IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN EDUCATION ASSOCIATION COUNCIL; WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, DISTRICT COUNCIL 40, AFL-CIO; WISCONSIN STATE EMPLOYEES UNION, AFSCME, DISTRICT COUNCIL 24, AFL-CIO; AFT-WISCONSIN, AFL-CIO; AFSCME, DISTRICT COUNCIL 48, AFL-CIO; SEIU HEALTHCARE WISCONSIN, CTW, CLC; and WISCONSIN STATE AFL-CIO,

Plaintiffs,

v.

SCOTT WALKER, Governor, State of Wisconsin; MICHAEL HUEBSCH, Secretary, Department of Administration; GREGORY L. GRACZ, Director, Office of State Employment Relations; JAMES R. SCOTT, Chair, Wisconsin Employment Relations Commission; JUDITH NEUMANN, Commissioner, Wisconsin Employment Relations Commission; and RODNEY G. PASCH, Commissioner, Wisconsin Employment Relations Commission,

Defendants.

OPINION AND ORDER

11-cv-428-wmc

Following this court's March 30, 2012 Opinion and Order, permanently enjoining certain provisions of 2011 Wisconsin Act 10, defendants filed a notice of appeal to the Seventh Circuit Court of Appeals. Defendants also filed a motion for this court to stay its injunction pending appeal to the Seventh Circuit pursuant to Federal Rule of Civil Procedure 62(c). Plaintiffs oppose the stay. Because defendants have failed to demonstrate a likelihood of success on appeal and irreparable harm and because the balance of equities lies in favor of plaintiffs, the court will deny defendants' motion to stay except as to those public unions who have already been decertified.

BACKGROUND

Plaintiffs brought this action challenging provisions of 2011 Wisconsin Act 10 as violating the Equal Protection Clause of the Fourteenth Amendment and the First Amendment. The court found two provisions of the Act -- a mandatory annual recertification requirement for general employee unions and a prohibition on dues collection from general employees' paychecks -- to be unconstitutional and issued an order enjoining the enforcement of either provision. The court provided the state and local government entities until May 31, 2012 to reinstate dues withholding.

Defendants filed an appeal on April 9, 2012. (Dkt. #111.) Presently before the court is defendants' April 9, 2012, motion for stay pending appeal. (Dkt. #112.)

OPINION

The court considers the following four familiar factors in determining whether a stay pending appeal is warranted:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (citation and quotation marks omitted). Defendants, as the party seeking the stay, "bear[] the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

Defendants contend that a "stay may be appropriate even where the district court believes that the enjoined party will likely *not* succeed on the merits on appeal." (Defs.'

Br. (dkt. #113) 2-3 (emphasis in brief) (citing *Eli Lilly v. Co. v. Emisphere Techs., Inc.*, No. 103-cv-1504, 2006 WL 1131786, at *3 (S.D. Ind. Apr. 25, 2006)). The district court in *Eli Lilly* granted a stay pending appeal, finding that the irreparable injury to plaintiff, the party moving for a stay, coupled with a lack of further injury to defendant pending appeal justified a stay even though the court considered that the plaintiff's likelihood of success was "not high." *Eli Lilly*, 2006 WL 1131786, at *3. Whether or not this translates into defendants' characterization of "likely not to succeed on appeal," the Supreme Court's and Seventh Circuit's more recent decisions establish that a "strong showing" of success on the merits or a "reasonable likelihood of success on the merits" is required to satisfy the first factor. *Nken*, 556 U.S. at 434; *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006).

Perhaps defendants' argument is simply that the court should apply a sliding scale in weighing the likelihood of success on appeal against irreparable injury: where the likelihood of success is high, the showing of irreparable injury need not be as strong; and, likewise, where the irreparable injury is certain, the likelihood of success may be relatively weaker. *See Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) ("These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted."); *Hoosiers Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("[T]he more net harm an injunction can prevent, the weaker the plaintiff's claim on the

merits can be while still supporting some preliminary relief.").[1] The problem for defendants, as explained below, is that their evidence and argument as to both prongs is weak, leaving nothing to outweigh the other.

I. Likelihood of Success on Appeal

Defendants contend that the Seventh Circuit will likely reverse this court's opinion given the relatively low bar of rational basis review. In support, defendants first argue that "they need only provide a rational basis for the classification created by Act 10 and not a separate and distinct rational basis for each operative provision of the act." (Defs.' Br. (dkt. #113) 4.) Defendants' position, however, is counter to the Supreme Court's treatment of constitutional challenges to multiple provisions in a single act of legislation. The Supreme Court's recent treatment of the Bipartisan Campaign Reform Act in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), provides an apt example. The Court considered multiple challenges to restrictions on the speech of corporations, finding some provisions -- like the prohibition of independent corporate expenditures for electioneering communications -- unconstitutional, and others -- like disclaimer and disclosure provisions -- constitutional. Contrary to defendants' position, the Court did not consider the government's interest in treating corporations and their speech differently at some aggregate level. Nor is this a recent development in Supreme

[1] These cases concern the entry of injunctions, but the same factors are in play in considering granting an injunction pending appeal. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 550 (7th Cir. 2007) (describing factors to consider in reviewing request for injunction pending appeal).

Court jurisprudence. *See, e.g., Heller v. Doe*, 509 U.S. 312 (1993) (analyzing separately two provisions of a Kentucky statute that treated "mentally-retarded" individuals differently than "mentally-ill" individuals). As such, the court concludes that defendants' attempt to posit a basis for the classification scheme covering the entire act will likely fail on appeal, just as it did before this court.

Second, defendants contend that the Seventh Circuit will accept their late-proffered bases, which were specific to the two enjoined provisions. Each was articulated in abbreviated fashion for the first time in defendants' combined brief in opposition to plaintiffs' motion for summary judgment and in reply to defendants' motion for judgment on the pleadings. (Defs.' Combined Opp'n & Reply (dkt. #95) 18, 21.)

As for an annual recertification requirement of general employee unions by a super-majority of the applicable bargaining unit, defendants contend that it is "justified because the scope of collective bargaining for general employees has been limited to the single issue of base wages" and, therefore, "it is completely justified to ask the employees to decide whether they believe having a union bargain on their behalf is desirable on an annual basis." (Defs.' Br. (dkt. #113) 5.) As the court explained in its order granting injunctive relief, the contrary is true: it seems irrational to impose an unprecedented, annual recertification by a super majority requirement "on a voluntary union with highly restrictive bargaining rights while maintaining far less burdens on public safety unions in

which involuntary membership and monetary support continue to be mandated by law." (Mar. 30, 2012 Order (dkt. #107) 23 (italics removed).)[2]

As for the prohibition on automatic dues withholding, defendants contend that the Seventh Circuit will find their proffered reason -- that the state no longer has an interest in subsidizing dues collection for general employee unions because the state no longer has an interest in ensuring that general employees unions are financially capable of bargaining the full panoply of working conditions and contract administration (Defs.' Br. (dkt. #113) 6) -- sufficient to satisfy rational basis review. Again, the proposed rationale is nonsensical; the state having determined a need to permit even general employees the right to bargain on base wages cannot justify a prohibition on voluntary dues to be

[2] Defendants also argue for the first time in their brief in support of the motion to stay that the recertification requirement is not unprecedented. (Defs.' Br. (dkt. #113) 5.) Specifically, defendants cite to a repealed regulation which required the National Mediation Board, acting pursuant to the Railway Labor Act, to limit certifications to unions securing the votes of a majority of the bargaining unit. *See* 75 Fed. Reg. 26062 (May 11, 2010). As plaintiffs explain, however, this defunct regulation was limited to the first election and did *not* mandate *annual* elections. Instead, like every labor law and regulation the parties and this court could find, a majority of bargaining unit members had to sign authorization cards to trigger a decertification election, (Pls.' Opp'n (dkt. #121) 12 n.3 (citing M. Abraham, *The Railway Labor Act* (BNA 2d ed. 1995) at 215)), making the RLA regulation similar to the recertification requirement which previously governed general employee unions and continues to apply to public safety employee unions in Wisconsin. (*See* Mar. 30, 2012 Op. (dkt. #107) 12.) Regardless, defendants do not seek reconsideration of this court's decision, and even if they did, this example does not change the court's conclusion that Act 10's recertification requirement is unprecedented, or otherwise persuade the court that the recertification requirement does not offend the Equal Protection Clause of the Fourteenth Amendment. Even if it would have, defendants in response to plaintiffs' proposed finding of fact failed to "put up" and must now live with this concession on summary judgment *and* on appeal. *See, e.g.*, *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) ("[S]ummary judgment is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.")

collected for this limited purpose so long as it extends this right to other unions mandating union fair share payments. That the amount or categories required to be bargained may be less does not change the *need* for a collection mechanism.

Moreover, defendants continue to ignore that their burden in justifying either an annual recertification requirement or the refusal to withhold voluntary dues is not met by posing thin reeds of rationality under the unique circumstances presented here. Appearance matters, and it appears these were punitive measures intended to impinge directly on the associational and free speech rights of political opponents, while leaving mainly supportive unions alone. Whether this was the purpose is not for this court to say. But the appearance alone demands some more plausible explanation for such counterintuitive and disparate treatment. (*See* Mar. 30, 2012 Order (dkt. #107) 28, 36 (discussing *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009)).) This, defendants failed to provide, nor has this court been able to discern.

For this reason, the court found plaintiffs had prevailed not only on Equal Protections grounds, but on First Amendment grounds, as to their challenge to the State's prohibition on voluntary dues deductions. In fairness, plaintiffs did not challenge the annual renewal requirement on First Amendment grounds and, therefore, defendants' likelihood of success is at least arguably greater.

II. Irreparable Injury to Defendants

Even if the court were to credit defendants' arguments on the merits, they have utterly failed to articulate an irreparable injury justifying a stay, much less offered

evidence substantiating such an injury. "[S]imply showing some possibility of irreparable injury fails to satisfy the second factor." *Nken*, 556 U.S. at 434-35 (internal citation and quotation marks omitted); *see also Stroman Realty, Inc. v. Martinez*, 505 F.3d 658, 664 (7th Cir. 2007) ("[S]peculation does not rise to the level of irreparable harm that would justify the intervention of a federal court.").

Defendants first argue that the very act of enjoining a legislative act constitutes irreparable injury. (Defs.' Br. (dkt. #113) 7 (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice, C.D. Cal. 1977)).) In *New Motor Vehicle Board*, Justice Rehnquist, reviewing the decision of a three-judge panel as Circuit Justice, detailed the harm to the government caused by the injunction at issue. Only after describing this harm, did he further note that "[i]t also seems to me that any time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.*, 434 U.S. at 1351. Whatever was meant by this statement, absent the identification of a rational basis for a statutory provision, it defies logic that the enjoining of an unconstitutional provision could somehow injure an unidentified government interest. Indeed, the Seventh Circuit has held that "there can be no irreparable harm to a [government] when it is prevented from enforcing an unconstitutional statute[.]" *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (citation and quotation marks omitted).

Defendants also contend that an injunction pending appeal will cause "confusion," specifically confusion as to how the state should treat "seven or more separate, decertified bargaining agents" in negotiations over total base wages. (Defs.' Br. (dkt. #113) 8.)

Plaintiffs suggest any uncertainty of the status of the law and unions' ability to negotiate on base wages can be adequately dealt with by inserting conditional language in any contracts negotiated during the appeal which account for the possibility that this court's injunction may be vacated. Moreover, defendants' general and unsubstantiated complaint of "confusion" seems the very type of speculative injury found insufficient to satisfy a stay. *See Stroman Realty,* 505 F.3d at 664. Still, the court is sensitive to the potential for confusion among the parties, and even more so non-parties, as to the status of unions that were -- at least in this court's view -- wrongly decertified. Since these decertifications were also found wrongful on Equal Protection grounds only, an argument can be made to stay this court's ruling as to those bargaining units decertified under Act 10 before March 30, 2012, at least pending appeal in order to maintain the status quo.

III.Injury to Plaintiffs

Defendants incredulously argue that plaintiffs will not suffer harm by staying the injunction pending appeal because plaintiffs and other unions have now had time to secure adequate alternative means to collect dues and because recertification has proven to be not overly onerous, with 86% of those bargaining units seeking recertification, receiving it.

As plaintiffs explain and substantiate in declarations, the recertification effort itself imposes significant expenses -- both in terms of time and money -- on unions opting to recertify. WEAC alone projected expenses of $4.5 million for the 2011 recertification elections. Plaintiff AFSCME Council 24 declined to participate in the recertification

process after learning that it would have to pay a $10,000 fee to the State just to participate in the recertification elections for its five units. Moreover, the elimination of payroll deductions has imposed and will continue to impose, if the stay is granted, irreparable harm in the form of unrecoverable net dues revenue amounting to an estimated $375,000 annually for WEAC alone on political speech. Even absent this unrecoverable economic harm, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[.]" *Joelner*, 378 F.3d at 620 (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (quotation marks omitted); *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). Even assuming defendants suffer some injury during the appeal of the injunction, that injury is far outweighed by the harm to plaintiffs.

IV. Public Interest

The public interest factor also weighs in favor of denying a stay. "[I]njunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859.

Still, defendants posit various speculative arguments as to possible harm to the public caused by the court's injunction. First, defendants contend that general employees who are no longer part of a certified bargaining agent may have received base wage increases that exceeded the statutory cap and, therefore, following this court's order, "the employees may be required to reimburse the municipality for any prior 'overpayments.'" (Defs.' Br. (dkt. #113) 11.) Defendants offer no evidentiary support

that such increases have been initiated. Moreover, as plaintiffs explain, any failure on the part of the municipality to bargain in good faith with the certified representative, would be waivable by the unions. (Pls.' Opp'n (dkt. #121) 20 n.4.)

Defendants also complain generally about the possibility of confusion on the part of public employees and local government entities. Specifically, defendants argue that the injunction restoring dues withholding will require municipal employers to receive authorization from each individual employees. But this is no different than the arrangement prior to Act 10, which required proper, written employee authorizations for dues deductions. (*Id.* at 21.) Moreover, defendants do not even attempt to prove that the sixty-day window already allotted by this court is insufficient for state, county and local government units to institute voluntary withholding, which they no doubt already do for other employee-specific deductions.

ORDER

IT IS ORDERED that defendants' motion to stay the court's injunction pending appeal (dkt. #112) is DENIED, except that this court's ruling is stayed pending appeal as to those bargaining units decertified pursuant to Act 10 before March 30, 2012.

Entered this 27th day of April, 2012.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge