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' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs submit this supplemental brief to provide a further response to the Court's questions at the June 23, 2023 hearing concerning whether, under *Jacobson v. Florida Secretary of State*, 974 F.3d 1236 (11th Cir. 2020), it would be necessary for the Plaintiff Unions to sue the employers with whom they bargain in order to have standing to challenge the payroll-deduction ban imminently to be imposed by Section 3 of SB256. The short answer is that it is not necessary, because *Jacobson* is distinguishable in two critical respects from this case.

First. The plaintiffs in *Jacobson* were not in danger of being punished as law violators by the defendant (or anyone else) if they continued conducting their affairs as usual. Instead, the plaintiffs were political organizations attempting to force the defendant Secretary of State to take action against others not before the

court: specifically, county administrators who issued ballots listing candidates through a method the plaintiffs claimed was unconstitutional. *Id.* at 1241-42.

In direct contrast to *Jacobson*, the Plaintiff Unions here could face sanctions (absent an injunction) if they continue conducting their affairs as usual, and the Defendants here are the officials responsible for enforcing the statute that provides for those sanctions. More specifically, beginning July 1, a covered union would face exposure to unfair-labor-practice charges under the Public Employees Relations Act (PERA) if the union sought to enforce a payroll-deduction provision in an existing contract or sought to bargain for one in a new contract. This is because PERA "prohibit[s]" a "public employee organization" from "attempting to cause the public employer to violate any of the provisions of this part," Fla. Stat. §447.501(2)(b), and Section 3 is one of the "provisions of this part."[1] Thus, a union that takes an action designed to maintain its pre-Section 3 payroll-deduction rights with respect to a particular employer would face exposure for a PERA violation *regardless of how the employer responded to the union's action.*

A party facing unfair-labor-practice charges for conduct it otherwise would undertake is plainly injured for Article III purposes. *See Babbitt v. Farm Workers*, 442 U.S. 289, 302 & n.13 (1979). And because the government officials who are

[1] Part II of PERA, titled "Public Employees," encompasses sections 447.201-447.609 of the Florida Statutes. Section 3 will be codified at §447.303, within the same "part" as the §447.501(2)(b) prohibition.

responsible for enforcing PERA's unfair-labor-practice provisions are the Defendant PERC Commissioners, *see* Fla. Stat. §447.503(2),(6), the Plaintiff Unions here plainly meet the traceability and redressability components of Article III standing found lacking in *Jacobson*.

Indeed, the simple standing theory here based on the Unions' own exposure to administrative sanctions follows the pattern of a seminal pre-enforcement standing decision, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 154 (1967), where the Court held: "[T]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." This is all true as to the Plaintiff Unions here. And nothing in *Jacobson* suggests that parties other than PERC's Commissioners would need to be joined in order to sustain this standing theory.[2]

Second. *Jacobson* would be distinguishable even if one were to focus only on the injury the Plaintiff Unions face in losing payroll deduction itself and were to

[2] A decision issued by the Supreme Court on the day of the hearing reinforces this point. *See United States v. Texas*, No. 22-58 (June 23, 2023), slip op. at 6 n.2 ("[W]hen the plaintiff is himself an object of the action (or forgone action) at issue, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." (internal quotation marks omitted)).

ignore the distinct injury they face from potential PERC sanctions. In *Jacobson*, there was no indication that the non-party county administrators preferred to list candidates in the manner sought by the plaintiffs, much less that they had made a binding commitment to the plaintiffs to do so. Here, in contrast, prior to the lawsuit, the school boards and other non-party employing agencies had bound themselves by contract to deduct union dues (and have been doing so for decades).

This distinction establishes that the controlling precedent here is not *Jacobson* but the Supreme Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), which Plaintiffs cited at the end of the June 23 hearing.

Bennett involved a suit under the Endangered Species Act by plaintiffs who received water from the Bureau of Reclamation (Bureau) but alleged that a different entity, the Fish and Wildlife Service (Service), had violated the statute in a manner that would result in plaintiffs receiving less water from the Bureau. *Id.* at 157-60. The plaintiffs therefore sued to enjoin the Director of the Service but *not* the Bureau. *Id.* at 159 ("Neither the Bureau nor any of its officials is named as defendant."). The alleged violation was that the Service had rendered an invalid "Biological Opinion" finding that the Bureau's method of releasing dam water was jeopardizing two fish species. *Id.* The plaintiffs further alleged that the Bureau would alter that method in response to the Service's invalid Biological Opinion to the detriment of the plaintiffs, who would receive less water. *Id.* at 160. There was

no allegation, however, that the Bureau would be *required* to alter its method, and in fact it was undisputed that the Bureau was "technically free to disregard the Biological Opinion." *Id.* at 170.

The Court, per Justice Scalia, held that the plaintiff had standing, even though the Bureau was not named as a defendant. *Id.* at 169-70. It was sufficient that, absent judicial intervention, the Bureau would be "likely" to follow the Service's Opinion because of "the virtually determinative effect" that opinions of that kind have on other agencies. *Id.* at 170-71. As the Court put it: "[G]iven petitioners' allegation that the Bureau had, until issuance of the Biological Opinion, operated … in the same manner throughout the 20th century," "petitioners have met their burden … of alleging that their injury is 'fairly traceable' to the Service's Biological Opinion and that it will 'likely' be redressed … if the Biological Opinion is set aside." *Id.* The Government's effort to defeat standing, the Court explained, "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Id.* at 168-69.

The same considerations exist here and compel the conclusion that the Plaintiff Unions' imminent loss of payroll deduction revenues will likely be redressed by an injunction against the PERC Defendants. The non-party employer agencies here, like the non-party Bureau in *Bennett*, had long acted favorably to the

Plaintiffs with respect to the matter in dispute—here, payroll deduction; there, water management. An allegedly impermissible government action attributable to the defendant, but not to the non-party, threatened to disrupt that longstanding practice—here, enforcement of Section 3 by PERC; there, the Service's Opinion. And finally, a court order invalidating that governmental action, while not absolutely guaranteed to alter the behavior of the non-party, would be "likely" to do so in both cases. Indeed, this case is a stronger one for standing than *Bennett*, because here the non-parties have not just made payroll deductions to the Plaintiff Unions under a long-standing practice; they have been and remain under a *contractual obligation* to do so.

While *Bennett* is closely on point, *Jacobson* is readily distinguishable from this case and from *Bennett*, because in *Jacobson,* the non-party county administrators did *not* have any longstanding practice, let alone any contractual obligation, that would provide a reliable basis for concluding that they would conduct their elections in the manner sought by the plaintiffs absent an injunction directed to the non-parties themselves. To extend *Jacobson* to the circumstances here would therefore be contrary to *Bennett.*

It would also require plaintiffs in many instances to sue someone who has done nothing wrong and who may in fact fully agree with the plaintiff as to the sole legal issue in the case—an ironic result given that Article III values "concrete

adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court find that Plaintiffs have standing as to both Section 3 injuries that they have identified: deprivation of the ability to press or attempt to persuade an employer to continue deducting member dues from payroll and deprivation of payroll deduction itself.

Respectfully submitted,

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RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that the foregoing supplemental brief consists of 1,463 words, excluding those elements of the brief excludable pursuant to Rule 7.1(F).

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