No. 16AP820

In The Wisconsin Court of Appeals

DISTRICT III

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 AND ITS LOCAL LODGE 1061, UNITED STEELWORKERS DISTRICT 2, AND WISCONSIN STATE AFL-CIO,
PLAINTIFFS-RESPONDENTS,

v.

STATE OF WISCONSIN, SCOTT WALKER, BRAD SCHIMEL, JAMES R. SCOTT, AND RODNEY G. PASCH,
DEFENDANTS-APPELLANTS.

On Appeal from the Dane County Circuit Court,
The Honorable William C. Foust, Presiding,
Case No. 2015CV628

OPENING BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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INTRODUCTION

Almost seventy years ago, Congress passed the historic Taft-Hartley Act, explicitly guaranteeing the right of States to forbid the forced subsidization of labor unions. Since then, twenty-six States, including Wisconsin, have enacted "right-to-work" laws. Critics speculated that those laws would cripple organized labor. But, as it turns out, unions in right-to-work jurisdictions are thriving.

Still, some unions in this State, including the plaintiffs here ("Unions"), persist in the belief that right-to-work in Wisconsin ("Act 1") threatens them with imminent financial doom. The argument goes that Act 1 forbids unions from exacting fees from nonmember-employees at the same time as it imposes on unions a costly duty to treat those employees fairly in collective bargaining and grievance representation. Hence, Act 1 "takes" the Unions' "property" interest in their "services" without "just compensation," in violation of the Wisconsin Constitution.

This theory—that Act 1 "takes" union "services"—fails for multiple reasons. To begin, Act 1 does not force unions to offer *any* "services." In fact, it *forbids* a kind of "taking": the forced payment of dues to a labor union. The Unions' challenge would have been more properly directed at the duty of fair representation, an entirely separate legal obligation under which, *if* a union voluntarily assumes the valuable government-conferred privilege of exclusively representing all

employees in a bargaining unit, *then* it must refrain from discriminating against employees in the unit or treating them arbitrarily or in bad faith. But the Unions have not sued to free themselves of this obligation. This is not surprising: had the Unions challenged the duty, and prevailed, their prized exclusive-representation power would have fallen with it—the two are inseparable.

Regardless, a challenge to the duty of fair representation would have fared no better. The Unions have voluntarily assumed the duty in exchange for a special privilege—against the backdrop of a statutory scheme that permitted right-to-work's enactment in Wisconsin. And the combined economic impact of the duty and right-to-work on unions is far from severe. More fundamentally, the duty has not deprived the Unions of any specific interest in "private property," so it does not implicate the Takings Clause in the first place.

Every appellate court to have considered a similar takings theory has agreed: right-to-work laws like Act 1 are beyond constitutional reproach.

ISSUE PRESENTED

Under the Wisconsin Constitution's Takings Clause, "[t]he property of no person shall be taken for public use without just compensation therefor." Wis. Const. Art. I, § 13. As relevant here, Act 1 imposes no obligations on labor organiza-

tions to provide any services to employees but instead provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . pay any dues, fees, or assessments or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization" or "any 3rd party." *See* 2015 Wis. Act 1, § 5 *codified at* Wis. Stat. § 111.04(3)(a)(3) & (3)(a)(4). The Unions argue that Act 1 violates Wisconsin's Takings Clause by requiring them to provide "services" to nonmember-employees while taking away their right to negotiate contracts that would allow them to force those nonmember-employees to pay dues. Is Act 1, on its face and as applied, unconstitutional under Wisconsin's Takings Clause?

The circuit court answered, yes.

ORAL ARGUMENT AND PUBLICATION

In light of Act 1's statewide importance, this case merits oral argument and publication.

STATEMENT OF THE CASE

I. Federal And State Labor Law Tie The Government-Created Benefit Of Exclusive Representation To The Obligation Not To Treat Employees In An Arbitrary, Discriminatory, Or Bad-Faith Manner

Under both federal and state law, employees have the right to "choos[e]" "representatives" "for the purpose of collective bargaining." 29 U.S.C. § 157; Wis. Stat. § 111.04(1); *see also* Wis. Stat. §§ 111.02(11), 111.05(1). This "representative"

need not be a labor union, and can simply be "one or more individuals." Wis. Stat. § 111.02(10) & (11); *see* 29 U.S.C. § 152(4). A representative is selected by majority vote of members of the bargaining unit. Wis. Stat. § 111.05(1) & (3); 29 U.S.C. § 159(a) & (c). The chosen "representative" is the "exclusive representative[ ] of all of the employees in such [bargaining] unit for the purposes of collective bargaining." Wis. Stat. § 111.05(1); *see* 29 U.S.C. § 159(a). To qualify for this special position, a would-be representative must generally file or authorize a petition. *See* Wis. Admin. Code § ERC 3.02; 29 C.F.R. § 102.60. Standing for election as exclusive representative is voluntary. *See* Wis. Admin. Code §§ ERC 3.02, 3.03, 3.04; 29 C.F.R. § 102.61.

The position of exclusive representative comes with an extraordinary "set of powers and benefits." *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014). "By its selection as bargaining representative, [the union] has become the agent of all the employees," including those who do not consent to or even benefit from representation, *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944), and the employer *must* bargain with it, *e.g.*, Wis. Stat. § 111.06(d). Unlike an ordinary principal with authority over his agent, "an individual employee lacks direct control over a union's actions." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990). The employee also loses the "power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). This "loss of individual rights for the greater

benefit of the group results in a tremendous increase in the power of the representative of the group—the union," *American Communications Association, C.I.O. v. Douds*, 339 U.S. 382, 401 (1950), making "[t]he complete satisfaction of all who are represented" impossible, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Akin to a "legislative body," the union has the power "to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). And, because labor unions are exempt from certain requirements of antitrust law, *see Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–23 (1975), they enjoy the benefits of functioning as a government-sanctioned monopoly and so can use their powers in "cartel"-like fashion to raise the price of labor services. *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 990, 997, 1001–02 (1984); *see also* Trevor Burrus, Harris v. Quinn *and the Extraordinary Privilege of Compulsory Unionization*, 70 N.Y.U. Ann. Surv. Am. L. 283, 285–95 (2015). These powers, taken together, are quite valuable, enabling unions not only to force employers to the bargaining table but also to attract and retain dues-paying members.

The laws that grant these extraordinary benefits to the union also impose an "inseparable" obligation of fair treatment of all employees in the bargaining unit. *Steele*, 323 U.S. at 204. If the law had conferred the exclusive-representative authority "without any commensurate statutory duty" toward

all employees, permitting discrimination against nonmembers, then "constitutional questions [would] arise." *Id*. at 198. The representative is accordingly "subject to constitutional limitations on its power to deny, restrict, destroy, or discriminate against the rights of those for whom it [bargains]" and "is also under an affirmative constitutional duty equally to protect those rights." *Id.*; *see Lewis v. Local Union No. 100 of Laborers' Int'l Union of N. Am., AFL-CIO*, 750 F.2d 1368, 1375–76 (7th Cir. 1984); *Mahnke v. WERC*, 66 Wis. 2d 524, 530–31, 225 N.W.2d 617 (1975). The duty is designed to serve as a "check on the arbitrary exercise" of the exclusive-representation power. *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 374 (1990). So it is the receipt of the exclusive-representation power, and not the collection of fees from all employees, that makes the fair-treatment obligation just and necessary. As the U.S. Supreme Court has explained, "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." *Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014).

While this duty of fair treatment flows from the unique powers and benefits of the exclusive-representative position, carrying out this duty is "purposefully limited" and not burdensome. *Rawson*, 495 U.S. at 374. The union need not go out of its way to further the interests of particular employees, whether members or not. To the contrary, "the interests of the individual employee may be subordinated to the collective

interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). Thus, a union breaches this obligation "only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *SEIU Local No. 150 v. WERC*, 2010 WI App 126, ¶ 20, 329 Wis. 2d 447, 791 N.W.2d 662 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). "[T]he union must not discriminate between members and nonmembers in negotiating and administering a collective-bargaining agreement [CBA] and representing the interests of employees in settling disputes and processing grievances. This means that the union cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others." *Harris*, 134 S. Ct. at 2636–37 (citations omitted).

The fair-treatment obligation also does not generally govern how much time or money the union must spend on representation. For example, federal and state laws require unions to negotiate concerning the "terms and conditions of employment of such employees, in a mutually genuine effort to reach an agreement with reference to the subject under negotiation." Wis. Stat. §§ 111.02(2), 111.06(1)(d); 29 U.S.C. § 158(a)(5), (b)(3) & (d). But apart from these "mandatory" bargaining topics, "each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

II. Wisconsin Exercises Its Federally Recognized Right To Protect Workers From Being Forced To Support Labor Organizations As A Condition Of Their Employment

It is settled that "labor organizations 'have no constitutional entitlement to the fees of nonmember-employees.'" *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 58, 358 Wis. 2d 1, 851 N.W.2d 337 (quoting *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007)). It is only by an "act of legislative grace," *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277, 2291 (2012) (citation omitted), that "an employer and a union [are allowed] to enter into an agreement requiring all employees" to pay dues to the union. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988). But that "act of legislative grace" does *not* permit agreements forcing employees to *join* a union. It allows unions and employers to agree to provisions requiring only that the nonmember-employees pay the union for "activities . . . germane to collective bargaining, contract administration, and grievance adjustment." *Beck*, 487 U.S. at 745.

At the same time, the States are free to ban such arrangements. Congress has specifically provided that "[n]othing" in the National Labor Relations Act "shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b). This provision means that federal law does

"not deprive the States of any and all power" to enact right-to-work laws. *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 102 (1963); *see also Sweeney,* 767 F.3d at 663 (so holding); *Int'l Union of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Canada, Local Unions Nos. 141, 229, 681, & 706 v. NLRB*, 675 F.2d 1257, 1260–62 (D.C. Cir. 1982) (same). Although federal law preempts the labor laws of States in many respects, *see generally Local 926, International Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669, 676 (1983), Congress has specifically left undisturbed the power of States to tie the benefit of exclusive representation with the duty of nondiscrimination, without any opportunity for unions to persuade employers to agree to a provision in a CBA forcing nonmembers to pay fees to the union.[1]

Wisconsin exercised its right to adopt a right-to-work law on March 11, 2015, by enacting 2015 Wisconsin Act 1. As relevant here, Act 1 provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . [p]ay any dues, fees, or assessments or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization" or "any 3rd party." *See* Act 1, § 5 *codified at* Wis. Stat. § 111.04(3)(a)(3) & (3)(a)(4).

[1] Employees of the federal government also enjoy right-to-work protection. *See* 5 U.S.C. § 7102; 39 U.S.C. § 1209(c).

Violating Act 1 is an unfair labor practice and misdemeanor. Wis. Stat. §§ 111.06(2)(a), 947.20.[2] The law applies only prospectively. *See* Act 1, § 13. Importantly for this lawsuit, the Act does not impose or alter the preexisting legal duty of fair representation for all employees within the bargaining unit. In all, under Act 1, Wisconsin is now one of twenty-six States to have enacted a right-to-work law, many of which have been in existence for decades. *See* Nat'l Right to Work Legal Defense Foundation, *Right to Work States*, *available at* http://www.nrtw.org/rtws.htm (last visited Aug. 9, 2016).

III. The Circuit Court Holds That Act 1 "Takes" Union Property

On March 10, 2015, the International Association of Machinists (District 10 and its Local Lodge 1061), the United Steel Workers District 2, and the Wisconsin State AFL-CIO, filed this suit challenging the constitutionality of Act 1, naming as Defendants the State of Wisconsin, Governor Scott Walker, Attorney General Brad D. Schimel, and WERC Commissioners James R. Scott and Rodney G. Pasch ("the State"). As described by the Unions, their theory is that Act 1 violates Article I, § 13 of the Wisconsin Constitution because "Act 1 unconstitutionally requires unions to represent non-members." R.25:8. Specifically, they claimed that this requirement amounts to a regulatory taking under the test of *Penn*

[2] Charging a nonmember dues in a right-to-work jurisdiction is also an unfair labor practice under federal law. *Journeymen & Apprentices*, 675 F.2d at 1260–62.

Central Transportation Company v. City of New York, 438 U.S. 104 (1978). *See* R.25:15–19. The Unions sought an order both declaring that certain parts of Act 1 are unconstitutional on their face and as applied and enjoining the defendants from enforcing them. R.2:9–10.

In an opinion issued on April 8, 2016, the circuit court agreed with the Unions' theory, holding that Act 1 "takes" their services because "Plaintiffs will be obligated to [provide] . . . services for which they cannot legally request compensation." App. 9. The circuit court did not address the State's point that Act 1 does not require anyone to provide any services. *See* R.36:7. Instead, the circuit court moved to the as-applied test under *Penn Central*, finding that "[t]he duty of fair representation compels unions to provide at least some level of service to both union members and non-members," that the Unions had investment-backed expectations in retaining the right to force nonconsenting workers to fund their operations, and that Act 1 is an impermissible "economic adjustment." App. 9–11. Finally, the circuit court rejected the Seventh Circuit's conclusion in *Sweeney*, 767 F.3d at 666, that unions are justly compensated for any taking by the benefits of exclusive representation. App. 13–15.

A week later, the circuit court entered final judgment, declaring several sections of Act 1 facially void and enjoining the defendants from enforcing them. App. 20–21. The State moved the court to put its judgment on hold, but the court declined. App. 50.

IV. This Court Stays the Circuit Court's Judgment

The State filed a notice of appeal and a motion for stay in this Court. On May 5, 2016, this Court granted that motion and stayed the circuit court's judgment pending appeal. App. 53–57. This Court concluded that, "[g]iven a relative lack of harm shown to either party or the public interest, the presumption of constitutionality of this duly enacted statute and the preference under the law to maintain the status quo to avoid confusion . . . the State has established there is sufficient likelihood of success on appeal to warrant the grant of the stay." App. 57.

STANDARD OF REVIEW

Whether the State has committed a regulatory taking is "a question of law . . . review[ed] without deference to the lower courts." *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 13, 244 Wis. 2d 497, 628 N.W.2d 781.

SUMMARY OF ARGUMENT

I. The Unions argue that Act 1 "takes" their property because "Plaintiffs will be obligated to [provide] services for which they cannot legally request compensation." App. 9. But Act 1 does not oblige anyone to provide services. It simply forbids unions from entering into contracts requiring workers to pay unions that they have not joined. Although the Unions object that they must continue to fairly represent nonmember-employees, they have not challenged the law that imposes

that duty. If the pre–Act 1 duty were a "taking" (as the theory of this challenge maintains), then the duty itself must be held unconstitutional unless the State—*not unwilling private citizens*—provides what the court determines to be just compensation. *See Madison Teachers*, 358 Wis. 2d 1, ¶ 58 ("Labor organizations have no constitutional entitlement to the fees of nonmember-employees." (citation omitted)). And anyway, striking down Act 1 will not remedy the Unions' claimed harms: without Act 1, *employers*, and not the State, will once again decide whether unions may collect the nonmember dues supposedly necessary to carrying out the fair-representation duty. This confirms that it is not the Act directly causing the alleged harm in the first place.

II. In any event, the duty of fair representation does not "take." The Unions voluntarily accept the fair-representation obligation in exchange for the valuable privilege of the exclusive-representation power. Like attorneys or hospitals required to provide discounted services to the poor, labor unions have "long been the source of public concern and the subject of government regulation." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984). They understood that those "regulation[s]"—especially those concerning the legality of forced-dues agreements—were, and remain, subject to frequent change. Since the Unions have entered the field of labor relations against that backdrop, their free assumption of the fair-representation duty "takes" nothing.

III. A takings challenge to the fair-treatment duty would also fail a full *Penn Central* analysis. *First*, the law's "economic impact"—viewed properly as a function of what it "takes," *not* the expenses that the affected party need not have incurred in the first place or the actions that the party would have performed anyway—is slight. For one thing, when the Unions collectively bargain and handle grievances for the bargaining unit, they do so because those activities benefit both the Unions themselves and the unit *as a whole*. So it is hardly surprising that the experience of unions in other right-to-work States undercuts the Unions' predictions of impending peril. In those jurisdictions, union dues generally have decreased while membership rates have either stabilized or have at times even increased. *See infra* pp. 32–36. *Second*, neither Act 1 nor the duty has unsettled any of the Unions' reasonable investment-backed expectations. Exclusive representatives have been "heavily regulated from the get-go," *R.W. Docks*, 244 Wis. 2d 487, ¶ 29, and the Unions certainly understood the risk that Wisconsin might exercise its federally guaranteed right to ban forced dues. *Third*, and finally, neither Act 1 nor the duty of fair representation causes anything like a "physical invasion" of property, but rather accomplishes a classic "adjust[ment of] the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124.

IV. Even if the duty of fair representation "takes," it does not take "private property." It simply "imposes an obligation to perform an act" and is "indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (opinion of Kennedy, J.). Precedent forecloses the Unions' argument the government commits a taking "whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223 (1986).

V. Finally, even if the duty of fair representation somehow took union property, the Unions are more than compensated by the valuable privilege of exclusive representation, as the Seventh Circuit has concluded. *Sweeney*, 767 F.3d at 666.

ARGUMENT

I. The Unions Have Challenged The Wrong Law

A. Act 1 Does Not Require Anyone To Provide Services, So It "Takes" Nothing

1. Article I, Section 13 of the Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation therefor," language that mirrors the Takings Clause of the Fifth Amendment to the United States Constitution.[3] A party alleging a taking "bears

[3] "When determining whether a taking occurred under" Wisconsin's Constitution, courts in this State "generally apply the same standards that are used to determine whether a taking occurred under the Fifth

a substantial burden." *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 850 (7th Cir. 2011) (citation omitted). While the more conventional sort of "taking" arises "from an actual physical occupation of land by the government," *Eberle v. Dane County Board of Adjustment,* 227 Wis. 2d 609, ¶ 23, 595 N.W.2d 730 (1999), the government also "takes" when it imposes a regulation of property that "goes too far." *R.W. Docks*, 244 Wis. 2d 497, ¶ 13 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The Unions claim to have suffered this second kind of violation: a "regulatory taking" of their "services."

2. Yet here, Act 1—the *only* regulation that the Unions challenge—imposes no affirmative duty to provide services. As relevant here, the Act simply provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . pay any dues, fees, or assessments or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization" or "any 3rd party." Wis. Stat. § 111.04(3)(a)(3), (3)(a)(4). The same is true of Indiana's right-to-work law, which makes no "*state* demand for services; the law merely prohibits employers from requiring union membership or the payment of monies as a condition of employment." *Zoeller v. Sweeney*, 19 N.E.3d 749, 752

Amendment." *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 38, 328 Wis. 2d 469, 787 N.W.2d 22; *see City of Milwaukee Post No. 2874 Veterans of Foreign Wars of U.S. v. Redevelopment Auth. of City of Milwaukee*, 2009 WI 84, ¶ 35, 319 Wis. 2d 553, 768 N.W.2d 749.

(Ind. 2014) (upholding Indiana's right-to-work law from a takings challenge). As the Seventh Circuit explained, since the "duty of fair representation" has a different legal source, a right-to-work statute does not itself "'take' property from the [u]nion[s]." *Sweeney*, 767 F.3d at 666; *cf. id.* at 684 (Wood, J., dissenting) (recognizing that there would be no "[takings] problem" if there were no duty of fair representation). The Unions' frequent claim that "Act 1 [ ] requires unions to represent non-members" is simply wrong. R.25:8.

The Unions' theory rests upon a sleight of hand. Pre–Act 1 law already imposes upon the exclusive-bargaining representative the duty to provide services to all members in a nondiscriminatory and non-arbitrary manner. The plaintiffs, "[a]s masters of the complaint, however, [ ] chose not" to challenge this pre–Act 1 law, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987). The Unions did not ask any court to enjoin or declare invalid the duty of fair representation, even though, under the Unions' theory, it "takes" their services. This is hardly surprising: The duty of fair representation is "inseparable from the power of representation," *Steele*, 323 U.S. at 204, a power that labor unions have "fought long and hard" to obtain and no doubt wish to keep, Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. Soc. Pol. & Econ. Stud. 163, 179 (1995), *cf. Sweeney*, 767 F.3d at 684 (Wood, J., dissenting) (speculating that unions might prefer that courts not strike down the duty of fair representation). So the Unions treat the duty as settled and assert that, because the

duty is a "taking" of their services, unwilling private parties must "compensate" them.

This gets takings doctrine backwards. If the Unions were correct that the pre–Act 1 duty to provide fair treatment to all employees is a "taking," then the question would be whether Wisconsin, after Act 1, has justly compensated the Unions for that taking. *See Williamson Cnty. Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194–95 (1985). If the Unions received just compensation from the State, then any takings claim would vanish. If the State has not compensated them, then the duty of fair representation itself must be held unconstitutional unless the State—*not unwilling private citizens*—provides what the court determines to be just compensation. *Id.*[4] The contention that the Unions are entitled to the funds (*i.e.* dues) of private parties—to which they "have no constitutional entitlement," *Davenport*, 551 U.S. at 185; *Madison Teachers*, 358 Wis. 2d 1, ¶ 58—in order to pay for their allegedly taken "services" is unsupported and unsupportable.

B. Striking Down Act 1 Will Not Redress The Unions' Claimed Harms

The government is responsible only for its own "takings"—those deprivations of property that it "direct[ly]" causes—and not those harms proximately caused by third

[4] The same logic would apply to any federal Takings Clause claim against the federal government that targeted the federal duty of fair representation.

parties. *Harms v. City of Sibley*, 702 N.W.2d 91, 100 (Iowa 2005); *see also Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005) (recognizing the role of "attenuat[ion]" in takings). This principle reveals a second problem with the Unions' attack on Act 1: *if* the Court were to provide the Unions all of the relief that they seek (declaring Act 1 void and enjoining its enforcement), the Unions still would not be legally entitled to nonmember dues, since employers could simply decline to add forced-dues provisions to their CBAs.

Although labor law requires unions and employers to bargain in good faith over the "terms and conditions of employment," *e.g.*, Wis. Stat. § 111.02(2), it "does not compel" the two sides to reach certain "agreements" on particular issues. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43–45 (1937); *see Wooster Div. of Borg-Warner*, 356 U.S. at 349. So, while a union may have wished to include a forced-dues provision in a CBA before Act 1, an employer could simply have refused to agree, *e.g.*, *Beck*, 487 U.S. at 745, and the union would have had no legal means of extracting from nonmembers the money allegedly necessary to do its job. Here, for example, the Unions admit that, before Act 1, their CBAs only "customarily" included forced-dues provisions. *E.g.*, R.25:4, 6.

Here again, the *logic* of the Unions' position and the *position itself* come into irreconcilable conflict. In *theory*, the government-imposed duty of fair representation "takes" the

Unions' money and services, which means that the government is responsible for defraying the expenses of carrying out the duty on a dollar-for-dollar basis. But in *fact*, it is not the Unions' purpose here to force the government—or even non-member-employees—to cover their losses. Instead, they ask only for the right to *seek the employer's permission* to collect the money they supposedly require—even while recognizing that, sometimes, the employer will say "no," just as Act 1 does now. It cannot be the law that the duty of fair representation takes a union's services *and* that, as to that taking, the government satisfies the just-compensation requirement simply by giving the union the right to negotiate with the employer for a line in a contract.

II. The Fair-Representation Duty Does Not "Take" Anything, Because The Unions Voluntarily Assumed This Duty To Obtain A Valuable Governmental Benefit

Had the Unions challenged their duty of fair representation as an unconstitutional taking, that claim also would have failed. The Unions voluntarily sought to assume the fair-representation obligation in exchange for the valuable privilege of exclusive-representation authority, all while knowing the State had the federally recognized right to enact a right-to-work law. Under settled precedent, the freely assumed duty "takes" nothing.

A. A typical regulatory-taking claim is evaluated under the *Penn Central* test. *R.W. Docks*, 244 Wis. 2d 497, ¶ 17 (citing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 (1978)). Under that "essentially ad hoc, factual" standard, *Penn Central*, 438 U.S. at 124, a court usually considers "the nature and character of the governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." *R.W. Docks*, 244 Wis. 2d 497, ¶ 17.[5]

But a full *Penn Central* analysis is not always necessary. For example, when an actor accepts a "rational[ ]" and "legitimate" condition on a special benefit or privilege in exchange "for the economic advantages" of the benefit, that act alone "disposes of the taking question," and any *Penn Central* claim challenging the condition necessarily fails. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 1007 (1984). In *Monsanto*, for example, the Court rejected a takings challenge to a law allowing the government to publicly disclose trade

[5] *Penn Central* claims are inherently as-applied challenges. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (contrasting the analysis appropriate to a facial takings claim with the multifactor "ad hoc, factual inquiry" under *Penn Central*); *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374 (1996) ("When a landowner alleges that a regulation effects a taking *as applied to a particular piece of property*, [the *Penn Central* test applies]." (emphasis added)). So, success under *Penn Central* would not void Act 1 entirely; it would mean only that Act 1 could not be applied to these plaintiffs. The Unions' request for facial invalidation, as well as the circuit court's granting of that request, is therefore improper.

secrets in exchange for Monsanto's obtaining a license to sell pesticides. The regulations were not a taking because the sale of pesticides has "long been the source of public concern and the subject of government regulation." *Id.* at 1007. Similarly, pension plans do not suffer a taking from unfavorable changes in liability rules, since plans have "long been subject to federal regulation" and so have no "reasonable basis to expect" those rules to remain static. *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645–46 (1993). And a marina owner on Lake Superior cannot reasonably expect to retain an unqualified right to develop his property when it is "encumbered by the public trust doctrine and heavily regulated from the get-go." *R.W. Docks*, 244 Wis. 2d 491, ¶ 29.

This logic applies to heavily regulated professions and services as well. Lawyers, for instance, are sometimes required to assume the obligation to provide free or reduced-fee legal services to the indigent as a condition of membership in the profession. Yet "[t]he vast majority of federal and state courts" have held this "not [to be] an unconstitutional taking of property without just compensation." *Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982) (collecting cases). This Court follows this majority approach, reasoning that pro bono services are a professional "obligation" and that lawyers "consent[ ] to, and assume[ ]" the obligation when joining the profession. *State ex rel. Dressler v. Circuit Court for Racine Cnty., Branch 1*, 163 Wis. 2d 622, 636–37, 472

N.W.2d 532 (Ct. App. 1991) (quoting *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965)). Similarly, hospitals are often required to provide free or partially reimbursed services to low-income patients. *See Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 126 (1st Cir. 2009).

The circuit court believed these cases "ha[ve] no bearing" here because a lawyer's "duty to provide such service originat[es] from" his or her legal status—the status of "an officer of the court." App. 8 (citation omitted). But a union's duty *also* derives from its legal status: it is "implied from its status . . . as the exclusive representative of the employees in the unit." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998); *SEIU Local No. 150*, 329 Wis. 2d 447, ¶ 19.

B. These principles foreclose the Unions' takings theory, even on the (incorrect) assumption that the Unions challenged the duty to provide fair representation. Labor organizations have "long been the source of public concern and the subject of government regulation." *Monsanto*, 467 U.S. at 1007. For its part, Wisconsin has regulated unions since 1939, *see* Wis. Laws of 1939, ch. 57, under its "sovereign prerogative to regulate both labor and management in the promotion of industrial peace." *United Auto., Aircraft & Agric. Implement Workers of Am., UAW, AFL-CIO, Local 283 v. Scofield*, 50 Wis. 2d 117, 123, 183 N.W.2d 103 (1971). The Unions entered this government-dominated scheme to obtain a valuable government-conferred benefit: the status of exclu-

sive representative, enabling them to shut out minority-controlled unions and recruit and retain members. The ability to bind persons without their consent—and even over their objection—does not arise by contract or some other private arrangement. It is a sovereign power. *Steele*, 323 U.S. at 202. Put differently, since the government may refrain from conferring the privilege *in the first place*, it may also make it available on reasonable conditions. By seeking out this privilege, the Unions accepted the duty to provide fair treatment to all employees, as well as the distinct possibility that Wisconsin would exercise its federally recognized right to ban forced-dues provisions.[6]

The circuit court sought to answer this argument by explaining that the Unions "cannot decline exclusive representative status unless [they] decline[ ] to be voted in at a workplace to begin with." App. 5. But that is the point. Monsanto could have kept its trade secrets by not entering the pesticides market "to begin with," and lawyers and hospitals can avoid providing free services to the poor by choosing other professions "to begin with." But when sophisticated parties

[6] It is also beyond dispute that the condition of fair representation is "rationally related to a legitimate Government interest." *Monsanto*, 467 U.S. at 1007. The exclusive-representation power serves that purpose by strengthening collective bargaining, as does the fair-representation *duty*, which is intertwined with the exclusive-representation power. *See, e.g.*, *Steele*, 323 U.S. at 202. And right-to-work laws such as Act 1 serve the important governmental purposes of (1) allowing employees to withhold financial support from organizations with which they do not agree and (2) promoting economic growth. *See infra* p. 40 & n.17.

choose to enter (and remain in) a heavily regulated area, they cannot later be heard to complain that a reasonable, entirely expected condition on operating in that field is an unconstitutional "taking."

III. Separately, The Unions' Theory Also Fails Under A Full *Penn Central* Analysis

Under *Penn Central*, a court evaluates a plaintiff's evidentiary showing generally under three factors: "[1] the nature and character of the governmental action, [2] the severity of the economic impact of the regulation on the property owner, and [3] the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." *R.W. Docks*, 244 Wis. 2d 497, ¶ 17. The point of the inquiry is "to identify regulatory actions that are *functionally equivalent* to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (emphasis added); *see also Noranda Expl., Inc. v. Ostrom*, 113 Wis. 2d 612, 628–29, 335 N.W.2d 596 (1983); *accord United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("governmental land-use regulation may *under extreme circumstances* amount to a 'taking' of the affected property" under *Penn Central* (emphasis added)). The vast majority of laws, however, are not nearly so burdensome. Though they invariably "curtail[ ] some potential for the use or economic exploitation of private property," they do not even approach the constitutional boundary.

Andrus v. Allard, 444 U.S. 51, 65 (1979). Indeed, legislatures "routinely create[ ] burdens for some that directly benefit others," and doing so is entirely "prop[er]." *Connolly*, 475 U.S. at 223. Hence, "it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Id.*

This challenge here asks this Court to go where *Connolly* would not, entreating this Court "to hold that the government can commit a *regulatory* taking by directing someone to spend money"—an argument that, if accepted, would "extend [*Penn Central*'s] already difficult and uncertain rule to the vast category of cases in which someone believes that a regulation is too costly." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (citation omitted). This Court should decline the invitation. All three *Penn Central* factors cut against the Unions.

A. The Economic Impact Is Far From "Severe"

"[T]he *Penn Central* inquiry turns in large part . . . upon the magnitude of a regulation's economic impact . . . ." *Lingle*, 544 U.S. at 540. To prevail on this factor, the plaintiff must show that the impact has been "severe." *R.W. Docks*, 244 Wis. 2d 497, ¶ 32.[7]

[7] The circuit court thought that the measure of the economic impact was the total dollar amount of forced dues that, but for Act 1, the Unions would have collected. App. 9–10. That was error. "It is settled law . . . that the sovereign need only pay for *what it actually takes* rather than for *all that the owner has lost*." *Air Pegasus of D.C., Inc. v. United States*,

1. The Unions allege that they perform a number of representational services from which "[b]oth members and non-members alike benefit financially." R.25:9. Even if that is true, the State could be said to "take" *only* those services (1) that the duty of fair representation "require[s]" a union to perform (2) but that "the union *would not undertake* if it did not have a legal obligation to do so" under the duty of fair representation. *Harris*, 134 S. Ct. at 2637 n.18 (emphasis added) (embracing this analysis in the analogous context of forced dues in public employment). Accordingly, for every expense that the Unions claim to have incurred here and that allegedly constitutes or contributes to a "taking," this Court should consider (1) whether the duty of fair representation of nonmembers *required* the Unions to incur that expense and (2) whether, but for the fair-representation duty, the Unions would not have done so. But the Unions make no effort to fit their factual showing into this framework.[8] And had they tried, they would have failed. The duty's economic impact is slight indeed.

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424 F.3d 1206, 1215 (Fed. Cir. 2005) (emphases added) (citation omitted). So the analysis is properly directed to the effect of the fair-representation duty: specifically, the costs that the duty requires the Unions to incur that they would *not* incur if they were not under the duty.

[8] Instead, the Unions simply itemize some of the services that they had funded with nonmember dues, such as hiring "experts on employee benefits, employee safety," "legal assistance for enforcing arbitration awards," a "library . . . containing arbitration awards," and "computerized databases which assist staff representatives in negotiations, grievance meetings and arbitration hearings." R.6:3.

The Unions first claim that they must expend "considerable" resources to carry out the duty of collective bargaining. R.25:9. Although the law does not compel agreements between employer and employees, *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 282–83 (1972), an exclusive representative does indeed have a duty to negotiate over "wages, hours, and other terms and conditions of employment" on the unit's behalf, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981), and to administer any subsequent collective-bargaining agreement, *Beck*, 487 U.S. at 739. And it is certainly true that the union's performance of that duty could have the effect of benefiting nonmembers.[9] But the exclusive representative owes this duty to its *members* as well. So, even without an obligation to nonmembers, unions still would need to incur the allegedly "considerable" expenses of negotiating wage increases, better benefits, and the like for the bargaining unit. To that unchallenged burden, the duty of fair representation of *nonmembers* adds only this: in collective bargaining, the union must not engage in conduct toward nonmembers that is "arbitrary" (meaning utterly "irrational"), "discriminatory," or "in bad faith." *Marquez v.*

[9] But then again, performance of the duty could also *harm* nonmembers—such as when the union pushes for seniority pay notwithstanding certain nonmembers' preference for merit pay. The only way for nonmembers to avoid this harm is to leave the unit entirely (by quitting their jobs). These employees are not "free riders"; they are "*forced* riders." *See Public Goods and Market Failures: A Critical Examination* 103–04 (Tyler Cowen ed., 1992) (explaining the forced-rider phenomenon).

Screen Actors Guild, Inc., 525 U.S. 33, 44, 46 (1998). So the union must not affirmatively go out of its way to arbitrarily *harm* nonmembers. But it need not go out of its way to *benefit* them.[10]

Hence, it cannot plausibly be "claim[ed]"—and the Unions do not claim here—that "[their] approach to negotiations on wages or benefits would be any different if [they] were not required to negotiate on behalf of the nonmembers as well as members." *Harris*, 134 S. Ct. at 2637 n.18. The Unions fail to show that they would not have incurred such expenses in the absence of "a legal obligation to do so" under the fair-representation duty. *Id.* And it is apparent that they could not have.

The Unions also state that they expend "considerable" resources on handling grievances, adding that, when they take a grievance all the way through arbitration, they can rack up "thousands of dollars in fees" in a single case. R.25:9–10. Yet, while the NLRB has held that "grievance representation is due [all] employees as a matter of right," *Machinists, Local 697*, 223 NLRB No. 119, 835 (N.L.R.B. 1976), it is the CBA—not labor law—that tells a union how much of the cost of representation it must cover. *See, e.g.*, *Mahnke*, 66 Wis. 2d

[10] For example, the fair-representation duty does not prevent unions from favoring union leaders in bargaining. *See, e.g.*, *Washington ex rel. Graham v. Northshore Sch. Dist. No. 417*, 662 P.2d 38, 45–46 (Wash. 1983) (approving an agreement allowing "release time" for union officers' attending to union business).

at 533 n.2 ("The contract grievance procedure provided the union and the employer would each pay one-half the cost of arbitration.").[11] And, what is more significant, a union need not raise a nonmember's grievance if, in the *union's* judgment, doing so would not serve the interest of the bargaining unit. *See, e.g.*, *Alexander v. Gardner-Denver*, 415 U.S. at 58 n.19 ("[T]he interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."). For instance, a union could pass on a grievance simply out of concern for its bottom line, or "maintenance" of its "bargaining power," or "the necessity" of maintaining good relations with management. *Baker v. Amsted Indus., Inc.*, 656 F.2d 1245, 1250 (7th Cir. 1981). Although the union's conduct in refusing to pursue a nonmember's claim must not be "intentional, invidious and directed at that particular employee," *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200, 203 (7th Cir. 1983) (citation omitted), *see also Mahnke*, 66 Wis. 2d at 531–32, employees cannot otherwise

[11] And, indeed, a small number of CBAs do not provide for arbitration. Bonnie Silber Weinstock, *The Union's Duty to Represent Conscientious Objectors*, 3 Lab. Law. 163, 166 (1987). It has even been suggested that unions' bargaining responsibility does not require them "to handle any grievances at all." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (noting but not deciding this question), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Whether or not the union presses grievances, the National Labor Relations Act gives "any individual employee or a group of employees" the right to "present grievances" on their own under certain circumstances. 29 U.S.C. § 159(a).

"force unions to process their claims irrespective of the terms of the collective-bargaining agreement," *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979)—an arrangement that plainly privileges the union over the employee.[12]

These principles show not only that it is the unusual case in which a union *must* exercise its "substantial discretion" in favor of pressing a nonmember's grievance but also that, when it does so, it is likely because the interests of *the union* and the *bargaining unit as a whole* call for it. The interest of the *employee*, without more, is not a reason to act. *See Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 70 (1975) (union "has a legitimate interest in presenting a united front on this as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests"). So, as with collective bargaining, it is hardly plausible—and the Unions here do not attempt to show—that (1) the fair-representation duty alone *compelled* them to process the small number of nonmember grievances that they have undertaken, and that, (2) absent the duty, they would not have processed those grievances.

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[12] And the unions no doubt prefer this arrangement. *See* Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry Into A "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 63 (1998) ("Unions want unchallenged control over . . . [the] grievance procedure and arbitration which they create[ ]," and so "prefer that the individual employee has no independent rights.")

2. In light of the fair-treatment obligation's *de minimis* impact, it is perhaps no surprise that "unions continue to thrive" under right-to-work laws. *Sweeney*, 767 F.3d at 664; *see Harris*, 134 S. Ct. at 2641 ("A host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions."). Statistics confirm that those laws have had no death-spiral-like effect whatsoever on union membership or even union dues.

A leading analysis draws on the Bureau of Labor Statistics' Current Population Survey to examine nationwide unionization trends from 2000 to 2014, separating States into three categories: States without any right-to-work law ("forced-dues States"), States with right-to-work laws on the books during the entire 14-year period ("right-to-work States"), and States that enacted right-to-work laws sometime during the 14-year period: Michigan, Indiana, and Oklahoma ("mixed-status States"). The study demonstrates that, during those 14 years, "the average percentage of union-represented private-sector employees who were full union members was 93% in [forced-dues] states, 94% in mixed-status states, and 84% in right-to-work states," and that "these numbers were relatively flat during those 14 years." *Br. of* Amicus Curiae *Mackinac Ctr. for Pub. Policy in Supp. of Pets.*, *Friedrichs v. Cal. Teachers Ass'n*, 2015 WL 5461532, *13 (U.S. 2015). The same statistics show that "the number of private-

sector union members and private-sector workers covered by a union contract in right-to-work states from 2000 to 2014 . . . ebbed and flowed a little during the period, but that overall, the figures remained steady."[13] *Id.* at *13–*14; *see* Heather M. Whitney, Friedrichs*: An Unexpected Tool for Labor*, 10 N.Y.U. J.L. & Liberty 191, 205 n.41 (2016) (agreeing with this analysis); *see also* Frank Manzo IV, et al., *The Economic Effects of Adopting a Right-to-Work Law: Implications for Illinois*, University of Illinois at Urbana Champaign Policy Brief, 5 (Oct. 7, 2013), *available at* https://goo.gl/RHCPxW (criticizing right to work, but concluding that it is statistically linked to only "a 1.5 percentage point decrease in the probability of being a union member").[14]

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[13] Focusing on the period between 2004 to 2013, another scholar reports that "total union membership rose by 0.5 percent in [right-to-work] states but declined by 4.6 percent in non-[right-to-work] states." Jason Russell, *How Right to Work Helps Unions and Economic Growth*, Manhattan Inst. (Aug. 27, 2014), *available at* http://goo.gl/PNz110.

[14] The effect in States that have more recently enacted right-to-work laws (the "mixed-status" category) has been especially striking. *See Br. of* Amicus Curiae *Mackinac Ctr. for Pub. Policy in Supp. of Pets.*, *Friedrichs v. Cal. Teachers Ass'n*, 2015 WL 905924, *21–*30 (U.S. 2015) (providing data showing that, six months after Michigan adopted a right-to-work law, 99 percent of the members of Michigan's largest public-education union had remained with the union, and that, even around a year and a half after the law was passed, the union had retained more than 95 percent of its members); *Right To Work Not Decreasing Union Membership*, Indiana Public Media (July 25, 2014), *available at* http://perma.cc/A6ND-S4KG (reporting that Indiana added 3,000 union members in the first year of right to work's passage); Tom Lampman, *Surprising Results from Indiana's Right-to-Work Law*, Buckeye Institute for Public Policy Solutions (Sept. 4, 2015), at 5–6, *available at* http://goo.gl/SjDOkz (last viewed Aug. 8, 2016) (noting that the rate of

Citing these figures, several labor scholars have openly contradicted union prophecies of financial ruin. For example, one commentator and right-to-work critic notes that, although some have predicted that laws like Act 1 would "result in the financial ruin" of labor unions, "we know that is not the case." Whitney, *supra*, at 204. She points out that, "[t]oday, 25 states already have right-to-work laws," yet "in those states we have not seen unions fall into financial peril." *Id.* at 204–05. Another scholar agrees: "[E]ven in American states that prohibit [forced-dues provisions], the difference between workers covered by a collective agreement and union membership is not terribly large," and "[e]ven unionized workplaces in right-to-work states have impressive *firm-level* union density." Matthew Dimick, *Productive Unionism*, 4 UC Irvine L. Rev. 679, 705 (2014). Likewise, he also concludes that the removal of forced-dues provisions "alone" would not "dramatically change the structure of unions and collective bargaining." *Id.*

The data on union dues in right-to-work states tell the same story. One might have expected that, if employees in right-to-work states were fleeing unions in droves, the unions would respond by increasing fees on remaining members to make up for the shortfall and fully cover the costs of representation. But, in fact, union dues are on average 10 percent

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growth of unionized employees in Oklahoma surpassed the national rate after right-to-work was passed).

lower in right-to-work states than in forced-dues states. *See* James Sherk, *Unions Charge Higher Dues and Pay Their Officers Larger Salaries in Non-Right-to-Work States*, Heritage Foundation Backgrounder No. 2987 (Jan. 26, 2015), *available at* http://goo.gl/j2hQFx.

Among the possible reasons for the disparity in dues in particular and the stability of right-to-work unions in general, the most obvious explanation draws upon a basic insight of economics: Like any other business, unions "institutionally tend to raise prices when their customers have no other options," but unions under right-to-work laws "must earn their members' voluntary support," by "reduc[ing] costs and improv[ing] service or risk losing members," *id.*, which in turn encourages employees to stick with those unions. Several high-ranking union officials agree: According to a leader of the United Autoworkers, right to work "*helps*" unions precisely by making unionism voluntary. Lydia DePillis, *Why* Harris v. Quinn *Isn't as Bad for Workers as It Sounds*, Wash. Post (July 1, 2014), *available at* https://goo.gl/T0mSph; *see also* Kris LaGrange, *Right to Work Laws are Just What Unions Need?*, Daily Kos (Mar. 12, 2015) (arguing that "unions quickly regain ground" after right-to-work laws are enacted, and those laws "may be just what labor needs"), *available at* http://goo.gl/tURgWU. Likewise, the former president of the American Federation of State, County, and Municipal Employees admits that its union "took things for granted" under the forced-dues system: "We stopped communicating with

people, because we didn't feel like we needed to. That was the wrong approach." Lydia DePillis, *The Supreme Court's Threat to Gut Unions Is Giving the Labor Movement New Life*, Wash. Post (July 1, 2015), *available at* http://goo.gl/oIhfLC.[15]

B. Neither The Duty Of Fair Representation Nor Act 1 Interferes With The Unions' Reasonable Investment-Backed Expectations

The "evaluation of . . . the extent to which" a regulation allegedly interferes with "investment-backed expectations[ ] is strongly influenced by the fact that" the property at issue has been "heavily regulated from the get-go." *R.W. Docks*, 244 Wis. 2d 497, ¶ 29. Indeed, "[t]hose who voluntarily enter a 'heavily regulated field' find regulatory takings claims especially difficult to maintain," since they "lack a reasonable expectation that the legislature will not enact new requirements from time to time that buttress the regulatory scheme." Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 340 (2007).

Here, after Act 1 (which applies only prospectively), the Unions freely accepted the duty of fair representation, in exchange for the special privilege of exclusive-representation authority. And even before Act 1, it was clearly foreseeable

[15] Another account suggests that non-economic forces are also at play: notwithstanding right-to-work (or perhaps because of it), union membership is increasingly seen as a valuable "social and political act" fostering a sense of "community" and "identity" and furthering the ideals of "[w]orker solidarity and mutual aid." Whitney, *supra*, at 204–06 (citing several works of labor scholarship).

that Wisconsin might protect its workers from forced subsidization of unions, as federal law expressly allowed it to do and as half of the other States have done. "The pendulum of politics swings periodically between restriction and permission in such matters, and prudent investors understand the risk." *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 (4th Cir. 2007). The Unions, having long been regulated under federal and state law, could not reasonably have relied on the nature and costs of its special obligations remaining static.

Looking for a way around this conclusion, the Unions compare themselves to public utilities, which suffer a taking when a legislature sets their rates so low as to "confiscat[e]" the utilities' "property serving the public," *e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). Pls'. Opp. to Stay Mot., Wis. Ct. App. Dist. III, 12–13, 19–20. But the analogy is inapt. One of Unions' cited cases explains the critical difference: "[T]he relation between the [utility] and its customers is not that of . . . agent and principal." *Wis. Tel. Co. v. Pub. Serv. Comm'n*, 232 Wis. 371, 287 N.W. 167, 171 (1939). But the relation between union and employee *is*: "By its selection as bargaining representative, [the union] has become the agent of all the employees," *Wallace Corp.*, 323 U.S. at 255—a status with tremendous inherent value. To the extent a nonmember-employee is entitled to any sort of affirmative "service" from the union, *but see supra* pp. 28–32, he is owed it by *law*, not by *payment*. *Hughes Tool Co.*, 104 NLRB No.

33, 329 (N.L.R.B. 1953). Hence unions "have no constitutional entitlement to the fees of nonmember-employees," *Madison Teachers*, 358 Wis. 2d 1, ¶ 58 (citation omitted)—they are not "customers" in the first place. *Wisconsin Tel. Co.*, 287 N.W. at 171. Even in a non-right-to-work state, unions are not *entitled* to employee fees; they have the right only to leverage their tremendous exclusive-representative power to persuade the employer to include a forced-dues clause in the CBA.

By contrast, the beneficiaries of a utility company are "customers" and "must pay." *Id.* And "the revenue paid by the customers for the service belongs to the company." *Id.* Without those payments, the company would not otherwise stay afloat. Unlike a union, it cannot wield legislative-like power over its users' rights or ably represent their interests in a negotiation with a third party and thereby win their financial backing. Instead, utilities obtain "a standard rate of return on the actual amount of money reasonably invested" by relying exclusively on customers' payments, which, if too low, will "destroy the value of [the utilities'] property for all the purposes for which it was acquired," *Duquesne*, 488 U.S. at 307, 309 (citation omitted).

C. The Law Does Not Physically Invade Union Property, But Instead Adjusts "The Benefits And Burdens of Economic Life To Promote The Common Good"

Under the "character of government action" prong, "[a] taking [is less likely to] be found when the interference with property [cannot] be characterized as a physical invasion by government," *Noranda Exploration*, 113 Wis. 2d at 628, but is instead a part of a "public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124, which is the "usual assumption," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992). The more that the affected property interest is "qualified in nature," the more this factor will "weigh[ ] against a finding . . . [of] a compensable regulatory taking." *R.W. Docks*, 244 Wis. 2d 497, ¶ 28.

Here, neither Act 1 nor the fair-treatment duty physically invades union property. *See supra* pp. 15–17. Act 1 simply "adjust[s] the benefits and burdens," *Penn Central*, 438 U.S. at 124, of a union's exclusive-bargaining authority by shifting the costs away from employees who do not want union representation. This "adjust[ment]" is not only constitutional, but also sound public policy designed "to promote the common good," *id.* The People's representatives reasonably concluded that the union's members *should* bear the costs associated with its activities, because they are the ones who presumably want the union's services to begin with. Those who did not wish to be represented should at least not be forced to

subsidize an organization that they oppose. Not only does affording this protection strengthen employee association rights, but it also furthers the purpose of fostering economic growth—an effect of right-to-work that experts have documented.[16] Far from constituting an impermissible "economic adjustment," App. 11, Act 1 is a reasonable change in law, which the Unions had every reason to believe might well be enacted.

IV. The Fair-Representation Duty Does Not Take "Property"

"When conducting a takings analysis," this Court "begin[s] by determining" whether a specific, cognizable "property interest exists." *Wis. Retired Teachers Ass'n, Inc. v. Employee Trust Funds Bd.*, 207 Wis. 2d 1, 18, 558 N.W.2d 83 (1997); *see also Wis. Med. Soc'y*, 328 Wis. 2d 469, ¶ 42. In takings law, the category of "private property" has definite boundaries. As the U.S. Supreme Court has explained, because legislatures "routinely create[ ] burdens for some that directly benefit others," and because doing so is unquestionably "prop[er]," "it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or

[16] *See, e.g.*, Jeffrey A. Eisenach, *Right-to-Work Laws: The Economic Evidence*, NERA Economic Consulting, at 2 (June 2015), *available at* http://goo.gl/FT80ne (the "large body of rigorous economic research . . . suggests that [right-to-work] laws have a positive impact on economic growth, employment, investment, and innovation").

her assets for the benefit of another." *Connolly*, 475 U.S. at 223.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), five Justices of the U.S. Supreme Court invoked this principle to reject a takings challenge. *See id.* at 539–45 (opinion of Kennedy, J.); *id.* at 553–56 (opinion of Breyer, J.) ("agree[ing] with Justice Kennedy's" takings analysis).[17] That case involved a takings challenge to a law requiring former coal companies to contribute to a fund for the health-care expenses of retired miners. *Id.* at 514–15 (opinion of O'Connor, J.). Although the law "impose[d] a staggering financial burden" on those companies, it did not "operate upon or alter an identified property interest," such as a right in land, intellectual property, "or even a bank account or accrued interest." *Id.* at 540 (opinion

[17] The *Apfel* Court was splintered. Five Justices (Justice Kennedy, Justice Breyer, and those joining Justice Breyer's opinion: Justices Stevens, Souter, and Ginsburg) rejected the takings challenge for failing to show a deprivation of "property," while a different five-Justice coalition (Justice O'Connor's plurality plus Justice Kennedy) agreed only that the Act was unconstitutional. Justice O'Connor's opinion asserted that it was an as-applied taking, 524 U.S. at 504, while Justice Kennedy thought it a violation of due process, *id.* at 539. Importantly for this case, the Breyer–Kennedy takings analysis constitutes binding federal precedent, as several courts have concluded. *Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1339 & n.10 (Fed. Cir. 2001) (*en banc*) (collecting cases); *Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys.,* 173 F.3d 46, 58 (1st Cir. 1999); *Compare Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2605 (2013) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting) (agreeing that the Breyer–Kennedy takings analysis in *Apfel* is a binding holding), *with id.* at 2599–600 (opinion of the Court) (acknowledging that five Justices in *Apfel* concluded that the "the Takings Clause does not apply to government-imposed financial obligations that do not operate upon or alter an identified property interest") (citation omitted)).

of Kennedy, J.). Instead, "[t]he law simply impose[d] an obligation to perform an act," and was "indifferent as to how the regulated entity elect[ed] to comply or the property it use[d] to do so." *Id.* But a statute burdening "*not* an interest in physical or intellectual property," but instead creating "an ordinary liability to pay money, and *not to the Government*, but to *third parties*," could not possibly amount to a taking. *Apfel*, 524 U.S. at 554 (opinion of Breyer, J.) (emphasis added); *compare id.* at 544 (opinion of Kennedy, J.) (doubting that an effect (or not) on third parties necessarily matters, but agreeing that "the Government's imposition of an obligation between private parties . . . must relate to a specific property interest to implicate the Takings Clause"). Unable to meet this "requirement" of establishing that the law deprived the company of "*specific* and *identified* properties or property rights," its takings challenge failed. *Id.* at 541–42 (opinion of Kennedy, J.); *id.* at 554–56 (opinion of Breyer, J.)

Likewise here, the government imposes at most an "obligation to perform an act," *id.* at 540 (opinion of Kennedy, J.): the duty to fairly represent all employees. Even if fairly representing nonmembers will sometimes cause a union to spend a small amount of time and money that it otherwise would not spend, *but see supra* pp. 28–32, the law is "indifferent as to how" unions "elect[ ] to comply" with the duty (so long as they do indeed comply) "or the property [they] use[ ] to do so." *Id.* The law does not care, for example, whether the Unions use

certain "tangible property [such as buildings] in the representation of employees," R.2:8. Nor is the law concerned with whether unions fund their grievance-adjustment practice with member dues, investment income, or outside donations. *See* R.25:16–17. The duty of fair representation targets "no specific fund of money." *Apfel*, 524 U.S. at 555 (opinion of Breyer, J.). It creates "only a general liability; and that liability runs, not to the Government, but to third parties," *id.*—the members of the unit not belonging to the union. *Vaca*, 386 U.S. at 177 (breach of fair-representation duty is a "cause of action" against union). Accordingly, the duty does not take "private property." *See* Whitney, *supra*, at 196–98 (criticizing *Sweeney*, but recognizing that, under "current precedent"—specifically *Connolly* and *Apfel*—neither the duty of fair representation nor right-to-work laws take "property").

This point (among others) distinguishes this case from *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the two cases that the dissent in *Sweeney* cited for its takings theory, 767 F.3d at 674 (Wood, J., dissenting). In those cases, which involved takings of interest earned on client money while held in discrete attorney trust accounts, "the monetary interest at issue [ ] arose out of the operation of a specific, separately identifiable fund of money," whereas here, "there is no specific fund of money." *Apfel*, 524 U.S. at 555 (opinion of Breyer, J.). There is only a duty to "provide services," if that, and the law is "agnostic about which money

(if any) ha[s] to be spent to provide them." Whitney, *supra*, at 195–96.

The Unions counter with a case—decided by the Wisconsin Supreme Court more than a hundred and fifty years ago—supposedly holding that, any time the State restricts "the time and services of the citizen," it "takes" his property. R.25:13 (citing *Dane Cnty. v. Smith*, 13 Wis. 585, 588 (1861)). But that precedent establishes no such principle. The narrow question in *Smith* was whether a statute had relieved county governments of their responsibility to pay for court-appointed lawyers in criminal cases. 13 Wis. at 587–89. The Court held that it had not, but its decision had nothing to do with takings doctrine. (The word "taking" or "takings" does not appear in the opinion.) According to the Court, the problem was that the statute ran contrary to the general principle that, where a court exercises "the power to make the appointment and order the services, it follow[s] as a necessary legal consequence" that the attorney appointed is owed payment. *Id.* at 587. Because the statute acknowledged the power of the court to appoint but did not affirm the "necessary legal consequence" of the implicit promise to pay, the statute was "inconsistent with itself," so the Court gave it "no effect." *Id.* at 589. Though the Court doubted (in dicta) that the legislature could command a citizen to act "in a matter which . . . relates *exclusively* to his private trade or calling" and deny him pay, *id.* at 588 (emphasis added), not a word in the opinion suggests that exclusive

representation is a "private trade or calling" (it is not) or questions the power of the State (or Congress) to regulate labor relations in the public interest.[18]

V. Labor Law Already Justly Compensates Unions

"In a variety of contexts, the Supreme Court has recognized that the benefits a property owner receives in conjunction with a regulation may offset the burdens and thus satisfy the takings clause." *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 865 (Cal. 1997) (collecting sources). And the offsetting benefits need not take the form of cash. *See, e.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984) (reading a previous takings precedent as establishing that "it would have been constitutionally permissible for the Federal Government to provide the city with a substitute landfill site instead of compensating it in cash"); *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 151 (1974) ("[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation.").

Here, any minimal "costs" of fairly representing nonmembers is more than offset not merely by the dues of member-employees who find the Unions' services valuable, but

[18] The Wisconsin Supreme Court has confirmed *Smith*'s narrow holding. *See Weisbrod v. Bd. of Sup'rs of Winnebago Cnty.*, 20 Wis. 418, 419 (1866) (*Smith* "[holds] that the liability of the county resulted from the power of the circuit court to appoint"); *Chafin v. Waukesha Cnty.*, 62 Wis. 463, 22 N.W. 732, 733 (1885) (similar).

also by the government-conferred privilege by which the union "alone gets a seat at the negotiation table," *Sweeney*, 767 F.3d at 666. The Seventh Circuit made this clear in *Sweeney*: "[T]he union is justly compensated by [the] law's grant to the Union the right to bargain exclusively with the employer." *Id.* (union is "fully and adequately compensated" by representation privilege). Similarly, the National Labor Relations Board has declared that a union, whether or not in a right-to-work state, "gains a thing of value by being allowed the power of exclusive representation over all employees in the bargaining unit whether the employees agree or not, and that value is sufficient compensation for whatever services [the union] perform[s] for employees." *Int'l All. of Theatrical Stage Employees, Moving Picture Techs., Artists & Allied Crafts of the U.S., Its Territories & Canada, Local 720, AFL-CIO, CLC (Tropicana Las Vegas, Inc.) & Gary Elias*, 363 NLRB No. 148 (N.L.R.B. 2016). Accordingly, even if Act 1 or (more accurately) the duty of fair representation works a taking upon unions, the exclusive-representation power more than compensates for it.

CONCLUSION

The judgment of the circuit court should be reversed, and the constitutionality of Act 1 upheld.

Dated this 10th day of August, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The word count of the portions of this brief identified in Wis. Stat. § 809.19(8)(c)1 is 10,988 words.

Dated this 10th day of August, 2016.

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