STATE OF WISCONSIN | CIRCUIT COURT BRANCH 14 | DANE COUNTY

MACHINISTS LOCAL LODGE 1061, et al.,

Plaintiffs,

v.

Case No. 15-CV-0628

STATE OF WISCONSIN, et al.,

Defendants.

DEFENDANTS' MOTION TO STAY THE COURT'S JUDGMENT AND BRIEF IN SUPPORT

MOTION

Defendants hereby move to stay this Court's judgment entered April 15, 2016, during the pendency of any appeal or petition for review, as permitted by Wis. Stat. §§ 808.07 and 808.075(1). Defendants rely on the following brief in support of this motion.

BRIEF

This Court's decision permanently enjoining portions of Wisconsin's right-to-work law will have significant, immediate impacts on the State and its citizens. This injunction will immediately undermine the policies that the People, through their elected representations, have determined are in the public interest, while generating substantial uncertainty. And the injunction will have only scant effects upon the plaintiffs here, especially in the short term. Due respect for the presumption of constitutionality and the public interest requires that the judgment

should be stayed until the appellate courts can finally decide whether Wisconsin, alone among its sister States, is prohibited from enacting a right-to-work law.

I. Standard

Wisconsin law permits this Court to stay the enforcement of its judgment, or make any other order appropriate to preserve the existing state of affairs, pending appeal, regardless of whether a notice of appeal has been filed yet. Wis. Stat. §§ 808.07(2), 808.075(1). Before granting such relief, a court must consider whether a movant has made (1) a strong showing that it is likely to succeed on the merits of its appeal; (2) a showing that, unless a stay is granted, the moving party will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that the stay will do no harm to the public interest. *Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986). The movant need not satisfy "each of the four" factors as if they were "tests." *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶ 18 n.14, 237 Wis. 2d 498, 614 N.W.2d 565. Instead, the court must "balance the relative strength of each." *Id.*

II. Argument

A. Defendants Have A Significant Likelihood of Success On Appeal

Defendants prevail on this factor for several reasons. The first is the simplest and most decisive: under *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995), the State makes a strong showing of success on appeal *simply by pointing out* that the invalidated law is a "regularly enacted" state

statute. *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995) (concluding that, despite the circuit court's determination that Wis. Stat. ch. 980 was unconstitutional, the State had satisfied the first stay factor solely because "regularly enacted statutes are presumed to be constitutional"); *see also State v. Johnson*, 2001 WI 52, ¶ 10, 243 Wis. 2d 365, 627 N.W.2d 455 (properly enacted statutes are presumed constitutional). Since 2015 Wisconsin Act 1 (the right-to-work law) was regularly enacted, that is sufficient—standing alone—for Defendants to prevail on the likelihood-of-success factor.

In any event, Defendants have other strong arguments on the merits. On appeal, the court will review the entirety of this tribunal's decision *de novo*. *See Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 13, 358 Wis. 2d 1, 25, 851 N.W.2d 337, 349, *reconsideration denied*, 2015 WI 1, ¶ 13, 360 Wis. 2d 178, 857 N.W.2d 620. And it will "indulge every presumption to sustain the law. Any doubt that exists regarding the constitutionality of the statute must be resolved in favor of its constitutionality." *Id.* Under that standard, Defendants are likely to succeed. The only other courts to have considered Plaintiffs' theory for challenging a right-to-work law have soundly rejected the theory. *See Sweeney v. Pence*, 767 F.3d 654, 665-66 (7th Cir. 2014); *Zoeller v. Sweeney*, 19 N.E.3d 749 (Ind. 2014).

As those decisions show, and as Defendants' briefing explained, there are many reasons why an appellate court is likely to hold that Act 1 does not cause an uncompensated taking. To review just a few: Unions could simply be voluntary organizations and decline the benefits and burdens of exclusive representation as "labor organizations" as defined by Act 1. But even if unions want to retain the

benefit of exclusive bargaining authority, and must as a result expend labor on behalf of nonmembers, no statute or case recognizes a legal property interest in Plaintiffs' "services." In any event, the State has not "taken" those services: the economic impact on Plaintiffs have been minimal, the law has not interfered with any of Plaintiffs' distinct investment-backed expectations,[1] and the effect of the act is not a physical invasion but rather a public program that adjusts the benefits and burdens of economic life for the common good. What's more, Plaintiffs pursued the wrong remedies (injunctive and declaratory relief) from the wrong defendants (the State of Wisconsin, Governor Scott Walker, and Attorney General Brad Schimel). Defendants' Reply in Support of Motion to Dismiss 6-8.

B. The State Will Suffer Irreparable Harm In The Absence Of A Stay

Defendants can also show irreparable harm. "[A]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, Circuit Justice); *see also Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (same). For just this reason, judges routinely deny applications for preliminary injunctions blocking state laws, just as

[1] Indeed, any collective bargaining agreements in effect as of the effective date of Act 1 were "grandfathered in" and were not required to conform to Act 1. *See* 2015 Wisconsin Act 1, § 13(1). Also, unions had notice of the Employment Peace Act, as amended by Act 1 *prior to voluntarily* entering into any new collective bargaining agreements. Thus, their distinct investment-backed expectations as to how they would be *required* to use their services on non-paying employees in the bargaining unit was not changed by Act 1.

this Court did in the present case. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, Circuit Justice) (citation omitted) (refusing to enjoin enforcement of a presumptively constitutional statute even where the Supreme Court would later declare the act unconstitutional). In addition, as described below, the public interests served by the law are substantial.

C. No Substantial Harm Will Come to Plaintiffs if a Stay Is Issued

If the Court issues a stay—preserving the year-plus status quo—any harm that would come to Plaintiffs pending an unsuccessful appeal would be slight. Plaintiffs' own summary judgment affidavits show that their inability to compel payments from objecting non-members poses no serious, immediate threat. (Affidavit of Patrick T. O'Connor, June 10, 2015, ¶ 4 (in support of Plaintiffs' Motion for Summary Judgment); Supplemental Affidavit of Ross M. Winklbauer Sr., June 7, 2015, ¶¶ 6-7 (in support of Plaintiffs' Motion for Summary Judgment).) And the Court itself has acknowledged that any loss in Plaintiffs' dues and fair-share fee revenue since the enactment of Act 1 "could be characterized . . . as minor." (April 8, 2016 Decision and Order at 10.) Moreover, the precise harm alleged by Plaintiffs is not simply the inability to collect payment from nonmembers, but the incurrence of expenses in representing those nonmembers. Plaintiffs have not shown that it will be representing nonmembers at a cost during this short appeal that could cause serious financial harm.

In any case, as this Court recognizes, Act 1 does not *require* employees to stop making dues and fair-share payments. (April 8, 2016 Decision and Order at 6.) On the contrary, Act 1 gives employees in a bargaining unit a choice: they may join the

union and pay dues, or not join the union and either pay fair-share fees or make no payment at all. Act 1 does not make that decision for employees. Nor does it force Plaintiffs to rely so heavily on subsidies from non-members—the collection of which may not even be necessary to the unions' success. *See Harris v. Quinn*, 134 S. Ct. 2618, 2641 (2014) ("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."); *see also id.* 2640 (observing that federal-employee unions are forbidden from collecting agency fees).

Last but not least, any short-term harm to Plaintiffs would only be monetary. But monetary harm is not irreparable. *Pure Milk Products Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979) (an irreparable harm is one "not adequately compensable in damages"). In short, any minor, monetary harm to Plaintiffs is simply not "substantial."

D. A Stay Will Protect The Public Interest.

A stay would further the public interest for at least two independently sufficient reasons.

First, and most fundamentally, the public *benefits* from Act 1 being in force because it represents the will of the People, through their elected representatives. Wisconsin's right-to-work law is a valid and beneficial policy choice; it values the freedom of workers to choose whether to join a union over the compelled-fees structure that has dominated private and public (until 2011 Wisconsin Act 10) unions for decades. And since over half of the States have made such a policy

choice, that fact alone demonstrates that right-to-work laws benefit the public interest.

Second, a stay of this Court's judgment would further the public interest by preserving the status quo. The Employment Peace Act, as amended by Act 1, has been the governing law of private-sector collective bargaining since March 2015. During that time, Plaintiffs have executed collective bargaining agreements with provisions that conform to Act 1. (Affidavit of Gary Dworak, June 10, 2015, ¶ 4, Ex. C (in support of Plaintiffs' Motion for Summary Judgment); Affidavit of Patrick T. O'Connor, June 10, 2015, ¶ 3, Ex. A (in support of Plaintiffs' Motion for Summary Judgment); Supplemental Affidavit of Ross M. Winklbauer Sr., June 7, 2015, ¶¶ 1-2, 14-15 (in support of Plaintiffs' Motion for Summary Judgment).) And any collective-bargaining agreements executed before Act 1 that are still in place are not affected by Act 1. Moreover, if a stay is not entered, then some Wisconsin employees represented by Plaintiffs may be required to pay fair-share fees during the pendency of this appeal, which would certainly upset the status quo for those employees and their families that rely on a weekly paycheck. So until an appellate court finally determines a portion of Act 1's constitutionality, the public interest favors preservation of the status quo over uncertainty. *See City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 217, 466 N.W.2d 861, 864 (1991) ("[Q]uestions of constitutionality . . . cannot finally be laid to rest until decided by final appellate adjudication . . . either by the court of appeals by published opinion or by determination by the Wisconsin Supreme Court."); *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993) ("[A] circuit court decision is

neither precedent nor authority," although it may be "highly persuasive and helpful for [its] reasoning.").

CONCLUSION

Defendants respectfully ask this Court to stay its judgment.

Dated this 18th day of April 2016.

Respectfully submitted,

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