Appeal No.: 16AP820

STATE OF 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 April 15, 2016, Judgement in Dane County Circuit Court, Case No. 15-CV-0628, Honorable C. William Foust

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BRIEF OF *AMICUS CURIAE* WISCONSIN MANUFACTURERS & COMMERCE

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INTEREST OF *AMICUS CURIAE*

Wisconsin Manufacturers & Commerce ("WMC") is the State Chamber of Commerce and Manufacturers Association, and is dedicated to making Wisconsin the most competitive state in the nation to do business. Founded in 1911, WMC is the leading advocacy organization for businesses in Wisconsin, with approximately 3,800 member companies that together employ one quarter of the State's private sector workforce. WMC represents small, medium, and large employers in every sector of Wisconsin's economy, including the manufacturing, construction, health care, transportation, financial services, retail, mining, insurance, energy, and service sectors.

WMC members have a substantial interest in employment laws. Operating a competitive business requires a clear understanding of the laws governing the employer-employee relationship. Likewise, negotiating (and administering) a collective bargaining agreement requires substantial certainty regarding the ground rules under both state and federal law. WMC members possess an important interest in the outcome of this litigation, as the result will have an effect upon the Wisconsin business community.

SUMMARY OF ARGUMENT

Based upon a free-rider theory that unions should not be required to provide services for which they cannot charge, the Circuit Court held that Act 1 "takes" services from unions because "Plaintiffs will be obligated to [provide] services for which they cannot legally request compensation." (Defendant's App. 9)[1] It, therefore, held Act 1 to constitute an unlawful taking in violation of the Wisconsin Constitution. However, this holding represents a significant misreading of Act 1 legislation. Act 1 cannot require a "taking of services" because (i) it does not require a union to provide any services whatsoever, and (ii) it does not deprive the union of the right to charge for its services, but only to charge for its services *as a condition of an employee's employment*. All other aspects of labor management relations are governed by the federal National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA").

Thus, to the extent a union is required to perform any services – arising from the duty of fair representation or otherwise – such services are required solely under federal law. As a result, any alleged "taking" of such services arises under the federal NLRA, not Act 1.

[1] WMC cites to the Appendix filed by the State of Wisconsin.

STARDARD OF REVIEW

This Court reviews a challenge to the constitutionality of a state statue de novo. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2013 WI App 77, ¶ 27, 348 Wis. 2d 714, 834 N.W.2d 393. A challenged statute is presumed to be constitutional, and "every presumption must be indulged to sustain the law." *Id.*, ¶ 29. A challenging party "bears a heavy burden to overcome the presumption of constitutionality." *Id.* Under this standard, the challenger "must demonstrate that the statute is unconstitutional beyond a reasonable doubt." *Id.*

ARGUMENT

I. The Collective Bargaining Relationship Is Almost Entirely Governed by Federal Law.

The preemptive effect of federal law over private sector collective bargaining relationships is broad. *Retail Clerks Local 1625 v. Schermerhorn (Schermerhorn II)*, 375 U.S. 96, 101 n. 8 (1963). It is well-established that federal law controls the interpretation of collective bargaining agreements and governs the relationships established by those agreements. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102-03 (1962). The NLRA, accordingly, prohibits state regulation of activities that the

federal law protects and regulates: activities like collective bargaining and the union's exclusive representation rights. *Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 225 (1993). "This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' integrated scheme of regulation." *Id.* (internal citations omitted); *see also Lucas Flour Co.*, 369 U.S. at 102-03. ("Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation ... [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.").

Thus, barring an exception authorized by Congress, the collective bargaining relationship and a union's representation rights are governed entirely by federal law.

II. "Right to Work" Legislation Is a Limited Exception to the NLRA's Preemption Doctrine.

Section 14(b) of the NLRA provides as follows:

> **(b) Agreements requiring union membership in violation of State law**

> Nothing in this subchapter 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) (emphasis added). The words "as a condition of employment" are critical to this analysis. The NLRA expressly authorizes state legislation such as Act 1, which prohibits employers and unions from entering into contracts that require employees to financially support a union *as a condition of an employee's employment* (*i.e.* to keep their job). 29 U.S.C. § 164(b); *Schermerhorn II*, 375 U.S. 96 (1963); *Retail Clerks Local 1625 v. Schermerhorn (Schermerhorn I)*, 373 U.S. 746 (1963). It has been well-established that Section 14(b) is, thus, a limited exception to the NLRA's preemption doctrine. *Schermerhorn II*, 375 U.S. at 101-03 ("[I]t is § 14(b) [which] gives the States power to outlaw even a union-security agreement that passes muster by federal standards.").

A majority (twenty-six) of states have enacted some form of a state right-to-work law,[2] utilizing this limited exception to the NLRA's preemption doctrine. In fact, courts have recognized that this specific

[2] National Conference of State Legislatures, "Right-to-Work Resources," available at http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last accessed Aug. 2, 2016).

exception only applies to state laws, and not local laws. *See United Auto., Aero. & Agric. Implement Workers of Am. v. Hardin Cnty.*, 2016 U.S. Dist. LEXIS 12737 (W.D. Ky. Feb. 3, 2016) (citing *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360, 362 (Ky. 1965) (concluding that Congress intended Section 14(b) to apply exclusively to state-level laws, and not to local laws). In *Hardin Cnty.*, the plaintiff labor organizations challenged a local county right-to-work ordinance, arguing that only states, not counties, were permitted to enact right-to-work laws because "the NLRA preempts right-to-work laws not specifically authorized in Section 14(b)." 2016 U.S. Dist. LEXIS 12737 at 4-5. The district court agreed and struck down the county right-to-work ordinance, holding that Section 14(b) is the sole exception to the NLRA preemption of right-to-work laws, such that only states and territories may prohibit union-security agreements. *Id.* at 18.

A. "Membership" under Section 14(B) of the NLRA Encompasses the Payment of Representation Fees.

It is well-established that union membership entails the payment of dues germane to the union's collective bargaining. *See Sweeney v. Pence*, 767 F.3d 654, 661 (7th Cir. 2014) (citing *NLRB v. GMC*, 373 U.S. 734, 742 (1963) ("The Supreme Court has described union membership as synonymous with paying the portion of dues germane to the union's

collective bargaining."). Thus, "membership" necessarily implicates "dues."

Indeed, in interpreting the term "membership" under Section 8(a)(3) of the NLRA, courts have determined that union membership can be "whittled down to its financial core." *Id.* The financial core of union membership comprises "those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Communications Workers of Am. v. Beck*, 487 U.S. 735, 763 (1988) (internal citations omitted). Accordingly, the term "membership" encompasses even representation fees (those fees paid by nonmembers of the union) under Section 8(a)(3) of the NLRA.

This same analysis applies to Section 14(b) of the NLRA. Courts have held that "membership" has the same meaning under Section 14(b) as it has under Section 8(a)(3) of the NLRA. *See Sweeny v. Pence*, 767 F.3d at 660 (citing *Schermerhorn I*, 373 U.S. at 751 ("[T]he agreements requiring 'membership' in a labor union which are expressly permitted by the proviso are the same 'membership' agreements expressly placed within the reach of state law by [Section] 14(b)."); *see also Sorenson v. Sec'y of*

Treasury of U.S., 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'") (internal citations omitted). Thus, the payment of representation fees by nonmembers constitutes "membership" for purposes of Section 8(a)(3) and 14(b) alike, such that "Section 14(b)'s express allowance of state laws prohibiting 'agreements requiring *membership* in a labor organization as a condition of employment' necessarily permits state laws prohibiting agreements that require employees to pay [r]epresentation [f]ees." *Sweeny v. Pence*, 767 F.3d at 661 (emphasis in original).

III. Wisconsin Exercised Its Federally-Recognized Right to Enact Act 1, Which Only Bars Agreements That Require Union Membership or the Payment of Dues *as a Condition of Employment.*

On March 15, 2015, Wisconsin exercised its right to adopt a right-to-work law by enacting Act 1. The statute provides as follows:

> No 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 . . .

Wis. Stat. § 111.04(3)(a)(3) (emphasis added). Nothing in the Wisconsin law requires a union to perform any services. In fact, nothing in the

Wisconsin law prohibits a union from entering into a contract directly with an employee it represents and seeking a fee for its services. The only type of agreement prohibited under this statute is an agreement requiring the payment of dues or fees as a condition of employment.

Act 1 does not impair a union's right under the NLRA to charge for its services. *See Cone v. Nevada Service Employees*, 116 Nev. 473, 478 (2000) (finding that a union policy that established a fee schedule applying to nonmembers for grievance representation did not violate the state's right-to-work law because the service fee was not a condition of keeping the employee's job); *see also Perry v. International Longshoremen Ass'n Local No. 1414*, 295 Ga. App. 799, 801 (2009) (finding that a union policy requiring hiring-hall referral fees for both members and nonmembers did not violate the state's right-to-work law because "the payment of the referral fee was not a condition of . . . employment"). Act 1 also does not prohibit unions from charging a higher rate for employees who request a higher level of services. In *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790 (1974), the union was permitted to suspend dues for individuals who were temporarily promoted to supervisory positions, even though the supervisors were still

union members, because the supervisors "did not actively participate in union affairs." *Id.* at 795 n.6. These supervisors had an "honorary" union status which would permit them "to return to active membership without paying normal initiation fees in the event they returned to rank-and-file work." *Id*.

Finally, the NLRA provides the union discretion in setting its dues. *See* 29 U.S.C. § 411(3). Within the confines of the NLRA, unions set their dues structures, formulas, and frequency of payments. There is nothing about Act 1 that changes this federal norm, nor a union's obligations to comply with those norms. Instead, Act 1 solely bars one type of agreement between an employer and a union: those that require employees to pay union dues as a condition of employment, *i.e.* to keep their job. Aside from this sole, permitted prohibition arising under Wisconsin law, every other aspect of the collective bargaining relationship is governed by (and preempted by) federal law.

Act 1, thus, fits squarely within Section 14(b)'s narrow exception: it simply provides that employees cannot be forced to join the union or pay dues in order to keep their jobs with their employer. In the words of the Indiana Supreme Court, with respect to the analogous Indiana statute,

"[T]he 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 (Ind. 2014).

IV. The Circuit Court Improperly Merged the "Duty of Fair Representation" Arising under Federal Law with the "Right to Work" Legislation Arising under State Law.

In holding that Act 1 "demands" services from the union, the Circuit Court relied on the "duty of fair representation" arising under the federal NLRA. The Circuit Court held that Act 1 constitutes a "taking" because a union is required, under the "duty of fair representation," to represent each employee, including employees that elect not to pay union dues. The Circuit Court found that Act 1 causes a "free-rider problem" because non-members can refuse to pay for services that unions are compelled to provide by law under the duty of fair representation. (Defendant's App. 6) This reading of the two laws is wrong.

The duty of fair representation is a federal, judicially-developed concept which requires unions to represent all employees in a bargaining unit without regard to any differentiating characteristic, such as race, ethnicity, gender, or union membership. *See Vaca v. Sipes*, 386 U.S. 171

(1967). The federally-imposed duty of fair representation solely means that the union must treat employees in a way that is even-handed and fair.

The Circuit Court applied its constitutional analysis to the wrong law. To the extent a union is required to provide services for non-members that it provides for members, such requirement arises solely under the federal NLRA. Act 1 does not require the union to provide any services or representation, fairly or otherwise. Rather than attacking the federal NLRA (which creates an employee's entitlement to fair representation and any claim of a "free-rider" problem), the Circuit Court mistakenly faulted Act 1 for obligations that Congress established under federal law.[3] *See Sweeney v. Pence*, 767 F.3d at 666 ("Because it is *federal* law that provides a duty of fair representation, Indiana's right-to-work statute does not 'take' property from the Union . . . .") (emphasis in original).

[3] Plaintiff also fails to establish a "taking" under the regulatory takings theory articulated in *Penn Central. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). This argument is a red herring. The *Penn Central* test requires a plaintiff to show (1) the economic impact of the challenged regulation upon the claimant; (2) the extent to which the regulation has interfered with the distinct investment-backed expectations; and (3) the character of the governmental action. The Union in this case cannot meet any of these elements. Simply put, neither Act 1 nor the duty of fair representation requires a union to provide certain services to any particular group of employees. In fact, a union can disclaim, at any time, its interest in representing a group of employees that it believes is not economically supportive of its efforts. The Circuit Court's alleged "free-rider" dilemma is a cost of doing business, not a constitutional issue.

Act 1 is a state law that does not impose any demands on any union. A union is not compelled to provide services to anyone under Act 1. A union still decides whether to provide certain services, the dues structure it charges for those chosen services, and how to market its services so employees see value in deciding whether to voluntarily pay dues. If a union cannot convince what it believes is an adequate number of employees to voluntarily pay dues, it is free to walk away from the group and disclaim its interest in representing them. All of this is still regulated by the federal NLRA. Act 1 simply prohibits one narrow type of agreement: an agreement that requires union membership or the payment of money as a condition of employment. *See id.* Because Act 1 does not demand any services from any union, the Circuit Court's judgment was in error.

CONCLUSION

For the foregoing reasons, Wisconsin's Right to Work statute, Act 1, does not violate the Wisconsin Constitution. The Circuit Court's finding that Wisconsin's Right to Work statute is unconstitutional should be reversed.

Dated this 9th day of August, 2016.

Respectfully submitted,

s/ Joseph P. Campbell

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RULE 809.19(8)(d) FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2, 677 words.

Dated this 9th day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats. on August 10, 2016. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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