).

When creating the Authority, the legislature decided to make it subject to the Peace Act. This required extensive revisions of the Peace Act’s text.

One necessary step was amending the Peace Act’s definition of a covered “employer.” Historically, the Peace Act defined an “employer” as “a person who engages the services of an employe[e],” Wis. Stat. § 111.02(7) [\(1995–96\)](#), and defined the embedded term “person” to include “individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees or receivers,” Wis. Stat. § 111.02(10) [\(1995–96\)](#). But effective July 1, 1997, the legislature amended the definition of “employer” to expressly include the Authority. It added a sentence to § 111.02(7) stating, “For purposes of this subsection, a person who engages the

services of an employe[e] includes the University of Wisconsin Hospitals and Clinics Authority.” [1995 Wis. Act 27](#) § 3782g; Wis. Stat. § 111.02(7) ([1997–98](#)).

But this was hardly the only change. The legislature did not wish to treat the Authority, a public body, identically to the private employers for whom the Peace Act was designed. So it enacted numerous special provisions applying to the Authority alone. These included provisions:

- Governing the formation and composition of collective bargaining units of the Authority’s fiscal, staff, patient care, science, and other employees. [1995 Wis. Act 27](#) §§ 3782m–3782n; Wis. Stat. §§ 111.05(5)–(6) ([1997–98](#)).
- Exempting the Authority from the Peace Act’s provisions regarding “all-union” agreements. [1995 Wis. Act 27](#) § 3782b; Wis. Stat. § 111.02(1) ([1997–98](#)).
- Addressing fair-share and maintenance of membership agreements at the Authority. *See* [1995 Wis. Act 27](#) § 3782h–3782j, 3785m; Wis. Stat. §§ 111.02(7m), 111.02(9m), 111.02(10m), 111.075 ([1997–98](#)).
- Establishing special notice requirements for strikes and lockouts. *See* [1995 Wis. Act 27](#) § 3789bc; Wis. Stat. § 111.115(2) ([1997–98](#)).
- Resolving potential conflicts between the Authority’s collective bargaining agreements and its obligations to Public Employee Trust Fund employees under Chapter 40 of the Wisconsin Statutes. *See* [1995 Wis. Act 27](#) § 3789r; Wis. Stat. § 111.17(2) ([1997–98](#)).

Special provisions also were needed in Chapter 233. There, the legislature qualified the Authority’s power and duty to establish its employees’ compensation and benefits with a countervailing “duty to engage in collective bargaining with employe[e]s in a collective bargaining unit for which a representative is recognized or certified under subch. I of ch. 111 [the Peace Act].” [1995 Wis. Act 27](#) §§ 6301, 6301j, 6301m; Wis. Stat. §§ 233.03(7) & 233.10(2) ([1997–98](#)). It also required the Authority’s

board of directors to include, as a nonvoting member, an employee or representative of a labor organization recognized or certified under the Peace Act. [1995 Wis. Act 27](#) § 6301; Wis. Stat. § 233.02(1)(h) ([1997–98](#)).

All these provisions remained on the books through the end of 2010. *See* Wis. Stat. §§ 111.02(1), 111.02(7)(a)2., 111.02(7m), 111.02(9m), 111.02(10m), 111.05(5)–(6), 111.075, 111.115(2), 111.17(2) ([2009–10](#)); Wis. Stat. §§ 233.02(1)(h), 233.03(7), 233.10(2) ([2009–10](#)).

### **C. Act 10 Removes the Authority from the Peace Act**

The legislature and Governor Walker enacted 2011 Wisconsin Act 10—known to its supporters and detractors alike as “Act 10”—on March 11, 2011. [2011 Wis. Act 10](#). Act 10 systematically repealed the statutory text that had reflected the Authority’s former place under the Peace Act.

This, of course, entailed repealing the language that defined the Authority as a Peace Act “employer.” *See* [2011 Wis. Act 10](#) § 188 (repealing Wis. Stat. § 111.02(7)(a)2.).

But more broadly, Act 10 scrubbed the Peace Act of *any* trace of the Authority’s presence. Page 3 above lists the many special provisions that, in the 1990s, the legislature added to Chapter 111 to differentiate the Authority from the private employers traditionally subject to the Peace Act. Act 10 eliminated every last one. *See* [2011 Wis. Act 10](#) §§ 190–92, 195–96, 203, 207, 209 (repealing §§ 111.02(7m), 111.02(9m), 111.02(10m), 111.05(5)–(6), 111.075, 111.115(2), 111.17(2)); *id.* § 183

(amending § 111.02(1) to eliminate the text exempting the Authority from the Peace Act's provisions about all-union agreements).

Nor did Act 10 leave Chapter 233 untouched. It repealed the provision reserving a nonvoting seat on the Authority's board of directors for an employee or representative of a labor organization recognized or certified under the Peace Act. *See [2011 Wis. Act 10](#) § 370* (repealing Wis. Stat. § 233.02(1)(h)). It also eliminated the language referencing collective bargaining obligations under the Peace Act:

233.03 (7) of the statutes is amended to read:

233.03 **(7)** Subject to s. 233.10 and ch. 40 and 1995 Wisconsin Act 27, section 9159 (4) ~~and the duty to engage in collective bargaining with employees in a collective bargaining unit for which a representative is recognized or certified under subch. I of ch. 111,~~ employ any agent, employee or special advisor that the authority finds necessary and fix his or her compensation and provide any employee benefits, including an employee pension plan.

.....

233.10 (2) (intro.) of the statutes is amended to read:

233.10 **(2)** (intro.) Subject to subs. (3), ~~(3m)~~, (3r) and (3t) and ch. 40 ~~and the duty to engage in collective bargaining with employees in a collective bargaining unit for which a representative is recognized or certified under subch. I of ch. 111,~~ the authority shall establish any of the following:

[2011 Wis. Act 10](#) §§ 372 & 378.

The intent behind this total erasure has always been exceedingly clear. Every relevant provision of Act 10 was present from the outset in the act's originating bill, 2011 Assembly Bill 11. *See [2011 A.B. 11](#) §§ 161, 166, 173–74, 181, 185, 187, 349, 351, 357* (Feb. 15, 2011). The Legislative Reference Bureau analysis printed at the top of that bill advised the voting legislators: “Under current law . . . employees of the UW

Hospitals and Clinics Authority . . . have the right to collectively bargain over wages, hours, and conditions of employment. This bill eliminates the rights of these employees to collectively bargain.” [2011 A.B. 11](#) at 2. Similarly, the Department of Administration provided lawmakers with a fiscal estimate grounded on the express assumption that 2011 Assembly Bill 11 “eliminates collective bargaining for the University of Wisconsin Hospitals and Clinics Authority.” Wis. Dept. of Administration, Div. of Executive Budget and Finance, [Fiscal Estimate – 2011 Session: AB-0011 \(JR1\)](#) (Feb. 15, 2011) at 2. The legislators knew that they were ending collective bargaining at the Authority when they voted to make the bill law.

Act 10 was, of course, controversial. The Joint Committee on Finance’s record of public hearing appearances and registrations “against” 2011 Assembly Bill 11 runs an astounding 150-plus pages. *See* Joint Committee on Finance, [Record of Committee Proceedings](#) (Feb. 15, 2011) at 2–8, & 8–159. The Authority took no position for or against the bill, but those appearing or registering against it included many individuals identifying themselves with SEIU, SEIU and UW Hospital, or simply UW Hospital, suggesting the stakes were clear to all involved. *See, e.g., id.* at 3, 4, 5, 17, 34, 35, 36, 37, 44, 47, 133. Ultimately, the legislature overrode those objections.

#### **D. Until Recently, Everyone Agrees About Act 10’s Effect**

That Act 10 removed the Authority from the Peace Act root and branch was never a subject of confusion or legitimate debate.

The Legislative Council’s Act Memo for the law said: “Under current law . . . employees of the UW Hospitals and Clinics Authority . . . have the right to collectively

bargain with their employer[]]. Act 10 eliminates collective bargaining for . . . employees of the UW Hospitals and Clinics Authority.” Wis. Legislative Council, [Act Memo: 2011 Wisconsin Act 10](#) (May 9, 2011) at 9 (emphasis removed).

SEIU itself agreed. Not long after Act 10’s passage, SEIU filed a complaint in federal court stating not only that Act 10 “eliminates coverage and extinguishes collective bargaining rights for certain employees of the UW Hospitals Authority,” but that Act 10 did so by “removing UW Hospitals Authority employees . . . from WEPA [the Peace Act].” *Wisconsin Educ. Ass’n Council, et al. v. Walker, et al.*, No. 3:11-cv-428-wmc, ECF No. 1, Compl. ¶ 44 (W.D. Wis. June 15, 2011), *attached as Exhibit 1 to this brief*. When moving to enjoin Act 10 from taking effect, SEIU also told the court that Act 10 “strips *all* rights to engage in collective bargaining from . . . employees of the UW Hospitals and Clinics Authority.” *Wisconsin Educ. Ass’n Council*, ECF No. 14, Br. in Supp. Pls.’ Mot. for a Temporary Restraining Order and/or Preliminary Injunction at 10 n.9 (W.D. Wis. June 20, 2011) (emphasis in original), *attached as Exhibit 2 to this brief*.

#### **E. Legislators Try but Fail to Restore the Authority to the Peace Act**

Because it was never debated that Act 10 eliminated Peace Act coverage for the Authority, lawmakers who object to that change tried to legislate the Authority back into the Peace Act just last year. Forty-plus senators and assemblypersons introduced identical bills proposing to undo all of Act 10’s doings with respect to collective bargaining at the Authority. See [2021 S.B. 404](#) (June 10, 2021); [2021 A.B. 438](#) (July 1, 2021). These legislators sought to restore the Authority’s former place in

the Peace Act’s definition of “employer.” [2021 S.B. 404](#) § 13; [2021 A.B. 438](#) § 13. And they proposed to reverse nearly every other change that Act 10 made in Chapters 111 and 233 when removing the Authority from the Peace Act. *See, e.g.*, [2021 S.B. 404](#) §§ 8, 14–15, 22, 30, 34, 37–38, 42; [2021 A.B. 438](#) §§ 8, 14–15, 22, 30, 34, 37–38, 42.

Lest there be doubt about the legislators’ intent, the Legislative Reference Bureau spelled it out in its analysis appearing at the top of each bill:

This bill allows employees of the University of Wisconsin Hospital and Clinics Authority to collectively bargain over wages, hours, and conditions of employment. Under current law, employers and employees are prohibited from collective bargaining except as expressly provided in the statutes. Prior to changes made by 2011 Wisconsin Act 10, employees of the [Authority] had the right to collectively bargain over wages, hours, and conditions of employment, and [the Authority] was required to bargain over those subjects. The bill restores those rights . . .

[2021 S.B. 404](#) at 1-2; [2021 A.B. 438](#) at 1–2.

Both bills failed.

**F. Eleven Years After the Fact, Attorney General Kaul is the First to Suggest that Act 10 Did Not Remove the Authority from the Peace Act After All.**

Only this year did anyone seriously question whether Act 10 ended Peace Act coverage for the Authority. Attorney General Kaul raised the issue when asked to opine, not about the Peace Act, but on whether the Authority has the power to *voluntarily* engage in collective bargaining. *See* Wis. Op. Att’y Gen. [OAG-01-22](#), ¶ 1 (June 2, 2022). In his letter requesting the opinion, Governor Evers acknowledged that “[u]ntil 2011 Wisconsin Act 10, the [Authority] was included in the definition of ‘employer’ under the Peace Act” but that “[c]urrently neither the definition of ‘employee’ or ‘employer’ includes any mention of the [Authority] or its employees.”

Office of the Governor Tony Evers, [Request for a formal opinion of the attorney general](#) (Mar. 21, 2022) at 1. Attorney General Kaul, however, raised the Peace Act question on his own in his response. Kaul “[did] not reach a conclusion on this issue” but suggested that the Authority “appears” to be covered by the Peace Act, despite Act 10’s changes. [OAG-01-22](#), ¶ 2.

This set the stage for SEIU to take the position it presumably will assert now: that on second thought, the court and legislative challenges to Act 10 in 2011 and 2021 were not needed after all, for in a truly stunning turn of events, the Peace Act has applied to the Authority the whole time.

## ANALYSIS

### I. Statutory Interpretation Framework

Courts follow a two-step process when interpreting statutes.

First, they conduct a “plain-meaning analysis” that encompasses not only current statutory text, but also “statutory history.” “Statutory history . . . involves comparing the statute with its prior versions.” *Brey v. State Farm Mut. Automobile Ins. Co.*, 2022 WI 7, ¶ 20, 400 Wis. 2d 417, 970 N.W.2d 1. Statutory history is “part of [the] ‘plain meaning analysis’” because “[u]nlike legislative history, prior versions of statutory provisions were enacted law” and “as such, statutory history constitutes an intrinsic source that is part of the context in which we interpret the words used in a statute.” *Id.* (internal quotation marks omitted); *see also id.* ¶ 21 (“We have long recognized a distinction between statutory and legislative history.”); *County of Dane v. Lab. and Indus. Rev. Commn.*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (“A review of statutory history is part of a plain meaning analysis because it is part

of the context in which we interpret statutory terms. . . . By analyzing the changes the legislature has made over the course of several years, we may be assisted in arriving at the meaning of a statute.” (internal quotation marks omitted)).

In the second step, a court may examine “legislative history.” Unlike statutory history, legislative history is a “byproduct of legislation” and represents “extrinsic evidence of a law’s meaning.” *Brey*, 2022 WI 7, ¶ 21. Courts consult legislative history “to confirm plain meaning or when a statute remains ambiguous even after the primary intrinsic analysis has been exhausted.” *Id.* (internal quotation marks omitted).

## **II. The Plain-Meaning Analysis Shows That Act 10 Entirely Removed the Authority from the Peace Act.**

The statutory history, which is part of the Peace Act’s intrinsic “plain meaning,” makes it impossible to construe the Peace Act as covering the Authority today. When creating the Authority, the legislature enacted not only language explicitly adding the Authority to the Peace Act’s definition of “employer,” but also numerous other Authority-specific provisions throughout the act. *See* pp. 2–3 above; [1995 Wis. Act 27](#) §§ 3782b, 3782g–3782j, 3782m—3782n, 3785m, 3789bc, 3789r; Wis. Stat. §§ 111.02(1), 111.02(7), 111.02(7m), 111.02(9m), 111.02(10m), 111.05(5)–(6), 111.075, 111.115(2), 111.17(2) ([1997–98](#)). It further enacted language in Chapter 233 accounting for the Authority’s role as a Peace Act “employer.” *See* pp. 3–4 above; [1995 Wis. Act 27](#) §§ 6301, 6301j, 6301m; Wis. Stat. §§ 233.02(1)(h), 233.03(7) & 233.10(2) ([1997–98](#)). Fifteen years later, the legislature repealed every one of these provisions

in Act 10. *See* pp. 4–5 above; [2011 Wis. Act 10](#) §§ 183, 188, 190–92, 195–96, 203, 207, 209, 370, 372, 378.

Only one interpretation explains these changes: the legislature added the Authority to the Peace Act in the 1990s, then took it out in Act 10. Even the single change of removing the Authority from the Peace Act’s definition of “employer” would be mysterious if the legislature had wanted the Authority to *remain* a Peace Act “employer,” as SEIU now contends. And the legislature’s decision to strike *every other* Peace Act provision relating to the Authority *and* Chapter 233’s text recognizing the Authority’s “duty to engage in collective bargaining . . . under [the Peace Act]” would be inexplicable if the legislature did not intend to definitively end the Authority’s time under the Peace Act. If the legislature had wanted the Authority to stay in the Peace Act, it would not have cleansed the Peace Act of any mention of the Authority—and Chapter 233 of any whisper of the Peace Act.

Wisconsin’s law of statutory interpretation bars the courts from answering the question posed here based solely on the Peace Act’s current definition of “employer.” Statutory language must be “interpreted in the context in which it is used,” *State ex rel. Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, and “statutory history . . . is part of the context in which [courts] interpret the words used in a statute,” *Brey*, 2022 WI 7, ¶ 20.

But the conclusion would be no different *even if* a court restricted itself to looking at the current text of one statutory section. The Authority does not fit the Peace Act’s definition of “person.” Wis. Stat. § 111.02(10). Thus, it cannot be an

“employer” under the Peace Act either. *See* Wis. Stat. § 111.02(7)(a) (“‘Employer’ means a *person* who engages the services of an employee . . . .” (emphasis added)).

The legislature could have, but did not, define “person” to include political bodies like the Authority for purposes of the Peace Act. The Wisconsin Statutes’ default definition of “person” does exactly this. *See* Wis. Stat. § 990.01(26) (“‘Person’ includes all partnerships, associations, and bodies politic or corporate.”); *see also* Wis. Stat. § 233.02(1) (the Authority is “a public body corporate and politic”); *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 2, 302 Wis. 2d 358, 735 N.W.2d 30 (the Authority is a “*political* corporation” for purposes of Wis. Stat. § 893.80, which governs notice requirements for claims against public bodies).

Rather than use § 990.01(26)’s default, the legislature adopted a narrower meaning of “person” in the Peace Act, defining that term to include *private* but not *public* entities. *See* Wis. Stat. § 111.02(10) (“The term ‘person’ includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, or receivers.” Wis. Stat. § 111.02(10). Unlike in § 990.01(26), the legislature omitted any broader reference to “bodies politic and corporate”—a choice that must be presumed intentional. *Cf. Southport Commons, LLC v. Wisconsin Dept. of Transportation*, 2021 WI 52, ¶ 32, 397 Wis. 2d 362, 960 N.W. 2d 17 (“Unlike Wis. Stat. § 893.55(1m), Wis. Stat. § 88.87(2)(c) does not contain any reference to ‘discovery.’ . . . From this, we conclude that the legislature chose not to include a discovery provision in § 88.87(2)(c), and it would be error to read one in.”).

Within Section 111.02(10)'s narrower definition of "person," the term "corporation" must be construed as referring to ordinary, privately organized corporations, not public bodies like the Authority. This construction befits the Peace Act's purpose of governing "employers and employees in the private sector." *State ex rel. Teaching Assistants Ass'n*, 96 Wis. 2d at 504–05. It also explains why the legislature had to explicitly add the Authority to the Peace Act's definition of "employer" in 1995 Wisconsin Act 27: the act's existing text ("a person who engages the services of an employee") did not cover the Authority, so the legislature had to add new text stating that "[f]or the purposes of this subsection, a person who engages the services of an employe[e] includes the University of Wisconsin Hospitals and Clinics Authority." [1995 Wis. Act 27](#) § 3782g; Wis. Stat. § 111.02(7) [\(1997–98\)](#) (emphasis added). Further, this construction comports with how the legislature uses the term "corporation," which the Peace Act does not define, elsewhere in the statutes. *See, e.g.*, Wis. Stat. § 180.0103(5) ("'[D]omestic corporation' . . . means a corporation for profit that is not a foreign corporation and that is incorporated under or becomes subject to this chapter.");<sup>1</sup> *see also State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773 (Statutory text may be interpreted in relation to the language of other statutes that "use similar terms.").

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<sup>1</sup> *See also* Wis. Stat. § 180.0103(9) ("'Foreign corporation' means a corporation for profit incorporated under a law other than the law of this state . . ."); Wis. Stat. § 181.0103(5) ("'[D]omestic corporation means . . . a nonstock corporation . . . that is incorporated under or becomes subject to this chapter, except a foreign corporation."); Wis. Stat. § 181.0103(13) ("'Foreign corporation' means a nonprofit or nonstock corporation organized under a law other than the law of this state . . ."). None of these definitions describe the Authority.

The Authority is not a “corporation” as that term is used in the Peace Act. Chapter 233 employs the word “corporation,” see Wis. Stat. §§ 233.03(9) & 233.04(7m)(c), but never to refer to the Authority, which instead is a “public body corporate and politic,” Wis. Stat. § 233.02(1). This confirms that “corporation” and “public body corporate and politic” (*i.e.*, a “political” corporation) mean different things. *Cf. Clean Wisconsin, Inc. v. Wisconsin Dept. of Nat. Resources*, 2021 WI 71, ¶ 25, 398 Wis. 2d 386, 961 N.W.2d 346 (“[I]n Wis. Stat. § 227.11(2)(a)3., the legislature used the word ‘specific.’ . . . This context shows us that the legislature knew how to use the word ‘specific,’ but did not do so in § 227.10(2m). As a result, we must presume the two words, explicit and specific, mean different things.”). The context furnished by the statutory history in any event compels the conclusion that Act 10 took the Authority out from under the Peace Act. But the result would be the same even if Wis. Stat. § 111.02’s current text was all that mattered.

### **III. Legislative History Confirms the Plain-Meaning Analysis.**

The legislative history would be decisive even if the plain-meaning analysis left any ambiguity about Act 10’s effect.

The bill’s drafters knew from the beginning that their task was to eliminate collective bargaining rights at the Authority. The drafting file contains an early draft labeled LRB-1211/P1. The top half of LRB-1211/P1 is available [here](#); its bottom half, [here](#). The draft’s introductory language began: “An Act: . . .; relating to: eliminating collective bargaining rights for employees of . . . the University of Wisconsin Hospitals and Clinics Authority . . .” [LRB-1211/P1 \(top half\)](#) at 1. Notes appended to the draft

also indicate that the draft originated with a request for a bill that would, among other things, “[e]liminate collective bargaining for UW Hospital and Clinics Authority.” [LRB-1211/P1 \(bottom half\)](#) at final page.

When 2011 Assembly Bill 11 was introduced in session, the Legislative Reference Bureau analysis at the top of the bill plainly stated that the bill was drafted to “eliminate[] the rights of . . . employees [of the Authority] to collectively bargain.” [2011 A.B. 11](#) at 2. This is powerful evidence that the legislature intended to accomplish that stated purpose. Lawmakers had the LRB’s analysis in front of them, prominently displayed on the bill’s first pages, when they voted to enact the bill’s text. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 32, 295 Wis. 2d 1, 719 N.W.2d 408 (“Because the LRB’s analysis of a bill is printed with and displayed on the bill when it is introduced in the legislature, the LRB’s analysis is indicative of legislative intent.”); *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995) (the LRB’s analysis is “attached to the bill when it [is] considered by lawmakers” and thus “is significant in determining legislative intent”). The same is true of the Department of Administration’s fiscal estimate, which confirmed for lawmakers that the bill was intended to “eliminate[] collective bargaining for the University of Wisconsin Hospitals and Clinics Authority.” Wis. Dept. of Administration, Div. of Executive Budget and Finance, [Fiscal Estimate – 2011 Session: AB-0011 \(JR1\)](#) (Feb. 15, 2011) at 2.

The Legislative Council’s Act Memo for Act 10 is compelling, too. It stated that “Act 10 eliminates collective bargaining for . . . employees of the UW Hospitals and

Clinics Authority.” Wis. Legislative Council, [Act Memo: 2011 Wisconsin Act 10](#) (May 9, 2011) at 9. The supreme court considers such contemporaneous Legislative Council analysis when reviewing legislative history. *State v. Jensen*, 2010 WI 38, ¶¶ 48–49, 324 Wis. 2d 586, 782 N.W.2d 415 (considering both an amendment memo and an act memo by the Legislative Council).

If any further confirmation were needed, the recent (failed) attempt to put the Authority back under the Peace Act shows that it is not *currently* under the Peace Act. See pp. 7–8 above; [2021 S.B. 404](#); [2021 A.B. 438](#). The proposals in 2021 Senate Bill 404 and 2021 Assembly Bill 438 would have made no sense if the Authority were already obligated to bargain collectively under the Peace Act. Further, the current legislature’s rejection of those proposals shows that, as in 2011, the legislature still intends that the Authority not be covered by the Peace Act. See *In re Gwenevere T.*, 2011 WI 30, ¶ 27, 333 Wis. 2d 273, 797 N.W.2d 854 (considering, for purposes of statutory interpretation, the legislature’s rejection of proposed changes to a statute many years after its enactment).

#### **IV. Attorney General Kaul’s Analysis Is Mistaken.**

Attorney General Kaul is misguided in his conjecture that, even after Act 10, the Authority “appears” to be covered by the Peace Act. [OAG-01-22](#), ¶ 2. Kaul “[did] not reach a conclusion on this issue,” *id.*, but he would be owed no deference even if he had. “An Attorney General’s opinion is only entitled to such persuasive effect as the court deems the opinion warrants.” *De La Trinidad v. Capitol Indem. Corp.*, 2009

WI 8, ¶ 16, 315 Wis. 2d 324, 759 N.W.2d 586 (internal quotation marks omitted)). In this case, the Attorney General’s opinion is not persuasive at all.

*First*, Kaul addressed barely any of the statutory history. He offered an alternate explanation of why, in Act 10, the legislature wrote the Authority out of the Peace Act’s definition of “employer.” See [OAG-01-22](#), ¶¶ 18–19. But he did not try to explain—and he may not have been aware of—the legislature’s decision to repeal *every one* of the many Peace Act provisions that referenced the Authority before Act 10. See pp. 4–5 above; [2011 Wis. Act 10](#) §§ 183, 188, 190–92, 195–96, 203, 207, 209. Nor did he address the legislature’s repeal of all language in Chapter 233 that had referred to the Peace Act. See p. 5 above; [2011 Wis. Act 10](#) §§ 370, 372, 378. So, for example, Kaul did not explain why the legislature would have repealed Chapter 233’s text regarding a “duty to engage in collective bargaining . . . under [the Peace Act]” if it had intended for the Authority to continue owing that very duty. He left the statutory history almost entirely unexamined.

*Second*, Kaul failed even in his narrow attempt to explain Act 10’s repeal of the language that previously identified the Authority as a Peace Act “employer.” Kaul’s explanation appears to be that Act 10’s elimination of a different entity—the University of Wisconsin Hospitals and Clinics *Board*—obviated the need for statutory text specifying that the *Authority* is an “employer” under the Peace Act. [OAG-01-22](#), ¶ 19. But that makes no sense. The University of Wisconsin Hospitals and Clinics *Board* was an independent executive branch agency under Wis. Stat. § 15.96. See Wis. Stat. § 15.96 ([2009–10](#)). The Board and its employees were covered by SELRA.

See Wis. Stat. §§ 111.815(1), 111.825(1m), 111.92(1)(b) [\(2009–10\)](#). In Act 10, the legislature repealed Wis. Stat. § 15.96, terminated the Board’s existence, and transferred its employees to the Authority. See [2011 Wis. Act 10](#), §§ 12 & 9151(2). If anything, this change—the Authority’s absorption of employees previously covered by SELRA—would have favored *keeping* the language that expressly subjected the Authority to the Peace Act (not SELRA), had that been the intent.

*Third*, Kaul only assumed that the Authority meets the Peace Act’s definition of “person” and thus its definition of “employer.” See [OAG-01-22](#), ¶ 6. He undertook no analysis of the question.

*Fourth*, Kaul disregarded the most obviously relevant pieces of legislative history. He said nothing about the Legislative Reference Bureau analysis printed at the top of 2011 Assembly Bill 11, which explained to lawmakers that while “[u]nder current law . . . employees of the UW Hospitals and Clinics Authority . . . have the right to collectively bargain over wages, hours, and conditions of employment,” “[t]his bill eliminates the rights of these employees to collectively bargain.” [2011 A.B. 11](#) at 2. Nor did he mention the Legislative Council Act Memo stating that whereas before Act 10, “employees of the UW Hospitals and Clinics Authority . . . ha[d] the right to collectively bargain with their employers,” Act 10 “eliminate[d] collective bargaining for . . . employees of the UW Hospitals and Clinics Authority.” Wis. Legislative Council, [Act Memo: 2011 Wisconsin Act 10](#) (May 9, 2011) at 9. Kaul evidently looked only at unspecified “statements” in the legislative history “concluding” that Act 10 had “removed bargaining rights for the Authority’s employees.” [OAG-01-22](#), ¶ 20. He

professed confusion as to “which” bargaining rights the “comments” he reviewed might have been referring to. Yet nothing is confusing about the Legislative Reference Bureau analysis printed with 2011 Assembly Bill 11 or the Legislative Council’s Act Memo. Had Kaul reviewed those, he would have seen that in Act 10, the legislature intended to eliminate *all* collective bargaining rights for the Authority’s employees.

*Finally*, a question so politically fraught as Act 10’s effect must be decided free from political influence. The Attorney General is a partisan office. Unlike judges, the Attorney General must win a party primary and is a leader of the state’s Republican or Democratic party. Attorneys General are not asked to check their party affiliation at the office door. They may, and they do, advocate for their party’s objectives just like other politicians. So, for example, before writing his opinion letter this year, Attorney General Kaul joined other leaders of his party in publicly advocating for unionization at the Authority. *See* Wisconsin Examiner, *At Capitol rally, nurses raise their voices for union rights*, <https://wisconsinexaminer.com/2021/05/10/at-capitol-rally-nurses-raise-their-voices-for-union-rights/> (“Attorney General Josh Kaul, Lt. Gov. Mandela Barnes, and more than a half-dozen lawmakers, all Democrats . . . signaled they plan to turn up the flame” in support of “the campaign by UW Hospitals & Clinics nurses seeking a union”). The Attorney General’s political advocacy is his prerogative, but it highlights that he is not—nor is he meant to be—impartial regarding partisan issues in the manner that judges are. No court or agency should blind itself to this reality when weighing the persuasive value of an Attorney General

opinion on a matter subject to live political controversy in which the Attorney General himself chose to participate.

Indeed, this is likely why courts view Attorney General opinions as persuasive at best, *De La Trinidad, supra*, why the Attorney General’s own [website](#) confirms that “Wisconsin courts do not have any obligation to follow [his] interpretation. . . ,” and why the Attorney General also cautions parties not to request opinions on issues that are the subject of reasonably imminent litigation, 62 Op. Att’y Gen. Preface (1973) (advising that “the court’s decision” should answer such questions and that “opinions of the Attorney General should not be utilized for the purpose of briefing current litigation”).

## CONCLUSION

The Commission should declare that Wisconsin’s Employment Peace Act, Wis. Stat. ch. 111, subch. I, does not apply to the University of Wisconsin Hospitals and Clinics Authority or its employees.

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QUARLES & BRADY LLP  
*Electronically signed by*

*Matthew Splitek*

James Goldschmidt (SBN 1090060)  
Nathan Oesch (SBN 1101380)  
Hannah Schwartz (SBN 1118503)  
411 East Wisconsin Avenue, Suite 2400  
Milwaukee, Wisconsin 53202  
(414) 277-5000  
[james.goldschmidt@quarles.com](mailto:james.goldschmidt@quarles.com)  
[nathan.oesch@quarles.com](mailto:nathan.oesch@quarles.com)  
[hannah.schwartz@quarles.com](mailto:hannah.schwartz@quarles.com)

Matthew Splitek (SBN 1045592)  
33 East Main Street, Suite 900  
Madison, Wisconsin 53703  
(608) 283-2454  
[matthew.splitek@quarles.com](mailto:matthew.splitek@quarles.com)

*Counsel for the University of Wisconsin Hospitals  
and Clinics Authority*