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

OPERATING ENGINEERS OF WISCONSIN, IUOE LOCAL 139 AND LOCAL 420, HEATH HANRAHAN, KAREN ERICKSON, AND ANTHONY LESPERANCE,

Plaintiffs,

v. Case No. 18-CV-285

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR, JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF WISCONSIN, AND JAMES DALEY, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR RULE 12(b) MOTION TO DISMISS

INTRODUCTION

In February 2018, Plaintiffs, two local chapters of the International Union of Operating Engineers, filed a complaint against then-Governor Scott Walker, then-Attorney General Brad Schimel, and James Daley, Chairman of the Wisconsin Employment Relations Commission, all in their

official capacities, challenging the constitutionality of 2011 Wisconsin Act 10 ("Act 10"). A few months later, in May 2018, Plaintiffs voluntarily dismissed their case by filing a "Notice of Voluntary Dismissal" pursuant to Fed. R. Civ. P. 41(a)(1)(i). This notice of voluntary dismissal was self-executing and, therefore, the Court closed the case.

Despite their voluntary dismissal and the case being closed, one year later, in May 2019, Plaintiffs filed an amended complaint, substituting Tony Evers for Scott Walker and Josh Kaul for Brad Schimel. In June 2019, three individual members of Local 139 joined as Plaintiffs, filed a second amended complaint, and then finally served the Defendants.

But Plaintiffs' attempt to resurrect this case—that they voluntarily dismissed and that this Court closed over one year ago—is improper. By way of Plaintiffs' Fed. R. Civ. P. 41(a)(1)(i) notice of voluntary dismissal, this Court's jurisdiction over the action ended. It thus lacks jurisdiction to proceed now. For this reason, the Court should grant Defendants' motion, dismiss Plaintiffs' second amended complaint, and deny as moot all other filings that occurred since May 2018.

Because this Court lacks jurisdiction, it should proceed no further. However, for the sake of completeness only, it also is the case that two of the defendants would be subject to dismissal for an independent reason. Specifically, Governor Evers and Attorney General Kaul are improperly named

as Defendants. Plaintiffs' allegations in their second amended complaint against these Defendants do not show they have any meaningful role in enforcing or administering Act 10. Accordingly, this Court has no Article III jurisdiction over these Defendants because it cannot order relief as to Governor Evers or Attorney General Kaul that would redress the harm Plaintiffs assert. Similarly, the Eleventh Amendment bars Plaintiffs' claims against them because there is no ongoing violation of federal law that this Court could enjoin.

ISSUES PRESENTED

I. Does this Court lack jurisdiction over this action because of Plaintiffs' Rule 41(a)(1)(i) notice of voluntary dismissal, filed over one year ago, which resulted in the case being closed?

This Court should answer yes.

II. Alternatively, must Governor Evers and Attorney General Kaul be dismissed from this action because they do not enforce the challenged law?

This Court should answer yes.

FACTUAL ALLEGATIONS

The following factual allegations are taken from Plaintiffs' second amended complaint and are accepted as true for the purposes of this motion.

Plaintiff International Union of Operating Engineers Local 139 is a labor organization that represents approximately 9,500 workers in Wisconsin.

(Dkt. 18 ¶ 3.) Plaintiff International Union of Operating Engineers Local 420 is a labor organization that represents more than 1,600 workers in Wisconsin. (Dkt. 18 ¶ 4.) Plaintiffs Heath Hanrahan, Karen Erickson, and Anthony Lesperance are members of Local 139. (Dkt. 18 ¶ 7.)

In 2011, the Wisconsin Legislature passed Act 10. (Dkt. 18 ¶ 17.) Among other things, Act 10 amended the Municipal Employment Relations Act, Wis. Stat. § 111.70, et seq. (MERA). (Dkt. 18 ¶ 17.) Act 10 significantly limited collective bargaining between labor organizations and municipal employers to the subject of base wages. (Dkt. 18 ¶ 18.) It prohibited a municipal employer from deducting labor organization dues from the earnings of their employees. (Dkt. 18 ¶ 19.) And Act 10 also changed the way labor organizations were certified by requiring a representative of a bargaining unit to receive at least 51 percent of the votes of the total number of bargaining unit members in an annual election. (Dkt. 18 ¶ 20.)

Defendant Governor Tony Evers "is sued in his official capacity as Governor of the State of Wisconsin." (Dkt. 18 ¶ 8.) "Governor Evers' predecessor, Governor Scott Walker signed Act 10 into law to effectuate the change to Wis. Stat. 111.70." (Dkt. 18 ¶ 8.) Paragraph 8 of the second amended complaint is the only paragraph alleging any conduct by Governor Evers.

Defendant Attorney General Joshua Kaul "is sued in his official capacity as Attorney General for the State of Wisconsin." (Dkt. 18 ¶ 9.) Plaintiffs allege

that "Defendant Kaul has responsibility for enforcing Wisconsin's laws." (Dkt. 18 ¶ 9.) Paragraph 9 of the second amended complaint is the only paragraph alleging any conduct by Attorney General Kaul.

Finally, Defendant James J. Daley "is sued in his official capacity as the Chair of the Wisconsin Employment Relations Commission, which is responsible for conducting elections" and "enforcing and resolving disputes arising under Wisconsin Statutes §111.70, *et seq*., including the changes pursuant to Wisconsin's Act 10." (Dkt. 18 ¶ 10.)

LEGAL STANDARD

To survive a Rule 12(b)(1) and (6) challenge, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Kanter v. Barr*, 919 F.3d 437, 440–41 (7th Cir. 2019); *Salah v. United States*, 11 Fed. App'x 603, 604–05 (7th Cir. 2001) (explaining a Rule 12(b)(1) jurisdictional challenge as a matter of law).

ARGUMENT

Plaintiffs' attempt to litigate the merits of this civil action after voluntarily ending it should be rejected. Their Fed. R. Civ. P. 41(a)(1)(i) notice of voluntary dismissal—filed before Defendants answered the complaint—resulted in this Court losing jurisdiction over the action. They cannot now

simply start filing new pleadings into a closed action. However, Plaintiffs' voluntary dismissal of their previous lawsuit does not preclude them from challenging Act 10; they simply must do so by commencing a new action.

Although that jurisdictional issue is dispositive, it also is the case that two of the defendants are improperly named—Governor Evers and Attorney General Kaul. Neither of these state officers is alleged to have any connection to the enforcement of the Act 10 provisions challenged, so they must be dismissed for lack of Article III standing or based on Eleventh Amendment immunity.

I. This Court lacks jurisdiction over this action because of Plaintiffs' Notice of Voluntary Dismissal.

A. A Rule 41(a)(1)(i) notice of voluntary dismissal effectuates the immediate dismissal of the suit.

Under Rule 41(a)(1)(i), an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. Fed. R. Civ. P. 41(a)(1)(i). The filing of such a notice "effect[s] the immediate dismissal of the suit." *Nelson v. Napolitano*, 657 F.3d 586, 587 (7th Cir. 2011). "No action remain[s] for the district court to take." *Id.*; *Scam Instrument Corp. v. Control Data Corp.*, 458 F.2d 885, 889 (7th Cir. 1972) (dismissing case as of date of Rule 41(a)(1)(i) notice of voluntary dismissal filed and holding any further action by the court not necessary). "A suit that is

voluntarily dismissed under Rule 41(a) generally is treated as if it had never been filed." *Nelson,* 657 F.3d at 587–88 (citing cases). "An unconditional dismissal terminates federal jurisdiction" except for limited purposes not relevant here. *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir. 1985); *Qureshi v. United States*, 600 F.3d 523, 525 (5th Cir. 2010) ("In short, in the normal course, the district court is divested of jurisdiction over the case by the filing of the notice of dismissal itself."). Put simply, after a notice of voluntary dismissal is filed, "the case [i]s gone." *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008).

The Seventh Circuit explained the consequences of a voluntary notice of dismissal:

> Rule 41(a)(1)(i) is the shortest and surest route to abort a complaint when it is applicable. So long as plaintiff has not been served with his adversary's answer or motion for summary judgment he need do no more than file a notice of dismissal with the Clerk. *That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play.* This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone.

Parker v. Freightliner Corp., 940 F.2d 1019, 1023 (7th Cir. 1991) (quoting *American Cyanamid Co. v. McGhee,* 317 F.2d 295, 297 (5th Cir. 1963) (emphasis added)). *See also Scott v. Delbert Servs. Corp.*, 973 F. Supp. 2d 949 (E.D. Wis. 2013) (Mem.) (Adelman, J.) (notifying lawyers in the district that

the district judge will not be signing any proposed orders filed along with Rule 41(a)(1)(A)(i) notices of voluntary dismissal because the notices are self-executing).

"[T]he general purpose of [Rule 41(a)] is to preserve the plaintiff's right to take a voluntary nonsuit and start over so long as the defendant is not hurt." *McCall-Bey*, 777 F.2d at 1184. "Thus the plaintiff can dismiss without the court's permission, and without prejudice to his being able to bring a new suit, if the defendant has not yet answered the complaint . . . ." *Id.* "Rule 41(a)(1) was not designed to give a plaintiff any benefit other than the right to take one such dismissal without prejudice." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 397 (1990).

B. Plaintiffs' Notice of Voluntary Dismissal ended this case, and they can only pursue their claims in a newly filed case.

In this case, Plaintiffs filed a "Notice of Voluntary Dismissal," explicitly stating "as of right and in accordance with Rule 41(a)(1)(i), Federal Rules of Civil Procedure" that they "hereby dismiss this action without prejudice to the rights of Plaintiffs." (Dkt. 8:1.) They filed this notice before any of the defendants at that time—Governor Walker, Attorney General Schimel, and Chairman Daley—answered the complaint (or were even served). Plaintiffs' notice was therefore timely and self-executing. *See Smith*, 513 F.3d at 782. This Court then did nothing more than close the case, as the law makes clear

that it is all it can do. As a result of Plaintiffs' notice, this Court lost jurisdiction in this matter to decide the merits of Plaintiffs' action.

Defendants do not assert that Plaintiffs are barred from attempting their constitutional challenge to Act 10 in federal court. Their voluntary dismissal gives them one more chance. *Cooter & Gell,* 496 U.S. at 397. Indeed, "[o]nce an action has been dismissed under Rule 41(a)(1) without prejudice, the plaintiff may bring the suit again by filing a new complaint." *Nelson*, 657 F.3d at 588. But that new complaint must be in a new civil action. *Id.* (citing *Richmond v. Chater*, 94 F.3d 263, 267 (7th Cir. 1996) (filing a new complaint and paying a new filing fee is generally required following dismissal without prejudice)). Plaintiffs can litigate their constitutional challenge to Act 10 if they so choose, just not in this closed case.

For these reasons, this Court should grant Defendants' motion to dismiss Plaintiffs' second amended complaint and strike as moot all other pending matters in the action.[1]

II. Alternatively, Governor Evers and Attorney General Kaul are improperly named Defendants.

The foregoing flaw is dispositive, but it is not the only flaw. For example, Plaintiffs sue three state officials, but only one is a proper Defendant in this

[1] *See, e.g., United States v. One 1997 E35 Ford Van VIN: 1FBJS31VHB70844*, No. 98-C-3548, 2010 WL 1172481, at *3 (N.D. Ill. Mar. 22, 2010) (denying as moot pending motions filed after a notice of voluntary dismissal was filed).

challenge to MERA—James Daley, as Chairman of the Wisconsin Employment Relations Commission, which is statutorily charged with enforcing this law. Because the Governor and Attorney General are not specifically charged with enforcing or administering MERA, they must be dismissed from any action.

A. Plaintiffs lack Article III standing in their claims against the Governor and Attorney General.

1. Legal principles regarding Article III standing.

"The jurisdiction of federal courts is limited to 'Cases' and 'Controversies' as described in Article III, Section 2 of the Constitution. There is no case or controversy if the plaintiff lacks standing to challenge the defendant's alleged misconduct." *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 587–88 (7th Cir. 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To confer standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). It follows from these principles that a case or controversy under Article III not only must be brought *by* a proper plaintiff, but also must be brought *against* a proper defendant. Standing to defend, no less than standing to sue, demands that the litigant possess a direct stake in the controversy. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). That is, the complaint must name a defendant to whose

conduct plaintiff's alleged injury can be traced and against whom the court could issue a remedy that would be likely to redress that injury. As the party invoking federal jurisdiction, a plaintiff has the burden to establish Article III standing. *Lujan*, 504 U.S. at 561.

Under Article III, a plaintiff who seeks to enjoin the enforcement of a state statute must sue a state official who is charged with specific duties of enforcement relating to that statute and who has taken or threatened some enforcement-related action vis-à-vis the plaintiff. *See Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc). "A litigant must establish a more immediate threat than simply a general policy of enforcing laws." *J.N.S., Inc. v. State of Ind.*, 712 F.2d 303, 305 (7th Cir. 1983). A state official who is not responsible for enforcing the statute is not a proper defendant. "Indeed, if a defendant does not have the authority to carry out the injunction, a plaintiff's claim for injunctive relief must be dismissed because the Court cannot enjoin a defendant 'to act in any way that is beyond [the defendant's] authority in the first place.'" *Swan v. Bd. of Educ. of Chicago*, 956 F. Supp. 2d 913, 918 (N.D. Ill. 2013) (alternation in original) (quoting *Okpalobi*, 244 F.3d at 426–27). Therefore, "[t]he redressability prong is not met when a plaintiff seeks relief against a defendant with no power to enforce a challenged statute." *Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007).

2. Plaintiffs lack Article III standing because their claims against Governor Evers and Attorney General Kaul are not redressable.

Here, the redressability prong is not met as to Plaintiffs' claims against the Governor and Attorney General. First, Plaintiffs' allegations against the Governor are sparse. Plaintiffs merely allege that the previous Governor signed Act 10 after it was passed by the Legislature. (Dkt. 18 ¶ 8.) Notably, Plaintiffs do *not* allege that the Governor has any connection to the enforcement of the challenged Act 10 provisions. Therefore, the Court cannot redress Plaintiffs' claims as plead against the Governor. But even if Plaintiffs alleged that Governor Evers has the general authority to enforce state law, there would still be no case or controversy. *See Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (dismissing an action against the Governor of Virginia because "he lack[ed] a specific duty to enforce the challenged statutes"); *1st Westco Corp. v. Sch. Dist. of Philadelphia*, 6 F.3d 108, 112–16 (3d Cir. 1993) (holding that the general authority of a state governor to enforce the laws of the state is in itself insufficient to establish an actual controversy for Article III purposes); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st. Cir. 1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute.").

Second, as to Plaintiffs' claims against the Attorney General, the same legal reasoning applies. There is no case or controversy between Plaintiffs and the Attorney General where the latter has no enforcement responsibility other than the general duty to uphold the laws, assuming the allegation to be true. (Dkt. 18 ¶ 9). *See 1st Westco Corp*, 6 F.3d at 112–16; *Shell Oil Co.*, 608 F.2d at 211.

Moreover, Plaintiffs' allegation is wrong on the law. While it is true that the Attorney General enforces many laws of the State, he has no authority to act unless a statute gives him authority. *See Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 912 (E.D. Wis. 2002) (Adelman, J.) (citing *State v. City of Oak Creek*, 232 Wis. 2d 612, 627, 605 N.W.2d 526 (2000)). And there is no state statute giving him enforcement powers over the only law challenged here—MERA. Plaintiffs' second amended complaint does not provide a statutory citation for the Attorney General's enforcement power under MERA. In fact, Plaintiffs' pleading states that it is another defendant—the Chairman of the Wisconsin Employment Relations Commission—who conducts elections and enforces and resolves disputes arising under MERA. (Dkt. 18 ¶ 10.) And this is true. *See* Wis. Stat. § 111.70(4) ("Powers of the commission") and (a). In accordance with these principles, this Court has previously dismissed claims against Wisconsin's Attorney General because that officer had no power to

enforce a Wisconsin statute that was alleged to be unconstitutional. *See Deida*, 192 F. Supp. 2d at 912.

Because neither the Governor nor the Attorney General has any power to redress Plaintiffs' alleged injuries resulting from Act 10, their allegations do not establish standing for their claims against these two state officers. Plaintiffs' claims against them must therefore be dismissed.

B. The Eleventh Amendment also bars Plaintiffs' claims against the Governor and Attorney General.

Plaintiffs' claims against Governor Evers and Attorney General Kaul are also barred by the Eleventh Amendment.

1. Legal principles regarding the Eleventh Amendment

The Eleventh Amendment bars suits against a state brought by private parties, whether the relief sought is money damages or an injunction. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54 (1996); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01 (1984) (this jurisdictional bar applies "regardless of the nature of the relief sought"). And "[s]uits against state officials in their official capacity . . . should be treated as suits against the State." *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Ex parte Young created a judicially recognized exception to Eleventh Amendment immunity that allows an action for prospective injunctive relief by a private citizen against a state officer whose acts violate federal law.

209 U.S. 123, 159–60 (1908). The state officer against whom the claim is brought must have "some connection" with the enforcement of the statute challenged to fulfill the immunity exception. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir. 2006). "To take advantage of *Young* the plaintiffs must sue the particular public official whose acts violate federal law." *David B. v. McDonald*, 156 F.3d 780, 783 (7th Cir. 1998). A court applying the *Ex parte Young* doctrine "need only conduct a 'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Ind. Prot. & Advocacy Servs. v. Ind. Family and Social Serv. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010) (alteration in original) (citation omitted).

2. The Eleventh Amendment bars Plaintiffs' claims against Governor Evers and Attorney General Kaul because these Defendants do not enforce the challenged law.

Here, Plaintiffs seek prospective injunctive relief against all three Defendants in their official capacities. (Dkt. 18:9–10.) But, as explained above, the second amended complaint alleges only that Defendant Daley is responsible for enforcing and resolving disputes arising under the challenged statute. (Dkt. 18 ¶ 9.) In other words, Plaintiffs' pleading does not allege that the Governor or Attorney General are currently violating federal law by having "some connection" to MERA. And the case law teaches that general

enforcement allegations against a governor and attorney general, without more, is insufficient.

This principle is well established. For example, in *Hearne v. Board of Education of City of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999), the Seventh Circuit dismissed the Governor of Illinois because he had "no role to play in the enforcement of the challenged statutes, nor does the governor have the power to nullify legislation once it has entered into force." And in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437, 440–41 (7th Cir. 1992), the Seventh Circuit dismissed the Attorney General of Illinois from a challenge to a state law because he never threatened the plaintiffs with prosecution nor did the plaintiffs cite any legal authority for him to do so.

Similar to *Sherman* and *Heard*, Plaintiffs here point to no state law giving the Governor or Attorney General any enforcement power over MERA, and Defendants know of none. Because neither the Governor nor the Attorney General bears any responsibility for the enforcement of the challenged provisions of Act 10, they do not have "some connection" to it, *Entertainment Software Ass'n*, 469 F.3d at 645, and, therefore, Plaintiffs cannot show that these two Defendants are violating federal law. As a consequence, Plaintiffs' claims against these Defendants do not meet the *Ex parte Young* exception,

and Eleventh Amendment immunity applies. Plaintiffs' claims against the Governor and Attorney General must be dismissed.

CONCLUSION

Defendants respectfully ask this Court to grant their motion to dismiss Plaintiffs' Second Amended Complaint and strike as moot all other pending matters in the action.

Dated this 11th day of July, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

Attorneys for Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-8549 (CPK)
(608) 267-2223 (Fax)
kilpatricksc@doj.state.wi.us
kawskicp@doj.state.wi.us