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

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| ALACHUA COUNTY EDUCATION ASSOCIATION, *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>DONALD J. RUBOTTOM, in his official capacity as chair of the Florida Public Employees Relations Commission, *et al.*,<br><br>*Defendants.* | Case 1:23-cv-00111-MW-HTC |

**PERC DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The briefing shows why Plaintiffs moved for preliminary injunctions on only a subset of their claims against SB256: it doesn't take much to show why the other claims are without merit. Section 1 doesn't violate Plaintiffs' freedom of association (Count II) for the simple reason that it doesn't dictate who can and cannot be members of an employee organization (*i.e.*, a union). Any public employee—or anyone else for that matter—remains free to join an employee organization subject to that organization's own criteria. Sections 1 and 3 do not violate the Equal Protection Clause (Counts III and VI) because rational-basis review applies, which those sections easily satisfy. And Section 4 does not violate the Contracts Clause (Count VII) because, among other reasons, it hasn't impaired a single contractual provision anywhere in Florida, much less "substantially impaired" one. The PERC Defendants are entitled to summary judgment on these secondary claims.

They are also entitled to summary judgment on the three claims the Court first saw this summer. Plaintiffs' Contracts Clause and First Amendment challenges to Section 3 (Counts IV and V) look just like they did before. That is particularly true for the Contracts Clause claim;

Plaintiffs' six briefs across their preliminary injunction and summary judgment motions are largely the same. For the same reasons the Court denied Plaintiffs' second preliminary injunction motion (and others), the Court should enter judgment for the PERC Defendants on that claim. As for the First Amendment challenge to Section 3, the Supreme Court's decision in *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009), controls as much today as it did in June.

That leaves only Plaintiffs' compelled speech claim against Section 1 (Count I). Nothing has changed there, either. Plaintiffs' challenge is not to Section 1 itself because that section "does not command Plaintiffs to take … action." ECF 45, at 5. And "by the terms of the statute, Plaintiffs are not directly penalized if they fail to convey the state's message to members through the required form. In this way, this case is unlike each of the compelled speech cases Plaintiffs cite in support of their claim." *Id.* at 5-6. So, Plaintiffs focus on a proposed rule implementing Section 1. The problem there? That rule has been pending since May, the parties and the Court addressed the rule in the first round, and the Court rejected Plaintiffs' argument that the rule compels them to convey Florida's message. *Id.* at 5-7.

Plaintiffs try a strange pivot to avoid a similar outcome here. They no longer focus on compelled speech cases to prop up their claim that Section 1 violates "the 'compelled speech' doctrine." ECF 123, at 44. They instead combine strange bedfellows—(1) the test for bringing a "pre-enforcement challenge" to vague speech restrictions on campus and (2) the unconstitutional conditions doctrine—to compose a new theory for compelled speech claims. The Court should reject this belated attempt to reframe their compelled speech claim into something new. The claim fails in its new iteration anyway. Plaintiffs remain free to speak and not speak as they wish—as are all employee organizations in Florida—and nothing in Section 1 or the proposed implementing regulation requires Plaintiffs to adopt Florida's governmental speech.

## BACKGROUND

A brief rejoinder to Plaintiffs' introduction to its last brief is necessary to address PERC's implementation of SB256. *See* ECF 123, at 8-12. SB256 went into effect on May 9 this year, and PERC almost immediately began the process of implementing the law because its provisions were set to go into effect on July 1 and October 1. To facilitate that process, PERC published a wide-ranging set of rule developments covering many

implementing rules. ECF 115-8. Included was a proposed rule that provided: "If a public employee has not delivered a signed and dated PERC Form 2023-1.101 to the employee organization as required by [Section 1], the employee may not be counted as an employee in the bargaining unit who paid dues to the employee organization under [Section 4]." *Id.* at 2. That proposed rule would be codified at Fla. Admin. Code §60CC-6.104.

PERC started implementing SB256 by first creating the form that Section 1 requires because that obligation kicked in July 1. *See* Fla. Stat. §447.301(1)(b); Fla. Admin. Code §§60CC-1.101. PERC then moved on to implementing SB256's statutory exemptions because of the urgency that many unions placed on that issue. *See* Fla. Stat. §447.301(1)(b)(6); Fla. Admin. Code §60CC-6.104. Issuing rules like these, however, requires far more than the snap of a finger. *See* Fla. Stat. §120.54(2). PERC must provide "notice of the development of proposed rules," hold "public workshops for purposes of rule development," and then publish notices of the proposal 28 days before the rule goes into effect. *Id.* §§120.54(2), (3)(a)(1)-(2). And after that, proposed rules are subject to preemptive challenges at the Division of Administrative Hearings. *Id.* §120.56. This process can be laborious. For example, PERC first proposed its rules for the statutory

exemptions on May 30, and the administrative process ended only on October 6 with the rule going into effect on November 7. *See Florida Police Benevolent Assoc., Inc. v. PERC*, 2023 Fla. Div. Adm. Hear. Lexis 429 ¶¶29-70 (Oct. 6, 2023); Fla. Admin. Code §60CC-1.104. PERC has issued two additional rules since SB256 was enacted, Fla. Admin. Code §§60CC-5.101, -6.401, and at least eight additional rules are pending consideration.

Among those pending rules remains Fla. Admin Code §60CC-6.104. Contrary to Plaintiffs' aspersions, PERC did not propose that rule, "abandon[]" it, and then "reverse[] course" last month. ECF 123, at 8-11. Rather, there were other rules that PERC directed its attention to first, and now it is on to §60CC-6.104. ECF 115-9, at 1. PERC is not an agency with unlimited resources, and it apportions its time accordingly.

To be sure, it appears that Plaintiffs convinced themselves that the proposed §60CC-6.104 was rescinded due to passing statements by one of PERC's three commissioners. Plaintiffs' view ignores the fact that the parties intensely litigated the proposed rule's import at the preliminary injunction stage and PERC prevailed. Moreover, PERC disputes the characterization and import of those comments made during discussions

about pending rules implementing SB256. But they make no difference to the outcome of this case challenging the constitutionality of the legislation in any event. The Court was familiar with the proposed rule this summer and ruled against the Plaintiffs. The same outcome should obtain here.

## ARGUMENT

### I. Defendants are entitled to summary judgment on Plaintiffs' Section 3 Contracts Clause claim (Count IV).

The parties have well covered the question of whether Plaintiffs have a cause of action under §1983 or directly under the Constitution. There is no need to retread that ground here. The PERC Defendants focus instead on the merits.

#### A. Section 3 does not substantially impair existing contract rights.

***(1) Reasonable expectations.*** Plaintiffs try to minimize the CBAs' clauses that expressly contemplate changes in the law and provide, for example, that those changes "shall take precedence when inconsistent with this agreement." ECF 97-6, at 15. Plaintiffs suggest that the Court give no weight to these clauses because they are merely "basic default rules that apply even in the absence of a savings clause." ECF 123, at 21. The Supreme Court itself rejected that premise in *Kansas Power*.

*See Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) (noting that "the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law."). And contracts typically don't include superfluous provisions that do no independent work. *See, e.g.*, *Tita v. Tita*, 334 So. 3d 646, 650 (Fla. Dist. Ct. App. 2022).

But even if Plaintiffs' premise were right, the CBAs do more than just recount "basic default rules." Two of them, in fact, expressly give the unions the right to "reopen negotiations" when a provision becomes "invalid during the life of this contract through legislative action." ECF 97-2, at 19; *see also* ECF 97-3, at 147. In other words, the CBAs reveal the parties expected that additional regulation in the field may supersede CBA provisions. *See* ECF 106, at 39.

***(2) Safeguarding interests.*** Plaintiffs argue that their "rapid pivot to the eDues alternative cannot be held against them" because that would "put contracting parties in an unfair dilemma every time a bill is proposed that could impair their contract rights: if they begin to mitigate their harm in anticipation of the bill's passage, their diligence would count against them." ECF 123, at 23-24. But the law rarely allows an

alleged victim to "sit back and do nothing." *Id.* at 24. The law requires plaintiffs in contract actions, for example, to mitigate their damages. *See, e.g.*, *Winter v. Am. Auto. Ass'n*, 149 So. 2d 386, 387 (Fla. Dist. Ct. App. 1963). The law requires the same of plaintiffs in employment actions. *Moreland v. Suntrust Bank*, 981 F. Supp. 2d 1210, 1212 (M.D. Fla. 2013). There is nothing remarkable about asking a plaintiff to engage in self-help. Indeed, that's the entire purpose of this prong of the analysis. If a plaintiff has the option to "safeguard[] or reinstat[e] his rights," *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018), that suggests the impairment is not "substantial" because a plaintiff can mitigate the harm. And the Supreme Court expects plaintiffs to take advantage of that option.

More broadly speaking, Plaintiffs' primary contention is that this factor weighs in their favor because they cannot reinstate their exact contract right of dues deduction. The Supreme Court, however, has spoken in terms of "safeguarding *or* reinstating" rights. Plaintiffs have already made substantial progress safeguarding against the loss of dues deduction. *See* ECF 116-1, at 28; *see also Sveen*, 138 S. Ct. at 1824 (a party's opportunity to safeguard their interests over "several months" weighs against substantial impairment). And as the Court has already

explained, Plaintiffs are free to reinstate their "right to have the public employer facilitate collection of dues for the union" via collective bargaining. ECF 106, at 34-35. Section 3 "only eliminates one way that public employers *facilitate* the collection of union dues." *Id.* at 35 (emphasis in original). Others remain. Plaintiffs have several avenues to mitigate Section 3's effect. *See id.* at 37.

***(3) Contractual bargain.*** Plaintiffs have largely rested this factor on the notion that they "would have demanded concessions elsewhere in the CBA as a condition of removing the payroll-deduction provisions." ECF 99-1, at 20. Five declarants repeat that party line nearly verbatim. ECF 97-3, ¶10; ECF 97-2, ¶10; ECF 97-6, ¶8; ECF 97-7, ¶7; ECF 97-5, ¶9. Yet when put to the test on what concessions they would have demanded, Plaintiffs cannot even identify a *category* of issues they would have renegotiated over, much less actual "concessions" that they "would demand." ECF 123, at 19 n.1; *see also* ECF 115-14, at 9. And even those Union Plaintiffs that have the right to reopen negotiations because of Section 3 haven't done so. *See* ECF 115-14, at 10.

These failures only underscore that this factor does not turn on a plaintiff's self-serving statements on a provision's importance. Every

plaintiff will *always* say the impaired provision was important—otherwise they wouldn't go through the trouble of filing a lawsuit. The proper analysis is to look at the provision's place in the entire contract. And here, dues deduction is "only an ancillary provision in each agreement that describes how the employees' bargaining representatives receive membership dues." *See Miami Beach Mun. Emps. AFSCME Local 1443 v. PERC*, 23-CA-1492 (Cir. Ct. Leon Cnty. June 30, 2023) ("*Miami Beach I*") (ECF 115-18), ¶23.[1]

### B. Section 3 is "drawn in an 'appropriate' and 'reasonable' way to advance a significant and legitimate public purpose."

Even if Section 3 substantially impairs Plaintiffs' CBAs, the "law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant

[1] Plaintiffs argue (at 13-14, 19) that the Calloway Declaration is "inadmissible hearsay." But his testimony based on his personal knowledge. ECF 115-1, ¶¶2-3, 5, 9-12. Of course, evidence "that is otherwise admissible may be accepted in an inadmissible form at summary judgment stage" so long as it "can be reduced to an admissible form" at trial. *Rowell v. BellSouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005) (citing *Macuba v. Deboer*, 193 F.3d 1316, 1324-25 (11th Cir. 1999)). Testimony, including in the form of sworn declarations, is the quintessential example of such evidence; and it is always admissible when based "on personal knowledge" because such declarations "set out facts admissible at trial." *Vondriska v. Cugno*, 368 F. App'x 7, 9 (11th Cir. 2010). Mr. Calloway's declaration testimony is competent summary judgment evidence.

and legitimate public purpose.'" *Sveen*, 138 S. Ct. at 1822. On this tailoring analysis, Plaintiffs attempt to subject the law to heightened scrutiny because "some of the impaired CBAs … are contracts between the State and disfavored unions." ECF 123, at 26. Yet none of these contracts are with the State itself, though it makes no difference. "[T]he real issue" on deference "is not so much whether the state is arguably a nominal party to the contract, but whether the state is acting in its own pecuniary or self-interested capacity." *Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciete*, 125 F.3d 9, 16 (1st Cir. 1997).

Florida was not acting in such a capacity. The cost to facilitate dues deduction is nominal. *See, e.g. Int'l Union of Operating Eng'rs v. Hous. Auth. of the City of Sanford*, 17 FPER ¶22025, 1990 WL 10612293 (Dec. 11, 1990) (requesting $600 per year to facilitate dues deduction). And Florida law has always guaranteed employers the option to negotiate reimbursement of those costs. *See* Fla. Stat. §447.303 (2022) (amended by SB256); ECF 97-2, at 24 (providing for reimbursement). So this is not "the sort of case in which the state legislature 'welches' on its obligations as a matter of 'political expediency.'" *Buffalo Tchrs. Fed'n v. Tobe*, 464 F.3d 362, 370 (2d Cir. 2006). As a result, the Court must "defer to

legislative judgment as to the necessity and reasonableness of a particular measure." *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977).[2]

No matter the deference applied, however, Section 3 is drawn "in an 'appropriate' and 'reasonable' way." Plaintiffs make four basic arguments about the "fit" between Florida's goal of transparency and Section 3's requirements. *See* ECF 123, at 24-25. Each fails. To start with, transparency is not "a post hoc justification because the legislature itself did not ground the need for Section 3 on transparency." *Id.* at 17. To be clear, "it is not necessary for a legislative body to 'articulate its reasons for enacting a statute.'" *INS v. Chadha*, 462 U.S. 919, 958 n.23 (1983). But the legislators did here anyway. Defendants have cited several examples in that legislative history identifying "transparency" as the reason for passing SB256. *See, e.g.*, Floor Statement, House State Affairs Committee 1:12:42 (Apr. 11, 2023), https://tinyurl.com/4249umje; Floor Statement,

[2] That granting payroll access does not cost public employers much doesn't mean it isn't also a "subsidy" to the unions. *See* ECF 123, at 25. The unions clearly value it as a subsidy. As does a client value a lawyer's pro bono work even though it costs the lawyer very little. In any event, PERC is not trying to "have it both ways." *Id.* The Supreme Court has called payroll access a subsidy for First Amendment purposes. *Ysursa*, 555 U.S. at 364. The PERC Defendants are bound to use that terminology when addressing that claim.

Constitutional Rights, Rule of Law and Government Operations Committee 8:45 (Mar. 16, 2023), https://tinyurl.com/34tbpded. Section 3's transparency rationale thus comes directly from the legislators themselves.

Next, Plaintiffs claim that "Section 3 is far less effective at furthering transparency than a simple disclosure statute." ECF 123, at 24-25. It is true, of course, that there may be other ways to accomplish Florida's transparency goal. But this is not strict scrutiny; Florida's solution does not have to be narrowly tailored. The question under the Contracts Clause is whether the "state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Sveen*, 138 S. Ct. at 1822. "[E]nsuring … transparency and accountability" is a "legitimate public purpose." *Conn. St. Police Union v. Rovella*, 36 F.4th 54, 63 (2d Cir. 2022). And prohibiting dues deductions is an "appropriate" and "reasonable" way to "advance" that purpose. That there may be *other* "appropriate and reasonable" ways to do so does not undermine what Florida has chosen to do.

Plaintiffs third argument fails for the same reason. They argue that Section 3 is "no better at informing members about the amount of their dues than payroll deduction." ECF 123, at 24. But as already explained,

the union recruitment process makes it "common for teachers to forget that they had authorized the union to collect dues directly from their paycheck. This often leads to teachers not knowing how much they pay their unions in dues each year." ECF 115-1, ¶10. In other words, dues deduction happens before the employee's money is deposited into his or her bank account, so it is less likely to be seen. Plaintiffs may disagree with Florida's solution, but that doesn't mean Florida violated the Constitution by using it.

*Fourth*, Plaintiffs claim that the Legislature's decision to exempt police, corrections, and firefighter unions undermines the transparency rationale. ECF 123, at 25. PERC Defendants have addressed Plaintiffs' various versions of this argument many times. *See* ECF 116-1, at 10-11. Florida's historical differentiation between public-safety officials and other public employees justifies the exemption, and it was the Legislature's basis for the distinction in this law. *See, e.g.*, ECF 116-1, at 20 (citing floor statements).

## II. Defendants are entitled to summary judgment on Plaintiffs' other Section 3 claims (Counts V-VI).

Defendants are also entitled to judgment as a matter of law on Plaintiffs' challenges to Section 3 under the First Amendment (Count V), and Equal Protection Clause (Count VI).

### A. Section 3 does not violate the First Amendment.

Plaintiffs have little to add in their two pages on this claim. ECF 123, at 27-28. Their primary tack is to try to tie *Ysursa*—which is a case about dues deduction that plainly applies here—to *Cornelius*—which is a case about nonpublic forums that does not apply. According to Plaintiffs, however, there is a "throughline through both *Ysursa* and *Cornelius*" that should lead the Court to read them together. ECF 123, at 27. That analysis is not how First Amendment scrutiny works. The Supreme Court has laid out different levels of First Amendment scrutiny for different contexts that range from very little scrutiny (government speech, for example) to strict scrutiny (content-specific restrictions, for example). *See Morial v. Judiciary Comm'n of State of La.*, 565 F.2d 295, 300 (5th Cir. 1977) ("The standard to be applied in any case is a function of the severity of impairment of first amendment interests."). Plaintiffs cannot pick and choose—much less combine—the standards that apply here.

This is a payroll deductions case, and that is why the Seventh and Sixth Circuits have concluded *Ysursa* controls in these exact circumstances. *See Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 647 (7th Cir. 2013); *Bailey v. Callaghan*, 715 F.3d 956, 958-59 (6th Cir. 2013). Plaintiffs hardly mention those cases in any of their briefing, much less distinguish them (or *Ysursa* for that matter). *Cornelius* is no help on its own terms anyway. The Court there found that the law was "facially" lawful and "express[ed] no opinion on the question whether petitioner's explanation is merely pretext for viewpoint discrimination." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Plaintiffs admit that this is not "an as-applied challenge," ECF 123, at 28; it is a facial challenge to SB256. On that score, Plaintiffs *still* have not identified a single case that permits courts to look at the structure of a facially neutral law and derive improper motive under the First Amendment. That omission is because no cases exist; courts can't look past the law itself. *See In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015) (citing *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). If in the future, Section 3's ban on payroll contributions "is not enforced evenhandedly,

plaintiffs are free to bring an as-applied challenge." *Ysursa*, 555 U.S. at 361 n.3.

**B. Section 3 does not violate the Equal Protection Clause.**

Plaintiffs offer two responses on the Equal Protection Clause. First, they claim that none of PERC Defendants' potential justifications for Section 3 have a rational relationship to its treatment of unions. ECF 123, at 29 (citing *USDA v. Moreno*, 413 U.S. 528, 534 (1973)). Many courts have disagreed. *See, e.g.*, *WEAC*, 705 F.3d at 657 ("Wisconsin's differential treatment of general and public safety unions [for payroll deduction] is supported by its concern for labor peace among the public safety employees."); *see also id.* at 654 (finding *Moreno* inapplicable); *Miami Beach Mun. Emps. AFSCME Local 1443 v. PERC*, 23-CA-1492 (Cir. Ct. Leon Cnty. Oct. 3, 2023) ("*Miami Beach II*") (ECF 115-19), ¶¶13-15; *Iowa State Educ. Ass'n v. State*, 928 N.W.2d 11, 18 (Iowa 2019) (collecting cases).

Second, Plaintiffs argue that (1) Section 3 treats only *unions* differently and (2) Florida has a history of treating only *employees* differently. This argument only matters as to whether the outlying Kentucky trial court—which turned its analysis on this issue—has any persuasive value here. *See* ECF 116-1, at 42-43. It doesn't. *See WEAC*, 705 F.3d at 657.

Even so, both of Plaintiffs premises are wrong. Florida has treated public-safety unions differently than other unions before. *See, e.g.*, Fla. Stat. §447.3075 (providing different rules for the size of law enforcement bargaining units). And Section 3 treats employees differently too: all public sector employees other than public-safety employees are prohibited from paying dues via a payroll deduction. Plaintiffs' argument fails even on its own terms.[3]

## III. Defendants are entitled to summary judgment on Plaintiffs' Section 4 Contracts Clause claim (Count VII).

### A. The Union Plaintiffs lack standing to challenge Section 4.

PERC Defendants explained how Plaintiffs lack standing as injured parties because they have not identified an allegedly impaired contractual provision for their benefit. To the contrary, they conceded that

[3] Section 3 also treats public-safety employees differently because they are typically not in "one centralized location" to meet with union officials to pay their dues. *See* Floor Statement, Committee on Governmental Oversight and Accountability 48:03 (Mar. 7, 2023), https://tinyurl.com/yvy7e7u5. Plaintiffs attempt to undermine that justification—because everyone now pays automatically through eDues and doesn't need to meet in person—doesn't survive their own evidence. Plaintiffs themselves have said "signing members up for eDues requires as many people in the field as possible visiting every school and meeting face-to-face with each member." ECF 97-14, at 4 ¶9.

"[t]here are no provisions of the CBAs that are for the benefit of the Unions and not for employees." ECF 115-13, at 9. And Union Plaintiffs lack associational standing because they have not identified any specific union member allegedly injured by Section 4. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

Plaintiffs have not rehabilitated these deficiencies. First, Plaintiffs argue that "as parties to the impaired contracts," they "necessarily have standing to bring Count Seven on their own behalf." ECF 123, at 31. But Plaintiffs cite no authority for this theory, which contravenes the fundamental rule that Article III standing requires an actual injury regardless of the legal theory a plaintiff proffers. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992). Being party to a contract, by itself, does not automatically confer standing. *See Case v. Ivey*, 542 F. Supp. 3d 1245, 1264-65 (M.D. Ala. 2021) (plaintiff lacked standing to bring a Contracts Clause challenge despite being a party to the allegedly impaired contracts).[4]

[4] In a footnote, Plaintiffs try to walk back their concession that "[t]here are no provisions of the CBAs that are for the benefit of the Unions and not for employees." ECF 115-13, at 9. What Plaintiffs meant, they argue, is that some CBA provisions are for the benefit of employees *and* the unions. ECF 123, at 32 n.7. The Court should reject this wordplay. But even if any CBA provisions are for the unions' benefit, Plaintiffs

Plaintiffs also argue they have standing because they are diverting resources to avoid the potential for future decertification. ECF 123, at 31-32. But "diversion of resources, standing alone, does not suffice to establish standing." *City of S. Miami v. Gov. of Florida*, 65 F.4th 631, 639 (11th Cir. 2023). That rule exists because "'an organization can no more spend its way into standing based on speculative fears of future harm than an individual can.'" *Id.* And as Defendants have explained, any potential that a Plaintiff union will be decertified is unripe for review. ECF 116-1, at 46-51.

Second, Plaintiffs rely on associational standing even though they still have not identified a single specific member allegedly injured by Section 4. ECF 123, at 32. It is black-letter law that "organizational standing … require[s] plaintiff-organizations to make specific allegations establishing that at least one identified member ha[s] suffered or w[ill] suffer harm." *Summers*, 555 U.S. at 498; *see also Georgia Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018) (holding *Summers* abrogated precedent allowing associational standing where plaintiff did not

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still have not identified them, and it is their burden to do so to establish standing.

"identify particular members" allegedly harmed). Plaintiffs' inability to identify even one injured member dooms their associational standing theory.

### B. Plaintiffs' challenge to Section 4 fails.

#### 1. Any challenge to a future decertification is unripe.

Plaintiffs appear to be asserting only that Section 4 has already impaired their CBAs and that violates the Contracts Clause. ECF 123, at 26 ("[T]he Unions have *already* suffered injury because Section 4 has altered the terms that govern the duration of their CBAs."). If that is Plaintiffs' theory, then all agree that it is ripe for adjudication—subject to the standing defects just addressed.

Perhaps the parties are talking past each other, however, because it is still not entirely clear to PERC Defendants whether Plaintiffs are asserting an additional theory. That is, they are claiming that a *future* decertification—were it to happen—would constitute an independent, additional Contracts Clause violation at that point in the future. *See, e.g.*, ECF 123, at 34 (highlighting "[t]he Plaintiffs Unions' diversion of resources to avoid decertification"). And as a result, they want a declaratory judgment today that a future decertification caused by Section

4 would violate the Contracts Clause. If that is their theory, then it is not yet ripe. *See* ECF 116-1, at 47-51.

**2. Section 4 does not modify or impair any existing contract right.**

Section 4 does not modify any provision of Plaintiffs' CBAs, nor does it make any part of their CBAs unenforceable. ECF 116-1, at 51-54. To the contrary, it merely adds to the regulatory requirements that Florida has long imposed on certified public-employee unions. In response, Plaintiffs contend that they contracted against the backdrop of the old regulatory scheme, and Florida may not change that scheme while their contracts are in effect. But numerous courts, including the Supreme Court, have explained that Plaintiffs may not use the Contracts Clause to ossify the regulatory landscape in this way. *See Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187-190 (1992); ECF 116-1, at 53-54 (collecting federal court of appeals cases).

Plaintiffs resist this conclusion by ignoring the result in *Romein* and instead emphasizing *Romein*'s statement that "laws affect[ing] the validity, construction, and enforcement of contracts" may be subject to Contract Clause scrutiny. 503 U.S. at 189; *see* ECF 123, at 37-38. Yet it should be undisputed that Section 4 does not affect the validity,

construction, or enforcement of anything in Plaintiffs' CBAs *today*. "The parties still have the same ability to enforce the bargained-for terms of the … contracts that they did before [Section 4] was enacted." *Romein*, 503 U.S. at 190. Every provision remains in effect.

Adopting Plaintiffs' broader theory would mean that any change to background regulations would work a contractual impairment—even if the new requirements had not caused any contractual provision to be nullified. This approach flips *Romein* on its head. Like the theory rejected in *Romein*, Plaintiffs' approach "would severely limit the ability of state legislatures to amend their regulatory legislation," and allow parties to "evade regulation by entering into long-term contracts." *Id.*

The federal court of appeals are aligned on this point. *See* ECF 116-1 at 53-54 (citing those courts); ECF 123, at 38 n.9 (briefly addressing them). A plaintiff must point to specific contractual terms abrogated by the challenged law. In *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), for example, the plaintiff argued that background regulatory changes "impair[ed] 'the very value bargained for' in the agreement." *Id.* at 1151. The Ninth Circuit rejected that theory, holding that the Contracts Clause "subject[s] only state statutes that impair a specific

(explicit or implicit) contractual provision to constitutional scrutiny." *Id.* "Compliance with nearly all environmental, workplace-safety, and public-health regulations requires private entities … to divert resources that could otherwise be realized as profits by their owners." *Id.* "Adoption of [the plaintiff's] rationale would subject all such measures to constitutional scrutiny, an approach the Supreme Court rejected more than half a century ago." *Id.* To PERC Defendants' knowledge, every other federal court to consider a similar theory of impairment has also rejected it. *See Boyz Sanitation Servs. v. City of Rawlins*, 889 F.3d 1189, 1196 (10th Cir. 2018); *AMEX Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 370 (3d Cir. 2012).

Notably, the only "courts" that Plaintiffs can point to for its contrary view is one Idaho state court case that follows a "see, e.g." citation. ECF 123, at 38. And that case is no help anyway. There, companies bought insurance from the Idaho State Insurance Fund, which itself is a state agency. *CDA Dairy Queen, Inc. v. State Ins. Fund*, 299 P.3d 186, 189 (Idaho 2013). The Idaho statutes that set the Fund's premium structure and repayment procedures were "'written into, and become an integral part of, [the Fund's] workers' compensation insurance policies.'" *Id.* at

195. The Legislature made retroactive changes to those statutes and, by extension, the portions of the contracts that adopted them. *Id.* The court held those retroactive changes impaired the plaintiffs' insurance contracts under *Romein*: "The statutes are essential to the contracts and their enforcement because the [insurance] policies do not mention the premium amount or how it is calculated and no valid contract could exist without the statutes." *Id.* In other words, the insurance contracts at issue expressly relied on Idaho statutes to set a critical contractual term with a state agency—the formula for calculating premiums—so Idaho could not unilaterally and retroactively change that term without implicating the Contracts Clause. To describe the facts of *Dairy Queen* (which Plaintiffs decline to do) is to distinguish it, because the CBAs here do not incorporate any statutory provisions retroactively modified by Section 4.

**3. Section 4 does not substantially impair any CBA.**

Even if Section 4 impairs Plaintiffs' CBAs, it does not "substantially impair" them. Plaintiffs do not respond to any of the points that PERC Defendants made concerning the 60% threshold. *Compare* ECF 116-1, at 54-57, *with* ECF 123, at 42-43. And they don't even mention the audit requirement. Instead, they argue that PERC's proposed regulation

(§60CC-6.104) would make the 60% threshold harder to reach, and, even if Section 4 is permissible, that proposed regulation is a bridge too far.

But the fundamentals here remain the same. ACEA, Pinellas CTA, and Lafayette were already subject to a 50% dues-paying threshold that could lead to a recertification election if missed. And Hernando USW and UFF-UF were on notice that Florida may impose a similar threshold requirement on them. The proposed regulation doesn't change any of that. In other words, the "subject matter of the contract itself [was] already subject to state regulation," *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1203 (11th Cir. 2019), *i.e.*, the metrics by which unions become and remain certified.

Even then, missing the 60% threshold does not automatically cause decertification; it leads only to a certification election. And Plaintiffs do not dispute that experience shows that incumbent unions are likely to win recertification elections. ECF 116-1, at 46-49; ECF 123, at 34. So the implementing regulation does little to alter the fact that Plaintiffs are unlikely to be decertified and their CBAs nullified.[5]

[5] Plaintiffs dispute PERC Defendants' additional points that even if a union were decertified, the CBA would not automatically terminate,

**4. Section 4 advances a legitimate public purpose.**

Even if Section 4 somehow substantially impaired a Plaintiff union's CBA, a legitimate public purpose justifies that impairment. Florida has a legitimate interest in ensuring that certified public-employee unions are supported by, and responsive to, the employees in the bargaining unit they represent. That assurance is necessary because certified bargaining units displace employees' ability to negotiate on their own behalf. ECF 116-1, at 59-60.

Plaintiffs do not dispute the importance of this interest. ECF 123, at 43. Nor do they dispute that requiring a showing of majority support for certified unions each year advances this interest. *Id.* Plaintiffs instead respond by questioning the fit between Florida's chosen means—the 60% threshold—and its concededly legitimate end of ensuring employees still support their exclusive bargaining agent. *Id.* at 43-44. Plaintiffs'

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and union members would not automatically lose their CBA protections because of Florida's status quo doctrine. *E.g.*, *City of Delray Beach v. Pro. Firefighters of Delray Beach*, 636 So. 2d 157, 161 (Fla. Dist. Ct. App. 1994). Tellingly, Plaintiffs cite no Florida cases to support their exposition of Florida's status quo doctrine. ECF 123, at 40-41. Florida cases make clear that a CBA's termination does not permit an employer to unilaterally change terms and conditions of employment. ECF 116-1, at 50-51. That fact further attenuates any risk to union members' CBA protections from Section 4.

argument is doomed because of the extremely deferential standard of review that governs this claim. *See Kansas Power*, 459 U.S. at 412-13 ("[A]s is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure'" (alteration omitted)). Plaintiffs' nitpicking about the extent of the "correlation between dues payment and support for union representation"—along with their contention that the prior regime was "already … reliable"—ignores that these kinds of legislative judgments are for Florida's elected representatives to make. ECF 123, at 36. Plaintiffs may think there are better ways to accomplish Florida's goal. But here again, this is not strict scrutiny. *See supra* 10-12. Florida need only show that its law "is drawn in an 'appropriate' and 'reasonable' way to advance a 'significant and legitimate public purpose.'" *Sveen*, 138 S. Ct. at 1822. It has done so.

## IV. Defendants are entitled to summary judgment on Plaintiffs' Section 1 claims (Counts I-III).

Plaintiffs have not moved for summary judgment on any of their three Section 1 claims because, according to them, the law "appeared to have little practical consequence." ECF 123, at 10. Plaintiffs' view changed only because PERC is moving forward with its pending proposed

regulation, Fla. Admin. Code §60CC-6.104. But that regulation was pending when the Court denied Plaintiffs' first motion for preliminary injunction as to Count I (compelled speech). The Court should enter judgment for PERC Defendants on that claim based on the same reasoning as in its prior decision. And the proposed regulation has no bearing on Count II (freedom of association) or Count III (equal protection).

### A. The Court should enter judgment in the PERC Defendants' favor on Plaintiffs' compelled speech claim.

#### 1. Section 1 and the proposed implementing regulation do not compel Plaintiffs to speak.

**a.** Plaintiffs do not quibble with most of the PERC Defendants' arguments why Section 1 does not compel any speech. Plaintiffs appear to accept that (1) the Section 1 form contains only government speech; (2) Section 1 requires only that a "public employee" must "sign and date" the form, Fla. Stat. §447.301(1)(b)(1); (3) Section 1 and the proposed regulation, on their face, do not command the Union Plaintiffs to speak at all; and (4) Section 1 does not penalize the Union Plaintiffs "if they fail to convey the state's message to members through the required form," ECF 45 at 5-6. These now-concessions all formed the basis of the Court's decision denying Plaintiffs first motion for preliminary injunction on their compelled speech claim. ECF 45 at 5-7.

Nothing has changed since then. The same proposed regulation implementing Section 1 is still pending before PERC, and it is now moving forward. *See* ECF 116-1, at 18-20. As Plaintiffs acknowledge, the Court disagreed that the proposed regulation made any difference. ECF 123, at 46; *see also* ECF 45, at 5. And Plaintiffs have still not identified any case holding that anything but a "statutory command" to speak can "amount[] to compelled speech." ECF 45, at 7. They fail to do so because "[t]he Supreme Court has only ever found a violation of the First Amendment right against compelled speech in the context of *forced speech* that requires the private speaker to embrace a particular government-favored message." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 188 (3d Cir. 2005) (emphasis added).

**b.** Of course, Plaintiffs still believe "the Court reached the incorrect conclusion at the preliminary-injunction stage." ECF 123 at 47. Yet they offer no reason to depart from that decision based on arguments the parties made at that stage. *Id.* Instead, Plaintiffs pivot from those arguments, effectively abandon compelled speech cases, and now ask the Court to apply (1) the test for a "pre-enforcement challenge" to vague speech *restrictions*, *see Speech First, Inc. v. Cartwright*, 32 F.4th 1110,

1119-20 (11th Cir. 2022), and (2) the unconstitutional conditions doctrine, *Bd. of Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). *See* ECF 123, at 48-51. Here again, Plaintiffs are trying to bootstrap rules from other doctrines to create a new rule that fits their claim. *See supra* 15-17.

That is not how the First Amendment works. The Supreme Court has outlined specific rules that apply in specific circumstances. Some contexts require strict scrutiny, *see, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (content-based restriction); others require intermediate scrutiny, *see, e.g.*, *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 73 (2022) (commercial speech); others require scrutiny akin to rational-basis review, *see, e.g.*, *Safelite Group v. Jepsen*, 764 F.3d 258, 259 (2d Cir. 2014), *(Zauderer*); others trigger no scrutiny at all, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015) (government speech); and so on. There is also a myriad of predicate, contextual questions to dictate what framework applies, such as whether a "forum" is "public" or "nonpublic." *Cornelius*, 473 U.S. at 797.

These rules are not haphazard. They are instead "a kaleidoscope of tests which are narrowly applicable in different factual contexts." *Pollack v. Regional Sch. Unit 75*, 12 F. Supp. 3d 173, 197 (D. Me. 2014). There is

no "throughline through" the First Amendment that allows plaintiffs to pick and choose parts from other standards, create a new standard out of those parts, and then apply that new creature to their case. *See* ECF 123, at 27. Frankenstein's monster has no place here. Plaintiffs' Count 1 is a compelled speech claim, and that requires the Court to apply compelled speech precedent to prevail.

**c.** Just explaining Plaintiffs' two new theories shows why courts must use the applicable First Amendment framework rather than mesh-ing multiple frameworks together. *Speech First* addressed whether a plaintiff could bring a "pre-enforcement challenge" to a vague college campus policy that *restricted* speech. *Id.* 32 F.4th at 1119. In that context, the plaintiff must "show (1) that he has 'an intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) that his conduct is 'arguably proscribed,' and (3) that he is subject to 'a credible threat of enforcement.'" *Id.* at 1119-20. The case had nothing to do with compelled speech. Rather, it addressed "[t]he fundamental question … whether the challenged policy 'objectively chills' protected expression." *Id.* at 1120. That "objectively chills" framework has a long pedigree. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Speech First*, 32

F.4th at 1122 (identifying *Bantam Books* as the "seminal case"). Yet Plaintiffs cite no court that has extended it to the compelled speech space; and PERC Defendants are not aware of one.

Plaintiffs' reliance on the unconstitutional conditions doctrine has even more problems. Most immediately, the Supreme Court has "ma[de] clear that an unconstitutional-conditions claim is its own constitutional cause of action." *Hillcrest Property, LLP v. Pasco County*, 915 F.3d 1292, 1299 (11th Cir. 2019). But Plaintiffs have not pleaded an unconstitutional conditions claim. "It seems as the litigation progressed, [Plaintiffs'] view of Count I[] progressed, too: What began as a [compelled speech] claim ended as an unconstitutional-conditions claim." *Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 726 (8th Cir. 2021). A plaintiff "may not amend [their] complaint through argument in a brief opposing summary judgment." *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). The Court should thus reject Plaintiffs' attempt to do so "through 'briefs and oral argument' rather than by 'filing an amended complaint.'" *Uradnik*, 2 F.4th at 726 (cleaned up).

Even if this unconstitutional condition theory is allowed to proceed, however, it is a poor fit for the facts of this case. It is not even a

"*substantive* First Amendment doctrine," as Plaintiffs argue. ECF 123, at 49. It is instead a theory that is "'predicated' on some *other* enumerated right," *Hillcrest*, 915 F.3d at 1299 (emphasis added), and broadly applies to rights across the constitutional spectrum from the taking of property to the right to travel, *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (collecting cases). The doctrine is also a famously opaque. "[T]he Supreme Court's line of unconstitutional conditions cases has been recognized as a troubled area of Supreme Court jurisprudence in which a court ought not entangle itself unnecessarily." *All. For Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 253 (S.D.N.Y. 2006) (alteration omitted). The doctrine has "long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting). It is not the foundation upon which to expand the compelled speech doctrine to new dimensions.

The far better path is to simply apply compelled speech principles. And the crux of a compelled speech claim is that the government directly

forces a private party to say something that it doesn't want to say. The problem that arises for Plaintiffs, however, is that Section 1 "neither limits what [they] may say nor requires them to say anything." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006). Unlike "the compelled speech in *Barnette* and *Wooley*," Section 1 "does not dictate the content of the [Plaintiffs'] speech at all." *Id.* at 62. And a command to speak is what Plaintiffs need to prevail. ECF 45, at 5-6. No such command exists in Section 1 or the proposed regulation.

**d.** The reason that Section 1 is not compelled speech is because the 91-word statement is nothing more than government speech. *See* ECF 116-1, at 70. Plaintiffs rely on faulty premises to try to get them from governmental to compelled speech. The proposed regulation, the argument goes, effectively requires the Union Plaintiffs to send the form to their members so that they will sign it (it doesn't). And the act of sending the form means the Union Plaintiffs are "compelled" to adopt the 91-word statement as their own (they aren't). Even if the first premise is correct, the second one is not: the mere act of sending the form does not require Plaintiffs to adopt the statement. If "[c]ompelling a law school" to send "scheduling e-mails" for "a military recruiter … is not the same as forcing

a student to pledge allegiance," *Rumsfeld*, 547 U.S. at 62, then neither is Plaintiffs emailing the form to their members. The form is still just government speech.

A recent case confirms as much. In *Anderson Federation of Teachers v. Rokita*, --- F. Supp. 3d ---, 2023 WL 2712267 (S.D. Ind. Mar. 30, 2023), the State of Indiana required a form almost exactly like the one here. There, unions were not entitled to payroll access as a matter of course. They had to get their members to sign a government-created form to do so, and that form had a similar statement as the one here: "The State of Indiana wishes to make you aware that you have a First Amendment right … to refrain from joining and paying dues to a union." *Id.* at *6. The court rejected the unions' argument that requiring the form was compelled speech; the form conveyed the government's speech. "Here, the dues deduction authorization form is a state form, created by state officials. The challenged advisement language required by [the law] was drafted and adopted by the Indiana General Assembly and written from the state's perspective." *Id.* at *10. Based on "these factors," the court explained, "we have little trouble concluding that the advisement as currently crafted is government speech." *Id.* So too here.

Nor did the *Anderson* form require anyone "to speak the government's message that they do not desire to adopt." *Id.* at *10. The prefatory statement—that "the State of Indiana wishes to make you aware"—made "clear that what follows is a message directed *to* the teachers that is crafted and spoken *by* the government, not a statement voiced or endorsed by the signee of the authorization form." *Id.* at *11; *see also B.W.C. v. Williams*, 990 F.3d 614, 619 (8th Cir. 2021) (explaining that for a similar form there was "'little risk' recipients of the form would believe that parents opting out were affiliating with the government's request *not* to opt out" (emphasis in original)). Florida's form contains the same type of prefatory language as in *Rokita*. *See* ECF 115-7, at 2 ("The State of Florida wants you to know the following …"). And for that reason, there is no reason to think recipients of the form would think that the 91-word statement was endorsed by the Union Plaintiffs.

**2. Section 1 (as implemented through the proposed regulation) satisfies *Zauderer*.**

**a.** Even if Section 1 and the proposed regulation implicated the First Amendment, the law allows for the truthful disclosure of factual information. "Laws that compel commercial disclosures … trigger relatively permissive First Amendment scrutiny." *NetChoice, LLC v. Att'y*

*Gen., Fla.*, 34 F.4th 1196, 1223 (11th Cir. 2022), *certiorari granted in part*. While "restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny," when "the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech … the less exacting scrutiny described in *Zauderer* governs." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010). Such a compelled disclosure must be only "'reasonably related to the State's interest in preventing deception of consumers.'" *Id.* at 250. The test is akin to "rational basis" review.[6]

Florida's "interest here is in ensuring that" public employees "are fully informed about" their rights. *NetChoice*, 34 F.4th at 1230. The state is hardly unique on this point. President Obama, for example, issued an Executive Order that compelled disclosure of employee rights to federal contractors. It provided that "[t]he attainment of industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights under Federal labor laws." Notification of

[6] *See, e.g., Safelite Group*, 764 F.3d at 259 (characterizing *Zauderer* as "rational basis review"); *King v. Governor of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014) (similar); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189 (4th Cir. 2013) (similar); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (similar).

Employee Rights Under Federal Labor Laws, Executive Order 13496 §1, (Jan. 30, 2009), https://tinyurl.com/3uvu39e3. President Bush issued a similar Executive Order, explaining that "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced." *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003). Section 1 serves similarly legitimate goals.

To this end, Plaintiffs briefly argue (at 59) that *Zauderer* requires Florida to prove that the disclosures will remedy a harm. But even then, a defendant needs to show only that the harm is "'*potentially real* not purely hypothetical.'" *NIFLA v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (emphasis added). That standard is low, as it is "in keeping with the 'minimal' interest that [speakers] have in refraining from 'providing any particular factual information.'" *Recht v. Morrisey*, 32 F.4th 398, 418 (4th Cir. 2022). Far from being a "potentially real not purely hypothetical" problem, there is ample evidence that public employees are often in the dark on their right to join or not to join a union and how the union spends their dues. *See* ECF 116-1, at 12-13; ECF 115-1, at 3-4, ¶¶9-10, 12; ECF

115-3, at 4, 11; ECF 115-5, at 112, 114.[7] For these reasons, Section 1 passes the *Zauderer* standard's "relatively permissive First Amendment scrutiny." *NetChoice*, 34 F.4th at 1223.

**b.** Plaintiffs also counter (at 54-55) that strict scrutiny should apply instead. Citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), they argue that Section 1 and the proposed regulation should be "subject to strict scrutiny because they require unions to interject government-prescribed statements … directly into their communications aimed at persuading prospective members to join." ECF 123 at 54. But the 91-word statement is not "inextricably intertwined with otherwise fully protected non-commercial speech." *Abramson v. Gonzales*, 949 F.2d 1567, 1575 (11th Cir. 1992) (cleaned up). "Nothing in the [law] prevents

[7] Plaintiffs attack the admissibility of the studies and reports that show confusion among public employees. ECF 123, at 13. This argument ignores "[t]he landmark case dealing with the admissibility of surveys and polls." *Debra P. v. Turlington*, 564 F. Supp. 177, 182 n.7 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984) (citing *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 682 (S.D.N.Y. 1963)). "The weight of case authority, the consensus of legal writers, and reasoned policy considerations all indicate that the hearsay rule should not bar the admission of properly conducted public surveys." *Zippo*, 216 F. Supp. at 682; *see also Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cnty.*, 630 F.3d 1346, 1358 (11th Cir. 2011) (acknowledging, in affirming summary judgment, that "[t]here is no precedent that bars a county from relying on studies that are not empirical in nature").

the speaker from conveying, or the audience from hearing, [any] noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages." *Bd. of Trustees v. Fox*, 492 U.S. 469, 474 (1989). That was not true in *Riley*, as the Court has already recognized, where the law required the disclosure "before an appeal for funds." 487 U.S. at 795; *see* ECF 45, at 6 (distinguishing *Riley*).

Next, Plaintiffs contend (at 55) that strict scrutiny applies because the 91-word notice requires "controversial" speech. On this point, Plaintiffs complain that the notice uses the phrase "Right to Work." But that is the title of the relevant provision of Florida's Constitution—first enacted in 1944—that the 91-word notice explains. *See* Fla. Const. Art. I, §6 (titled "Right to work"). And the notice tracks the text of that constitutional provision. *See id.* ("The right of persons to work ...."). The "right to work" is also a phrase that is used in the very first section of Florida's public-sector labor laws. *See* Fla. Stat. §447.01(1). A boilerplate statement repeating the law's very language is not "controversial." Were it otherwise, virtually every disclosure about what a law requires could be attacked as "controversial" and therefore subject to heightened scrutiny. *Cf. CTIA–The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (9th

Cir. 2019) ("We do not read the Court as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial.").

For these reasons, PERC Defendants are entitled to summary judgment on Plaintiffs' Section 1 speech claim.

### B. Section 1 does not violate First Amendment freedom of association.

Plaintiffs argue (at 60) that Section 1 infringes on Plaintiffs' First Amendment freedom of association by asserting control over how an individual may become a member of a union. That assertion is incorrect. To be as plain as possible: PERC has no control over who is a member of a union. Any employee can become a member of a union without signing the PERC Form, which makes clear that an organization "is not required" to use the form "as part of its membership application." ECF 116-1, at 74 (citing ECF 115-17, at 1). The PERC Form goes on to explain that "the organization is free to establish its own membership requirements," so SB256 and the implementing regulations have no control whatsoever on who or how an employee joins a union. ECF 115-17, at 1.

Plaintiffs get to a different result by conflating whether a public employee is a *member* of a union and whether that employee has complied

with his or her independent obligation to complete the form. Those are two very different things that have *no* effect on one another. To be plain again: Section 1 does require public employees who join a union to sign the form. That is why the statute says that "a public employee who desires to be a member of an employee organization must sign and date a membership form." Fla. Stat. §447.301(1)(b)(1). But that requirement is not a *condition* on membership; it is an independent obligation on employees. Those employees will remain union members *whether they sign the form or not*. There is no statutory or regulatory penalty that ejects a public employee from his or her union for failing to sign the form. Section 1 gives PERC no authority to do that.

That Plaintiffs ignore this reality is unfortunate. It is rare to find parties so eager to see a ghost. One could be forgiven for thinking that Plaintiffs do not like Section 1 as a general matter, want it eliminated, and are searching for ways to eliminate it—even if that means manufacturing a claim against an apparition to do so. The Court should reject this strategy.

Plaintiffs' second strategy (at 62-63) attempts to bootstrap their Section 4 Contracts Claim to this one. Even if Section 1 does not *actually*

dictate who is a member in an employee organization, Plaintiffs argue, an employee who does not sign the form "is not, in fact, a full-fledged dues-paying union member in the eyes of the State" because that employee will not count toward Section 4's 60% threshold. There is a lot to unravel there but here is the topline: this argument is not about burdening the freedom of association. It's about Plaintiffs trying to constitutionalize their perceived right to remain exclusive bargaining agents.

For reference, Plaintiffs are each just an "employee organization," which the code defines as "any labor organization, union, [etc.] which *represents*, *or seeks to represent*, any public employee or group of public employees concerning any matters relating to their employment." Fla. Stat. §447.203(11) (emphasis added). They are groups who advocate on behalf of employees, and they exist whether they are a certified bargaining agent or not. Florida cannot interfere with who these groups choose as their members, which is true whether or not they are certified bargaining agents.

What Florida can do, however, is decide the criteria and process by which an employee organization can become (or remain) a certified bargaining agent. *See* Fla. Stat. §§447.305, .307 (outlining how employee

organizations must register and be certified to become exclusive bargaining agents.); *id.* §447.203(12) (defining "[b]argaining agent"). What Plaintiffs want is not only to decide who their members are—a right the First Amendment guarantees. They also want to dictate the criteria by which they remain an exclusive bargaining agent, *i.e.*, how the 60% threshold is calculated—a purported right the First Amendment has nothing to do with. For these reasons, neither Section 1 nor the proposed rule violate Plaintiffs' freedom of association.

**C. Section 1 does not violate the Equal Protection Clause.**

Plaintiffs devote less than one page to their equal protection argument against Section 1. In doing so, they primarily refer back to their equal protection arguments concerning Section 3. *See* ECF 123, at 59 (citing "Part III.B, *supra*"). The PERC Defendants' responses on that claim address those arguments. *See supra* §II.B. Other than that, Plaintiffs suggest (at 60) that Florida must provide "evidence" to support its carveout in order to survive rational-basis review. That is not how rational-basis review works. Because "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature," "the absence of 'legislative facts'

explaining the distinction 'on the record' has no significance in rational-basis analysis." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). "In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.*

In any event, the Legislature crafted a narrowly targeted exemption from Section 1 for the same reasons as the other sections of the law, which accords with Florida's long-time treatment of public-safety employees. *See supra* 17-18. Section 1 easily survives rational basis review, and the PERC Defendants are entitled to summary judgment on Plaintiffs' Section 1 Equal Protection claim.

**V. Plaintiffs are not entitled to a permanent injunction.**

Plaintiffs are not entitled to any relief because each of Plaintiffs' claims is foreclosed as a matter of law. In addition, Plaintiffs cannot show irreparable harm and the remaining equitable factors to obtain a permanent injunction.

On irreparable harm as to Section 3, Plaintiffs do not dispute that they are owed back-dues from members that have stopped payment. And they have not explained why they can't recover those back-dues once a

member signs up for eDues (or some other payment method). Their claims of ongoing irreparable harm should be met with suspicion as a result. Indeed, Plaintiffs claim that "[e]ven if [they] eventually convert 100% of those members to eDues, Plaintiffs will *never* recover the *ongoing* losses caused by impairment of their payroll-deduction clauses." ECF 123, at 64 (emphasis added). It's hard to see how there can be "ongoing losses" when Plaintiffs have converted 100% of their members to eDues. Or why they would need an injunction to "stop that ongoing harm" when there is no harm ongoing. *Id.* It appears Plaintiffs want an injunction no matter what. But an injunction—whether preliminary or permanent—is a "drastic and extraordinary remedy, which should not be granted as a matter course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

On Section 4, Plaintiffs point to their "diversion of resources to avoid decertification" as the basis of their irreparable harm. ECF 123, at 65. But the costs of basic regulatory compliance are not the stuff of irreparable harm. *See, e.g.*, *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm.").

On the remaining factors, the State's interest in enforcing its laws may not be easily quantified, but it is still an important consideration. *See Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018). And here, that interest outweighs the Plaintiffs' purported harms in missing dues payments that they are entitled to recover and their diversion of resources to comply with the law.

## CONCLUSION

This Court should grant the PERC Defendants' cross-motion for summary judgment, deny Plaintiffs' partial motion for summary judgment, and enter judgment in favor of Defendants.

Dated: November 21, 2023

Respectfully submitted,

*/s/ Bryan Weir*

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## CERTIFICATE OF COMPLIANCE

Under Local Rule 7.1(F) and the Court's order granting additional words, ECF 122, undersigned counsel for the PERC Defendants certifies that the above memorandum, excluding those portions excluded by Local Rule 7.1(F), consists of 10,096 words.

*/s/ Bryan Weir*
Bryan Weir

## CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2023, I electronically filed the foregoing via CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

*/s/ Bryan Weir*
Bryan Weir