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

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, et al.,

Plaintiffs,

v. Case No. 19-CV-1233

JAMES J. DALEY,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS

INTRODUCTION

This Court should grant Defendant James J. Daley's motion to dismiss Plaintiffs' Complaint under Rule 12(b)(6). This Court cannot, as Plaintiffs propose, "revisit" binding Seventh Circuit precedent, *Laborers Local 236, AFL-CIO v. Walker*, 749 F.3d 628, 640 (7th Cir. 2014), and *Wisconsin Education Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) (*WEAC*). (Dkt. 26:2.) As discussed in the first brief, *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. ___, 138 S. Ct. 2448 (2018), did not displace those decisions.

Regarding Count III, which challenges Act 10's payroll-deduction prohibition, Plaintiffs recognize that *WEAC* forecloses their claim. (Dkt. 26:12.)

Nonetheless, they question the Seventh Circuit's reasoning in *WEAC* and whether *Janus* undermined it (Dkt. 26:12–13), but *WEAC* remains binding. Plaintiffs' argument about the payroll-deduction prohibition favoring some viewpoints was resolved by the Seventh Circuit, which held that Act 10 does not invidiously discriminate on the basis of viewpoint and that the payroll-deduction prohibition "survives rational basis review." *WEAC*, 705 F.3d at 648, 657. Likewise, Plaintiffs' reliance on *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is misplaced (Dkt. 26:12–13), as the case is irrelevant and was distinguished in *WEAC*. This Court must apply *WEAC* and should, therefore, dismiss Count III.

Regarding Count II, which challenges Act 10's limitation on public-sector collective bargaining, Plaintiffs claim they are "not challenging [Wis. Stat. § 111.70(4)(mb)1.] on its face" (Dkt. 26:3), but that statement does not negate that *Laborers Local 236* controls and requires dismissal. Its reasoning and the U.S. Supreme Court decisions it relied upon remain binding after *Janus*. In their response, Plaintiffs say they are troubled by the "artifice used to uphold this provision previously," but that does not change the precedent. (Dkt. 26:11.)

Finally, regarding Count I, which challenges Act 10's annual certification election requirement, Plaintiffs have not shown that this Court should disregard *WEAC* and *Laborers Local 236*. In their response, Plaintiffs rely upon a 1937 U.S. Supreme Court decision and a 2011 D.C. Circuit decision,

both of which are inapposite. (Dkt. 26:7–8.) Plaintiffs acknowledge these decisions do not "address the First Amendment rights of employees not to speak" (Dkt. 26:8), which is the very right Plaintiffs allege is being infringed. Plaintiffs again rely upon *Janus*, which is a speech-subsidy case; whereas, here, Plaintiffs are arguing the annual certification election compels employees to speak. (Dkt. 26:6.) *Janus* is not on point, and Act 10 does not require employees to speak or direct them how to speak. They remain free to vote or not, and there is no government-imposed penalty for making that choice.

The Court should grant Defendant Daley's motion to dismiss.

ARGUMENT

I. Act 10's payroll-deduction prohibition comports with the First Amendment; therefore, Count III should be dismissed.

This Court must apply *WEAC* and should, therefore, dismiss Count III. The Seventh Circuit has rejected the viewpoint-discrimination argument Plaintiffs are making, and *Janus* did not upset *WEAC*.

In their response, Plaintiffs assert that Wis. Stat. § 111.70(3g) infringes on "the rights of individual employees to speak via financially supporting Local 139, while the State allows that same payroll deduction mechanism to be used to facilitate speech to favored entities." (Dkt. 26:3.) This allegedly "draws a viewpoint discriminatory line between those who may speak and those who may not." (Dkt. 26:3.) While recognizing *WEAC*, Plaintiffs attempt

to distinguish the case by arguing that "the *WEAC* court did not consider Act 10's impact on employees' First Amendment rights, focusing on the First Amendment rights of Unions." (Dkt. 26:12.)

However, *WEAC* controls. The Seventh Circuit rejected the viewpoint-discrimination argument Plaintiffs are making. The court said: "On its face, Act 10 is neutral—it does not tie *public employees'* use of the state's payroll system to speech on any particular viewpoint." *WEAC*, 705 F.3d at 648 (emphasis added). "Act 10 is not viewpoint discriminatory" and "does not implicate the First Amendment and requires only rational basis review." *Id.* at 652–53. The Seventh Circuit found that Act 10's payroll-deduction prohibition passes rational-basis review because "Wisconsin could have rationally eliminated all payroll deductions," and the State has a legitimate concern for "labor peace" that warranted treating public safety employees differently regarding payroll deductions. *Id.* at 657.

Plaintiffs nonetheless assert that "the *WEAC* court's reliance on speech subsidy cases is misplaced and should be reconsidered in light of *Janus*." (Dkt. 26:13.) That argument fails for three main reasons.

First, this Court cannot "reconsider" *WEAC*. It is binding.

Second, *Janus* is not on point. Plaintiffs emphasize that *Janus* held that union speech in collective bargaining is a matter of "great public concern." (Dkt. 26:5 (citing *Janus*, 138 S. Ct. at 2476).) But that principle does not negate

the Seventh Circuit's holding that "the State is not constitutionally obligated to provide payroll deductions at all." *WEAC*, 705 F.3d at 657 (quoting *Ysursa v. Pocatello Education Association*, 555 U.S. 353, 359 (2009)). *Janus* did not overrule the U.S. Supreme Court precedent, such as *Ysursa* and *Regan v. Taxation without Representation*, 461 U.S. 540 (1983), that the *WEAC* court relied upon. *See WEAC*, 705 F.3d at 648, 657. In fact, *Janus* did not address *Ysursa* or *Regan* at all.

Third, Plaintiffs rely upon *Citizens United*. (Dkt. 26:12–13.) However, the *WEAC* court already considered *Citizens United* and distinguished the law addressed in that case from Act 10. Specifically, the court held that Act 10's payroll-deduction prohibition is not subject to heightened scrutiny, unlike the outright prohibition on speech in *Citizens United*.

In rejecting the plaintiffs' argument that speaker-based discrimination in the speech-subsidy context is subject to heightened scrutiny, the court stated: "The cases cited by the Unions, which invalidated laws discriminating on the basis of speaker, confirm [that heightened scrutiny is not appropriate]. Each one—unlike Act 10—involved a law that actively created barriers to speech rather than mere subsidies." *WEAC*, 705 F.3d at 648. The Seventh Circuit said that *Citizens United* "involved a law that prohibited speech by forbidding certain speakers from spending money, akin to prohibiting speech altogether." *Id.* The court, therefore, rejected that *Citizens United* "controls on

government subsidies of speech," which is a context where "speaker-based distinctions are permissible." *Id.* (citing *Regan*, 461 U.S. at 548–49). *Citizens United* is not applicable because Act 10's payroll-deduction prohibition does not prohibit anyone from speaking. *See id.*

Count III is barred by the precedent and should be dismissed.

II. Act 10's limitation on public-sector collective bargaining is constitutional; therefore, Count II should be dismissed.

A. Plaintiffs' "as applied" First Amendment challenge to Wis. Stat. § 111.70(4)(mb)1. fails.

Plaintiffs "challenge that portion of Act 10 which precludes collective bargaining between unions and municipalities over any issue besides wages. *Wis. Stat. § 111.70(4)(mb)1.*" (Dkt. 26:3.) They claim in their response that they are "not challenging [Wis. Stat. § 111.70(4)(mb)1.] on its face." (Dkt. 26:3.) Instead, they challenge "the interpretation of this provision as stated at various times by the Wisconsin Employment Relations Commission ('WERC'), that Act 10 precludes Unions and employers from entering into agreements on any issue besides wages, even if not collectively bargained." (Dkt. 26:3.)

This distinction is illusory because the issues identified are one and the same. Plaintiffs' "as applied" First Amendment challenge to Act 10's limitation on public-sector collective bargaining fails, and Count II should be dismissed.

Plaintiffs' ability to speak is not infringed by WERC's alleged interpretation of the law. Plaintiffs contend that they are prevented from

entering into agreements with municipal employers over subjects outside of base wages: a training center and apprenticeship program; access to a skilled, temporary workforce; and assistance with health-benefit coverage for a workforce. (Dkt. 1:6–7 ¶¶ 24–28[1]; *see also* 26:10.) This is the same constitutional claim the plaintiffs made in *Laborers Local 236*.

The Seventh Circuit held that Act 10 does not restrict employees' First Amendment right to speak; it only bars municipal employers from listening to and engaging with employees' speech, unless the subject of that speech is wages. Wis. Stat. § 111.70(4)(mb) ("*The municipal employer is prohibited* from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to . . . [a]ny factor or condition of employment except wages, which includes only total base wages and excludes any other

[1]The Court should disregard Plaintiffs' Exhibit A and the reference in their response to telephone calls with "representatives of WERC" staff because they are not part of their complaint. (Dkt. 26:10; 26:11 n.2; 26-1.) "Courts are restricted to an analysis of the complaint when evaluating a motion to dismiss." *Hill v. Trs. of Ind. Univ.*, 537 F.2d 248, 251 (7th Cir. 1976); *see also Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) ("consideration of a motion to dismiss is limited to the pleadings.").

But Exhibit A does not support Plaintiffs' arguments, in any event. First, it does not represent Defendant's or WERC's view on the law. Specifically, the document includes a caveat: "As always, the speaker's views and remarks are not necessarily those of the WERC." (Dkt. 26-1:2.) And the author of the document is not Defendant. (Dkt. 26-1:1.) Second, the decisions referenced at the top of page 5 of Exhibit A do not involve Defendant or WERC holding that a grievance-settlement agreement is a form of collective bargaining. *See Daniel Williams*, Dec. No. 37790-C, (WERC Aug. 23, 2019), http://werc.wi.gov/decisions/37790-C.pdf.; *Daniel Williams,* Dec. No. 37790-B, (WERC May 2, 2019), http://werc.wi.gov/decisions/37790-B.pdf.

compensation."); *see also Laborers Local 236*, 749 F.3d at 635 ("[G]eneral employees remain free to associate and represented employees and their unions remain free to speak; municipal employers are simply not allowed to listen." (citation omitted)); *WEAC*, 705 F.3d at 646 ("Act 10 places no limitations on the speech of general employee unions, which may continue speaking on any topic or subject.").

In Plaintiffs' examples (Dkt. 1:6–7 ¶¶ 25–27; 26:10), the employees and union are speaking without restriction, and the municipal employers are the ones restricted. Thus, WERC's alleged interpretation and application of Act 10 does not violate the First Amendment because the Seventh Circuit has already found such interpretation and application constitutional.

In their response, Plaintiffs question the Seventh Circuit's rationale for its holding, stating they are "troubled by the artifice used to uphold the provision previously; that Act 10 does not restrict Unions' ability to speak, only the municipalities' ability to listen. *Laborers Local 236*, 749 F.3d at 635-36." (Dkt. 26:11.) Nonetheless, the precedent is binding. This Court cannot disregard it, nor have Plaintiffs distinguished it.

Plaintiffs also state that "there is every reason to believe [after *Janus* that] the Supreme Court would be open to righting this historical wrong to the extent *Smith* [*v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463

(1979)] and [*Minnesota State Board for Community Colleges v.*] *Knight* [, 465 U.S. 271 (1984),] bar Plaintiffs' claim on this issue." (Dkt. 26:11 n.2.)

But *Smith* and *Knight* remain good law after *Janus*. *Janus* addressed neither case. And Plaintiffs have provided no meaningful explanation of why or how *Janus* affects *Smith* and *Knight*. Thus, the precedent the Seventh Circuit relied upon to uphold Act 10's restriction on collective bargaining persists.

Finally, Plaintiffs say that "if the WERC would confirm its agreement with the statements expressed by the Seventh Circuit (and the position of the State as explained by the *Laborers* court, *Id.* at 633-34), Plaintiffs' Count II would be moot." (Dkt. 26:10.) There are three responses to this.

First, because Plaintiffs' allegations about Defendant's interpretation of Act 10 already mirror the Seventh Circuit's interpretation in *Laborers Local 236*, for the purposes of this motion to dismiss, Defendant "confirm[s] [his] agreement." (Dkt. 26:10.) And nothing about Defendant's position taken in briefing here is inconsistent with *Laborers Local 236*. Moreover, as explained in his opening memorandum, Defendant knows of no other court—federal or state—that has interpreted Act 10 differently than the Seventh Circuit did. As a result, Plaintiffs' Count II is not moot, but it is still subject to dismissal because of that precedent.

Second, Plaintiffs emphasize that the Seventh Circuit said in *Laborers Local 236* that, "since Act 10's enactment, some local employers and unions have collaborated informally in order to make changes in the workplace." (Dkt. 26:10 (quoting *Laborers Local 236*, 749 F.3d at 636).) But, here, the right of employees to "collaborate informally" with employers is not infringed by Defendant's alleged actions. Plaintiffs conflate "collaborate informally" between the municipal employer and bargaining unit with "collective bargaining." Under Act 10, "collective bargaining" "includes the reduction of any agreement reached to a written and signed document." Wis. Stat. § 111.70(1)(a). Therefore, informal collaboration is permitted, as long as the result is *unilateral* action by the municipal employer. Collective bargaining on any subject other than wages, however, is not. The informal-collaboration language from *Laborers Local 236* is consistent with Defendant's position.

Third, if Plaintiffs are suggesting that *Laborers Local 236* did not resolve First Amendment right-to-petition claims against Act 10's restriction on the subjects of collective bargaining, they are mistaken. (*See* Dkt. 26:10 ("Act 10 is being read to preclude such voluntary interactions, even outside of collective bargaining, in clear violation of the First Amendment rights of Unions and their members to petition the government.").) The Seventh Circuit already rejected that claim. *Laborers Local 236*, 749 F.3d at 638 ("Act 10's prohibition on collective bargaining does not run afoul of the Petition Clause.").

B. Plaintiffs have waived any argument that Count II states a cognizable equal-protection claim.

Defendant Daley argued that Count II fails to state a claim for a violation of the Equal Protection Clause of the Fourteenth Amendment. (Dkt. 10:18–20.) Plaintiffs did not respond to Defendant's argument. (Dkt. 26.) By not responding, Plaintiffs have abandoned any such claim and thus have waived any argument that Count II states a cognizable equal-protection claim. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.").

III. Act 10's annual certification election comports with the First Amendment; therefore, Count I should be dismissed.

A. The annual certification election does not compel employees to speak.

Act 10's annual certification election does not compel employees to speak. They remain free to vote or not vote. There is no government-mandated order to vote and no order on how to vote or penalty for not voting.

Plaintiffs do not respond to the U.S. Supreme Court precedent Defendant cited (*see* Dkt. 10:22–23), which holds that "freedom of speech prohibits the government from telling people what they must say" and prohibits the government from "forc[ing] one speaker to host or accommodate another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*,

547 U.S. 47, 61, 63 (2006). Act 10 does neither of those things; therefore, Plaintiffs' Count I fails to state a claim upon which relief can be granted.

Plaintiffs argue that "[l]eading up to a recertification election, the *status quo* is that the Union is the collective bargaining representative of the unit, having won an election just twelve months prior." (Dkt. 26:8.) They assert that "[t]reating employees' silence as indicating a desire to change the *status quo*, rather than acquiescence to it, makes a mockery of basic democratic principles." (Dkt. 26:8.)

Plaintiffs' argument, however, is unsupported by any authority. (Dkt. 26:8.) *Pelfresne v. Vill. of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point."). There is no First Amendment right to maintaining the status quo in the annual certification election context. As the Seventh Circuit explained in rejecting the plaintiffs' equal protection argument, "the legislature enacted a law [Act 10] which presumes that when many employees abstain from a recertification election, those employees are, at best, unenthusiastic about the union's representation." *WEAC*, 705 F.3d at 656–57. "In such cases, it is permissible for Wisconsin to rationally conclude that the union is not worth maintaining through an automatic recertification process—or, at least, Wisconsin does not want to incur the costs of unions

which have uncommitted members." *Id.* at 657. The same reasoning would apply to Plaintiffs' First Amendment argument, too. *See id.*

Further, *Janus* does not change the analysis. *Janus* addressed speakers being required to *subsidize* speech with which they disagreed. Under the Illinois law struck down in *Janus*, "public employees [were] forced to subsidize a union, even if they [chose] not to join and strongly object[ed] to the positions the union [took] in collective bargaining and related activities." 138 S. Ct. at 2469–60. Unlike in *Janus*, Plaintiffs here are not asserting that Wis. Stat. § 111.70(4)(d)3.b. forces them to *subsidize* speech they disfavor. *Janus* is inapplicable.

B. *Virginian Railway Co.* and *Air Transport Ass'n* do not apply.

In their response, Plaintiffs rely primarily upon two cases in support of Count I, namely, *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), and *Air Transport Ass'n of America, Inc. v. National Mediation Board*, 663 F.3d 476 (D.C. Cir. 2011). (Dkt. 26:7–8.) Their arguments based upon these cases fail for two reasons.

First, the cases are not on point. The portion of *Virginian Railway Co.* that Plaintiffs discuss in their response (*see* Dkt. 26:7), addressed only the correct interpretation of a specific provision of the federal Railway Labor Act. It states: "The majority of any craft or class of employees shall have the right

to determine who shall be the representative of the craft or class for the purpose[ ] of this Act (chapter)." 300 U.S. at 560 (quoting 45 U.S.C. § 152, Fourth). The Supreme Court held that the statute should be interpreted so that "[t]hose who do not participate [in the vote] are presumed to assent to the expressed will of the majority of those voting." *Id.* (citation omitted).

Count I is not about determining the correct way to interpret Act 10's annual certification election requirement. And Act 10's language is not like that of the Railway Labor Act provision at issue in *Virginian Railway Co.*, so it can provide no interpretive guidance. Rather, Plaintiffs' claim in Count I is about the First Amendment's guarantee of free speech, something *Virginian Railway Co.* did not involve. The only constitutional claims in that case involved the Commerce Clause and the Fifth Amendment's Due Process Clause. *Virginian Railway Co.*, 300 U.S. at 553–57, 558–59. *Virginian Railway Co.* is not relevant.

Air Transport Ass'n is inapposite for the same reason: it is about the proper interpretation of the same federal law. There, the D.C. Circuit upheld the validity of a National Mediation Board rule providing that, in representation disputes, a majority of the valid ballots cast would determine representation. *See Air Transport Ass'n*, 663 F.3d at 477–78. Like the Supreme Court in *Virginian Railway Co.*, the *Air Transport Ass'n* court was tasked with determining the proper interpretation of 45 U.S.C. § 152 to ascertain whether

the Board's rule was valid considering the statutory text and the Administrative Procedures Act. *Id.* at 479–83. The D.C. Circuit affirmed the validity of the rule. *Id.* at 489. The court rejected the only constitutional claim against the rule, which was that the rule allegedly violated the First Amendment right to free association. *Id.* at 488.

Air Transport Ass'n does not impact whether Count I states a cognizable First Amendment claim challenging Act 10's annual certification election requirement. Like *Virginian Railway Co.*, the case involved statutory interpretation of an unrelated federal law, not a free speech claim. This Court should disregard these two cases, as they do not address the constitutional issues here.

Second, and relatedly, Plaintiffs themselves fail to connect *Virginian Railway Co.* and *Air Transport Ass'n* to their claim.

Plaintiffs state that they "are not challenging the annual recertification requirement; they are only challenging the infringement of employees' First Amendment rights caused by the way Act 10 treats non-voters." (Dkt. 26:6.) But then they acknowledge that "[t]hese [Railway Labor Act] cases [*Virginian Railway Co. and Air Transport Ass'n*] do not appear to have considered the First Amendment rights of the affected employees, as the challenges were brought by employers or employer associations." (Dkt. 26:8.) Further, Plaintiffs

admit that the cases "do not address the First Amendment rights of employees not to speak in the context of a Union election." (Dkt. 26:8.)

Plaintiffs do not explain why they believe these two cases apply. Plaintiffs appear to suggest the cases *do not* apply, as they do not address an employee's right not to speak, the specific claim at issue here. (Dkt. 26:8.) Thus, the Plaintiffs' provide no basis to apply these cases here, as they involve neither an annual certification procedure like Act 10's nor a similar First Amendment claim.

CONCLUSION

The Court should grant Defendant's motion to dismiss Plaintiffs' Complaint.

Dated this 7th day of November, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 7, 2019, I electronically filed the foregoing Defendant's Reply in Support of His Motion to Dismiss with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 7th day of November, 2019.

s/ Steven C. Kilpatrick
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