Nos. 16-3736, 16-3834

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139;
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 420,
PLAINTIFFS-APPELLANTS, CROSS-APPELLEES,

v.

BRAD SCHIMEL; JAMES R. SCOTT,
DEFENDANTS-APPELLEES, CROSS-APPELLANTS.

On Appeal From The United States District Court
For The Eastern District of Wisconsin
Case No. 16-cv-0590
The Honorable J.P. Stadtmueller, Judge

DEFENDANTS-APPELLEES' RESPONSE AND CROSS-APPEAL BRIEF

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, Cross-Appellees' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Have the Plaintiffs failed to give a "compelling reason" for this Court to create a circuit conflict by overruling its recent and correct statutory holding in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), that the National Labor Relations Act explicitly permits States to enact right-to-work laws like 2015 Wisconsin Act 1?

2. Is the Plaintiffs' Fifth Amendment claim—that Wisconsin's right-to-work law commits an unconstitutional "taking"—unripe under the state-litigation requirement adopted in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), foreclosed by *Sweeney*'s rejection of an identical takings theory, or otherwise meritless?

INTRODUCTION

Less than three years ago, this Court held that the National Labor Relations Act explicitly permits States to enact right-to-work laws forbidding unions from forcing nonmembers to pay them money, *Sweeney v. Pence*, 767 F.3d 654, 658–65 (7th Cir. 2014)—as 28 States have done. The *stare decisis* force of that holding, which aligned this Court with the long-established position of the D.C. Circuit, is overwhelming: No federal case departs from *Sweeney*, and several courts have faithfully applied it. Further, no later factual, statutory, or doctrinal developments—in this circuit, the Supreme Court, or elsewhere—have cast doubt on *Sweeney*'s soundness.

What is more, *Sweeney* is a statutory holding, a quality that gives it considerable precedential weight. It is also recent and easy to apply, as is demonstrated by the district court opinion in this case upholding Wisconsin's right-to-work law, Act 1.

Still, Plaintiffs International Union of Operating Engineers Locals 139 and 420 ("the Unions") urge this Court to reverse because *Sweeney* "was wrongly decided." Pls. Opening Br. 5. But they do not even try to carry their burden of showing a "compelling reason" to overrule it. *United States v. Kendrick*, 647 F.3d 732, 734 (7th Cir. 2011). The Unions are content simply to assert that *Sweeney* erred and to note that the vote over whether to rehear the case en banc was close. Both points are categorically insufficient reasons to revisit a case, much less to create a circuit conflict. At any rate, the Unions concede that "a three-judge panel of this Court is bound to follow *Sweeney* and reject the Unions' appeal." Pls. Opening Br. 4. This concession, combined with the Unions' forfeiture under the "compelling reason" standard (which applies whether or not this Court is sitting en banc), is enough to summarily dispose of the Unions' preemption argument.

Regardless, *Sweeney*'s preemption analysis is correct. The Supreme Court has held that union-security agreements "expressly permitted" under a proviso of the National Labor Relations Act "are the same [ ] agreements" that the Act "expressly place[s] within the reach of state law." *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 751–52 (1963) (*Retail Clerks I*). Here, it is undisputed that the proposed agreements satisfy the Act's proviso, so they are subject to state prohibition. Precedent could not be clearer: federal law "allows individual States . . .

to enact so-called 'right-to-work' laws." *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 (1976).

Sweeney also considered and correctly rejected the theory that right-to-work laws commit "takings" in violation of the Fifth Amendment. 767 F.3d at 665–66. The Unions renew that argument: that right-to-work laws "take" their "services" by forbidding them from exacting fees from nonmembers despite the Unions' duty to treat those employees fairly in collective bargaining. There are several reasons to reject this claim. First, it is unripe; the Unions must first seek relief in the Wisconsin courts, just as several other unions have done. On the merits, the Unions concede that *Sweeney*'s takings analysis controls. Even if it did not, their theory is meritless. Act 1, the only law challenged, does not force the Unions to offer any "services." The Unions' real grievance is with the duty of fair representation, which has an entirely different source. Yet the Unions have voluntarily assumed that duty in exchange for the special privilege of exclusive representation, against the backdrop of a statute that permits state enactment of right to work. And while the Unions fear financial doom, the fact is that "unions continue to thrive" under right-to-work laws. *Sweeney*, 767 F.3d at 664.

STATEMENT OF THE CASE

I. Background

A. Federal Law Ties The Government-Created Benefit Of Exclusive Representation To The Obligation Of Providing Services In A Nondiscriminatory Manner

Under the National Labor Relations Act, employees generally have the right to choose a representative for the purposes of "collective bargaining" with their employer. *See* 29 U.S.C. § 157; *see also* Wis. Stat. §§ 111.02(11), 111.05(1). The chosen candidate becomes the "exclusive representative" of all of the employees in a bargaining unit. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998).

A union's election to the position of exclusive representative clothes it with an extraordinary "set of powers and benefits." *Sweeney*, 767 F.3d at 666. It becomes "the agent of all the employees" in the bargaining unit, including those who do not consent. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). In addition, unlike an ordinary principal with authority over his agent, "an individual employee lacks direct control over a union's actions." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990). The employee also loses the "power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

This "loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Am. Commc'n Ass'n v. Douds*, 339 U.S. 382, 401 (1950). Its powers are like "those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). In addition,

because labor unions are exempt from certain requirements of antitrust law, *see Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–23 (1975), they enjoy the benefits of functioning as a government-sanctioned monopoly and so can use their powers in "cartel"-like fashion to raise the price of labor services. *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. Chi. L. Rev. 988, 990, 997, 1001–02 (1984). These powers, taken together, enable unions not only to influence employers but also to attract and retain dues-paying members.

The same federal laws that grant these extraordinary benefits to unions also impose an attendant obligation of fair treatment of all employees in the bargaining unit. If the law conferred the exclusive-representative authority "without any commensurate statutory duty" toward all employees, permitting discrimination against nonmembers, "constitutional questions [would] arise." *Steele*, 323 U.S. at 198. A union is accordingly "subject to constitutional limitations on its power to deny, restrict, destroy, or discriminate against the rights of those for whom it [represents]" and "is also under an affirmative constitutional duty equally to protect those rights." *Id.*; *see Lewis v. Local Union No. 100 of The Laborers' Int'l Union of N. Am.*, 750 F.2d 1368, 1375–76 (7th Cir. 1984). The duty is designed to serve as a "check on the arbitrary exercise" of the exclusive-representation power. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 374 (1990). Importantly, it is the receipt of exclusive-representation powers, not the collection of fees from all employees, that makes the fair-treatment obligation necessary. "A union's status as exclusive bargaining agent and the

right to collect an agency fee from non-members are not inextricably linked." *Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014).

While this duty of fair treatment flows from the unique powers and benefits of the exclusive-representative position, carrying out this duty is "purposely limited" and not burdensome. *Rawson*, 495 U.S. at 374. A union need not go out of its way to further the interests of particular employees, whether members or not. To the contrary, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). Thus, a union breaches this obligation "only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "This means that a union cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others." *Harris*, 134 S. Ct. at 2636–37 (citation omitted).

B. Wisconsin Exercises Its Federally Recognized Right To Protect Employees From Being Forced To Support Labor Organizations As A Condition Of Their Employment

Although federal law generally dominates the field of labor relations, the National Labor Relations Act ("the Act"), as amended by the Taft-Hartley Act of 1947, permits States to ban union-security agreements.[1] Two provisions of the Act are rel-

[1] A union-security agreement is "[a] contract between an employer and a union requiring workers to make certain payments (called 'agency fees') to the union as a condition of

evant. Under 29 U.S.C. § 158(a)(3) (or § 8(a)(3) of the Act), it is an "unfair labor practice" to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." But the provision adds that "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later," if certain conditions are met. *Id.* A separate but closely related section, 29 U.S.C. § 164(b) (or § 14(b) of the Act), provides that "[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." As this Court held in *Sweeney v. Pence*, § 164(b) leaves States free to enact right-to-work laws banning agreements forcing nonmembers to pay unions money. 767 F.3d at 658–65.

On March 11, 2015, Wisconsin exercised its federally guaranteed right to adopt a right-to-work law by passing Act 1. Act 1 provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . [p]ay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization" or "any 3rd party." *See* 2015 Wis.

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getting or keeping a job." *Wex Legal Dictionary*, Cornell University Law School Legal Information Institute, *available at* goo.gl/ruSo7v.

Act 1, § 5, *codified at* Wis. Stat. § 111.04(3)(a)3 & (3)(a)4. The law applies only to collective-bargaining agreements made after its enactment. *See* Act 1, § 13. Act 1 does not impose or alter the preexisting legal duty of fair representation imposed on exclusive representatives. Wisconsin is now one of 28 States to have enacted right-to-work laws, many of which predate the National Labor Relations Act. *See Sweeney*, 767 F.3d at 658–65; *Right-to-Work Resources*, National Conference of State Legislatures, *available at* https://goo.gl/CH8TBY.

C. A Different Group Of Unions Initiates (Still-Pending) Litigation In Wisconsin Courts To Challenge Act 1 Under The Wisconsin Constitution's Takings Clause

In March of 2015, other labor unions brought a lawsuit challenging Act 1 as an unconstitutional taking under Article I, § 13, of the Wisconsin Constitution. The trial court accepted the plaintiffs' theory, declaring several sections of Act 1 void and enjoining the State from enforcing them. *See* Order Granting Stay, *Machinists Local Lodge 1061 v. Walker,* No. 2016AP820 (Wis. Ct. App. May 24, 2016) (describing proceedings below), *available at* goo.gl/Bqvx7Y. The State defendants appealed and moved for a stay in the appellate court, which was granted. *Id.* That appeal is now fully briefed, and oral argument is scheduled for May 3, 2017.

II. Proceedings Below

Rather than seek to join the pending state-court case or file a state-court takings challenge of their own, the Unions brought a federal suit against Brad Schimel, in his official capacity as Attorney General of Wisconsin, and James R. Scott, in his official capacity as Chairman of the Wisconsin Employment Relations Commission

(collectively "the State"). A.7.[2] The Unions claim that Act 1 is preempted by the National Labor Relations Act and that, "as applied," Act 1 violates the Takings Clause of the Fifth Amendment of the United States Constitution "[t]o the extent that [it] prohibits a union from obtaining reimbursement for the cost of collective bargaining representation that the union is obligated to provide to non-members by federal law." A.5, 7–8, 16. The Unions sought declaratory and injunctive relief, as well as whatever other relief the court deemed appropriate. A.16.

The Unions moved for a preliminary injunction on both their preemption and takings claims, but conceded that their claims were barred by this Court's decision in *Sweeney*. SA.15. The State moved for judgment on the pleadings. SA.1. Regarding preemption, the State agreed that *Sweeney* foreclosed the Union's statutory challenge. SA.15. Addressing the takings claim, the State first argued that the claim was unripe because it had not yet been litigated in state court. SA.16. The State also pointed out that, even if the claim were ripe, the district court was bound not only by *Sweeney*'s reasoned dicta rejecting an identical takings argument in that case, but also by the Unions' concession that *Sweeney*'s takings analysis was controlling. Dkt. 21:2. Third, the State explained that, in any event, *Sweeney* was correct that State right-to-work laws are not takings. Dkt. 21:2.

The district court granted the State's motion and denied the Unions' motion as moot. SA.24. On preemption, the court concluded that *Sweeney* foreclosed the Unions'

[2] Citations of the Plaintiffs' Appendix appear as "A.__," and citations of the Plaintiffs' Short Appendix appear as "SA.__."

claim. SA.15. Regarding the takings argument, the court acknowledged that the Unions had failed to satisfy *Williamson County*'s state-litigation requirement, SA.19, but it concluded that an exception to that rule for certain facial takings claims applied, SA.20–22. Although the Unions' complaint challenged Act 1 "as applied," the court thought the "substance" of the "[Unions'] allegations" are "best understood as comprising a facial challenge to Act 1." SA.20, 22. This meant that the Unions could proceed in federal court, but would need to show that "mere enactment" of Act 1 constituted a taking because it denied labor unions use of their services and that Act 1 is not constitutional in any "set of circumstances." SA.19–20 (citations omitted). On the merits, the district court agreed that *Sweeney*'s takings analysis barred the Unions' claim. SA.15.

The Unions appealed from the two merits rulings, and the State cross-appealed on the ripeness ruling.[3]

SUMMARY OF ARGUMENT

I. The Unions argue that the National Labor Relations Act forbids States from passing right-to-work laws (as 28 States have). But *Sweeney* holds the opposite. The

[3] The district court's dismissal of the Unions' takings claim was presumably on the merits. *See Bernstein v. Bankert*, 733 F.3d 190, 224 (7th Cir. 2012). Although the State agrees that the Unions' takings claim lacks merit and therefore warrants dismissal with prejudice, the State also contends that the takings claim is not presently ripe for litigation in federal court, meaning that the claim would warrant dismissal without prejudice so that the Unions can exhaust state-court remedies. *See, e.g.*, *Forseth v. Village of Sussex*, 199 F.3d 363, 373 (7th Cir. 2000). As far as the State is aware, the law is not certain on whether, in these circumstances, a party intending to raise arguments in support of both a dismissal with prejudice *and* a dismissal without prejudice must file a cross-appeal from a dismissal with prejudice in order to preserve arguments in support of a dismissal without prejudice. *Accord Bernstein*, 733 F.3d at 224. Here, the State has filed such a cross-appeal in an abundance of caution.

Unions make no attempt to show a "compelling reason" for overruling that precedent, *Kendrick*, 647 F.3d at 734, and they even concede that "a three-judge panel of this Court is bound to follow *Sweeney* and reject the Unions' appeal." Pls. Opening Br. 4. *See infra* p. 18 (discussing Circuit Rule 40(e)). Although they assert that *Sweeney* was wrongly decided, that alone is never a compelling reason to revisit a case, *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582–83 (7th Cir. 2005), and it is certainly not cause for creating a circuit conflict, *see Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005). Nor is it relevant that the previous case was upheld by only a "5–5 vote" of the en banc Court. *See Santos v. United States*, 461 F.3d 886, 894 (7th Cir. 2006).

Even if the Unions had tried to make a case under the "compelling reason" test, they would have failed. No federal case has disagreed with *Sweeney*, and several courts have applied it faithfully. What is more, no factual, statutory, or doctrinal developments have cast doubt on *Sweeney*'s analysis. *Id.* at 891. It is also a recent decision, *see United States v. Hill*, 48 F.3d 228, 230 (7th Cir. 1995), and easy to apply, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015). On top of all of this, *Sweeney* interprets a statute, so it carries "enhanced force." *Id.* at 2409–15.

At any rate, *Sweeney*'s preemption analysis is correct. The text of the National Labor Relations Act makes this clear. A proviso to 29 U.S.C. § 158(a)(3) allows as a matter of federal policy "agreement[s] . . . requir[ing]" post-hire "membership" in a union as a "condition of employment." At the same time, 29 U.S.C. § 164(b) estab-

lishes that the very same category of agreements—those "requiring [union] membership . . . as a condition of employment"—may be "prohibited" by state law. In other words, the union-security agreements made permissible by the proviso "are the same [ ] agreements" that § 164(b) "expressly place[s] within the reach of state law." *Retail Clerks I*, 373 U.S. at 751–52. Here, because it is undisputed that the union-security agreements at issue satisfy the Act's proviso (forced payments to a union make one a "member" within the meaning of § 158(a)(3)), they are subject to state prohibition. Hence § 164(b) "allows individual States . . . to enact so-called 'right-to-work' laws." *Oil, Chem. & Atomic Workers*, 426 U.S. at 409. History confirms that this was § 164(b)'s purpose. *See Int'l Union of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. NLRB*, 675 F.2d 1257, 1260–62 (D.C. Cir. 1982).

II. The Unions next argue that, if Act 1 is not preempted, it is an unconstitutional taking under the Fifth Amendment. This claim fails at the threshold and on the merits.

First, this claim is not ripe for federal adjudication; the Unions must satisfy *Williamson County*'s "strict requirement that Takings Clause litigants must first take their claim to state court," *Daniels v. Area Plan Comm'n of Allen Cnty.*, 306 F.3d 445, 453 (7th Cir. 2002), regardless of what relief they seek in this litigation, *see Sorrentino v. Godinez*, 777 F.3d 410, 413–14 (7th Cir. 2015). No exception to *Williamson County* applies. Pursuing relief in state courts would not be futile, since Wisconsin's Constitution includes a self-executing takings clause that potentially would afford

relief, *Zinn v. State*, 334 N.W.2d 67, 77 (Wis. 1983), and sovereign immunity would not bar a damages award, *Wis. Retired Teachers Ass'n, Inc. v. Emp. Trust Funds Bd.*, 558 N.W.2d 83, 95 (Wis. 1997). Nor do the Unions meet the exception for "pre-enforcement facial challenges to the constitutionality of a law under the [federal] Takings Clause." *Muscarello v. Ogle Cnty. Bd. of Comm'rs*, 610 F.3d 416, 422 (7th Cir. 2010). They do not assert a facial takings claim against Act 1, since they allege only that Act 1 is invalid "as applied," A.16, and they do not attempt to show that "mere enactment" of Act 1 has deprived their "services" of all or substantially all value, *Daniels*, 306 F.3d at 467.

Even if the takings claim were ripe, it would fail on the merits. To begin with, the Unions concede that it is foreclosed by *Sweeney*, Pls. Opening Br. 4—even in the face of the State's position below that *Sweeney*'s takings analysis was only considered dicta. That concession alone is reason to summarily reject the claim.

The Unions' theory could not succeed anyway. First, their theory targets the wrong law. Act 1 does not force unions to offer any "services." In fact, it *forbids* a kind of "taking": the forced payment of dues to a labor union. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 185 (2007) (unions "have no constitutional entitlement to the fees of nonmember-employees"). By the same token, striking down Act 1 would not redress the Unions' claimed harms; it would simply leave it up to employers whether to agree or not agree to the forced-dues provisions that, under the Unions' theory, the Constitution mandates. The proper target of the Unions' argument is the statutory duty of fair representation, but they have chosen not to challenge it.

Even a properly aimed takings claim would have failed. The Unions freely accept the fair-representation obligation in exchange for the valuable privilege of the exclusive-representation power, and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), holds that such a free exchange does not impose a taking. *Id.* at 1005–07. Labor organizations have "long been the source of public concern and the subject of government regulation." *Id.* at 1007. They understand that those regulations—especially those concerning the legality of forced-dues agreements—have been, and remain, subject to frequent change. Because the Unions have entered the field of labor relations against that statutory backdrop, their free assumption of the fair-representation duty "takes" nothing. *Monsanto* aside, the Unions do not, and could not, show that right to work makes their services "essentially worthless." *Muscarello*, 702 F.3d at 913. As this Court observed less than three years ago, "unions continue to thrive" under right-to-work laws. *Sweeney*, 767 F.3d at 664. That remains true. In addition, any burden on union "services" does not take "property" within the meaning of the Takings Clause. The law does not target any specific interest in property but at most imposes an "obligation to perform an act." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (opinion of Kennedy, J.). Finally, Act 1 does not take for a "private use," since it has a rational basis. *Gamble v. Eau Claire Cnty.*, 5 F.3d 285, 287 (7th Cir. 1993).

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of the State's motion for judgment on the pleadings. *Barr v. Bd. of Trs. of W. Ill. Univ.*, 796 F.3d 837, 839 (7th

Cir. 2015). Judgment on the pleadings is appropriate when "the plaintiff[s] cannot prove any facts that would support [their] claim for relief." *Hayes v. City of Chicago*, 670 F.3d 810, 813 (7th Cir. 2012).

ARGUMENT

I. As *Sweeney* Holds, The National Labor Relations Act Explicitly Permits State Right-To-Work Laws

The Unions acknowledge that *Sweeney* bars their argument that Act 1 is preempted. Pls. Opening Br. 4. They argue that *Sweeney* was wrongly decided. Pls. Opening Br. 5. Yet, they do not even try to show a "compelling reason" to overrule it. Nor could they, since all of the "compelling reason" factors favor reaffirming *Sweeney*. But even putting *stare decisis* aside, *Sweeney* is correct.

A. The Unions Do Not Even Attempt To Show A "Compelling Reason" To Overrule *Sweeney*, And There Is None

In *Sweeney v. Pence*, decided less than three years ago, this Court rejected a preemption challenge to Indiana's materially identical right-to-work law, squarely holding that Indiana's statute "is . . . not preempted by the NLRA." 767 F.3d at 656, 659–65. Reading federal law "against th[e] backdrop of states' extensive authority" in "the field of union-security agreements," the *Sweeney* Court explained that the States' statutorily protected right to forbid "agreements requiring membership in a labor organization" included the right to ban agreements requiring forced payments to labor organizations. *Id.* at 658–64. This Court explained that this reading (among its other virtues) accorded with Supreme Court precedent, made the meaning of the term "membership" consistent throughout the Act, and did not render any provision of the

Act superfluous. *Id.* An additional benefit was that this Court's position aligned with that of the D.C. Circuit, and no case from any other federal court of appeals was to the contrary. *Id.* at 663–64 (citing *Journeymen & Apprentices*, 675 F.2d at 1260–62).

1. To persuade a court to take the extraordinary step of overruling a precedent, a litigant bears a heavy burden. *See Chi. Truck Drivers, Helpers & Warehouse Union (Indep.) Pension Fund v. Steinberg*, 32 F.3d 269, 272 (7th Cir. 1994). To begin, this Court "require[s] a compelling reason" to overrule any binding circuit decision, *Kendrick*, 647 F.3d at 734 (citation omitted), whether or not this Court is sitting en banc, *see Buchmeier v. United States*, 581 F.3d 561, 565–66 (7th Cir. 2009) (en banc) (concluding there that "[o]verruling would not be consistent with a proper regard for the stability of [this Court's] decisions"). It is well established that a "solid defense of the arguments that [this Court] rejected" in the previous case is decidedly not "compelling." *Kendrick*, 647 F.3d at 734. Even a showing that the precedent "was decided incorrectly" is insufficient—otherwise, "stare decisis is out the window, because no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with." *Tate*, 431 F.3d at 582–83. Likewise, the mere fact that "the previous decision was upheld by a 5–5 vote" of the en banc Court does not justify "upsetting the stability and predictability of the law." *Santos*, 461 F.3d at 894. A close en banc vote shows at most that the decision was thought to be "debatable," but "debatable is not enough." *Id.* at 893.

Avoiding a circuit conflict is a compelling reason to stand by a precedent, not to revisit it. While moving from one side to the other of an already-existing conflict

"will not make it go away; sooner or later, either Congress or the Supreme Court must bring harmony." *Trompler, Inc. v. NLRB,* 338 F.3d 747, 753 (7th Cir. 2003) (Easterbrook, J., concurring), "reconsideration is more appropriate when this circuit can *eliminate* the conflict by overruling a decision that lacks support elsewhere," *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010) (emphasis added); *see United States v. Howze*, 343 F.3d 919, 924 (7th Cir. 2003). In those circumstances, "the interest in avoiding unnecessary intercircuit conflicts comes into play," and if the precedent cannot withstand "conscientious reexamination," this Court will "abandon [its] position in order to spare the Supreme Court extra work." *Russ*, 414 F.3d at 788 (citation omitted). *A fortiori*, this Court would be especially reluctant to "abandon [its] position" when that would *create* "extra work" for the Justices.

On top of showing the usual "compelling reasons" that would justify revisiting any of this Court's cases, a litigant targeting a decision that interprets a statute also must overcome the "special force" that *stare decisis* bears "in the statutory arena." *Chicago Truck Drivers*, 32 F.3d at 272 (citations omitted). The Supreme Court has repeatedly stressed the importance of statutory *stare decisis* in recent years. *See, e.g.*, *Kimble*, 135 S. Ct. at 2409–15; *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014). In *Kimble*, for example, the Court explained that one reason that statutory precedents have "enhanced force" is that a uniform judicial interpretation of a legislative enactment, "in whatever way reasoned, effectively become[s] part of the statutory scheme, subject (just like the rest) to congressional change." 134 S. Ct. at 2409. Such decisions "are balls tossed into Congress's court, for acceptance or not

as that branch elects." *Id.* at 2409–10. In the meantime, "parties are especially likely to rely on such precedents when ordering their affairs." *Id.* at 2410. And while it is possible that a litigant could identify "special justifications" for overruling a statutory case, *Kimble* identifies only two: that either the development of judicial doctrine or statutory law has "removed the basis for a decision," or the precedent has "proved unworkable," meaning extremely difficult to apply. *Id.* at 2410–11.

2. The Unions make no attempt to show a compelling reason to revisit *Sweeney* or a special justification to overturn its well-considered interpretation of federal statutes. In fact, the Unions even concede that "a three-judge panel of this Court is bound to follow *Sweeney* and reject the Unions' appeal." Pls. Opening Br. 4. If the Unions are under the impression that a three-judge panel of the Seventh Circuit is powerless to overrule circuit precedent, they are incorrect. *See, e.g.*, *United States v. Wahi*, __ F.3d __, No. 15-2094, 2017 WL 816883, at *1 n.1 (7th Cir. 2017) ("Because this opinion overrules circuit precedent, we have circulated it to all judges in active service in accordance with Circuit Rule 40(e)."). In any event, even if this case were before the en banc Court, it would still be incumbent upon the Unions to point in their opening brief to a compelling reason to revisit *Sweeney*. *See Buchmeier*, 581 F.3d at 565. Their failure to do so amounts to forfeiture. *See United States v. Foster*, 652 F.3d 776, 793 (7th Cir. 2011) (the principle that "undeveloped arguments are deemed waived on appeal . . . holds particularly true" when the undeveloped argument "asks us to overturn circuit precedent").

The Unions do not even indirectly identify a "compelling reason" to overturn *Sweeney*. Asserting that *Sweeney* was "wrongly decided" for the reasons given in the "dissent" in that case, Pls. Opening Br. 5, 18, gives them no traction. *See Tate*, 431 F.3d at 582–83. Merely to "rehash[ ]" arguments "previously considered" and "rejected" by a decision is not a reason to revisit it, *Kendrick*, 647 F.3d at 734 (citations omitted), much less to create a circuit conflict, *Russ*, 414 F.3d at 788. Nor, obviously, is it relevant that the vote over rehearing *Sweeney* was close. *See Santos*, 461 F.3d at 894.

3. The Unions could not have made a case for overruling *Sweeney* had they tried. Already a robust decision the day it was decided, *see infra* pp. 20–32, *Sweeney* has grown stronger with time. No federal court has questioned it, and several courts, including one outside the Seventh Circuit, have applied it faithfully and without difficulty. *See* SA.15; *Int'l Union of Operating Engineers Local 370 v. Wasden*, No. 415-cv-500, __ F. Supp. 3d. __, 2016 WL 6211272, at *8–*11 (D. Idaho Oct. 24, 2016) (relying on *Sweeney* to uphold Idaho's right-to-work law). Likewise, the D.C. Circuit's decision in *Journeyman & Apprentices*, on the books for nearly 35 years, has an equally spotless record. No subsequent factual, statutory, or doctrinal developments—in this circuit, the Supreme Court, or anywhere else—have cast doubt on either case. *See Santos*, 461 F.3d at 891 (a precedent for which that is true is "entitled to considerable weight"). What is more, *Sweeney* "is simplicity itself to apply." *Kimble*, 135 S. Ct. at 2411. It is also a recent decision, "[a]nd the more recent a precedent, the

more authoritative it is." *Hill*, 48 F.3d at 230. Thus, far from warranting a second look, *Sweeney* should be reaffirmed.

B. *Sweeney*'s Preemption Holding Is Correct

1. As *Sweeney* shows, the straightforward text of the National Labor Relations Act settles the preemption question in this case. Although § 158(a)(3) forbids union-security agreements that "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage [union] membership,"[4] its proviso generally allows "agreement[s] . . . requir[ing]" post-hire "membership" in a union as a "condition of employment."[5] At the same time, § 164(b)'s matching language makes clear that the very same category of agreements—those "requiring [union] membership . . . as a condition of employment"—may be "prohibited" by state law. In other words, a State may prohibit any union-security agreement that the Act permits. Here, the proposed agreements would force employees, upon hire, to begin "pay[ing] [the Unions] for costs related to" carrying out their statutory duties of collective bargaining, contract administration, and grievance processing. A.13. Those agreements are plainly legal under the Act. That is because paying a union to perform its statutory duties constitutes post-hire "membership" within the meaning of § 158(a)(3). Accordingly, it is also "membership" under § 164(b). And because the agreements here would make that "membership" a condition of employment, a State may forbid them

[4] *See also* 29 U.S.C. § 158(b)(2) (making this an unfair labor practice for unions).

[5] For simplicity, the State will refer to this language as § 158(a)(3)'s "proviso," even though § 158(a)(3) technically has a second proviso as well.

under § 164(b). By adopting Act 1, Wisconsin has done just that. Act 1's ban on forced-dues provisions is therefore entirely legal under federal law.[6]

This conclusion is compelled by three Supreme Court precedents interpreting the meaning of, and relationship between, § 158(a)(3) and § 164(b). Two of those cases comprehensively define and limit the meaning of "membership" in § 158(a)(3). *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734 (1963); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988). The third case carries over § 158(a)(3)'s definition of "membership" to "membership" in § 164(b). *See Retail Clerks I*, 373 U.S. 746. As the Supreme Court has since made explicit, it follows from these cases that § 164(b) "allows individual States and Territories to exempt themselves from [§ 158(a)(3)] and *to enact so-called 'right-to-work' laws* prohibiting union or agency shops." *Oil, Chem. & Atomic Workers*, 426 U.S. at 409 (1976) (emphasis added).

General Motors settles the general scope of § 158(a)(3). To begin, it is clear that this provision forbids a "closed shop," which is any union-security agreement that permits an employer to hire only workers who are already full-fledged union members. 373 U.S. at 740 (1963); *see Black's Law Dictionary* (10th ed. 2014) ("shop – closed shop"). That is because a closed shop discriminates "in regard to hire" to "encourage" union membership, but does not meet the proviso, since it does not allow workers to join the union after landing the job. 29 U.S.C. § 158(a)(3). By contrast, "union shop" agreements that generally require only that employees become members of the union

[6] For its part, the federal government also has adopted right to work for employees in agencies in which unionization is allowed. *See Harris*, 134 S. Ct. at 2640 & n.22 (collecting statutes).

after being hired, satisfy the proviso. *Id.* So, although these arrangements also discriminate in favor of union membership, they are not prohibited. *Gen. Motors,* 373 U.S. at 741.

General Motors likewise makes clear that § 158(a)(3) permits "agency shop" agreements under which "employees are required as a condition of employment" to pay certain fees to the union but "need not actually become union members" formally. *Gen. Motors*, 373 U.S. at 736. The Court reasoned that, if Congress meant to permit the union shop, it also must have "intended to preserve the status" under federal law "of less vigorous, less compulsory contracts which demanded less adherence to the union"—namely, "*all other* union-security arrangements *permissible under state law*." *Id.* at 741 (emphasis added). The Court found support for this position in an important 1950 decision of the National Labor Relations Board, which held that "*any* [union-security] agreement as might now be legally consummated"—including an agency-shop arrangement—"was immunized by the terms of the proviso" and was therefore permitted, if not forbidden by state law. *Elec. Workers, Ibew Local B-1436 (Pub. Serv. Co. of Colorado)*, 89 NLRB 418, 423 (1950); *see Gen. Motors*, 373 U.S. at 739, 742.

But the cornerstone of *General Motors*' holding was the Court's interpretation of the statutory term "membership." The employer in that case argued that, because the union's proposed agreement did not require "actual membership" but "demand[ed] only initiation fees and monthly dues," it was "not saved by" the literal terms of "the proviso." 373 U.S. at 741. The Court disagreed. It concluded that "[i]t is

permissible to condition employment upon membership, but membership, *insofar as it has significance to employment rights*, may in turn be conditioned only upon payment of fees and dues." *Id.* at 742 (emphasis added). The Act, in other words, uses "membership" as a term of art. As a condition of employment, its meaning "is whittled down to its financial core." *Id.* Mere payment is "membership."[7]

Beck, the second case, builds on *General Motors* by making clear that paying a union solely for the costs of carrying out its exclusive-representative duties is also "membership." *Beck*, 487 U.S. at 745. And *Beck* further holds that those limited payments set the boundary of what any "membership" condition may require under § 158(a)(3). *Id.* As the Court put it, the Act's "financial core" definition of membership does not "include[ ] the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Id.* Accordingly, § 158(a)(3) forbids "a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated" to the union's performance of its statutory duties.[8]

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[7] *General Motors* blurred the distinction between union shops and agency shops. "[E]mployees under a 'union shop' arrangement who are required by contract to become union members, may be subjected to only one membership requirement—the payment of dues—and employees under an 'agency shop' arrangement who are required by contract only to pay dues need not become union members even in form." *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 764 (9th Cir. 2002). Thus "there is no realistic difference from a legal standpoint" between the two arrangements. *Id.*

[8] The contract in *Beck* set up an agency shop. But like *General Motors*, *Beck* makes the labels "union shop" and "agency shop" practically meaningless in this context. Under either arrangement, *Beck* limits "the costs that members in name only—or nonmembers—can be compelled to bear by way of dues." *United Food & Commercial Workers,* 307 F.3d at 765. Hence "[t]he terms 'dues-paying nonmembers,' 'financial core members,' 'objecting nonmembers,' and 'nonmembers,' are used interchangeably in the case law to refer to employees who

The third case, *Retail Clerks I*, extends § 158(a)(3)'s "financial core" definition of membership to § 164(b), the key provision allowing States to ban the "execution or application of agreements requiring *membership* in a labor organization as a condition of employment." 29 U.S.C. § 164(b) (emphasis added); 373 U.S. at 751. This holding furthered § 164(b)'s purpose. As the Court explained, "Congress feared" that courts would read § 158(a)(3) not simply to *permit* as a matter of federal law union-security clauses that satisfy its proviso, but also to *preempt* the laws of States "where such arrangements were contrary to the State policy." *Id.* at 751 (citations omitted). So Congress enacted § 164(b) to "make certain" that the Act would not at all "extinguish[ ] state power," *id.* at 751, but would leave "States free to legislate in th[e] field" of "execution and enforcement of union-security agreements," *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 99–102 (1963) (*Retail Clerks II*). Or, as the Court has put it in other cases, "[§ 164(b)] was designed to make clear that [§ 158(a)(3)] left the States free to pursue 'their own more restrictive policies in the matter of union-security agreements,'" *Oil, Chem. & Atomic Workers*, 426 U.S. at 417 (quoting *Algoma Plywood Co. v. Wis. Bd.*, 336 U.S. 301, 314 (1949)), including bans on agreements requiring nonmembers to pay "fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit," *Retail Clerks I*, 373 U.S. at 748–49.

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pay only the required dues or the 'agency fees,' regardless of whether the employees are subject to a union shop or an agency shop provision." *Id.* at 765 n.5.

In light of these cases, "[t]he connection between the [§ 158(a)(3)] proviso and [§ 164(b)] is clear." *Id.* at 751–52. "At the very least, the agreements requiring 'membership' in a labor union which are expressly permitted by the proviso [in § 158(a)(3)] are the same 'membership' agreements expressly placed within the reach of state law by [§ 164(b)]." *Id.* The latter provision "simply mirrors" the former. *Oil, Chemical & Atomic Workers*, 426 U.S. at 417; *see also id.* at 426–27 (Stewart, J., dissenting) ("[Section 158(a)(3) and § 164(b)] together exhaust the federal interest in the types of union-security agreements employers and unions may make. The closed shop is absolutely prohibited. *Any lesser security agreement*, though consistent with the federal interest, is sanctioned only if it harmonizes with state policy.") (emphasis added). Therefore, "[§ 164(b)] gives the States power to outlaw even a union-security agreement that passes muster by federal standards." *Retail Clerks II*, 375 U.S. at 103; *see also Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 747 (10th Cir. 2004).

Applying this settled understand of § 164(b) to this case is straightforward. The Unions' proposed agency-shop agreements at issue here, which would impose upon employees the "membership" obligation of paying the costs of the Unions' exclusive representation, A.13, are permitted as a matter of federal policy under § 158(a)(3)'s proviso. Since the proposed agreements "are expressly permitted by the proviso," they are also "expressly placed within the reach of state law by [§ 164(b)]." *Retail Clerks I,* 373 U.S. at 751–52. Accordingly, the application of Act 1 to those agreements comports with federal law, and the agreements are therefore invalid.

The history of § 164(b) supports this conclusion. As the Supreme Court has observed, 12 States had right-to-work laws at "the time [§ 164(b)] was written into the Act." *Retail Clerks II*, 375 U.S. at 100. Although five of those States seemed to prohibit only the union shop, seven adopted "language similar to Indiana's" and Wisconsin's right-to-work laws, forbidding not only mandatory union membership (in the formal sense) but also forced payment of dues to unions. *Sweeney*, 767 F.3d at 662. That is important because "Congress seems to have been well informed" about those laws when it drafted § 164(b). *Retail Clerks II*, 375 U.S. at 100. The bill's House Report included a list of them. *See Sweeney*, 767 F.3d at 662–63. The Senate Report discussed them as well. *See Journeymen & Apprentices*, 675 F.2d at 1260–61.

Yet no legislator seemed to think that those state laws had been, or would be, preempted. To the contrary, it was generally accepted that the bill would explicitly preserve them. As Senator Robert A. Taft—a co-sponsor of the bill—explained to his colleagues, "[m]any states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in such states illegal. As stated in the report accompanying the Senate committee bill, *it was not the intent to deprive the States of such power*." *Journeymen & Apprentices*, 675 F.2d at 1261 (emphasis added) (citation omitted). Some worried that those state laws, if allowed to stand, would create a "free rider" problem, but critics and supporters alike understood "precisely what state laws [§ 164(b)] was validating." *Journeymen & Apprentices*, 675 F.2d at 1260–61. One senator noted that § 164(b) "expressly provides that in the case where the State law covering union-security agreements is more rigorous than the policy expressed in the bill

such State law shall be unaffected." *Id.* at 1261 n.5 (citation omitted). Another senator agreed: § 164(b) "leaves in effect all the strictures which any state may impose." *Id.* Still another senator observed that § 164(b) sides with "States that have enacted laws abolishing or making illegal all forms of union security." *Id.* Likewise, in his veto message, President Truman took aim specifically at § 164(b) for "abdicat[ing]" the "policy of preserving some degree of union security . . . in all states where more restrictive policies exist." *Id.* at 1261 (citation omitted). Congress enacted § 164(b) anyway, overriding the President's veto.

2. The Unions' counterarguments fail. They first contend that this Court should read "membership" in § 164(b) to accord with its supposed "literal" sense of "being a member of an organization." Pls. Opening Br. 25. To be a union "member" under this definition, the Unions suggest, would mean "payment of dues and swearing an oath of loyalty to the union constitution, among other obligations, as well as the right to attend union meetings and to vote in union elections." Pls. Opening Br. 25.

This argument has several fatal defects. First, and most obviously, it would make § 164(b) a nullity. *General Motors* and *Beck* establish that "membership" in § 158(a)(3) is not to be read literally but as a term of art, meaning that nonmember employees satisfy a "membership" condition so long as they pay dues to the union to help cover the union's costs of performing its statutory exclusive-representative duties. A union-security agreement that purports to impose additional "membership"

obligations on objectors—such as "swearing an oath of loyalty"—is simply unenforceable under § 158(a)(3). Although the Unions accept this understanding of *General Motors* and *Beck*, Pls. Opening Br. 25, 28, they fail to see that their supposedly literalist definition of "membership" in § 164(b) would mean that States could ban only those union-security agreements that federal law already forbids under § 158(a)(3)—such as those that impose oath-swearing obligations. Under that reading, § 164(b) would do no work. *See Corley v. United States*, 556 U.S. 303, 314, (2009).

The Unions take a back-up position: "membership" in § 164(b) should at least mean something different than "membership" in § 158(a)(3), giving States some room to regulate union-security agreements. Pls. Opening Br. 33. This second argument does not improve upon the first. Just as it causes the Unions to lose the benefit of one interpretive principle (because it does not give "membership" in § 164(b) its "plain" sense), it runs headlong into another: the cardinal rule that identical words in a statute "should bear the same meaning." *Reno v. Koray*, 515 U.S. 50, 58 (1995). As the Unions concede, *General Motors* and *Beck* hold that the Act repeatedly uses "membership" as term of art. Pls. Opening Br. 22, 25. Its meaning is "whittled down to its financial core," authorizing unions (as a matter of federal law) to exact fees from objectors only to cover the performance of the unions' core statutory duties. *Beck*, 487 U.S. at 745 (quoting *General Motors Corp.*, 373 U.S. at 742). There is no good reason to create a mismatch between "membership" in § 158(a)(3) and "membership" in § 164(b). And there is an especially good reason *not* to: the Supreme Court already

has extended § 158(a)(3)'s term-of-art meaning of "membership" to § 164(b) in *Retail Clerks I*. *See supra* pp. 24–25.

The Unions respond that *Retail Clerks I* technically did not decide the status under § 164(b) of union-security agreements "less stringent" than the agency-shop clause in that case, which required nonmembers to pay fees in the same amount as members and which lacked an "ironclad restriction" on what the union could do with nonmember payments. Pls. Opening Br. 25–26 (citation omitted). There are two problems with this argument. First, it distinguishes only the *facts* of *Retail Clerks I*, "not its rationale." *Journeyman & Apprentices*, 675 F.2d at 1262. The principle of *Retail Clerks I* is what controls. And its principle is that § 164(b) "simply mirrors that part of [§ 158(a)(3)] which focuses on post-hiring conditions of employment." *Oil, Chemical & Atomic Workers*, 426 U.S. at 417 (describing *Retail Clerks I*). Under that rule, *any* union-security agreement permitted under § 158(a)(3)'s proviso—including a forced-dues provision like the ones at issue here—is susceptible of state prohibition.

Second, and more fundamentally, the Unions' attempted narrowing of *Retail Clerks I* ignores *Beck*. Under *Beck*, unions cannot in the first place enforce as written union-security agreements as facially broad as the one in *Retail Clerks I*. Specifically, *Beck* holds that § 158(a)(3) simply does not authorize (and therefore it forbids) any union-security agreement that forces the "collection of fees in excess of those necessary to cover the costs of collective bargaining." 487 U.S. at 754–55. So the Unions' position must mean either that § 164(b) is entirely inoperative after *Beck* (because it

permits States to ban only those union-security arrangements that federal law already forbids), or that *Beck* must be overruled.

Faced with this choice, the Unions ultimately set their sights on *Beck*, devoting more than four pages of their opening brief to an attack on its reasoning. *See* Pls. Opening Br. 29–33. They contend, for example, that *Beck*'s "non-literal" interpretation of the Act is "strained" or "cramped," and that it does "violence" to the statute's text. Pls. Opening Br. 29–33. But of course, the proper audience for these arguments is the only court with authority to overrule *Beck*: the Supreme Court.

The Unions next argue that § 164(b)'s legislative history shows that it was not meant to allow States to "outlaw service fee agreements for the cost of representation." Pls. Opening Br. 34–42. But they fail to grapple with or even address the numerous sources set forth in *Sweeney* and *Journeyman & Apprentices* indicating the opposite. This omission makes it easier for the Unions, with a seeming air of plausibility, to assert that "[n]o member of Congress suggested that [§ 164(b)] would allow states to prohibit the kind of fee for representational services at issue here." Pls. Opening Br. 38. Statements from at least three senators quoted above, *supra* pp. 27–27, are directly to the contrary.

Further undermining the Unions' legislative-history argument is that, as explained *supra* p. 26, seven States had right-to-work laws materially identical to Wisconsin's at the time of § 164(b)'s enactment, as the Unions concede. Pls. Opening Br. 38. The Unions respond that a "close examination" of those laws shows that some had provisions that violated separate, completely unrelated parts of the National Labor

Relations Act, so Congress "could not have meant" to ratify them. Pls. Opening Br. 40. But the Congress that enacted § 164(b) did not set out to ratify state provisions that possibly violated unrelated parts of the Act. It set out to save from preemption state laws banning union-security agreements permitted under § 158(a)(3)'s proviso. And that is just what it did. *See Oil, Chemical & Atomic Workers*, 426 U.S. at 417.

Next, the Unions argue that, "even if the term 'membership' has the same meaning" in § 158(a)(3) and § 164(b), neither Wisconsin nor any State can ban union-security agreements that (allegedly like the ones here) require paying a union *less* than the "full amount" of membership fees that *Beck* permits: namely, payment for those costs necessarily incurred to carry out a union's statutory duties as exclusive representative. Pls. Opening Br. 42–43. This is a puzzling assertion. The obligations of nonmembers under the proposed agreements here *would* extend to the outer limits of *Beck*, since they would commit nonmembers to contributing to the Unions' "costs related to negotiating and administering the collective bargaining agreement, including investigating and processing grievances." A.13, 19–20 (cited in Pls. Opening Br. 43). *Compare Beck*, 487 U.S. at 745 (outer limit of "financial core" of "membership" is obligation to support costs "germane to collective bargaining, contract administration, and grievance adjustment"). Anyway, the Unions are simply incorrect that their argument would give "membership" the "same meaning" in § 158(a)(3) and § 164(b). If it is true, as the Unions agree, that the proposed agreements in this case are permissible under § 158(a)(3)'s proviso, then it must be that they impose "membership" as a "condition of employment." § 158(a)(3). And if the proposed agreements impose

"membership," then it must be that Wisconsin may forbid them under § 164(b), if indeed "membership" means the same under both provisions, as this alternative argument assumes and as the Supreme Court has held.

Finally, the Unions argue that the principle of constitutional avoidance compels their reading of § 164(b), because otherwise the statute would not stop States from committing unconstitutional takings by passing right-to-work laws. Pls. Opening Br. 43–44. But the Unions' takings theory could not succeed on the merits, *see infra* pp. 40–58, so there are no constitutional concerns to avoid here. Even if there were, "there is no ambiguity" in § 164(b) "for this Court to sidestep through constitutional avoidance." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1305 (2015). Additionally, the Unions cite no authority for the proposition that constitutional avoidance applies to the interpretation of a statute that, no matter how it is read, is itself indisputably constitutional.[9]

[9] *Amici Curiae* Law Professors disagree with *Sweeney* and point this Court to the contrary analysis set forth "in their articles and in books." *Amici* Law Prof. Br. at v. Yet, as several scholars (including at least two of *amici*) have recognized, the weight of opinion on this question appears to be against them. *See, e.g.*, Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2, 95 (2016) ("Twenty-six states . . . have enacted laws granting such union-represented employees the right to refuse to pay the union; [§ 164(b)] gives states the authority to do so."); Cynthia Estlund, *The "Constitution of Opportunity" in Politics and in the Courts*, 94 Tex. L. Rev. 1447, 1465 (2016) (§ 164(b) is "generally understood" to "allow states to prohibit mandatory union fees of all kinds"); Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. Rev. 144, 226 (2016) (reporting right-to-work states had "exempt[ed] themselves from the [federal] union shop system"); William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v Quinn: déjà Vu All over Again?*, 2014 Sup. Ct. Rev. 133, 168 (2014) (*Sweeney* dissent "seems tenuous").

II. The Unions' Takings Claim Is Unripe, Foreclosed, And Otherwise Meritless

The Unions next argue that, if Act 1 is not preempted, it is an unconstitutional taking. But this claim, styled an "as applied" challenge, A.16, is not ripe for federal adjudication; the Unions must first seek relief in Wisconsin courts, per *Williamson County*, 473 U.S. 172. Even if the claim were ripe, the Unions concede that it is foreclosed by *Sweeney*'s takings analysis. In any event, the claim could not succeed on the merits for multiple reasons.

A. The Unions' Takings Challenge Is Unripe Under *Williamson County*'s State-Litigation Requirement

1. The Takings Clause of the Fifth Amendment, which applies to the States under the Fourteenth Amendment, provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V; *Sorrentino*, 777 F.3d at 413. The clause does not forbid the taking of property—only "taking without just compensation." *Williamson Cnty.*, 473 U.S. at 194. Nor does it require payment of just compensation before or at the same time as the taking. The State need only provide an adequate means "for obtaining compensation . . . at the time of the taking." *Id.* (citation omitted).

Williamson County fashions these principles into the following exhaustion rule: "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a [takings] violation . . . until it has used the procedure and been denied just compensation." 473 U.S. at 195. In other words, takings claimants first must pursue "state remedies against the . . . state action that he wants to

attack." *Gamble*, 5 F.3d at 287. And since "state litigation . . . is the way to get" those remedies, *Callahan v. City of Chicago,* 813 F.3d 658, 660 (7th Cir. 2016), "this Circuit has consistently maintained a strict requirement that Takings Clause litigants must first take their claim to state court," *Daniels*, 306 F.3d at 453.

A takings plaintiff cannot plead around *Williamson County* by asking a federal court for only injunctive or declaratory relief instead of monetary compensation. Although this Court in *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007), acknowledged the "strong presumption that damages, not injunctive relief, is the appropriate remedy in a Takings Clause action," it rejected the argument that "*Williamson County*, by its terms, is limited to suits *for compensation,* not suits seeking to *enjoin* an 'unlawful' taking, and, therefore, at minimum, [a] claim for injunctive relief should proceed [in federal court] immediately." *Id.* at 730, 733. Accordingly, in *Sorrentino*, even though the plaintiffs sought only "injunctive and declaratory relief for the alleged takings," this Court held that *Williamson County* "doom[ed]" their claims, given that at least the State's "common law, which affords a remedy for every wrong, [would] furnish the appropriate action for the redress of [plaintiffs'] grievance." 777 F.3d at 412–13 (citation omitted). The plaintiffs were "not exempt from *Williamson*'s ripeness requirement" even if state law "may require them to file their claim in a court that cannot grant [the] equitable relief" they seek. *Id.* at 414.

Here, the Unions concede that they have not attempted to seek state remedies. SA.19. Unlike other unions, *see supra* p. 8, they have not filed a lawsuit in state court

raising their takings claim under the Wisconsin Constitution. Accordingly, the Unions' federal takings claim is unripe.

2. To avoid this conclusion, the Unions would need to meet one of "two exceptions to the exhaustion requirement": "one for situations in which relief is not available in state court" and "one for pre-enforcement facial challenges." *Muscarello*, 610 F.3d at 422. Neither exception applies here.

First, remedies for unconstitutional takings are available in Wisconsin courts, and pursuing that relief would not be futile. This Court has held that "a self-executing provision of a state's constitution may constitute a sufficiently reasonable, certain and adequate remedy to satisfy the Fifth Amendment" and is therefore "sufficient to require the plaintiff to proceed in state court before raising a federal takings claim." *Peters*, 498 F.3d at 734 n.6 (7th Cir. 2007). Wisconsin's Constitution has just such a provision: a takings clause of its own, codified in Article I, Section 13. And the Wisconsin Supreme Court has held that, where no state statute confers a right of action or offers a remedy for a taking, plaintiffs may litigate their claims "directly under Art. I, sec. 13 of the constitution." *Zinn*, 334 N.W.2d at 77; *Eberle v. Dane Cnty. Bd. of Adjustment*, 595 N.W.2d 730, 745 (Wis. 1999). It is also settled that the State's sovereign immunity would not bar a remedy of compensation in such a suit, since "just compensation following a taking is a constitutional necessity." *Wis. Retired Teachers Ass'n*, 558 N.W.2d at 95 (citation omitted). Consistent with these cases, this Court has correctly held that a suit under Wisconsin's takings clause is an available

"state law remed[y]" under *Williamson County*, so seeking relief for a taking in Wisconsin courts would not be futile. *Forseth*, 199 F.3d at 373; *see Everson v. City of Weyauwega*, 573 Fed. App'x 599, 600 (7th Cir. 2014). Thus, the Unions cannot show that Wisconsin courts are not up to the task of remedying their claimed wrong or that relief in those courts is unavailable.

Second, the exception for "pre-enforcement facial challenges to the constitutionality of a law under the Takings Clause" does not apply either. *Muscarello*, 610 F.3d at 422. To state a facial takings claim, a plaintiff must assert that "no set of circumstances exists under which the Act would be valid." *Daniels*, 306 F.3d at 467 (citation omitted). The "mere enactment" of the statute must "constitute[ ] a taking." *Id.* (quoting *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)). There is an "important distinction" between such a theory and an as-applied takings claim governed by the "ad hoc, factual" standard of *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494–95 (1987). Whereas a *Penn Central* analysis "must be conducted with respect to specific property, and the particular estimate of economic impact and ultimate valuation relevant in the unique circumstances," a facial challenge presents "no concrete controversy concerning either application" of the statute "or its effect on specific [property]." *Keystone*, 480 U.S. at 495 (citation omitted); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (a facial takings claim "does not depend on the extent to which [plaintiffs] are deprived of the economic use of their particular . . . property"). Instead,

the test in a facial challenge, although more demanding, is also more "straightforward": plaintiffs must show that the law effects a categorical, or per se, taking because it "denies them" all or substantially all "economically viable use of their [property]." *Daniels*, 306 F.3d at 467; *see Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015 & 1016 n.6 (1992). Such claims "face an uphill battle." *Keystone*, 480 U.S. at 495; *see Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (facial takings claims are "difficult" to make).[10]

Here, the Unions do not, and plausibly could not, assert a facial takings claim. The Unions' complaint alleges only that, "[a]s applied," Act 1 is unconstitutional. A.16. Their arguments "focus[ ] on the economic deprivation" that they *themselves* allegedly will suffer—"the characteristic 'as applied' challenge." *Muscarello*, 610 F.3d at 422. They do not assert that Act 1 is unconstitutional "in all of its applications." *Daniels*, 306 F.3d at 467. Nor could they: Act 1 forbids persons from requiring, as a condition of employment, any individual to "pay *any*" money or "provide *anything* of value" to a labor organization. Wis. Stat. § 111.04(3)(a)3 (emphases added). The prohibition is not limited to the category of payments that the Unions regard as constitutionally required: fees to fund their collective-bargaining activities. It also forbids unions from collecting dues for "any" activities whatever, such as donating to political

[10] Although some cases have suggested that facial takings challenges may also proceed on the theory that the challenged law does not substantially advance legitimate state interests, that argument is no longer open to takings plaintiffs after *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 346 n.25 (2005). Likewise, there is no exhaustion exception for "private use" takings claims; they, too, are subject to *Williamson County*'s state-litigation requirement. *See Daniels*, 306 F.3d at 453 (collecting cases).

campaigns. So even if a court accepted the Unions' takings theory, Act 1's applications to forced payments for non-representational services would remain completely lawful.

Likewise, the Unions appear to have declined to raise a facial takings claim under *Lucas*, which would require them to show that Act 1 categorically denies their property of all economically viable use. *See Daniels*, 306 F.3d at 467. Act 1 does not "take" union property at all, *see infra* pp. 40–58, but even if it were to have a negative "economic impact" on the Unions' services under *Penn Central*, *but see infra* p. 44–54 & n. 12, the law certainly does not deny the Unions all economically viable use of their "services." The Unions could not, and do not, Pls. Opening Br. 43–50, claim otherwise.

3. The district court incorrectly concluded that the Unions' takings theory is ripe. It acknowledged that the Unions "have not sought any form of relief from Wisconsin State courts and, therefore, fail to satisfy" *Williamson County*. SA.19. It also recognized that, "to mount a facial attack in the takings context" and thereby avoid the state-litigation requirement, plaintiffs must allege that "mere enactment" of the statute violates the Takings Clause and that under "no set of circumstances" is the statute valid. SA.19–20 (citations omitted). Nevertheless, the district court purported to divine from "the substance of the Plaintiffs' allegations . . . a facial attack on Act 1." SA.20.

The district court's understanding of the "substance" of the Unions' theory rests on two basic errors. First, the court took the Unions to be contending that, under Act 1, "there are 'no set of circumstances' in which the Plaintiffs may obtain 'just

compensation' *for services that they are compelled to give*." SA.20 (emphasis added) (citation omitted). But, as explained *supra* pp. 36–38, that is simply not the Unions' theory here and could not be. A claim that a statute is unconstitutional in only some circumstances (here, when it potentially bars compensation "for services that [the Unions] are compelled to give," SA.20) is not a claim that it is invalid in all of its applications, *Daniels*, 306 F.3d at 467–69, such as when it bars compensation for activities that the Unions are *not* compelled to undertake (such as lobbying).

Next, the district court concluded that the Unions were making a facial claim under *Lucas* because, in its view, "the complaint sufficiently alleges that the Plaintiffs' property, namely their services, will be deprived of economic value if they are rendered for free." SA.21. Again, even if that were what Plaintiffs allege, that is hardly a claim that Act 1's "prohibition . . . bar[s] *all* economically viable use" of the Union's "services." *Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 431 (7th Cir. 2011) (Hamilton, J., concurring in part and dissenting in part) (emphasis added) (describing *Lucas*). Regardless of whether Act 1 will diminish unions' *revenue*, it does not "take" all of the services that unions perform. It is possible the district court thought the relevant "denominator" in the takings calculation is not the Unions' "services" generally but only the particular services that the law putatively takes: services performed to benefit objecting nonmembers. But such an "attempt to bring this case under the rule in *Lucas* by focusing exclusively on the property" allegedly taken would be "unavailing." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 303 (2002).

B. Even If The Takings Claim Were Ripe, The Unions Concede That It Is Barred By *Sweeney*

In *Sweeney*, this Court considered and rejected the argument that state right-to-work laws, if not preempted, commit unconstitutional takings. First, "it is federal law that provides a duty of fair representation"; right-to-work laws do "not 'take' property from the Union"—they "merely preclude[ ]" unions from forcing nonmembers to pay. 767 F.3d at 666. But a properly targeted takings claim would also fail since a union "is justly compensated" for any representational burden "by federal law's grant to the Union the right to bargain exclusively with the employer." *Id.* at 666. Put differently, the fair-representation duty is not a taking because unions freely accept it "in exchange for the powers granted to the Union as an exclusive representative," which comes with a valuable "set of . . . benefits." *Id.*

Sweeney forecloses the Unions' takings claim in this case. Although the State took the position in the district court that *Sweeney*'s takings analysis was merely "considered dicta," Dkt.21:5, the Unions conceded below that *Sweeney* completely forecloses their takings theory, and the district court accepted that concession. SA.15. Now, on appeal, and notwithstanding the State's position below, the Unions unequivocally renew their concession. They write that, unless this Court were to overrule *Sweeney*, "a three-judge panel of this Court is bound to follow *Sweeney* and reject the Unions' appeal" across the board. Pls. Opening Br. 4. In light of this intentional and knowing relinquishment of any argument that *Sweeney*'s takings reasoning is not binding in later Seventh Circuit appeals, this Court should reject the Unions' takings theory at the outset. *See, e.g.*, *United States v. Lawson*, 301 Fed. App'x 550, 551 (7th

Cir. 2008) (summarily affirming in light of appellant's "conce[ssion] that circuit precedent forecloses his arguments").

C. *Sweeney* Is Correct That State Right-To-Work Laws Are Not Unconstitutional Takings

Even if the Unions' concession were ignored, their takings claim would fail on the merits for several reasons.

1. The Unions' Takings Theory Targets The Wrong Law

a. A party alleging a taking "bears a substantial burden." *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 850 (7th Cir. 2011) (citation omitted). While the more conventional sort of taking arises when the State physically occupies private land, the government also "takes" when it imposes a regulation of property that "goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Unions purport to have suffered this second kind of violation: a "regulatory taking" of their "services," because Act 1 (the only law that the Unions challenge) allegedly makes them perform those services while also forbidding them from forcing nonmembers to fund them.

Yet Act 1 imposes no affirmative duty to provide services and so could not possibly impose a taking. As relevant here, the Act simply provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . pay any dues, fees, or assessments or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization" or "any 3rd party." Wis. Stat. § 111.04(3)(a)3, 4. The same is true of Indiana's right-to-work law, which makes no "*state* demand for services; the law merely prohibits employers from requiring union membership or the payment of monies as a condition of employment." *Zoeller v.*

Sweeney, 19 N.E.3d 749, 752. (Ind. 2014) (upholding Indiana's right-to-work law against a takings challenge). As this Court explained, since the "duty of fair representation" has a different legal source, a right-to-work statute does not itself "'take' property from the [u]nion[s]." *Sweeney*, 767 F.3d at 666.

The Unions' position depends on a sleight of hand; their takings theory turns out not to implicate Wisconsin's right-to-work law at all. Pre–Act 1 law already imposes upon the exclusive-bargaining representative the duty to provide services to all members in a nondiscriminatory and nonarbitrary manner. The Unions, "[a]s masters of the complaint, however, [ ] chose not" to challenge this pre–Act 1 law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987). The Unions did not ask the district court to enjoin or declare invalid the duty of fair representation, even though, under the Unions' theory, it is the source of the "taking" of their services. This is hardly surprising: The duty of fair representation is "inseparable from the power of representation," *Steele*, 323 U.S. at 204, a power that labor unions have "fought long and hard" to obtain and no doubt wish to keep, Charles W. Baird, *Toward Equality and Justice in Labor Markets*, 20 J. Soc. Pol. & Econ. Stud. 163, 179 (1995). So the Unions treat the duty as settled and assert that, because the duty is a "taking" of their services, unwilling private parties must "compensate" them (or at least the Unions must have the *option* of negotiating for that arrangement, *see infra* pp. 43–44).

This is not how takings doctrine works. If the Unions were correct that the pre–Act 1 duty to provide fair treatment to all employees is a "taking," then the question would be whether Wisconsin, after Act 1, has justly compensated the Unions for

that taking. *See Williamson Cnty.*, 473 U.S. at 194–95. If the Unions received just compensation from the State, then any takings claim would vanish. If the State has not compensated them, then the duty of fair representation itself must be held unconstitutional unless the State, *not unwilling private citizens*, provides what the court determines to be just compensation. *Id*. The contention that the Unions are entitled to money belonging to private parties—funds to which the Supreme Court has said they "have no constitutional entitlement," *Davenport*, 551 U.S. at 185—in order to pay for their allegedly taken "services" is unsupportable.

b. By the same token, striking down Act 1 would not redress the Unions' claimed harms, which proves that the government is not committing a "taking" in the first place. *See Harms v. City of Sibley*, 702 N.W.2d 91, 100 (Iowa 2005) (government responsible only for deprivations of property that it "direct[ly]" causes, not harms proximately caused by third parties); *see also Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005) (recognizing the role of "attenuat[ion]" in takings). Labor law requires only that unions and employers bargain in good faith over the terms and conditions of employment. 29 U.S.C. §§ 158(a)(5), (b)(3), (d). It "does not compel" the two sides to reach certain "agreements" on particular issues. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43–45 (1937); *see NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349 (1958). So, while unions before Act 1 were free to bargain for forced-dues provisions in collective-bargaining agreements, employers were equally free to refuse to agree to them. *E.g.*, *Beck*, 487 U.S. at 745. If as a result of those negotiations no forced-dues clause made it into a final contract, the union

would have no legal means of extracting from nonmembers the money allegedly necessary to do its job—money that, the theory goes, the union *must* be paid in every case.

The Unions' takings theory proves too much. If the government-imposed duty of fair representation "takes" the Unions' money and services, then presumably the government would be responsible for defraying the expenses of carrying out the duty on a dollar-for-dollar basis. But it is not the Unions' purpose here to force the government, or even nonmember employees, to cover their losses. Instead, they ask only for the right to *seek the employer's permission* to collect the money that they supposedly require—even while recognizing that, sometimes, the employer will say "no," just as Act 1 does now. Yet if the employer who says "no" is not the cause of a taking, then neither is Act 1.

2. The State Does Not "Take" Anything, Both Because The Unions Voluntarily Assumed The Fair-Representation Duty To Obtain A Special Privilege And Because The Duty Has Not Rendered The Unions' Services "Essentially Worthless"

Circuit precedent identifies two categories of regulatory-takings claims: (1) "deprivation[s] of all beneficial economic use" of a property, under the *Lucas* test, and (2) deprivations that go "too far" under the ad hoc, multifactor standard in *Penn Central*, which considers "the character of the governmental action," the severity of the "economic impact," and "the extent to which the regulation has interfered" with the property owner's "distinct investment-backed expectations," 438 U.S. at 124. *See Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1073–74 (7th Cir. 2013). The Unions do not say whether they understand their claim to fall in the first category, the

second, or both. In truth, the posture of this case leaves no choice. As explained *supra* pp. 36–37, because *Penn Central* challenges are inherently as-applied claims and therefore unripe if not first litigated in state court, *see Keystone*, 480 U.S. at 494–95, it follows that, if this Court can reach the merits of the Unions' takings challenge at all, then the Unions' claim must stand or fall under *Lucas*'s facial test.[11] Hence the Unions must show that the mere enactment of the government's regulation of their supposed services has driven the dollar value of those services to "near zero," *Callahan*, 813 F.3d at 660, "render[ing] the property essentially worthless," *Muscarello*, 702 F.3d at 913. For at least two reasons, the Unions do not come close to satisfying this standard.[12]

a. The Supreme Court has held that when an actor accepts a "rational[ ]" and "legitimate" condition on a special government-conferred benefit or privilege in exchange "for the economic advantages" of the benefit, that act alone "disposes of the taking question": any regulatory-takings claim challenging the condition necessarily fails. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 1007 (1984). In *Monsanto*, for example, the Court rejected a takings challenge to a law allowing the government to publicly disclose trade secrets in exchange for Monsanto's obtaining a license to sell pesticides. The regulations were not a taking because the sale of pesticides had "long

[11] The Unions also would need to clear the "no set of circumstances" standard for facial challenges, which they cannot, *see supra* pp. 36–38.

[12] For largely the same reasons, a takings theory like the one alleged here would fail under *Penn Central*, 438 U.S. 104. The likely economic impact is far from severe. *See infra* pp. 44–54. Neither Act 1 nor the fair-representation duty interferes with the Unions' reasonable investment-backed expectations in the property. *See infra* pp. 44–47. And the character of the government action is a classic adjustment of "the benefits and burdens of economic life to promote the common good." 438 U.S. at 124.

been the source of public concern and the subject of government regulation." *Id.* at 1007. Likewise, the Supreme Court has held that pension plans do not suffer a taking from unfavorable changes in liability rules, since plans have "long been subject to federal regulation" and so have no "reasonable basis to expect" those rules to remain static. *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645–46 (1993).

This logic applies to other heavily regulated professions and services as well. Lawyers, for instance, are sometimes required to assume the obligation to provide free or reduced-fee legal services to the indigent as a condition of membership in the profession. Yet "[t]he vast majority of federal and state courts" have held this "not [to be] an unconstitutional taking of property without just compensation." *Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982) (collecting cases).

Labor organizations, too, have "long been the source of public concern and the subject of government regulation." *Monsanto*, 467 U.S. at 1007. Since at least the 1930s, Wisconsin and the federal government have exercised their "sovereign prerogative to regulate both labor and management in the promotion of industrial peace." *United Auto., Aircraft & Agric. Implement Workers of Am., UAW, AFL-CIO, Local 283 v. Scofield*, 183 N.W.2d 103, 106 (1971). The Unions entered and remain in this government-dominated scheme in order to obtain a valuable government-conferred benefit: the power of exclusive representation, enabling them to shut out minority-controlled unions and to recruit and retain members. *Sweeney*, 767 F.3d at 665–66 (concluding that this privilege makes up for any burden). This power to bind persons

without their consent—and even over their objection—does not arise by common law, contract, or some other private arrangement. It is a sovereign power. *Steele*, 323 U.S. at 202. Because the government may refrain from conferring the privilege in the first place, it may also make it available on reasonable conditions. By freely taking on the power, the Unions also accepted both the duty not to discriminate against nonmembers and the distinct possibility that Wisconsin and other States would exercise their federally recognized right to ban forced-dues provisions, as the majority of States have.

The Unions suggest that *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), which distinguished *Monsanto*, is a better fit here. Pls. Opening Br. 48–49. *Horne* held that when the government insists that farmers "turn over 47 percent of their raisin crop[ ] . . . for the 'benefit' of being allowed to sell the remaining 53 percent," the exchange is not "voluntary" in the way that the arrangement in *Monsanto* was. 135 S. Ct. at 2430. But the Unions omit the basis for the Court's distinction, which is that *Monsanto*'s rule governs conditions on special, government-conferred "benefits" and not "basic and familiar uses of property," such as growing grapes. *Id.* It is hard to imagine a use of property more *un*basic and *un*familiar than the exclusive representative's power to order the rights and duties of persons without their consent and even over their objections—a "power not unlike that of a legislature," that has been extended to unions only as a matter of legislative grace. *Steele*, 323 U.S. at 198.

b. *Monsanto* aside, neither Act 1 nor the fair-representation duty (nor the combination) will make labor organizations' services in Wisconsin "essentially worthless"

under *Lucas*. *Muscarello*, 702 F.3d at 913. This Court observed three years ago that "unions continue to thrive" under right-to-work laws. *Sweeney*, 767 F.3d at 664. That is still true. Even the Supreme Court has observed recently that forced-dues clauses appear to be entirely unnecessary to union well being. After all, "[a] host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions." *Harris*, 134 S. Ct. at 2641.

The data back up *Sweeney*'s and *Harris*'s insights, showing that right-to-work laws have had no death-spiral-like effect on union membership or even union dues. One analysis draws on the Bureau of Labor Statistics' Current Population Survey to conclude that "the average percentage of union-represented private-sector employees who were full union members" between 2000 and 2014 stayed "relatively flat": 93 percent in forced-dues states, 94 percent in states that enacted right-to-work in that period, and 84 percent in states that have had right-to-work since 2000. *Br. of* Amicus Curiae *Mackinac Ctr. for Pub. Policy in Supp. of Pets.*, *Friedrichs v. Cal. Teachers Ass'n*, 2015 WL 5461532, *13 (U.S. 2015). Likewise, "the number of private-sector union members and private-sector workers covered by a union contract in right-to-work states from 2000 to 2014 . . . ebbed and flowed a little during the period, but [ ] overall, the figures remained steady." *Id.* at *13–*14; *see* Heather M. Whitney, Friedrichs*: An Unexpected Tool for Labor*, 10 N.Y.U. J.L. & Liberty 191, 205 n.41 (2016); *see also* Frank Manzo IV, et al., *The Economic Effects of Adopting a Right-to-Work Law: Implications for Illinois*, University of Illinois at Urbana Champaign Policy

Brief, 5 (Oct. 7, 2013), *available at* https://goo.gl/RHCPxW (criticizing right to work, but concluding that it is statistically linked to only "a 1.5 percentage point decrease in the probability of being a union member"); Jason Russell, *How Right to Work Helps Unions and Economic Growth*, Manhattan Inst. (Aug. 27, 2014), *available at* http://goo.gl/PNz110. Citing these figures, some labor scholars have openly contradicted union prophecies of financial ruin. For example, one expert admits that in states with right to work, "the difference between workers covered by a collective agreement and union membership is not terribly large," and "[e]ven unionized workplaces in right-to-work states have impressive *firm-level* union density." Matthew Dimick, *Productive Unionism*, 4 UC Irvine L. Rev. 679, 705 (2014). A ban on forced dues, he concludes, does not "dramatically change the structure of unions and collective bargaining." *Id.*; *see also* Whitney, *supra*, at 204–05 ("we know it is not the case" that right-to-work laws "result in the financial ruin" of unions).

The data on union dues in right-to-work states tell the same story. One might have expected that, if employees in right-to-work states were fleeing unions in droves in order to become "free riders," the unions would respond by increasing fees on remaining members to make up for the drop off in revenue and fully cover the costs of representation. But, in fact, union dues are on average 10 percent *lower* in right-to-work states than in forced-dues states. *See* James Sherk, *Unions Charge Higher Dues and Pay Their Officers Larger Salaries in Non-Right-to-Work States*, Heritage Foundation Backgrounder No. 2987 (Jan. 26, 2015), *available at* http://goo.gl/j2hQFx. The best explanation is probably that, while firms "institutionally tend to raise prices

when their customers have no other options," unions under right-to-work laws "must earn their members' voluntary support," by "reduc[ing] costs and improv[ing] service or risk losing members," *id.*, which in turn encourages employees to stick with those unions.

Several high-ranking union officials agree that right-to-work laws have made unions stronger. According to a leader of the United Autoworkers, right to work "*helps*" unions precisely by making unionism voluntary. Lydia DePillis, *Why* Harris v. Quinn *Isn't as Bad for Workers as It Sounds*, Wash. Post (July 1, 2014), *available at* https://goo.gl/T0mSph; *see also* Kris LaGrange, *Right to Work Laws are Just What Unions Need?*, Daily Kos (Mar. 12, 2015) (arguing that "unions quickly regain ground" after right-to-work laws are enacted, and those laws "may be just what labor needs"), *available at* http://goo.gl/tURgWU. Similarly, the former president of the American Federation of State, County, and Municipal Employees admits that its union "took things for granted" under the forced-dues system: "We stopped communicating with people, because we didn't feel like we needed to. That was the wrong approach." Lydia DePillis, *The Supreme Court's Threat to Gut Unions Is Giving the Labor Movement New Life*, Wash. Post (July 1, 2015), *available at* http://goo.gl/oIhfLC.

The Unions in this case respond by listing a number of their services that allegedly benefit both members and nonmembers and that Act 1 allegedly will make harder to provide. Pls. Opening Br. 6–9. But the measure of a taking is "what [the government] actually takes rather than all that the owner has lost." *Air Pegasus*, 424 F.3d at 1215. So even under the Unions' general theory, the government can be said

to "take" only those services that (1) the duty of fair representation "require[s]" unions to perform to benefit nonmembers, but that (2) unions "would not undertake if [they] did not have a legal obligation to do so." *Harris*, 134 S. Ct. at 2637 n.18. Accordingly, for every cost that a union claims to have incurred that is allegedly part of the "taking," a court must scrutinize not only (1) whether the duty of fair representation of nonmembers required the union to incur that expense, but also (2) whether the union would have incurred the expense anyway, even if it had not been under a duty to fairly represent nonmembers.

The Unions make no effort to fit their litany of expenses into this framework. It is not enough, for example, simply to allege that collective bargaining requires a "significant expenditure" of union resources. Pls. Opening Br. 7. An exclusive representative does indeed have a duty to negotiate over "wages, hours, and other terms and conditions of employment" on the unit's behalf, *First Nat. Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981), as well as to administer any collective-bargaining agreement, *Beck*, 487 U.S. at 739. And the union's performance of that duty could have the effect of benefiting nonmembers. But then again, it just as well could *harm* nonmembers: a union might push for a benefits package that favors elderly workers over younger employees who do not pay dues, or advocate for seniority-based compensation that disadvantages those nonmembers who would be paid more under a meritocratic system. Those workers, whose only means of protesting the union's bargaining positions is leaving the unit entirely by quitting, are hardly "free riders"—they are "*forced* riders." *See Public Goods and Market Failures: A Critical Examination* 103–

04 (Tyler Cowen ed., 1992) (explaining the forced-rider phenomenon). Even with the issue of "free" or "forced" riding set to one side, a union owes its collective-bargaining duty to its *members* as well. So even without an obligation to nonmembers, unions still would need to incur the allegedly significant expense of negotiating wage increases and the like for the unit. To that unchallenged burden, the duty of fair representation of *nonmembers* adds only this: the union must not engage in conduct toward nonmembers that is "arbitrary" (meaning "irrational"), "discriminatory," or "in bad faith." *Marquez*, 525 U.S. at 44, 46. The union, in other words, must not affirmatively go out of its way to harm nonmembers. But it need not go out of its way to benefit them either.[13]

The Unions' vague allegation that they expend substantial resources on handling grievances is similarly unhelpful. *See* Pls. Opening Br. 8. For one thing, although the NLRB has held that "grievance representation is due [all] employees as a matter of right," *Machinists, Local 697*, 223 NLRB No. 119, 835 (NLRB 1976), it is a collective-bargaining agreement—not labor law—that tells a union how much of the cost of representation it must cover. *See, e.g.*, *Mahnke v. Wis. Emp't Relations Comm'n*, 225 N.W.2d 617, 623 n.2 (1975). Even a union obligated to process grievances need not raise a nonmember's complaint to begin with when, in the union's judgment, doing so would not serve the interest of the bargaining unit. *See, e.g.*, *Alexander v. Gardner-Denver*, 415 U.S. at 58 n.19. For instance, a union could pass on

[13] For example, the fair-representation duty does not prevent unions from favoring union leaders in bargaining. *See, e.g.*, *Washington ex rel. Graham v. Northshore Sch. Dist. No. 417*, 662 P.2d 38, 45–46 (Wash. 1983).

a grievance simply out of concern for its bottom line, "maintenance" of its "bargaining power," or "the necessity" of maintaining good relations with management. *Baker v. Amsted Indus., Inc.*, 656 F.2d 1245, 1250 (7th Cir. 1981). Although the union's refusal to pursue a claim must not be "intentional, invidious and directed at that particular employee," *Superczynski v. P.T.O. Servs., Inc.*, 706 F.2d 200, 203 (7th Cir. 1983), employees cannot otherwise "force unions to process their claims," *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 51 (1979)—and that arrangement plainly privileges the union over the employee, which the unions no doubt prefer. *See* Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry Into A "Unique" American Principle*, 20 Comp. Lab. L. & Pol'y J. 47, 63 (1998).

Finally, the Unions here compare themselves to public utilities, which suffer a taking when a legislature sets their rates so low as to "confiscat[e]" the utilities' "property serving the public." *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). The analogy is inapt. "[T]he relation between the [utility] and its customers is not that of . . . agent and principal." *Wis. Tel. Co. v. Pub. Serv. Comm'n*, 287 N.W. 167, 171 (Wis. 1939). But the relation between a union and an employee is: "By its selection as bargaining representative, [the union] has become the agent of all the employees," *Wallace Corp.*, 323 U.S. at 255—a status with tremendous inherent value. To the extent a nonmember-employee is entitled to any sort of affirmative "service" from the union, he is owed it by *law*, not by *payment*. *Hughes Tool Co.*, 104 NLRB No. 33, 329 (NLRB 1953). Hence unions "have no constitutional entitlement to the fees of nonmember-employees," *Davenport*, 551 U.S. at 185 (2007)—they are not "customers"

in the first place. Even in a non-right-to-work state, unions are not *entitled* to employee fees; they have the right only to leverage their tremendous exclusive-representative power to persuade an employer to include a forced-dues clause in a collective-bargaining agreement. By contrast, the beneficiaries of a utility company are customers, and so they must pay. *Wis. Tel. Co.*, 287 N.W. at 171. Without their payments, the company would not stay afloat. Unlike a union, a utility cannot wield legislative-like power over its users' rights or ably represent their interests in a negotiation with a third party and thereby win their financial backing. Instead, utilities obtain "a standard rate of return on the actual amount of money reasonably invested" by relying exclusively on customers' payments, which, if too low, will "destroy the value of [the utilities'] property for all the purposes for which it was acquired." *Duquesne*, 488 U.S. at 307, 309 (citation omitted).

3. Neither Act 1 Nor The Fair-Representation Duty Takes "Property" Within The Meaning Of The Takings Clause

The Takings Clause protects "private property." In takings law, that is a category with definite boundaries. As the Supreme Court has explained, because legislatures "routinely create[ ] burdens for some that directly benefit others," and because doing so is unquestionably "prop[er]," "it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223 (1986).

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), five Justices of the Supreme Court invoked this principle to reject a takings claim. *See id.* at 539–45 (opin-

ion of Kennedy, J.); *id.* at 553–56 (opinion of Breyer, J.) ("agree[ing] with Justice Kennedy's" takings analysis).[14] That case involved a challenge to a law requiring former coal companies to contribute to a fund for the health-care expenses of retired miners. *Id.* at 514–15 (opinion of O'Connor, J.). Although the law "impose[d] a staggering financial burden" on those companies, it did not "operate upon or alter an identified property interest," such as a right in land, intellectual property, "or even a bank account or accrued interest." *Id.* at 540 (opinion of Kennedy, J.). Instead, "[t]he law simply impose[d] an obligation to perform an act," and was "indifferent as to how the regulated entity elect[ed] to comply or the property it use[d] to do so." *Id.* Yet a statute burdening "not an interest in physical or intellectual property," but instead creating "an ordinary liability to pay money, and *not to the Government*, but to *third parties*," could not possibly amount to a taking. *Id.* at 554 (opinion of Breyer, J.) (emphasis added); *compare id.* at 544 (opinion of Kennedy, J.). Unable to meet this "requirement" of establishing that the law deprived the company of "*specific* and *identified*

[14] The *Apfel* Court was splintered. Five Justices (Justice Kennedy, Justice Breyer, and those joining Justice Breyer's opinion: Justices Stevens, Souter, and Ginsburg) rejected the takings challenge for failing to show a deprivation of "property," while a different five-Justice coalition (Justice O'Connor's plurality plus Justice Kennedy) agreed only that the Act was unconstitutional. Justice O'Connor's opinion asserted that it was an as-applied taking, 524 U.S. at 504, while Justice Kennedy thought it a violation of due process, *id.* at 539. Importantly for this case, the Breyer–Kennedy takings analysis constitutes binding federal precedent, as many courts and several of the Justices have concluded. *See Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1339 & n.10 (Fed. Cir. 2001) (en banc) (collecting cases); *compare Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2605 (2013) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting) (agreeing that the Breyer–Kennedy takings analysis in *Apfel* is a binding holding), *with id.* at 2599–600 (opinion of the Court) (acknowledging that five Justices in *Apfel* concluded that the "the Takings Clause does not apply to government-imposed financial obligations that do not operate upon or alter an identified property interest") (citation omitted)).

properties or property rights," its takings challenge failed. *Id.* at 541–42 (opinion of Kennedy, J.); *id.* at 554–56 (opinion of Breyer, J.).

Likewise here, the government imposes at most an "obligation to perform an act," *id.* at 540 (opinion of Kennedy, J.): the duty to fairly represent all employees. Even if carrying out that obligation might sometimes cause a union to spend time and money that it otherwise would not, the law is "indifferent as to how" unions "elect[ ] to comply" with the duty "or the property [they] use[ ] to do so." *Id.* The law does not care, for example, whether the Unions pay "33 business agents, who drive Union-supplied cars," to visit job sites and discuss employee concerns, as does one of Plaintiffs here. Pls. Opening Br. 7. Nor, for example, is the law concerned with whether unions fund their grievance-adjustment practice with member dues, investment income, or outside donations. The duty of fair representation operates upon "no specific fund of money." *Apfel*, 524 U.S. at 555 (opinion of Breyer, J.). It creates "only a general liability; and that liability runs, not to the Government, but to third parties," *id.*—the members of the unit not belonging to the union, *Vaca*, 386 U.S. at 177 (breach of fair-representation duty is a "cause of action" against union). Accordingly, under *Apfel*, the duty does not take "private property." *See* Whitney, *supra*, at 196–98 (agreeing).

This point (among others) distinguishes this case from *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the two cases that the dissent in *Sweeney* cited for its takings theory. *See* 767 F.3d at 674 (Wood, C.J., dissenting). In those cases, which involved

takings of interest earned on client money while held in discrete attorney trust accounts, "the monetary interest at issue [ ] arose out of the operation of a specific, separately identifiable fund of money," whereas here, "there is no specific fund of money." *Apfel*, 524 U.S. at 555 (opinion of Breyer, J.). There is only a general duty to "provide services"—if that—and the law is "agnostic about which money (if any) ha[s] to be spent to provide them." Whitney, *supra*, at 195–96.

4. Neither Act 1 Nor The Fair-Representation Duty Takes For "Private Use"

The Unions suggest that the State not only takes their "services" but that it does so for a forbidden "private use." Pls. Opening Br. 43–54. They do not develop an argument in support of this point, and, in any event, such a takings theory would be unripe. *See supra* p. 37 n. 10. Even if ripe, it would be meritless.

"A purely private taking c[an]not withstand the scrutiny" of the Takings Clause's public-use requirement "and [is] thus void." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984). But establishing a "private use" is extremely difficult. *Gamble*, 5 F.3d at 287 (finding "no case in the last half century where a taking was squarely held to be for a private use"). That is because "all the state ha[s] to show" to satisfy the public-use requirement is that the taking has a "rational relation to a *conceivable* public purpose." *Id.*

Both the fair-representation duty and Act 1 are rational. The duty is reasonably related to the exclusive-representation power, which serves the State's interest in strengthening collective bargaining. *See, e.g.*, *Steele*, 323 U.S. at 202. And right-to-

work laws such as Act 1 serve many important governmental purposes, such as fostering economic growth and promoting employees' associational interest in withholding financial support from organizations to which they object. Thus, neither law takes for private use.

CONCLUSION

The judgment of the district court should be either affirmed across the board or affirmed in part and vacated in part with instructions to dismiss without prejudice the Unions' takings claim as unripe.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 16,486 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: March 13, 2017

/s/ Ryan J. Walsh
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2017, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: March 13, 2017

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