STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 14

INTERNATION ASSOCIATION OF MACHINISTS AND ITS LOCAL LODGE 1061,
4265 N. 30th Street,
Milwaukee, WI 53216

UNITED STEELWORKERS DISTRICT 2,
1244A Midway Road
Menasha, WI 54952

WISCONSIN STATE AFL-CIO,
6333 W. Bluemound Road,
Milwaukee, WI 53213

Plaintiffs,

v.

Case No. 15-CV-0628
Case Type 30701

STATE OF WISCONSIN,

SCOTT WALKER,
Governor of the State of Wisconsin,
115 East State Capitol
Madison, WI 53702

BRAD SCHIMEL,
Attorney General of the State of Wisconsin,
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

JAMES R. SCOTT
Chairman of the Wisconsin Employment Relations Commission,
4868 High Crossing Blvd.,
Madison, WI 53704,

RODNEY G. PASCH
Commissioner of the Wisconsin Employment Relations Commission,
4868 High Crossing Blvd.,
Madison, WI 53704,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITON TO MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Plaintiffs oppose the motion of individual petitioners and the NFIB Legal Center for leave to file an Amici Curiae brief as an inappropriate intervention in an action where their interests, to the extent they are relevant, are represented by Defendants and where the arguments raised are not germane to the present litigation.

I. THE MOTION OF THE NFIB AND INDIVIDUALS FOR LEAVE TO FILE AN AMICUS BRIEF SHOULD BE DENIED AS IT SEEKS INTERVENTION AND MISCHARACTERIZES THE LAW.

The National Federation of Independent Business Small Business Legal Center, together with four individuals, have filed a Motion for Leave to File An Amici Curiae Brief and have also filed form affidavits from each of the individual proposed Amici. The Motion for Leave to File Amici Curiae Brief should be denied because, in essence, the proposed Amici seek to intervene in this action and to make arguments which are directed not to the issues in this lawsuit but rather are focused on amendments the proposed Amici would like to see in federal and state law.

The proposed Amici's Motion for Leave to File an Amici Curiae Brief does not cite any legal precedent for their involvement in this action. State law permits non-parties to file amicus briefs under Wis. Stat. §809.19(7), which is part of the Rules of Appellate Procedure. The section provides: "A person not a party may by motion request permission *to file a brief.* The motion shall identify the interest of the person and state why a brief filed by that person is desirable." (emphasis added).[1] There is no provision for an amicus to submit evidence. The affidavits therefore should not be added to the record in this matter.

[1] The brief of the proposed Amici is signed by counsel for the National Right To Work Legal Defense Foundation, Inc.(NRWLDF) and the Wisconsin Institute for Law and Liberty, Inc. ("WILL"). Neither organization has identified its interests pursuant to Wis. Stat. §809.19(7). The NRWLDF and WILL have failed to do so probably because they are attempting to interject herein issues of interest to those organizations, but not actually involved in this case.

Here, the proposed individual Amici each filed an affidavit which focuses not on the issues in the present litigation, but their desire not to be represented by a union, although they are members of existing bargaining units which are represented by unions. Thus, they would like to challenge the principal of exclusive representation, which is a long-settled matter of law.

They also state their belief that fee payment for the services they receive would violate the U.S. Constitution—an issue challenging the validity of the federal statutes which permit fee collection.[2] It would appear from their affidavits that the proposed Amici are attempting to inject evidence into this case rather than file a brief concerning the evidence presented by the parties.

While the NFIB and individuals purport to be seeking amicus status, in reality they seek to intervene. "It is universal that no one has any right to intervene in any action unless he has some right to protect which is not being protected." *White House Milk Co. v. Thomson*, 275 Wis. 243, 247 (1957) (internal quotations and citation omitted). "A state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interest of all of its citizens." *Helgeland v. Wisconsin Municipalities*, 2006 WI App 216 (Ct. App. 2006) *aff'd Helgeland v. Wisconsin Municipalities*, 2008 WI 9 (2008)(citing *Environmental Defense Fund, Inc. v. Higginson*, 203 U.S. App. D.C. 156, 631 F.2d 738, 740 (D.C. Cir. 1979)). In *White House Milk Co.*, the Court affirmed the trial court's denial of a motion to intervene and explained, "[w]e hesitate to hold that [the proposed intervenor] is even a proper party, absent any allegation in the petition for intervention that the attorney general has failed in his duty to properly defend the action and uphold the constitutionality of the challenged statute." 275 Wis. at 248.

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[2] Not only have the union security provisions of the National Labor Relations Act been upheld against such challenge, this Court has no occasion here to entertain whether this federal law passes muster under the U.S. Constitution. The present declaratory judgment concerns whether a Wisconsin statute violates the Wisconsin Constitution. Amici wish to hijack this case to present arguments about their own First Amendment rights, which are not in dispute between the parties to this declaratory judgment action.

As the Court explained in *Helgeland*, "[t]o intervene in a suit in which the state is already a party, a citizen...must overcome this presumption of adequate representation through more than a minimal showing that the representation may be inadequate." 2006 WI App at 221. Here, the proposed Amici do not claim that the State of Wisconsin representatives are in any way inadequate to represent their interests in this litigation.

II. THE PROPOSED AMICI CURIAE BRIEF SHOULD BE REJECTED AS NOT GERMANE TO THE ISSUES IN THIS CASE.

The proposed Amici argue that even though the National Labor Relations Act ("NLRA") permits union security provisions, "Amici oppose them because they infringe upon first amendment rights." Thus, they want to advocate concerning an issue not presented by this case or by Act 1. In support of their position, proposed Amici cite Supreme Court cases which involve the public sector. *Davenport v. Washington Education Association*, 551 U.S. 177 (2007) and *Knox v. SEIU Local 1000*, 132 Sup. Ct. 2277 (2012). The cited cases address First Amendment protection for public sector employees against having to support political advocacy. These are issues which are not present in this action, because it involves private sector employees who have been protected against having to give financial support to political activities of their union for more than 20 years under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), a case which proposed Amici do not cite.

Proposed Amici claim that they do not wish to have the Union's representation, although they are in bargaining units where a union was selected as representative by a majority of employees in the unit. (*See* ¶4 of individual proposed Amici affidavits.) There is however no doubt the unions which represent their units must provide representation to them. Specifically, in administering grievance procedures, "a union must, in good faith and in a nonarbitrary manner,

make decisions as to the merits of particular grievances." *Vaca v. Sipes,* 386 U.S. 171, 194 (1967)(citations omitted); *Coleman v. Outboard Marine Corp.*, 92 Wis. 2d 565, 575 (1979). "[I]n the grievance context, a union may not arbitrarily ignore a meritorious grievance or process it perfunctorily." *Id.* at 574 (internal quotations and citations omitted) (holding summary judgment was inappropriate where material issue of fact existed regarding whether the employee was terminated for just cause and whether the union breached its duty of fair representation).

In stating they would prefer not to be represented, the proposed Amici are expressing a disagreement with current law, not an argument about any issues relevant to this action. The proposed Amici brief appears focused not on Act 1 and whether it constitutes a taking, but rather on disagreements with existing law with respect to private sector collective bargaining under the federal NLRA and Wisconsin law. When proposed Amici have purposes other than those germane to the litigation of the parties, Amici status is properly denied. *See State v. Henley*, 2011 WI 68 (2011) (three justices of an equally divided supreme court concluded that the court should not have granted a motion to accept amicus curiae brief where the amicus interest was to seek amendment of a decision in furtherance of separate litigation).

III. PROPOSED AMICI'S BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS SHOULD BE REJECTED

A. Plaintiffs Must Expend Resources on Non-Members.

Proposed Amici argue representation is not costly and that in any case unions could avoid what cost there is by simply no longer being exclusive representatives. Their brief in this regard adds nothing to arguments already made by the State herein. There is therefore no reason to permit the filing of this additional brief.

As to their first point that representation is not costly, "a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation." *Mahnke v. Wisconsin Employment Relations Comm'n*, 66 Wis. 2d 524, 534 (1975). As set forth in the affidavits of Ross Winklbauer, Patrick O'Connor and Alex Hoekstra, the costs of bargaining and enforcing contracts are not minimal and must be and are expended for non-members as well as members. Proposed Amici thus want to use this case as a platform to urge this Court to flout specific binding precedents of the Wisconsin Court, based upon parts of the Wisconsin Employment Peace Act that are not being challenged by any party, and unrelated to Act 1. This purpose is not a proper one for an Amici Curiae brief.

Drawing a distinction based on union-membership when deciding whether to process a grievance simply because it was filed by a nonmember is discriminatory and, thus a breach of the union's duty of fair representation. *Zimmerman v. French Int'l. School*, 830 F.2d 1316, 1320 (4th Cir. 1987); *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 347-348 (5th Cir. 1980). Because individual employees, whether member or non-member, have the right to challenge the union's processing of a grievance under state and federal labor law, it is clear that a union is not able to ignore or only minimally represent employees in a bargaining unit.

Whatever proposed Amici claim they would like, the law requires real representation which requires provision of services and expenditure of property, without just compensation now that Act 1 prohibits any payment of fees as a condition of employment.

Proposed Amici are once more arguing for a change in current law which is not at issue in this case when they suggest that unions do not have to be exclusive bargaining representatives. Wisconsin permits *only* exclusive bargaining representatives if a union is to act as a representative at all. Act 1 defines "labor organization" to mean an organization which exists "in

whole or in part of engaging in *collective bargaining* with any employer concerning grievances, labor disputes, wages, hours, benefits or other terms or conditions of employment." Wis. Stat. §111.02(9g). Collective bargaining in turn "means the negotiation by an employer and a majority of the employer's employees in a collective bargaining unit...." Wis. Stat. §111.02(2). A "collective bargaining unit" in turn "means all of the employees of one employer, employed within the state" in a unit determined appropriate by the Wisconsin Employment Relations Commission. Wis. Stat. §111.02(3).

To say a labor union need not be an exclusive bargaining representative thus is to say it can cease to exist for legal purposes in Wisconsin. Under Wis. Stat. §111.06(e) as it is revised under Act 1, it is still an unfair labor practice for an employer "to bargain collectively with the representatives of less than a majority of the employer's employees in a collective bargaining unit." When proposed Amici claim unions should become representatives of only supporters in a bargaining unit they are not addressing Act 1, but rather their dissatisfaction with the structure of private sector bargaining established by the State of Wisconsin and the federal government. For better or worse, that structure currently orders private sector labor relations based upon collective bargaining by an exclusive representative, selected by a majority of employees, which is then required to represent all employees within a bargaining unit, and not some other form of industrial governance. In another state, "members only" bargaining might be legal, and might present other questions: Those questions simply are not present here.

B. Having the Status of Exclusive Representative Is Not Equivalent to Just Compensation Under the Wisconsin Constitution.

Proposed Amici's next argument is also repetitive of defenses argued by the State. They also claim that having the status of exclusive representative is itself compensation for the

services unions are required to provide to non-members. This argument is foreclosed by *Angelo v. Railroad Commission*, 194 Wis. 543 (1928), because under Article I, Section 13 of the Wisconsin Constitution, just compensation must be in the form of money. *See also Wisconsin Tel. Co. v. Public Service Commission*, 232 Wis. 371 (1939)(noting that one who receives a publicly mandated service must pay for it).

C. Federal Law Does Not Preempt the Prohibition Against Taking Property Without Just Compensation in the Wisconsin Constitution.

The last argument presented by proposed Amici is the claim that federal law preempts the Wisconsin Constitution's takings clause to the extent Act 1 is declared unconstitutional, because employers have a "right" not to agree to union security clauses in bargaining, and if they do not, then employees have a "right" not to pay dues. This point is also a duplicate of an argument already made by the State, with the added twist of preemption.[3] The argument however is a non sequitur. It also reveals a lack of understanding of basic preemption law.

It is not true that employers or employees have a federally protected right not to have a union security clause in their contracts. Employers and unions both have a duty to bargain in good faith. A contract with a union security clause may or may not result from such bargaining, but an employer has no veto power over the contents of a contract, any more than a union does. Indeed, a union can strike to compel inclusion of a union security clause in a contract because it is a mandatory subject of bargaining. *E.g., Rocky Mountain Hospital*, 289 NLRB 1347, 1362-1363 (1988); *Adco Advertising*, 206 NLRB 497, 498 (1973) Neither employers nor employees have a federally protected right to free representation services from unions.

[3] The Attorney General is prohibited from making this preemption argument because he cannot argue against the constitutionality of Wisconsin law, *e.g., State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶89 (2011); *State v. City of Oak Creek*, 2000 WI 9 (2000), and so cannot argue that federal law preempts the state Constitution, as proposed Amici wish him to argue. As shown in the text, there is no merit to proposed Amici's position.

Act 1 however prohibits both unions and employers from negotiating such clauses regardless of the outcome of their good faith negotiations. From the ideological perspective of proposed Amici, they cannot understand why all employers do not exercise their purported "right" to veto a union security clause; that is, they cannot understand why all employers do not provoke strikes over union security. As Plaintiffs have demonstrated, however, nearly all of their contracts have historically contained union security clauses despite the employer's supposed "right" to insist that they not have one. Proposed Amici never explain how the give and take of bargaining between private parties causes federal law to preempt the Wisconsin Constitution—because, of course, there is no such preemption applicable here.

Federal labor law does preempt state regulation of private sector labor relations which is arguably protected or prohibited by the NLRA, but not state laws of general application that are "deeply rooted in local feeling and responsibility." *San Diego Building Trades Council v. Garmon*, 358 U.S. 236 (1959). If a state law is preempted under *Garmon*, the state court lacks the power to hear the dispute at all–it is then within the primary jurisdiction of the National Labor Relations Board, where it must be heard. "A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case." *International Longshoremen's Ass'n. v. Davis*, 476 U.S. 380, 393 (1986). Proposed Amici thus want to intervene for the purpose of arguing that this Court should send this case to the NLRB—where, presumably, the Board will decide the meaning of the Wisconsin Constitution. Because of the stark absurdity of this outcome, proposed Amici do not say this openly, but their claim that the NLRA preempts Wisconsin's taking clause if they cannot demand free services from unions necessarily implies such an outcome.

Proposed Amici do not openly assert that the NLRA "arguably" prohibits the Wisconsin Constitution's taking clause from invalidating Act 1, because they cannot demonstrate that the NLRB could rule in their favor on such a claim (or even that the Board could acquire jurisdiction over such a claim). "If the word 'arguably' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor." *Longshoremen's Ass'n, supra,* 476 U.S. 380 at 395. Rather, proposed Amici make the bald conclusory assertion of preemption that the Supreme Court held was plainly insufficient to establish preemption in *Longshoremen's Ass'n. Id.* at 394.

There is no conflict between an employer's rights to bargaining collectively and a requirement that unions be allowed to negotiate just compensation for the services the State of Wisconsin compels them to provide to nonmembers. Indeed, for many years exactly this situation prevailed prior to Act 1 and produced a constitutionally-sound outcome.[4] The unions have never contended that Art. I, §13 automatically imposes a union security clause despite the congressional scheme of the NLRA, only that it must permit the unions to negotiate to obtain just compensation. Act 1's defect is that it prohibits willing unions and employers from achieving this goal.

Even if it did, there is no question that a constitutional provision that prohibits takings without just compensation is not preempted, because the takings clause is clearly deeply rooted in local feeling. *See, e.g., Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977) (claims of intentional infliction of emotional distress not preempted); *Youngdahl v.*

[4] Pursuant to the proviso to §8(a)(3) of the NLRA, 29 U.S.C. §158(a)(3) as amended by the Labor Management Relation Act, union security agreements are permitted:

> Nothing in this subchapter or any other statute of the United States shall preclude an employer from making an agreement with a labor organization...to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later....if the conditions of the section are met.

Rainfair, 355 U.S. 131 (1957) (state's power to enjoin violence not preempted). Wisconsin is requiring unions to provide representation services to nonmembers; it clearly has the power to regulate itself not to demand such services be provided for free, by leaving in place a lawful scheme that allows unions to negotiate union security clauses permitted under federal law.

The Supreme Court has "also acknowledged an exception for conduct that is arguably protected under §7 where the injured party has no means of bringing the dispute before the Board." *See Longshoremen's Ass'n, supra,* at 393, *citing Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202-203 (1978)("the primary-jurisdiction rationale does not provide a sufficient justification for pre-empting state jurisdiction ... [when] the other party to the dispute has no acceptable means of" presenting the issue to the Board). Proposed Amici have failed to show the court how the unions can get the dispute pertaining to Act 1's unlawful taking before the NLRB. Surely the Board has no jurisdiction to interpret the Wisconsin Constitution. The Unions thus brought the takings claim as a declaratory judgment case in the forum available, where they have a right to seek constitutional protection for their property. Proposed Amici by contrast have no federal right to vindicate—they do not have a federally protected right to free representation or a federally protected right to have Act 1 upheld. There is, therefore, no bona fide preemption question presented.

Federal law thus does not prohibit union security agreements or guarantee employers or dissenting employees that they will receive free representation services. It provides for union security and merely allows states to prohibit agreements requiring membership as a condition of employment. Some states have passed such laws; some have not. It follows that a state, by constitution or statute, as well as by inaction, may allow union security agreements, or a state may prohibit union security agreements. Such prohibition, if it exists at all, will be the result of

state law alone, because federal law allows union security agreements. Section 14(b) creates no federal rights which could then preempt the takings clause of the Wisconsin Constitution. Put somewhat differently, the existence of §14(b) of the labor act *permits* "right to work" laws that prohibit membership as a condition of employment, but it does not *mandate* the passage of laws, like Act 1, which go to the extreme of taking unions' property and services without just compensation.[5] The NLRA does not "arguably protect" unconstitutional takings.

It follows that there is no federal preemption of the Wisconsin State Constitution when it prevents the unconstitutional taking created by Act 1 when it mandates services to non-members without providing just compensation. The restrictions imposed by the Wisconsin Constitution on Act 1 because of Act 1's broad scope prohibiting any required payment from non- members is no more preempted than Wisconsin's prior decision to allow union security clauses.

CONCLUSION

Plaintiffs respectfully request that the Court deny the Motion of Proposed Amici to File Brief of Amici Curiae and reject the arguments contained therein as irrelevant to the present litigation concerning Act 1 and because the arguments are not supported by law.

Dated this 11th Day of June 2015.

Respectfully submitted,

THE PREVIANT LAW FIRM, S.C.

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[5] The narrow exception to §8(a)(3) found in §14(b) of the Labor-Management Relations Act, 29 U.S.C. §164(b) providest: "Nothing in this subchapter shall be construed as authorizing the execution and 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." Section 14(b) thus does not create a federal right to anything; it merely removes the bar of federal preemption to laws that prohibit membership as a condition of employment. Section 14(b) does not address the takings claim present in this declaratory judgment case.

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