STATE OF WISCONSIN CIRCUIT COURT BRANCH 14 DANE COUNTY

MACHINISTS LOCAL LODGE 1061, et al.,

Plaintiffs,

v. Case No. 15-CV-628

STATE OF WISCONSIN, et al.,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is about 2015 Wisconsin Act 1 ("Act 1"),[1] which is Wisconsin's right-to-work law. Twenty-five states have now enacted similar laws, and legal challenges have been roundly rejected, including by the U.S. Court of Appeals for the Seventh Circuit in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014). Nonetheless, Plaintiffs now ask this Court to be the first and only court in the country to grant summary judgment in favor of labor unions based on a theory that a right-to-work law works an unconstitutional taking. Plaintiffs' bold request should be refused for the very simple reason that no case supports their novel takings theory.

[1]Attached as Exhibit 1.

Act 1 does not take any private property from labor unions. The law simply grants the freedom to choose—it provides that Wisconsin workers are *not* required to join unions and are *not* required to pay union dues as a condition of employment in the private sector. Whether unions adjust to this new economic reality is their choice, but Act 1 does not unconstitutionally take any union property.

If anyone supports "taking" property, it is Plaintiffs. It is Plaintiffs who want to confiscate money from workers who do not want to be part of their unions. There is simply no case or legal proposition supporting the premise that a labor union has a property interest in money in the pockets of workers who are not union members. "[U]nions have no constitutional entitlement to the fees of nonmember-employees." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007). Furthermore, the State has not "taken" any union funds or services and given them from "A" to "B." And the facts do not even suggest a viable takings claim based upon a "regulatory takings" theory.

Plaintiffs have not proven Act 1 to be unconstitutional beyond a reasonable doubt. Therefore, they have failed to establish that they are entitled to judgment as a matter of law under Wis. Stat. § 802.08(2), and the motion for summary judgment should be denied. The Court should instead enter summary judgment in Defendants' favor.

FACTUAL BACKGROUND

Act 1, effective as of March 11, 2015, provides that private-sector employees are not required to join a union, pay union dues, or pay so-called "fair-share" assessments as a condition of employment. (*See* Ex. 1, §§ 4-5.)[2] Through the enactment of Act 1, Wisconsin joined 24 other states with similar right-to-work statutes or constitutional provisions.[3] *See Sweeney*, 767 F.3d at 663. Many of these right-to-work laws have existed for decades. *Id*.

The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69, applies to most private-sector employers. While labor relations are typically regulated by federal labor law, state right-to-work laws are expressly authorized by section 14(b) of the NLRA. *See* 29 U.S.C. § 164(b); *see Sweeney*, 767 F.3d at 659. Under the NLRA, closed shops—businesses operating with a union-security agreement whereby an employer agrees to hire only union members—are banned.[4] The NLRA permits, however, an arrangement requiring nonunion members to pay "fair share" assessments to their exclusive bargaining representative. As an alternative to this arrangement, the NLRA allows the States to ban union-security agreements

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[2]*See also* Wis. Stat. § 111.04(2) and (3).

[3]Act 1 primarily amended the Wisconsin Peace Act. *See* subchapter I of Wis. Stat. ch. 111. The Wisconsin Peace Act is mostly pre-empted by the National Labor Relations Act with respect to Wisconsin employers engaged in interstate commerce.

[4]As an example of a union shop clause in an expired collective bargaining agreement. (*See* Affidavit of Gary Dworak ¶ 2, Ex. A, Art. II (Agreement between Manitowoc Ice, Inc. and Clipper City Lodge No. 516, International Association of Machinists and Aerospace Workers).)

altogether so that employees may opt out of paying dues and fair-share assessments. *Id.*; *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 102 (1963) ("Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements" and "it is plain that Congress left the States free to legislate" in the field of union-security agreements.). In short, under the NLRA, the States may choose between fair-share union-security agreements or right-to-work laws. Wisconsin chose the latter.[5]

Just last fall, the Seventh Circuit held that the NLRA did not prohibit Indiana from enacting its right-to-work law, which allows workers to choose not to become members in a union or pay union dues or fair-share assessments as a condition of employment. *Sweeney*, 767 F.3d at 666. And in so holding, the court also decided that Indiana's state law did not violate the Takings Clause of the U.S. Constitution. *Id.* at 665-66. Indiana's right-to-work law is identical to Act 1 in all material respects.

The NLRA imposes a duty of fair representation upon the exclusive bargaining representative. *See, e.g., Lewis v. Local Union No. 100 of Laborers' Int'l Union of N. Am., AFL-CIO*, 750 F.2d 1368, 1375-76 (7th Cir. 1984) (footnote omitted) ("The duty of fair representation was judicially created as a correlative to

[5]Act 1 modified the employer unfair-labor-practices provision of subchapter I of Wis. Stat. ch. 111 to eliminate any exceptions for all-union agreements. (*See* Ex. 1, § 7.) The Act also makes a violation of Wis. Stat. § 111.04(3)(a) a Class A misdemeanor. (*See* Ex. 1, § 12.)

the union's statutory right under section 9(a) of the Act to serve as the exclusive representative for the members of the collective, bargaining unit."). Wisconsin courts have held that its labor laws impose this duty as well. *See Mahnke v. WERC*, 66 Wis. 2d 524, 532, 225 N.W.2d 617 (1975).

An exclusive collective bargaining representative has a duty to fairly represent all employees in both its bargaining with the employer and in the enforcement of the resulting collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Under the duty of fair representation, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id*.

Plaintiffs are not required to offer the expensive services that they claim. (Pls.' Br. 14.) Neither federal nor state law requires a union or other entity to become an exclusive bargaining representative, and no law requires that an exclusive bargaining agent provide a particular level of service to the workers it represents. Indeed, an exclusive bargaining agent's duty to represent workers in grievance disputes results from the collective bargaining agreement itself, not from any law. *See, e.g., Serv. Emps. Int'l Union Local No. 150 v. WERC*, 2010 WI App 126, ¶ 19, 329 Wis. 2d 447, 791 N.W.2d 662 ("Pursuant to most collective bargaining agreements, the union exercises authority over the grievance procedure, has the ability to settle a grievance over an employee's objection and

decides whether to pursue arbitration of a grievance."). (*See also* Compl. Ex. A at 9.)[6]

The collective bargaining agreements submitted by Plaintiffs in support of their motion for summary judgment include articles covering grievance procedure and arbitration. (Affidavit of Patrick T. O'Connor ¶ 3, Ex. A (Agreement between DRS Power & Control Technologies, Inc. and District 10 and Local Lodge 1061, International Association of Machinists and Aerospace Workers, AFL-CIO); Affidavit of Gary Dworak ¶¶ 2-4, Exs. A, C (Agreement between Manitowoc Ice, Inc. and Clipper City Lodge No. 516, International Association of Machinists and Aerospace Workers).) Pursuant to these collective bargaining agreements, the unions offer the service of representation in grievance procedures and arbitration to the employees in the bargaining unit. Grievances can be filed on subjects such as lay-offs, recalls, transfers, job openings, vacancies, and the typical disciplinary actions. For example, one union (District 10) will represent an employee who applies for, but does not obtain, a vacant job within the company. (O'Connor Aff. ¶ 3, Ex. A, Art. III/3.03 and 3.06.) This means that the union will represent the employee beginning with Step Three (*i.e.*, the final step) of the grievance process, and if the grievance is not settled, in final and binding arbitration. (O'Connor Aff. ¶ 3, Ex. A, Art. III/1.01, 4.04, and 4.01 [sic], A-F.) Notably, the union has agreed to

[6]Moreover, the workers represented by the exclusive bargaining agent "do[ ] not have an absolute right to arbitration. The fact that the Union settles a grievance short of arbitration does not, without more, constitute a breach of the duty of fair representation." *Coleman v. Outboard Marine Corp.*, 92 Wis. 2d 565, 573, 285 N.W.2d 631 (1979).

pay half the fees and expenses of the arbitrator chosen and all the fees of any witnesses it produces. (O'Connor Aff. ¶ 3, Ex. A, Art. III/4.01 [sic], D.) These are similar terms agreed to by another union (Local Lodge 516). (Dworak Aff. ¶¶ 2-4, Exs. A, C, Arts. VII, XVII, and XVIII/Sec. 2.) These are expenses over which these unions have collectively bargained. In other words, Plaintiffs have voluntarily agreed to incur these expenses as the exclusive bargaining representatives of the employees in the bargaining unit. No law required these unions to include these services in their collective bargaining agreements.

In sum, while Act 1 permits workers to opt out of union membership or paying dues and assessments, it does not require unions to become an exclusive bargaining representative or perform any specific services. Beyond the duty of fair representation, the services provided by unions result from the unions' choices in entering contracts that they negotiate, not from any statutory obligation. In exchange for performing this statutory duty of fair representation, unions obtain a valuable status: they are the exclusive agent for all employees. The employer may not bargain with an individual or minority group; the union is the exclusive agent and undoubtedly benefits from that enhanced bargaining power.

ARGUMENT

I. Plaintiffs' summary judgment motion is premature.

Plaintiffs filed this motion for summary judgment before this case has even been joined. No Defendant has filed an answer.

Under summary-judgment procedures, a court examines the complaint to determine if it sets forth a claim for relief, and if it does, the court examines the answer to determine if it joins issue, and if it does, it further proceeds to determine the summary judgment on the merits. *Hydrite Chem. Co. v. Aetna Cas. & Sur. Co.*, 220 Wis. 2d 26, 31-32, 582 N.W.2d 423 (Ct. App. 1998). To proceed through this process, the pleadings must be complete; otherwise, the court cannot review a motion for summary judgment. *City of La Crosse v. Jiracek Cos., Inc.*, 108 Wis. 2d 684, 690, 324 N.W.2d 440 (Ct. App. 1982); *Alliance Laundry Sys. LLC v. Stroh Die Casting Co., Inc.*, 2008 WI App 180, ¶ 12, 315 Wis. 2d 143, 763 N.W.2d 167. Therefore, "[h]earing a motion for summary judgment before the pleadings are complete is not authorized by the statute." *City of La Crosse*, 108 Wis. 2d at 690.

Because Defendants have not filed an answer, Plaintiffs' motion for summary judgment is premature and should be denied. The Court should first rule on Defendants' pending motion to dismiss. If the Court denies the motion to dismiss, the Court should grant summary judgment to Defendants for the reasons that follow. Alternatively, if the motion to dismiss is denied and the Court finds that summary judgment is not appropriate, Defendants should be permitted to file and serve an answer, and the case should proceed to a scheduling conference.

II. Standard of review.

If the Court reaches the merits of this motion (notwithstanding the authority provided above), the Court should deny the motion for the reasons set forth below,

and grant summary judgment in Defendants' favor. Summary judgment is permitted only if all of the record evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). The Court may award summary judgment to the non-moving party. Wis. Stat. § 802.08(6).

When considering Plaintiffs' motion, the Court must presume that Act 1 is constitutional. In addition to the normal summary-judgment standards, therefore, Plaintiffs must clear a high bar to obtain summary judgment. "If any doubt exists as to a law's unconstitutionality, it will be resolved in favor of its validity." *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985).

A court must indulge every reasonable presumption necessary to uphold legislation against constitutional challenges. *Quinn*, 122 Wis. 2d at 577; *Wis. Bingo Supply & Equip. Co., Inc. v. Wis. Bingo Control Bd.*, 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979). "Because of the strong presumption in favor of constitutionality, a party bringing a constitutional challenge to a statute bears a heavy burden." *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22 (citation omitted) (internal quotation marks omitted). It is *not sufficient* for a party to demonstrate "that the statute's constitutionality is doubtful or that the statute is probably unconstitutional." *State v. Smith,* 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. Instead, the presumption can be overcome only if the party establishes "that the statute is unconstitutional beyond a reasonable

doubt." *Id.* (quoting *State v. Cole,* 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328).

In addition to the presumption of constitutionality, this Court must also apply the facial-challenge standard. Plaintiffs' only claim is a facial challenge to Act 1. (Compl. 9-10.) Wisconsin courts have recognized that there are "fundamental differences" between facial and as-applied challenges. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2013 WI App 77, ¶ 7, 348 Wis. 2d 714, 834 N.W.2d 393, *aff'd*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302. In *State v. Wood*, the Wisconsin Supreme Court explained the important differences between facial and as-applied constitutional challenges:

> A party may challenge a law . . . as being unconstitutional on its face. Under such a challenge, the challenger must show that the law cannot be enforced "under any circumstances." If a challenger succeeds in a facial attack on a law, the law is void "from its beginning to the end." In contrast, in an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us, "not hypothetical facts in other situations." Under such a challenge, the challenger must show that his or her constitutional rights were actually violated. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim.

2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63 (citations omitted); *see also United States v. Salerno*, 481 U.S. 739 (1987).

To succeed in this lawsuit, therefore, the Plaintiffs must prove that there is no genuine issue as to any material fact and that Act 1 is unconstitutional *beyond a reasonable doubt* in *all* of its potential applications.

III. Plaintiffs have not established that Act 1 is an unconstitutional taking of private property for public use.

The Wisconsin Constitution, like the U.S. Constitution, prohibits the government from taking private property without paying for it: "The property of no person shall be taken for public use without just compensation therefor." Wis. Const. art. I, § 13. An unconstitutional taking occurs when *all* of the following circumstances exist: (1) the plaintiff has a property interest; (2) the government takes that property interest from the plaintiff; (3) the government took the property for public use; and (4) the government did not give just compensation for the property. *See Wis. Med. Soc., Inc.*, 328 Wis. 2d 469, ¶ 38. Here, Plaintiffs cannot establish even one of these factors, let alone all of them.

A. Plaintiffs have not established a legally recognized property interest for purposes of a "takings" claim.

Plaintiffs are not entitled to judgment because they have not established a legally recognized property interest under Wisconsin takings law. A property interest exists if state law recognizes and protects that interest. *Id.* ¶ 41. Importantly, a party has a property interest only if there is a "legitimate claim of entitlement to the property, as opposed to an abstract need or desire or unilateral expectation." *Id*. ¶ 42 (citations omitted) (internal quotation marks omitted). The Seventh Circuit, in *Sweeney,* did not identify any relevant property interest implicated by a right-to-work law. 767 F.3d at 665-66.

Plaintiffs cannot point to the constitution, any statutes, or any contract identifying a legally relevant property interest. They only point to services that they

perform for the bargaining-unit employees, which are covered in a contract with the employer—not in a contract with the employees.

Plaintiffs argue that "Act 1 compels unions to provide services without compensation, [thus] it effects a taking." (Pls.' Br. 13.) Relying upon a Wisconsin Supreme Court case from 1861 and two foreign cases, Plaintiffs focus the Court's attention on their "services" as the relevant property interest and assert that "it has long been held that the labor of a required service is property." (*Id.* at 13-14.) Plaintiffs are wrong.

Plaintiffs' reliance upon *County of Dane v. Smith*, 13 Wis. 585 (1861), is misplaced. (Pls.' Br. 13.) *Smith* is not at all about the constitutional right to just compensation when property is taken for a public use. Instead, the case involved whether the Legislature could lawfully create a statutory scheme whereby attorneys are required to provide free services to indigent criminal defendants. *Smith*, 13 Wis. at 588-89. The Dane County Board of Supervisors refused to pay $25 in fees to counsel who was appointed by the circuit court to represent an indigent defendant who was accused of larceny. *Id.* at 585. These facts are nothing like what Plaintiffs assert in this case regarding "services" to non-members, nor are the *Smith* facts and the law at issue in *Smith* in any way similar to how the right-to-work law operates or what actions it requires Plaintiffs to take. Plaintiffs' services in this case are a voluntary choice—no one, especially not Defendants, are forcing Plaintiffs to provide the level of services that they now claim as "services" being "taken" by the government without just compensation.

Moreover, *Smith* had nothing to do with article I, section 13 of the Wisconsin Constitution, and the case is irrelevant to whether Plaintiffs have a property interest that is recognized under Wisconsin takings law. *See Wis. Med. Soc'y, Inc.*, 328 Wis. 2d 469, ¶ 41 ("[a] property interest is constitutionally protected if state law recognizes and protects that interest") (citations omitted) (internal quotation marks omitted). There is no Wisconsin statute or case that establishes that Plaintiffs' future "services" are a valid, recognized property interest for purposes of a takings analysis in Wisconsin. No court in Wisconsin has ever held as much, and this Court would be creating new law if it accepts Plaintiffs' argument.

Plaintiffs also disregard the "vast majority of federal and state courts [that] have . . . decided that requiring counsel to serve without compensation is not an unconstitutional taking of property without just compensation." *Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982) (collecting cases). In *State ex rel. Dressler v. Circuit Court for Racine County, Branch 1*, the Wisconsin Court of Appeals favorably cited *Williamson*, characterized the reasoning of the cited cases as "sound," and concluded: "Therefore, we hold that in Wisconsin the appointment of counsel to represent the indigent at a reduced level of compensation does not constitute a taking of property or involuntary servitude." 163 Wis. 2d 622, 637-38, 472 N.W.2d 532 (Ct. App. 1991). Furthermore, the cases from Alaska and Iowa that Plaintiffs rely upon represent a minority view regarding whether compelled

attorney services can constitute an unconstitutional taking of property. (Pls.' Br. 13-14.) As *Williamson* observed, there is no taking in that situation based upon the weight of authority. *See* 674 F.2d at 1214.

Plaintiffs' "services" theory of their property interest has no foundation in Wisconsin takings law. The cases Plaintiffs rely upon are irrelevant, and so in effect, Plaintiffs are asking this Court to break new legal ground and hold that "services" are a relevant property interest. Plaintiffs are essentially trying to "constitutionalize" the member dues and fair share payments that they used to receive under the pre-Act 1 Peace Act. But case law does not support this novel theory in the least. In fact, there is no legal support for this theory, and the Court should deny summary judgment based purely on the fact that Plaintiffs are unable to identify a legally recognized property interest.

B. Assuming Plaintiffs have a legally recognized property interest, they have not established that interest has been "taken" by the State under a regulatory takings theory.

Assuming that Plaintiffs have a property interest recognized by Wisconsin law, Plaintiffs have not established how the operation of Act 1 "takes" *their* property. Plaintiffs claim that they are asserting a "regulatory taking by the State" under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). (Pls.' Br. 15.) They assert that "[t]he operation of Act 1 together with Wisconsin's

requirement that unions fairly represent nonmembers constitute a regulatory taking by the State." (*Id.*)[7]

The *Penn Central* regulatory takings theory does not bear out in Plaintiffs' evidence. Importantly, Plaintiffs have not provided proof that Act 1 results in a decrease in Plaintiffs' "distinct investment-backed expectations." *See Wis. Builders Ass'n v. Wis. DOT*, 2005 WI App 160, ¶ 37, 285 Wis. 2d 472, 702 N.W.2d 433 (quoting *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2081-82 (2005)). Plaintiffs have not proffered evidence showing that they have a distinct, investment-backed expectation that statutory law in Wisconsin would remain the same and that they would *always* have a right to collect fair-share payments from nonmembers. They have no such right because the Legislature can and did amend the statutes, as it was authorized to do under the Wisconsin Constitution.

Nor have Plaintiffs submitted evidence establishing a regulatory taking based upon "a physical invasion," which is the second criteria to consider under *Penn Central Wis. Builders Ass'n*, 285 Wis. 2d 472, ¶ 37 (quoting *Lingle*, 125 S. Ct. at 2081-82). Instead, if anything, Plaintiffs' evidence shows that there was a change in the law that "merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (quoting *Lingle*, 125 S. Ct. at 2081-82). Under the *Penn Central* analysis, as

[7]The duty of fair representation is also imposed by federal law under the NLRA.

described in *Wisconsin Builders Association* and *Lingle*, this type of government regulation is not a taking.

None of the other cases that Plaintiffs cite can compensate for Plaintiffs' inability to prove a regulatory taking under *Penn Central*. Plaintiffs rely again upon *County of Dane v. Smith*, *DeLisio v. Alaska Superior Court*, and *McNabb v. Osmundson* to support their takings theory based upon providing compelled services. (Pls.' Br. 16-18.) These are not regulatory takings cases, nor do they address the factors that the Supreme Court considered in *Penn Central* or its progeny, such as *Lingle*.

Plaintiffs' reliance upon *Wisconsin Medical Society v. Morgan* and *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 4, 309 Wis. 2d 365, 749 N.W.2d 211, is also misplaced. (Pls.' Br. 18-19.) While it is true that some legislative acts can be unlawful takings, *Morgan* and *Olson* do not support Plaintiffs' takings theory.

Morgan involved the transfer of money from the Injured Patients and Families Compensation Fund to another legislatively created fund. *Morgan*, 328 Wis. 2d 469, ¶ 1. This resulted in a taking because the Plaintiffs had a constitutionally protected interest, equitable title, in the Injured Patients fund. *See id.* ¶ 61. This interest was established by law. Plaintiffs here have not established equitable title to money in some fund that is being diverted by the State to another fund in which they have no interest.

Olson did not resolve whether a taking had occurred due to a government regulation. Aside from determining the appropriate standard of review, the only

other question before the Wisconsin Supreme Court was whether the case was justiciable—specifically, whether it was ripe for review. *Olson*, 309 Wis. 2d 365, ¶ 4. It is quite a stretch to say—as Plaintiffs do in their brief—that *Olson* concluded that an "ordinance was an unconstitutional taking." (Pls.' Br. 18.) *Olson* resolved no takings claim; it remanded that claim to the circuit court. *Olson*, 309 Wis. 2d 365, ¶ 73 (mandate). It is hard to understand how *Olson* bolsters Plaintiffs' claim that they have established a regulatory taking.

Finally, Plaintiffs' citation to *Noranda Exploration, Inc. v. Ostrom*, 113 Wis. 2d 612, 335 N.W.2d 596 (1983), is inapt. *Noranda* involved Wis. Stat. § 107.15 (1977-78), the application of which resulted in "the state's acquisition of a private citizen's property, and the distribution of that property (after the period of confidentiality ends) to other private citizens for their benefit." *Id.* at 629. Act 1 does not require Plaintiffs to give their property to the State to redistribute to private citizens.

Plaintiffs have now clarified in their brief that they are only pursuing a regulatory-takings claim based upon *Penn Central*. Yet they have identified no evidence establishing that they had distinct, investment-backed expectations in continuing to collect nonmembers' funds, nor a physical invasion caused by Act 1. Plaintiffs therefore are not entitled to judgment.

C. Plaintiffs have not established that their property has been taken "for public use."

Wisconsin Const. art. I, § 13 states: "The property of no person shall be taken for public use without just compensation therefor." Plaintiffs have not proffered

evidence supporting their claim that their property, if taken, was taken "for public use."

Plaintiffs argue that "public use" and "public purpose" are synonymous, so it does not matter if they did not allege any facts in their complaint to establish a "public use." (*See* Pls.' Br. 21-24.) They miss the point entirely.

The Wisconsin Constitution includes the words "for public use," and it does not include the words "for a public purpose." The Wisconsin Supreme Court has recognized a distinction between the phrase "public use" in Wis. Const. art. I, § 13 and what is known as the "public purpose doctrine." *See Town of Beloit v. Cty. of Rock*, 2003 WI 8, ¶ 20, 259 Wis. 2d 37, 657 N.W.2d 344. The supreme court explained:

> Although there is no specific clause in the Wisconsin Constitution establishing the public purpose doctrine, this Court has recognized that the doctrine is firmly accepted as a basic constitutional tenet of the Wisconsin Constitution and the United States Constitution, mandating that public appropriations may not be used for other than public purposes.

Id.; *see also id.* ¶ 44 ("Although the test under the public use clause, like the test under the public purpose doctrine, is deferential to the legislative determination, the analyses are not identical."); *id.* ("'While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists . . . .'") (quoting *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 8-9 (Ill. 2002)).

Plaintiffs have conflated public use with the concept of "public purpose" in Wisconsin law. (*See* Compl. ¶ 25 ("Wisconsin Act 1 was passed for the public

purpose [of] making the business climate in the State more favorable by eliminating the power of labor organizations to collect fair share fees from nonmembers.").) Here, there is no issue regarding the State appropriating or spending public funds; therefore, the public purpose doctrine described in *Town of Beloit*—and pled in Plaintiffs' complaint—is wholly inapplicable. Plaintiffs have failed to proffer any evidence establishing that Act 1 takes property "for public use." Wis. Const. art. I, § 13.[8]

D. Plaintiffs' right to exclusive representation is "just compensation."

Plaintiffs assert in their brief that just compensation means money. (Pls.' Br. 24.) Yet Plaintiffs do not seek money damages. (Compl. 10.) The obvious disconnect between the remedies demanded in the Complaint and Plaintiffs' legal theory here is another sign that Plaintiffs' arguments about just compensation

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[8]Plaintiffs seem to rely solely on comments from legislators as evidence. (Compl. ¶ 25.) Yet "[t]he text of the statute, and not the private intent of the legislators, is the law." *Cont'l Can Co., Inc. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990). *See also Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of legislators.").

It is "utterly impossible" to discern what members of a legislative body intended, except to the extent that "intent is manifested in the *only* remnant of 'history' that bears the unanimous endorsement of the majority of each House: the text of the enrolled bill that became law." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia. J., concurring). Relying selectively upon legislator commentary illustrates why ascertaining a legislative purpose for a law from the legislative record is analogized to "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy*, 507 U.S. at 519.

cannot be right, or are at least irreconcilable with the relief requested in the Complaint.

Furthermore, accepting for purposes of argument that Plaintiffs have established the other "takings" factors, Plaintiffs have been justly compensated as a matter of law. They are granted statutory, exclusive collective bargaining rights for their unions. *See, e.g.*, 29 U.S.C. § 158(a)(5) ("It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."); *see also* Wis. Stat. § 111.05(1). Therefore, as a matter of law, Plaintiffs have not established a taking without just compensation. In *Sweeney*, the Seventh Circuit stated:

> [W]e believe the union is justly compensated by federal law's grant to the Union the right to bargain exclusively with the employer. The reason the Union must represent all employees is that the Union alone gets a seat at the negotiation table. *See Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 761, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) (A "union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion."); *Hughes Tool Co.,* 104 N.L.R.B. 318, 324–25 (1943) ("[A] union could not assess nonmembers for costs arising from contract negotiations for the latter are the exclusive duty and prerogative of the certified representative which the nonmember minority is both entitled to and bound under."). The powers of the bargaining representative are "comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.,* 323 U.S. 192, 65 S.Ct. 226, 232, 89 L.Ed. 173 (1944). The duty of fair representation is therefore a "corresponding duty" imposed in exchange for the powers granted to the Union as an exclusive representative. *Id.* 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. And no information before us persuades us that the Union is

> not fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table.

767 F.3d at 666. The Indiana Supreme Court agreed with this analysis in upholding its state's right-to-work law. *See Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) ("The Union's federal obligation to represent all employees in a bargaining unit is optional; it occurs only when the union elects to be the exclusive bargaining agent, for which it is justly compensated by the right to bargain exclusively with the employer.").

Plaintiffs have already been compensated, and therefore, they are not entitled to judgment for an unconstitutional taking.

IV. Plaintiffs have not followed the proper procedures.

Plaintiffs are also not entitled to summary judgment because this Court has no competency to proceed to judgment due to Plaintiffs' failure to abide by the service requirements of Wis. Stat. § 806.04(11). Subsection (11) of the Uniform Declaratory Judgments Act reads, in pertinent part:

> If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard. . . . In any proceeding under this section in which the constitutionality, construction or application of any provision of ch. 13, 20, 111 . . . is placed in issue by the parties, the joint committee on legislative organization shall be served with a copy of the petition and the joint committee on legislative organization, the senate committee on organization or the assembly committee on organization may intervene as a party to the proceedings and be heard.

Wis. Stat. § 806.04(11).

Wisconsin Stat. § 806.04(11) uses the words "shall be served" when referring to service on the joint committee on legislative organization and the Attorney General. This language means that service is mandatory, not discretionary. *See Bollhoffer v. Wolke*, 66 Wis. 2d 141, 144, 223 N.W.2d 902 (1974); *Richards v. Young*, 150 Wis. 2d 549, 555, 441 N.W.2d 742 (1989).

Act 1 creates and amends several sections of Wis. Stat. ch. 111. As a result, Plaintiffs would be required to serve the joint committee on legislative organization "with a copy of the petition." Wis. Stat. § 806.04(11). But Plaintiffs have filed no proof of service that such action occurred.

And this service failure would be no mere technicality. On the contrary, *strict* compliance with the service requirements of Wis. Stat. § 806.04 is required, and failure to comply is a defect in jurisdiction, or more correctly, "competency." *See State v. Town of Linn*, 205 Wis. 2d 426, 449, 556 N.W.2d 394 (Ct. App. 1996); *McCabe v. Milwaukee*, 53 Wis. 2d 34, 37, 191 N.W.2d 926 (1971); *O'Connell v. Blasius*, 82 Wis. 2d 728, 735, 264 N.W.2d 561 (1978); *In Matter of Estate of Fessler,* 100 Wis. 2d 437, 444, 302 N.W.2d 414 (1981). The result would be dismissal.

In *Bollhoffer*, 66 Wis. 2d at 144, the Wisconsin Supreme Court dismissed a declaratory judgment action when the record did not contain proof that the Attorney General had been served, even though it was claimed at oral argument that he was served and an assistant attorney general had been contacted. *See also In Interest of Jason B.*, 176 Wis. 2d 400, 406, 500 N.W.2d 384 (Ct. App. 1993) (failure to comply with service time requirements results in loss of competency and

dismissal without prejudice). Just as a failure to serve the Attorney General requires dismissal for lack of competency to proceed, Plaintiffs' failure to serve the joint committee on legislative organization also mandates dismissal.

Finally, Defendants have not waived this service failure issue. Plaintiffs filed their complaint on March 10, 2015, and served Defendants on the same day. Defendants filed their motion to dismiss on April 24, 2015, in compliance with Wis. Stat. § 802.06(1). At the time Defendants filed their motion to dismiss, Plaintiffs still had over one month to serve the joint committee on legislative organization, assuming the 90-day service period in Wis. Stat. §§ 801.02(1) and 893.02 is a reasonable time to expect service. The 90-day service requirement ended on June 8, 2015. Hence, the defense of lack of competency to proceed due to a failure of service did not yet exist and was not ripe for pleading at the time Defendants filed their motion to dismiss. Consequently, Defendants could not have raised this defense in their initial brief, and therefore, are entitled to raise it here.

CONCLUSION

Procedurally, Plaintiffs have made two critical errors. They have filed a motion for summary judgment before an answer has been filed, which is not permitted. And they say they want a declaratory judgment, but they did not follow the statutory rules necessary to pursue a claim under the Uniform Declaratory Judgments Act.

On the merits, Plaintiffs' legal theories are a mystery. They argue that their property was taken, but admit that they just want the ability to take other peoples'

property (*i.e.*, nonmembers' money). They say that just compensation means money, but they apparently do not want money.

The Court should deny the Plaintiffs' motion for summary judgment and instead enter judgment for Defendants as permitted by Wis. Stat. § 802.08(6).

Dated this 28th day of August, 2015.

Respectfully submitted,

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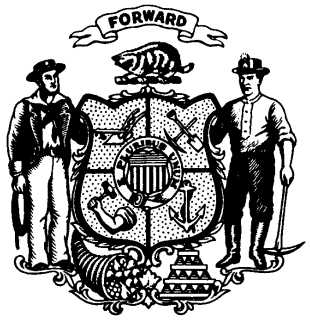

Date of enactment: **March 9, 2015**
2015 Senate Bill 44 Date of publication*: **March 10, 2015**

2015 WISCONSIN ACT 1

AN ACT ***to repeal*** 111.01 and 111.06 (1) (c) 2., 3. and 4.; ***to renumber and amend*** 111.04 and 111.06 (1) (c) 1.; ***to amend*** 111.02 (3), 111.06 (1) (e), 111.06 (1) (i), 111.39 (6) and 175.05 (6); and ***to create*** 111.02 (9g), 111.04 (3) and 947.20 of the statutes; **relating to:** prohibiting as a condition of employment membership in a labor organization or payments to a labor organization and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 111.01 of the statutes is repealed.

SECTION 2. 111.02 (3) of the statutes is amended to read:

111.02 **(3)** "Collective bargaining unit" means all of the employees of one employer, employed within the state, except that where a majority of the employees engaged in a single craft, division, department or plant have voted by secret ballot as provided in s. 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, but, in appropriate cases, and to aid in the more efficient administration of ~~ss. 111.01 to 111.19~~ this subchapter, the commission may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the commission shall be subject to all rights by termination or modification given by ~~ss. 111.01 to 111.19~~ this subchapter in reference to collective bargaining units otherwise established under ~~ss. 111.01 to 111.19~~ this subchapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit have voted by secret ballot as provided in s. 111.05 (2) so to do.

SECTION 3. 111.02 (9g) of the statutes is created to read:

111.02 **(9g)** "Labor organization" means 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.

SECTION 4. 111.04 of the statutes is renumbered 111.04 (1) and amended to read:

111.04 **(1)** Employees shall have the right of self−organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection~~; and such employees~~.

(2) Employees shall ~~also~~ have the right to refrain from ~~any or all of such activities~~ self−organization; forming, joining, or assisting labor organizations; bargaining collectively through representatives; or engaging in activities for the purpose of collective bargaining or other mutual aid or protection.

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

Exhibit 1

SECTION 5. 111.04 (3) of the statutes is created to read:

111.04 **(3)** (a) No person may require, as a condition of obtaining or continuing employment, an individual to do any of the following:

1. Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization.

2. Become or remain a member of a labor organization.

3. Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.

4. Pay to any 3rd party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

(b) This subsection applies to the extent permitted under federal law. If a provision of a contract violates this subsection, that provision is void.

SECTION 6. 111.06 (1) (c) 1. of the statutes is renumbered 111.06 (1) (c) and amended to read:

111.06 **(1)** (c) To encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment ~~except in a collective bargaining unit where an all−union agreement is in effect. Any all−union agreement in effect on October 4, 1975, made in accordance with the law in effect at the time it is made is valid~~.

SECTION 7. 111.06 (1) (c) 2., 3. and 4. of the statutes are repealed.

SECTION 8. 111.06 (1) (e) of the statutes is amended to read:

111.06 **(1)** (e) To bargain collectively with the representatives of less than a majority of the employer's employees in a collective bargaining unit, or to enter into an all−union agreement ~~except in the manner provided in par. (c)~~.

SECTION 9. 111.06 (1) (i) of the statutes is amended to read:

111.06 **(1)** (i) To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable ~~at the end of any year of its life~~ by the employee giving to the employer at least ~~thirty~~ 30 days' written notice of ~~such~~ the termination ~~unless there is an all−union agreement in effect. The employer shall give notice to the labor organization of receipt of such notice of termination~~. This paragraph applies to the extent permitted under federal law.

SECTION 10. 111.39 (6) of the statutes is amended to read:

111.39 **(6)** If an order issued under sub. (4) is unenforceable against any labor organization in which membership is a privilege, ~~the~~ an employer with whom the labor organization has an enforceable all−union ~~shop~~ agreement shall not be held accountable under this chapter ~~when~~ if the employer is not responsible for the discrimination, the unfair honesty testing, or the unfair genetic testing.

SECTION 11. 175.05 (6) of the statutes is amended to read:

175.05 **(6)** RIGHTS OF LABOR. Nothing in this section shall be construed to impair, curtail or destroy the rights of employees and their representatives to self−organization, to form, join or assist labor organization, to strike, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, under either the federal labor relations act or ~~ss. 111.01 to 111.19~~ subch. I of ch. 111.

SECTION 12. 947.20 of the statutes is created to read:

947.20 Right to work. Anyone who violates s. 111.04 (3) (a) is guilty of a Class A misdemeanor.

SECTION 13. Initial applicability.

(1) This act first applies to a collective bargaining agreement containing provisions inconsistent with this act upon the renewal, modification, or extension of the agreement occurring on or after the effective date of this subsection.