UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et. al.,

Plaintiffs,

v.

JANET McCLELLAND, et al.,

Defendants.

No. 2:20-cv-12433

HON. GEORGE CARAM STEEH

MAG. R. STEVEN WHALEN

Andrew Nickelhoff (P37990)
Marshall J. Widick (P53942)
Nickelhoff & Widick PLLC
Attorneys for Plaintiffs
333 W. Fort St., Ste. 1400
Detroit, MI 48226
(313) 496-9429
anickelhoff@michlabor.legal
mwiddick@michlabor.legal

Joseph T. Froehlich (P71887)
Jason Hawkins (P71232)
Attorneys for Defendants
Mich. Dep't of Attorney General
Labor Division
P.O. Box 30736
Lansing, MI 48909
517-335-7641
froehlichj1@michigan.gov
hawkinsj@michigan.gov

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR IMMEDIATE INJUNCTIVE RELIEF

CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs are likely to succeed on the merits of their Contracts Clause and First Amendment claims.

2. Whether Plaintiffs will suffer irreparable harm in the absence of a preliminary injunction.

3. Whether a preliminary injunction will serve the public interest.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 355 (2009).

Mich. State AFL-CIO v. Schuette, 847 F.3d 800, 805 (6th Cir. 2017).

Mich. State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997).

Bailey v. Callaghan, 715 F.3d 956 (6th Cir. 2013).

Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307 (6th Cir. 1998).

INTRODUCTION

There is no need for emergency or immediate injunctive relief in this case because Plaintiffs have not and will not suffer a legally recognized harm, let alone an irreparable one.

Plaintiffs seek to enjoin a Michigan Civil Service Commission rule that requires employees to affirmatively authorize an automatic deduction from their paychecks. They say it is an emergency even though the rule has been in place for over two months already. Since that time, thousands and thousands of Plaintiffs' members – more than 73 percent of those affected by the rule – have managed to authorize the deduction of dues and fees from their paychecks, and weeks remain in the fiscal year for other employees to do the same.

In seeking this extraordinary form of relief, Plaintiffs present a case that is wrong on the facts and wrong on the law.

They cannot establish a Contracts Clause violation because any allegedly impaired collective bargaining agreement provisions cannot supersede the challenged rule, which regulates a prohibited subject of bargaining. But even setting that fundamental fact aside, the rule does not actually impair the agreements. And even if the agreements were

impaired by the challenged rule, the rule is a reasonable and appropriate means of achieving a significant and legitimate public purpose.

Plaintiffs also cannot establish a First Amendment violation because the challenged rule does not implicate speech or expression at all. But even if it did, the rule is a content-neutral time, place, and manner restriction.

At bottom, Plaintiffs are simply unsatisfied with the Commission's exercise of its constitutional authority. But Rule 6-7.2 is a reasonable and appropriate means of achieving a significant and legitimate public purpose—recognizing and respecting the First Amendment rights of employees. Plaintiffs' dissatisfaction with Rule 6-7.2 does not amount to actionable constitutional harm—let alone irreparable harm outweighing the public interest supporting the Commission's rulemaking. Accordingly, Plaintiffs' motion for immediate injunctive relief should be denied.

STATEMENT OF FACTS

The citizens of Michigan gave the Civil Service Commission exclusive and plenary authority to regulate the terms and conditions of employment in the State's classified service. Mich. 1963 Const. art. 11, § 5, ¶ 4. In exercise of that plenary authority, the Commission established a limited system of collective bargaining that is unique because the Commission has significant authority over the content of the collective bargaining agreements (CBAs) and the collective-bargaining processes surrounding those agreements.

Plaintiffs attempt to provide this Court with background information about the collective-bargaining system in Michigan's classified service. (See Pls.' Br. in Supp. of Mot. for Immediate Injunctive Relief, ECF No. 2-13, PageID.148–51.) But Plaintiffs present several misstatements and omissions about the legal status of CBAs and the Commission's authority to regulate the terms and conditions of employment despite the existence of CBAs.

A. The Commission has possessed plenary authority over the terms and conditions of employment for classified employees for 80 years.

Michigan's current civil service system and the Commission were not created in 1963, as Plaintiffs assert. (ECF No. 2-13, PageID.148.) Rather, they date back to 1940. The first civil service in Michigan was established by statute in 1937 but was gutted in 1939 after political control shifted. This sparked the creation of the current civil service system. "Fed up" with such partisan actions, the citizens responded in 1940 by placing a constitutional amendment on the ballot and passing it. *Mich. Coal. of State Employee Unions v. Mich. Civil Serv. Comm'n,* 634 N.W.2d 692, 697 (Mich. 2001). By that amendment, the people stripped the legislature of authority to regulate the classified civil service, granted the Commission plenary constitutional power in that sphere, and provided constitutionally guaranteed funding to protect the commission from political interference. Mich. 1908 Const. art. 6, § 22; *Plec v. Liquor Control Comm'n*, 34 N.W.2d 524, 525 (Mich. 1948).

While the current Commission was not established in 1963, the 1963 Constitutional Convention did add a new provision regarding the Commission's powers in a manner relevant to this case. A new article

IV, § 48, clarified that "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." Mich. 1963 Const. art. 4, § 48. This provision affirmed the general right of the legislature to adopt labor laws addressing things like collective bargaining for most public employees, but also made clear that this did not extend to the state civil service "because the constitution has specific provisions for the operation of the state civil service." 2 Official Record, Constitutional Convention 1962, p 2337. (Ex. A.)

B. The Commission considered authorizing collective bargaining for several years before eventually authorizing limited collective bargaining in 1980.

For many years, the Commission did not believe collective bargaining was consistent with its constitutional charge. At its July 24, 1963 meeting, the Commission rejected a request to allow collective bargaining because the Constitution charged the Commission with regulating the terms and conditions of employment in the classified service. (Decl. of John Gnodtke, Ex. B, Attach. 1 at 001–004.) At its February 20, 1976 meeting, the Commission again rejected calls to allow collective bargaining, noting that permitting collective bargaining

in state employment "would effectively preclude the Commission from discharging [its] constitutional duties [and] would, at the very least, be contrary to the spirit of Article XI, Section 5." (Ex. B, Attach. 1 at 005–007.)

But in 1979, the Commission acted to authorize a form of collective bargaining for the first time. (Ex. B, Attach. 1 at 011.) But even from the beginning, the Commission noted that a system of collective bargaining for the State classified service is different from most collective-bargaining systems. Indeed, the Commission stated in its initial employee-relations policy authorizing bargaining that "certain fundamental economic, political, and legal differences exist between employer-employee relations in state employment and employer-employee relations in private sector and other public sector employment." (Ex. B, Attach. 1 at 014.) The Commission retained similar language emphasizing these unique considerations when it converted its policy to rule status in its 1983 rulebook and in its current Rule 6-1.2. (Ex. B, Attach. 1 at 016.) So, unlike other employer-employee relations, when the Commission permits collective bargaining, it is conditionally delegating a part of its plenary

constitutional authority. Thus, the collective-bargaining system for classified State employees is subject to robust regulation by the Commission.

C. The Commission's rules state that not all terms and conditions of employment are open to collective bargaining, and the Commission may reject or modify provisions of CBAs.

Again, the Commission is constitutionally charged with setting the rules of any system of collective bargaining it sees fit. The Commission exercises that authority most notably in Chapter 6 of its rules. These rules permit "classified employees in eligible positions to organize, elect an exclusive representative, and negotiate with the employer over proper subjects of bargaining." Civ Serv. R. 6-2.1. Any CBA is governed by the Commission's rules and regulations and is subject to review by the Commission. Civ Serv. R. 6-2.1(d); Civ Serv. R. 6-10.1. The Commission also retains the authority to "reject or modify, in whole or in part, any provision of a [CBA], including a provision previously approved by the commission." Civ Serv. R. 6-10.2. An approved CBA is binding on the parties to the CBA but is not binding on the Commission. Civ Serv. R. 6-2.1(e); Civ Serv. R. 6-3.1(d).

Not all terms and conditions of employment can be included in a CBA. The Commission's rules list several prohibited subjects of bargaining. There are two subjects that are most applicable to this case. The first one prohibits parties from bargaining over the authority of the Commission or the State Personnel Director[1], as established in the Commission's rules and regulations. Civ Serv. R. 6-3.2(b)(6). The second one prohibits parties from bargaining over the "system of collective bargaining" established in the Commission's rules and regulations, including the limitations and restrictions on parties to CBAs and on the CBAs themselves. Civ Serv. R. 6-3.2(b)(7). And if a CBA contains a provision governing or purporting to govern a prohibited subject of bargaining, the Commission must reject or modify it. Civ Serv. R. 6-10.3.

[1] The State Personnel Director is a constitutionally created position in the classified service that is charged with administering the Commission's powers. Mich. 1963 Const. art. 11, § 5, ¶ 3; Civ Serv. R. 1-4.2.

D. Parties to a CBA can agree to have the State deduct unions dues or fees, but establishing the process for such deductions lies exclusively with the State Personnel Director.

The Commission's rules permit parties to a CBA to agree to have the State deduct union dues or service fees through payroll deductions. Civ Serv. R. 6-7.1. Several years ago, the mechanics of this payroll deduction were a proper subject of collective bargaining and CBAs could therefore contain provisions about how and when the authorization for such deductions could occur.

But in 2017, the Commission amended its rules and gave the State Personnel Director the authority to "establish the exclusive process for employees to authorize or deauthorize deduction of dues or fees." (Ex. B, ¶ 4; Ex. B, Attach. 1 at 023.) Thus, prior to any current CBA being entered into, the process for how, when, and where an exclusively represented employee could authorize or deauthorize a payroll deduction for union dues or fees could be established only by the State Personnel Director, and it was therefore a prohibited subject of bargaining.

E. In July 2020, the Commission amended its rule governing payroll deductions.

On June 5, 2020, the State Personnel Director notified all interested parties that the Commission was seeking public comment on proposed changes to its rule governing the authorization for payroll deductions of union dues and service fees. (ECF No. 2-4, PageID.82–83.) This notification provided some reasons for exploring possible amendments to Rule 6-7, it contained proposed language for the amended rule, and it invited comments on the proposed amendments. (*Id.*) A few weeks later, and at the request of Plaintiffs, the State Personnel Director issued a clarification of the proposed amended rule that focused on "the timeline under the proposed amendments, if adopted, for when authorizations would expire if not reauthorized." (ECF No. 2-5, PageID.85.) The notification invited further comments from interested parties and notified them that the Commission would consider the proposed amendments at its July 13, 2020 meeting. (*Id.* at PageID.86.)

On July 13, 2020, the Commission amended Rule 6-7, which gave rise to the present case challenging Rule 6-7.2. This rule continues to vest the State Personnel Director with exclusive authority to establish

"the process for employees to authorize or deauthorize deduction of dues or fees." Civ Serv. R. 6-7.2. The rule now says that these authorizations will expire at the start of the first full pay period each fiscal year unless an employee reauthorized the deduction during the previous fiscal year. *Id.* If an employee has authorized or reauthorized during the current fiscal year (October 1, 2019–September 30, 2020), their authorization is valid through the pay period ending on October 2, 2021. (Decl. of Susan Wilmore, Ex. C, ¶ 6.) If an employee does not reauthorize a deduction of dues or fees by October 3, 2020, their authorization expires, and dues or fees will not be deducted beginning with their October 29, 2020 paycheck. (Ex. B, ¶ 19.)

An employee whose authorization expires on October 4, 2020, may still authorize the deduction of dues or fees. (Ex. C, ¶ 7.) Assuming such an authorization occurs in the next fiscal year, the authorization would remain valid through October 1, 2022 for dues, and December 31, 2021 for fees. (*Id.*)

STANDARD FOR A PRELIMINARY INJUNCTION

In deciding whether to grant a preliminary injunction, a court weighs four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012).

Importantly, "[t]he party seeking the preliminary injunction bears the burden of justifying such relief, including showing irreparable harm and likelihood of success," and faces a "much more stringent [standard] than the proof required to survive a summary judgment motion" because a preliminary injunction is "an extraordinary remedy." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). It is "reserved only for cases where it is necessary to preserve the status quo until trial." *Hall v. Edgewood Partners*, 878 F.3d 524, 526 (6th Cir. 2017).

ARGUMENT

I. Plaintiffs cannot show a substantial likelihood of success on the merits of their claims.

A. Plaintiffs have no likelihood of success on their Contracts Clause claim.

The Constitution provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. The Contracts Clause prohibits a State from imposing "a substantial impairment" on a "contractual relationship," *Michigan State AFL-CIO v. Schuette*, 847 F.3d 800, 805 (6th Cir. 2017) (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45 (1978)), unless that impairment amounts to a "reasonable" and "appropriate" means of achieving "a significant and legitimate public purpose," *Id.* (*quoting Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983)).

Establishing a "substantial impairment" requires showing (1) that there is a contractual relationship; (2) that a change in law impairs that contractual relationship; and (3) that the impairment is substantial. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992).

Plaintiffs are not likely to succeed on their Contracts Clause claim for one primary reason and two alternative reasons. Primarily, the CBAs at issue cannot be impaired by Rule 6-7.2 because the CBAs cannot govern or control the process for authorizing, reauthorizing, or deauthorizing payroll deduction authorizations. But even if that were not the case, Rule 6-7.2 does not actually impair the CBAs at issue. And finally, even if Rule 6-7.2 did impair the CBAs at issue, Rule 6-7.2 is a reasonable and appropriate means of achieving a significant and important public purpose.

1. The CBAs cannot be impaired by Rule 6-7.2 because the CBAs cannot control the process for dues or fees authorizations or reauthorizations.

As stated earlier, the Commission gave the State Personnel Director exclusive authority over the process for authorizing payroll deductions for union dues and fees several years ago. That marked the end of union and employer involvement in deciding the mechanics of such authorizations because bargaining over the process for dues and fees authorizations became prohibited. As a result, at the very outset, Plaintiffs' Contract Clause claim fails. Simply put, under the collective-bargaining rubric established by the Commission, the CBAs cannot

control the process for dues or fees authorizations, reauthorizations, or deauthorizations.

a. The Commission allows collective bargaining but closely and pervasively regulates it.

In authorizing limited collective bargaining over the terms and conditions of employment for certain classified employees, the Commission noted that it must be able to review, approve, and modify CBAs in order to carry out its constitutional duties. Civ Serv. R. 6-1.2. Thus, while Michigan's civil service system permits a form of collective bargaining, the Commission uniquely retains ultimate control over the content of the CBAs.

To repeat, the Commission has "the final authority to approve, modify, or reject, in whole or in part, all primary and secondary collective bargaining agreements, impasse panel recommendations, and coordinated compensation recommendations submitted to the commission." Civ Serv. R. 6-10.1. The Commission may "reject or modify, in whole or in part, any provision of a proposed collective bargaining agreement, including a provision previously approved by the commission." Civ Serv. R. 6-10.2. And the Commission must reject or

modify any CBA or provision "that supersedes or violates a civil service rule or regulation governing a prohibited subject of bargaining." Civ Serv. R. 6-10.3(c).

b. Employers and unions cannot collectively bargain over prohibited subjects of bargaining.

In addition to the retention of control over the substantive content of the CBAs already identified, there are certain terms and conditions of employment that are not subject to negotiation through the collective bargaining process. Parties cannot bargain over a prohibited subject of bargaining (Civ Serv. R. 6-2.1(b)), and a CBA "cannot be interpreted or applied to violate, rescind, limit, or modify a civil service rule or regulation governing a prohibited subject of bargaining" (Civ Serv. R. 6-3.2(a)(1)). Finally, the Commission has the "authority to determine during the term of a collective bargaining agreement if a provision previously approved has been applied or interpreted to violate or otherwise rescind, limit, or modify a civil service rule or regulation governing a prohibited subject of bargaining." Civ Serv. R. 6-3.5

Particularly germane here is Rule 6-3.2(b), which says that parties cannot bargain over the authority of the Commission or the State

Personal Director, or over the limitations on the collective bargaining parties, as established in the rules and regulations. Thus, if the rules and regulations give the Commission or the State Personnel Director exclusive authority over something, a CBA cannot usurp, alter, or limit that authority. Plaintiffs overlook that plain and dispositive fact.

c. The State Personnel Director has exclusive authority over the process for authorizing payroll deductions for dues or fees, and a CBA cannot govern that process.

Because the process for the authorization, deauthorization, or reauthorization lies exclusively with the State Personnel Director, because it concerns the system of collective bargaining, and because it concerns a limitation on the parties to collective bargaining, it is a prohibited subject of bargaining. Several years ago, and prior to the current CBAs, the mechanics of this process were a proper subject of bargaining and CBAs could contain provisions about how authorizations, deauthorizations, and reauthorization occurred.

But that is no longer the case because in September 2017, the Commission amended Rule 6-7 to state, "[t]he [state personnel] director shall establish the exclusive process for employees to authorize or

deauthorize deduction of dues or fees." (Ex. B, ¶ 4; Ex. B, Attach. 1 at 023.) Thus, well before the recent amendment to Rule 6-7, the State Personnel Director had exclusive authority over the process for authorizing dues and fees deductions. This is something the Plaintiffs were aware of before the current CBAs were entered into.

Because of the September 2017 change to Rule 6-7 and amendments to other civil service rules on prohibited subjects of bargaining, the current primary and secondary CBAs were reviewed in 2017 and 2018 to identify provisions that needed to be modified. (Ex. B, ¶ 5.) Following the review, the bargaining parties received marked-up copies of CBAs with identified changes to reflect the September 2017 rule changes that expanded the list of prohibited subjects of bargaining. (*Id.*, Attach. 1 at 040–043.) The Plaintiff unions provided multiple rounds of feedback to Commission staff regarding the proposed changes to the CBAs.[2] Numerous provisions relating to the authorization

[2] During this feedback process, there was substantial communication between the Commission's staff and the Plaintiffs. On numerous occasions, the Plaintiff unions explicitly and implicitly recognized that the process for how dues and fees deductions are authorized and deauthorized is a prohibited subject of bargaining. (See Ex. B, ¶ 6, Attach. 1 at 044–083.)

process for dues and fee were ultimately struck from the CBAs. Thus, the CBAs cannot be interpreted or applied in a manner that seeks to control the process for authorizing, deauthorizing, or reauthorizing payroll deductions for union dues and fees. Therefore, as a matter of law, Rule 6-7.2 cannot impair the existing CBAs.

Thus, Plaintiffs knew in 2017 and 2018 (when they were negotiating the CBAs they now allege are impaired by Rule 6-7.2) that the process for dues and fees authorizations was a prohibited subject of bargaining. They accepted that fact and entered into the CBAs with that clear understanding. Yet now—several years later—they bring this action, conjure up an emergency, and say they will suffer irreparable harm if this Court does not grant them *immediate* injunctive relief.

And while it is true that some limited provisions regarding deduction of dues and fees remain in the CBAs, that is because payroll deduction of dues and fees remain permitted by Rule 6-7.1. That is, parties can still agree that the State will deduct union dues and fees when properly authorized. In other words, *whether* to offer dues deduction is a proper subject of bargaining, but *how* dues deductions are

authorized and deauthorized is not. The Commission recognized this distinction in delaying the effective date for the portion of new Rule 6-7.1, which ends the availability of payroll deduction of service fees when the current CBAs expire on December 31, 2021. Rule 6-7, which was in effect when the current CBAs were entered into, allowed CBAs to provide for payroll deduction of service fees, and the Commission waited until after the current CBAs expire to eliminate service-fee deductions. In other words, that rule change regarding a proper subject of bargaining was delayed until the current CBAs expired. But the process for authorizing, deauthorizing, or reauthorizing deductions was a prohibited subject of bargaining when the current CBAs were entered into, so that is why the current Rule 6-7.2 could become effective on July 13, 2020, without impairing the current CBAs.

d. The CBAs at issue here all recognize they are subject to the Commission's rules and regulations.

Because the process for authorizing, deauthorizing, or reauthorizing payroll deductions for union dues and fees is a prohibited subject of bargaining, the CBAs at issue here cannot be read or applied in a way that limits, alters, or impairs the governing Commission rules

and regulations. The existing CBAs are peppered with clear language recognizing the supremacy of the Commission's rules. For example, Article 6 of the UAW Local 6000 CBA begins:

> To the extent permitted by the Rules of the Michigan Civil Service Commission and the Regulations of the Michigan Civil Service Commission, it is agreed that: [. . .]. (Ex. D, at 17.)

Similarly, Article 41, § D of the UAW CBA provides:

> The Employer agrees to continue to provide payroll deductions for employees in the following categories **as permitted by Civil Service Rules and Regulations**: (Ex. D, at 17) (emphasis added)).

All of the CBAs forming the basis of this lawsuit contain similar language recognizing that the provisions regarding dues and fees – and the deduction of those dues and fees – must be consistent with any applicable civil service rules on the same subject. Thus, under the plain language of the CBAs themselves, Rule 6-7.2 does not – and cannot – impair the CBAs because the bargaining parties lack the authority to bargain over the subject matter. The CBAs specifically recognize that in the event of a conflict between the provisions of the CBAs and the civil service rules, the rules reign supreme. Language in the CBAs

cannot be applied to limit the authority of the State Personnel Director given by the Commission in implementing Rule 6-7.2.

2. Even if the Commission did not retain exclusive authority over the process for authorizations for payroll deductions, the CBA provisions identified by the Plaintiffs are not impaired by Rule 6-7.2.

Plaintiffs identify several provisions of the CBAs that are allegedly impaired by Rule 6-7.2. But review of the provisions confirms that the opposite is true – Rule 6-7.2 does not impair these provisions at all, and the plain language of the provisions requires that the CBAs be read consistently with the civil service rules.

The cited CBA provisions say that the employer agrees to deduct dues or fees when there is a proper authorization. Rule 6-7.2 allows for this to happen. The employers and the Plaintiffs can still use a payroll-deduction system to collect union dues and fees. Each provision identified by Plaintiffs will be considered in turn.[3]

[3] Plaintiffs use the provisions of the UAW CBA as an exemplar for making their impairment arguments. Defendants do the same.

a. Article 6, § A

In more than one respect, article 6, § A of the UAW CBA explicitly recognizes the ultimate authority of the Commission to regulate the process for authorization for dues and fees deductions. In addition to the prefatory language identified in the preceding section[4], article 6, § A states:

> Upon receipt of an authorization from any of its employees covered by the Agreement, **currently being provided by the Union and approved by the Civil Service Commission**, the Employer will deduct from the pay due such employees those dues and initiation fees required to maintain the employee's membership in the Union in good standing. ((Ex. D, at 17) (emphasis added).)

Even setting aside the explicit recognition that the Commission has the ultimate approval over the form of an authorization, article 6, § A is not impaired by Rule 6-7.2. The provision merely provides that the employer will deduct dues and fees from an employee's earnings when authorized by the employee. The provision does not say how, when, or where the authorization must occur, nor does it address the duration of an authorization. If the provision did have language purporting to

[4] "To the extent permitted by the Rules of the Michigan Civil Service Commission and the Regulations of the Michigan Civil Service Commission, it is agreed that…."

govern these things, the provision would be not be permitted to govern under the Civil Service Rules, which vest the State Personnel Director exclusive authority to establish those mechanics.

The remainder of article 6, § A is also not impaired by Rule 6-7.2. The second paragraph provides that deductions shall be made only when there are sufficient earnings to cover the deduction after taxes, insurance premiums, and other specifically identified expenses are paid. (Ex. D., at 17.) The third paragraph provides for the continuation of an authorization where an employee transfers from one department or agency to another and upon return from layoff status, but says the authorization does not remain in effect when an employee transfers or promotes out of a bargaining unit.[5] (*Id.*) The final paragraph states that an employer will collect delinquent fees and dues under specified circumstances. (*Id.*)

All of these provisions are wholly unaffected by the change to Rule 6-7.2. The identification of certain circumstances where an

[5] Article 6, § C contains similar language regarding the continuation of an authorization where an employee transfers from one department or agency to another and upon return from layoff status. (Ex. D., at 18.) For the same reasons that article 6, § A is not impaired by Rule 6-7.2, article 6, § C is not impaired by Rule 6-7.2.

authorization will not be given effect when an employee changes jobs or leaves a job does not prohibit the Commission or State Personnel Director from approving an authorization process requiring that authorization be renewed on an annual basis. In other words, the requirement that an authorization does not remain in effect when an employee transfers or promotes out of a bargaining unit does not foreclose the Commission's exclusive authority to regulate the process for authorization. And to the extent that the provision could be read to require such a limitation on the Commission, the provision would not be permitted by the rules and would be unenforceable.

b. Article 6, § E

Next is article 6, § E, which unremarkably states that "Dues or Voluntary Representation Service Fees Deduction authorization may be revoked at any time by the employee." (Ex. D, at 19.) Again, Rule 6-7.2 does not change that fact, and an employee's freedom to revoke an authorization does not implicate the Commission's authority to approve an authorization process requiring that authorization be renewed on an annual basis. As with the other provisions of article 6, § E must be read

consistent with the rules, and in the event of a conflict, the provision must yield to the rules.

c. Article 41, § D

Article 41, § D of the CBA references authorizations for deductions. (Ex. D, at 130.) Importantly, the provision begins with the recognition that the "Employer agrees to continue to provide payroll deductions for employees in the following categories **as permitted by Civil Service Rules and Regulations**…." (*Id.* (emphasis added).) Once again, the UAW CBA explicitly recognizes the ultimate authority of the Commission to regulate the process for authorization for dues and fees deductions.

Given this recognition, the later statement in article 41, § D that "a deduction authorized by the employee shall continue until the appropriate written stop order is received" must be read consistently with Rule 6-7.2's mandate that the state personnel director "shall establish the exclusive process for employees to authorize or deauthorize deduction of dues or fees." "Stop order" is not defined in the CBA, but a notification that a given employee's authorization has expired pursuant to Rule 6-7.2 must be considered a proper "stop order"

given the State Personnel Director's exclusive authority to establish the payroll deduction authorization process. Any reading of article 41, § D that does not recognize the process established in Rule 6-7.2 is inconsistent with the statement in the provision insisting that payroll deductions be administered as "permitted by the Civil Service Rules and Regulations."

d. Article 47

This conclusion is only further cemented by article 47 of the UAW CBA, titled "Effect of Civil Service Commission Rules, Regulations and Compensation Plan." (Ex. D, at 175.) This article states that the CBAs shall govern proper subjects of bargaining, and take precedence over conflicting civil service rules regarding proper subjects of bargaining. (*Id.*) But as already established, the process for the authorization of deduction of dues and fees is not a proper subject of bargaining.

And Article 47 begins with yet another recognition that "this Agreement is subject to the Rules and Regulations of the Civil Service Commission…." (*Id.*) Its two remaining provisions explicitly state that the provisions apply "except as otherwise provided in the Civil Service Rules and Regulations." (*Id.*)

At bottom, Rule 6-7.2 does not impair any provision of the CBAs, and to the extent that any CBA provision could be interpreted as being impaired by the rule, a harmonious reading is required by the rubric of Michigan's civil service collective bargaining system, and also by the plain language of the CBAs themselves.

Given all of the foregoing, the situation at hand is distinguishable from *Michigan State AFL-CIO v. Schuette*, 847 F.3d 800 (6th Cir. 2017) and *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998). Those case both involved state laws that completely prohibited certain types of payroll deductions all together. Rule 6-7.2 contains no such wholesale prohibition.

Indeed, Rule 6-7.2 specifically preserves payroll deductions for dues and fees. The rule merely regulates the process by which the deductions for dues and fees are authorized. And again, control over the mechanism for authorizing dues and fees is a power that the Commission has reserved for itself (acting through the State Personnel Director) in 2017.

In short, Rule 6-7.2 does not impair any provision of the CBAs, and Plaintiffs' Contract Clause claim fails.

3. Even if the CBA provisions identified by the Plaintiffs were impaired by Rule 6-7.2, the rule would be a reasonable and appropriate means of achieving a significant and legitimate public purpose.

Plaintiffs cannot establish any impairment to the CBAs, let alone a substantial one. But even if the Court were to determine that a substantial impairment exists, the Commission has a "significant and legitimate" public purpose for the amendment to Rule 6-7.2. *Pizza*, 154 F.3d at 323. If the state proffers such a significant and legitimate public purpose for the regulation, the court must determine whether "the adjustment of the 'rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the Rule's] adoption.'" *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983) (alterations in original) (*quoting United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 22 (1977)).

Through Rule 6-7.2, the Commission seeks to ensure that authorizations of payroll deductions for union dues and fees are freely given by the affected employees. (ECF No. 2-4, PageID.82.) This is a

significant and legitimate purpose, based on holdings of state and federal courts in recent years.

In 2014, the Michigan Court of Appeals decided *UAW v. Green*, 839 N.W.2d 1 (Mich. Ct. App. 2014), and held that the imposition of mandatory agency shop fees upon employees in the Michigan classified civil service was unconstitutional under the Michigan Constitution. The Michigan Supreme Court affirmed on alternate grounds in 2015. *UAW v. Green*, 870 N.W.2d 867 (Mich. 2015). Both decisions determined that the Commission did not have the authority under the Michigan Constitution to require classified employees to pay an agency shop fee[6] as a condition of employment. Neither decision concerned the constitutional rights of unions or employees regarding agency shop fees.

But in *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), the United States Supreme Court held that mandatory agency shop fees violated the First Amendment. Specifically, the Court determined that

[6] Agency shop fees are mandatory service fees collected from non-union members who opt out of union membership. *Green*, 870 N.W.2d at 869. As a condition of obtaining or maintaining employment, employees are required to pay agency shop fees to defray union costs, including costs associated with collective bargaining. *Id.*

requiring payment of the fees as a condition of employment compelled non-union members to subsidize the private speech of unions on matters of substantial public concern. *Id.* at 2486. The Court recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Id.* at 2464 (*quoting Knox v. Serv. Employees*, 567 U.S. 298, 310–311 (2012)). "Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." *Id.*

At bottom, *Janus* held:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met. *Janus*, 138 S.Ct. at 2486 (cleaned up) (citations omitted).

Under the CBAs in effect in prior to the Michigan Supreme Court's decision in *Green*, covered non-union employees could either pay the agency shop fee or lose their jobs. The Michigan Supreme Court said that practice could not continue. *Janus* recognized a constitutional harm if employees have money deducted to support unions that they have not freely and affirmatively consented to by clear and compelling evidence.

Yet, approximately 75 percent of employees authorizing the deduction of fees and 58% of employees authorizing the deduction of dues made their authorization before the Michigan Court of Appeals first decided *Green*. (Ex. C, ¶ 10.) Another 13.7% of employees authorizing the deduction of fees and 25% of employees authorizing the deduction of dues made their authorization between the *Green* decision and the *Janus* decision. (*Id.*) The *Janus* Court said it "would be unconscionable to permit free speech rights to be abridged in perpetuity." *Janus*, 138 S.Ct. at 2484.

Plaintiffs gloss over the importance of *Janus* and *Green* and insist that there is no problem with continuing to deduct dues and fees pursuant to authorizations that were approved by employees five, ten,

or even twenty or more years ago. And while several courts have acknowledged that *Janus* does not allow individual union members to invalidate an otherwise enforceable agreement where they agreed to pay union dues, that analysis does not address the First Amendment concerns raised by the Commission in amending Rule 6-7.2 – ensuring that deduction authorizations are not stale, and represent current, knowing and voluntary waivers of constitutional rights. (ECF No. 2-4, PageID.82.) So, while Plaintiffs correctly state that *Janus* did not require the Commission to amend Rule 6-7.2 (ECF No. 2-13, PageID.183), that is not the proper focus. The citizens of Michigan have constitutionally vested the Commission with plenary authority to make these decisions involving the state classified civil service. The Commission was not compelled under current caselaw to enact rule 6-7.2, but was certainly within its legal authority as policymaker for the Commission to do so. *Janus* highlights the important First Amendment issues and the importance of ensuring that these deductions are clearly, voluntarily, and affirmatively consented to.

Contrary to Plaintiffs" assertion, the change to Rule 6-7 is not anti-union – it is pro-informed consent. To that end, employees who use

the MI HR Service Call Center are read a statement that tracks the language of Rule 6-7:

> You have the right to choose whether to join and pay dues or fees to the union that represents your bargaining unit. You are not required to join or pay dues or fees to the union to keep your job. You may join or resign from the union anytime and may authorize or deauthorize payroll deduction of dues or fees to the union anytime. All employees, whether a member or not are subject to the collective bargaining agreement for the unit. The union must fairly represent all employees, regardless of membership or dues or fees payment. (Ex. B, ¶ 22.)

The content of the message allows the employee to make a knowing and voluntary decision whether to authorize the deduction of dues and fees – exactly the type of informative consent required by *Janus*.

Ensuring that these deductions are voluntarily and affirmatively consented to is a substantial and legitimate state interest, if not a compelling one. By verifying on an annual basis that individuals intend to continue deducting union dues and fees, the annual renewal requirement of 6-7.2 ensures that the deductions are knowing and voluntary and are made in accordance with the current desires of the employees. This respects the free exercise of First Amendment rights and it counteracts the inertia that would tend to cause people to continue giving funds indefinitely even after their support for the union

may have waned. It also avoids a continuing constitutional violation after *Janus*, where the overwhelming majority of employees paying service fees had not authorized since agency-shop arrangements were deemed unconstitutional.

In sum, the CBAs cannot be impaired by Rule 6-7.2 because the CBAs cannot control the process for authorizing or reauthorizing deductions for dues or fees. But even if the Commission did not retain exclusive authority over the process for authorizations for deductions, the CBA provisions identified by the Plaintiffs are not impaired by Rule 6-7.2. And even if the CBA provisions identified by the Plaintiffs were impaired by Rule 6-7.2, the rule is a reasonable and appropriate means of achieving a significant and legitimate public purpose. Thus, Plaintiffs have no likelihood of success on their Contracts Clause claim.

B. Plaintiffs have no likelihood of success on their First Amendment claims.

1. Rule 6-7.2 does not implicate speech or expression at all.

"Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. The guarantee extends to speech by incorporated entities, including for-profit corporations, nonprofit

corporations, and unions. *Citizens United v. FEC*, 558 U.S. 310, 342, (2010).

The problem for Plaintiffs, however, is that the unions have no constitutional right to the use of payroll deductions to pay for union dues or fees. "The First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009). In *Michigan State AFL-CIO v. Schuette*, 847 F.3d 800, 806 (6th Cir. 2017), the Sixth Circuit explicitly rejected the notion advanced by Plaintiffs and held that unions do not have an independent constitutional right to "compel their employer to assist them in exercising their First Amendment rights." *Id.* (*quoting Pizza*, 154 F.3d at 320). "Absent a burden on a constitutionally cognizable right, the government may regulate what is at best a speech-facilitating mechanism." *Id.*

The Sixth Circuit "does not stand alone in reaching this conclusion." *Schuette*, 847 F.3d at 806. The Seventh Circuit, in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), held that a law did not

infringe the First Amendment rights of unions merely because it made it more difficult for them to collect funds. *Id.* at 669. The state's "decision not to subsidize the exercise of a fundamental right" did not itself infringe that right. *Id.*

In *Pizza*, the Sixth Circuit nicely summarized the flaws with Plaintiffs' attempt to claim a First Amendment right to control payroll deduction processes:

> The problem with this reasoning is that it confuses what citizens and the associations they form may do to support and disseminate their views with what citizens and groups they form may require the government to do in this regard. It is important to note that it is employers rather than the unions that administer the wage checkoffs at issue, even if they are intended to benefit employees. This is important because the First Amendment only "protects individuals' 'negative' rights to be free from government action and does not create 'positive' rights-requirements that the government act." 154 F.3d at 319 (citations omitted).

So, even if the loss of payroll deductions could impair the effectiveness of the Plaintiffs in representing its members, such an impairment is not one prohibited by the First Amendment. *S.C. Educ. Ass'n v. Campbell*, 833 F.2d 1251, 1257 (4th Cir. 1989).[7] In sum, there

[7] See also *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 645–46 (7th Cir. 2015)("While the First Amendment prohibits "plac[ing] obstacles in the path" of speech, nothing requires government to "assist others in

is simply no First Amendment right for the unions to control payroll deductions.

Plaintiffs attempt to circumvent this directly-on-point law by challenging the neutrality of Rule 6-7.2 and contending that the rule addresses only payroll deductions to unions and does not require annual reauthorization of other payroll deductions. (ECF No. 2-13, PageID. 196–97.) But in *Bailey v. Callaghan*, 715 F.3d 956 (6th Cir. 2013), the Sixth Circuit rejected a similar contention. At the outset, the Sixth Circuit acknowledged that such a distinction is not problematic because the unions have no constitutional interest with respect to controlling payroll deductions. *Bailey*, 715 F.3d at 859. But even if there were a First Amendment interest implicated, Rule 6-7.2, like the challenged law in *Bailey*, does not discriminate based upon viewpoint (i.e., it is not based on a union or those paying dues or fees taking or opposing a particular position). *Id*. Indeed, Rule 6-7.2 says nothing about speech

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funding the expression of particular ideas" (cleaned up, citations omitted)); *Ala. Educ. Ass'n v. Bentley*, 803 F.3d 1298, 1313 (11th Cir. 2015)(holding that no First Amendment right was implicated in legislation eliminating state-sponsored collection of union dues through payroll deductions.)

of any kind. It, like the statutory provision in *Bailey*, is a content-neutral regulation.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240 (6th Cir. 1997), further supports the Defendants' assertion that Plaintiffs cannot succeed on their First Amendment claim. And their attempt to distinguish the case is unavailing. Like the statute at issue in *Miller*, Rule 6-7.2 is content neutral and is underpinned by concern for the protection of individual First Amendment rights. *Id.* at 1252. That the Commission has evidenced concern about one category of payroll deduction rather than all categories of payroll deductions does not subject Rule 6-7.2 to strict scrutiny. *Id.*

Plaintiffs' attempt to cast aspersions on the motives of the Commission in promulgating Rule 6-7.2 must also be rejected. (*See* ECF No. 2-13, PageID.148, 199.) As the Sixth Circuit stated in *Bailey*, "the law forecloses this kind of adventure." *Bailey*, 715 F.3d at 960. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). This principle applies with equal weight here. This

Court should not "peer past" the text of Rule 6-7.2 "to infer some invidious [] intention." *Id. (quoting Wis. Educ. Ass'n Council v. Walker,* 705 F.3d 640, 649-50 (7th Cir. 2013)).

In sum, Rule 6-7.2 does not implicate the First Amendment rights of the Plaintiffs because they have no constitutional right to demand that the State administer payroll deductions at all, let alone in a manner that the Plaintiffs deem appropriate. Plaintiffs cannot succeed on their First Amendment claims.

2. To the extent that Rule 6-7.2 does implicate speech, the Rule is a content-neutral time, place, and manner restriction.

Again, Rule 6-7.2 does not implicate speech at all. But even if it did, it would pass constitutional muster, meeting the applicable intermediate scrutiny standard as a reasonable time, place, and manner restriction.

A content-neutral law will satisfy intermediate scrutiny if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that

interest." *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 662 (1994) (*quoting United States v. O'Brien,* 391 U.S. 367, 377 (1968).). Moreover, "[n]arrow tailoring in this context requires ... that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

The first prong of this test examines whether the rule "furthers an important or substantial governmental interest." *Miller*, 103 F.3d at 1253. As asserted earlier, the interest underlying Rule 6-7.2 is a substantial and important state interest, if not a compelling one. By verifying on an annual basis (at most) that individuals intend to continue deducting union dues and fees, the authorization process in Rule 6-7.2 reminds employees of their choices in joining or supporting a union and it "counteracts the inertia that would tend to cause people to continue giving funds indefinitely even after their support for the [union] may have waned." *Id.* The annual consent requirement ensures that the deductions are knowing and voluntary and are made in accordance with the current desires of the employees.

The second element is that "the governmental interest is unrelated to the suppression of free speech." *Miller*, 103 F.3d at 1253. As asserted previously, Rule 6-7.2 does place any limits on speech, and there is no protected speech interest in the payroll deductions in the first instance. The rule "does not determine who can speak, how much they can speak, or what they may say." *Id.* Plaintiffs may continue to collect just as much money in dues now as they could before Rule 6-7.2 was amended. They may lose the fees of individuals who decide that they no longer wish to continue the automatic deductions, or they may not. In any event, that risk existed before the promulgation of Rule 6-7.2. As Plaintiffs put it, employees have always been permitted to revoke their authorization at any time. (ECF No. 2-13, PageID.147, 157–58, 161, 169, 182.) Even if the number of employees electing to authorize payroll deductions were to decline, the ostensible cause would be the exercise of informed choice by individuals, not suppression of speech.

The third factor is that the law not "burden substantially more speech than is necessary." *Miller*, 103 F.3d at 1253. As stated by the Sixth Circuit in *Miller*, "the suggestion that asking people to check a

box once a year unduly interferes with the speech rights of those contributors borders on the frivolous." *Id.* And for the reasons explained in Argument II, *infra*, the Plaintiffs wildly overstate the difficulty with acquiring renewed authorizations.

In sum, Plaintiffs do not have a likelihood of success on their First Amendment claims.

II. Plaintiffs cannot establish irreparable harm.

Not only have Plaintiffs failed to show a likelihood of success on the merits of their claims, they have also failed to show, as they must, that they will suffer irreparable injury without the preliminary injunction requested. *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005). As explained in the preceding sections, Plaintiffs cannot establish a constitutional violation. On that basis alone, injunctive relief should be denied.

Furthermore, the Plaintiffs' protestations about the difficulty of reauthorization is not based on reality. Plaintiffs claim that it is impossible to accomplish outreach to 25,000+ payers of dues between the Commission's action on July 13 and the October 3rd deadline to reauthorize deductions. (ECF No. 2-13, PageID.187–92.) The window

between those dates is eleven weeks and five days. Moreover, there was notice of the potential for this change on June 5, which provided another five weeks and three days during which planning could have occurred. (ECF No. 2-4, Page ID.82–83.) Plaintiffs' claim is notably undermined by the fact that they were able to get the Governor of Michigan, during a pandemic, to film a video encouraging employees to authorize their deductions and telling them where to go to do that.[8] One of the Plaintiffs has described reauthorizing as "easy and takes just one minute."[9] More importantly though, actual experience shows that the authorization process is simple and that the systems available to process the authorizations has performed well. In fact, 73% of the affected employees have already renewed their authorizations as of September 14. (Ex. C, ¶ 9, Attach. 1 at 001.)

A. The vast majority of affected employees have already reauthorized their deductions.

As of September 14, 2020, 25,487 employees affiliated with the Plaintiff unions have authorized dues or fees and are potentially

[8] https://www.youtube.com/watch?v=cv1KhZQW0j8

[9] https://www.mco-seiu.org/category/reauthorize-today/

affected by the amendment to Rule 6-7.2. (Ex. C, ¶ 8, Attach. 1 at 001.) On the date of the filing of this lawsuit (September 3, 2020), 8,371 remaining employees who could reauthorize deductions, had not yet reauthorized the deduction of their dues or fees. (Ex. B, ¶ 27.) In other words, as of the date of the filing of this lawsuit, more than two-thirds of eligible employees had reauthorized payroll deductions already. September 3rd was not even halfway through the 59-day period between July 13 and October 3.

More recent data from September 14, 2020, shows that 18,622 employees (73%) have reauthorized the deductions. (Ex. C, ¶ 9, Attach. 1 at 001.) 6,848 employees (26%) have yet to make their decision, but they have 19 days left to do so. (*Id.*)

The fact that so many employees have managed to authorize the payroll deduction – with a few more weeks remaining – severely undercuts the Plaintiffs' claims of undue burden. That roughly two-thirds of employees reauthorized before the halfway mark of the 59-day reauthorization window undermines complaints that the system is or was inadequate.

B. The Commission's staff has undertaken substantial efforts to assist the Plaintiffs in communicating with the affected employees.

The Commission's staff has undertaken substantial effort to ensure that employees are aware of the change in the authorization process. They have repeatedly addressed the concerns of the unions, they have provided requested reports and educational materials, they have added requested functionality for mobile devices, and they have provided requested communications to employees. (Ex. B, ¶¶ 14–17.)

First, the Commission's executive staff held a series of meetings with Plaintiffs to discuss the reauthorization process. This included meetings with union leadership on July 23, August 6, August 11, August 18, August 25, and September 8, and a meeting with union staff on August 7 to describe the process. (Ex. B, ¶ 14.) At the initial meeting on July 23:

- Examples of informational handouts were shown to Plaintiffs and they confirmed that they would like similar materials and screenshots provided once the reauthorization transaction was available. (Ex. B, ¶ 15.)

- Plaintiffs asked for a reminder to be sent to employees on how to reset passwords for self-service. (Ex. B, ¶ 15.) Commission staff sent a message to affected employees on July 27 with password-reset information

and a reminder that in August they would get more information on reauthorizing continued payroll deductions for dues and fees online. (Ex. B, Attach. 1 at 100.)

- Plaintiffs asked about adding information to the onboarding website about dues deduction. (Ex. B, ¶ 15.) That information has been added so that all new hires have access to information on how to authorize dues or fees through HR Self-Service or MI HR Service Center. (Ex. B, Attach. 1 at 113–114.)

- Plaintiffs asked about accessing self-service from mobile devices, which has since been made possible. (Ex. B, ¶ 15, Attach. 1 at 114.)

The Commission's staff completed coding, testing, and updating the HR Gateway portal to offer the new reauthorization transaction on the morning of August 6. (Ex. B, ¶ 16(c).) That same morning, a demo was held for union leadership. (*Id.*) The next day, a demo was held for union staff. (*Id.*) The Commission's staff also shared handouts and screenshots with Plaintiffs describing how to perform the authorization, a one-minute captioned video showing how to log into HR Self-Service, and a one-minute captioned video showing how to perform the reauthorization transaction. (Ex. B, ¶ 16(b).) Although these videos totaled two minutes, the transaction itself can be completed in under 30 seconds. (Ex. C, ¶ 12 (video viewable at https://youtu.be/ldkS-t_aLiU).)

At the request of Plaintiffs, the Commission's staff sent the first in a series of mass emails to employees with an upcoming authorization expiration on August 13. (Ex. B, ¶ 16(d).) The emails explain that deductions will end if not reauthorized, provide links to the HR Gateway, and provide links to the one-minute videos explaining how to access HR Self-Service and reauthorize. (Ex. B, ¶ 16(d), Attach. 1 at 105–107.) Commission staff also provided Plaintiffs with requested biweekly reports identifying employees who had not yet reauthorized. (Ex. B, ¶ 16(e), Attach. 1 at 108–112.)

On August 27, Commission staff sent the second sets of reports to Plaintiffs and emails to employees who had not yet reauthorized. (*Id.*) Those emails contained the same information as the previous ones and introduced a new mobile-friendly access for HR Self-Service that went live on August 27. (Ex. B, ¶ 16(d), Attach. 1 at 106.) This was the first supported access for HR Self Service from smart phones and tablets. A third cycle occurred on September 10. (Ex. B, Attach. 1 at 107.) At the request of Plaintiffs, the Commission's staff will continue sending emails and reports on September 24, October 1, and October 8. (Ex. B, ¶ 17.)

C. The Commission's phone and computer systems are sufficiently available and able to process deduction authorizations.

Plaintiffs allege that there are large windows when employees cannot perform the transaction. (ECF No. 2-13, PageID.188–90.) But this overstates reality. A call center is available on state workdays from 8 a.m. to 5 p.m. (Ex. C, ¶ 14.) And online access through HR Self-Service is typically available day and night for three of the four weekend days and seven of the ten weekdays during each two-week pay period. (See Ex. C, ¶ 13.) There are regular processing and maintenance activities that take place at night and on every other Saturday. (*Id.*) Every other week, website access has been unavailable from Sunday through Wednesday for state payroll processing. (*Id.*) But during these periods where the website is unavailable, employees can reauthorize through the call center during normal business hours. (Ex. C, ¶ 14.) There are also nightly backups during which the system is unavailable for around 30 minutes and a maintenance window every other Saturday for several hours. (Ex. B, ¶ 13.)

The reality is that during the 59-day reauthorization period, the call center, online system, or both should be available to complete the authorization over 70 percent of the time, day or night. (Ex. C, ¶ 15.)

Plaintiffs make much ado about the 30 percent of time when the transaction is unavailable, yet they do not identify a single employee who wished to authorize payroll deductions and was unable to do so. And as noted earlier, 3 out of 4 affected employees have already reauthorized their deductions with weeks to go in the 59-day period. Simply put, Plaintiffs' generalized and non-specific allegations are insufficient to establish irreparable harm as a matter of law.

Likewise lacking in support is Plaintiffs' assertion that even when available, the HR Gateway portal is "balky" and "unable to meet baseline user demand." (ECF No. 2-13, Page ID.188.) This statement is unsupported by reference to any declaration, it is nebulous, and it is false. HR Self-Service is an online system that, according to regular load testing, can accommodate several hundred simultaneous users performing hundreds of thousands of database calls over the course of an hour. (Ex. C, ¶ 16.) It is more than able to handle 25,000 simple reauthorization transactions over the course of 1,416 hours. As of this

filing of this lawsuit, under 700 transactions per day were being processed. (*Id.*) Only one day has seen over 1,400 transactions. (*Id.*) The director of the Commission's technical staff had not received and was not aware of any complaint from Plaintiffs since the reauthorization transaction went live about specific balkiness or users rejected because of excess demand on servers. (Ex. C, ¶ 17.)

The call center is intended as an auxiliary for those who are uncomfortable with or unable to use online HR self-service. (Ex. B, ¶ 21.) On August 13, when the first announcement email went out, the average wait time in the call center was 7 minutes and 55 seconds, although employees could enter a callback number so that they did not have to wait on hold. (Ex. B, ¶ 25.)

Plaintiffs also say that the Commission's systems were overloaded because of annual insurance enrollment changes that occur in August. (ECF No. 2-13, PageID.189.) But the Commission's staff suggested that Plaintiffs might want to wait until after August 18 when insurance open enrollment (the busiest period of the year for the call center) ended to minimize the risk of hold times, but Plaintiffs were adamant that they wanted the messaging emails sent on August 13.

(Ex. B, ¶ 24.) Nevertheless, on August 19, 20, and 21, average hold times were 54 seconds, 80 seconds, and 54 seconds, respectively. (Ex. B, ¶ 25.) The average hold time did not exceed 5 minutes for the remainder of August. (Ex. B, Attach 1 at 115.)

Plaintiffs' complaints that many employees do not have the correct operating system or compatible software is belied by the facts. (ECF No. 2-13, PageID.188–89.) Access to HR Self-Service depends on the browser used and not the operating system. (Ex. C, ¶ 18.) HR Self-Service is supported for Chrome, Firefox, Safari, Outlook, and Edge browsers, which according to marketshare.com, account for 97.78% of U.S. browser use. (*Id.*) Other niche browsers are not officially supported because of the work required for staff to test them, but the lack of official support does not necessarily mean that they cannot be used to access HR Self-Service. (*Id.*) According to netmarketshare.com, Windows, Mac OS, Linux, and Chrome operating systems represent 99.82% of personal computer operating systems, and all have multiple supported browsers. (Ex. C, ¶ 19.) Commission technical staff is unaware of any complaint of a specific individual being unable to access

HR Self-Service due to their operating system not having a supported browser available. (*Id.*)

D. 59 days is a sufficient time period for affected employees to reauthorize their deductions.

When compared to other processes for authorization of payroll deductions, the reasonableness of a 59-day window to complete a thirty-second transaction cannot be denied. Benefits open enrollment affects roughly twice as many employees, and requires independent choices involving health, dental, vision, long-term disability, life, and dependent-life insurances, including independent dependent-coverage decisions for each. (Ex. C, ¶ 21.) Insurance open enrollment had the same call-center hours and lasted 16 days, 4 of which were on the weekend. (*Id.*)

Another open enrollment for flexible-spending programs, offered to significantly more employees, is more complex than the payroll deduction authorization process, and it lasted 26 days, 9 of which were on the weekends or holidays. (Ex. C, ¶ 22.)

The dues-reauthorization transaction can be completed in 30 seconds and had a window of 59 days, 18 of which were on the

weekends or holidays. There was nothing unconscionable or unreasonable about the timeline for reauthorization.

In sum, the Plaintiffs have not suffered irreparable harm, and will not suffer irreparable harm if the Court denies their request for an injunction. At this point, the vast majority of affected employees have already reauthorized the payroll deductions. Employees who had not previously authorized dues deduction can still authorize deductions anytime and have them take effect the next pay period. And Plaintiffs can always establish their own payment systems or amnesty programs to prevent members from losing out on benefits. Plaintiffs fall well short of establishing irreparable harm supporting the extraordinary relief of a preliminary injunction.

III. A preliminary injunction will cause substantial harm to others and will not serve the public interest.

The third and fourth factors are similar—whether an injunction will cause substantial harm to third parties, and whether it would serve the public interest. In regard to the fourth factor, the public interest "will not be as important as the other factors considered in the award of preliminary injunctive relief in actions involving only private interests,

[but] it will be prominently considered in actions implicating government policy or regulation, or other matters of public concern." 13 Moore's Federal Practice § 65.22 (Matthew Bender 3d. ed).

As discussed at length in the preceding sections, the interest underlying Rule 6-7.2 is a substantial and important state interest, if not a compelling one. By verifying on an annual basis that individuals intend to continue having union dues or fees automatically deducted from their paychecks, Rule 6-7.2 ensures that such authorizations are clear and affirmative and reflect the current desires of the employees. Enjoining Rule 6-7.2 would summarily strip employees of these much-needed protections that have been identified by the highest courts of Michigan and the United States. An injunction would also represent an unwarranted intrusion into Michigan's sovereignty and the Commission's powers given to it by Michigan's citizens under the Michigan Constitution. Finally, an injunction would require the continuation of deductions of fees from service fee payers with no evidence of voluntary authorization in violation of *Janus*.

As a result, the third and fourth factors favor the Commission as well, and they far outweigh any harm Plaintiffs may claim.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request that the Court deny Plaintiffs' motion for immediate injunctive relief, and that it grant any other appropriate relief to Defendants.

Respectfully submitted,

/s/ *Joseph T. Froehlich*
Joseph T. Froehlich (P71887)
Jason Hawkins (P71232)
Assistant Attorneys General
Attorneys for Defendants
Labor Division
P.O. Box 30736
(517) 335-7641
froehlichj1@michigan.gov
P71887

Dated: September 17, 2020

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on September 17, 2020 , I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Joseph T. Froehlich
Joseph T. Froehlich (P71887)
Assistant Attorney General
Attorney for Defendants
Labor Division
P.O. Box 30736
(517) 335-7641
froehlichj1@michigan.gov
P71887