No. 16AP820

IN THE WISCONSIN COURT OF APPEALS
DISTRICT III

MACHINISTS 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.

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On Appeal from the April 15, 2016 Judgment in Dane County Circuit Court, Case No. 15-CV-628, the Honorable C. William Foust Presiding

AMICI CURIAE BRIEF OF ARNIE DIERINGER, RANDY DARTY, TODD MOMBERG, DANIEL SARAUER, DANIEL ZASTROW, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS' APPEAL

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INTRODUCTION

Pursuant to the Court's May 23, 2016 order providing for Amici's participation in this matter, Amici Curiae, who are identified in their May 18, 2016 Motion to File Amici Brief, file this brief in support of Defendants-Appellants' appeal of Dane County Judge C. William Foust's judgment, which found certain provisions of 2015 Wisconsin Act 1 ("Act 1") constitute an "unconstitutional taking of the private property of labor organizations in the State of Wisconsin for a public purpose and without just compensation, in violation of Article 1 § 13 of the Wisconsin Constitution" and held these provisions to be null and void. Judgment (R. 45:1-2).

ARGUMENT

The Circuit Court's holding that Act 1 effects an illegal taking under article I, section 13 of the Wisconsin Constitution rests on faulty legal and factual premises, and should be reversed for the following reasons. 1) Act 1 does not, in fact, cause a "taking" of any property; 2) Unions have no vested property interests or investment-backed expectations in future forced fees from nonmembers; and 3) Unions are justly compensated for their representational services.

I. Act 1 Does Not Effect a Taking

The Circuit Court set forth the following elements of a successful takings claim: "(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." (R. 44:7 (quoting *Wis. Med. Soc'y, Inc. v. Morgan*, 328 Wis. 2d 469, 491, 787 N.W.2d 22, 33 (2010)).) Act 1 neither takes a property interest nor compels a service of any kind. Instead, it *prevents* a forced taking, namely, the taking of monies from nonmember employees as a condition of their employment. At its core, Act 1 merely makes it illegal to force nonmember employees to pay fees to a union as a condition of employment. Wis. Stat. § 111.04(3)(a). Thus, the Circuit Court has declared Act 1 unconstitutional under a "takings" theory when Act 1, in fact, takes nothing, and actually protects the private property rights of employees.

Despite this, the Circuit Court found Act 1 causes a "taking" by compelling Unions to expend their resources providing services to nonmembers (without being paid by nonmembers). (R. 44:7-11.) The Circuit Court misunderstood basic labor law concepts when it found that Unions "*must* engage in collective bargaining" and must become "the sole—or exclusive—representative of all employees in the workplace." (R. 44:4 (emphasis added).) To the contrary, Unions *voluntarily* assume this exclusive

representative status. Unions could instead choose to operate as professional organizations, without being exclusive bargaining representatives. It is only when an organization makes the choice to be an exclusive representative that it is then required to represent nonmembers under the concomitant duty of fair representation. This duty of fair representation is imposed, *not by Act 1*, but by Section 9(a) of the National Labor Relations Act ("NLRA"). *See* 29 U.S.C. § 159(a); *see also Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 86-87 (1989); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Thus, if there were a taking, it would be effected by federal law not Wisconsin law. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014) (holding that because the NLRA, not state law, requires the duty of fair representation, the Indiana Right to Work law did not "take" property from unions by merely banning compulsory fees). But even a challenge to the NLRA would fail for the same reasons this lawsuit fails—there is no taking and, even if there were a taking, Unions are adequately compensated by the power and privileges of exclusive representation.

The central question the Circuit Court failed to consider is: how does Wisconsin take *anything* when it is the federal government requiring a union to provide equal representation when it chooses to become an exclusive representative? Indeed, it is Congress, not Wisconsin, that "has seen fit to

clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, [and] has also imposed on the representative a corresponding duty." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) (citation omitted). "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft." *Id.* at 204.

The Seventh Circuit recognized in *Sweeney* that a Right to Work law "does not 'take' property from the Union—it merely precludes the Union from collecting fees designed to cover the costs of performing the duty" of fair representation, which was a duty voluntarily assumed by the union when it chose to become employees' exclusive representative. 767 F.3d at 666; *see Zoeller v. Sweeney*, 19 N.E.3d 749, 752-53 (Ind. 2014).

II. Unions Do Not Have a Protectable Property Interest or Investment-Backed Expectation in Receiving Forced Fees for Their Services

The Circuit Court found that Unions have a "property interest in the services they perform for their members and non-members" and that spending union dues and nonmember forced fees on services was "enough to establish that unions do have a legally protectable property interest at stake."

(R. 44:9.) It later accepted the Unions' claim that they had a "distinct, investment-backed expectation . . . that they would always have a right to collect fair-share payments from non-members as long as they were compelled by law to provide them services." (R. 44:10.) These findings, however, are erroneous.

As noted above, the NLRA's requirement that Unions spend money on services that might also benefit nonmembers is not a taking. Moreover, Unions have no protectable interest—"investment-backed" or otherwise—in future receipt of forced fees.[1] Whatever property interests they possess as exclusive representatives are defined by the NLRA. The NLRA *expressly contemplates* that states may prohibit forced fees, 29 U.S.C. § 164(b), so Unions have always known that revenue source—other people's money[2]—could vanish.

In *Ruckelshaus v. Monsanto Co.*, the Supreme Court ruled that Monsanto's "reasonable investment-backed expectations" were not disturbed when the EPA chose to use Monsanto's trade secrets (which it had voluntarily turned

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[1] "[U]nions have no constitutional entitlement to the fees of nonmember-employees." *Davenport v. Wash Educ. Ass'n*, 551 U.S. 117, 185 (2007). Instead "[a] union's 'collection of fees from nonmembers is authorized by an act of legislative grace,' . . . one that we have termed 'unusual' and 'extraordinary.'" *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2291 (2012) (citations omitted).

[2] Forced fees that Unions would confiscate from nonmembers, absent a Right to Work law, are not Unions' property at all, but "*other people's* money" that they can "acquire and spend" only with an "extraordinary state entitlement." *Davenport*, 551 U.S. at 187.

over in exchange for "the economic advantages of a registration") in a manner expressly authorized by law. 467 U.S. 986, 1006-07 (1984). Here, Unions voluntarily assumed the burdens of exclusive representation in exchange for its benefits, *see* Section III, *infra*, knowing that the State could eliminate one of those benefits at any time. *See* 29 U.S.C. § 164(b); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (holding there is no taking when the "interests were not part of [the property owner's] title to begin with"). As even the Circuit Court noted, a party does not have a property interest if the interest is merely "an abstract need or desire or unilateral expectation." (R. 44:7 (quoting *Wis. Med. Soc'y*, 328 Wis. 2d at 493, 787 N.W.2d at 34)); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (the Takings Clause "does not apply to government-imposed financial obligations that 'd[o] not operate upon or alter an identified property interest.'" (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998)).

Here, Unions assumed the mantle of exclusive representative knowing that Wisconsin could pass a Right to Work law and that the duty of fair representation would still attach. Now Unions claim (and the Circuit Court accepted) that they have vested property interests in post-Act 1 forced fees.[3]

[3] Per section 13 of Act 1, relevant contracts that already contain forced fees provisions are not impacted by Act 1's prohibition.

(R. 44:10.) But even absent Act 1, Unions possess no protectable property interests in future forced fees because federal labor law allows employers and employees unilaterally to deny such interests, and to refuse or eliminate forced fees from any labor contract.

First, employers have the protected right *not* to agree to forced fees provisions in contracts. 29 U.S.C. § 158(d); *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (NLRA "does not compel agreements between employers and employees."); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 106-07 (1970). NLRA Section 8(d) requires only that employers and unions confer in good faith and meet at reasonable times regarding subjects of bargaining, 29 U.S.C. § 158(d), and in bargaining, neither side need agree to a proposal or make any concession. *H.K. Porter Co.*, 397 U.S. at 106. This extends to forced fees clauses, which are only subjects of good-faith bargaining in non-Right to Work states, and no guarantee of union income. *See Nat'l Steel & Shipbuilding Co.*, 324 N.L.R.B. 1031 (1997). In fact, many employers have successfully resisted entering into such agreements. *See, e.g.*, *id.*; *Hickinbotham Bros. Ltd.*, 254 N.L.R.B. 96 (1981); *Phelps Dodge Specialty Copper Prods. Co.*, 337 N.L.R.B. 455 (2002).

Second, employees have a statutory right to decertify the union, meaning the employees can revoke a union's exclusive representative status. *See* 29 U.S.C. §

159; *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160 (1958) (decertification elections are permissible three years into a contract).

Third, the NLRA gives employees the statutory right to eliminate a forced fees requirement in their contract via deauthorization elections. 29 U.S.C. § 159(e); *see Covenant Aviation Sec., LLC*, 349 N.L.R.B. 699 (2007); *Albertson's/Max Food Warehouse*, 329 N.L.R.B. 410 (1999); *Andor Co.*, 119 N.L.R.B. 925 (1957); *Great Atl. & Pac. Tea Co.*, 100 N.L.R.B. 1494 (1952). Any number of variables can extinguish Unions' expectation of forced fees, and the Circuit Court's findings that they have protectable property interests in *future* forced fees has no legal basis.

III. Even If There Were a "Taking," *Arguendo*, Unions Are Owed No Compensation as They Receive Just Compensation When Granted the Extraordinary Privilege of Being Nonmembers' Exclusive Representatives

The Circuit Court defied decades of precedent when it determined that a union's acceptance of the extraordinary power of exclusive representation is not, in and of itself, "just compensation" for any "losses" it incurs in representing nonmembers. (R. 44:13-15.) Instead, the Circuit Court hitched its rickety logic to a *dissent* written by Seventh Circuit Judge Wood in *Sweeney*, calling her argument "prescient to this case," while it simultaneously rejected the reasoning of the *Sweeney* majority. (R. 44: 13-15.)

Exclusive representative status is, however, a significant boon to unions. It vests them with the extraordinary legal authority to speak and contract for all bargaining unit employees, whether or not the employees support unions. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees"). A union's right to deal solely with an employer on the employees' behalf is another status benefit. Overall, an exclusive representative's powers are "comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele*, 323 U.S. at 202. And unlike any other freely contracting party, unions receive the statutory power as the exclusive bargaining representative to force the employer "to bargain in good faith," which is the "*quid*" for the "*quo*" of "tak[ing] on the responsibility to act as a genuine representative of all the employees in the bargaining unit, 'irrespective of union membership or the existence of a union security contract.'" *Machinists, Local 697 (H.O. Canfield Rubber Co.)*, 223 N.L.R.B. 832, 834 (1976) (quoting *Peerless Tool & Eng'g Co.*, 111 N.L.R.B. 853, 858 (1955), *enforced sub nom. NLRB v. Die & Tool Makers Lodge No. 113*, 231 F.2d 298 (7th Cir. 1956)). Moreover, exclusive representatives secure various forms of immunity from

federal anti-trust laws. The Supreme Court has "found in the labor laws an implicit antitrust exemption that applies where needed to make the collective-bargaining process work." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996).

The federally-conferred powers and privileges that come with being an exclusive representative are their own, extraordinary, reward, which unions seek regardless of whether they can extract forced fees from nonmember employees.[4] Both the Seventh Circuit and the Indiana Supreme Court have rightly held that Indiana's similar statutory ban on forced fees does not unconstitutionally demand services from unions without just compensation, but rather "fully and adequately compensate[s a union] by its rights as the sole and exclusive member at the negotiating table." *Sweeney*, 767 F.3d at 666; *see also Zoeller*, 19 N.E.3d at 753.

The NLRB recognized the valuable compensation unions receive when they are the exclusive representative when it affirmed an administrative law judge's finding that:

> [the union] has a duty of fair representation because it 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,

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[4] Unions continue to organize employees in Right to Work states. *See, e.g.*, Harriet McLeod, *Vote at Boeing South Carolina Plants Sets Up Labor Showdown*, Reuters (Mar. 25, 2015, 3:17 p.m.), http://reuters.com/article/2015/03/25/us-boeing-machinists-vote-idUSKBN0ML1Z320150325 (describing IAM efforts to unionize Boeing's aircraft manufacturing employees in Charleston, South Carolina).

> and that value is sufficient compensation for whatever services the [union] perform[s] for employees.

IATSE, Local 720 (Tropicana Las Vegas, Inc.), No. 28-CB-131044, 2016 WL 1255306, at *2 (NLRB Mar. 30, 2016); *accord Machinists, Local 697*, 223 N.L.R.B. at 834-35. Unions are justly compensated for the representational services they must provide under the duty of fair representation; they are granted the unique privilege of speaking and contracting on behalf of *all* bargaining unit members, with no competition (once the status is granted) from other labor organizations or individual employees.

Unions voluntarily compete for the valuable position as exclusive representative of a bargaining unit. Indeed, no union is forced into such a role, even in Wisconsin. The Circuit Court mused that Unions "must" be exclusive representatives and represent nonmembers per the current law. (R. 44:4.) That is incorrect. Unions *chose* to become exclusive representatives and now must accept the obligations associated with that choice. Similarly, the State does not force anybody to drive a motor vehicle on public roads, but once somebody chooses to, they must accept the responsibilities that accompany that choice. The application fees, passing a driving test, securing and renewing a driver's license, and even the mandatory motor vehicle insurance—none of those are "takings" without compensation, yet are mandatory when one *chooses* to drive.

The Circuit Court misses the obvious; that Unions weigh the costs and benefits of serving as a bargaining unit's exclusive representative and voluntarily choose to enter the market—even when forced fees are not available.[5] Many organizations make this choice (whether to enter a regulated market) every day. The Supreme Court noted this in *Monsanto*: "That Monsanto is willing to bear this burden in exchange for the ability to market pesticides in this country is evidenced by the fact that it has continued to expand its research and development and to submit data to EPA despite the enactment of the [law it challenged]." 467 U.S. at 1007.

If Unions find the duty of fair representation is too burdensome without forced fees, they are free to disclaim representation and abandon their exclusive representation status—even during an existing contract. *See Trump Taj Mahal Assocs.*, 329 N.L.R.B. 256 (1999) (union faced with a deauthorization election may lawfully disclaim representation and walk away). Just as other organizations decide whether to enter or remain in markets, subject to varying regulations, Unions' choice to enter, or remain in, the labor marketplace and

[5] Any reliance by Unions on *Cone v. Nevada Service Employees Union*, 116 Nev. 473, 998 P.2d 1178 (2000) is misplaced. In *Cone*, the Nevada court allowed a union to charge nonmembers a service fee for grievance representation, but only because Nevada's public sector bargaining statute did *not* make the union the employees' exclusive bargaining representative for purposes of filing a grievance, and allowed individuals to forego union representation. 116 Nev. at 478, 998 P.2d at 1181-82. Here, individuals under the exclusive representation regime of the NLRA or Wisconsin law have no right of "individual grievance representation." *See, e.g.*, *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975) (employee covered by the NLRA has no right of self-representation in processing a grievance, and all his grievances are subservient to the union and its contract.

assume the role of exclusive representative. *See Monsanto*, 467 U.S. at 1007 (quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979) ("[S]uch restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.'").

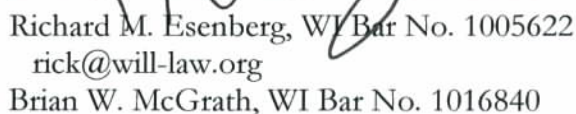
As the Seventh Circuit recognized in *Sweeney*, it "seems disingenuous not to recognize that the Union's position as a sole representative comes with a set of powers and benefits as well as responsibilities and duties." 767 F.3d at 666. That Circuit also acknowledged: "the union is justly compensated by federal law's grant to the Union the right to bargain exclusively with the employer." *Id.* Even if Act 1 does effect a taking, which it does not, Unions have been justly compensated for their services.

CONCLUSION

Amici respectfully request that the Court reverse the Circuit Court's judgment and decision.

Dated: August 8, 2016

Respectfully submitted,



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RULE 809.19 FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sections 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,988 words, calculated using the Word Count function of Microsoft Word 2010.

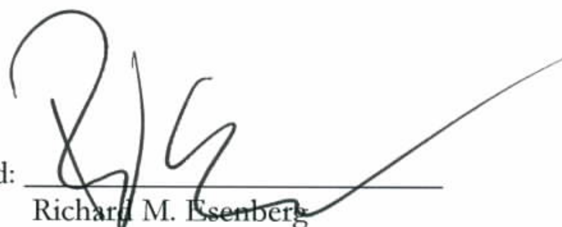
Dated: August 8, 2016

Signed: ______________________
Richard M. Esenberg

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief that complies with the requirements of Section 809.19(12). 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 parties to this matter.

Dated: August 8, 2016



Signed: ________________________
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