EFILED
5/18/2022 5:12 PM
Paul Palazzolo
7th Judicial Circuit
Sangamon County, IL
2022CH000034

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

SARAH SACHEN, ET AL., Petitioners, v. THE ILLINOIS STATE BOARD OF ELECTIONS, ET AL., Respondents.	Case No. 2022-CH-34 **Petitioners' Response to Respondents Jesse White and Susana Mendoza's Objection to Petition for Leave to File Taxpayer Action**

Petitioners respond to Respondents Jesse White and Susana Mendoza's Objection to Petition for Leave to File Taxpayer action as follows.

I. Taxpayers may seek an injunction to keep an unconstitutional proposal off the ballot.

Contrary to Respondents' arguments, taxpayers like Petitioners may seek an injunction to prevent a proposed constitutional amendment that is itself unconstitutional from being placed on the ballot. The Illinois Supreme Court made that clear in *Hooker v. Illinois State Board of Elections*, 2016 IL 121077 ¶ 8 n.2, and *Chicago Bar Association v. Illinois State Board of Elections*, 161 Ill. 2d 502, 508 (1994).

To argue otherwise, Respondents rely on *Fletcher v. Paris*, 377 Ill. 89 (1941) and a short decision applying *Fletcher* in like circumstances, *Slack v. Salem*, 31 Ill. 2d 174 (1964). But *Fletcher* does not control here because it was based on premises that

are no longer correct statements of Illinois law—at least with respect to constitutional challenges to proposed ballot measures.

Fletcher quoted an 1868 decision's statement: "We are aware of no well considered case which has enjoined the holding of an election, or prevented an officer of the law from giving the required noticed for, or the certificate of election." 377 Ill. at 92 (quoting *People v. City of Galesburg*, 48 Ill. 485 (1868)). But now there *are* Illinois Supreme Court decisions that have enjoined state officials from placing unconstitutional proposed amendments on the ballot: *Hooker* and *Chicago Bar Association*. Indeed, the dissenting *Chicago Bar Association* opinion expressly recognized that *Fletcher* did not bar the plaintiffs' claims because the Court has "recognized an exception to [*Fletcher*'s] rule where, as here, injunctive relief is sought 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 516 (Harrison, J., dissenting). The majority endorsed the dissent's analysis on this point. *Id.* at 506-07.

Fletcher also quoted a 1919 decision for the proposition that "an injunction will not issue out of a court of equity for the purpose of restraining the holding of an election or in any manner directing or controlling the mode in which the same shall be conducted." *Fletcher*, 377 Ill. at 93 (quoting *Payne v. Emmerson*, 290 Ill. 490, 495 (1919)). Again, *Hooker* and *Chicago Bar Association* show that Illinois courts now can and do enjoin the placement of unconstitutional proposed amendments on the ballot.

Fletcher concluded that taxpayers could not seek to enjoin the placement of a proposed municipal ordinance on the ballot, in part because their injury from the use of their tax money to place an unlawful measure on the ballot was not "direct" enough ("too trifling") to give them standing. 377 Ill. at 93-95. But *Fletcher*, decided more than 80 years ago, long predates the statute under which Petitioners brought this action, 735 ILCS 11-303, which the General Assembly enacted in its 1981-1982 to authorize taxpayer actions. That is the statute under which the plaintiffs in *Hooker* and *Chicago Bar Association* brought their claims, and it authorizes Petitioners' claims here as well. *See Hooker*, 2016 IL 121077 ¶ 8; *Chi. Bar Ass'n*, 161 Ill. 2d at 515. Moreover, *Fletcher*'s view of taxpayer standing conflicts with a line of cases—decided after *Fletcher*—that recognized taxpayers' standing to enjoin the use of public funds to implement an unconstitutional law, "whether the amount [of public funds used] be great or small." *Snow v. Dixon*, 66 Ill. 2d 443, 450 (1977); *see also Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956) ("The misuse of [public] funds for . . . unconstitutional purposes is a damage which entitles [taxpayers] to sue."); *Krebs v. Thompson*, 387 Ill. 471, 473-74 (1944) (recognizing taxpayer standing to challenge unconstitutional professional licensing statute); *Crusius v. Ill. Gaming Bd.*, 348 Ill. App. 3d 44, 49-50 (1st Dist. 2004) (recognizing taxpayer standing to challenge riverboat gambling licensing statute). Further, a 1966 decision, *Droste v. Kerner*, 34 Ill. 2d, 495, 505 (1966), cited *Fletcher*'s narrow view of standing to reject a taxpayer lawsuit—and was overruled on that point several years later. *Paepcke v. Public Bldg. Comm'n*, 46 Ill. 2d 330, 340 (1970).

Finally, even if *Fletcher* did bar Petitioners' request for injunctive relief, it still would not bar Petitioners' request for declaratory relief and therefore could not warrant denying their Petition. *Fletcher*'s holding applied only to equitable proceedings—and the Illinois Supreme Court held several years after *Fletcher* that an election-related declaratory judgment action is not an equitable proceeding and therefore is not barred by *Fletcher*. *Progressive Party v. Flynn*, 400 Ill. 102, 106 (1948).

II. Petitioners' action is timely.

Respondents also argue that Petitioners' claim is premature because voters have not yet approved Amendment 1. Objection to Petition for Leave to File Taxpayer Action ("Obj.") 1. That argument fails because, again, *Hooker* and *Chicago Bar Association* show that taxpayers *may* challenge a proposed amendment before it is placed on the ballot. Here again, Respondents are forced to rely on *Fletcher*—which, as discussed above, conflicts with modern case law allowing constitutional challenges to proposed ballot measures.

Respondents attempt to distinguish *Hooker* and *Chicago Bar Association* from this case by arguing that the constitutional challenges in those cases pertained to the Illinois Constitution's restriction on the permissible subject matter of amendments proposed by ballot initiative—that is, they considered whether the "*chosen mode*" of placing the amendments on the ballot was constitutional, not whether the substance of the amendment was constitutional. Obj. 10-13.

Hooker and *Chicago Bar Association* did not suggest that a taxpayer action is permissible to challenge only *one particular type* of unconstitutionality. And that only makes sense: placing an unconstitutional proposal on the ballot is a "waste of public funds," *Chi. Bar Ass'n*,161 Ill. 2d at 516 (Harrison, J., dissenting), regardless of *why* the measure is unconstitutional.

Under Respondents' view, taxpayers would suffer no cognizable injury from the state's use of public funds to place a flagrantly unconstitutional proposal—e.g., an amendment that would mandate race discrimination or prohibit speech criticizing elected officials—on the ballot, as long as the proposal was approved by the General Assembly. Yet, in Respondents' view, taxpayers do suffer an actionable injury (only) if an amendment proposed by ballot initiative strays outside the boundaries of "structural and procedural" topics pertaining to the legislative branch. *See* Obj. 11. That makes no sense. In either event, the proposal is unconstitutional, and the use of public funds to place it before voters is a waste.

Petitioners' action is timely because the waste that would result from presenting Amendment 1 to the voters is imminent and could not be remedied after the election, even if Amendment 1 were challenged and struck down after its enactment. Once the state uses public funds for an unconstitutional purpose, taxpayers have no means of recovering the money—the treasury can only be replenished by taking more money from taxpayers. That is why taxpayers have an "equitable interest" in public funds and may seek injunctive relief to prevent public funds' misuse *before* it can occur. *See Crusius*, 348 Ill. App. 3d at 49.

Respondents argue that Petitioners' claim is premature because it would require the Court to "look beyond the ballot to [Amendment 1's] anticipated enforcement," contrasting this case with *Hooker*, which supposedly only concerned "the legality of the *mode* or *act* of amendment." Obj. 13. But that is a false distinction. In *Hooker*, the Court *did* have to construe the proposed amendment, including its "anticipated enforcement," to determine whether it satisfied the Illinois Constitution's requirements for a ballot initiative. *Hooker* and *Chicago Bar Association* were not about a procedural issue, like whether petitions had enough valid signatures or were in the proper form; they were about whether the amendments in question were improper based on their *substance*. *See Hooker*, 2016 IL 121077 ¶ 42; *Chi. Bar Ass'n*, 161 Ill. 2d at 509. Further, Petitioners' claim does not call for the Court to speculate as to Amendment 1's "anticipated enforcement." It challenges Amendment 1 based on its plain language, which establishes a right to collective bargaining for all "employees," including private-sector employees.

Respondents also try to distinguish *Hooker* by observing that, in that case, "[n]o additional steps appear[ed] to stand in the way of the proposal being placed on the ballot," so "[t]he only steps remaining for the Board of Electors [were] solely administrative." Obj. 12 (quoting *Hooker*, 2016 IL 121077 ¶ 8 n.2). Respondents say this case is different because "there remains a final discretionary act in the 'legislative process'": voters' decision as to whether to adopt Amendment 1. Obj. 13. But that is no distinction at all. In *Hooker* the proposed amendment would have gone before the voters but for an injunction—just as Amendment 1 will appear on

the ballot without an injunction. In *Hooker*, voters might have rejected the proposed amendment, if given the opportunity—just as voters might reject Amendment 1. But the taxpayers in *Hooker* did not have to wait to see whether voters would moot their challenge; they had a right to prevent their tax money from being used to place an unconstitutional measure on the ballot in the first place. So do Petitioners here.

III. The Supremacy Clause renders Amendment 1 unconstitutional and provides a basis for enjoining Respondents from placing it on the ballot.

There is no merit in Respondents' argument that Petitioners cannot challenge Amendment 1 because their argument is based on preemption—that is, the Supremacy Clause—rather than some other constitutional provision. There is nothing special about the Supremacy Clause that renders Petitioners' challenge any less viable than any other type of constitutional challenge.

Respondents suggest that preemption creates a unique sort of unconstitutionality because a preempted state law is not "struck down as invalid" but is "merely suspended, or 'displaced,' *while the federal law exists*" and could be "revive[d]" if the preempting federal law were repealed. Obj. 14. Respondents imply that state laws that violate the Supremacy Clause remain on the books, but laws declared invalid for violating other constitutional provisions do not. But that is not true: although courts and others might refer to unconstitutional laws being "struck down," a declaration that a law is unconstitutional—for any reason—does not actually strike the law from the books. Such a law remains in place unless and until

the legislature repeals it. *See Wis. Right to Life v. Schober*, 366 F.3d 485, 490 (7th Cir. 2004) (federal court's declaration that statute was unconstitutional did not repeal it because "only the Wisconsin legislature [could] repeal the statute"); *Winsess v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts."); *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.20 (Tex. 2017) ("When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it . . . ."). And if a statute held to be unconstitutional is not repealed, it could be rendered operative again if a later controlling court decision deems it to be permissible. *Cf. Wis. Right to Life*, 366 F.3d at 490 ("[A] district court's declaration that [a] statute is unconstitutional does not automatically stop state officials from trying to enforce the statute."); *see also, e.g., State v. Douglas*, 278 So.2d 485, 491 n.6 (La. 1973) (law invalidated by an overruled court decision "can be reinstated" by the court); *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. App. 1952) (statute declared unconstitutional was "dormant but not dead"); *Pierce v. Pierce*, 46 Ind. 86, 95-96 (1874) (after decision declaring statute unconstitutional is overruled, "the statute must be regarded for all purposes as having been constitutional and in force from the beginning").

Thus, the remote possibility that Amendment 1's preemption problem might be eliminated in the future—in the unlikely event that Congress someday repeals the National Labor Relations Act—does not render Amendment 1 any less

unconstitutional, or its submission to voters any less improper, *now*. Any law currently considered unconstitutional might someday be deemed constitutional and revived—but that is no reason for courts to abstain from issuing judgments or injunctions based on the *current* law.

Respondents' argument receives no help from *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996). *See* Obj. 14. There, the preempting statutory provision had an expiration date: by the statute's terms, the preempting provision would only be operative for one fiscal year, so an injunction had to be limited to that time period. *Dalton*, 516 U.S. at 477-78. The decision did not imply, much less hold, that a court may *never* issue a permanent injunction against a state law that violates the Supremacy Clause—or may not do so where, as here, preemption arises out of a federal statute that provides the foundation of American labor law, has been in effect for most of a century, and has no apparent prospect of ever being repealed.

The Illinois Supreme Court case on which Respondents rely, *Lily Lake Road Defenders v. County of McHenry*, 156 Ill. 2d 1 (1993), is wholly inapposite. That decision contrasted preemption with "repeal by implication"; it did not consider any difference between state laws held to violate the Supremacy Clause (indeed, it did not involve the Supremacy Clause at all) and laws held to violate other constitutional provisions. *See id.* at 8. Repeal by implication occurs "when two enactments of the *same* legislative body are irreconcilable," and the earlier-enacted legislation is thereby deemed repealed. *Id.* As discussed above, repeal by implication

does not occur when legislation is declared unconstitutional, so *Lily Lake* is irrelevant here.

Respondents also cite the U.S. Supreme Court's statement that the Supremacy Clause "does not create a cause of action" to suggest that Petitioners cannot challenge Amendment 1 for violating the Supremacy Clause. Obj. 14 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015)). But that decision concerned whether the Supremacy Clause, by itself, creates a federal private right of action that Congress cannot abridge—a question irrelevant to this case. *See Armstrong*, 575 U.S. at 325-26. That decision also acknowledged that "once a case or controversy properly comes before a court, judges are bound by federal law" and "may issue an injunction upon finding [challenged] state regulatory actions preempted." *Id.* at 326. If Petitioners are granted leave to file their proposed Complaint, it will present a case or controversy properly before the Court under Illinois's doctrine of taxpayer standing. That doctrine does not apply in federal courts, which cannot hear a taxpayer challenge to a state ballot measure, or even a state law, for violating the Supremacy Clause—or for violating nearly any other provision of the U.S. Constitution. *See Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584, 591-98 (7th Cir. 2007) (reviewing case law on taxpayers' lack of standing to raise constitutional claims in federal court). So a federal court decision regarding whether *federal* courts may hear a claim alleging a violation of the Supremacy Clause is irrelevant to the question here: whether *this* Court may hear a taxpayer challenge to a proposed constitutional amendment

based on an allegation that it violates the Supremacy Clause. The Court may do so, just as it may consider a taxpayer action based on any other allegation of unconstitutionality.

IV. Amendment 1's application to public-sector employees cannot save it.

There is no merit in Respondents' argument that Amendment 1 must survive Petitioners' proposed challenge because the right to collective bargaining it would establish would be permissible with respect to public-sector employees, who are not subject to the NLRA.

Respondents rely on the general rule for "facial" constitutional challenges to state laws: that "an enactment is facially invalid only if no set of circumstances exist under which it would be valid." Obj. 15 n.11 (citing *Napleton v. Vill. Of Hinsdale*, 229 Ill. 2d 296, 306 (2008)). That rule cannot save Amendment 1 because there are no "circumstances" under which the NLRA would not preempt Amendment 1.

It is true that the NLRA would not preempt Amendment 1 if the proposal's right to collective bargaining applied only to public-sector employees. But Amendment 1 is not so limited: by its terms, it applies to *all* employees. By including private-sector employees, Amendment 1 seeks to protect and regulate an activity protected and regulated by the NLRA.

Respondents cannot save Amendment 1 by suggesting that the state might only apply it to public-sector employees—in other words, that the state might not implement the amendment as written. *See* Obj. 15-17. Respondents have cited no

authority for the proposition that a law can survive a facial challenge—or that a proposed amendment can survive a taxpayer challenge—because officials might simply choose to disregard it. "An 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 narrow Amendment 1 by construing it to only apply to public-sector employees—contrary to its plain language—"would be rewriting state law to conform it to constitutional requirements and substituting the judicial for the legislative department of the government." *Id.* ¶ 30. Further, the establishment of a state-law private-sector right to collective bargaining, by itself, violates the Supremacy Clause, irrespective of any speculation about what state officials would do after it is enacted.

Dalton does not support Respondents' argument on this point. In that case, the U.S. Supreme Court affirmed an injunction against a section of a state law that restricted public funding for abortions—but only to the extent that the restriction applied to federally funded programs, for which federal law prescribed a different rule. 516 U.S. at 474-77. In limiting its injunction, the Court cited the rule "that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Id.* at 476.

That rule—about the scope of relief federal courts should provide when considering unconstitutional state laws that have already been enacted—does not apply here. Respondents have cited no authority for their implicit proposition that

the state may use public funds to present a ballot measure that is at least partially unconstitutional to voters.

Absent an injunction, voters will be asked to vote on Amendment 1 *as a whole*. And they will not be advised that Amendment 1 is unconstitutional to the extent that it creates a state-law right to private-sector collective bargaining—even though many voters, unaware of Supremacy Clause doctrine, might reasonably assume that the amendment would *primarily* affect private-sector workers. Voters are especially likely to make that assumption given the General Assembly's official explanation of Amendment 1, which tells voters that the amendment would guarantee "workers"—without limitation—the right to collectively bargain. *See* Ill. Sen. Joint Res. 55 (2022).[1] The official "Arguments in Favor of the Proposed Amendment" that will be presented to voters strongly imply that Amendment 1 would apply to the private-sector, stating that the amendment would "protect workers' and others' safety" by, for example, "guaranteeing nurses' right to put patient care ahead of profit," "making sure construction workers can speak up when there's a safety issue," and "protect[ing] workers from being silenced when they call attention to food safety threats, shoddy construction, and other problems that could harm Illinoisans." *Id.* The official "Arguments Against the Proposed Amendment" say nothing that would disabuse voters of that notion. *Id.* Further, Amendment 1's prominent supporters are promoting the measure by asserting that it would protect private-sector

---

[1] https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=110&GA=102&DocTypeId=SJR&DocNum=55&GAID=16&LegID=140923&SpecSess=&Session=.

workers. *See, e.g.,* Randy Harris, *Madison County Democrats Approve Resolution to Endorse Passage of Workers' Rights Amendment*, RiverBender.com (May 2, 2022)[2] (letter to the editor from Madison County Democratic Party chair stating that Amendment 1 "will guarantee that workers in the public *and private* sectors have the fundamental right to organize and bargain collectively) (emphasis added); Tim Drea & Bob Reiter, *Workers Should Have the Right to Raise Workplace Safety Concerns*, Chi. Sun-Times, Apr. 30, 2022[3] (letter to the editor by the presidents of the Illinois AFL-CIO and the Chicago Federation of Labor stating that Amendment 1 would "ensure that every Illinoisan has access to a safe workplace"); Democratic Party of Illinois, *Democratic Party of Illinois Unanimously Endorses Workers' Rights Amendment*, Mar. 23, 2022[4] (stating that "[a]ll workers will benefit from [Amendment 1's] protections").

Thus, with Amendment 1, voters are specifically being asked to vote for something that is unconstitutional, and they are being misled. If Respondents are correct in suggesting that the state will limit Amendment 1's application to the public sector, that means the state is presenting voters with a measure that is unconstitutional in one of its most obvious and important aspects, and promoting it based on that unconstitutional aspect, as a means of enacting a narrower measure

---

[2] https://www.riverbender.com/articles/details/letter-to-the-editor-madison-county-democrats-approve-resolution-to-endorse-passage-of-workers-rights-amendment-58460.cfm.
[3] https://chicago.suntimes.com/2022/4/30/23046394/illinois-constitution-workplace-safety-chicago-public-schools-accountability-speed-cameras-letters.
[4] https://ildems.com/democratic-party-of-illinois-unanimously-endorses-workers-rights-amendment/.

(protections for public-sector employees alone) that voters might find less appealing. Respondents have presented no reason why taxpayers should be forced to pay for a deceptive scheme that relies on using public funds to present an unconstitutional measure to the voters.

V. This Court has the power to issue an injunction.

Finally, there is no merit in Respondents' argument that this Court lacks the power to issue the injunction that Petitioners seek because the Illinois Constitution requires amendments approved by the General Assembly to be placed on the ballot. The Illinois Constitution prescribes many acts that public officials must carry out—but that does not mean courts cannot enjoin officials from carrying out those duties when doing so would use public funds for a purpose that violates the U.S. Constitution. As discussed above, Illinois law protects taxpayers from having public funds used for an unconstitutional purpose—including the placement of an unconstitutional measure on the ballot. This Court has the power to enforce that right. Further, even if the Court lacked the power to grant injunctive relief, that would not be a reason to deny the Petition because the Court still could provide the declaratory relief that Petitioners seek.

CONCLUSION

Petitioners' proposed Complaint is supported by reasonable ground, and the Court therefore should grant Petitioners leave to file it.

Dated: May 18, 2022

Respectfully submitted,

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

By: /s/ Jacob Huebert
One of their Attorneys

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

Mailee Smith (#6280167)
Illinois Policy Institute
802 S. 2nd Street
Springfield, Illinois 62704
(217) 528-8800
msmith@illinoispolicy.org

CERTIFICATE OF SERVICE

I, Jacob Huebert, certify under penalties as provided by law pursuant to 735 ILCS 5/1-109 that on May 18, 2022, I served the foregoing Petitioners' Response to Respondents Jesse White and Susana Mendoza's Objection to Petition for Leave to File Taxpayer Action on counsel for Respondents Jesse White and Susana Mendoza by electronic mail to their attorney, Joshua D. Ratz, Joshua.Ratz@ilag.gov. I also served the foregoing Response on the general counsel for Respondent Illinois State Board of Elections by electronic mail to its general counsel, Marni Malowitz, MMalowitz@elections.il.gov.

/s/ Jacob Huebert
Jacob Huebert
Attorney for Petitioners