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

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 and its LOCAL LODGE 1061,
4265 N. 30th Street
Milwaukee, WI 53216

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

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

Plaintiffs,

v.

STATE OF WISCONSIN,

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

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

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

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

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

Case No. 2015CV000628

On March 9, 2015, Wisconsin enacted 2015 Wisconsin Act 1. (Compl. at ¶ 14). The new law, known as the "right to work" law, prohibits labor organizations from assessing dues, fees, or charges of any kind on non-union members and on negotiating union security clauses in collective bargaining contracts, among other things. Wis. Stat. § 111.04(3)(a)(4); § 111.06(1)(c). Plaintiffs are two labor organizations, International Association of Machinists Local Lodge 1061 and United Steelworkers District 2, and one federation of labor organizations, Wisconsin State AFL-CIO. (Compl. at ¶¶ 2-4). According to their complaint, the law (hereinafter "Act 1") effects an unconstitutional taking of Plaintiffs' property without just compensation in violation of Article I § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representation services which unions continue to be obligated to provide" by law. (Compl. at ¶ 23). This Court previously denied Defendants' motion to dismiss on November 9, 2015. While that motion was pending, Plaintiffs filed the Motion for Summary Judgment at issue here. (Mot. Summ. J., June 11, 2015.) For the reasons state below, the Motion is granted.

STANDARD OF REVIEW

Plaintiffs present a constitutional challenge to the validity of Act 1. Because statutes enjoy a presumption of constitutionality, the Court must "indulge every presumption to sustain the law." *Wisc. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 36, 328 Wis. 2d 469, 490, 787 N.W.2d 22, 33. Any doubt about the statute's constitutionality must be resolved in favor of upholding the statute. *Id.* The challenging party bears the burden of demonstrating unconstitutionality beyond a reasonable doubt. *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis.2d 520, 665, N.W.2d 328.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). A material fact is one that would affect the outcome of the controversy. *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶ 21, 291 Wis. 2d 393, 407, 717 N.W.2d 58, 65. A court may grant summary judgment to either the moving or non-moving party so long as it is supported by the record. *Manor v. Hanson*, 120 Wis. 2d 582, 586, 356 N.W.2d 925, 927 (Ct. App. 1984), rev'd on other grounds, 123 Wis. 2d 524, 368 N.W.2d 41 (1985). Here, both parties agree that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. (Pls.' Br. 2; Defs.' Opp. Br. 2.)

ANALYSIS

I. 2015 Wisconsin Act 1 and labor law in Wisconsin

As a threshold matter, the Parties disagree on how Act 1 operates within Wisconsin's organized labor law scheme. This requires an understanding of how organized labor operates under our statutes and case law.

A Wisconsin labor organization, or a union, is "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."[1] Wis. Stat. § 111.02(9g). Collective bargaining itself is "the negotiation by an employer and a majority of the employer's employees in a collective bargaining unit concerning representation or terms and conditions of

[1] This definition is new to Act 1; the prior version of this subchapter, titled "Employment Peace," did not define labor organization.

employment..." § 111.02(2). A collective bargaining unit, in turn, "means all of the employees of one employer" or of a specific craft, division, department or plant of that employer. §111.02(3). In defining "employees," the law does not differentiate between union members or non-members. § 111.02(6).

In sum, a Wisconsin union must engage in collective bargaining; to engage in collective bargaining, it must represent a majority of the employees in a collective bargaining unit, which is a majority of all employees in the workplace. For an employer to bargaining collectively with a union representing anything less than a majority of employees is prohibited. § 111.06(1)(e). Because there may be only one group representing a majority of employees in a given workplace, a union, once elected, becomes the sole—or exclusive—representative of all employees in the workplace.

Designation as exclusive representative carries serious legal implications. Since the National Labor Relations Act (NLRA) was enacted in 1935 and amended in 1947, federal case law has developed a duty of fair representation on the part of an exclusive representative 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." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 910, 17 L. Ed. 2d 842 (1967). This extends to collective bargaining itself, the enforcement of any resulting agreement, and any union activity. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130, 113 L. Ed. 2d 51 (1991). There is no dispute that Wisconsin adopted this duty of fair representation in *Mahnke v. Wisconsin Employment Relations Comm'n*, 66 Wis. 2d 524, 532, 225 N.W.2d 617, 622 (1975). In fact, at times the Wisconsin Attorney General acts to enforce that duty upon a union accused of

falling short. *See, e.g., Serv. Employees Int'l Union Local No. 150 v. Wisconsin Employment Relations Comm'n*, 2010 WI App 126, 329 Wis. 2d 447, 791 N.W.2d 662.

The State argues, and Amici agree, that "neither federal nor state law requires a union or other entity to become an exclusive bargaining representative." (Defs.' Opp. Br. 5; Amicus Br. 3 ("Unions *voluntarily* choose to become exclusive representatives.")). That statement is disingenuous. A union makes no election to become the exclusive representative; if the union exists at all, as statutorily defined by § 111.02(9g) (i.e. to engage in collective bargaining), and is chosen by a majority of the employees voting in a collective bargaining unit, then it must be the employees' exclusive representative. It cannot decline exclusive representative status unless it declines to be voted in at a workplace to begin with. Neither the State nor Amici have substantiated their argument with any way in which a union could evade this status. The deliberate interplay of Wisconsin statutes and case law make it so.

The duty of fair representation has been well developed, understood, and applied throughout the long history of organized labor law in Wisconsin. Because a union had obligations to all employees, not just its dues-paying members, unions relied on union security clauses to ensure non-members paid the equivalent of full union dues. But seeing the First Amendment problem with requiring non-members to pay for all of a union's activities, including those political, the courts narrowed the permissible charge to the costs of collective bargaining, contract administration, and grievance adjustment. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745, 108 S. Ct. 2641, 2648, 101 L. Ed. 2d 634 (1988). Unions, then, could require non-members pay only a "fair share fee" equal to the cost of services they receive from the union's core function, despite their non-membership.

Act 1 changed this landscape by prohibiting fair share fees. Under § 111.04(3)(a), "no person may require, as a condition of obtaining or continuing employment, an individual to...(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." A non-member can choose not to pay her fair share, although the union still must collectively bargain on her behalf and then enforce the collective bargaining agreements in her interest. A free-rider problem is born—the ability of non-members to refuse to pay for services unions are compelled to provide by law. Justice Antonin Scalia identified this free-rider issue in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 507, 111 S. Ct. 1950, 1952, 114 L. Ed. 2d 572 (1991), a First Amendment, public-sector union case. Though the facts of *Lehnert* are not analogous to this case, Justice Scalia's separate opinion forecasts Wisconsin's current predicament with Act 1:

> What is distinctive...about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects they are free riders whom the law requires the union to carry-indeed, requires the union to go out of its way to benefit, even at the expense of its other interests. In the context of bargaining, a union must seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

Id. at 556.

Having established the free-rider effect of Act 1 on Wisconsin organized labor, we turn to whether the law passes constitutional muster.

II. Constitutional analysis

Plaintiffs assert a taking in violation of Article I § 13 of the Wisconsin Constitution, which reads "[t]he property of no person shall be taken for public use without just compensation

therefor." A taking requires four elements: "(1) a property interest exists, (2) the property interest has been taken, (3) the taking was for public use, and (4) the taking was without just compensation." *Wisc. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 38, 328 Wis. 2d 469, 491, 787 N.W.2d 22, 33. In this case, the State disputes each of the four elements, which I address individually. Because Plaintiffs specifically allege a regulatory taking, I apply an additional balancing test under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

A. Whether Plaintiffs have a legally protectable property interest

To succeed, Plaintiffs must first identify a legally protectable property interest. *Wisc. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94 at ¶ 39 (finding health care providers had a constitutionally protected property interest in the Injured Patients and Families Compensation Fund, in which they held equitable title). "A party has a property interest if he or she has a legitimate claim of entitlement to the property, as opposed to an abstract need or desire or unilateral expectation." *Id.* at ¶ 42.

Plaintiffs claim they have a legally protectable property interest in their "money, tangible property used in the representation of employees, and the services of their members and agents for the purpose of contract negotiation, administration, enforcement and grievance processing and arbitration." (Compl. ¶ 22.) In support, they cite a series of Wisconsin and foreign cases declaring labor is property, all in the context of attorney services. (Pl.'s Br. 13, citing *County of Dane v. Smith*, 13 Wis. 585 (1861) (holding the state could not appoint a private attorney to provide representation at no compensation); *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987) (holding it unconstitutional for the state to "deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden"); *McNabb v.*

Osmundson, 315 N.W.2d 9 (Iowa 1982)). The State counters with its own Wisconsin and foreign cases holding an attorney may be compelled to provide legal services to indigent clients without compensation. (Defs.' Opp. Br. 13, citing *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982) (holding Missouri courts may compel private attorneys to represent indigent defendants when the state legislature has failed to appropriate sufficient funds to compensate lawyers, although it may not require the lawyers to pay expenses deemed necessary for the defense of the accused); *State ex rel. Dressler v. Circuit Court for Racine County, Branch 1*, 163 Wis.2d 622 (Ct. App. 1991)). They urge that *Williamson* represents the majority view in federal and state courts. (Oral Arg. Tr. 38:19-39:19.) I agree that *Williamson* presents a majority view, but on narrow grounds that apply only in the attorney context: that because attorneys have a "pre-existing duty to provide such service" originating from their "status as an officer of the court," they may at times be called upon to offer legal assistance as public servants. 674 F.2d at 1215. That holding, however widespread, has no bearing on whether private sector unions have a property interest in this case. And while the Wisconsin Court of Appeals agreed with the *Williamson* court in *Dressler*, that case turned on very different circumstances: whether a voluntarily retained private attorney could withdraw mid-case and seek payment from the court in representing a criminal defendant after the initial fees were exhausted.

Plaintiffs plainly theorize that services constitute property under the law and the Court agrees. The conclusion is logical. Labor is a commodity that can be bought and sold. A doctor, a telephone company, a mechanic—all would be shocked to find they do not own the services they perform. While each accepts the fact that they perform them in a regulated environment, that concession does not surrender their ownership of the services in the first place. Unions are no

different; they have a legally protectable property interest in the services they perform for their members and non-members.

Perhaps the most straightforward property interest to identify is the union's treasury. When members pay their dues and non-members their fair share fees, all would say the union is building a treasury that it holds as property. When it expends those funds to perform services, as it must, no one would dispute that that money is the union's property. Plaintiffs will be obligated to spend treasury—their property—on services for which they cannot legally request compensation. This is enough to establish that unions do have a legally protectable property interest at stake.

B. Whether that property interest was taken

Next, the Plaintiffs assert the government has taken their property, under the regulatory takings theory of *Penn Central,* adopted in *Wisc. Builders Ass'n v. Wisc. Dep't of Transp.*, 2005 WI App 160, ¶¶ 37-38, 285 Wis. 2d 472, 499, 702 N.W.2d 433, 446. Under *Penn Central*, a regulation that neither physically invades nor denies a property owner of substantially all practical use of her property may still effect a taking following a court's "ad hoc" factual inquiry into (1) the economic impact of the regulation on the claimant, (2) its interference with distinct investment-backed expectations, and (3) the character of the governmental action. 438 U.S. at 124. A court considers these factors with no clear weight accorded to each. *Id.*

Plaintiffs emphasize the economic impact Act 1 has and will have on their ability to carry out their function of fairly and adequately representing employees. The duty of fair representation compels unions to provide at least some level of service to both union members and non-members; they have no other choice beyond ceasing to exist. After Act 1, these unions may no longer request payment whatsoever for those services. This presents a clear free-rider

problem, as discussed above, but not just hypothetically. For example, following Act 1, the bargaining unit DRS Power and Control Technologies has lost individuals whose monthly payments will equal a loss of $2,125.44 to the union each year. (O'Connor Aff. ¶ 4.) Likewise, USW Local 1527 has lost payments that will equal $4,268.16 per year, or a 10% reduction in its revenues, and bargaining unit Russel Metals faces a yearly loss of $1,856.40. (Winklbauer Supp. Aff. ¶¶ 10, 15.) The State argues that isn't enough; the size of the taking matters under *Penn Central*, and this one is too small. (Oral Ar. Tr. 31:22-32:2.) A court might engage that angle if the economic losses were confined, but that is not the case here. While Plaintiffs' losses today could be characterized by some as minor, they are not isolated and the impact of Act 1 over time is threatening to the unions' very economic viability.

Similarly, unions have experienced a shift in their investment-backed expectations, the second balancing factor of *Penn Central*. As Plaintiffs have shown, "the only sources of revenues for unions are the fees they charge employees and the investment income from their accumulated reserves." (Pls.' Br. 16.) Union dues and fair share fees are based on the union's anticipated expenses for the year. *Id.* Without the ability to demand compensation for their services, unions can expect to diminish their reserve account principal and, consequently, investment income. The State frames Plaintiffs' stance here as "a distinct, investment-backed expectation that statutory law in Wisconsin would remain the same and that they would *always* have a right to collect fair-share payments from nonmembers." (Defs.' Opp. Br. 15.) There is, of course, no inherent right to static statutory laws. But Plaintiffs' claim is different: their distinct, investment-backed expectation was that they would always have a right to collect fair-share payments from non-members as long as they were compelled by law to provide them services.

Lastly, the *Penn Central* analysis calls for weighing the character of the governmental action, for instance whether it constitutes a physical invasion or instead "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. The State characterizes Act 1 as just that—a mere public program adjusting part of economic life. (Defs.' Opp. Br. 15.) Act 1 is more significant than that. An economic adjustment would reconfigure the balance of burdens between the unions and non-members, not eliminate the burden (i.e. fees) on one side while holding the burden (duty to provide services) constant on the other.

In this Court's view, the three *Penn Central* factors weigh in favor of finding that the government has taken Plaintiffs' property.

C. Whether the taking occurred for a public use

Article I § 13 next requires the governmental taking be "for public use." To meet this prong, Plaintiffs point to various statements made by Wisconsin legislators which indicate the intent to enact Act 1 "for the purpose [of] making the business climate in the State more favorable by eliminating the power of labor organizations." (Compl. ¶ 25.) Here, the State argues Plaintiffs have only asserted a "public purpose," a semantical change with implications fatal to Plaintiffs' claim. (Defs.' Opp. Br. 17-19.) The Court agrees with Plaintiffs that the terms are essentially synonymous and have not evolved as legally distinct under Wisconsin takings law. *See, e.g., Falkner v. N. States Power Co.*, 75 Wis. 2d 116, 125, 248 N.W.2d 885, 891 (1977); *Wis. Retired Teachers Ass'n*, 207 Wis.2d 1, 10 (1997), *Stelpflug v. Town Bd., Town of Waukesha, Cty. of Waukesha*, 2000 WI 81, ¶ 22, 236 Wis. 2d 275, 287, 612 N.W.2d 700, 706.

Is the legislative intent here sufficient to constitute a public use of Plaintiffs' property? This Court believes it is. It is well established that "public use" encompasses much more than

physical use of private property by the public. *See Hoepker v. City of Madison Plan Comm'n*, 209 Wis.2d 633, 651, 563 N.W.2d 145 (1997); *Eberle v. Dane Cty. Bd. of Adjustment*, 227 Wis. 2d 609, 595 N.W.2d 730, 737 (1999). The Wisconsin Supreme Court has held the legislature's intent to benefit the public is sufficient to establish a public use. In *Wisc. Retired Teachers Ass'n, Inc. v. Employee Trust Funds Bd.*, 207 Wis. 2d 1, 24, 558 N.W.2d 83, 93 (1997), a teachers' association challenged a law that transferred funds out of the Wisconsin Retirement System to pay dividends to certain annuitants in order to offset spending from general purpose revenue. In its takings analysis, the court agreed the legislature's fiscal motivation was enough to constitute a public use:

> All parties agree that the legislature enacted the...legislation for the purpose of reducing [general purpose revenue] outlays. In addition, the Administration Defendants assert that Act 27 was intended to blunt the impact of inflation on the retirement system's oldest annuitants... Because both inure to the benefit of the public, there is no dispute that if a taking has occurred, it is for a public purpose.

Id. at 24. Here, too, the legislature announced its intention to enact Act 1 to benefit the public with a better business climate at the expense of private unions.

The fact that the property in this case transfers from one private party to another does not make it fail the public use prong. Echoing the United States Supreme Court, Wisconsin has recognized "[t]here is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person..." *Stierle v. Rohmeyer*, 218 Wis. 149, 154 (Wis. 1935). Wisconsin takings cases, like *Wisc. Retired Teachers Association*, have reflected this over the years. As such, Plaintiffs have proven the taking here occurred for the public use.

D. Whether Plaintiffs received just compensation

The final requirement for a takings claim is the absence of just compensation. *Wisc. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 38. It is undisputed that the government has not compensated Plaintiffs with money for their services. The State asks this Court to adopt dicta from the Seventh Circuit Court of Appeals in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), to conclude Plaintiffs have been justly compensated for their compelled labor with the privilege of exclusive representation. (Defs.' Opp. Br. 21.) Such a ruling would contradict Wisconsin's long history of equating Art. I § 13's "just compensation" to the payment of money, not to a grant of special privileges or other non-pecuniary benefits of purportedly equal value. It would also put Wisconsin courts in the difficult position of fixing a value on non-monetary privileges or benefits in each takings challenge to gauge whether enough has been exchanged for the property taken. The judiciary need not be tasked with that role.

Throughout the course of this case, the rallying cry of the State and Amici is that no right to work law has been struck down in any state where one has been enacted. (Defs.' Opp. Br. 1.) That includes Indiana, where the state's right to work law recently survived a takings challenge under the Indiana constitution. This Court, of course, has no obligation to reconcile this Order with Indiana law, but it is nonetheless worth noting why the outcome in Indiana and at the Seventh Circuit does not dictate the outcome here.

The challenge to Indiana's right to work law involved parallel state and federal cases. In *Sweeney v. Pence*, unions challenged a federal district court's finding that the state law was not preempted by federal labor law. 767 F.3d 654. Though the plaintiff-appellants had not raised a takings claim before the court, the majority briefly addressed the issue in response to Judge Wood's lengthy dissent concluding a taking had occurred. *Id.* at 665. The court confined its

takings analysis to creating the unprecedented notion that a union's status as exclusive representative constitutes just compensation for its compelled labor, concluding that because exclusive representation "comes with a set of powers and benefits as well as responsibilities and duties...[n]o information before us persuades us that the Union is not fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table." [2] *Id.* at 666.

Judge Wood felt differently. Her dissent began by emphasizing that U.S. labor law is built as a system of exclusive representation in which unions cannot avoid the duties of representing non-members, noting

> There is nothing inevitable about our system of labor law; it can be contrasted with a hypothetical regime that is more protective of minority or members-only unions, under which employees who want to bargain collectively might be free to form a members-only union and interact with their employer on that basis. But, to repeat, that is not the system that the United States has adopted."

Sweeney v. Pence, 767 F.3d 654, 672 (Wood, J., dissenting)(7th Cir. 2014). Acknowledging the free-rider problem resulting from the "significant asymmetry embedded in this system" (*Id.* at 673), she stated, "[t]he question is therefore whether the law as it stands today includes a solution to the potential free-rider problem. If it does, by creating a way to require nonmembers to pay for actual benefits received, then all is well. If it does not, then issues of constitutional magnitude arise" (*Id.* at 674). Those issues, she concluded, came in the form of a Fifth Amendment taking. *Id.* at 683 ("I would feel compelled to find a taking."). In strong opposition to the majority's conclusion that the unions had received just compensation, she argued

> That idea does not hold up under any level of scrutiny. First, this suggestion fundamentally misunderstands how the union obtains its seat at the bargaining table...[I]t does not win that seat either through the grace of the employer or in exchange for some kind of quid pro quo from either the employer or the bargaining-unit employees (i.e., "you cover the expenses of collective bargaining

[2] In the later decided state case, *Zoeller v. Sweeney*, the Indiana Supreme Court adopted that argument, also holding that no taking had occurred because unions elect to become exclusive bargaining representatives and thus voluntarily choose to assume the duty of fair representation. 19 N.E.3d 749, 753 (2014).

> and grievance processing, and in exchange we'll let you participate in the process").
>
> Second, the majority seems to think that the employer receives no benefits from collective bargaining, but that is not true either. Collective bargaining agreements commonly include such features as no-strike clauses, management rights clauses, and a grievance procedure, all of which are a win-win for both labor and management. Third, the majority's hypothesis is flatly inconsistent with the Supreme Court's reasoning...that recognized the tangible value of the services that nonmembers and objectors receive as a result of the duty of fair representation.
>
> Finally, even if there were anything to the point, it would apply at most to the collective bargaining portion of the union's duties, not to the administration of the contract and the costly grievance procedures. For all these reasons, the majority cannot avoid the confiscatory regime it has endorsed by pointing to a certified union's right to represent the workers.

Id. at 684. This Court finds her argument prescient to this case.

CONCLUSION

For the reasons stated above, the Court finds Act 1 effects a taking of Plaintiffs' property without just compensation in violation of Article I § 13 of the Wisconsin Constitution. Plaintiffs' Motion for Summary Judgment is granted.

Dated this 8th day of April, 2016.

15CV628
The Honorable C. William Foust
Dane County Circuit Court – Branch 14