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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, STATE OF FLORIDA

FLORIDA EDUCATION ASSOCIATION, et al.,

Plaintiffs,

v. Case No. 2018-CA-001446

DONNA MAGGERT POOLE, as Chair and Commissioner of the Florida Public Employees Relations Commission, JAMES BAX, as Commissioner of the Florida Public Employees Relations Commission, and CURT KISER, as Commissioner of the Florida Public Employees Relations Commission,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT II

Defendants, DONNA MAGGERT POOLE, as Chair and Commissioner of the Florida Public Employees Relations Commission, JAMES BAX, as Commissioner of the Florida Public Employees Relations Commission, and CURT KISER, as Commissioner of the Florida Public Employees Relations Commission, hereby submit their memorandum in opposition to Plaintiffs' Motion for Summary Judgment as to Count II of the Complaint ("Motion").

Summary of Argument

As shown below, the Motion should be denied because the newly-enacted provisions challenged by Plaintiffs—various teachers unions, union presidents, and teachers—amount to nothing more than minor added reporting requirements of information to be made by unions representing public teachers in Florida.

Specifically, under the new provisions, § 1012.2315(4)(c)1. & 2., Fla. Stat., certified bargaining agents (i.e., unions) for units of instructional personnel (basically K-12 public school teachers) must now include in their applications for registration renewal: (1) the number of employees in the unit who are eligible for representation by the union organization; and (2) the number of employees in the unit who are represented by the union organization, along with the number of members of the union organization who pay union dues and the number of members who do not. **These data are already known to the union representatives and cannot seriously be claimed to be unduly burdensome to report**.

What exercises Plaintiffs here is that the challenged provisions further provide that, if these newly-required data reveal that the number of dues-paying members is **less than 50 percent** of the employees in the unit who are eligible for representation, then the union organization must petition for recertification. Thus, the disclosure of these data will actually serve to **enhance** the ability of teachers to control—or to

avoid—their representation by unions for collective bargaining purposes. Hence, this litigation.

The Plaintiff unions (and the Plaintiff teachers who support their position) contend in their Motion that these provisions violate the right to work and to bargain collectively under Article I, section 6 of the Florida Constitution and violate the equal protection clause of Article I, section 2 of the Florida Constitution. As matters of settled law and common sense, those contentions are without merit.

As noted, the new provisions strengthen the right to work and to bargain collectively—which rights belong solely to the employees rather than to the unions—obliterating any claim that Article I, section 6 of the Florida Constitution is violated. Indeed, because the reporting requirements are imposed on the unions and not the employees, it stretches credulity beyond reason to characterize the provisions as having any adverse impact whatsoever on the teachers' right to work or to have collective bargaining representatives of their own choosing.

Moreover, the fact that the provisions apply to "instructional units" rather than all public employees does not give rise to an equal protection violation. Prior to its amendment, section 1012.2315(4), Florida Statutes, already made distinct provisions for collective bargaining in public education. As shown below, the new legislation imposed yet other, far more demanding requirements on the unions that

are **not** challenged here, but which further underscore that public education is legitimately treated differently from other occupations for collective bargaining purposes under Florida law. Because neither the teachers nor the unions constitute a suspect classification under equal protection jurisprudence, and because the challenged provisions impose no burdens or limitations on the teachers' right to work or to bargain collectively as they choose, and otherwise do not abridge any fundamental right of the teachers or the unions, it follows that strict scrutiny analysis cannot be applied in assessing Plaintiffs' claims.

Hence, the rational relationship to a legitimate state interest test governs. Under that standard, which requires that considerable deference be accorded by the courts to legislative enactments, the challenged provisions easily pass muster. Public education, the existing teacher shortage, and the need to retain qualified teachers are matter of the utmost concern to the People of Florida, warranting added precautions to ensure that teachers be satisfied with their control over and the quality of their union representatives for collective bargaining purposes.

Pertinent Background

In 2018, Chapter 2018-6, Laws of Florida, was enacted to deal with various legislative concerns about public education in Florida. Included among its provisions was section 33, which has been codified as section 1012.2315(4), Florida

Statutes (2018). Section 1012.2315(4) provides:

> (4) COLLECTIVE BARGAINING.—
>
> (a) Notwithstanding provisions of chapter 447 relating to district school board collective bargaining, collective bargaining provisions may not preclude a school district from providing incentives to high-quality teachers and assigning such teachers to low-performing schools.
>
> (b) Before the start of the 2019-2020 school year, each school district and the certified collective bargaining unit for instructional personnel shall negotiate a memorandum of understanding that addresses the selection, placement, and expectations of instructional personnel and provides school principals with the autonomy described in s. 1012.28(8).
>
> (c)1. In addition to the provisions under s. 447.305(2), an employee organization that has been certified as the bargaining agent for a unit of instructional personnel as defined in s. 1012.01(2) must include for each such certified bargaining unit the following information in its application for renewal of registration:
>
> a. The number of employees in the bargaining unit who are eligible for representation by the employee organization.
>
> b. The number of employees who are represented by the employee organization, specifying the number of members who pay dues and the number of members who do not pay dues.
>
> 2. Notwithstanding the provisions of chapter 447 relating to collective bargaining, an employee organization whose dues paying membership is less than 50 percent of the employees eligible for representation in the unit, as identified in subparagraph 1., must petition the Public Employees Relations Commission pursuant to s. 447.307(2) and (3) for recertification as the exclusive representative of all employees in the unit within 1 month after the date on which the organization applies for renewal of registration pursuant to s. 447.305(2). The certification of an employee organization that does not comply with this paragraph is revoked.

§ 1012.2315(4), Fla. Stat. (2018).

Prior to the amendment of section 1012.2315(4), the statute consisted solely of what now is subparagraph (a). But as a review of subsection (a) shows, even prior to the amendment the Legislature already was imposing distinctions for collective bargaining in public education not found in other areas of public employment. Notably, subsection (a) is not challenged here.

The new subsection (b)—which, significantly, also is not challenged in this action—requires that the union representative "negotiate a memorandum of understanding that addresses the selection, placement, and expectations of instructional personnel and provides school principals with the autonomy described in s. 1012.28(8)."[1] Thus, subsection (b) also imposes direct duties on the union representative that are not found in the laws of Florida as they pertain to collective bargaining outside the area of public education.

Subsection (c), the only provision at issue, requires that the certified bargaining agents for units of instructional personnel must now include in their applications for registration renewal: (1) the number of employees in the unit who are eligible for representation by the union organization; and (2) the number of employees in the unit who are represented by the union organization, along with the

[1] Section 1012.28, Florida Statutes, sets forth numerous duties and responsibilities of school principals, including authority over the placement and transfer of teachers within a school district.

number of members of the union organization who pay union dues and the number of members who do not. As noted, these data are already in the possession of the union representatives, and disclosure of the data imposes no significant burden.

Subsection (c) further provides that, if these newly-required data reveal that the number of dues-paying members is less than 50 percent of the employees in the unit who are eligible for representation, then the union organization must petition for recertification. Thus, the disclosure of these data enhances the ability of teachers to control—or, should they so choose, to avoid—their representation by unions for collective bargaining purposes.

In their Complaint for Declaratory and Injunctive Relief, Plaintiffs assert three claims: Count I, for alleged violations of Article III, section 6 of the Florida Constitution arising from the inclusion of other provisions addressing public education besides those at issue here, thereby supposedly running afoul of the single-subject limitation; Count II, for violation of Article I, section 2's equal protection clause, arising from violation of Article I, section 6's right to work and to bargain collectively provision; and Count III, also for violation of Article I, section 6. Of these three counts, only Count II is at issue in the Motion.

Argument

Plaintiffs mount a facial challenge against section 1012.2315(4)(c), Florida Statutes (2018). *See* Motion at 9.

In *Fraternal Order of Police, Miami Lodge No. 20 v. City of Miami*, 243 So. 3d 894 (Fla. 2018), the Florida Supreme Court stated:

> In a facial challenge, our review is limited. We consider only the text of the statute, not its specific application to a particular set of circumstances. To succeed on a facial challenge, the challenger must demonstrate that no set of circumstances exists in which the statute can be constitutionally valid. Generally, legislative acts are afforded a presumption of constitutionality and we will construe the challenged legislation to effect a constitutional outcome when possible.

243 So. 3d at 897 (citations omitted).

Thus, to succeed, Plaintiffs must overcome a heavy presumption in favor of upholding the challenged legislation, and further must shoulder the burden of showing that there are no circumstances in which the legislation can be valid. In these regards, Plaintiffs have altogether failed. If anything, it is Defendants in whose favor summary judgment should be entered.

I. NO VIOLATION OF THE CONSTITUTIONAL RIGHT TO WORK AND TO BARGAIN COLLECTIVELY HAS BEEN ESTABLISHED.

Article I, section 6 of the Florida Constitution provides:

> **SECTION 6. Right to work.—**The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by

> and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Art. I, § 6, Fla. Const.

In *Schermerhorn v. Local 1625 of the Retail Clerks International Association, AFL-CIO*, 141 So. 2d 269 (Fla. 1962), the Florida Supreme Court struck down the "agency shop" provision of a collective bargaining agreement that required nonunion members to pay dues to a union as a condition of employment. There, the Court, addressing Article I, section 6's nearly identical predecessor, stated:

> This section clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job. Inasmuch as the Constitution has granted this right, the agency shop clause is repugnant to the Constitution in that it requires the nonunion employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact, abrogates it by requiring the non-union worker to pay the union for the exercise of the right or, in the alternative, to be discharged from his employment. Such an arrangement is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12.

Schermerhorn, 141 So. 2d at 272-73. Thus, the Court made plain that the right to work and to bargain collectively provision exists for the protection of employees, not labor unions, and that employees' freedom of choice is central to the protections

under the Constitution's Declaration of Rights.[2]

Section 447.301, Florida Statutes, codifies the thrust of *Schermerhorn* and goes further, by protecting not only the right of public employees to form, join, or participate in any employee organization of their own choosing for collective bargaining, but also "to refrain from forming, joining, or participating in" such organizations. § 447.301(1), Fla. Stat. The statute also provides: "Public employees shall have the right to refrain from exercising the right to be represented." § 447.301(2), Fla. Stat. Thus, the right to bargain collectively expressly includes the right to refrain from bargaining collectively, and that right does not belong merely to individual employees but to **all** employees. Here in Florida, they have every right to go without union representation altogether should they so decide.

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[2] The 1962 *Schermerhorn* opinion dealt with the then-current version of section 12 of the Declaration of Rights, which stated: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." *Schermerhorn*, 141 So. 2d at 272. The Declaration of Rights now is found in Article I of the Florida Constitution. Section 6 of Article I, while slightly reworded, is virtually identical to section 12 of the Declaration of Rights, except for section 6's inclusion of a new provision denying the right to strike to public employees. That change, however, is irrelevant to this action. Accordingly, the reasoning of the *Schermerhorn* Court with respect to section 12 of the Declaration of Rights fully applies in construing Article I, section 6 of the current Florida Constitution, and thus fully applies to the issues raised by the Motion.

The right to forgo union representation is also reflected in section 447.308(2), Florida Statutes, which provides: "If a majority of the employees voting in such election vote against the continuation of representation by the certified bargaining agent, the certification of the employee organization as the exclusive bargaining agent for the employees in the bargaining unit shall be revoked."

Recently, the United States Supreme Court further reined in labor unions, in the context of misspending employees' "agency fees" taken by union representatives for political and ideological purposes. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), the Court noted: "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Id.* at 2460. The Court went on to note that a State's requirement that a union serve as the exclusive bargaining agent of its employees "itself [is] a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id.* at 2478.

While Plaintiffs, typical of labor unions, make reference to non-union employees within a bargaining unit as being "free riders"—a reference to their being

able to avail themselves of the fruits of union bargaining without paying the full fare by way of union dues—the *Janus* Court noted: "Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, 'free-rider arguments ... are generally insufficient to overcome First Amendment objections.'" *Janus*, *id.* at 2466 (citation omitted).

Still more pointedly, the Florida Supreme Court, in addressing the meaning of the virtually identical predecessor of Article I, section 6 of the Florida Constitution, stated:

> The appellees contend that, except for the "agency-shop" provision, the non-union employees of the appellant Food Fair would be "free riders," that is, they would reap the benefits of union representation without having to bear any of the cost thereof. This argument is grounded on the fact that the union is, by law, the bargaining agent for all employees—those who do not belong to the union as well as those who do. 29 U.S.C.A. § 159. This argument may be answered by reference to the section of the Constitution under consideration. Clearly, it is the intent of this section to leave as a matter for *individual determination and preference* the question of whether the worker will derive any benefit from association with a labor union. The choice is his to make. Presumably, the appellants in the instant case have decided that union membership is not an overall benefit to them personally, else they would have joined.

Schermerhorn, *supra*, 141 So. 2d at 273 (emphasis in original). Thus, if anything, Florida law is even less receptive to arguments hostile to non-union employees.

That Plaintiffs here, in assailing new statutory provisions that strengthen

employees' control over union representatives, claim to have the so-called free riders' best interests at heart is difficult enough to accept even if offered in a defensive posture. That Plaintiffs claim, as a basis for summary judgment in their favor, to be on the side of the free-riders is implausible if not preposterous.

In *Dade County Classroom Teachers' Association v. Ryan*, 225 So. 2d 903, 906 (Fla. 1969), the Florida Supreme Court stated that "Legislative enactments regulating the subject matter embraced in said [Article I,] Section 6 should be accorded considerable deference by the judiciary…." (Citations omitted.) *See also City of Tallahassee v. Public Employees Relations Commission*, 393 So. 2d 1147, 1150 (Fla. 1st DCA 1981) ("We recognize … that considerable deference should be accorded to legislative enactments implementing Article I, Section 6.") (citing *Ryan*). Here, rather than exhort this Court to follow binding precedent requiring that it give deference to the Legislature when it comes to laws implementing Article I, section 6, Plaintiffs ask the Court to do the very opposite.

In seeking a declaration of unconstitutionality, Plaintiffs contend that the challenged legislation "implicates" the right to engage in collective bargaining, thereby triggering the need to apply strict scrutiny here. Plaintiffs' contention is not only conclusory, but misleading. While the Florida Supreme Court uses the term "implicate" from time to time, *see, e.g.*, *Estate of McCall v. United States*, 134 So.

3d 894, 901 (Fla. 2014) ("Unless a suspect class of fundamental right protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge."), the gist of its meaning is not that legislation merely touches upon a protected right, but that it impinges upon that right. *See, e.g.*, *City of Tallahassee*, 393 So. 2d at 1150 ("The legislative enactment removing retirement as a subject of collective bargaining for public employees abridges or curtails that right and, therefore, violates Article I, Section 6, of the Florida Constitution."); *Headley v. City of Miami*, 215 So. 3d 1, 8 (Fla. 2017) ("The right to bargain collectively is, as part of the state's constitution's declaration of rights, a fundamental right. As such, it is subject to official abridgment only upon a showing of a compelling state interest.") (internal citation and quotations omitted).[3]

In the case at bar, no abridgement or curtailment of the right to work or the right to bargain collectively arises from the challenged provisions. If anything, they serve to promote the protections of public-school teachers, negating any basis for imposing the strict scrutiny standard.

[3] *Cf. Black's Law Dictionary* 770 (8th ed. 2004), which defines "implicate" as: "*vb.* 1. To show (a person) to be involved in (a crime, misfeasance, etc.) <when he turned state's evidence, he implicated three other suspects>. 2. To be involved or affected <three judges were implicated in the bribery>." Thus, to be implicated is to be involved in wrongdoing of some sort.

That the provisions are protective of public-school teachers also leads to the conclusion that the provisions pass muster under the rational relationship (or rational basis) test, discussed below in the context of Plaintiffs' equal protection attack.

Finally, this being a facial challenge, it was incumbent upon Plaintiffs to demonstrate that there can be no circumstances in which the challenged provisions could be upheld. Plaintiffs have utterly failed to meet this standard, warranting denial of their motion.

II. NO VIOLATION OF THE EQUAL PROTECTION CLAUSE HAS BEEN ESTABLISHED.

In *Estate of McCall v. United States,* 134 So. 3d 894 (Fla. 2014), the Florida Supreme Court stated:

> All natural persons, female and male alike, are equal before the law. Art. I, § 2, Fla. Const. This Court has stated "[t]he constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation." *Caldwell v. Mann,* 157 Fla. 633, 26 So. 2d 788, 790 (1946).
>
> Unless a suspect class or fundamental right protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge. *See Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 897 So. 2d 1287, 1291 n.2 (Fla.2005). To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed. *Dep't of Corr. v. Fla. Nurses Ass'n,* 508 So. 2d 317, 319 (Fla.1987). Stated another way, the test for consideration of equal protection is whether

> individuals have been classified separately based on a difference which has a reasonable relationship to the applicable statute, and the classification can never be made arbitrarily without a reasonable and rational basis.

Estate of McCall, 134 So. 3d at 900-901. There, in a wholly distinct situation, the Court, rejecting the strict scrutiny standard, struck down the statute at issue under the rational basis standard.

In *Fraternal Order of Police, Miami Lodge No. 20 v. City of Miami*, 243 So. 3d 894 (Fla. 2018), the Florida Supreme Court stated: "Equal protection is not violated merely because some individuals are treated differently than others. Instead, it requires that persons similarly situated be treated similarly." *Id.* at 899 (citation omitted).[4]

This principle was applied in the Court's earlier decision in *Florida High School Activities Association v. Thomas*, 434 So. 2d 306 (Fla. 1983), in which legislation distinguishing between regular-season and playoff high school football—including limiting of team rosters for the playoffs—was challenged. There, the

[4] There, the Court held that private employees are distinct from public employees because of the public interest in protecting public monies. The dispute concerned section 447.4095, Florida Statutes, and the City of Miami's decision to declare a fiscal emergency to invoke the statute's process in order to modify an existing collective bargaining agreement for the benefit of the employer, not its employees. Accordingly, strict scrutiny analysis was applied, but even so the statute was upheld as warranted by a compelling state interest.

Court, utilizing the rational relationship test, upheld the statute, on the grounds that it helped to reduce the cost of playoff games, promoted fair play in championships, and prevented playoff violence. *Id.* at 308. The Court further noted that, while the rule "will inevitably and unfortunately preclude certain players from participating in post-season play, this, in itself, does not deny those players equal protection under the law." *Id.* at 309.

Further elucidating the rational basis test, the Florida Supreme Court stated in *Samples v. Florida Birth-related Neurological Injury Compensation Association*, 114 So. 3d 912 (Fla. 2013):

> Because neither a suspect class nor a fundamental right is implicated here, we review the Samples' equal protection claim under the rational basis test. *See Westerheide v. State*, 831 So. 2d 93, 110 (Fla. 2002). To be entitled to relief under the rational basis test, the Samples must show that the parental award provision does not "bear some rational relationship to legitimate state purposes." *Id.* at 110. It is not our task "to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." *Loxahatchee River Envtl. Control Dist. v. Sch. Bd. of Palm Beach Cnty.*, 496 So. 2d 930, 938 (Fla. 4th DCA 1986). A statute does not fail rational basis scrutiny simply "because it might have gone farther than it did." *Newman v. Carson*, 280 So. 2d 426, 430 (Fla.1973) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966)).

Samples, 114 So. 3d at 917. Thus, under the rational basis test, the challenged legislation need not be perfect or ideal. It is enough that it have a legitimate goal

and utilize rationally-related means to achieve that goal.

Turning to the case at bar, as noted above, no fundamental right protected by the Florida Constitution has been shown to have been abridged by the enactment of the challenged statutory provisions.

Nor has any suspect class, as recognized under Florida or federal equal protection jurisprudence, been identified.

Here, the goal of the statute is clearly to afford public-school teachers better protection against labor unions that have come to represent less than 50 percent of the teachers, by requiring the union representatives to furnish the requisite data per the statute's provisions. The provisions themselves do not oust the union from its position, but instead trigger the opportunity for the employees—the majority of whom are not dues-paying members—to reconsider whether to alter the status of their representation, including the possibility of deciding to go forward without representation, as is their right.

That the challenged provisions do not apply to other public employees outside the sphere of public educational instruction does not render them facially invalid. Florida recognizes the need for further accommodations when it comes to public-school teachers. Florida explicitly recognizes that a severe teacher shortage exists, *see* § 1012.07, Fla. Stat., warranting heightened concern for retaining teachers rather

than suffering their attrition, *see* § 1012.05, Fla. Stat. Indeed, the bulk of the provisions of Chapter 1012, Florida Statutes, concern public-school personnel issues, evidencing a clear and justifiable determination by the Legislature to treat those personnel—including public-school teachers and other instructors—differently from other public employees. Such differential treatment is further warranted as a means to assist Florida in meeting Article IX, section 1's goal of having a "high quality system of free public schools that allows students to obtain a high quality education…." Art. IX, § 1, Fla. Const. Notably, "[t]he constitutional right to bargain must be construed in accordance with all provisions of the constitution." *Florida Police Benevolent Association v. State of Florida*, 818 So. 2d 584, 586 (Fla. 1st DCA 2002).

As with Plaintiffs' claim that the right to work and to bargain collectively provision of the Florida Constitution has been violated, Plaintiffs' claim of an equal protection violation should be rejected. If anything, summary judgment should be entered in favor of Defendants.

Conclusion

For all the reasons stated above, Plaintiffs' Motion for Summary Judgment should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 25th day of July, 2019, I caused a true and correct copy of the foregoing to be served on all counsel of record, shown below, by electronic filing via the Court's electronic filing system:

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