Nos. 16-3736 & 16-3834
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 Presiding

AMICUS CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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STATEMENT OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources to, and to be the voice for, small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing its members in Washington, D.C. and all 50 state capitols. Founded in 1943, as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The NFIB Legal Center frequently files *amicus* briefs in cases that will affect small businesses. In the present case, employers have an interest in promoting public policy that enables them to recruit and retain skilled and motivated employees—including those who might be deterred from accepting a position if the offer of employment were made contingent upon the employee

joining or financially supporting a union. Moreover, NFIB Legal Center has a special interest in the proper development of takings law, and therefore in the arguments raised by both sides in this present dispute.

RULE 29(c)(5) STATEMENT

No counsel for any party authored this *Amicus* brief, nor did a party or party's counsel contribute money intended to prepare or submit this brief. No person other than the *Amicus Curiae* contributed money intended to fund preparation or submission of this brief.

RULE 26.1 DISCLOSURE STATEMENT

Richard Esenberg and Brian McGrath of the Wisconsin Institute for Law & Liberty represent the *Amicus Curiae* National Federation of Independent Businesses Small Business Legal Center ("NFIB Legal Center"). Luke Wake of the NFIB Legal Center also appears in this matter as "Of Counsel" on behalf of the NFIB Legal Center.

The NFIB Legal Center is a 501(c)(3) public interest law firm. The NFIB Legal Center is affiliated with the National Federation of Independent Business ("NFIB"), a 501(c)(6) business association, which supports the NFIB Legal Center through grants and exercises common control of the NFIB Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of the NFIB or the NFIB Small Business Legal Center.

INTRODUCTION

In passing the Taft-Harley Act in 1947, Congress had federalism in mind, as the Act specifically allows States to enact Right to Work laws. So far, twenty-eight states have enacted Right to Work.[1] State Legislatures are moving in this direction based on the favorable economic results from Right to Work legislation.

According to a review of data compiled by the U.S. Department of Labor's Bureau of Labor Statistics, Right to Work states have significantly higher job growth than non-Right to Work states.[2] The increases in their employment rolls were three percent higher than in non-Right to Work states from 2003-2013.[3] Total employment grew twice as fast in Right to Work States from 1990-2014.[4] And personal income in Right to Work states grew by twelve percent more than in states without Right to Work laws.[5] While critics sometimes assert that employees in Right to Work states earn less than workers in non-Right to Work states, the reality is that any differences are erased completely when the relative cost of

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[1] This Court referenced 24 such states in its decision in *Sweeney v. Pence*, 767 F.3d 654, 663 (7th Cir. 2014). After *Sweeney*, Wisconsin, West Virginia, Kentucky, and Missouri adopted Right to Work legislation. http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx

[2] David Fladeboe and Luke Hilgemann, *The Right-to-Work Advantage*, WALL STREET JOURNAL, March 4, 2015 (available at: https://www.wsj.com/articles/luke-hilgemann-and-david-fladeboe-the-right-to-work-advantage-1425513105).

[3] *Id*.

[4] James Sherk, *6 Myths About Right-to-Work Laws* (http://dailysignal.com/2014/12/27/6-myths-about-right-to-work-laws/).

[5] David Fladeboe and Luke Hilgemann, *The Right-to-Work Advantage*, WALL STREET JOURNAL, March 4, 2015 (available at: https://www.wsj.com/articles/luke-hilgemann-and-david-fladeboe-the-right-to-work-advantage-1425513105).

living in non-Right to Work states is taken into account.[6] In fact, economists have found that Right to Work laws have no measurable impact on income inequality in jurisdictions guaranteeing the freedom of workers to decide whether or not to join and support union activities.[7]

In 2015, while Wisconsin was debating the benefits of a Right to Work law, the Wisconsin Policy Research Institute released a comprehensive study concluding that Right to Work would benefit Wisconsin's economy, as Right to Work laws had added about six percentage points to the growth rates of states that had such laws from 1983 to 2013.[8] With Right to Work, Wisconsin's per capita personal income growth would have increased by 59.29% rather than 53.29% during that period. Significantly, Wisconsin would have gone from trailing the national average growth rate to exceeding it.[9]

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[6]Ben Casselman and Neil Shah, *'Right-to-Work' Economics*, WALL STREET JOURNAL, December 14, 2012 (available at https://www.wsj.com/articles/SB10001424127887324296604578179603136860138). *See also* Stan Greer, *Employees and Employers Benefit From Right to Work Laws* http://www.nilrr.org/2012/05/03/employees-and-employers-benefit-from-right-to-work-laws/); James Sherk, *6 Myths About Right-to-Work Laws* (http://dailysignal.com/2014/12/27/6-myths-about-right-to-work-laws/) ("Studies that control for differences in costs of living find workers in states with voluntary dues have no lower – and possibly slightly higher – real wages than workers in states with compulsory dues.").

[7] Jeffrey L. Jordan, et. al., *Did right-to-work laws impact income inequality?* (available at: http://www.aei.org/publication/did-right-to-work-laws-impact-income-inequality-evidence-from-u-s-states-using-the-synthetic-control-method/).

[8] The Economic Impact of a Right to Work Law on Wisconsin, WPRI Report, February, 2015 (available at http://www.wpri.org/WPRI-Files/Special-Reports/Reports-Documents/RTWfinal.pdf).

[9] *Id*.

As the representative of small business, *Amicus* supports Right to Work laws because they contribute to economic growth by allowing for a more open and competitive labor market. These laws encourage job creation, as well as growth in personal income. NFIB Legal Center submits this *Amicus* brief to defend Wisconsin's Right to Work law.

SUMMARY OF ARGUMENT

Right to Work laws have been upheld as lawful since their inception in the 1940's. *See, Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (holding that Right to Work laws do not violate the First Amendment, the Contracts Clause, the Equal Protection Clause, or the Due Process Clause of the United States Constitution).

In 1963, the Supreme Court held that Right to Work laws may do more than merely prohibit forced membership in a union. They may also prohibit so-called union security agreements – collective bargaining provisions that require non-union employees to pay dues (or a fee) to a union even if they are not members. *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963).

Since then it has been clear that states may lawfully prohibit union security agreements (*i.e.*, contractual provisions requiring non-union employees to pay dues [or a fee] to a union). *See e.g., Int'l Union of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U. S. & Canada, Local Unions Nos. 141, 229, 681, & 706 v. N. L. R. B.*, 675 F.2d 1257,

1262 (D.C. Cir. 1982); *Amalgamated Ass'n of St. Elec. Ry. and Motor Coach Emps. v. Las Vegas–Tonopah–Reno Stage Line, Inc.*, 319 F.2d 783, 786–87 (9th Cir. 1963); *Int'l Union of Operating Engineers Local 370 v. Wasden*, 2016 WL 6211272, at *8 (D. Idaho Oct. 24, 2016); *Mich. State AFL–CIO v. Callaghan*, 15 F. Supp. 3d 712, 720 (E.D. Mich. 2014).

As this Court noted in *Sweeney v. Pence*, 767 F.3d 654, 663 (7th Cir. 2014), "[t]he longevity of many of these statutes, coupled with the lack of disapproval expressed by the Supreme Court, suggests that state right-to-work laws fall 'squarely within the realm of acceptable law.'" In *Sweeney*, this Court upheld Indiana's Right to Work law and specifically rejected arguments identical to those made by the Plaintiffs-Appellants/Cross-Appellees International Union of Operating Engineers Local 139 and International Union of Operating Engineers Local 420 (the "Unions") here.

In *Sweeney*, this Court concluded that (a) Indiana's Right to Work legislation was not preempted by the National Labor Relations Act and (b) was not an unconstitutional taking. In 2015, six months after the decision in *Sweeney*, Wisconsin passed Right to Work legislation in a law known as 2015 Act 1 ("Act 1"). Act 1 is very similar to Indiana's statute and all parties agree that Act 1 must be upheld under *Sweeney*.

The Unions urge reversal of *Sweeney*, but without offering any compelling reason for this Court to reconsider a thoroughly reasoned judgment from only

three years ago. Based upon the principle of *stare decisis*, *Amicus* urges this Court to apply *Sweeney* as the controlling precedent in this Circuit. Indeed, there is no compelling reason for reopening the questions definitely put to rest in *Sweeney*. It would prove a waste of judicial and private resources to re-examine the merits decided in *Sweeney* given the long-standing affirmance of Right to Work laws by the courts and reliance on those laws by the public. Thomas R. Lee, *Stare Decisis in Economy Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 651 (2000). ("The cost savings associated with a system of stare decisis extend beyond those incurred in litigation. Increased certainty not only discourages litigation; it also enables more efficient planning in reliance on precedent.")

On the merits, NFIB Legal Center focuses on the Unions' takings arguments for two reasons. First, the Defendants-Respondents/Cross-Appellants (the State Defendants) have already addressed the Unions' preemption arguments thoroughly. And second, the small business community has a tremendous interest in the proper development of takings jurisprudence.

Amicus agrees that the Takings Clause protects economic actors against certain forms of government regulation. Nonetheless, the Unions' takings claim fails because the Supreme Court has already made clear — in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) — that economic regulation in cases like this one is beyond the scope of the Takings Clause.

The only exception to *Eastern Enterprises* is set forth in *Koontz v. St. Johns River Management District*, 133 S. Ct. 2586 (2013), which held that the Takings Clause may be invoked to invalidate a regulatory requirement to pay money, or to dedicate some other form of property, when imposed as a condition on one's right to freely use and enjoy a separate property interest. But the Unions' argument herein does not fit within that exception. Act 1 does not, in any manner, regulate the Unions' prerogative to use and enjoy its monetary assets, real estate investments or any other form of property.

ARGUMENT

I. The Principle of *Stare Decisis* Undercuts the Position of the Unions.

The Unions ask this Court to overrule *Sweeney* based on their claim that it was wrongly decided. But as this Court has itself said, such an approach throws the principle of *stare decisis* out the window:

> The plaintiffs' lawyer asks us to overrule *Harkins* because, he contends, it was decided incorrectly. But if the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window, because no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with; a court has no incentive to overrule them even if it is completely free to do so.

Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582–83 (7th Cir. 2005).

The doctrine of *stare decisis* imparts authority to a decision "merely by virtue of the authority of the rendering court and independently of the quality of its reasoning." *Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 457 (7th Cir.

2005). And in most cases the "bare fact that a case has been decided is a ground for deciding the next case, if materially identical, in the same way." *Id.*

The Unions do not address *stare decisis* in their brief. Indeed, they studiously avoid acknowledging what is indisputably true: *Sweeney* is the law of this Circuit with the force of *stare decisis* behind it. In an exercise of denial, they call *Sweeney* everything but a decision of this Court, employing euphemisms such as the "2-1 panel decision" (Unions' Br. at 4), or "the majority's interpretation of the NLRA" (*Id.* at 14). If overturning a recent precedent requires something more than mere disagreement with that decision, the proponent of a course that diverts from the normal operation of *stare decisis* should at least begin with an acknowledgment that this is what is being asked for. The Unions do not even do that, much less offer this Court a reason to depart from *stare decisis* and reverse itself. Apart from the fact that *Sweeney* got it right, there are at least four good reasons for the Court to follow its own precedent.

First, *Sweeney* is consistent with the law of other circuits. *See Int'l Union of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U. S. & Canada, Local Unions Nos. 141, 229, 681, & 706 v. N. L. R. B.*, 675 F.2d 1257, 1262 (D.C. Cir. 1982) (upholding Mississippi Right to Work law); *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty., Kentucky*, 842 F.3d 407, 422 (6th Cir. 2016) (upholding Hardin

County, Kentucky Right to Work law). No circuit has accepted the arguments that the Unions make here.

Second, there was a request for *en banc* review in *Sweeney*, which was not granted. This Court, as a whole, had the opportunity to review the panel's decision in *Sweeney* and did not do so. It is true that the make-up of this Court is slightly different than it was at the time *Sweeney* was decided, but the retirement of one judge from the Court should not be enough to result in a sweeping change in the law.[10] If anything, the Unions' call for original en banc hearing—even prior to a panel decision—transparently speaks to the Unions' opportunism, which counsels all the more for this Court to hold fast to the doctrine of *stare decisis*, so as to avoid the appearance of political rather than legal decision-making.

Third, *Sweeney* is a very recent decision by this Court. This is not the type of case where one could argue that time and experience has shown that the Court's decision in a previous case should be reconsidered because it is outdated, impractical or has otherwise been overtaken by events.

Fourth, the Unions do not point to the existence of any of the factors that courts consider to overcome the principle of *stare decisis*. In *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992), the Supreme Court pointed to three such factors: (1) whether the rule has proven to be intolerable

[10] The make-up of the Court is the same today as it was when *Sweeney* was decided except for the retirement of Judge Tinder.

based upon practical unworkability, (2) whether related principles of law have developed so as to have left the old rule no more than a remnant of abandoned doctrine, and (3) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[11] This Court has adopted and applied those same factors. *Tate*, 431 F.3d at 583.

The Unions do not point to the existence of any of these factors in this case. Right to Work is not intolerable or impractical – it is the law in 28 states and has been around for 70 years. There are no developments in the law since *Sweeney* that would support a change. There have been no Supreme Court or Circuit Court decisions – in this Court or elsewhere - since *Sweeney* that would suggest that *Sweeney* was wrongly decided or which create any rule or doctrine that conflicts with Sweeney. Nor have the facts changed. There are no factual differences between this case and *Sweeney* that would support a different outcome.

Under the circumstances, a reversal of *Sweeney* would be nothing more than a decision by the panel in this case that it disagrees with *Sweeney*. But the public is entitled to more consistency and certainty than that. A situation in which a Court of Appeals reverses itself for no apparent reason does not contribute to public confidence in the integrity of the judicial branch or in the authority of legal

[11] The Supreme Court in *Planned Parenthood* also discussed a fourth factor applicable to *stare decisis* - whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation – but that factor would support the application of *stare decisi*s and not overcome it.

precedent. Business owners, like the members of the NFIB, ought to be able to rely on the recent decisions of this Court absent some unusual change in circumstances, none of which are present here.

II. Act 1 Does Not Effect a Taking of Private Property.

The Unions argue that Act 1 results in an unlawful taking even though the statute takes nothing from the Unions. Instead, the statute affirmatively prevents a taking—i.e., the taking of money from employees who do not want to join the union and do not desire the services it provides. Act 1 is protective of property rights and not violative of the Takings Clause.

A. The Unions' Takings Claim is Squarely Precluded by the Supreme Court's Decision in *Eastern Enterprises v. Apfel*

It is a fundamental principle of law that no one may assert a legal claim to the property of another in the absence of an enforceable contractual right agreed upon in a mutual bargain (*i.e.*, a 'meeting of the minds'). *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007) (unions "have no constitutional entitlement to the fees of nonmember-employees"); *see also Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) ("[A] law that takes property from A, and gives it to B: It is against all reason and justice..."). But, the Unions assume exactly the opposite. They say that they are entitled to a constant stream of revenue from all of the workers in a bargaining unit whether or not all of them have agreed to join the union and whether or not some of them object because they do not want anything

that the union offers. On its face, this is preposterous. A business might as well claim that, having hired workers and built facilities, it is now entitled to the compelled continued patronage of its customers. There can be no taking in an act that simply forecloses a union from asserting a right to another's property.

The Unions' takings theory cannot be shoehorned within any existing takings test. They certainly cannot invoke physical takings case law in a challenge to mere economic regulation. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2001) (explaining that courts cannot rely on physical takings cases in the context of a regulatory takings claim); *see also Horne v. U.S.D.A.*, 135 S. Ct. 2419, 2427(2015).

From the pleadings, it appears that the Unions seek to analogize their position to that of a public utility, invoking case law holding that government cannot compel such a business to provide services without guaranteeing a reasonable rate of return. On this point, NFIB Legal Center's view of takings law may stand in tension to some extent with that espoused by the State Defendants. As a general matter, *Amicus* does not dispute the proposition that there would be a takings problem if the government should (a) order a business (including a union) to agree to provide services on pain of civil penalties while also (b) prohibiting the business from charging to recoup operating costs and to earn reasonable profits. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *Jersey*

Cent. Power & Light Co. v. Federal Energy Regulatory Comm'n, 810 F.2d 1168, 1181 (D.C. Cir. 1987).

But that is not this case, and the Unions' analogy fails. This is because, unlike public utilities that are statutorily obligated to *continue* providing public services at government mandated rates, there is no on-going obligation on the part of a labor union to continue providing any services after the expiration of an existing and voluntarily negotiated collective bargaining agreement. It does not have to represent anyone. If a union does not wish to provide services to a group of employees – say because a large minority does not wish to join – then it is free to decline to do so.

Even if a union decides to represent a bargaining unit, it is not "required" to provide services to a group of workers who do not wish to pay for them. Unions choose to voluntarily assume the responsibility of representing both union and non-union members alike when seeking to become the exclusive representative of a given bargaining unit. *See Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) ("The Union's federal obligation to represent all employees in a bargaining unit is optional; it occurs only when the union elects to be the exclusive bargaining agent…"). Unions could choose to enter "members only" agreements, so as to represent only voluntarily paying members. *See Consolidated Edison Co. of N.Y., Inc. v. NLRB*, 305 U.S. 197 (1938); *see also* Stan Greer, Union 'Representation' is Foisted on Workers--Not Vice-Versa, National Institute

for Labor Relations Research (Feb. 2004).[12] Each union is free to decide whether the benefits of exclusive representation is sufficient to compensate it for providing its services to all covered employees.

So long as a union has a choice as to whether to prospectively engage in the market for its proffered services, it stands on equal footing with essentially any other economic actor voluntarily engaged in a regulated market. The Unions' takings theory, if accepted, would open the door for business entities to challenge all sorts of burdensome government mandates that are triggered by virtue of their choice to continue manufacturing or to continue providing regulated services.[13] But of course, much to the chagrin of the small business community, the Takings Clause cannot be invoked simply because one finds regulatory requirements difficult or onerous.

For example, hospitals who accept certain federal payments must treat all patients who come to their emergency rooms whether or not there is any hope that the patient will be able to pay. If the Unions' argument prevails, then these requirements are called into question. Government requirements that employers

[12] Available at: http://www.nilrr.org/files/SKMBT_60009080411230.pdf (last visited Mar. 15, 2017) (discussing testimony of former NLRB Chairman William Gould, and proving a survey of relevant case law).

[13] Virtually every regulatory requirement imposes compliance costs for business—with many demanding that companies must affirmatively pay to fund public programs (*i.e.*, unemployment insurance, or workers compensation), or to pay for costly employee benefits (*e.g.*, affordable health insurance coverage). So if it were true that regulation violates the Takings Clause simply in requiring economic actors to expend resources, that conclusion would call into question all sorts of regulatory regimes. Ironically that would undercut major efforts of the labor movement over the past century.

provide paid family leave in some jurisdictions would likewise be called into question if the Unions' theory were endorsed.

In *Eastern Enterprises v. Apfel*, the Supreme Court closed the door on the idea that the Takings Clause could be wielded as a broad sword against economic regulation. 524 U.S. 498 (1998).[14] Specifically, *Eastern Enterprises* made clear that there can be no takings claim where a regulation merely imposes costs on those who have chosen to engage in regulated economic conduct. Once again, if that were not the case then businesses would be able to challenge all sorts of regulatory mandates—from minimum wage and paid sick leave requirements to environmental and safety design standards imposing added costs for manufacturers. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

[14] Writing for plurality in *Eastern Enterprises*, Justice O'Connor would have held the Coal Act unconstitutional under the Takings Clause because it imposed major liabilities—"on the order of $50 to $100 million"—on a company, on the basis of the fact that it had once participated in the coal market. *Id*. at 530-537. The fact that this obligation was imposed retroactively weighed heavily in the plurality's analysis, since no one would expect to be saddled with financial obligations on the basis of lawful conduct thirty years in the past. But Justice Kennedy disagreed with the plurality's takings analysis. *Infra* at 540-46 (Kennedy, J., concurring). His concurring opinion was controlling because he agreed that the provisions in question violated due process in imposing retroactive liabilities. *Id*. at 547-48. But, Kennedy joined with the four dissenting justices in concluding that a regulation requiring an expenditure of funds simply cannot not amount to a taking—not even where the requirement is retroactively imposed.

With that said, this Court should recognize that *Eastern Enterprises* does not stand as a categorical bar on takings claims challenging economic regulation. Importantly, the Supreme Court's subsequent decision in *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013), recognized a vital exception in cases where economic regulation requires the dedication of private property for public use as a condition of exercising another regulated property interest.[15] For example, in that case, Coy Koontz was denied the right to build on his land because he refused to accede to regulatory demands for the payment of money to fund unrelated public improvements. *Id*. at 2600 ("The fulcrum this case turns on is the *direct link* between the government's demand and a specific parcel of real property.") (emphasis added). But in the present case, there is no such "direct link" between the challenged economic regulation and the Unions' private property rights.[16]

[15] Justice Alito explained that there was no takings problem in *Eastern Enterprises* because—in that case—the financial obligation did not "operate upon ... an identified property interest" by directing the owner of a specific property to make a monetary payment. *Koontz*, 133 S. Ct. at 2599.

[16] Certainly, there are cases where economic regulation is directly linked to an individual or business' private property rights. For example, *Koontz* would recognize a taking if a business or occupational license were conditioned upon a requirement to dedicate money to fund some unrelated public program. *See* Luke A. Wake, Jarod M. Bona, *Legislative Exactions After* Koontz v. St. Johns River Mgmt. Dist., 27 GEO. INT'L ENVTL. L. REV. 539, 571-72 (2015) (discussing application of *Koontz* in non-land use cases). Likewise, *Koontz* would recognize a takings problem if the Wisconsin Legislature should enact legislation prohibiting continued use of existing industrial facilities, except upon payment of an unrelated fee. *Id*. At 571. But no such takings problem is presented here. .

Even if other legal proscriptions should require a union to provide certain services as a condition of becoming an exclusive bargaining agent, that requirement is completely untethered to any concrete property interest. Act 1 does nothing to restrict the Unions' right to spend their own money, or to utilize any other form of privately owned property, as they may desire. Accordingly, the Unions' takings claim should be summarily rejected under *Eastern Enterprises*.

Finally, the Unions cannot rely on regulatory takings cases concerning the imposition of restrictions limiting development opportunities on real property because those cases require a highly fact-specific analysis of (i) the economic impact of the restriction on "the parcel as a whole," (ii) the owner's reasonable investment-backed expectations and (iii) the character of the government action. *See Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978). It is possible that regulation might simply "go too far" in impairing the use of property. S*ee Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But there is nothing in the record to suggest that impeding a union from compelling all workers in a bargaining unit to use – or even to pay for the services they receive – rises to this level.

B. The Union's Alleged Injury Stems from the Dictates of Federal Law—Not Wisconsin's Act 1

The Unions argue that Act 1 effects a "taking" by requiring unions to provide services to nonmembers, but it does no such thing. The State Defendants

establish in their brief that the "taking" alleged by the Unions is not something caused by Right to Work laws but instead "exists," – if it does - as a result of the duty of "fair representation" imposed by the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The Supreme Court imposed that duty as a quid pro quo for a union being made the exclusive bargaining agent for a group of employees, including employees who chose not to join the union. Thus, the duty of fair representation pre-existed Act 1 by more than 45 years.

Amicus will not repeat the legal argument made by the State Defendants but would make one additional point. The fallacy of the Unions' logic can be seen in a long-established rule of labor law. Even in a non-Right to Work state (such as Wisconsin before Act 1), employers have the right not to agree to any provision in a proposed contract, including a so-called union security provision. *See* 29 U.S.C. § 158(d). Employers must bargain in good faith regarding such a provision, but they are not compelled to agree to anything. As a result, even in non-Right to Work states there are collective bargaining agreements that do not contain union security agreements.[17] And under those contracts the unions still have a duty of fair representation to non-union workers.

[17] The proportion of workers covered by a union contract in non-Right to Work States but who do not belong to the union is 6.4%. Joe C. Davis and John H. Huston, *Right-to-work Laws and Free Riding*, ECONOMIC INQUIRY, Vol 31, Issue 1 (Jan 1993) (available at: http://www.freepatentsonline.com/article/Economic-Inquiry/13833418.html).

Thus, even in non-Right to Work states there are situations where unions must provide services to non-dues paying employees and no court has held that such a result is an unconstitutional taking. The alleged "taking" that the Unions allege here cannot be the result of Right to Work laws because the same result occurs in Right to Work states and non-Right to Work states alike.

Act 1 creates no taking. If the Unions have a disagreement with the requirement of fair representation they have raised the wrong legal challenge here. They could ask a court (or the legislature) to extinguish the duty of fair representation, but that has nothing to do with Act 1. Act 1 imposes no such duty and causes no taking.

CONCLUSION

NFIB Legal Center, as *Amicus Curiae*, urges the Court to respect the principle of *stare decisis*, but even if the Court revisits the issues decided in *Sweeney*, the *Amicus* urges the Court to reject the arguments of the Unions on the merits and to affirm the decision of the District Court.

Respectfully submitted,

Dated: March 20, 2017

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. Rules App. P. 29 and 32(a)(7)(B) because it contains 4,754 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6)because it has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** in **12 point Times New Roman**.

Dated this 20th day of March, 2017.

/S/ RICHARD M. ESENBERG

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that he has filed electronically, pursuant to Circuit Rule 31(e), versions of this brief that are available in a non-scanned PDF format.

Dated this 20th day of March, 2017.

/S/ RICHARD M. ESENBERG

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 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.

Dated this 20th day of March, 2017.

/S/ RICHARD M. ESENBERG