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

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

Petitioners,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Respondents.

Case No.: 22-CH-34

ORDER DENYING LEAVE TO FILE TAXPAYER ACTION

Matter comes on for hearing on the petition seeking leave under 735 ILCS 5/11-303 to "file an action to restrain and enjoin the . . . [respondents] from disbursing the public funds of the State" in connection with the placement of the proposed Workers' Rights Amendment on the general election ballot for consideration by the voters this November. Attorney Jacob Huebert is present on behalf of the petitioner. AAG Joshua Ratz is present on behalf of the defendants. Arguments heard. The court took the matter under advisement. Because the court is not "satisfied that there is reasonable ground for the filing of such action," the Petition is denied.

There is no dispute that the Illinois House and Senate passed, by a three-fifths margin, Senate Joint Resolution Constitutional Amendment No. 11 (the "Workers' Rights Amendment"), which proposes to amend Article I of the Illinois constitution by adding a Section 25:

> SECTION 25. WORKERS' RIGHTS
>
> (a) Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.

(b) The provisions of this Section are controlling over those of Section 6 of Article VII [Powers of Home Rule Units].

102d Gen. Assem., Senate Joint Resolution Constitutional Amendment No. 11, (May 26, 2021).

Petitioners assert that if the Workers' Rights Amendment is enacted, it would be preempted by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 to 169, as applied to private-sector employees. From this assertion, Petitioners conclude the proposed amendment is unconstitutional under the Supremacy Clause and that the State may be enjoined from spending public funds to place an unconstitutional amendment on the ballot.

The question before the Court is whether Petitioners have presented "reasonable ground for the filing of" their proposed action. 735 ILCS 5/11-301. Reasonable grounds are lacking where a suit is brought for ulterior, frivolous, or malicious purposes, where it is an "unjustified interference[]" in the application of public funds, *Strat-O-Seal Mfg. Co.*, 27 Ill. 2d 563, 565–66 (1963), or where the claims sought to be asserted fail as a matter of law, *Tillman v. Pritzker*, 2021 IL 126387, ¶ 22; *Wirtz v. Quinn*, 2011 IL 111903, ¶¶ 6, 9; *Kaider v. Hamos*, 2012 IL App (1st) 111109, ¶¶ 6, 20, 24, 28, 33, 35. In evaluating whether reasonable grounds exist, well-pleaded nonconclusory allegations of fact must be taken as true, *Hamer v. Dixon*, 61 Ill. App. 3d 30, 31–32 (2d Dist. 1978), but conclusions or unjustified allegations should be disregarded, *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 162 (1956).

Even accepting as true all of Petitioners' allegations, there are no reasonable grounds to permit suit. Petitioner's claims fail as a matter of law, and impermissibly seek an advisory opinion as to "constitutional issues . . . [which] may never progress beyond the realm of the hypothetical." *Slack v. Salem*, 31 Ill. 2d 174, 178 (1964).

First, under Article XIV, section 2 of the Illinois Constitution, "[a]mendments approved by the vote of three-fifths of the members elected to each house *shall be submitted to the electors*

at the general election next occurring at least six months after such legislative approval, unless withdrawn by a vote of a majority of the members elected to each house." Ill. Const. art. XIV, § 2(a) (emphasis added). The requirements of section 2 are plainly met, and the constitutional command is clear. The proposal *must* be submitted to the voters for adoption or rejection. *Id.* "The constitution is the supreme law . . . and every court is bound to enforce its provisions." *Hooker v. Ill. State Bd. of Elections*, 2016 IL 121077, ¶ 38.

Second, the Court has no power to restrain a referendum on the grounds that, if the proposed law were enacted, its enforcement would be unconstitutional. *Slack*, 31 Ill. 2d at 175–76 (no power to restrain referendum to approve issuance of revenue bonds alleged to be unconstitutional as a use of public credit in aid of a private corporation); *Fletcher v. Paris*, 377 Ill. 89, 90–94 (1941) (no power to restrain referendum to approve an ordinance to build a light and power plant or to declare the ordinance "invalid before it became effective or in force"). "[C]ourts should *restrain the enforcement, rather than the passage of*, unauthorized [laws]. Indeed, there is a distinction between enjoining legislative action and enjoining action taken in accordance with unauthorized legislative action." *Ziller v. Rossi*, 395 Ill. App. 3d 130, 138 (2nd Dist. 2009). To borrow from *Fletcher* and *Slack*, "the obvious and predominate purpose of [the proposed] suit [is] to have [the Workers' Rights Amendment], at the suit of the taxpayers, declared invalid prior to the time it ha[s] passed through all the legislative processes necessary to give it life." *Fletcher*, 377 Ill. at 98–99. "The validity of [the Amendment] cannot be thus prematurely and circuitously attacked in the courts." *Id.* at 99. "The courts have no more right to interfere with or prevent the holding of an election which is one step in the legislative process for the enactment or bringing into existence a [constitutional amendment], than they would have to enjoin the [General Assembly] from adopting the [amendment proposal] in the first instance." *Id.* at 96. "The holding

of an election is the exercise of a political right," with which the courts will not interfere. *Id.* at 98. "This court has no power to render advisory opinions, and until the legislative process has been concluded, there is no controversy that is ripe . . . . Indeed, the constitutional issues upon which the opinion of this court is sought may never progress beyond the realm of the hypothetical." *Slack*, 31 Ill. 2d at 178.

Petitioners' reliance on *Hooker* and *Chicago Bar Association v. Illinois State Board of Elections*, 161 Ill. 2d 502 (1994), is misplaced. Those cases concerned the requirements of citizen ballot initiatives, which are governed by Article XIV, *section 3*, not legislative initiatives—such as the Workers' Rights Amendment—, which are governed by section 2. Citizen ballot initiatives "may only be used for amendments directed at 'structural and procedural subjects contained in Article IV' of the constitution, pertaining to Illinois's legislative branch." *Hooker*, 2016 IL 121077, ¶ 3. In *Hooker*, the proposal would have "greatly expand[ed] the duties" of the Auditor General, which are subjects of Article VIII, not the Legislative Article (Article IV). *Hooker*, 2016 IL 121077, ¶ 27. In *Chicago Bar Association*, the proposed amendment would have instituted term limits, which the Illinois Supreme Court held was neither a "structural" nor "procedural" subject of the Legislative Article because eligibility or qualifications of individual legislators "does not involve the structure of the legislature *as an institution*." *Chi. Bar Ass'n*, 161 Ill. 2d at 504, 509–10. Thus, in both cases, the *proposal* did not comply with Article XIV, section 3; that is, the proposed *manner of amendment* violated the Illinois constitution. However, neither case involved, as here, a challenge to enforcement of the amendment or its substantive validity assuming a successful referendum. Neither case turned on whether term limits are unconstitutional, or whether changes to the duties of the Auditor General conflicted with any other law. Instead, the cases addressed solely whether such amendments could be the subject of *citizen ballot initiatives*. *See*

Hooker, 2016 IL 121077, ¶ 34 (the Court's "role does not require us to read between the lines of every proposal in an attempt to discern the propriety of the proponent's underlying intentions; *our role is solely* to determine whether the proposal comports with the strict limitations set out in article XIV, section 3" (emphasis added)).

In sum, *Hooker* and *Chicago Bar Association* merely stand for the unremarkable principle that ballot *proposals* must comply with the requirements for such proposals. They set forth an exception to the general prohibition against enjoining elections where the challenge is not to the anticipated enforcement of the end product of the election—the ordinance, law, or constitutional amendment—, but rather to the election *itself.* As Justice Harrison put it in his *dissent* in *Chicago Bar Association* (and upon which Petitioners rely):

> While it is true, as a general rule, that a court may not enjoin an election we have recognized an *exception* to this rule where . . . 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.*

Chi. Bar Ass'n, 161 Ill. 2d at 516 (Harrison, J., dissenting) (emphasis added) (citing *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 460 (1976) and *Jordan v. Officer*, 155 Ill. App. 3d 874, 877 (5th Dist. 1987)). *Coalition for Political Honesty*, of course, merely held that if the election *itself* is "called in violation of the constitution," the election may be restrained. 65 Ill. 2d at 460–61. And *Jordan* succinctly recounts that "[t]he general rule is subject to exception, where injunctive relief is necessary to prevent a waste of public funds by the holding of an election *under an unconstitutional election statute* or any *election called in violation of the constitution.*" *Jordan*, 155 Ill. App. 3d at 877 (emphasis added).

In this case, the "ballot proposition" described by Justice Harrison or the "election statute" referenced in *Jordan* is not the anticipated Workers' Rights Amendment, but rather Senate Joint Resolution Constitutional Amendment No. 11. The question for the Court is whether that

Resolution comports with the Illinois constitution. In *Hooker* and *Chicago Bar Association*, the citizen ballot initiative elections violated the Illinois constitution because they did comply with the requirements for such initiatives. They were improper *methods of amendment*. Petitioners do not allege the "ballot proposition" at issue in this case or the *holding of the upcoming referendum* violates the constitution. The referendum is plainly proper because the requirements for holding the referendum under XIV, section 2 are met. And the *proposition* cannot conflict with federal law because it has no operation; it has not "passed through all the legislative processes necessary to give it life." *Fletcher*, 377 Ill. at 99. Petitioners cite *Krebs v. Thompson*, 387 Ill. 471, 473 (1944), which holds that "[i]t has long been the settled rule in Illinois that the expenditure of public funds by an officer of the State, for the purpose of *administering an unconstitutional act*, constitutes a misapplication of such funds." (emphasis added). While this may be true, Petitioners do not seek by this lawsuit to prevent the expenditure of funds administering the Workers' Rights Amendment. They cannot because it does not exist, and may not exist. Instead, they seek to prevent the expenditure of funds to administer the *Senate Joint Resolution Constitutional Amendment No. 11*, which requires *only* that the language that may *become* the Workers' Rights Amendment be put to the People for a vote. But Senate Joint Resolution Constitutional Amendment No. 11 is not unconstitutional. It was validly passed. Ergo, spending money to effect its purposes does not constitute "administering an unconstitutional act." Petitioners true attack is not to the *referendum itself* as in *Hooker* and *Chicago Bar Association.* Instead, they look *beyond* the election, objecting to the anticipated *enforcement* of the *end product* of a *successful* election—an enacted Workers' Rights Amendment. Nevertheless, as noted, "[t]he validity of [the Amendment] cannot be thus prematurely and circuitously attacked in the courts." *Id.* at 99.

Third, even if the Court had power to offer an opinion as to the prospective validity of an enacted Workers' Rights Amendment, and even if Petitioners are correct that application of an enacted Workers' Rights Amendment to private employees would be preempted by the NLRA, Petitioners plainly concede the Amendment would have valid applications, specifically application to public employees. Pet. ¶ 12 (the Workers' Rights Amendment "makes no distinction between private-sector and public sector employees and therefore *would establish a right to collective bargaining for both.*" (emphasis added)); *see also* Proposed Compl. ¶ 56. The Amendment would also prohibit the passage of laws restricting union security agreements, a subject about which "Congress . . . . left the states free to legislate." *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 102, 104–05 (1963). These are plainly substantial applications of the Amendment. Petitioners offer no basis for preventing the Amendment's submission to the voters merely because *some* anticipated applications *may* be preempted by federal law. The rule is exactly the opposite. "An enactment is facially invalid only if no set of circumstances exist under which it would be valid," and "[t]he fact that [an] enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). Indeed, "[i]n a pre-emption case . . . , state law is *displaced*," and "only to the extent that it actually conflicts with federal law." *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) (emphasis added). The fact that a state law may conflict with federal law in some applications is not sufficient to preempt the state law as to all applications. *Id.*

Moreover, under the Supremacy Clause, "[i]f federal law imposes restrictions or confers rights on private actors and a state law confers rights or imposes restrictions that conflict with the federal law, the federal law *takes precedence* and the state law is preempted." *Kansas v. Garcia*,

140 S. Ct. 791, 801 (2020) (emphasis added) (internal quotation marks omitted). Preemption is *merely a "rule of decision,"* "instruct[ing] courts what to do *when* state and federal law clash." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324-25 (2015) (emphasis added). Thus, even assuming Petitioners are correct that the Workers' Rights Amendment would be preempted by the NLRA as to private employees, the Amendment would merely be suspended, or "displaced," *while the federal law exists. See Lily Lake Road Defenders v. County of McHenry*, 156 Ill. 2d 1, 8 (1993) ("[T]he subordinate legislative body's enactment is *suspended and rendered unenforceable by the existence* of the superior legislative body's enactment," and is revived upon "repeal of the preempting statute." (emphasis added)); *see also Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.*, 15 Ill. 2d 182, 193 (1958) ("[T]he State statute is, in effect, merely unenforceable or suspended by the existence of the Federal legislation."). Thus, there is no basis for denying the voters the opportunity to decide whether to enact a state right to collective bargaining as a supplement or backup to federal rights secured by the NLRA. At most, federal preemption would merely render the Workers' Rights Amendment dormant, not invalid, because it would still apply to situations not covered by the NLRA and would become enforceable even as to preempted applications in the event the NLRA were ever repealed. *See Dalton*, 516 U.S. at 476–78 (state constitutional ban on public funding of abortion preempted only to the extent it conflicted with Hyde Amendment's requirement that federal funds could be used in instances of rape and incest, ban remained valid as to situations involving only state funds, and ban as to federal funds was capable of being enforced in the future in the event the Hyde Amendment was repealed or modified).

Thus, the proposed Amendment would serve *at least* three permissible purposes. First, it would create rights for public employees, which Petitioners concede is *not* preempted by the

NLRA. Second, it would restrain the power of the General Assembly to pass laws restricting union security agreements, a subject left open to the states. Third, it would act as a state-law failsafe to preserve rights for private-sector employees in the event the federal government ever decided to abandon the NLRA. There are no grounds for denying the voters the opportunity to decide whether to add the Workers' Rights Amendment to the Illinois constitution.

Accordingly, the Petition states no reasonable grounds for filing suit. The Illinois constitution requires the amendment to be put to the voters because it complies with the requirements in Article XIV, section 2 of the Illinois constitution. The Court has no power to pass on the validity of the proposed Amendment unless and until it is adopted by the voters. To do so would constitute an improper advisory opinion. "Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 504 (1982). Moreover, even if the Court could entertain Petitioners' challenges to the anticipated enforcement of the proposed Amendment, Petitioners plainly concede it has substantial applications unaffected by any federal preemption. Petitioners are therefore not entitled to an order prohibiting the placement of the proposed Amendment on the ballot. The Petition is denied.

SO ORDERED.

Date: 5/26/2022

Raylene DeWitte Grischow, *Circuit Court Judge*