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 STATE DEFENDANTS' MOTION TO DISMISS

Defendants, Mitch Daniels, in his official capacity as the Governor of the State of Indiana, Gregory F. Zoeller, in his official capacity as the Indiana Attorney General, and Lori A. Torres, in her official capacity as the Commissioner of the Indiana Department of Labor (collectively, "State Defendants"), respectfully file this Memorandum in Support of their Motion to Dismiss.

I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On February 22, 2012, Plaintiffs – the International Union of Operating Engineers, Local 150, AFL-CIO, two of the Union's officers, and several of the Union's members – filed suit against the Governor, the Attorney General, and the Department of Labor Commissioner, in their official capacities, seeking declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983 and pendent state law claims.[1] Doc. No. 1 at 1. Plaintiffs allege that the Indiana Right-to-Work law violates the United States Constitution and the Indiana Constitution.

[1] On February 27, 2012 (several days after Plaintiffs filed their Complaint), Plaintiffs filed their Emergency Motion for Temporary Restraining Order and supporting brief asserting that Section 3 of Indiana's Right-to-Work law violates the Contracts Clause. Doc. No. 14, 15. State Defendants submitted their Brief in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order on March 2, 2012. Doc. No. 17. That same day, Plaintiffs filed their Notice of Withdrawal of Emergency Motion for Temporary Restraining Order. Doc. No. 21.

Plaintiffs' legal challenge to the Right-to-Work law is wrong on all counts and warrants dismissal of the Complaint in its entirety. The Eleventh Amendment bars Plaintiffs' claims for damages under 42 U.S.C. § 1983 and Plaintiffs' pendent state law claims. The Right-to-Work law does not apply until March 14, 2012; therefore, Plaintiffs' claims are not ripe for adjudication. Governor Daniels is absolutely immune from Plaintiffs' claims for his legislative acts. Likewise, the Attorney General has absolute prosecutorial immunity from Plaintiffs' suit. Finally, the new law does not violate the United States Constitution and is not preempted by federal law. For all of these reasons, the Court should dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

The statutes commonly known as Indiana's Right-to-Work legislation, Indiana Code §§ 22-6-6-1 through 13, were signed into law on February 1, 2012. Following Right-to-Work statutes in several other states, Indiana's Right-to-Work law sets forth an individual's freedom to work in Indiana without belonging to, or paying for, a union.

Specifically, 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. 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…). After setting forth those definitional and coverage provisions, the 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;
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> as a condition or employment or continuation of employment.

I.C. § 22-6-6-8. The Right-to-Work law then 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 or intentionally, directly or indirectly violates I.C. § 22-6-6-8 of this chapter commits a Class A misdemeanor." I.C. § 22-6-6-10. Section 11 allows an employee to file a complaint with the Attorney General, the Department of Labor, or the prosecuting attorney for the county where the employment relationship exists alleging a violation of the law and grants those officials the discretion to investigate the complaint and enforce compliance with the law. *See* I. C. § 22-6-6-11. The Department of Labor may issue an administrative order providing for civil penalties, and courts may award civil remedies for violations of the new law. *See* I. C. §§ 22-6-6-11 through 12.

It is important to note that Indiana's Right-to-Work law is not retroactive and is not yet in full force and effect. The substantive portions of the law – Sections 8 through 12 –

> (1) apply to a written or oral contract or agreement entered into, modified, renewed, or extended **after March 14, 2012**; and
>
> (2) 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 (emphasis added).

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1946-47, 1949 (2009). Pursuant to Rule 12(b)(6), dismissal is appropriate when the complaint sets forth no viable cause of action upon which relief can be

granted. Fed. R. Civ. Proc. 12(b)(6); *see also Rangel v. Reynolds*, 607 F.Supp.2d 911 (N.D. Ind. 2009). For purposes of the motion and supporting memorandum, the State Defendants neither confirm nor deny the allegations contained in the complaint, but for a Rule 12(b)(6) motion all well-pleaded, non-conclusory, factual allegations are presumed to be true and are viewed in the light most favorable to the plaintiff. *Iqbal*, 129 S.Ct. at 1949-50. Courts are not required to accept as true those legal conclusions couched as conclusory factual assertions. *Id.* at 1949.

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).

III. PLAINTIFFS' CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY

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) ("Expressly 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 State Defendants are officials of the State of Indiana. Plaintiffs sued State Defendants in their official capacities. Thus, Plaintiffs' claims against State Defendants pursuant to 42 U.S.C. § 1983[2] are barred by the Eleventh Amendment and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

Furthermore, Plaintiffs' pendent state law claims (Counts VIII and IX) are also barred by the Eleventh Amendment and sovereign immunity. The State of Indiana does not consent to suit in federal court for violations of state law. *See Meadows, 854* F.2d at 1068; *Stanley v. Indiana Civil Rights Comm'n; Elliot v. Hinds.* Pendent state law claims brought pursuant to 28 U.S.C. § 1367 do not circumvent the consent requirements of the Eleventh Amendment. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals, including their own citizens, in federal court."); *Gossmeyer v. McDonald,* 128 F.3d 481, 487 (7th Cir. 1997); *Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992). Therefore, the adjudication of Plaintiffs' pendent state law claims is barred by the Eleventh Amendment and the Court should dismiss those claims pursuant to Federal Rule of Civil Procedure 12(b)(1), as well.

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[2] Hand-in-hand with the Eleventh Amendment sovereign immunity is the fact that the State and state agencies 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. 50, 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). Therefore, State Defendants in their official capacities are not "persons" within the meaning of 42 U.S.C. § 1983 when sued for damages, and Plaintiffs have failed to state a claim against them.

IV. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW

The United States Supreme Court has long held that federal courts cannot issue advisory opinions that address abstract legal questions. *See United Public Workers v. Mitchell,* 330 U.S. 75, 89 (1947). Pursuant to Article III of the United States Constitution, federal courts have jurisdiction to decide only actual cases or controversies. *See Wisconsin's Environmental Decade, Inc. v. State Bar of Wisconsin,* 747 F.2d 407, 410 (7th Cir.1984) (citing *Poe v. Ullman,* 367 U.S. 497, 502 (1961); *Muskrat v. United States,* 219 U.S. 346, 354-57 (1911)). "Under the Declaratory Judgment Act, 28 U.S.C. § 2201, federal courts may issue declaratory judgments only in cases of actual controversy." *Doe v. Prosecutor, Marion County, Ind.*, 566 F. Supp. 2d 862, 869 (S.D. Ind. 2008).

The ripeness doctrine involves the timing of judicial review and the principle that courts should conserve their power and resources for issues that are present or imminent – not squandered on problems that are a future possibility.

> No precise test exists to distinguish between an abstract question and a justiciable case or controversy, but well-established principles provide guidance. *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 297-98, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979); *J.N.S., Inc. v. Indiana,* 712 F.2d 303, 305 (7th Cir.1983). The case or controversy requirement prevents federal courts from rendering judgments that are unnecessary to resolve a real dispute or in cases in which a court would have difficulty reaching a competent decision. *Illinois v. General Electric Co.,* 683 F.2d 206, 210 (7th Cir.1982). **The lack of an immediate conflict could make it difficult for a court to make factual findings and could also reduce the parties' incentives to argue the case vigorously.** *Id.* The basic question the court must ask is whether the contentions of the parties present "a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt,* 442 U.S. at 298, 99 S.Ct. 2301 (quoting *Railway Mail Association v. Corsi,* 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945)). **It is insufficient that the controversy may arise in the future; the controversy must be immediate.** *Wisconsin's Environmental Decade, Inc.,* 747 F.2d at 411; *J.N.S., Inc.,* 712 F.2d at 305.

Id. at 869-870 (emphasis added).

Plaintiffs have not presented any immediate conflict for this Court to adjudicate. The substantive provisions – I.C. § 22-6-6-8 through I.C. § 22-6-6-12 – do not apply to contracts that are in existence on March 14, 2012, and do apply to contracts entered into, modified, renewed, or extended after that date. *See* I.C. § 22-6-6-13. At this time, then, the substance of the Right-to-Work law is not in full force and effect. Furthermore, Plaintiffs' claims that I.C. § 22-6-6-1 *et seq.* constitutes ex post facto punishment are not ripe for review because Plaintiffs have not been charged with or convicted of any wrong arising out of that chapter. Indeed, Plaintiffs have not even alleged that there has been even a threat or informal indication that any such prosecution is likely to occur. Additionally, Plaintiffs have presented no evidence that they are even engaged in conduct that would potentially violate I.C. § 22-6-6-1. Consequently, Plaintiffs' claims concern a situation that is not certain to arise in the future and are not ripe for review.

V. THE GOVERNOR IS ABSOLUTELY IMMUNE FROM PLAINTIFFS' CLAIMS

Governor Daniel's actions are protected by absolute legislative immunity; thus, he must be dismissed from Plaintiffs' lawsuit. 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, 53–54 (1998). 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. 710, 732–33 (1980); *United States v. Blagojevich,* 638 F.3d 519, 529 (7th Cir.2011), *reh'g en banc granted in part, opinion vacated in part by* 649 F.3d 799 (7th Cir.2011); *Risser v. Thompson,* 930 F.2d 549, 551 (7th Cir.1991); *see also Hagan v. Quinn*, 11-3213, 2012 WL 161354 (C.D. Ill. Jan. 19, 2012)..

The Supreme Court has held that the act of signing a bill into law is a legislative act that is protected by absolute legislative immunity. *See Bogan,* 523 U.S. at 55 (act of signing an ordinance into law was legislative in form). Indiana Code § 22-6-6-1 *et seq.* does not bestow any power on the Governor. The statute does not mandate that the Governor has any specific duty to enforce that law. It does not give Governor Daniels the authority to invalidate the statute after its effective date. Indeed, the only official role Governor Daniels had with regard to Indiana Code § 22-6-6-1 *et seq.* was the official act of signing that chapter into law. Under controlling precedent, the Governor is absolutely immune from Plaintiffs' claims for that official act. *See also Hearne v. Board of Education 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 and injunctive relief pursuant to *Ex parte Young* for alleged civil rights violations against a state governor where the governor's sole official act was signing a bill into law restricted employees' collective bargaining rights; 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). Consequently, Plaintiffs' claims against the Governor are barred and warrant dismissal.

VI. THE ATTORNEY GENERAL IS ABSOLUTELY IMMUNE FROM PLAINTIFFS' CLAIMS

Plaintiffs' claims against Attorney General Gregory Zoeller are barred by prosecutorial immunity. 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) (attorney general immune from civil rights liability when exercising statutory power to disapprove state contracts). The Attorney General is absolutely immune from Plaintiffs' claims and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

VII. INDIANA'S RIGHT-TO-WORK LAW DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Laws are shrouded in a strong presumption of constitutionality. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("'[L]egislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.'" (alteration added) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961)). When a plaintiff alleges a constitutional violation, the burden is on him to prove that the violation exists. *Id.*

In the present case, Plaintiffs claim that the Right-to-Work law violates the Contracts Clause (Count I), Equal Protection Clause (Count II-IV), and Ex Post Facto Clause of the United States Constitution (Count X). Plaintiffs also allege that federal law preempts Indiana's Right-to-Work legislation (Count V-VII), rendering the new law void. However, the United States Supreme Court has validated similar legislation in other states, and federal law provides room for state right-to-work laws. *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, therefore, warranted.

A. Indiana's Right-to-Work Law Does Not Violate the Contracts 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. Plaintiffs misread the statute. When properly read, it is clear that the statute does not apply to existing contracts and, therefore, Plaintiffs' claim 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. 1988) (retroactive legislation is contrary to the original purpose of the Contracts Clause); *U.S. v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985) (*dicta*).

The substance of the Indiana Right-to-Work law is set forth in Sections 8-12. Section 8 announces what is unlawful in Indiana and makes clear that a person may not, as a condition of employment or continuation of employment, require an individual to: become a member of a labor organization; pay dues, fees, assessments, or other charges of any kind or amount to a labor organization; or 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. *See* I.C. §22-6-6-8. Contracts, agreements, understandings, or practices (written, oral, express, implied) between labor organizations and employers that violate Section 8 are unlawful and void. *See* I.C. § 22-6-6-9. A person who violates Section 8 commits a Class A misdemeanor. *See* I.C. § 22-6-6-10. Provisions for private rights of action and for complaints to either the Department of Labor or the Attorney General are set forth in Sections 11 and 12. *See* I.C. § 22-6-6-11; § 22-6-6-12.

Significantly, the Right-to-Work law makes evident that the substantive provisions of the law do not apply to or abrogate a written or oral contract or agreement that is in effect on March 14, 2012, and that the substantive provisions of the law only apply to a written or oral contract or agreement entered into, modified, renewed, or extended after March 14, 2012. *See* I.C. § 22-6-6-13. In other words, the law does not apply to existing contracts.[3]

As such, no currently existing contract is impacted by the Right-to-Work law and, accordingly, Plaintiffs' Contract Clause claim is wholly without merit. *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").

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[3] Plaintiffs' reliance on § 22-6-6-3 does not alter this analysis. In that regard, said provision is not substantive. It is found tucked in among the definitional and coverage provisions of the law. *See* I.C. § 22-6-6-1 ("chapter does not apply to...); I.C. § 22-6-6-2 ("chapter does not apply to...); I.C. § 22-6-6-3 ("[n]othing in this chapter is intended, or should be construed...); 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 "state" as...). Accordingly, Section 3 merely clarifies that the substance of the Indiana law (Sections 8-12) applies to union contracts in the construction industry. Perhaps recognizing this, Plaintiffs withdrew their Emergency Motion for a Temporary Restraining Order.

B. Indiana's Right-to-Work Law Does Not Violate The Equal Protection Clause

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. A court will uphold a law challenged on equal protection grounds if it survives rational basis review (unless the classification involves a suspect class, such as race, or infringes the exercise of fundamental constitutional rights, such as freedom of religion, in which case it must survive heightened judicial scrutiny). *See Nordlinger,* 505 U.S. at 10. 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." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, (1973) (quoting *Madden v. Kentucky,* 309 U.S. 83, 88, (1940)).

Under rational basis, courts will not invalidate a law merely because it is deemed unwise, unfair, or unsound, or because there are "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).

For there to be an equal protection claim, there must first be two classes of people who are treated differently. In Count III of their Complaint, Plaintiffs' claim that, under the Right-to-

Work law, workers in the building and construction industry are treated differently from workers in other industries.[4] As discussed at length above, 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. However, even assuming, arguendo, that two classes existed, there would still be no violation. Union status does not implicate a fundamental right, nor does it constitute a protected class for purposes of the equal protection analysis. *See, e.g., City of Charlotte v. Local 660, Int'l Ass'n of Firefighters,* 426 U.S. 283, 286 (1976) ("Since it is not here asserted-and 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...."). As such, the 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.'" *Payday Today, Incorporated*, 2006 WL 148943 at *8, quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993).

As Right-to-Work forbids employers from discriminating against union and nonunion workers, it thus commands equal employment opportunities for both groups. *See Lincoln Fed.*

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[4] Plaintiffs also claim that employees of a political subdivision (cities, counties, towns, etc.) are being treated differently by being expressly excluded from the Right-to-Work law under I.C. § 22-6-6-1(5). Admittedly, they are being treated differently for the very *rational* reason that employees of a political subdivision are different from most other workers in that political subdivisions are expressly excluded as employers under the National Labor Relations Act. *See* 29 U.S.C. § 152 (2)("The 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, any claim of an equal protection violation as applied to employees of a political subdivision is meritless.

Labor Union No. 19129, A.F. of L., 335 U.S. at 532. As a general rule, the Supreme Court of the United States has held the relative need for protection against discrimination of union and non-union workers "is a matter for the legislative judgment" *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 542, (1949). With respect to any alleged disparity between workers generally and a workers in the building and construction industry under some tortured reading of the I.C. §22-6-6-1, the Defendants still prevail as they need only provide a rational basis for the Statute, in the instant case—economic development.

If one were forced to differentiate between the building and construction industries and the rest of the labor market, one would need to go no further than the National Labor Relations Act itself. The Act explicitly acknowledges that the two industries operate differently and require different rules and regulations because of the nature of the work. Logically, building cars or making steel at a factory or 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 given substantive meaning, a rational basis exists for treating these industries differently. Thus, dismissal of Plaintiffs' equal protection claim is warranted.

C. The Right-to-Work Law Is In Congruence With Federal Law

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.

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. Put another way, these provisions prohibit agreements between labor organizations and management pursuant to which an employee must pay money to the union even where the employee is not a union member. This prohibition is 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 Retail Clerks International, Association, Local 1625 v. Shermerhorn*, 375 U.S. 746 (1963) ("*Retail Clerks I*"); *Retail Clerks International, Association, Local 1625 v. Shermerhorn*, 375 U.S. 96 (1963) ("*Retail Clerks II*").

To illustrate, 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. As is the norm, the agreement provided for various terms and conditions of employment. 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 s the exclusive bargaining agent of the employees in the appropriate bargaining unit.

Retail Clerks I, 375 U.S. at 748. 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 fees 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 in the collective bargaining agreement illegal.

The Court began its analysis by noting 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 authorizes the states to enact right-to-work laws. *Id.* at 757.

The Court retained the case for re-argument on the issue of whether Florida courts, rather than solely the National Labor Relations Board, are tribunals that 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. And, 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. Counts V, VI, and VII must be dismissed.

D. Plaintiffs Have Received Fair Warning; No Ex Post Facto Violation Exists

In Count X of the Complaint, Plaintiffs argue that the criminal and civil penalties sections of Indiana's Right-to-Work law constitute ex post facto punishment under the United States Constitution. Because Indiana Code § 22-6-6-13 is explicit that the Right-to-Work law is **not** retroactive, this Court should dismiss Plaintiffs' ex post facto claims.

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. The United States Supreme Court first considered the meaning of "ex post facto" in the case of *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648 (1798). The Court explained that the United States Constitution prohibits:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. at 390 (emphasis omitted). "Thus, almost from the outset, we have recognized that central 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). The Ex Post

Facto Clause pertains to criminal law. The Clause generally does not apply to civil statutes. *See Flores-Leon v. I.N.S.*, 272 F.3d 433, 439-40 (7th Cir. 2001) (citing to *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), for the holding that the Ex Post Facto Clause only applies to criminal laws).

In order for a law to constitute ex post facto punishment, it must meet two requirements. First, the law "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.* Second, the law must "disadvantage the offender affected by it." *Id.*

The criminal penalties in Indiana's Right-to-Work law do not apply retroactively. I.C. § 22-6-6-13 specifically states that the law does not apply to conduct that occurs before March 14, 2012. *See* Ind. Code § 22-6-6-13. The law does not "apply to events occurring before its enactment;" thus, it does not meet the first requirement of ex post facto punishment. Moreover, officials can seek criminal penalties against only those individuals who "knowingly or intentionally" violate I.C. § 22-6-6-8. I.C. § 22-6-6-10. A person who engages in conduct that is banned by the Right-to-Work law before March 14, 2012, cannot "knowingly or intentionally" violate the law. Consequently, the criminal penalties provision of the Indiana Right-to-Work law does not constitute ex post facto punishment.

In the civil context, the ex post facto analysis starts with an inquiry into whether the law was meant as punishment or as a non-punitive regulatory scheme. *See Smith v. Doe*, 538 U.S. 84, 92-93 (2003). "If the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* However, if the legislature intended to enact a non-punitive regulatory scheme, the court must determine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *United States v. Ward,* 448 U.S. 242, 248-249

(1980). Courts usually defer to a state legislature's stated intent; consequently, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States,* 522 U.S. 93, 100, (1997) (quoting *Ward, supra,* at 249, 100 S.Ct. 2636). Though they are not an exhaustive list, the seven factors set forth in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169 (1963), are generally used as a guide to determining the punitive effects of a law. *See Smith v. Doe,* 538 U.S. 84, 97 (2003). The factors are:

> [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Mendoza-Martinez, 372 U.S. at 168-69.

The provision of the Indiana Right-to-Work law that grants individuals the right to file a *civil* complaint regarding *civil* wrongs under that law, I.C. § 22-6-6-12(b), does not constitute punishment. First, the law does not apply retroactively. As a result, it simply cannot constitute ex post facto punishment. *See Miller,* 482 U.S. at 430. Moreover, the *Mendoza-Martinez* factors weigh against finding the law to be punitive. The law does not impose an affirmative disability or restraint upon individuals who are governed by the Right-to-Work law because it does not prevent persons from belonging to unions and it gives Indiana citizens the freedom to obtain employment without belonging to a union. It is not the type of law that is traditionally or historically regarded as punishment because it simply provides a cause of action to aggrieved individuals so that they may be made whole. I.C. § 22-6-6-12(b) does not provide for retributive or deterrent penalties. It does not require a finding of scienter. The law does not promote the

traditional aims of punishment because its intent is to create a cause of action to remedy civil wrongs. As discussed above, the civil penalties provision of Indiana's Right-to-Work law is rationally related to the state legislature's intent to provide individuals an opportunity to obtain employment without having to become a member of a union. Finally, the civil penalties provision is not excessive because it contemplates that a party will recover only actual damages and costs and/or equitable relief.

Simply put, neither the criminal nor civil penalty section of Indiana's Right-to-Work law applies retroactively. I.C. § 22-6-6-13 specifically states that the penalties provisions apply to conduct after March 14, 2012. The law does not constitute ex post facto punishment.

VIII. THE LAW SURVIVES PURSUANT TO INDIANA'S SEVERABILITY CLAUSE

In the unlikely event that the Court finds that a portion of the challenged statute violates the U.S. Constitution, such a ruling would not render the entire statute void or entirely unconstitutional. On the contrary, any unconstitutional provision is entirely severable from the statute as a whole.

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).

Indiana courts have found I.C. § 1-1-1-8 to "create a presumption" of legislative intent to keep the valid portions of a statute intact, despite the presence of an invalid provision. *Back v. Carter,* 933 F. Supp. 738, 760 (N.D. Ind. 1996); *Alliance for Clean Coal v. Bayh,* 888 F. Supp. 924, 937 (S.D. Ind. 1995), *aff'd,* 72 F.3d 556 (7th Cir. 1995). "While a single statute may be partially valid and partially invalid, a determination of whether or not it is severable rests upon a judicial determination of the legislative intent." *State v. Kuebel,* 241 Ind. 268, 278, 172 N.E.2d 45, 50 (1961).

Plaintiffs allege that the Right-to-Work law does not contain a severability clause and that the statute as a whole is non-severable. (*See, e.g.,* Compl., Counts III - X.) Specifically, Plaintiffs claim that I.C. § 22-6-6-3 is a "carve-out" for the building and construction industry that, among other things, violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (*Id.* at Count III, ¶¶ 18)

Even if the Court were to find that Section 3 is unconstitutional (which it is not) that would not render the entire Indiana Right-to-Work legislation invalid. If Section 3 was removed from the statute, the remainder would not be 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). The core piece of the Right-to-Work legislation is undoubtedly 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. This core is neither inseparably connected to nor dependent on the language contained in Section 3. It stands alone as an important and independently operative piece of legislation dealing with labor relations in the State of Indiana. *See, e.g., 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).

Further, if Section 3 were removed from the rest of the statute, the remainder would not be incomplete or incapable of execution according to legislative intent in that portion's absence. I.C. § 1-1-1-8(b)(2). Rather, the remaining statute would constitute a complete piece of legislation that fulfills the Right-to-Work legislative intent. It would also be fully capable of execution in the absence of Section 3.

Indiana Code § 1-1-1-8 provides for the possibility of severability if a court deems a portion of a statute unconstitutional or otherwise invalid when certain circumstances apply. The severability statute applies to the Right-to-Work statute here, and any portion of that legislation that is deemed unconstitutional is fully severable, leaving the remainder fully effective.

IX. CONCLUSION

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

Respectfully submitted,

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