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 SECOND MOTION FOR PRELIMINARY INJUNCTION

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

INTRODUCTION

Plaintiffs' opening brief, Dkt. No. 63-1 ("Open.Br."), showed that the Second Amended Complaint, filed on July 14, 2023, Dkt. No. 48 ("SAC"), both (1) cured the standing defect identified by the Court in its June 26 Order denying Plaintiffs' first motion for a preliminary injunction, Dkt. No. 45, and (2) made it more explicit that Plaintiffs were pursuing their Contracts Clause claims both under 42 U.S.C. §1983, and under the Constitution itself. Plaintiffs did not re-brief the question whether they could pursue a claim for relief under the Contracts Clause but relied on an earlier brief, Dkt. No. 42, for that point. Plaintiffs' opening brief showed both that Plaintiffs had a likelihood of success on the question whether Section 3 of SB256 violates the Contracts Clause and that the other preliminary injunction factors weighed in their favor.

In response, Defendants acknowledge that the SAC cured the standing defect, Dkt. No. 80 ("Opp.") 6, but argue that, while the SAC now pleads both a §1983 claim and a direct action under the Contracts Clause, no federal claim is available to a plaintiff whose contract rights have been impaired in violation of the Contracts Clause, *id.* at 7-17. They then respond to the balance of Plaintiffs' submission. *Id.* at 17-41.

Because the issues in dispute have shifted since Plaintiffs' opening brief, this Reply begins in Part I by showing that, contrary to Defendants' argument, a

plaintiff whose contract rights have been impaired in violation of the Contracts Clause does have a federal claim that can be pursued in federal court. It then turns to the merits of the Contracts Clause issue in Part II, showing that Plaintiffs are likely to succeed in establishing a violation of that Clause. And finally, in Part III, it addresses the other preliminary injunction factors, showing that they also weigh in favor of preliminary relief given the serious, continuing irreparable harm that the Plaintiff Unions are suffering because of Section 3's retroactive nullification of the payroll-deduction provisions in their collective bargaining agreements.

ARGUMENT

I. PLAINTIFFS HAVE A CAUSE OF ACTION FOR THEIR CONTRACTS CLAUSE CLAIM ON EITHER OF TWO GROUNDS

Before addressing the merits of Plaintiffs' claim under the Contracts Clause, Defendants urge that this claim is unlikely to succeed for want of a federal cause of action. Defendants posit that Plaintiffs' only means of pressing their claim under the federal Contracts Clause is through a state court breach of contract claim. Opp.7-17.

Defendants' argument is doubly wrong. As explained in Plaintiffs' previous briefing, *see* Dkt. No. 42 at 11-16, the Contracts Clause claim is actionable under either 42 U.S.C. §1983 or as a direct action in equity alleging a violation of the

Contracts Clause. Both of these grounds are clearly invoked in Plaintiffs' Second Amended Complaint. *See* SAC ¶5. We address them in turn.

A. Section 1983 Provides a Cause of Action for Claims Alleging Violation of the Contracts Clause

Section 1983 provides a private right of action for plaintiffs alleging the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983. The constitutional provision prohibiting states from enacting laws "impairing the obligation of contracts" is found in Article I, §10 of the Constitution—the section that Chief Justice Marshall once described as "a bill of rights for the people of each state." *Fletcher v. Peck*, 10 U.S. 87, 138 (1810). While it should seem evident on its face that this clause, which protects citizens from having their contractual rights abrogated by state legislation, creates a "right[], privilege[], or immunit[y]," the deprivation of which would be actionable under §1983, the Eleventh Circuit has not had occasion specifically to address this issue. Nonetheless, it follows clearly from what the Supreme Court has said with respect to a closely-related question that the intuitive answer is the correct one.

In *Dennis v. Higgins*, 498 U.S. 439 (1991), the Court addressed the issue of whether claims based on violation of the Constitution's dormant Commerce Clause could be brought under §1983. Like the Contracts Clause, the Commerce Clause is contained in Article I of the Constitution, which deals with the powers of Congress, and like the Contracts Clause, the Commerce Clause (implicitly) limits

the legislative authority of the states—thus creating "rights, privileges, or immunities," the deprivation of which would be actionable under §1983. That is exactly the conclusion reached by the *Dennis* Court, which held that "suits for violations of the Commerce Clause may be brought under [§1983]." *Id.* at 440.

The Court began by emphasizing that "[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 and laws." *Dennis*, 498 U.S. at 443 (internal quotations omitted). While conceding that the "'prime focus' of §1983 … was to ensure 'a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto,'" the Court emphasized that it

> ha[d] never restricted the section's scope to the effectuation of that goal. Rather, we have given full effect to its broad language, recognizing that §1983 "provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights."

Id. at 444-45 (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 611 (1979); *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978)). The Court emphasized that "the Commerce Clause does more than confer power on the Federal Government; it is also a substantive 'restriction on permissible state regulation' of interstate commerce." *Id.* at 447 (quoting *Hughes v. Oklahoma*, 441 U.S. 332, 326 (1979)). The Court concluded that the "combined restriction on state power and entitlement to relief under the Commerce Clause

amounts to a 'right, privilege, or immunity' under the ordinary meaning of those terms." *Id.*

This analysis applies equally—indeed *a fortiori*—to the Contracts Clause. Indeed, Justice Kennedy, who authored the two-Justice dissenting opinion in *Dennis*, made exactly that point, explaining that there was a *stronger* argument that the Contracts Clause created rights actionable under §1983 than was the case with respect to the Commerce Clause. 498 U.S. at 457-58 (Kennedy, J., dissenting) (noting that the language of the Contracts Clause "provide[s] some support for an argument that the Contracts Clause prohibits States from 'doing what is inconsistent with civil liberty,'" while the Commerce Clause "is, if anything, a less obvious source of rights for purposes of §1983, as its text only implies a limitation upon state power" (quoting legislative history of §1983)).

In short, absent any binding authority to the contrary, *Dennis* compels the conclusion that §1983 provides a cause of action for rights secured under the Contracts Clause, just as it does for those that stem from the Commerce Clause.

Defendants offer only one argument to the contrary. Having nothing to say about the reach of the Court's Commerce Clause holding in *Dennis*, Defendants rely solely on the Supreme Court's decision in *Carter v. Greenhow*, 114 U.S. 317 (1885), which they say held that §1983 provides no right of action for violations of the Contracts Clause. Opp.8-12. But that is a misreading of *Carter*'s holding, as the

Supreme Court has explained on at least three occasions. Most recently, in *Dennis* itself the dissent advocated the same understanding of *Carter* as Defendants pursue here. *See* 498 U.S. at 457 (Kennedy, J., dissenting). In response, the Court majority squarely rejected that reading of *Carter*, noting that it had previously "given that decision a narrow reading." *Id.* at 451 n.9. All that *Carter* held, the Court explained, was that the plaintiff in *Carter* had pleaded only a breach of contract claim, and accordingly that case "held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the Contracts Clause], to which he had 'chosen not to resort.'" *Id.* (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 n.29 (1979)). Indeed, the holding of *Carter* has been understood as addressing only a pleadings issue since at least 1939, when Justice Stone's opinion in *Hague v. CIO*, 307 U.S. 496, 527 (1939), described the holding of *Carter* in these same terms. And the *Dennis* Court's understanding of *Carter* is not dictum; it is essential to the reasoning of *Dennis* itself, for had Justice Kennedy's reading of *Carter* been correct, the majority's extension of §1983 to Commerce Clause challenges would have been inexplicable.[1]

[1] Against these recent decisions Defendants cite dicta discussing *Carter* in an 1887 case that did not involve a claim brought under §1983. *See* Opp.8 (citing *In re Ayers*, 123 U.S. 443, 504 (1887)). It is sufficient to say, in this regard, that *Dennis*

Defendants attempt to deal with the *Dennis* Court's treatment of *Carter* by noting that "[n]owhere in *Dennis* did the Supreme Court explicitly overrule its holding in *Carter*," and pointing to the Court's admonitions to the lower courts not to anticipate potential overrulings until the Court itself says otherwise. Opp.9. But this is not a case in which "the reasoning of [a previous] decision appears to have been rejected in later decisions." *Id.* (quoting *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012)). Rather, the Court—in *Dennis*, as previously in *Chapman* and *Hague*—has given an authoritative statement of what the Court held in *Carter*. Given that *Carter* decided only a pleadings issue, the Court had no occasion to overrule it. *Carter* thus remains good law on the pleadings issue it decided, which poses no obstacle to the conclusion that a claim for violation of the Contracts Clause will lie under §1983.

To be sure, as Defendants point out, two Circuits have held otherwise, reading *Carter* as having held that §1983 provides no cause of action for Contracts Clause violations. *Kaminski v. Coulter*, 865 F.3d 339, 345-47 (6th Cir. 2017); *Crosby v. City of Gastonia*, 635 F.3d 634, 639-41 (4th Cir. 2011). These decisions—both of which were issued by those courts *sua sponte*, without briefing

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and its recent predecessors, which gave *Carter* a "narrow reading," *Dennis*, 498 U.S. at 451 n.9, clearly represent the modern Court's understanding of *Carter*.

by the parties on this issue[2]—are, of course, not binding on this Court.[3] Plaintiffs respectfully submit that they were wrongly decided, cannot be squared with *Dennis*' authoritative interpretation of *Carter* as deciding only a pleadings matter, and accordingly should not be followed.

The views of the *Kaminski* and *Crosby* courts have, moreover, been rejected or questioned by other courts and individual judges. Thus, the Ninth Circuit has followed the Supreme Court's reading of *Carter* in *Dennis*, squarely holding that the deprivation of a right under the Contracts Clause is actionable under §1983. *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 886-87 (9th Cir. 2003) (per curiam). The Sixth Circuit's split decision in *Kaminski* was issued over a strong dissent by Judge Moore, who "would … follow the Supreme Court's direction to read *Carter* narrowly and to construe §1983 liberally," and therefore "conclude[d] that an alleged violation of the Contracts Clause can give rise to a violation of §1983." 865 F.3d at 351 (Moore, J., dissenting). Other courts, while not being required to decide the issue, have expressed similar views. In *Heights*

[2] *See Kaminski*, 865 F.3d at 345; *Crosby*, 635 F.3d at 641 n.6.

[3] Nor should *Crosby* be given greater weight because retired Justice O'Connor—who had been part of the seven-Justice majority in *Dennis*—sat by designation on the *Crosby* panel. *Contra* Opp.10-11. She authored no opinion in either *Dennis* or *Crosby*, and she was only one of the seven Justices who joined in the *Dennis* decision, so that even if her individual *post hoc* view had any jurisprudential value, it could hardly be attributed to the Court.

Apartments, LLC v. Walz, 30 F.4th 720, 727-28 (8th Cir. 2022), the Eighth Circuit assumed, without deciding (because the defendant had not raised the issue), that a cause of action for violation of the Contracts Clause could be brought under §1983; and it clearly signaled that it did not believe that *Carter* controlled:

> Although the Supreme Court appeared to suggest initially in [*Carter*] that there was no private cause of action under the Contract Clause, the Court has since clarified that *Carter* was a question about pleading and not about whether the plaintiff could bring a claim under the Contract Clause.

Id. at 727 (citing *Dennis*); *see also Elliott v. Bd. of Sch. Trs.*, 876 F.3d 926, 931-32 (7th Cir. 2017) (recognizing that, contra *Kaminski* and *Crosby*, the "Supreme Court and other opinions reflect another view, reading *Carter* as based more narrowly on the way the particular claim in that case was pled").

In short, *Carter* has no bearing on whether Plaintiffs can proceed under §1983. Under *Dennis*, therefore, §1983 provides a cause of action for Plaintiffs to vindicate their rights under the Contracts Clause.

B. In the Alternative, Plaintiffs Can Proceed Through a Direct Cause of Action in Equity

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 federal Constitution. *See Osborn v. Bank of the United States*, 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 fact, been exercised by [f]ederal courts from the time of *Osborn*." Allowing 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). In short, "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *see also Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002).

This general principle applies equally to actions seeking to enjoin state officials from violating the Contracts Clause. Indeed, that is clear from *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 upon which Defendants rely for their §1983 argument. In *Allen*, the plaintiff had filed a bill in equity in federal circuit court, contending that a Virginia statute abrogating an agreement the State had made to accept state-issued bond coupons as a set-off for taxes owed violated the Contracts Clause. *Id.* at 313. The circuit court issued a permanent injunction preventing the state auditor from invoking that statute, and the Supreme Court affirmed. *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).

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, 301 (1952) (allowing federal-court challenge to state tax that "would impair the obligation of contract"); *Pennoyer v. McConnaughy*, 140 U.S. 1, 19 (1891) (allowing federal-court suit where the legislation in question "operates to impair the obligation of a contract"); *see also Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900).

Defendants ask the Court to disregard these cases on the theory that they address only the courts' subject-matter jurisdiction, *i.e.*, whether the cases were properly in federal court, and say nothing about whether the plaintiffs had a "cause of action" to pursue their Contracts Clause claims. Opp.14-15. But Defendants mistakenly fixate on the word "jurisdiction," at the expense of the clear import of the Court's holdings. As the Supreme Court has only recently pointed out, "[j]urisdiction ... is a word of many, too many meanings." *Biden v. Texas*, 142 S. Ct. 2528, 2540 (2022) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). Thus, for example, "the question whether a court has jurisdiction to

grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims." *Id.* Even today, the existence of a cause of action often is conflated with the extent of the court's "jurisdiction." *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008) (declining to recognize a private right of action where doing so would "conflict[] with the authority of Congress under Art. III to set the limits of federal jurisdiction") (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 746-47 (1979) (Powell, J., dissenting)).

Examination of the Court's *Allen* opinion, and the others cited above, makes clear that the Court was using the term "jurisdiction" not to refer to its subject-matter jurisdiction, but rather in the sense of "jurisdiction to grant a particular remedy." *Biden v. Texas*, 142 S. Ct. at 2540. Thus, in summarizing its holding, the *Allen* Court explained that "the jurisdiction in equity to grant the relief prayed for by injunction, and the propriety of its exercise, are alike indisputable." 114 U.S. at 317. Moreover, the Court explained that "[t]he exercise of [federal] jurisdiction" in Contracts Clause cases was "in the highest degree beneficial and necessary" to "vindicate the supremacy of the Constitution, and to maintain the integrity of the powers and rights which it confers and secures." *Id.* at 316. Plainly, it would have been nonsensical for the Court to stress the importance of vindicating Contracts

Clause rights in federal court if there was in fact no cause of action available to redress those rights.

The same is true for the other cases Defendants invoke, each of which makes clear that plaintiffs could bring Contracts Clause challenges in federal court, even though the Court did not use the terms "cause of action" or "right of action." Thus, in *Holt*, the Court explained that "[i]f state legislation impairs the obligations of a contract, ... *remedies* are found in the 1st section of the [1888 Judiciary Act]"—confirming that the Court was referring to "jurisdiction" in the remedial sense. 176 U.S. at 72 (emphasis added). And in *Pennoyer*, the Court held that "[w]e think it clearly demonstrated from the authorities above referred to that the *relief prayed can be granted*, if, as is contended for, the legislation of the [s]tate under which the defendants are assuming to act is unconstitutional, in that it operates to impair the obligation of a contract." 140 U.S. at 19 (emphasis added). These are, in sum, hardly "*sub silentio* or drive-by decisions," Opp.15 n.3, in which the Court gave no heed to whether the claim was one on which relief could be granted.[4]

[4] The Court's Fifth Amendment equal-protection jurisprudence belies Defendants' argument that the Supreme Court must use the magic words "cause of action" or "right of action" to permit claims for injunctive relief directly under the Constitution. In *Jacobs v. United States*, 290 U.S. 13 (1933), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), *on reargument as to remedy*, 349 U.S. 294, 301 (1955), the Court directed the lower federal courts to issue remedies for equal-protection violations by federal actors without any express discussion of whether a "cause of action" or "right of action" existed. When later presented with the contention that there was not a direct cause of action under the Fifth Amendment,

Defendants' remaining argument is that the courts will recognize no implied right of action when "alternative remedies" are available. Opp.13 (quoting *Hearth, Inc. v. Dep't of Pub. Welfare*, 612 F.2d 981, 982 (5th Cir. 1980)). Defendants rely particularly on *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244 (11th Cir. 2012), which they quote for the proposition that "when a plaintiff has 'an adequate remedy, we will not imply a judicially created cause of action under the Constitution.'" Opp.13 (quoting *GeorgiaCarry*, 687 F.3d at 1253 n.15). But that truncated quotation from a footnote is misleading. The full sentence is: "Where a *statute* provides an adequate remedy, we will not imply a judicially created cause of action directly under the Constitution." *GeorgiaCarry*, 687 F.3d at 1253 n.15 (emphasis added). And the quotation supported the court's observation in text that "we are aware of no case holding that such cause of action is implied when the relief a plaintiff seeks is plainly available *through a mechanism created by Congress*." *Id.* at 1253 (emphasis added). Nor does Defendants' abbreviated quotation from *Hearth* tell the full story of that case, in which the Fifth Circuit declined to find an implied right of action directly under the Fourteenth Amendment's Due Process Clause precisely because of the availability, *in §1983*,

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the Court cited *Jacobs* and *Bolling* to explain that "this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment." *Davis v. Passman*, 442 U.S. 228, 242 (1979).

of a congressionally created "means of seeking relief against state officials who violate the Constitution." *Hearth*, 617 F.2d at 382.[5]

Neither case is apposite here. Assuming *arguendo* that Plaintiffs' Contracts Clause claim cannot be brought under §1983, Congress has created no "means of seeking relief against state officials who violate" the Contracts Clause. The recourse to which Defendants point—a state-court suit seeking to enforce Plaintiffs' collective bargaining agreements, *see* Opp.11-12, 13—is not the sort of *federal statutory remedy* that the *GeorgiaCarry* and *Hearth* courts believed would preclude a direct cause of action under the Constitution.[6] Nor, in any event, is that remedy accessible to Plaintiffs, who could be held liable for an Unfair Labor Practice under Fla. Stat. §447.501(2)(b) if they were to initiate a grievance or arbitration proceeding against an employer that refused to honor a payroll deduction provision in a CBA. *See* Open.Br.10. In short, this is not a case in which

[5] The *Hearth* opinion from 612 F.2d cited by Defendants was modified in a revised opinion, found in 617 F.2d, to which we cite.

[6] In *Hearth*, the Fifth Circuit cited *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), as the exceptional case in which a cause of action arising directly from the Constitution had been found, noting the "absence of alternative remedies" in that case: "[T]here simply was no other means of seeking redress for flagrant violations of the plaintiff's constitutional rights." 617 F.2d at 382. The court could not have made that distinction had it believed recourse to state court constituted an "adequate remedy" for a violation of federal constitutional rights, as the plaintiff in *Bivens* had just such a state-court remedy: a tort claim, with the federal issue being decided in response to an anticipated defense. *See Bivens*, 403 U.S. at 390.

the ordinary state forms of action would be open to Plaintiffs, even on the assumption that they would otherwise be "adequate remedies" for the deprivation of Plaintiffs' federal rights under the Contracts Clause.[7]

* * *

There are, in sum, two alternative theories under which Plaintiffs can proceed with their claim for injunctive relief in this case. The first is that §1983 provides a cause of action for violation of the Contracts Clause, just as it does for violation of the Commerce Clause and any number of other constitutional claims. *See Dennis*, 498 U.S. at 443-47, 451 n.9. In the alternative, however, Plaintiffs can vindicate their constitutional claim by proceeding directly under the Contracts Clause—an action that this Court would have jurisdiction to adjudicate under 28 U.S.C. §1331. One way or the other, it is inconceivable that citizens claiming to be aggrieved by state statutes retroactively impairing their contractual rights in violation of the federal Constitution—whether unions' collective bargaining agreements or, for example, the rights of property owners seeking to vindicate a contractual right to evict nonpaying tenants, *see Heights Apartments*, 30 F.4th at

[7] Defendants' assertion that 28 U.S.C. §1331 "does not create causes of action," Opp.13-14, is correct but misunderstands the issue. Plaintiffs' contention is not that §1331 is the source of their direct cause of action; rather, the Constitution itself generates a claim in equity to enjoin violations of the Constitution (in this case the Contracts Clause)—a claim over which §1331 confers federal jurisdiction.

724-25—could be left without a federal remedy for the constitutional violation they allege.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIM THAT SECTION 3 VIOLATES THE CONTRACTS CLAUSE

On the merits of the Contracts Clause question, Defendants' submission is equally flawed. Defendants begin by misapplying all three factors that speak to the question whether Section 3's nullification of payroll-deduction provisions in existing collective bargaining agreements works a "substantial impairment" of those contracts, and they seriously misstate Supreme Court and Eleventh Circuit precedents.

Those precedents will be examined closely below. But first it is important to step back and observe that, if those precedents were as Defendants portray them, public sector collective bargaining agreements, as a category, would be stripped of the protection of the Contracts Clause. All it would take to render the *substantive provisions* of a collective bargaining agreement unprotected would be the existence of a state statute that comprehensively regulated the *process* of collective bargaining. *See* Opp.18-22. And because every state that allows collective bargaining in the first instance also comprehensively regulates the collective-bargaining process, every collectively bargained obligation would, on Defendants' rendition of the Contracts Clause, be subject to retroactive nullification at the whim of any Legislature. Defendants' position would render illusory not only bargained-

for obligations to deduct union dues, but also bargained-for obligations to increase wages or provide health benefits. That is not the law.

As demonstrated in Plaintiffs' opening brief and further demonstrated below, courts from across the country have invalidated on Contracts Clause grounds state laws that retroactively repealed collectively bargained obligations. *See* Open.Br.12-14. Among those cases are the Sixth Circuit's directly on-point decisions in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), and *Michigan State AFL-CIO v. Schuette*, 847 F.3d 800 (6th Cir. 2017), which invalidated state laws that retroactively repealed payroll-deduction clauses.

A. Section 3 Substantially Impairs Plaintiffs' Contract Rights

In considering whether a law "substantially impairs" contract rights, courts consider three factors: "the extent to which the law [1] undermines the contractual bargain, [2] interferes with a party's reasonable expectations, and [3] prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018).

1. Section 3 Interferes with the Plaintiffs' Reasonable Expectations

a. Beginning with the second factor, Defendants cite the Eleventh Circuit's decision in *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198 (11th Cir. 2019), for the proposition that this factor can be "dispositive" where, as in that case, the contract in question "d[id] not give rise to any reasonable contractual

expectations" at all. Opp.18. Defendants then imply that the CBAs here are analogous to the contract in *S&M Brands*, *see id.* at 21, but, tellingly, they never describe the contract in *S&M Brands*, because to describe that contract is to reveal that it is worlds apart from the CBAs at issue here.

The special feature of the "contract" in *S&M Brands* was that it was a contract in name only, since it was not a bargained-for exchange but instead an unusual escrow arrangement whose terms were dictated by state regulators from the inception of the arrangement. *See* 925 F.3d at 1203 ("Every term of the old model escrow agreement was specifically dictated by the Attorney General as a condition of approval under O.G.C.A. §10-13A-3(d)(2). It is hard to say that such a contract could give rise to *any* reasonable contractual expectations that would implicate the [Contracts] Clause."). The substantive provisions of the CBAs at issue here, by contrast, were negotiated by the parties themselves and were *not* dictated by regulations, making *S&M Brands* utterly inapposite.[8]

b. Defendants nevertheless argue that public-sector collective bargaining is heavily regulated in Florida and suggest that a contract is incapable of being

[8] *Fraternal Order of Police v. District of Columbia*, 45 F.4th 954 (D.C. Cir. 2022), is also inapposite. There the plaintiff union sought to invoke the Contracts Clause to give it rights that extended *past* the expiration of its contract with the city. *Id.* at 961. Unsurprisingly, the court had little trouble in concluding that the union had no reasonable *contractual* expectations safeguarded by the Contracts Clause. *Id.*

substantially impaired as a matter of law in "'an industry [that] is already heavily regulated.'" Opp.18 (quoting *S&M Brands*, 925 F.3d at 1203).

An initial problem for Defendants in pressing this argument is that the very passage they quote from *S&M Brands* to support their contention says only that "regulatory changes that abrogate industry players' contract rights are *less likely* to be considered substantial impairments" in a "heavily regulated" industry than are regulatory changes in a previously unregulated industry. *S&M Brands*, 925 F.3d at 1203 (emphasis added). But that truism hardly means that the existence of industry regulation is in any way "dispositive" of the substantial impairment factor when the subject matter of the substantive provision of the contract that is being impaired is one that has *not* been subject to frequent regulatory change.

Quite to the contrary, in *Pizza*, there was no doubt that the state of Ohio comprehensively regulated the *process* of collective bargaining, *see* Ohio Rev. Code §§ 4117.01-.24, but nothing in Ohio's history of regulation suggested that payroll-deduction clauses were the subject of particular regulatory attention. Likewise, in *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977), the Court held that New Jersey violated the Contracts Clause by enacting a law that repealed a statutory covenant that had provided one of several forms of security to investors in a public transit municipal bond offering, even though both public transit and municipal bonds are heavily regulated. *Id.* at 28-31.

Examples like these show that the Seventh Circuit in *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892 (7th Cir. 1998), was right to say that "a history of regulation is never a *sufficient* condition for rejecting a challenge based on the contracts clause" and that "[t]he fact that some incidents of a commercial activity are heavily regulated does not put the regulated firm on notice that an entirely different scheme of regulation will be imposed." *Id.* at 895 (emphasis added). Thus, the court explained, a history of regulation of the car dealer franchise industry would not permit the legislature to enact legislation that retroactively changed *price* terms, but at most would allow only modifications of those terms that had historically been subject to frequent change. *Id.*[9]

Perhaps recognizing that a plaintiff's Contracts Clause challenge will be stronger when it is only the general industry that has experienced a history of regulatory change, and not "the subject matter of the contract itself," Defendants

[9] Defendants' contention "[t]hat [the *Chrysler* Court's] view contradicts the Eleventh Circuit's" on this point, *see* Opp.18 n.4, is seriously mistaken. In *S&M Brands*, the Eleventh Circuit never came close to saying that a history of regulation in a given industry *suffices* to give States carte blanche to impair any and all contracts in that industry without accountability under the Contracts Clause. All the Eleventh Circuit said was that such a history makes it "less likely" that further regulation will be struck down on Contracts Clause grounds, and that when there is a history of regulation of the subject matter in dispute, a Contracts Clause claim challenging further regulation is "even weaker." *S&M Brands*, 925 F.3d at 1203. All of that is entirely consistent with the view of the Seventh Circuit in *Chrysler* that treats the history of regulation as a factor, but not a dispositive one, in Contracts Clause analysis.

attempt to fit this case into the "weaker" category. Opp.18. They attempt to do so by characterizing the relevant subject matter of these collective bargaining agreements as collective bargaining itself, and by then pointing to the extent to which PERA regulates the process of collective bargaining in Florida. *Id.* at 19-21.

But the subject of a collective bargaining agreement is not collective bargaining itself; it is the topics over which the parties have bargained, such as wages, hours, and various conditions of employment, including payroll deduction of dues. And because Florida does not have a history of making frequent changes to the rules surrounding payroll deduction of dues, much less retroactive changes that override clauses in existing, unexpired contracts, it does not matter that Florida has closely regulated the collective bargaining process writ large.

Nor, contrary to Defendants' submission, does "Florida law make[] clear that every provision of a CBA is subject to changes in the law." Opp.20. To support that assertion, Defendants resort to cropping important language out of their quotation from subsection (3) of Fla. Stat. §447.309 so as to change its meaning. *Id.* When the relevant language is added back in, it becomes apparent that subsection (3), far from giving the government free rein to enact after-the-fact laws that would override otherwise binding CBA provisions during the middle of a CBA term, instead provides a procedure through which a union, *before a tentatively agreed-upon CBA becomes effective in the first instance*, can bargain

for an actual or proposed amendment to a law, regulation, or ordinance. Fla. Stat. §447.309(3).

Subsection (3) states in full:

> If any provision of a collective bargaining agreement is in conflict with any law, ordinance, rule, or regulation over which the chief executive officer has no amendatory power, the chief executive officer shall submit to the appropriate governmental body having amendatory power a proposed amendment to such law, ordinance, rule, or regulation. Unless and until such amendment is enacted or adopted and becomes effective, the conflicting provision of the collective bargaining agreement shall not *become* effective.

Fla. Stat. §447.309(3) (emphasis added). Thus, if the "chief executive officer" (CEO) of the particular public employer has "amendatory power" over a given law, ordinance, or other regulation, the union can bargain to have the regulation amended, whereas if the CEO *lacks* amendatory power, the union can bargain to have the CEO request an amendment from the body that possesses that power. And the agreement becomes binding on the public employer only after it "has been ratified by the public employer and by public employees who are members of the bargaining unit, subject to the provisions of subsections (2) and (3)." Fla. Stat. §447.309(1).

When read uncropped and in its statutory context, it is plain that subsection (3) addresses the situation where both parties are aware of the external law and are seeking, prospectively, to include a CBA provision that would require a modification of that law. Subsection (3) does *not* address the situation where,

after a CBA is executed and becomes binding, a change in external law purports to nullify an agreed-upon CBA provision. This is why the statute speaks of a CBA provision that "shall not *become* effective," Fla. Stat. §447.309(3) (emphasis added), rather than a CBA provision that "shall cease to be effective."

Indeed, the post-execution change in external law is the situation that the Florida Supreme Court addressed in the case of *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), cited in Plaintiffs' opening brief. Open.Br.16. In *Chiles*, the court held that the Florida Legislature violated the Florida Constitution's Contracts Clause and guarantee of the right to collectively bargain when it passed a law that purported to override a contractually binding pay raise for public university faculty. 615 So. 2d at 673-74. Defendants therefore could not be more wrong when they assert that, under PERA, every provision in a CBA is subject to changes in the law.

In sum, there is nothing in Florida's collective bargaining statute that would distinguish it for Contracts Clause purposes from the collective bargaining statutes that formed the backdrop of the numerous cases in which courts found dues

deduction provisions in CBAs,[10] as well as other substantive CBA provisions,[11] to have been unconstitutionally impaired in violation of the Contracts Clause.

c. Defendants next argue that the Unions themselves agreed in each of the CBAs at issue here to allow the Legislature to nullify contract terms, and that they thereby waived their constitutional right against the impairment of their contracts. Opp.22-25. Defendants are again mistaken.

This argument is grounded in Defendants' suggested distinction between, on the one hand, "generic" severability clauses—clauses that even Defendants admit do not constitute waivers of the parties' right to challenge post-contract-execution statutes on constitutional grounds—and, on the other hand, what Defendants dub "*Kansas Power*" clauses that they claim constitute waivers of Contracts Clause rights. Opp. 24-25 (citing *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983)). According to Defendants, a savings clause is "generic" when it (1) identifies the possibility that some provision of the contract might conflict with a federal, state, or local law and (2) provides that, in that event, the *remaining* provisions of the contract are to stay in effect and that the parties are required to *follow* those remaining provisions. Opp. 24. But, say the Defendants, a

[10] *See Pizza, Schuette, supra*; *see also Anderson Fed'n of Tchrs. v. Rokita*, 546 F. Supp. 3d 733, 746 (S.D. Ind. 2021).
[11] *See Chiles, supra*; *see also Univ. of Haw. Prof. Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999); *Ass'n of Surrogates v. New York*, 940 F.2d 766 (2d Cir. 1991).

clause crosses the line into so-called "*Kansas Power*" territory when it states explicitly what is implicit in any "generic" savings clause, which is that the parties are *not* required to follow the *invalid* provision. Opp.24-25.

To illustrate the point, consider how Defendants apply their distinction to the Hernando CBA. Defendants concede, Opp.25 n.6, that this sentence from the Hernando CBA is "generic":

> In the event that any of the provisions of this Agreement shall be held in violation of any federal, state, or local law by a court of final appeal, such determination shall not in any way affect the *remaining* provisions of this Agreement.

Dkt. No. 63-2, Ex. 1, Art. I, §4 (emphasis added). But the preceding sentence, which states the necessary corollary—i.e., that "[n]othing in this Agreement shall require either party to act in violation of any federal, state, or local law" is—according to Defendants, a *Kansas Power* waiver. *Id.*

Defendants' distinction is entirely artificial. It is not one on which the *Kansas Power* Court in any way suggested important constitutional rights should rise or fall.

Indeed, the only way that Defendants can make it appear plausible that *Kansas Power* suggested something like this is through resort to yet another cropped quotation, this time using brackets to change the meaning of the passage in question. Defendants attribute to *Kansas Power* the proposition that a provision in a contract between a natural gas supplier and a power company "could be

interpreted to incorporate all future [*regulatory changes*], and thus dispose of the Contracts Clause claim." Opp.23 (brackets and words in brackets supplied by Defendants; emphasis added). But the Court actually stated that the clause "could be interpreted to incorporate all future state *price regulation*, and thus dispose of the Contracts Clause claim." *Kansas Power*, 459 U.S. at 416 (emphasis added).

The difference between "regulatory changes" and "price regulation" is no small nuance, because the precise question in *Kansas Power* was whether the plaintiff natural gas supplier was on reasonable notice when it entered into the contract at issue that the contract's *price* term might be affected by subsequent regulation, not whether the supplier was on notice of any and all conceivable regulatory changes, regardless of topic, that might occur during the term of the agreement. 459 U.S. at 413-16. The seller was on notice of *price* regulation, the Court explained, because when the contract was executed there was close federal regulation of natural gas prices that was directly taken account of in the contract itself. *Id.* Here, precisely because there is *no* evidence that the Plaintiff Unions entered into their CBAs contemplating the prospect that Florida would ban *payroll-deduction* for the first time, this case is dramatically different from *Kansas Power*.

Without their impermissible reading of *Kansas Power*, the Defendants have no explanation as to why the generic savings clauses here—clauses that not only are silent as to the topic of payroll deduction but silent as to all substantive

topics—should deprive Plaintiffs of their ability to invoke the Contracts Clause to enjoin Section 3.

Nor have Defendants provided any response at all to Plaintiffs' showing in their opening brief that the severability and savings clauses at issue here merely set forth one or both of two default principles of CBA interpretation—principles that would apply even if the clauses had never appeared in the CBAs in the first instance. Under the first rule, collective bargaining agreements are, by default, severable.[12] Under the second, when legislation is adopted after a CBA is executed that conflicts with and purports to override a provision of the CBA, the party adversely affected by the legislation is entitled to demand good-faith bargaining from the other party over the effect of the invalidation but is not entitled to any modification of the CBA unless the other party agrees to a modification.[13]

These default presumptions also applied to the CBAs at issue in the directly on point decisions by the Sixth Circuit in *Pizza* and *Schuette*. Even if those CBAs lacked savings clauses, a point on which the record in each case is unclear, the

[12] Open.Br.16-17 (citing *Chattanooga Mailers Union, Loc. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1313 (6th Cir. 1975); *Graphics Commc'ns Int'l Union Loc. 121-C v. S. Coupon, Inc.*, 852 F. Supp. 970, 975 (N.D. Ala. 1993)).

[13] Open.Br.17 n.4 (citing *Palm Beach Jr. Coll. Bd. Of Trustees v. United Fac. of Palm Beach Jr. Coll.*, 475 So .2d 1221, 1227 (Fla. 1985); *Arizona Publ. Serv. Co.*, 247 N.L.R.B. 321, 325 (1980))

default presumptions would render the CBAs no different in meaning and operation than the CBAs at issue here.

In sum, the Union Plaintiffs had a reasonable expectation when they entered into their CBAs that they would receive the benefit of the payroll-deduction provision in those CBAs and that the Legislature would not ban payroll deduction, let alone selectively and retroactively.

2. Section 3 Undermines the Contractual Bargain

Just as the "reasonable expectations" factor weighs in Plaintiffs' favor, so too does the factor that examines the extent to which the challenged legislation "undermines the contractual bargain." *Sveen*, 138 S. Ct. at 1822. In this regard, the Sixth Circuit's decisions in *Pizza* and *Schuette* are again directly on point. Indeed, Plaintiffs already have shown that the payroll-deduction provisions at issue here are even more important than the provisions held to be protected against legislative impairments in *Pizza* and *Schuette*. That is because the unconstitutional statutes in those cases banned the use of payroll deduction only as a means of financing unions' political action committees (PACs), whereas Section 3 retroactively nullifies collectively-bargained provisions requiring employers to deduct the union's *basic membership dues*—the monies unions use to finance their core representational functions on behalf of the workers they represent. *See* Open.Br.13-14.

Defendants try to make that distinction work in their favor by suggesting that somehow PAC expenditures inure more directly to the benefit of each employee in the bargaining unit than do union dues. Opp.31 n.8. But they cite no support for that assertion, because there is none. Both PAC expenditures and expenditures of union dues are made by representatives of employees, not by each individual employee. Indeed, because individual employees can make political campaign contributions on their own, there would be no purpose in having a union PAC if union leaders were not responsible for making expenditure decisions on behalf of union members as a collective body, just as union leaders are responsible for expending union dues for the benefit of represented employees as a collective body.

Equally far afield is Defendants' argument that payroll deduction provisions are unimportant because they do not "guarantee Plaintiffs any revenue." Opp.30. Defendants suggest that because, in a hypothetical alternative universe, every single member could simultaneously decide one day to withdraw their dues authorizations, unions have been wasting their resources for decades bargaining for payroll deduction. *Id.* This argument is difficult to take seriously. It is no different from arguing, for example, that a payroll processing company under contract with an employer would have no rights protectable by the Contracts Clause if the

employees were all at-will and theoretically could quit without notice at the same time. That, too, would be a non-starter.

In the real world, where public-sector employees want to be members of the union and pay dues, it is undisputed that payroll deduction is the most efficient and cost-effective mechanism for the union to collect the funds it needs to represent them. The promise by the employer to make payroll deduction available to those employees who want to participate is therefore of great value to the union. That Defendants must resort to conjuring theoretical possibilities to rebut the proposition that payroll-deduction clauses are valuable serves only to highlight how clearly the "undermines the contractual bargain" factor weighs in favor of Plaintiffs' position that Section 3 works a substantial impairment.

3. Section 3 Does Not Offer Unions a Means to Safeguard or Reinstate their Payroll Deduction Rights

The final "substantial impairment" factor inquires into the extent to which the challenged statute "prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822. Plaintiffs' opening brief demonstrated that this factor does *not* inquire into the ability of a party to mitigate the damage caused by an unconstitutional deprivation of rights but "only into the ability of a party to easily prevent the deprivation of rights from happening in the first instance, *or*

from becoming final in the event there is a provisional deprivation." Open.Br.18 (emphasis added).

Section 3 does not offer any mechanism that allows the covered Unions either to safeguard or to reinstate their payroll-deduction rights. If, for example, Section 3 had said that a union would lose payroll-deduction privileges *unless* the union paid the employer in advance for the small annual costs of administering the payroll deduction system, *that* could be an example of a mechanism that would provide a relatively nonburdensome means for safeguarding the unions' rights. But Section 3 leaves covered unions with *no* means for preserving their right to payroll deduction. Unions instead must expend substantial resources both on third-party vendors to run eDues systems and on efforts to contact their members and persuade them to convert from payroll deduction to such systems.

The paradigmatic low-cost and low-burden mechanisms for safeguarding or restoring rights are the filing of simple notice forms such as those at issue in *Texaco, Inc. v. Short*, 454 U.S. 516, 518-19 & n.7 (1982), and the filing of a simple change-of-beneficiary form in *Sveen*, 138 S. Ct. at 1823-25. Securing a third-party vendor and undertaking a massive campaign to convert thousands of members to a new dues-payment system bears no resemblance to those mechanisms that have been held to weigh against a finding of substantial impairment.

B. Retroactive Impairment of Plaintiffs' CBAs Is Not Reasonable and Necessary to Achieve a Significant and Legitimate Public Purpose

Because Section 3 substantially impairs existing contracts, the inquiry proceeds to the second step of the Contracts Clause test: "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 (quoting *Kansas Power*, 459 U.S. at 411-12).

1. The only interest that Defendants identify as the public purpose of Section 3 is the interest in "transparency." Defendants define "transparency" in this context to mean the interest in "ensur[ing] public employees are fully informed about the dues they are paying their unions." Opp.34. To satisfy the second step of the test, then, Defendants must carry the burden of establishing that the transparency interest is both legitimate and significant and that Section 3 is "appropriately and reasonably tailored" to serve that 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.").[14]

[14] 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 significant 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 plainly fails to advance the asserted "transparency" interest that it falls regardless of who has the burden.

The State's asserted transparency interest is found nowhere in the legislative record, which is "cause for grave concern" when the State has a "self-interest" in seeing the Plaintiffs' dues deduction provisions impaired. *Pizza*, 154 F.3d at 325. Here, notwithstanding Defendants' assertion to the contrary, Opp.33-34, the State does have a self-interest in the impairment. The State itself, as a public employer, is party to numerous contracts covered by PERA, including the UFF CBA at issue in this case, and is abrogating its own contracts through Section 3, thus warranting heightened skepticism and more careful scrutiny than when only private contracts are being abrogated. *See United States Tr. Co.*, 431 U.S. at 25-26.

Beyond that, the "transparency" interest that Defendants impute to Section 3 does not begin to explain the need to abrogate existing payroll-deduction provisions *retroactively*. As explained in Plaintiffs' opening brief, a state interest in a law's prospective application is distinct from its interest in retrospective abrogation of existing rights. *See* Open.Br.21; *Pizza*, 847 F.3d at 326-27. This is a crucial point that Defendants simply ignore. As the Supreme Court explained in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Contracts Clause is one of a series of provisions in the Constitution that reflect the view that "retroactive statutes raise particular concerns"—including that "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration" and that "[i]ts responsivity to political pressures

poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.* at 266.

For these reasons, the Court has explained that "a justification sufficient to validate a statute's prospective application … may not suffice to warrant its retroactive application." *Id.* at 266 (internal quotations omitted). *See also Elliott*, 876 F.3d at 938 ("Indiana has not shown it needs to impose this *retroactive* impairment of its earlier promises of job security to improve teacher quality." (emphasis added)).

Defendants' silence on this issue speaks volumes. Their failure to offer a reason why the effectuation of the transparency interest that they impute to Section 3 cannot "wait until existing contracts expire," *Pizza*, 154 F.3d at 327, is because there is no reason. As we have noted, the House sponsor of SB256 did not even think that Section 3 would operate retroactively, *see* Open.Br.20, so it should not be surprising that the legislative record is devoid of any possible explanation as to why retroactive implementation of Section 3 is necessary to achieve its purpose.

2. While the absence of any explanation for the supposed need to make Section 3 retroactive should be dispositive, the fact is that Section 3 is not even appropriately or reasonably tailored to the interest in transparency on a going-forward basis.

To begin with, Section 3 simply abolishes voluntary payment of dues via payroll deduction; it does not require any disclosures or other "transparency" measures. Moreover, as Defendants concede, payroll deduction itself furthers transparency by generating a paystub that shows employees the dues amounts that they pay. Opp.35. And, as demonstrated in Plaintiffs' opening brief, Section 3 does not create more transparency than that, because it permits automated alternatives like eDues that are indistinguishable from payroll deduction for "transparency" purposes. Open.Br.21-22. Defendants' only response on this point is to offer the speculative assertion that dues deduction "is less likely to be seen [than] a direct ACH payment." Opp.36. But there is no support for that in the legislative record, or even in the preliminary injunction record.[15]

[15] If this case were a case governed by the lowest possible standard of review—the rational basis test applicable to ordinary economic legislation—such *post hoc* speculation by litigation counsel could be permissible. And it is telling in this regard that Defendants, in attempting to establish a fit between Section 3's means and its stated ends, resort to citing cases setting the lowest judicial-review bar in existence. *See* Opp.37 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993) and *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)). But where a statute substantially impairs contract rights, a much more searching standard of review applies, requiring a showing that the impairment is appropriately and reasonably tailored to advance a significant public purpose. *Supra* at 3.B.1; *see also Pizza*, 154 F.3d at 326 (a statute's ability to "survive[] rational basis scrutiny for purposes of our equal protection analysis does not mean that it justifies a very substantial impairment of a pre-existing contract"). And under that more searching standard of review, the sort of speculative justification offered by Defendants here cannot suffice. *Pizza*, 154 F.3d at 327.

Beyond that, Section 3 abolishes payroll deduction only for members of certain disfavored unions, not for the tens of thousands of members who belong to the favored unions. *See* Open.Br.22 n.6. And Defendants point to nothing suggesting that police officers and other favored-union members are more likely to know the amount of their dues than are teachers and other disfavored-union members.[16] This glaring under-inclusiveness alone should be fatal to Section 3's ability to satisfy the second step of the Contracts Clause analysis, because that step requires that the State interest advanced by the impairing legislation must be not merely "legitimate" but "significant." *Sveen*, 138 S. Ct. at 1822; *see also United States Tr. Co.*, 431 U.S. at 25-26 (to be justified, an impairment must advance an "important public purpose"). And the conspicuous carve-out in Section 3 for

[16] Defendants make the random observation that public-safety employees belonging to the favored unions tend to work longer shifts that keep them away from a single centralized location where they can interact with union representatives and, in theory, pay their dues in person by handing a check to a union representative. *See* Opp.36-37. But that observation does not help Defendants, for it depends on the premise that there is a critical mass of union members whose *first* choice for paying dues is by payroll deduction but whose *second* choice is not another form of automated payment like eDues but is instead tracking down a union representative at some centralized location every month and handing the representative a check. Defendants point to no evidence that anyone would fall into this category, nor could they. Perhaps more to the point, Section 3 does not require in-person payment, so even if there were anything to the proposition that it would be better for union members to pay dues in person, Section 3 would be the most poorly tailored law imaginable to achieve that outcome.

police, fire, and corrections employees highlights that the Legislature itself could not have considered the transparency problem to be "significant," as any legislature believing the problem to be significant and truly pressing would have extended the payroll-deduction ban to all categories of public employees.[17]

The carve-out for favored unions also defeats any contention that Section 3 is the kind of law calibrated to attacking a "broad and general social or economic problem" that can often justify a properly tailored contractual impairment. *Kansas Power*, 459 U.S. at 412. The carve-out instead reveals Section 3 to be the kind of law that the Contracts Clause disfavors, as the carve-out protects "special interests," *id.*, leaving Section 3 "aimed at specific" targets, *id.* at 412 n.13.

C. The Recent State Court Cases Cited By Defendants Are Either Distinguishable, Unpersuasive, or Both

In addressing the merits of the Contracts Clause question, Defendants invite the Court to find guidance, not in the comprehensive and carefully reasoned

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[17] Unable to offer any distinction between public-safety employees and other public employees relevant to *transparency*, Defendants point to a PERC decision that explains why there is a distinction between police and other employees relevant to the completely different issue of whether police should be in separate bargaining units from employees that they may have to investigate. Opp.36 (citing *Broward Cnty. Police Benevolent Ass'n, Inc. v. Schl. Bd. of Broward Cnty.*, 32 PFER ¶11, 2006 WL 6824956 (Jan. 13, 2006)). Needless to say, the fact that a distinction can be drawn between two groups in such a way as to reasonably and appropriately advance *one* governmental interest does not mean that the same distinction is reasonable or appropriate to advance *all* governmental interests.

decision by Judge Boggs, writing for the Sixth Circuit in *Pizza*, but in a pair of recent state court decisions from Tennessee and from Florida. *See Tennessee Educ. Ass'n. v. Lee*, No. 23-0784 (Chancery Ct. July 28, 2023); *Miami Beach Mun. Emps. AFSCME Loc. 1443 v. PERC*, 23-CA-1492 (Cir. Ct. Leon Cnty. June 30, 2023).

The *Tennessee Education Association* case is, first of all, distinguishable from the instant case on a factual point that could hardly be more fundamental. At issue there were payroll deduction clauses in two different CBAs between local teachers' unions and local boards of education, and "[i]n both cases," the court found, "the respective boards of education have reserved the right to change their payroll practices absent further negotiation." Dkt. No. 83-1 at 4-5. In contrast, none of the CBAs at issue here have any language that would allow the employer to eliminate or alter payroll deduction unilaterally. It is undisputed that, but for Section 3, the contracts would require the employer to provide payroll deduction for the duration of their term.

To the extent that the Tennessee court's reasoning would suggest that even CBAs like those here are unprotected from retroactive impairment, that reasoning echoes the reasoning that Defendants here have urged this Court to adopt, and that Plaintiffs have shown to be unpersuasive. Plaintiffs would only add in this regard that the Tennessee court, in minimizing the importance of payroll deduction

clauses, was compelled to rely on the *dissent* in *Pizza*, which underscores the fact that Defendants' position here cannot be reconciled with Judge Boggs' persuasive reasoning in that case.

While the *Tennessee Education Association* case is distinguishable and contains unpersuasive reasoning insofar as it follows the dissent in *Pizza*, the *Miami Beach* decision contains no reasoning. Its analysis of the Contracts Clause issue is contained in a single conclusory paragraph that does not cite any cases. Moreover, even the court's single-paragraph recitation of conclusions was dicta, as the court found that the plaintiffs lacked standing to bring their claims. In short, *Miami Beach* is unpersuasive and should not be followed.

III. THE BALANCE OF EQUITIES FAVORS PRELIMINARY RELIEF

A. Irreparable Harm

Defendants do not deny that Plaintiffs have suffered and will continue to suffer a significant loss in dues revenues arising from the fact that employers are no longer remitting dues to them via the predominant system of collecting dues that was in place prior to Section 3's effective date. Nor do Defendants deny that Plaintiffs have incurred and will continue to incur significant out-of-pocket costs to establish and maintain their alternative eDues collection system to replace the system that Section 3 retroactively invalidated. Nor still do Defendants deny that, to recover dues not paid in any given payroll cycle, Plaintiffs will have to expend

additional resources to collect those dues member by member, with their only legal recourse against the member being a lawsuit. That means that any given dues payment that the Plaintiffs fail to receive is automatically worth less than the face value of the dues obligation, because the costs of collection will have to be netted against the amount due, leaving the Plaintiffs with fewer resources to provide services to their members, advocate on their behalf to their employer and to the legislative bodies and the public, and to otherwise carry out their missions as labor organizations.

This is precisely the type of monetary harm—loss of a high number of small payments with "no guarantee of eventual recovery"—that the Supreme Court held qualifies as "irreparable harm" in *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). There, the series of small payments were past due monthly rents that landlords could not collect due to the Covid eviction moratorium but that were theoretically collectable in the future through lawsuits against tenants or other costly collection mechanisms. While no doubt some of the past-due rents were collectable, the Court found that there was no realistic possibility that landlords would be able to recover all of them, meaning that the moratorium was causing them irreparable harm.

Defendants do not even cite *Alabama Realtors*, still less explain why its reasoning should not be followed. Instead, they take out of context a statement

from Plaintiffs' brief to the effect that that the Unions will not be able to collect all of the past-due amounts that have accumulated since payroll deduction ended on July 1, *see* Open.Br.24, portray that statement as if it claimed that the Unions will not be able to collect any of those amounts, and then fault Plaintiffs for failing to prove that they will not be able to collect any of the past-due amounts. Opp.38. But in order for Plaintiffs to invoke *Alabama Realtors*, they do not need to show that every past due amount will go uncollected. They can rely, just like the plaintiff landlord groups there, on the commonsense proposition that, where there is a large group of debtors who owe small past-due amounts, no collection strategy can guarantee the recovery of the all the past-due amounts.

Defendants next argue that because the Plaintiffs are not within weeks of insolvency, they cannot establish irreparable harm. *See* Opp.39. But that does not detract from the fact that the Plaintiffs, without dues deduction, are suffering ongoing losses of revenues with no realistic prospect that alternative collection mechanisms will restore all of the losses. Under *Alabama Realtors*, that constitutes "irreparable" harm.[18]

[18] Defendants cite *Lifestar Ambulance Serv., Inc. v. United States*, 365 F.3d 1293 (11th Cir. 2004), for the proposition that "*recoverable* monetary loss does not constitute irreparable injury." Op.38 (citing *Lifestar*, 365 F.3d at 1296 n.5 (emphasis added). That case is fully consistent with Plaintiffs' position here, which is that, like a portion of the lost rents in *Alabama Realtors*, a portion of the lost dues here is not recoverable.

Finally, Defendants argue that two of the four local union Plaintiffs, PCTA and HUSW, should be denied preliminary relief even if the other two, ACEA and UFF, are granted such relief. PCTA and HUSW joined this lawsuit on July 14, within two weeks of Section 3's effective date and joined the instant motion for a preliminary injunction five days later. Defendants argue, however, that their failure to act sooner "undermines" their claim of irreparable harm. As purported support for that argument, Defendants cite *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). But in *Wreal*, the plaintiff filed a lawsuit and then, for five months, conducted no discovery and made only routine case-management filings, before suddenly filing a preliminary injunction motion with no explanation as to why it did not seek an injunction close in time to its complaint. *Id.* at 1247. Here, PCTA and HUSW filed the instant motion within days of filing their complaint.

Moreover, PCTA and HUSW are affiliated with Plaintiff FEA, their parent body, and with Plaintiffs ACEA and UFF, their sister bodies. Those Plaintiffs filed suit within hours of SB256's enactment, brought a preliminary injunction motion within days of filing the lawsuit, and obtained a hearing date within days of filing the motion. Dkt. No. 1 (May 9, 2023); Dkt. No. 15 (May 12, 2023); Dkt. No. 29 (May 19, 2023). While that preliminary injunction motion did not succeed, it was eminently reasonable for PCTA and HUSW to monitor the proceedings, rather

than multiply them, in the belief that if the Court had reached the issue as to whether Section 3 was likely to be found unconstitutional, they would likely have been able to resolve the matter of payroll deduction in the interim through discussions with their employer and PERC. In *Wreal*, the plaintiff was not monitoring similar litigation but inexplicably chose to treat its dispute with the defendant "with the urgency of someone out on a meandering evening stroll rather than someone in a race against time." 840 F.3d at 1246. The circumstances here are entirely different. Plaintiffs are suffering continuing irreparable harm and have acted diligently to seek relief from that harm.

B. Remaining Preliminary Injunction Factors

The remaining equitable factors also weigh in favor of a grant of preliminary injunctive relief. As shown in Plaintiffs' opening brief, Plaintiffs will be more seriously injured by the absence of an injunction than Defendants or the public will be by its issuance. Plaintiffs are already suffering from a reduction in irreplaceable revenue that is about to become more severe and more harmful to their members. In contrast, Defendants stand to lose nothing if the injunction issues aside from the "nebulous, not easily quantified harm of being prevented from enforcing one of its laws." *Odebrecht Const. v. Sec'y, Fla. Dep't of Transpt.*, 715 F.3d 1268, 1289 (11th Cir. 2013). While Defendants claim that the "transparency" interest that they claim Section 3 advances would be harmed by an injunction that would leave

Section 3 in place except as applied to existing pre-SB256 CBAs, it is difficult to credit Defendants' contention that this interest is of such immediate urgency that it cannot await the expiration of existing contracts—particularly when SB256 permanently exempts tens of thousands of police, fire, and correction employees from the supposed "transparency" protections that Defendants claim for Section 3.

* * *

In short, all of the equitable factors weigh in favor of granting preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, and those stated in Plaintiffs' opening brief, the motion for preliminary injunction should be granted.

August 10, 2023 Respectfully submitted,

/s/ Leon Dayan
LEON DAYAN

On behalf of:

LEON DAYAN*
(DC Bar ID 444144)
ldayan@bredhoff.com
ADAM BELLOTTI*
(DC Bar ID 1020169)
abellotti@bredhoff.com
KARA A. NASEEF*
(DC Bar ID 1671394)
knaseef@bredhoff.com
Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

MARTIN F. POWELL
mpowell@meyerblohmlaw.com
Florida Bar No. 70317
Meyer, Blohm and Powell, P.A.
403 East Park Avenue
Post Office Box 1547 (32302)
Tallahassee, Florida 32301
(850) 878-5212

KIMBERLY C. MENCHION
kimberly.menchion@floridaea.org
Florida Bar No. 425613
Florida Education Association
213 South Adams Street
Tallahassee, Florida 32301
(850) 224-7818

ALICE M. O'BRIEN*
aobrien@nea.org
PHILIP A. HOSTAK*
phostak@nea.org
National Education Association
1201 16th Street N.W.
Washington, D.C. 20036
(202) 822-7035

MARK H. RICHARD
mrichard@phillipsrichard.com
Florida Bar No. 305979
Phillips, Richard & Rind, P.A.
9360 S.W. 72nd Street, Suite 283
Miami, Florida 33173
(305) 412-8322

DANIEL J. MCNEIL**
dmcneil@aft.org
American Federation of Teachers
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 879-4400

FAITH E. GAY
fgay@selendygay.com
Florida Bar No. 129593
MAX SIEGEL*
msiegel@selendygay.com
Selendy Gay Elsberg PLLC
1290 Avenue of the Americas
New York, New York 10104
(212) 390-3000

* Admitted *pro hac vice*
** Admission *pro hac vice forthcoming*

Counsel for Plaintiffs

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 Second Motion For Preliminary Injunction, excluding those portions excluded by Local Rule 7.1(F), consists of 9665 words.

/s Leon Dayan
Leon Dayan

Dated: August 10, 2023

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2023, I electronically filed the foregoing via CM/ECF, which automatically serves all counsel of record for the parties who have appeared. I also have caused a true copy of the foregoing Plaintiffs' Reply in Support of Their Second Motion for a Preliminary Injunction, to be served via email, upon:

DAVID M. DELANEY
ddelaney@wsh-law.com
Weiss, Serota, Helfman, Cole, and Bierman
2631 NW 41 Street, Building B
Gainesville, FL 32606
(352) 416-0066

Counsel to Defendant,
The School Board of Alachua County

/s *Leon Dayan*
Leon Dayan