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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PERC'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Intervening events solely within the PERC Defendants' control have made it necessary for Plaintiffs, in this combined Opposition/Reply Brief, to address a broader set of issues than those that were argued in Plaintiffs' Opening Brief. While Plaintiffs moved for partial summary judgment only as to the constitutionality of Sections 3 and 4 of SB256, ECF 98, PERC's intervening action has brought into play the constitutionality of Section 1 as well. As the Court will recall, Section 1, which took effect on July 1, 2023, requires public employees who desire to be members of an employee organization to sign and date a government-drafted "membership authorization form" ("Form") containing, *inter alia*, a "right-to-work" message that Plaintiffs find objectionable. Section 1 has become a critical element of this litigation because, as was only made clear to Plaintiffs on the eve of Defendants' October 6 filing, PERC intends to move forward with a regulation that it seemingly had abandoned in July—a regulation that would trigger a decertification election under Section 4 for any union that failed to collect signed Section 1 Forms from at least 60% of the employees it represents.

PERC's regulatory plans were first set out in the "preliminary text" of a proposed rule published on June 5, 2023. *See* ECF 115-8. Whereas the text of Section 4 states that a certified union must petition for re-certification every year and undergo a decertification election unless it can show that 60% or more of the

employees in the unit it represents "paid dues" in the previous year, Fla. Stat. §447.305(3), (6) (2023), the June 5 proposed rule would only have counted an employee as having paid dues if the employee *also* signed the Form. It did so by allowing unions to report as dues-paying members on their renewal applications required by Fla. Stat. §447.305(3)(c) only those unit employees who had signed and returned the Form, *see* ECF 115-8, which would then be used as the numerator to determine the percentage of eligible employees who paid dues for §447.305(6). That proposed extra-textual requirement would have made it a practical necessity for employee organizations to disseminate, urge their members to sign, and collect the signed Form to avoid a decertification election—a point that Plaintiffs made in their preliminary-injunction briefing. ECF 42 at 5-6.

The proposed rule, however, was not placed on the agenda of subsequent PERC public meetings, leading a Florida Education Association ("FEA") representative to ask at a July 17, 2023, PERC public meeting whether employees who paid dues to an employee organization but who had not turned in the Form would be counted by PERC for Section 4's 60% requirement. *See* ECF 120-1 Ex. A 26:13-27:8. The Chair of PERC, Defendant Rubottom, responded by stating: "[T]here's no proposed rule that relates the form to the 60% count." *Id.* 27:13-14. He added:

> I don't see any consequences based on how many forms you have. I see consequences based on how many people are paying dues. So we're all

> going to need to know how many is in the unit, how many is paying dues. Those are the numbers that have consequences for the recertification petition process further in that section [4].

Id. 28:6-14.

> About ten minutes later, Chair Rubottom returned to the topic and said:
>
> [T]he real challenge there [in Section 4] is dues paying members, and that's going to be a hard number and you're going to have to prove it and a CPA is going to have to verify it. So those are the critical numbers that have real meaning I think to how the rest of the law works for that bargaining unit. So I don't think its advantageous in the initial implementation to add a whole bunch of other burdens on there, *and I don't see it in the law*…. You don't have to solicit them, you don't have to round up your member to get them, you don't have to [k]ick people out of the group if they haven't filed a form…. That should alleviate concerns about that."

Id. 36:5-24 (emphasis added).

Chair Rubottom's on-the-record comments reinforced the position PERC took in this litigation that Section 1 does not require Plaintiffs to "'act as couriers' of the form and deliver it to the public employee" or to interject the form into communications between unions and prospective members aimed at persuading prospective members to join. ECF 41 at 25-26.

In reliance on those representations, Plaintiffs refrained from moving for summary judgment as to Section 1, as that issue appeared to have little practical consequence. *See* ECF 99-1 at 10 n.8. Additionally, in describing the burdens that Section 4's re-certification requirement places on unions, Plaintiffs omitted any mention of the burden of having to collect the Forms. *Id.* at 7-10.

More importantly, out in the field, Plaintiffs focused their organizing resources on re-signing members to pay their dues in a different manner than provided for in their CBAs and did not attempt to also secure members' assent to PERC's Form, which carried a misleading message with which Plaintiffs disagreed. ECF 120-2 ¶¶8-12.

But, after Plaintiffs had moved for partial summary judgment, PERC reversed course and proposed the same rule from which it had apparently receded—an intention that was first manifested in PERC's October 6, 2023, filing in this Court. ECF 115-9. PERC's proposed rule again requires members' signatures on the Section 1 Forms for those dues-paying members to be reported on registration renewals and ultimately to count toward Section 4's 60% threshold. *Id.*

PERC's about-face leaves the Plaintiff Unions—all of whom face re-registration between November 8, 2023, and May 25, 2024, ECF 99-1 at 12—without the signed Forms that PERC has belatedly decided are a necessary precondition to retaining one's status as the certified bargaining representative. ECF 115-13 at 16. They will therefore have to rapidly disseminate the Form to have any prospect of meeting the 60% threshold before their next PERC registration date. ECF 120-2 ¶¶13-14. Consequently, PERC has now caused the effective compulsion to disseminate the Form that Plaintiffs feared when they filed

their first Motion for Preliminary Injunction. And, contrary to PERC's confident prediction that Plaintiffs will meet the 60% threshold, ECF 116-1 at 38-39, it is all but certain that, if Plaintiffs' current dues-payers do not count, Plaintiffs will each face the full force of Section 4's sanctions—including the loss of their certifications and their CBAs unless they gather 30% showing-of-interest cards and then petition for and win a decertification election. *See* ECF 99-1 at 7-10.

Thus, PERC's suspiciously timed roll-out of its extra-textual rule—after Section 4's effective date and after unions had proceeded in reliance on the PERC Chair's July 17 public statements—changes the game: not only as to Section 1, the compulsion from which is now apparent, but as to Section 4, because of the near-certainty that Plaintiffs and other Florida unions will now face decertification elections. The impact of that regulation on Plaintiffs' challenges to Sections 4 and 1 is fully explored in Sections IV-V of this brief.

COUNTERSTATEMENT OF FACTS

Plaintiffs' Opening Brief comprehensively laid out the undisputed facts concerning the Plaintiffs, the CBAs, the bargaining that produced the CBAs, the Plaintiffs' PERC registration requirements, the members and other employees represented by Plaintiffs, the impact SB256 has had on Plaintiffs' dues collection, the costly organizing efforts Plaintiffs have had to undertake to blunt the impact of SB256, and the difficulty Plaintiffs will have satisfying Section 4's audit

requirement. ECF 116-1 at 11-19. PERC has not disputed any of these facts with competent evidence.

Instead, the Background Section of PERC's brief attempts to build a case for SB256, and its own implementing regulations, by asserting that public employees do not know their rights, do not understand the dues they pay, and do not know what those dues are used for. ECF 116-1 at 3-4. PERC's brief goes on to speculate that these purported facts can be explained by the way employees join unions and authorize dues. *Id.* at 4-5. PERC's only citations for these assertions, however, are to the lay opinion declaration of Keith Calloway, ECF 115-1, and a series of unauthenticated hearsay studies and news articles, ECF 115-3, 115-4, 115-5. *Id.*

Neither Calloway's Declaration nor the studies and articles are in a form that would be admissible in evidence. The unauthenticated studies include survey results—which are offered by PERC for their truth—that purport to report what public employees know about their rights *nationwide*, including from states that lack Florida's long history of fully voluntary unionism in public employment. As such, the results are not only pure hearsay, but unreliable on their own terms as a gauge of Florida employees' knowledge of their rights. As for Calloway, his declaration testimony is self-evidently not based on personal knowledge when he asserts that teachers are ignorant of (i) their "rights with respect to union membership" and payroll deduction authorization; (ii) "the total amounts they pay

the union"; and (iii) their union contracts. ECF 116 at 3-4 (citing ECF 115-1 ¶¶9-10, 12). Therefore, all of his testimony is likewise inadmissible hearsay on which Defendants cannot rely at summary judgment. For these reasons, Plaintiffs object to consideration of this evidence.

The admissible—and undisputed—evidence on these points is as follows:

- Plaintiffs' members understand that joining and financially supporting the union is voluntary and not a condition of employment. ECF 97-04 Ex.1 (UFF-UF membership card); ECF 120-3 ¶5;
- Some of those voluntary employee-members elected to pay their union dues through payroll deduction because it enabled them to easily and conveniently financially support the Union. ECF 120-3 ¶8; ECF 97-3 ¶18; and
- Before Florida terminated payroll deduction, all members had to do to determine the amount of dues paid in a pay period was to check their paystub. ECF 97-18 ¶¶15-16 Ex.4; ECF 120-3 ¶7.

The undisputed evidence also establishes that some public employees want to remain full members of the Unions—and be counted as such—but object to the State-imposed statutory and regulatory requirements that will make them less than full members unless they complete PERC's Form. ECF 120-3 ¶¶15, 19-21. Thus, Individual Plaintiff Schueller has testified that, although she was unaware of Form

2023-1.101 until provided with a copy of it by counsel, she objects to the "Right-to-Work" slogan, she objects to the Form statements overall because they are designed to deter people from joining the Union, and she objects to the State dictating the terms on which she can become or remain a full-fledged member of her union. *Id.* ¶¶ 13, 15-16.

ARGUMENT

I. PLAINTIFFS' CONTRACTS CLAUSE CHALLENGES MAY BE ASSERTED IN FEDERAL COURT.

A. This Court has already rebuffed Defendants' effort to deny this Court, and all federal district courts, the authority even to review Plaintiffs' Contracts Clause claims. ECF 106 at 9. In holding that "Plaintiffs' Contracts Clause claim falls within the scope of section 1983," the Court carefully examined the Supreme Court's decision in *Dennis v. Higgins*, 498 U.S. 439 (1991), a case that, in turn, construed earlier Supreme Court precedents, including *Carter v. Greenhow*, 114 U.S. 317 (1885). ECF 106 at 9, 13-17.

In response, Defendants continue to insist that *Carter* should be construed to foreclose the use of §1983 to bring Contracts Clause claims, adding this time that *Carter*, as so read, was correctly decided because, they say, the Contracts Clause is merely a "structural" limitation on government power, not a rights-conferring provision. ECF 116-1 at 13-15. Defendants also argue that it would have been

"bizarre" for Justice O'Connor, when sitting by designation on the Fourth Circuit in *Crosby v. City of Gastonia*, 635 F.3d 634 (4th Cir. 2011), to have joined in that panel's opinion if she had thought that *Dennis*, another opinion she joined in, had adopted a different construction of *Carter*. ECF 116-1 at 13-15.

Neither argument provides a persuasive basis for disturbing the Court's holding that §1983 provides a cause of action for Contracts Clause claims. Given the square holding of *Dennis* that §1983 may be invoked to enforce the dormant Commerce Clause—a clause that can much more fairly be described as a "structural" limitation on government power than the Contracts Clause—there is simply no room for the proposition that §1983 cannot be invoked to enforce the Contracts Clause. ECF 106 at 16-17. And whatever Justice O'Connor's motivations may have been, it is the Supreme Court's published reasoning in *Dennis* (supported by six other Justices)—not speculation about her unstated reasons for joining the *Crosby* panel decision—that is binding on this Court.

B. Although the Court did not need to reach the issue, Plaintiffs have established in prior briefing that they also have a cause of action directly under the Contracts Clause. *See* ECF 84 at 9-16, incorporated herein by reference. In response, Defendants point out that the Eleventh Circuit has been reluctant to imply a cause of action arising directly under the Constitution. ECF 116-1 at 15-16. That proposition is beside the point here, because the Supreme Court has

already recognized a direct federal cause of action for violations of the Contracts Clause. *See Allen v. B&O R.R. Co.*, 114 U.S. 311, 317 (1885) (federal circuit court properly granted injunction to prevent state from enforcing law that violated Contracts Clause). Of course, if there had been no cause of action in *Allen*, the Circuit Court could not have properly granted the injunction. But there was and it did. In short, Plaintiffs are not asking this Court to imply a new federal cause of action; they merely ask the Court, should it reach this issue, to invoke a direct cause of action that the Supreme Court has already recognized. Defendants have never offered a persuasive reason why Plaintiffs should not be able to avail themselves of the same direct cause of action as other plaintiffs have done for well over a century. *See* ECF 79 at 12-16; 116-1 at 15-16.

II. SECTION 3 VIOLATES THE CONTRACTS CLAUSE.

Section 3 of SB256 invalidates clauses in public-sector CBAs that provide for payroll deduction of union dues if, but only if, the union benefiting from the clause does not belong to the favored class of police, fire, and correctional unions. Because Section 3 invalidates such clauses even where, as here, they were negotiated before Section 3's adoption, Plaintiffs, in Count IV of the Second Amended Complaint ("SAC"), challenge Section 3 under the Contracts Clause, contending that Section 3 substantially impairs their CBAs and does so without advancing any legitimate and substantial public purpose.

In its Order Denying the Plaintiffs' Second Motion for Preliminary Injunction, the Court, applying only the preliminary-injunction standard, held that, while some of the substantial-impairment criteria weighed in Plaintiffs' favor, the "Plaintiffs have not clearly carried their burden to demonstrate a substantial likelihood of success" on substantiality, ECF 106 at 20, and the Court therefore did not address whether there was a legitimate and substantial governmental interest justifying the impairment. Plaintiffs respectfully submit that, with the benefit of the parties' full briefing on their cross-motions for summary judgment, Plaintiffs have established their entitlement to judgment as a matter of law because Section 3 does substantially impair their CBAs, and there is no legitimate and substantial public purpose that justifies that impairment.

A. Section 3 substantially impairs Plaintiffs' CBAs.

Plaintiffs have previously set forth the three-factor test for evaluating whether an impairment is "substantial." Plaintiffs will therefore focus their arguments on the Court's preliminary-injunction ruling, to show why, on a fuller record and under the applicable summary-judgment standard, the impairment here is "substantial" as a matter of law.

1. The Contractual Bargain. As this Court recognized in its preliminary-injunction ruling, Section 3's invalidation of the payroll-deduction provisions has undermined the parties' contractual bargain because those provisions were critical

to Plaintiffs' ability to function as bargaining representatives and because Plaintiffs considered them to be materially valuable terms of the overall contracts. ECF 106 at 23-24. And, at summary judgment, the record evidence remains undisputed that Plaintiffs placed immense value on these provisions. ECF 99-1 at 13 (citing declarations from all local-union Plaintiffs).

Defendants' attempt to cast doubt on that evidence by arguing it should be discredited is improper. *See* ECF 116-1 at 20-21.[1] "Even if the district court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices." *Miller v. Harget*, 458 F.3d 1251, 1255-56 (11th Cir. 2006). Similarly, Defendants' assertion that "dues deductions are immaterial to public employees," ECF 116-1 at 21, is supported only by the Calloway Declaration, ECF 115-1 ¶12, which, as shown above, constitutes inadmissible hearsay, *see supra*, at 6-7. That assertion, moreover, is contradicted by competent record evidence that members value the convenience and simplicity of payroll deduction. ECF 97-3 ¶18; ECF 120-3 ¶8. At

[1] In particular, Defendants fault Plaintiffs for not being able to go back in time and figure out what concessions elsewhere in the CBA might have compensated them for the loss of payroll deduction. ECF 116-1 at 21. That Plaintiffs cannot do so just underscores the absence of foreseeability: neither Plaintiffs nor the Public Employers foresaw the prohibition of payroll deduction at the time of CBA negotiations, so neither party proposed eliminating the payroll-deduction provisions and no Plaintiff formulated a wish-list of what they would demand in exchange for doing so. *See* Part II.A.2, *infra*.

summary judgment, it was Defendants' burden to come forward with *admissible* evidence to support their factual assertions. Fed.R.Civ.P. 56(c). PERC's failure to do so leaves uncontradicted Plaintiffs' evidence concerning the material value of the payroll-deduction provisions to the parties' overall contractual bargain.

2. Parties' Reasonable Expectations. This Court has rightly rejected the Defendants' simplistic argument that *Kansas Power* turns all contracts with savings clauses into "illusory agreement[s]" that are "subject to change at the whim of the Legislature." ECF 106 at 32. Respectfully, however, by focusing on Florida's general regulation of collective bargaining and non-specific language in the CBAs acknowledging that regulation, the Court understated the degree to which this abrupt change in policy caught the contracting parties off-guard.

a. For starters, Plaintiffs and Defendants agree that the contracting parties' reasonable expectations must be measured "at the time of contracting." *Anderson Fed'n of Tchrs. v. Rokita*, 546 F. Supp. 3d 733, 745 (S.D. Ind. 2021); *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 509 (5th Cir. 2001). Therefore, Plaintiffs' diligent efforts to implement alternative dues-collection methods after SB256 was introduced as a bill, which continued after SB256's passage, are not evidence that Plaintiffs reasonably expected, *when they contracted*, that their CBAs' payroll-deduction provisions might be invalidated. *Cf.* ECF 106 at 33.

b. Beyond this, while relevant, neither a history of general state regulation nor the Plaintiffs' acknowledgement of such regulation in their CBAs tips the Plaintiffs' undisputed reliance on their payroll-deduction provisions from reasonable to unreasonable. *See* ECF 97-2 ¶11; 97-5 ¶10; 97-6 ¶9; 97-7 ¶8 (undisputed statements from Local Unions that they expected their payroll deduction agreements to last the term of their CBAs).

The Eleventh Circuit has held that contracts can be substantially impaired by midterm state action, even when those contracts are made in highly regulated fields like insurance. *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427, 1433 (11th Cir. 1998). And although the CBAs' savings clauses acknowledge basic default rules that apply even in the absence of a savings clause, including that contract provisions contrary to law cannot be enforced, *e.g.*, ECF 97-7 Ex.1 at 1, none of those clauses waived either party's right to challenge a later-enacted law as unconstitutional or purported to incorporate changes in state law into the baseline terms of the contract. *Cf. Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 438 (8th Cir. 2007) (contract clause incorporated state law into the contract).

In short, the record shows that the contracting parties knew they were subject to general state regulation and set the ground rules for what would happen if a provision of the CBA were to be found inconsistent with such regulation, but

the record also shows that the contracting parties expected their specific promises concerning payroll deduction to survive to the end of their CBAs. In these circumstances, a midterm law that completely prohibits the deduction and remittance of dues upset their reasonable expectations.[2]

3. Plaintiffs' Ability to Reinstate or Safeguard Contractual Rights. In its preliminary injunction ruling, the Court defined Plaintiffs' "right" as "the right to have the public employer facilitate the collection of dues for the union." ECF 106 at 34-35. But, as Plaintiffs argued in their Opening Brief, the Supreme Court was clear in *Sveen* that the "right" that needs to be "safeguard[ed] or restor[ed]" is the plaintiff's "original contract rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 & n.3 (2018); ECF 99-1 at 27-28. Here, none of the Plaintiffs contracted for mere employer "facilitation" of dues collection; each Plaintiff contracted to have the public employers deduct and remit their members' voluntary dues from payroll. If Section 3 prohibits Plaintiffs from reinstating or restoring that "original contract right"—which it undisputedly does—it substantially impairs Plaintiffs' contract

[2] Defendants cite to the uncontested fact that each individual employee's payroll-deduction authorization was revocable at the will of the employee. *See* ECF 116-1 at 18. But that fact is irrelevant, as the only contract right Plaintiffs are arguing is protected by the Contracts Clause is the right to have public employers deduct and remit dues from those public employees who have signed voluntary *and unrevoked* payroll-deduction authorizations. Because there are many such employees, ECF 115-13 at 4, the bargained-for payroll-deduction clauses in the CBAs are unquestionably of great value to Plaintiffs.

rights. Therefore, whether Plaintiffs might be able to bargain for some less-effective means of employer facilitation, ECF 106 at 35, does not determine if Section 3 works a substantial impairment.

Second, the evidence of Plaintiffs' partial success at transitioning members to alternative methods of dues payment—methods that require no employer facilitation—cannot serve as evidence that Plaintiffs can restore or safeguard their original contract rights. That is especially true here, where the evidence shows that the Plaintiffs began in earnest to attempt a transition to eDues only after SB256 was filed as a bill on February 28, 2023. The earliest Plaintiff to roll out eDues (UFF) did so only after that date. ECF 97-3 ¶16. The bill was then fast-tracked through the Senate, which passed the bill on March 29, 2023, *see* https://www.flsenate.gov/Session/Bill/2023/256, before the rest of the Plaintiffs began their efforts to transition to eDues. Bearing in mind that "without revenue, Plaintiffs have no voice to effectively represent their members," ECF 106 at 36, Plaintiffs' rapid pivot to the eDues alternative cannot be held against them as evidence of their ability to restore their *contractual* rights, which, by definition, concern Plaintiffs' ability to hold public employers to their promises. Instead, as Plaintiffs have argued throughout, because of Section 3, they can never get back the benefit of their "original contract rights," *Sveen*, 138 S. Ct. at 1822 n.3.

Thus, the Court was mistaken to consider Plaintiffs' efforts to mitigate the damages caused by Section 3 to be evidence of Plaintiffs' ability to safeguard their original contractual rights. *See* ECF 106 at 37. Indeed, the Court's ruling will put contracting parties in an unfair dilemma every time a bill is proposed that could impair their contract rights: if they begin to mitigate their harm in anticipation of the bill's passage, their diligence would count against them for substantive Contracts Clause purposes. But if they sit back and do nothing, their harm will compound *and* their inaction would count against them for balance-of-equity purposes, because "equity aids the vigilant, not those who slumber on their rights." *Smith v. Davis*, 953 F.3d 582, 590 (9th Cir. 2020) (en banc).

Neither *Sveen* nor any of the cases cited by Defendants, *see* ECF 116-1 at 19-20, suggest that contracting parties must navigate such a dilemma to preserve their Contracts Clause rights.

B. Section 3 is not justified by a significant and legitimate public purpose.

Everything that Plaintiffs have said throughout this lawsuit about the poor fit between Section 3 and the State's asserted transparency interest remains true: (i) transparency is a post hoc justification because the legislature itself did not ground the need for Section 3 on transparency; (ii) Section 3 is a very poor vehicle for furthering transparency because it is no better at informing members about the amount of their dues than payroll deduction; (iii) Section 3 is far less effective at

furthering transparency than a simple disclosure statute requiring unions or public employers to disclose the amount of dues paid; and (iv) any claim of a fit between Section 3 and transparency is fatally undermined by Section 3's underinclusive failure to cover the tens of thousands of Florida public employees who belong to police, fire, and corrections unions. ECF 99-1 at 29-34.[3]

Because PERC has not rebutted these points, ECF 116-1 at 24, Plaintiffs focus here on the degree of deference the legislature is owed in passing SB256. Defendants have repeatedly argued that the State is owed full deference in its choice of policy because Florida "did not pass SB256 out of financial self-interest." ECF 116-1 at 17. Elsewhere in its brief, however, PERC repeats the undisputed point that "making payroll deduction available to unions is a form of 'subsidy' . . . that can be withdrawn across the board without facing heightened scrutiny." *Id.* at 25-26. PERC cannot have it both ways. Payroll deduction is either a State subsidy—in which case withdrawing it serves the State's pecuniary

[3] In contrast, *Connecticut State Police Union v. Rovella*, cited by the Defendants, is an example of a well-tailored transparency statute. 36 F.4th 54 (2d Cir.), *cert. denied,* 143 S. Ct. 215 (2022). There, the Second Circuit found a state law that nullified a CBA provision preventing police disciplinary records from being FOIAed was justified by a substantial public purpose in transparency. *Id.* at 68. Thus, both the CBA provision and the statute expressly concerned disclosure. Here in contrast, the State has used a very blunt tool—the complete prohibition of payroll deduction—that is only connected to its claimed transparency interest by a series of tenuous leaps.

interests—or it isn't. All parties agree it is, so Section 3 is not entitled to substantial deference.

Additionally, when determining the applicable degree of deference, the Court previously observed that it was unclear whether the CBAs should be considered contracts with Florida. ECF 106 at 20. For deference purposes, it is sufficient that some of the impaired CBAs—including that between Plaintiff UFF and UF—are contracts between the State and disfavored unions. *See* Fla. Stat. §447.203(2) (2023) (in PERA, the Governor is the public employer of all state employees and the Board of Governors of the State University System, or the board's designee, is the public employer with respect to all public employees of each constituent state university). Of course, the State is also party to multiple additional CBAs with disfavored unions whose CBAs are likewise impaired by Section 3. *See* ECF 120-4 Ex.7 at 19 (listing eight non-public-safety bargaining units in the State Personnel Service).

Finally, it is important not to lose the forest for the trees: public-employee unions exist to improve wages and other terms of public employees' employment. Doing so inevitably affects the pecuniary interest of all public employers, including the State itself. Therefore, as other courts have readily concluded, "the state has an obvious self-interest in muting public employee unions." *Toledo Area AFL-CIO*

Council v. Pizza, 154 F.3d 307, 325 (6th Cir. 1998). Florida's efforts to do so to Plaintiffs by cutting off their main source of funding are not entitled to deference.

III. SECTION 3'S SELECTIVE WITHDRAWAL OF PAYROLL DEDUCTION VIOLATES THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE.

A. In response to Plaintiff's First Amendment claim, PERC relies heavily on the undisputed point that a government can withdraw a payroll-deduction subsidy in full without violating any former beneficiary's right to engage in political speech. ECF 116-1 at 25-27 (citing *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009)). PERC also brushes off the access concerns motivating the Supreme Court's decision in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985), as having only to do with nonpublic forums. ECF 116-1 at 30.

What PERC fails to grapple with—and what runs as a throughline through both *Ysursa* and *Cornelius*—is that the First Amendment requires *evenhanded* application when the government eliminates avenues through which private parties engage in political speech. *See Ysursa*, 555 U.S. at 361 n.3 ("If the [payroll-deduction] ban is not enforced evenhandedly, plaintiffs are free to bring an as-applied challenge" under the First Amendment); *Cornelius*, 473 U.S. at 811 ("The existence of reasonable grounds for limiting access to a nonpublic forum, however,

will not save a regulation that is in reality a facade for viewpoint-based discrimination.").

Here, Plaintiffs do not need to wait to bring an as-applied challenge, because the Legislature and PERC have done the work to tee up this claim for resolution. Specifically, the legislature built uneven application directly into Section 3 when it limited Section 3's application to disfavored unions. Fla. Stat. §447.303(2)(a) (2023). And then PERC publicly confirmed what previously had been obvious but unstated: Section 3 was passed because of the State's belief that "public employers should not be in the business of facilitating a union's *political speech* by collecting their dues for them." *See* ECF 97-19 at 16 (emphasis added).

Section 3, of course, keeps public employers in the business of facilitating political speech, but only speech by those unions whose political speech the State likes. That type of viewpoint discrimination violates the First Amendment under both *Ysursa* and *Cornelius*. Therefore, Plaintiffs are entitled to summary judgment on their claim that Section 3 is invalid under the First Amendment.

B. Both Parties agree that Plaintiffs' equal-protection cause of action is subject to rational-basis review. Where they depart, however, is on Defendants' belief that any articulated difference between the class of unions subject to and exempt from Section 3 will suffice to satisfy that level of review. That is not the case.

Even under rational-basis review, the classification drawn between the regulated group and the exempt group must have some rational relationship to the classification scheme itself. *See USDA v. Moreno*, 413 U.S. 528, 534 (1973) (rejecting classification scheme that was "clearly irrelevant to the stated purposes of the Act"). Here, the purported differences between the favored and disfavored unions identified by Defendants—the dangerous nature of public safety jobs; a concern for labor peace among public safety employees; the absence of one centralized work location—have no relationship to the necessity for these employees to continue to enjoy preferred access to payroll deduction.[4] Indeed, far from there being a "longstanding" and "inviolate" policy of differential regulation of public-safety *unions* in Florida, *cf.* ECF 116-1 at 10-11, there is sporadic differential treatment of public-safety *employees* based on the unique needs of their jobs. *E.g.*, Fla. Stat. §121.0515(1) (2023) (lower retirement age for employees because of physically demanding nature of the job); Fla. Stat. §447.3075 (2023)

[4] PERC makes one attempt to connect these differences to dues collection when it argues that the absence of a centralized work location deprives public-safety union officials of a convenient place to collect dues. ECF 116-1 at 32. In 2023, however, no union collects dues in person. Rather, all of the dues-deduction mechanisms PERC has touted as available to Florida unions after SB256 rely on some automated, remote mechanism of collection. *See* ECF 80 at 26-27. Having a centralized work location for all of its members would not help any union—whether public-safety or not—collect dues via eDues or any similar automated means.

(law-enforcement specific bargaining units because of unique community-of-interest).

In sum, until SB256, Florida regulated public-safety and non-public-safety unions the same. Fla. Stat. §§447.305-447.307. To regulate certain unions differently, the State needs to proffer some rational relationship between the classification and that differential treatment. Despite repeated briefing, PERC has failed to do so. As a result, Section 3's discrimination between public-safety and non-public-safety unions is nothing more than naked "favoritism for certain labor organizations performing the same services as the non-exempted labor organizations." *Ky. Educ. Ass'n v. Link*, No. 23-CI-00343, slip op. (Ky. Cir. Ct., Aug. 30, 2023) (ECF 97-20).[5] Such naked favoritism does not constitute a rational basis for the arbitrary classifications drawn by Section 3.

[5] PERC attempts to distinguish *Link* by arguing that Kentucky, unlike Florida, does not recognize a distinction between public-safety and non-public-safety employees. ECF 116-1 at 33-34. But Kentucky has the same differential treatment of public-safety employees in retirement. *Compare* Fla. Stat. §121.0515(1), *with Link*, slip op. 12. What the *Link* court correctly recognized is that there is no corresponding history of differential treatment of public-safety *unions* enshrined in either Florida or Kentucky.

IV. SECTION 4 VIOLATES THE CONTRACTS CLAUSE.

A. The Court has jurisdiction.

Defendants first assert that the Court lacks jurisdiction to consider the Plaintiffs' challenge to Section 4, which changes unions' annual reporting obligations and triggers either immediate decertification if the union does not produce CPA-audited financial statements or a decertification election if the union does not report 60% dues payment. *See* Fla. Stat. §447.305. Defendants claim Plaintiffs lack standing and that their challenge is not ripe. ECF 116-1 at 34-42. Neither contention has any merit.

1. Defendants' initial claim—that the Unions lack standing to bring this lawsuit, either in their own right or on behalf of their members, *id.* at 34-36—is doubly wrong. In the first place, the Plaintiff Unions, as parties to the impaired contracts, necessarily have standing to bring Count Seven on their own behalf.[6] And, quite apart from their standing as parties to the agreements, the Plaintiff

[6] Plaintiffs FEA and Schueller have standing as intended third-party beneficiaries of the CBAs. *See* ECF 45 at 8 n.2 (citing ECF 97-4 ¶13); *United States v. Manning*, 434 F. Supp. 2d 988, 1022 (E.D. Wash. 2006) (Contracts Clause challenge successfully brought by third-party beneficiary), *aff'd*, 527 F.3d 828 (9th Cir. 2008).

Unions are being harmed *now* by being obliged to devote considerable resources to preventing the nullification of their CBAs. *See infra*, Part IV.A.2.[7]

The Unions also have associational standing. Defendants assert that "neither Plaintiffs' operative complaint nor any exhibits have identified any specific union members who are allegedly threatened with injury from Section 4." ECF 116-1 at 36. Yet the Second Amended Complaint alleges (and PERC admits) that, with respect to each of the Plaintiff Unions, the union is the PERC-certified collective-bargaining representative for a unit of public employees, ECF 48 & 114 ¶¶8, 12, 16, 18, 20, and, for each Union Plaintiff, attaches the CBA, *see* ECF 97-2 Exs.2-3; 97-3 Ex.1; 97-5 Exs.1-2; 97-6 Ex.1; 97-7 Ex.1. Each member-employee is "threatened with injury from Section 4," ECF 116-1 at 36, should their collective-bargaining representative be decertified, thus terminating the CBA that governs the terms of their employment and rendering those terms unenforceable. *See* ECF 99-1 at 3-4; *infra*, at 33-34.

[7] PERC's argument to the contrary rests on the flawed premise that nothing in the CBAs other than the payroll-deduction clauses benefits Plaintiff Unions. ECF 116-1 at 35 (citing Plaintiffs' interrogatory answer). Plaintiffs, of course, never answered they are not benefited by the CBAs. Rather, Plaintiffs answered PERC's compound question by truthfully stating that there are no CBA provisions that benefit the Unions *but not* represented employees. ECF 115-13 at 9.

2. Defendants' second jurisdictional argument asserts that, because the Plaintiff Unions may ultimately be able to avoid decertification, their challenge to Section 4 is not ripe. ECF 116-1 at 36-42. This is wrong for at least two reasons.

First—as Defendants acknowledge—the Unions have *already* suffered injury because Section 4 has altered the terms that govern the duration of their CBAs. *Id.* at 36-37 (noting Plaintiffs' argument that "Florida immediately impaired those CBAs when it changed that regime under Section 4"). Where a union has reached an agreement with the employer, and the state subsequently imposes an additional condition the union must meet to maintain that agreement, that is an injury in itself. *See* ECF 99-1 at 45-48.

Here, moreover, Plaintiff Unions are already suffering an additional injury: they are currently diverting resources to avoiding the loss of their CBAs through campaigns to attain 60% dues payers (and to prepare for decertification elections should they fail to achieve that threshold) and by complying with the new audit requirement. *See* ECF 99-1 at 15-17, 44-45; ECF 120-2 ¶¶12, 14-16. That present diversion of resources satisfies both standing and ripeness requirements. As the Supreme Court has held, standing exists when "a 'substantial risk' that the harm will occur … may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). Thus, "[a]n organization suffers actual harm 'if the defendant's illegal acts impair [the

organization's] ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.'" *City of S. Miami v. Governor of Florida*, 65 F.4th 631, 638 (11th Cir. 2023) (quoting *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)).

The Plaintiff Unions' diversion of resources to avoid decertification under Section 4 meets this standard. The Unions' efforts in this regard are not "based on speculative fears of future harm." *City of S. Miami*, 65 F.4th at 639. To the contrary, the Unions are expending their resources to do precisely what the statute requires to avoid decertification—both by attaining a level of 60% dues payers (and, failing that, collecting showing-of-interest cards and preparing for decertification election campaigns), and by complying with the new audit requirement. ECF 120-2 ¶¶12, 16. That the Unions may ultimately be successful in avoiding decertification—as Defendants confidently predict, ECF 116-1 at 38-40, but Plaintiffs seriously doubt, ECF 120-2 ¶¶13-15—does not mean that the Unions do not have to divert their resources from other programs to achieve that success. That diversion of resources from the Union's normal organizing, bargaining, and contract enforcement to "avoid th[e] harm" of decertification is sufficient injury to

confer standing. *Clapper*, 568 U.S. at 414 n.5.[8] *See* ECF 120-2 ¶¶12, 14-17.

3. We add here one point that, although not necessary to defeat Defendants' contention with respect to standing, responds to a major argument advanced in Defendants' brief. That is the contention that "[e]xperience signals [it] will not be a problem" for the Plaintiff Unions to attain the threshold of 60% dues payers necessary to avoid an annual decertification election. ECF 116-1 at 38-40. Apart from any other consideration with respect to this 60% requirement, *see* ECF 99-1 at 54-55, Defendants' actions—by first disavowing and then re-proposing a regulation that requires members to sign PERC's Form to be reported and ultimately counted as dues payers *after* Section 4 went into effect—undercut any prior arguments about the ease with which unions will meet the 60% requirement. *See* ECF 116-1 at 9-10; 115-8; *supra*, at 1-4.

Assuming PERC promulgates the intended regulation, everything Defendants assert about how easy it will be for unions to attain 60% dues payers, *see* ECF 116-1 at 38-39, is not only wrong but risible. And that is particularly so

[8] Defendants cite a recent state-court decision involving the same statute (but a different legal theory), in which the court held that "Plaintiffs' efforts to comply with Section 4 are not, by themselves, a sufficient injury for purposes of standing." *Miami Beach Mun. Emps. AFSCME Loc. 1554 v. PERC*, No. 2023-CA-1492, slip op. ¶10 (Cir. Ct. Leon Cty. Oct. 3, 2023) (ECF 115-19). But the opinion does not cite, let alone distinguish, the body of federal law recognizing diversion-of-resources standing. In any event, we respectfully submit that, for the reasons discussed above, that holding is erroneous and should not be followed.

considering Defendants' cynical assertion that Section 1 requires *nothing* of unions because it is the individual employees who are responsible for getting these Forms filled out and signed. *See id.* at 62-64. Whatever level of dues payers each of the Plaintiff Unions may have attained by now becomes insufficient to maintain certification without an additional union campaign—albeit a campaign the unions supposedly are not "require[d]" to conduct, *id.* at 62—to meet the entirely different, additional condition of obtaining 60% signatories to the "right-to-work" acknowledgment. ECF 120-2 ¶14.

B. Section 4 Impairs Plaintiffs' CBAs.

1. In *GMC v. Romein*, 503 U.S. 181, 189 (1992), the Supreme Court made clear that "changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contracts' bargained-for terms." That is the case here, where Section 4 substantially alters the provisions of Florida law under which these contracts were made—including in particular the "contract bar" provisions of Fla. Stat. §§447.307(3)(d) & 447.308(1) (2023). Under that pre-existing contract-formation law, the CBAs would remain valid and enforceable for their full three-year term, subject only to the possibility of a decertification election during the final months of that contractual term. Such "laws affecting the enforceability of contracts" are "'incorporated terms' … subject to Contract Clause

analysis because without them, contracts are reduced to simple, unenforceable promises." *Romein*, 503 U.S. at 189.

In *Romein*, to be sure, the Court found this legal theory inapplicable to the specific facts of that case—which forms the beginning, middle, and end of Defendants' argument about it. ECF 116-1 at 44. In *Romein*, the employer argued that the substantive provisions of Michigan's workers' compensation law in effect when it entered into its CBA constituted an implied term of those contracts, so that the statute's amendment violated the Contracts Clause. But the Court rejected the employer's "suggestion … that all state regulations are implied terms of every contract entered into while they are effective." 503 U.S. at 189. Rather, "state laws are implied into private contracts regardless of the assent of the parties *only when those laws affect the validity, construction, and enforcement of contracts*." *Id.* (citing *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977)) (emphasis added). That, the Court held, was not what happened in *Romein*. But it most assuredly *is* what happened here, where the change in Florida law obviously "affect[s] the validity, construction, and enforcement" of the Plaintiff Unions' CBAs.

Defendants' assertion that, after *Romein*, "courts have roundly rejected Contracts Clause claims when the plaintiff cannot point to *specific contractual terms* abrogated by the challenged law," ECF 116-1 at 44 (emphasis added), turns *Romein* on its head. *Romein*'s teaching is just the opposite: "changes in the laws

that make a contract legally enforceable may trigger Contract Clause scrutiny … *even if they do not alter any of the contracts' bargained-for terms*." 503 U.S. at 189 (emphasis added). Thus, contrary to Defendants' assertion, the Court in *Romein* most assuredly did *not* "reject[] this theory," ECF 116-1 at 44, and courts, unsurprisingly, have invoked *Romein* to subject statutory amendments to Contracts Clause scrutiny when the amendments affect a contracting party's ability to enforce their contract in the first place. *See, e.g.*, *CDA Dairy Queen, Inc. v. State Ins. Fund*, 299 P.3d 186, 195 (Idaho 2013). Indeed, any other rule would wreak havoc on contractual stability, because existing contracts can be impaired through new statutory conditions precedent to enforcement as easily as through new statutes directly altering their express terms.[9]

2. Under Section 4, Plaintiff Unions are also subject to decertification and contract impairment if they fail to comply with the new requirement that its annual financial statement be audited by a CPA. Both the 60% dues-payer requirement and the audit requirement constitute additional conditions that the state has retroactively imposed on the duration and value of unions' CBAs.

[9] Nor do any of the three post-*Romein* appellate cases cited by Defendants, ECF 116-1 at 44-45, support Defendants' contention that a plaintiff must "point to specific contractual terms abrogated by the challenged law." All of those cases dealt with alleged impairments of the contracts' substantive provisions, and not with changes to background law of enforceability/validity.

Defendants' argument with respect to the audit largely misses the point. Although the audit requirement presents small local unions like LEA with a significant financial burden,[10] as well as other compliance challenges,[11] the most important burden on Plaintiffs' contracts is the penalty of decertification that is potentially imposed should the union be unable to provide a CPA's audit of its financial statement, *see* Fla. Stat. §447.305(6)—a penalty that is not imposed on "favored" unions that fail to comply with the very same audit requirement, §447.305(9). If, as is the case for the favored unions, Section 4 "merely refine[d] [the pre-existing] regime by requiring an 'independent certified public accountant' to certify the union's financial reports," ECF 116-1 at 58, without more, the audit requirement would be of much less concern under the Contracts Clause. As it is, Defendants' only response with respect to the decertification penalty is their

[10] Whether the cost of an audit is $1,000, $5,000, or $10,000, it is a significant portion of the available revenue for a small local like LEA. Like all FEA locals, the bulk of LEA's dues collections consists of pass-through payments that it is contractually required to forward to its state affiliate FEA (which, together with its national affiliates, provides LEA with collective-bargaining services). For LEA, these per-capita payments amount to $22,492 of LEA's $27,612 total dues collections—leaving just over $5,000 for all of LEA's local expenditures, including an audit. ECF 115-16. There is also no basis for Defendants' assertion that the audit requirement is challenged only by LEA. ECF 116-1 at 54. LEA's situation was described only to "illustrate[] the point." ECF 99-1 at 17. *See also* ECF 48 ¶90 (citing LEA as an "example" of the problem).

[11] As previously noted, how a union's financial records are currently maintained can make it difficult for its records to be audited at all during the transition period to SB256. ECF 99-1 at 17.

contention that decertification "would make little or no difference." *Id.* at 56. This surprising assertion rests entirely on Defendants' misunderstanding of labor law, which leads them to believe that decertification does not result in termination of the CBA or permit unilateral changes to its substantive provisions. We now turn to that issue.

3. Defendants take issue with Plaintiffs' showing that decertification of a union as collective-bargaining representative results in termination of the CBA. *See* ECF 116-1 at 40-42. We discussed this issue in our opening brief, ECF 99-1 at 3-4, and Defendants have no response other than to claim that PERC did not really mean it when it held that, unless the incumbent is replaced, "[u]pon decertification of the incumbent union, the collective bargaining agreement no longer exists." *Teamsters Loc. Union No. 385 v. Orange County*, 25 FPER ¶30072, 1999 WL 35114734 (Feb. 3, 1999). That rule is not only obvious—because there is no one with the statutory authority to enforce the CBA when one of the parties to the contract has been decertified with no new party replacing it—but is consistent with a body of law from the NLRB and federal courts addressing the same issue under the NLRA. *See* ECF 99-1 at 3-4 (citing cases).

Nor is there any merit to Defendants' attempt, in the alternative, to draw support from the rule that following expiration of a CBA an employer may not unilaterally alter the contractual terms while a new agreement is under negotiation.

ECF 116-1 at 41-42. While it is generally correct that an employer must maintain the status quo in such circumstances, that rule—as is apparent from the cases Defendants cite—only applies when there remains a certified representative. That is because the rule against unilateral changes to the status quo is simply an aspect of the employer's *duty to bargain in good faith with the certified representative*. *NLRB. v. Katz*, 369 U.S. 736, 742-43 (1962). The status-quo rule has no bearing when there is no certified representative with whom to bargain, including when the representative has been decertified. Instead, when an employer wishes to change a term of employment that was enshrined in the CBA and there is no certified representative to whom to present a proposal—as would be the case here—the employer can simply make the change unilaterally. *See NLRB v. Arkema, Inc*., 710 F.3d 308, 320 (5th Cir. 2013) (employer did not violate duty to bargain in good faith by making unilateral changes after union lost decertification election).

To be clear, Plaintiffs would prefer a rule by which a formerly certified union and any employee could enforce the CBA prospectively, at least through its expiration date, after the union was decertified and no replacement union was elected. But that rule does not exist, as PERC's own precedents make clear. In the real world, PERC's decertification of Plaintiff Unions for failure to comply with Section 4 will render Plaintiffs' CBAs nullities.

C. The Threatened Nullification of Plaintiffs' CBAs is a Substantial Impairment that is not Reasonable and Necessary to Achieve a Legitimate Public Purpose.

Plaintiffs' Opening Brief anticipated most of the Defendants' arguments concerning the remaining elements of the Contracts Clause inquiry—whether the impairment of contracts is "substantial," and whether the impairment is justified by a legitimate public purpose. *See* ECF 99-1 at 49-56. We therefore respond briefly only to several discrete points.

1. In addressing the "substantial impairment" issue, Defendants emphasize what they think is the "devastating" effect on the Unions' reasonable expectations of the 50% dues-payer requirement previously applicable to K-12 teachers' unions. ECF 116-1 at 47. We previously addressed this issue, *see* ECF 99-1 at 51-52, but now that PERC has rewritten the statute to require 60% of unit employees assent to the government's prescribed "right-to-work" Form, PERC's claims that the Unions should have foreseen Section 4 are even further divorced from reality. *See* ECF 116-1 at 9-10; *supra*, at 4-5. Even if one were to credit Defendants' unsupported assertion—which the Court should not—that moving the threshold from a majority to a super-majority "cannot upset any of [the unions'] reasonable expectations," ECF 116-1 at 47, PERC is introducing a qualitatively different requirement by forcing an annual decertification election anytime a union cannot show that 60% of bargaining-unit employees have submitted PERC's Form.

No union could reasonably have expected when it entered into its CBA that the agreement's continued validity would depend on whether a sufficient number of the employees it represents would sign PERC's Form.

2. As to the State's legitimate purpose for impairing Plaintiffs' contracts, Defendants contend that while the percentage of bargaining-unit members who pay dues to the union may not be a "reliable gauge" of support for the union as collective-bargaining agent,[12] that metric can still be *some* gauge of such support. ECF 116-1 at 51. But the relevant question is not whether there exists *some* correlation between dues payment and support for union representation, but rather whether the State's interest in using *this*—flawed—gauge of support is so great that it justifies the impairment of Plaintiffs' contracts.

Defendants assert that "Florida had to choose *some* metric to accomplish its goal of ensuring employees still support their exclusive bargaining agent." *Id.* at 52. But there already was a reliable metric in place under Florida law: initial certification of the union as bargaining agent, coupled with the opportunity for bargaining-unit members or a rival union to challenge that status near the end of the CBA's term or post-expiration. *See* ECF 99-1 at 53. And it is no response to

[12] Elsewhere in their brief, Defendants only reinforce the unreliability of the dues-paying percentage as a measure of bargaining-unit support for union representation, when they note that a K-12 union that repeatedly fell below the then-applicable 50% dues-payer threshold "has won the recertification election each time." ECF 116-1 at 39.

say, as do Defendants, that the State could have adopted an even greater impairment of Plaintiffs' contracts. ECF 116-1 at 52 ("Florida could simply have required a recertification election every year …."). To be clear, Florida is free, as far as the Contracts Clause is concerned, to adopt prospectively a regime of recertification elections every year, or every month. But it cannot do these things—or what it purports to do through SB256—retroactively, in the face of existing contracts.

V. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' SECTION 1 CLAIMS.

A. Count I Survives Summary Judgment Because SB256, as PERC Plans to Implement It, Violates the "Compelled Speech" Doctrine.

Count I challenges Section 1 of SB256 on the ground that, as PERC plans to implement it, Section 1 violates the First Amendment's "compelled speech" doctrine. Section 1 requires that public employees sign PERC's Form to be members of an employee organization. Fla. Stat. §447.301(1)(b). The statute requires that the Form include, "in 14-point font," a 91-word state-drafted message that advertises Florida as a "right-to-work state." *Id.* The Form must also include information about union officer salaries, as well as certain information—including

seriously inaccurate information[13]—about employee rights under Florida law. *Id.* The Plaintiff Unions object to the message prescribed in the Form and, absent State compulsion, would choose not to disseminate it. ECF 120-2 ¶¶8-10.

As noted earlier, PERC has vacillated as to whether unions declining to disseminate the Form will face any consequences for failing to do so. *Supra*, at 1-5. While the plain language of SB256 merely requires unions to retain Forms turned in by employees and report annually how many Forms they have received, Fla. Stat. §447.305(3)(b), PERC intends to implement SB256 to require unions to collect Forms from 60% of the employees they represent or face a decertification election. Indeed, under the proposed regulation, failure to collect and maintain the Form from 60% of represented employees triggers a decertification election even if 100% of the employees in the unit commit to union membership and even if 100% pay dues. *See* ECF 115-9.

In Plaintiffs' first preliminary-injunction motion, they argued that the regulatory consequences faced by a union that fails to collect Forms from 60% of its represented employees make it a practical necessity for unions to disseminate

[13] The Form's assertion that "[n]o employee may be discriminated against in any manner … for refusing to join or financially support a labor union" is incorrect. Under PERA, "certified employee organizations shall not be required to process grievances for employees who are not members of the organization." Fla. Stat. §447.401. (2023) ECF 120-2 ¶8; *see also NLRB v. Fin. Inst. Emps., Loc. 1182*, 475 U.S. 192, 205 (1986) (unions may exclude nonmembers from certain activities, including officer elections and other votes).

the Forms. ECF 42 at 3-11. Plaintiffs further argued that, where a government policy or regulatory regime makes it a practical necessity for a speaker to disseminate unwanted speech, that suffices to trigger First Amendment scrutiny and to confer standing on the speaker to challenge the regime. *Id.* It is also practically necessary for unions to disseminate the Form because it requires information that membership applicants would not normally possess. *Id.* at 5-6; *see* ECF 120-3 ¶14.

Although the Court "agree[d] with Plaintiffs that, in the real world, unions that desire to grow—or even exist—would most likely shoulder the burden of printing the forms, filling out the necessary disclosures, and distributing them to prospective members for signatures to avoid the consequences set out in section 447.305 and PERC's proposed rule," ECF 45 at 5, the Court nevertheless rejected the legal proposition that "the *practical* effect of this statute" was the touchstone for determining whether Plaintiffs had standing to challenge it under the compelled-speech doctrine, *id.* at 6. Instead of looking to practical effects, the Court reasoned that standing turned on whether the statute imposed "a *de jure* command to speak," such that Plaintiffs would be "*directly penalized* if they fail to convey the state's message to members through the required form," *id.* at 5-6 (emphasis added). The absence of any *de jure* command and direct penalty, the Court reasoned, foreclosed Plaintiffs from establishing standing. *Id.* at 7.

Respectfully, the Court reached the incorrect conclusion at the preliminary-injunction stage because it began with the incorrect legal premise—a premise now fully embraced by Defendants, ECF No. 115-1 at 63-64—that a governmental policy must contain "a *de jure* command" and "directly penalize[]" an exercise of free-speech rights for an affected speaker to challenge the policy. Once that premise is corrected, it becomes clear that Plaintiffs not only have standing to assert their compelled-speech claim but have adduced sufficient evidence to prevail on the merits of that claim.

1. Supreme Court and Eleventh Circuit Precedents Squarely Foreclose Defendants' Contention that a Governmental Policy Must "Directly Penalize[]" a Speaker Who Violates a "De Jure" Command in Order for the Speaker to Successfully Challenge the Policy.

a. In *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022), the Eleventh Circuit addressed a First Amendment challenge to a university's policy that empowered a university "response team" that possessed "no authority to dispense punitive measures" against students—or even to compel students to cooperate with its protocols—to investigate bias-related complaints against students. The principal purpose of the response team was to mediate and defuse situations involving allegedly hurtful speech, including speech not prohibited by any code of conduct. *Id.* at 1116-17 & n.1. The district court held that the plaintiffs

lacked standing to challenge a policy that neither could penalize them nor command their cooperation, but the Eleventh Circuit reversed. *Id.* at 1120.

In doing so, the Court of Appeals took the opportunity to "clarify our own pre-enforcement challenge doctrine, at least as it applies in First Amendment cases." *Id.* at 1120. As clarified, the doctrine is as follows:

> [T]o determine whether a First Amendment plaintiff has standing, we simply ask whether the "operation or enforcement" of the government policy would cause a reasonable would-be speaker to "self-censor[]," *Wollschlaeger* [*v. Governor, Fla.*], 848 F.3d [1293], 1305 [(11th Cir. 2017)]—*even where* the policy "falls short of a direct prohibition against the exercise of First Amendment rights," *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

Speech First, 32 F.4th at 1120 (emphasis added).

Applying that doctrine to the facts before it, the Eleventh Circuit held that the district court erred in focusing on the response team's inability to penalize any speech, because "[n]either formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—*indirect pressure may suffice*." *Id.* at 1123 (emphasis added). The court concluded that because "the average college-aged student would be … chilled from exercising her free-speech rights by subjection to the bias-related-incidents policy," the plaintiffs had established standing. *Id.* at 1124.

The Eleventh Circuit, in other words, eschewed a formalistic analysis and applied a practical-effects test to determine whether the challenged government

policy chilled speech. *See also Healy v. James*, 408 U.S. 169, 183 (1972) ("We may concede … that the administration 'has taken no direct action ... to restrict the rights of [petitioners] to associate freely….' But the Constitution's protection is not limited to direct interference with fundamental rights…. *We are not free to disregard the practical realities*." (emphasis added)).

b. That First Amendment *standing* doctrine turns on the practical effects of government policies on speech rights—and not just on formal commands and penalties—is a necessary outgrowth of *substantive* First Amendment doctrine. The Supreme Court has long held that the First Amendment protects against more than just penal sanctions on speech or silence, such that the government's imposition of "unconstitutional conditions," even on government benefits that may be denied at will, triggers First Amendment scrutiny. *Bd. of Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *see also O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721-22 (1996).

In *Umbehr*, the Supreme Court—invoking the same *Laird v. Tatum* decision that the Eleventh Circuit cited in *Speech First*—summarized the modern substantive law in this area as follows:

> Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental efforts *that fall short of a direct prohibition* against the exercise of First Amendment rights," *Laird v. Tatum*, 408 U.S. 1, 11 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit

> to a person on a basis that infringes his constitutionally protected ... freedom of speech" even if he has no entitlement to that benefit.

518 U.S. at 674 (emphasis added; brackets omitted). Put another way, because a state can, without issuing any *de jure* command, achieve the same result through non-penal methods such as the withholding of benefits, the Supreme Court has interpreted the First Amendment to reach indirect as well as direct forms of government pressure. "What the First Amendment precludes the government from *commanding* directly, it also precludes the government from *accomplishing* indirectly." *Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990) (emphasis added).

After setting out the basic principle of the unconstitutional-conditions doctrine, the *Umbehr* Court held that, just as government employment is a benefit that can be denied at will but that cannot be conditioned on speech or silence without triggering First Amendment scrutiny, *see id.* at 675 (citing *Abood v. Detroit Bd. of Educ.*, 431 U. S. 209, 234 (1977) (compelled speech); *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U. S. 274, 283-84 (1977) (compelled silence)), so too is the opportunity to contract with the government as independent business enterprise, *Umbehr*, 518 U.S. at 677.

In sum, it is not necessary for private parties whose speech interests are adversely affected by government policy to identify any "direct penalty" or "*de jure* command" to show that they have standing to sue. And, by the same token, no

such "*de jure* command" is necessary to trigger First Amendment scrutiny of Section 1, as we now explain.

2. Section 1, as PERC Plans to Implement It, Triggers First Amendment Scrutiny.

The reasoning of the Eleventh Circuit's *Speech First* decision and the Supreme Court's "unconstitutional conditions" case law leads directly to the conclusion that Section 1, as PERC plans to implement it, triggers First Amendment scrutiny.

In its earlier ruling in this case, the Court identified the practical compulsion of the new regulatory regime: "Plaintiffs' bargaining unit certifications may ultimately be in jeopardy if they fail to collect signed forms from at least sixty-percent of their dues-paying members."[14] ECF 45 at 5. And the Court also has "agree[d] with Plaintiffs that, in the real world, unions that desire to continue to grow—or even exist—would most likely shoulder the burden of printing the Forms, filling out the necessary disclosures, and distributing them to prospective members for signatures *to avoid the consequences set out in section 447.305 and PERC's proposed rule*." *Id.* (emphasis added). Thus, for unions, avoiding the consequence that their bargaining-unit certifications will be jeopardized if they do not conform to §447.305 and PERC's proposed rule easily satisfies the test of

[14] Under PERC's plan, Plaintiffs would need to collect signed Forms from 60% of all represented employees, not just 60% of dues-paying members. *See* ECF 115-9.

Speech First, which asks whether the challenged governmental policy would cause "a reasonable would-be speaker" to alter the content of its speech. 32 F.4th at 1120.

The pressure placed on the Plaintiff Unions in this case is no different in kind from that applied to the plaintiff in *O'Hare*. There, the Court found that First Amendment scrutiny was triggered where a towing company faced removal from a town's approved list of contractors if it did not express support for the mayor's re-election campaign. 518 U.S. at 721-22. For a Florida public-sector union, a bargaining certification is, in effect, the union's license to enter into contracts with the government. Therefore, as in *O'Hare*, the pressure on a union to hold its nose and disseminate the State's "right-to-work" Form to protect its certification is—even without any "*de jure* command"—sufficient to compel a "reasonable would-be speaker" to alter the content of its speech. *Speech First*, 32 F.4th at 1120.[15]

It is also immaterial that Plaintiffs could theoretically do nothing and hope that 60% of the employees they represent come forward with completed Forms. What matters is that a "reasonable would-be [local-union] speaker" would feel

[15] It makes no difference whether state action compels speech or compels silence, as both affect the *content* of citizen speech. *Compare O'Hare*, 518 U.S. at 723 (government contractor pressured to support incumbent), *with Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."), *and Umbehr*, 518 U.S. at 674 (government contractor pressured to refrain from criticizing incumbent).

compelled by PERC's rule to disseminate the Form, with the Union-specific information filled in, to avoid a decertification election. And it is likewise immaterial that Plaintiffs' certification might theoretically survive the decertification election. To avoid the time, expense, and risk associated with collecting showing-of-interest cards and then campaigning against decertification, ECF 120-2 ¶¶16-17, a reasonable union will have no choice but to "self-censor" by disseminating PERC's Form. Because, in other words, Section 1 and PERC's implementation rule will induce a "reasonable would-be [local-union] speaker" to disseminate the government's preferred message, they compel speech under the Eleventh Circuit's *Speech First* test—a test that faithfully implements the Supreme Court's admonition in *Healy* that, when addressing government actions affecting First Amendment interests, courts "are not free to disregard the practical realities."

In sum, Section 1, as PERC plans to implement it, is a government policy that Plaintiffs have standing to challenge and that triggers First Amendment scrutiny under the compelled-speech doctrine.

3. Section 1, as PERC Plans to Implement It, Fails First Amendment Scrutiny.

Not only does Section 1 trigger First Amendment scrutiny; it violates the First Amendment because it fails to pass strict scrutiny, or, indeed, any level of heightened scrutiny that could be applicable. Defendants' brief offers no argument on this point; rather, Defendants rest their entire submission on the contention that

the Section 1 Form is nothing more than "government speech" and therefore not subject to *any* First Amendment scrutiny. ECF 116-1 at 61-62. Without that argument—which fails for the reasons we have just discussed—Defendants have nothing to say in response to Plaintiffs' showing that Section 1 cannot survive any level of First Amendment scrutiny.

Plaintiffs have previously briefed why Section 1 is subject to strict scrutiny, why it fails that test, and why it would fail even under a less-heightened standard of scrutiny. *See* ECF 15-1 at 10-18; ECF 42 at 7-11. Because the issue is no longer contested, we refer the Court to those briefs and add here only a summary.

a. Section 1's compelled dissemination requirements are subject to strict scrutiny because they require unions to interject government-prescribed statements and government-dictated information directly into their communications aimed at persuading prospective members to join. Such communications are "persuasive speech" and subject to "exacting" scrutiny. *See Riley*, 487 U.S. at 796-98 (striking down a government requirement that fundraisers provide certain factual information as part of fundraising solicitations). This "persuasive speech" category clearly encompasses union membership solicitations. *See Thomas v. Collins*, 323 U.S. 516, 537-38 (1945). Indeed, the union-solicitation speech regulated by Section 1 falls more clearly within the "persuasive" and non-"commercial"

category than even the speech in *Riley*, because Section 1 regulates not the solicitation of *money alone* but of private-organization *memberships*.

Nor is Section 1 a law regulating "purely factual and uncontroversial information" of the kind that is subject to lesser (but still heightened) scrutiny under the standard of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Section 1's requirements, after all, compel disfavored unions to disseminate an ideological slogan—"Right to Work"—akin to the "Live Free or Die" slogan at issue in *Wooley v. Maynard*, 430 U.S. 705 (1977). "Right to Work" is not a neutral term. This Court noted, in the preliminary-injunction hearing, what both the Fifth Circuit and Dr. Martin Luther King Jr. had to say about this term:

> The highly controversial nature of so called right-to-work laws is well known. No subject of labor relationship between employers and union causes greater bitterness….
>
> [W]e must guard against being fooled by false slogans such as, quote, "right to work." It is a law to rob us of our civil rights and job rights. Its purpose is to destroy labor unions and the freedom of collective bargaining by which unions have improved wages and working conditions of everyone.

ECF 120-5 at 84:4-17; *see also* ECF 120-2 ¶8; ECF 120-3 ¶15.

b. To survive strict scrutiny, the State must make a two-pronged showing. First, it must show that the danger sought to be addressed by the regulation is real, not conjectural; otherwise, the asserted state interest is not "compelling." *Riley*, 487 U.S. at 800. Second, it must show that the State has

chosen means "precisely tailored" to combatting the supposed danger, meaning that "more benign and narrowly tailored options" were unavailable. *Id.* Defendants have not attempted to make either showing—nor could they.

As to the first prong, the only "dangers" that Section 1 can conceivably be claimed to address are that Florida public employees might join a union unaware that they had another choice or unaware of the amount of dues used to compensate the highest-earning officials. But union membership has long been voluntary in Florida. *See* Fla. Const. art. I, §6, There is thus no reason—and certainly none in the legislative record—to believe workers do not know that union membership is voluntary. Indeed, the significant percentages of union-represented employees who consistently do not join the union representing them, *see* ECF 120-4 Ex.7 at 20, proves the opposite. And, even prior to the enactment of SB256, another Florida statute already required unions to file publicly available annual financial reports with PERC stating, among other things, the compensation of *all* officers, as well as all employees earning more than $10,000 in a given year. Fla. Stat. §447.305(2)(c).

Section 1 thus fails the first prong of strict scrutiny just as did the regulations in *Riley*. There, the Court held there was no "compelling" interest in forcing fundraisers to make disclosures of the percentage of contributions turned over to charity because:

> Donors are … undoubtedly aware that solicitations incur costs, to which part of their donation might apply. And, of course, a donor is free to

> inquire how much of the contribution will be turned over to the charity. Under another [state] statute, also unchallenged, fundraisers must disclose this information upon request.

487 U.S. at 799 (citation omitted). Everything in this passage applies here. *See also Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2377 (2018) (compelled-disclosure law failed even less-heightened scrutiny because the state "point[ed] to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals").

Section 1 also fails the second prong of strict scrutiny. Far from choosing the most "benign and narrowly tailored options" to achieve the only conceivably legitimate purpose for the requirement—helping public employees make informed choices regarding union membership—the State has chosen a means so heavy-handed and ill-adapted to that purpose that it suggests the Legislature had no legitimate purpose at all.

In the first place, SB256 exempts the favored unions from Section 1's compelled disclosure requirements. The Legislature has made no finding, nor could it, that the voluntariness of union membership and the salaries earned by union officials are better known among police officers, prison guards, and firefighters than among the workers covered by Section 1. Where, as here, a compelled-speech regulation is "wildly underinclusive," it cannot satisfy strict scrutiny because "[s]uch underinclusiveness raises serious doubts about whether

the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *NIFLA*, 138 S. Ct. at 2375-76 (cleaned up).

Even without its underinclusiveness, Section 1 would fail the second prong of strict scrutiny, because forcing unions to spread the government's message is not necessary to inform workers of the information on the Form. The government has a readily available and "more benign" option, which is simply to communicate directly with new hires about the voluntariness of unionism in Florida and to advise them of the availability of the officer/employee salary information that Florida unions already file. That would keep the government out of the unions' own communications aimed at persuading members to join. Here again, *Riley* is directly on point: "[T]he State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation." 487 U.S. at 800.

c. Even were a less-heightened standard of First Amendment scrutiny applicable, such as the standard applied to commercial speech in *Zauderer* and *NIFLA*, it would not help Defendants. In *NIFLA*, for example, 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, as noted above, is similarly underinclusive. And, 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. ECF 120-4 Ex.7 at 20.

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

B. Count III Survives Summary Judgment Because SB256, as PERC Plans to Implement It, Violates the Equal Protection Clause.

For reasons already discussed, Plaintiffs' Count III Equal Protection claim likewise survives summary judgment. That Section 1 is "wildly underinclusive," *NIFLA*, 138 S. Ct. at 2375, dooms it not only as a matter of First Amendment strict scrutiny, but also as a matter of Equal Protection. *See* Part III.B, *supra*. Even under "rational basis" review, the application of Section 1 only to "disfavored" unions, and the exclusion from its requirements of the "favored" police, fire, and correction unions cannot pass muster. "As in all equal protection cases, … the

crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Absent any evidence that members of the latter unions are any more knowledgeable about Florida's "right-to-work" laws or their union officers' salaries than are members of the disfavored unions, it is impossible to detect any governmental interest in the unequal treatment of these two similarly situated classes. The classification imposed by Section 1 is, accordingly, arbitrary and capricious and in violation of the Equal Protection clause.

C. Count II Survives Summary Judgment Because SB256, as PERC Plans to Implement It, Infringes Plaintiffs' Freedom of Association.

Section 1 cannot stand for the additional reason that it infringes Plaintiffs' First Amendment freedom of association, as alleged in Count II. *See generally Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984). It does so by purporting to assert control over how an individual may become a member of the organization, thus both intruding into the union-member relationship and impacting the individual employee's choices about joining the union.

This governmental intrusion into the union-member relationship and the prospective members' choices is apparent from the plain language of the statute: "[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 …," Fla. Stat. §447.301(1)(b)(1), the content of which is set out in detail in the statute (including in particular the acknowledgment that "[t]he State of Florida is a right-to-work state"), *id.*, §447.301(1)(b)(2), (3).

One could be forgiven for thinking, based on this seemingly clear statutory language, that "the form is a precondition to employees becoming members of a union." ECF 116-1 at 65. Yet Defendants deny that this is the case—and indeed their contention that the statute does not mean what it says constitutes the *only* argument they advance in support of their motion for summary judgment on Plaintiffs' freedom of association claim. *See id.* at 65-66. As Defendants would have it, "[a]n employee can become a member of a union without signing the form." *Id.* at 65. But that litigation position is contradicted by both the statutory language and PERC's own guidance, which states that "PERC Form 2023-1.101 is mandatory for every public employee not otherwise exempted who is, or desires to become, a member of a registered employee organization that is, or is seeking to become, the certified bargaining agent for the employee's bargaining unit." ECF

115-17 at 1.[16]

While the plain language of the statute itself, as well as PERC's own statements, would seem to be enough, there are two further reasons why Defendants cannot avoid the conclusion that Section 1 infringes impermissibly on unions' and union members' associational rights. First, PERC itself has stated in previous draft regulatory text that may yet return that public employees who are dues-paying members of an employee organization but have not delivered the Form to their bargaining agent will be subject to an order to show cause why they should not face enforcement proceedings. ECF 115-8 at 3. Both the statutory language and PERC's interpretive guidance threatening legal consequences for union members who fail to comply, thus make clear that Section 1 constitutes a *de jure* command on employees like Individual Plaintiff Schueller who wish to be union members to sign and deliver the government's Form.

Second, PERC's re-issued regulation implementing Sections 1 and 4 provides that, whatever the union and the member may think about his or her

[16] Indeed, just a few pages earlier in its brief Defendants acknowledge that Section 1 "commands employees who desire to join a union to sign and date the government-drafted form." ECF 116-1 at 63 (emphasis omitted) (quoting the Court's order denying preliminary injunction, ECF 45 5). *See also* ECF 116-1 at 61 n.9 (referring to "the requirement that Plaintiff Schueller sign the form"). And, at the outset of their brief, Defendants state flatly that "Section 1 requires public employees to sign a government form if they join or stay a member of a union." *Id.* at 5-6.

membership status, an employee is not, in fact, a full-fledged dues-paying union member in the eyes of the State unless she has signed the government's "right-to-work" Form. *See* ECF 115-9. Employees who want to join the union will, obviously, be doing so because they want the union to be their certified representative for purposes of collective bargaining with the public employer. *See* ECF 120-3 ¶¶5-6. But the State's refusal to count their membership toward Section 4's 60% requirement puts substantial pressure on unions to disseminate *and* on members to sign the Form. Thus, quite apart from the government's *de jure* command that union members sign the Form, the State through Section 1 interferes with unions' and union members' rights of association in the same way it impinges on their rights of free speech—by "caus[ing] a reasonable would-be speaker to 'self-censor[].'" *Speech First*, 32 F.4th at 1120.[17]

In short, Section 1's requirement that bargaining-unit employees can become full union members only by signing a state-mandated Form acknowledging Florida's "right-to-work" laws violates Plaintiffs' First Amendment freedom of association.

[17] *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) ("The fact that Alabama … has taken no direct action … to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order.… In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.").

VI. A PERMANENT INJUNCTION IS NECESSARY TO REMEDY PLAINTIFFS' ONGOING SECTION 3 AND 4 HARM.

Plaintiffs' opening brief laid out why, applying the permanent-injunction factors, the ongoing deprivation of Plaintiffs' rights effectuated by Sections 3 and 4 can only be remedied through entry of a permanent injunction. ECF 99-1 at 57-61. Therefore, we respond briefly only to those new points raised by Defendants in their Opposition.

A. Irreparable Harm / No Remedy at Law. On Section 3, Defendants continue to tout Plaintiffs' purported ability to get unpaid dues directly from their members, asserting Plaintiffs can collect them through any number of permissible methods, including a cause of action at law against Plaintiffs' members. ECF 116-1 at 67-68. Undisputed record evidence, however, shows the decline in dues-paying members between the first and second halves of 2023. ECF 115-13 at 6-7 (reflecting an FEA-wide drop in dues payers from 145,658 to 100,500). Even if Plaintiffs eventually convert 100% of those members to eDues, Plaintiffs will never recover the ongoing losses caused by impairment of their payroll-deduction clauses. An injunction would stop that ongoing harm.

Defendants' Section 4 argument basically merges with their merits and jurisdictional arguments: they assert Plaintiffs cannot show harm because decertification might not happen. ECF 116-1 at 67. This argument, while unsatisfactory on its own terms in light of PERC's proposed regulation, completely

ignores the ongoing harm caused by Plaintiffs' diversion of resources to avoid decertification. *See supra*, Part IV.A.2. Again, an injunction is necessary to cut off that ongoing harm.[18]

B. Balance of the Equities / Public Interest. On the final two factors, the State cannot point to anything other than the "nebulous, not easily quantified harm of being prevented from enforcing one of its laws." *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). Indeed, there is no record evidence that anyone—public employee; public employer—will be better off under SB256's regime. After months of briefing and expedited discovery, SB256 remains a solution in search of a problem. And there is certainly no public

[18] After arguing that Plaintiffs have sought relief *too early*, Defendants pivot to the contention that Plaintiffs have sought relief *too late* when they argue that Plaintiffs' Section 4 irreparable harm showing is undermined by Plaintiffs' failure to move earlier for a preliminary injunction against that provision. ECF 116-1 at 67 (citing *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016)). This argument is doubly defective. To start, *Wreal* dealt only with delay in requesting a preliminary injunction, not a permanent injunction. 840 F.3d at 1248 The analysis is fundamentally different where a plaintiff seeks a permanent injunction. *See Fla. Virtual Sch. v. K12, Inc.*, No. 6:20-CV-2354-GAP-EJK, 2021 WL 2823436, at *2 (M.D. Fla. Mar. 31, 2021) (plaintiff's "alleged delay in filing suit does not provide a basis for dismissal. Here, [plaintiff] seeks a permanent injunction, not a preliminary one."). And even more fundamentally, Plaintiffs did not sit on their hands: they filed this lawsuit the same day the Governor signed SB256 and moved for a permanent injunction against Section 4 almost a month before its effective date.

interest in imposing SB256's novel provisions before the end of the Plaintiffs' current CBAs.

CONCLUSION

Plaintiffs' Motion for Partial Summary Judgment should be granted, and Defendants' Cross-motion for Summary Judgment should be denied.

Respectfully submitted,

/s/ Leon Dayan
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RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), undersigned counsel for the Plaintiffs certifies that the foregoing Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to PERC's Cross-Motion for Summary Judgment, excluding those portions excluded by Local Rule 7.1(F), consists of 13,995 words.

/s Leon Dayan
Leon Dayan

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2023, I electronically filed the foregoing via CM/ECF, which automatically serves all counsel of record.

/s *Leon Dayan*
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