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*.	Case No. 1:23-cv-00111-MW-HTC

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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OVERVIEW AND SUMMARY

Plaintiff unions, who represent school, college, and university educators in Florida, face severe deprivations of their constitutional rights and imminent irreparable harm to their core operations unless two unconstitutional provisions of Florida Senate Bill 256 ("SB 256" or "the Act") signed into law three days ago are preliminarily enjoined before they take effect on July 1, which is only seven weeks from now.

SB 256 amends Florida's Public Employees Relations Act ("PERA") to divide Florida unions into two classes: a favored class of unions representing law enforcement officers, correctional workers, and firefighters (the "favored unions"); and a disfavored class of unions representing all other public employees, including educators (the "disfavored unions"). The division neatly aligns with a political distinction, as SB 256 favors unions who have supported Governor DeSantis and punishes unions who have not.

Section 1 of SB 256 forces disfavored unions to deliver the State's preferred political message in their membership sign-up forms. More specifically, Section 1 requires disfavored unions to include in those forms a lengthy government-drafted warning that includes an anti-union slogan and a false statement about the rights of nonmembers. It further dilutes the unions' speech in their membership applications by compelling them to include other information of the government's choice. This

compelled speech violates the First Amendment and will cause concrete, irreparable injury absent emergency relief.

Section 3 of SB 256 further discriminates against disfavored unions. It prohibits them from collecting dues via payroll deduction, as they have done for nearly half a century. Unions depend on payroll deduction for the reliable collection of dues, and even a short-term interruption will be crippling.

Unions in the favored class, who supported Governor DeSantis' re-election bid, are exempt from these punishing and unnecessary burdens.

This preliminary injunction motion seeks relief from Sections 1 and 3 of the Act, because Plaintiffs are highly likely to succeed on the merits of their constitutional claims and will suffer irreparable harm if a preliminary injunction is not granted before these provisions' July 1 effective date.

Section 1's compulsion of speech is unconstitutional under controlling Supreme Court precedent that prohibits the government from forcing private parties to disseminate a government message. If the First Amendment's freedoms of speech and association mean anything, private organizations must remain free to recruit members using their own words on their own membership applications. That Section 1 facially discriminates between speakers—burdening only the speech of disfavored unions—adds to the grounds on which it violates the Constitution. These

constitutional violations inflict severe, immediate harm by corrupting unions' speech and placing their advocacy efforts at the mercy of the State.

Section 3's ban on payroll deduction is unconstitutional for multiple, independent reasons. It violates the Contracts Clause because it substantially impairs unions' existing contracts without justification. That impairment would be unconstitutional even if it applied to all unions, but its selective application to disfavored unions deepens its blatant unconstitutionality. Section 3 separately violates the First Amendment and the Equal Protection Clause, because its discrimination against disfavored speakers is a façade for impermissible viewpoint discrimination. Even a brief disruption to payroll deduction will be devastating to the Plaintiffs, who depend on their members' payment of dues to fund their core operations, including collective bargaining and advocacy for the rights of workers.

The fact that SB 256 singles out disfavored unions proves that the statute is not aimed at remedying any genuine social evil but instead represents a naked effort to injure disfavored groups (including Plaintiffs) and chill their advocacy. Preliminary relief is urgently required under these circumstances.

CONSTITUTIONAL, STATUTORY, AND FACTUAL BACKGROUND

A. The Pre-SB 256 Constitutional and Statutory Landscape

For decades, Florida public-sector employees have been guaranteed the individual right to join employee organizations, as well as the collective right, if the

majority of their co-workers so choose, to bargain collectively. Art. I, §6, Fla. Const. PERA was enacted in 1974 to "provide statutory implementation of [§]6, [a]rt. I of the State Constitution" by "[g]ranting to public employees the right of organization and representation." Fla. Stat. §447.201 (2022). The Florida Public Employees Relations Commission ("PERC" or the "Commission") is responsible for enforcing PERA.[1]

Before SB 256, PERA, by barring employer interference with the administration of employee organizations, Fla. Stat. §447.501(1)(e) (2002), guaranteed public-sector employee organizations' right to distribute their own membership applications using their own words. Plaintiffs Alachua County Education Association ("ACEA") and United Faculty of Florida-University of Florida ("UFF-UF") exercised that right and distributed their own forms to prospective members. *See* Ward Decl. ¶13, Ex. 4; Ortiz Decl. ¶¶7-9, Exs. 1-2. If prospective members wished to learn how much the union paid its officers and staff, they could ask the union or review publicly filed financial reports—available on demand through a simple email request—that list compensation to the union's officers and employees. Ward Decl. Ex. 6; Gothard Decl. Ex. 3; McCulloch Decl. ¶¶3-4, Exs. 1-2.

[1] PERC's Chair and Commissioners are charged with enforcing SB 256, Fla. Stat. §§447.205, 447.207, and are named as defendants in their official capacities.

Florida public-sector employees have long enjoyed the flexibility to choose to voluntarily pay union membership dues through payroll deduction. UFF and ACEA obtain the great majority of their operating revenue through payroll deductions. In 2020-2021, for example, over $2.159 million of the UFF's $2.794 million in total revenue consisted of voluntary membership dues. Gothard Decl. ¶13. Similarly, about 90% of ACEA's total income for 2022 was derived from voluntary membership dues. Ward Decl. ¶17. Most dues were paid via payroll deduction because employees chose that convenient method. Gothard Decl. ¶18; Ward Decl. ¶18.

B. SB 256's New Restrictions and Burdens on Disfavored Unions

SB 256 upends this longstanding system by dividing employee organizations into a favored class of law-enforcement officer, correctional officer, and firefighter unions and a disfavored class of all other unions, including educator unions like Plaintiffs. SB 256 §§1(1)(b)(6), 3(2), 4(9), 2023 Leg., (Fla. 2023). SB 256 imposes a host of new burdens on disfavored unions, including Sections 1 and 3, which take effect on July 1 and are the subject of this motion.[2]

[2] Section 4, also challenged in this lawsuit, is not addressed in this Motion, because it takes effect on October 1.

1. Section 1's Compelled-Speech Requirements

Section 1 requires that "a public employee who desires to be a member of a[] [disfavored] employee organization must sign and date a membership authorization form, *as prescribed by the commission*, with the bargaining agent." SB 256 §1(b)(1) (emphasis added). The form must communicate "in 14-point type" this message:

> The State of Florida is a right-to-work state. Membership or non-membership in a labor union is not required as a condition of employment, and union membership and payment of union dues and assessments are voluntary. Each person has the right to join and pay dues to a labor union or to refrain from joining and paying dues to a labor union. No employee may be discriminated against in any manner for joining and financially supporting a labor union or for refusing to join or financially support a labor union.

Id. §1(b)(3). The first sentence of this forced script espouses the anti-union "right-to-work" slogan. *See infra* at 13-14 & n.5. The last sentence contains a serious inaccuracy. 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; *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); *Palm Beach Junior Coll. Bd. of Trs. v. United Faculty*, 425 So. 2d 1221, 1225 (Fla. 1985) (federal decisions construing NLRA are "persuasive" in construing PERA).

The form forced on the disfavored unions must also include "the name and total amount of salary, allowances, and other direct or indirect disbursements,

including reimbursements, paid to each of the five highest compensated officers and employees of the employee organization disclosed under [§] 447.305(2)(c).” SB 256 §1(b)(2).

2. Section 3’s Invalidation of Payroll Deduction Clauses in Existing Contracts

Section 3 prohibits disfavored unions from “hav[ing] [their] dues and uniform assessments deducted and collected by the employer from the salaries of those employees in the unit,” SB 256 §3(1), (2)(a), with nothing in the statute’s text exempting payroll deduction clauses in contracts negotiated prior to SB 256’s enactment.

UFF and ACEA’s contracts with the University of Florida Board of Trustees and School Board of Alachua County, respectively, were executed in 2021 and expire in 2024. Gothard Decl. Ex. 1, art. 33, §33.1; Ward Decl. Ex. 2, art. I, §1. Each contract provides for payroll deduction.

UFF’s contract states:

> The University shall deduct bi-weekly the following from the pay of those faculty members in the bargaining unit who individually and voluntarily make such request …:
>
> (a) … UFF membership dues …;

Gothard Decl. Ex. 1 art. 5, §§5.1-5.8.

ACEA’s contract states:

> The Association will have the right to dues deduction and to uniform membership assessments in the following manner:
>
> (a) Any teacher eligible for membership in the Association may request dues deduction for Association dues in equal installments according to the pay frequency selected by the teacher …
>
> (d) The Board will remit to the Association each month, in a timely manner, the proceeds of payroll deductions…

Ward Decl. Ex. 2 art. V, §4.

If UFF and ACEA had expected when negotiating these provisions in 2021 that payroll deduction would be outlawed, and material provisions in their contracts obliterated, they would have made different bargaining choices. *See* Gothard Decl. ¶10; Ward Decl. ¶10. They likewise would have begun much earlier the time-consuming and costly process to implement an alternative dues-collection system, mitigating the grave harms to their operations that Section 3 will cause if not enjoined before July 1. *See* Gothard Decl. ¶20. These irreparable harms are further enumerated in Part II.A, *infra.*

* * *

Neither the text of SB 256 nor the official legislative analysis accompanying the bill identifies a purpose for its distinctions between favored and disfavored unions. Though there is no official explanation of the distinction, the class of public employee unions that are favored by SB 256 is strikingly similar to the class of public employee unions that supported the Governor's re-election. *See* McCulloch Decl.

¶¶5-8. The remaining class of public employee unions is composed almost exclusively of unions that did not support the Governor and includes all those unions, including UFF-UF and ACEA, that actively opposed the Governor and many of his signature policy initiatives. *See* McCulloch Decl. ¶¶5-8; Ward Decl. ¶¶4-6; Ortiz Decl. ¶¶19-21. Indeed, in his public remarks at the SB 256 signing ceremony, the Governor invoked as justification for the statute his disagreement with the "politics" of the "school unions" on matters ranging from "parents' rights" to "standards" to "Covid." McCulloch Decl. Ex. 6. On the last topic, the Governor faulted the teachers' unions for "getting districts to adopt [masking] policies" and for being "instrumental in getting [school districts] to fight the state when we said [they] couldn't [enforce mask mandates]." *Id.*

PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction "the moving party [must] show[] that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)).

ARGUMENT

I. THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Section 1 of SB 256 Violates the First Amendment by Compelling Disfavored Unions to Communicate a Government-Drafted Message to Their Prospective Members

Beginning seven weeks from today, Section 1 forces any prospective member of the plaintiff unions to sign an application form containing a 91-word government-drafted script touting Florida as a "right-to-work state," and it forces the plaintiff unions to disseminate that script, along with government-mandated information regarding union officials' salaries, when they solicit new members. *See supra* at 6-7. These requirements violate the First Amendment.

1. Section 1 Is Subject to Strict Scrutiny.

"Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (internal quotation marks omitted). The reach of the "landmark" case referred to in this passage, *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633 (1943), has been extended in two relevant ways.

First, the Supreme Court held that the First Amendment is offended by laws that require a private citizen to *disseminate* a government-prescribed ideological message, even when not required, as in *Barnette*, to personally affirm the message. Thus, in *Wooley v. Maynard*, the Court struck down a New Hampshire law requiring drivers to display the "Live Free or Die" motto embossed on the state's license plates, because "where the State's interest is to disseminate an ideology … such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." 430 U.S. 705, 717 (1977).[3]

Next, the Court held that the government may not force private parties to interject even non-ideological factual information into their communications, absent a justification that satisfies exacting scrutiny. Thus, in *Riley v. National Federation of the Blind*, the Court struck down a law providing that, before soliciting a prospective donor to contribute to a charity, a professional fundraiser must disclose to the prospective donor the percentage of the fundraiser's receipts actually distributed to the charity. 487 U.S. 781, 795-98 (1988). The Court explained that, because "[m]andating speech that a speaker would not otherwise make necessarily

[3] When the government delivers its message directly without forcing private parties to act as couriers, the "government speech" doctrine may immunize the governmental action from First Amendment scrutiny. *See Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 553, 566-67 (2005). Here, because the State of Florida *is* forcing private organizations to act as couriers, *see supra* at 6, the "government speech" doctrine is inapposite.

alters the content of the speech," a compelled-disclosure statute is "a *content-based* regulation of speech" subject to heightened scrutiny. *Id.* at 795-796 (emphasis added); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message.").

Section 1's compelled dissemination requirements are subject to strict scrutiny. They require unions to interject government-prescribed statements and government-dictated information directly into their communications aimed at persuading prospective members to join—communications that, like the fundraising solicitations in *Riley*, constitute "persuasive speech," not pure commercial speech. 487 U.S. at 796. Persuasive speech is subject to "exacting scrutiny," *id.*, which is synonymous with strict scrutiny in this context: the regulation must be "narrowly tailored to serve a compelling interest," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015).

Union membership solicitations constitute persuasive speech. In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court squarely held that "attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty," *id.* at 537; that "espousal of the cause of labor" is entitled to "the same protection" as "the espousal of any other lawful cause," *id.* at 538; and that laws

restricting solicitation of union membership are subject to a demanding precursor to the current strict scrutiny test, *id.* at 530.

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*. Section 1 does not regulate the solicitation of *money alone* but of private-organization *memberships*. It thus also implicates the freedom of association, which would be drained of its essence if it did not include the freedom of private organizations to recruit members using their own words and their own forms. That Section 1 trenches on that freedom is thus an independent reason for strict scrutiny. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984) (governmental interference in private associations' membership requirements is subject to strict scrutiny).

Just as surely as Section 1 is a law regulating "fully protected expression," *Riley*, 487 U.S. at 796, it is not a law regulating "purely factual and uncontroversial information" of the kind that is subject to lesser (but still heightened) scrutiny under the standard enunciated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).[4] Section 1's requirements, after all, compel disfavored unions to

[4] The *Zauderer* standard, which demands that the regulation be "reasonably related" to a "substantial governmental interest," 471 U.S. at 650-51, is satisfied only if the government "prove[s]" that the challenged regulation will "remedy a harm that is … not purely hypothetical" and "extend[] no broader than reasonably necessary," *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2377 (2018).

disseminate an ideological slogan—"Right to Work"—akin to the "Live Free or Die" slogan at issue in *Woolley*.[5] Worse, Section 1 insists that those who wish to join a disfavored union must, as a condition of membership, sign their name to a form bearing that slogan. This aspect of Section 1 imposes a compelled affirmation in contravention of Supreme Court precedent dating back to *Barnette*. 319 U.S. at 633-34.

Nor is Section 1's 91-word script "purely factual and uncontroversial." Rather, it is *factually misleading*, as it indicates that unions cannot discriminate in any respect against non-members. But unions may decline to represent non-members in grievance proceedings and exclude them from certain activities, including officer and committee elections. *See supra* at 6. This inaccuracy will force Plaintiffs to further alter their speech, as they must counter such misinformation.

In sum, Section 1 is subject to strict scrutiny.

2. Section 1 Does Not Come Close to Passing Strict Scrutiny.

The State must make a two-pronged showing for Section 1 to survive strict scrutiny. First, it must show that the danger sought to be addressed by the regulation

[5] The phrase "Right to Work" is not a neutral term. It is a phrase so favored by opponents of unionism that the leading anti-union advocacy group, the National Right to Work Committee, made the slogan part of its name. Union supporters consider the phrase anathema, as they understand it to be a euphemism that masks the desire to avoid paying one's fair share for the economic benefits produced by collective negotiation.

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.* Florida can make neither showing.

(a) 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 as to how much of members' dues went toward compensating the highest-earning officials. But union membership has long been voluntary in Florida under a 1944 constitutional amendment prohibiting all employers from making membership a condition of employment. *See* Art. I, §6, Fla. Const. There is thus no reason to believe workers do not know that union membership is voluntary. Nor is there any evidence in the legislative record that Florida workers are ignorant of the voluntariness of union membership or cannot learn this simply by asking.[6]

Indeed, prior to the enactment of SB 256, another Florida statute already required unions to file publicly available annual financial reports with PERC stating,

[6]The limited legislative record behind SB 256 indicates the opposite: in every instructional bargaining unit included in the Senate's Bill Analysis and Fiscal Impact Statement, at least 10% of represented employees did not join the union representing them. CS/SB 256 Fiscal Impact Statement, at 7-9, https://m.flsenate.gov/session/bill/2023/256/analyses/2023s00256.go.pdf.

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).

The absence of such evidence is fatal to Florida's ability to show a compelling, or even substantial, state interest supporting Section 1. In all compelled-speech cases, the State has the burden "to prove" that the danger supposedly combated by a compelled disclosure requirement is real, not conjectural. *See supra* note 4. No such proof exists here.

Section 1 flunks the first prong of strict scrutiny just like the regulations in *Riley*. There, the Court held there was no "compelling" interest in forcing professional fundraisers to make pre-solicitation 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. Even were that not so, if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate.

Riley, 487 U.S. at 799 (citation omitted).

Everything in this passage applies here. Undoubtedly, most public employees are aware that they do not have to join a union. Any who are uncertain may inquire whether membership is voluntary, consult public sources to learn what union officers and employees are earning, *see supra* at 3-4, ask the union itself for the pertinent

information, and choose not to join the union if the union refuses to provide it. *See also NIFLA*, 138 S. Ct. at 2377 (compelled-disclosure law flunked 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.").

(b) Section 1 also fails the second prong of strict scrutiny. Far from choosing the most "benign and narrowly tailored options" to achieving 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.

For starters, SB 256 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. When a compelled-speech regulation is "wildly underinclusive," it cannot satisfy strict scrutiny. *NIFLA*, 138 S. Ct. at 2375. "Such under inclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 2376 (internal quotation marks omitted). Here, serious doubts are

not merely "raise[d]" by SB 256's underinclusiveness, they are confirmed by the remarkable correspondence between those unions disfavored by the statute and those unions that have criticized or declined to support the Governor and his policies. *See supra* at 8-9.

Even without its underinclusiveness, Section 1 would fail the second prong of strict scrutiny. That is because forcing unions to spread the government's message is not necessary to inform workers. 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.

Section 1's compelled speech requirements thus plainly violate the First Amendment and would do so even if they were evenhandedly imposed on all unions. That Section 1 spares favored unions of the indignity it imposes on the others only compounds the offense.

B. Section 3 of SB 256 Violates the Contracts Clause, Without Justification, By Abrogating Payroll-Deduction Provisions Currently in Effect.

Beginning seven weeks from today, Section 3 prohibits governmental employers from honoring voluntary requests by members of disfavored unions to have their union dues deducted from their paychecks, imposing that prohibition *even where the government employer has obligated itself in a collective-bargaining agreement to do so*. Plaintiffs ACEA and UFF are parties to collective-bargaining agreements—signed well before the enactment of SB 256 and running through mid-2024—that contain clauses requiring government employers to honor dues-deduction requests from union members. *See supra* at 7-8. Plaintiffs are highly likely to succeed in establishing that Section 3 violates the Contracts Clause.

1. Section 3 Substantially Impairs Existing Labor Contracts.

The U.S. Constitution provides that "[n]o State shall … pass any … Law impairing the Obligation of Contracts." U.S. Const., art. I, §10, cl. 1. The Contracts Clause prohibits statutes that "operate[] as a substantial impairment of a contractual relationship" and that are not "drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22 (2018) (internal quotation marks omitted). Section 3 is void as applied to preexisting collective-bargaining agreements with payroll-deduction provisions, including the Plaintiffs' contracts, because Section 3's invalidation of

payroll-deduction obligations constitutes a "substantial impairment" of those obligations and serves no significant and legitimate public purpose.

In determining whether an impairment is substantial, courts consider "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights" through self-help. *Id.* at 1822. Legislation like SB 256 that invalidates extant payroll deduction clauses constitutes a "substantial" impairment under all three factors.

Abundant case law supports this conclusion. In a case directly on point, the Sixth Circuit struck down a Michigan statute that barred employers from honoring obligations to deduct union members' contributions to union-sponsored political action committees ("PACs"), because the statute worked a "substantial impairment" of those obligations. *Mich. State AFL-CIO v. Schuette*, 847 F.3d 800, 804 (6th Cir. 2017). Section 3 causes the same total impairment of employer obligations to provide for payroll deduction. But Section 3's impairment has an even more severe impact, as it bars deduction, not of mere PAC contributions, but of the normal membership dues that provide the core operating funds for unions. Gothard Decl. ¶13; Ward Decl. ¶17; *see also Anderson Fed'n of Tchrs. v. Rokita*, 546 F. Supp. 3d 733, 744 (S.D. Ind. 2021) (invalidation of payroll-deduction authorizations is a "substantial" impairment).

SB 256 does not just "undermine[]" payroll-deduction obligations but renders them unenforceable and worthless. *See U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 (1977) (outright repeal of a provision in public bond contract worked a significant impairment). It likewise interferes with unions' "reasonable expectations" that payroll-deduction provisions will be enforced, particularly where, as here, the provision is negotiated in a state where such provisions had long been lawful.[7] Finally, SB 256 leaves unions unable to "safeguard[]" or "reinstate[]" their rights through self-help, for when payroll deduction is rendered unlawful, it does not merely impose a default rule that a party can undo with little effort. *Cf. Sveen*, 138 S. Ct. at 1823 ("policyholder c[ould] reverse the effect of [the challenged] statute with the stroke of a pen" because statute merely changed a default rule, rendering any impairment insubstantial). Legislation like SB 256 irreversibly bars unions from accessing government payroll-deduction systems to collect dues. The impairment it causes is therefore substantial.

[7] Before the passage of SB 256, it had been settled since at least 1977 that Florida unions could request payroll deduction and that "[r]easonable costs to the employer of said deductions shall be a proper subject of collective bargaining." *See* Ch. 74-100, §3, Laws of Fla.; Ch. 77-343, §10, Laws of Fla. *See Anderson Fed'n of Tchrs.*, 546 F. Supp. 3d at 744 (reasonable expectations upset where payroll deduction had been in place for decades).

2. Section 3's Impairment of Contractual Rights Is Not Reasonable and Necessary to Achieve a Legitimate and Important Public Purpose.

Because Section 3 substantially impairs contractual rights, the Court must analyze whether that impairment is reasonable and necessary to achieve a legitimate public purpose. *Sveen*, 138 S. Ct. at 1822; *U.S. Tr. Co.*, 431 U.S. at 26-27. At this step, the State bears the burden to show a significant and legitimate public purpose underlying the challenged Act. *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 859 (8th Cir. 2002). The State must show that its impairment is aimed at "remedying…a broad and general social or economic problem," such that the State "is exercising its police power, rather than providing a benefit to special interests." *Energy Rsrvs. Grp. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) ("*Kansas Power*"). And where, as here, the State is itself interested in the impaired contracts,[8] courts apply even more heightened scrutiny to the State's action and will not defer to the legislature's judgment as to reasonableness and necessity. *U.S. Tr. Co.*, 431 U.S. at 26-27.

SB 256 is not "reasonable and necessary to achieve a legitimate public purpose." The legislation itself identifies no purpose—substantial, legitimate, or even pretextual—for selectively banning payroll deduction, let alone at the expense

[8] The State is plainly interested in the contracts impaired by Section 3, as the State itself is party to CBAs that contain affected payroll deduction provisions. Plaintiff UFF's CBA is with the University of Florida Board of Governors, a state entity.

of existing contractual rights. And because payroll deduction has long been permissible, Florida's abrupt termination of the practice is hardly "necessary." *See, e.g.*, *Schuette*, 847 F.3d at 804 ("Until now, Michigan, like Ohio, has been willing to tolerate or been unaware of the evils it now claims are associated with PAC checkoffs. Here too, then, the State may tolerate them a bit longer until [the] contractual obligations expire." (cleaned up)).

Moreover, the payroll deduction ban is not uniform. It applies solely to disfavored unions without any legitimate reason, suggesting that the real reason is animus toward political opponents of the Governor. Thus, the same "wildly underinclusive" feature of Section 1—its singling out of disfavored unions for adverse treatment without legitimate reason, *see supra* at 17-18—plagues Section 3. Florida cannot simultaneously allow voluntary payroll deduction to continue for favored unions and yet maintain that voluntary payroll deduction is a "broad" or "general" social or economic problem. *See Kansas Power*, 459 U.S. at 412; *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 248-249 (1978) (state pension statute struck down under Contracts Clause was focused only on a discrete subset of employers and not on pension practices generally).

* * *

For these reasons, Plaintiffs will likely succeed in establishing that Section 3 unconstitutionally impairs their contracts.

C. Plaintiffs Are Likely to Succeed on the Merits of their First Amendment Challenge to Section 3 Because its Selective Ban on Payroll Deduction Is a Façade for Viewpoint Discrimination.

Quite apart from its Contracts Clause infirmities, Section 3's selective payroll deduction ban is unconstitutional because its discrimination between favored and disfavored unions is a façade for viewpoint discrimination.

Section 3 discriminates against disfavored unions with regard to access to governmental payroll deduction systems, even though the favored and disfavored classes of unions are similarly situated with respect to the subjects on which they may bargain. *See* Fla. Stat. § 447.301 (listing organizational rights provided to both law-enforcement and general public employees); *see also* PERC, Scope of Bargaining, 3d ed. (Oct. 2021), *available at* http://perc.myflorida.com/pubs/Scope_of_Bargaining.pdf (detailing mandatory and permissive subjects of bargaining for all union classifications). That absence of any meaningful distinction between the favored and disfavored unions indicates that Section 3 is a vehicle for discriminating between different *viewpoints*, not different *speakers*. And it is well established that viewpoint classifications are subject to heightened scrutiny. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

Plaintiffs recognize that making payroll deduction available to unions is a form of "subsidy" of expressive activities that can be withdrawn across the board

without facing heightened scrutiny. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015). Furthermore, when the government subsidizes speech without restricting it, it can permissibly discriminate between classes of speakers who have different statuses relevant to the need for the subsidy. *See, e.g.*, *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 48 (1983) (school district could permissibly grant access to its internal mail system to unions with "exclusive representative" status while denying it to other unions, because unions with the former status had unique duties giving them a greater need for access); *WEAC v. Walker*, 705 F.3d 640, 648 (7th Cir. 2013) (where unchallenged provisions of a statute left one subset of unions free to bargain over the traditional range of bargaining topics and virtually eliminated the topics over which a second subset could bargain, the statute could permissibly leave only the former subset with payroll deduction rights).

But the government cannot selectively subsidize speech to discriminate "on the basis of ideas," *Leathers v. Medlock*, 499 U.S. 439, 450 (1991), including by using speaker classifications as a disguised means of "suppress[ing] a particular point of view," *Cornelius*, 473 U.S. at 812. *Cornelius* addressed a government program through which federal employees could periodically solicit coworkers during working hours to contribute via payroll deduction to certain types of charities. Because the program could be terminated outright or modified to exclude certain

classes of charitable speakers from participating, it was not a public forum, *id.* at 805-06, but was instead analyzed much in the manner of a subsidy. Even so, the Court held, the program could not make exclusions that functioned as a "façade for viewpoint-based discrimination." *Id.* at 811; *see also Ysursa*, 555 U.S. at 361 n.3 (although the state's ban on the use of municipal payroll deduction systems for all PAC contributions was permissible and not "viewpoint discriminat[ory]," a future First Amendment challenge could be brought if the ban were not applied "evenhandedly").

Although speech-subsidy laws are judged by different criteria from speech-restrictive laws, the "deep[] skeptic[ism]" the Supreme Court has expressed toward speech-restrictive laws that "'distinguish among different speakers, allowing speech by some but not others,'" *NIFLA*, 138 S. Ct at 2378 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)), is also warranted when considering speech-subsidizing laws. In both instances, speaker-based distinctions pose a serious risk that the legislature's real purpose may be to favor "those speakers whose messages are in accord with its own views." *Id.* Were courts to suspend their skepticism in this context, legislatures could evade heightened scrutiny by simply finding a speaker-based distinction that serves as a ready proxy for viewpoint discrimination and use that distinction to thinly veil its true purpose.

The design and structure of SB 256—in particular, its pervasive underinclusiveness—make clear that SB 256 is precisely the type of speaker-discriminatory law that must be subjected to heightened scrutiny. While a legislature could legitimately conclude that public employers should never assist unions in collecting membership dues or should not assist any unions lacking full bargaining rights or lacking exclusive-representative status, the distinctions Section 3 makes between favored and disfavored unions do not reflect any such legitimate status-based judgment. *See NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (the underinclusiveness in the "design and structure" of the statute "suggest[s] a real possibility that these individuals were targeted because of their beliefs").

Because Section 3 is subject to heightened scrutiny, Plaintiffs' First Amendment challenge to Section 3 is likely to succeed. Any form of heightened scrutiny requires a close fit between the statute's means and some legitimate governmental interest, *see, e.g.*, *Sorrell*, 564 U.S. at 572, and here there is no fit at all. While legitimate interests can support a law banning payroll deductions, *see Ysursa*, 555 U.S. at 358-59—no legitimate interest would be advanced by Florida's unexplained distinction between the unions favored by SB 256 and those disfavored by the bill. *Cf. Herman v. Loc. 1011, United Steelworkers*, 207 F.3d 924, 928 (7th Cir. 2000) ("[T]he means are not adapted to the end, suggesting that the real end may be different."). In contrast, there is a close fit between the distinctions made in

SB 256 and the illegitimate interest of advantaging the speech of the unions that have supported the Governor relative to other unions.

Indeed, given the utter mismatch between any legitimate purpose that can be posited for Section 3 and the Legislature's exemption of the favored unions from Section 3's reach, Section 3's classification scheme fails rational basis review and thus violates the Equal Protection Clause. *See U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 529 (1973) (striking down statute on equal protection grounds because distinctions lacked a rational relation to any legitimate government interest).

II. ADDITIONAL PRELIMINARY INJUNCTION FACTORS OVERWHELMINGLY FAVOR GRANTING PROVISIONAL RELIEF.

Sections 1 and 3 of SB 256 will not only infringe Plaintiffs' constitutional rights, they will cause Plaintiffs irreparable harm and otherwise tip the balance of equities decisively in favor of granting provisional relief.

A. Plaintiffs Will Suffer Irreparable Harm if Sections 1 and 3 Are Not Enjoined Before Their July 1 Effective Date.

1. Section 1 Will Inflict Imminent Irreparable Harm.

Section 1 will cause the Plaintiff unions to suffer irreparable injury absent a preliminary injunction. The reason is simple: the government-dictated speech that Section 1 will force the unions to convey to their prospective members violates the disfavored unions' First Amendment rights. The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also FF Cosms.*, 866 F.3d at 1298 (citing *Elrod* and holding that "an ongoing violation of the First Amendment constitutes an irreparable injury"); *Michel-Trapaga v. City of Gainesville*, 907 F. Supp. 1508, 1512 (N.D. Fla. 1995) ("It is well-settled in this Circuit that the loss of First Amendment freedoms … constitutes irreparable injury"). The injury here "constitute[s] 'direct penalization, as opposed to incidental inhibition' of First Amendment rights and thus [can]not be remedied absent an injunction." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

This harm is not abstract. Section 1 will force the Plaintiff unions to suffer the interjection of a government-drafted script and government-dictated information into speech that strikes at the core of their associational autonomy—speech aimed at persuading prospective members to join their organizations. *See supra* at 12-14 (explaining how Section 1 infringes Plaintiffs' associational freedoms). Making the First Amendment harms even more acute, any new members that join Plaintiffs after July 1 would have to sign their name to a form espousing an ideological slogan drafted by the State and opposed by union supporters.

None of these injuries can later be undone were the statute enjoined after its effective date. That is the essence of irreparable First Amendment injury.

2. Section 3 Will Inflict Additional and Distinct Irreparable Harms.

Section 3's ban on the payroll deduction of dues will likewise cause Plaintiffs irreparable harm, both concrete and intangible.

(a) Concretely, Plaintiffs' net income from membership dues will fall off dramatically beginning July 1 and will lead to losses that will be impossible to recover through an action at law or otherwise. UFF and ACEA obtain most of their operating revenue through voluntary dues received via payroll deduction. Gothard Decl. ¶13; Ward Decl. ¶17. Transitioning to alternative automated collection mechanisms, such as eDues, is both time- and resource-intensive, meaning that Plaintiffs are unlikely to convert even a majority of current members between now and Section 3's July 1 effective date. Roeder Decl. ¶¶4-6, 14-16; Gothard Decl. ¶19; Ward Decl. ¶20. Furthermore, even if those alternative collection mechanisms eventually proved as popular to members as payroll deduction and generated the same enrollment, Plaintiffs would still suffer a net loss in revenues, because alternative programs generate vendor and transaction fees that reduce the proceeds available for Plaintiffs to carry out their advocacy on behalf of the employees they represent. Roeder Decl. ¶¶7-10.

It is well established that serious reduction in net operating revenues constitutes irreparable harm. *See, e.g., Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1288 (11th Cir. 2013) (finding irreparable harm to

construction contractor by enforcement of state contract bar where "almost its entire revenue stream would simply evaporate"); *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of Am., Inc.*, 549 F.3d 1079, 1090 (7th Cir. 2008) (interim risk of "loss of property, employees … [or] damage to its goodwill" constituted irreparable harm), *abrogation recognized on other grounds*, *Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

While financial harms that a plaintiff can ultimately be expected to recover through damages remedies often do not qualify as "irreparable," the harms that Plaintiffs will suffer here are irreparable, because the Eleventh Amendment precludes Plaintiffs from seeking monetary damages remedies against Florida, the sovereign responsible for enacting and enforcing Section 3. *See Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (Eleventh Amendment immunizes States from monetary relief for wrongly withheld benefits).

(b) Section 3 will also cause Plaintiffs to suffer intangible irreparable harm from the infringement of their constitutional rights.

Plaintiffs showed in Part II.A.1 that the temporary deprivation of First Amendment rights constitutes a per se irreparable injury. Thus, if this Court concludes that Section 3 is likely void under the First Amendment on viewpoint-discrimination grounds, that same conclusion would follow.

Separately, First Amendment rights are not the sole constitutional rights that, when violated, cause inherent irreparable harm. *See, e.g.*, *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981).[9] State violations of the Contracts Clause also cause inherent irreparable harm. *See, e.g.*, *Anderson Fed'n of Tchrs.*, 546 F. Supp. 3d at 752 (law impairing payroll deduction contracts irreparably harmed plaintiff unions); *Conn. State Police Union v. Rovella*, 494 F. Supp. 3d 210, 220 (D. Conn. 2020) ("presumption of irreparable harm" from Contracts Clause violation). Indeed, in the directly-on-point Contracts Clause case discussed above, the Sixth Circuit affirmed, solely on Contracts Clause grounds, a preliminary injunction against a state statute barring payroll deduction of union dues. *See Schuette*, 847 F.3d at 805.

Put another way, Contracts Clause rights are intangible in nature and cannot be fully remedied through money damages even where (unlike here) such damages might be recoverable against the defendant. "The Contracts Clause does not seek to maximize the bottom line but to protect minority rights 'from improvident majoritarian impairment.'" *Sveen*, 138 S. Ct. at 1830 (Gorsuch, J., dissenting) (quoting Laurence Tribe, American Constitutional Law § 9-8, at 613 (2d ed. 1988));

[9] *Deerfield* is binding on this Court. *See United States v. Schultz*, 565 F.3d 1353, 1360 n.4 (11th Cir. 2009) (Unit B Fifth Circuit panel decisions are binding within Eleventh Circuit).

see also Donohue v. Mangano, 886 F. Supp. 2d 126, 150, 151 (E.D.N.Y. 2012) ("[T]he creation of authority in the County Executive to unilaterally and limitlessly 'modify any County contracts' in contravention of any currently existing CBAs is likely a constitutional injury in and of itself.").

B. Preliminary Injunctive Relief Would Preserve the Status Quo and Cause No Harm to Defendants or to the Public Interest.

The final preliminary injunction factor is whether irreparable harm to the plaintiff in the absence of a preliminary injunction outweighs any harm to the defendant or to the public interest in the event of an injunction. *FF Cosms.*, 866 F.3d at 1298. Here, the answer is plainly "yes," as the harms to Plaintiffs are manifold, *see supra*, Part II.A, and no harm would befall Defendants or the public interest from maintaining the status quo.

1. The Irreparable Harm Inflicted by Section 1 Clearly Outweighs Non-existent Harm from Maintaining the Status Quo.

Neither Defendants nor the public interest would be harmed by a temporary injunction against enforcement of Section 1's compelled-speech requirements. The Legislature has made no finding—and there is no evidence—that prospective union members are harmed in the slightest by the status quo. *See supra*, at 17. Under current law, prospective members are entitled to hear a union present in its own words the case for why they should join a union, and employees who are persuaded sign up to become union members on the union's own form rather than on a

government-drafted and imposed form. Members curious about union officials' salaries can ask the union or examine public records that are readily available by email from PERC. *Supra* at 4.

2. The Irreparable Harm Inflicted by Section 3 Likewise Outweighs the Non-existent Harm from Maintaining the Status Quo.

No material harm would result from temporarily enjoining Section 3's selective ban on the payroll deduction of union dues and maintaining the status quo.

At present, payroll deductions for membership dues for state employees are fully voluntary and are revocable upon 30 days' written notice to the employer and employee organization. Fla. Stat. §447.303. Governmental bodies that wish to offset the minor costs associated with the practice can demand offset payments in bargaining. *Id.* The Legislature has made no finding—and, again, there is no evidence—that the current status quo harms any interest. Indeed, the House sponsor of the bill stated in a floor colloquy that the bill would not even apply to existing contracts. McCulloch Decl. Ex. 7. That statement on its own discredits any suggestion that material harm would result from a temporary injunction.

More fundamentally, the Legislature has conveyed through the text of SB 256 that it does not consider either payroll deduction or the right of unions to use their own words to solicit prospective members to be serious evils, as it leaves current law undisturbed as to the large swath of Florida's public-sector bargaining units that are

represented by the favored unions. That gaping underinclusiveness not only affirmatively disproves that SB 256 advances important governmental interests, it undermines any claim of urgency that SB 256 must take effect before the serious constitutional questions it raises can be addressed.[10]

All that is left on the State's side of the scale is the "nebulous, not easily quantified harm of being prevented from enforcing one of its laws." *Odebrecht Constr.*, 715 F.3d at 1289. But that interest "is present every time the validity of a state law is challenged" and is easily outweighed by the harm to Plaintiffs here. *Id.* Put simply, "the public has no interest in the enforcement of what is very likely an unconstitutional statute," *id.* at 1290, particularly one like SB 256 that appears to have been enacted for no end other than silencing critics of the Governor.

CONCLUSION

The Plaintiffs' motion for a preliminary injunction should be granted.

[10] Because a preliminary injunction will simply maintain the status quo, no damages or costs will have been incurred by Defendants in the event they are found to have been wrongfully enjoined. Thus, no bond should be required. *See* Fed. R. Civ. P. 65(c); *see also Bell South v. MCI Metro Access, LLC*, 425 F.3d 964, 971 (11th Cir. 2005).

Respectfully submitted,

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RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), undersigned counsel for the Plaintiffs certifies that the foregoing Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, excluding those portions excluded by Local Rule 7.1(F), consists of 7,967 words.

/s Leon Dayan
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