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

ALACHUA COUNTY EDUCATION ASSOCIATION, *et al.*,

Plaintiffs,

v.

DONALD J. RUBOTTOM, *et al.*,

Defendants.

Civil Action No. 1:23cv111-MW/HTC

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs' opening brief showed that Sections 1 and 3 of SB256 violate the First Amendment and Contracts Clause by failing the standards of scrutiny applicable to each constitutional provision. Defendants have responded with a series of arguments aimed at shielding Sections 1 and 3 from scrutiny altogether: that the "government speech" doctrine immunizes Section 1 from First Amendment challenge; that this Court cannot even *hear* Contracts Clause claims; and that statutes withdrawing "subsidies" can make speaker-based distinctions so facially incongruous as to suggest viewpoint discrimination but remain categorically unreviewable.

Given that Sections 1 and 3 are so difficult to defend on their merits, arguments that would insulate the merits from review are unsurprising. They are also unavailing, as are Defendants' fallback arguments. And it is even clearer now than when this Motion was filed that Plaintiffs will suffer serious irreparable harm unless Sections 1 and 3 are enjoined immediately.

I. PLAINTIFFS HAVE STANDING.

In response to the Court's Order Regarding Briefing, Dkt. No. 21, Defendants, commissioners of the Florida Public Employees Relations Commission ("PERC"), have correctly conceded that Plaintiffs have standing to challenge the validity of both Section 1 and Section 3. Opp.10-12.

Section 1 requires unions to a use a new PERC-drafted form—"Form 2023-1.101"—to sign up members beginning July 1. Weir Decl. Ex.F. As Defendants note, a union that declines to use the form will commit an unfair labor practice ("ULP") in violation of the Florida Public Employees Relations Act ("PERA"). Opp.11. As Plaintiffs would not use the PERC form except under compulsion, Second Gothard Decl. ¶7, they have standing to challenge it.

Indeed, the harm Section 1 will inflict on Plaintiffs appears more serious and immediate now than when Plaintiffs filed this Motion, because PERC's proposed implementing regulations require SB256-covered unions to collect signed PERC forms even from "each … *current* member." Weir Decl. Ex.F, at 60CC-1.103(2) (emphasis added). This will require Plaintiff ACEA, for example, to collect the new PERC forms from its 2400 existing members—including years-long members—just to keep them as statutory "members." Moreover, unless a covered union collects signed PERC forms from 60% of its represented employees, it will face a costly decertification election under Section 4 of SB256, which takes effect October 1, 2023. *See* Weir Decl. Exs.F-G; Ward. Decl. ¶22.[1] Thus, if unions do not begin distributing PERC's form immediately, they will almost certainly face that sanction.

[1] Plaintiffs dispute PERC's position that Section 1 applies to pre-July union members, but PERC's position is pertinent to the standing and irreparable harm inquiries.

Section 3 will also injure Plaintiffs and all other unions with current CBAs containing payroll-deduction provisions.[2] Under PERC's implementation plan, employers honoring those provisions will commit a ULP. Weir Decl. Ex.F, at 60CC-5.101. For that reason, multiple employers under payroll-deduction contracts have informed UFF that they intend to cease deducting UFF dues effective July 1. Second Gothard Decl. ¶¶8-11.

II. PLAINTIFFS' CHALLENGE TO SECTION 1 IS LIKELY TO SUCCEED.

Plaintiffs have shown that requiring unions in SB256's disfavored class to use a government-drafted form to sign up members implicates Plaintiffs' core First Amendment rights. Open.Br.10-14. As such, Section 1 triggers strict scrutiny under *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Open.Br.11-12. And, Section 1 fails to satisfy strict scrutiny—or even the less-heightened scrutiny applicable under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018). Open.Br.14-18.

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[2] Plaintiff FEA may seek an injunction on behalf of its affiliated local unions that, like UFF and ACEA, have CBAs that will be impaired by Defendants' actions on July 1. *See All. of Auto. Mfrs., Inc. v. Jones*, 897 F. Supp. 2d 1241, 1253-54 (N.D. Fla. 2012) (manufacturers' alliance had standing to seek declaration of invalidity and injunction against enforcement of regulations that would have impaired its members' dealer contracts). Defendants' suggestion to the contrary, *see* Opp.12, 29, is unsupported.

In response, Defendants make no effort to show that Section 1 can pass strict scrutiny, thus conceding the point. Instead, they try to free themselves from *any* First Amendment scrutiny by invoking the "government speech" doctrine. They then argue in the alternative that the less demanding *Zauderer-NIFLA* standard applies, and that Section 1 meets that standard. Defendants are wrong at every turn.

A. Section 1 Is Not Immunized from First Amendment Scrutiny by the "Government Speech" Doctrine.

Defendants' opposition begins with a lengthy review of cases and quotations assembled to prove a self-evident point that Plaintiffs have fully embraced: PERC Form 2023-1.101 is "government speech." Opp.12-20. Defendants write as if that ends the inquiry. But under *Wooley v. Maynard*, 430 U.S. 705 (1977), it only begins it.

Wooley involved a statute requiring drivers to display the "Live Free or Die" motto on the state's license plates. As here, no party disputed that the plates were government speech. 430 U.S. at 707. Instead, Plaintiff argued that the requirement, which could be avoided only by giving up driving, was a form of compulsion, and such compulsion triggered First Amendment scrutiny. *Id.* at 710. The Court agreed, holding that driving is "a virtual necessity for most Americans," *id.* at 715, and that the First Amendment barred the state from enlisting private parties to serve as "courier[s]" for the government's speech, *id.* at 717.

The parties here similarly agree that the PERC form itself is government speech. The questions are whether unions are effectively compelled by SB256 to disseminate the form, and whether such compulsion triggers First Amendment scrutiny. *Wooley* answers both questions in the affirmative.

First, SB256, as Defendants plan to implement it, will leave unions with no choice but to disseminate the form. Section 1 strips the disfavored unions' current members of their status as statutory "members" effective July 1 and then subjects those unions to decertification elections as early as this fall unless they collect the form from at least 60% of the employees they represent. *See supra* at 2. That makes the dissemination and collection of the form not merely a "virtual" necessity for the covered unions, 430 U.S. at 717, but an existential one.

Against this, Defendants insist that "Section 1 does not force the plaintiff unions to disseminate" the form, because Defendants will post it on PERC's website "for public employees to download and fill out themselves." Opp.15-16. But the PERC Form requires the insertion of information about the union—including the union's PERC registration number, dues information, and detailed salary information—that only the union is realistically in a position to fill out, *see* Weir Decl. Ex.E. Thus, the fact that an employee who happens to know that the form exists can find the form on PERC's website does nothing to detract from the reality that a union will find it a "virtual necessity" to disseminate the form itself if

it wishes to avoid a calamitous loss of members and a decertification election. That renders the form's dissemination compulsory.

But even apart from the immediate crisis disfavored unions face, it is absurd for Defendants to suggest that a union can successfully solicit prospective members without disseminating the form on its own. Opp.16-17. That is because, by operation of Section 1, an otherwise successful solicitation will be without statutory effect unless the *union representative* secures a signed PERC form from the prospective member. The text of Section 1 itself reflects that reality by stating that "a public employee who desires to be a member of an employee organization must sign and date a membership authorization form, as prescribed by the commission, *with the bargaining agent*." (Emphasis added). Thus, Defendants' attempt to bootstrap their way into a government-speech defense by posting the PERC form on the internet is a non-starter.

Without that bootstrap argument, Defendants have little else to say in support of the government-speech defense. They cite *B.W.C. v. Williams*, 990 F.3d 614, 617-18 (8th Cir. 2021), Opp.19, but that case is fully consistent with Plaintiffs' position. Under the statute challenged there, the government did not only compose but also disseminated and collected the challenged form—a vaccine-exemption form sent to parents of public-school students. The same was true in *Anderson Federation of Teachers v. Rokita*, ---F. Supp. 3d---, 2023 WL 2712267

(S.D. Ind. 2023). *See* Opp.17-19. The statute there prescribed a government payroll deduction form that government employees were required to send "directly to" the government. 2023 WL 2712267, at *4. Unlike SB256, the statute did not regulate union membership at all, let alone require employees desiring to be union members to sign and provide a government form to the union. The fact that the government-speech doctrine was held to insulate the statute there from free-speech scrutiny is thus unremarkable and of no aid to Defendants here.[3]

B. Section 1 Cannot Pass Strict Scrutiny under *Riley* or Even Less-Heightened Scrutiny under *Zauderer* and *NIFLA*.

After pressing their government-speech defense, Defendants fall back by arguing that speech by a union to prospective members aimed at convincing them to join the organization constitutes purely "commercial speech" subject to a lesser degree of First Amendment protection than ordinary expression. Opp.20-23. Defendants then argue they can clear that lower bar. Opp.23-25. Neither proposition is correct.

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[3] While a state may be able to invoke the "government speech" doctrine to protect itself against a *free speech* claim by ensuring (unlike here) that private parties will not be compelled to serve as the government's messengers, a state cannot protect itself against a *free association* claim when it goes beyond speaking and installs itself as the gatekeeper of private association membership admissions. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-32 (1984); *Alaska v. ASEA*, ---P.3d---, 2023 WL 3669747, at *7 (Alaska May 26, 2023) (observing that the government cannot create obstacles to voluntary union membership without "impinging upon" on the "First Amendment right of free association").

1. The Supreme Court in *Riley* held that even professional fundraisers who solicit funds for charities on commission are engaged in "fully protected expression," rather than less-protected commercial speech, and thus can invoke the "exacting … scrutiny" standard. 487 U.S. at 796, 798; *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015) (equating *Riley's* "exacting scrutiny" with "strict scrutiny)." Indeed, the *Riley* Court, to support that conclusion, cited *Thomas v. Collins*, 323 U.S. 516, 530 (1945), a case that treated speech by a union official aimed at soliciting workers to join a union as fully protected by the "clear and present danger" test, a precursor of modern strict scrutiny. *See* Open.Br.12-13 (discussing *Thomas*). Defendants have no answer for *Thomas*, which forecloses Defendants' argument that less-heightened scrutiny applies.

Instead, Defendants pretend that the PERC form can be walled off from the unions' solicitation speech and suggest that unions will be able to solicit new members without the form interrupting or interfering with their persuasive efforts. Opp.15-17. That suggestion is fanciful. During the course of a solicitation, the union representative will have to direct the prospective member to the form, await review of it, and answer any questions about it before successfully completing the solicitation. Indeed, precisely this type of interjection of government speech into a private party's efforts at persuasive solicitation led the *Riley* Court to treat

government-compelled disclosure as a type of regulation that "alters the content of the speech," of the private party, warranting strict scrutiny. 487 U.S. at 795.

Defendants also claim that the PERC form conveys only accurate facts and is free of ideological sloganeering. Although Defendants are doubly mistaken,[4] the dispositive point is that in *Riley* itself the government-compelled information was factual and non-ideological, and yet the statute there was subject to strict scrutiny because it affected non-commercial persuasive solicitation speech. *See* 487 U.S. at 797-98; *see also Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957 (D.C. Cir. 2013) (invalidating NLRB regulation requiring employers to post accurate notices of certain employee rights and holding that "the right against compelled speech is not, and cannot be, restricted to ideological messages"). So too here.

In sum, strict scrutiny applies to the speech at issue here. And because Defendants do not even argue that Section 1 can pass strict scrutiny, Plaintiffs are likely to succeed on the merits.

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[4] In arguing that the form is accurate when it asserts that union discrimination against nonmembers "in any manner" is prohibited, Defendants cite only the general rule in PERA that bars discrimination against nonmembers, Opp.23-24; they do not cite the important exception that allows unions to decline prosecution of nonmembers' grievances against the employer, *see* Open.Br.6, 14. And to pretend that the phrase "Right to Work" is non-ideological is to ignore history. *See* Open.Br.14 n.5; Marc Dixon, *Heartland Blues: Labor Rights in the Industrial Midwest* 30-31 (2020) (explaining that "Right-to-Work" became "a full-blown political slogan" in 1941).

2. Section 1 flunks even the less-heightened First Amendment scrutiny applied to commercial speech in *Zauderer* and *NIFLA*. While Defendants attempt to whittle that standard down to a "rational basis" test by quoting an out-of-context phrase from an out-of-circuit opinion decided several years before *NIFLA*, Opp.21, *NIFLA* refutes that notion and demonstrates that the *Zauderer* standard has more than enough bite to invalidate Section 1.

In *NIFLA*, the Court invoked *Zauderer* scrutiny to invalidate a statutory provision requiring unlicensed pregnancy counseling facilities to disclose their unlicensed status. 138 S. Ct. at 2377-78. The Court did so because the statute was "wildly underinclusive" in failing to subject similar unlicensed businesses to the disclosure requirement. *Id.* at 2375, 2377-78. Section 1 is similarly underinclusive. *See* Open.Br.17-18. As an independent basis for finding that the provision failed *Zauderer* scrutiny, the *NIFLA* Court observed that the state could point to "nothing suggesting that pregnant women do not already know" that the staff in the covered facilities are unlicensed.138 S. Ct. at 2377. Here, nothing in the legislative record shows that public employees are unaware of their decades-old right not to join a union. Indeed, Florida public records establish the contrary by reporting that, in

many union-represented bargaining units, more than a majority of the employees are not union members. Second McCulloch Decl. Ex.7 at 20.[5]

For these reasons, Section 1 cannot pass any degree of First Amendment scrutiny.

III. PLAINTIFFS' CHALLENGE TO SECTION 3 IS LIKELY TO SUCCEED.

Plaintiffs' opening brief showed that Section 3's selective prohibition of payroll deduction for voluntary membership dues violates their Contracts Clause and First Amendment rights. Defendants' responses are unpersuasive.

A. Section 3 Violates the Contracts Clause.

1. Federal Courts Have Two Statutory Vehicles for Remedying Contracts Clause Violations, Not Just the One Defendants Address.

Plaintiffs have invoked *both* 28 U.S.C. §1331, the general federal-question jurisdictional provision, *and* 28 U.S.C. §1343, the jurisdictional provision for 42 U.S.C. §1983 claims, to ground their injunctive-relief claims, including their Contracts Clause claim challenging Section 3. FAC ¶¶6, 67-72.

Despite Plaintiffs' invocation of two separate jurisdictional bases for that claim, Defendants respond by (i) addressing only the §1983 basis; (ii) arguing that *Carter v. Greenhow*, 114 U.S. 317 (1885), forecloses that basis; and (iii) urging the

[5] Against this convincing evidence, Defendants resort to citing unreliable multiple-hearsay sources, including one *paid advertisement* that they describe as a *Seattle Times* "article." Weir Decl. ¶4.

Court not to reach the merits of the Contracts Clause claim based on *Carter.* Opp.26-28.

Defendants are mistaken. While the courts of appeals have split on whether *Carter* precludes claims brought under §1983 to redress a Contracts Clause violation,[6] this Court need not reach that issue to conclude that Plaintiffs can pursue their Contracts Clause claim. The Supreme Court has repeatedly held that there is a direct cause of action available under §1331 to enjoin violations of the Contracts Clause. Furthermore, §1983 *also* provides a cause of action; the circuits holding otherwise have misread *Carter.*

a. For nearly 200 years, the Supreme Court has held that there is a direct federal cause of action in equity against state officials who violate the U.S. Constitution. *See Osborn v. Bank of the U.S.*, 22 U.S. 738, 844 (1824). As the Court observed in *Ex parte Young*, 209 U.S. 123, 167 (1908), which allowed a federal court injunction suit to proceed against a state official alleged to be enforcing an unconstitutional law, "jurisdiction of this general character has, in

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[6] *Compare Southern Cal. Gas v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003) (Contracts Clause violation can be pursued under §1983), *with Crosby v. Gastonia*, 635 F.3d 634, 639-41 (4th Cir. 2011) (disagreeing with Ninth Circuit), *and Kaminski v. Coulter*, 865 F.3d 339, 345-47 (6th Cir. 2017) (same). *See also Heights Apartments, LLC v. Walz*, 30 F.4th 720, 727-28 (8th Cir. 2022) (observing that, after *Carter*, "the [Supreme] Court has since clarified that *Carter* was a question about pleading and not about whether the plaintiff could bring a [§1983] claim under the Contract Clause").

fact, been exercised by Federal Courts from the time of *Osborn*." Allowing for such suits is "necessary" "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst St. Sch. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Young*, 209 U.S. at 160).

The Supreme Court has applied this general rule to hold that a plaintiff can bring claims directly under the Contracts Clause against state officials. Indeed, in *Allen v. B&O Railroad*, 114 U.S. 311 (1885)—one of the "Virginia Coupon Cases" heard by the Court together with the *Carter* case that Defendants invoke—the plaintiff had filed a bill in equity in federal circuit court. The bill contended that Virginia violated the Contracts Clause by passing a statute that abrogated an agreement it had made to accept state-issued bond coupons as a set-off for taxes owed. *Id.* at 313. The circuit court issued a permanent injunction preventing the state auditor from invoking that statute, and the Supreme Court affirmed over the objection that the circuit court lacked jurisdiction. *Id.* at 316-17. As the Court held, the circuit court "indisputabl[y]" had jurisdiction to issue the injunction because the plaintiff's Contracts Clause rights "are those of private citizens, and are of those classes which the constitution of the United States either confers or has taken under its protection." *Id.*; *see also White v. Greenhow*, 114 U.S. 307, 308 (1885)

(another Virginia Coupon case finding "rightful jurisdiction" in circuit court over Contracts Clause claim).[7]

Allen is no outlier: the Supreme Court has repeatedly held that state officials can be sued in federal court to enjoin violations of the Contracts Clause. *See, e.g.*, *Georgia R.R. v. Redwine*, 342 U.S. 299, 302-06 (1952) (allowing federal-court challenge to state tax that "would impair the obligation of contract"); *Pennoyer v. McConnaughy*, 140 U.S. 1, 18-19 (1891) (allowing federal-court suit where the legislation in question "operates to impair the obligation of a contract"); *see also Holt v. Ind. Mfg. Co.*, 176 U.S. 68, 72 (1900).

In short, Plaintiffs have a cause of action directly under §1331 to enjoin Defendants from taking actions that would violate the Contracts Clause. The Court therefore need not decide at this stage whether Plaintiffs also could pursue their Contracts Clause claim under §1983. *See Georgia Latino Alliance v. Governor*, 691 F.3d 1250, 1262 n.9 (11th Cir. 2012) (holding that the court "need not address the propriety of [plaintiffs'] action" under §1983 because plaintiffs could pursue direct constitutional claim).

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[7] In *Carter*, in contrast, the Supreme Court held that there was no federal jurisdiction under §1331 because the amount-in-controversy was less than $500, which was the jurisdictional threshold for federal-question cases at that time. 114 U.S. at 322-23.

b. Although it is unnecessary to resolve now, Defendants' §1983 argument is wrong. That argument rests entirely on the premise that the Supreme Court's decision in *Carter* is "squarely on point" and "dispositive." Opp.27, 28. But the only question that the Court decided in *Carter* was whether "the facts stated in the plaintiff's declaration constitute a cause of action within the terms of [§1983]." 114 U.S. at 321. The Court answered in the negative, holding that the plaintiff had brought a breach-of-contract claim and had "simply chosen not to resort" to a claim that he had been deprived of any right under the Contracts Clause. *Id.* at 322. In other words, the Court in *Carter* held only that the plaintiff had pleaded himself out of federal court.

Whatever doubt may have existed about *Carter's* breadth was dispelled by the Court in *Dennis v. Higgins*, 498 U.S. 439 (1991). There, the Court held that private citizens could bring §1983 claims premised on alleged violations of the dormant Commerce Clause. *Id.* at 443-51. Justice Kennedy dissented, arguing, as relevant here, that the Court's holding could not be squared with *Carter*. *Id.* at 457. The Court responded that Justice Kennedy had misread *Carter* because the Court "ha[d] already given that decision a narrow reading." 498 U.S. at 451 n.9. All that *Carter* held, explained the Court, was that "as a matter of pleading the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress the deprivation of the [Contracts Clause], to which he had chosen not to

resort." *Id.* (quoting *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 613 n.29 (1979) (internal quotation marks omitted)).

In sum, because Plaintiffs' Complaint expressly contends that SB256 violates the Contracts Clause, *Carter* is irrelevant to whether Plaintiffs can proceed under §1983.

Once *Carter's* limitations are understood, it is clear that §1983 can redress Contracts Clause violations. "A broad construction of §1983 is compelled by the statutory language, which speaks of deprivations of '*any* rights, privileges, or immunities secured by the Constitution.'" *Dennis*, 498 U.S. at 443 (quoting §1983). In *Dennis*, the Court held that a plaintiff could pursue even a *dormant* Commerce Clause claim under §1983, which establishes only an "*implied* right" derived by negative implication from the Commerce Clause in Article I, Section 8. *Id.* at 447 n.7 (emphasis added). It ineluctably follows that a plaintiff can pursue a *Contracts Clause* claim under §1983, which is an *express* right enumerated in Article I, Section 10—the section that Chief Justice Marshall classified as "a bill of rights for the people of each state." *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

2. Section 3 Substantially Impairs Crucial Provisions of Plaintiffs' CBAs.

There is no debate that Section 3 completely invalidates the payroll-deduction provisions of Plaintiffs' CBAs. Opp.30-31. Given that magnitude of impairment, it is unsurprising that all three factors illustrate the extent to which

Section 3 works a "substantial impairment of a contractual relationship." *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22 (2018) (identifying factors).

i. Section 3 undermines the contractual bargain.

First, by completely denying Plaintiffs the benefit of one term of their bargain, Section 3 upsets the contractual balance reached by the parties. This factor focuses on the degree of impairment, and complete impairments of contractual rights are regularly found to undermine the parties' bargain, even when those rights are part of a broader contractual arrangement. *E.g.*, *Michigan State AFL-CIO v. Schuette*, 847 F.3d 800, 801-02 (6th Cir. 2017) (voiding of PAC payroll-deduction clauses substantially impaired CBAs);[8] *21st Century Oncology, Inc. v. Moody*, 402 F. Supp. 3d 1351, 1359 (N.D. Fla. 2019) (voiding of noncompete clauses substantially impaired employment contracts). Indeed, in one case cited by Defendants, the plaintiff's lease agreements were held substantially impaired when one remedial option—eviction—was temporarily suspended but the plaintiff's underlying contract rights remained intact. *Heights*, 30 F.4th at 729, cited at Opp.30. Here, Plaintiffs have lost all the value of a bargained-for term—at least as substantial an impairment as in *Heights*.

[8] Defendants' attempt to distinguish *Schuette* on the ground that "the parties focused only on the affected provisions" of their contract, Opp.33-34, just makes this point: the court held that a law totally invalidating payroll-deduction terms substantially impaired the parties' CBAs, without even having to reference the full contracts. *Schuette*, 847 F.3d at 804.

Instead of focusing on the degree of impairment, Defendants discount the *importance* of Plaintiffs' payroll-deduction provisions, dubbing them "ancillary" to the CBAs' employment terms. Opp.30. PERC, a stranger to the CBAs, is not positioned to know what the parties themselves considered important. *See Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 324 (6th Cir. 1998) (concluding that unions "who negotiated the affected CBAs considered the promise by public employers to administer [payroll deductions] a significant and important aspect of their [CBAs]"). And PERC certainly cannot have its conjecture override the actual evidence on this point. *Compare* Opp.30-32, *with* Gothard Decl. ¶10; Ward Decl. ¶¶9-11.

Beyond this, Defendants' attempt to separate union contract rights from workers' contract rights and portray them as in tension is entirely artificial. It demonstrates a misunderstanding of the crucial role payroll deduction plays in collective bargaining. In both the private and public sector, payroll deduction benefits employees in many ways, *see Valley Hosp. Med. Ctr., Inc.*, 371 NLRB No. 160, at *8 (Sept. 30, 2022) (enumerating benefits)—including by enabling the union to focus on bargaining instead of "forcing it to expend time and resources creating and implementing an alternate mechanism for dues collection during a critical bargaining period," *id.*

Notably, Defendants cite nothing in the legislative record suggesting that payroll deduction is unimportant to contracting parties. Instead, their sole support is a *post hoc* declaration from Keith Calloway, a lay witness employed by the Professional Educators Network of Florida ("PEN"). Calloway Decl. ¶¶2, 7-9; Opp.30. PEN is a nonunion association that admits teachers and administrators into its membership and declares itself uninterested in advancing "social agendas." Second McCulloch Decl. Ex.5. Calloway is scarcely a credible witness for the relative unimportance of payroll deduction because, although he fails to mention it, PEN avails itself of its right under a special Florida statute, unaffected by SB256, "to collect voluntary membership fees through payroll deduction." Fla. Stat. §1001.03(4) (conferring payroll-deduction rights to "teacher associations that offer membership to all … administrators"); Second McCulloch Decl. Ex.6; *see also Duval Tchrs. United v. Sch. Dist. of Duval Cnty.,* 37 FPER 173 (2011) (upholding PEN's payroll-deduction rights). That PEN remains entitled to collect its dues through payroll deduction, while disfavored unions have been barred from doing so by SB256, only underscores SB256's already fatal under-inclusiveness. *See* Open.Br.23.

Finally, although the focus belongs on whether a legislative impairment upsets the *contracting parties'* bargain—here, the bargain between union and employer—the notion that Section 3 does not impair individual workers' rights is

false. *Cf.* Opp.33. Like in *Schuette*, the Plaintiffs' members have been denied the convenience of a voluntary, safe, and easy mechanism through which they can pay their dues. Gothard Decl. ¶18. Plaintiffs, who sue on their own behalf and on behalf of their members, FAC ¶5, are appropriate parties to vindicate those rights.

ii. Section 3 interferes with the parties' reasonable expectations.

Second, the evidence submitted by Plaintiffs fully supports that Plaintiffs did not reasonably expect Florida to retroactively ban payroll deduction during their CBAs' terms. Ward Decl. ¶11; Gothard Decl. ¶20. In response, Defendants essentially claim that Plaintiffs should have known better because Florida has regulated labor relations generally in the past and the CBAs include savings clauses. Opp.34-36. That showing does not meet the standard demanded by the Contracts Clause.

a. While a history of frequent regulatory changes governing the *specific subject matter* of the allegedly impaired contract provision can be relevant to the Contracts Clause analysis, *see Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998), the mere regulation of some expansive field, like labor relations "is never a sufficient condition for rejecting a challenge based on the contracts clause," *id.* In other words, "[t]he fact that some incidents of a commercial activity are heavily regulated does not put the regulated [entity] on notice that an entirely different scheme of regulation will be imposed." *Id.*

Although Florida had long regulated the general field of labor relations before it enacted SB256, it had left untouched for decades PERA's provision authorizing dues deduction at the request of a certified representative and providing for bargaining over the cost of the deduction system. That history hardly put Plaintiffs on notice when they bargained their current CBAs in 2021 that Florida would yank payroll deduction away during the term of those contracts. *See Pizza*, 154 F.3d at 325 (nothing in state's robust history of regulating labor agreements and elections would have put unions on notice that the state would "simply abolish [PAC checkoff,] one section of their bargained-for benefits"). Indeed, just the day before SB256 passed the House, the House sponsor of the bill was unaware that SB256 *itself* would ban payroll deduction clauses in existing contracts, for he assumed (wrongly, according to PERC, *see supra* at 2), that the legislation would not be applied to abrogate existing, lawful CBAs. *See* Open.Br.34.

b. The mere existence of savings clauses in the CBAs does not alter the foreseeability of Florida's action. *Cf.* Opp.36. The savings clauses in both CBAs are general provisions that make no specific reference to the CBAs' payroll-deduction provisions. ACEA CBA 1; UFF CBA 136. The Sixth Circuit has rejected Defendants' argument that generic savings clauses—which, after all, are a feature of almost all commercial contracts—express the parties' intent to accede to all

changes in the governing law, including unconstitutional changes. *Cummings, McGowan & W., Inc. v. Wirtgen Am., Inc.*, 160 F. App'x 458, 462 (6th Cir. 2005); *see also Searcy, Denney v. State*, 209 So.3d 1181, 1190-92 (Fla. 2017) (contingency-fee contract, which capped the fee at "the amount provided by law" and was entered into when the cap was 25% of the client's recovery, was "substantially impaired" by a statute limiting fee to a flat amount that was less than 1% of the recovery).

That result is particularly appropriate here because in *Chiles v. UFF*, the Florida Supreme Court rejected the notion that savings clauses in Florida public-sector labor contracts may be interpreted as "an escape hatch" for the legislature that entitles it to "nullify them" through legislation that otherwise would be unconstitutional. 615 So.2d 671, 673 (Fla. 1993). Instead, such clauses are properly interpreted to be "a means of preserving the contracts in the event of partial invalidity" that may result from constitutionally *compliant* enactments. *Id. Chiles'* Florida-law interpretation of savings clauses set the parties' reasonable expectations when they entered into these CBAs. The CBAs' savings clauses thus do not establish that Plaintiffs reasonably foresaw, let alone acquiesced in, SB256's total invalidation of their payroll-deduction provisions. To hold otherwise would perversely turn the savings clauses into self-destruction clauses.

c. Finally, Plaintiffs' recent effort to mitigate the harm SB256 will do to their operations says nothing about whether they foresaw the complete invalidation of payroll deduction when they contracted for that protection. *See Anderson*, 546 F. Supp. 3d at 745 (parties' expectations are assessed "at the time of contracting"); *cf.* Opp.36-37. SB256 was introduced on February 28, 2023, and Plaintiffs began the arduous process of transitioning members to eDues in March and April of 2023. Gothard Decl. ¶16; Ward Decl. ¶19. Those recent actions shed no light on the parties' expectations when they bargained for payroll deduction in 2021.

iii. Section 3 prohibits Plaintiffs from safeguarding their contractual rights.

Third, contrary to Defendants' assertion that Plaintiffs can otherwise safeguard their interests, Opp.37, Plaintiffs can never "restore" their contractual rights, let alone do so through the kind of simple and unilateral self-help that could have preserved the contract right at issue in *Sveen*, *see* 138 S. Ct. at 1823; *cf.* Opp.38-39. Section 3 makes it *illegal* for Plaintiffs to enforce or revive their payroll-deduction rights. *See* Opp.10-11. Thus, Plaintiffs' ability to engage in laborious mitigation efforts to partially reduce the harm caused by the permanent loss of their contractual right to payroll deduction is nothing like Sveen's ability to fully *restore* his right to designate his ex-spouse as a beneficiary with a pen stroke at any time before he died. *See* 138 S. Ct. at 1823. Defendants' flippant assertion that FEA's task to enroll 140,000 members in a completely new dues system is

"modest," Opp.38-39, does not make it so. The evidence is all to the contrary. *See* Roeder Decl. ¶¶ 2, 13-14.

3. Section 3 Is Not Reasonable and Necessary To Achieve Defendants' Claimed Transparency Interest.

Because it substantially impairs existing contracts, Section 3 can be sustained only if the impairment that it causes is reasonable and necessary to achieve the State's claimed interest. *See Sveen*, 138 S. Ct. at 1822. Here, the only interest Defendants advance for Section 3 is the interest in "transparency," defined to mean the interest in making union members "fully aware of the dues amounts that they pay" and "how those dues are used." Opp.6. To demonstrate the required means-ends fit, Defendants must therefore establish that the impairment Section 3 causes is "appropriately and reasonably tailored" to serve that asserted transparency interest. *See Heights*, 30 F.4th at 730; *see also Pizza*, 154 F.3d at 323 ("Once it is determined that the state regulation is a substantial impairment … the burden shifts to the state.").[9]

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[9] Defendants' citation to *UAW v. Fortuno* for the proposition that Plaintiffs bear the burden to show that Section 3 lacks the required nexus to a legitimate purpose is against the weight of authority, as *Fortuno* itself acknowledges. 633 F.3d 37, 43 nn.9, 10 (1st Cir. 2011). Defendants cite no Eleventh Circuit authority allocating the burden in that manner. And, as explained in text, Section 3 so fails to advance the asserted "transparency" interest that it falls regardless of who has the burden.

The State's asserted transparency interest for Section 3 is absent from the legislative record, which is "cause for grave concern" when, as here, the State has an "obvious self-interest" in seeing the Plaintiffs' CBAs impaired. *Id.* at 325. But beyond that, the posited interest is one having nothing to do with the need to abrogate *existing* payroll-deduction provisions. A state interest in a law's prospective application is distinct from its interest in retrospective abrogation of existing rights. *See* Open.Br.22-23; *Schuette*, 847 F.3d at 804.

While nothing more need be said, the fact is that Section 3 is not even appropriately or reasonably tailored to the interest in transparency going forward. To begin with, Section 3 abolishes payroll deduction only for members of certain disfavored unions, not for the many members who belong to the favored unions. And Defendants point to nothing suggesting that police officers and other favored-union members are more likely to know the amount of their dues or how they are spent than are teachers and other disfavored-union members. That glaring under-inclusiveness alone is fatal to Section 3's ability to satisfy the tailoring requirement. Open.Br.23.

But even if Section 3 applied to all unions equally, it still would not advance any purported interest in transparency. Section 3 simply abolishes the voluntary payment of dues via payroll deduction; it does not require any disclosures. Moreover, payroll deduction itself incidentally furthers transparency by generating

a paystub that shows employees "the dues amounts that they pay," Opp.6; *see* Second Gothard Decl. ¶¶15-16 & Ex.4. And Section 3 does *not* require more transparency that that, because it permits automated alternatives like eDues that are indistinguishable from payroll deduction for "transparency" purposes. Finally, Section 3 does not in any conceivable way advance the State's professed interest in making members aware of "how those dues are used." Opp.6. Indeed, the fact that Section 3's selective abolition of payroll deduction is so transparently ill-suited to Florida's "transparency" interest is a powerful indicator that "transparency" is not the interest that the Legislature actually was aiming to advance in passing Section 3.

Regardless of whether the Florida Legislature was singularly inept in advancing the goal of transparency through Section 3 or was not even trying to do so, the outcome of the Contracts Clause analysis is the same: Defendants cannot meet their burden of showing that Section 3 is reasonably tailored to the purpose Florida attributes to the provision.

B. Section 3 Violates the First Amendment.

Plaintiffs' opening brief showed that government payroll deduction systems, while a form of speech subsidy, are akin to another form of speech subsidy: government-provided, nonpublic, forums. Open.Br.24-26. More specifically, Plaintiffs showed that government payroll deduction programs are analogous to the

federal government program at issue in *Cornelius v. NAACP*, 473 U.S. 788 (1985), which devoted government resources to benefit private nonprofit organizations by allowing federal employees on government time to solicit fellow employees to authorize payroll deductions in favor of qualified nonprofits. *Id.* at 790-91. That program was subject to moderately heightened scrutiny, as it was vulnerable to challenge if it could be shown that the speaker-based discriminations the government made between different types of nonprofit organizations were a "façade for viewpoint-based discrimination." *Id.* at 811.

Plaintiffs then showed that, from the structure and design of SB256—and without any need to resort to extrinsic evidence of animus—it could be determined that the speaker-based discriminations the legislature adopted here are so inexplicable and underinclusive that they cannot advance any legitimate object, leaving the clear inference that they are a façade for the illegitimate object of viewpoint discrimination. Open.Br.27.

In response to that showing, Defendants omit any discussion of *Cornelius*, even though it is the lead case upon which Plaintiffs relied. That omission is revealing, because it confirms that Defendants cannot reconcile their simplistic assertion that government subsidy programs are completely immune from First Amendment review with the relevant Supreme Court case law. Defendants also fail to grapple with an important footnote in *Ysursa v. Pocatello Education Ass'n*, 555

U.S. 355, 361 n.3 (2009). The footnote, after explaining that the payroll-deduction statute there was, on its face, neither speaker- nor viewpoint-discriminatory, goes on to say that, if a future plaintiff could show that "public employers permit deductions for some political activities but not for those of unions," a different question would be presented. *Id.*

That question is presented here. SB256 *is* speaker discriminatory—and inexplicably so, because SB256's favored and disfavored unions do not have substantially different functions within Florida's labor-relations regime. Both classes of union can function as exclusive representatives of the employees they represent and engage in collective bargaining on their behalf as to a wide range of terms and conditions of employment. Both classes therefore have the same need for, and derive the same efficiencies from, payroll deduction. That distinguishes this case both from *Perry Education Ass'n v. Perry Local Educators' Ass'n*, and from *WEAC v. Walker*, as the different categories of unions in those cases had fundamentally different roles in the respective state-law systems of collective bargaining. *See Perry*, 460 U.S. 37, 50-51 (1983) (extending government's internal mail-distribution system only to exclusive-representative unions); *WEAC*, 705 F.3d

640, 642-43 (7th Cir. 2013) (extending payroll-deduction only to unions with full collective-bargaining rights).[10]

Finally, this case also is readily distinguishable from *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015), where the court rejected an effort to issue deposition subpoenas to lawmakers responsible for a challenged classification and reasoned that their subjective reasons for enacting the classification were not relevant to the validity of the legislation. *Id.* at 1301-02. Here, Plaintiffs' showing that SB256's speaker-based classification is a façade for viewpoint discrimination rests on an examination of the structure and design of the text of SB256 and not from resort to extrinsic evidence of the subjective motivations of the legislators who voted for it. Open.Br.27-28. SB256's under-inclusiveness is so substantial and so inexplicable by reference to legitimate governmental objectives that it creates a powerful inference that what is driving the decision to exclude the disfavored unions from Florida's payroll deduction system is the illegitimate objective of weakening those unions that are apt to express views out of step with that of the Governor. *Id.* The evidence as to the political alignment of the favored and disfavored classes of

[10] Further, Florida authorizes payroll deduction for dues to associations like PEN that admit administrators to membership, *supra* at 19, and for contributions to nonunion non-profit organizations, *see* Fla.Stat. §110.114; https://ufcc.ufl.edu/campaign-resources/faqs.

unions here is relevant simply to confirm that the inference that leaps from the structure and design of SB256's text is itself a fair one.[11]

IV. PLAINTIFFS WILL BE IRREPARABLY HARMED IF SECTIONS 1 AND 3 ARE NOT ENJOINED BY JULY 1.

Section 1. Defendants acknowledge that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006). Yet they argue that an unconstitutional compelled-speech regulation like Section 1 does not meet that standard because it does not "direct[ly] penal[ize]" speech. Opp.51.

They are profoundly mistaken. A violation of Section 1 is penalized as an unfair-labor practice. Opp.11. And Section 1, like other compelled-speech regulations, offends the First Amendment precisely because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. This case illustrates the point. But for SB256, the Plaintiff unions would continue to exercise their right to control the content of the presentations they make to prospective members to persuade them to join. The

[11] Defendants point to no instances where a disfavored union contributed to the Governor and none where a favored union contributed to his opponent. That some disfavored unions gave to some Republican-affiliated groups somewhere in the state, *cf.* Phipps Decl. ¶¶8-10, does not detract from the reality that the speaker-based discriminations here closely track the pattern of political support for the Governor.

unions would choose the words spoken, the materials used, and the forms distributed to members for their signature. Under Section 1, unions will lose that autonomy, as they will have to interject Form 2023-1.101 into the mix and dilute their own message or face ULP sanctions—not to mention the prospect of having their voluntary members uncounted by the State. *See* supra at 2. That is more than sufficient to meet the standard of irreparable harm.

Section 3. Defendants discount the threat to Plaintiffs' operations posed by Section 3's ban on payroll deduction, because Plaintiffs can theoretically sue the tens of thousands of members to recover the small sums that will not be paid when payroll deduction ends. Opp.52. But as the Supreme Court recently recognized, the risk of irreparable harm exists when state action impedes the collection of small payments with "no guarantee of eventual recovery." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

Here, there is no practical likelihood that Plaintiffs will be able to recover even a fraction of the dues that go unpaid while the lawsuit is pending. FEA, for example, has approximately 140,000 members and estimates that most FEA-affiliated unions will have transitioned fewer than half of their members to an alternative dues-payment mechanism by July 1, 2023. Roeder Decl. ¶¶ 2, 14. The impracticality of filing tens of thousands of individual lawsuits to recover tens or a few hundred dollars of missed dues is sufficient to establish the likelihood that

Plaintiffs will never see this money. *See Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. That is to say nothing of the transaction costs Plaintiffs will incur every month because they have been forced to bear the expense of eDues, and for which there is no possibility of recovery. Roeder Decl. ¶¶ 8-11.

Finally, Plaintiffs will suffer the intangible harm of losing their contract rights, a *per se* harm other district courts have recognized as sufficient to support an irreparable harm showing. *See* Open.Br.32 (collecting cases). All that irreparable harm is sufficient to establish Plaintiffs' entitlement to a preliminary injunction, especially given that Defendants—rightly—do not claim they will suffer *any* tangible harm if Section 3 is temporarily enjoined. Opp.54.

CONCLUSION

For the foregoing reasons, and those given in Plaintiffs' Opening Brief, Plaintiffs' Motion for a Preliminary Injunction should be granted.

Respectfully Submitted,

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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 Plaintiffs' Reply Memorandum In Support Of Their Motion For Preliminary Injunction, excluding those portions excluded by Local Rule 7.1(F), consists of 7,316 words.

/s Leon Dayan
Leon Dayan

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2023, I electronically filed the foregoing via CMF/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Leon Dayan
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