No. 121475

IN THE
SUPREME COURT OF ILLINOIS

ILLINOIS COLLABORATION ON YOUTH, *et al.*,	)	On Motion for Direct Appeal Pursuant to Supreme Court Rule 302(b).
Plaintiffs-Appellants,	)	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 16 CH 6172, to the Appellate Court, First District, No. 1-16-2471.
v.	)	
JAMES DIMAS, Secretary of the Illinois Department of Human Services, in his official capacity, *et al.*,	)	The Honorable RODOLFO GARCIA, Judge Presiding.
Defendants-Appellees.	)	

RESPONSE TO PLAINTIFFS-APPELLANTS' RULE 302(b) MOTION FOR DIRECT APPEAL

Defendants-appellees James Dimas, in his official capacity as Secretary of the Department of Human Services, *et al.*, by their counsel, Lisa Madigan, Attorney General of Illinois, respectfully submit this response to plaintiffs-appellants' motion requesting that this Court allow a direct appeal from the circuit court's judgment pursuant to Supreme Court Rule 302(b).

Introduction and Summary of Argument

While this case arises out of the unusually difficult circumstances created by the State's prolonged budget battle, the circuit court's judgment involves a straightforward application of well-established law. Plaintiffs' claims seek a court order requiring payments out of state funds for services they provided under contracts with state agencies, even though those contracts expressly provide that they are subject to legislative appropriations and the General Assembly has not enacted appropriations for all the payments Plaintiffs sought. The circuit court granted Defendants' motion to dismiss, which argued that these claims are barred by sovereign immunity and lack merit in any

event. Plaintiffs appealed, and they now ask this Court to allow a direct appeal pursuant to Supreme Court Rule 302(b).

Plaintiffs' motion for a direct appeal should be denied. As an initial matter, although the unprecedented delay in enacting legislation authorizing payments to Plaintiffs caused them serious hardships, on June 30, 2016, the legislature passed and the Governor signed an appropriations bill authorizing funds to cover operations for fiscal year 2016 ("FY16") and part of fiscal year 2017, including paying for most, but not all, of the services provided by Plaintiffs. In addition, the circuit court's judgment is fully consistent with this Court's precedent, including its opinion in *State v. AFSCME*, 2016 IL 118422. Nor does the circuit court's judgment involve any issue on which there is conflicting appellate court precedent. Instead, that judgment faithfully applies controlling law, and Plaintiffs' contrary arguments can be adequately considered by the appellate court under the normal review process. If the appellate court finds merit in Plaintiffs' claims, which seek to declare governing state statutes unconstitutional as applied to them, that decision is reviewable as of right in this Court under Rule 317. There is, therefore, no convincing reason for this Court to take this appeal now.

Factual Background

Plaintiffs-appellants are social service organizations that entered into contracts with various state agencies for FY16. (SR 5-10.)[1] These contracts, by their terms, were expressly made subject to legislative appropriations. (SR 5, 10, 111.) For many months, the State's prolonged budget impasse led to the absence of any enacted appropriations for Plaintiffs' contracts. (SR 13, 16.) The

[1] The case was dismissed at the pleading stage, so this statement of the factual background accepts as true the well-pleaded allegations of fact in Plaintiffs' complaint, but not legal or factual conclusions. See *Beahringer v. Page*, 204 Ill. 2d 363, 378 (2003).

Governor's proposed budget for FY16 included funds to pay for most of the services provided by Plaintiffs, but the General Assembly did not enact appropriations in line with that budget. (SR 8-9.) In late May 2015, the General Assembly passed appropriations bills that included funds to pay for most of the services in Plaintiffs' contracts, but on June 25, 2015, the Governor vetoed those bills, and the General Assembly did not override those vetoes. (*Id.*) Almost a year later, on June 10, 2016, the Governor vetoed a similar appropriation bill, and again the General Assembly did not override the veto. (SR 12.)

Despite the ongoing lack of appropriations, Plaintiffs continued to provide the services described in their contracts. (SR 10-11.) They hoped that doing so would improve their chances of getting paid and increase the amount of any such payments. (SR 10.) They also feared a loss of funding from foundations or other funding sources as well as other adverse consequences if they ceased providing the services specified in their contracts. (SR 10-11.) On June 30, 2016, the last day of the fiscal year, the General Assembly passed, and the Governor signed, an appropriation bill, which became Public Act 99–0524, that provided funds to pay much, but not all, of the amounts provided in these contracts. (SR 13.)

Plaintiffs filed this action in May 2016 seeking a court order requiring that they be paid the full amounts specified in their contracts out of unappropriated state funds, despite the subject-to-appropriation provisions in these contracts. (Plaintiffs filed copies of their contracts with their complaint; SR 5-7, 9.)

In an attempt to overcome the jurisdictional bar of sovereign immunity, Plaintiffs' complaint alleged that various actions by different defendants were "*ultra vires*" and therefore could be judicially enjoined. (SR 16-17.) Plaintiffs also alleged that the failure of the General Assembly and the Governor to enact appropriations legislation to pay the amounts provided in their contracts

constituted an unconstitutional impairment of contractual obligations, in violation of Article I, section 16 of the Illinois Constitution. (SR 17-20.) They also claimed due process and equal protection violations from the lack of appropriations. (SR 20-21.) The relief they sought included, in particular, a court order requiring that Defendants immediately pay the vouchers submitted by Plaintiffs for services rendered in fiscal year 2016, "regardless of whether there are sufficient appropriated funds." (SR 17, 19, 21.)

Defendants' motion to dismiss maintained that Plaintiffs' suit was barred by sovereign immunity, and the court therefore lacked jurisdiction over the case, because all of Plaintiffs' claims sought monetary recovery from the state based on their contracts with state agencies. (SR 106, 114-22, 162-66.) Defendants' motion alternatively argued that each of Plaintiffs' claims lacked merit. (SR 107, 122-32, 166-72.)

With respect to Plaintiffs' claim that Defendants engaged in *ultra vires* conduct, Defendants' motion argued, among other things, that (1) the General Assembly did not act in an *ultra vires* manner by not enacting appropriations legislation to pay the full amount claimed by Plaintiffs for their services provided in their contracts; (2) the Governor did not act in an *ultra vires* manner by vetoing appropriations legislation that would have provided finding for Plaintiffs' contracts; (3) and the defendant agency heads did not act in an *ultra vires* manner by not processing payments for Plaintiffs' services without a legislative appropriation. (SR 118-21, 163-65.) Defendants further argued that if the defendant agency heads did act in an *ultra vires* manner by allowing Plaintiffs to continue providing these services without corresponding appropriations, the remedy would be to enjoin these defendants from doing so, not to order payments to Plaintiffs out of unappropriated state funds. (SR 121, 164.)

With respect to Plaintiffs' other claims, Defendants argued that (1) Plaintiffs' contracts, which expressly provide that they are subject to appropriations, did not create any contractual right to payment absent such appropriations; (2) such payments were prohibited by the Appropriations Clause (Ill. Const. art. VIII, § 2(b)), which provides that "[t]he General Assembly by law shall make appropriations for all expenditures of public funds by the State," and by Section 9(c) of the Comptroller Act (15 ILCS 405/9(c)), which states that the Comptroller may not draw any warrant for the expenditure of public funds for which there are not legally available "unencumbered appropriations" or other "unencumbered obligational or expenditure authority . . . to incur the obligation or to make the expenditure"; and (3) nonpayment of the amounts claimed by Plaintiffs was at most a breach of contract, not an unconstitutional impairment of contract. (SR 110-11, 122-28, 161, 166-72.) In support of these arguments, Defendants relied on this Court's recent decision in *State v. AFSCME*, 2016 IL 118422, ¶ 52, which held that where financial provisions in a collective bargaining agreement between AFSCME and the State "were always contingent on legislative funding, . . . the failure of that contingency to occur cannot 'impair' AFSCME's agreement with the State." (SR 110-11, 121, 123-24, 127, 161, 166-70.)

After briefing and argument, the circuit court on August 31, 2016 dismissed Plaintiffs' claims with prejudice. (SR 211.) They appealed that judgment on September 13, 2016, but did not seek expedited consideration of the appeal under Supreme Court Rule 311. More than a month later, they now move for a direct appeal to this Court from the circuit court under Rule 302(b).

Argument

While the State's extraordinary budget crisis has caused many difficulties for organizations that provide services for the State, a direct appeal of Plaintiffs' case to this Court under Rule 302(b) is not warranted. The circuit court's judgment represents an uncontroversial application of well-

established law that (1) gives effect to the State's sovereign immunity against "present claims" founded on a contract; (2) gives controlling significance to explicit contractual provisions making contracts subject to appropriations; and (3) recognizes the basic difference between the enactment of a law that impairs the obligation of contract and a claimed breach of contract that results from the absence of appropriations legislation. The circuit court's judgment does not conflict with this Court's precedent, nor does it raise any issues on which there is conflicting appellate court precedent. Plaintiffs' appeal should be heard in the appellate court under the ordinary procedure for appeals.

I. The circuit court's order correctly applied firmly established law.

A. Sovereign Immunity

Plaintiffs do not dispute that, under Section 1 of the State Lawsuit Immunity Act (745 ILCS 5/1) and Section 8 of the Court of Claims Act (705 ILCS 505/8), circuit courts lack jurisdiction over "present claims" that seek relief against the State, including claims for monetary relief founded on a contract. The circuit court properly held that this jurisdictional bar precludes circuit court jurisdiction over Plaintiffs' claims, all of which are founded on contracts they entered into with the State and seek monetary recovery for services under those contracts.

Plaintiffs attempted to avoid this result by characterizing the relief they seek — immediate payment of state funds to them for services under their contracts — as a prospective injunction against an ongoing pattern of *ultra vires* conduct in violation of the Illinois Constitution, and therefore within the "officer suit" exception to sovereign immunity. (SR 140-41, 146-48.) The relief they seek, however, is not to enjoin any *ultra vires* conduct, as allowed by this exception to sovereign immunity, but to pay Plaintiffs what they claim under their contracts. That relief clearly falls within the State's sovereign immunity. See *Ellis v. Bd. of Governors of State Colls. & Univs.*, 102 Ill. 2d 387, 394-95 (1984) (holding that circuit court lacked jurisdiction over claim for damages

and injunction, in form of reinstatement, for alleged breach of state university professor's employment contract), *Smith v. Jones*, 113 Ill. 2d 126, 130-33 (1986) (holding that Court of Claims has exclusive jurisdiction over breach of contract suit against State, despite conclusory allegation that defendant "acted outside his authority . . . in violation of contract law"); *Brucato v. Edgar*, 128 Ill. App. 3d 260, 267 (1st Dist. 1984) (holding that sovereign immunity barred plaintiff's claim based on a contract with the State where, "although plaintiff's prayer for relief is framed in equitable terms," the relief sought was monetary recovery from the State); see also *Leetaru v. Bd. of Trs. of the Univ. of Ill.*, 2015 IL 117485, ¶¶ 1, 35, 42-50 (holding that circuit court had jurisdiction over suit asking that defendants be prospectively enjoined from proceeding further with allegedly unauthorized investigation of graduate student for academic misconduct); *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 268 (2005) ("sovereign immunity will not bar a cause of action in the circuit court where the plaintiff seeks to bar a State officer from taking *future actions* in excess of his delegated authority") (emphasis added, citation and internal quotation marks omitted).

B. *Ultra Vires* Conduct by State Officials

There is no merit to Plaintiffs' complaint that any of the defendants acted in excess of their legal authority and, if they did, that the remedy would be to order the payment of unappropriated state funds to Plaintiffs.

First, despite Plaintiffs' repeated assertions to the contrary (SR 3, 13, 141, 149), the Illinois Constitution does not require enactment of a "budget" to cover the State's operations for a fiscal year. See *State v. AFSCME,* 2016 IL 118422, ¶ 42. The Constitution directs the Governor to submit a proposed budget (Ill. Const. art. VIII § 2(a)), which he did. And it gives the General Assembly the responsibility to enact appropriations legislation, subject to the Governor's veto. (Ill. Const. art. VIII, §§ 2(b); art. IV, § 9(d).) But it does not require the General Assembly to enact a "budget" or

appropriations for all government operations.

Second, with limited exceptions not relevant here, the Constitution does not require the General Assembly to enact appropriations for any specific operations, including social services, or to override a gubernatorial veto of any appropriation bills.[2] The absence of such appropriations (or appropriations of desired amounts) for certain categories of spending is a direct result of the legislative process established by the Constitution, not conduct in excess of the legislature's constitutional authority.

Third, the Constitution expressly authorizes the Governor to veto appropriations bills (Ill. Const. art. IV, § 9(d)), and therefore his exercise of that express authority cannot be in excess of his authority. That is true regardless of his alleged motives for doing so. See, e.g., *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn.1993); see also *Williams v. Kerner*, 30 Ill. 2d 11, 14 (1963) (holding that veto is legislative action); *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723, 730-31 (7th Cir. 2014) (holding that claims of improper motive generally cannot nullify legislative actions).

Fourth, in light of the separation of powers among the different branches of government, including the Appropriations Clause's allocation to the legislative branch of the power of the purse, it is perfectly proper, and indeed common, for executive branch officials to enter into contracts that are subject to appropriations. See 1979 Ill. Att'y Gen'l Op. 24 (S-1412); see also *State v. AFSCME,* 2016 IL 118422, ¶¶ 49-53. Accordingly, neither entering into such contracts nor "accepting the services of plaintiffs" before any appropriations were enacted for them (see Motion at 9), can be considered *ultra vires*.

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[2] In the few situations where the Constitution itself mandates certain state expenditures, such as the payment of judicial salaries, the General Assembly is required to appropriate the necessary funds, and if it fails to do so that constitutional mandate may be judicially enforced. See *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 314 (2004). No such mandate applies to the contracts at issue here.

In short, Plaintiffs' various allegations of *ultra vires* action by state officials have no merit. Plaintiffs did also allege, in conclusory fashion, that the defendant agency heads "enforced" Plaintiffs' contracts before any appropriations were enacted. (SR 10.) (Plaintiffs added, however, that in light of several considerations, they chose to continue performing under these contracts despite the ongoing lack of appropriations; SR 10-11.) But even if that conclusory allegation could be read to assert that any of these defendants took specific actions in excess of their legal authority (which Plaintiffs never identify), the appropriate legal remedy would be to enjoin any unauthorized conduct, not to require payments for amounts allegedly due under Plaintiffs' contracts without corresponding appropriations. See *Leetaru*, 2015 IL 117485, ¶¶ 48-50; *PHL, Inc.*, 216 Ill. 2d at 268.

C. Impairment of Contractual Obligations

There is likewise no merit to Plaintiffs' claim that the Contracts Clause in the Illinois Constitution — which provides that no "law . . . impairing the obligation of contracts . . . shall be passed" (Ill. Const. art. I § 16) — supports the extraordinary relief they seek, requiring the payment of unappropriated state funds for services under contracts that explicitly provided they were subject to appropriations. The Contracts Clause in the Illinois Constitution is interpreted in tandem with the similarly worded provision in the United States Constitution. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 482 (1998). That provision operates to invalidate laws enacted by a legislative body that impair rights under prior contracts. *People v. Ottman*, 353 Ill. 427, 430 (1933). The remedy in such a case is a judicial declaration that the law is ineffective, not specific enforcement of the contract. *Carter v. Greenhow*, 114 U.S. 317, 322 (1885).

Plaintiffs' Contracts Clause claim does not allege the enactment of such a law or seek such a judicial declaration. Instead, they complain about the *nonenactment* of legislation. At most, therefore, they complain about a breach of contract, not a law impairing a contractual obligation.

And it is well settled that a breach by the government of one of its contracts (as opposed to passage of a law that impairs previously available remedies for breach, which Plaintiffs do not allege here) does not violate the Contracts Clause. *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996).

Plaintiffs' Contracts Clause claim also fails for the more fundamental reason that the obligations in their contracts were, by their express terms, conditioned on, and thus limited by, the extent of any legislative appropriations for them. The absence or inadequacy of such appropriations accordingly could not impair those obligations. That was the Court's precise holding in *State v. AFSCME*, where the plaintiff's contract was made contingent on appropriations by Section 21 of the Public Labor Relations Act (the "PLRA"). Responding to the contention that the lack of appropriations sufficient to pay the amounts specified in the contract violated the Contracts Clause, the Court stated that because the contract was always contingent on legislative funding, the "failure of that contingency to occur cannot 'impair'" it. *Id.*, 2016 IL 118422, ¶ 52. This case represents a straightforward application of that same principle.

Plaintiffs nonetheless contend that this case is distinguishable from *State v. AFSCME* because there the appropriation contingency was contained in a statute (Section 21 of the PLRA), and here there is "no statutory provision like Section 21." (Motion at 12.) This attempted distinction is unsound. Nonfulfillment of an appropriation contingency logically defeats any impairment-of-contract claim predicated on the absence of appropriations, regardless of the source of that contingency. In any event, in this case the appropriation contingency is found not only in Plaintiffs' contracts, but also in the Appropriations Clause (on which the Court relied in *State v. AFSCME*, 2016 IL 118422, ¶¶ 2, 42, 45, 48, 56), and in governing state statutes, see 15 ILCS 405/9(c); 30 ILCS 105/30, which Plaintiffs effectively seek to have declared unconstitutional as to them.

D. Plaintiffs' Other Claims

There is also no merit to Plaintiffs' other claims, including the claim that the General Assembly's failure to enact appropriations legislation sufficient to fund Plaintiffs' contracts deprived them of a property right without due process, or violated their right to equal protection of the law. Even if — despite the appropriation contingencies in their contracts — Plaintiffs had a property right to payment under those contracts (which Defendants do not concede), the legislative process provided all of the process due. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Ind.*, 57 F.3d 505, 513 (7th Cir. 1995). Likewise, because Plaintiffs are not a suspect class and do not invoke any fundamental right, the General Assembly's spending decisions in the exercise of its appropriation power easily satisfy the constitutional obligation of equal protection. See *Miller v. Ill. Dep't of Pub. Aid*, 94 Ill. App. 3d 11, 19-20 (1st Dist. 1981) (rejecting equal protection challenge to policy eliminating public aid coverage for certain optical and dental conditions in light of "the obvious constraints of finite financial resources").

II. This Case Does Not Present Issues that Warrant Expedited Resolution by this Court.

In support of their motion, Plaintiffs characterize the situation affecting them as a "break-down of constitutional government in the State of Illinois." (Motion at 10.) As explained above, that characterization is based on a fundamental misunderstanding of the nature of the State's fiscal operations, as well as the available remedies for what Plaintiffs describe as *ultra vires* conduct. The circuit court correctly applied well-established law, and review of that judgment does not justify the extraordinary step of a direct appeal. That is especially true because Plaintiffs never sought an expeditious resolution of this matter but instead waited many months during the ongoing absence of legislative appropriations before filing this action, and then, even after taking an appeal, did not

move for an accelerated docket.

Defendants recognize the hardships suffered by Plaintiffs and their clients as a result of the State's budget impasse. But the General Assembly and Governor, who are constitutionally responsible for the State's finances, responded to those hardships and, in the face of well-known fiscal challenges, enacted Public Act 99–0524 at the end of FY16, providing funding for most of the services specified in Plaintiffs' contracts. That is what Plaintiffs hoped to obtain by continuing to provide services before those appropriations. But they still assert a right to court-ordered payment of everything they claim to be owed, despite the explicit appropriation contingency in their contracts.

In essence, Plaintiffs seek a judicial solution to a fiscal problem whose resolution, under the structure of our Constitution, is vested in the other branches of state government. Pulling this case out of the normal appellate process would only encourage public expectations that this Court will step in to exercise legislative or executive functions whenever the officials elected by the people to do so are at an impasse. Worse, Plaintiffs effectively invite this Court to take responsibility for difficult fiscal decisions about how to allocate limited resources among competing spending demands, or even to order spending that is not constitutionally mandated without legislative appropriations. That is neither constitutionally proper nor sensible. There is an important difference between judicial action to constrain conduct that violates the Constitution and judicial action that substitutes for unpopular, or even unwise, acts or omissions by elected nonjudicial officers. No constitutional violation is present here, and there is no compelling justification for the Court to exempt this case from the usual appellate process.

Conclusion

For the foregoing reasons, Plaintiffs' Rule 302(b) motion should be denied.

October 26, 2016

Respectfully submitted,

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Proof of Filing and Service

The undersigned, an attorney, declares under penalty of law as provided in 735 ILCS 5/1–109 that on October 26, 2016, he electronically filed the foregoing Response to Plaintiffs-Appellants' Rule 302(b) Motion for Direct Appeal with the Clerk of the Illinois Supreme Court using the I2File system, and served a copy by e-mail to:

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