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. 15CV628

BRIEF OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION

This case concerns the impact of the so-called "right to work" law, 2015 Wisconsin Act 1, upon labor unions in Wisconsin. Prior to Act 1, unions could legally charge non-members only for their fair share of the costs of collective bargaining. Act 1 prohibits unions from charging "anything of value" to non-members whom Wisconsin law nevertheless compels the unions to represent. Act 1 thus creates a "free-rider" problem. (App. 6.). It denies unions just compensation for their services taken by the State and thus violates Article I, § 13.

ISSUE PRESENTED

When the government compels a private entity, such as a labor union, to provide services and expend money on behalf of another person, and then forbids charging or collecting any fee for these services and expenses, has a taking of the service provider's property occurred within the meaning of Article I, § 13 of the Wisconsin Constitution?

The trial court answered yes.

ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

STATEMENT OF THE CASE

The Appellants' Statement of the Case is neither complete nor correct.

1. Nature of the Case.

On March 10, 2015, the day before Act 1 took effect, the Unions sought a declaratory judgment and injunctive relief in the Circuit Court for Dane County against the State and its officials. The complaint alleged facts, ultimately undisputed, showing

that Wisconsin compels the Unions to expend money and provide services on behalf of non-members for collective bargaining and grievance adjustment, and that Act 1 denies just compensation for this taking of their property in violation of Article I, § 13.

2. Course of Proceedings Below.

The Unions sought preliminary injunctive relief upon filing the complaint. This request was denied on the basis that the Unions had not proven irreparable harm. Defendants requested discovery, obtaining several collective bargaining agreements, but took no depositions and posed no interrogatories. Defendants moved to dismiss on a variety of procedural and substantive grounds; the Unions cross-moved for summary judgment supported by affidavits and exhibits. Both parties filed replies, but Defendants filed no counter-affidavits.

The circuit court denied the motion to dismiss and held that Defendants must be permitted to file an answer before considering summary judgment. Defendants answered, and the Unions stood on their original motion for summary judgment. Defendants made no further response. The circuit court held oral argument.

On April 8, 2016, the circuit court granted summary judgment to the Unions. (App. 1-15). It issued a final judgment on April 15, 2016 enjoining enforcement of those parts of Act 1 denying unions in Wisconsin just compensation for the taking of their property. (App. 16-23).

The circuit court denied Defendants' request a stay on April 25, 2016. This Court granted a stay pending appeal on May 24, 2016.

3. Disposition Below.

The circuit court explained the statutory framework concerning collective bargaining and Act 1's prohibition on receiving any fees for representation. It concluded that Wisconsin law creates a "free-rider" problem because unions are required to represent non-members but are prohibited from charging them for expenditures made on their behalf. (App. 3-6).

The circuit court analyzed the four elements of a takings case. It found that the Unions have two legally protected property interests in the accumulated funds they are required to spend on behalf of, and the services they provide to, non-members. (App. 7-9). It held that Act 1 constitutes a regulatory taking under the analysis adopted in *Wisconsin Builders Ass'n v. Wisconsin DOT*, 2005 WI App 160, ¶¶37-28 (2005). (App. 9-11). It found that Act 1 unlawfully transfers private property from one citizen to another. (App. 11-12). Finally, the court eschewed a foreign dictum that the obligation to represent non-members is compensation for itself and held instead that Act 1, by prohibiting collection of fair share fees, denies Unions just compensation for the taking of their property. (App. 13-15).

4. Statement of Facts

Plaintiffs-Respondents are here collectively called "the Unions." International Association of Machinists District 10 (hereinafter "IAM District 10") and its Local Lodge 1061, and United Steelworkers District 2 (hereinafter "USW District 2"), are labor organizations within the meaning of § 111.02(9g) of the Wisconsin Employment Peace

Act. Wisconsin State AFL-CIO is a statewide federation of unions, including labor organizations within the meaning of § 111.02(9g).

The facts are undisputed. Appellants presented no evidence below and did not controvert any facts presented by the Unions. The entire record consists of the pleadings and the affidavits presented by the Unions.

The Unions represent employees of private sector employers covered by Act 1 for the purpose of collective bargaining throughout Wisconsin. (Supplemental Appendix 2, 77). USW District 2 represents approximately 25,323 members in Wisconsin and had at least 15 collective bargaining agreements with employers affected by the passage of Act 1. *Id*. IAM District 10 represents approximately 9,843 employees in Wisconsin. (Supp. App. 4)

The Unions historically negotiated union security clauses in their collective bargaining agreements to require both members and non-members to pay their fair share of the costs of collective bargaining. (Supp. App. 3-4, 77). These clauses require all employees who enjoy the benefit of that agreement either to pay dues as members or a discounted fee charging non-members only the cost of services germane to collective bargaining, contract administration and grievance adjustment.[1] At the time Act 1 passed, there were 54 such fee-payers in local unions affiliated with USW District 2, (Supp. App. 77-78) and 131 in local lodges affiliated with IAM District 10. (Supp. App. 4).

[1] This option to pay only "fair share" fees has been required since 1988. *Communication Workers v. Beck*, 487 U.S. 735 (1988).

As a result of Act 1, these numbers increased, and all of these non-members ceased to pay *any* fee to the Unions for the services they receive. The Unions lost substantial revenues because of Act 1 and its denial of just compensation for compelled services. (App. 10). In just one bargaining unit, IAM District 10 is losing more than $2000 annually as a result of Act 1. In just one bargaining unit, USW District 2 is losing more than $4000 annually, or 10% of its revenue. In a second unit, USW District 2 is losing another $1800 per year. The lower court found that these losses are not "confined" or "isolated" but rather are ongoing indefinitely into the future. *Id.*[2]

Unions are required to represent members and non-members equally. The costs of such representation are substantial. USW District 2 has taken grievances to arbitration at an expense of more than $6,000, which is not unusual. (Supp. App. 85-86). Even initiating a case that settles before arbitration is expensive. IAM District 10 incurred more than $1,000 in expenses to prepare for an arbitration case for a non-member that settled a few days before the hearing. The assertion by Appellants that the cost of representing non-members is subsumed in the overall cost of representing members is contrary to the record in this matter and simply untrue.

The lower court correctly found that the Unions have two property interests at stake in their representation of non-members:

> Perhaps the most straightforward property interest to identify is the union's treasury. When members pay their dues and non-members their fair share

[2] Another lodge in IAM District 10 suffered an annualized loss of more than $6000. (Supp. App. 35-36). These are significant losses for small organizations like the Unions. The erosion of membership caused by Act 1 constitutes a significant percentage of their overall membership. For example, in one unit, six out of 73 fee-payers were lost (Supp. App. 83-84); in another, 12 out of 102 were lost. (Supp. App. 3).

> fees, all would say that the union is building a treasury that it holds as property. When it expends those funds to perform services, as it must, no one would dispute that the money is the union's property. [The Unions] will be obligated to spend money—their property—on services for which they cannot legally request compensation. This is enough to establish that the unions do have a legally protectable property interest at stake.

(App. 9.). The lower court likewise found that the services themselves are a protected property interest:

> The conclusion [that services are property] is logical. Labor is a commodity that can be bought or sold. A doctor, a telephone company, a mechanic—all would be shocked to find they do not own the services they perform. While each accepts that they perform them in a regulated environment, that concession does not surrender their ownership of the services in the first place. Unions are no different; they have a legally protectable property interest in the services they perform for their members and non-members."

Id. The circuit court found only two sources of income from which the Unions could pay for required services to non-members: the fees charged to employees and their investment income from reserves. *Id.* at 10. Appellants cite no support in the record to challenge these factual findings.

STANDARD OF REVIEW

The factual findings of the circuit court are entitled to deference unless clearly erroneous. *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶51 (2009). Whether a legislative act constitutes a taking without just compensation is a question of law reviewable de novo. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 372-373 (1996). The application of takings doctrine to a set of facts presents a mixed question of fact and law reviewable de novo. *Waller v. American Transmission, LLC*, 2013 WI 77, ¶52 (2013). "[T]the court benefits from the [analysis] of the circuit court," and the "clearly

erroneous" standard of review applies to the historical facts found by the circuit court. *Id.*

SUMMARY OF THE ARGUMENT

Wisconsin Act 1 requires unions to represent non-members but unconstitutionally disables them from collecting any compensation for such representation. This legislative scheme violates the Takings Clause in Wisconsin's Constitution in Article 1, Section13.

The money and services expended by the Unions to provide representation to non-members is a legally protected property interest. Wisconsin's statutory scheme requires unions to provide these services to non-members as a condition of being "labor organizations" as defined in Act 1. Act 1 further deprives unions of the right to seek any compensation for performing services that the government mandates they provide. The circuit court correctly concluded that the interplay of these statutory and case law requirements effects an unconstitutional taking. The status of a labor union in this regard is akin to a utility that is required to provide services to customers; like a utility, a union is entitled to be compensated by the customer for the services rendered. Requiring a utility to perform these services at confiscatory rates is unconstitutional; requiring unions to perform them for no fee at all is *a fortiori* a taking.

Appellants' argument that Act 1 does not cause the taking, and the Unions have challenged the wrong law, is mistaken. Under well-established takings jurisprudence, the constitutional violation is proximately caused by the denial of just compensation. Act 1 alone effects the taking. The argument that the burden of exclusive representation is just

compensation for itself is circular and illogical, and directly contravenes Wisconsin takings jurisprudence that "just compensation" means "money."

If a statutory scheme imposes a regulatory taking, the appropriate remedy is to invalidate the statute. The circuit court correctly enjoined the enforcement of Act 1 statewide, not only for the Unions below, but for all affected labor organizations. There are no circumstances where the government can constitutionally impose such a taking of private property to benefit other private actors, without just compensation.

ARGUMENT

The trial court applied the correct legal analysis to the undisputed facts. Article I, Section 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." An unconstitutional taking occurs when (1) a property interest exists; (2) the property interest has been taken; (3) the taking was for public use; and (4) the taking was without just compensation. *Wis. Retired Teachers Ass'n v. Employe Trust Funds Bd.*, 207 Wis. 2d 1, 18-24, 558 N.W.2d 83 (1997).

I. THE PROPERTY AND SERVICES UNIONS ARE FORCED TO EXPEND FOR NON-MEMBERS ARE PROTECTED BY ARTICLE I, SECTION 13.

Appellants' assertion that the Unions have no property interest at stake directly contradicts two factual findings of the circuit court. Both the Unions' accumulated funds which they are forced to spend, and the services they are forced to provide, constitute property in Wisconsin. These two findings are not clearly erroneous.

The circuit court was obviously correct that when the government forces a private entity to spend its treasury for the benefit of another private entity, merely because the latter does not wish to pay for services it receives, the funds so spent are "property." Likewise, the labor of rendering services has long been treated as property in Wisconsin. Appellants' suggestion that government has the power to compel citizens to render free service to others, even for a brief time, other than for penal labor, is literally unprecedented.

As the circuit court found, unions provide representation to non-members in part by spending money from their accumulated funds. These funds unquestionably constitute legally protected property interests. Money is clearly property. *Wisconsin Medical Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶38 (2010). Even authorities cited by Appellants agree that required expenditure of money to represent another person violates the takings clause. *See Williamson v. Vardeman*, 674 F.2d 1211(8th Cir. 1982)(holding that even where attorney services can be compelled because attorneys are "officers of the court," attorneys cannot be required to pay the costs of representation out of their own pockets, without violating the takings clause).[3] When a union representative is compelled to pay the costs to litigate a non-member's case by the State, these costs constitute property taken by the State.

Appellants advance no reason why union expenditures in this regard are legally different from a utility's providing of gas or telephone services, other than to assert that

[3] "Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is…constitutionally distinct from merely compelling lawyers to provide their services....The class of lawyers has no more obligation to pay such expenses than any other class of citizens." 674 F.2d at 1215.

the utility is not an agent of the customer. This assertion is a non-sequitur. Agency does not affect property ownership; otherwise, the principal could demand the property of the agent or demand the agent work without compensation, which has never been true, in any jurisdiction. Appellants' attempt to distinguish how unions and utilities are treated under Art. I, § 13 thus fails.

It has long been held that the labor of a required service is property. *See, e.g., County of Dane v. Smith*, 13 Wis. 585 (1861)(the State cannot "command the time and services of the citizen…and then say that he shall receive no pay for them"); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 440-441 (Alaska 1987)("[i]t has long been recognized that 'labor is property'" in a takings case) (citing authorities in Kansas, Indiana, Missouri, Utah and English common law); *McNabb v. Osmundson*, 315 N.W.2d 9, 22-23 (Iowa 1982) (compensation for attorney services was a "constitutional mandate that private property shall not be taken without just compensation")(internal quotations omitted). *See Doe v. Roe*, 958 F.2d 763, 768 (7th Cir. 1992) ("individuals…have a compensable property interest in their toil and labor," citing Illinois law); *Sudberry v. Royal & Sun Alliance*, 2006 Tenn. App. LEXIS 500 (July 27, 2006) (individual "has a property interest in his labor"); *Colbert v. Rickmon*, 747 F. Supp. 518 (W.D. Ark. 1990); *Samuel v. Johnson*, 2013 U.S. Dist. LEXIS 183642 (N.D. Fla. Dec. 18, 2013)(applying takings analysis to compelled services). In Wisconsin, the only compelled labor held to have no constitutional right to be paid is prison labor. *Borzych v. Litscher*, 2002 U.S.

Dist. LEXIS 28995 (W.D. Wis. Mar. 14, 2002). Services are property in Wisconsin for many if not most purposes, despite Appellants' sweeping contrary claim.[4]

The holding in *County of Dane v. Smith*, *supra*, forecloses any argument that government can compel someone to work without compensation for another unwilling to pay:

> Can the legislature … command the time and services of the citizen, not officially but … [relating] exclusively to his private trade or calling, and then say that he shall receive no pay for them? *We are of opinion that they cannot. …. We do not believe that the legislature have the power generally to say to the physician, the surgeon, the lawyer, the farmer, or anyone else, that he shall render this or that service, or perform this or that act in the line of his profession or business without remuneration.*

13 Wis. at 587-589 (emphasis added). Appellants do not argue that *County of Dane* is no longer good law, but merely quibble whether it is a due process or a takings case.

Representation costs money and requires work. When unions negotiate wages and working conditions, or present grievances, they pay agents to provide this representation, and spend money, as does any service-provider. Prosecuting grievances to arbitration costs significant sums, which include arbitrator and court reporter fees; professional fees; rental for hearing rooms; travel expenses, meals, witness fees and mileage; and

[4] *E.g.*, telephone and video services are defined as property, Wis. Stat. § 943.45; Wis. Stat. § 943.46. *See State v. Steffes*, 2013 WI 53 (2013) (theft of telephone services also constitutes a theft of the electricity used in providing it). Telephone services are property under Wisconsin's taking clause. *Cf. Wisconsin Tel. Co. v. Public Service Com.*, 232 Wis. 371, 379 (1939). Compensated labor constitutes property under Wisconsin law. *E.g.*, Wis. Stat. § 102.835(1)(f) (defining "property" to include compensated services in Workers' Compensation Act); Wis. Stat. § 108.225(1)(g) (same, for Unemployment Compensation); Wis. Stat. § 49.195(3n)(a)6. (same, for child support purposes). Many statutes treat compensated services as property for purposes of theft. *E.g., Loss Prevention Sys. v. Alpha Omega Sec., Inc.*, 229 Wis. 2d 734 (Ct. App. 1999) (theft by contractor statute); *State v. Peters*, 2003 WI 88 (2003) (obtaining services through identity theft).

miscellaneous costs such as supplies, paper, ink and all of the overhead required to produce exhibits, briefing, and other documents. (Supp. App. 78).

Even a single arbitration case for a non-member can cost more than a lifetime of paid dues. *E.g., Hughes Tool Co.,* 104 N.L.R.B. 318, 319–20 (1953) (one arbitration was 30 times a member's annual dues). The record here supports this claim: In the record is proof that a single arbitration cost $6000. In one bargaining unit, the loss of fees from 12 employees constituted $2125.44 per year, or approximately $177 per person. It would take almost 34 years to recoup the cost of this single arbitration. Appellants' contention that these costs are *de minimis* is contrary to the record.

The Unions' property interests derive from revenue generated by union security clauses which require payment of fees in exchange for representation. These services and funds clearly constitute real and substantial property interests for purpose of takings analysis.

II. ACT 1 UNCONSTITUTIONALLY TAKES THE PROPERTY OF THE UNIONS.

A. The Unions Did Not Sue to Overturn "the Wrong Law."

Appellants misunderstand the statutory scheme in Act 1 and the fundamentals of Wisconsin takings jurisprudence when they assert the Unions challenged "the wrong law." Contrary to their argument that the duty of fair representation and "free-riding" are unconnected, Act 1 explicitly and deliberately linked the definition of unions as collective bargaining agents, and hence as exclusive representatives having a duty to non-members, to the prohibition on receiving fees for such services. This linkage was made

by the government, not the Unions. Act 1 effects the taking because it imposes a duty to represent non-members *and* denies just compensation for the compelled services.

Act 1, not the duty of fair representation, is the proximate cause of the Unions' losses. Under Wisconsin takings jurisprudence, it is not the required use of property but the denial of just compensation which violates Art. I, § 13. There is, in other words, no unconstitutional taking without a denial of just compensation. *See Wisconsin Builders, supra,* at ¶36 (takings per se are not prohibited, but the power to take is subject to the requirement of just compensation).

A legislative act can be an unlawful taking. *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶38 (Wis. 2010)(statutory transfer of monies between trust funds); *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶8 (2008)(ordinance challenged as unconstitutional taking). The taking here occurs not because federal, or state law, or both, require unions to represent non-members, but solely because Act 1 prohibits the Unions from receiving just compensation for their compelled services. "[N]o constitutional violation occurs until just compensation has been denied." *Eberle v. Dane County Bd. of Adjustment*, 227 Wis. 2d 609, 638 (1999). *Accord Hoepker v. City of Madison Plan Comm'n*, 209 Wis. 2d 633, 652 (Wis. 1997); *United States v. 101.88 Acres of Land, etc.*, 616 F.2d 762, 767 (5th Cir. 1980)(loss must be proximately caused by the taking).

The proximate cause of the losses to unions is not that they are compelled to be exclusive representatives, but that they are compelled to provide such services to non-members *for free*. That loss is caused solely by Act 1. The Unions did not challenge "the wrong law" by failing to request that the legislature un-do the statutory scheme of

exclusive representation. Wisconsin has long held collective bargaining to be a public good. The State designed that process to be majoritarian and exclusive, so that unions, if they exist at all, must represent all alike, even dissenting non-members. There is no constitutional flaw in this scheme.[5] A flaw exists solely if the State compels a private party to provide services to another, for the good of the State, without compensation. Act 1 does this very thing, and Article I, § 13 prohibits such a statute.

Appellants' argument is obviously specious when applied to any other actor besides a union. Utilities have long been obliged to provide services to all customers without discrimination. They are commonly monopolies, and individual citizens have no choice of providers; yet, the utility must serve these objectors, and the objectors must pay for the services. It is unconstitutional and a prohibited taking for the State to compel the utility to provide the service at a confiscatory rate. *Madison v. Madison Gas & Elec. Co*., 129 Wis. 249, 267 (1906) (forcing a public utility to furnish services at confiscatory rates would be an unconstitutional taking). The customer receiving the service, not the State, provides the just compensation which avoids an unconstitutional taking:

> The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, *the customers must pay for it.*

Wisconsin Tel. Co. v. Public Service Com., 232 Wis. 371, 379 (1939) (emphasis added).[6]

[5] *NLRB v. Allis-Chalmers*, 388 U.S. 175, 180 (1967)(upholding the principle of exclusive representation, even though it extinguishes the rights of individuals to bargain with their employers).

[6] This example also shows that just compensation need not be a certainty; some customers may not pay their bills on time or at all, but the scheme is constitutional so long as the utility can legally attempt to collect the unpaid bill. *See* Part IV, pp. 40ff., *infra.*

Utility rates and the requirement to provide services are not conjoined in a single enactment. Rates change over time, and if a particular rate is deemed confiscatory and unconstitutional, the utility has a right to challenge it under Art. I, § 13. It would be absurd to say the utility is then challenging "the wrong law"—that it should instead challenge the legislatively-granted monopoly of exclusive service. Such an argument would wipe out takings law in every case of required service. The utility has a right to challenge the denial of just compensation, not the taking itself, even though the requirement that the service be provided for customers may have existed for decades. The Unions too have the right to challenge Act 1 for denying them just compensation. They did not challenge the wrong law.[7]

B. The Statutory Scheme Both Imposes a Duty to Represent Non-Members and Deprives the Unions of Just Compensation for the Required Representation.

In Wisconsin, labor unions are defined by statute to be private voluntary associations that represent working people for the purpose of collective bargaining with their employers. This definition was created by Act 1 itself, which enacted a new Wis. Stat. § 111.02(9g) redefining "labor organization" to mean "any employee organization in which employees participate and that exists for the purpose, in whole or in part, of engaging in collective bargaining with any employer concerning grievances, labor disputes, wages, hours, benefits, or other terms or conditions of employment." Because

[7] The suggestion that unions could avoid uncompensated service by ceasing to act as exclusive representatives (i.e., by going out of business) is unserious. Confiscatory rates are not justified merely because a utility could go into another line of business. Any entity could avoid confiscation by ceasing to exist. Article I, § 13 was meant as a brake upon such state power to destroy private entities.

Act 1 added this definition, the State's claim that it does not require unions to provide services to non-members is simply untrue, as is the contention that Act 1 does not impose the duty of fair representation upon unions. The legislature enacted this definition knowing that it would require exclusive representation, including representation of non-members.

The Employment Peace Act defines "collective bargaining" in Wis. Stat. § 111.02(2) to mean bargaining by a majority of the employer's employees in a particular collective bargaining unit, which in turn is defined by § 111.02(3) to mean "all" of the employees of one employer or in a craft, division, department or plant of that employer.

These definitions have consequences. For a union to exist at all in Wisconsin, it must engage in collective bargaining conducted in "units" that include "all" of the affected employees. Unions are therefore, by legislative design, the representatives of "all" the employees in a bargaining unit. It is not possible to have collective bargaining by less than a majority of employees in the relevant bargaining unit, thus eliminating any contention that a Wisconsin union can be a "members only" representative. The Peace Act outlaws bargaining with minority unions in Wis. Stat. § 111.06(1)(e). This statutory prohibition is strictly Wisconsin law. Federal law has no such prohibition.

To be unions in Wisconsin, labor organizations have no choice but to seek to be majority, exclusive representatives of all employees in a recognized or certified "bargaining unit," whether or not they are members. The argument made in the Indiana litigation over its "right to work" law in *Sweeney v. Pence,* 767 F.3d 654 (7th Cir. 2014) and *Zoeller v. Sweeney,* 19 N.E.3d 749 (Ind. 2014), that unions theoretically could be

"members only" representatives, and so "choose" to suffer a taking by being majority exclusive representatives, is foreclosed here. Unions have no choice in Wisconsin and must represent non-members because of the new definition of labor organization created in Act 1. Unions do not voluntarily seek a status that carries it with it a taking; the taking is imposed by state legislative enactment.

The circuit court correctly held that a union "cannot decline exclusive representative status unless it declines to be voted in at a workplace to begin with." (App. 5.) The court below debunked Appellants' theory that the taking is self-imposed by the union's desire to be an exclusive representative: "Neither the State nor Amici have substantiated their argument with any way in which a union could evade this status. The deliberate interplay of Wisconsin statutes and case law make it so." *Id.* (rejecting Appellants' argument as "disingenuous").

Because of this status, Wisconsin law also imposes upon unions an obligation to represent fairly *all* employees in any given bargaining unit, including non-members. *Coleman v. Outboard Marine Corp.*, 92 Wis. 2d 565, 575 (1979); *Mahnke v. Wisconsin Employment Relations Com.*, 66 Wis. 2d 524, 533 (1975)(adopting the federal *Vaca* standard for the duty of fair representation); *Vaca v. Sipes,* 386 U.S. 171 (1967).[8] Merely being a union as defined in Act 1 imposes the costs of representing non-members.

[8] Amici argue that because there is a parallel federal duty, the state duty is not a "taking" in conjunction with the right to work law. They cite no authority for the proposition that a state is relieved from its own constitutional protections because of the creation of parallel federal duties, and none exists. Because Indiana has no state-created duty of fair representation, its takings jurisprudence differs from Wisconsin's. Our state clearly and deliberately imposed the duty of fair representation in Act 1 when it defined unions to be exclusive majority collective bargaining representatives in § 111.02(9g). The "right

These costs are real, substantial and unavoidable, as shown above. The duty of fair representation applies to all aspects of a union's relationship with the employees it represents. Performance of this duty requires unions to expend money and devote considerable human resources to negotiation and enforcement of contracts. It requires a union to spend money and effort on all of the items required to present a modern arbitration case or to negotiate and administer a modern collective bargaining agreement.

The record is undisputed on this point. The State made no serious contention that the Unions can provide any of these services to nonmembers without incurring actual costs. The taking is thus clear, and the only real dispute is over the size of the taking without just compensation.

When discussing the duty of fair representation, Appellants mention only the prong of the duty that includes *negotiations*. The costs of negotiating for non-members may be an incremental (although still real) increase over what it would otherwise be if the union negotiated only for its members—a choice it does not have—but negotiations are not the only facet to the exclusive representation duty, which also includes contract administration and prosecution of individual grievances and arbitrations. *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991)(holding that the duty of fair representation "applies to all union activity"). By ignoring two-thirds of the duty, Appellants have conceded that the circuit court's conclusion is correct.

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to work" law, and its denial of just compensation, is conjoined with the state duty of fair representation. The existence of a federal duty of representation does not disjoin them.

When Act 1 created the definition of unions as exclusive majority collective bargaining representatives, it also outlawed union security or "fair share" clauses in their entirety. Section 5 of the law creates a new statute which prohibits requiring anyone to "[p]ay any dues, fees, assessments, or other charges or expenses of any kind" to a labor organization as a condition of employment, even if they receive compelled services from the union. Act 1 thus outlaws a union from attempting to collect "anything of value" from a non-member as a condition of continued employment—even a non-member who demands representation costing thousands of dollars. Act 1 thus compels a taking of the union's property.

C. Act 1 Is Not Merely an Economic Regulation But a Taking of Property for Public Use Without Just Compensation.

Appellants argue that being compelled to render services for free is merely an economic regulation unions voluntarily agree to suffer because they receive an important governmental power in return, the power of exclusive representation. Appellants here have confused the police power, which enables the legislature to regulate public harms, with the takings clause, which requires the State to compensate owners when their property is taken for the public good. Act 1 does the latter, not the former.

Appellants concede that a regulation can be so severe that it amounts to a taking of private property. If the purpose of such a regulation is to eliminate a public harm, then the power being exercised is *police power*, and any loss of property incurred by the owner is incidental and merely part of distributing the burdens of economic life. No compensation is required.

If the purpose of a law is to advance a public good, however, and private property must be taken for that purpose, then the governmental action is a *taking* which must be compensated, or it is otherwise unconstitutional. Appellants ignore this distinction entirely, and simply argue that the government never needs to compensate owners whose property is used for public or private benefit so long as the imposition is "not severe."[9]

The Wisconsin Supreme Court articulated the distinction between police power and the takings clause in *Just v. Marinette County*:

> "[I]f the damage … ought to be borne by the individual as a member of society for the good of the public safety, health, or general welfare, it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful."… "From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

56 Wis. 2d 7, 15-16 (1972) (citations omitted). A right to compensation for taking of property arises when the property is not inherently a nuisance but rather is being taken for the public good. The Court clarified this concept in *Wisconsin Public Service Corp. v. Marathon County*, 75 Wis. 2d 442 (1977), where it considered forced removal of wires from the property of a utility to facilitate expansion of an airport. Because the wires were not inherently harmful, it was not a police power case, but a taking of private property for the public good. The Court stated:

[9] This position is jarring. Taken literally, it means the State can confiscate property simply for redistribution to other private owners, so long as only small amounts are taken. No case holds that such a scheme is consistent with the takings clause. Several cases explicitly say it is not. *See* Part III, *infra.*

> This case also borders the fine line between taking and … reasonable regulation under the police power. It could be argued that there was no taking, and because the utility retained its property interest there was only an exercise of the police power which…is uncompensable. … [The Court concludes] a taking has occurred. Here the forced removal was because it was useful to the public in that it facilitated enlargement of the airport. The wires were not removed because they harmed the public. The removal is more like a taking than the exercise of the police power.

Id. at 448-449.

Collective bargaining and exclusive representation cannot be characterized as "public harms." Both are legislative creations for the public good, and indeed, *refusal* to bargain collectively is declared to be an unfair practice, that is, a public harm, in Wis. Stat. § 111.06(d). The requirement of nondiscrimination in representation likewise is not harm but a public good. The State's attempt to deny compensation to the Unions is therefore not an exercise of police power at all, but a taking. The taking is directly the result of the State's scheme to benefit the public by compelling unions to represent non-members without compensation.

Act 1 is not a mere economic regulation, nor is it analogous to a conditional privilege extended to one engaging in an inherently dangerous activity. Act 1 imposes a statutory obligation on unions to represent non-members for no other reason than that they are employed in a workplace where the majority has chosen a union. It then disables the union from attempting to negotiate an otherwise lawful fair share fee arrangement, so that the required services must be rendered for free, without compensation. It is thus a taking. The circuit court correctly held that the Act violates Art. I, § 13.

D. Act 1 Is an Unconstitutional Regulatory Taking Under Wisconsin Law.

The operation of Act 1 together with Wisconsin's requirement that unions fairly represent non-members constitutes a regulatory taking by the State. Wisconsin has adopted the *Penn Central* analysis for takings under Wisconsin law, which considers three factors—(1) the economic impact upon the property owner, (2) interference with substantial investments, and (3) the character of the governmental action. *Wisconsin Builders Ass'n v. Wis. DOT*, 2005 WI App 160 at ¶¶ 37-38 (2005).

The economic impact of Act 1 is severe. Wisconsin does not allow unions to represent only their members, so it imposes upon them the obligation to represent non-members or to cease to function as labor organizations at all. Wisconsin now deprives unions of all methods of charging non-members for the services that they receive from the unions. In other words, it requires unions either provide free services to non-members or go out of business entirely. The circuit court correctly perceived the economic impact of this condition is severe.

The magnitude of the taking is large. Immediately after Act 1 passed, the Unions began to incur monthly losses in membership and fees constituting a significant percentage of their revenues. For example, IAM District 10, which represents about 9000 employees, began losing $8000 per year in just two bargaining units. These losses are large relative to the small size of the Unions.

Appellants trivialize these losses by relying entirely upon theoretical studies, which are contradicted by the actual record here, arguing that the impact of "right to work" laws is minimal. Extra-record "evidence" is "nothing but an 'unsubstantiated

assertion…by counsel.' Assertions of fact that are not part of the record will not be considered on appeal." *In re City of Superior*, 164 Wis. 2d 718, 728 (Ct. App. 1991), *citing Jenkins v. Sabourin*, 104 Wis. 2d 309, 313, 311 N.W.2d 600, 603 (1981). *See also Banks v. Thomas*, 2012 U.S. Dist. LEXIS 13904 (S.D. Ill. Feb. 6, 2012)(scholarly articles are hearsay and inadmissible). None of these articles were even cited to the court below prior to the summary judgment ruling in favor of the Unions. These new arguments raised for the first time on appeal have been forfeited.[10]

The circuit court correctly found the Unions have their investment-backed expectations defeated by Act 1. (App. 10).[11] The only sources of revenue for unions are the fees they charge employees and the investment income from their accumulated reserves.[12] Unions determine what dues to charge members by financial planning for anticipated expenses, with the balance going to their treasuries deposited in their investments to act as reserves. The State, through Act 1, is decreasing membership and prohibiting charges to non-members; the cost to represent non-members will increase as their numbers rise. The Unions must either charge more to paying members (assuming

[10] The specific argument sought to be preserved must have been made to the circuit court; merely raising a general issue is not sufficient. *E.g.*, *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)(explaining the forfeiture rule requires that, to preserve its arguments, a party must "make all of their arguments to the trial court").

[11] "Evaluation of the degree of interference with investment-backed expectations…is one factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001).

[12] Unions are not allowed to charge non-members extra for services that are provided to members in exchange for their dues. *See Columbus Area Local, Am. Postal Workers Union (U.S. Postal Serv.)*, 277 N.L.R.B. 541, 543 (1985)("[c]harging nonmembers the cost of providing a service which members get free (even though they pay dues)" is unlawful).

members will increase their own dues to benefit "free-riders") or deplete their investments. Unions necessarily deplete their accumulated reserves and diminish the investment expectations of its membership in those reserves to represent non-members who refuse to pay their fair share fees. Over time, their reserves will be wiped out, defeating their investment-backed expectations.

The State's action thus literally interferes with the investment-backed expectations of the Unions and their remaining members. The "right to realize investment earnings" is a property right under Article I, § 13, such that removal of any part of a common fund constitutes a taking. *Wisconsin Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶¶88-90 (Wis. 2010). "Any improper transfer infringes upon this right." *Id.* The Unions' right to enjoy increases in their net assets is a protected property interest, *id.* at ¶91, and that interest is taken by the State when it prohibits collection of fair share fees and obliges the Unions to transfer their property for the benefit of non-members without compensation when it represents them. *See Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd.*, 207 Wis. 2d 1, 19-20, 558 N.W.2d 83 (1997)(interest in receiving distributions from future surpluses was a protected property interest under Wisconsin Constitution). The Unions have a right to be compensated justly for the expenses on behalf of non-members the State requires unions to make. The State is not entitled to use the Unions' reserves as a public resource without just compensation.

Appellants respond in two ways. They assert that the Unions could be paper representatives only, seeking the status of exclusive representative but performing no actual services. They also assert that the Unions' losses are self-imposed because they

seek to be exclusive representatives in the first place—that they could avoid the taking by choosing not to be "labor organizations" at all. Both arguments are fallacious.

It is simply not true that a union could, by curtailing its own activities to a bare minimum, avoid the unconstitutional taking in Act 1. The State requires unions to provide non-members the same representation it provides to members. Appellants' disingenuous argument is that the Unions can avoid the unconstitutional taking they suffer if they provide no services to anyone, even members willing to pay for them. Unions cannot avoid the unconstitutional taking imposed by Act 1 by doing nothing. The Attorney General himself has argued, and Wisconsin courts agree, that there is a minimum standard of representation below which a union violates its statutorily-imposed duty of representation. *E.g.*, *SEIU Local 150 v. WERC*, 2010 WI App 126 (Ct. App. 2010)(wherein the Attorney General argued that a union had in a particular case provided less than the minimum required standard of representation).

While there may be some variation in the amount of representation provided, there is a minimum standard, and it costs money to provide that minimum. Appellants' assertion that unions may refuse to represent non-members on the basis that it is too expensive to do so has specifically been rejected by the Wisconsin Supreme Court. *E.g.*, *Mahnke v. Wisconsin Employment Relations Comm'n*, 66 Wis. 2d 524, 534 (1975)("a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation").

Any argument that unions could incur no costs to represent non-members is absurd. If each employee were responsible for bearing the cost of his own representation,

it could hardly be contended that a non-member's self-representation would cost nothing. If she were discharged or suspended, she would bear the cost of the arbitration proceeding including all the same costs unions bear today. These costs do not disappear because they are borne by the employees collectively in a union rather than by the individual.

Appellants mistakenly rely upon *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). *Monsanto* held that a large chemical producer could be forced to share chemical data pertaining to pesticides with the EPA, and ultimately, competitors, on the grounds that the pesticide industry was historically subject to comprehensive regulation. The Court was also influenced by the police power doctrine because pesticides are poisonous, i.e., a regulated harm.

Monsanto is directly contrary to well-established Wisconsin takings jurisprudence. In *Noranda Exploration, Inc. v. Ostrom*, 113 Wis. 2d 612, 620 (1983), a statute required a private party to give away its geologic survey data to other private parties for free by publication. *Id.* at 629. The Wisconsin Supreme Court held that "[i]n such a case, the usual 'police power' 'balancing' analysis is not appropriate, since the government's acquisition of private property is in some ways more closely akin to a permanent physical occupation of property." *Id.* The Wisconsin Supreme Court found that a taking did occur. It invalidated the statute and enjoined its enforcement.

Even assuming *Monsanto* were not inconsistent with Wisconsin takings jurisprudence, it is clearly distinguishable on a ground cited by the circuit court. Unlike a giant chemical manufacturer, which could exit the pesticide market and still remain

profitable in one of its many, other fields of endeavor, Wisconsin law allows labor unions in Wisconsin to have exactly one business model—exclusive representative status in majority units. Unions cannot exit the "representation" market without ceasing to exist. The regulation is therefore severe, and has the character of a physical occupation by the State. In *Monsanto* by contrast, the requirement to disclose some particular pesticide data (but not all of the trade secrets for the manufacturer's many lines of business) was a mere economic regulation.[13]

Appellants misstate the ruling in *Monsanto.* It did not hold that government may take private data collections merely because an industry is regulated. The statute regulating pesticides, FIFRA, was amended several times. The Court found that takings had occurred under some iterations of the statute; later, after amendment, the statute provided just compensation. This compensation was not, as Appellants imply, the privilege of selling dangerous pesticides, but actual money. FIFRA provided that Monsanto's data could not be used without its consent for 10 years, and for 15 years thereafter, it received monetary compensation. 467 U.S. at 994-995. Monsanto could also sue under the Tucker Act for further compensation. *Id.* at 1019.

Here, by contrast, the State requires the Unions to give away their sole service, representation, for the benefit of people who will not pay for it, with no compensation at all. This taking of union property is complete and irreversible: The costs of prosecution for a non-member's grievance arbitration, once spent, are gone and can never be

[13] *Monsanto* was not cited to the circuit court until the stay litigation, after summary judgment was decided. The argument was forfeited by not being raised below. *Rogers*, *supra*.

retrieved. This use of union property is thus closely akin to an "occupation" of that property by the State, as the Court found in *Noranda*, *supra*.

State ex rel. Dressler v. Circuit Court for Racine County, 163 Wis. 2d 622 (Ct. App. 1991) is inapposite. In *Dressler*, a private attorney took a $50,000 mortgage on a defendant's home to secure his fee, and when there was a deficiency from the sale, sought to be appointed by the court with compensation for the difference between his fee and the sale proceeds. There was nothing involuntary about the service by the attorney, and the deficiency resulted from the client's inability to pay, not from any act of the State of Wisconsin.[14]

Appellants also cite *Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121 (1st Cir. 2009) where Maine prohibited hospitals from turning away indigent uninsured patients but also reimbursed the hospital through its Medicaid program. The hospital suffered temporary, limited losses, but Maine did not condition its certification on providing free care and neither prohibited payment to the hospital nor attempts by the hospital to collect its fees. The losses to the hospital in *Harvey* were about 0.5% of its revenues. These facts are wholly unlike Act 1, which does not apply merely to the indigent, but to every employee who simply does not wish to pay, and which criminalizes attempts to collect fees for services actually rendered. The losses to the Unions here in a single bargaining unit were 10%—many times the proportionate loss in *Harvey*.

[14] Here, service to non-members *is* compelled by the State. Act 1 does not apply only to non-members who are indigent; rather, the State allows them to *choose* not to pay but still mandates the service. Nothing in *Dressler* prevented the attorney from seeking to collect his deficiency judgment from the client. Act 1 does specifically prohibit unions from negotiating union security contracts that allow for the payment of fair share fees by non-members.

A doctor can decline Medicare patients and still practice medicine. A chemical manufacturer can exit the pesticide market and still be a large profitable company. By contrast, a union in Wisconsin either becomes an exclusive representative and has its property taken by the government, or it ceases to act as a union at all. Appellants tellingly have no answer to this Hobson's choice for unions—either suffer an unconstitutional taking, or go out of business.

Appellants also analogize Act 1 to *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where mine operators challenged the Coal Act's formula for allocating health care premiums for miners employed or formerly employed by them. The formula resulted in massive, retroactive liability. The Court splintered into five opinions. The plurality and main opinion of the Court found a taking.[15] One of the dissenting opinions (Justice Kennedy's) stated that there is no taking of property, in part, where a statute "is indifferent to how the regulated entity elects to comply or the property it uses to do so," and a different dissent (Justice Breyer's) stated that the takings clause does not apply to "an ordinary liability to pay money." 524 U.S. at 554.

The taking worked upon unions by Act 1 has nothing in common with the Coal Act. Act 1 prevents unions from seeking fees for having to perform required services. It is not a direct liability to pay money as in *Eastern.* The Coal Act, unlike Act 1, did not attempt to prevent coal mines from seeking any compensation. Justice Kennedy stated:

[15] The judgment of the Court was announced by Justice O'Connor, and joined by Chief Justice Rehnquist and Justices Scalia and Thomas. This opinion was not joined by a fifth Justice; the votes needed to declare the Coal Act unconstitutional were supplied by justices who opined that the statute offended due process because it imposed liability retroactively.

> The Coal Act does not appropriate, transfer, or encumber … even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Id. at 540. The large retroactive liability in *Eastern* was no different in concept from the minimum wage. It was imposed only for miners formerly employed and paid by the coal companies, from whom the mines had already received the consideration of work.

Act 1 however does more than merely reaffirm exclusive representative status and the duty of fair representation; it forbids unions to charge the recipient of those services any amount of money. Because unions have no other assets, it *does* act to appropriate a specific fund (the union's treasury) and specific services—the only ones in fact that unions provide. The character of the governmental intrusion is thus more akin to a physical occupation of property than a mere monetary liability.

Second, Act 1 is clearly not "indifferent" to "how the regulated entity seeks to comply or the property it uses to do so," *id.*, but rather specifically forbids charging non-members any amount for the services they are required to be provided. It is thus not "indifferent" as to how unions pay for the services they are required to provide. The very goal of Act 1 is to ensure that the recipients of the mandated services do *not* pay for them.

If Appellants were correct that *Eastern* has the sweeping import they attribute to it, then a utility could be required to provide free services for no compensation without offending the Wisconsin Constitution, a conclusion at odds with the precedents in *Wisconsin Tel. Co., supra* and *Madison Gas, supra.* The requirement that utilities provide services could also be likened to simple liabilities to pay money. It could be said that no "specific" piece of property is regulated by a law requiring the provision of free

telephone service or free electricity. Wisconsin law recognizes that such requirements are confiscatory and unconstitutional. The five opinions in *Eastern* do not alter this common sense conclusion.

Appellants overstate the import of *Connolly v. PBGC*, 475 U.S. 211 (1986). It does not hold that the takings clause is never implicated by "legislation [that] requires one person to use his assets for the benefit of another." *Id.* at 223. In *Connolly*, employers were required to pay for vested but unfunded pension liabilities they incurred by participating in a private pension fund. This liability was purely monetary, like the minimum wage, and was consideration for work already done, as in *Eastern*. *Id.* The employers in *Connolly* were voluntary actors; no law required them to participate in that, or any, pension fund. Unions have no choice whether to provide services to non-members. Act 1 does not merely require them to provide services to non-members, but prohibits them from being compensated.

The legislative power to create causes of action does not mean that the legislature can take property from one private person and give it to another. If it could, the State could require utilities (or any business) to give away their products for free to anyone who objected paying for them. It is already established that such is an illegal confiscation. *Wisconsin Tel. Co., supra* and *Madison Gas, supra.* While *Connolly* says not every monetary liability is a taking, it does not overrule *Penn Central*'s holding that severe statutory regulation has the character of a taking. *Connolly* does not and could not overrule *Stierle v. Rohmeyer*, 218 Wis. 149, 154 (1935), holding that "[t]here is no rule or principle known to our system under which private property can be taken from one

person and transferred to another." The circuit court correctly analyzed Wisconsin takings jurisprudence to find that Act 1 is unconstitutional.

There are indeed regulations that impose costs on private parties that are not takings, but none of those regulations—and the State certainly has not cited a single example—are laws requiring a private party to give away products or services to someone who refuses to pay for them. The State has been utterly unable to distinguish the very common sense notion in *Wisconsin Tel. Co., supra,* that if a business is compelled to provide service, the customer must pay for it. Act 1 tells non-members that the State will force Unions to represent them for free. This is a taking.

III. ACT 1 REQUIRES UNIONS TO USE THEIR PROPERTY FOR OTHER PRIVATE CITIZENS IN VIOLATION OF ARTICLE I, § 13.

The public use prong of the takings doctrine is easily met here, as the circuit court found. (App. 11-12). The terms "public purpose" and "public good" are synonymous for purposes of the takings clause. *Stelpflug v. Town of Waukesha,* 2000 WI 81, ¶22, 236 Wis.2d 275, 287 (2000). It is sufficient to meet this standard that the legislature acted to benefit the public. *Wisconsin Retired Teachers Ass'n, supra,* at 93.

Appellants counter that the legislature intended to benefit "free riders," whom they ironically call "forced riders," arguing that non-members receiving free union services may not actually "want" the services they demand. It stretches credulity to think that a non-member who is fired, and files a grievance to get his job back, does not really "want" the union to arbitrate his case and devote the resources needed to win it. This situation was not created by the Unions whose property is being taken by the State. The State

itself created the statutory scheme of majority representation. It created the "forced riders" and forced the Unions to represent them. The government's desire that "forced riders" it created ride for "free" is no answer to an unconstitutional taking of the property from the party actually injured here, namely the Unions. Non-members have no constitutional right to represent themselves. *NLRB v. Allis-Chalmers, supra.* The only constitutional rights implicated in this case are the Unions' rights to their property.

It is no answer for the State to point out that unions have no constitutional right to fees in public sector cases, such as *Harris v. Quinn*, 134 S.Ct. 2618 (2014). In the public sector, the employer *is* the government. There are First Amendment implications to requiring employees to support unions that are entirely absent from the private sector. *Id.* at 2639-2640. Act 1 does not apply in the public sector. *Harris* does not apply in the private sector and is thus inapposite.

Harris noted that the union there was not performing any services for non-members, whose wages and working conditions were set by statute, not by collective bargaining. The union there was acting as a lobbyist, *id.* at 2637 and n.18, 2640. Under *CWA v. Beck, supra*, since 1988, non-members in the private sector cannot be charged for lobbying, but only for the expenses of collective bargaining and grievance adjustment. Unlike the home health assistants in *Harris*, non-members covered by Act 1 do not have their pay and benefits established by the State, but by collective bargaining. They do receive meaningful services from the Unions, for which they do not pay anything. Their ideological objections to unions are irrelevant, because their employers are not governmental entities.

Act 1 therefore, although ostensibly passed to benefit the public, actually transfers private wealth from unions to non-members. Unions are forced by Act 1 itself to provide real, substantial and expensive services to non-members; the non-members are given an unfettered right to demand services and refuse to pay. In the utility context, this situation has always been known to be unconstitutional confiscation. *Wisconsin Tel. Co., supra.* It is no less here. *State ex rel. Wausau S. R. Co. v. Bancroft*, 148 Wis. 124, 143(1912)("private property should not be taken for public use without just compensation, and by necessary inference *that it should not be taken for private use at all"*); *Stierle v. Rohmeyer*, *supra* at 154 ("There is no rule or principle known to our system under which private property can be taken from one person and transferred to another"); *Calder v. Bull*, 3 U.S. 386, 3, Dall. 386, 388, 1 L. Ed. 648 (1798) (Chase, J.) (legislature cannot "enact 'a law that takes property from A. and gives it to B'") *cited in Eastern Enterprises v. Apfel*, 524 U.S. at 523.

IV. THE "PRIVILEGE" OF EXCLUSIVE REPRESENTATION IS NOT JUST COMPENSATION FOR ITSELF.

Plain upon its face is that the very purpose of Act 1 is to deny just compensation. The law has no point if the point is not to compel union services without compensation. Appellants' main argument on this question has been to urge Wisconsin courts to ignore Wisconsin law and to adopt a dictum from *Sweeney v. Pence, supra,* to the effect that exclusive representation is its own reward—literally, that the duty of fair representation compensates Unions for itself.

Wisconsin takings jurisprudence has long held that just compensation must be paid in the form of legal money. The Court said in *Angelo v. Railroad Com.*, 194 Wis. 543, 547 (1928), "when in sec. 13, art. I, Const., it is required that 'just compensation' shall be given for private property taken for public use, it means, of course, money." The circuit court properly rejected Appellants' request to ignore the Supreme Court in favor of a foreign dictum in the *Sweeney* case.

When an entity is commanded by law to provide services in Wisconsin, it is entitled to be paid, in money, for state-compelled service, by the recipient:

> The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, *the customers must pay for it.*

Wisconsin Tel. Co. v. Public Service Com., 232 Wis. at 379 (emphasis added).

Appellants' argument that exclusive representation is a "valuable government benefit" that compensates unions for their duty to represent non-members is circular. The duty to represent is not a separate legal principle from exclusive representation; the former derives from the latter, because a union has a fiduciary obligation to everyone in the bargaining unit once elected as majority representative. This obligation is not a "valuable benefit" but literally a liability—unions can be sued to enforce it, as the Attorney General himself has done. Unions do not "seek" exclusive representative status; it is, by statute, the only status that a union can have, since all other forms of representation, such as minority unionism, have been outlawed by the state.

"Just compensation is what the owner has lost, not what the condemnor has gained." *Luber v. Milwaukee County*, 47 Wis. 2d 271, 279 (1970). *Accord City of*

Milwaukee Post No. 2874 VFW v. Redevelopment Auth., 2009 WI 84 (2009); *Volbrecht v. State Highway Com.*, 31 Wis. 2d 640 (1966). This rule means that "exclusive representation" cannot be just compensation. Unions have not "lost" exclusive representation as a result of Act 1. They lost the fair share fees that they were formerly allowed to collect before the right to work law outlawed them. Conversely, "exclusive representation" *is* what the State has gained—it has imposed upon unions the duty to perform services that represent a social cost otherwise borne by the non-members themselves.

This scheme offends Art. I. §1 3, which requires the owner of property taken for the public good to be justly compensated. Until Act 1, the only means of obtaining just compensation for the services that Wisconsin law requires unions to provide to non-members was to collect fair share fees. "Union security" clauses allowed unions to share the costs of representation among all those represented, whether members or not. Wisconsin heretofore permitted such arrangements in the now-repealed Wis. Stat. § 111.06(1)(c) and § 111.06(1)(e). The maximum lawful extent of such clauses today is to require that the represented employee pay his or her fair share of the union's regular dues and fees germane to collective bargaining. Unions already cannot impose on non-members charitable or political expenditures. *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

Appellants argue that unions never had just compensation, even before Act 1, because unions cannot achieve fair share clauses without the consent of the employer. Act 1 however makes it unlawful for *both* unions *and* employers to negotiate such

clauses. The statutory scheme prior to Act 1 permitted unions to negotiate fair share fees for providing services to non-members; as such, it satisfied the constitutional requirement of just compensation. "[A]ll that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Hoepker v. City of Madison Plan Comm'n*, 209 Wis. 2d 633, 652 (1997). Heretofore, unions could attempt to negotiate just compensation and failing that, they could provide the service or choose to disclaim any interest in representing the bargaining unit, just as a utility could cease to service a particular area if there were insufficient customers to justify the expense of market participation.

It is undisputed the Unions had successfully negotiated such clauses in the past. This declaratory judgment suit was not brought to complain that employers were bargaining too hard to resist fair share agreements; it complained that both unions and employers were threatened with criminal prosecution for doing what they had agreed to do for many years. Wis. Stat. § 947.20 (criminalizing negotiation of a fair share fee clause); Wis. Stat. § 111.06(1)(L) (making it an unfair labor practice). Not employers, but the State effects the taking here.

Appellants' argument also misunderstands collective bargaining itself. Employers do not dictate to unions whether or not they can have a fair share fee clause. It is a mandatory subject of bargaining, and but for Act 1, a union could negotiate hard to obtain the clause and even strike to enforce its demand. In no sense does the employer have a "veto" power over whether a fair share fee clause exists. Even if the employer exercised a disproportionate influence over this question, however, there clearly were many

employers who were willing to negotiate such clauses prior to Act 1. Doing so now subjects the employer to criminal prosecution as well. Act 1 thus does not merely strengthen the hand of one party to a labor dispute; it forbids both parties from negotiating any clause that provides compensation for the state-mandated representation services. This is a taking without just compensation.

V. THE REMEDY FOR A VIOLATION OF ARTICLE I, § 13 IS TO INVALIDATE THE LAW DENYING JUST COMPENSATION AND ENJOIN ITS ENFORCEMENT.

The remedy for a police power regulation "that goes so far that it has the same effect as a taking by eminent domain . . . is not 'just compensation,' but invalidation of the regulation...." *Williamson Co. Regional Planning v. Hamilton Bank*, 105 S. Ct. 3108, 3122 (1985), quoted by the Attorney General, OAG 3-86, 75 Op. Atty Gen. Wis. 10, 1986 Wisc. AG LEXIS 44 (Jan. 30, 1986). "It must also be borne in mind that in this state a final injunction against the unconstitutional taking of private property, even for public purposes, without compensation, is not a matter of grace but a matter of right." *Schuster v. Milwaukee Electric R. & Light Co.*, 142 Wis. 578, 582 (1910). The circuit court's decision was correct.

CONCLUSION

The circuit court correctly applied Wisconsin takings jurisprudence to conclude that Act 1 works an unconstitutional taking upon unions in this state by compelling them to use their property to provide services to non-members while at the same time prohibiting the Unions from seeking any compensation for them. The court correctly held that this statutory scheme is an unconstitutional taking. The circuit court properly

entered a statewide injunction against the enforcement of Act 1, and this Court should affirm.

Dated this 9th day of September, 2016.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(b) AND (c)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (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 10,923 words.

Dated this 9th day of September, 2016.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

1) I have submitted an electronic copy of this brief, excluding the supplemental appendix, if any, which complies with Wis. Stat. § 809.19(12).

2) This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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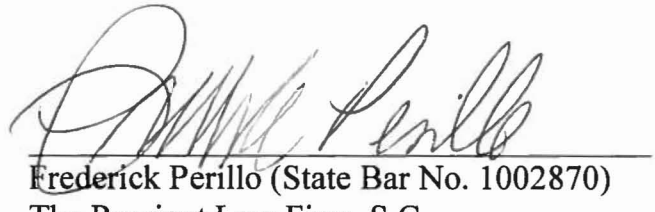
Dated this 9th day of September, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, three (3) copies of the attached Brief and three (3) copies of the Supplemental Appendix were served via U.S. Mail upon:

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State of Wisconsin - Department of Justice
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Madison, WI 53707-7857;

Richard M. Esenberg & Brian McGrath
Wisconsin Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, WI 53202;

Milton Chappell, Nathan J. McGrath & Brandon K. Rowland
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160; and

Timothy Costello, David Froiland, Joseph Campbell & Darius Love
Ogeltree, Deakins, Nash, Smoak & Stewart, P.C.
1243 N. 10th Street, Suite 210
Milwaukee, WI 52305.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 9th day of September, 2016.

Frederick Perillo (State Bar No. 1002870)
The Previant Law Firm, S.C.