STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 14

MACHINISTS LOCAL
LODGE 1061, et al.,

Plaintiffs,

v. Case No. 15-CV-628

STATE OF WISCONSIN, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

MOTION

Defendants move to dismiss Plaintiffs' complaint in its entirety for failure to state a claim upon which relief can be granted. Wis. Stat. § 802.06(2).

INTRODUCTION

In their complaint, Plaintiffs allege a single claim—that 2015 Wisconsin Act 1 ("Act 1") is a violation of Wis. Const. art. I, § 13. This constitutional mandate provides: "The property of no person shall be taken for public use without just compensation therefor." Wis. Const. art. I, § 13. Although "right-to-work" laws like Act 1 exist in many states—and have

existed for decades—no appellate court has ever held that such laws result in an unconstitutional taking of private property for public use.

Plaintiffs fail to allege sufficient facts to state a takings claim for the following reasons:

First, Plaintiffs lack standing. On the face on the complaint, the allegations are speculative and not concrete. Plaintiffs claim that Act 1, in the future, will prevent them from signing collective bargaining agreements that may provide for certain services, and that if employees exercise their rights under Act 1, then Plaintiffs will lose money. This hypothetical concern is not the type of concrete, particularized injury required to establish standing.

Second, the complaint should be dismissed because it does not present a justiciable controversy. Plaintiffs' claim is not ripe, in that they have yet to allege an impact from Act 1. Furthermore, Plaintiffs' allegations fail to establish a legally protectable interest. Instead, Plaintiffs allege that they have an interest in future fair-share assessments that might be paid based on future contracts that have yet to be signed. At this point, therefore, Plaintiffs' claim is a mere theoretical dispute and not justiciable.

Third, the complaint does not sufficiently allege facts supporting all of the elements of a takings claim. Plaintiffs do not allege that they have a property interest that was taken by Defendants; instead, they allege that

they hope for future contracts and future fair-share assessments that may be paid by non-members.

Fourth, and finally, the remedies Plaintiffs seek—declaratory relief, injunctive relief, and attorney fees—are simply not available against the named defendants. "Just compensation," which is the specific relief provided by the text of the Wisconsin Constitution, is the remedy for a takings claim, and other relief may only be awarded as an ancillary matter to enforce "just compensation." Because there will be no just compensation in this case (since none was sought), ancillary relief is unavailable.

Each of these bases is sufficient to dismiss Plaintiffs' complaint. Defendants, therefore, respectfully request that the Court dismiss this lawsuit in its entirety.

FACTS AS ALLEGED IN THE COMPLAINT

I. The parties.

Plaintiffs are two labor organizations and a federation of labor organizations with their principal places of business in Wisconsin. (Compl. ¶¶ 2-4.)

Plaintiffs International Association of Machinists District 10 ("District 10") and Local Lodge 1061 ("Lodge 1061") represent employees for purposes of collective bargaining. (*Id.* ¶ 2.) District 10 is comprised of approximately 30 local lodges. (*Id.*) Lodge 1061 is an affiliate of District 10

that represents approximately 102 employees. (*Id.*) Lodge 1061 has negotiated union security clauses with employers that require "fair share" payments of non-union members. (*Id.*) Lodge 1061 is "currently in the process of renegotiation" of a contract with DRS Power and Control Technologies, Inc. in Milwaukee, where Lodge 1061 represents 12 non-union members. (*Id.*)

Plaintiff United Steel Workers District 2 ("USW District 2") also represents employees in collective bargaining. (*Id.* ¶ 3.) It has negotiated union security clauses with employers in its collective bargaining agreements that require "fair share" payments. (*Id.*)

Plaintiff Wisconsin State AFL-CIO ("WI AFL-CIO") is an unincorporated federation of labor organizations. (*Id.* ¶ 4.) Its member organizations include unincorporated labor organizations, such as District 10, Lodge 1061, and USW District 2. (*Id.*) WI AFL-CIO "represents in excess of 200 affiliated organizations that in turn represent in excess of 100,000 private sector employees in Wisconsin." (*Id.*)

Defendant State of Wisconsin is a political entity and a named defendant. (*Id.* ¶ 5.)

Defendant Scott Walker is the Governor of Wisconsin and "is charged with the enforcement of the laws of the State of Wisconsin including Wis. Act 1." (*Id.* ¶ 6.) He is sued in his official capacity. (*Id.*)

Defendant Brad Schimel is the Attorney General of Wisconsin and is "charged with enforcement of [the State's] laws and the investigation of crimes of statewide significance, and to consult with and advise district attorneys who prosecute misdemeanors." (*Id.* ¶ 7.) He is sued in his official capacity. (*Id.*)

Defendants James R. Scott and Rodney G. Pasch are the commissioners of the Wisconsin Employment Relations Commission. (*Id.* ¶¶ 8-9.) They are sued in their official capacities. (*Id.*)

II. Allegations regarding labor laws, Act 1, and Plaintiffs' activities.

Plaintiffs' complaint alleges that the federal National Labor Relations Act and Wis. Stat. § 111.05(1) "impose upon labor organizations, including the Plaintiffs and the member organizations of Plaintiff Wisconsin State AFL-CIO, the duty to represent fairly all persons in a bargaining unit regardless whether or not such persons become and remain members of the labor organization." (*Id.* ¶¶ 10-11.) This "duty" applies to a labor organization's negotiation, administration, and enforcement of collective bargaining agreements, including grievances and arbitration. (*Id.* ¶ 11.) Fulfilling this "duty" allegedly "requires the labor organizations to expend considerable sums of money to employ trained staff, outside professionals,

and arbitrators." (*Id.*) Fulfilling the duty of fair representation also allegedly involves the use of property and services. (*See id.*)

Plaintiffs have collective bargaining agreements with union-shop clauses or other security clauses whereby employees in a bargaining unit are required to pay fees, dues, or fair share payments relating to collective bargaining and contract administration, as a condition of employment. (*Id.* ¶ 12.) "These sums are the primary source of income for [Plaintiffs] . . . ." (*Id.*)

Plaintiffs represent non-members of their organizations. (*Id.* ¶ 13.) These non-members are entitled to "fair representation because of the principle of exclusive majority representation." (*Id.*) Representing non-members allegedly "costs a substantial sum of the property of the labor organizations." (*Id.*)

Plaintiffs allege that Governor Walker signed Act 1 into law on March 9, 2015. (*Id.* ¶ 14.) They then characterize Act 1's provisions and its legal impact, including making union security clauses void and criminalizing the act of requiring the payment of dues, fees, or other money by a non-union member as a condition of employment. (*Id.* ¶¶ 14-18.)

III. Plaintiffs' only cause of action: an unconstitutional taking.

Plaintiffs assert a single legal cause of action: "Act 1 upon its face takes the property of Plaintiffs without compensation," in violation of Wis. Const. art. I, § 13. (*Id.* ¶ 28.)

Plaintiffs allege that they have a "property interest" in the following: "their collective bargaining agreements with employers in the private sector" and "their money, tangible property used in the representation of employees, and the services of their members and agents for the purposes of contract negotiation, administration, enforcement and grievance processing and arbitration." (*Id.* ¶ 22.)

Plaintiffs allege that "Act 1 effects a transfer of property from the Plaintiffs . . . to nonmembers." (*Id.* ¶ 26.) Plaintiffs' complaint includes no factual allegations regarding how "property" gets from Plaintiffs to non-members. (*Id.*)

Plaintiffs do not allege in this section of their complaint, *i.e.*, ¶¶ 19 through 28, the conduct in which Defendants engage that injures Plaintiffs. Instead, Plaintiffs' allegations in their legal-claim section focus on what Act 1 does—not on what Defendants do. Plaintiffs' complaint is bereft of factual allegations explaining what actions taken, or to be taken, by Defendants have injured, or will injure, Plaintiffs.

Plaintiffs make no allegation that Act 1 or Defendants' conduct takes their property for a "public use," which is the verbatim language in Wis. Const. art. I, § 13. Instead, Plaintiffs allege that "Act 1 was passed *for the public purpose* making the business climate in the State more favorable by eliminating the power of labor organizations to collect fair share fees from nonmembers." (*Id.* ¶ 25 (emphasis added).)

IV. Plaintiffs' request for relief: declaratory relief, injunctive relief, and attorney fees.

Plaintiffs request a declaratory judgment that Act 1 is "an unconstitutional taking of private property for a public purpose without just compensation" and that it is "therefore null and void." (*Id.* at 10.) Plaintiffs further request that the Court "permanently enjoin the implementation and enforcement of Act 1." (*Id.*) They also request "such other and further relief as may be appropriate including without limitation, attorneys fees and costs." (*Id.*)

Plaintiffs do not request just compensation in the form of money. Plaintiffs also do not request an injunction against Defendants to prevent them from doing certain activities or to compel them to do certain activities.

LEGAL STANDARD

In 2014, the Wisconsin Supreme Court adopted the motion-to-dismiss standard established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693.

There are two steps to the *Twombly* process. First, the court must disregard any conclusory allegations: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining the *Twombly* standard). Courts are also not bound to accept as true legal conclusions couched as factual allegations. *Id.*

Second, after ignoring conclusory allegations, a court must analyze whether the remaining well-plead allegations constitute a plausible claim for relief: "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 678. This process is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. But where the alleged facts "do not permit the court to infer more than the mere possibility of misconduct," the plaintiff has not sufficiently alleged a cause of action. *Id.*

In this case, after removing the conclusory allegations from the complaint, Plaintiffs have not stated a plausible claim that Defendants have taken their property under Act 1. Therefore, dismissal is appropriate.

ARGUMENT

I. Plaintiffs do not have standing to pursue a takings claim.

The doctrine of standing assures that courts do not become "'a vehicle for the vindication of the value interests of concerned bystanders.'" *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶ 129, 333 Wis. 2d 402, 797 N.W.2d 789 (Prosser, J., concurring) (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). The standing doctrine "restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." *Three T's Trucking v. Kost,* 2007 WI App 158, ¶ 16, 303 Wis. 2d 681, 736 N.W.2d 239.

A party asserting a constitutional claim must allege a real and direct, actual or threatened injury resulting from the legislation under attack. *Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983); *State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 309, 290 N.W.2d 321 (1980); *Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979). In other words, Plaintiffs must allege that they have been "injured in fact." *Mogilka v. Jeka*, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986).

This standard is "conceptually similar" to the federal standing rule. *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1067, 236 N.W.2d 240 (1975).

Under that federal rule, the injury alleged must be "concrete and particularized . . . actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations, footnote, and internal quotation marks omitted). Wisconsin courts agree: "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox,* 112 Wis. 2d at 525 (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983)).

Plaintiffs' takings claim is premised on the allegation that they will be required to provide services to non-union members without compensation. The complaint reads as follows: "Wis. Act 1 deprives the unions of their property without just compensation by prohibiting the unions from charging nonmembers who refuse to pay for representative services which unions continue to be obligated to provide." (Compl. ¶ 23.) For a number of reasons, Plaintiffs' claim is speculative, not real and imminent.

First, Act 1 does not apply to collective bargaining agreements existing before March 11, 2015. The Act, by its very terms, applies only to future contracts:

> This act first applies to a collective bargaining agreement containing provisions inconsistent with this act upon the renewal, modification, or extension of the agreement occurring on or after the effective date of this subsection.

Act 1, § 13. Plaintiffs have not alleged that they have entered into any contracts affected by Act 1, and therefore have not alleged that they are required to provide services to non-members. Unless and until Plaintiffs can allege that they have actually entered into a post-Act 1 contract, their harms are speculative.

Second, even if Plaintiffs had entered into a contract compliant with Act 1, Plaintiffs would still need to allege that the law requires them to perform a service. Beyond negotiation of the collective bargaining agreement itself, neither federal nor state law alone requires that a union provide any particular service, such as grievance representation, to covered employees. *See, e.g., Serv. Emps. Int'l Union Local No. 150 v. WERC*, 2010 WI App 126, ¶ 19, 329 Wis. 2d 447, 791 N.W.2d 662 ("Pursuant to most collective bargaining agreements, the union exercises authority over the grievance procedure, has the ability to settle a grievance over an employee's objection and decides whether to pursue arbitration of a grievance."). Therefore, it

is wrong to assume that *the law* requires the labor organizations to perform particular services; and it is speculative to assume that these future post-Act 1 *contracts* will require Plaintiffs to do anything, let alone spend money on non-members.

Third, even if Plaintiffs had entered into a post-Act 1 contract, *and* the law requires them to perform a future service, *and* Plaintiffs had signed a contract requiring them to perform a future service, Plaintiffs would still need to allege that they have spent money performing a service for an employee who did not pay dues or fees because of Act 1.

Plaintiffs have not made any of these allegations. Instead, Plaintiffs hypothesize that these harms will occur at an unspecified future date. But this Court is not in a position to remedy future anticipated wrongs when Plaintiffs have not identified the scope or even the certainty of such alleged harms. Their claims are speculative; they do not have standing.

Furthermore, it is important to note that these alleged contracts and alleged injuries all hinge on the unknown future actions of third parties, namely, the employers. Contracts require two parties: in this case, a collective bargaining agreement requires the consent of both the employer and the labor organization. The future collective bargaining agreements themselves are speculative because the employers are not required to enter into any contracts with Plaintiffs, and the level of service provided by a labor

organization in an agreement is not established in law. Under *Lujan*, Plaintiffs bear a heavy burden on standing when the alleged injury may result from the actions of a third party:

> When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 562 (citations and internal quotation marks omitted).

In conclusion, even if the future actions of third parties were certain, Plaintiffs still have no present injury. They have not alleged that Act 1 has depleted their treasuries or that their services are required or have been rendered. And they cannot make such a claim at this time because Act 1, by its terms, applies only to *future* contracts. Until Plaintiffs have alleged a current, direct, and compensable harm, they have only alleged future and contingent harm. This type of alleged speculative harm does not confer standing. Dismissal on this basis is required.

II. Plaintiffs' claims are non-justiciable.

In addition to the requirements of establishing standing, Plaintiffs must also demonstrate that their claims are justiciable. There are four elements of justiciability: (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination. *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). If any of the four factors are missing, then the controversy is not "justiciable," and it is improper for a court to entertain the action. *Id.*

Plaintiffs' claim is not justiciable for two primary reasons. First, Plaintiffs have not alleged any legally protectable interest. In evaluating whether the interest asserted is a legally protectable interest, Plaintiff must establish that their alleged interest is recognized by law. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 164. Plaintiffs make no such allegation. Instead they claim that Act 1 will reduce future fair-share assessments paid by current non-member employees. But Plaintiffs do not have any legally protectable interest in these future fair-share fees. *See Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 42, 328 Wis. 2d 469, 787 N.W.2d 22 (internal quotation marks

omitted) (no legally protectable interest when the plaintiff simply has an "abstract need or desire or unilateral expectation" of a property interest). These are future fees under post-Act 1 contracts (that Plaintiffs have not alleged even exist). Plaintiffs' complaint does not allege that they are entitled to any of these future assessments under existing contracts, and therefore, Plaintiffs have not alleged a legally protectable interest.

Second, Plaintiffs' claim is not ripe for a judicial determination. Ripeness "requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Miller Brands-Milwaukee, Inc.*, 162 Wis. 2d at 694. Facts alleged must not be contingent or uncertain. *Id.* The alleged facts in this case, however, are both contingent and uncertain.

As explained above in the section on standing, Plaintiffs have not alleged that Defendants (presumably through operation of Act 1) have taken any of their property. The reason for this is simple: Plaintiffs are operating under *pre*-Act 1 contracts. They have not alleged that Act 1 is forcing them to spend money on non-members who have not paid fair-share fees. Their claim for relief is contingent upon (1) entering into post-Act 1 contracts, (2) that offer services—that are not mandatory under any law—covering non-members, and (3) provide services to those non-paying members. Because this claim is both contingent and uncertain, Plaintiffs' claim is not ripe, and therefore not justiciable.

III. Plaintiffs have not stated a takings claim.

Even if Plaintiffs had standing, and had alleged justiciable claims, they have failed to state a taking claim upon which relief can be granted. An unconstitutional taking occurs when all of the following circumstances exist: (1) the plaintiff has a property interest; (2) the defendants took that property interest from the plaintiff; (3) the defendants took the property for public use; and (4) the defendants did not provide just compensation for the property. *See Wis. Med. Soc'y, Inc.*, 328 Wis. 2d 469, ¶ 38.

Plaintiffs have not sufficiently alleged these elements.

A. Plaintiffs' only alleged property interests are *existing* collective bargaining agreements and *existing* money and tangible property.

To state a claim, Plaintiffs must allege that they have a relevant property interest. *Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 132, 243 Wis. 2d 512, 627 N.W.2d 807. A property interest exists if state law recognizes and protects that interest. *Wis. Med. Soc'y, Inc.*, 328 Wis. 2d 469, ¶ 41. Importantly, a party has a property interest only if there is a "legitimate claim of entitlement to the property, as opposed to an abstract need or desire or unilateral expectation." *Id.* ¶ 42 (internal quotation marks omitted).

In the complaint, Plaintiffs allege only two property interests. First, Plaintiffs allege that they "have a property interest in their collective

bargaining agreements with employers in the private sector." (Compl. ¶ 22.) This interest is later described as collective bargaining agreements with "union security clauses." (*Id.*) Second, Plaintiffs claim they have a property interest in their "money, tangible property used in the representation of employees, and the services of their members and agents for the purposes of contract negotiation, administration, enforcement and grievance processing and arbitration." (*Id.*)

Plaintiffs have identified no other property interests than these two existing interests: collective bargaining agreements and money/tangible property.

B. Plaintiffs have not alleged a relevant property interest that has been taken by the Defendants.

After identifying a property interest, the next step is for Plaintiffs to allege that Defendants have taken this property. They do not.

The complaint does not allege a taking of either of the property interests they identified. To allege a violation of the Takings Clause, there must be a "taking" of private property for public use. *Zinn v. State*, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983). But the complaint does not

allege that either of the two identified property interests have been taken by Defendants.

- *First*, Plaintiffs do not allege that their "collective bargaining agreements" are being taken. Plaintiffs simply allege that they have a property interest in existing collective bargaining agreements with union security clauses. (Compl. ¶ 22). And of course they do not allege a taking of these contracts because Act 1 does not apply to current contracts.
- *Second*, Plaintiffs do not allege that their existing "money, tangible property used in the representation of employees, and the services of their members" are being taken by Defendants. (*Id.*) Plaintiffs allege that they have a property interest in these things, but do not explain how Defendants are taking this property.

In short, the fundamental defect with the complaint is the disconnect between the property interests alleged (existing contracts, money, and services), and the alleged taking (future contracts, money, services). While Plaintiffs are quick to identify their property interests (existing collective bargaining agreements and money/services), they do not allege that Defendants have taken *this* property without just compensation.

The reason for this is simple: Plaintiffs *believe* that, in the future, they *may* receive less union dues or fair-share assessments and be required to

perform services under future contracts for employees who do not pay dues or fair-share assessments. These are the allegations:

> Wis. Act 1 deprives the unions of their property without just compensation by prohibiting the unions from charging nonmembers who refuse to pay for representative services which unions continue to be obligated to provide.
>
> . . . .
>
> Wisconsin Act 1 effects a transfer of property from the Plaintiffs . . . to nonmembers who by state action are under Act 1 [*sic*] can no longer be required to pay for the representation the Plaintiffs are required to use their property to provide.

(*Id.* ¶¶ 23, 26.) These future property interests in paragraphs 23 and 26, however, are not the same ones alleged in paragraph 25 (existing collecting-bargaining agreements and existing money/services). The alleged property interests in paragraphs 23 and 26 are future, contingent interests. This cannot form the basis of a takings claim because a property interest only exists if there is a "legitimate claim of entitlement to the property, as opposed to an abstract need or desire or unilateral expectation." *Wis. Med. Soc'y, Inc.*, 328 Wis. 2d 469, ¶ 42 (internal quotation marks omitted).

Plaintiffs' *existing* property is not being taken. On the contrary, they are simply alleging that they may have to spend more money in the future to remain a going concern. But "the imposition of an obligation to pay money does not constitute an unconstitutional taking of property." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001);

E. Enters. v. Apfel, 524 U.S. 498, 526 (1998) (internal quotation marks omitted) ("the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking"); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible.").

Indeed, as discussed in Defendants' brief in opposition to Plaintiffs' motion for a temporary restraining order, Plaintiffs fail to allege a coherent takings claim under any theory. For example, Plaintiffs do not allege that the Legislature actually has diverted money from Plaintiffs' treasuries; thus, there is no analogy to the scenario discussion in *Wisconsin Medical Society* or *Wisconsin Retired Teachers Association*. *See Wis. Med. Soc'y, Inc.*, 328 Wis. 2d 469, ¶ 24; *Wis. Ret. Teachers Ass'n v. Emp. Trust Funds Bd.*, 207 Wis. 2d 1, 13, 558 N.W.2d 83 (1997). Further, this would not qualify as a regulatory taking, as there is no allegation that Plaintiffs are denied "all or substantially all" of Plaintiffs' property. *Eberle v. Dane Cnty. Bd. of Adjustment*, 227 Wis. 2d 609, 595 N.W.2d 730 (1999). If the law were otherwise, any number of common regulations would be takings. *See, e.g.,* 42 U.S.C. § 12182 (public-accommodation requirements in the Americans with Disabilities Act); 42 U.S.C. § 1395dd (Emergency Medical Treatment

and Active Labor Act, requiring hospitals to treat emergency room patients regardless of ability to pay).

In short, Plaintiffs will not be able to point to a published decision from any jurisdiction, let alone Wisconsin, that supports their novel takings theory. This is particularly significant since right-to-work laws have been on the books for decades around the country and have withstood numerous challenges.

Therefore, because Plaintiffs have not alleged that Defendants have taken a current property interest, they have not alleged a takings claim.

C. Plaintiffs have not alleged that their property was taken for a "public use."

To properly plead a takings claim, Plaintiffs must allege that Defendants have taken their "private property for public use." *Zinn*, 112 Wis. 2d at 424. The Wisconsin Supreme Court has explained in detail the meaning behind the term "public use" as follows:

> "the term 'public use', in our constitution, means a more intimate relationship between the public and an item of property which has been acquired under the power of eminent domain than is denoted by terms such as 'public benefit' and 'public utility.' 'Public use' demands that the public's use and occupation of the property must be direct. If someone other than the public uses the property, the fact that the public will share in the benefits does not suffice. It must be the public which will use and occupy the property upon its acquisition. . . .

> No private person will use, possess, have an interest in, or make a profit out of it."

David Jeffrey Co. v. City of Milwaukee, 267 Wis. 559, 577, 66 N.W.2d 362 (1954) (quoting *Foeller v. Hous. Auth. of Portland*, 256 P.2d 752, 766 (1953)).

Plaintiffs have not alleged that the "taking" in this case is for a "public use." Plaintiffs have only identified a "public purpose" of Act 1. (Compl. ¶ 25.) But as explained in the passage above, "public purpose" is not the same as "public use." And the "public use" must be tied to the taking itself, not the general purpose of the legislation. Plaintiffs do not identify or even allege a "public use" for the property that has allegedly been taken from them.

D. As a matter of law, Plaintiffs received just compensation and therefore cannot state a claim.

Even assuming, *arguendo*, Plaintiffs have a relevant property interest and Defendants took Plaintiffs' property by operation of Act 1, the exclusive remedy for a violation of the Takings Clause of the Wisconsin Constitution is "just compensation." *Wis. Builders Ass'n v. Wis. DOT*, 2005 WI App 160, ¶ 36, 285 Wis. 2d 472, 702 N.W.2d 433. The Takings Clause of the Wisconsin Constitution does not prohibit the taking of private property, but simply requires the government to compensate the plaintiff in the event of a taking. *Id*. "In other words, it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of

otherwise proper interference amounting to a taking." *Id.* (internal quotation marks omitted).

As the Seventh Circuit has already held, even assuming that Act 1 takes Plaintiffs' property, Plaintiffs have already been compensated: unions are "justly compensated by federal law's grant to the Union the right to bargain exclusively with the employer." *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014).

IV. Plaintiffs cannot obtain declaratory relief, injunctive relief, or attorney fees in this case.

Even assuming Plaintiffs have a colorable takings claim, they still cannot state a claim upon which relief can be granted because the remedies they seek in this case are unavailable.

Plaintiffs have sued five Defendants: the State of Wisconsin, Scott Walker, Brad Schimel, James Scott, and Rodney Pasch. Because Plaintiffs have sued all of the individual defendants in their official capacities, this suit is, in essence, a suit "against the state." As the supreme court has explained:

> A proceeding against a state officer in his official capacity is a suit against the state, governed by sec. 27, Art. IV, of the Wisconsin Constitution providing: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." Pursuant to this mandate, it is the legislature that determines how

> and in what respect the state can be sued, and the mandate is equally applicable to administrative arms and agencies of the state.

Appel v. Halverson, 50 Wis. 2d 230, 235, 184 N.W.2d 99 (1971) (footnote omitted). By suing "the State," therefore, Plaintiffs have directly implicated principles of sovereign immunity that prevent a remedy in this case.

Because the State and its officers have sovereign immunity, Plaintiffs must identify a clear and express waiver of sovereign immunity to proceed. *See Fiala v. Voight*, 93 Wis. 2d 337, 342-43, 286 N.W.2d 824 (1980). The supreme court explained the principles of sovereign immunity in the context of a takings claim in *Wisconsin Retired Teachers Association*, 207 Wis. 2d at 28. In that case, the supreme court acknowledged the State's sovereign immunity but explained that the Takings Clause is consent to sue the State for money damages. *Id*. Apart from "just compensation," the supreme court did not identify any other appropriate remedy against the State or its officials for a violations of the Takings Clause: "just compensation is *the* constitutionally prescribed remedy for a taking . . . . What remains for our consideration is the appropriate method of valuing that property right." *Id*. at 30 (emphasis added).

Under existing caselaw, neither injunctive relief nor declaratory relief is available as an independent remedy when the only cause of action alleged

against the State is a takings claim.[1] Declaratory and injunctive relief are merely *ancillary* remedies to enforce "just compensation." *See, e.g., id.* at 39-40 (remanding for the entry of declaratory and injunctive relief only as a method of enforcing "just compensation"); *Wis. Med. Soc'y, Inc.*, 328 Wis. 2d 469, ¶ 106 (ordering injunctive relief as a method of transferring money back into fund). In the absence of a request for just compensation, therefore, injunctive or declaratory relief is not available in a case in which the only cause of action is for an unconstitutional taking. Because Plaintiffs are not seeking just compensation, they cannot obtain any ancillary relief to enforce what is constitutionally required as the exclusive remedy: just compensation.

CONCLUSION

Plaintiffs have failed state a claim for an unconstitutional taking challenging Wisconsin's right-to-work law. No court has ever held that statutes like Act 1 work an unconstitutional taking. And even assuming that Plaintiffs have stated a valid takings claim, the remedies sought by Plaintiffs are barred by principles of sovereign immunity.

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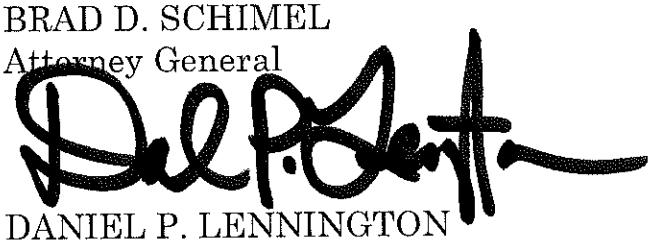
[1]This would also include Plaintiffs' claim for attorney fees. (Compl. ¶ 10.) No statute or case provides that in a takings claim against the State, the plaintiffs may recover attorney fees. There is no express statutory authorization and no waiver of sovereign immunity for attorney fees. Therefore, this claim for attorney fees should be dismissed.

Defendants therefore respectfully request that this lawsuit be dismissed in its entirety.

Dated this 24th day of April, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General



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