In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1708

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 365, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF EAST CHICAGO and ANTHONY COPELAND,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 21-cv-00154 — **Philip P. Simon**, *Judge*.

ARGUED NOVEMBER 7, 2022 — DECIDED DECEMBER 21, 2022

Before FLAUM, EASTERBROOK, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. The plaintiffs in this case are thirty-eight firefighters and their union, International Association of Fire Fighters, Local 365 (collectively, the "Fire Fighters"). They sued the City of East Chicago, Mayor Anthony Copeland, and former East Chicago Fire Chief Anthony Serna, alleging that the defendants implemented an

undesirable work schedule in retaliation for their protected First Amendment activity. The Fire Fighters filed a motion for a preliminary injunction, which the district court granted after full briefing and a two-day hearing. In a combined opinion and order, the district court ordered the City to "immediately begin the process of reinstating the" old work schedule and gave the City until April 18, 2022, to implement the change.

The City and Copeland appealed the decision.[1] On appeal, they challenge several of the district court's findings of fact, contend that the court applied improper preliminary injunction standards, and argue that the court failed to consider certain state statutes giving the mayor and fire chief control over the Fire Fighters' work schedules. For the reasons below, we affirm.

I. Background

A. Factual History

Anthony Copeland, a former firefighter of twenty-six years, was elected mayor of the City of East Chicago in 2010. He ran on a campaign to reduce corruption, obtain financial stability, and increase the quality of life in the City. Shortly after he was elected, Copeland implemented certain cost-cutting measures to address the City's deficit. One such effort was freezing the salaries and benefits of East Chicago firefighters, including abolishing terminal leave, freezing longevity pay and grade pay, and eliminating the payout of leave banks for firefighters hired after 2010.

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[1] Because Serna did not join the appeal, we use the term "appellants" when referring to the City and Copeland and the term "defendants" when referring to the City, Copeland, and Serna.

In 2019, Copeland ran for reelection. The Fire Fighter's political action committee actively and publicly endorsed Copeland's opponent for mayor, as well as several candidates who opposed Copeland's policies for positions on East Chicago's legislative body, the Common Council. Copeland was reelected but so were six of the Common Council candidates who the Fire Fighters endorsed. Several firefighters protested at Copeland's inauguration, which Copeland found to be "disrespectful."

In August of that year, Union President David Mata and the Common Council worked together to draft a salary ordinance that would return some of the benefits that Copeland froze in 2010. The Council read the draft salary ordinance at its September 2019 public safety meeting for discussion and amendment. After another draft, the public safety committee passed the ordinance by a vote of 7-0. The Council later passed the ordinance by a 5-4 vote, but Copeland vetoed the ordinance. The Council was unable to override the veto, and the ordinance was never passed.

Sometime after the September 2019 public safety meeting, Copeland directed then-Fire Chief Anthony Serna to develop a new schedule for the East Chicago Fire Department. At the time, the Fire Department utilized the same work schedule used by most other fire departments in the country—the 24/48 work schedule, whereby a firefighter would be on-duty for twenty-four hours and then off-duty for the next forty-eight hours. Serna proposed two alternative work schedules to Copeland: (1) an 8/24 schedule, whereby a firefighter would work eight hours and then be off twenty-four hours and (2) a 12/36 schedule, whereby a firefighter would work twelve

hours and then be off thirty-six hours. Copeland decided to implement the 8/24 work schedule.

No other fire department in the country has adopted the 8/24 schedule. Unlike the 24/48 system, where the firefighters are on-duty the same hours every day that they work, the 8/24 schedule assigns the firefighters to different shifts every day. A firefighter could, for example, work the day shift on one day, the night shift the next day, and the graveyard shift the day after. This rotating schedule wreaked havoc on the personal lives and wellbeing of the firefighters, making it difficult—if not impossible—for the firefighters to manage their children's regular schedules and establish consistent sleep schedules. As a result, the firefighters experienced weight gain, lack of sleep, irritability, and trouble concentrating.

The Union soon learned of the plan to modify the work schedule. On November 2, 2019, Serna and Mata met at a local Burger King to discuss the change. Mata secretly wore a wire to the meeting and recorded the conversation.

During the discussion, Serna defended the decision to implement the 8/24 work schedule. He explained that the schedule change was in response to the Common Council's and Union's 2019 ordinance to unfreeze the firefighters' salary and benefits:

> The 8-hour schedule and … all those moves are a reaction to that original ordinance. So, to protect … the public's interest … moves that we are gonna make now, in anticipation of that's what the firefighters' union and council is gonna do. They didn't get to do it this time. When the opportunity comes again, it's gonna happen. And so, these moves are in reaction to

> what we saw. It's like a card game—poker. You showed your hand. So we know what the hand is. So in anticipation of what's coming down the road, that's what these moves are right here.

Serna went on: "You can call it retaliation. And I'm gonna call it—we know what it is you want, what you're going for so we have to prepare for that." He again brought up the 2019 ordinance, emphasizing that "[a]ll this is reactionary to the original ordinance. Knowing what it is you're going for we have to be proactive instead of waiting til we can't do anything about it. We are being proactive." He then stated that he and Copeland believed the Fire Fighters were responsible for the terms of the ordinance: "You're in control of what [Common Council member Robert Garcia] presents. You're in control of that. He gave you a blank sheet. I know this. … Everybody knows it's the firemen who wrote that. What I'm saying is that original ordinance is what fucked this all up."

On December 2, 2019, Serna and Mata met again, along with then-Deputy Fire Chief Marc Escobedo, then-Union Vice President Manual Paredes, and then-Union Secretary Mike Widemann. At the meeting, the parties discussed a draft memorandum of understanding, whereby the defendants agreed to give up the proposed change to the 8/24 work schedule in exchange for the Union's agreement to give up its right to lobby the Common Council. The document stated: "The Local agrees that it will not meet with or have any discussion with any member of the East Chicago Common Council in regards to the council's pursuit of any ordinance concerning the East Chicago Fire Department." Copeland and Serna took no part in drafting the memorandum of

understanding; rather, it was Widemann who wrote the terms of the agreement and sent the draft to Mata.

On December 3, 2019, the Union rejected the memorandum of understanding. The very next day, Serna issued three memoranda, which, among other things, discontinued the 24/48 schedule and implemented the 8/24 schedule. Over the next several days, Copeland posted two Facebook posts discussing the change. He insisted in the first post that the new work schedule was "not about retaliation [but] about efficiency." He wrote in the second post that the Union's refusal to sign the memorandum of understanding "le[ft] us with no choice but to move on with the schedule change."

Following the schedule change, the Union immediately began to lobby the Common Council to pass an ordinance reinstating the old policy. On December 23, 2019, the Common Council passed Ordinance 19-0029, which set the firefighters' work schedule back to the 24/48 schedule. Copeland vetoed the ordinance, but the Council passed the ordinance over the veto. Copeland then filed suit against the Common Council, alleging that Ordinance 19-0029 violated his executive power under Indiana law. On March 4, 2021, the Lake County Superior Court issued a decision agreeing with Copeland and struck down the ordinance—leaving the 8/24 schedule in effect.

B. Procedural History

One month after the Lake County Superior Court decision, the Fire Fighters filed this suit, alleging that the defendants' implementation of the 8/24 work schedule was retaliation for the Fire Fighters' exercise of their First Amendment rights. The Fire Fighters filed a motion for a preliminary injunction

on July 30, 2021, requesting that the district court order the defendants to revert to the 24/48 schedule during the pendency of the case. The parties submitted briefing and conducted limited discovery on the motion.

On October 7–8, 2021, the district court held a two-day preliminary injunction hearing where it heard testimony from Mata, Peredes, firefighter Angel Gilarski, and retired Assistant Chief Carlos Aburto. Mata testified regarding the effects of the new schedule on fire department staffing and workload. He stated that, following the implementation of the 8/24 schedule, firefighters quit and took off work far more frequently than under the previous schedule. The overall number of line firefighters decreased from sixty-three to forty-four, which increased the workload for the remaining firefighters. According to Mata, there were only fourteen firefighters available to man the fire engines, whereas, before the schedule change, the minimum number of firefighters needed to staff the engines was seventeen. Because of this staffing shortage, the City removed one fire engine.

Mata also described the detrimental effects the new schedule had on the firefighters' personal lives and wellbeing. Under the new policy, firefighters were no longer permitted to trade shifts, making it difficult for them to arrange childcare. Additionally, the irregular shift schedule disrupted their ability to maintain a regular sleep schedule, and this lack of sleep negatively affected their ability to perform their jobs.

Next, Gilarski testified as to how the new schedule affected her personally. She stated that her irregular work schedule caused sleep deprivation and made it difficult for her to manage her child's routine. Gilarski also explained that she and the Union feared further retaliation from the

defendants and that, as a result, the Union felt the need to scrutinize every decision it made.

Peredes echoed the concerns of Mata and Gilarski. He told the court that the 8/24 work schedule negatively impacted his sleep and mental health and that he began seeing a therapist to help with these problems. Peredes eventually resigned from the East Chicago Fire Department due to the new schedule and now works for the Hobart Fire Department.

Lastly, Aburto testified regarding the benefits of the old 24/48 work schedule. He explained that the old schedule allowed the firefighters to work and live together for twenty-four hours at a time with no distractions. This allowed the crew to learn each firefighter's respective strength and weakness and figure out which role each person should play. In contrast, Aburto stated, the 8/24 work schedule does not give the firefighters enough time together to learn the dynamics of each particular crew or build comradery. Aburto also reiterated the personal problems that the others discussed: he testified that the new schedule made it difficult for firefighters to care for their kids or elderly parents or meet other family responsibilities.

On March 28, 2022, the district court issued a combined opinion and order granting the Fire Fighters' motion for a preliminary injunction.[2] It noted that, to be entitled to a

[2] Typically, we require that a district court issuing a preliminary injunction file a "separate document setting forth the terms of such an injunction." *MillerCoors LLC v. Anheuser-Busch Cos.*, 940 F.3d 922, 922 (7th Cir. 2019) (citation omitted); *see also* Fed. R. Civ. P. 65(d)(1). The district court did not do so in this case, instead issuing a single opinion and order containing both the injunction and its reasoning for its decision. Nonetheless, the district court's opinion contains enough content to permit

preliminary injunction, the Fire Fighters had to meet four requirements: (1) they were likely to succeed on the merits of their First Amendment retaliation claim; (2) they would suffer irreparable harm without an injunction; (3) the balance of the equities tipped in their favor; and (4) an injunction was in the public interest. On the first element, the court found that the Fire Fighters' lobbying with the Common Council constituted protected First Amendment activity and that this lobbying was a motivating factor in the implementation of the 8/24 work schedule. The court further found that the defendants' implementation of the 8/24 work schedule was likely to deter free speech and that, under our caselaw, this satisfied the irreparable harm element. Additionally, the court found that, without an injunction, the firefighters working under the schedule would continue to experience physical and psychological harms like sleep deprivation, weight gain, and irritability. Comparing this harm with the alleged cost-saving benefits of the 8/24 schedule, the court determined that the balance of the equities tipped in favor of the Fire Fighters and the injunction was in the public interest.

II. Analysis

Determination of whether a movant is entitled to a preliminary injunction involves a multi-step inquiry. "As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has 'no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief is denied." *Cassell v. Snyders*,

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effective enforcement. *See Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 676 (7th Cir. 2019). Accordingly, we have appellate jurisdiction.

990 F.3d 539, 544–45 (7th Cir. 2021) (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). If the movant makes this showing, the district court must then consider two additional factors: "the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied" and "the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Id.* at 545 (quoting *Abbott Labs.*, 971 F.2d at 11–12). The district court must equitably weigh these four factors together to determine if a preliminary injunction is warranted. *Id.*

When evaluating a district court's grant of a preliminary injunction, we review its "findings of fact for clear error, its legal conclusions *de novo*, and its balancing of the factors for a preliminary injunction for abuse of discretion." *Doe v. Univ. of S. Ind.*, 43 F.4th 784, 791 (7th Cir. 2022) (citing *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016)). The appellants argue that the court erred in its decision to issue a preliminary injunction because the Fire Fighters failed to satisfy the first three elements for a preliminary injunction. Specifically, they argue that (1) the district court clearly erred in making several factual determinations regarding whether the Fire Fighters were likely to succeed on the merits; (2) it applied an incorrect standard in determining that the Fire Fighters would suffer irreparable harm without an injunction; and (3) it failed to consider relevant state law when balancing the potential harm to the parties. For the reasons below, these arguments are unpersuasive.

A. Likelihood of Success on the Merits

"[G]overnment employees do not sign away their free speech rights when answering the call to public service."

Kingman v. Frederickson, 40 F.4th 597, 601 (7th Cir. 2022). To make out a prima facie case of First Amendment retaliation, the plaintiff must "show that: (1) he engaged in constitutionally protected speech; (2) he suffered a deprivation likely to deter him from exercising his First Amendment rights; and (3) his speech was a motivating factor in his employer's adverse action against him." *Cage v. Harper*, 42 F.4th 734, 741 (7th Cir. 2022). Once the plaintiff makes that showing, "the burden shifts to the government employer to produce evidence that it would have [taken the disputed action] even in the absence of the protected speech." *Kingman*, 40 F.4th at 601. "If the employer carries that burden, a plaintiff must persuade the factfinder that the defendant's proffered reasons were pretextual." *Id.* at 602.

The district court found that the Fire Fighters were likely to succeed on the merits of their First Amendment retaliation claim. On the first element, it found that the Fire Fighters' communications with the Common Council constituted protected First Amendment activity—rejecting the defendants' contention that the Fire Fighters' lobbying concerned only their own private interests. Turning to the second element, the district court found that the Fire Fighters' political speech was a motivating factor in the schedule change. It concluded that certain of Serna's and Copeland's statements supported its conclusion and that, contrary to the defendants' representations, there was no evidence suggesting that the 8/24 work schedule was expected to result in substantial cost-savings for the City. Lastly, the district court found—based on Gilarski's testimony from the preliminary injunction hearing—that the change in schedule was likely to deter the Fire Fighters from exercising their First Amendment rights in the future.

The appellants challenge the court's conclusion that the Fire Fighters' speech was a motivating factor in the schedule change. In doing so, they take issue with three of the district court's factual findings: (1) its finding that Serna told Mata at the November 2, 2019, meeting at the local Burger King that the 8/24 work schedule was implemented as retaliation for the Fire Fighters' political activity; (2) its finding that Copeland implemented the 8/24 work schedule in response to the Fire Fighters' refusal to sign the memorandum of understanding; and (3) its finding that there was no evidence of any cost-savings due to the implementation of the 8/24 schedule.

We disagree on all fronts. Our review of a district court's findings of fact is for clear error, a standard that is "highly deferential" to the district court. *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1070 (7th Cir. 2013). We will find clear error only where "after considering all the evidence, we cannot avoid or ignore a definite and firm conviction that a mistake has been made." *United States v. Mercado*, 53 F.4th 1071, 1085 (7th Cir. 2022). That is not the case here. There is sufficient evidence in the record, from the parties' filings and the two-day hearing, to support the district court's findings.

1. Serna's Statements at the Burger King Meeting

The district court found that Serna's statements at the November 2, 2019, Burger King meeting suggested that the defendants were motivated by the Fire Fighters' lobbying activity to implement the new work schedule. At the meeting, Serna told Mata:

> The 8-hour schedule and . . . all those moves are a reaction to that original ordinance. So, to protect . . . the public's interest . . . moves that we are gonna make

> now, in anticipation of that's what the firefighters' union and council is gonna do. They didn't get to do it this time. When the opportunity comes again, it's gonna happen. And so, these moves are in reaction to what we saw. It's like a card game—poker. You showed your hand. So we know what the hand is. So in anticipation of what's coming down the road, that's what these moves are right here.

Serna also stated: "You can call it retaliation. And I'm gonna call it: We know what it is you want—what you're going for—so we have to prepare for that." The district court did not clearly err in determining that these comments support that the defendants' actions were in response to the Fire Fighters' work with the Common Council.

The appellants' arguments do not warrant a different conclusion. They first contend that the district court clearly erred when it found that Serna told Mata that "it was payback time." But the appellants misread the district court's opinion. Although the opinion states that "Chief Serna told Mata it was payback time," the court did not find that Serna used the specific phrase "payback time" at the meeting. Rather, the district court evaluated all of Serna's statements at the meeting and concluded that the overall takeaway of the conversation was that the schedule change was "payback" for the ordinance. This much is clear from the court's use of quotation marks in its opinion when referring to Serna's exact statements. The phrase payback time was not in quotes because it was merely a summary of Serna's statements.

The appellants also suggest that the district court clearly erred because Serna never stated that the schedule change was retaliation during the meeting. This argument holds no

water. There is no magic language requirement for First Amendment retaliation claims. Even without using the term "retaliation," Serna suggested with thinly veiled euphemisms that the defendants retaliated against the Fire Fighters. He stated that "[t]he 8-hour schedule [was] a *reaction* to that original ordinance"; that "[a]ll this is *reactionary* to the original ordinance"; and that "these moves [were] in *reaction* to what we saw." He even told Mata that he "c[ould] call it retaliation."

Next, the appellants argue that the district court failed to properly consider certain of Serna's statements that, they contend, demonstrate that the new work schedule was not motivated by the Fire Fighters' lobbying, but rather by the 2019 ordinance and the desire to protect the public interest. The appellants, however, identify statements that make up only a small portion of the conversation between Serna and Mata. And when heard in context, they further support the district court's conclusion that the Fire Fighters' lobbying efforts were a motivating factor in the implementation of the 8/24 work schedule. For example, the appellants maintain that they implemented the schedule change because of the 2019 ordinance, but Serna made it clear that he understood the ordinance to be a direct result of the Fire Fighters' political activity:

> **Serna**: You're in control of what [Robert Garcia] presents. You're in control of that. He gave you a blank sheet. I know this. Okay, but whatever.
>
> **Mata**: No.
>
> **Serna**: So he wrote all that? He came up with that. You're telling me Robert came up with all that? You know he didn't. I know, everybody knows it's the

> firemen who wrote that. What I'm saying is that original ordinance is what fucked this all up.

Given the conversation as a whole, the district court did not clearly err in finding that Serna's statements supported the conclusion that the Fire Fighter's lobbying efforts were a motivating factor in the implementation of the 8/24 work schedule.

Lastly, the appellants argue that the district court's findings are somehow clearly erroneous because they are "based on the audio recording the Fire Fighters did not even want to produce." Whether and why the Fire Fighters delayed in producing the recording, however, has no effect on the content of that recording.[3] The district court was able to evaluate Serna's statements for itself, and, as previously discussed, it did not clearly err in doing so.

2. Memorandum of Understanding

The district court found that the discussions and events surrounding the memorandum of understanding supported the Fire Fighters' position. According to Mata's and Paredes's testimony during the preliminary injunction hearing, Serna initiated the idea of a memorandum of understanding at the December 2 meeting. Mata further testified that Serna reached out to him after the meeting asking him for the signed memorandum of understanding. And *the day after* the Union declined to sign the memorandum of understanding, Serna issued three memoranda implementing certain policy changes, including the schedule change. Copeland also made two

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[3] The appellants do not suggest that there was a discovery violation that should have resulted in the exclusion of the recording.

Facebook posts within a few days of the Union's decision not to sign the memorandum of understanding. In his second post, he stated that the Union's refusal to sign the memorandum of understanding "le[ft] us with no choice but to move on with the schedule change."

The appellants contend that the district court's finding was in error because Widemann, the secretary for the Union, wrote the terms of the memorandum of understanding and Copeland "played no role in drafting" the agreement. This argument is misguided, however, because the district court did not base its findings on a mistaken belief that Copeland and Serna were responsible for drafting the memorandum of understanding. Instead, it found that their statements suggested that the implementation of the 8/24 schedule was a response to the Fire Fighters' refusal to sign the document. The fact that Widemann drafted the terms of the document does not undermine this finding.

Next, the appellants dispute the Fire Fighters' characterization of the evidence and contend that the record forecloses a finding that they imposed the schedule change because of the Fire Fighters' refusal to sign the memorandum of understanding. Serna told Mata about the schedule change a month before the December 2 meeting, and according to the appellants, this timing suggests that the decision to implement the 8/24 work schedule had been made before the memorandum of understanding discussions. The appellants further contend that the timing of the implementation of the policy change (December 4) was not because of the rejection of the memorandum of understanding, but rather because the City sets vacation time and other paid time off at the end of the year.

These arguments do not demonstrate that the district court's findings were clearly erroneous. Serna may have informed Mata about the schedule change a month earlier, but this change was not implemented until the day after the Union declined to sign the memorandum of understanding. And, even if we accept that the City sets vacation time and other paid time off at the end of the year, this does not explain why the defendants decided to implement the schedule change in early December, merely one day after the Union rejected the memorandum of understanding. It was reasonable for the district court to infer from this timing that the Union's rejection of the agreement motivated the implementation of the 8/24 policy. *See Kingman*, 40 F.4th at 601 (noting that circumstantial evidence includes "the timing of events"). Additionally supporting the district court's finding is Copeland's second Facebook post, in which he stated that the Union's refusal to sign the agreement "le[ft] us with no choice but to move on with the schedule change."

Finally, the appellants argue that the district court clearly erred because Copeland testified during the preliminary injunction hearing that he did not retaliate against the Union because it would not sign the memorandum of understanding. They also quote Copeland's first Facebook post where he states, "It's not about retaliation. It's about efficiency." But these are self-interested statements made by a defendant whose credibility the district court was entitled to assess. After considering the record as a whole, we cannot say that the district court clearly erred in weighing the other evidence above these statements.

3. Alleged Cost-Savings of the 8/24 Work Schedule

The appellants next claim that the district court failed to address Serna's testimony regarding the cost-saving benefits of the schedule change, estimating that the new schedule "[wa]s saving probably about $200,000." The district court did address this evidence, however; it simply did not find the testimony persuasive. In its opinion, the court acknowledged what it referred to as the "conclusory statements from Chief Serna," but it emphasized that Serna never talked to the finance director, city comptroller, or anyone else about the cost-savings of the 8/24 work schedule. We agree. What matters is whether, at the time the schedule was enacted, the defendants believed it would save money. The defendants' inability to produce such evidence ends the inquiry.

* * *

For the reasons above, the district court did not clearly err in finding that the defendants' implementation of the 8/24 schedule was motivated by the Fire Fighters' lobbying activity. It therefore did not err in concluding that the Fire Fighters were likely to succeed on the merits of their First Amendment retaliation claim.

Before moving to the appellants' next argument, we pause to emphasize one thing: that is, what makes the Fire Fighters' claim likely to succeed on the merits here is unrelated to the fact that the defendants rejected the Fire Fighters' lobbying campaign. We recognize that "[p]olitical life has winners and losers," and we do not suggest that "[t]he first amendment … ensure[s] that every lobbying campaign will prevail." *Kelsey v. Sheehan*, No. 01-1718, 2001 WL 1173166, at *1 (7th Cir. Oct. 2, 2001). An elected official who disagrees with a citizen or

organization concerning the proper course of action is well within his rights to act against that citizen's or organization's wishes. Accordingly, if the defendants had adopted the 8/24 policy for cost-cutting reasons as they claim, such a decision would have been entirely proper. But the fact that the defendants could have adopted the 8/24 policy in *some* circumstance does not mean that they were permitted to do so in *this* circumstance. *See Spiegla v. Hull*, 371 F.3d 928, 941 (7th Cir. 2004), *vacated on other grounds*, 481 F.3d 961 (7th Cir. 2007).

B. Irreparable Harm

In addition to showing a likelihood of success on the merits, plaintiffs seeking a preliminary injunction must also show that, absent an injunction, they will suffer irreparable harm. The district court found that the Fire Fighters met this burden, crediting Gilarski's testimony that she and other members of the Union were deterred from exercising their First Amendment rights following the schedule change. Independent of the First Amendment harm, the district court also found that the Fire Fighters suffered irreparable harm in the form of physical and psychological injury from the imposed schedule.

On appeal, the appellants dispute both findings. We address each in turn.

1. First Amendment Harm

Under Seventh Circuit law, irreparable harm is presumed in First Amendment cases. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). The district court concluded that the defendants punished the Fire Fighters for exercising their First Amendment rights and that these injuries constituted irreparable harms satisfying the preliminary injunction requirement. The appellants contend that the district court

applied "an incorrect preliminary injunction standard" and that this presumption does not apply because "the Fire Fighters' speech was not deterred." In support, they point to testimony from the Fire Fighters' witnesses, admitting that they engaged in various forms of political activity following the schedule change.

We disagree. The record supports the district court's finding that the implementation of the 8/24 work schedule deterred at least some political activity. During the preliminary injunction hearing, Gilarski testified that, after the schedule change, she and others were afraid to engage in any kind of politics—including posting on social media, talking to the newspaper, or lobbying the Common Council—for fear of another adverse policy change. She stated that the Fire Fighters began to "scrutinize" "[e]very decision that [they] ma[d]e as a union," asking whether such action would be subject to retaliation. And because of this fear of retaliation, Gilarski testified, the Union decided not to engage in certain actions or speak out about certain issues. The district court found this testimony credible, and it is sufficient to show the Fire Fighters were deterred from exercising their First Amendment rights. *See Spiegla*, 371 F.3d at 941 (holding that an "unfavorable change in schedule" could be an adverse action sufficient to deter the exercise of free speech).

That the Fire Fighters continued to engage in *some* political activity does not foreclose their contention that they were deterred from engaging in other activities. A loss is a loss: the Fire Fighters need not show total deprivation to meet the irreparable harm element for a preliminary injunction. As the Supreme Court has stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably

constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The appellants also contend, citing this Court's decision in *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983), that the Fire Fighters' eighteen-month delay in applying for a preliminary injunction dooms their motion. In *Shaffer*, we affirmed the district court's refusal to grant the plaintiff injunctive relief, in part, because she "wait[ed] two months after the … denial of class action to make the request." *Id.* The appellants similarly contend the Fire Fighters' "delay is inconsistent with a claim of irreparable injury." *Id.*

But that is not the whole story. Immediately after Serna announced the schedule change, the Fire Fighters began to lobby the Common Council to pass an ordinance to reinstate the 24/48 work schedule, as well as meet with Copeland to negotiate the issue. During the time between the implementation of the new schedule and the filing of this suit, the Fire Fighters succeeded in getting the ordinance drafted, passed, and passed again over Copeland's veto. Their efforts were ultimately undone when the Lake County Circuit Court struck down the ordinance. Within a month of that decision, however, the Fire Fighters filed this suit.

The Fire Fighters' actions do not suggest lack of irreparable harm. As the district court acknowledged, "the firefighters can [hardly] be criticized for first trying to negotiate their way out of this onerous schedule before resorting to the courts for relief." Although the Fire Fighters did not immediately file suit, they swiftly worked—on multiple fronts—to change their work schedules back to the 24/48 system. These actions signaled to the defendants that the Fire Fighters were dissatisfied with the change and would work to undo it. *See Ty, Inc.*

v. Jones Grp., Inc., 237 F.3d 891, 903 (7th Cir. 2001) ("Whether the defendant has been lulled into a false sense of security or had acted in reliance on the plaintiff's delay influences whether we will find that a plaintiff's decision to delay in moving for a preliminary injunction is acceptable or not.") (citation and internal quotation marks omitted). These actions also distinguish this case from *Shaffer*, where the plaintiff waited until two months after the denial of class certification to file her motion for a preliminary injunction, doing nothing in the meantime to resolve her problem. 721 F.2d at 1123.

2. Physical and Psychological Harms

Independent of the First Amendment harms, the district court found that the Fire Fighters were likely to suffer other irreparable harms without an injunction. Specifically, it found that the 8/24 work schedule "had deleterious effect[s]" on the Fire Fighters, resulting in sleep problems, "weight gain, trouble concentrating, … irritability," and difficulty obtaining reliable childcare or eldercare. The appellants fail to address this point in their opening brief. And although they discuss the issue in their reply brief, by that point, their arguments are waived. *See Griffin v. Bell*, 694 F.3d 817, 822 (7th Cir. 2012) ("[A]rguments raised for the first time in a reply brief are deemed waived.").

In any event, the district court did not clearly err in finding that the Fire Fighters suffered physical and psychological harm from the schedule change. During the preliminary injunction hearing, several of the Fire Fighters' witnesses credibly testified regarding the harms they experienced as a result of the new schedule. Mata, Gilarksi, and Peredes testified that the 8/24 schedule hindered the firefighters' ability to maintain a regular sleep schedule, negatively affecting their work

performance and mental health. In fact, Peredes told the court that, due to these mental health issues, he eventually resigned from the East Chicago Fire Department and now works for a different fire department. Additionally, Mata, Gilarksi, and Aburto explained that the irregular schedule made it difficult to satisfy familial obligations, for example, managing the schedules of their children or elderly parents.

The appellants describe these harms as "speculative at best" and criticize cherry-picked testimony from the Fire Fighters' witnesses in an attempt to undermine their claimed injuries. The appellants argue, for example, that Gilarski's alleged harms could not have been serious because she did not seek treatment for any physical or psychological issues. But seeking treatment is not a mandatory condition to establish harm, and the district court found that Gilarski credibly testified as to the numerous ways the 8/24 work schedule negatively affected her personally and professionally. Although the appellants also point out that Mata testified that he was still able to find times to sleep during the 8/24 work schedule, Mata stated that he was unable to establish a *consistent* sleep schedule because of the unpredictability of his shifts under the new policy. To this end, Mata stated that, under the 8/24 schedule, his sleep pattern "became irregular" and that he didn't "have a set time" to "go to bed because [he was] working a different shift every day."

C. Balancing of the Equities

The appellants' last argument is that the district court erred when it ignored relevant Indiana statutes granting Copeland and Serna the exclusive right to set work schedules for the East Chicago Fire Department. *See* Ind. Code § 36-4-9-4(b) (establishing that "[t]he head of each city department or

agency is under the jurisdiction of the executive"); *id.* § 36-8-3-3(g) (stating that "the fire chief has exclusive control of the fire department" and "[i]n time of emergency … the fire chief [is] … subordinate to the city executive and shall obey the city executive's orders and directions, notwithstanding any law or rule to the contrary").

As far as we can tell, the argument here is that the district court abused its discretion when balancing the equities by failing to consider Copeland's and Serna's interests in their statutory authority over the fire department.[4] They cite *Boucher v. School Board of School District of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998), where we held that the district court erred in granting a preliminary injunction prohibiting the defendant school district from expelling the plaintiff. The plaintiff had published an article teaching students how to hack into school computers, and we reasoned that the injunction would "undermin[e] the authority of the Board to take disciplinary action for what it believed to be a serious threat to school property." *Id.* at 827. Because the district court failed to consider this "substantial harm" in its analysis, we concluded that it failed to "str[ike] a correct balance." *Id.*

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[4] To the extent that the appellants' argument is that the preliminary injunction violates the Indiana statutes, this argument is obviously foreclosed by the Supremacy Clause. *See McHenry County v. Kwame Raoul*, 44 F.4th 581, 587 (7th Cir. 2022) ("In cases where federal and state law conflict, 'federal law prevails and state law is preempted.'") (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018)). The Indiana statutes may grant the mayor and fire chief exclusive authority over the fire department, but this does not permit them to use that authority in violation of the First Amendment.

The record here demonstrates that, without an injunction, the Fire Fighters were likely to continue to suffer First Amendment harms, as well as physical and psychological harms, caused by the 8/24 schedule. These are serious injuries that money damages cannot remedy. On the other side of the scale is the speculative financial benefit of the 8/24 schedule and the undefined harm to the statutory authority of Copeland and Serna. There is little, if any, persuasive evidence supporting these alleged harms: as previously discussed, the district court found that there was no credible evidence of any cost-savings from the implementation of the new schedule, and the appellants fail to point to any evidence regarding their alleged statutory authority injury. In light of this imbalance of evidence, it was not an abuse of discretion for the district court to find that the "undocumented possibility that East Chicago might be saving money" was a "feather" in comparison to the "anvil" of harms to the Fire Fighters.

III. Conclusion

For the reasons above, we find that the district court did not err in determining that the defendants' actions were motivated by the Fire Fighters' First Amendment activity; that there was no evidence that the 8/24 schedule was expected to result in cost-savings for the City; and that the Fire Fighters would suffer irreparable harms without an injunction. We additionally find that the district court did not abuse its discretion in balancing the equities in this case, considering the severity of the harms the Fire Fighters have experienced and the lack of evidence supporting the defendants' alleged harms. The decision of the district court is therefore

AFFIRMED.

EASTERBROOK, *Circuit Judge*, concurring. Does political payback violate the Constitution? The firefighters union, which waged and lost a political battle, says that the answer is yes if defeat can be called retaliation for political speech. By that standard, many political decisions are unconstitutional, and the judiciary will decide which policies promote the public interest. The judge in this suit found that the Mayor's decision made the public worse off, leading to an injunction restoring the former policy. It is hard to imagine a more direct impingement on democratic governance.

Political losers often pay a price. Lobbyists may seek a benefit for themselves or their clients, only to find that political actors adopt a policy that makes them worse off. States request more money from Congress but get less because they are on the losing side of a political fight. Sometimes the loss would not have happened but for the lobbying, which may have raised the issue's political salience; sometimes it is just the result of the lobbyist not having enough political muscle. That is normal politics—and the Constitution is designed to protect the normal institutions of democracy, not to condemn them.

The Supreme Court has never held that a policy that harms the losers in a political contest can be enjoined as a penalty for speech, even though some Presidents mastered the art of payback. (Robert Caro's biography of Lyndon Johnson presents examples.) Penalties imposed on individual speakers through *ad hoc* decisions can be set aside; that's the burden of the decisions cited at pages 10–11 of the majority's decision. Contrast *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008). But a *policy*? Our case concerns a policy that affects all of the City's firefighters, only some of whom engaged in

speech—and only some of whom opposed the Mayor's program. The Mayor's supporters in the Fire Department have been treated just like his opponents. Similarly, the terms of a collective bargaining agreement may hurt members who asked the union (or the governmental agency) to structure workplace relations differently. I'm not aware of any authority for the proposition that workers disappointed by the outcome of the bargaining process can ask a court to adopt their proposals on the ground that they suffered "retaliation" because they supported the losing side of the debate.

Forget local working conditions and think of recent national events. President Trump reversed many of President Obama's policies, including some about immigration and medical care. Could former President Obama, and his supporters, have sued to reinstate the policies on the ground that President Trump was making the change to penalize speech by Democrats? President Biden in turn reversed many of President Trump's policies; is that a constitutionally forbidden penalty on Republicans' speech? New Presidents appoint members to agencies, and it is common for a new majority at the NLRB or some other agency to reverse policies adopted during the previous Administration. Must a federal court determine, as a matter of fact (after receiving evidence), whether the political winner's policies produce net public benefits, or were expected to do so? The canonical question is whether any rational basis can be *imagined* to support a policy, not whether the policy is beneficial in fact. See, e.g., *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022); *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780 (2019); *Park Pet Shop, Inc. v. Chicago*, 872 F.3d 495 (7th Cir. 2017); *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124 (7th Cir. 1995). To recast the question as one of actual or intended

benefit is to act as a council of revision, holding hearings and deciding which rules and laws promote the public interest. Democracy would be the loser in that transformation.

The background of the 8/24 policy, which my colleagues describe, is not pretty. But much legislation is adopted in a similar fashion. As Otto von Bismarck quipped, no one should see how laws or sausages are made. Politicians understand who wins and who loses from their decisions, which may be petty and mean-spirited, designed to reward supporters and penalize opponents. The losers will have been vocal and can cry "retaliation." Federal courts cannot superintend that process, at the losers' behest, without displacing elected officials as the policy makers. Cf. *United States v. Blagojevich*, 794 F.3d 729, 735–38 (7th Cir. 2015) (rejecting a contention that logrolling by a petty and mean-spirited Governor can be treated as a form of fraud on the public).

But the City does not make an argument along these lines. Our litigants, like the district judge, have assumed that whatever is true for retaliation against single speakers must be true at the level of policies that affect larger groups. Instead of denying the legal premise of the Union's argument, the City denies that politics played any role in the Mayor's decision. It maintains that the district judge erred when finding that the Mayor changed the staffing schedule in response to the Union's unsuccessful attempt to get higher wages and better benefits from the Common Council. An appeal on *that* ground is doomed, because none of the findings is clearly erroneous.

We pass only on the arguments made by the litigants. See *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). I agree with my colleagues' disposition of those arguments and join the court's opinion. But no one should assume from this

decision that we have authorized district judges to review other public policies to ascertain whether they do more good than harm—or whether the persons who adopted the policies expected them to have net benefits. Those are political questions for political actors rather than for judges who never need to face the voters.