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.

DEFENDANTS-APPELLANTS' MEMORANDUM IN SUPPORT OF MOTION TO STAY THE CIRCUIT COURT'S JUDGMENT

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INTRODUCTION

The circuit court's unprecedented decision, holding unconstitutional a right-to-work law forbidding the forced subsidization of labor unions, cries out for a stay pending appeal. The theory upon which the court staked its holding—that Act 1 "takes" union "services"—fails for multiple reasons. To begin, Act 1 does not force unions to offer any "services." It simply forbids requiring workers to support financially unions that they oppose. The circuit court's takings analysis would have been more properly directed at the duty of fair representation, which is an entirely separate legal obligation under which, *if* a union voluntarily assumes the special, government-conferred privilege of exclusively representing all employees in a bargaining unit, *then* it must treat all such employees fairly. But Plaintiffs have not sued to free themselves from this duty. And even had Plaintiffs challenged this fairness mandate as a taking, that claim would have failed because, *inter alia*, the unions voluntarily assumed this obligation in order to obtain the valuable benefit of being the exclusive representative of all employees, including unconsenting ones.

The circuit court wrongly refused to stay its erroneous decision. In so doing, the court disregarded binding precedent that Act 1, as a

regularly enacted law, must be presumed to be constitutional for purposes of stay analysis. It also ignored that its decision is significantly harming the State and its citizens. Twenty-six States have exercised their sovereign right—*explicitly recognized by federal law*—to enact right-to-work laws. In twenty-five of those States, all workers know that they cannot be made to support labor organizations against their will. Yet, so long as the circuit court's judgment stands unstayed, Act 1 cannot be enforced by the state officials who are defendants here or as to the workers Plaintiffs represent. Adding to this uncertainty, Plaintiffs have stated publicly—and, in the State's view, incorrectly—that, under the circuit court's judgment, Act 1 is a dead letter for all workers in Wisconsin. Only a stay of that judgment can rein in this unnecessary confusion and unlawfully imposed harm.

FACTS

I. Federal And State Law Tie The Government-Created Benefit Of Being The Exclusive Bargaining Representative To The Obligation Of Providing Services In A Fair Manner

Under both federal and state law, employees have the right of "choosing" a "representative" for the purposes of "collective bargaining." *See* 29 U.S.C. § 157; Wis. Stat. §§ 111.02(11), 111.05(1). This

"representative" need not be a labor union, and can simply be "one or more individuals." Wis. Stat. § 111.02(10) & (11). An exclusive representative is selected by majority vote of members of the bargaining unit. *See* Wis. Stat. §§ 111.05(1), 111.02(10) & (11). Under Wisconsin law, the chosen "representative" is the "exclusive representative[ ] of all of the employees in such a [bargaining] unit for purposes of collective bargaining." Wis. Stat. § 111.05(1).

To qualify for this special position, a would-be representative must generally file or authorize a petition. *See* Wis. Admin. Code § ERC 3.02. Standing for election as exclusive representative is voluntary. *See id.*; Wis. Admin. Code § ERC 3.04. If the candidate has second thoughts about becoming the exclusive representative, it may withdraw its petition for election. *See* Wis. Admin. Code § ERC 3.03.

The election of a candidate to the position of exclusive representative clothes it with an extraordinary "set of powers and benefits." *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014). "By its selection as bargaining representative, it has become the agent of all the employees," including as to employees who do not consent. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). Unlike an ordinary principal with authority over his agent, "an individual employee lacks direct

control over a union's actions." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990). The employee also loses the "power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). This "loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Am. Commc'n Ass'n v. Douds*, 339 U.S. 382, 401 (1950). Its powers are like "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, 202 (1944). In addition, because labor unions are exempt from certain requirements of antitrust law, *see Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–23 (1975), they enjoy the benefits of functioning as a government-sanctioned monopoly and so can use their powers in "cartel"-like fashion to raise the price of labor services. *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 990, 997, 1001–02 (1984). These powers, taken together, are extremely valuable, enabling unions not only to influence employers but also to attract and retain dues-paying members.

The same state and federal laws that grant these extraordinary benefits to the union also impose a concomitant obligation of fair treatment of all employees in the bargaining unit. If the law had conferred the exclusive-representative authority "without any commensurate statutory duty" toward all employees, permitting discrimination against nonmembers, "constitutional questions [would] arise." *Steele*, 323 U.S. at 198. The representative is accordingly "subject to constitutional limitations on its power to deny, restrict, destroy, or discriminate against the rights of those for whom it legislates" and "is also under an affirmative constitutional duty equally to protect those rights." *Id.*; *see Lewis v. Local Union No. 100 of Laborers' Int'l Union of N. Am., AFL-CIO*, 750 F.2d 1368, 1375–76 (7th Cir. 1984); *Mahnke v. WERC*, 66 Wis. 2d 524, 529–530, 225 N.W.2d 617 (1975). The duty is designed to serve as a "check on the arbitrary exercise" of the exclusive-representation power. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 374 (1990).

Critically, it is the receipt of exclusive-representation powers, not the collection of fees from all employees, that makes the fair-treatment obligation just and necessary. As the U.S. Supreme Court has explained, "[a] union's status as exclusive bargaining agent and the

right to collect an agency fee from non-members are not inextricably linked." *Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014).

While this duty of fair treatment flows from the unique powers and benefits of the exclusive-representative position, carrying out this duty is "purposely limited" and not burdensome. *Rawson*, 495 U.S. at 374. The union need not go out of its way to further the interests of particular employees, whether members or not. To the contrary, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). Thus, a union breaches this obligation "only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *SEIU Local No. 150 v. WERC*, 2010 WI App 126, ¶ 20, 329 Wis. 2d 447, 791 N.W.2d 662 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). "[T]he union must not discriminate between members and nonmembers in negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances. This means that the union cannot, for example, negotiate particularly high wage increases for its members

in exchange for accepting no increases for others." *Harris*, 134 S. Ct. at 2636–37 (citations omitted).

The fair-treatment obligation also does not govern how much time or money the union must spend on nonmembers. Federal and state laws require unions to negotiate concerning the "terms and conditions of employment of such employees, in a mutually genuine effort to reach an agreement with reference to the subject under negotiation." Wis. Stat. § 111.02(2). But apart from these "mandatory" bargaining topics, "each party is free to bargain or not to bargain, agree or not to agree." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The law does not mandate what services the union must perform, and, in turn, what costs it must incur. *See, e.g.*, 29 U.S.C. § 158(d). For example, it is the collective-bargaining agreement (CBA)—not labor law—that determines whether the union must administer or undertake grievance and arbitration representation. *See Vaca*, 386 U.S. at 184; *SEIU Local No. 150*, 329 Wis. 2d 447, ¶ 19. And it is the CBA—not labor law—that determines whether and to what extent the union (as opposed to, for example, the employer) must bear the costs of the services to which it commits. *See, e.g.*, *Mahnke*, 66 Wis. 2d at 533 n.2 ("The contract

grievance procedure provided the union and the employer would each pay one-half the cost of arbitration.").

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

Congress has specifically provided that "[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b). As the Supreme Court has stated, this provision means that federal law does "not deprive the States of any and all power" to enact right-to-work laws. *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 98 (1963); *see also Sweeney,* 767 F.3d at 663. Although federal law preempts the labor laws of States in many situations, *see generally Local 926, International Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669, 676 (1983), Congress has specifically left undisturbed the ability of States to tie the benefit of exclusive representation with the duty of nondiscrimination, without any requirement that nonmembers pay fees to the union.

Wisconsin exercised its right to adopt a right-to-work law on March 11, 2015, by enacting 2015 Wisconsin Act 1 (Act 1). As relevant here, Act 1 provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . pay any dues, fees, or assessments or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization" or "any 3rd party." *See* Act 1, § 5 *codified at* Wis. Stat. § 111.04(3)(a)(3) & (3)(a)(4). The law applies only to CBAs made *after* its enactment. *See* Act 1, § 13. Importantly for this lawsuit, Act 1 does not impose or alter the preexisting legal duty of fair representation for all employees within the bargaining unit. In all, under Act 1, Wisconsin is now one of twenty-six States to have exercised its federally recognized power to enact a right-to-work law, many of which have been in existence for decades. *See Right to Work States*, http://www.nrtw.org/rtws.htm (last visited April 29, 2016).

One critical tool for enforcing the protections in Act 1 is the ability of private parties to submit unfair-labor-practice complaints to the Wisconsin Employment Relations Commission (WERC). Wis. Stat. § 111.07(2). If WERC finds that an unfair labor practice has occurred,

a district attorney or the Attorney General can, upon WERC's request, enforce its decisions and orders in circuit court. Wis. Stat. § 111.12.

III. The Circuit Court Holds That Act 1 "Takes" Union Services, Enjoins Defendants From Enforcing The Law, And Then Refuses To Stay Its Decision

On March 10, 2015, the International Association of Machinists (District 10 and its Local Lodge 1061), the United Steel Workers District 2, and the Wisconsin State, AFL-CIO, ("Plaintiffs") brought a lawsuit challenging the constitutionality of Act 1, naming as Defendants the State of Wisconsin, Governor Scott Walker, Attorney General Brad D. Schimel, and WERC Commissioners James R. Scott and Rodney G. Pasch ("Defendants"). As described by Plaintiffs, their theory is that Act 1 violates Article I, § 13 of the Wisconsin Constitution because "Wisconsin Act 1 unconstitutionally requires unions to represent non-members." Pls.' Sum. Judg. Br. 8.

In an opinion issued on April 8, 2016, the circuit court agreed with Plaintiffs' theory, holding that Act 1 "takes" their services because "Plaintiffs will be obligated to [provide] services for which they cannot

legally request compensation." App. 9.[1] As relevant to the clear errors of law raised in this motion, the circuit court did not address Defendants' point that Act 1 does not require anyone to provide any services. *See* Def. Br. Opp. Sum. Judg. 7. Instead, the circuit court moved to the three-part test under *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), finding that "[t]he duty of fair representation compels unions to provide at least some level of service to both union members and non-members," that Plaintiffs had investment-backed expectations to be able to force nonconsenting workers to fund their operations, and that Act 1 is an impermissible "economic adjustment." App. 9–11. Finally, the circuit court rejected the Seventh Circuit's holding in *Sweeney*, 767 F.3d at 666, that unions are justly compensated for any taking by the benefits of the exclusive-representative status, explaining that, in its view, just compensation should come in the form of the payment of money. App. 13.

A week later, on April 15, 2016, the circuit court entered final judgment, declaring several sections of Act 1 void and enjoining

[1] The appendix (cited as App. __) includes the circuit court's order granting summary judgment (April 8, 2016), its formal judgment and related memorandum (April 15, 2016), and transcript of the hearing on the motion to stay (April 25, 2016).

Defendants from enforcing them. App. 20–21. In justifying the injunction, the circuit court specifically relied upon the importance of stopping Defendants from using their sovereign authority to enforce Act 1. App. 18–19.

Defendants quickly moved to stay the judgment. At a hearing on Monday, April 25, the circuit court denied the motion for a stay pending appeal, memorialized in a signed order the next day. In reaching this decision, the circuit court flatly disregarded its legal duty to presume that the State had established likelihood of success on the merits under *State v. Gudenschwager*, 191 Wis. 2d 431, 440 (1995), instead declaring that "there are years of weight in support of the decisions I reached," while finding appropriate Plaintiffs' analogy to "the possibility of Jim Crow laws." App. 46–48. Regarding the balance of harms, the court found "no evidence that the State suffers one way or another." App. 48. As between the nonmember employees and the unions, the court viewed the employees' forced payments as "not very significant" compared to the unions' loss of those funds. App. 49.

ARGUMENT

This Court may stay a circuit court's judgment pending appeal, under Wis. Stat. §§ 808.07(2), 809.12, where a movant has made: (1) a

strong showing that it is likely to succeed on the merits of its appeal; (2) a showing that, unless a stay is granted, the moving party will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that the stay will do no harm to the public interest. *Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986). The movant need not satisfy "each of the four" factors as if they were "tests." *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 25 n.15, 237 Wis. 2d 498, 614 N.W.2d 565. Instead, the court must "balance the relative strength of each." *Id.* "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Gudenschwager*, 191 Wis. 2d at 440. The *Gudenschwager* standard is a sliding scale: "[P]robability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay. In other words, more of one factor excuses less of the other." *Id.* at 441. This Court reviews a trial court's decision on a stay for "an erroneous exercise of discretion." *Id.* at 440.

Here, the circuit court abused its discretion because its decisions contained numerous legal errors and all four factors favor a stay.

I. Defendants Are Extremely Likely To Succeed On The Merits

A. Defendants' Strong Likelihood Of Success Must Be Presumed Because Act 1 Is A "Regularly Enacted" Law

In *Gudenschwager*, the Supreme Court of Wisconsin held that because "regularly enacted statutes are presumed to be constitutional, we conclude that, for purposes of deciding whether to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal." *Id.* at 441 (citation omitted). Here, as in *Gudenschwager*, the lower court has declared unconstitutional a "regularly enacted" statute, Act 1. Accordingly, Defendants prevail on this factor for that reason alone. That the circuit court held that Defendants failed to satisfy this factor—based upon what that court considered to be "years of weight in support of the decisions I reached," App. 48—was undisputable legal error.

B. Defendants' Likelihood Of Success Is Particularly Compelling Here Because The Circuit Court's Decision Is Entirely Indefensible

While the State satisfied the likelihood of success factor as a matter of law, *Gudenschwager*, 191 Wis. 2d at 441, the indefensible nature of the circuit court's decision means that this factor provides a particularly powerful reason for issuing a stay, as part of the

Gudenschwager sliding scale. *Id*. at 440–41. The circuit court's decision is extremely unlikely to survive review for at least four independent reasons.

1. The Taking-Of-Services Theory Fails Because Act 1, The Only Law Plaintiffs Challenge, Does Not Require Anyone To Provide Any Services

The circuit court ruled that Act 1 "takes" the unions' services because "Plaintiffs will be obligated to [provide] services for which they cannot legally request compensation." App. 9. The circuit court simply ignored a fundamental problem with this theory, which dooms Plaintiffs' lawsuit entirely: *Act 1 imposes absolutely no duty on anyone to provide services*.

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

payment of monies as a condition of employment." *Zoeller v. Sweeney*, 19 N.E.3d 749, 752 (Ind. 2014). As the Seventh Circuit explained, because *other* laws "provide[ ] a duty of fair representation," a right-to-work statute does not itself "'take' property from the [u]nion[s]." *Sweeney*, 767 F.3d at 666.

Plaintiffs' theory rests upon a sleight of hand. Pre-Act 1 law already imposes upon the exclusive-bargaining representative the duty to provide services to all members in a nondiscriminatory and non-arbitrary manner. Plaintiffs, "[a]s master[s] of the complaint, however, [ ] chose not" to challenge this pre-Act 1 law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987). Plaintiffs did not ask any court to enjoin or declare invalid the duty of fair representation, which Plaintiffs assert "takes" their services. Instead, Plaintiffs decided to treat the duty as an unchallengeable fact and asserted that, because the duty is a "taking" of their services, unwilling private parties must "compensate" them.

That gets the issue entirely backwards. If Plaintiffs were correct that the pre-Act 1 state-law duty to provide fair treatment to all employees is a "taking," then the question would be whether the State of Wisconsin after Act 1 has justly compensated Plaintiffs for that

taking. If they received just compensation from the State, any takings claim would necessarily fail. If they have not been justly compensated by the State, then the duty of fair representation itself must be declared unconstitutional unless the State—*not unwilling private citizens*—provides what the court determines to be just compensation. *See Wis. Retired Teachers Ass'n, Inc. v. Emp. Trust Funds Bd.*, 207 Wis. 2d 1, 25, 558 N.W.2d 83 (1997).[2] The circuit court's conclusion that Plaintiffs are entitled to the funds (i.e. dues) of private parties—to which they have no constitutional right, *see Davenport v. Washington Education Ass'n*, 551 U.S. 177, 185 (2007)—in order to pay for their allegedly taken "services," is unsupported and unsupportable.

2. Even If Plaintiffs Had Challenged The Duty of Fair Representation, That Obligation Would Not Be A "Taking" Of Their Services Because Plaintiffs Voluntarily Assumed This Duty To Obtain Valuable Governmental Benefits

Had Plaintiffs challenged their duty of fair representation as an unconstitutional taking, that claim still would have failed. Plaintiffs voluntarily sought to assume the fair-representation obligation in

[2] The same logic would apply to any federal Takings Clause claim against the Federal Government, objecting to the federal duty of fair representation.

exchange for the valuable privilege of exclusive representation authority, all while knowing the State had the federally recognized right to enact a right-to-work law. Under settled precedent, the freely assumed duty "takes" nothing.

When an actor accepts a condition on a special benefit or privilege in exchange "for the economic advantages" of the benefit, and that condition is "rationally related to a legitimate Government interest," the condition is not a taking. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984); *see also R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 13, 244 Wis. 2d 497, 628 N.W.2d 781 (consulting federal law in interpreting Wisconsin's Takings Clause). *Ruckelshaus v. Monsanto*, for example, rejected a takings challenge to a law allowing the government to publicly disclose trade secrets in exchange for Monsanto obtaining a license to sell pesticides. The regulations were not a taking because the selling of pesticides has "long been the source of public concern and the subject of government regulation." *Id*. Similarly, pension plans do not suffer a taking from unfavorable changes in liability rules, since plans have "long been subject to federal regulation" and so have no "reasonable basis to expect" those rules to remain static. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602,

645–46 (1993). And a marina owner on Lake Superior cannot reasonably expect to retain an unqualified right to develop his property when it was "encumbered by the public trust doctrine and heavily regulated from the get-go." *R.W. Docks*, 244 Wis. 2d 497, ¶ 29.

This logic applies to heavily regulated professions and services as well. Lawyers, for instance, are sometimes required to assume the obligation to provide free or reduced-fee legal services to the indigent as a condition of membership in the profession. Yet "[t]he vast majority of federal and state courts" have held this "not [to be] an unconstitutional taking of property without just compensation." *See Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982) (collecting cases). This Court follows this majority approach, reasoning that pro bono services are a professional "obligation" and that lawyers "consent[ ] to, and assume[ ]" the obligation when joining the profession. *State ex rel. Dressler v. Circuit Court for Racine Cnty., Branch 1*, 163 Wis. 2d 622, 636, 472 N.W.2d 532 (Ct. App. 1991) (quoting *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965)).[3] Similarly, hospitals are often

[3] The circuit court believed these cases "ha[ve] no bearing," because a lawyer's "duty to provide such service originat[es] from [his or her] status as an officer of the court." App. 8 (citation omitted). But the

required to provide free or partially reimbursed services to low-income patients. *See Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 126 (1st Cir. 2009).

These principles foreclose Plaintiffs' takings theory, even on the (incorrect) assumption that Plaintiffs challenged the duty to provide fair representation. Labor organizations have "long been the source of public concern and the subject of government regulation." *Monsanto*, 467 U.S. at 1007. For its part, Wisconsin has regulated unions since 1939, *see* Wis. Stat. ch. 111, under its "sovereign prerogative to regulate both labor and management in the promotion of industrial peace." *United Auto., Aircraft & Agric. Implement Workers of Am., UAW, AFL-CIO, Local 283 v. Scofield*, 50 Wis. 2d 117, 123, 183 N.W.2d 103 (1971). Plaintiffs entered this government-dominated scheme to obtain a valuable government-conferred benefit: the status of exclusive representative, enabling them to shut out minority-controlled unions and recruit and retain members. The ability to bind persons without

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same thing is true of a union—its "duty [of fair representation is] implied from its status . . . as the exclusive representative of the employees in the unit." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998); *SEIU Local No. 150*, 329 Wis. 2d 447, ¶ 19 ("The duty of fair representation derives from the union's status as the sole bargaining representative . . . .") (citation omitted).

their consent—and even over their objection—does not arise by contract or some other private arrangement. It is a sovereign power. *Steele*, 323 U.S. at 202. Put differently, since the government may refrain from conferring the privilege *in the first place*, it may also make it available on reasonable conditions. *See Holliday Amusement Co. v. South Carolina*, 493 F.3d 404, 409 (4th Cir. 2007). By seeking out this privilege, Plaintiffs accepted *both* the duty to provide fair treatment to all employees and the distinct possibility that Wisconsin would exercise its federally-recognized right to enact a right-to-work law.[4]

The circuit court sought to answer this point by explaining that Plaintiffs "cannot decline exclusive representative status unless it declines to be voted in at a workplace to begin with." App. 5. But that is precisely the point. Monsanto could have kept its trade secrets by not entering into the field of selling pesticides "to begin with," and lawyers

[4] It is also beyond dispute that the condition of fair representation is "rationally related to a legitimate Government interest." *Monsanto*, 467 U.S. at 1007. The exclusive-representation power serves that purpose by "strengthen[ing] collective bargaining," *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 409 (1982) (citation omitted), as does the fair-representation *duty*, which is intertwined with the exclusive-representation power. *See, e.g.*, *Steele*, 323 U.S. at 202. And right-to-work laws such as Act 1 serve the important governmental purpose of allowing employees to withhold financial support from organizations with whom they do not agree. *See infra* p. 27.

and hospitals can avoid having to provide free services to the poor by choosing another field. But when sophisticated parties choose to enter (and remain in) a heavily regulated area, they cannot later be heard to complain that a reasonable, entirely expected condition on operating in that field is an unconstitutional "taking."

3. Separately, Plaintiffs' Theory Also Fails Under The *Penn Central* Analysis

Even if the unions had challenged the duty to provide fair representation, and even if their voluntary decision to assume that duty did not categorically bar their takings claims, their case would fail under *Penn Central*. *See R.W. Docks*, 244 Wis. 2d 497, ¶¶ 15–32 (applying *Penn Central*). To determine whether a *Penn Central* taking has occurred, a court must consider: (1) "[t]he economic impact of the regulation on the claimant," (2), "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. All three factors cut against Plaintiffs here.

First, the "economic impact of the regulation" here is slight, and nowhere near the "severe" impact needed "to constitute a regulatory taking under traditional . . . analysis." *R.W. Docks*, 244 Wis. 2d 497, ¶

32. The circuit court's claim of dire financial impact on Plaintiffs rests upon the "unwarranted" and "unsupported empirical assumption, namely, that the principle of exclusive representation . . . is dependent on a union or agency shop." *Harris*, 134 S. Ct. at 2634. "Indeed, unions continue to thrive and assert significant influence in several right-to-work states, including Iowa, where provisions equivalent to Indiana's have been in effect for more than sixty-five years." *Sweeney*, 767 F.3d at 664–65. "According to Bureau of Labor Statistics data, from 2004 to 2013 total union membership rose by 0.5 percent in [right-to-work] states but declined by 4.6 percent in non-[right-to-work] states." Jason Russell, *How Right to Work Helps Unions and Economic Growth*, Manhattan Inst. (Aug. 27, 2014), *available at* http://www.economics21.org/html/how-right-work-helps-unions-and-economic-growth-1080.html.

There are good reasons to discount Plaintiffs' protestations to the contrary. They fail to explain, for example, why they cannot continue to pitch their value to employees to persuade them to become paying members and/or to increase the fees for those who actually want Plaintiffs' services. *See Harris*, 134 S. Ct. at 2641 ("A host of organizations advocate on behalf of the interests of persons falling

within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions."). And, neither Act 1 nor the duty of fair representation dictates which services a union must provide or to what extent it must provide them. So long as the union puts forth "genuine effort" to represent all employees, Wis. Stat. § 111.02(2), and does not act "arbitrar[ily], discriminator[ily], or in bad faith," *Mahnke*, 66 Wis. 2d at 531 (citation omitted), the union is free to scale back its activities by entering into more limited CBAs. *See Wooster*, 356 U.S. at 349.

Second, the duty of fair representation does not interfere with any of Plaintiffs' reasonable investment-backed expectations. After Act 1 (which applies only prospectively), Plaintiffs freely accepted the duty of fair representation, in exchange for the special privilege of exclusive representation authority. *See supra* Argument, Part I.B.2. And even before Act 1, it was clearly foreseeable that Wisconsin might protect its workers from forced subsidization of unions, as federal law expressly allows it to do and as half of the other States have done. "The pendulum of politics swings periodically between restriction and permission in such matters, and prudent investors understand the risk." *Holliday Amusement*, 493 F.3d at 411. The unions, having long been regulated

under federal and state law, could not reasonably have relied on the nature and costs of its special obligations remaining static.

Third, the "character of the governmental action" here strongly cuts against any finding of a taking. "A taking [is less likely to] be found when the interference with property [cannot] be characterized as a physical invasion by government." *Noranda Exploration, Inc. v. Ostrom*, 113 Wis. 2d 612, 628, 335 N.W.2d 596 (1983). And the more that the affected property interest is "qualified in nature," the more this factor will "weigh[ ] against a finding . . . [of] a compensable regulatory taking." *R.W. Docks*, 244 Wis. 2d 497, ¶ 28.

Act 1 does not physically invade any union property and does not invade whatever property interest the unions have in their intangible services. *See supra* Argument, Part I.B. Act 1 simply "adjust[s] the benefits and burdens," *Penn Central*, 438 U.S. at 124, of a union's exclusive bargaining authority by shifting the costs away from employees who do not want union representation. This "adjust[ment]" is not only constitutional, but also sound public policy. The People's representatives reasonably concluded that the union's members *should* bear the costs associated with its activities, because they are the ones who wanted the union's services to begin with. Those who did not want

to be represented should at least be given the dignity of not having to subsidize an organization that they oppose. Far from being an impermissible "economic adjustment," App. 11, Act 1 is a reasonable change in law, which Plaintiffs had every reason to believe may well be enacted.

4. Labor Law Already Justly Compensates Unions

Finally, even if the unions were correct that Act 1 commits a regulatory taking, they receive just compensation not only from the dues of member-employees who find the union's services valuable, but also from the government-conferred privilege by which the union "alone gets a seat at the negotiation table." *Sweeney*, 767 F.3d at 666. The Seventh Circuit made this clear in *Sweeney*: "[T]he union is justly compensated by [the] law's grant to the Union the right to bargain exclusively with the employer." *Id.* Examining the legality of Indiana's right-to-work statute, the court explained that "[t]he duty of fair representation is [ ] a 'corresponding duty' imposed in exchange for the powers granted to the Union as an exclusive representative," and this suggested that "the Union is . . . fully and adequately compensated by its rights as the sole and exclusive member at the bargaining table." *Id.* Therefore, whether

or not Indiana's statute (or some similar right-to-work law, like Act 1) worked a taking upon unions, the exclusive-representation power has compensated for it.

The circuit court's reason for rejecting this argument only serves to highlight one of the fundamental flaws in Plaintiffs' lawsuit. The court pointed out that it believed that just compensation should be in the form of money, not other government-provided benefits. App. 13. Even if this unsupported assertion were correct—which it is not, *see Sweeney*, 767 F.3d at 666—it would doom Plaintiffs' case. As noted above, *see supra* pp. 17–18, any payment of just compensation for a taking must come from the party doing the alleged taking—in this case, the State. It does not come from private parties, who do not wish to obtain the property allegedly being "taken." Given that the circuit court's judgment against Act 1 implicates only private funds, not state funds, the judgment is unlawful on that basis alone.

II. A Stay Is Necessary To Prevent Irreparable Harm To The State And Its Citizens And To Protect The Public Interest

The Legislature enacted Act 1 to protect all of Wisconsin's workers against being forced to support labor organizations against their will. As described above, this legislative judgment was lawful. *See*

supra Argument Part I.B. Act 1 is also consistent with the laudable public policy adopted by the majority of States. These right-to-work laws rest upon the precept that all workers should have the right to choose whether or not to financially support labor organizations. Protecting this fundamental associational right not only forwards the public interest in its own right, but also enhances the overall economic environment of the State.

The circuit court's decision here interferes with this sound policy judgment, making Wisconsin the only State in this country whose people's decision to protect workers with a right-to-work law is presently being undermined by court order. Act 1 has been the law of Wisconsin since March 2015, and employers, employees, and unions have ordered their affairs around it. Now, a single circuit court has declared the law unconstitutional and enjoined the State and several of the critical public officials from enforcing it. This decision is imposing irreparable harm upon the State, and undermining the public interest embodied in Act 1, in at least three significant respects. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor*

Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

First, the circuit court's decision undermines the State's ability to safeguard all Wisconsin workers from violation of their statutorily recognized, associational rights. One of the critical tools for enforcing Act 1's protections on a statewide basis is that a private party can file an unfair labor practice claim with the WERC for violation of Act 1, and then the Attorney General can enforce WERC's decision. Wis. Stat. §§ 111.07(2), 111.12. Yet, in light of the circuit court's injunction, neither the WERC Commissioners nor the Attorney General may enforce Act 1. The circuit court's decision thus undermines the full enforcement of Act 1 that the Legislature intended, imposing irreparable harm upon the State and harming the public interest that Act 1 embodies.

Second, the circuit court's decision sews confusion as to Act 1's validity. *See Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 58 (5th Cir. 2014) (noting the confusion that would result from a law "being enjoined and then subsequently reinstated"). While "questions of constitutionality . . . cannot *finally* be laid to rest until decided by final appellate adjudication . . . either by the court of appeals by published

opinion or by determination by the Wisconsin Supreme Court," *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 217, 466 N.W.2d 861 (1991) (emphasis added), the continuing effect of the circuit court's decision has already begun to create uncertainty around the State. Plaintiffs have asserted in public that, in light of the circuit court's decision, unions should seek to renegotiate their CBAs and begin to collect fees from nonconsenting employees.[5] While Defendants strongly disagree with Plaintiffs' claim that the circuit court's decision has any legally binding impact on non-parties, there is no reason to permit any uncertainty to persist. Act 1 is entirely lawful. Accordingly, permitting the circuit court's decision to stand during this litigation can only serve to mislead and needlessly confuse the public.

Third and finally, the circuit court's decision undermines the rights of the workers whom Plaintiffs in this case exclusively represent, contrary to the declared public interest embodied in Act 1. Every one of those workers, like all of the other workers in Wisconsin and the other

[5] Union: Employees May Bargain Over "Fair Share" Dues In Wake Of Right-To-Work Ruling, Chippewa Herald, http://chippewa.com/news/state-and-regional/union-employees-may-bargain-over-fair-share-dues-in-wake/article_3e719f86-a955-5d61-95a6-e7ab98683671.html (Apr. 27, 2016).

twenty-five States that have enacted right-to-work laws, have a statutorily-recognized, associational right not to support financially a labor union with whom they disagree. Under the circuit court's order, however, these workers are no longer protected by Act 1. This undermines the State's sovereign interest in the full enforcement of its laws, and the public interest as embodied in Act 1.

III. A Stay Will Not Cause Substantial Harm To Plaintiffs

Plaintiffs will not suffer any harm, let alone substantial harm, if this Court were to stay the circuit court's decision. *See Scullion,* 237 Wis. 2d 498, ¶ 22. The impact of Act 1, if any, on Plaintiffs during the pendency of this appeal is minimal. Act 1 applies only to CBAs entered into after March 11, 2015. *See* 2015 Wis. Act 1, § 13. Accordingly, any negative financial effect of a stay would be felt by Plaintiffs only if: (1) they included snap-back provisions in a post–March 11 CBA, which permitted Plaintiffs to collect fees from nonmembers if a circuit court enjoins Act 1 while appeal was pending; and/or (2) the employers with whom Plaintiffs deal were willing to renegotiate a post–March 11 CBA, or enter into a new CBA, to include the collection of fees from nonmembers, *and* those new CBAs were to go into effect while appeal was pending. Given that Plaintiffs have not placed any snap-back

provisions in the record and have not provided any reason to believe that employers would be willing to enter into CBAs that violate Act 1 during appeal, no harm would come to Plaintiffs from a stay.

And even if Plaintiffs were to submit proof of a relevant snap-back provision triggered by the circuit court's decision, or declarations from employers willing to include terms in imminent CBAs that violated Act 1, any harm to Plaintiffs would be limited to lost dues from workers wishing not to associate with Plaintiffs. This speculative risk of harm to Plaintiffs provides no reason to decline a stay of a clearly unlawful decision, which is stoking state-wide uncertainty and limiting the enforceability of a critical protection for Wisconsin's workers.

CONCLUSION

The motion for a stay pending appeal should be granted.

Dated this 29th day of April, 2016.

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