STATE OF WISCONSIN | CIRCUIT COURT BRANCH 10 | DANE COUNTY

MADISON TEACHERS, INC., *et al.*,

Plaintiffs,

v.

Case No. 11-CV-3774

SCOTT WALKER, *et al.*,

Defendants.

DEFENDANT COMMISSIONERS' RESPONSE BRIEF TO NON-PARTY MOVANTS' MOTION TO HOLD DEFENDANTS JAMES R. SCOTT AND RODNEY G. PASCH IN CONTEMPT OF COURT AND FOR REMEDIAL SANCTIONS

Defendant Commissioners of the Wisconsin Employment Relations Commission, James R. Scott and Rodney G. Pasch, by and through undersigned counsel, hereby submit their response to the motion for contempt and remedial sanctions filed against them by non-party movants Wisconsin Education Association Council; AFT-Wisconsin, AFL-CIO; SEIU Healthcare Wisconsin, CTW, CLC; Wisconsin Federation of Nurses and Health Care Professionals, AFT, AFL-CIO; District Council 40, AFSCME, AFL-CIO; and Kenosha Education Association, on September 24, 2013.

INTRODUCTION

Five non-party labor organizations move this Court to find two Commissioners of the Wisconsin Employment Relations Commission ("WERC") in contempt and to impose remedial sanctions.[1] Their not-so-subtle-goal, of course, is to take the declaration of this court dated September 14, 2012, and force the Commissioners to apply it to non-parties.

The plaintiffs in this case have tried to accomplish the same goal, thus far without success. They first requested injunctive relief in their complaint and motion for summary judgment. The Court issued a declaration, but did not issue the requested injunction. In response, the Commissioners applied the Court's order to the parties in this case, but not to non-parties.[2] On appeal, the parties engaged in lengthy briefing regarding a stay of the Court's order, and upon a request for supplemental briefing by the Court of Appeals, directly addressed the legal effect of the Court's order with respect to non-parties. In that briefing, the plaintiffs asked the Court of Appeals to force the Commissioners to apply the Court's order to non-parties. The Court of Appeals rejected the plaintiffs' arguments and declined to order the Commissioners to take a different course of action with respect to non-parties. Following this unsuccessful effort, the plaintiffs asked this Court again to issue an injunction. This Court correctly recognized that no such relief was warranted under the law, and denied the motion on September 17, 2013.

The Commissioners respectfully acknowledge the Court's recent recitation of its views on the effect of its September 14, 2012, Order. However, the legal effect of the Court's decision was litigated on appeal, and the Court of Appeals did not suggest that the Commissioners must

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[1] Wisconsin Stat. § 785.04(1)(d) states that a remedial sanction imposed by the court upon a finding of contempt can be "[a]n order designed to ensure compliance with a prior order of the court." *See also Diane K. J. v. James L. J.*, 196 Wis. 2d 964, 968-70, 539 N.W.2d 703 (Ct. App. 1995) ("Remedial contempt is imposed to ensure compliance with court orders. . . . The sanction must be purgeable through compliance with the original order. . . .") (citation omitted).

[2] This Court has recognized that the Commissioners do not intend to enforce Wis. Stat. § 111.70(4)(d)3 with regard to the plaintiffs in the case. Decision and Order on Petition for Injunction, p. 3.

apply the Court's declaration to non-parties. More pertinent to the limited question in a contempt proceeding, the Commissioners have been consistent in following injunctions regarding Act 10 when issued,[3] and have consistently abided by their legal responsibilities as they understood them in response to this Court's issuance of a declaration, and not an injunction, in its September 14, 2012, Order.

Thus, the notion that the Commissioners knew they must apply this Court's September 14, 2012, Order to non-parties is at best, specious, and without question, erroneous. Moreover, the non-party movants' over-the-top assertions that the Commissioners believe themselves to be above the law or this Court are ill-chosen, inappropriate, and untrue. No, the Commissioners have not intentionally disobeyed an order of this court. The movants here have no legal leg to stand on, and the Court must deny this motion. The underlying merits of this case will be heard by the Wisconsin Supreme Court in just over five weeks. To insert new statewide confusion over legal rights and responsibilities through the guise of a meritless motion would be a great disservice to the rule of law, the non-parties whose interests would be adversely affected by such a dramatic action, and to the superior appellate court in whose hands this case now rests.

As explained more fully below, the non-party movants' motion for contempt must be denied because the Court lacks jurisdiction to entertain it, because they are not "aggrieved" persons under the contempt statute, because the Court has never issued any order which clearly and unambiguously required the two Commissioners to take, or to refrain from taking, any specific action, and because non-compliance with a declaratory judgment alone cannot be enforced through contempt proceedings.

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[3] By contrast, in *Wis. Educ. Ass'n Council, et al. v. Walker, et al.*, Case No. 11CV428 (W.D. Wis.), when the federal district court declared certain statutory provisions unconstitutional *and* enjoined the Commissioners from enforcing the provisions, the Commissioners ceased enforcing the provisions until the federal district court's order was reversed on appeal.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION OR COMPETENCY TO HEAR THE NON-PARTY MOVANTS' MOTION FOR CONTEMPT.

Non-party labor unions have moved this Court under Wis. Stat. § 785.03(1)(a) for an order finding the Defendant Commissioners in contempt and for remedial sanctions. However, the plain language of the relevant state statutes makes clear that this Court does not have jurisdiction or competency to act upon this motion.

The power of a circuit court to hear and decide issues in a case is necessarily limited once the case is on appeal. Having two separate courts empowered to simultaneously adjudicate issues in a single case would hamper the orderly administration of justice by creating the very real possibility of inconsistent results and uncertainty. Recognizing both jurisdictional and judicial economy interests, the Legislature has created an exhaustive list of specific actions that a circuit court may take while a case is on appeal. *See* Wis. Stat. § 808.075.

The plain language[4] of Wis. Stat. § 808.075 shows that a circuit court does not have the authority to act on a motion for contempt filed pursuant to Wis. Stat. § 785.03(1)(a) while an appeal is pending. Wisconsin Stat. § 808.075(3) reads: "[T]he circuit court retains the power to act on all issues **until the record has been transmitted to the court of appeals**. Thereafter, the circuit court may act **only** as provided in subs. (1) and (4)." *Id.* Here, there is no doubt that the record has been transmitted to the Court of Appeals, and in fact, the vast majority of the circuit court record is now with the Wisconsin Supreme Court. Indeed, the merits of the appeal are

[4] "The first step in any statutory analysis is to look at the language of the statute." *Hutson v. State of Wisconsin Pers'l Comm'n*, 2003 WI 97, ¶ 49, 263 Wis. 2d 612, 665 N.W.2d 212. "In construing or 'interpreting' a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967).

fully briefed and the Supreme Court only needs to schedule oral argument and render its decision. Thus, this Court's jurisdiction or competency is restricted to those matters specifically enumerated in "subs. (1) and (4)" of Wis. Stat. § 808.075. However, neither subsection contains any reference to the statute under which the non-party movants bring their motion - Wis. Stat. § 785.03.

Regardless, the non-party movants argue that this Court has inherent authority to find parties in contempt of court. (Brief in Support of the Motion to Hold Defendants James R. Scott and Rodney G. Pasch in Contempt of Court and for Remedial Sanctions ("Movants' Brief."), 8.) While it is true that courts have an inherent power, this power may nonetheless be regulated by the legislature. In *Evans v. Luebke* the Court of Appeals explained:

> Contempt power is recognized as an "inherent" judicial power, that is, one that does not necessarily derive from legislative mandate and which inheres in the definition of a court. **For over one hundred twenty years, however, the Wisconsin Supreme Court has recognized legislative regulation of the contempt power, and the court has proscribed the exercise of this power outside of the statutory scheme.** "[T]he power to punish for contempt was not conferred in the first instance by statute ... [however, this court] holds that whenever a statute prescribes the procedure in a prosecution for contempt, or limits the penalty, the statute controls."

2003 WI App 207, ¶ 17, 267 Wis. 2d 596, 611, 671 N.W.2d 304 (emphasis added) (internal citations omitted) (brackets in original). *See also Matter of B.L.P.*, 118 Wis. 2d 33, 40, 345 N.W.2d 510 (Ct. App. 1984) ("Although legislatures cannot take away any power constitutionally conferred upon the judiciary, they can certainly write reasonable regulations on the means by which courts exercise that power.") *Id.* (citing *State v. Holmes,* 106 Wis. 2d 31, 46, 315 N.W.2d 703, 710 (1982)).

In sum, the Legislature has created an exhaustive list of actions that a circuit court may take while an appeal is pending. Hearing a motion for contempt and remedial sanctions by non-parties under Wis. Stat. § 785.03(1)(a), is not one of them. As such, the motion must be denied.

II. THE NON-PARTY MOVANTS ARE NOT "AGGRIEVED" PERSONS UNDER WIS. STAT. § 785.03(1)(A), AND THEREFORE, ARE NOT ENTITLED TO BRING A CONTEMPT MOTION.

The non-party movants claim that they are persons "aggrieved" under Wis. Stat. § 785.03(1)(a), and thus, have standing to file this motion. (Movants' Br., 5-7.) However, they are not parties in this action, they are not in privity with the plaintiffs, and most importantly, the Court's September 14, 2012, Order did not bear directly on *their* interest. *Town of Greenfield v. Joint County Sch. Committee*, 271 Wis. 442, 447, 73 N.W.2d 580 (1955) ("A person is aggrieved by a judgment whenever it operates on **his** rights of property or bears directly on **his** interest.") (emphasis added). Therefore, they are not "aggrieved" by any contempt of court and cannot bring this motion.[5]

The movants claim that they are aggrieved by the Commissioners implementing and enforcing the annual recertification election provision of MERA, through promulgation of emergency administrative rules, such as setting filing deadlines and filing fees for petitions, scheduling elections, and decertifying bargaining representatives that did not file petitions consistent with the rules "all in direct contravention of this Court's orders of September 14, 2012 and September 17, 2013." (Movants' Br., 6.) This entire argument that they are "aggrieved," however, is based on the false premise that this Court's declaratory judgment benefited them in the first place. As explained more fully below in section III of this brief, the Court's September 14, 2012, Order declaring Wis. Stat. §111.70(4)(d)3 unconstitutional did not affect *their* legal rights. The Uniform Declaratory Judgments Act, Wisconsin Stat. § 806.04, confirms

[5] The Commissioners do not dispute that, because movant Kenosha Educational Association did not submit a petition for the annual recertification election, as a matter of law the Commission takes the position that this labor union is decertified as a bargaining unit representative under Wis. Stat. § 111.70(4)(d)3. However, the Commissioners do dispute statements in paragraphs five and eight of the Affidavit of Timothy E. Hawks. *See Affidavit of Peter G. Davis*, October 4, 2013, ¶¶ 2-5. Contrary to the claims of the other non-party movants, the Commissioners have not taken any official action with regard to petitions filed by bargaining unit representatives that either were untimely or accompanied by insufficient payment.

that a declaratory judgment is effective between *the parties*, and that non-parties' rights are *not* determined. It reads, in pertinent parts:

> When declaratory relief is sought, **all persons shall be made parties who have or claim any interest which would be affected by the declaration**, and no declaration may prejudice the right of persons not parties to the proceeding.

Wis. Stat. § 806.04(11).

> **Any person interested** under a deed, will, written contract or other writings constituting a contract, or **whose rights, status or other legal relations are affected by a statute**, municipal ordinance, contract or franchise, **may have determined any question of construction or validity arising under the** instrument, **statute**, ordinance, contract or franchise **and obtain a declaration of rights, status or other legal relations thereunder**.

Wis. Stat. § 806.04(2).

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. **The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.**

Wis. Stat. § 806.04(1). A "judgment" is defined as "[t]he final decision of the court resolving the dispute and determining the rights and obligations **of the parties**." BLACK'S LAW DICTIONARY, 841-42 (6th ed. 1990) (emphasis added).

Under Wis. Stat. § 806.04, the non-party movants had the ability to participate in this action challenging the constitutionality of the Act 10 amendments to MERA, and thus, the opportunity to benefit from any declaratory judgment issued by the Court. However, they did not participate as parties,[6] and consequently, they cannot now claim to benefit from the judgment. If they take issue with the current enforcement of the statute at issue by the Commissioners, they must file their own separate action. In other words, these non-party

[6] On the contrary, many of these movants were the unsuccessful plaintiffs in *Wis. Educ. Ass'n Council, et al.*, Case No. 11cv428, before the United States District Court for the Western District of Wisconsin, and, ultimately, before the Seventh Circuit Court of Appeals in *Wis. Educ. Ass'n Council, et al. v. Walker, et al.*, Appeal Nos. 12-1854, 12-2011, and 12-2058.

movants may not inject themselves into this action in which they were not involved in any way whatsoever, through a contempt motion, when that judgment did not benefit them in the first instance.

Furthermore, the non-party movants cite no case law at all in support of their position that non-parties are "aggrieved" for the purposes of Wis. Stat. § 785.03(1). (Movants' Br., 5-6.) On the contrary, as explained below, case law holds that a declaratory judgment cannot be enforced through contempt. *Steffel v. Thompson,* 415 U.S. 452, 471 (1974).

Accordingly, because the non-party movants' are not "aggrieved," their motion for contempt must be denied.

III. THE CIRCUIT COURT'S DECLARATORY JUDGMENT IN THAT A STATE STATUTE IS UNCONSTITUTIONAL IN A FACIAL CHALLENGE, WHERE THE COURT HAS TWICE DENIED INJUNCTIVE RELIEF TO THE PLAINTIFFS, CANNOT SERVE AS THE BASIS FOR CONTEMPT AGAINST DEFENDANT COMMISSIONERS.

A. Because The Court Of Appeals Rejected The Same Argument From the Plaintiffs Now Being Made By The Non-Party Movants, The Commissioners Are Not In Contempt of Court.

The non-party movants assert that the Commissioners are in contempt because it is the "well-established law" in Wisconsin that statutes declared unconstitutional by a circuit court in a facial challenge, without an injunction, cannot be enforced by state officer defendants against anyone. (Motion of Non-Party Movants, 2, Movants' Brief, 1.) This is not a correct view of the law.

Contrary to the position of the non-party movants, the Court's September 14, 2012, declaratory judgment alone did not prevent the Commissioners from enforcing Wis. Stat. § 111.70(4)(d)3, the annual recertification election MERA statute, as to non-parties. The Court of Appeals said as much in its two orders issued in response to the defendants' motion to stay.

In its order for supplemental briefing to the parties, the Court of Appeals made it very clear that the plaintiffs had failed to demonstrate that in a facial challenge, a declaratory judgment of a circuit court that a state statute is unconstitutional, without an injunction, binds the Commissioners when it deals with non-parties. The Court of Appeals explained:

> [Plaintiffs] next point to cases stating that when a statue has been declared unconstitutional on its face, it is to be treated as null and void from its inception. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (2010). **But none of the cases brought to our attention involve the question whether this proposition means that a decision of a *circuit court* has binding effect on non-parties, or, for that matter, on a party with respect to other controversies.** In sum, none of the authorities cited by the unions for these two propositions directly address the questions of *which if any non-parties are bound*, **and *to what extent parties are bound in other controversies***, by a circuit court decision declaring a statute void ab initio on the grounds that it is facially unconstitutional.
>
> Regarding the effect on parties to this action, the unions argue that the circuit court's order will have statewide effect because the state officials who they assert are charged with the responsibility of administering MERA – namely, members of the Wisconsin Employment Relations Committee [sic] (WERC) – are parties to this action, and are therefore bound by it. For this proposition, the unions cite ***Lister v. Board of Regents***, 72 Wis. 2d 282, 302-03, 240 N.W.2d 610 (1974). Again, however, that case did not directly address who is bound by a *circuit court* decision holding a statute facially unconstitutional, but instead focused on the legal fiction that allows controversies regarding the constitutionality or proper construction of statutory provisions to be brought against an officer or agency charged with administering a statute without violating principles of sovereign immunity. Moreover, though none of the parties focus on this fact, **we note that the mandate portion of the circuit court order at issue here declaring MERA void in part does not appear to contain language enjoining WERC from taking any particular actions.**
>
> **We observe that circuit-court ordered injunctions against a state agency or official often have statewide effect because the injunction directs the agency or official to take action or refrain from taking action and, in doing so, may direct action or prohibit action statewide. It is not immediately apparent, however, why an agency like WERC is necessarily bound to apply a non-precedential circuit court decision declaring a statute unconstitutional to parties other than those involved in the case in which the decision arose.**

Madison Teachers, Inc., et al. v. Walker, et al., No. 2012AP2067, slip op. at 3-4 (Wis. Ct. App. Dec. 28, 2012) (italics in original) (bold added). It is quite apparent from this language that the

Court of Appeals has rejected the very argument that the non-party movants now make in support of their motion for contempt.

Giving the plaintiffs the opportunity to improve their argument, and recognizing the differences between declaratory and injunctive relief, the Court of Appeals ordered the parties to brief the following questions:

> (1) **Taking into account the potential difference between declaring portions of a law unconstitutional and granting particular injunctive relief**, did the circuit court indicate, either orally or in writing, that it was enjoining WERC in any respect? If yes, identify with specificity the court's language.
>
> (2) Sometimes the arguments of parties before a circuit court assist us in understanding the meaning of a ruling. Regardless of the answer to (1), **could the inclusion of injunctive relief be deemed implicit in the circuit court's order based upon any arguments or discussions before the circuit court about the remedy being sought**? If yes, then direct this court's attention to anything in the record or submitted materials that bears upon this question.

Id. at 4-5 (bold added).

In their supplemental brief, the defendants asserted that this Court did not indicate, either orally or in writing, that it was enjoining the Commissioners in any respect. Furthermore, the defendants argued that injunctive relief could not be deemed implicit either through arguments or discussions before this Court. (Affidavit of Steven C. Kilpatrick, ¶ 3, Ex. B.)

Clearly, not being persuaded by the plaintiffs' arguments, upon the conclusion of the supplemental briefing the Court of Appeals denied the defendants' motion for a stay because, in part, it did not find that non-parties would be harmed. Recognizing the defendants' position that this Court's declaratory judgment alone did not have state-wide binding effect on the Commissioners' dealings with non-parties, the Court of Appeals wrote, "If the reach of the circuit court's order is as plainly limited as the [defendants] argue, the [defendants] have no need for a stay because there is no underlying cause for confusion on the part of the non-party municipal employers." *Madison Teachers, Inc., et al. v. Walker, et.al,* No. 2012AP2067, slip op.

at 13 (Wis. Ct. App. Mar. 12, 2013). Moreover, the Court of Appeals firmly rejected the plaintiffs' position that this Court's declaratory judgment is binding on non-parties or on the WERC when it deals with non-parties, writing:

> In their motion for a stay, the [defendants] indicated that the circuit court's decision was not binding state-wide. In response to our request for supplemental briefing, the [defendants] expanded on this topic and more forcefully argued that the circuit court's decision is not binding state-wide on nonparties.
>
> We acknowledge that the *[plaintiffs]* argue that the circuit court's decision here *is* binding state-wide. **But we reject out of hand the proposition that the circuit court's decision has the same effect as a published opinion of this court or the supreme court.**

Id. at 14, n.1 (italics in original) (bold added).

Thus, the Court of Appeals – after first noting that the plaintiffs had not persuaded it that a circuit court's declaratory judgment, without an injunction, prevented the Commissioners from enforcing statutes declared unconstitutional as to non-parties, and then specifically ordering supplemental briefing on the very issue – did *not* hold that the Commissioners were precluded from enforcing the MERA statutes declared unconstitutional as to non-parties. In fact, the Court of Appeals opined that the Commissioners would be prevented from doing so only if a future court determined, in its discretion, that it was appropriate to apply the doctrine of issue preclusion, also noting that "different courts might make different decisions on that topic." *Id.*

Notably, during briefing, the plaintiffs, like the non-party movants here, cited *State v. Konrath*, 218 Wis. 2d 290, 305 n.13, 577 N.W.2d 601 (1998), in support of their position. (Kilpatrick Aff., ¶ 3, Ex. B.) Yet, despite this decision, the Court of Appeals still did not accept their argument, likely for at least two reasons. First, the *Konrath* decision did not directly tackle the issue of whether a circuit court's declaratory judgment in a facial challenge, without an injunction, prevents state officers from enforcing the statutes declared unconstitutional as to non-parties. Second, the decision's *footnote* simply cites a law review article, Michael C. Dorf,

Facial Challenges to State and Federal Statutes, 46 Stan. L.Rev. 235, 236 (1994), that also does not discuss the question directly. In fact, the page of the law review article cited is found within the article's general introduction, which is not specific to Wisconsin law in any way. In sum, *Konrath* is not an application of the principle of law the non-party movants claim it is. If it were, the Court of Appeals would have determined that the Commissioners' position on appeal was wrong. But it did not.

Finally, the Court of Appeals' orders also reveal that it considered the case law holding that a circuit court decision is non-precedential to be relevant to the question of whether the Commissioners may enforce the annual recertification election statute with respect to non-parties. To be sure, the Supreme Court explained that a declaration by a circuit court on the constitutionality of statutes can only be *final* upon the issuance of a published appellate decision. In *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 217, 466 N.W.2d 861 (1991), it wrote, "Of course, questions of constitutionality . . . cannot finally be laid to rest until decided by **final appellate adjudication** . . . either by the court of appeals by published opinion or by determination by the Wisconsin Supreme Court") (emphasis added) (footnote omitted). This language shows that a circuit court's declaratory judgment that a statute is unconstitutional is not a final adjudication of constitutionality until an appellate court issues a published decision. Treating a circuit court's declaration of unconstitutionality as final would elevate the decision of a circuit court, which is always unpublished, to the level of a published court of appeals decision or decision of the supreme court. This is a position that the Court of Appeals expressly rejected. *Madison Teachers, Inc., et al. v. Walker, et al.*, No. 2012AP2067, slip op. at 14 n.1 (Wis. Ct. App. Mar 12, 2013).

Therefore, the Commissioners submit that the language from the orders of the Court of Appeals *in this litigation* illustrate that the non-party movants are incorrect in stating that the law is "well-established" that a Wisconsin circuit court's declaratory judgment, by itself, precludes defendant state officers from enforcing statutes declared unconstitutional as to non-parties. As a result, because this Court issued only a declaratory judgment, and twice declined to issue an injunction, the Commissioners' actions in furtherance of its intent to administer annual recertification elections with regard to non-parties have been undoubtedly necessary and proper. In no way has the Commissioners' action been an intentional disobedience of this Court's September 14, 2012, and September 17, 2013, orders, as a matter of law. The Commissioners are simply not in contempt of the Courts orders.

B. Declaratory Judgments Are Distinct From Injunctions.

The Wisconsin Supreme Court has acknowledged that "judicial remedies fall into four major categories: damages remedies, restitutionary remedies, coercive remedies (**such as injunctions that are backed by the court's contempt power**), and declaratory remedies." *Sch. Dist. of Shorewood v. Wausau Ins. Companies*, 170 Wis. 2d 347, 368-69, 488 N.W.2d 82 (1992) (emphasis added) (citing Dobbs, *Handbook on the Law of Remedies,* § 1.1 at 1 (1973)). Also, the United States Supreme Court "has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other." *Steffel v. Thompson,* 415 U.S. 452, 469 (1974) (citations omitted). For example, "irreparable injury must be shown in a suit for an injunction, but not in an action for declaratory relief." *Perez v. Ledesma,* 401 U.S. 82, 123 (1971) (Brennan, J., concurring in part and dissenting in part) (citing *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,* 300 U.S. 227, 241 (1937). Also, a declaratory judgment is less coercive because it "is merely a declaration of legal

status or rights," whereas an injunction either mandates or prohibits particular conduct and **"paralyzes the [s]tate's enforcement machinery."** *Id.* (emphasis added). *See also Morrow v. Harwell*, 768 F.2d 619 (5th Cir. 1985) ("There is no question but that the passive remedy of a declaratory judgment is far less intrusive into state functions than injunctive relief that affirmatively commands specific future behavior under the threat of the court's contempt powers.").

Furthermore, Wisconsin courts have long recognized that a circuit court may enjoin state officer defendants from enforcing state statutes declared unconstitutional. "There can be no doubt that the circuit court has jurisdiction in the sense that it has power to enjoin state officials from enforcing a statute which is invalid because in contravention of the Constitution." *John F. Jelke Co. v. Hill*, 208 Wis. 650, 242 N.W. 576 (1932); *Olson v. State Conservation Comm'n*, 235 Wis. 473, 293 N.W. 262, 264 (1940) ("Courts unquestionably have the power to enjoin state officials from enforcing statutes which contravene the constitution."). Indeed, in order to avoid the defense of sovereign immunity and proceed with this action in the first instance, the plaintiffs were required to name state officers in their official capacities, allege an on-going violation, and seek *injunctive* relief. *City of Kenosha v. State*, 35 Wis. 2d 317, 323, 151 N.W.2d 36 (1967) (courts may entertain suits to *enjoin* state officers and state agencies from acting beyond their constitutional or jurisdictional authority).

However, that does not mean that a circuit court's declaratory judgment, absent an injunction, necessarily prohibits those state officer defendants from enforcing the statutes as to non-parties. Wisconsin's Uniform Declaratory Judgments Act itself illustrates that a declaratory judgment alone is not sufficient. Wisconsin Stat. § 806.04(8) specifically allows for supplemental injunctive relief. It reads, in part: "Further relief based on a declaratory judgment

or decree may be granted whenever necessary or proper." Wis. Stat. § 806.04(8). Case law as well shows that an injunction can give a declaration effect. *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957) ("Injunctive relief may be granted in aid of a declaratory judgment, **where necessary or proper to make the judgment effective.**") (emphasis added) (citation omitted). Indeed, the plaintiffs in this action filed such a petition for broad injunctive relief under this subsection subsequent to the Court's declaratory judgment.

If the non-party movants are correct in their legal position, then there is no difference between a declaration and an injunction; nor is there any difference between a published appellate decision and a circuit court's decision. But this runs contrary to the established law as described above, and certainly contrary to the Court of Appeals' language in its two orders in this case.

C. Declaratory Judgments Cannot Form The Basis For Contempt.

The United States Supreme Court has made it clear that non-compliance with a declaratory judgment cannot form the basis for contempt. Put simply, a declaratory judgment cannot be enforced through contempt proceedings. *Steffel,* 415 U.S. at 466-71 (citing *Perez,* 401 U.S. at 125-26); *Burgess v. Ryan,* 996 F.2d 180, 184 (7th Cir. 1993) (recognizing that "declaratory judgments ... are not enforced by contempt[.]"); *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D. C. Cir. 1993) (appellate court reversed finding of contempt based on a mere declaratory judgment).

Unlike the Commissioners, the non-party movants have cited no case law standing for the proposition that a defendant can be held in contempt for violating a declaratory judgment. Wisconsin case law says otherwise. In *Hunter v. Hunter*, 44 Wis. 2d 618, 622, 172 N.W.2d 167 (1969), the Supreme Court held that although a divorce judgment expressly noted the statute

prohibiting remarriage without court permission, it provided no basis for a contempt order because there was "no specific order . . . entered requiring court permission prior to remarriage." *See also Joint Sch. Dist. No. 1 v. Wisconsin Rapids Educ. Ass'n.*, 70 Wis. 2d 292, 324, 234 N.W.2d 289 (1975) ("In Wisconsin, a civil contempt occurs when the violation of an **injunctional** order tends to defeat, impair, impede or prejudice the rights or remedies of the other party. ") (emphasis added) (citation omitted).

D. The Court's September 14, 2012, Declaratory Judgment Was Not A Clear And Unequivocal Directive to the Commissioners.

Notwithstanding that the Commissioners cannot be subject to contempt because the Court's September 14, 2012, Order is a declaratory judgment, the evidence in this case also requires that they not be found in contempt.

To be punishable by contempt, a court's order must be an unequivocal directive. *See State v. Dickson*, 53 Wis. 2d 532, 541, 193 N.W.2d 17 (1972); *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 76 (1967) (reversing opinion upholding contempt finding for violating order that "did not state in 'specific ... terms' the acts that it required or prohibited"); *see also Armstrong,* 1 F.3d at 1289 ("'[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous,' . . . and the violation must be proved by 'clear and convincing' evidence.") (internal citations omitted). While it is true that a court's order does not need to include the specific words such as "enjoin" or "injunction" in order to be considered an injunction, only an "order or judgment which requires specific conduct (either to do, or to refrain from, specific actions) can be enforced by contempt." *Carney v. CNH Health and Welfare Plan*, 2007 WI App 205, ¶ 17, 305 Wis. 2d 443, 740 N.W.2d 625; *see also Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 24, 312 Wis. 2d 435, 752 N.W.2d 359 ("Injunctions, of course, must be specific as to the prohibited acts and conduct in

order for the person being enjoined to know what conduct must be avoided."). Therefore, a court's order must require a specific direction to a party to take action or to refrain from taking action to serve as the basis for contempt.[7]

Here, the Court's September 14, 2012, Order states, in its entirety:

ORDER

> For the reasons stated above, the court grants summary judgment in favor of the plaintiffs, denies the defendants' motion for judgment on the pleadings and declares that Wis. Stat. §§ 66.0506, 118.245, 111.70(1)(f), 111.70(3g), 111.70(4)(mb) and 111.70(4)(d)3 violate the Wisconsin and United States Constitution, and Wis. Stat. § 62.623 violates the Wisconsin Constitution and all null and void. This is a final order as defined by Wis. Stat. § 808.03(1) for purposes of appeal.

Decision and Order, dated September 14, 2012, p. 27.

Plainly, this Order did not expressly direct the Commissioners from taking any action, nor did the Order expressly direct them to take any action. Unlike the language of the United States District Court for the Western District of Wisconsin that specifically enjoined the Commissioners from enforcing the Act 10 amendments to MERA that the court had just declared

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[7] A prohibitory injunction has been defined as one that operates to restrain the commission or continuance of an act and to prevent a threatened injury.

> A mandatory injunction on the other hand is one that goes beyond a mere restraint,–it commands acts to be done or undone; it compels the performance of some affirmative action.

Carpenter Baking Co. v. Bakery Sales Drivers Local Union No. 344, 237 Wis. 24, 296 N.W. 118, 122 (1941) (citations omitted).

unconstitutional,[8] this Court's order is only a declaratory judgment, not a declaratory judgment combined with an injunction. Indeed, the non-party movants well know that the Commissioners complied with the federal court injunction for several months until it was dissolved by the Seventh Circuit Court of Appeals.

By enforcing the annual recertification election provision of MERA as to at least one of the non-party movants, the Commissioners are not intentionally disobeying the original order of this Court. Rather, they respect the declaratory judgment and made clear that they would not enforce the annual recertification election statute and emergency rules as to the plaintiffs. The Commissioners' action is not contemptuous, but instead reveals a legal position on an issue that stands on all fours with the Court of Appeals orders. To be sure, the Commissioners must consider competing interests and demands of municipalities, unions, and individual employees throughout the state. Rather than intentionally disobeying this Court's declaratory judgment, the Commissioners are making every effort to satisfy their obligations under this case, as well as the

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[8] The District Court's Order stated, in part:

> 13) Sections 227, 242, 289, 298, 9132 and 9155 of 2011 Wis. Act 10 are **declared null and void**;
>
> 14) **defendants are enjoined from enforcing** Wis. Act 10's recertification requirements for general employees unions;
>
> 15) **defendants are enjoined from prohibiting** deductions for general employee unions and directed to facilitate voluntary deductions on or before May 31, 2012 . . . .

Wisconsin Educ. Ass'n Council v. Walker, et al., 824 F. Supp. 2d 856, 877 (W.D. Wis. 2012) *aff'd in part, rev'd in part*, 705 F.3d 640 (7th Cir. 2013) (emphasis added). As noted above, the Commissioners obeyed the district court's injunction.

Also, before this Court issued its September 14, 2012, Order, two other branches of the Dane County Circuit Court in 2012 declared Wisconsin statutes unconstitutional and also issued injunctions against state officer defendants specifically enjoining enforcement. *See Milwaukee Branch of the NAACP, et al. v. Walker, et al.*, Dane County Circuit Court Case No. 11cv5492, Order for Judgment and Judgment Granting Declaratory and Injunctive Relief, July 17, 2012, p. 20; *League of Women Voters of Wisconsin Education Network, Inc. et al. v. Walker, et al.*, Dane County Case No. 11cv4669, Decision and Order Granting Summary Judgment and Permanent Injunction, March 12, 2012, p.8.

legitimate claims by many others who were not parties to this action. For all of the above-stated reasons, the Commissioners should not be found in contempt and subject to remedial sanctions.

E. This Court's September 17, 2013, Decision Denying Plaintiffs' Motion for Injunctive Relief Cannot Form The Basis Of Contempt Because Any Language Clarifying Its September 14, 2012, Order Was Dicta And The Defendants Could Not Appeal The Favorable Decision In Any Event.

The non-party movants allege that the Commissioners refuse to comply with the Court's September 17, 2013, order. Motion for Contempt and Remedial Sanctions, p. 4. While the Commissioners acknowledge that this Court has interpreted its declaratory judgment to bind them as to non-parties, they respectfully assert that they cannot be found to be in contempt of this order for the following reasons.

First, the movants cite no case law for the proposition that a party can be found in contempt for intentionally refusing to obey a court's order that denies another party's motion for an injunction. That is because there is none. As explained above, it cannot be reasonably asserted that the Court's September 17, 2013, order actually "ordered" the Commissioners to take any action or to refrain from taking any action. In that Decision and Order, this Court concluded that the plaintiffs' petition for an injunction had to be denied based on their inability to prove irreparable harm. Thus, the Court's only "order" was that the plaintiffs' motion was denied. Any opinion as to the reach of this Court's September 14, 2012, declaratory judgment is dicta.[9] It certainly cannot be called an order directed at the Commissioners.

Second, and related to the first reason, the Commissioners are without the power to appeal the September 17, 2013, order because it was *favorable* to them. A final order or

[9] "'Dicta' is language which is broader than necessary to determine an issue." *Malone by Bangert v. Fons*, 217 Wis. 2d 746, 754, 580 N.W.2d 697 (Ct. App. 1998).

judgment may be appealed as a matter of right. Wis. Stat. § 808.03(1). An appeal is a "review in an appellate court by appeal or writ of error authorized by law of a judgment or order of a circuit court." Wis. Stat. § 808.01(1). However, while there is no statutory language explicitly prohibiting a *successful* party from appealing a final judgment or order of a circuit court, the fundamental concept that only an *aggrieved* party may appeal a final judgment or order is a valid principle of law. *Mutual Service Cas. Ins. Co. v. Koenigs*, 110 Wis. 2d 522, 526, 329 N.W.2d 157 (1983) (an appealable judgment or order can only be brought by an aggrieved party); *Kenosha Prof'l Firefighters v. City of Kenosha*, 2009 WI 52, ¶ 15 n.9, 317 Wis. 2d 628, 766 N.W.2d 577 ("A party cannot appeal from a judgment or order that is in its favor."); *see also Estate of Bryngelson*, 237 Wis. 7, 11, 296 N.W. 63 (1941) ("We think it elementary that a party may not appeal from a judgment in his favor."); *see also Tierney v. Lacenski*, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983) ("the judgment or order appealed from must bear directly and injuriously upon the interests of the appellant; he must be adversely affected in some appreciable manner"). Thus, the Commissioners are not permitted to appeal the Court's September 17, 2013, order because they are not aggrieved by it. As a result, the Commissioners should not be held in contempt for violating an order which did not contain clear and unambiguous language directing them to take action or to refrain from taking action, and which they could not take back up to the Court of Appeals.

In summary, without an unequivocal directive order, the Commissioners are not in contempt of court and punishment by contempt cannot stand against them. As a consequence, the non-party movants' motion must be denied.

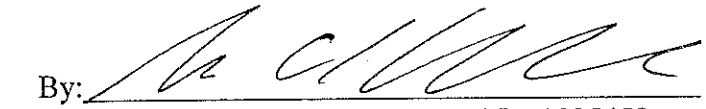
CONCLUSION

Based on the foregoing reasons, Defendant Commissioners are not in contempt of court. Accordingly, they respectfully urge the Court to deny the non-party movants' motion for contempt and remedial sanctions.[10]

Dated this 4th day of October, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

By: 

Steven C. Kilpatrick, State Bar No. 1025452
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
Phone: 608.266.1792
Counsel for Defendant Commissioners Scott and Pasch

[10] In the event this Court finds the Commissioners in contempt of court, they respectfully reserve the ability to brief, and attend a hearing if necessary, the issue of the appropriateness of the remedial sanctions requested by the movants under Wis. Stat. § 785.04(1). Several important legal issues could arise from any order granting any of the specific sanctions sought, such as whether sovereign immunity is a defense to the requested sanctions of attorneys' fees and forfeitures against the Commissioners sued in their official capacities. And because the movants also request as a sanction a refund of over $100,000 in election fees paid, an evidentiary hearing may be necessary to address this specific issue as well.