Nos. 16-3736 & 16-3834

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139;
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 420,

Plaintiffs-Appellants / Cross-Appellees,

v.

BRAD SCHIMEL, in his official capacity as Attorney General for the State of Wisconsin; JAMES R. SCOTT, in his official capacity as Chairman of the Wisconsin Employment Relations Commission,

Defendants-Appellees / Cross-Appellants.

On Appeal from the United States District Court for the Eastern District of Wisconsin, Milwaukee Division, No. 16-cv-00590
Honorable J.P. Stadtmueller

APPELLANTS' COMBINED RESPONSE AND REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs International Union of Operating Engineers Local 139 and International Union of Operating Engineers Local 420 (collectively, "the Unions") have asserted two claims: *first*, that the National Labor Relations Act ("NLRA") preempts Wisconsin Statutes §111.04(3)(a)(3), which prohibits an employer and a labor union from privately agreeing to require represented employees to pay their fair share for any of the services the union provides to them; and *second*, that interpreting the NLRA to permit state bans on such service fee agreements would authorize a violation of the Takings Clause of the Fifth Amendment, which Congress would not have intended.

The question whether Section 14(b) of the NLRA allows a state to prohibit private agreements requiring all employees, regardless of union membership status, to pay for the cost of a union's representation was expressly left open by the Supreme Court in *Retail Clerks International Association, Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963). As the Unions' opening brief sets forth, this Court, in its 2-1 decision in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014) (petition for rehearing en banc denied 5-5), answered that question by holding that a state may prohibit such agreements, and that such a construction of NLRA Section 14(b) does not violate the Takings Clause. *See* Dkt. 13 (Unions' Br.) 4.

Contrary to the State's argument, stare decisis does not preclude this Court from reconsidering *Sweeney*'s holding en banc. "An en banc court may … set aside its own precedent if, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (discussing a case in which the court "overturned a four-year-old precedent because we concluded that the rule established in that case was inconsistent with the intent of Congress and that the panel had misapplied a Supreme Court decision"). The Supreme Court has recommended the use of en banc procedures where there is "doubt about the correctness of the Circuit precedent." *Groves v. Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990). Given the fundamental flaws in the *Sweeney* majority opinion, and *Sweeney*'s growing importance as more states enact similarly overbroad "right to work" laws, reconsideration is justified here.[1]

[1] Similarly, the fact that Congress has not amended the NLRA to overturn the 1982 decision of a single, sharply divided D.C. Circuit panel in *Int'l Union of the Plumbing & Pipefitting Indus. v. N.L.R.B.*, 675 F.2d 1257 (D.C. Cir. 1982), is no reason for this Court to allow the similarly wrong majority opinion in *Sweeney* to stand. The NLRA itself — a comprehensive statute reflecting major bipartisan compromises — has not been amended in any substantive way since well before 1982. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002) (explaining that the NLRA has been "practically unamendable," and the "text … has remained virtually untouched since 1959" due to congressional deadlock).

The State's merits arguments in support of affirmance are unpersuasive. First, the State misreads Supreme Court precedent interpreting the NLRA and asks the Court to dramatically expand a narrow exception to federal labor preemption by adopting a definition of the term "membership" in Section 14(b) that is "virtually [the] inver[se]" of its "literal meaning." *Wegscheid v. Local Union 2911, Int'l Union, United Auto. Workers of Am.*, 117 F.3d 986, 987, 990 (7th Cir. 1997). The State also distorts the legislative history of the 1947 Taft-Hartley Act. Nothing in the legislative history supports the State's contention that Congress intended to condone the complete free-ridership permitted by Wisconsin's law.

Second, even if the Court *were* to adopt the strained meaning of "membership" the State urges, under the Unions' alternative NLRA preemption argument, Wisconsin Statutes §111.04(3)(a)(3) still goes too far because it prohibits the Unions' Fair Representation Fee Agreement, which would require nonmembers to pay *less* than the full amount of expenses authorized by *Beck*.

Third, as to the State's cross-appeal, the Unions' takings claim was ripe for resolution because exhaustion of state administrative remedies was not required. The Unions mount a facial constitutional challenge to Wisconsin Statutes §111.04(3)(a)(3); just compensation would be unavailable in a state

court proceeding; and Wisconsin's law takes the Unions' property for private use. The cross-appeal, which concerns only the State's ripeness defense to the takings claim, should therefore be rejected.

Fourth, the Unions' Takings Clause claim is valid on the merits. The claim properly targets Wisconsin Statutes §111.04(3)(a)(3), rather than the federal duty of fair representation, because only Wisconsin's law unconstitutionally deprives the Unions of the opportunity to obtain just compensation for their services. Nor has Wisconsin conferred any benefit on the Unions that would justify the state-imposed obligation to provide free representation. Because federal statutes must not be interpreted to "raise serious constitutional problems" where another reasonable interpretation is available, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988), the Court should adopt the Unions' interpretation of the NLRA and reverse the judgment below.

ARGUMENT

I. The NLRA preempts Wisconsin Statutes §111.04(3)(a)(3)

The parties agree that the NLRA generally preempts state laws that regulate labor relations. The only dispute is whether NLRA Section 14(b), a narrow exception to preemption that allows states to prohibit private labor-management agreements requiring employees to obtain union "membership,"

29 U.S.C. §164(b), also allows states to ban *all* union fee agreements, including those that merely require employees to pay their fair share for the union's representational services. The Unions' opening brief demonstrates that the 1947 Congress intended to allow unions and employers to enter into fee agreements to prevent employee free-ridership, and that the 1947 Congress meant to authorize states to prohibit only those agreements that require actual union membership or its practical equivalent. Thus, by prohibiting agreements requiring payment of "*any* dues, fees … of any kind or amount … to a labor organization," Wisconsin Statutes §111.04(3)(a)(3) goes too far and is preempted by federal law. The State's response distorts the legislative history and the Supreme Court cases interpreting the relevant provisions of the NLRA to date.

A. Section 14(b), which permits states to prohibit "agreements requiring membership in a labor organization as a condition of employment," 29 U.S.C. §164(b), was added to the NLRA as part of the 1947 Taft-Hartley Act. The stated intent of Congress was to allow states to ban the "closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement." NLRB, *Legislative History of the Labor Management Relations Act, 1947* ("Leg. Hist.") 564 (1948). The State interprets the phrase "compulsory unionism agreement" to include agreements requiring

nonmembers to pay only for the representational services they receive, rather than agreements requiring actual union membership or its equivalent (like "closed shop, union shop, and maintenance of membership" agreements).

Nothing in the legislative history indicates that the 1947 Congress interpreted the phrase the same way. No legislator — including the three senators relied on by the State — suggested that Section 14(b) would allow states to prohibit service fees. Instead, many spoke at length about the problems with free-ridership, the need to preserve the ability of unions and employers to "contract to meet that problem," *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 749 (1988), and the importance of avoiding a situation in which "the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself," Leg. Hist. at 1422 (statement of Senator Taft).

For example, the State quotes out of context the statement of Senator Taft referencing the 12 states that had "enacted laws or adopted constitutional provisions to make all forms of compulsory unionism … illegal," and indicating that Congress did not intend "to deprive the States of such power." Dkt. 35 (State's Br.) 27. Senator Taft qualified his statement by reference to "the report accompanying the Senate committee bill," Leg. Hist. at 1543 — which itself discusses only "State Laws regulating the closed

shop," which required employees to already be union members in order to be hired, *id*. at 412. The report contains no discussion of state laws allowing free-ridership. Indeed, the report ends with the Committee's opinion that the Taft-Hartley "amendments remedy the most serious abuses of compulsory union membership," by banning the closed shop, "and yet give employers and unions who feel that such agreements promoted stability by eliminating 'free-riders' the right to continue such arrangements." Leg. Hist. at 413.

Likewise, the State's brief omits the opening phrase of the quote from Senator Morse, in which he states that Section 14(b) "*completely outlaws any form of the union shop* in those States that have enacted laws abolishing or making illegal all forms of union security." Leg. Hist. at 1562 (emphasis added). With that key omission corrected, it becomes clear that Senator Morse, like the rest of Congress, was focused on Section 14(b)'s impact on closed shop agreements, rather than on service fees to avoid free-ridership. "Union security" was thus limited in Congress's view to agreements requiring actual union "membership," like the closed or union shop. In context, congressional statements about Section 14(b)'s impact on vague concepts like "compulsory unionism" or "union security" simply do not carry the weight the State would place on them — particularly given that such statements were made at a time when closed shop agreements were fully legal and could be

used "as a method of depriving [non-union workers] of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons." Leg. Hist. at 412-13.

Thus, even if Congress were "well informed" that 12 states had passed right to work laws, State's Br. 26 (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 100 (1963)), it is notable that *not one* legislator spoke about state restrictions on service fees, or the fact that any of the existing laws permitted free-ridership. Instead, congressmen described the total universe of "union security" agreements as comprised of "closed-shop contracts, … union-shop contracts, … maintenance-of-membership contracts, and … preferential-hiring contracts." Leg. Hist. at 665. These agreements, all of which make some form of *actual* union membership a condition of employment, are what Congress meant by "compulsory unionism" in 1947.

Further, if Congress were in fact "well informed" about the existing state laws, Congress's choice to draft Section 14(b) in terms of agreements requiring union "membership" — which this Court has recognized "[r]ead literally," according to its "plain meaning," means agreements "compel[ling] all the employees in the bargaining unit to join the union and pay the full union dues," *Wegscheid*, 117 F.3d at 987, 990 — undermines the argument that Congress intended to ratify broader state laws banning all union fees.

As Judge Mikva of the D.C. Circuit concluded after extensive consideration of the statutory text and legislative history, "[h]ad Congress chosen, it could have framed section 14(b) in terms identical to [the broader] existing state right-to-work laws" prohibiting all union fees. *Plumbing & Pipefitting*, 675 F.2d at 1274 (Mikva, J., dissenting). "Employers could have been precluded from making agreements 'requiring membership in or payments of any kind to a labor organization,' rather than those simply 'requiring membership in a labor organization.'" *Id*. "On its face, section 14(b) is by no means as broad as the more restrictive state laws" that existed in 1947, *id*. — or as broad as Wisconsin's law today. In 1947, "[c]ongressional attention focused on closed shops and union shops, which were said to place workers at the mercy of capricious or corrupt treatment by labor organizations. Section 14(b) was meant to extend associational freedom to employees in states that had passed legislation dealing with this subject." *Id*. But Congress did not mean to authorize free-ridership. "Nothing in the legislative history of section 14(b) suggests that Congress meant to give this power to the states." *Id*. at 1274-75.

B. The State also misrepresents the applicable Supreme Court precedent. Section 14(b) permits states to prohibit labor-management "agreements requiring membership in a labor organization." 29 U.S.C.

§164(b). In *Retail Clerks v. Schermerhorn*, 373 U.S. at 751-52, the Supreme Court held that the "membership" agreements states could prohibit included agreements that allowed employees to refrain from becoming actual union members, but still required nonmembers to pay union dues and fees *equal to* those paid by union members.

The State misreads *Retail Clerks* to hold that states may also prohibit fee agreements requiring only payment of an employee's pro rata share of the cost of the union's representational activities. But *Retail Clerks* did not address such an agreement; the collective bargaining agreement ("CBA") in *Retail Clerks* required nonmembers to pay the same dues as union members (what was then known as an "agency fee" requirement), which covered the union's representational activities *and* its political or institutional activities. *Retail Clerks* held that agency fee agreements that require nonmembers to pay *full* union dues are covered by Section 14(b) because such agreements require the "'practical equivalent'" of union "membership." *Id*. at 751 (quoting *N.L.R.B. v. Gen. Motors*, 373 U.S. 734, 743 (1963)).

Retail Clerks expressly reserved judgment as to whether Section 14(b) allows states to prohibit "less stringent union-security arrangements" that require nonmembers to pay less than the full amount of dues paid by union

members. *Id*. at 751-52. In the fifty years since *Retail Clerks*, the Supreme Court has not resolved that question.

The State argues, nonetheless, that *Retail Clerks* should be read to have anticipated and preemptively adopted a different definition of the term union "membership" that the Supreme Court used 15 years later in *Communications Workers of America v. Beck*, when interpreting a different provision of the NLRA. But the State's theory that *Retail Clerks* preemptively incorporated *Beck*'s definition of "membership" is belied by the *Retail Clerks* decision itself. The Supreme Court generally aims to "decide the case before [it]" based on the facts presented, "and leave broader issues for another day." *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 148 n.10 (2011). The Court's decision in *Retail Clerks* reflects these principles of judicial restraint in at least two ways.

First, because the CBA at issue in *Retail Clerks* required payment of dues *equal* to those paid by union members, the Court expressly did not decide whether an agreement requiring the payment of lesser amounts could also be prohibited by state law. 373 U.S. at 751-52. The Court confronted the question of service fees directly in *Retail Clerks*. The union argued that its agency fee should not be considered the equivalent of a "membership" requirement because, even though nonmembers paid the same *amount* as

members, the union *used* the nonmembers' monies for "collective bargaining purposes alone." *Id.* at 752. The Court determined, however, that "if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share." *Id.* at 753-54. So the Court held that any agreement requiring nonmembers to pay the same amount as members is the "'practical equivalent'" of membership for purposes of Section 14(b). *Id.* at 751 (quoting *Gen. Motors*, 373 U.S. at 743). Contrary to the State's contention in this case, the Court did not go on to hold that an agreement requiring nonmembers to pay less than members could also be the "'practical equivalent'" of membership for purposes of Section 14(b).

Second, the State is wrong that *Retail Clerks* held that the phrase "membership" in Section 14(b) means the same thing as in Section 8(a)(3). It is true that *Retail Clerks* held that states could, pursuant to Section 14(b), prohibit agreements requiring nonmembers to pay full union dues, while that same term *General Motors* held that employers could, pursuant to Section 8(a)(3), require nonmembers to pay full union dues. But the Court in *Retail Clerks* carefully declined to decide whether "the s[ection] 8(a)(3) proviso and s[ection] 14(b) … are perfectly coincident," concluding only that "they overlap to some extent." *Id.* at 751. Instead, the Court held only that "[a]t least to

[the] extent" of agency fee agreements requiring full union dues "did Congress intend s[ection] 8(a)(3) and s[ection] 14(b) to coincide." *Id*. at 752. So when *Beck* changed the meaning of Section 8(a)(3), it did not also mandate a change in the meaning of Section 14(b).

The State is wrong that the Unions are "attempt[ing to] narrow[]" *Retail Clerks*. State's Br. 30. On the contrary, the Unions are asking the Court to apply the actual holding of *Retail Clerks*. The State is seeking to change the holding based on a subsequent case (*Beck*), which addressed a different provision of the NLRA. But it is particularly important to hew closely to that holding and rationale of *Retail Clerks* because there are good reasons not to expand *Beck*'s definition of the term "membership" from Section 8(a)(3) to Section 14(b).[2] In particular, as discussed in the Unions' opening brief, *Beck*'s definition of "membership" in Section 8(a)(3) is strained, and the reason the *Beck* Court adopted such a strained definition — to ensure consistency between Section 8(a)(3) and an analogous provision of the Railway Labor Act — does not apply to Section 14(b). *See* Unions' Br. 29-33. Given the different purposes served by Section 14(b) and Section 8(a)(3), this is a situation in which the meaning of a term "when used in … different

[2] The State is mistaken that the Unions are asking this Court to overrule *Beck* or limit it in any way. Obviously, this Court does not have that power.

provisions" *should* "vary to meet the purposes of the law." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (citation and quotation marks omitted).

For the same reasons, the Employee Amici are incorrect that *Beck*'s definition of "membership" in Section 8(a)(3) must be applied to Section 14(b) because the same term ("membership") also appears in Section 7 and Section 8(f) of the NLRA. *See* Dkt. 38 (Employee Amici Br.) 18-21. The references to union "membership" in Sections 7, 8(a)(3), and 8(f) are to be considered apiece. Each "contains a statutory grant of authority to unions and employers" to enter into agreements which condition employment on the employee's obtaining union "membership." Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right to Work*, 4 UC Irvine L. Rev. 857, 865 (2014). Indeed, Section 7 expressly cross-references Section 8(a)(3). *See* 29 U.S.C. §157 ("except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section []8(a)(3)"). And Section 8(f) is meant solely to permit the same basic "membership" agreements in the construction industry, to which different provisions apply throughout the NLRA. *See* 29 U.S.C. §158(f). It makes sense, then, that all three — Sections 7, 8(a)(3), and 8(f) — should be construed to authorize the same sorts of agreements.

Section 14(b) is different. It is a narrow grant of authority to the states to legislate in an area entirely preempted by federal law. And there are valid reasons not to treat these provisions as "perfectly coincident," *Retail Clerks*, 373 U.S. at 751, particularly in light of the "serious constitutional problems" caused by the State's interpretation of Section 14(b), *DeBartolo,* 485 U.S. at 575. *See infra* at pp. 21-50.[3]

C. The State argues that failing to expand Section 14(b) to allow states to prohibit service fees "would make [Section 14(b)] a nullity" because "States could ban only those union-security agreements that federal law already forbids under [Section 8(a)(3)]" after *Beck*. State's Br. 28. Professor Cynthia Estlund — who agrees with the Unions that "section 14(b) … permit[s] states to bar agreements requiring either actual union membership or its financial equivalent, but not agreements requiring payment of the core fee-for-services" — has similarly recognized that the result of this interpretation "would be that state 'right-to-work' laws no longer do any work." Cynthia L. Estlund, *Are Unions A Constitutional Anomaly?*, 114 Mich. L. Rev. 169, 222 (2015). But, as Professor Estlund explains, "that is only

[3] Moreover, as discussed at pp. 17-20, *infra*, under the Unions' alternative theory, even if the definition of "membership" in *Beck were* imported from Section 8(a)(3) into Section 14(b), Wisconsin's ban on *all* service fees would still be overbroad.

because the Supreme Court in *Beck* later did all the work (nationwide) that such state laws could do consistent with the NLRA." *Id.* By "barr[ing] agreements requiring individuals to pay the full financial equivalent of membership, and allow[ing] only those that directly meet the free-rider problem otherwise entailed by exclusive representation," *id.*, *Beck* itself made it unnecessary for states to exercise their authority under Section 14(b) to also ban such agreements.

Before *Beck*, employers could enter into agreements requiring nonmembers to pay the equivalent of full union dues (covering both the union's representational and non-representational work). *See, e.g.*, *Gen. Motors*, 373 U.S. at 743. At the same time, Section 14(b) authorized states to prohibit such agreements. *Retail Clerks*, 373 U.S. at 751. There is no question that Section 14(b) served a purpose then. But no interpretive principle justifies reading Section 14(b) to reach further than the 1947 Congress intended simply to give Section 14(b) a different role to play after *Beck*. Thus, Section 14(b) does not allow states to prohibit voluntary labor-management agreements requiring employees to pay their fair share for representational services.

D. In any event, under the Unions' alternative argument, *see* Unions' Br. 42-43, even if the definition of "membership" in *Beck were* imported from Section 8(a)(3) into Section 14(b), Wisconsin still could not justify its total ban on agreements requiring payment of "*any* dues, fees, assessments, or other charges or expenses of *any* kind or amount." Wis. Stat. §111.04(3)(a)(3) (emphasis added). In particular, Wisconsin cannot prohibit an agreement like the Fair Representation Fee Agreement proposed by the Unions in this case, which would require nonmembers to pay considerably *less* than the amount the Unions spend per capita on chargeable collective bargaining and contract administration expenses under *Beck*. Dkt. 14 (App.) 13, 19-20.

The State argues that if the Unions' proposed Fair Representation Fee Agreement is permissible under Section 8(a)(3) (i.e. if the Unions can enforce it without running afoul of that section's prohibition on discrimination against nonmembers), "then it must be that Wisconsin may forbid [it] under [Section 14](b), if indeed 'membership' means the same under both provisions." State's Br. 32. In the State's view, because the Unions could clearly, under federal law, require nonmembers to pay less than the amounts deemed chargeable under *Beck*, Wisconsin must be able to ban such a

requirement. But the State misunderstands the nature of Congress's grants of authority in Section 8(a)(3) and Section 14(b), respectively.

"Section 8(a)(3) contains a statutory grant of authority to unions and employers." Fisk at 865. Unions and employers may enter into agreements that require employees to pay the financial equivalent of union "membership," as construed by *Beck*, which means paying the dues and fees necessary to fund a union's activities "germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. Section 8(a)(3) sets the "outer bounds of the authority granted to unions and employers." Fisk at 865. Employers may require employees to pay for the union's representational work, *Beck*, 487 U.S. at 745, but they may not require *more* of nonmembers. For example, in light of *Beck*, employers may not require employees to become actual union members or to pay for the union's political or non-representational work. But because Section 8(a)(3) establishes only the "outer bounds" of what private parties can agree to require, unions and employers may also "require *less* of nonmembers" than what *Beck* construed as requiring "membership." Fisk at 865. Thus, an agreement requiring, for example, nonmembers to pay for either grievance handling or collective bargaining — but no more — would be permissible

because it is less exacting than Section 8(a)(3) permits. The State does not appear to dispute this proposition.

"Like Section 8(a)(3), Section 14(b) determines the outer bounds of the authority it grants—but rather than limiting the authority of unions and employers to enter agreements, it sets the outer bounds of what states may prohibit consistent with the NLRA." Fisk at 866. Section 14(b) authorizes states to ban agreements that "requir[e] membership" in a union, 29 U.S.C. §164(b), including (if the Court were to reject the Unions' principal argument and conclude that it must import that same definition into Section 14(b)) what *Beck* has defined as "membership." But a state "cannot ban more than that without exceeding the authority granted to [it] by federal law. So, when a state bans payments to a union that do not rise to the level of membership," like Wisconsin has done, it "exceed[s] the authority granted [it] under section 14(b)." Fisk at 866. Where a state prohibits more than "agreements requiring membership," 29 U.S.C. §164(b), its law falls outside the scope of Section 14(b) and is preempted by federal law. *See N.L.R.B. v. Houston Ch., Assoc. Gen. Contractors of Am., Inc.*, 349 F.2d 449, 453 (5th Cir. 1965).

Because the Unions' proposed Fair Representation Fee Agreement would require nonmembers to pay less than the full amount of expenses authorized by *Beck*, it would not "requir[e] membership," within the meaning

of Section 14(b), 29 U.S.C. §164(b), even if "membership" in that provision were construed to have the same strained meaning as "membership" in Section 8(a)(3). Accordingly, Wisconsin "does not have authority to ban [such an agreement], even though [the] provision is permissible under section 8(a)(3)." Fisk at 866.

* * *

In sum, both the Supreme Court precedent and the legislative history support the conclusion that Congress intended to allow states to prohibit agreements requiring actual "membership" — the term chosen by Congress in Section 14(b) — and its financial equivalent, as the Supreme Court later held in *Retail Clerks*. But there is no evidence that Congress intended to allow free-ridership. Section 14(b) thus "does not permit [states] to allow any worker who wishes to free-ride on the union's mandatory efforts on the nonmember's behalf to do so." *Sweeney*, 767 F.3d at 682 (Wood, C.J., dissenting). Wisconsin's arguments in support of its total ban on service fees would require the Court to distort the plain language of Section 14(b) and to undermine the "twin purposes" of the 1947 Congress, one of which was to ensure that all employees could be made to "'pay their share of the cost'" of the union's representation. *Gen. Motors*, 373 U.S. at 740-41 (quoting Leg. Hist. at 412).

II. The Unions' takings claim is properly presented

The State's cross-appeal concerns only the "portion [of the district court order] holding that [the Unions'] takings claim is presently ripe for litigation in federal court." App. 78. Because "constitutional issues [should] not be needlessly confronted," if the Court agrees with the Unions' interpretation of the NLRA, it need not address the takings claim or the State's ripeness defense thereto. *DeBartolo*, 485 U.S. at 575.

Indeed, the avoidance concerns expressed in *DeBartolo* apply even if the Court were to conclude that the particular Union-Plaintiffs in this case are procedurally barred from bringing their takings claim at this juncture. *See Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 550 (7th Cir. 2014) (Posner, J., concurring in the judgment) (applying the canon of constitutional avoidance even where the statute had been repealed). Where the NLRA can, consistent with the intent of Congress, be construed to avoid "serious constitutional problems" (whether raised by these Unions or others), it must be. *DeBartolo*, 485 U.S. at 575. Nevertheless, as we show below, the district court was correct that the Unions' takings claim is ripe.

A. The takings claim is ripe for review

As the district court correctly held, the Unions were not required to bring suit in state court under the Wisconsin Constitution before filing their

federal constitutional claim. Dkt. 13 (Short App.) 16. As a general matter, "exhaustion of state administrative remedies [is] not . . . required as a prerequisite to bringing an action pursuant to [42 U.S.C.] § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982). Without departing from that fundamental principle, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), explained that certain takings claims are not ripe for resolution by the federal courts until the plaintiff has sought and been denied compensation from the state. *Id.* at 194. The *Williamson* Court reasoned that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Id.* at 194-95 (citation and quotation marks omitted).

Williamson did not create a blanket, jurisdictional requirement of exhaustion of state remedies. *See Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013) (*Williamson* is "not . . . jurisdictional"). Instead, *Williamson* was motivated by "prudential" concerns, recognizing that a state should have the opportunity to provide just compensation before a federal court invalidates state action as an uncompensated taking. Notably, *Williamson* carefully distinguished between state "procedures that allow a property owner to

obtain compensation for a taking," thus avoiding any constitutional violation in the first place, and "remedial" procedures, "such as those for obtaining a [state] declaratory judgment," or injunction, "by which an injured party may seek review . . . and obtain a remedy" if the state action "is found to be [an] unlawful" taking. 473 U.S. at 194 n.13 & 193. Only the former type of state procedure must be utilized; "[e]xhaustion of review procedures is not required." *Id.* at 194 n.13.

Consistent with these principles, *Williamson* applies to a subset of takings claims only. As the State acknowledges, a takings claim may proceed immediately in federal court if the plaintiff brings a "pre-enforcement facial challenge[]" to the statute, *Muscarello v. Ogle Cty. Bd. of Comm'rs*, 610 F.3d 416, 422 (7th Cir. 2010), or if "state procedures for obtaining just compensation are either unavailable or inadequate," *Peters v. Vill. of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007). In addition, this Court has identified a third exception to *Williamson*: "when the government has taken property for a private, rather than a public, use." *Peters*, 498 F.3d at 732. Each of these exceptions applies here, and the Unions' takings claim may thus proceed immediately in federal court.

1. Wisconsin's law is facially unconstitutional

The district court was correct that the Unions' takings claim is ripe "because the plaintiffs' allegations are best understood as comprising a facial challenge to Act 1," Short App. 19, and "facial challenges to legislative action authorizing a taking can be litigated immediately in federal court," *Peters*, 498 F.3d at 732. As the district court noted, the Unions "argue that Act 1 categorically prohibits [unions] from lawfully seeking compensation from nonmembers operating under CBAs across the state for services that the unions are compelled to render to them under federal law." Short App. 20. The State suggests that the district court erred because "the Unions do not, and plausibly could not, assert a facial takings claim." State's Br. 37.

As was clear below, the Unions challenge Wisconsin's law as unconstitutional *on its face*, not only as applied. The district court roundly rejected the State's suggestion (made again on appeal, State's Br. 37), that the mere appearance of the phrase "as applied" in the Complaint was meant to waive any facial challenge to the law. Short App. 22. As an initial matter, the State reads those words in the Complaint out of context. The Complaint alleges that "[a]s applied to unions covered by the NLRA, Wisconsin Statutes §111.04(3)(a)(3) effects an unconstitutional taking." App. 16 (cited in State's Br. 33). Thus it is clear that, in context, the Complaint alleges that the state

law is unconstitutional with respect to *every* NLRA covered union, not simply where certain facts exist. Indeed, Wisconsin Statutes §111.04(3)(a)(3) only applies to private sector unions. *See* Wisconsin Statutes §111.02(7) (defining "employer" to exclude the "state or any political subdivision thereof").

Regardless, the Supreme Court has made clear that the "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010). The "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings.… The distinction … goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *see also Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 864 (11th Cir. 2013) ("we are not bound by a party's characterization of the complaint as facial, but rather look to whether 'the complaint sets forth a cause of action for an as-applied challenge'" (citation omitted)).

Thus, the district court was correct that the "as applied" language quoted by the State "does not control whether the substance of the complaint constitutes a facial or as-applied challenge." Short App. 22. Rather, the Unions' Complaint "indicates that not only will [the Plaintiff-Unions] suffer an economic loss as a result of Wisconsin Act 1, but so too will any union

elected as the exclusive bargaining representative of Wisconsin workers. While Act 1, certainly 'applies' to the plaintiffs, so too does it equally 'apply'—and work the same unconstitutional taking—on every other union in the state." *Id*. The Unions "claim is 'facial' in that it is not limited to [the Unions'] particular case, but challenges application of the law more broadly to all" Wisconsin labor unions. *Doe*, 561 U.S. at 194.

The State is also wrong that the Unions' facial challenge fails on the pleadings. The State misunderstands what it means for a law to be unconstitutional on its face, and overreads the case law stating that a law must be "unconstitutional 'in all of its applications.'" State's Br. 37.

The State urges that Wisconsin Statutes §111.04(3)(a)(3) is facially constitutional because the provision sweeps so broadly that it encompasses some union fee arrangements that the Legislature could lawfully prohibit; for example, agreements requiring nonmembers to pay for a union's "political campaigns." State's Br. 37-38. But the Supreme Court has rejected the State's "basic method of analysis." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 894 (1992) (rejecting similar arguments defending a law as facially constitutional). Just because the Legislature could have drafted a narrower, constitutionally-permissible law that is wholly encompassed by Act 1 does not make Wisconsin's current law facially constitutional.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), for example, the Court struck down as facially unconstitutional D.C.'s law prohibiting possession of all handguns. It was undisputed that D.C. could have banned the possession of handguns under certain circumstances: their possession by convicted felons, the "insane," or those without a license. *Id.* at 631. And those same constitutionally-permissible applications would be covered by D.C.'s total handgun ban. But the fact that D.C.'s law swept so broadly as to encompass some permissible restrictions did not doom the plaintiffs' challenge. The same is true in other contexts; a state law that prohibits all abortions, for example, is unconstitutional *on its face*, notwithstanding the fact that such a prohibition would be constitutional as applied to abortions after viability. *See, e.g., Casey*, 505 U.S. at 846.

The State is thus mistaken that the relevant "'denominator' in the takings calculation" is "the Unions' 'services' generally" rather than "the particular services" for which Wisconsin's law denies compensation: the "services performed to benefit objecting nonmembers." State's Br. at 39. In *Casey*, the state argued that a law requiring spousal notification for an abortion could not be facially unconstitutional because over 99 percent of abortion-seekers either had no husband or would notify their husbands voluntarily and therefore, in the vast majority of applications, the law would

not pose an unconstitutional undue burden. 505 U.S. at 894. The Court responded unequivocally:

> We disagree with respondents' basic method of analysis. The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Id. (emphasis added).

Even *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007), which upheld an abortion restriction as facially constitutional, acknowledged that the Court looks only at those applications challenged to be unconstitutional. The Court noted that "[t]he abortions affected by the Act's regulations take place both previability and postviability" but "[t]he question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions." *Id*. Even though the state could unquestionably prohibit postviability abortions, and the state law in question covered postviability abortions, the plaintiffs were not prevented from challenging the law on its face. The requirement that a law be unconstitutional "in all of its applications," thus cannot mean what Wisconsin suggests it does. State's Br. 37.

Here, Wisconsin's law denies the Unions any compensation for services they are required to perform for the benefit of nonmembers. Wisconsin's law is "irrelevant" with respect to fee restrictions on nonmembers for non-collective bargaining expenditures already imposed by federal law, or as to the collection of full membership dues from Union members who have privately agreed to pay such dues as a condition of Union membership. *Casey*, 505 U.S. at 894. The proper focus of the Court's facial invalidity review is thus the context in which Wisconsin Statutes §111.04(3)(a)(3) operates as an unconstitutional restriction: obtaining compensation for representational services the Unions are obligated to provide to nonmembers. As with a law banning all handguns or all abortions, Wisconsin Statutes §111.04(3)(a)(3) is unconstitutional on its face because it goes too far. By prohibiting labor unions from seeking to obtain *any* payment for services rendered, the law on its face effects an uncompensated taking in violation of the Fifth Amendment.

The State is also wrong that the Unions cannot plausibly allege that Wisconsin Statutes §111.04(3)(a)(3) "'denies them' all or substantially all 'economically viable use of their'" property. State's Br. 37 (quoting *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445, 467 (7th Cir. 2002)). Again, the State's argument focuses on the wrong property: the only property that is relevant to a takings analysis is the property for which the law denies

compensation — here, the representational services which must be rendered for free. The Unions are not required to show that Wisconsin's law denies them compensation for the services they render to dues-paying members, or for political and institutional services the Unions choose to provide which are not mandated by federal law. The district court properly focused on the uncompensated representational services at issue and held that "the complaint sufficiently alleges that the [Unions'] property, namely, their services, will be deprived of economic value if they are" required to be "rendered for free" to nonmembers. Short App. 21.

For this reason, it is irrelevant to the constitutional analysis whether "'unions continue to thrive' under right-to-work laws." State's Br. 48 (quoting *Sweeney*, 767 F.3d at 664). Even if some unions may have been able to convince some employees to voluntarily continue paying higher dues to cover the representational services that must be provided for free to nonmembers, Wisconsin Statutes §111.04(3)(a)(3) deprives the Unions of all or substantially all economically viable use of the relevant property.

2. Just compensation is not available in state court

Because the district court concluded that the Unions assert a facial challenge against Act 1, it rejected the State's ripeness argument and did not consider whether the Unions claim is also ripe because it falls within the

futility exception to *Williamson*. Short App. 22. The Unions' claim is ripe under that exception as well. Where, as here, "state procedures for obtaining just compensation are either unavailable or inadequate," a takings claim "is immediately ripe in federal court." *Peters*, 498 F.3d at 732.

The Unions were not required to bring a state-court action under the Wisconsin Constitution because resort to that process in this case would not have yielded an award of just compensation to save Wisconsin Statutes §111.04(3)(a)(3) from unconstitutionality. In Wisconsin, an inverse condemnation proceeding seeking just compensation may be brought pursuant to a statutory condemnation scheme, Wis. Stats. §32.10, or, if that procedure is inapplicable, directly under article I, section 13 of the Wisconsin Constitution. *See Eberle v. Dane Cnty. Bd. of Adjustment*, 595 N.W.2d 730, 745 (Wis. 1999). The relief obtained in such a proceeding is generally "an exercise of eminent domain and payment of just compensation by the government." *Id.* at 744 n.29. The State appears to concede that Wisconsin's statutory inverse condemnation scheme is inapplicable here.

The State contends, however, that the Unions were required to exhaust state remedies by bringing a claim in state court under the Wisconsin Takings Clause. State's Br. 35. But given the nature of the Unions' claim here — which concerns a state law causing a continuing, prospective taking

for which the Legislature clearly did not intend to provide compensation — a proceeding under the Wisconsin Constitution to challenge Wisconsin Statutes §111.04(3)(a)(3) would provide only the same declaratory or injunctive relief sought in federal court, making it precisely the type of state "review procedure[]" that plaintiffs are *not* required to exhaust under *Williamson* and *Patsy*. *Williamson*, 473 U.S. at 194 n.13. Indeed, in similar, non-traditional takings challenges brought under the Wisconsin Constitution, state courts have awarded only declaratory or injunctive relief, not "just compensation."

For example, in *Machinists Local Lodge 1061 et al. v. Walker*, No. 2015-CV-000628 (Wis. Cir. Ct. Dane Cty., Ap. 1, 2016), the state trial court struck down Wisconsin Statutes §111.04(3)(a)(3) as violating the Wisconsin Constitution's Takings Clause. The trial court did not, as the State envisions, fashion some sort of just compensation to avoid a constitutional violation. Instead, the court simply enjoined the law.[4] Although state-court injunctive relief is one way to remedy the wrong caused by an unconstitutional taking, *Williamson* does not require the Unions to exhaust state "review procedures" to obtain such a prospective remedial judgment. 473 U.S. at 194 n.13.

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[4] As the State notes, the trial court injunction is no longer in effect, as the state Court of Appeals has stayed the judgment pending appeal. State's Br. 8.

Similarly, in *Wisconsin Medical Society, Inc. v. Morgan*, 787 N.W.2d 22 (Wis. 2010), a group of health care providers challenged a state law authorizing the transfer of $200 million from a medical malpractice fund. The court determined that the health care providers had a property interest in the fund, that the state "'took' money from the Fund, did so for public use, and did not compensate the Fund for this taking." 787 N.W.2d at 33-34. The court thus held that the state law was "unconstitutional beyond a reasonable doubt." *Id*. But rather than provide some form of "just compensation" that would allow the law to survive constitutional scrutiny, the court ordered that the transferred money be restored and that Wisconsin be permanently enjoined from transferring money out of the fund pursuant to the unlawful statute. *Id.* at 47. The state court judgment did not, therefore, make the law constitutional by providing just compensation; it simply afforded injunctive relief.

Likewise, in *Wisconsin Retired Teachers Association, Inc. v. Employee Trust Funds Board*, 558 N.W.2d 83 (Wis. 1997), upon which the State relies, State's Br. 35, teachers challenged the constitutionality of a state law authorizing the transfer of certain benefits from the public employees' retirement trust fund. The court determined that the teachers had a protected property interest in the earnings of the trust fund, and that the

challenged legislation took that property without just compensation. As a result, the state court granted declaratory and permanent injunctive relief, restoring the monies to the trust fund for subsequent equitable distribution. *Id*. at 99. Again, the state court did not provide ongoing just compensation to render the legislation constitutional.

Here, as the recent Wisconsin trial court *Machinists* decision demonstrates, a state court lawsuit challenging Wisconsin Statutes §111.04(3)(a)(3) under the Wisconsin Constitution would result only in an order enjoining the State's unlawful statute, not in ongoing monetary compensation. Because *Williamson* does not require plaintiffs to exhaust remedial procedures by seeking declaratory or injunctive relief in state court, the Unions' takings claim is ripe for resolution by this Court.[5]

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[5] The State cites this Court's decision in *Forseth v. Village of Sussex*, 199 F.3d 363, 373 (7th Cir. 2000), as support for its position that a plaintiff must exhaust state remedies by bringing a claim under Wisconsin's Takings Clause where available. *See* State's Br. 36 (also citing an unpublished disposition in *Everson v. City of Weyauwega, Wis.*, 573 F. App'x 599, 600 (7th Cir. 2014)). First, *Forseth* addresses the possibility of a state takings claim only in passing, and does not seek to establish a categorical rule requiring exhaustion of such a claim even if it would not result in just compensation. Nor could it. Such a holding would be contrary to *Forseth*'s own recitation of this Circuit's well-established law that "a plaintiff need not pursue state procedures that are unavailable or inadequate," 199 F.3d at 373 n.14, and contrary to *Williamson* itself. Second, *Forseth* makes clear in eleven separate places in the opinion that its discussion is limited to "land-use disputes," *id*. at 372. *Forseth* concerned the plaintiffs' claim that the government had

3. Wisconsin's law takes property for a private use

A third exception to *Williamson* also applies here. As this Court recognized in *Peters*, "it is well accepted that, when the government has taken property for a private, rather than a public, use, injunctive or declaratory relief may be appropriate." 498 F.3d at 732. In such circumstances, a plaintiff need not seek compensation from the state before bringing a federal claim because "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even [if] *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Where compensation alone would not remedy the constitutional wrong, a plaintiff's federal claim is immediately ripe.[6]

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wrongfully interfered with their property rights in a tract of land by refusing to allow them to develop it as they wished. Such a routine application of state inverse condemnation law could clearly result in an award of just compensation, unlike the Unions' claim here.

[6] The State cites *Daniels*, 306 F.3d at 453, for the proposition that even claims that property has been taken for private use must first be litigated in state court. The district court was uncertain about whether this third exception is available under this Circuit's case law, but found it "unnecessary to address whether the plaintiffs' purported 'private use' claim is exempt from the ripeness test." Short App. 19. Not only is the State's understanding of *Daniels* contrary to the fundamental principles on which *Williamson* is based and the distinction the Supreme Court drew between procedures for seeking compensation and other state remedies, but this Circuit's more recent cases indicate that such cases may proceed in federal court in the first instance. *See, e.g.*, *Sorrentino v. Godinez*, 777 F.3d 410, 414 (7th Cir. 2015) (identifying takings for private use as a circumstance in which equitable

The Unions clearly allege that the State has taken their property for private use. *See* App. 16. Wisconsin Statutes §111.04(3)(a)(3) takes the Unions' services for the benefit of nonmembers and entitles those private individuals to receive services for free. Because the Unions' services are paid for entirely by membership dues, Wisconsin Statutes §111.04(3)(a)(3) essentially takes money from Union members and transfers it to nonmembers. Representation of nonmembers at grievance hearings, for example, is very costly. *See* Unions' Br. 8. As a result of such laws, "[s]ometimes local unions are forced to increase membership dues to avoid cutting services, which makes the situation even worse." App. 74.

Under *Kelo v. City of New London*, the Supreme Court's most recent exposition of the "public use" requirement, Wisconsin's scheme would not pass constitutional muster. The State is "forbidden from taking" one private

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relief, rather than compensation, may be required); *Peters*, 498 F.3d at 732 (same). Indeed, *Daniels* itself held that the plaintiffs had satisfied the "futility exempt[ion]" from *Williamson*, 306 F.3d at 457, noting that although the plaintiffs "had the option of bringing their claim for equitable or declaratory relief in state court, . . . they were not required to do so under *Williamson*," *id.* at 457 n.12. If the State's characterization of *Daniels* were correct, it would be contrary to the judgment of every other federal Court of Appeals to have addressed the issue. *See Carole Media LLC v. N.J. Transit Corp.*, 550 F.3d 302, 308 (3d Cir. 2008) (collecting cases from the D.C., Fifth, Sixth, Eighth, and Ninth Circuits); *see also Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*, 604 F.3d 7, 16 (1st Cir. 2010); *cf. Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1176 (10th Cir. 2011).

party's property "for the purpose of conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477. "Nor would the [State] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478. In *Kelo*, which concerned the use of eminent domain for redevelopment, the Court determined that the "public use" requirement was met only after a searching review of the record revealed that the takings "would be executed pursuant to a 'carefully considered' development plan." *Id.* (citation omitted). The Court relied on extensive findings "that there was no evidence of an illegitimate purpose" or an intent to confer a private benefit. *Id.* Here, the Wisconsin Legislature made no such findings and utterly failed to explain why "conscript[ing] the union into providing uncompensated services to anyone who decides to opt out of union membership," and leaving one set of employees to foot the bill for their coworkers, benefits the *public*, rather than individual free-riders. *Sweeney*, 767 F.3d at 683-84 (Wood, J., dissenting).[7]

[7] The State's brief on appeal relies heavily on news articles, opinion pieces, and academic studies regarding purported benefits of "right to work" laws that are neither in the record nor subject to judicial notice. State's Br. 49-50. If the district court judgment is reversed, the Unions will dispute the State's factual assertions on summary judgment. But those extrarecord sources should not be considered now.

* * *

As shown above, three separate exceptions to *Williamson*'s exhaustion requirement apply to the Unions' takings claim, any one of which would be sufficient to reject the State's ripeness defense. Accordingly, the State's cross-appeal should be denied.

B. Wisconsin Statutes §111.04(3)(a)(3) violates the Takings Clause

Having dispensed with the State's ripeness argument, the district court dismissed the Unions' takings claim on the merits, holding that it was bound by this Court's dicta in *Sweeney*. Short App. 15. On appeal, the State contends that even if not for *Sweeney*, the Unions "takings claim would fail on the merits for several reasons." State's Br. 41. Each is unpersuasive.

1. The State argues that "the Unions' takings theory targets the wrong law," because the NLRA — not Wisconsin Act 1 — imposes the duty of fair representation. State's Br. 41. As discussed in the Unions' opening brief, this argument ignores Section 8(a)(3) of the NLRA, which permits employers and unions to enter into agreements to ensure that all employees pay their fair share for the cost of the union's representation. 29 U.S.C. §158(a)(3). It is Wisconsin's law that — by prohibiting such private, voluntary agreements — denies the Unions the opportunity to obtain compensation for their services. *See* Unions' Br. 46-47.

The State's argument works only if one turns a blind eye to the "background principles" of federal labor law (including the duty of fair representation) that predate Wisconsin's "right to work" legislation denying the Unions compensation for their services. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). But both the Supremacy Clause and the Supreme Court's Takings Clause jurisprudence dictate that states consider such pre-existing "background principles" in enacting any legislation which might impinge on federal rights. *Id.*

2. The State also mischaracterizes the Complaint as asserting a constitutional claim against individual nonmembers or against employers for refusing to enter into service fee agreements. State's Br. 43-44. The Unions claim nothing of the sort. The Takings Clause protects against uncompensated *government* takings only. *See Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 111 (2d Cir. 2003) ("state action is a necessary component of any … takings claim"). Wisconsin Statutes §111.04(3)(a)(3) takes private property because the state law prohibits the Unions from entering into service fee agreements with willing employers. If Wisconsin law permitted such agreements and an employer nonetheless refused, the Unions would

have no claim against the State.[8]

The Unions have alleged that "[p]rior to the enactment of Wisconsin's right to work law, each of the Unions had, in each of its [CBAs], a union security clause that required all bargaining unit employees to pay their fair share for the Union's representation." App. 13. And as the amicus brief of the Northern Indiana Independent Contractors Group (an employer association located in what only recently became a "right to work" state) points out, many union-signatory employers willingly enter into union security agreements because they have found that such agreements "promote[] the[ir] objectives of maintaining labor stability," "preventing industrial strife," and avoiding "[r]esentment between union members paying full dues and free-riders," which can be dangerous "at the jobsite level." Dkt. 19 (Employer Amicus Br.) 7, 15, 13. Wisconsin Statutes §111.04(3)(a)(3) unconstitutionally restrains the Unions and their signatory employers from agreeing to include these same provisions in future CBAs.

[8] For the same reason, the argument put forward by the Employee Amici that service fees constitute "an unconstitutional taking of *employee* property" is misguided. Employee Amici Br. 17. This case concerns private sector employment agreements. If a private sector employer voluntarily negotiates an agreement requiring its employees to pay for the actual cost of services they receive, there is no state action, no taking, and no constitutional violation.

3. The State and Employee Amici's simplistic reliance on *Davenport v. Washington Education Association*, 551 U.S. 177 (2007), for proposition that "unions have no constitutional entitlement to the fees of nonmember-employees" is misplaced. *Id.* at 185 (quoted in State's Br. 14, 43, 53 and Employee Amici Br. 2). *Davenport* addressed a First Amendment claim only, arising in the context of public sector employment. In *Davenport*, a state court held that a law requiring unions to obtain consent before spending employees' fees for political purposes triggered a First Amendment claim for the unions. The Supreme Court merely clarified that it "ha[d] never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees." *Id.* The case did not concern the Takings Clause or a union's right to negotiate private agreements with willing employers to ensure that all employees, regardless of union membership status, pay their fair share for the union's compelled services.

4. In a variant on the *Sweeney* majority's suggestion that labor unions are "adequately compensated" for their services, the State argues that Wisconsin Statutes §111.04(3)(a)(3) is simply a "'rational[]' and 'legitimate' condition on a special government-conferred benefit,'" which cannot to give rise to a takings claim. State's Br. at 45 (quoting *Ruckelshaus*

v. Monsanto Co., 467 U.S. 986, 1005 (1984)). The State identifies the "privilege" of exclusive representation (i.e. the ability, if elected by a majority, to represent all bargaining unit employees) as the "government-conferred benefit" upon which Wisconsin Statutes §111.04(3)(a)(3) is placed as a condition. State's Br. 46. But exclusive representation in the private sector is creature of federal law, not state law. With respect to the Unions' representation of private sector workers covered by the NLRA, Wisconsin's laws are completely preempted by federal labor law. *See La Crosse Tel. Corp. v. Wis. Emp. Relations Bd.*, 336 U.S. 18, 25 (1949). For this reason, the State is mistaken in asserting that because Wisconsin "may refrain from conferring the privilege" of exclusive representation "in the first place," it may condition that "privilege" upon the representation of nonmembers for free. State's Br. 47. With respect to NLRA-covered unions, the "privilege" of exclusive representation is not Wisconsin's to grant or deny.[9]

[9] The Unions dispute the implication that exclusive representation is a "benefit" that allows labor unions or their officials to personally prosper at the expense of bargaining unit employees. *See* Employee Amici Br. 6. Labor unions are not profit-making enterprises. Exclusive representation increases bargaining power, which enables the Unions to negotiate better wages and benefits *for the employees* they represent, including "cajol[ing] employers to fund union healthcare and pension plans," *id.*, to ensure that workers have good health care and retirement benefits.

Further, the Supreme Court has been clear that for Wisconsin's burdens/benefits argument to work, any benefits must have been "caused by" *the same* government action that caused the taking. *See Bauman v. Ross*, 167 U.S. 548, 584 (1897). Wisconsin Statutes §111.04(3)(a)(3) itself confers no benefit on the Unions. The State cannot take the Unions' property in exchange for a purported benefit the State did not provide.

Moreover, the State's suggestion that exclusive representation "does not arise by common law, contract, or some other private arrangement," but "has been extended to unions only as a matter of legislative grace" is simply historically inaccurate. State's Br. 47; *see also* Employee Amici Br. 15 n.6. Private "closed shop" agreements, which required all employees to be union members, predated the 1934 enactment of the NLRA. *See* NLRB, *Legislative History of the National Labor Relations Act, 1935* 81 (1935) (testimony of Professor Robert L. Hale about workers in "closed-shop industr[ies]" who are "governed by the rules of [the] union"). At the time, there were no legal restrictions on the negotiation of such labor-management agreements, the effect of which was to create exclusive representation by private contract, rather than by law.

Finally, the Supreme Court has rejected attempts to broadly apply case law suggesting that a regulated entity can be made to give up property rights

in exchange for a "special benefit." The Court distinguished *Monsanto* in *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015), explaining that

> [s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point.

Id. at 2430-31. The State's likening government regulation of private sector union fee agreements to that of dangerous pesticides is simply off-base.

5. The State's analogies of labor unions to lawyers and other "heavily regulated professions" do not fit. *See* State's Br. 46. It is highly unusual for the government to require professionals to provide free services. As discussed in the Unions' opening brief, courts are split as to whether lawyers can be constitutionally required to provide pro bono representation in light of the "ancient and established tradition" of court-mandated pro bono services and lawyers' role as quasi-judicial "officers of the court." *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965); *see also State ex rel. Scott v. Roper*, 688 S.W.2d 757, 762-64 (Mo. 1985) (collecting cases). Accountants, psychologists, auto mechanics, electricians, plumbers, and others who provide labor, rather than goods, have never faced similar government mandates. Like these other service professionals — and unlike lawyers — labor

organizations have no quasi-judicial role. Nor are nonmembers indigent; because they receive equal wages and benefits under the CBA, they are no less able to pay for the Unions' services than are their coworkers.

There is, however, a way in which the State's analogy is apt: courts have uniformly concluded that a lawyer's representational services constitute "private property" which may form the basis for a takings claim. That is because "[l]abor is property. The laborer had the same right to sell his labor, and to contract with reference thereto, as any other property owner." *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 76 P. 848, 850 (1904). Thus, "a lawyer's services are as much his property as a grocer's stock, an electrician's tools, or an individual's home," as to which the Takings Clause applies. *Roper*, 688 S.W.2d at 764; *see also Scheehle v. Justices of Supreme Ct. of Ariz.,* 508 F.3d 887, 893 n.6 (9th Cir. 2007) ("[T]here is no question that [a lawyer's] services constitute private property").

Courts have reached the same conclusion — that personal services are private property — when considering claims by medical professionals arising out of a government-imposed duty to provide free emergency medical care, the other rare example of government-compelled services. *See, e.g., Garelick*

v. Sullivan, 987 F.2d 913, 916 (2d Cir. 1993).[10] For purposes of determining whether an individual has a property interest in his labor, there is no basis for distinguishing a union officer's services from that of a lawyer, a doctor, or any other service professional.

The State's reliance on *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), to suggest that the Unions lack a cognizable property interest in their representational services is therefore misplaced. State's Br. 54-55. As the State acknowledges, *Apfel* concerned a law requiring former coal companies to contribute money to fund the health care expenses of retired miners — essentially a tax. Unlike Wisconsin Statutes §111.04(3)(a)(3), the law in *Apfel*

[10] Aside from the fact that both concern personal services rather than tangible goods, Wisconsin Statutes §111.04(3)(a)(3) bears little resemblance to state "charity care" laws, which require hospitals to provide free emergency care to indigent patients. Such laws are most often justified as a state-imposed condition on a state-conferred payment. For example, if a hospital wants state Medicaid funds, it has to provide free emergency care to indigents under certain, limited circumstances. *See Garelick*, 987 F.2d at 916 ("[W]here a service provider voluntarily participates in a price-regulated program . . . there can be no taking."). But as discussed, Wisconsin Statutes §111.04(3)(a)(3) makes no payment to the Unions to which a state-imposed obligation to provide free representation may be attached. Furthermore, states have a unique interest in the provision of emergency medical care. Absent charity care laws, the state risks having its most vulnerable citizens die after being turned away from the emergency room. In recognition of this critical role, most states treat non-profit hospitals as "public charit[ies]" and require their "assets [to be] held for the purpose of fulfilling . . . charitable purposes." *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 128 n.8 (1st Cir. 2009). Wisconsin has no similar interest in the provision of free collective bargaining representation to private sector workers.

did not mandate that the companies provide uncompensated personal services. Indeed, *Apfel* expressly distinguished laws which "appropriate, transfer, or encumber … a valuable interest in an intangible (e.g., intellectual property)," 524 U.S. at 540, which is precisely the effect of Wisconsin Statutes §111.04(3)(a)(3).

6. Finally, the Unions are baffled by the State's bald assertion that a labor union's obligation to represent nonmembers for free is "not burdensome." State's Br. 6. The Unions spend hundreds of thousands of dollars per year representing Wisconsin workers. That includes routinely representing individual employees in grievances over whether a specific instance of discipline is supported by just cause. Many of these grievances are fact-bound and, if successful, affect solely the individual employee whose discipline is reversed. Thirty years ago, the NLRB observed that it "would take over 4 years' worth of dues to pay for the cost of one single grievance taken to arbitration," which at the time in Ohio "would cost a minimum of $1000." *Am. Postal Workers (Postal Serv.)*, 277 NLRB 541, 542-43 (1985). Today, labor arbitrators in Wisconsin routinely charge $4,500 - $10,000, App. 12, 44, and the cost of hiring legal counsel greatly exceeds the cost of the arbitrator. Because local union treasuries come almost entirely from members' dues payments, any money spent on one employee's grievance must

be paid for by his coworkers.

Although the State is correct that labor unions are not obligated to pursue every grievance if, for example, the employer's action was clearly justified or the employee is in a probationary status, *Ooley v. Schwitzer Div., Household Mfg. Inc.*, 961 F.2d 1293, 1304 (7th Cir. 1992), the Board and federal courts have made clear time and again that a union cannot treat nonmembers in the grievance process *any differently* than the union treats members, *Am. Postal Workers*, 277 NLRB at 543 (citing *Vaca v. Sipes*, 386 U.S. 171 (1967)). Thus, if the Unions would grieve a dues-paying member's discharge under certain circumstances, the Unions must do the same for a nonmember. And because of Wisconsin Statutes §111.04(3)(a)(3), the Unions must do it for free.

Labor unions routinely face legal claims for breach of the duty of fair representation arising from their decisions not to pursue grievances. *See, e.g.*, *Conn v. GATX Terminals Corp.*, 18 F.3d 417, 421 (7th Cir. 1994). Such claims may be brought in federal court, 29 U.S.C. §185, 28 U.S.C. §§1331, 1337, or before the NLRB, 29 U.S.C. §158(b), can result in an award of money damages, *Vaca*, 386 U.S. at 197-98, and are costly to defend regardless of their merit. Thus, the State's assurances aside, the Unions cannot fail to pursue grievances for free-riding nonmembers that they would pursue for

dues-paying members.[11]

The State's suggestion that a union could take bargaining positions that affirmatively "*harm* nonmembers" or that "workers … only means of protesting the union's bargaining positions [would be] leaving the unit entirely by quitting" is similarly uninformed. State's Br. 51 (emphasis in original). Employees can and do routinely bring lawsuits asserting that their union's bargaining positions or agreements unfairly favored one group of employees over another. *See, e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). To the extent that a CBA favored union members over "employees who do not pay dues," the union could face significant legal liability. State's Br. 51.

* * *

In sum, the proposed Fair Representation Fee Agreement, which would allow the Unions to charge nonmembers only their fair share for the

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[11] It is also no answer to suggest, as the State does here, that a union could agree to a non-exclusive grievance procedure — a decision that could directly harm employees and impair their hard-bargained contractual rights. Because of the central role grievances play in collective bargaining, courts "must treat [an] arbitrator's award as if it represent[s] an agreement between [the employer] and the union as to the proper meaning of the contract's words." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000). In a non-exclusive grievance system, one employee advancing his own interpretation of the CBA could obtain an arbitration decision that effectively changes the meaning of that agreement for all other bargaining unit employees.

representational services they receive, would provide just compensation under the Fifth Amendment's Takings Clause. To the extent that Wisconsin Statutes §111.04(3)(a)(3) prohibits the Unions from entering into such an agreement with willing Wisconsin employers, the law is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the State's cross-appeal should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2013, and contains 11,273 words in 13-point proportionately-spaced Century Schoolbook typeface.

Dated: April 19, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. All counsel of record are registered CM/ECF users.

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