February 28, 2020

Office of the Texas Attorney General
Attn: Virginia K. Hoelscher, Chair, Opinion Committee
P.O. Box 12548
Austin, TX 78711

Via email to opinion.committee@oag.texas.gov

Re: Request for Attorney General Opinion No. 0330-KP, Application of the United States Supreme Court's *Janus* decision to payroll deductions of public union members

Ms. Hoelscher,

The Freedom Foundation appreciates the opportunity to submit the following comments regarding Request No. 0330-KP for your consideration.

By way of background, the Freedom Foundation ("Foundation") is a nonprofit organization organized under 26 U.S.C. § 501(c)(3). Founded in 1991 in Olympia, Wash., the organization's mission is to promote individual liberty, free enterprise and limited, accountable government. In recent years, the Foundation has opened offices in Oregon, California, Ohio and Pennsylvania, and devoted much of its attention to supporting reforms to make labor unions representing public employees more transparent and accountable to their members and taxpayers.

The Foundation strongly supported the U.S. Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), and submitted two amicus briefs in support of the plaintiff. Since the decision, the Foundation regularly provides free legal assistance to public employees whose rights have been violated by their union and/or employer. In fact, the Foundation currently represents public employees in dozens of such lawsuits in federal courts up and down the west coast.

Because of the Foundation's experience and expertise in this area, we believe it is incumbent upon public employers, such as the State of Texas, to take decisive steps to protect the First Amendment rights of their employees, as outlined in more detail below.

Overview: The *Janus v. AFSCME* decision

On June 27, 2018, the U.S. Supreme Court ruled in *Janus v. AFSCME, Council 31* that it is unconstitutional to compel public employees to fund union advocacy. 138 S. Ct. 2448, 2486 (2018).

In *Janus*, Illinois state employee Mark Janus brought suit against his employer and union seeking to invalidate the Illinois statute authorizing public-sector unions to assess agency fees (often termed "fair share" fees) from public employees who were not members of a union but who

nonetheless belonged to a workplace bargaining unit for which a union was designated as the exclusive representative. *Id*. at 2460-61.

The Court agreed that such laws are unconstitutional, overruling its earlier 1977 decision in *Abood v. Detroit Board of Education*. In *Abood*, the Court had held that, although compulsory agency fees infringed workers' First Amendment rights to free speech and free association, such fees were justified by the compelling state interests of promoting "labor peace" and "avoiding free riders." *See* 431 U.S. 209 (1977).

Prior to *Janus*, therefore, states could require public employees to pay compelled "agency fees" as a condition of employment.

In *Janus*, however, the Court made clear that states' perceived interests in "labor peace" and "avoiding free riders" (among others) were insufficient to justify the infringement of public employees' First Amendment rights caused by compelled union fees. 138 S. Ct. at 2465-68. The Court also held that public-sector collective bargaining is inherently political speech, that *Abood* "did not sufficiently take into account the difference between the effects of agency fees in public and private sector collective bargaining," and that *Abood* did not "foresee the practical problems that would face objecting nonmembers" as it relates to which union expenses they could be legally obligated to subsidize. *Id* at 2480.

The Court held:

> *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down shed new light on the issue of agency fees, and no reliance interest on the part of public sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

Id. at 2460.

Under no circumstances may payments from public employees to labor organizations be compelled. This is true regardless of whether the employer deducts the fees or, if the employer does not deduct dues/fees directly from employees' paychecks, whether a union contends a worker must be discharged for not paying fees directly to the union. Under no circumstances may a public employer discharge an employee for failure to financially support a union.

In *Janus*, the U.S. Supreme Court did much more than simply strike down compelled "agency fees" as unconstitutional.

The Court also held that the long-established use of "opt-out" schemes is unconstitutional, and that a public employee's decision to pay money to a union constitutes a waiver of constitutional rights which cannot be presumed. Because the waiver of a constitutional right must satisfy a much higher

standard than that of a normal contractual right, such waivers must be proven by "clear and compelling" evidence.

The Court held:

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

Janus, 138 S. Ct. at 2486.

Opt-out schemes are illegal.

"Opt-out schemes" are agreements between a union and an employer which require the employer to deduct union dues/fees from an employee's wages by default, even without the employee's authorization. Under such an arrangement, deductions may cease only if an employee affirmatively objects to the automatic deductions. *See e.g.*, *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258, 263 (9th Cir. 1992).

Such schemes are now illegal in the public sector in all 50 states.

In *Janus*, the Court made clear that no amount of money can be deducted from a public employee "*unless the employee affirmatively consents to pay*." *Id*. at 2486. This includes any type of money that an employer could theoretically deduct and forward to a union, however it is labeled (e.g., initiation fees, processing fees, agency fees, membership dues, etc.). *Id*. ("Neither an agency fee nor any other payment to the union…").

Public employers must now obtain "clear and affirmative consent before any money is taken" from an employee's wages. *Id*.

Agreements to pay money to a union must constitute valid waivers of constitutional rights.

The Supreme Court in *Janus* held that, "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Janus*, 138 S. Ct. 2486.

The Court made clear that an agreement between a union and a public employee in which an employee commits to pay money to a union must constitute a valid waiver of the employee's First Amendment right to not fund union advocacy. Thus, a party seeking enforcement of a constitutional waiver must satisfy a much higher legal standard than normally necessary to prove mere contractual obligations. Courts have consistently acknowledged that government enforcement of contracts may still violate constitutional rights where there is not clear and compelling evidence of a waiver of those rights. *See, e.g., D.H. Overmyer Co. Inc. of Ohio v. Frick*

Co., 405 U.S. 174, 185–86 (1972) ("More than mere contract law…is involved" in determining whether constitutional rights are waived); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *Gonzalez v. Hidalgo County, Texas*, 489 F.2d 1043, 1046 (5th Cir. 1973) ("a heavy burden must be borne by the party claiming that a voluntary, intelligent, and knowing contractual waiver has occurred"); *Erie Telecom.*, 853 F.2d at 1094 ("we do not apply Pennsylvania contract principles as we normally would" when considering contractual waivers of constitutional rights "because the question of a waiver of a federally guaranteed constitutional right is a federal question controlled by federal law."); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 523–24 (3d Cir. 1988); *Lake James Cty. Volunteer Fire Dep't Inc. v. Burke Cty., N.C.*, 149 F.3d 277, 280 (4th Cir. 1998) ("But a waiver of constitutional rights in a contract might well heighten the scrutiny of its enforceability because the law does not presume the waiver of constitutional rights.").

In evaluating the standard necessary to show that a public employee validly waived his or her constitutional right under *Janus*, it's important to keep several points in mind.

First, courts never presume a waiver of constitutional rights. *Id*. at 2486 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). This is why opt-out schemes are now illegal in the public sector.

Second, valid waivers of a constitutional right "must be freely given and shown by 'clear and compelling' evidence." *Id*. This requires the party seeking enforcement of a constitutional waiver to show by clear and compelling evidence that the other party "voluntarily, intelligently, and knowingly" waived his or her constitutional right. *See Overmyer*, 405 U.S. at 187 (applied to a waiver of due process rights); *Fuentes*, 407 U.S. at 95 (due process); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (cited in *Janus*); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (First Amendment right must be a "known right" before it can be waived) (cited in *Janus*); *Gonzalez*, 489 F.2d at 1046 (waiver of due process rights in a contract could not be presumed and had to be "voluntarily, intelligently and knowingly" executed); *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) ("First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent").

***Janus* protects union members**.

The primary counterargument to the claim that *Janus* requires a First Amendment waiver prior to the deduction of any and all union payments deducted from public employees' wages, including membership dues, is that *Janus* does not apply to employees who agreed to the dues deductions, i.e., *Janus* does not apply to union members. Unions base this argument on: (1) the fact that the statute overturned in *Janus* was an agency fee statute which required fee payments without *any* form of consent; and (2) a narrow interpretation of *Janus'* holding based on the Supreme Court's reference to "nonmembers." *See* 138 S. Ct. at 2486. But this reasoning is flawed for several reasons.

First, to argue that *Janus* does not apply to union members (and, thus, neither does its waiver standard) because the employees consented to dues deductions puts the cart before the horse because it is logically backwards; a waiver of constitutional rights is required to prove a dues deduction authorization agreement constitutes proper consent. After all, if *Janus* does not apply to certain employees, no consent to dues deductions is constitutionally required at all. *See e.g.*,

Mitchell, 963 F.2d at 263 (previously approving of dues deductions without consent under the First Amendment, i.e., so-called "opt-out schemes"). If it is true that the First Amendment prohibits dues deductions from union members' wages absent *any* consent *to dues deductions*, as even unions will concede, then it is *only because Janus* applies to them.

Second, the argument that *Janus* does not apply to union members ignores the obvious fact that employees *are* almost universally union *non*members when they are hired. As such, "[b]y agreeing to pay [money to a union], *nonmembers* are waiving their First Amendment rights, and such a waiver cannot be presumed." *Janus*, 138 S. Ct. at 2486 (emphasis added). In a post-*Janus* world in which agency fees are illegal, what possible type of payment to a union could a nonmember agree to pay other than membership dues? If *Janus'* waiver standard does not apply to membership dues, it never applies anywhere—an untenable interpretation of *Janus'* holding, to say the least.[1]

Third, distinguishing between union members and nonmembers results in an illogical two-tier application of *Janus'* holding, in which a heightened waiver standard is applied to nonmembers and a lower (presumably) contract law standard to members. Not only does such a standard defy common sense, there is also no indication anywhere in *Janus* that the Supreme Court intended such a complex, two-tier consent standard. The Supreme Court's reference to "nonmembers" in *Janus'* holding simply reflects an appreciation of the fact that those who have not agreed to pay money to a union will typically be nonmembers.

Fourth, *Janus'* holding does not support the proposition that proof of union membership, as opposed to proof of a constitutional waiver, establishes affirmative consent to dues deductions. Union membership does not prove, or even suggest, that employees knew of their First Amendment right to not subsidize a union to *any* degree, much less that they voluntarily and intelligently waived that right. Were it otherwise, absurdity would result: the need for constitutional waiver could be obviated merely by including union membership terms on the same piece of paper as a dues deduction authorization. There is no principled reason why adding membership language to a dues deduction form should eliminate the need for a waiver under *Janus*.

Fifth, limiting *Janus* to only prohibit opt-out schemes (which deduct dues without any form of authorization) makes no sense. If *Janus'* holding only prevents opt-out schemes, its waiver language would not apply to anything. The Supreme Court held that the affirmative choice to pay money to a union is a waiver of First Amendment rights for which there must be clear and compelling evidence. *Janus*, 138 S. Ct. at 2486. This language cannot refer to opt-out schemes because opt-out schemes, by definition, exist only when there is no "agree[ment] to pay" union dues. There can only be clear and compelling evidence of an affirmative decision. In virtually all post-*Janus* workplaces, such evidence will take the form of dues deduction authorizations which contain union membership provisions.

[1] Depriving employees who eventually decide to pay money to a union of their right to a waiver is essentially presuming such employees want to pay money to a union, which violates the presumption against constitutional waivers. Employees who agree to pay money to a union are precisely the employees that need to be protected from unknowing and involuntary decisions. It makes little sense to only apply a heightened waiver standard to employees who have already demonstrated they know their rights by declining dues payments, i.e., union nonmembers.

There is no legally meaningful distinction between a statute which compels a state to deduct union dues without authorization (an agency fee scheme or an "opt-out scheme") and a statute which compels a state to deduct union dues upon insufficient authorization. Without *proper* consent, payments to unions constitute the compulsory deduction of fees. After all, that is the entire point of requiring a waiver. Absent a waiver, compulsion results.

Sixth, limiting *Janus'* application only to "nonmembers" ignores the broad language the Supreme Court used in *Janus'* holding. The Supreme Court referred to "any" union payments three times and "employees" in general twice. *Janus*, 138 S. Ct. at 2486.

Finally, equating union membership to a First Amendment waiver places the fate of the First Amendment in the hands of private organizations with a financial interest in subverting those rights. Union membership policies are determined internally and unilaterally by unions themselves. A union is free to consider an employee a member on any terms it wants. In fact, a union need not even require dues payments as a condition of membership. *Janus* dealt with a state's deduction of money from its employees' wages and its transfer to a union. Whatever arrangements or contractual obligations arise solely between a union and an employee, e.g., questions about membership, dues rates, internal union elections, dues deduction irrevocability periods, etc., does not impact the status of the state's deductions as state action or the constitutional requirements imposed on government when it seizes employees' wages on behalf of a private entity. Simply because a union makes "members" of employees having money deducted from their wages by a public employer does not mean that the deductions are not state action or that they escape constitutional scrutiny. A union cannot use a unilateral, internal policy decision as a magic poison pill to defeat state action, absolve itself and a public employer from constitutional scrutiny, and do an end run around the First Amendment.

Unions commonly cite *Cohen v. Cowles Media Co.*, for the proposition that employees who agree to union dues deductions must be held to those agreements because "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." 501 U.S. 633, 672 (1991); *see also Belgau v. Inslee*, 359 F. Supp. 3d 1000, 1018 (2019) (employees "cannot now invoke the First Amendment to wriggle out of [their] contractual duties."). Not only does this interpretation of *Cohen* directly contradict the plethora of cases which stand for the proposition that a constitutional waiver analysis involves a heightened standard above that of mere contract law standards, *cited supra* at 4, it also misapplies *Cohen*.

Union members who resign union membership and object to dues payments are not trying to "disregard promises" or "wriggle out of their contractual duties." Rather, such employees generally claim that no contractual duties arose in the first place because the agreement which allegedly authorizes the deductions was not valid in the first place (because it failed to constitute a First Amendment waiver). In other words, no valid promise to pay union dues was ever made. In contrast, the parties in *Cohen* presumed the promise made by the newspaper to not reveal the source's identity was, in fact, made and "otherwise [could] be enforced." *Cohen*, 501 U.S. at 671-72. The newspaper did not argue the underlying promise was invalid. That argument was not made and not before the Court. *See Id*. at 672 ("The Minnesota Supreme Court's incorrect conclusion that the First Amendment barred Cohen's claims may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established…"). Rather, the newspaper

argued it was categorically exempt under the First Amendment from the requirements of even valid promises. *Id*. at 668 (the respondents "argu[ed] that the First Amendment barred the enforcement of the reporter's promises to Cohen.") In other words, the newspaper argued that its First Amendment rights were not waivable—an argument that employees challenging dues deduction authorizations typically do not make. Unlike such employees, the newspaper in *Cohen* argued the First Amendment guaranteed a right to renege on valid promises. *Id*. at 671-72. Unlike *Cohen*, employees challenging dues deduction agreements argue that no valid promises arose in the first place because the underlying consent unions allege gave rise to an obligation to pay union dues was invalid.

In sum, for an agreement to pay money to a union, including membership dues, to be valid, a public employee must voluntarily, intelligently, and knowingly waive his or her right to not fund union advocacy. Any party seeking to enforce such a waiver must prove the waiver by clear and compelling evidence.

What constitutes a knowing, voluntary, and intelligent waiver?

When evaluating waivers, "courts indulge every reasonable presumption against finding a waiver." *Bueno v. City of Donna*, 714 F.2d 484, 492 (5th Cir. 1983) (internal citations omitted). Purported waivers of fundamental constitutional rights "are subject to the most stringent scrutiny." *Id*. "The record must reflect a basis for the conclusion of actual knowledge of the existence of the right or privilege, full understanding of its meaning, and clear comprehension of the consequence of the waiver." *Id*. A showing of waiver requires proof of "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

An agreement to pay union dues must have been executed on or after June 27, 2018 to be valid.

A minimum requirement for the waiver is that the constitutional right is recognized. A person cannot *knowingly* waive a constitutional right that has not been recognized by courts. *See Curtis Publishing Co.*, 388 U.S. at 145 (the Court "would not hold that Curtis waived a known right before it was aware of the [relevant court] decision" recognizing that right"); *Felter v. Southern Pac. Co.*, 359 U.S. 326, 336 (1959) ("…we doubt whether the right to revoke could be waived at all in advance of the time for its exercise..."); *Big Horn County Elec. Co-op Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000) ("an exception to the waiver rule exists for intervening changes in the law"); *Sambo's Restaurants Inc. v. City of Ann Arbor*, 663 F.2d 686, 692-93 (6th Cir. 1981) (rejecting the argument that a restaurant waived its First Amendment commercial speech rights pre-1972 because the restaurant "did not have First Amendment commercial speech rights in 1972 which it could waive"); *Erie Telecommunications Inc.*, 853 F.2d at 1098-99 (analyzing whether a party knew of its constitutional rights before allegedly waiving them); *Walker v. Pepersack*, 316 F.3d 119, 127-128 (4th Cir. 1963) ("it is clear that he did not intentionally abandon a known right since there was no such right for him to abandon…before the Supreme Court's decision" recognizing the right.); *Legal Aid Society v. City of New York*, 114 F. Supp.2d 204, 227-28 (S.D.N.Y. 2000) (a contractor could not waive its First Amendment right against government

retaliation against speech on matters of public concern because "the Supreme Court did not extend First Amendment protections to government contractors until after the [agreement] was signed.").

Thus, at a minimum, an effective employee waiver to pay money to a union could only have been executed *after* the Court issued its *Janus* decision on June 27, 2018. Union dues deductions by public employers from their employees' wages are unlawful if based solely on purported waivers signed before June 27, 2018 and make no mention of the First Amendment right of a public employee to pay nothing to a union.

Unions commonly argue, based on cases such as *Brady v. United States*, 397 U.S. 742 (1970), that dues deduction authorizations are contracts like plea agreements and are not invalidated by subsequent changes in the law—even rulings on the constitutionality of a law. But a change in law that relates to an essential element of the charge to which an individual pled guilty can invalidate a plea agreement. *See Bousley v. United States*, 523 U.S. 614, 618-19 (1998). By contrast, a change in law that relates to a subsidiary matter will not invalidate a plea agreement. *Id*. (*discussing Brady*). For example, in *Brady*, a change in sentencing law did not render unintelligent a defendant's "solemn admission[ ] in open court that he committed the act with which he is charged," namely kidnapping. 397 U.S. at 757. But employees from whom states deduct union dues without a waiver were not informed of their First Amendment right to not subsidize union speech and were thus denied knowledge of an essential element in their decision to waive a constitutional right, unlike the defendant in *Brady*.

Brady "involved a criminal defendant who pleaded guilty after being correctly informed as to the essential nature of the charge against him." *Bousley v. United States*, 523 U.S. 614, 619 (1998). The guilty plea was an intelligent waiver because Brady was correctly informed as to what he was pleading guilty to (kidnapping). *Id*. But it is different with employees who were denied a waiver because, as in *Bousley*, "petitioner asserts that he was misinformed as to the true nature of the charge against him." *Id*.

Brady also is distinguishable from circumstances in which states deduct union dues from employees who allegedly consented such payments prior to *Janus* and while subject to a CBA which included an agency fee provision. This is because Brady was provided the option the constitution required: to plead innocent of the charges against him. Employees who consented in the aforementioned circumstances were misinformed of the true nature of their choice because they were presented only the unconstitutional Hobson's choice of either paying full dues or unlawful compelled fees, when in reality the First Amendment guaranteed them the right to not subsidize a union to *any* degree. This is akin to a state giving criminal defendants only the options of being found guilty or pleading guilty to a slightly lesser offense. No one would say a plea made under those circumstances was a voluntary, knowing, or intelligent waiver.

None of these cases stand for the proposition that a plea agreement, or a contract of any kind, renders unassailable the denial of a constitutional right without a proper waiver. If the plea bargain agreements in those cases failed to constitute clear and compelling evidence of a waiver, the result would have been state denial of a constitutional right. *See Boykin v. Alabama*, 395 U.S. 238, 244 (1969) (a plea agreement is invalid if "the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty."); *Steinvik v. Vinzant*, 640 F.2d 949, 954 (9th Cir.

1981) ("A plea of guilty to be valid must be made voluntarily and with knowledge of its consequences."); *George v. U.S.*, 633 F.2d 1299, 1301 (1980) ("…lack of a knowing waiver would render the plea involuntary."). *See also Sambo's Restaurants*, 663 F.2d at 693, 691 (plaintiff could not waive its First Amendment rights because it "did not have First Amendment…rights in 1972 which it could waive" even if the presence of consideration can "constitute some evidence of a waiver.") So too with consent to the payment of union dues. If there is not clear and compelling evidence of a First Amendment waiver, the result will be state denial of a First Amendment right.

A public employee's agreement to pay union dues executed before June 27, 2018 is invalid and unenforceable.

A waiver must be "freely given," i.e. *voluntary*.

To be effective, "the waiver must be freely given and shown by clear and compelling evidence." *Janus* 138 S. Ct. at 2486.

Employees must be free from all forms of intimidation or coercion when presented with the waiver. Otherwise, the waiver is not voluntary or freely given. The circumstances must also be free of any appearance of intimidation, coercion, trickery, word games, or the threat of loss of rights. *See Miranda v. Arizona*, 384 U.S. 436, 476 (1966) ("[A]ny evidence that" a person "was threatened, tricked, or cajoled into a waiver will, of course, show" that the person "did not voluntarily waive his privilege…").

Additionally, the impact of a compelled agency fee provision in a CBA at the time an employee purports to waive the right against compelled advocacy must be considered because "the mere presence of choice does not always settle the compulsion issue. The legitimacy of a choice largely depends on the coerciveness of the proffered alternatives…" *Deering v. Brown,* 839 F.2d 539, 542-43 (9th Cir. 1988). *See also Schneckloth v. Bustamonte,* 412 U.S. 218, 229 (1973) (courts must be "watchful…against any stealthy encroachments thereon" as well as "subtly coercive" tactics and "the possibly vulnerable subjective state of the person who consents."). A purported waiver is not voluntary if the State forces the individual to "choose between alternative perils." *Ancheta v. Watada*, 135 F. Supp.2d 1114, 1126 (D. Hawaii 2001) (*citing Overmyer*, 405 U.S. at 187; *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). "The government may [not] cloak unconstitutional punishment in the mantle of choice." *Ancheta*, 135 F. Supp. at 1125 (*citing Campbell v. Wood*, 18 F.3d 662, 680 (9th Cir. 1994)).[2]

A compelled agency fee provision is effectively a punishment for declining union membership because the employee was forced to "either curb his protected rights of expression…or engage in such protected activity…" and be punished by the State. *Id*. at 1126. It is not difficult to understand the leverage that compelled fees gave to unions when soliciting membership, especially

[2] *See also Gete v. I.N.S.*, 121 F.3d 1285, 1294-95 (9th Cir. 1987) (applying this concept in a jurisdictional matter, concluding that "the Appellants did not waive their right to challenge the constitutionality" of a chosen procedure because an alternative procedure may have been constitutional); *LeGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999) (the petitioner's voluntary choice of lethal gas as method of execution of death sentence did not waive his claim that the use of lethal gas was unconstitutional).

considering unions would also deprive employees who declined union membership of rights such as voting on their own employment contract.

Additionally, circumstances surrounding a purported constitutional waiver may invalidate it. *See Overmyer*, 405 U.S. at 186-87 (discussing the level of a party's corporate sophistication, the relative bargaining power between parties, whether the agreement was a contract of adhesion, and the presence of advising counsel); *Fuentes*, 407 U.S. at 95 (noting that there was no bargaining over the contract terms, the parties possessed vastly different bargaining power, the contract was presented as a take-it-or-leave-it form contract, and the party allegedly waiving her right was not actually aware or made aware of the significance of the contract). Unions are powerful, imposing, and sophisticated multimillion dollar political corporations which are granted significant privileges by states in the form of exclusive representation, "itself a significant impingement on [employees'] associational freedoms that would not be tolerated in other contexts," *Janus*, 138 S. Ct. at 2478, and other "special privileges, such as obtaining information about employees and having dues and fees deducted directly from employee wages." *Id* at 2467. This results in "a tremendous increase in [] power" to unions, which dramatically increases the leverage unions have over individual employees in the public employment context. Public employers must be wary of honoring "waivers" acquired under such circumstances if evidence of a proper and fair waiver is not "clear and compelling."

The language of a waiver must be clear.

"A waiver of constitutional rights in any context must, at the very least, be clear." *Fuentes*, 407 U.S. at 95. A court "need not concern [itself] with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Id*.; *see also, Legal Aid Society v. City of New York*, 114 F. Supp.2d 204, 227 (S.D.N.Y. 2000) ("…the agreement neither explicitly mentions [those rights] nor explicitly releases the City from all claims arising out of the transfer of business to other legal services providers"). At a minimum, then, even if the purported waiver does not explicitly mention "constitutional rights," the language must on its face describe the right being waived and that the document constitutes a waiver of that right.

The language therefore must do more than simply permit the employer or union to deduct union dues/fees from the employee's wages.[3] It must explicitly state that: (1) employees have the unequivocal right to not fund union advocacy; (2) the document being presented constitutes a waiver of that right; and (3) declining to fund union advocacy will have no adverse effect on their employment.

[3] A familiar analogy is instructive. When a suspect in custody is answering a police officer's questions, the constitutional issue is not whether the suspect knows he is answering a police officer's questions. Rather, the constitution requires that he knows he is waiving his constitutional rights against self-incrimination and to assistance of counsel by so doing. *See Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). Similarly, when a criminal defendant agrees to a plea-bargain in lieu of a trial, the question is not whether the defendant knows he is bypassing a trial, but whether he knows he has a constitutional right to a trial. *See Johnson*, 304 U.S. at 465.

Public employers must establish procedural safeguards to ensure union dues are deducted in a manner that protects employees' constitutional rights.

"[T]he burden of proving the validity of a waiver of constitutional rights is always on the government." *Moran*, 475 U.S. at 421. The First Amendment free speech clause and the Fourteenth Amendment due process clause each require procedural safeguards to prevent government infringement on constitutional rights.

First, long before *Janus*, in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, the Supreme Court held that the First Amendment prohibited union dues deduction schemes that are "entirely controlled by the Union, which is an interested party." 475 U.S. 292, 307-08 (1986). The Supreme Court imposed these requirements because the deduction of union fees from public employee wages was fraught with First Amendment infringements and that safeguards were necessary to "minimize the risk that nonunion employees' contributions might be used for impermissible purposes." *Hudson*, 475 U.S. at 309; *see also id.* at 301 (exclusive representation and agency fees infringe "an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."); *Janus*, 138 S. Ct. at 2460 and 2467 (exclusive representation "substantially restricts the rights of individual employees," "confers many benefits on unions," and "results in a tremendous increase in the power" of the union"). Compelled agency fees are now unconstitutional but exclusive representation remains constitutional.

This means that procedures related to the deduction of union dues from public employees' wages should not be entirely controlled by a union. Post-*Janus*, it has been common for public employers to delegate the protection of its employees' constitutional rights to unions by granting unions the sole discretion to decide which employees have properly authorized dues deductions and which have not—whether through statute or CBA provisions. Under such policies, only unions may notify employees of their rights or process employee objections to union membership and dues payments. Employers must ignore any and all employee objections to union membership or dues payments, instead referring objecting employees to the union itself and improperly leaving employees "with no means for vindication of [constitutional] rights, whose protection has been delegated to private actors, when they have been denied." *West v. Atkins*, 487 U.S. 42, 55-56, n. 14 (1988). The conflict of interest is clear. Unions, as "interested part[ies]," are strongly incentivized to increase revenue by infringing employees' First Amendment rights.

Second, although the Supreme Court stated in *Hudson* that it was "convinced that…the procedures required by the First Amendment also provide the protections necessary for any deprivation of property [under procedural due process requirements]," *Hudson*, 475 U.S. at 304, n. 13, union-controlled dues deduction schemes also pose problems under the Fourteenth Amendment's due process clause. *See e.g., Lugar v. Edmondson Oil Co*., 457 U.S. 922, 942 (1982) ("whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute."). This also applies to wage garnishment. *See Jackson v. Galan*, 868 F.2d 165, 167-68 (5th Cir. 1989); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). Thus, a public employer's procedures for seizing its employees' wages and forwarding them to a union must be "constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). This inquiry examines "the procedural safeguards built into the statutory or

administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Id*. Statutes and CBA provisions which entirely outsource union dues deduction authorization and objection procedures to private, third-party unions clearly lack the safeguards required by due process and, as such, violate the Fourteenth Amendment.

The State of Texas should implement a dues collection process that properly observes public employees' First Amendment rights

The failure of many states to implement any procedural safeguards to ensure union dues are only deducted from the wages of public employees who have properly authorized the deductions and waived their First Amendment rights has permitted abusive and illegal behavior by unions to proliferate.

Through our communications with hundreds of thousands of union-represented public employees on the west coast, and through dozens of legal actions taken on behalf of employees whose rights have been violated by their union and employer, the Foundation has learned and documented that unions routinely employ coercive and deceptive practices to initiate and maintain union dues deductions from employees' wages. Operating without accountability, unions are increasingly going so far as to forge employees' signatures on membership forms and dues deduction authorizations.

Since *Janus*, the Freedom Foundation has filed five federal lawsuits on behalf of employees who have been victimized by union forgeries: Three in Washington state, including two on behalf of state-paid home caregivers represented by an SEIU affiliate and one on behalf of a state worker represented by an AFSCME affiliate; one in Oregon on behalf of a state employee represented by an SEIU affiliate; and one in California on behalf of a state-paid home caregiver represented by an AFSCME affiliate. Additional cases are pending. *See Ochoa v. SEIU 775, et al.*, No. 2:18-cv-297 (E.D. Wa. October 4, 2019) (Dkt.63); *Araujo v. SEIU 775*, No. 4:20-cv-05012 (E.D. Wa.); *Yates v. Washington Federation of State Employees, et al*., No. 3:20-cv-05082 (W.D. Wa.); *Quezambra v. UDW AFSCME, Local 3930*, No. 8:19-cv-00927 (C.D. Cal.); *Zielinski v. SEIU 503*, et al., No. 3:20-cv-00165 (D. Or.).

In light of the preceding legal realities and to prevent union misconduct from occurring in the first place, it is imperative that the State of Texas implement appropriate safeguards to protect employees' rights. To that end, Texas should:

1. Develop and utilize a standardized dues deduction authorization form that includes a notice of employees' First Amendment rights and a statement specifically waiving those rights. We believe the language proposed by Rep. Cain in his request of January 30, or language substantially similar thereto, would be appropriate.
2. Only deduct union dues from an employee's wages upon receipt of proper authorization from the employee. Records of employees' dues deduction authorization should be presented to and maintained by the State employer. To prevent instances of forgery, the State should consider implementing a two-step verification system whereby, upon receipt of a dues deduction authorization, the employer contacts the employee directly to confirm the authenticity of the authorization prior to initiating deductions.

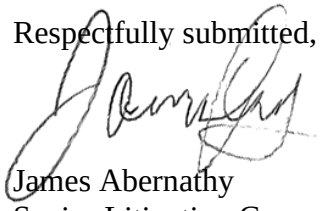
3. Promptly discontinue union dues deductions from the wages of any employee for whom the State has no authorization on file, for whom the State has only an authorization signed prior to June 27, 2018, or for whom the State lacks an authorization that complies with the First Amendment.
4. Annually notify state employees of their First Amendment right to join and financially support, or refrain from joining and financially supporting, a labor union. Alternatively, the State should cease deducting union dues from an employee's wages unless the employee periodically reauthorizes the deductions.
5. Cease withholding union dues as soon as logistically possible after an employee requests to cancel the deductions.

Additionally, to the extent it is able, the State of Texas should require or encourage its political subdivisions to implement these or substantially similar policies, practices, and safeguards to the extent feasible.

Taking these actions will ensure that the Constitutional rights of public employees in Texas are protected and not left vulnerable to misconduct or circumvention by entities with a financial interest in dues collection.

We appreciate the opportunity to offer our recommendations on this important issue and stand ready to provide any further assistance that may be of use to your office.

Respectfully submitted,



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