20-3530

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CONNECTICUT STATE POLICE UNION,

Plaintiff-Appellant,

v.

JAMES ROVELLA, COMMISSIONER OF DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
No. 3:20-cv-10147 (CSH)

BRIEF FOR THE PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant The Connecticut State Police Union is a non-stock corporation. No parent corporation or publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because this action is based on an alleged violation of the Contract Clause, Article I, Section 10 of the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) because this appeal is from the order of the District Court denying the Plaintiff's motion for preliminary injunction. Venue is proper pursuant to 28 U.S.C. § 1292 because this appeal is from a decision of the United States District Court for the District of Connecticut. This appeal was timely filed on October 15, 2020, within 30 days of the District Court's October 13, 2020 order denying the Plaintiff's motion for preliminary injunction.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the District Court erred in refusing to enjoin the Defendant from disclosing false complaints made against the Plaintiff's members in violation of the Collective Bargaining Agreement.

STATEMENT OF THE CASE

This is an appeal from the order of the District Court (*Haight, Senior District Judge)* denying the motion of the Plaintiff, the Connecticut State Police Union ("CSPU" or the "Union"), for a preliminary injunction. CSPU sought to enjoin the Defendant from disclosing false complaints about State Troopers. In particular, through this action, CSPU is seeking a declaration that Sections 8 and 9 of Connecticut Public Act 20-1, An Act Concerning Police Accountability ("Public

Act 20-1" or the "Act"), violate the Contract Clause, Article I, Section 10 of the United States Constitution.

The operative Collective Bargaining Agreement ("CBA") between CSPU and the State of Connecticut grants the Union's members the right to object to freedom of information ("FOI") requests that invade their privacy, and exempts from disclosure information contained in internal affairs investigations that resulted in a disposition of "exonerated, unfounded, or not sustained." Verified Compl., ¶¶ 21-22 & Ex. A (JA17-18, JA119). These terms were specifically negotiated in the CBA in response to an increase in anonymous false complaints that were being made against State Troopers. The Connecticut General Assembly approved the CBA and these provisions in May 2019. *Id.* ¶ 20 (JA17). In June 2020, following a contested grievance proceeding, the Connecticut Office of Labor Relations ordered the Department of Emergency Services and Public Protection ("DESPP")[1] to cease and desist from violating these provisions of the CBA. *Id.* ¶ 25 (JA18).

Thereafter, the State sought to effectuate an unconstitutional and impermissible end-run around the CBA by adding into to the Police Accountability Act two sections which purport to retroactively override Article 9 of the CBA, in violation of the Contract Clause, Article I, Section 10 of the United States

[1] DESPP is the state agency that oversees the Division of State Police.

Constitution. This lawsuit seeks to have Sections 8 and 9 of Public Act 20-1 declared unconstitutional.

I. The Collective Bargaining Agreement

CSPU is the collective bargaining representative for all Connecticut State Police. CSPU represented State Troopers in connection with negotiations for (1) the State Police [NP-1] Bargaining Unit Contract with the State of Connecticut for July 1, 2015 to June 30, 2018 (the "2015-2018 CBA"); and (2) the State Police [NP-1] Bargaining Unit Contract with the State of Connecticut for July 1, 2018 to June 30, 2022 (the "2018-2022 CBA"). Verified Complaint, ¶¶ 15, 17 (JA15-16).

Article 9 of both CBAs relates to, among other things, FOI requests for personnel files and internal affairs investigations. In the 2015-2018 CBA, Article 9, Section 2(c) provided:

> When an employee, after notification to him/her that a freedom of information request has been made concerning his/her file, objects to the release of that information on the basis of reasonable belief that the release would constitute an invasion of his/her privacy, the employee shall petition the Freedom of Information Commission for a stay on the release of said information, and the Department shall support the employee's petition and not release the information until the FOIC has made a final determination on the issue of whether said release would constitute an invasion of privacy.

Id., ¶ 16 (JA15-16).

The 2018-2022 CBA was the result of both negotiations between the State and CSPU and a binding arbitration on certain issues. In the end, both the tentative

agreements between the State and CSPU and the arbitrator's decision were approved by the General Assembly in May 2019. *Id.*, ¶¶ 19-20 (JA16-17). The 2018-2022 CBA is a contract between CSPU and the State, which remains in full force and effect until at least June 30, 2022. *Id.*, ¶ 23 (JA18).

One of the issues of concern to CSPU during the negotiation of the 2018-2022 CBA was the increase in anonymous false complaints about State Troopers, because indiscriminate disclosure of such false allegations has the potential to unfairly jeopardize a trooper's reputation and livelihood.[2] To address that concern, Article 9 of the 2018-2022 CBA differs from Article 9 of the 2015-2018 CBA in that it has a new, negotiated provision that specifically exempts false complaints from internal affairs investigations from being disclosed pursuant to a FOI request. Article 9, Section 2(c) now provides that:

> When an employee, after notification to him/her that a freedom of information request has been made concerning his/her file, objects to the release of that information on the basis of reasonable belief that the release would constitute an invasion of his/her privacy, the employee shall petition the Freedom of Information Commission for a stay on the release of said information, and the Department shall support the employee's petition and not release the information until the FOIC has made a final determination on the issue of whether said release would constitute an invasion of privacy. **An employee's OPF [Official Personnel Folder] and internal affairs investigations with only a disposition of "Exonerated, Unfounded or Not Sustained" shall not be subject to the Connecticut Freedom of Information Act.**

[2] *See* Written Testimony of A. Matthews, Conn. Judiciary Committee Hearing (July 17, 2020), *available at* https://tinyurl.com/yd59wueh (last visited Dec. 30, 2020), Ex. 1 to Reply in Support of Mot. for Preliminary Injunction (ECF 17-1).

(Emphasis added.) Verified Complaint, ¶ 21 & Ex. 1 (JA17 & JA119).

Notably, prior to the enactment of Public Act 20-1, the 2018-2022 CBA's requirement that "[a]n employee's OPF and internal affairs investigations with only a disposition of 'Exonerated, Unfounded or Not Sustained' shall not be subject to the Connecticut Freedom of Information Act" became the subject of a 2020 grievance and related adjudicative proceedings. The contested issues included, *inter alia*, whether the DESPP was engaging in policies and practices in violation of the CBA with respect to releasing this type of information. *Id.*, ¶ 24 (JA18). On June 10, 2020 a decision was issued by the Connecticut Office of Labor Relations declaring:

> The Department shall cease and desist from releasing investigations that are Sustained, in whole or in part, without affording the subject Trooper an opportunity to object to FOI as the contract requires. Moreover, the Department shall cease and desist from seeking consent from Troopers to release investigations where the result is Exonerated, Unfounded, or Not Sustained as the contract does not allow release in those circumstances.

Id., ¶ 25 (JA18); Conn. Office of Labor Relations, Institutional Grievance Step 2 Response (June 10, 2020) (JA199).

II. Public Act 20-1 And Its Retroactive Nullification Of Section 9 Of The Collective Bargaining Agreement

Sections 8 and 9 of Public Act 20-1, which became effective on July 31, 2020, endeavor to nullify Article 9, Section 2(c) of the 2018-2022 CBA. Prior to

the Act, Connecticut General Statutes § 5-278(e) provided that when there was a conflict between a collective bargaining agreement or arbitration award and a state statute, regulation, or special act, "the terms of such agreement or arbitration award shall prevail." Sections 8 and 9 of the Act create a carve-out to that provision specifically aimed at abrogating Article 9, Section 2(c) of the 2018-2022 CBA. Specifically, Sections 8 and 9 of the Act provides in relevant part:

> Sec. 8. Subsection (e) of section 5-278 of the general statutes is repealed and the following is substituted in lieu thereof (Effective from passage):
>
> > (e) [Where] (1) Except as provided in subdivision (2) of this subsection, where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any general statute or special act, or regulations adopted by any state agency, the terms of such agreement or arbitration award shall prevail…
> >
> > (2) For any agreement or arbitration award approved ***before***, on or after the effective date of this section, in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, where any provision in such agreement or award pertaining to the disclosure of disciplinary matters or alleged misconduct would prevent the disclosure of documents required to be disclosed under the provisions of the Freedom of Information Act, as defined in section 1-200, the provisions of the Freedom of Information Act shall prevail. The provisions of this subdivision shall not be construed to diminish a bargaining agent's access to information pursuant to state law.

* * *

> Sec. 9. (NEW) (*Effective from passage*) No collective bargaining agreement or arbitration award entered into ***before***, on or after the effective date of this section, by the state and any collective bargaining unit of the

> Division of State Police within the Department of Emergency Services and Public Protection may prohibit the disclosure of any disciplinary action based on a violate of the code of ethics contained in the personnel file of a sworn member of said division.

(Emphasis added). Conn. Public Act 20-1, §§ 8-9.

Sections 8 and 9 of Public Act 20-1 endeavor to abolish Article 9, Section 2(c) of the 2018-2022 CBA by changing the procedure to be followed when a FOI request seeks information about an employee's OPF or internal affairs investigation(s) by:

a. dispensing with the requirement that a Trooper be notified of a FOIA request concerning his file so that he can have the opportunity to protect his privacy interest if he reasonably believes that the release of the information would constitute an invasion of his privacy; and

b. nullifying the mutually agreed-upon language that "an employee's OPF and internal affairs investigations with only a disposition of 'Exonerated, Unfounded or Not Sustained' shall not be subject to the Connecticut Freedom of Information Act."

III. The Department Issues A Bulletin Declaring That It Will Breach The CBA Because Of Public Act 20-1

After the enactment of Public Act 20-1, DESPP publicly declared that, as a result of the Act, it intended to breach its obligations under the CBA. Specifically, on July 31, 2020, the State Police Training Academy issued a Training Bulletin

which specified the actions that DESPP planned to take due to Public Act 20-1. Verified Compl., ¶ 30 (JA20). The Training Bulletin stated in relevant part that Public Act 20-1:

> Nullifies collective bargaining language and arbitration awards previously negotiated, regarding the disclosure of disciplinary action, including Internal Affairs investigations. The bill provides for the public disclosure of disciplinary matters or alleged misconduct (sustained, unsustained, exonerated, and unfounded IAs) under the Freedom of Information Act, which will be released with the appropriate redactions.

Ex. B to Verified Compl. (JA185). Thus, DESPP created and published an official policy document announcing its intention to immediately release information relating to false, anonymous complaints about CSPU's members that is expressly prohibited from disclosure under the CBA. Moreover, there are pending FOI requests for personnel files and information about internal affairs investigations relating to the Union's members. Verified Compl., ¶ 32 (JA21).

IV. District Court Proceedings

On August 11, 2020, CSPU filed this action seeking a declaration that Sections 8 and 9 of the Act violate the Contract Clause and an injunction ordering the Defendant to comply with his obligations under the CBA. CSPU also filed an application for a temporary restraining order and motion for preliminary injunction to prevent the Defendant from disseminating false complaints about the Union's members until the Court adjudicates this case on the merits. On August 11, 2020, the District Court declined to enter an immediate temporary restraining order and

ordered expedited briefing on the issue. On August 20, 2020, after initial briefing, the District Court issued an order denying the application for a temporary restraining order (without prejudice) and setting the motion for preliminary injunction for a hearing. On September 1, 2020, the Court held a telephonic hearing on the motion for preliminary injunction. On October 13, 2020, the District Court issued a decision denying the motion. CSPU filed this appeal on October 15, 2020.[3]

SUMMARY OF THE ARGUMENT

The District Court erred in refusing to enjoin the disclosure of false complaints made against State Troopers because it incorrectly found that the State's attempt to override the CBA likely did not violate the Contract Clause. While the District Court acknowledged for purposes of this proceeding that Sections 8 and 9 impair the settled contractual rights of CSPU's members, the Court improperly found that impairment to be excusable because it purportedly furthered the State's general interest in enhanced accountability and transparency in law enforcement.

[3] CSPU also filed a motion for injunction pending appeal in the District Court on October 19, 2020, which the Court denied on November 10. CSPU then filed a motion for injunction pending appeal in this Court on November 13, 2020. As of this date, that motion is still pending.

That conclusion was erroneous because the District Court failed to explain how the disclosure of false allegations against State Troopers could possibly be essential to a general policy in favor of transparency and accountability. The Court did not identify anything in the record that demonstrates how the disclosure of false allegations could possibly lead to increased accountability among police officers. Nor did the Court explain how the public dissemination of false information is necessary to achieve the state's goal of transparency in the administration of law enforcement. In fact, both the Plaintiff and the Defendant should have a strong interest in preventing the publication of false information that has the potential to cause serious and lasting damage to the reputations and careers of State Troopers. As explained more fully below, for these reasons, the District Court erred in refusing to enjoin the Defendant from disclosing false complaints about CSPU's members.

ARGUMENT

I. The District Court Erred In Failing To Enjoin The Defendant From Disseminating False Complaints About State Troopers In Contravention Of CSPU's Collective Bargaining Agreement

A. Standard of Review

This Court reviews the District Court's denial of a motion for preliminary injunction for an abuse of discretion. *Alleyne v. New York State Educ. Dep't*, 516 F.3d 96, 100 (2d Cir. 2008). "A district court abuses its discretion 'when (1) its decision rests on an error of law (such as application of the wrong legal principle)

or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.'" *Id.* (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 88–89 (2d Cir.2006)). "Under abuse of discretion review, the factual findings and legal conclusions underlying the district court's decision are 'evaluated under the clearly erroneous and de novo standards, respectively.'" *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (quoting *Garcia v. Yonkers School District*, 561 F.3d 97, 103 (2d Cir.2009)).

"[T]o obtain a preliminary injunction against governmental action taken pursuant to a statute, the movant has to demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction. The movant also must show that the balance of equities tips in his or her favor." *Libertarian Party of Connecticut v. Lamont*, 977 F.3d 173, 176 (2d Cir. 2020) (quoting *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020)).

This Court reviews "a district court's denial of a preliminary injunction for abuse of discretion, but "must assess *de novo* whether the court proceeded on the basis of an erroneous view of the applicable law." *Agudath Israel of Am. v. Cuomo*, __ F.3d __; 2020 WL 7691715, at *6 (2d Cir. Dec. 28, 2020), *available at* https://tinyurl.com/ycg3m3am (last visited Dec. 30, 2020).

B. CSPU Established That It And Its Members Would Suffer Irreparable Harm Absent An Injunction

The District Court merged the irreparable harm factor into the likelihood of success on the merits, explaining that:

> If the CSPU is likely to succeed on the merits, a presumption of irreparable harm is warranted, since the CSPU's alleged injury is both imminent and actual, and can only be remedied by requiring Defendant to comply with notice and non-disclosure requirements of Section 9 of the 2018–2022 Collective Bargaining Agreement.

Mem. Dec. at 12 (JA272). According to the District Court's analysis, the preliminary injunction determination rises and falls on the "likelihood of success on the merits" determination (*i.e.* the constitutionality of Sections 8 and 9 of Public Act 20-1). *See New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020). Nonetheless, it is worth noting that CSPU established irreparable harm based on the record below.

"A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citation omitted). "[T]o satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (citation and quotation

marks omitted). It is well-settled that when a "plaintiff[] allege[s] deprivation of a constitutional right, no separate showing of irreparable harm is necessary." *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999); *see also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973)).

There are two bases for irreparable harm in this case. First, CSPU's claim is based on an alleged violation of the Contract Clause. U.S. Const., Article I, Section 10. This alone is sufficient to establish irreparable harm. *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm" (emphasis in original)). Second, CSPU established that, absent an injunction, the Defendant intends to disseminate unsubstantiated allegations about its members from internal affairs investigations in contravention of the express negotiated terms of the CBA, which would cause irreparable damage to their privacy interests and professional reputations. *See Really Good Stuff, LLC v. BAP Inv'rs, L.C.*, 813 F. App'x 39, 44 (2d Cir. 2020) ("The loss of reputation and goodwill constitutes irreparable harm."). Indeed, that harm is unquestionably irreparable because once information that should not be released under the CBA is disclosed, it can never be retracted. *See John Doe*

Agency v. John Doe Corp., 488 U.S. 1306, 1309, (1989) (*Marshall, J.*, in chambers) ("The fact that disclosure would moot that part of the Court of Appeals' decision requiring disclosure … create[s] an irreparable injury."); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again.").

The record makes clear that CSPU and its members would be irreparably harmed by the reputational damage to State Troopers that would result from the dissemination of untrue allegations of misconduct, as well as the irremediable violation of the Contract Clause caused by Sections 8 and 9 of Public Act 20-1.

C. The District Court Erred In Concluding That CSPU Had Not Shown A Likelihood That Sections 8 And 9 Of Public Act 20-1 Are Unconstitutional

The central issue in this case is whether, by authorizing the dissemination of false allegations against CSPU's members, Sections 8 and 9 of Public Act 20-1 violate Article I, Section 10 of the U. S. Constitution. Thus, the likelihood of success factor necessarily requires considering whether Sections 8 and 9 are, in fact, unconstitutional. *See International Dairy Foods Association v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996); *New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020) (constitutional question "dominant, if not the dispositive, factor" in preliminary injunction analysis).

1. Relevant legal principles

The Contract Clause states that "[n]o State shall … pass any … Law impairing the Obligation of Contracts …."[4] U.S. Const. Art. I, § 10, cl. 1. The underlying purpose of the Contract Clause is to protect expectations of persons who enter into contracts from danger of subsequent legislation that has the effect of impairing the contract. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 97 S. Ct. 1505, 1519-23 (1977). This Circuit has set forth a three-question test to determine whether a state statute violates the Contract Clause:

> (1) whether the contractual impairment is substantial and, if so, (2) whether the law serves a legitimate public purpose such as remedying a general social or economic problem and, if such purpose is demonstrated, (3) whether the means chosen to accomplish this purpose are reasonable and necessary.

Sullivan v. Nassau County Interim Fin. Auth., 959 F.3d 54, 64 (2d Cir. 2020) (internal brackets omitted).

This analysis has been applied four times by the Second Circuit to legislative acts impairing state collective bargaining agreements. *See Sullivan v. Nassau County Interim Fin. Auth.*, 959 F.3d 54, (2d Cir. 2020); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362 (2d Cir. 2006), cert. denied, 50 U.S. 918 (2d Cir. 2007);

[4] The full text of Article I, Section 10, clause 1 is as follows: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Condell v. Bress, 983 F.2d 415 (2d Cir. 1993); *Ass'n of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991). Unlike this case, however, those four cases involved changes to financial terms of the relevant collective bargaining agreements. In *Sullivan* and *Buffalo Teachers*, this Court concluded that the subject legislation did not violate the Contract Clause based on the second and third questions. In *Condell* and *Association of Surrogates*, this Court found Contract Clause violations. The District Court here relied heavily on *Sullivan* and *Buffalo Teachers* to conclude that CSPU could not show "the likelihood that its Contract Clause claim will succeed, where that claim by the plaintiffs in *Buffalo Teachers* and *Sullivan* failed." Mem. Dec. at 32 (JA292). However, the District Court did not appreciate that the instant case presents the first time that a Court in this Circuit has had before it a Contract Clause claim where the contract at issue is a state collective bargaining agreement and the impairment is a non-financial one that does not implicate budgetary policy.

2. Public Act 20-1 substantially impairs the contractual rights of CSPU's members

The contractual impairment here is a new statute that retroactively eliminates the requirement that the Defendant not disseminate false complaints against State Troopers, a term that was agreed to after negotiations of a collective bargaining agreement with the State. There is no dispute that, by authorizing the dissemination of false allegations against State Troopers, the Act purports to

abrogate terms of the CBA that prohibited such disclosure. Courts universally recognize that such an impairment of a public employees' collective bargaining agreement is a substantial one because the legislation upsets the reasonable expectations of the union members. *See Sullivan*, 959 F.3d at 64-64; *Univ. of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096, 1102 (9th Cir. 1999); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998); *Condell v. Bress*, 983 F.2d 415 (2d Cir. 1993); *Ass'n of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991). On this factor, the District Court found in favor of CSPU, at least for purposes of the motion for a preliminary injunction. Mem. Dec. at 18-19 (JA278-79) ("The precise question posed by this case appears to be an open one under the law of this circuit. For the purpose of the present motion by the CSPU for a preliminary injunction, I will assume without deciding that the Act's disclosure provisions disrupted the CSPU's reasonable expectations under the 2018–2022 Collective Bargaining Agreement and thus constituted substantial impairment of that contract.")

There should be no dispute that CSPU's reasonable expectations of its negotiated collective bargaining agreement were impaired by Public Act 20-1. The impairment of CSPU's reasonable expectations has special import in Connecticut because the agreement must be approved by the legislature before going into

effect. *See* Conn. Gen. Stat. § 5-278(e).[5] In order for Article 9, Section 2 of the CBA to be effective, the State's bargaining representative needed to request approval of this specific provision from the legislature, and the legislature needed to approve the CBA and the supersedence provisions. Given that the General Assembly affirmatively voted to approve the CBA, and specifically the provisions superseding FOIA, CSPU clearly had a reasonable expectation that the terms of the CBA would be honored. *See Elliott v. Bd. of School Trustees*, 876 F.3d 926, 936 (7th Cir. 2017) ("When a State enters a binding commitment, the other party's reliance on that commitment is even more justified."). In light of this process, it is beyond peradventure that Sections 8 and 9 of Public Act 20-1 substantially impair Article 9, Section 2 of the CBA.

3. The District Court erred in finding that the disclosure of false allegations against CSPU's members serves a legitimate public purpose

As the District Court acknowledged, it is the *defendant's burden* to present evidence that the legislature's intent in enacting the legislation was to address a specific public policy. *See Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368–69 (2d Cir. 2006), *cert. denied*, 50 U.S. 918 (2007) ("When a state law constitutes

[5] For an explanation of the Connecticut supersedence statutes, *see* L. Hansen, Conn. Gen. Assembly Office of Legislative Research, Research Report, *Questions on Public Employee Supersedence Laws* (Dec. 13, 2019), *available at* https://www.cga.ct.gov/2019/rpt/pdf/2019-R-0327.pdf (last visited Dec. 30, 2020).

substantial impairment, ***the state*** must show a significant and legitimate public purpose behind the law.") (emphasis added.) The District Court opined that the defendant had met this burden, stating:

> As evident from the public record, the Act was adopted "to promote greater transparency and accountability for law enforcement" in response to "a Minneapolis police officer's killing of George Floyd on May 25, 2020, which led to mass and sustained protests across the country and awoke the public's demand for reforms to our law enforcement agencies and progress toward a just and equitable society." The Commissioner states that, by subjecting police disciplinary records to FOIA, Sections 8 and 9 of the Act ensure greater police accountability and benefit the public, "who can now access these important records and see for themselves how state government is operating in this area."

Mem. Dec. at 19-20 (JA279-80). There are two problems with the Court's analysis.

First, the State is not permitted to rely on "post-hoc" justifications for the legislation that have no support in the legislative record. *See Toledo Area*, 154 F.3d at 325. The District Court did not identify anything in the legislative record providing an explanation for why it was necessary to break the CBA and allow anonymous and untrue complaints against Connecticut troopers to be made public.

In fact, the relevant legislative history here shows that the only purpose of Sections 8 and 9 of the Act was to nullify the express terms of the CBA, with no discussion of what purpose would be served by the

dissemination of false allegations against CSPU's members. The provision was discussed during the public hearings on Public Act 20-1, Andrew Matthews, CSPU's executive director, testified as follows:

> In 2018 the Legislature approved by our contract 2018-2022 Contract an in part it talks about the "internal affairs investigations with only a disposition of exonerated, unfounded or not sustained shall not be subject to Connecticut's Freedom of Information Act." This new language was negotiated between the parties because in recent years we've seen a significant increase in anonymous, false complaints involving serious allegations of misconduct and we believe that information should not be disclosed to the public if it was unfounded. This portion of the Bill applies to agreements in our Award in Connecticut, a collectively bargained agreement and in the Bill it talks about eliminating awards that we entered into before the Bill takes effect. We believe that the State should honor the language in our contract.

Testimony of A. Matthews, Hearing Before Conn. Judiciary Committee, pp. 11-12 (July 17, 2020), *available at* https://tinyurl.com/yaveet2k (last visited Dec. 30, 2020).

In addition, the bill analysis for Public Act 20-1 prepared by the General Assembly's Office of Legislative Research acknowledged that Sections 8 and 9 would impair CSPU's rights under the CBA, and noted that those sections may well violate the Contract Clause:

> Under current law, the provisions of a collective bargaining agreement or arbitration award between the state and a state employee bargaining unit supersede any conflicting state statutes, special acts, or regulations as long as the superseding provisions are appropriate to collective bargaining. The bill creates an exception for certain conflicts with the Freedom of Information Act (FOIA). Under the bill, if the provisions of an agreement or award (1) pertain to disclosing disciplinary matters or alleged misconduct and

> (2) would prevent document disclosures required by FOIA, then FOIA's provisions prevail. The bill applies to agreements and awards entered into before, on, or after the bill's effective date. It specifies that it should not be construed as diminishing a bargaining agent's access to information under state law. The bill also bars any collective bargaining agreement or arbitration award between the state and any State Police bargaining unit from prohibiting the disclosure of any disciplinary action based on a violation of the code of ethics contained in a sworn member's personnel file. The prohibition applies to agreements and awards entered into before, on, or after the bill's effective date. ***It is unclear whether applying these provisions to existing agreements and awards would conflict with the U.S. Constitution's contracts clause*** ….

Conn. Gen. Assembly Office of Legislative Research, Bill Analysis, HB 6004 (July 29, 2020) (emphasis added), *available at* https://tinyurl.com/y7n5gdqu (last visited Dec. 30, 2020).

Finally, that the purpose of this law specifically targeted the CSPU's CBA was expressly discussed on the House floor:

> REP. REBIMBAS (70TH):
>
> In section 8, we've done some changes regarding the disclosure through FOIA. If the good Chairman can highlight that for us?
>
> ***
>
> REP. STAFSTROM (129TH):
>
> … I believe section 8, … provides for the fact that contracts cannot supersede state statute particularly with respect to section 9 of the bill, which requires that disciplinary actions or violations be publicly disclosable or viewable under FOIA.
>
> ***
>
> REP. REBIMBAS (70TH):

… does this apply to the municipal police?

***

REP. STAFSTROM (129TH):

… section 9 I believe only applies to the State Police.

***

REP. REBIMBAS (70TH):

… and why only the State Police?

***

REP. STAFSTROM (129TH):

… that was simply the way this section was drafted.

***

REP. REBIMBAS (70TH):

…this section specifically that makes this change and makes it FOIA-able, when does this take effect?

***

REP. STAFSTROM (129TH):

Upon passage…

***

REP. REBIMBAS (70TH):

… So this is upon passage. My understanding is that currently, the State Police contracts would be contrary to this language; is that correct?

***

REP. STAFSTROM (129TH):

… I believe so.

***

REP. REBIMBAS (70TH):

… So I know clearly there is language in this proposal that says moving forward, no contracts can be negotiated that would eliminate this requirement essentially if it passes, requirement, but are we subjecting the current State Police contracts to adhere to this exact language upon passage?

***

REP. STAFSTROM (129TH):

… that's my understanding.

***

REP. REBIMBAS (70TH):

… is there a reason why we didn't do it to be passed or apply to State Police upon the renegotiation of their contracts?

***

REP. STAFSTROM (129TH):

… I don't believe that was ever asked in the discussions and negotiations on this bill we had.

***

REP. REBIMBAS (70TH):

> … I guess, I don't know what the good Chairman is referring to as to negotiations or discussions. I guess I'll ask straight out. Did the State Police opine as to whether or not they want their negotiated current contract to be impacted by this FOIA provision?
>
> ***
>
> REP. STAFSTROM (129TH):
>
> … I don't believe that being discussed in their testimony. [6]
>
> ***

Conn. House of Representatives, Transcript of Proceedings (July 23, 2020), p. 428-436, *available at* https://tinyurl.com/y8kk4lrk (last visited Dec. 30, 2020). The District Court did not cite anything in the legislative record showing a public purpose would be served by reneging on the terms of the CBA and authorizing the dissemination of false allegations about State Troopers.

Second, the District Court improperly conflated the Governor's general goals for the Special Session during which Public Act 20-1 was enacted with the specific legislative purpose behind Sections 8 and 9. The only evidence that the District Court cited to support its conclusion about the purpose of Sections 8 and 9 is a statement from the Governor's proclamation convening a Special Session of

[6] Representative Stafstrom's representation that the State Police did not take a position on Sections 8 and 9 was not correct. *See* Testimony of A. Matthews & Comments of R. Stafstrom, Hearing Before Conn. Judiciary Committee, pp. 11-12 (July 17, 2020), *available at* https://tinyurl.com/yaveet2k (last visited Dec. 30, 2020).

the General Assembly to enact legislation dealing with a handful of issues, one of which was transparency and accountability in policing in light of the killing of George Floyd. *See* Proclamation of July 17, 2020, *available at* https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200717-Call-of-July-2020-Special-Session.pdf (last visited Dec. 30, 2020). Even assuming that vague statement of intent by the Governor can be relied on as evidence of the legislative purpose of the Act generally, there is nothing to support that the provisions authorizing the disclosure of false allegations against CSPU's members was intended to further that purpose. As noted above, the only discussion of Sections 8 and 9 demonstrates that those provisions were adopted to renege on the CBA.

4. The Defendant did not establish that Sections 8 and 9 were reasonable and necessary to any legitimate public purpose

Even if there were a legitimate purpose behind the legislature's decision to authorize the disclosure of anonymous false allegations against State Troopers, the State did not and could not demonstrate that the means used were reasonable and necessary to achieve the General Assembly's purported goals with respect to police accountability. A state is not free to impose a drastic impairment when an evident and more moderate course would answer its concerns equally well. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 30 (1977).

Though the Contract Clause applies to private contracts as well as public contracts, courts apply the three-step test differently when dealing with public

contracts as opposed to private ones. When the state is a party to a contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the [s]tate's self-interest is at stake." *Id.* at 26. Thus, courts will be less deferential to the state's assessment of reasonableness and necessity when legislation is self-serving. *Buffalo Teachers*, 464 F.3d at 369.

Here, Sections 8 and 9 are self-serving because the evidence shows that the State used this legislation to "renege" on Article 9, Section 2 of the negotiated CBA. *See Sullivan*, 959 F.3d at 67. In *Sullivan*, the Court explained: "If there are *some indicia* that the contract impairment is merely 'the government [reneging] on its obligations – altering the contract for its own benefit,' then 'less deference scrutiny is needed.'" 959 F.3d at 66 (quoting Guido Calabresi, *Retroactivity: Paramount Powers & Contractual Changes*, 71 Yale L.J. 1191, 1200-01 (1962)) (emphasis and alterations in original). "Reneging is, at its core, about impairments imposed to benefit the state financially, or *as a matter of political expediency*." *Sullivan*, 959 F.3d at 66 (emphasis added.). This Court has recognized that "evidence showing indicia of reneging may take many forms," including "that the contractual impairment was chosen when other politically unpopular alternatives were available," or "that the contractual impairment is a response to a well-known, long-standing, problem, as opposed to a change in circumstances." *Sullivan*, 959 F.3d at 66-67.

Here, the evidence of reneging is palpable. In addition to the legislative history, the timing and circumstances of the adoption of Sections 8 and 9 evidences the State's self-interest. On June 10, 2020, the Connecticut Office of Labor Relations sustained an institutional grievance filed by CSPU against DESPP for violating Article 9, Section 2 of the CBA, ordering that:

> The Department shall cease and desist from releasing investigations that are Sustained, in whole or in part, without affording the subject Trooper an opportunity to object to FOI as the contract requires. Moreover, the Department shall cease and desist from seeking consent from Troopers to release investigations where the result is Exonerated, Unfounded, or Not Sustained, as the contract does not allow release in those circumstances.

Conn. Office of Labor Relations, Institutional Grievance Step 2 Response (June 10, 2020) (JA199). One month later, the State sought an end-run around this decision by slipping Sections 8 and 9 into the Police Accountability Act for the sole purpose of nullifying Article 9, section 2 of the 2018-2022 CBA. This is much more than just "some indicia" of the State's intent to renege on the CBA.

Moreover, the Defendant could not and did not meet his burden to show that Sections 8 and 9 are "reasonable and necessary."[7] "Contractual impairments can be

[7] In *Sullivan*, 959 F.3d at 66, this Court opined that the question of who bears the burden of proof as to whether the legislation is reasonable and necessary is unclear, but nevertheless placed the burden on the defendant. This is consistent with how most circuits allocate the burden. *See Toledo Area*, 154 F.3d at 323; *Elliott v. Bd. of School Trustees*, 876 F.3d 926, 938 (7th Cir. 2017); *State of Nev. Employees Ass'n v. Keating*, 903 F.2d 1223, 1228 (9th Cir. 1990); *but see United Auto. Aerospace Agr. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 43

reasonable if either (1) [the contract] 'had effects that were unforeseen and unintended' when originally adopted, or (2) 'subsequent changes' in circumstances 'caused the covenant to have a substantially different impact' than anticipated." *Elliott*, 876 F.3d at 938-39 (quoting *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. at 31-32).

As CSPU noted in the District Court, there have been *no* changed or unforeseen circumstances since the CBA was approved by the General Assembly last year. Since its adoption in 1975, Connecticut General Statutes § 5-278(e) expressly provided that when there is a conflict between a provision in a collective bargaining agreement and any general statute, the collective bargaining agreement prevails, provided that the General Assembly approves of the conflicting provision. *See* Conn. Public Act 75-566, § 9. The General Assembly expressly approved the CBA, including the provision in Section 2(c) that supersedes FOIA, little more than a year before attempting to renege on that approval. Given that Section 5-278(e) had been in effect for nearly 45 years by the time the 2018-2022 CBA went into effect, and that the legislature only recently voted to approve the provision in question, there is no basis to conclude that the CBA had unforeseen consequences or that some change in circumstances justified the State reneging on its promise.

(1st Cir. 2011). However, the District Court here placed the burden on CSPU because, in its view, the fact that this is a motion for a preliminary injunction causes the burden to shift to the plaintiff. *See* Mem. Dec. at 27 n.43 (JA287).

The District Court relied on the tragedy of George Floyd's death in May 2020, and the consequent public push for greater accountability, as a "change of circumstance" that justified the State to renege on the CBA, opining that allowing greater accessibility to police disciplinary records "ensure[s] greater police accountability …." Mem. of Dec., p. 24 (JA284). However, the Court's analysis does not explain how the desire to increase accountability for misconduct by law enforcement would be furthered by the dissemination of ***false*** allegations of misconduct against State Troopers. In other words, the question is not whether access to police disciplinary records as a general matter would tend to foster greater accountability among police officers. Rather, the question in this case is whether the disclosure of anonymous false allegations against the Union's members in particular furthers that goal. It is difficult to imagine how the release of information about State Troopers who are falsely accused of misdeeds would lead to increased accountability for those officers who actually do engage in misconduct.

Finally, the District Court erred in failing to consider that the contractual impairment must be *essential* in order to survive constitutional scrutiny. "When a State impairs its own contracts, the impairment must be 'clearly necessary' or 'essential,' not merely convenient or expedient." *Elliott*, 876 F.3d at 938. "Impairing a contract is not necessary if 'a less drastic modification' would have

allowed the contract to remain in place." *Welch v. Brown*, 551 Fed. Appx. 804, 811 (6th Cir. 2014). Put differently, the impairment "must have been a last resort measure." *Buffalo Teachers*, 464 F.3d at 371.

Here, the State presented no evidence as to how disclosure of false allegations against State Troopers is essential to any public purpose. While the State ordinarily would be free to amend the relevant statutes to authorize such disclosure, it cannot violate CSPU's contractual rights in order to do so in the absence of any evidence that disclosing false allegations is essential to furthering some legitimate public policy. Under these circumstances, there is no reason why the legislature could not wait until after the expiration of the CBA to consider amending § 5-278(e).

Indeed, for 45 years, the rule in Connecticut was that the terms of a collective bargaining agreement control over a conflicting statute, as long as the legislature approves of the agreement. As the Sixth Circuit explained in a case in which a statute sought to impair a non-budgetary provision of a collective bargaining agreement that allowed public employees to make political contributions through wage checkoffs:

> The state has been permitting checkoffs for quite some time. Throughout this time, it has been willing to tolerate or been unaware of the evils it now claims are associated with permitting public employees and their unions to utilize checkoffs for political causes. If the state has known of, but tolerated, these problem throughout this time, it can tolerate them a bit longer until its contractual obligations expire. If the state's concern is the result of a recent

> epiphany, it has failed to persuade us that the newly discovered danger of checkoffs justifies the extreme solution of substantially impairing existing contracts. What is to prevent such epiphanies from serving as the basis for the state to abrogate any other contractual obligation it has undertaken? Certainly, the state is permitted to enact measures to deal with a newly discovered evil. But, the achievement of even a good goal (newly discovered) can normally wait until existing contracts expire.

Toledo Area, 154 F.3d at 326–27. "The contract clause, if it is to mean anything, must prohibit [Connecticut] from dishonoring its existing contractual obligations when other policy alternatives are available." *Ass'n of Surrogates*, 940 F.2d at 774.

D. The Public Interest And Balancing Of Equities Require The Granting Of An Injunction

Finally, the District Court concluded that "enjoining Sections 8 and 9 of the Act would not serve the public interest, and that the balance of equities does not tip in favor of the CSPU." Mem. Dec. at 30 (JA290). The Court reasoned:

> These provisions, which promote disclosure under FOIA, were adopted in response to the public's demand for police reform, and align with FOIA's legislative policy in favor of disclosure of governmental records. Enjoining Sections 8 and 9 of the Act would circumvent the state's salutary efforts to enhance transparency and promote accountability in law enforcement.

Id. The Court's analysis fails to consider the countervailing public interests at stake.

First, the Court failed to consider that the impairment of the CBA and violation of Article I, section 10 of the Constitution is, itself, a public wrong. It is in the public interest that the State honor its contractual agreements because "[t]he

Government does not have an interest in the enforcement of an unconstitutional law." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir.2003)); *see also Sullivan*, 959 F.3d at 65 (State must consider impairment of contract to be on par with other policy alternatives) (quoting *Buffalo Teachers*, 464 F.3d at 369-70)).

The public interests in the State honoring its contractual and constitutional obligations outweigh any public interest in allowing disclosure of false information. CSPU had settled contractual expectations that the State would abide by the provisions of the CBA, which were agreed upon after lengthy negotiations and ratified by the legislature. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246 (1978) (legislation which retroactively changed obligations "in an area where the element of reliance was vital" violated the Contract Clause). There is no question that CSPU and its members had an established expectation and a vested right in the CBA's provisions. The public interest in the State honoring its obligation under the contract and the Constitution should control.

Second, neither the Plaintiff nor the Defendant should have an interest in disseminating false allegations that harm a person's name and reputation. While the District Court focused only on the public interest in government transparency as a general proposition, it failed to recognize that the public also has an interest in

preventing the spread of false information, including false allegations about government employees. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 631 (1980) (recognizing government entity may be held liable for violating constitutional due process rights by publicizing false allegations about government employee). Indeed, there is no public interest in disseminating false information. *See Federal Trade Commission v. LeadClick Media, LLC*, 838 F.3d 158, 171 (2d Cir. 2016) (upholding unfair trade practice liability based on advertisements through fake news website). Thus, the public interest and the balance of equities weigh in favor of issuing the injunction.

In sum, the District Court erred by not recognizing that there is simply no public value in disseminating anonymous false complaints about State Troopers. *Cf. Curtis Pub. Co. v. Butts*, 388 U.S. 130, 169–70 (1967) (*Warren, C.J.*, concurring) (First Amendment does not protect dissemination of false information that could "destroy lives or careers"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"). The preliminary injunction should have been granted.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the District Court and remand this case with direction to grant the Plaintiff's motion for preliminary injunction.

Respectfully submitted,

CONNECTICUT STATE POLICE UNION

Date: December 30, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2020, the foregoing Brief for the Plaintiff-Appellant was filed electronically. Notice of this filing was sent by e-mail to all parties listed below by operation of the court's electronic filing system.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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