STATE OF WISCONSIN CIRCUIT COURT BRANCH 14 DANE COUNTY

MACHINISTS LOCAL LODGE 1061, et al.,

Plaintiffs,

v. Case No. 15-CV-628

STATE OF WISCONSIN, et al.,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

INTRODUCTION

This case is about 2015 Wisconsin Act 1 ("Act 1"),[1] which is Wisconsin's right-to-work law. Twenty-five states have now enacted similar laws, and legal challenges have been roundly rejected, including by the United States Court of Appeals for the Seventh Circuit in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014).

Perhaps guided by the previous unsuccessful challenges, Plaintiffs make a single claim in this lawsuit: that Act 1, on its face, results in an

[1]Attached as Exhibit 1.

unconstitutional taking of their property. But Act 1 does no such thing. The law simply provides that Wisconsin workers are not required to join unions or to pay union dues. Whether unions adjust to this new economic reality is their choice, but Act 1 does not unconstitutionally take any union property.

Setting aside the merits, Plaintiffs' motion presents the Court with a narrow issue: are Plaintiffs entitled to a temporary restraining order or a temporary injunction? The status quo is that Act 1 is the law of Wisconsin. As explained in this brief, Plaintiffs have no likelihood of proving that Act 1 is facially unconstitutional beyond a reasonable doubt. Plaintiffs cannot prove irreparable harm or the absence of a remedy at law, especially since their own brief and affidavits show that what they seek is "just compensation," which is, as they explain, money.

Defendants therefore respectfully request that Plaintiffs' motion be denied.

BACKGROUND

Act 1, effective as of March 11, 2015, provides that private-sector employees are not required to join a union, pay union dues, or pay so-called "fair-share" assessments as a condition of employment. (*See* Ex. 1, §§ 4-5.)[2] Through the enactment of Act 1, Wisconsin joined 24 other states that have

[2]*See also* Wis. Stat. § 111.04(2) and (3).

similar right-to-work statutes or constitutional provisions.[3] *See Sweeney*, 767 F.3d at 663. Many of these right-to-work laws have existed for decades. *Id*.

The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69, applies to most private-sector employers. While labor relations are typically regulated by federal labor law, state right-to-work laws are expressly authorized by section 14(b) of the NLRA. *See* 29 U.S.C. § 164(b); *see Sweeney*, 767 F.3d at 659. Under the NLRA, closed shops—a union-security agreement whereby an employer agrees to hire only union members—are banned. The NLRA permits, however, an arrangement requiring non-union members to pay "fair share" assessments to their exclusive bargaining representative. As an alternative to this arrangement, the NLRA allows the States to ban union-security agreements altogether so that employees may opt out of paying dues and fair-share assessments. *Id.*; *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 102 (1963) ("Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements" and

[3]Act 1 primarily amended the Wisconsin Peace Act, *see* subchapter I of chapter 111 of the Wisconsin Statutes. The Wisconsin Peace Act is mostly pre-empted by the National Labor Relations Act with respect to Wisconsin employers engaged in interstate commerce.

"it is plain that Congress left the States free to legislate" in the field of union-security agreements.) In short, under the NLRA, the States may choose between fair-share union-security agreements or right-to-work laws. Wisconsin chose the latter.[4]

Just last fall, the Seventh Circuit held that the NLRA did not prohibit Indiana from enacting its right-to-work law, which allowed workers to choose not to become members in a union or pay union dues or fair-share assessments as a condition of employment. *Sweeney*, 767 F.3d at 666. And in so holding, the court also decided that Indiana's state law did not violate the Takings Clause of the U.S. Constitution. *Id*. at 665-66. Indiana's right-to-work law is identical to Act 1 in all material respects.

Plaintiffs emphasize the many expensive services they provide and decry the so-called "free riders." (Pls.' Br. 22.) Plaintiffs are correct that the NLRA imposes a duty of fair representation upon the exclusive bargaining representative. *See, e.g., Lewis v. Local Union No. 100 of Laborers' Int'l Union of N. Am., AFL-CIO*, 750 F.2d 1368, 1375-76 (7th Cir. 1984) (footnote omitted) ("The duty of fair representation was judicially created as a

[4]Act 1 modified the employer unfair-labor-practices provision of subchapter I of chapter 111 of the Wisconsin Statutes to eliminate any exceptions for all-union agreements. (*See* Ex. 1, § 7.) The Act also makes a violation of Wis. Stat. § 111.04(3)(a) a Class A misdemeanor. (*See* Ex. 1, § 12.)

correlative to the union's statutory right under section 9(a) of the Act to serve as the exclusive representative for the members of the collective, bargaining unit.") Wisconsin courts have held that its labor laws impose this duty as well. *See Mahnke v. WERC*, 66 Wis. 2d 524, 532, 225 N.W.2d 617 (1975).

An exclusive collective bargaining representative has a duty to fairly represent all employees in both its bargaining with the employer and in the enforcement of the resulting collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Under the duty of fair representation, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id*.

Plaintiffs do not have to offer the expensive services that they claim. Neither federal nor state law requires that a union or other entity become an exclusive bargaining representative, nor does any law require that an exclusive bargaining agent provide a particular level of service to the workers it represents (beyond negotiation of the collective bargaining agreement). Indeed, an exclusive bargaining agent's duty to represent workers in grievance disputes results from the collective bargaining

agreement itself, not from any law. *See, e.g., Serv. Emps. Int'l Union Local No. 150 v. WERC*, 2010 WI App 126, ¶ 19, 329 Wis. 2d 447, 459, 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.") (*See also* Compl. Ex. A at 9.)[5]

In conclusion, while Act 1 permits workers to opt out of union membership or paying dues and assessments, it does not require unions to perform any specific services beyond the negotiation of a collective bargaining agreement. Beyond the duty of fair representation, the services provided by unions result from the unions' choice, not from any statutory obligation. In exchange for performing this statutory duty of fair representation, unions obtain a valuable status: they are the exclusive agent for all employees. The employer may not bargain with an individual or minority group; the union is the exclusive agent and undoubtedly benefits from that enhanced bargaining power.

[5]Moreover, the workers whom the exclusive bargaining agent represents "do[ ] not have an absolute right to arbitration. The fact that the Union settles a grievance short of arbitration does not, without more, constitute a breach of the duty of fair representation." *Coleman v. Outboard Marine Corp.*, 92 Wis. 2d 565, 573, 285 N.W.2d 631 (1979).

ARGUMENT

I. Plaintiffs face a very high hurdle in obtaining a temporary restraining order or injunction against a state statute.

A. Temporary restraining orders and temporary injunctions.

The Wisconsin Supreme Court explained the temporary-injunction standard in *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) (footnote omitted):

> Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo *pendente lite*, the permanent injunction sought would be rendered futile.

Under *Werner*, each of the factors set forth above must be present before a court may issue a temporary injunction. *Id.*; *see also* Wis. Stat. §§ 813.02(1)(a) and 813.025.

An injunction is an extraordinary equitable remedy, and as a result, courts should exercise their discretion to deny an injunction where the inconveniences and hardships that would result from granting the injunction outweigh its benefits. *See Kuntz v. Werner Flying Serv., Inc.*, 257 Wis. 405, 410, 43 N.W.2d 476 (1950). Even if the statutory requirements for an injunction have been met, granting an injunction is not

mandatory. *Werner*, 80 Wis. 2d at 524. Temporary injunctions are not to be issued lightly. *W. Supply Co. Inc. v. T.V. Appliance Mart, Inc.*, 146 Wis. 2d 216, 224-25, 430 N.W.2d 720 (Ct. App. 1988).

In addition to the factors described above, a court faced with a temporary injunction motion should also balance the harm to the plaintiffs against the harm the injunction would cause to the defendants and to the public interest before an injunction can be granted. *See, e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013). The "equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor." *Id.*; *see also Kealey Pharmacy & Home Care Serv., Inc. v. Walgreen Co.*, 539 F. Supp. 1357, 1370 (W.D. Wis. 1982), *aff'd*, 761 F.2d 345 (7th Cir. 1985) (a court must determine whether the public interest will be disserved if an injunction is issued). The moving party must satisfy the court that, on balance, equity favors issuing the injunction. *See W. Supply Co. Inc.*, 146 Wis. 2d at 224-25. Temporary injunctions are not to be issued lightly. *Id.*

Plaintiffs have failed to meet the standards necessary for issuing a temporary injunction because: (1) they have not shown a reasonable probability of success on the merits; (2) the requested injunction would disrupt rather than preserve the status quo; and (3) the balance of harms to

Plaintiffs and to the State and public does not favor issuing a temporary injunction or restraining order.

B. Act 1 is presumed constitutional.

Act 1 is presumed constitutional, and Plaintiffs must clear a high bar to obtain the relief that they are requesting. "If any doubt exists as to a law's unconstitutionality, it will be resolved in favor of its validity." *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985).

A court must indulge every reasonable presumption necessary to uphold legislation against constitutional challenges. *Id.*; *Wis. Bingo Supply & Equip. Co., Inc. v. Wis. Bingo Control Bd.*, 88 Wis. 2d 293, 301, 276 N.W.2d 716 (1979). "Because of the strong presumption in favor of constitutionality, a party bringing a constitutional challenge to a statute bears a heavy burden." *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22 (citation and internal quotations omitted). It is *not sufficient* for a party to demonstrate "that the statute's constitutionality is doubtful or that the statute is probably unconstitutional." *State v. Smith,* 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. Instead, the presumption can be overcome only if the party establishes "that the statute is unconstitutional beyond a reasonable doubt." *Id.* (quoting *State v. Cole,* 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328).

C. Plaintiffs' facial challenge must meet a very high standard.

Plaintiffs' only claim is a facial challenge to Act 1. (Compl. 9-10.) Wisconsin courts have recognized that there are "fundamental differences" between facial and as-applied challenges. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2013 WI App 77, ¶ 7, 348 Wis. 2d 714, 834 N.W.2d 393, *aff'd*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302. In *State v. Wood*, the Wisconsin Supreme Court explained the important differences between facial and as-applied constitutional challenges:

> A party may challenge a law . . . as being unconstitutional on its face. Under such a challenge, the challenger must show that the law cannot be enforced "under any circumstances." . . . If a challenger succeeds in a facial attack on a law, the law is void "from its beginning to the end." In contrast, in an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us, "not hypothetical facts in other situations." Under such a challenge, the challenger must show that his or her constitutional rights were actually violated. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim.

2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63; *see also United States v. Salerno*, 481 U.S. 739 (1987).

To succeed on a facial challenge to Act 1, the plaintiffs must prove *beyond a reasonable doubt* that the statute is unconstitutional in *all* of its

potential applications.[6] Plaintiffs cannot meet that burden and, as a result, cannot show that there is any probability of success on the merits.

II. Plaintiffs are not likely to succeed on the merits.

With these standards in mind, Plaintiffs must now demonstrate that they can overcome the onerous and substantial defenses to their lone claim. Plaintiffs cannot meet that burden.

Plaintiffs must first convince the Court that they have a reasonable probability to succeed in proving that Act 1 works an unconstitutional taking beyond a reasonable doubt. *See Werner*, 80 Wis. 2d at 520 (reasonable likelihood of success); *Smith*, 323 Wis. 2d 377, ¶ 8 (beyond a reasonable doubt). They must also prove that Act 1 creates an unconstitutional taking in every potential set of circumstances. *Wood*, 323 Wis. 2d 321, ¶ 13.

As an initial, yet important matter, Plaintiffs fail to distinguish the only case on point. In *Sweeney*, the Seventh Circuit decided that Indiana's nearly identical right-to-work law was *not* an unconstitutional

[6]For example, Plaintiffs would have to prove that Act 1 would be unconstitutional where all employees in an employment setting paid union membership dues. Certainly, Act 1 would not be unconstitutional in that circumstance, since the union in that circumstance could not even allege injury.

taking. 767 F.3d at 665-66.[7] That court stated that union dues were not the property of unions and they were not "taken" by Indiana's right-to-work law. *Id.* Instead of addressing *Sweeney* head-on, Plaintiffs argue that Act 1 takes money out of union treasuries, and compels unions to perform services without pay. Plaintiffs, however, have no chance of succeeding on the merits because Act 1 does not take any of their property (money), nor does it compel them to perform services without pay.

A. Plaintiffs do not have a takings claim.

The Wisconsin Constitution, like the U.S. Constitution, prohibits the government from taking private property without paying for it: "The property of no person shall be taken for public use without just compensation therefor." Wis. Const. art. I, § 13.

An unconstitutional taking occurs when all of the following circumstances exist: (1) the plaintiff has a property interest; (2) the government takes that property interest from the plaintiff; (3) the government took the property for public use;[8] and (4) the government did not

[7]Wisconsin courts apply the same standards as the Seventh Circuit in interpreting the Wisconsin Constitution's takings clause. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374, 548 N.W.2d 528 (1996).

[8]Defendants do not dispute that Act 1 supports significant public purposes, namely economic growth and personal freedom.

give just compensation for the property. *See Wis. Med. Soc., Inc.*, 328 Wis. 2d 469, ¶ 38. Here, Plaintiffs cannot establish either that they have a cognizable property interest, or that the government has taken any property interest from them.

1. Plaintiffs have not identified a relevant property interest.

The first step in the taking analysis is for Plaintiffs to identify 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., 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 quotations omitted). The Seventh Circuit, in *Sweeney,* did not identify any relevant property interest implicated by a right-to-work law. 767 F.3d at 665-66.

First, Plaintiffs claim that they have an interest in their treasuries. (Pls.' Br. 11.) The current balance in the union's treasuries, though, is not the relevant property interest in this case. Act 1 requires no disbursements from Plaintiffs' treasuries. Not one single penny will be removed from Plaintiffs' bank accounts because of Act 1.

Instead, Act 1 prohibits Plaintiffs from requiring nonmembers to pay dues or fair-share assessments under future collective bargaining agreements. Assuming Plaintiffs are correct, and some workers refuse to pay dues or assessments because of Act 1 under future contracts, then the effect of Act 1 will be a reduction of future payments into union treasuries, not a withdrawal from union treasuries. Act 1 is not about union treasuries at all; it is about future payments from nonmembers under future contracts that currently do not exist. Contrary to Plaintiffs' complaint, this case is not about the union's money; it is about the workers' money. (*See* Compl. ¶ 26, claiming that Act 1 will transfer property from Plaintiffs "to nonmembers.")

Second, Plaintiffs claim to have a property interest in the services they choose to provide (*e.g.*, collective bargaining negotiations, grievance representation). (Pls.' Br. 11.) According to Plaintiffs, Act 1 will require unions to perform these services for nonmembers without compensation. Plaintiffs ignore a crucial fact: *they* decide what services to provide *under the contracts they negotiate*. No law requires a union to provide services like training or arbitration or grievance administration. These are self-imposed duties. The only relevant duty to this lawsuit is the duty of fair representation, meaning that unions must treat members and nonmembers alike. *Coleman*, 92 Wis. 2d at 573.

The cases Plaintiffs cite discussing a relevant "property interest" are clearly distinguishable. In *Wisconsin Medical Society*, the Legislature transferred $200 million out of the Patients and Families Compensation Fund. 328 Wis. 2d 469, ¶ 24. The supreme court held that the plaintiffs had a vested interest in the fund because the plaintiffs were specifically named as beneficiaries, and the fund was an irrevocable trust. *Id.* ¶ 103. In this case, however, there has been no such direct transfer of money by the Legislature out of a fund in which Plaintiffs have a vested interest.

Likewise, in *Wisconsin Retired Teachers Association, Inc. v. Employe Trust Funds Board*, the Legislature diverted money from the Wisconsin Retirement System ("WRS") annuity reserve accounts. 207 Wis. 2d 1, 13, 558 N.W.2d 83 (1997). WRS beneficiaries challenged the transfer and won; the supreme court held that the Legislature's transfer took their vested property for non-trust-fund purposes. *Id.* at 25. In holding for the plaintiffs, the supreme court decided that "the plaintiff annuitants have a property right in the investment earnings of the annuity reserve account." *Id.* In the present case, the Legislature has not diverted any money from Plaintiffs' treasuries.

This entire discussion illuminates Plaintiffs' failure to discuss the actual property interest at issue. Plaintiffs focus on their current treasuries. But, in terms of a property interest, Act 1 applies only to future union dues

that have yet to be paid by nonmembers. Plaintiffs have no contractual or legal interest in those future union dues. Plaintiffs must prove that they have a legally vested interest in the "property interest" at issue. *See Wis. Med. Soc., Inc.*, 328 Wis. 2d 469, ¶ 42 (internal quotations omitted) (stating that 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.") They have no such interest in future union dues. They have therefore failed to identify a relevant property interest under the first prong of the takings analysis.

2. There has not been, and will not be, any taking in this case caused by Act 1.

Even assuming Plaintiffs can identify a relevant property interest, to show 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). Under the Wisconsin Constitution, two types of governmental conduct can constitute a taking: (1) an actual physical occupation of private property or (2) a restriction that deprives an owner of all, or substantially all, of the beneficial use of his property. *E-L Enters., Inc. v. Milwaukee Metro. Sew. Dist.,* 2010 WI 58, ¶ 22, 326 Wis. 2d 82, 785 N.W.2d 82. The latter category is called a "regulatory taking" and does not involve physical invasions of land

by the government. *See Hoepker v. City of Madison Plan Comm'n*, 209 Wis. 2d 633, 651, 563 N.W.2d 145 (1997).

Plaintiffs claim that Act 1 amounts to a "regulatory taking by the State." (Pls.' Br. 12.) Plaintiffs have asserted no other takings theory. In *Sweeney*, the Seventh Circuit rejected the identical argument. Interpreting Indiana's right-to-work law, the *Sweeney* court decided that a ban on the collection of compelled union dues was not an unconstitutional taking. 767 F.3d at 665-66. Wisconsin courts apply the same standards as the Seventh Circuit in interpreting the Wisconsin Constitution's takings clause. *Zealy*, 201 Wis. 2d at 374. According to *Sweeney*, right-to-work laws do not "take" any property of unions: "Indiana's right-to-work statute does not 'take' property from the Union—it merely precludes the Union from collecting fees designed to cover the costs of performing the duty [of fair representation]." *Sweeney*, 767 F.3d at 666.

Even assuming Act 1 "takes" Plaintiffs property by forcing them to perform certain uncompensated duties (a position that *Sweeney* rejected), Act 1 is not a "regulatory taking" because it does not deny Plaintiffs of "all or substantially all practical uses of a property." *Eberle v. Dane Cnty. Bd. of Adjustment*, 227 Wis. 2d 609, 622, 595 N.W.2d 730 (1999) (citation and internal quotations omitted). Plaintiffs' own numbers belie the claim that

Act 1 will deprive them of "all or substantially all" of their treasuries or services. Consider the following employment statistics provided by Plaintiffs:

- Plaintiff USW District 2 states that it is currently negotiating with 15 separate employers with bargaining units representing 2,168 employees. In these units, only 54 of these employees are nonmembers, or 2.5%. (Winklbauer Aff. ¶¶ 2-3.)[9]
- Plaintiff International Association of Machinists District 10 represents 9,843 employees. Of this number, only 131 are nonmembers, or 1.3%. (Hoekstra Aff. ¶ 9.)

Even accepting the most generous number supplied by Plaintiffs, and accepting Plaintiffs' speculation as true, Act 1's worst-case scenario is Plaintiffs losing fair-share payments from 2.5% of the employees in their bargaining units. While this is a reduction, it does not deprive Plaintiffs of "all or substantially all" of their future treasuries. Therefore, it is not a regulatory taking.

Plaintiffs compare their plight to attorneys who are required to represent indigent clients. (Pls.' Br. 11.) They cite cases from Alaska and the D.C. Circuit. But instead of supporting Plaintiffs' argument, these cases actually recognize that the "great weight of authority" supports the

[9]The affidavits cited in this brief are attached to Plaintiffs' complaint.

contention that an attorney may be compelled to represent an indigent defendant without compensation. *See DeLisio v. Alaska Superior Court*, 740 P.2d 437, 440 (Alaska 1987). The D.C. Circuit likewise recognized that "there is no facial unconstitutionality to the statute or rules that require appointments in uncompensated cases." *Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984). Although the court in *Moultrie* remanded for a more complete factual record concerning the burden imposed by the pro bono rule, the court never concluded that it was unconstitutional to require attorneys to accept pro bono appointments.

In spite of Plaintiffs' attempt to paint the issue of pro bono appointments as a settled issue, the "vast majority of federal and state courts . . . have decided that requiring counsel to serve without compensation is not an unconstitutional taking of property without just compensation." *Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982) (collecting cases).

Notably, plaintiffs fail to cite the relevant Wisconsin case governing compelled attorney services. In *State ex rel. Dressler v. Circuit Court for Racine County, Branch 1*, the Wisconsin Court of Appeals favorably cited *Williamson*, characterized the reasoning of the cited cases as "sound," and concluded: "Therefore, we hold that in Wisconsin the appointment of counsel

to represent the indigent at a reduced level of compensation does not constitute a taking of property or involuntary servitude." 163 Wis. 2d 622, 637-38, 472 N.W.2d 532 (Ct. App. 1991).

Plaintiffs may claim that this proves their point because Wisconsin attorneys are not uncompensated for indigent services—they are merely compensated at a reduced level. But this "reduced level of compensation" language actually works in Defendants' favor. What Act 1 may do, in the short term, is force unions to operate at a "reduced level" of funding.[10] But, in the long term, the union may take a number of steps to respond to this "reduced level" of financial support. For example, the unions may increase their dues to cover any loss; they could reduce arbitration-administration costs by negotiating a "loser pays" provision in their collective bargaining agreements; they may reduce the number or cost of services they provide; they might even persuade nonmembers to join the union. All of these are possible options and reveal that unions are not compelled to provide uncompensated services. Act 1 merely affects the level of compensation for services in the future. It is up to the unions to adjust, as any business must

[10]As explained earlier, even taking Plaintiffs' evidence as true, they stand to lose fair-share payments from only somewhere between 1.3% and 2.5% of their employees.

adjust to a new act of the Legislature or regulation of an agency that imposes costs or reduces a business's revenue.

Plaintiffs also suggest that Act 1 requires them to spend money on services for nonmembers, resulting in a taking. But the U.S. Supreme Court has held that "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) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 526 (1998) ("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 (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.")

So to the extent that Act 1, in conjunction with other labor laws, requires the disbursement of funds from union treasuries, that fact alone cannot create a regulatory taking. If Plaintiffs were correct, then this new theory would call into question a whole host of garden-variety government regulations that impose obligations on businesses to spend money. *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.)

3. Assuming that Act 1 is a taking, the exclusive remedy is just compensation, not declaratory or injunctive relief.

When discussing remedy, Plaintiffs correctly cite *Wisconsin Builders Association v. Wisconsin Department of Transportation*, 2005 WI App 160, ¶ 36, 285 Wis. 2d 472, 702 N.W.2d 433. As this decision explains, the Takings Clause of the Wisconsin Constitution does not prohibit the taking of private property, but simply requires the government to compensate a 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.* (citation and internal quotations omitted).

The exclusive remedy for Plaintiffs in this case, therefore, is "just compensation," not a broad injunction against Act 1. In fact, no case grants this Court authority to enjoin all applications of Act 1 under the Takings Clause.

Even the cases cited by Plaintiffs do not support their argument for injunctive relief. In *Olson v. Town of Cottage Grove*, the plaintiff challenged a local ordinance on multiple constitutional grounds, including that the

ordinance unconstitutionally applied *ex post facto*. 2008 WI 51, ¶ 18, 309 Wis. 2d 365, 749 N.W.2d 211. For his taking claim, the plaintiff sought just compensation. *Id*. The supreme court's decision concerned justiciability, not remedy. *Id*. ¶ 73.

Likewise, in *Lightbourn*, the plaintiffs challenged the Legislature's changes to the WRS on many different bases. 243 Wis. 2d 512, ¶¶ 5, 59. The plaintiffs claimed that certain WRS distributions were unconstitutional impairments of contract, violated the equal protection clause, and failed to pass the Legislature by a required three-fourths vote. *Id*. Because there were numerous claims, the supreme court did not face the question of whether the remedies for an unconstitutional taking may include injunctive or declaratory relief.

The remedy is "just compensation," not a temporary restraining order or injunction. And 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*, 767 F.3d at 666. Assuming a taking, Plaintiffs have already been compensated by their right to be the exclusive bargaining representative.

4. Even if Plaintiffs have proven a takings claim, they still cannot succeed on a facial challenge.

To prevail on their facial challenge, Plaintiffs must prove that Act 1 "cannot be enforced under any circumstances." *Wood*, 323 Wis. 2d 321, ¶ 13 (internal quotations omitted).

There are at least two circumstances in which Act 1 would be constitutionally enforced, even assuming Plaintiffs can prove a taking theory. First, Act 1 provides that all contracts in place as of March 11, 2015, are valid and remain in full force and effect. *See* Act 1, § 13. No union with a contract in full force and effect would have any claim because there would be no damage or injury to that union. *See, e.g., Zoeller v. Sweeney*, 19 N.E.3d 749, 754 (Ind. 2014) (Rucker, J., concurring in result) (citations and internal quotations omitted) ("The Right to Work statute provides that the terms of union contracts in effect on March 14, 2012 remain valid. On this ground, under the procedural circumstances here, the Union's facial constitutional challenge must fail. This is because there exists at least one circumstance [ ] under which the statute can be constitutionally applied.")

Second, Act 1 would have no effect on a union shop where all the employees were dues-paying union members. If all employees in an employment setting were dues-paying members, then again, a union would

have no injury and see no impact from Act 1. In a factual situation with a purely voluntary union workforce, there is no injury.

Because Plaintiffs cannot prove that Act 1 is unconstitutional in all possible circumstances, their facial challenge must fail.

B. Even taking all the allegations in the complaint as true, Plaintiffs have failed to state a claim upon which relief can be granted.

Plaintiffs also cannot succeed on the merits because they have not stated a claim. In the near future, Defendants will file a motion to dismiss in response to the complaint. The supreme court has held that Plaintiffs "must allege facts that plausibly suggest they are entitled to relief." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693 (adopting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Additionally, bare factual assertions and conclusory legal allegations are "not entitled to be assumed true," and must be disregarded by a reviewing court. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (explaining the *Twombly* standard).

Even taking all the allegations in the complaint as true, Plaintiffs have not stated a claim. Plaintiffs have no property interest in the unpaid union dues of nonmember employees or in the self-imposed services that Plaintiffs provide; and even if they have such an interest, Defendants have not "taken" any of those funds. Because Act 1 does not "take" property from Plaintiffs'

treasuries, as a matter of law, Plaintiffs have not stated a claim upon which relief can be granted.

III. There is an adequate remedy at law.

For a temporary restraining order to issue, this Court must find that there is no adequate remedy at law. *Werner*, 80 Wis. 2d at 520.

According to Plaintiffs, "In Wisconsin, 'just compensation' means 'money.'" (Pls.' Br. 16.) Because this case is only about money, as Plaintiffs see it, there is an adequate remedy at law. *Kohlbeck v. Reliance Const. Co.,* 2002 WI App 142, ¶ 13, 256 Wis. 2d 235, 647 N.W.2d 277 (no adequate remedy at law means "that the injury cannot be compensated by damages.") In fact, Plaintiffs have gone to great lengths to describe their monetary injury. For example, Plaintiff Local Lodge 1061 explains that under Act 1, it stands to lose $6,376.32 annually on the contract with DRS Power & Controls Technologies, Inc. (Hoekstra Aff. ¶ 8.) Furthermore, Plaintiff USW District 2 estimates an annual loss of $15,800 under Act 1. (Winklbauer Aff. ¶ 7.)

Plaintiffs know exactly how much their members pay, how much their nonmembers pay in "fair-share dues," and how much their expenses are. There is no need for an injunction because if Plaintiffs win this lawsuit, and the Court finds they are entitled to just compensation, then Plaintiffs will have no trouble calculating their damages. In short, they will have an adequate remedy at law—money.

IV. A temporary restraining order would not preserve the status quo.

For a temporary restraining order to issue, this Court must also find that the temporary restraining order is necessary to preserve the status quo. *Werner*, 80 Wis. 2d at 520.

Act 1 went into effect on March 11, 2015. The status quo is that the law is in effect. Businesses, investors, unions, and employees are making decisions based on the fact that Act 1 is in effect. Granting injunctive relief would upset the status quo.

V. Plaintiffs will not suffer irreparable harm, but the State will if a temporary restraining order or temporary injunction is granted.

Plaintiffs will not suffer irreparable harm if this temporary restraining order or a temporary injunction is denied. As explained above, Plaintiffs' alleged damages are monetary. A harm is irreparable only if "not adequately compensable in damages." *Pure Milk Products Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). All losses alleged here are economic, which can be cured through "just compensation." That type of harm is far from irreparable. *See id.*

Furthermore, Plaintiffs can freely negotiate conditional contracts now that would be contingent on whether Act 1 is ultimately upheld by the courts. Plaintiffs can avoid irreparable harm by negotiating such contracts.

On the flip side, the State will suffer irreparable harm if Act 1 is enjoined, even temporarily. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (internal quotations omitted) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see also Veasey v. Perry*, 769 F.3d 890, 895-96 (5th Cir. 2014) (same); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 n.60 (5th Cir. 2013) (same); *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006) (same); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same).

The State has a legitimate and weighty interest in seeing that statutes validly enacted by the Wisconsin Legislature are applied. In light of these interests, the balance of harms tips decidedly against granting temporary injunctive relief or a restraining order here.

VI. Plaintiffs' claims are speculative and not ripe for review; therefore, they do not have standing.

Even if Plaintiffs could establish all the elements necessary to obtain temporary relief, they still do not have standing to challenge Act 1 because they do not have an injury. Any potential injury is speculative, and therefore not ripe for review.

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, Inc.*, 2011 WI 36, ¶ 129, 333 Wis. 2d 402, 797 N.W.2d 789 (Prosser, J., concurring) (internal quotations omitted) (quoting *United States v. Student's Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)). 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 have personally suffered a real and direct, actual or threatened injury resulting from the legislation under attack. *Fox v. Dep't of Health and Soc. Servs.*, 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). Plaintiffs must demonstrate 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 rule. *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1067, 236 N.W.2d 240 (1975).

Under that federal rule, the injury must be "concrete and particularized . . . actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation and internal quotations 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)).

Any alleged injury in this case is speculative. First, Plaintiffs would have to negotiate a collective bargaining agreement under Act 1. Second, they would have to enter into that negotiated contract. Third, the contract would have to cover workers who refuse to pay union dues or assessments. Fourth, Plaintiffs would have to expend funds from their treasuries to cover the services demanded by those non-paying employees.

Plaintiffs fail at step one. No Plaintiff has alleged that it has entered into a post-Act-1 contract. Thus, it is mere speculation that the parade of horribles Plaintiffs assert will happen in the future. As explained above, Plaintiffs could mitigate any alleged harm by adjusting their union dues, demanding certain contractual provisions from the employer, or reducing the

amount and manner of services provided. Any claim of harm is guesswork until Plaintiffs actually see the results of a contract under Act 1.

Plaintiffs may argue that while their future injuries may be speculative, they have an injury right now because they cannot bargain for the union-security clauses they want. But again, that is not the source of the takings claim in this lawsuit. Plaintiffs' takings claim is not an inability to enter into a contract, or the ability to obtain a union-security clause, but that their property (*i.e.*, treasury funds and services) will be taken from them without just compensation *by operation of* their failure to obtain a union-security clause. This is not a direct harm, but a conditional and potential harm.

In conclusion, Plaintiffs have no present or threatened injury. They have not alleged that Act 1 has depleted their treasuries or that their services have been expended. And they cannot make such a claim at this time because 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.

(Ex. 1, § 13.) Plaintiffs have not alleged any current, direct, and compensable harm or even a realistic threat of harm. They have only alleged future and contingent harm. This type of alleged harm does not constitute standing.

CONCLUSION

Plaintiffs are asking this Court to upset a well-settled area of constitutional law. There is no need for such a hasty and drastic step. Even assuming that Plaintiffs could prove that they have a property interest that has been "taken" by Act 1, they readily admit that they have remedies available at law through monetary compensation. A temporary restraining order or temporary injunction would upset the status quo and cause irreparable harm to the State.

For these reasons, Defendants respectfully request that Plaintiffs' motion be denied.

Dated this 17th day of March, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

DAVID V. MEANY
Assistant Attorney General
State Bar #1008985

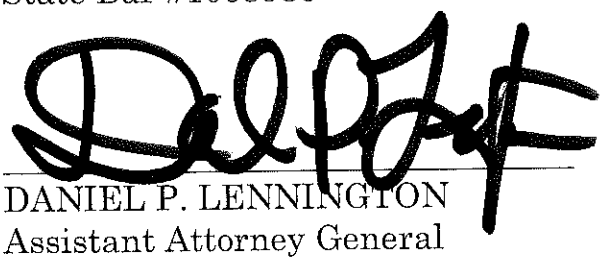

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EXHIBIT

State of Wisconsin

2015 Senate Bill 44

Date of enactment: **March 9, 2015**
Date of publication*: **March 10, 2015**

2015 WISCONSIN ACT 1

AN ACT ***to repeal*** 111.01 and 111.06 (1) (c) 2., 3. and 4.; ***to renumber and amend*** 111.04 and 111.06 (1) (c) 1.; ***to amend*** 111.02 (3), 111.06 (1) (e), 111.06 (1) (i), 111.39 (6) and 175.05 (6); and ***to create*** 111.02 (9g), 111.04 (3) and 947.20 of the statutes; **relating to:** prohibiting as a condition of employment membership in a labor organization or payments to a labor organization and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 111.01 of the statutes is repealed.

SECTION 2. 111.02 (3) of the statutes is amended to read:

111.02 **(3)** "Collective bargaining unit" means all of the employees of one employer, employed within the state, except that where a majority of the employees engaged in a single craft, division, department or plant have voted by secret ballot as provided in s. 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered, but, in appropriate cases, and to aid in the more efficient administration of ~~ss. 111.01 to 111.19~~ this subchapter, the commission may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the commission shall be subject to all rights by termination or modification given by ~~ss. 111.01 to 111.19~~ this subchapter in reference to collective bargaining units otherwise established under ~~ss. 111.01 to 111.19~~ this subchapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit have voted by secret ballot as provided in s. 111.05 (2) so to do.

SECTION 3. 111.02 (9g) of the statutes is created to read:

111.02 **(9g)** "Labor organization" means any employee organization in which employees participate and that exists for the purpose, 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.

SECTION 4. 111.04 of the statutes is renumbered 111.04 (1) and amended to read:

111.04 **(1)** Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; ~~and such employees.~~

(2) Employees shall ~~also~~ have the right to refrain from ~~any or all of such activities~~ self-organization; forming, joining, or assisting labor organizations; bargaining collectively through representatives; or engaging in activities for the purpose of collective bargaining or other mutual aid or protection.

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

SECTION 5. 111.04 (3) of the statutes is created to read:

111.04 **(3)** (a) No person may require, as a condition of obtaining or continuing employment, an individual to do any of the following:

1. Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization.

2. Become or remain a member of a labor organization.

3. Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.

4. Pay to any 3rd party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

(b) This subsection applies to the extent permitted under federal law. If a provision of a contract violates this subsection, that provision is void.

SECTION 6. 111.06 (1) (c) 1. of the statutes is renumbered 111.06 (1) (c) and amended to read:

111.06 **(1)** (c) To encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure, or other terms or conditions of employment ~~except in a collective bargaining unit where an all–union agreement is in effect. Any all–union agreement in effect on October 4, 1975, made in accordance with the law in effect at the time it is made is valid~~.

SECTION 7. 111.06 (1) (c) 2., 3. and 4. of the statutes are repealed.

SECTION 8. 111.06 (1) (e) of the statutes is amended to read:

111.06 **(1)** (e) To bargain collectively with the representatives of less than a majority of the employer's employees in a collective bargaining unit, or to enter into an all–union agreement ~~except in the manner provided in par. (c)~~.

SECTION 9. 111.06 (1) (i) of the statutes is amended to read:

111.06 **(1)** (i) To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable ~~at the end of any year of its life~~ by the employee giving to the employer at least ~~thirty~~ 30 days' written notice of ~~such~~ the termination ~~unless there is an all–union agreement in effect. The employer shall give notice to the labor organization of receipt of such notice of termination~~. This paragraph applies to the extent permitted under federal law.

SECTION 10. 111.39 (6) of the statutes is amended to read:

111.39 **(6)** If an order issued under sub. (4) is unenforceable against any labor organization in which membership is a privilege, ~~the~~ an employer with whom the labor organization has an enforceable all–union ~~shop~~ agreement shall not be held accountable under this chapter ~~when~~ if the employer is not responsible for the discrimination, the unfair honesty testing, or the unfair genetic testing.

SECTION 11. 175.05 (6) of the statutes is amended to read:

175.05 **(6)** RIGHTS OF LABOR. Nothing in this section shall be construed to impair, curtail or destroy the rights of employees and their representatives to self–organization, to form, join or assist labor organization, to strike, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, under either the federal labor relations act or ~~ss. 111.01 to 111.19~~ subch. I of ch. 111.

SECTION 12. 947.20 of the statutes is created to read:

947.20 Right to work. Anyone who violates s. 111.04 (3) (a) is guilty of a Class A misdemeanor.

SECTION 13. Initial applicability.

(1) 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.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 17, 2015

HAND DELIVERED

The Honorable C. William Foust
Circuit Court Judge, Br. 14
Dane County Courthouse
215 South Hamilton Street, Room 7109
Madison, WI 53703-3291

Re: *Machinists Local Lodge 1061, et al. v. State of Wisconsin, et al.*
Case No. 15-CV-0628

Dear Judge Foust:

Enclosed for filing are Defendants' Notice of Appearance and Response in Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Temporary Injunction in this case. Copies are being mailed this date to opposing counsel.

Thank you.

Sincerely,

Daniel P. Lennington
Assistant Attorney General
State Bar #1088694

DPL:ajw

Enclosures

c: Frederick Perillo/Marianne Robbins/Yingtao Ho/Erin F. Medeiros

STATE OF WISCONSIN CIRCUIT COURT BRANCH 14 DANE COUNTY

MACHINISTS LOCAL LODGE 1061, et al.,

Plaintiffs,

v. Case No. 15-CV-628

STATE OF WISCONSIN, et al.,

Defendants.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Assistant Attorneys General David V. Meany, Daniel P. Lennington, Clayton P. Kawski, and Steven C. Kilpatrick appear as counsel for the defendants in the above-captioned action, and requests that copies of all documents filed subsequent to this Notice be served upon them personally at 17 West Main Street, Madison,

Wisconsin 53703, or by first class mail at Post Office Box 7857, Madison, Wisconsin 53707-7857.

Dated this 17th day of March, 2015.

Respectfully submitted,

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