UNITEED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

Case No. 77-7100

v.

Hon. Sean F. Cox

CITY OF DETROIT, *et al*.,

Defendants.

MOTION OF MICHIGAN AFSCME COUNCIL 25
TO INTERVENE AS OF RIGHT IN THE ABOVE CAPTIONED MATTER;
AND FOR PRELIMINARY INJUNCTION

NOW COMES Michigan AFSCME Council 25, by and through its Attorney, Herbert A. Sanders of the Sanders Law Firm, P.C., and for its Motion seeking leave from the Court to intervene as a Defendant in this action, and its request for preliminary injunction, it states as follows:

1. Petitioner Michigan AFSCME Council 25 (AFSCME) is a labor union located within the State of Michigan, with over 50,000 members throughout the State of Michigan.
2. AFSCME brings this Motion as an organization, and representative of its members, over 3,500 of which are employees of the City of Detroit, and subject to a collective bargaining agreement held with the City of Detroit.
3. The United States Environmental Protection Agency (EPA) initiated this action in 1977 against the City of Detroit, State of Michigan and the Detroit Water and Sewerage Department (DWSD), alleging violations of the *Clean Water Act, 33 U.S.C. § 1251 et seq. (Clean Water Act).*

4. The objective of the *Clean Water Act* is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters". See *Weinberger v Romero-Barcelo, 456 U.S. 305, 314 (1982).*

5. By Order dated July 6, 1977, Judge Feikens joined as parties all communities whose wastewater was treated by the DWSD pursuant to either First Tier Customer contracts with the DWSD or contracts between such First Tier Customers and their constituent community customers.

6. On July 8, 2011 the City of Detroit and the Michigan Department of Environmental Quality (DEQ) filed a motion to dismiss the cause of action.

7. The Motion was denied by the Court on September 9, 2011, which maintained there was still a lack of compliance with the *Clean Water Act*. Rather, the Court issued an order which stated in part:

> *To be fair, the City has been constrained in the measures it has proposed or implemented to date because the City is bound by various provisions of the City's Charter and ordinances, and by existing contracts, that prevent the City from making fundamental changes in the identified problem areas.*
>
> * * *
>
> *Accordingly, the court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a member of the current Board of Water Commissioners (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, devise a plan to address the root causes of non-compliance discussed in this Opinion & Order. In making such recommendations to the Court, these individuals shall not be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts. See Exhibit 1.*

8. Recognizably, missing from the Court appointed Committee was any representative of the Unions that would be affected by any recommended plan.

9. Thereafter, the above Committee delineated in the Court's Order drafted a *confidential* report dated September 30, 2011 and entitled *Synopsis of Capital Improvement Program, Purchasing, Human Resources and Succession Planning/Organizational Structure. See Exhibit 2.*

10. In addition to delineating specific ways in which to achieve compliance with the *Clean Water Act*, the report recommended altering and/or amending several provisions of the collective bargaining agreement had between the City of Detroit and AFSCME.

11. Notably, the AFSCME Union was neither notified, nor consulted concerning the recommended alterations and amendments to its collective bargaining agreement.

12. Thereafter, the Committee issued a report entitled *Committee's Plan of Action* dated November 2, 2011 in which it adopted recommendations from the *Synopsis of Capital Improvement Program, Purchasing, Human Resources and Succession Planning/Organizational Structure,* and delineated 10 specific changes it believed needed to occur to the existing City of Detroit collective bargaining agreements. See Exhbit 3.

13. Notably, once again, the AFSCME Union was neither notified, nor consulted concerning the recommended alterations and amendments to its collective bargaining agreement.

14. Further, the Committee stated within its report concerning the recommended changes to the collective bargaining agreements:

> *While the Committee was able to identify the above CBA and work rule challenges, it could not agree if the solution to these challenges could/should be left to negotiations or if Court ordered implementation was required. See Exhibit 3.*

15. None of the recommended changes to the AFSCME collective bargaining agreement are even remotely connected to enforcement of the *Clean Water Act*.

16. Moreover, most if not all of the recommended changes to the AFSCME collective bargaining agreement were never proposed by the City of Detroit during negotiation of the last several collective bargaining agreements.
17. Thereafter, on November 4, 2011, this Court issued an Order implementing the *Committee's Plan of Action* altering key provisions within the AFSCME collective bargaining agreement, affecting mandatory subjects of collective bargaining including wages, hours, and working conditions. See Exhibit 4.
18. Pages 6 and 7 of the Court's Order restricts the rights of City employees and City unions, it does absolutely nothing to stop pollution or enforce the *Clean Water Act*.
19. Denying City workers who are laid off the right to bump into the AFSCME classifications at DWSD does absolutely nothing to assist in the enforcement of the *Clean Water Act*.
20. Contrary to what is implied in the Court's Order, AFSCME's contract has never limited the DWSD's ability to subcontract for construction projects.
21. The contract does require the City to notify the Union before a subcontract is issued concerning operations and maintenance, to avoid subcontracting that causes layoffs or reduction in overtime for existing workers.
22. The collective bargaining agreement also encourages management to maintain a full staff of regular workers capable of running the plant on a daily basis.
23. Daily operations and maintenance are subjected to better quality control and greater collective knowledge and skills when this work is done in-house.
24. AFSCME objects to paragraphs 7-12 of this Court's Order which defines how promotions, overtime, and job classifications will be handled, how long disciplinary actions will remain on members' work record, and what past practices will be protected.

25. AFSCME objects to the Court's Order to disregard any past practices on operational issues when management initiates operational changes on operational issues.
26. AFSCME objects to paragraph eight which gives carte blanche authority to management to reorganize classifications without bargaining with the Union.
27. AFSCME objects to this Court's Order to the extent that it strips the Union of its right to defend its collective bargaining rights through grievances and unfair labor practice charges; or to seek relief for disputed issues through the Michigan Employment Relations Commission or the National Labor Relations Board.
28. AFSCME objects to paragraph 3 which excludes DWSD employees from the citywide collective bargaining agreement, and limits them to a collective bargaining agreement with DWSD only.
29. The master agreement provides for Special Conferences and the Supplemental Agreements have always been used to address department-specific issues, consequently there is no basis to end bargaining on a city-wide basis.
30. There is an actual controversy between the parties as to the constitutionality of the Court's Order implementing the *Committee's Plan of Action* under *U.S. Const., Art I, § 10.*
31. The *United States Constitution* provides that *"No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." See U.S. Const., Art I, §1O.*
32. By the actions delineated above, the Court's Order has or will substantially impair the AFSCME collective bargaining agreement, in violation of the *United States Constitution*.
33. This violation of United States Constitution is actionable under *42 USC § 1983*.

34. There is an actual controversy between the parties as to the constitutionality of the Court's Order implementing the *Committee's Plan of Action* under *U.S. Const., Am V*.

35. The *United States Constitution* prohibits the taking of private property without just compensation. *See U.S. Cons.t, Am V*.

36. The Takings Clause of the *Fifth Amendment* to the United States Constitution, which applies to Michigan and the City of Detroit through the *Fourteenth Amendment*, provides that *"private property [shall not] be taken for public use without just compensation."*

37. The rights of the employees represented by AFSCME to receive wages, benefits and terms and conditions of employment under their collective bargaining agreement with the City of Detroit constitutes private property within the meaning of the Takings Clause.

38. By the actions alleged above, the City of Detroit, acting under color of law, have taken the private property of Petitioner and its members covered under the AFSCME collective bargaining agreement without just compensation, in violation of the Takings Clause.

39. This taking is without just compensation, and thus violates the *United States Constitution.*

40. There is an actual controversy between the parties as to the constitutionality of the Court's Order implementing the *Committee's Plan of Action* under *US Const, Am XIV*.

41. The United States Constitution provides that no state shall *"deprive any person of life, liberty, or property without due process of law." See US Const, Am XIV.*

42. AFSCME and its members have vested property rights in the benefits to which they are entitled pursuant to the collective bargaining agreement had with the City of Detroit.

43. The Court's Order bears no rational relationship to the stated purpose of the *Clean Water Act, nor* any permissible legislative objective.

44. The Court's Order to the extent it alters and/or amends the AFSCME collective bargaining agreement is arbitrary, and is not supported by any facts that were known or could reasonably be assumed.

45. The Court's Order improperly infringes upon the liberty and property interests of Petitioner and its members, without due process of law, in violation of the *United States Constitution*.

46. This violation of the United States Constitution is actionable under *42 USC § 1983*.

47. *Federal Rule of Civil Procedure 24. Intervention* states in part:

> *(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:*
>
> * * *
>
> *(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.*

48. A four-part test exist for determining applications of right to intervention: (1) The applicant's motion is timely, (2) the applicant asserts interest relating to property or a transaction which is the subject of the action, (3) the applicant is so situated that without intervention disposition of action may as practical matter impair or impede the applicants ability to protect its interest, and (4) the applicant's interest is inadequately represented by other parties. See *Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1245*

(6th Cir. 1997); Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999 (6th Cir. 2006).

49. Each of the elements for intervention by right as delineated above are met by AFSCME.

50. Attached to this motion is a proposed pleading setting forth the argument that Petitioner has a right to present in this action and for which intervention is sought.

51. Petitioner requests the court to enter an order allowing intervention as a party and to file the attached pleading.

52. Further Petitioner, moves pursuant to *Rule 65 of the Federal Rules of Civil Procedure* for a preliminary injunction in this cause.

PRAYER FOR RELIEF

WHEREFORE, AFSCME respectfully request that this Court issue an Order:

(1) Granting its Motion for intervention in accordance with *Federal Rule of Civil Procedure 24*;

(2) Declaring that the Court's Order as delineated herein has impaired the contractual rights of AFSCME in violation of the *Contract Clause of the United States Constitution;*

(3) Declare that the Order as delineated herein constitutes a taking of private property without just compensation in violation of the *Takings Clause of the United States Constitution;*

(4) Declare that the status quo be restored by ordering all actions taken by the Court and parties to this litigation to modify, amend, or terminate AFSCME's collective bargaining agreement, or to limit its recourse for violation of its collective bargaining agreement void *ab initio;*

(5) Enter a temporary restraining order, preliminary injunction and permanent injunction enjoining all parties to this litigation, and all persons and entities acting in concert with them, from taking any actions which authorizes the modification, amendment, or termination of the AFSCME collective bargaining agreement, or limits its recourse for violation of its collective bargaining agreement;

(6) Awarding AFSCME the attorney fees, costs, and other expenses incurred in prosecuting this lawsuit, as well as such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Date: November 14, 2011

/s/ Herbert A Sanders
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UNITEED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

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CITY OF DETROIT, *et al*.,

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BRIEF IN SUPPORT OF MOTION OF MICHIGAN AFSCME COUNCIL 25 TO INTERVENE AS OF RIGHT IN THE ABOVE CAPTIONED MATTER; AND FOR PRELIMINARY AND PERMANENT INJUNCTION

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I. ISSUES

A. Whether the Court should grant Petitioner AFSCME intervention as of right wherein AFSCME has demonstrated (1) that its motion is timely, (2) that it asserts interest relating to property or a transaction which is the subject of the action, (3) that it is so situated that without intervention disposition of action may as practical matter impair or impede its ability to protect its interest, and (4) that its interest are inadequately represented by other parties?

Petitioner submits that the answer is yes.

B. Whether the Court should issue a preliminary injunction against the threatened abrogation of the collective bargaining agreements between the AFSCME and the City of Detroit?

Petitioner submits that the answer is yes.

II. FACTS

1. Petitioner Michigan AFSCME Council 25 (AFSCME) is a labor union located within the State of Michigan, with over 50,000 members throughout the State of Michigan.
2. AFSCME brings this Motion as an organization, and representative of its members, over 3,500 of which are employees of the City of Detroit, and subject to a collective bargaining agreement held with the City of Detroit.
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4. The objective of the *Clean Water Act* is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters". See *Weinberger v Romero-Barcelo, 456 U.S. 305, 314 (1982).*

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> *Accordingly, the court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a member of the current Board of Water Commissioners (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, devise a plan to address the root causes of non-compliance discussed in this Opinion & Order. In making such recommendations to the Court, these individuals shall not be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts. See Exhibit 1.*

8. Recognizably missing from the Court appointed Committee was any representative of the Unions that would be affected by any recommended plan.
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11. Notably, the AFSCME Union was neither notified, nor consulted concerning the recommended alterations and amendments to its collective bargaining agreement.
12. Thereafter, the Committee issued a report entitled *Committee's Plan of Action* dated November 2, 2011 in which it adopted recommendations from the *Synopsis of Capital Improvement Program, Purchasing, Human Resources and Succession Planning/Organizational Structure,* and delineated 10 specific changes it believed needed to occur to the existing City of Detroit collective bargaining agreements. See Exhibit 3.
13. Notably, once again, the AFSCME Union was neither notified, nor consulted concerning the recommended alterations and amendments to its collective bargaining agreement.
14. Further, the Committee stated within its report concerning the recommended changes to the collective bargaining agreements:

> *While the Committee was able to identify the above CBA and work rule challenges, it could not agree if the solution to these challenges could/should be left to negotiations or if Court ordered implementation was required. See Exhibit 3.*

15. None of the recommended changes to the AFSCME collective bargaining agreement are even remotely connected to enforcement of the *Clean Water Act*.
16. Moreover, most if not all of the recommended changes to the AFSCME collective bargaining agreement were never proposed by the City of Detroit during negotiation of the last several collective bargaining agreements.
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29. The master agreement provides for Special Conferences and the Supplemental Agreements have always been used to address department-specific issues, consequently there is no basis to end bargaining on a city-wide basis.
30. Petitioner requests the court enter an order allowing intervention as a party and to file the herein pleading.
31. Further Petitioner, moves pursuant to *Rule 65 of the Federal Rules of Civil Procedure* for a preliminary injunction in this cause.
32. There are three federal constitutional safeguards, against the action taken by the Court as delineated above. The Contract Clause of the United States Constitution proscribes

such a substantial impairment of contractual obligations, *U.S. Const. Art. I, Sec. 10*; the Takings Clause of the United States Constitution proscribes such a "taking" for public use without just compensation, *U.S. Const. Am. V;* and the Due Process Clause of the United States Constitution proscribes such a taking of liberty and property without notice and an opportunity to be heard, *US Const, Am XIV.* Petitioner respectfully requests that this Court enjoin temporarily the threatened constitutional violations pending further and final determination on the merits.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 24, Intervention states in part:

> *(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:*
>
> * * *
>
> *(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.*

A four-part test exist for determining applications of right to intervention: (1) The applicant's motion is timely, (2) the applicant asserts interest relating to property or a transaction which is the subject of the action, (3) the applicant is so situated that without intervention disposition of action may as practical matter impair or impede the applicants ability to protect its interest, and (4) the applicant's interest is inadequately represented by other parties. See *Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997); Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999 (6th Cir. 2006).*

In deciding whether to issue injunctive relief, a district court in the Sixth Circuit considers: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; (4) whether the public interest would be served. See *Mascio v. Public Employees Ret. System of Ohio*, 160 F.3d 310, 312-13 (6th Cir. 1998) (quoting *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998)).

A. ARGUMENT

A. IN ACCORDANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 24, PETITIONER SHOULD BE ALLOWED TO INTERVENE IN THE HEREIN CAUSE OF ACTION AS A MATTER RIGHT.

Federal Rule of Civil Procedure 24, Intervention states in part:

> *(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:*
>
> * * *
>
> *(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.*

A four-part test exist for determining whether applicants can intervene in a case as a matter of right: (1) The applicant's motion is timely, (2) the applicant asserts interest relating to property or a transaction which is the subject of the action, (3) the applicant is so situated that without intervention disposition of action may as practical matter impair or impede the applicants ability to protect its interest, and (4) the applicant's interest is inadequately represented by other parties. See *Mich. State AFL-*

CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997); Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999 (6th Cir. 2006).

Clearly, in the case at bar, AFSCME meets the prerequisites for intervention as a matter of right in the herein cause of action:

1. The application of AFSCME is timely. The Court Order issued by the Court to which AFSCME takes exception was issued on November 4, 2011, less than two weeks prior to the filing of this petition.
2. Clearly AFSCME has an interest in property or a transaction which is the subject of the action. As delineated below, AFSCME maintains that it has a property interest in the benefits delineated within its collective bargaining agreement that have been unilaterally altered or amended by the Court's Order.
3. AFSCME is so situated that without intervention disposition of the action will impair or impede its ability to protect its interest. As delineated above, AFSCME was not invited to give input on the recommendation submitted to the Court addressing enforcement of the *Clean Water Act.* Consequently, action has been taken in this litigation that drastically affects AFSCME; yet AFSCME has not had an opportunity to address its concerns to the Court.
4. Clearly AFSCME's interest is inadequately represented by the other parties to the litigation. No party to the litigation is capable of representing the 3000 plus AFSCME members affected by the Court's Order other than the duly elected bargaining representative for the employees, Michigan AFSCME Council 25.

B. THE ORDER ISSUED BY THE COURT ALTERING PROVISIONS OF THE AFSCME COLLECTIVE BARGAINING AGREEMENT IS VIOLATIVE OF ARTICLE I, SECTION 10 OF THE U.S. CONSTITUTION.

Article I, section 10 of the U.S. Constitution provides in relevant part that, "No State shall . . . pass any . . . law impairing the Obligation of Contracts." This provision "was made part of the Constitution to remedy a particular social evil – the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts – and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.'" *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 256 (1978) (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439 (1934)).

Furthermore, in the case at bar, the *severity* of the threatened contract impairment defies justification. While some courts have upheld temporary and narrowly-tailored contract impairments as satisfying the legal standards – "reasonable" and "necessary" – to ameliorate a fiscal crisis, *e.g., Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 371 (2nd Cir. 2006) (upholding a "temporary wage freeze" against Contract Clause claim), the court order at issue is not remotely related to enforcement of the *Clean Water Act*. Its measures are worse than any of those found violative of the Contract Clause in reported case law. *See, e.g., Condell v. Bress*, 983 F.2d 415, 419 (2nd Cir. 1993) ("lag payroll" impaired collective bargaining agreement in violation of Contract Clause).

C. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION TO RESTRAIN THE THREATENED ABROGATION OF PETITIONERS' COLLECTIVE BARGAINING.

In the Sixth Circuit, "the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *Mascio*, 160 F.3d at 313 (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

As the Sixth Circuit has emphasized, "[a] party . . . is not required to prove his case in full at a preliminary injunction hearing . . . ." *In re DeLorean Motor Co.*, 755 F.2d at 1230 (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). A district court may also issue injunctive relief if the movant "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 .2d 1261, 1270 (6th Cir. 1985) (quotation omitted). In this case all of the factors are in favor of issuing injunctive relief.

1. **Petitioner Is Likely To Succeed On Their Claim That The Threatened Contract Abrogation Violates The U.S. Constitution.**

In enforcing the Contract Clause, the judiciary has balanced the police power of states with the "high value" placed by the Constitution's framers on the protection of contracts. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978)). As the Supreme Court has explained: "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Spannaus*, 438 U.S. at 245, quoted by *Pizza*, 154 F.3d at 323.

Contract Clause cases involve "individual inquiries, for no two cases are necessarily alike." *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 373 (2nd Cir. 2006), also quoting *Home Bldg.& Loan Ass'n v. Blaisdell*, 290 U.S. 398, 430 (1934) ("Every case must be determined upon its own circumstances."). The analytic framework for the individual inquiries has been set forth as follows: (1) Does the challenged action in fact operate as a "substantial impairment of a contractual

relationship"? (2) If so, has the state proffered "a significant and legitimate public purpose for the regulation warranting the extent of the impairment caused by the measure"? (3) And if the state meets that burden, is "the adjustment of the rights and responsibilities of contracting parties" based upon "reasonable conditions" and "of a character appropriate to the public purpose justifying [the act]"? See *Pizza*, 154 F.3d at 323 (internal quotations omitted). *Wojcik v. City of Romulus*, 257 F.3d 600, 612 (6th Cir. 2001) (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)).

a. The Threatened Contractual Impairment Is Substantial.

The Sixth Circuit has found that the impairment of a collective bargaining agreement is "substantial" where the state has "deprived the affected workers and their unions of a meaningful benefit they negotiated for in their CBAs." *Pizza*, 154 F.3d at 324 (impairment of pay checkoff system in CBA found to be "substantial" under Contract Clause analysis). By way of example, courts have found "substantial" impairments where the state implemented a wage freeze (*Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 368 (2nd Cir. 2006)) or where a city implemented a furlough plan effectively reducing wages by 1% (*Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1018 (4th Cir. 1993)) contrary to the terms of collective bargaining agreements.

Courts have found wage impairments to be substantial for the vital reason that people largely plan their lives based upon their salaries. *See, e.g., Association of Surrogates v. New York*, 940 F.2d 776, 772 (2nd Cir. 1991) (a 10% reduction in salary over 20 weeks led the court to observe that "[t]he affected employees have surely relied

on full paychecks to pay for such essentials as food and housing"); *see also Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 n. 9 (1969) ("For a poor man to lose part of his salary often means his family will go without the essentials.").

Here, the substantiality test is fully satisfied. The Court's Order altering the collective bargaining agreement of AFSCME is more substantial than the contract alterations in any precedent that we find. *See, e.g., Condell v. Bress*, 983 F.2d 415, 419 (2nd Cir. 1993) ("lag payroll" postponing the receipt of five days' pay was a "substantial" impairment of collective bargaining agreement's wage provisions). By any reasonable analysis, the threatened alterations to the collective bargaining agreements "operate as a substantial impairment of a contractual relationship" within the meaning of the Contract Clause jurisprudence. In fact, the severity of this impairment "is said to increase the level of scrutiny" to which the action is subjected. *Pizza*, 154 F.3d at 323.

b. The Parties To The Litigation Cannot Advance A Significant And Legitimate Public Purpose Warranting The Extent Of The Threatened Contract Impairment.

The Sixth Circuit puts this burden squarely on the governmental entitty and its agents. "Once it is determined that the state regulation is a substantial impairment and the extent of the impairment is measured, the burden shifts to the state." *Pizza*, 154 F.3d at 323. The governmental entity, must proffer a "significant and legitimate" public purpose warranting the extent of contract impairment, and *post hoc* explanations will not meet this burden. *Id*. at 325. It is insufficient for the defendants merely to posit a purpose and then demand deference to their executive judgment. See *Mascio v. Public Employees Retirement System of Ohio*, 160 F.3d 310 (6th Cir. 1998). Notably, in the

case at bar, the Committee stated within its report concerning the recommended changes to the collective bargaining agreements:

> ***While the Committee was able to identify the above CBA and work rule challenges, it could not agree if the solution to these challenges could/should be left to negotiations or if Court ordered implementation was required.***

c. The Threatened Impairment Is Neither Reasonable Nor Necessary.

Even if the Court's Order is found to have advanced a legitimate purpose warranting the extent of the contractual impairment, the plan to abrogate the collective bargaining agreements still cannot survive scrutiny under the final test of the Contract Clause analysis. The threatened impairment is neither "reasonable" nor "necessary" to effectuate the asserted purpose.

Under the Contract Clause, the challenged legislation must be "precisely and reasonably designed" to meet the purpose which it purports to fulfill. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 243 (1978). It will survive scrutiny only if it is "reasonable and necessary to serve an important public purpose." *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977)

(quoted by *Association of Surrogates v. State of New York*, 940 F.2d 766, 772 (2nd Cir. 1991)). As the Sixth Circuit has stated, the Contract Clause invalidates legislation which, though purporting to serve a legitimate goal, is "neither necessary nor reasonable for the state to renege on its contract to achieve this goal." *Pizza*, 154 F.3d at 326.

Further, the federal judiciary gives less deference to the state when the state's self-interest is at stake. *Pizza*, 154 F.3d at 323; *Buffalo Teachers Federation*, 464 F.3d at 369-71 (assuming without deciding that less deference would be given where state

finances were arguably affected). The Sixth Circuit has not pinned down the exact level of scrutiny applied in this context. Rather, at least in the context of a PAC checkoff ban, the Sixth Circuit in *Pizza* has explained:

> *Something more than the showing made to survive rational basis scrutiny is required to justify such an impairment. The hurdle is even higher given the state's obvious self-interest and the lack of any evidence as to what actually motivated the state to seek to abrogate its contractual obligation. Pizza*, 154 F.3d at 326.

Here, the government's self-interest is prominent. In light of this self-interest, the more exacting standard of judicial review leads to the conclusion that the Order mandating alteration to the AFSCME agreement is neither reasonable nor necessary. This is especially evident when there is no evidence that the alterations to the AFSCME collective bargaining agreement are even remotely related to enforcement of the *Clean Water Act.*

The City of Detroit and the parties to the litigation here must explain why alteration of the AFSCME collective bargaining agreement is "reasonable and necessary" when the Committee appointed by the Judge did not recommend the alterations be had outside the collective bargaining process.

The City of Detroit cannot put the abrogation of contracts – which its own agent negotiated, signed, or approved – on the same level with other policy alternatives that do not impair the state's obligations. *Mascio*, 160 F.3d at 314 (citing *United States Trust Co.*, 431 U.S. at 30-31); *Cayetano*, 183 F.3d at 1107.

Petitioners are likely to prevail on their claim that the Court's Order to alter and amend the AFSCME collective bargaining agreement violates the Contract Clause.

d. Petitioner Will Suffer Irreparable Harm Absent The Issuance Of Injunctive Relief.

The federal judiciary finds irreparable harm warranting injunctive relief where, as here, the defendants threaten a violation of constitutional rights. *See, e.g., Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982) (reversing trial court and directing issuance of preliminary injunction where state statute violated the Commerce Clause of the U.S. Constitution); see also, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[d]eprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury"); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("the denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction"). This principle ties in with the axiom that a court finds irreparable harm where the court could not provide an adequate or commensurate remedy in monetary damages alone. *Six Clinics Holding Corp. v. Cafcomp Systems, Inc.*, 119 F.3d 393, 403 (6th Cir. 1997) (affirming irreparable harm where plaintiff would be denied a defense to claims in a related arbitration).

Yet here the irreparable harm is threatened on a personal level as well. The importance of a contract's security was made clear by the Supreme Court: "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Spannaus*, 438 U.S. at 245, quoted by *Pizza*, 154 F.3d at 323. This Court can and should foreclose the threat of irreparable harm.

e. The Balance Of Harms and The Public Interest Favor The Issuance Of Injunctive Relief.

The requested injunction is to preserve the *status quo* solely in the form of the AFSCME collective bargaining agreement. The contract that was negotiated, approved, and signed by the City of Detroit. The public interest lies in the issuance of an injunction against the provisions of the Court's Order altering the AFSCME contract, and as unconstitutionally applied to the Petitioners. "It is in the public interest not to perpetuate an unconstitutional application of a statute". See *Martin-Marietta Corp., supra* at 568. As the Sixth Circuit also explained: "[T]he public has no interest in the enforcement of laws in an unconstitutional manner." *Id*. The overall balance of harms and public interest favor issuance of a preliminary injunction.

D. ADDITIONALLY, THE COURT ORDER IN QUESTION VIOLATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION.

Although the likelihood of success on the plaintiffs' Contract Clause claim by itself supports the issuance of preliminary injunctive relief, there is another independent and sufficient reason to restrain the altering and amending of the AFSCME collective bargaining agreement as delineated in the Court's Order. The deprivation of wages, hours, and working conditions, and key benefit terms constitutes an unlawful "taking" within the meaning of the Fifth Amendment's Takings Clause, which applies to the states through the Fourteenth Amendment. *Kelo v. New London*, 545 U.S. 469, 472 n.1 (2005).

The Takings Clause mandates that no "private property shall be taken for public use, without just compensation." U.S. Const. Am. V. This proscription applies to both "physical" takings, such as where the government physically takes possession of or

intrudes upon property, *Tahoe-Sierra pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002), and "regulatory" takings, such as where the government affects or limits property rights to such an extent that the limitation constitutes a taking. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992). Often under the "regulatory" category, contract rights fall within the Takings Clause's protective ambit. As the Supreme Court has explained: "Contract rights are a form of property," and "as such" may not be taken by the State for public use unless "just compensation is paid." See *United States Trust Co., supra*, 431 U.S. at 19 n. 16 (citing cases). *Accord, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

In a regulatory takings case, such as this, the courts assess three key factors to determine whether an unlawful taking has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with distinct government-backed expectations; and (3) the character of the regulation. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005) (citations omitted). In assessing these factors, the court focuses on the relative "severity" of the burden imposed by the government's action. *Id*. at 539. All the factors are satisfied in this case. As explained above, there is no reported case law which addresses a deprivation of mandatory subjects of bargaining, wages, hours, and working conditions, of this magnitude. Unlike some situations where the governmental action interferes with property rights by indirect restriction or regulation, the Court's Order abrogates the collective bargaining agreement directly negotiated between the Petitioner Union and the City of Detroit. Third and finally, the "character" of this Order is a classic *taking* of severe consequences. The Court Order has allowed the City of Detroit to seize large swaths of

the collectively-bargained contract rights and benefits of the Petitioner Union members. As Justice Holmes cautioned, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This is an additional constitutional ground upon which plaintiffs are likely to succeed.

E. MOREOVER, THE COURT ORDER IN QUESTION VIOLATES THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION.

Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property. See *Kampf v Kampf, 237 Mich App 377, 382; 603 NW2d 295 (1999).* Procedural due process generally requires notice, an opportunity to be heard, before an impartial trier of fact, and a written statement of findings. See *Verbison v Auto Club Ins Ass'n, 201 Mich App 635 (1993); In re Nunn, 168 Mich App 203, 208-209 (1988); Traxler v Ford Motor Co, 227 Mich App 276, 288 (1998); Newsome v Batavia Local Sch Dist, 842 F2d 920, 927 (CA 6, 1988).* In other words, procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. See *Reed v Reed, 265 Mich App 131, 159 (2005).* Clearly, in the case at bar, Petitioner and its members were deprived of that opportunity.

In *Farhat v Jopke, 370 F3d 580, 584 (6th Cir 2004)* the Court held that due process requires some sort of pretermination hearing, the formality of which depends

upon the importance of the interest and the nature of the subsequent proceedings. The case of *Cleveland Board of Education v Loudermill, 470 US 532, 546; 105 S Ct 1587; 84 L ed 2d 494 (1985)*, provides that the "public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story". The pretermination hearing "should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id at 545-546*. Obviously in the case at bar, the Petitioner and the employees it represents have been denied their right to due process. Benefits of employment and collective bargaining rights have been unilaterally terminated with, and those that have been affected have not been given the opportunity to be heard.

PRAYER FOR RELIEF

WHEREFORE, AFSCME respectfully request that this Court issue an Order:

(1) Granting its Motion for intervention in accordance with *Federal Rule of Civil Procedure 24*;

(2) Declaring that the Court's Order as delineated herein has impaired the contractual rights of AFSCME in violation of the *Contract Clause of the United States Constitution;*

(3) Declare that the Order as delineated herein constitutes a taking of private property without just compensation in violation of the *Takings Clause of the United States Constitution;*

(4) Declare that the status quo be restored by ordering all actions taken by the Court and parties to this litigation to modify, amend, or terminate AFSCME's collective

bargaining agreement, or to limit its recourse for violation of its collective bargaining agreement void *ab initio;*

(5) Enter a temporary restraining order, preliminary injunction and permanent injunction enjoining all parties to this litigation, and all persons and entities acting in concert with them, from taking any actions which authorizes the modification, amendment, or termination of the AFSCME collective bargaining agreement, or limits its recourse for violation of its collective bargaining agreement;

(6) Awarding AFSCME the attorney fees, costs, and other expenses incurred in prosecuting this lawsuit, as well as such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Date: November 14, 2011

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UNITEED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

Case No. 77-7100

v.

Hon. Sean F. Cox

CITY OF DETROIT, *et al*.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system. A copy of the filing will be served upon all counsel of record.

Date: November 14, 2011

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