**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF FLORIDA**
**GAINESVILLE DIVISION**

| | |
|---|---|
| ALACHUA COUNTY EDUCATION ASSOCIATION *et al.*,<br><br>*Plaintiffs,*<br><br>v.<br><br>DONALD J. RUBOTTOM, *et al.*,<br><br>*Defendants*. | Civil Action No.<br>1:23cv111-MW/HTC |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs bring this motion for partial summary judgment, which asks the Court to grant declaratory and injunctive relief in Plaintiffs' favor on the fourth through seventh causes of action in Plaintiffs' Second Amended Complaint. Those causes of action challenge the constitutionality of Sections 3 and 4 of Florida SB256, two provisions that amend Florida's Public Employees Relations Act ("PERA") retroactively and selectively. Section 3 prohibits employers from deducting certain unions' dues through the payroll deduction process, even as applied to existing collective-bargaining agreements. Section 4 subjects certain unions to the loss of the enforceability of their existing collective-bargaining agreements if they do not meet certain newly imposed conditions that were not in place at the time of contracting. Police, fire, and corrections unions, which tend to support the Governor politically, are spared the brunt of these provisions, whereas unions that chose not to support the Governor are subject to their full punishing force. Regardless of the motivation behind these provisions, they are unconstitutional and should be permanently enjoined.

## STATUTORY BACKGROUND

### A. The Pre-SB256 Statutory Landscape

For decades, Florida public-sector employees have been guaranteed the individual right to join employee organizations, as well as the collective right, if the majority of their co-workers so choose, to bargain collectively. Fla. Const. art.

I, §6. PERA was enacted in 1974 to "provide statutory implementation of [§]6, [a]rt. I of the State Constitution" by "[g]ranting to public employees the right of organization and representation." Fla. Stat. §447.201 (2022).

Pursuant to PERA, the right of public employees to engage in collective bargaining has been implemented through the creation, certification, and regulation of employee organizations authorized to engage in collective bargaining with public employers on public employees' behalf.

### 1. Pre-SB256 Provisions Concerning Certification, Decertification, and the Protection of Multiyear Collective-Bargaining Agreements

*a.* Under pre-SB256 law, every employee organization seeking to become a certified bargaining agent for public employees was first required to register with the Public Employees Relations Commission ("PERC"). Fla. Stat. §447.305(1) (2022). To register, a union had to complete an application and provide basic information about the organization, including its officers, fees, and constitution and bylaws. *Id.* It also had to provide a financial statement. *Id.*

Once registered, an employee organization was eligible to be designated by PERC as the certified bargaining agent for employees in a bargaining unit by following one of two paths: voluntary recognition by the employer, based on a showing of majority support in the bargaining unit; or secret-ballot election, in which the question whether the employees desired union representation was

decided by a majority of the votes cast in a PERC-conducted secret ballot election held among the employees in the bargaining unit. Fla. Stat. §447.307(1), (2) (2022).

A certified bargaining agent, under either path to certification, was then authorized to bargain collectively with the public employer concerning the wages, hours, and terms and conditions of employment of *all* of the represented employees, including those choosing to join the union and pay dues and those choosing not to do so. Fla. Stat. §447.309(1) (2022). The parties were authorized to enter into a collective-bargaining agreement ("CBA") of up to three years in duration, subject to ratification by a majority of the votes cast among the bargaining unit employees, with dues-payers and non-dues-payers alike having the right to vote. §447.309(1)-(5).

*b.* An employee organization, once certified, could be decertified if 30% of the employees in the bargaining unit petitioned PERC to conduct an election to decertify the incumbent union and replace it with no union or with a rival union. *Id.* §§447.307(3)(d), 447.308(1) (2022). If, in that election, a majority voted against the incumbent union, PERC revoked its certification. Fla. Stat. §447.308(2).

When decertification results in no union, then "[u]pon decertification of the incumbent union, the collective bargaining agreement no longer exists." *Teamsters*

*Loc. Union No. 385 v. Orange Cnty.*, 25 FPER ¶30072, 1999 WL 35114734 (Feb. 3, 1999) (citing *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 284 n.8 (1972)); *see also Pioneer Nat. Res. USA, Inc. v. Paper Workers Int'l Union Loc. 4-487*, 338 F.3d 440, 441 (5th Cir. 2003) (when the union was decertified, "the CBA automatically terminated by operation of law"); *Wayne Cnty. Neighborhood Legal Servs., Inc.*, 333 N.L.R.B. 146, 148 n.10 (2001) (contract "became null and void … when the final results of the … election were announced and [the incumbent union] was no longer the employees' collective bargaining representative") (citing additional cases).[1]

*c*. Of crucial importance to this Motion, once a CBA of up to three years was agreed to by an employee organization and ratified by a vote of the bargaining unit, the organization's certification—and hence the contract itself—was protected by PERA's "contract bar" provision. Fla. Stat. §447.307(3)(d). Under that provision, only during a sixty-day window, opening 150 days before the expiration date of the CBA and closing 90 days before the expiration date, could a petition be filed to decertify the incumbent union and replace it with no union or a rival union. §§447.307(3)(d), 447.308(1).

[1] NLRA precedents are "persuasive" in interpreting analogous provisions of PERA. *Palm Beach Junior Coll. Bd. of Trs. v. United Fac. Of Palm Beach Junior Coll.*, 475 So. 2d 1221, 1225 (1985); *see also City of Ocala v. Marion Cnty. Police Benevolent Ass'n*, 392 So. 2d 26 (Fla. App. 1980) (relying on NLRA precedents to analyze duty to bargain while a decertification petition pending).

For a three-year CBA, this would mean that for its first 31 months no decertification petition could be entertained by PERC; thus, no election could be scheduled and then run until after such petition was processed, and no vote in favor of decertification would become effective until the end of the contract. After a contract expired and until a new agreement was reached, pre-SB256 law also generally allowed decertification petitions to be processed. Fla. Stat. §447.307(3)(d).[2]

*d.* PERA's pre-SB256 provisions, taken together, meant that both the union that signed a three-year CBA and the employees in the relevant bargaining unit could be secure that the CBA that the employees had ratified would remain binding, enforceable, and immune from unilateral employer changes until the end of its term.

Although a union was required to submit annual financial statements and other documents to renew its registration, Fla. Stat. §447.305(2), a union's failure to submit the required renewal materials only barred that union from organizing and certifying new units; it did *not* cause the union to lose any of its existing certifications or require the union to re-apply for any certification of existing units.

[2] PERA provided only one exception to this contract-bar rule, when a union engaged in an illegal strike. *See* Fla. Stat. §447.507(6). In addition, a non-PERA provision in the Education Code established another limited exception, applicable only to units of K-12 instructional personnel. *See infra*, Part III.C.

*City of Bradenton*, 8 FPER ¶13239, 1982 WL 951651 (June 3, 1982) ("[R]evocation of certification is not one of the consequences which flows from the lapse, suspension, or revocation of a certified employee organization's registration license."). Nor, of particular importance, did such a failure nullify any of the union's existing CBAs or render them unenforceable. *Id.* (identifying the consequences of a lapse in registration, none of which include nullification of a CBA). Furthermore, under pre-SB256 law, a union's financial statements were not required to be audited. Fla. Stat. §447.305(2). It was sufficient that they were signed under oath by designated union officers. *Id.*

### 2. Pre-SB256 Provisions Concerning Payroll Deduction of Union Dues

Pre-SB256 law also allowed public employees the flexibility to choose to voluntarily pay their union membership dues through payroll deduction and for unions and public employers to bargain for payroll-deduction clauses in CBAs. Fla. Stat. §447.303 (2022). Indeed, before the passage of SB256, it had been settled since at least 1977 that Florida unions could request payroll deduction and that "[r]easonable costs to the employer of said deductions shall be a proper subject of collective bargaining." *See* Ch. 74-100, §3, Laws of Fla.; Ch. 77-343, §10, Laws of Fla.

### B. SB256's New Restrictions on Disfavored Unions

SB256 upended PERA in numerous ways, two of which are particularly pertinent to this Motion. *See* ECF 97-1 (SB256 enrolled text).

#### 1. Section 4's New Recertification Requirements for Disfavored Unions

Perhaps SB256's most sweeping retroactive changes to prior law are those set forth in Section 4 of the statute, which begins to take effect October 1.[3]

Section 4 makes the continued validity and enforceability of CBAs entered into by covered unions—including CBAs in existence at the time of the statute's enactment—dependent on the union signatory's ability to satisfy two new and demanding conditions not in place when the contracts were entered into.

First, Section 4 adds the following new section to Fla. Stat. §447.305:

> (6) Notwithstanding the provisions of this chapter relating to collective bargaining, an employee organization that had less than 60 percent of the employees eligible for representation in the bargaining unit pay dues during its last registration period must petition the commission pursuant to s. 447.307(2) and (3) for recertification as the exclusive representative of all employees in the bargaining unit within 1 month after the date on which the employee organization applies for [annual] renewal of registration pursuant to subsection (2). The certification of an employee organization that does not comply with this section is revoked.

[3] We say "begins" to take effect on October 1, because Section 4 takes effect as to any given union on its first annual registration renewal after October 1, 2023.

§447.305(6) (current version). The petition for "recertification" to which this provision refers requires an incumbent union to submit a petition for a new election, supported by at least 30% of bargaining-unit members—even if the election falls early in the term of an existing CBA rather than in the narrow window near the end of the CBA's term under which decertification petitions may be filed under pre-SB256 law. If the union fails to garner a majority of the votes cast in the newly required "recertification" election, the union is decertified. *See* Fla. Stat. §447.308(2). As explained *supra* at 3-4, the consequence of such decertification is that any CBA to which the union was a party is rendered null and void.

The new recertification requirement does not apply to unions representing the tens of thousands of police, fire, or corrections employees (the "favored unions").[4] It applies only to unions, such as the Plaintiff Unions,[5] that represent other Florida public employees (the "disfavored unions").

[4] *See* https://www.bls.gov/oes/current/oes_fl.htm (Bureau of Labor Statistics data showing that, even excluding first-line supervisors, nearly 100,000 workers are employed in Florida as police and sheriff's patrol officers, firefighters, and correctional officers and jailers.).

[5] "Plaintiff Unions" refers to plaintiffs Alachua County Education Association ("ACEA"); United Faculty of Florida ("UFF"); Hernando United School Workers ("HUSW"); Pinellas Classroom Teachers Association ("PCTA"); and Lafayette Education Association ("LEA").

Second, Section 4 requires for the first time that an employee organization's application to renew its registration "include a current annual audited financial statement, certified by an independent certified public accountant." Fla. Stat. §447.305(2).[6] The new post-SB256 renewal application also requires the union to submit "the following information and documentation as of the 30th day immediately preceding the date of renewal in its application for any renewal of registration on or after October 1, 2023":

> (a) The number of employees in the bargaining unit who are eligible for representation by the employee organization.
>
> (b) The number of employees in the bargaining unit who have submitted signed membership authorization forms without a subsequent revocation of such membership.
>
> (c) The number of employees in the bargaining unit who paid dues to the employee organization.
>
> (d) The number of employees in the bargaining unit who did not pay dues to the employee organization.

§447.305(3).

Disfavored unions that fail to comply with these reporting and documentation requirements are subject to revocation of their certifications, and hence nullification of their contracts, *see* Fla. Stat. §447.305(6)-(8)—a sanction

[6] This audit requirement was unsupported by any legislative findings that the information unions submitted under oath pursuant to the prior law was inaccurate or unreliable.

that PERA never before visited upon unions for noncompliance with a reporting requirement.[7]

### 2. Section 3's Retroactive Invalidation of Payroll-Deduction Clauses in the CBAs of Disfavored Unions

As the Court is aware, Section 3 of SB256 imposes the first prohibition on payroll deduction in PERA's nearly 50-year history. With an exemption for the favored unions, "an employee organization that has been certified as a bargaining agent may not have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees in the unit." Fla. Stat. §447.303.[8] The State takes the position that Section 3 applies to employers and unions with current CBAs.

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[7] The favored unions are not subject to the requirement that they show 60% dues payers (or prevail in a recertification election) to maintain their certification, nor are they required to report on their number of dues paying and non-dues-paying bargaining unit members. And, while the favored unions must, prospectively, have their annual financial statements audited, failure to meet that requirement does *not* subject them to the harsh sanction of revocation of their certifications as to existing bargaining units and the concomitant nullification of their contracts governing such units. *See* Fla. Stat. §447.305(9). Only the relatively mild sanctions of pre-SB256 law apply to the favored unions.

[8] Section 1, which requires employees desiring to be members of a (disfavored) union to sign a new PERC-issued membership authorization form, *see* Fla. Stat. §447.301(1)(b), is also challenged in this lawsuit as a violation of the freedom of speech, the freedom of association, and equal protection. *See* SAC ¶¶96-113 (counts one, two, and three). Plaintiffs are not seeking summary judgment as to those counts, because it is possible—though, as of this filing, uncertain—that PERC will implement Section 1 so as to essentially moot those claims.

## STATEMENT OF UNDISPUTED FACTS

### A. The Parties and the CBAs

Each of the Plaintiff Local Unions—ACEA, UFF, LEA, HUSW, and PCTA—is the certified representative of at least one bargaining unit of non-public-safety public employees. ECF 97-2 ¶2; 97-3 ¶2; 97-4 ¶2; 97-5 ¶2; 97-6 ¶2; 97-7 ¶2. Each Local Union is affiliated with Plaintiff FEA, the statewide union representing teachers, professors, graduate assistants, education-support professionals, and other education personnel. ECF 97-3 ¶3; 97-4 ¶2; 97-8 ¶2; 97 -5 ¶3.

The PERC Defendants are the PERC Commissioners with responsibility for enforcing SB256, including Sections 3 and 4. The Defendant Public Employers—the UF Trustees, and the School Boards of Alachua, Hernando, and Pinellas counties—are each party to one or more collective-bargaining agreements with one of the Plaintiff Local Unions. ECF 97-3 Ex.1; 97-2 Ex.2; 97-6 Ex.1; 97-7 Ex.1. The Lafayette County School Board ("LCSB") is not party to this action but has confirmed in a sworn declaration that if the Court enjoins PERC from enforcing Section 4, LCSB will honor and apply the terms of its CBAs with LEA for the remainder of their terms as before the enactment of Section 4. ECF 97-9 ¶ 6.

Each of the CBAs to which a Local Union is party was entered into before SB256 was enacted by the Florida Legislature. And each CBA expires after the applicable Local Union's next annual PERC registration date. The following table

summarizes the CBAs' expiration dates and the applicable Local Union's PERC registration date:

| **Local Union** | **CBA Expiration Date** | **Next PERC Registration Date** |
|---|---|---|
| ACEA | 7/31/2024 | 5/25/2024 |
| UFF/UFF-UF | 6/30/2024 | 3/9/2024 |
| LEA | 6/30/2025 | 1/31/2024 |
| HUSW | 6/30/2026 | 11/8/2023 |
| PCTA | 6/30/2025 | 2/9/2024 |

ECF 97-2 Ex.2 art.1; 97-10 ¶2; 97-3 Ex.1 art.33; 97-11 ¶3; 97-5 ¶¶4, 6, Ex.1 art.XXVI, Ex.2 art.I; 97-6 Ex.1; 97-12 ¶2; 97-7 Ex.1 art.6; 97-13 ¶2.

Each CBA sets the terms and conditions of employment for employees in that bargaining unit. Each CBA also includes a payroll deduction provision. The ACEA payroll deduction provision is materially representative of the provisions in the other CBAs:

> The Association will have the right to dues deduction and to uniform membership assessments in the following manner:
>
> (a) Any teacher eligible for membership in the Association may request dues deduction for Association dues in equal installments according to the pay frequency selected by the teacher…
>
> (d) The Board will remit to the Association each month, in a timely manner, the proceeds of payroll deductions…

ECF 97-2 Ex.2, §4. *See also* ECF 97-3 Ex.1 art.5; 97-5 Ex.1 art.2 §§8-9, Ex.2 art.VI §§3-4; 97-6 Ex.1 art.VI; 97-7 Ex.1 art.40.

During bargaining, the local unions considered the payroll deduction provisions to be valuable parts of the overall contractual bargain reached with the employers, and the unions would have demanded concessions elsewhere in the CBA as a condition of removing the payroll-deduction provisions. ECF 97-3 ¶10; 97-2 ¶¶9-10; 97-6 ¶¶7-8; 97-7 ¶¶7-8; 97-5 ¶¶8-9. The Local Unions also expected the public employers' contractual commitment to deduct and remit dues to remain in effect for the duration of the CBAs. ECF 97-2 ¶11; 97-3 ¶20; 97-5 ¶10; 97-6 ¶9; 97-7 ¶8.

### B. The Unions' Memberships and Organizing Efforts

Each of the Local Unions represents bargaining units containing employees who have chosen to become full members of the Union and some employees who have not so chosen. The following table summarizes, for each Local Union, the number of employees in the bargaining unit represented by that union and the number of employees who have chosen to become full members of the Local Union, the FEA, and the NEA/AFT:

| **Local Union** | **Total Unit Employees** | **Employee-Members** |
|---|---|---|
| ACEA | 3,369 | 2,415 |
| UFF/UFF-UF | 2,150 | 911 |

| | | |
|---|---|---|
| LEA | 138 | 78 |
| HUSW | 945 | 153 |
| PCTA | 6,897 | 3,906 |

ECF 97-10 ¶¶3-4; 97-11 ¶¶4-5; 97-5 ¶¶18-19; 97-12 ¶¶3-4; 97-13 ¶¶3-4.

All of the Unions' employee-members have agreed to pay voluntary dues to the local unions, FEA, and NEA/AFT. Not all of the Local Unions' employee-members, however, have paid dues since July 1, 2023. The following chart summarizes, for each Local Union, the number of employee-members who have paid dues this calendar year and the number who have paid dues since July 1, 2023:[9]

| **Local Union** | **Dues Payers, 2023 YTD** | **Dues-Payers since 7/1/2023** |
|---|---|---|
| ACEA | 2,369 | 1,822 |
| UFF/UFF-UF | 897 | 450 |
| LEA | 78 | 78 |
| HUSW | 141 | 0 |
| PCTA | 3,790 | 2,625 |

[9] The number of dues-paying employees in the bargaining unit fluctuates month-to-month based on new hires, separations, leaves of absence, and other factors, in addition to employees opting into or out of dues. The numbers reported in the "2023 YTD" column are the highest monthly figure in 2023. The numbers reported in the "Due-Payers since 7/1/2023" column are the highest monthly figure for which data was available at the time of the Declarant's Declaration.

ECF 97-10 ¶5; 97-11 ¶¶6-7; 97-5 ¶20; 97-12 ¶5; 97-13 ¶5.

The failure of some members to pay dues since July 1, 2023 is a direct result of the passage of Section 3. ECF 97-14 ¶12. Specifically, substantially all of these employees had authorized dues to be deducted from their paychecks and remitted to the Unions. *Id.* ¶3. When Section 3 became effective on July 1, the members' employers stopped deducting and remitting dues to the Unions as required by the CBAs. Before and after July 1, some, but not all, of the Unions' members have signed up for an alternative dues-payment method, including the FEA's in-house ACH dues-payment system, eDues. ECF 97-8 ¶¶12-16; 97-15 ¶¶7-10.

The Unions have exerted substantial efforts to educate current members of the need to enroll in an alternative dues-payment system, diverting substantial financial and human resources from activities they otherwise would engage in for the benefit of the bargaining unit. ECF 97-5 ¶¶22-24; 97-8 ¶¶4-11; 97-10 ¶¶9; 97-11 ¶¶10-12; 97-13 ¶9; 97-14 ¶¶5-6, 9, 11, 13. As a result, educating current members of the need to enroll in eDues or another dues-payment system essentially requires a second—and costly—organizing campaign.

The FEA, together with its affiliated local unions, is currently undertaking that second organizing campaign. FEA has designated eight organizing leads to work with local unions fulltime on their campaigns to encourage members to enroll in an alternative dues-payment mechanism. ECF 97-14 ¶5. But for the eDues campaign, those eight organizing leads would have assisted local unions with collective bargaining and contract enforcement, or in organizing new work and new workers. *Id.* In addition to staff, FEA has allocated over $1 million in grant funds to its local unions to assist with their eDues campaigns. *Id.* ¶7. FEA is required to allocate so many employees and such a large portion of its budget to the eDues campaign because, in FEA's experience, nearly all members require a one-on-one conversation before they take the affirmative step of enrolling in eDues or another alternative payment mechanism; specifically, although FEA sent members emails, text messages, and automated phone calls, fewer than 10% of members who have enrolled in eDues have done so in response to these automated efforts. *Id.* ¶9. Instead, more than 90% of members who made the switch have done so in response to an in-person conversation or one-on-one telephone call. *Id.*

Separately, persuading employees to become new dues-paying members in a legal regime like Florida's, so as to satisfy Section 4's 60% threshold, is particularly challenging, because employees know that they are entitled to share in

many of the benefits of the collective-bargaining agreement even if they choose not to share in its costs by paying dues. ECF 97-14 ¶8.

### C. Section 4's Audit Requirement

The requirement in Section 4 that certified representatives, to maintain their certification, must submit a current financial statement audited by a certified public accountant, *see* §447.305(2), (6)-(8), will be difficult, if not impossible, for many unions to comply with.

For starters, there is no need for an entity that is not subject to an audit requirement to maintain its records in the "audit-ready" format that CPAs require before performing an audit. And, because they have never before been subject to an audit requirement, many FEA-affiliated unions do not currently maintain their books and other financial records in an easily auditable manner. ECF 97-14 ¶15. Since financial statement audits are necessarily backwards-looking, the absence of auditable financial records for this most-recent fiscal year makes it impracticable, if not impossible, for these unions to comply with the audit requirement before their next annual PERC registration date. *Id.* Thus, even finding a local CPA willing to do this work will be challenging.

Plaintiff LEA illustrates the point. On behalf of Plaintiff LEA, Plaintiffs' counsel contacted CPAs in Lafayette and surrounding counties to locate a CPA who would be able to perform the audit required by Section 4. ECF 97-16 ¶5. Counsel

did not locate a CPA willing to take on LEA as a new client. *Id.* ¶¶6-8. CPAs' unwillingness to take on LEA as a new client was in part because LEA does not maintain its books and financial records in an easily auditable manner; given the small amounts at issue, LEA's volunteer Treasurer keeps track of income and expenses on a single Excel spreadsheet. ECF 97-5 ¶12. Moreover, even if a CPA willing to perform the required audit and to make the required certifications were located, retaining such a CPA would not be financially feasible for a local union of LEA's size and resources. In its fiscal-year 2022-2023 budget, for example, LEA's income excluding the per capita dues it collects for FEA (and including a one-time grant made by FEA to LEA) was only about $10,000. ECF 97-5 ¶13. FEA has obtained a quote from a CPA stating that the cost of performing the audit required by Section 4 would be approximately $10,000. ECF 97-14 ¶14. That amount would take approximately all of LEA's retained revenues, crowding out all other representation activities in which the Union would normally engage.

**D. Favored and Disfavored Unions' Political Activity**

A review conducted by Plaintiffs of large union-affiliated political action committees ("PACs") for the 2022 state election cycle showed that disfavored unions overwhelmingly supported the Governor's opponent, Charlie Crist. ECF 97-17 ¶¶6-8 & Exs.3-4. Conversely, union support received by the Governor

came overwhelmingly from favored unions. *Id.* Indeed, the review did not identify any contributions by a favored-union PAC to the Governor's opponent. *Id.*

## ARGUMENT

### I. SECTION 3 VIOLATES THE CONTRACTS CLAUSE.

Count Four of Plaintiffs' Second Amended Complaint alleges that Section 3 violates the Contracts Clause, Article I, Section 10 of the Constitution. As Plaintiffs have previously shown, parties injured by a Contracts Clause violation have a cause of action in federal court to redress such a violation. ECF 84, at 3-17.

To establish that state action impermissibly impairs a contract, the plaintiff must establish both that the challenged legislation caused a "substantial impairment" of the plaintiff's contract rights and that the legislation is not "drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (internal quotations omitted).

Here, on undisputed facts, both requirements are satisfied. Indeed, Plaintiffs' challenge to Section 3 based on the retroactive impairment of their CBAs is materially indistinguishable from the union challenges found meritorious in the Sixth Circuit's well-reasoned decisions striking down payroll-deduction bans as contract impairments in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), and *Michigan State AFL-CIO v. Schuette*, 847 F.3d 800 (6th Cir. 2017).

Because the Sixth Circuit faithfully applied the Supreme Court's jurisprudence, this Court should follow its lead and enter summary judgment for Plaintiffs on Count 4.

### A. Section 3 Substantially Impairs Plaintiffs' Contractual Relationship with the Public Employers.

Plaintiffs have carried their initial burden to establish that Section 3 substantially impairs their CBAs by establishing that Section 3 completely invalidates one substantive provision of their CBAs. *See U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 (1977) (outright repeal of a "not superfluous" security provision in a bond contract impaired the obligation of the contract). That basic point is confirmed by reference to the three factors the Supreme Court has instructed courts to evaluate when assessing the substantiality of an impairment: "the extent to which the law [1] undermines the contractual bargain, [2] interferes with a party's reasonable expectations, and [3] prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822.

*1. The contractual bargain*. The undisputed evidence supports Plaintiffs' contention that Section 3 undermines the contractual bargain the unions struck with the public employers in their CBAs. All four unions' CBAs contain contractual commitments requiring the public employers to deduct and remit union dues to the Plaintiffs. *Supra* at 12-13. The Plaintiff Unions considered these dues-deduction provisions to be important aspects of their contracts, and would have demanded

concessions elsewhere as consideration for removing them from their CBAs during bargaining. *Supra* at 13. That is sufficient to establish that the Legislature's complete invalidation of the payroll-deduction provisions upset the parties' contractual bargain. *See Pizza*, 154 F.3d at 324 (the unions "who negotiated the affected CBAs considered the promise by public employers to administer the checkoffs a significant and important aspect of their collective bargaining agreements.").

It does not matter that the payroll-deduction provisions are just one part of a comprehensive contract governing the terms and conditions of employment for employees represented by the Plaintiffs. Courts routinely find a substantial impairment when state action impairs one provision of a more comprehensive agreement. *See, e.g.*, *U.S. Tr.*, 431 U.S. at 19 (one security provision of a complex municipal bond contract); *Melendez v. City of New York*, 16 F.4th 992, 1033 (2d Cir. 2021) (personal guaranty provisions of commercial real estate leases); *Pizza*, 154 F.3d at 324 (PAC deduction clause of a comprehensive CBA). Thus, whether or not the payroll deduction articles are the most important provisions in the parties' CBAs—and for Plaintiffs they certainly are among the most important, as they provide the secure source of financing that allows the union reliably to enforce all the other provisions for the benefit of the represented employees—their complete invalidation constitutes a substantial impairment.

*2. The Plaintiffs' reasonable expectations*. At the time the Plaintiffs bargained their CBAs, they had every reason to expect that the payroll-deduction provisions would remain valid through the end of their current agreements. *Supra* at 13. Therefore, Section 3 upsets Plaintiffs' reasonable expectations that their contracts would be honored, because before SB256 radically changed the rules for public-union financing, nothing put Plaintiffs on notice that the decades-old payroll-deduction system enshrined in their CBAs would be ending. *See Anderson Fed'n of Tchrs. v. Rokita*, 546 F. Supp. 3d 733, 744 (S.D. Ind. 2021) (given decades-long practice permitting payroll deduction of membership dues, contracting parties had no reason to anticipate a change in the law that would retroactively terminate their existing agreements).

*a.* It is true that Florida—like all states that permit public-sector collective bargaining—has regulated public-employee labor relations in general, and that Florida had, until SB256 repealed it for disfavored unions, a statute permitting payroll deduction of voluntary membership dues. But the mere existence of regulation in the field does not render unreasonable Plaintiffs' expectation that their CBAs would be honored. Rather, "a history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause," because "[t]he fact that some incidents of a commercial activity are heavily regulated does not put the regulated firm on notice that an entirely different

scheme of regulation will be imposed." *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998).

The Seventh Circuit's description of the impact of regulation on a party's reasonable expectations is fully consistent with Eleventh Circuit authority. In *Vesta Fire Insurance Corp. v. Florida*, for example, the court held that a moratorium preventing insurers from cancelling their insurance contracts at the end of their terms "substantially impaired the contracts between the insurance companies and their insureds." 141 F.3d 1427, 1433 (11th Cir. 1998). The court found that loss of the insurers' ability to reevaluate a policy's risk and to decide whether they wished to continue to insure that risk upset the insurers' contractual expectations, even though those contracts arose "in the regulated field of insurance." *Id.* at 1432-33 (internal brackets omitted).[10]

Moreover, nothing in Florida law prior to SB256 suggested that bargaining over payroll deduction would be subject to *restrictions*. To the contrary, the costs

[10] In *S&M Brands, Inc. v. Georgia ex rel. Carr*, in contrast, the Eleventh Circuit held that the plaintiff had no "reasonable contractual expectations that implicate the Contract Clause" because "[e]very term of [the contract] was specifically dictated by the Attorney General." 925 F.3d 1198, 1203 (11th Cir. 2019). Thus, the "contract" was really just a form of state regulation, and not the product of arms'-length negotiation. *Id.* (the state "does not strip itself of police power when it regulates by requiring private parties to contract"). The *S&M Brands* contract bears no resemblance to the CBAs impaired by Section 3, in which the bargain was struck by independent parties after extensive, arm's-length collective bargaining.

of administering payroll deduction have always been a proper subject of bargaining in Florida, and that topic remains a proper bargaining subject for those favored unions who continue to enjoy payroll deduction of membership dues. Fla. Stat. §447.303(2)(b). In these circumstances, Plaintiffs' expectation that the public employers would be required to honor the dues-deduction provisions in their CBAs as a matter of contract was fully justified. In short, this is not a situation where "the party to the contract who is complaining could have seen it coming," *Ass'n of Equip. Mfrs. v. Burgum*, 932 F.3d 727, 730 (8th Cir. 2019), but a situation where the contracting parties' reasonable expectations were disrupted by mid-contract state action. That disruption constitutes a substantial impairment.

*b.* Nor do the CBAs themselves constitute evidence that Plaintiffs expected legislation to impair their payroll-deduction provisions during the CBAs' term.

As Plaintiffs showed in preliminary-injunction briefing, the CBAs make no reference to the prospect of legislation on payroll deduction or on any other specific subject of bargaining. ECF 63-1, at 16-17; ECF 84, at 26. The CBAs simply contain generic savings clauses that do nothing more than restate default labor-relations rules that would apply even in the absence of the clauses: first, that the rest of the CBA remains in effect if one provision is held or rendered invalid; and second, that, in that circumstance, the parties are obligated to bargain on

request about the effects of such invalidation. ECF 63-1, at 16-17 (citing *Chattanooga Mailers Union, Loc. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1313 (6th Cir. 1975) (rejecting employer's bid to invalidate the whole CBA on the basis of a single invalid provision even where CBA lacked severability clause); *Palm Beach Junior Coll.*, 475 So. 2d at 1227 (unfair labor practice to insist to impasse on clause that purported to waive union's midterm right to bargain about effects of employment changes)).

In the earlier briefing, the PERC Defendants failed to respond to this point. That is because there is no response. Contract provisions that do nothing more that restate default rules of contract interpretation cannot possibly constitute sufficient evidence that the contracting parties intended to waive all constitutional objection to state action retroactively impairing their contract rights. *See Chiles v. UFF*, 615 So. 2d 671, 673 (1993) ("The savings clauses clearly were meant as a means of preserving the contracts in the event of partial invalidity; they are not an escape hatch for the legislature."); *Cummings, McGowan & W., Inc. v. Wirtgen Am., Inc.*, 160 F. App'x 458, 462 (6th Cir. 2005) (rejecting argument that a generic savings clause reflected parties' intent to incorporate retroactive impairments into their contracts).

Nor does labeling the clauses as "*Kansas Power* clauses," ECF 80, at 25, alter that conclusion. The Supreme Court's decision in *Energy Reserves Group,*

*Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), arose against the backdrop of a long history of pervasive federal price controls in the natural-gas industry. The parties in that case had contracted for price-escalator clauses that would adjust the contract price in response to changes in federal price controls. They also contracted to make their gas-supply agreement subject to relevant present and future state and federal law. *Id.* at 416. Such clauses were common in gas-supply contracts, the Court explained, because such contracts were assumed to be "subject to governmental price regulation." *Id.* at 416 n.22. In those circumstances, the Court held that the contracting parties could not reasonably complain that their expectations were upset by subsequent state regulation controlling the price of gas in the intrastate Kansas market. *Id.*

Thus, the Court never held that the inclusion of a clause generically referencing the prospect of future changes in unspecified laws would forever waive a party's ability to bring a Contracts Clause challenge to state action concerning a topic never referenced in the contract. Rather, it held only that a party who contracted for a mechanism to account for changes in government-set prices could not later claim that its contract was impaired by governmental price setting. That holding is unremarkable and has no bearing on this case.

*c. Ability to safeguard or reinstate contract rights*. Section 3 imposes a flat ban on the payroll deduction of membership dues for the disfavored unions,

overriding their existing, bargained-for contract rights to payroll deduction and providing no mechanism through which they can safeguard or reinstate those rights.

Notwithstanding that undisputed fact, the PERC Defendants have tried to turn the Plaintiff Unions' resourcefulness against them by arguing (ECF 80, at 27-28) that, because Plaintiffs have been able to partially implement a costly and inferior ACH-based dues-collection system in lieu of payroll deduction to avoid immediate insolvency and mitigate some of the harm caused by the deprivation of their contract rights, those rights themselves have somehow been "safeguard[ed] or reinstat[ed]."

Although Defendants invoke the Supreme Court's decision in *Sveen* to support this argument, ECF 80, at 28, *Sveen* actually supports Plaintiffs' position. For the *Sveen* Court clarified that it is the plaintiff's *contract right*—and not some non-contractual means of mitigating damages—that must be safeguarded or reinstated. Thus, in explaining the safeguarding/reinstatement factor, the Court noted that it "has always approved statutes like this one, which enable a party with only minimal effort to protect his *original contract rights* against the law's operation." 138 S. Ct. at 1822 n.3 (emphasis added). And, as support, the Court cited *Jackson v. Lamphire*, a case which upheld against a Contracts Clause challenge a state statute that required deeds to real property to be recorded. 28 U.S.

280, 290 (1830). In both cases, the contracting party could get the full benefit of its contractual bargain if it took some ministerial step: in *Sveen*, by submitting the designation of beneficiary form undoing the legislature's change in default beneficiary rules, and in *Lamphire* by recording the deed as required by the legislature. *See also Texaco, Inc. v. Short*, 454 U.S. 516, 518-19 & n.7 (1982) (owners of mineral rights could prevent termination of their interests by filing a statement of claim).

Thus, under *Sveen*, a defendant cannot defeat a Contracts Clause claim by pointing to the ability of the adversely affected party to reduce the harm caused by the loss of a contract right through self-help methods that fail to restore or reinstate the as-negotiated right itself. *See, e.g.*, *Melendez*, 16 F.4th at 1033 (prohibition on enforcing personal guaranty provisions of leases prevented landlords from "safeguarding or ever reinstating rights," even though alternatives, including seeking unpaid rent directly from tenants, existed). And where, as here, those self-help methods are themselves costly and capable of mitigating only a fraction of the harm, it would trample on the values underpinning the Contracts Clause to adopt Defendants' argument. Because, in sum, the Plaintiff Unions are powerless to regain the *contract right* they secured through bargaining—deduction and remittance of membership dues by the public employers for a stated period of time—they easily meet the "substantial impairment" test.

### B. Impairment of Plaintiffs' Contractual Relationship Is Not Reasonable and Necessary to Serve a Significant and Legitimate Public Purpose.

Since Section 3 substantially impairs the Plaintiffs' CBAs, the State must articulate a "a significant and legitimate public purpose" and must show that the law "is drawn in an 'appropriate' and 'reasonable' way to advance" that interest. *Sveen*, 138 S. Ct. at 1822 (quoting *Kan. Power*, 459 U.S. at 411-12); *see also Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 859 (8th Cir. 2002) ("The State bears the burden of proof in showing a significant and legitimate public purpose underlying the Act."). This inquiry focuses on the "means and ends of the legislation." *Sveen*, 138 S. Ct. at 1822. To demonstrate that the impairing law appropriately and reasonably advances the stated interest, the State must go beyond articulating a rational basis for the legislation and must demonstrate the necessity of retroactive application to existing contracts, because "a justification sufficient to validate a statute's prospective application … may not suffice to warrant its retroactive application." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (internal quotations omitted). Thus, Section 3 is reasonable and necessary to serve the State's asserted interest only if its retroactive application is itself reasonable and necessary to serve that purpose. *See Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch.*, 876 F.3d 926, 938 (7th Cir. 2017).

Although courts owe some deference to the legislature concerning the necessity of the state action, "[t]he degree of deference differs depending on the severity of the impairment and on the State's self-interest." *Id.* at 937. Thus, "[w]hen the State is a party to the contract, complete deference to a legislative assessment of reasonableness and necessity is not appropriate." *Kan. Power*, 459 U.S. at 412 n.14 (internal quotations omitted). And it is not only the State's pecuniary interests that matter. Instead, "[i]n almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." *Id.* Thus, when the State or its subdivisions make an "express commitment," its self-interest is at stake and full deference to the legislature is not warranted. *Elliott*, 876 F.3d at 937; *see also Pizza*, 154 F.3d at 325 (limiting deference because "the state has an obvious self-interest in muting public employee unions.").

Here, both the State and its subdivisions have made just such an "express commitment" to deduct and remit membership dues to the Plaintiffs. In particular, the CBA between UFF and University of Florida Board of Trustees—one of the CBAs impaired by Section 3—is a contract between a plaintiff and a State entity in which the State agreed to deduct and remit dues through June 30, 2024. ECF 97-3 Ex.1. By enacting Section 3, the State is trying to renege on that commitment, and it can do that only if it has "a substantial reason for breaking its own promise."

*Elliott*, 876 F.3d at 937. In sum, the State's identification of a policy justification for Section 3's retroactive application is entitled only to the most limited form of deference, meaning that the State carries its burden only if it establishes that "the impairment [is] clearly necessary or essential, not merely convenient or expedient." *Id.* at 938 (internal quotations omitted).

The State cannot carry this burden. SB256 contains no statement of purpose for its retroactivity, which is itself "cause for grave concern" that the Legislature may not even have thought retroactivity was necessary to advance any significant governmental interest. *Pizza*, 154 F.3d at 325.

During preliminary injunction briefing, the State asserted one post hoc rationale for Section 3: transparency, which it defined to mean "ensuring public employees are fully informed about the dues they are paying their unions." ECF 80 at 34. Section 3 is not reasonable and necessary to advancing that interest. Indeed, it is so ill-adapted to that purpose that it heightens the already "grave concern" that the Legislature was not even thinking that it was advancing the posited interest.

*First.* There is absolutely no explanation in the legislative record or this litigation of why the Legislature deemed it necessary to retroactively impair existing contracts, rather than to prohibit payroll deduction only in post-enactment agreements. There is no claim of emergency conditions. Indeed, for decades, Florida successfully carried out public-employee labor relations under a system

that permitted payroll deduction of voluntary membership dues. There is also no claim—and the State certainly could not establish—that public employees recently became less informed about the amount of dues they were paying. That absence of changed conditions is compelling evidence that retroactive application of Section 3 was neither "necessary" nor "essential" to accomplish the State's goal in transparency. *See U.S. Tr.*, 431 U.S. at 32 (concluding that "changed circumstances" were of degree and not kind, and therefore insufficient to support retroactive impairment); *Elliott*, 876 F.3d at 938-39 (absence of changed circumstances made retroactive impairment of teacher-tenure contracts unreasonable).[11]

Absent some separate justification for its retroactive application, Section 3 cannot be deemed reasonable or necessary to promote transparency.

*Second.* Even when judged in purely prospective terms, Section 3 is an incredibly poor vehicle for informing union members about the amount of voluntary dues they pay. Section 3 does not require unions or public employers to disclose to members the amount of dues they pay, something unions do anyway in

[11] This absence of emergency conditions or changed circumstances also distinguishes Section 3 from those impairments of public-employee CBAs found to be reasonable and necessary. *Watters v. Bd. of Sch. Dirs. of City of Scranton*, 975 F.3d 406, 410 (3d Cir. 2020) (suspensions amid annual budget deficit of $4.5 million); *Buffalo Educ. Support Team v. Tobe*, 464 F.3d 362, 365 (2d Cir. 2006) (wage freeze amid ballooning budget deficits).

the normal course. That would have been a far less intrusive and far more direct and effective means of accomplishing the same legislative goal. Indeed, payment of dues by an ACH-based system like eDues is no better at informing members of the amount of dues they pay than the payroll-deduction system it replaces. Under both systems, the member is provided with a regular reminder of the amount of dues (the member's paystub in payroll deduction; the member's bank statement in ACH). *See* ECF 97-18, Ex.4.

Faced with this deficiency in its post hoc rationale, Defendants have previously speculated that ACH-based systems might be better at informing members because they deduct the dues after a paycheck is deposited into the employee's account. ECF 80, at 43. Whatever might be said about such a tenuous rationale under minimal rational-basis scrutiny, *cf. Pizza*, 154 F.3d at 326 (a statute's ability to "survive[] rational basis scrutiny for purposes of our equal protection analysis does not mean that it justifies a very substantial impairment of a pre-existing contract"), such a rationale is too speculative to survive Contracts Clause scrutiny. And because Defendants have adduced zero evidence in support of their dubious theory, it cannot justify immediate, retroactive implementation of a payroll-deduction ban even if it could permit a prospective change in the law.

*Third.* Section 3's lack of necessity is further demonstrated by its glaring under-inclusiveness. Whatever the true reason for the Legislature's conspicuous

carve-out of public-safety unions from Section 3, its willingness to tolerate payroll deduction of such employees' dues—without any showing that public-safety employees are any better informed about the amount of dues they are paying—undercuts any assertion that *retroactive* application of Section 3 as to Plaintiffs was "clearly necessary" or "essential" to accomplish its stated goal. *See Elliott*, 876 F.3d at 938.

In sum, Section 3 is a poorly tailored statute that does not even advance the post hoc legislative purpose Defendants impute to it—a purpose that Defendants do not and cannot claim arose from any changed circumstances or emergency conditions of the kind held sufficient to justify other substantial impairments. Therefore, Section 3 cannot be considered reasonable or necessary to achieve the claimed interest in transparency and should be invalidated.

## II. SECTION 3 VIOLATES THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE.

Quite apart from its Contracts Clause infirmities, Section 3's selective payroll deduction ban is unconstitutional even as applied prospectively. Its discrimination between favored and disfavored unions is a façade for viewpoint discrimination and cannot survive heightened, or even rational-basis scrutiny. Summary judgment therefore should be entered in favor of Plaintiffs on their First Amendment challenge to Section 3, pleaded as Count Five of the operative complaint, and on their equal-protection challenge, pleaded as Count Six.

***A. First Amendment.*** Section 3 discriminates against disfavored unions with regard to access to governmental payroll deduction systems, even though the favored and disfavored classes of unions are similarly situated with respect to the subjects on which they may bargain. *See* Fla. Stat. §447.301 (listing organizational rights provided to both law-enforcement and general public employees); *see also* PERC, Scope of Bargaining, 3d ed. (Oct. 2021), *available at* http://perc.myflorida.com/pubs/Scope_of_Bargaining.pdf (detailing mandatory and permissive subjects of bargaining for all union classifications). That absence of any meaningful distinction between the favored and disfavored unions' bargaining rights and obligations indicates that Section 3 is a vehicle for discriminating between different *viewpoints*, not different *speakers*. And it is well established that viewpoint classifications are subject to heightened scrutiny. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

Plaintiffs recognize that making payroll deduction available to unions is a form of "subsidy" of expressive activities that can be withdrawn across the board without facing heightened scrutiny. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015). Furthermore, when the government subsidizes speech without restricting it, it can permissibly discriminate between classes of speakers who have different statuses relevant to

the need for the subsidy. *See, e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 48 (1983) (school district could permissibly grant access to its internal mail system to unions with "exclusive representative" status while denying it to other unions, because unions with the former status had unique duties giving them a greater need for access); *WEAC v. Walker*, 705 F.3d 640, 648 (7th Cir. 2013) (where one subset of unions were free to bargain over the traditional range of bargaining topics and a second subset had virtually no bargaining rights, the statute could permissibly leave only the former subset with payroll deduction rights).

But the government cannot selectively subsidize speech to discriminate "on the basis of ideas," *Leathers v. Medlock*, 499 U.S. 439, 450 (1991), including by using speaker classifications as a disguised means of "suppress[ing] a particular point of view," *Cornelius*, 473 U.S. at 812. *Cornelius* addressed a government program through which federal employees could periodically solicit coworkers during working hours to contribute via payroll deduction to certain types of charities. Because the program could be terminated outright or modified to exclude certain classes of charitable speakers from participating, it was not a public forum, *id.* at 805-06, but was instead analyzed much in the manner of a subsidy. Even so, the Court held, the program could not make exclusions that functioned as a "façade for viewpoint-based discrimination." *Id.* at 811; *see also Ysursa*, 555 U.S. at 361

n.3 (although the state's ban on the use of municipal payroll deduction systems for all PAC contributions was permissible and not "viewpoint discriminat[ory]," a future First Amendment challenge could be brought if the ban were not applied "evenhandedly").

Although speech-subsidy laws are judged by different criteria from speech-restrictive laws, the "deep[] skeptic[ism]" the Supreme Court has expressed toward speech-restrictive laws that "distinguish among different speakers, allowing speech by some but not others," *NIFLA v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)), is also warranted when considering speech-subsidy laws. In both instances, speaker-based distinctions pose a serious risk that the legislature's real purpose may be to favor "those speakers whose messages are in accord with its own views." *Id.* Were courts to suspend their skepticism in this context, a legislature could evade heightened scrutiny simply by finding a speaker-based distinction that served as a ready proxy for viewpoint discrimination and using that distinction to thinly veil its true purpose.

The design and structure of SB256—in particular, its pervasive under-inclusiveness—make clear that SB256 is precisely the type of speaker-discriminatory law that must be subjected to heightened scrutiny. While a legislature could legitimately conclude that public employers should never assist

unions in collecting membership dues or should not assist any unions lacking full bargaining rights or lacking exclusive-representative status, the distinctions Section 3 makes between favored and disfavored unions do not reflect any such legitimate status-based judgment. *See NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (the underinclusiveness in the "design and structure" of the statute "suggest[s] a real possibility that these individuals were targeted because of their beliefs").

Because Section 3 is subject to heightened scrutiny, it cannot survive Plaintiffs' First Amendment challenge. Any form of heightened scrutiny requires a close fit between the statute's means and some legitimate governmental interest, *see, e.g.*, *Sorrell*, 564 U.S. at 572, and here there is no fit at all. While legitimate interests can support a uniform law banning payroll deductions, *see Ysursa*, 555 U.S. at 358-62, no legitimate interest would be advanced by Florida's distinction between the unions favored by SB256 and those disfavored by the bill.

As discussed in Part I.2 *supra*, the only legislative interest that Defendants have put forward for Section 3 in this case is an interest that does not appear in any legislative findings: namely, the purported interest in ensuring that union members know how much they are paying in dues. Section 3 would be poorly tailored to advance that interest even if it were an evenhanded and uniform ban on payroll deduction. *Supra* at 32-33. But it isn't, and there is no connection whatsoever between the supposed transparency interest and SB256's discriminatory

classification scheme. There is no indication in the legislative record—or anywhere—that members of unions representing police, fire, and corrections personnel are more aware of how much they are paying in dues than are members of other unions.

And when "the means are not adapted to the end," that "suggest[s] that the real end may be different." *Herman v. Loc. 1011, United Steelworkers*, 207 F.3d 924, 928 (7th Cir. 2000). In this vein, it is telling that in responding to a state-law challenge to Section 3, PERC—perhaps recognizing how difficult it is to credibly assert "transparency" as the interest advanced by the payroll-deduction ban—offered an additional rationale for enacting the ban. In particular, PERC argued that the ban expresses the view that "public employers should not be in the business *of facilitating a union's political speech* by collecting their dues for them." *See* ECF 97-19 at 16 (emphasis added).

That is undoubtedly *closer* to the true rationale for Section 3. But the Legislature's decision to specifically exempt from Section 3 the unions that represent the tens of thousands of Florida police, fire, and corrections personnel means that Florida remains in the business "of facilitating [some] union[s'] political speech." That makes the conclusion inescapable that Section 3 was enacted to stop facilitation of disfavored speakers and their political speech while continuing to facilitate favored speakers and their political speech. Such

discrimination plainly offends the First Amendment, and the Court can reach that conclusion without venturing outside the four corners of the statute. *Cf. Hubbard*, 803 F.3d at 1313 (holding that the subjective motives of legislators expressed outside the confines of the statutory text and legislative record could not be considered in a First Amendment challenge to allegedly discriminatory legislation). Thus, the fact that unions supporting the Governor are overwhelmingly part of the favored class and unions opposing the Governor are overwhelmingly part of the disfavored class, *see supra* at 18-19, while serving as a confirmatory data point, is not a necessary fact to conclude that Section 3 violates the First Amendment.

***B. Equal Protection.*** Similarly, there is no legitimate purpose that can be posited for Section 3 and the Legislature's exemption of the favored unions from Section 3's reach, so Section 3's classification scheme fails even rational basis review and thus violates the Equal Protection Clause. *See USDA v. Moreno*, 413 U.S. 528, 529 (1973) (striking down statute on equal protection grounds because distinctions lacked a rational relation to any legitimate government interest).

That was the conclusion of the court in *Kentucky Education Ass'n v. Link*, No. 23-CI-00343 (Ky. Cir. Ct., Aug. 30, 2023) ("*KEA*"), which recently struck down, on summary judgment, a Kentucky statute identical to Section 3, in that it (a) prohibits the payroll deduction of union dues, but (b) exempts police, fire, and corrections employees from the ban. ECF 97-20 at 2. The case was brought solely

under the Kentucky equal protection clause, but Kentucky courts follow federal precedent in that area. *See id.* at 8-9.

After recognizing that labor-relations distinctions between public-safety employees and other employees are valid for certain purposes, the *KEA* court reasoned that "the classification provided for in SB 7 is one that can best be summed up as favoritism for certain labor organizations performing the same services as the non-exempted labor organizations." *Id.* at 12. The Court added that it "wholly accepts that the Commonwealth has a compelling interest in avoiding the appearance that public resources are being used to support partisan political activity," but reasoned that the statute at issue "does not fit this goal as it has instead allowed the General Assembly to arbitrarily select which labor organizations get to participate in the 'optic' of using public resources to support partisan political activity." *Id.* For this reason, the court held that the distinction between the favored and disfavored unions made the statute "so arbitrary and capricious as to be hostile, oppressive and utterly devoid of rational basis." *Id.* at 13.

The same is true of Section 3, and it, too, should be struck down on summary judgment.

## III. SECTION 4 VIOLATES THE CONTRACTS CLAUSE.

If, as shown above, the nullification of a single contractual term imposed by Section 3 constitutes an unconstitutional impairment of the Plaintiff Unions' collective-bargaining agreements, then Section 4 does so *a fortiori*—for it threatens to negate not just a particular provision in the collective-bargaining agreements but the entire contract. And it requires affected unions to devote substantial resources to avoid that result.

### A. Section 4 Retroactively Changes Florida Laws Affecting the Enforceability of Extant Collective Bargaining Agreements During their Terms.

*1*. The background law against which Section 4 was enacted is set forth in more detail *supra* at 2-6. The three essential points are these:

First, to negotiate a collective-bargaining agreement on behalf of the members of a bargaining unit, a union must be "certified" by PERC as the exclusive representative of all employees in the unit. *Supra* at 2. That certification follows either from the public employer's recognition that the union enjoys majority status in the unit, or from the union having been selected by a majority of the employees voting in a secret-ballot election conducted by PERC. *Supra* at 2-3. Upon its certification as bargaining agent, a union is authorized to negotiate a collective-bargaining agreement with the public employer that can be binding for as many as three years. *Supra* at 3.

Second, the consequence of a union's loss of certification is severe. Any contract between a union and a public employer becomes void from the date of decertification and is therefore unenforceable. *Supra* at 3-4.

Third, precisely because that harsh consequence follows from decertification, the "contract bar" rule codified in Fla. Stat. §447.307(3)(d) and §447.308(1), provided that bargaining unit members could petition for an election to decertify a union only near the end of a contractual term or following its expiration. *Supra* at 4-5.

*2.* Beginning October 1, 2023, Section 4 requires disfavored unions to submit to a new decertification election every year—including during the term of CBAs entered into before SB256's enactment—*unless* the union demonstrates that more than 60% of the members of the bargaining unit paid dues to the union in the previous year. Thus, Section 4 requires disfavored unions, as part of their annual application for renewal of their PERC registration, *see* Fla. Stat. §447.305(2), to provide a statement—"as of the 30th day immediately preceding the date of renewal"—of the number of "employees eligible for representation" in the bargaining unit, and the numbers of such employees who did and did not pay dues to the union, §447.305(3). The statute then provides that

> an employee organization that had less than 60 percent of the employees eligible for representation in the bargaining unit pay dues during its last registration period must petition the commission pursuant to s. 447.307(2) and (3) for recertification as the exclusive

> representative of all employees in the bargaining unit …. The certification of an employee organization that does not comply with this section is revoked.

§447.305(6).

Thus, notwithstanding the contract-bar rule that was in place when all pre-SB256 contracts were negotiated, Section 4 provides that a union's failure annually to show that at least 60% of its bargaining-unit members pay dues results in a decertification election. And the stakes of that election are high, for the union loses its status as exclusive bargaining representative—and the contract becomes void for the remaining months or years of its negotiated term—if the union fails to obtain a majority of the votes cast in that election. *See generally* §447.307(2)-(3).

Furthermore, even if the union ultimately survives this process—by showing 60% dues payers, or prevailing in a certification election—it will have to devote considerable resources to defending the continuing validity of its collective-bargaining agreement. Thus, to prevent the termination of its CBA, any union that is near or below the 60% threshold will need to undertake a resource-intensive organizing campaign to persuade more bargaining unit members to become dues payers. *See supra* at 15-17. And, failing that, the union must undertake a resource-intensive election campaign.

In addition, Section 4 imposes a new requirement that the union's financial statement (submitted as part of its annual application for registration renewal) be

audited "by an independent certified public accountant." Fla. Stat. §447.305(2). Failure to comply with the audit requirement subjects unions to the prospect of revocation of the union's certification as exclusive bargaining representative. §447.305(6)-(8). And, as explained *supra* at 17-18, compliance with these new audit requirements will be costly for all unions and impossible for some unions to achieve in the time available between now and their first post-October 1 renewal.

Section 4 exempts the favored unions representing police, fire, and correctional employees from the 60% recertification requirement and exempts those same unions from potential decertification—and hence the loss of their CBAs—if they fail to submit a CPA-audited financial statement. *See* §447.305(9) (providing that "[s]ubsections (3)-(8) do not apply" to such unions).

### B. The Retroactive Changes Made by Section 4 Impair the Plaintiff Unions' Collective-Bargaining Agreements.

In many cases a statute impairs the obligations of a contract in violation of the Contracts Clause by nullifying or altering a specific, explicit term of the contract. Thus, as discussed above, Section 3 explicitly negates the provisions of the unions' CBAs that provide for payroll deduction of dues. But it has long been settled that a statute (or other governmental action) can violate the Contracts Clause even without explicitly targeting a specific term of a contract. As the Supreme Court has explained, "changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of

pre-existing contracts, *even if they do not alter any of the contracts' bargained-for terms*." *GMC v. Romein*, 503 U.S. 181, 189 (1992) (emphasis added).

Thus, for example, "laws affecting the enforceability of contracts … are subject to Contract Clause analysis because without them, contracts are reduced to simple, unenforceable promises." *Id.* at 189. As the Court put it in an early case:

> The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other…. *If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract*, in favor of one party, to the injury of the other … [and] is directly obnoxious to the prohibition of the Constitution.

*McCracken v. Hayward*, 43 U.S. 608, 612 (1844) (emphasis added). Put a bit differently, laws that "affect the validity, construction, and enforcement of contracts" are "implied into private contracts regardless of the assent of the parties." *Romein*, 503 U.S. at 189. And, in the labor arena, laws conferring or revoking a union's "certified" status are akin to laws in the commercial sphere governing capacity to enter into and enforce contracts, in that a union possessing that status may enter into and enforce new CBAs and a union lacking that status is barred from entering into new CBAs or enforcing an existing CBA. *See supra* at 3-4.

In this case, the parties entered into their CBAs with the expectation that, under existing Florida law, those contracts would remain in effect for their full term, subject only to the possibility of a decertification election during the final months of that contractual term. Indeed, not only was existing Florida law, including the contract-bar rule, Fla. Stat. §§447.307(3)(d), 447.308(1), incorporated as an implied term of the CBAs, but all of these contracts, by their explicit terms, have expiration dates that extend beyond the time when, under Section 4, the unions would be required to show 60% dues payers or submit to a decertification election. *See* supra at 12 (summarizing Plaintiffs' expiration and registration renewal dates). In short, it was the parties' settled expectation that, under then-existing Florida law, the Unions' CBAs would remain in effect for their full term, and that expectation was "so central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole, that it must be deemed to be a contract term." *Romein*, 503 U.S. at 188-89.

Section 4's recertification requirement undermines those settled expectations by changing the rules under which the union could be forced to submit to a decertification election. It does so in two respects: First, Section 4 alters the timing of a potential decertification election. Rather than being allowed only during a 60-day period near the end of the contract's three-year term, Section 4 creates the possibility that unions will have to submit to decertification elections as often as

annually. Second, and even more fundamentally, whereas under previous Florida law such a decertification election could be triggered only upon submission of signed statements by 30% of bargaining-unit members seeking to decertify their union representative (or to certify a rival union in its place), Section 4 requires a decertification election if the union is unable (annually) to show that it has 60% dues payers.

Beyond this, Section 4 also subjects a union to the risk of decertification if the union fails to comply with its new requirement that the union's financial statement not only be under oath (as under prior law) but audited by a CPA. Thus, Section 4 significantly increases the likelihood—compared to the legal regime in effect at the time these contracts were made—that a union will face the prospect of decertification and nullification of the entire CBA. It goes without saying that these changes in the law unsettle the reasonable expectations that the parties held at the time the contracts were made, thus undermining the obligations of these contracts.

The combined effect of Section 4's new recertification requirement and its new audit requirement is to diminish the value of the unions' collective-bargaining agreements to the union and its members, both by significantly increasing the possibility that these contracts will be invalidated before the end of their three-year term, and by imposing immediate, material costs on the unions—as the price of ensuring the continued validity of their CBAs—that they would not otherwise have

had to incur. Thus, unions will have to divert resources from other activities to fund campaigns to sign up additional dues-paying members. Then, if they fail to reach the 60% threshold, they must incur the additional cost of undertaking an election campaign to maintain union representation while paying half the cost of a decertification election itself. All that is in addition to obtaining a costly new audit. When the legislature requires a party to incur new expenses and burdens to maintain the duration and value of the contract it had already bargained for, the legislature impairs the value of that contract.

### C. The Threatened Nullification of the Unions' Collective-Bargaining Agreements is a Substantial Impairment.

If, as we have just shown, Section 4 constitutes an impairment of Plaintiffs' collective-bargaining agreements, then it should go without saying that the impairment is "substantial." This is not a case where a single, specific term of a contract is nullified. Rather, by imposing burdensome conditions that did not exist when the CBA was entered into, Section 4 threatens to nullify the entire CBA prior to its scheduled termination date, thus negating *everything that the union bargained for*. If this impairment is not "substantial," it is hard to imagine what would be.

We have previously discussed the Supreme Court's three-part standard for "substantiality" of impairment under the Contracts Clause: "the extent to which the law [1] undermines the contractual bargain, [2] interferes with a party's reasonable

expectations, and [3] prevents the party from safeguarding or reinstating his rights." *Sveen* 138 S. Ct. at 1822; *see supra* at 20-28 (discussing these factors in the context of Section 3). We see no need at this point to address the first of these, as it should be self-evident, from what we have already shown, that retroactive application of Section 4 undermines the parties' contractual bargains.

The other two factors require only brief discussion. We begin with the third. There is no low-cost way for the Unions to avoid the impairment of their contracts. To the contrary, to keep its contract intact a union will have to expend significant resources to mount an organizing campaign attempting to reach the 60% dues-payer threshold. *See supra* at 15-17. And, if that effort is not successful, it will have to devote additional resources to a certification election campaign. For neither of these is the outcome within the union's control (as in the examples noted above); and even if the union is ultimately successful, it will have devoted considerable resources to these organizing efforts.

In short, the mere possibility that a union could avoid losing its contract does not mean that its contract has not been substantially impaired by Section 4. An analogous case in this regard is *Equipment Manufacturers*, 300 F.3d at 854-55, where the court (on a pre-enforcement facial challenge) struck down under the Contracts Clause a South Dakota statute prohibiting farm equipment manufacturers from exercising their contract right to terminate dealers' contracts when the dealer

underwent a change of management or ownership—unless the manufacturer could show that the change would be detrimental to its product. That the manufacturer might ultimately be able to meet that standard was immaterial, the court made clear, as the manufacturers' "contract expectations … [we]re substantially disrupted" by the statute, which was "therefore a substantial burden on the contractual rights of manufacturers under the preexisting dealership agreements." *Id.* at 855.

As to the second factor—interference with reasonable expectations—the only conceivable argument Defendants might offer applies only to a subset of the Plaintiff Unions, and even as to them, it has no merit. In particular, the Legislature adopted a provision in the Education Code in 2018 applicable only to unions representing K-12 teachers (as opposed to unions like UFF, UFF-UF, and HUSW representing higher education faculty and staff and noninstructional K-12 employees). That provision required the covered unions to undergo a recertification election if fewer than 50% of their members were not dues payers as of a specified date. *See* Fla. Stat. §1012.2315(4) (2022) (repealed by SB256).

We anticipate that Defendants may invoke *Kansas Power* to argue that that provision put K-12 instructional unions on notice that their contracts could be nullified mid-term by any percentage threshold the Legislature might thereafter retroactively impose. Such an argument would be unavailing, because there is a

fundamental distinction between, on the one hand, laws like the price-cap statute at issue in *Kansas Power* that regulate primary conduct in the marketplace and, on the other hand, laws like those analyzed in *Romein* that "affect the validity, construction, and enforcement of contracts" themselves. 503 U.S. at 189. As we have shown, Section 4 is the second type of law. And, as to that type of law, what is "implied into private contracts regardless of the assent of the parties" are "the laws which subsist *at the time and place of the making of [the] contract*." *Id.* at 188-89 (emphasis added; internal quotations omitted). Here, those laws, as applied to the Plaintiff Unions representing K-12 teachers, included the now-repealed 50% rule but not the new and materially more demanding 60% rule accompanied with the new audit requirements. The Legislature therefore cannot change those laws retroactively without bringing about an impairment of the pertinent contracts.

Were the law otherwise, a State could circumvent the strictures of the Contracts Clause by, for example, passing a statute in year one that (prospectively) raised the age at which parties had the capacity to contract, and thereafter declare itself free to *retroactively* raise that age at any time notwithstanding the damage to core Contracts Clause values that such a serious unsetting of contractual expectancies would cause.

The short of the matter is that Section 4 works a substantial impairment of *all* of the Plaintiffs Unions' contracts.

### D. The Threatened Retroactive Nullification of the Unions' Collective-Bargaining Agreements is not Reasonable and Necessary to Achieve a Significant and Legitimate Public Purpose.

Nor can Defendants show that the new requirements of Section 4—and particularly their retroactive application to unions with existing contracts—are reasonable and necessary to achieve a significant, legitimate public purpose. While, to be sure, the state has a legitimate interest in ensuring that an exclusive bargaining representative enjoys the support of a majority of its bargaining unit, that objective is achieved through the initial certification of the union as bargaining agent, *see* Fla. Stat. §447.307(1)-(3), as well as the opportunity for that status to be challenged through a decertification election near the end of the CBA's term or when no CBA is in effect, §447.307(3)(d). Indeed, pre-existing Florida law, which codifies the "contract bar" doctrine prohibiting decertification petitions during all but the last months of the term of an existing CBA, *see id.*, demonstrates the obvious public interest in promoting the stability of union contracts. It is difficult to perceive any legitimate purpose whatsoever for a regime that could result in decertification elections every year during a three-year contract—and that is particularly so when applied retroactively to contracts that were entered into when no such rule existed.

Even if there were otherwise some important and legitimate public purpose—contrary to the contract-bar rule—for requiring or allowing a

decertification election in the middle of a contract term (or even annually, as contemplated by Section 4), there certainly would be no legitimate basis for triggering such an election on the basis of the union's failure to show that 60% of the bargaining unit are dues-paying union members. As Judge Posner explained some years ago:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to.

*Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989). The latter group—"free riders" who appreciate the union contract—"want[] merely to shift as much of the cost of representation as possible to other workers, i.e., union members." *Id.* And that is doubly true under a legal regime—as exists in Florida (and now in public-sector employment generally)—where bargaining-unit members who so choose can obtain many of the benefits of the CBA without having to pay any share of the costs. *See* ECF 97-14 ¶8; 97-11 ¶11. In short, the percentage of bargaining-unit members who pay union dues is never a reliable gauge of support for the union as collective-bargaining agent, and is a particular poor proxy where the there is a financial incentive for employees to free ride.

And, even apart from that consideration, where a union need obtain only a simple majority of the vote to prevail in a certification election, it is difficult to

discern any legitimate public purpose in requiring an annual showing that *sixty percent* of the members of the bargaining unit paid dues during the past year—or indeed any purpose at all other than to make it easier for unions to be stripped of their certification as collective-bargaining agents. That is surely not a legitimate public purpose that could justify the impairment of contracts.

Beyond these points, moreover, the absence of a significant and legitimate public purpose justifying Section 4 is also evident from two of the factors we discussed above with respect to Section 3. First, whatever justification might be mustered for the Section 4 rule were it to be applied only prospectively—and it is hard to imagine what that might be—cannot possibly explain why the Legislature has deemed it necessary to apply this new rule *retroactively* to abrogate existing contract rights. That is particularly the case given the potential impossibility, as discussed above, for many unions to comply in the short term with Section 4's audit requirement. *See supra* at 17-18.

Second, the selective application of Section 4's decertification provisions to disfavored unions makes it even more difficult to imagine how Defendants could identify some justification for the impairment of the Plaintiff' CBAs. Certainly, any urgent general social problem that would require that drastic remedy would apply equally to the exempted unions.

This is especially so with respect to the newly imposed requirement that unions' financial statements be audited by a CPA. Plaintiffs already have noted the implausibility of any legitimate justification for enforcing that requirement through revocation of a union's certification and the resulting nullification of its collective-bargaining agreement. *Supra* at 53-54. That implausibility becomes an impossibility when the differential treatment of favored and disfavored unions is added to the equation. That is because, although the police, fire, and corrections unions are not exempted from the audit requirement itself, these favored unions nevertheless *are* exempted from the prospect of decertification for noncompliance with that requirement. *See* §447.305(2), (7)-(8), (9). In this respect as well, it is impossible to imagine what legitimate public purpose could be so urgent as to require terminating existing CBAs as a penalty for noncompliance with the audit requirement—when the police, fire, and corrections unions are exempted from that penalty. Again, the only plausible explanation "can best be summed up as favoritism." *KEA* (ECF 97-20) at 12.

For all of these reasons, Defendants cannot possibly meet their burden of demonstrating that the newly imposed requirements of Section 4—which threaten to nullify the Plaintiff Unions' existing collective-bargaining agreements in their entirety—are reasonable and necessary to achieve a significant and legitimate public purpose.

## IV. A PERMANENT INJUNCTION IS NECESSARY TO REMEDY SECTION 3 AND 4'S UNCONSTITUTIONAL INTERFERENCE WITH PLAINTIFFS' RIGHTS.

Because both Section 3 and Section 4 violate the Contracts Clause, and because Section 3 likewise violates the First Amendment and Equal Protection Clauses, the PERC Defendants must be permanently enjoined from enforcing Section 3 or Section 4 as against any Plaintiff Local Union or the public employers for the remainder of their current CBAs, and PERC must be permanently enjoined from enforcing Section 3 against the Plaintiffs and public employers even after the Plaintiffs' current CBAs expire. The Defendant Public Employers, for their part, should be permanently enjoined from invoking Section 3 and Section 4 in any forum as a basis for refusing to honor the provisions of their current CBAs with the Plaintiff Unions. The particulars of the requested permanent injunction are set forth in the [Proposed] Order submitted to the Court contemporaneously with this memorandum.

Only a permanent injunction against enforcement of or reliance on Sections 3 and 4 will provide the Plaintiffs with complete relief. "To obtain a permanent injunction, the moving party must show that (1) it has suffered irreparable harm; (2) remedies at law will not provide adequate compensation for the injury; (3) on balance, an equitable remedy is warranted; and (4) a permanent injunction will not disserve the public interest." *West Virginia v. U.S. Dep't of the Treasury*, 59 F.4th

1124, 1148 (11th Cir. 2023) (petition for rehearing *en banc* pending). All four factors counsel in favor of remedying the Plaintiffs' harm with a permanent injunction.

*1. Irreparable Harm*: Plaintiffs have established that they are currently suffering and will continue to suffer irreparable harm because of Sections 3 and 4.

Section 3's prohibition on the deduction and remittance of union dues by public employers is the direct cause of the significant reduction in dues revenue the Plaintiffs experienced between June 2023 and August 2023. ECF 97-10 ¶7; 97-11 ¶8; 97-12 ¶7; 97-13 ¶7; 97-14 ¶12. Plaintiffs, moreover, are unlikely to ever recoup even a small fraction of the membership dues that are currently going unpaid by those members who have voluntarily authorized the payment of dues to the Plaintiffs through payroll deduction but have yet to authorize the payment of dues through an alternative dues-payment mechanism. *See Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (risk of irreparable harm existed when state action impedes the collection of many small payments with "no guarantee of eventual recovery"). In addition, there is no prospect that the Plaintiff Unions will ever be able to recover the significant out-of-pocket costs they continue to expend in establishing and maintaining the eDues system. *See* ECF 97-8 ¶¶7-10 (outlining the vendor and service fees required to operate the eDues platform).

The ongoing harms caused by Section 4 will be, if anything, even more difficult to unwind after the fact. To begin with, Section 4's very existence weakens the CBAs by making them entirely defeasible before their agreed-upon term expires, unless the Plaintiffs meet new conditions. And Plaintiffs currently are expending significant resources to meet those new conditions, including organizing non-member employees to become dues-paying members to avoid the impact of Section 4's 60% requirement. ECF 97-14 ¶4-8, 13. That harm is irreparable, as of course would be the harm to Plaintiffs and their members if Plaintiffs were to be decertified because of Section 4 and see all of their contract protections vanish.

*2. No Remedy at Law*: That there is no adequate remedy at law follows directly from the above discussion of the irreparable harm Plaintiffs and their members will suffer if Sections 3 and 4 are not enjoined. But the inadequacy of damages remedies is particularly stark here, because Sections 3 and 4 express the policy of the State of Florida, and the Eleventh Amendment will protect Defendants from any damages accountability for the harms Section 3 and 4 cause to Plaintiffs. *See West Virginia*, 59 F.4th at 1148 (no adequate remedy at law where immunity from suit protected government from money damages); *see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (money damages inadequate when financial harm is caused by the State,

because a plaintiff "has no monetary recourse against a state agency … because of the Eleventh Amendment.").

*3. Balance of the Equities and the Public Interest*. Finally, the irreparable harms Plaintiffs and their members will suffer absent injunction of Sections 3 and 4 outweigh the nebulous harms Defendants might claim to suffer if no injunction issues. *See Odebrecht*, 715 F.3d at 1289. And because the government is a defendant in this action, the public interest also favors an injunction. That is especially true because the injunction Plaintiffs seek will not forever prevent Florida from advancing the policies claimed for the challenged sections of SB256.

With respect to both Contracts Clause causes of action, the proposed injunctions will run only until the end of the applicable Plaintiff's CBA; after the expiration of the CBAs, the State will be free to implement the relevant statutory provisions. Thus, the inconvenience caused by that pause in implementation is easily outweighed by the stability that results from allowing the contracting parties to adjust to the radical changes to PERA set forth in Sections 3 and 4. As to the First Amendment and Equal Protection causes of action, they rest on the proposition that Section 3's discriminations are either a façade for viewpoint discriminatory or so arbitrary and irrational as to promote no policy except naked

favoritism. The policies claimed to support Section 3 can be advanced through *uniform* legislation.

In short, the public interest is not served by the enforcement of unconstitutional statutes. *Id.* Instead, where, as here, the State seeks to enforce a statute that tramples on Plaintiffs' constitutional rights, the public interest is served by injunction of the offending provisions.

## CONCLUSION

For the foregoing reasons, the Court should declare that Section 3 and Section 4 are invalid and should enjoin Defendants' enforcement of or reliance on those provisions.

Respectfully Submitted,

s/ Leon Dayan
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DATED: September 5, 2023

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## RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), undersigned counsel for the Plaintiffs certifies that the foregoing Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, excluding those portions excluded by Local Rule 7.1(F), consists of 13,965 words.

/s Leon Dayan
Leon Dayan

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of September, 2023, I electronically filed the foregoing via CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s Leon Dayan

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