



June 2, 2020

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *O’Callaghan v. Napolitano*, No. 19-56271

The *O’Callaghan* case is fully briefed and awaiting the scheduling of oral argument. Pursuant to Federal Rule of Appellate Procedure 28(j), counsel for Plaintiff-Appellants Cara O’Callaghan and Jenee Misraje hereby submit the Attorney General of Texas Opinion No. KP-0310, issued on May 31, 2020, attached as Exhibit A.

The Opinion represents a formal and authoritative interpretation of the Supreme Court’s opinion in *Janus v. AFSCME*, 138 S. Ct. 2884 (2018), and the implications of the *Janus* case for government employers, employees, and unions. Because the *O’Callaghan* case relies heavily on *Janus*, the Opinion is relevant to this Court’s consideration of the *O’Callaghan* case.

In particular, at page 3 of the Opinion, General Paxton reaches the conclusion that “a one-time, perpetual authorization is inconsistent with the Court’s conclusion in *Janus* that consent must be knowingly and freely given.” General Paxton goes on to state, “Organizations change over time, and consent to membership should not be presumed to be indefinite,” citing *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 315 (2012).

Moreover, at page 4 of the Opinion, General Paxton points out that while a one year period may be reasonable, it is not clear that periods longer than one year can satisfy *Janus*. This is consistent with Appellant’s contention that locking O’Callaghan into union membership for a

period of nearly four years violates her rights under *Janus*. See Appellants' Opening Brief (Dkt. 8) at 13.

Respectfully Submitted,

/s/Brian K. Kelsey

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Exhibit

A



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 31, 2020

The Honorable Briscoe Cain
Chair, House Select Committee on Driver's License Issuance & Renewal
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0310

Re: Application of the United States Supreme Court's *Janus* decision to public employee payroll deductions for employee organization membership fees and dues (RQ-0330-KP)

Dear Representative Cain:

You ask three questions related to “payroll deductions being used to support public sector unions” in Texas in light of the 2018 United States Supreme Court decision in *Janus v. American Federation of State, County, & Municipal Employees*.¹ In *Janus*, the Court addressed an Illinois statute requiring public employees “to subsidize a union,” even in instances when they chose not to join and strongly objected to the positions taken by the union. 138 S. Ct. 2448, 2459–60 (2018). Under that statute, if a majority of the employees in a bargaining unit voted to be represented by a union, it was designated as the exclusive representative of the employees. *Id.* at 2460. While employees were not required to join the union, those who declined were still assessed an agency fee to cover costs associated with collective bargaining, contract administration, and the union’s pursuit of matters affecting wages, hours, and conditions of employment. *Id.* at 2461.

Finding that this procedure compelled subsidization of private speech, the Court held that the statute violated the First Amendment and could not stand. *Id.* at 2464, 2486. Relevant to your questions, the Court emphasized that *no fee* to a 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.” *Id.* at 2486. The Court further explained that by “agreeing to pay [the union], nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.” *Id.* Instead, “to be effective, the waiver must be freely given and shown by ‘clear and compelling’ evidence.” *Id.*

¹Letter from Honorable Briscoe Cain, Chair, House Select Comm. on Driver’s License Issuance & Renewal, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Jan. 27, 2020).

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In Texas, the Legislature permits employees of state agencies to authorize payroll deductions for payment of membership fees or dues for unions and other eligible state employee organizations. TEX. GOV'T CODE §§ 403.0165(a), 659.1031(a); *see also* 34 TEX. ADMIN. CODE § 5.46(a)(15) (defining a “state employee organization” to include “a union . . . that advocates the interests of state employees”). An employee authorizes a payroll deduction by completing an authorization form and submitting the form to the organization to which the membership fee will be paid. 34 TEX. ADMIN. CODE § 5.46(b)(1)(C). The authorization form is created by the organization and must be approved by the Comptroller. *Id.* § 5.46(e)(1).

The Legislature also authorizes counties and certain municipalities to do the same for their employees. *See* TEX. LOC. GOV'T CODE § 141.008(a) (“The governing body of a municipality with a population of more than 10,000 may deduct from a municipal employee’s monthly salary or wages . . . payment of membership dues to a bona fide employees’ association[.]”); *id.* § 155.001(a)(2) (“The commissioners court, on the request of a county employee, may authorize a payroll deduction to be made from the employee’s wages or salary for . . . payment of membership dues in a labor union or bona fide employees association.”). And school district employees are “entitled to have an amount deducted from” their salaries for “membership fees or dues to a professional organization.” TEX. EDUC. CODE § 22.001(a). In each instance, participation by the employee is voluntary and can be revoked by the employee at any time. *See* TEX. GOV'T CODE § 403.0165(a), (c); TEX. LOC. GOV'T CODE § 155.002(a), (b); TEX. EDUC. CODE § 22.001(b). The payroll deductions generally remain in effect until an employee authorizes a change or revocation of the deduction. TEX. GOV'T CODE § 403.0165(a); TEX. LOC. GOV'T CODE §§ 141.008(e), 155.002(b); TEX. EDUC. CODE § 22.001(b). With these procedures as background, we turn to your specific questions.

You first ask whether, in light of the Supreme Court’s *Janus* decision, “the State of Texas and its political subdivisions have an obligation to provide their employees with notice of the First Amendment rights against compelled speech.” Request Letter at 1. The Court in *Janus* emphasized that an employee’s payments to a union impact the employee’s First Amendment rights, and it made clear that a governmental entity may not deduct funds from an employee’s wages to provide payment to a union unless the employee consents, by clear and compelling evidence, to the governmental body deducting those fees. 138 S. Ct. at 2486.

Under the current administrative procedure authorizing deductions at the state level, state agencies rely on the unions and employee organizations to obtain consent from employees. *See* 34 TEX. ADMIN. CODE § 5.46(b)(1)(C) (requiring state employees to submit the authorization form “to the eligible organization to which the membership fees will be paid”).² The organizations serve as a middleman, receiving the authorizations from employees and forwarding them to the state agencies, which make the requested payroll deductions. In doing so, state agencies appear to

²The statutes authorizing municipalities, counties, and school districts to make deductions do not articulate the same process for employees to authorize the deductions. To the extent that those entities rely on the unions or employee organizations to obtain consent, this analysis likewise applies to those entities. *See* TEX. EDUC. CODE § 22.001(a)(1) (requiring school employees to file with their districts “a signed written request identifying the organization and specifying the number of pay periods per year the deductions are to be made”); TEX. LOC. GOV'T CODE § 155.002(a)(2) (requiring a county employee’s request for a payroll deduction “be submitted to the county auditor”).

have no independent method of confirming that an employee knowingly and voluntarily consented to the payroll deduction without any coercion or improper inducement. To be consistent with *Janus*, at a minimum, the State must ensure that employee consent to a payroll deduction for membership fees or dues in a union or employee organization is collected in a way that ensures voluntariness. This assurance could be secured, in part, by requiring that an employee, and not an employee organization, directly transmit to an employer authorization of the withholding. *See* TEX. LAB. CODE § 101.004 (voiding a contract that permits payroll withholding for dues unless the employee delivers written consent to the employer to authorize the withholding).

You next ask whether the following language would be legally sufficient to provide notice of the nature and scope of these rights to an employee:

I recognize that I have a First Amendment right to associate, including the right not to associate. My rights provide that I am not compelled to be a member of a labor organization. I am not compelled to pay a labor organization any money as a condition of employment, and I do not have to sign this consent form. However, I am waiving this right and consent to union membership. I also consent to having union dues deducted from my paycheck. My consent may be revoked at any time, resulting in the immediate termination of any financial agreement to pay the union dues, fees, or any other form of payment.

Request Letter at 4. The Court in *Janus* required that consent to payroll deductions for union membership dues, and the accompanying waiver of certain First Amendment rights of the employee, be “freely given and shown by ‘clear and compelling’ evidence.” 138 S. Ct. at 2486. But it did not provide specific language or a method by which a governmental entity must obtain consent from an employee to make a payroll deduction for union dues or fees. The language you propose is consistent with the knowing and voluntary requirements emphasized in *Janus*. *See id.* If a public employer used such language to obtain consent for an employee payroll deduction, a court would be unlikely to find any constitutional defect.

In your final question, you ask about the effective duration of employee consent to a payroll deduction for membership dues or fees to a union or employee organization. Request Letter at 4. In particular, you question whether some periodic inquiry into the public employee’s continued consent is required, and if so, the period of time consent remains valid without reauthorization. *Id.* Under the current Texas laws authorizing payroll deductions, an employee’s authorization remains effective until the employee affirmatively revokes or amends it, effectively allowing continuous consent. TEX. GOV’T CODE § 403.0165(a); TEX. LOC. GOV’T CODE §§ 141.008(e), 155.002(b); TEX. EDUC. CODE § 22.001(b). However, a one-time, perpetual authorization is inconsistent with the Court’s conclusion in *Janus* that consent must be knowingly and freely given. 138 S. Ct. at 2484, 2486. Organizations change over time, and consent to membership should not be presumed to be indefinite. *See Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 315 (2012) (explaining that the choice to support a union may change as a result of changes in the union’s political advocacy).

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That said, the Court in *Janus* did not articulate the appropriate interval in lieu of a one-time consent that extends indefinitely for employee deductions. The period of time for which employee consent to a payroll deduction validly operates therefore remains an open question. However, a court would likely conclude that consent is valid for one year from the time given and is sufficiently contemporaneous to be constitutional. *See id.* (explaining that giving employees an opportunity once per year to opt into dues payments is tolerable as long as employees can make an informed choice). While a court would likely conclude that a one-year consent period satisfies the constitutional requirements addressed in *Janus*, the extent to which some lengthier period satisfies the requirement is unclear.

S U M M A R Y

The United States Supreme Court held in *Janus v. American Federation of State, County, & Municipal Employees* that a public employer may not deduct a fee from an employee's wages to pay union fees or dues unless the employee affirmatively consents to pay, and the Court required that the consent be shown by clear and compelling evidence. Thus, at a minimum, public employers must ensure that employee consent to a payroll deduction for membership fees or dues in a union or employee organization is collected in a way that ensures voluntariness, such as requiring direct provision of authorization from an employee to an employer.

The Court in *Janus* did not provide specific language or a method by which a public employer must obtain consent from an employee. If a public employer used the language proposed, a court is unlikely to find any constitutional defect.

A one-time, perpetual consent to a payroll deduction for membership fees or dues is inconsistent with the Court's holding in *Janus*. A court would likely conclude that consent for one year from the time given is valid and is sufficiently contemporaneous to be constitutional.

Very truly yours,



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