V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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| FAIRFAX WORKERS COALTION, et al. | : | |
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| Plaintiffs, | : | |
| | : | |
| v. | : | |
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| FAIRFAX COUNTY, et al. | : | Civil Action No. _____ |
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| Defendants. | : | |
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**PLAINTIFFS' MEMORDUM IN SUPPORT OF THEIR MOTION FOR ENTRY OF A TEMPORARY INJUCTION**

COME NOW the Plaintiffs, the Fairfax Workers Coalition ("FWC") and thirteen Fairfax County Employees (together "Plaintiffs"), by and through undersigned counsel, and hereby move the Court for Entry of a Temporary Injunction, which would enjoin the Defendants, Fairfax County (the "County") and Sarah Miller Espinosa, d/b/a SME Dispute Resolution, LLC as the Labor Relations Administrator ("Espinosa" or "LRA") (together "Defendants") from conducting an election for selecting the collective bargaining representative for the General County bargaining unit, until such future order of this Court.

**STATEMENT OF FACTS**

FWC is a union of Fairfax County Government employees which is independent of any national or international union. Compl. ¶ 1. On October 19, 2021, Fairfax County adopted an ordinance establishing collective bargaining (the "Ordinance"). Compl. ¶ 9, Exhibit A. The Ordinance establishes the LRA, a contractor who is tasked with holding and conducting elections for certification of the exclusive bargaining representative for the collective bargaining units

established in the Ordinance. Compl. ¶ 10. An election for the exclusive bargaining representative is triggered when an employee organization presents a "Showing of Interest" of at least thirty (30%) of the employees in the bargaining unit supporting the organization. *Ordinance* 3-10-9(a); Compl. ¶ 15. When an election is triggered, additional Interested Organizations are permitted to join the election by submitting a Showing of Interest of 30% of the employees in the same bargaining unit, at which point the organization becomes a "intervening organization." Compl. ¶ 15.

Pursuant to the Ordinance, the Showing of Interest must contain "administratively acceptable evidence" to establish the supporting thirty (30%) of the bargaining unit. The Ordinance defines "administratively acceptable evidence" to include:

> [c]urrent employee group membership cards; a current membership roster; evidence of a currently effective dues payment; or other current evidence of bargaining unit employees' desire to be represented by an employee organization for collective bargaining purposes.

*Ordinance* 3-10-8(b). Using this "administratively acceptable evidence," the LRA then makes a determination regarding the sufficiency of the evidence provided by each employee organization.

Following the adoption of the Ordinance, FWC and the Service Employees International Union, Local 512 ("SEIU") established themselves as Interested Organizations for the General County bargaining unit pursuant to the Ordinance. Compl. ¶ 18. On or about December 31, 2024, SEIU filed a petition seeking an election for certification of a General County Collective Bargaining Representative. Compl. ¶ 27. Following the LRA's determination that SEIU's petition met the required showing of interest, FWC filed a petition to be an Intervening Organization. Compl. ¶ 30. FWC's petition did not meet the 30% threshold. Several hundred employee names

included in FWC's petition overlapped with SEIU's petition. Compl. ¶ 33-4. As a result, the LRA refused to count those employees as supporting FWC and instead counted them as supporting SEIU. Compl. ¶ 34. The Ordinance requires the LRA to count an employee who is listed on more than one petition to be a supporter only of the first petition. *Ordinance* § 3-10-9(b). An election for the exclusive bargaining representative is expected to occur on or before March 17, 2025. For the scheduled election, SEIU is the only Interested Organization on the ballot.

## ARGUMENT

### I. THE LEGAL STANDARD FOR ENTRY OF A TEMPORARY INJUNCTION.

The Virginia Supreme Court "has not definitively delineated the factors that guide granting the equitable relief of a temporary injunction, [but] we have recognized that an 'injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Commonwealth v. Sadler Brothers Oil Company*, 2023 WL 9693656 (2023) at 5 (citations omitted). "[W]hether the claim is likely to succeed on the merits is the linchpin of the decision-making process regardless of the specific injunction standard applied." *Id.*

One circuit court has followed the traditional four-part test for an injunction under federal law. "A plaintiff seeking a [temporary] injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Dillon v. Northam*, 105 Va. Cir. 402 at 4 (Va. Beach 2020), *citing Winter v. Nat. Res Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). A temporary injunction "allows a court to preserve the status quo between the parties while litigation is

ongoing." *Id.*, *quoting May v. R.A. Yancey Lumber Corp.,* 297 Va. 1, 18, 822 S.E.2d 358, 367 (2019).

## II. THE COUNTY ORDINANCE IS UNCONSTITUTIONALLY VAGUE IN ITS USE OF THE TERMS OF "ADMINISTRATIVELY ADMISSIBLE EVIDENCE" AND "CURRENT MEMBERS" AND MUST BE STRUCK DOWN.

Plaintiffs are likely to succeed on their claim that the term "administratively acceptable evidence," and the term "current members" as used, are unconstitutionally vague.

When it comes to the proper drafting of local ordinances, "[t]he constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the Due Process Clause." *Tanner v. City of Virginia Beach*, 277 Va. 432, 439 (2009), *citing United States v. Williams,* 553 U.S. 285, … 128 S.Ct. 1830, 1845, 170 L.Ed.2d 650 (2008) (other citations omitted). More specifically,

> The constitutional prohibition against vagueness also protects citizens from the arbitrary and discriminatory enforcement of laws. A vague law invites such disparate treatment by impermissibly delegating policy considerations "'to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

*Id.* at 439, *quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2293, 2294, 33 L.Ed.2d 222 (1972).

In *Tanner*, the plaintiffs challenged the constitutionality of a municipal noise control ordinance. Plaintiffs were the owners of a restaurant and entertainment venue in Virginia Beach. They were cited by local police for violating the city's noise ordinance. One police officer testified that he applied a "reasonable person standard" to determine whether the ordinance was violated, using his "background, experience, knowledge of the dynamics of the moment,

listening, and witnessing." *Id.* at 437. A different officer testified that he enforced the noise ordinance if the noise could be linked to the establishment from a person standing across the street. *Id.* The plaintiffs alleged the vagueness of the ordinance did not provide them with "fair notice" of what conduct was unlawful, inviting "selective prosecution" by granting police "unfettered … discretion." *Id.* at 436. The Court agreed, finding that the nature of "sound" does not lend itself to "ascertainable standards." *Id.* at 440. Terms such a "reasonable person" "leave to a police officer the determination whether persons the police officer considers to be reasonable would be disturbed" by the noise. *Id.* Therefore, "[b]ecause these determinations required by the ordinance can only be made by police officers on a subjective basis, we hold that the language of the ordinance is impermissibly vague." *Id.* at 441.

There are two independent ways in which a statute can be impermissibly vague: (1) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and (2) "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 337 (2010) (citations omitted). Indeed, "[t]he language of a law is unconstitutionally vague if persons of 'common intelligence must necessarily guess at [the] meaning [of the language] and differ as to its application.'" *Tanner*, 277 Va. at 439, quoting *Connally v. Gen. Constr. Co.*, 26 S. Ct. 126, (1926).

The "administratively acceptable evidence" definition in the instant Collective Bargaining Ordinance provides both clarity and the lack thereof. Ordinance at § 3-10-9 (b). "Current group membership cards, a membership roster, and effective dues payments" may seem at first to be rather clear indicators of support (but see *infra*). But "other current evidence of bargaining unit employees' desire to be represented by an employee organization for collective

bargaining purposes" is not so clear. The LRA has no greater ability to ascertain what represents an employee's "desire to be represented" than the Virginia Beach police had to determine reasonable noise levels in *Tanner*. Anything could fall into such a category, and since the Ordinance does not permit the determination of the LRA to be reviewed, *Ordinance* at § 3-10-8 (b), and the LRA Rules do not permit any person or organization even to see the petitions and the administratively acceptable evidence that is submitted, *LRA Rules* at Section II, p.3, there is no way to check what standard, if any, is being applied.

On a more specific note, the Ordinance implements a completely arbitrary standard. The Ordinance provides that a petition for intervention (which would be filed by a second interested organization, seeking access to the ballot established by the first organization's filing) "may not be supported by any employee who already supported the initial petition for an election." *Ordinance* at § 3-10-9(b). At first, that rule may sound reasonable. Someone could be prohibited from supporting one organization and then coming in and support a second, thereby "doubling" their support. But that is not the problem here. The LRA acknowledged that she struck as many as 400 names off the FWC petition for intervention. *See* [redacted] *Declaration* (Exhibit 12). Given that FWC had only submitted 250 names that were not paying FWC members, that meant the LRA had struck several hundred FWC members off the FWC petition. *See* [redacted] *Declaration*. Exhibits 1-11 are declarations from employees who were once SEIU members or on an SEIU list but resigned or tried to get off the list. Taken together, these declarations lead to the inevitable conclusion that SEIU's petition was inflated with several hundred people who do not at present support its petition. Rather, they were former SEIU members. Similarly, FWC lost hundreds of signatures off its petition not due to the employees' intent, but simply because the other

organization submitted a petition first. It is not rational, and indeed it is arbitrary, in such cases to dictate by rule that the person must be counted as supporting one organization and not the other, based not on any evidence of their own intent, but based on which organization gets its petition in the door first. Such a standard is too vague, and indeed is an improper basis for determining employee intent.

Lastly, the application of the Ordinance in the current instance also fails on an "as applied" analysis. In *Vlaming v. West Point School Board,* 302 Va. 504, 576 (2023), the Court discussed an "as applied" constitutional challenge. That is, the Court looked at certain language "not in the abstract," but "as they apply to [the] specific situation." *Id.* In the instant case, the term "current member" may seem clear on its face. But it was not clear in its application. The evidence suggests the SEIU may not have taken people off its membership rolls at their request. *See* [redacted] *Declarations.* These employees at one point, perhaps years ago, were members of SEIU. They resigned their membership. However, they continued to receive member communications from the SEIU. When they learned that the LRA had implied as many as 400 people were listed on both the SEIU and FWC petitions ([redacted] Declaration), they rightly were concerned that they were still presented as "current members" by the SEIU. Yet, because neither the Ordinance nor the LRA Rules permit review of the administratively acceptable evidence, or challenges to it, they have no way to ensure they are not being counted toward the SEIU total. Indeed, the LRA refused to answer these employees' requests to know whether the SEIU claimed them as its supporters. *See Declarations* (Exhibits 1-11). In fact, it appears they ARE being counted as "current members" and therefore supportive of SEIU's petition. As such, the government is associating them with an

organization they have rejected, thus impacting their First Amendment Right to Association. Consequently, even terms like "current membership roster" appear to be unconstitutionally vague in their application in this circumstance.

Juxtaposed to the vague and arbitrary process established by the Ordinance and the LRA Rules, the process used by the Commonwealth of Virginia for nomination of candidates to elected office contains little, if any, room for confusion. Candidates for office circulate petitions that state the office sought by the candidate, the date of the election, and a clear statement that the signatories "do hereby petition the above named individual to become a candidate for the office state above in the [type and date of election]. *See Sample Petition* (Exhibit E to the Complaint). The election officials who review petitions for candidates for office look at the signer's name and address, and ensures the information about the office sought and the date of the election is clear. The function is ministerial and not subject to significant discretion. In the instant case, however, the LRA is given unbridled discretion, which is then not subject to review by anyone.

The result of the application of these vague principles is clear. County employees who were once SEIU members, but are no longer, are counted in the SEIU petition. This is no small matter. The initial filing by the SEIU on December 31, 2024, fell short. *See* [redacted]*' Declaration* (Exhibit 12). A few weeks later, the SEIU met the threshold. It is likely they did not pass the threshold by much, given their initial shortfall. Therefore, if the SEIU petition contained up to 400 signatures of FWC supporters, that inflated total may have made the difference between the SEIU triggering and election and falling short.

The signatures taken from FWC also reduced the FWC total, causing it to fall further short of the threshold required to intervene in the election. The issue here is *not* whether FWC would have qualified for this election if it counted those 400 signatures. It would not have. But if the SEIU was not able to trigger an election now by use of those signatures (as it had not been able to do for the last 2 ½ years), then FWC would have gained additional time to eventually reach the required threshold itself. As such, the application of the Ordinance by the LRA to grant SEIU an election, at the expense of FWC, caused FWC and its supporters to be deprived of their rights.

## III. THE ORDINANCE AS WRITTEN AND IMPLEMENTED VIOLATES THE DUE PROCESS RIGHTS OF THE PLAINTIFFS BY DEPRIVING THEM OF THEIR RIGHTS TO FREE ASSOCIATION UNDER THE FIRST AMENDMENT WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD.

Pursuant to the First Amendment, an individual has the right to "engage in activities protected by the First Amendment or a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

The Ordinance as written and implemented violates the due process rights of the individual Plaintiffs because it deprives them of their right to freely associate under the First Amendment without notice and opportunity to be heard. Under the Constitution of Virginia, "no person shall be deprived of his life, liberty, or property without due process of law." VA CONST. art. 1, § 11. Pursuant to the Due Process clause an individual must be given "some kind of

hearing" prior to be deprived of a significant property interest. Due process is protected when an individual is provided with 'the opportunity to be heard' by requiring, at a minimum, 'some kind of notice' and 'some kind of hearing.'" *Vlaming v. West Point Sch. Bd.*, 302 Va. 504, at *639 (2023) (Mann, J., concurring); *Fairfax Cnty. Sch. Bd. v. S.C. by Cole*, 297 Va. 363, 376 (2019); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 533 (1985).

In *Loudermill,* several terminated school district employees brought actions against the board of education for failing to provide terminated employees with an opportunity to respond to the charges against them prior to their removal. The court concluded that an individual must be given an "some kind of hearing" before they are deprived of any significant property interest. As such, employees who have a constitutionally protected property interest in their employment must be given a hearing before they are permitted to be discharged. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 533 (1985).

As government employees of Fairfax County, through the Virginia statute giving localities the right to establish collective bargaining for their employees, and current ordinance which did so establish, Fairfax County employees were granted a property interest in their right to support and vote for a collective bargaining organization of their choice. There is significant evidence that that right was taken away by the LRA without notice or opportunity to be heard. Plaintiffs [redacted] all, to varying degrees, did not wish to support the SEIU in this collective bargaining petition drive. *See Declarations* as Exhibits 1-11. Most had left SEIU previously and now support FWC. It appears, however, that their right to support FWC, as well as similar rights of potentially several hundred other employees were taken away. The LRA admitted that she had

rejected over 400 employees on the FWC petition for collective bargaining representative. *See* [redacted] *Declaration* (Exhibit 12). FWC submitted 900 names in its petition, including about 650 through member cards on a payroll list. *Id.* That means only 250 non-members were submitted on the FWC petition. Consequently, at a minimum 150 members must have been rejected by the LRA if all of the 250 non-members were rejected. Likely, the number was higher. The most plausible explanation for this rejection was Ordinance Section 3-10-9(b), which states that "a petition for intervention may not be supported by any employee who already supported the initial petition for an election." *See Ordinance*, Exhibit A to the Complaint. In other words, current FWC members were not counted as FWC supporters because of their *past* affiliation with SEIU.

It is completely arbitrary to institute a rule that says if an employee shows up on two petitions, the *only* determining factor is which organization filed its petitions first. That rule gives no credence to the employees' intent. In fact, with eleven declarations of employees stating that they did not support SEIU, it appears their right to support FWC was taken away without notice. Several of those submitting declaration stated that they tried to find out if their own name was on the SEIU petition and that request was denied. These employees were denied both notice (being told they were on a petition) and the right to be heard (the right to object to inclusion on the SEIU list, perhaps by showing that they had cancelled their membership).

In the instant case, if and when the individual plaintiffs were rejected as part of the FWC petition, they should have been so notified and given an opportunity to respond. Such opportunity would have provided them with the ability to demonstrate that they had terminated their SEIU membership and should not have been included on the SEIU petition, and instead should have been counted on the FWC petition. Instead, when they made inquiries regarding

which petition their signature counted toward, the LRA declined to inform them, citing the "confidentiality" of the petitions as the reason. The number of names rejected from the FWC petition creates the reasonable inference that some, and perhaps all, of the plaintiffs, and many others, were not counted on the petition of their choice. The refusal to hear them out deprived them of their First Amendment right to associate with the Interested Organization of their choice.

The fact that the FWC did not have sufficient signatures, even with the inclusion of all their disputed members, to gain ballot access, is not determinative of the constitutional issue. In fact, it is not relevant at all. The relevant question is whether SEIU would have made the 30% threshold without the inclusion of the disputed employees. We think they would not have, given that SEIU's initial petition submission was short of the required signatures. *See* [redacted] *Declaration*, Exh. 12. In that event, FWC would still be "in the game" to continue to grow its support and eventually file its own petition once it hit the 30% threshold. Given that the Ordinance was passed in 2021 and the LRA Rules were drafted in 2022, it took SEIU three years to submit its petition, and it may have run short. In another year or two, FWC may have had the necessary support. Its members had the right to try.

## IV. A TEMPORARY INJUNCTION IS NECESSARY BECAUSE THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT IT, a BALANCING OF THE EQUITIES FAVOR AN INJUNCTION, AND THE PUBLIC INTEREST FAVORS A DELAY IN THE ELECTION UNTIL THE LEGAL ISSUES ARE RESOLVED.

In addition to Plaintiffs' likelihood of success on the merits, the other principles for consideration favor the Plaintiffs' application as well.

The Plaintiffs will suffer immediate and irreparable harm absent preliminary relief. In determining if a party will suffer irreparable harm, "the irreparable injury analyzed is the harm

without preliminary relief…prior to the trial on the merits." *Freemason St. Area Ass'n, Inc. v. City of Norfolk*, 100 Va. Cir. 172, at *10 (2018). Once the election for a collective bargaining representative is held, it cannot be undone. Plaintiffs will have no avenue for redress if they ultimately prevail in this matter, because the election will be over. To "undo" the election, the Court would have to take away its results and perhaps nullify a collective bargaining agreement between the representative organization and the County, which would have broad, prohibitive ramifications. The reality is there would be no practical way to provide relief to the Plaintiffs months from now if a temporary injunction is denied but the Plaintiffs eventually succeed on the merits.

The balancing of the equities also favors Plaintiffs. Plaintiffs seek a temporary injunction enjoining the upcoming March 2025 election for an exclusive bargaining representative. Such an injunction will protect Plaintiffs' ability to have their claims heard and resolved before the election. Defendants will suffer no comparable harm. Even after a delay in the election for couple months, an election for exclusive bargaining agent held in June would still allow the winner to begin collective bargaining with the County by the July timeframe anticipated by the Ordinance. Under the Ordinance, collective bargaining must begin by July 1 and conclude by October 15, in order to provide guidance for the county budget to be passed for the following fiscal year. *Ordinance*, §3-10-12. Even if that deadline is not met, there is only minimal harm. The organizations just wait until the next year. The Ordinance was passed in October 2021. The LRA Rules were adopted on August 30, 2022. An Interested Organization could have submitted its petition for election in the Spring of 2023 or the Spring of 2024. None did, because they did not have the signatures. Having waited three years, these organizations can wait one more year, if

necessary, to ensure the constitutional rights of employees and employee organizations are protected. Accordingly, the balance of equities favors granting the requested temporary injunction.

Plaintiffs have shown "that the public interest advanced by granting the motion for temporary injunction outweighs the public interest advanced by denying the motion." *Dillon v. Northam*, 105 Va. Cir. 402, at *9 (2020). "[I]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* The public benefits by the protection of constitutional rights. The public, having had its governmental leaders at the state and local level pass statutes and ordinances providing for collective bargaining for county employees, will be best served by making sure the process is conducted appropriately. A one year delay, after three years of delay by interested organizations, is a small price to pay to meet the large goal of protecting constitutional rights and having a fair and just process.

**CONCLUSION**

For the forgoing reasons, FWC and the aforementioned Fairfax County Employees respectfully request that the Court grant their Motion for Temporary Injunction and enter the requested order enjoining the Defendants from conducting an election for collective bargaining representative for the General County bargaining unit, until such further order of this Court.

Dated March 5, 2025

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I served a copy of the foregoing Memorandum in Support of Motion for Entry of a Temporary Injunction via email, and by service through private process server, this 5th day of March, 2025 to:

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