UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JAMES M. SWEENEY, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	**CAUSE NO. 2:12-CV-81-PPS-PRC**
	)	
MITCH DANIELS, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants, Mitch Daniels, in his official capacity as the Governor of the State of Indiana ("Daniels"), Gregory F. Zoeller, in his official capacity as the Indiana Attorney General ("Zoeller"), and Lori A. Torres, in her official capacity as the Commissioner of the Indiana Department of Labor ("Torres") (collectively, "Defendants"), respectfully file this Memorandum in Support of their Motion to Dismiss Plaintiffs' First Amended Complaint for Declaratory Judgment, Injunctive Relief and Damages.

INTRODUCTION AND SUMMARY

On July 26, 2012, Plaintiffs filed their Amended Complaint. (Dkt. No. 62). In this pleading, Plaintiffs argue that: certain provisions of the Right-to-Work law (and the definition of "employee" found in an Emergency Rule and a Proposed Rule) are preempted by federal labor law (Counts V, VI, VII, and XI); certain provisions of the Right-to-Work law violate the Equal Protection Clause (Counts II, III, and IV); certain provisions of the statute violate the Contracts Clause of the U.S. Constitution (Count I); certain provisions of the law violate the *Ex Post Facto* Clause of the U.S. Constitution and the Indiana Constitution (Count IX and X); and certain provisions of the statute violate Article I, Section 21 of the Indiana Constitution (Count VIII).

Because Plaintiffs' Amended Complaint is fatally deficient, it must be dismissed with prejudice for the following reasons.

First and foremost, the Amended Complaint seeks damages against state officials who have been sued in their official capacities. Counts I-XI (whether premised on the U.S. Constitution or the Indiana Constitution) are barred by the Eleventh Amendment and sovereign immunity. Additionally, Plaintiffs have sued Governor Daniels and Attorney General Zoeller. Governor Daniels is not properly subject to the present suit and enjoys absolute legislative immunity for his single act of signing the bill into law and Attorney General Zoeller enjoys absolute prosecutorial immunity for allegations pled in Plaintiffs' Amended Complaint.

Beyond these fatal flaws with Plaintiffs' Amended Complaint, the fact is that the Right-to-Work law does not apply to contracts that were in effect on March 14, 2012, nor does it retroactively impose sanctions against those who entered such contracts before that date. Indeed, Section 13 of the law provides that Sections 8-12 -- the substantive provisions -- of the Right-to-Work law "apply to a written or oral contract or agreement entered into, modified, renewed, or extended after March 14, 2012" and "do not apply to or abrogate a written or oral contract or agreement in effect on March 14, 2012." I.C. § 22-6-6-13. Absent retroactive application, Counts I, IX, and X (Contracts Clause and *Ex Post Facto* Clause) fail. Moreover, Plaintiffs' Counts V, VI, and VII (preemption) fail because federal labor law and Supreme Court precedent make clear that states, like Indiana, are authorized to enact right to work statutes. Further, the Supreme Court has long held that right to work laws do not violate the Equal Protection Clause so Counts II, III, and IV fail. And, as to the claim (Count XI) based on the definition of "employee" found in the Proposed Rule, that definition is not in the Final Rule; thus, that claim is moot.

INDIANA'S RIGHT-TO-WORK LAW

Governor Daniels signed House Enrolled Act 1001 -- known as Indiana's Right-to-Work law -- on February 1, 2012. The Indiana Right-to-Work law contains several definitional sections as well as sections that make clear to whom the law applies and to whom it does not. *See* I.C. § 22-6-6-1 (chapter does not apply to…); I.C. § 22-6-6-2 (chapter does not apply to the extent that…); I.C. § 22-6-6-3 (nothing in this chapter is intended, or should be construed to change or affect any law that…); I.C. § 22-6-6-4 (defining employer as…); I.C. § 22-6-6-5 (defining labor organization as…); I.C. § 22-6-6-6 (defining person as…); I.C. § 22-6-6-7 (defining the state as…).

The Indiana Right-to-Work law substantively provides:

A person may not require an individual to:

(1) Become or remain a member of a labor organization;

(2) Pay dues, fees, assessments or other charges of any kind or amount to a labor organization; or

(3) Pay to a charity or third party an amount that is equivalent to or a pro-rata part of dues, fees, assessments or other charges required of members of a labor organization;

as a condition of employment or continuation of employment.

I.C. § 22-6-6-8. The Right-to-Work law then substantively provides that a "contract, agreement, understanding, or practice, written or oral, express or implied, between" a "labor organization" and an "employer" that violates § 22-6-6-8 is "unlawful and void." I.C. § 22-6-6-9. Section 10 states that a person who knowingly, intentionally, directly, or indirectly violates Section 8 commits a Class A misdemeanor. I.C. § 22-6-6-10. Section 11 allows one to file a complaint with the Attorney General, the Department of Labor, or the Prosecuting Attorney alleging a violation of the law and authorizes officials to investigate the complaint and enforce the

complaint; also the Department of Labor may issue an administrative order providing for civil remedies. I.C. § 22-6-6-11. Section 12 allows individuals to bring private causes of action for purported violations of the law. I.C. § 22-6-6-12. Section 13 establishes March 14, 2012 as the effective date for the substantive provisions of the law. I.C. § 22-6-6-13.

ARGUMENT

A. Standards Applicable To Motions To Dismiss

"It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (emphasis in original). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) ("after puzzling the profession for 50 years, this famous observation [the 'no set of facts' language] has earned its retirement"). '"[L]egal conclusions[, or t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements'" need not be accepted as true. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (and noting that a plaintiff may not merely "parrot" the language of the claims that are being asserted) (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009)).

The same basic rule applies when reviewing a motion to dismiss for lack of subject matter jurisdiction. "The district court must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's favor." *Transit Exp., Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001). However, the federal courts "are not required to accept legal conclusions that may be alleged in the complaint. *Reichenberger v. Pritchard,* 660 F.2d 280, 282 (7th Cir. 1981)." *Vaden v. Village of Maywood, Ill.*, 809 F.2d 361, 363 (7th Cir.), *cert. denied*, 482 U.S. 908 (1987).

B. Plaintiffs' Suit Against Governor Daniels Is Improper

Plaintiffs have sued Governor Daniels because he is the Governor of Indiana and because he signed the bill into law. (Dkt. No. 62, ¶¶ 9, 15). This single act does not subject Governor Daniels to the present suit for any number of reasons; accordingly, the Amended Complaint as to Governor Daniels must be dismissed.

1. Because The Governor Does Not Enforce SEA 298, The Case Is Not Justiciable Against Him And This Court Lacks Article III Jurisdiction

Article III limits the "judicial power" of the United States to the resolution of "cases" and "controversies." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471 (1982). This means that the business of federal courts is limited to adjudging the rights of litigants "having adverse legal interests." *Deveraux v. City of Chicago*, 14 F.3d 328, 331 (7th Cir. 1994) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). While courts unquestionably have the power to determine whether a statute is constitutional, this power arises only when the question is presented in an actual case or controversy between parties; courts do not have the power to issue advisory opinions. *Wisconsin's Environmental Decade, Inc. v. State Bar of Wisconsin*, 747 F.2d 407, 410 (7th Cir. 1984) (citing *Muskrat v. U.S.*, 219 U.S. 346, 361-62 (1911)); *see also Valley Forge*, 454 U.S. at 471 ("[t]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts."). Strict adherence to these dictates ensures the separation of powers mandated by the Constitution. *Id.* at 474.

Incident to the requirement for a "case" or "controversy," courts have always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit. *Valley Forge*, 454 U.S. at 471. Standing turns on whether Plaintiffs have a personal stake in the controversy and "whether the dispute touches upon the 'legal relations of the parties having

adverse legal interests.'" *O'Sullivan v. City of Chicago*, 396 F.3d 843, 853 (7th Cir. 2005) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Such considerations are especially important when state laws or the actions of state officials are at stake because the federal courts must ensure that the principles of federalism are not contravened. *Id.* at 854.

To have standing, Plaintiffs must demonstrate: 1) a personal injury; 2) fairly traceable to the defendant; 3) that is likely to be redressed in the event of a favorable ruling from the Court. *Plotkin v. Ryan*, 239 F.3d 882, 884 (7th Cir. 2001); *see also O'Sullivan*, 396 F.3d at 854. The injury must be causally related to the defendant's action and not the result of the independent action of some third party. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The second and third elements of standing require that "a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

Of particular significance here, a "[g]eneral authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113-14 (3d Cir. 1993) (holding that the school district officials, not the Attorney General or state Secretary of Education, were the proper defendants in a challenge to a contractor residency requirement); *see also Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002), *cert. denied*, 540 U.S. 875 (2003) (holding that federal courts lacked jurisdiction over a city ballot text dispute brought against the California Secretary of State because the city was not required to follow the Secretary's directions when running its municipal elections).

Courts have held that there is no subject matter jurisdiction to adjudicate lawsuits against the Indiana state officials who have no authority to provide the relief Plaintiffs seek. In *Libertarian Party of Indiana v. Marion County Board of Voter Registration*, 778 F. Supp. 1458, 1459 (S.D. Ind. 1991), the political parties sued individual state officials to try to obtain paper and computer tape copies of Marion County voter registration data. The Southern District ruled that the claims against the members of the Indiana State Election Board were not justiciable because the Marion County Voter Registration Board could provide all requested relief and the State Election Board could not discipline or remove members of the county board. *Id.* at 1461.

Here, an Article III "case or controversy" is lacking as to Governor Daniels because the injuries Plaintiffs assert are not fairly traceable to him and because he does not have the authority to provide the relief Plaintiffs seek. The Governor, in short, has no authority to enforce the Right-to-Work law and no role under this statute. All he did was sign a bill into law. There is no such thing, however, as a doctrine conferring Article III jurisdiction against the Chief Executive merely because of that role. *Freedom From Religion Found, Inc. v. Obama*, 641 F.3d 803, 808 (7th Cir. 2011) (citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974)). The Amended Complaint must be dismissed as to Governor Daniels.

2. Because The Governor Does Not Enforce SEA 298, The Eleventh Amendment Separately Bars This Action

Similarly, the Eleventh Amendment bars this action because the State of Indiana, as a sovereign entity, has not consented to be sued by Plaintiffs. Under the doctrine of *Ex Parte Young*, "officers of the state, [who] are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings … to enforce against parties affected an unconstitutional act … may be enjoined by a Federal court of equity from such action." 209 U.S. 123, 155-56 (1908). The theory behind this exception is that, since

the authority under which the officer acts is void, the officer is "stripped of his official or representative character and is subject to the consequences of his official conduct." *Id*. at 160.

Because *Young* presumes some ability of the defendant state official to enforce the law at issue, it does not apply where such responsibility is lacking. In *Young* itself the Court acknowledged that the sovereign immunity exception it creates applies only when the named state officials have "some connection with the enforcement of the act." *Id*. at 157. More recent decisions from various circuits have respected this limiting on *Young*. In *1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993), the court held that *Young* does not apply when a defendant state official has neither enforced nor threatened to enforce an allegedly unconstitutional state statute. In *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996), the court observed that, for an officer of a state to be a proper defendant in a suit to declare an act unconstitutional, "such officer must have some connection with the enforcement of the act." *Id*. at 1416, *cert*. *denied*, *Children's Healthcare is a Legal Duty, Inc. v. Montgomery*, 519 U.S. 1149 (1997).

The requisite connection between the defendant official and the challenged statute is not satisfied by merely alleging that the official has a general duty to uphold the laws. Indeed, the Supreme Court's reasoning in *Young* is particularly instructive. There, the Court observed that if the constitutionality of a statute could be tested merely by bringing a suit against an officer of the state, "then the constitutionality of every act passed by the legislature could be tested by a suit against the governor [or] the attorney general," based upon the theory that each is charged with the general duty to execute or enforce the laws. 209 U.S. at 157. "That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law," the court concluded, "but it is a mode which cannot be applied to the states of the Union

consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Id*.

Based on this instruction from *Young*, federal courts have rejected lawsuits against governors and other state officials based on their general duties. *See, e.g., Shell Oil Co. v. Noel*, 608 F.2d 208, 211(1st Cir. 1979) ("[t]he mere fact that a governor is under a general duty to enforce state law does not make him a proper defendant in every action attacking the constitutionality of a state statute."); *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976) (an attorney general's duty to support the constitutionality of challenged state statutes does not constitute enforcement of the statute in question).

As described above, the Governor has no specific authority to enforce the Right-to-Work law and the Plaintiffs have named the Governor merely as a representative of the State of Indiana, which is insufficient to invoke the *Young* exception to the Eleventh Amendment prohibition of suits against the State and its officials. Accordingly, the Eleventh Amendment bars this action as it relates to Governor Daniels.

3. Governor Daniels Merely Signed SEA 298 Into Law And Immunity Bars This Suit Against Him

Plaintiffs have sued Governor Daniels and they assert their federal constitutional claims through 42 U.S.C. § 1983. It is well-established, however, that Plaintiffs may only bring their § 1983 claims against those individuals personally responsible for the constitutional deprivation. *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001). The Right-to-Work law bestows no power on the Governor. Indeed, the only official role Governor Daniels had with regard to the Right-to-Work law was the official act of signing that bill into law. In the Seventh Circuit, that official act alone is not enough to make the Governor liable for any alleged constitutional violations arising out of the Right-to-Work law. *See Hearne v. Bd. of Educ. of the City of*

Chicago, et al., 185 F.3d 770, 777 (7th Cir. 1999) (holding that a union could not bring a claim for declaratory or injunctive relief pursuant to *Ex parte Young* against a state governor for alleged civil rights violations arising from legislation that restricted employees' collective bargaining rights, where the governor had no role to play in the enforcement of the challenged statutes and did not have the power to nullify the legislation once it had entered into force).

Put another way, the Governor's actions are protected by absolute legislative immunity; thus, Plaintiffs' lawsuit must be dismissed. The United States Supreme Court has provided absolute immunity from suit under 42 U.S.C. § 1983 for "actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott–Harris,* 523 U.S. 44, 53-55 (1998) (also concluding that the signing of a bill into law is a legislative act that is protected by absolute immunity). That immunity applies to claims for damages and injunctive and declaratory relief. *See Supreme Court of Virginia v. Consumers Union of the U.S., Inc.,* 446 U.S. 719, 732-33 (1980); *Risser v. Thompson,* 930 F.2d 549, 551 (7th Cir.1991), *cert. denied*, 502 U.S. 860 (1991). In *United States v. Blagojevich*, the Seventh Circuit recently extended absolute legislative immunity to "governors who are sued for their role in legislative activity." 638 F.3d 519, 529 (7th Cir.) (holding that allegations that the governor "took bribes in exchange for influencing the state legislature to pass the Racing Acts and for signing the Acts into law" referred to acts that were legislative in nature; therefore, the governor was entitled to absolute legislative immunity), *reh'g en banc granted in part, opinion vacated in part by* 649 F.3d 799 (7th Cir.2011). *See also Hagan v. Quinn*, 11-3213, 2012 WL 161354 (C.D. Ill. Jan. 19, 2012). The Amended Complaint avers only that Governor Daniels is the Governor and signed the bill into law. Accordingly, the Amended Complaint as against him must be dismissed.

C. Attorney General Zoeller Is Absolutely Immune From Plaintiffs' Claims

The Attorney General is absolutely immune from civil liability for prosecuting individuals under the law or generally acting "as an advocate for the state." *Mendenhall v. Goldsmith*, 59 F.3d 685, 691 (7th Cir.), *cert. denied*, 116 S. Ct. 568 (1995) (extending absolute immunity to prosecutor in civil forfeiture case). *See also Spear v. Town of West Hartford*, 954 F.2d 63, 66-67 (2d Cir.) (city counsel absolutely immune for initiating civil action), *cert. denied*, 506 U.S. 819 (1992). Attorneys general have been held immune from civil rights liability "when administering the criminal laws." *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 672 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (attorney general immune from civil rights liability when exercising statutory power to disapprove state contracts). The Amended Complaint must be dismissed as to Zoeller.

D. Plaintiffs' Claims Are Without Merit

It is well settled that absent the State's consent, the Eleventh Amendment bars suits by private parties against States and their agencies. *See Penhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 100 (1984); *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) ("[e]xpressly applying to suits in equity as well as at law, the [Eleventh] Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State"). *See also Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *Stanley v. Indiana Civil Rights Commission*, 557 F. Supp. 330, 333-34 (N.D. Ind. 1983), *aff'd*, 740 F.2d 972 (7th Cir. 1984). The State of Indiana has not so consented. *See Elliott v. Hinds,* 573 F. Supp. 571, 575 (N.D. Ind. 1983). The Eleventh Amendment also bars actions against state officers and employees in their official capacities and against state agencies, as well as directly against the State itself. *See Meadows v. State of Indiana*, 854 F.2d

1068 (7th Cir. 1988); *Stanley,* 557 F.Supp. at 334 (citing *Owen v. Lash*, 682 F.2d 648, 654-55 (7th Cir. 1982)). It is not disputed that Defendants are officials of the State of Indiana and, indeed, Plaintiffs sued Defendants only in their official capacities. Thus, Plaintiffs' claims for damages against Defendants are barred by the Eleventh Amendment and should be dismissed.[1]

E. Plaintiffs' State Constitutional Claims Are Barred By The Eleventh Amendment

Notwithstanding the doctrine of *Ex parte Young*, claims against Defendants based on the Indiana Constitution, can never be pressed here because such state-law claims (even for injunctive and declaratory relief) are wholly barred by the Eleventh Amendment:

> This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated state law. In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984). *See also Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *Meadows v. State of Indiana*, 854 F.2d 1068 (7th Cir. 1988); *Elliott v. Hinds*, 573 F. Supp. 571, 575 (N.D. Ind. 1983). Accordingly, Plaintiffs' state-law claims are barred and these claims must be dismissed.

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[1] The State, state agencies, and individuals sued in their "official capacities" are not "persons" within the contemplation of 42 U.S.C. § 1983, and are not, therefore, subject to suit under that statute. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989); *AFSCME v. Tristano*, 898 F.2d 1302, 1306 (7th Cir. 1990); *Santiago v. Lane*, 894 F.2d 218, 220 n. 3 (7th Cir. 1990). Moreover, Plaintiffs' claims brought pursuant to 42 U.S.C. § 1983 cannot be premised on violation of state law. *See Hickey v. O'Bannon*, 287 F.3d 656, 658 (7th Cir. 2002) (collecting cases) (dismissing § 1983 claim that was premised on alleged violations of state law).

F. Plaintiffs' Federal Constitutional Claims Must Be Dismissed

Even if properly pled, Plaintiffs' federal constitutional claims must be dismissed.[2] Plaintiffs claim that the Right-to-Work law violates the Contracts Clause of the U.S. Constitution (Count I), the Equal Protection Clause of the U.S. Constitution (Count II-IV), and the *Ex Post Facto* Clause of the U.S. Constitution (Count X). Plaintiffs also allege that federal law preempts Indiana's Right-to-Work law (Count V-VII) and that the definition of "employee" that is found in an Emergency Rule and a Proposed Rule (Count XI) is likewise preempted. The United States Supreme Court has validated similar legislation and has concluded that right to work laws are constitutionally permissible. *See, e.g., Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525, 532, (1949). Dismissal of Plaintiffs' claims is warranted.

1. Statutes Are Presumed To Be Constitutional

The Right-to-Work law, like any statute duly enacted by the State of Indiana, begins clothed with the presumption of constitutionality and Plaintiffs must clearly overcome that presumption to prevail. *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind. 1992). *See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality") (further quotation omitted). Not only

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[2] Because Plaintiffs' state-law claims cannot be asserted under § 1983 and are otherwise barred by the Eleventh Amendment, Defendants will not discuss all of the substantive flaws with these claims. In passing, however, we note that the claim premised on Indiana's *Ex Post Facto* Clause fails because, among other reasons, the Right-to-Work law does not apply retroactively and does not punish conduct that occurred before its effective date. As to Count VIII (Article I, Section 21), Defendants note that this claim is being litigated in state court. Moreover, Count VIII is analytically similar to Plaintiffs' theory under the Thirteenth Amendment -- both claims assert that Plaintiffs are forced to provide services for no compensation. Just as the Union is not within the zone of interests that were to be protected by the Thirteenth Amendment, the Union is not within the ambit of those who were intended to be protected by Article I, Section 21. *See Bayh v. Sonnenburg*, 573 N.E.2d 398, 411-14 (Ind. 1991), *cert. denied*, 502 U.S. 1094 (1992) (listing examples of Hoosiers who attended militia training, worked on road improvements, testified before the grand jury, testified in criminal matters, provided uncompensated legal services to the poor, provided expert medical testimony at trial and further noting that this provision was designed to protect "individuals" from providing uncompensated services to the State); Dkt. No. 59 at 9-10. As to the individual plaintiffs, the fact is that the Right-to-Work law does not "force the individual Plaintiffs to work for any particular employer or require the individual Plaintiffs to remain in the employment of a given employer." Dkt. No. 59 at 12.

do Plaintiffs bear the burden of proof but all doubts are resolved against them. *Id*. If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, courts should choose the path that permits upholding the statute as it should not "presume that the legislature violated the constitution unless unambiguous language of the statute requires that conclusion." *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1037 (Ind. 1988). *See also Beach Communication*, 508 U.S. at 315.

2. Indiana's Right-To-Work Law Does Not Violate The Contracts Clause Or The *Ex Post Facto* Clause

In Count I, Plaintiffs aver that the Contracts Clause of the U.S. Constitution has been violated because, according to Plaintiffs, the substantive provisions of the law apply to existing contracts. In Count X, Plaintiffs claim that the Right-to-Work law violates the *Ex Post Facto* Clause of the U.S. Constitution because it punishes behavior that occurred in the past. The statute is not retroactive and these claims must be dismissed.

The Contract Clause of the U.S. Constitution provides that "[n]o State shall…pass any…law impairing the Obligation of Contracts. U.S. Const., Art. I, § 10. A state violates that provision if a change in state law substantially impairs a contractual relationship. *See Khan v. Gallitano*, 180 F.3d 829, 832 (7th Cir. 1999). The relevant inquiry, therefore, has three components: (1) whether there is a contractual relationship; (2) whether a change in law impairs that contractual relationship; and (3) whether the impairment is substantial. *Id*. At bottom, then, the Contracts Clause is designed to deal with retroactive application of new rules that could penalize detrimental reliance on old rules. *See Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 896 (7th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) (retroactive legislation is contrary to the original purpose of the Contracts Clause).

Similarly, Article I of the United States Constitution provides that neither Congress nor any State shall pass any "*ex post facto* Law." *See* U.S. Const. Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. "[C]entral to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Miller v. Florida,* 482 U.S. 423, 430 (1987) (citation omitted). In other words, for a law to constitute *ex post facto* punishment, it "must be retrospective, that is, it must apply to events occurring before its enactment." *Miller,* 482 U.S. at 430 (citation omitted). A law is "retrospective" only if it "changes the legal consequences of acts completed before its effective date." *Id.*

Critical to both of these constitutional claims, then, is the requirement that Plaintiffs must allege, and ultimately prove, that the Right-to-Work law retroactively applies to contracts entered into before March 14, 2012 and to conduct that that occurred before this date. Contrary to Plaintiffs' assertion, however, Section 13 specifically states that the substantive provisions of the law -- Sections 8-12 -- "do not apply to or abrogate a written or oral contract or agreement in effect on March 14, 2012" but that the provisions "apply to a written or oral contract or agreement entered into, modified, renewed, or extended after March 14, 2012." I.C. § 22-6-6-13.

Since the substantive provisions of the Indiana Right-to-Work law do not apply to contracts or conduct before its effective date, there is no violation of the Contracts Clause or the *Ex Post Facto* Clause and Counts I and X must be dismissed with prejudice. *See Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982) (a "Statute cannot be said to impair a contract that did not exist at the time of its enactment"); *Payday Today, Incorporated v. Indiana Department of Financial Institutions*, No. 2:05-cv-122, 2006 WL 148943 at *10-*11 (N.D. Ind. Jan. 17, 2006) (rejecting challenge to Indiana statute regulating pay-day loan companies because law at issue did not

retroactively apply to existing contracts); *Howell v. Anne Arundel Cty.*, 14 F. Supp. 2d 752, 755 (D. Md. 1998) (plaintiffs' Contract Clause claims fail because the complained-of pension law change applied only prospectively and not retroactively to vested benefits); *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984) ("[a] very important prerequisite to the applicability of the contract Clause…to an asserted impairment of a contract by state legislative action is that the challenged law operate with retrospective, not prospective effect"). *See also California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995) (denying *ex post facto* claim explaining that "[i]n accordance with this original understanding, we have held that the [*Ex Post Facto*] Clause is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts'") (further quotations and citations omitted); *U.S. v. Demaree*, 459 F.3d 791, 793 (7th Cir. 2006), *cert. denied*, 551 U.S. 1167 (2007) (purpose of the *Ex Post Facto* Clause "is to protect people against being punished for conduct that was not criminal when they engaged in it, or being punished more severely for their crime was punishable when committed, or being deprived of defenses that had been available then, or otherwise being blindsided by a change in law").[3]

3. Indiana's Right-To-Work Law Does Not Violate The Equal Protection Clause

In Counts II, III and IV, Plaintiffs assert equal protection claims. Count II is based on the contention that the Right-to-Work law treats dues paying union employees differently than non-union employees; Count III is based on the theory that the Right-to-Work law treats the construction industry differently than other industries; Count IV avers that the Right-to-Work law treats public sector employees differently than private sector employees.

[3] Plaintiffs' reliance on § 22-6-6-3 does not alter this analysis because that provision is not substantive. Rather, it is definitional and merely clarifies that the substance of the Indiana law (Sections 8-12) applies to union contracts in the construction industry. Defendants made this point in their materials opposing Plaintiffs' Emergency Motion for a TRO and Plaintiffs withdrew that Motion.

The Equal Protection Clause of the United States Constitution provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Union status does not implicate a fundamental right, nor does it constitute a protected class for purposes of the equal protection analysis. *See City of Charlotte v. Local 660, Int'l Ass'n of Firefighters,* 426 U.S. 283, 286 (1976) ("this Court would reject such a contention if it were made" that "respondents' status as union members ... is such as to entitle them to special treatment under the Equal Protection Clause").

Because the Right-to-Work law is economic legislation, it is reviewed under the rational basis standard. Under this most deferential standard, the law will not be found to violate the Equal Protection Clause merely because it may be deemed unwise, unfair, or unsound, or because there may have been "more reasonable" or "more effective" policy choices that could have been made. *See Beach Communications,* 508 U.S. at 313–14. Rather, "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." *Vance v. Bradley,* 440 U.S. 93, 97, (1979) (footnote omitted). A law survives rational basis review if (1) "there is a plausible policy reason for the" law, (2) "the legislative facts on which the [law] is apparently based rationally may have been considered to be true by the governmental decisionmaker," and (3) "the relationship of the [law] to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger,* 505 U.S. at 11 (citations omitted).

Plaintiffs need to affirmatively show that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications, Inc.*, 508 U.S. at 313. In essence, Plaintiffs must negate every conceivable basis which *might* support the law. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). Statutes, such as this

one, which are economic in nature, are accorded "a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Lehnhausen*, 410 U.S. at 364 (rational basis is the most deferential standard of review and can invalidate a statute "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes").

The Supreme Court, in *Lincoln Federal Labor Union No. 19129, v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), rejected an equal protection claim that was premised on comparing union employees to non-union employees:

> Third, it is contended that the North Carolina and Nebraska laws deny unions and their members equal protection of the laws and thus offend the equal protection clause of the Fourteenth Amendment. Because the outlawed contracts are a useful incentive to the growth of union membership, it is said that these laws weaken the bargaining power of unions and correspondingly strengthen the power of employers. This may be true. But there are other matters to be considered. The state laws also make it impossible for an employer to make contracts with company unions which obligate the employer to refuse jobs to union members. In this respect, these state laws protect the employment opportunities of members of independent unions….This circumstance alone, without regard to others that need not be mentioned, is sufficient to support the state laws against a charge that they deny equal protection to unions as against employers and non-union workers.
>
> It is also argued that the state laws do not provide protection for union members equal to that provided for non-union members. But in identical language these state laws forbid employers to discriminate against union and non-union members. Nebraska and North Carolina thus command equal employment opportunities for both groups of workers.

Id. at 532-33. In short, *Lincoln Federal* disposes of Count II; it must be dismissed.

In Count III of their Complaint, Plaintiffs' claim that, under Section 3 of the Right-to-Work law, workers in the building and construction industries are treated differently from workers in other industries in terms of the effective date of the Right-to-Work law. Section 3 of the Right-to-Work law is not substantive and all of the substantive provisions of the Right-to-Work apply equally to all workers, regardless of their involvement in the building and

construction industry. *See* I.C. §§ 22-6-6-8 through -12. Even assuming, however, that two classes existed, there would still be no violation because, even the National Labor Relations Act, explicitly acknowledges that the two industries operate differently and require different rules and regulations because of the nature of the work. Logically, moreover, building cars at a factory or making steel at a mill is different than working on numerous construction projects over the course of a career, or even a year. Even if I.C. §22-6-6-3 were substantive, a rational basis exists for the distinction and dismissal of Count III is warranted.

As to Count IV federal law distinguishes between public and private employees. *See* 29 U.S.C. § 152(2) ("[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act"). *See also Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 231 (1993) ("the State is excluded from the definition of the term 'employer' under the NLRA"). Any group excluded under 29 U.S.C. § 152(2) has likewise been excluded from I.C. § 22-6-6-1. As such, Count IV must be dismissed.

4. Indiana's Right-To-Work Law Is Specifically Authorized By Federal Law And, Thus, It Is Not Preempted

Count V, Count VI, and Count VII all allege preemption. As it relates to these claims, the Right-to-Work law provides:

> A person may not require an individual to:
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> ***
>
> (2) pay dues, fees, assessments, or other charges of any kind or amount to a labor organization; or

> (3) pay to a charity or third party an amount that is equivalent to or a pro rata part of dues, fees, assessments, or other charges required of members of a labor organization
>
> as a condition of employment or continuation of employment.

I.C. § 22-6-6-8(2, 3). The Right-to-Work law also provides that a "person who knowingly or intentionally, directly or indirectly, violates section 8 of this chapter commits a Class A misdemeanor." I.C. § 22-6-6-10. These sections are not preempted by federal labor law. In fact, federal labor law specifically authorizes states to enact such laws and the Supreme Court has recognized this authorization for almost 50 years. *See* 29 U.S.C. § 164(b); *Retail Clerks International, Association, Local 1625 v. Shermerhorn*, 373 U.S. 746 (1963) ("*Retail Clerks I*"); *Retail Clerks International, Association, Local 1625 v. Shermerhorn*, 375 U.S. 96 (1963) ("*Retail Clerks II*").

Retail Clerks Local 1625 was the certified bargaining agent for a supermarket chain in Florida. In October 1960, the union and employer negotiated a collective bargaining agreement that was effective until April 1963. Critically, the agreement provided:

> Employees shall have the right to voluntarily join or refrain from joining the Union. *Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service 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 (emphasis added). Put simply, this clause acknowledged that union membership in Florida was voluntary; however, it also recognized that those employees who chose not to join the union were required to pay money to aid the union in meeting its authorized expenses as the exclusive bargaining agent. *Id.* at 749.

Non-union employees brought a class action lawsuit and sought a declaration that this provision of the collective bargaining agreement was null and void and unenforceable. *Id*. at 750. They also sought a temporary and permanent injunction and an accounting. The basis for their claims was the right-to-work provision of the Florida Constitution, which provided that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization. *Id*. at 750 n.2. In short, the non-union employees argued that the Florida constitutional provision made the clause commanding payment of money 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" illegal.

The Court recognized that this "case to a great extent turns upon the scope and effect of § 14(b) of the National Labor Relations Act, added to the Act in 1947, 29 U.S.C. § 164(b)" and quoted that provision as follows:

> Nothing in this Act 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.

Id. at 750-51 (quoting 29 U.S.C. § 164(b)). From there, the Court recognized: "[a]s is immediately apparent from its language, § 14(b) was designed to prevent other sections from the Act from completely extinguishing state power over certain union-security arrangements. And it was the proviso to § 8(a)(3), expressly permitting agreements conditioning employment upon membership in a labor union, which Congress feared might have this result. It was desired to 'make certain' that § 8(a)(3) could not 'be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy.'" *Id*. at 751 (quoting H.R. Conf.

Rep. No. 510, 80th Cong., 1st Sess. In the end, the Court held that § 14(b) of the Act and the legislative history of it specifically authorize the states to enact right-to-work laws. *Id.* at 757.

Subsequently, the Court addressed whether Florida courts have jurisdiction to enforce the State's prohibition against "agency shop" clauses in union contracts. *Retail Clerks II*, 375 U.S. at 97-98. In *Retail Clerks II*, the Court began by recapping and reaffirming the holding and reasoning in *Retail Clerks I*:

> We start from the premise that, while Congress could preempt as much or as little of this interstate field as it chose, it would be odd to construe § 14(b) as permitting a State to prohibit the agency clause by barring it from implementing its own law with sanctions of the kind involved here.
>
> ***
>
> By the time § 14(b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices – a state power which we sustained in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525. These laws -- about which Congress seems to have been well informed during the 1947 debates -- had a wide variety of sanctions, including injunctions, damage suits, and criminal penalties.

Retail Clerks II, 375 U.S. at 99-100.

And:

> In light of the wording of § 14(b) and this legislative history, we conclude that Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. Since it is plain that Congress left the States free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws. Otherwise the reservation which Senator Taft felt to be so critical would become empty and largely meaningless.

Id. at 102. The "States by reason of § 14(b) have the final say and may outlaw" union security agreements. *Id.* at 102-03. "There is a conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements." *Id.* at 103. In the end, "Congress … chose to abandon any search for uniformity in dealing with the problems of state laws barring the

execution and application of agreements authorized by § 14(b) and decided to suffer a medley of attitudes and philosophies on the subject." *Id*. at 104-05.

Accordingly, Plaintiffs' preemption claims were rejected nearly 50 years ago. *Retail Clerks I* and *Retail Clerks II* make clear that states have the authority to enact laws like Indiana's Right-to-Work law and can impose criminal sanctions under such laws. Counts V, VI, and VII must be dismissed. *See also Local 514, Transport Workers Union of America v. Keating*, 212 F. Supp. 2d 1319, 1324-25 (E.D. Ok. 2002) (subsequent history omitted) (upholding identical provisions of Oklahoma's right to work law and concluding that these provisions are authorized by federal law).[4]

5. Count XI (Claiming That The Definition Of "Employee" In the Emergency Rule and Proposed Rule Is Preempted) Must Be Dismissed As Moot

In Count XI, Plaintiffs argue that the definition of "employee" -- including both a current employee and an applicant for employment -- found in Emergency Rule #12-293(E) and Proposed Rule #12-290 is preempted by federal law. (Dkt. No. 62, Count XI, ¶¶24-27).

The Final Rule that was recently approved does not contain this definition of "employee." *See* Exhibit A. As such, Count XI -- challenging the Emergency Rule and Proposed Rule because of the definition of "employee" -- is moot and must be dismissed. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987) (bill expired thus rendering moot the question of whether the President's pocket veto prevented the bill from becoming law); *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (case mooted by change to the challenged regulation); *Sappenfield v. State of Indiana*, 574 F. Supp. 1034 (N.D. Ind. 1983) (dismissing constitutional challenge as there was no case or controversy: "Federal Courts established under Article III of the

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[4] In *Local 514*, the challengers did not appeal the District Court's conclusion that these identical provisions were not preempted. Moreover, *Local 514* noted that the provision of the NLRA used here to support Count VII was held to violate the First Amendment. *See Wilson v. NLRB*, 920 F.2d 1262 (6th Cir. 1990), cert. denied, 505 U.S. 1218 (1992).

Constitution do not render advisory opinions" and for "adjudication of Constitutional issues, concrete legal issues, presented in actual cases, not abstractions, are requisite") (further citations and quotations omitted); *CFMOTO Powersports, Inc. v. U.S.*, 780 F. Supp. 2d 869, 874-75 (D. Minn. 2011) (dismissing, on ripeness grounds, constitutional challenge to regulations that may be applied in the future).

G. The Right-To-Work Law Is Severable

Plaintiffs attack Section 3 of the Right-to-Work law and argue that all of the Right-to-Work law must be stricken. Indiana Code § 1-1-1-8 governs severability for Indiana statutes. It provides that an invalid statutory provision "does not affect other provisions that can be given effect without the invalid provision or application." I.C. § 1-1-1-8. The law applies to all statutes, except for those with non-severability clauses, or "when the remainder is so essentially and inseparably connected with, and so dependent upon, the invalid provision or application that it cannot be presumed that the remainder would have been enacted without the invalid provision or application." I.C. § 1-1-1-8(b)(1). The law further excludes those provisions that would leave the remainder incomplete and "incapable of being executed in accordance with legislative intent." I.C. § 1-1-1-8(b)(2). *See also Back v. Carter,* 933 F. Supp. 738, 760 (N.D. Ind. 1996) (I.C. § 1-1-1-8 "create[s] a presumption" of severability); *State v. Kuebel,* 241 Ind. 268, 278, 172 N.E.2d 45, 50 (1961).

Accordingly, even if the Court were to find that Section 3 is unconstitutional (which it is not) such a conclusion would not render the entire Indiana Right-to-Work legislation invalid. The core of the Right-to-Work legislation is Section 8, which prevents an individual from requiring someone else to become, remain in, or pay dues or otherwise to a labor organization as a condition or continuation of employment. *See* I.C. § 22-6-6-8. *See also Local 514 Transp.*

Workers Union of Am. v. Keating, 212 F. Supp. 2d 1319, 1329 (E.D. Okla. 2002) (finding provisions nearly identical to the ones at issue to be the "core" of the Oklahoma right to work legislation, independent of other provisions and constitutionally valid) (subsequent history omitted).[5] Section 3 is not inseparably connected with or dependent on the excised portion, such that the remainder would not have been enacted without it. *See* I.C. § 1-1-1-8(b)(1). And, even if Section 3 were removed, the remainder would not be incomplete or incapable of execution. I.C. § 1-1-1-8(b)(2). Plaintiffs' attempt to strike the entire Right-to-Work law based on Section 3 fails.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court grant their Motion to Dismiss and dismiss Plaintiffs' Amended Complaint with prejudice.

Respectfully submitted,

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[5] The District Court concluded that portions of Oklahoma's right to work law -- that are identical to those challenged here -- were constitutionally permissible. That conclusion was not disturbed on appeal.

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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