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No. 4-22-0470

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

SARAH SACHEN, IFEOMA NKEMDI, JOSEPH OCOL, and ALBERTO MOLINA, Petitioners-Appellants, v. ILLINOIS STATE BOARD OF ELECTIONS; IAN LINNABARY, *in his official capacity as Chair of the Illinois State Board of Elections*; CASANDRA B. WATSON, WILLIAM J. CADIGAN, LAURA K. DONAHUE, TONYA L. GENOVESE, CATHERINE S. MCCRORY, WILLIAM M. MCGUFFAGE, *AND* RICK S. TERVEN, SR., *in their official capacities as members of the Illinois State Board of Elections*; JESSE WHITE, *in his official capacity as Illinois Secretary of State*; SUSANA MENDOZA, *in her official capacity as Illinois State Comptroller*, Respondents-Appellees.	Appeal from the Circuit Court, Seventh Judicial Circuit, Sangamon County, Illinois No. 22-CH-34 The Honorable Raylene DeWitte Grischow, Judge Presiding **Oral Argument Requested**

APPELLANTS' REPLY BRIEF

Jacob Huebert (#6 305 339)
Jeffrey Schwab (#6 290 710)
440 N. Wells Street, Suite 200
Chicago, Illinois 60 654
Phone: (312) 637-2280
jhuebert@ libertyjusticecenter.org
jschwab@libertyjusticecenter.org

Mailee Smith (#6 280 167)
Illinois Policy Institute
802 S. 2nd Street
Springfield, Illinois 62 704
Phone: (217) 528-8000

Attorneys for Petitioners-Appellants

I. Taxpayers may seek an injunction to prevent Respondents from using public funds to place an unconstitutional proposed amendment on the ballot because such misuse would injure them.

Contrary to Respondents' argument, allowing Petitioners' claim to proceed would not require the courts to render an advisory opinion. *See* Brief of Respondents-Appellees Jesse White & Susana Mendoza ("Resp. Br.") 14.

An opinion would be "advisory" where "any judgment [the court] could render would be wholly ineffectual for want of a subject matter on which it could operate," *People ex rel. Black v. Dukes*, 96 Ill. 2d 273, 276 (1983), so that a decision would only serve to "guide future litigation" rather than resolve an actual controversy among the parties, *George W. Kennedy Constr. Co. v. Chicago*, 112 Ill. 2d 70, 76 (1986). In the absence of an actual controversy, the parties may "lack the personal stake in the outcome . . . which serves to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Dukes*, 96 Ill. 2d at 276.

Where taxpayers seek to enjoin the use of public funds for an unlawful purpose, as Petitioners do here, they do *not* seek an advisory opinion. They present an "actual controversy" and have the "personal claim, status, or right which is capable of being affected" required for standing because they have an equitable interest in preventing the misuse of public funds. *Crusius v. Ill. Gaming Bd.*, 348 Ill. App. 3d 44, 49 (1st Dist. 2004). *See* Appellants' Brief ("App. Br.") 6, 14.

Petitioners have standing, and their claim is ripe, because, without injunctive relief, Respondents will *imminently* use public funds to place Amendment 1—which Petitioners allege to be unconstitutional—on the November 2022 general election ballot. That use of public funds for an unconstitutional purpose will injure Petitioners irreparably: once Respondents expend the funds, the only way to replenish the treasury for those wasted funds will be by taking more money from Petitioners and other Illinois taxpayers. *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956).

Fletcher's rejection of a taxpayer lawsuit seeking to prevent a proposed municipal ordinance from appearing on the ballot was premised on the notion that the taxpayers could not show that they had "sustained, or [were] in immediate danger of sustaining, some direct injury." *Fletcher*, 377 Ill. at 95. According to *Fletcher*, "the mere fact that the cost of the election [would] have to be borne by the State, and indirectly by taxpayers," was "too trifling" of and injury. *Id.* at 93.

That directly conflicts with later Illinois Supreme Court cases that establish that such an injury is *not* "too trifling" to support taxpayer standing. Again, those cases establish that *any* misuse of public funds injures taxpayers, "whether the amount [of funds to be used] be great or small." *Snow v. Dixon*, 66 Ill. 2d 443, 450 (1977). *See also* App. Br. 6. And the Illinois Supreme Court has established specifically that the use of public funds to place an unconstitutional amendment on the general election ballot causes

taxpayers sufficient injury to give them standing in *Chicago Bar Association v. Illinois State Board of Elections*, 161 Ill. 2d 502 (1994), which *expressly* recognized that taxpayers could challenge a proposed amendment under the taxpayer-action statute. *Id.* at 506; *id.* at 516 (Harrison, J., dissenting).

Respondents attempt to distinguish *Chicago Bar* and *Hooker* by arguing that the constitutional defects challenged there were supposedly "procedural" in nature, as they were based on the provision of Article XIV, Section 3 of the Illinois Constitution ("Section 3") requiring that citizen-initiated amendments pertain to "structural and procedural subjects contained in Article IV." Resp. Br. 15-19. One reason that argument fails is because Section 3's prohibition of citizen-initiated amendments that stray outside certain subject matter is *not* a "procedural" rule. Section 3 does include procedural rules: it states the form petitions must take, provides the number of signatures required for a proposal to qualify for the ballot, states that "[t]he procedure for determining the validity and sufficiency of a petition shall be provided by law," and requires that a petition found to be "valid and sufficient" through that procedure be submitted to the voters. But those procedures, including those to be "provided by law" regarding whether a petition is "valid," do not involve any consideration of whether the *substance* of a proposed amendment is constitutionally permissible. *See Coalition for Political Honesty v. State Board of Elections*, 65 Ill. 2d 453, 462-63 (1976). Instead, the Constitution's drafters expected that taxpayers could raise

challenges about whether a proposed amendment was substantively improper in court. *See id.*

A more fundamental reason why that argument fails is because it ignores the reason why the *Chicago Bar* and *Hooker* plaintiffs had standing. Their standing was not premised on their challenge's procedural nature; it was premised on the fact that, as taxpayers, they would be irreparably injured by the "waste" that would result from placing an unconstitutional proposed amendment on the ballot. *See Chicago Bar*, 161 Ill. 2d at 506; *id.* at 516 (Harrison, J., dissenting). And there is no reason why presenting voters with a proposed amendment that is unconstitutional for a reason other than Section 3's subject-matter limitation would not likewise be a waste of public funds. A proposed amendment whose subject matter strays outside the subject matter permitted by Section 3 is no more constitutionally offensive—and its presentment is no more or less of a waste of public funds—than a proposed amendment that violates the right to free speech or, as here, the Supremacy Clause of the U.S. Constitution.

Contrary to Respondents' argument, Resp. Br. at 21, the Illinois Supreme Court did *not* limit taxpayers' standing to challenge proposed amendments to citizen-initiated proposals that run afoul of Section 3's subject-matter limitation in *Coalition*. In that case, the plaintiffs challenged three citizen-initiated proposed amendments on several grounds: (1) that they did not comport with Section 3's subject matter limitation; (2) that they violated the

due process clauses of the state and federal constitutions; and (3) that they violated the equal protection guarantees of the state and federal constitutions. 65 Ill. 2d at 458-59. In analyzing whether taxpayers could challenge the proposed amendments, the Court acknowledged that some might argue that the "questions of due process and equal protection under the proposed amendments were not ripe for determination." *Id.* at 461. But the Court *did not address that argument* because it did not need to: it was clear enough that "[n]o future events or consideration would or could sharpen or better define" the question of whether the proposed amendments comported with Section 3's subject-matter limitation, *id.*—and that question was dispositive, as the amendments *did* violate that limitation, *id.* at 463-72.

Thus, Respondents' assertion that *"Coalition* rests on the basic distinction between a procedural challenge to the process of amending the Constitution and a substantive challenge to the amendment itself," Resp. Br. 22-23, is false.

One cannot infer from the *Coalition* decision that taxpayers lack standing to challenge the substantive validity of a proposed amendment on any ground other than a violation of Section 3's subject-matter limitation. The Court's decision to limit its focus to a single dispositive constitutional claim does not imply that the plaintiffs' other claims were improper: it simply reflects the Illinois appellate courts' policy against "consider[ing] issues that are not essential to the disposition of the cause before them," *Condon v. Am.*

Telephone & Telegraph Co., 136 Ill. 2d 95, 99 (1990), and the "long-standing" rule that "courts must avoid reaching constitutional issues unless necessary to decide a case," *People v. Bass*, 2021 IL 125434 ¶ 30. Moreover, the circuit court in *Coalition did* rule on the taxpayers' other constitutional claims—concluding that one of the proposed amendments violated the equal protection and due process clauses, and that another violated "the due process clauses of both [the federal and state] constitutions," *Coalition*, 65 Ill. 2d at 456-57—and the Illinois Supreme Court's decision does not imply, let alone hold, that the circuit court erred in doing so.

Respondents argue that, because *Coalition* only addressed the plaintiffs' Section 3 claim, any "exception" it established to *Fletcher*'s general rule barring taxpayer lawsuits challenging ballot measures is limited to claims based on Section 3. Resp. Br. 21. But *Chicago Bar* recognized a broader exception, endorsing the view that courts may issue "injunctive relief . . . to prevent the waste of public funds on a ballot proposition that is alleged to be in violation of the constitution." 161 Ill. 2d at 506; *id.* at 516 (Harrison, J.). That quote from *Chicago Bar* does not just say that taxpayers may challenge an allegedly unconstitutional ballot measure, but also explains why: because the presentment of an unconstitutional proposal is—always—a "waste of public funds."

And that is why Respondents' attempt to separate challenges based on "procedural" issues from challenges based on "substantive" issues fails. The

only reason taxpayers may challenge *any* proposed amendment is because the use of public funds to place an unconstitutional amendment on the ballot is an improper use of the public's money and thus injures taxpayers. It might be possible that, in *some* cases, "future events or consideration would or could sharpen or better define" issues relevant to a substantive constitutional challenge, *Coalition*, 65 Ill. 2d at 461, to an extent that a pre-election challenge would be premature. But that is not so here. As discussed in Petitioners' opening brief, the National Labor Relations Act and the Supremacy Clause plainly prohibit Amendment 1's attempt to give private-sector employees a "fundamental right" to engage in collective bargaining, *see* App. Br. 19-26, so there is no reason why the courts cannot or should not address that issue now.

II. Taxpayers may seek declaratory relief regarding an unconstitutional proposed amendment because the alleged misuse of public funds gives rise to an actual controversy for which declaratory relief is proper.

Regardless of whether they are entitled to pursue injunctive relief, Petitioners are entitled to pursue declaratory relief.

To argue otherwise, Respondents cite *Slack*, which applied *Fletcher* to conclude that taxpayers could seek neither injunctive nor declaratory relief against a municipal referendum. Resp. Br. 24-25. But *Slack* just took *Fletcher*'s view (also citing a 1941 treatise on declaratory judgments) that a pre-election challenge to a ballot measure necessarily seeks an advisory opinion. 31 Ill. 2d at 177-78. Again, *Fletcher*'s conclusion that an opinion on a

ballot proposal would be "advisory" was based on a view of taxpayer standing that is contrary to modern case law. Again, the injury that *Fletcher* (and, by extension, *Slack*) found to be "too trifling" to support standing *is* sufficient under the taxpayer standing doctrine applied in *Chicago Bar* and *Hooker*, among other cases.

Moreover, in a 1988 case on standing to pursue a declaratory judgment, the Illinois Supreme Court recognized that "[s]tanding requirements"—particularly *taxpayer* standing requirements—"[had] been liberalized to some degree during the past two decades." *Kluk v. Lang*, 125 Ill. 2d 306, 315 (1988). The primary case the Court cited for that point, *id.* at 315-16, was *Paepcke v. Public Building Commission*, 46 Ill. 2d 330 (1970)—which partly overruled *Droste v. Kerner*, 34 Ill. 2d 495 (1966), for taking an unduly narrow view of taxpayer standing *based on Fletcher*. *See Paepcke*, 46 Ill. 2d at 340-41 (overruling *Droste* in part for unduly limiting taxpayer standing); *Droste*, 34 Ill. 2d at 505 (citing *Fletcher* for its limited view of taxpayer standing). Although *Paepcke* and *Droste* addressed taxpayer standing under the "public trust" doctrine, "the liberalized standing requirements recognized by *Paepcke* were expanded" to other types of taxpayer lawsuits. *Kluk*, 125 Ill. 2d at 316-17.

Thus, the Illinois Supreme Court has specifically rejected the point in *Fletcher* on which *Slack* relied, and on which Respondents rely. Under modern case law on declaratory judgments and taxpayer standing,

Petitioners have alleged a sufficient injury to show the "actual controversy" necessary to seek a declaratory judgment.

III. Petitioners' Supremacy Clause claim has merit.

On the merits of Petitioners' Supremacy Clause challenge to Amendment 1, Respondents do not argue that Petitioners' preemption argument is incorrect. Rather, they primarily argue that a Supremacy Clause violation arising out of federal preemption is a special temporary or tentative sort of constitutional violation because it could someday be eliminated—and a preempted state law could be revived—by repeal of the preempting federal law. That view is incorrect.

Respondents are correct that a court decision holding that a state law is preempted by federal law, and thus violates the Supremacy Clause, does not repeal the preempted state law, and that the state law could become enforceable again if the preempting federal law were to someday be amended or repealed to eliminate the preemption. Resp. Br. 26. But that does not distinguish state laws that violate the Supremacy Clause from state laws that violate any other provision of the U.S. Constitution. As Petitioners explained in their opening brief, if a court concludes that a state law violates the U.S. Constitution *for any reason*, that law nonetheless remains on the books unless and until the state legislature repeals it. And, if the law is not repealed, it might someday become effective again if a change in federal case law renders it permissible again. *See* App. 30-31 (citing cases).

Thus, it is not true that laws held to violate the Supremacy Clause are merely "suspended," Resp. Br. 27, while laws held to violate other federal constitutional provisions are invalidated in some more permanent way. *Any* law held to violate *any* provision of the U.S. Constitution is *invalidated* unless and until a change in federal statutory or case law renders it valid again. In arguing to the contrary, Respondents ignore the U.S. Supreme Court's clear statement that "the Supremacy Clause *invalidates all state laws* that conflict or interfere with an Act of Congress." *Rose v. Ark. State Police*, 479 U.S. 1, 3 (1986).

Although Respondents continue to insist that there is a distinction between "suspension" (for laws held to violate the Supremacy Clause) and invalidation (for laws held to violate other constitutional provisions), they also respond to Petitioners' argument on this point by observing that "the ordinary remedy in [any] constitutional litigation is to enjoin a statute's enforcement, rather than 'erase' it from the state code." Resp. Br. 33. Respondents then say that the remedy Petitioners seek here—preventing Amendment 1 from appearing on the ballot—is therefore improper. *Id.* at 33-34. But that remedy is appropriate in this context because, as discussed above in Section I, Illinois taxpayers like Petitioners have a right to prevent public funds from being used for an unconstitutional purpose, including the placement of an unconstitutional proposed amendment on the ballot. It is

irrelevant that most constitutional cases have a different posture that calls for a different remedy.

Respondents argue that the U.S. Supreme Court took their view of preemption and the Supremacy Clause in *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996) by limiting the temporal scope of an injunction against a preempted provision of a state constitutional amendment. Resp. 28. That injunction was limited as to its time only because the preempting federal statute would, by its terms, only remain effective for a limited time—unlike the NLRA, which has no sunset provision and has been in effect since 1935. *Id.* at 477-78. Thus, *Dalton* would only support Respondents' argument if the NLRA were set to expire, which it is not.

Respondents also argue that Amendment 1 is not facially invalid because, even if Petitioners' preemption argument is correct (indeed, Respondents do not attempt to refute it), Amendment 1 would have *some* constitutional applications—specifically, in providing a "backstop" in case the NLRA is repealed, in providing a fundamental right to collective bargaining to public-sector employees, and in prohibiting Right-to-Work laws. Resp. Br. 29-32.

Petitioners have already addressed the "backstop" argument in their opening brief and will not reiterate that argument here. *See* App. Br. 32-33.

As for Amendment 1's application to public-sector employees, the Illinois Supreme Court has made clear that, irrespective of the general doctrine on facial challenges, "[a]n unconstitutional statute does not 'become

constitutional' simply because it [could be] applied to a particular [narrower] category of persons who could have been regulated, had the legislature seen fit to do so [specifically]." *People v. Burns*, 2015 IL 117387 ¶ 29. To attempt to distinguish *Burns*, Respondents simply assert that the statute at issue there "was unconstitutional *as written*" because it "categorically prohibited the possession and use of an operable firearm for self-defense outside the home." Resp. Br. 35-36 (cleaned up). That misses the point: *Burns* recognized that it is permissible for the state to prohibit *some* categories of people, such as felons, from possessing and using a firearm outside the home, but that could not save a statute containing a "flat ban" that was "not limited to a particular subset of persons" who would be properly subject to such a ban. *Burns*, 2015 IL ¶ 25. Amendment 1 presents the same situation: it would be permissible for the state to grant collective-bargaining rights to *some* employees—namely, public-sector employees—but that cannot justify a provision which is "not limited to [that] particular subset of persons" but instead purports to grant such rights to *all* employees—the overwhelming majority of whom are *not* members of the "subset" for whom such a grant would be permissible.

Burns stated that to apply a broad statute to a narrow category of persons who fall under it "would be [improperly] rewriting state law to conform it to constitutional provisions." *Burns*, 2015 IL 117387 ¶ 29. That concern for "rewriting" is especially warranted here, where Amendment 1 will be presented to voters who will be unaware that—if it is enacted and

Respondents' view prevails—will inevitably be "rewritten" to give enhanced collective-bargaining rights only to public-sector employees, not to all employees. *See* App. Br. 33-36.

As for the Right-to-Work ban, it cannot defeat Petitioners' challenge because it does not eliminate their injury. If Amendment 1 is placed on the ballot, Petitioners and all Illinois taxpayers will be forced to pay to place Amendment 1's unconstitutional grant of private-sector collective-bargaining rights on the ballot. There is no reason why the state should be allowed to force taxpayers to suffer such an injury by placing *one* constitutional provision in an otherwise-unconstitutional proposal. If the General Assembly wishes to present its Right-to-Work ban before voters, it can and must do so in a manner that does not inflict an injury on taxpayers.

CONCLUSION

The Court should reverse the circuit court's order denying Petitioners leave to file their complaint.

Dated: August 2, 2022

Respectfully submitted,

SARAH SACHEN, IFEOMA NKEMDI, JOSEPH OCOL, and ALBERTO MOLINA

By: /s/ Jacob Huebert

One of their Attorneys

Jacob Huebert (#6305339)
Jeffrey Schwab (#6290710)
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Phone: (312) 637-2280
jhuebert@ libertyjusticecenter.org
jschwab@libertyjusticecenter.org

Mailee Smith (#6280167)
Illinois Policy Institute
802 S. 2nd Street
Springfield, Illinois 62704
Phone: (217) 528-8000
msmith@illinoispolicy.org

Attorneys for Petitioners-Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.

/s/ Jacob Huebert

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

I, Jacob Huebert, an attorney, certify that on August 2, 2022, I electronically filed the foregoing Appellants' Reply Brief with the Clerk of the Court for the Illinois Appellate Court, Fourth Judicial District. I further certify that I served a copy of this Brief on Defendants' counsel of record by the Court's Electronic Filing System and electronic mail to Alex.Hemmer@ilag.gov and CivilAppeals@ilag.gov.

/s/ Jacob Huebert