No. 16AP820

In The Wisconsin Court of Appeals

DISTRICT III

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 AND ITS LOCAL LODGE 1061, UNITED STEELWORKERS DISTRICT 2, AND WISCONSIN STATE AFL-CIO,
PLAINTIFFS-RESPONDENTS,

v.

STATE OF WISCONSIN, SCOTT WALKER, BRAD SCHIMEL, JAMES R. SCOTT, AND RODNEY G. PASCH,
DEFENDANTS-APPELLANTS.

On Appeal from the Dane County Circuit Court,
The Honorable William C. Foust, Presiding,
Case No. 2015CV628

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Plaintiffs ("Unions") ask this Court to venture where no appellate tribunal—in the 100-plus years of right-to-work's history in the United States[1]—has gone before. It is undisputed that federal law explicitly secures the right of States to forbid the forced subsidization of labor unions by enacting right-to-work laws like 2015 Wisconsin Act 1. More than half of the States have done so, as has the federal government. Yet in *none* of those 26 States has an appellate court struck down a right-to-work law as an unconstitutional taking. *See* Opening Br. 1–2, 8–10. The Unions invite this Court to be the first.

This Court should decline that extraordinary request. The Unions argue that Act 1 "takes" their "services" by requiring them to represent nonmember-employees without the right to force those nonmember-employees to pay "fees"—fees to which the Unions "have no constitutional entitlement." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 58, 358 Wis. 2d 1, 851 N.W.2d 337 (citation omitted). But, to begin with, Act 1 (the sole target of this litigation) does not force unions to offer any "services" to anyone. It is only the separate duty of fair representation that arguably requires a union to perform acts for nonmember-employees that it otherwise would not. But the Unions do not seek to free themselves of that obligation, and it is obvious why: A union is charged with the

[1] *See Sweeney v. Pence*, 767 F.3d 654, 662 & n.5 (7th Cir. 2014) (stating that 12 states already had right-to-work laws when the Taft-Hartley Act was passed in 1947, and at least one of those laws was first enacted in 1911).

"duty" of fairly representing all employees in a bargaining unit (in reality, the duty is merely a prohibition on arbitrary or bad-faith conduct) *only if* the union has first voluntarily assumed the valuable government-conferred privilege of exclusive representation. The privilege and the duty go hand in hand. If the duty were to fall, so would the privilege. *See* Opening Br. 15–18.

This relates to a second basic problem with the Unions' challenge to Act 1. Just as invalidating the right-to-work statute would not relieve the Unions of their fair-representation duty, it would not guarantee them "just compensation." Employers again would be free not to agree to forced-dues provisions in collective-bargaining agreements. *See* Opening Br. 18–20. So striking down Act 1 would not redress the Unions' claimed injury.

Had the Unions instead challenged the duty of fair representation, their lawsuit would have fared no better. The Unions have freely accepted the duty in exchange for a special government-conferred privilege and against the backdrop of a regulatory scheme that certainly made Wisconsin's enactment of a right-to-work law foreseeable. This point alone forecloses any takings claim targeting the fair-representation duty. *See* Opening Br. 20–25.

Such a claim would also fail under a full *Penn Central* analysis. The Unions have not shown that the fair-representation duty after Act 1 threatens a "severe" economic impact, and it is apparent that it does not. Nor have they shown that

Act 1 has upset any reasonable "expectations" or that Act 1 resembles a "physical invasion" of property. *See* Opening Br. 25–40.

At any rate, the fair-representation duty does not deprive the Unions of any specific interest in "property" in the first place, so it does not even implicate Wisconsin's Takings Clause, Wis. Const. Art. I, § 13. *See* Opening Br. 40–45. And even if it did, the benefits that flow from assuming the mantle of the representation privilege more than compensate the Unions for any burden that the duty imposes. *See* Opening Br. 45–46.

The Unions' brief fails to refute these points.

I. The Unions Continue To Target The Wrong Law

The Unions persist in claiming that Act 1 "imposes" the duty of fair representation on exclusive representatives and so is the proper target of their lawsuit. *E.g.*, Resp. Br. 13. They also insist that it is irrelevant that, even without Act 1, they would not be entitled to the nonmember dues that they allegedly require. *See* Resp. Br. 14 n.6. The Unions are wrong on both counts.

First, it is straightforwardly false that Act 1 "clearly and deliberately impose[s] the duty of fair representation." *E.g.*, Resp. Br. 17–18 n.8. The Unions think it does because the statute added a definition of "labor organization" to Wisconsin's Employment Peace Act. Resp. Br. 15–16. But that

detail is utterly insignificant. Labor law imposes the fair-representation duty not on "labor organizations" per se but on employees' "representatives," Wis. Stat. § 111.02(2), a category that includes "*any person* chosen by an employee to represent the employee," Wis. Stat. § 111.02(11) (emphasis added). Such "representatives" have been subject to the duty of fair representation for many decades. *See Clark v. Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W.2d 132 (1959). The Unions themselves pointed this out in their opposition to the State's stay motion. *See* Opp. to Stay Mot. 4. They were right then and wrong now.[2]

Next, though the Unions concede that, without Act 1, employers would again be free not to agree to forced-dues clauses, the Unions think this fact makes no difference. Resp. Br. 37–38. They are mistaken—for a reason that they themselves point out. According to their brief, takings doctrine requires "that a reasonable, *certain* and adequate provision for obtaining compensation exist at the time of the taking." Resp. Br. 37 (emphasis added) (citation omitted). But that is just the point: the Takings Clause demands a *certain* means of securing compensation. And, without Act 1, it is not at all certain that the Unions would succeed in "obtaining" the legal

[2] The Unions state (Resp. Br. 18) that the State has "ignor[ed]" that the fair-representation duty applies not only to negotiations but also generally to contract administration and grievance handling. That is incorrect. *See, e.g.*, Opening Br. 7, 8, 28–31.

right to "compensation" from nonmember-employees. In every case, it would be for employers to decide.

II. The Unions Fail To See That Free Acceptance Of A Condition On A Valuable Government-Conferred Privilege "Takes" Nothing

As the State has explained (Opening Br. 20–25), because the fair-representation duty is a reasonable condition on a special government-conferred benefit (the exclusive-representation power), acceptance of the condition is categorically not a taking. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

Rather than contest this framing of the *Monsanto* test or the State's application of it, the Unions contend, first, that *Monsanto* conflicts with *Noranda Exploration, Inc. v. Ostrom*, 113 Wis. 2d 612, 335 N.W.2d 596 (1983). *See* Resp. Br. 26. But the Unions do not flesh out the alleged contradiction, and none is apparent. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374, 548 N.W.2d 528 (1996) (explaining that *Noranda* "adopted" *Penn Central*, which *Monsanto* applied). *Noranda*, decided a year before *Monsanto*, held that a statute requiring mineral explorers to disclose their proprietary geologic data was an unconstitutional taking because mandating disclosure did not "substantially" advance the State's asserted interests and so was an improper exercise of the State's "police power."

113 Wis. 2d at 626–27.[3] This statute-specific ruling is not remotely in tension with *Monsanto*.

The Unions next argue that *Monsanto* applies only to "mere economic regulation[s]," not laws that would require affected entities to take on a new "business model." Resp. Br. 26–27. Even if one accepts for the sake of argument the premise that Act 1 threatens the Unions with financial collapse, *but see* Opening Br. 26–36, the Unions do not derive this amorphous distinction from *Monsanto* itself or any other case. In truth, as later cases have reiterated, *Monsanto* applies simply to any reasonable condition on a "valuable Government benefit," *e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2430–31 (2015).

Finally, the Unions assert that a regulation burdening property commits "a taking of private property" whenever the law is enacted to further "the public good," rather than eliminate an "inherent[ ]" or "public harm," such as a tortious "nuisance." Resp. Br. 19–21 (relying primarily on *Wisconsin Public Service Corp. v. Marathon County*, 75 Wis. 2d 442 (1977)). This is not the law. (Of course, if it were, few statutes would stand.) The language quoted from the *Marathon County* line of precedents simply addresses how to tell

[3] The Unions argue that the State has forfeited the right to cite *Monsanto* because it "was not cited to the circuit court until the stay litigation." Resp. Br. 27 n.13. But invocation of *Monsanto* "is not a new argument; it is simply citation to additional authority," which is permissible. *State v. Markwardt*, 2007 WI App 242, ¶ 33, 306 Wis. 2d 420, 742 N.W.2d 546. The argument for which the State cites *Monsanto* is not new. *See* R.36:12, 15.

whether property has been "taken" or merely "damaged," *Wikel v. State Dep't of Transp.*, 2001 WI App 214, ¶¶ 9–10, 247 Wis. 2d 626, 635 N.W.2d 213, and one factor under that analysis (among five) is whether the law creates a public benefit, *id.* Nothing about that inquiry displaces standard takings doctrine as set forth, for example, in *R.W. Docks & Slips v. State*, 2001 WI 73, ¶¶ 13–17, 244 Wis. 2d 497, 628 N.W.2d 781.

III. The *Penn Central* Factors Favor Act 1

The State has explained that all three *Penn Central* factors indicate that Act 1 is not a taking. *See* Opening Br. 25–40. The Unions' response falls short.[4]

First, addressing the "economic impact" factor, the Unions repeatedly claim that the effect of Act 1 is "severe." *E.g.*, Resp. Br. 22. But they fail to *show* that this is so. Instead, like the circuit court, they simply highlight the total amount in dues that they no longer may forcibly collect from nonmember-employees. *E.g.*, Resp. Br. 5. Yet the question under takings doctrine is not what "the owner has lost" but what the government "actually takes." Opening Br. 26–27 n.7 (quoting *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215

[4] The State also has explained that, because "*Penn Central* claims are inherently as-applied challenges," "[t]he Unions' request for facial invalidation" of Act 1, "as well as the circuit court's granting of that request, is [ ] improper." Opening Br. 21 n.5. The Unions do not contest this point, effectively conceding that facial relief is not available here.

(Fed. Cir. 2005)). And, under the Unions' theory, the government "takes" only those services that the duty of fair representation "require[s]" the Unions to perform but that they would *not* perform if they "did not have a legal obligation to do so." *Harris v. Quinn*, 134 S. Ct. 2618, 2637 n.18 (2014). Again, "the Unions make no effort to fit their factual showing into this framework." Opening Br. 27. Though they mention, for example, anecdotal evidence that a Plaintiff Union once incurred "more than $1,000 in expenses" preparing "for an arbitration case for a non-member," Resp. Br. 5, they do not explain (among other things) whether the fair-representation duty *required* the Union to incur those expenses—which is unlikely, given its "substantial discretion" to decline representations, *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 917 (7th Cir. 2013)—or whether, but for the duty, the Union would not have undertaken the arbitration.

Turning to the "reasonable investment-backed expectations" factor, the Unions have no answer to the decisive point that labor organizations, having "long been subject to federal [and state] regulation," had no "reasonable basis to expect" that those regulations would remain static, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645–46 (1993), much less that Wisconsin would never join its 25 sister States in adopting right-to-work, as federal law explicitly allows. *See, e.g.*, Opening Br. 8–10, 21–25. Instead, the Unions return to the inapt analogy of the utility-rate cases. *See* Resp. Br. 14–15, 34. But labor unions

are unlike public utilities for many reasons. For one thing, utilities do not wield anything remotely like the agency power of exclusive representation over their customers—they have no "agen[cy]" power at all, *Wis. Tel. Co. v. Pub. Serv. Comm'n*, 232 Wis. 371, 287 N.W. 167, 171 (1939). *See* Opening Br. 37–38. And nonmember-employees are not the Unions' "customers" to begin with (in the sense that consumers of electricity are customers of a power company), *Wis. Tel. Co.*, 287 N.W. at 171. After all, the function of labor unions is not to serve the interests of individuals but rather the collective good of the bargaining unit. *See, e.g.*, *Alexander v. Gardner-Denver*, 415 U.S. 36, 58 n.19 (1974). Accordingly, not only are some employees not benefitted by a union's services, but some are bound to be positively harmed by them. *See, e.g.*, Opening Br. 28 n.9. That is obviously not true of a utility's customers.

Finally, on the "character of the government action" factor, the Unions assert that, because the effect of Act 1 on their "treasur[ies]" is allegedly "severe," the Act's burden "has the character of a physical occupation by the State." Resp. Br. 27, 30. But, as noted, the Unions have not *shown* such a "severe" effect. In any event, the third *Penn Central* factor does not duplicate the first. It looks in particular to whether the claimed "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Act 1 is just such an "adjust[ment]." *E.g.*, Opening Br. 39–40.

IV. The Unions' "Money" and "Services" Are Not "Property" As Takings Jurisprudence Defines The Term

The Unions continue to assert that Act 1 "takes" two kinds of property: their saved-up "money" and their "services." Resp. Br. 8–9. They add that the circuit court's holdings that the Unions' money and services are "property" for purposes of takings doctrine are "factual findings" that may not be set aside unless clearly erroneous. Resp. Br. 8. Both points are incorrect.

Of course, it is obvious that persons generally have property interests in their money and the various kinds of "services" that the Unions itemize in their brief. Resp. Br. 11 n.4 (mentioning, for example, "telephone" and "video services"). But whether a person suffers an *unconstitutional taking* whenever following the law costs him money or causes him to change the way he uses or provides services is an entirely different question. And it is one that precedent answers: legislatures "routinely create[ ] burdens for some that directly benefit others," and doing so is surely "prop[er]," so "*it cannot be said* that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223 (1986) (emphasis added). The inquiry instead is whether the law deprives an owner of "specific and identified properties or property rights," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541–42 (1998) (opinion of Kennedy, J.); *id.*

at 554–56 (opinion of Breyer, J.), which would raise a takings question, or whether instead the law simply "imposes an obligation to perform an act" and "is indifferent as to how the regulated entity elects to comply or the property it uses to do so," which would *not* trigger the Takings Clause, *id.* at 540 (opinion of Kennedy, J.).

The Unions do not dispute that *Apfel* is correct and should be followed. They instead try to distinguish it, asserting that the Coal Act, which was at issue in *Apfel* and required coal companies to contribute to a fund for health-related expenses, is "unlike Act 1." Resp. Br. 29. In fact, under the Unions' theory, the laws challenged in both cases are materially identical: Both the Coal Act and Act 1 (which "imposes" the fair-representation duty, according to the Unions) regulate "owner[s] without regard to property," *Apfel*, 524 U.S. at 540 (opinion of Kennedy, J.). Both laws "do[ ] not appropriate, transfer, or encumber an estate in land . . . a valuable interest in an intangible . . . or even a bank account or accrued interest." *Id.* Rather, under the Unions' theory, both statutes "simply impose[ ] an obligation to perform an act" but are "indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.*

Finally, Plaintiffs are incorrect that the circuit court's findings of "property interests" are reviewable only for clear error. The question of whether a law takes "property" within the meaning of the Wisconsin Constitution is a quintessential legal question considered de novo. *See Wis. Retired Teachers*

Ass'n v. Employee Trust Funds Bd., 207 Wis. 2d 1, 17–18, 558 N.W.2d 83 (1997).

V. The Privilege of Exclusive Representation Is Its Own Reward

As the Seventh Circuit and the Indiana Supreme Court have declared, a union is justly compensated for any costs of fairly representing nonmember-employees by the government-conferred privilege by which the union "alone gets a seat at the negotiation table," *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014); *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014). *See* Opening Br. 45–46. The Unions respond that a "final injunction" must issue against any "unconstitutional taking of private property . . . without compensation," Resp. Br. 38 (citation omitted). But that just begs the question of whether a taking of property without compensation has occurred here. *Sweeney* and *Zoeller* indicate that none has.[5]

CONCLUSION

The judgment of the circuit court should be reversed.

[5] Any differences between labor law in Wisconsin and Indiana (*see* Resp. Br. 16–17) are irrelevant: in *all* states, "[t]he duty of fair representation is [ ] a corresponding duty imposed in exchange for the powers granted to the Union as an exclusive representative." *Sweeney*, 767 F.3d at 666 (quotation omitted).

Dated this 22nd day of September, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a brief produced with a proportional serif font. The word count of the portions of this brief identified in Wis. Stat. § 809.19(8)(c) is 2,986 words.

Dated this 22nd day of September, 2016.

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RYAN J. WALSH
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CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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