LIBERTY JUSTICE CENTER

August 13, 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 has been fully briefed since March 23, 2020. Pending before the Court are a request for the scheduling of oral argument by Appellants and a motion to stay from Appellee Teamsters Local 2010.

Pursuant to Federal Rule of Appellate Procedure 28(j), counsel for Appellants, Cara O'Callaghan and Jenee Misraje, hereby submit two recent authorities with bearing on this case: Indiana Attorney General Opinion 2020-5, issued on June 17, 2020, attached as Exhibit A, and the Proposed Amendments of the Michigan State Personnel Director to the Michigan Civil Service Rules, which were adopted by the Michigan Civil Service Commission on July 13, 2020, attached as Exhibit B.

The Opinion of Indiana Attorney General Hill 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 6 of the Opinion, General Hill reaches the conclusion that "the State and its political subdivisions must require that employees provide the necessary consent directly to them." General Hill goes on to find that "[t]o ensure an employee's consent is up-to-date, as required for it be a valid waiver of the employee's First Amendment rights, an employee must be provided a regular opportunity to opt-in and opt-out", citing *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 312 (2012).

Moreover, also at page 6 of the Opinion, General Hill advises that "[t]o ensure constitutional validity, we think it is reasonable that such a waiver be obtained annually." 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. And it is factually distinct from *Belgau v. Inslee*, No. 19-35137, which is pending before this Court.

Likewise, Michigan Public Service Commission adopted amendments to its state Rule 6-7 because it believed that "Ongoing deduction of fees based on old authorizations is problematic." Therefore, it adopted a new rule 6-7.2:

> Effective September 1, 2020, an authorization will expire if not authorized or reauthorized during the previous year. The director shall provide annual notice to all exclusively represented employees of the right to join or not join an exclusive representative without affecting employment status, the right not to maintain membership in an exclusive representative to retain employment, an exclusive representative's duty of fair representation to all bargaining-unit members, and the prohibition on union activities during actual-duty time.

This is also consistent with Appellants' contention that Teamsters Local 2010's policy of trapping employees in automatically renewing memberships for years on end violates their rights under *Janus*.

Respectfully Submitted,

/s/Brian K. Kelsey
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Exhibit

A

STATE OF INDIANA

OFFICE OF THE ATTORNEY GENERAL
302 WEST WASHINGTON STREET, IGCS 5TH FLOOR
INDIANAPOLIS, INDIANA 46204

CURTIS T. HILL, JR.
ATTORNEY GENERAL

June 17, 2020

OFFICIAL OPINION 2020-5

The Honorable James R. Buck
Indiana State Senate
200 West Washington Street
Indianapolis, IN 46204

RE: Payroll deductions for public sector employees

Dear Senator Buck:

You asked three questions related to payroll deductions of public employees used to support public sector unions in light of the decision of the U.S. Supreme Court in *Janus v. American Federation of State, County, and Municipal Employees Council 31*, 138 S.Ct. 2448 (2018). The three questions you asked were as follows:

1. Does the State of Indiana or its political subdivisions have an obligation to provide their employees with notice of their First Amendment rights against compelled speech?

2. If there is such an obligation, what information would be legally sufficient when providing this notice?

3. How long should a waiver of these constitutional rights remain valid before needing to be affirmatively renewed? That is, is there a certain time frame in which employees need to renew?

BRIEF ANSWER

To the extent the State of Indiana or its political subdivisions collect union dues from its employees, they must provide adequate notice of their employees' First Amendment rights against compelled speech in line with the requirements of *Janus*. Such notice must advise employees of their First Amendment rights against compelled speech and must show, by clear and compelling evidence, that an employee has voluntarily, knowingly, and intelligently waived his or her First Amendment rights and consented to a deduction from his or her wages. Finally, to be constitutionally valid, a waiver, or opt-in procedure, must be obtained from an employee annually.

BACKGROUND

Indiana has a robust set of laws that empower public and private sector employees to freely decide whether to join or support labor unions. First, Indiana is a "Right to Work" state. Indiana's Right to Work law provides that an individual may not be required to become or remain a member of a labor union, pay dues, fees, assessments, or other charges to a labor union as a condition of employment. Ind. Code § 22-6-6-8. The law declares a contract, agreement, understanding, or practice between a labor union and an employer that violates these provisions unlawful and void, and provides criminal penalties and civil remedies for violations. Ind. Code §§ 22-6-6-9, 22-6-6-10, 22-6-6-12. The Right to Work law only applies to private sector industry and does not apply to federal, state, or local employees. Ind. Code § 22-6-6-1.

Second, Indiana law prohibits collective bargaining between the state and labor unions. Ind. Code § 4-15-17-4. It makes strikes by state employees illegal. *Id*; see also Ind. Code § 4-15-17-8. The law also prohibits the state from recognizing a union or other employee organization as a representative of state employees, bargaining collectively with labor unions, entering into a collective bargaining agreement, or requiring an employee to join or financially support a labor union. Ind. Code § 4-15-17-5. State employees may still be a member of or otherwise associate with labor unions, consult with others for the common good of employees, financially support a labor union, and petition for the redress of grievances. Ind. Code § 4-15-17-6. The statute declares any contract, agreement, settlement, condition of cooperation, or any other device resulting from negotiations between the state and a labor union as illegal and of no effect. Ind. Code § 4-15-17-7.

Some public sector unions are established and governed by other Indiana statutes, political subdivisions, or local ordinances. For example, Indiana Code art. 20-29 provides that a school employee (teacher) may not be required to join or financially support a school employee organization (union) through the payment of fair share fees, representation fees, professional fees, or other fees. Public Safety, Regional Transportation Authority, Urban Mass Transportation System, and other local government personnel are other examples of individuals permitted to join a public sector union provided for in Title 36 of the Indiana Code.

Recently, the Supreme Court of the United States held 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 consents to pay." 138 S. Ct. 2448, 2486 (2018). In *Janus*, Mark Janus, a state employee of Illinois, challenged provisions of the Illinois Public Labor Relations Act, which allowed state and local employees to unionize. In sum, Mr. Janus refused to join the union and filed suit challenging the constitutionality of the state law authorizing "agency fees" which were a percentage of the full union dues. The agency fee was designed to cover union expenditures attributable to those activities "germane" to the union's collective bargaining activities (chargeable expenditures), but not the union's political and ideological projects (nonchargeable expenditures).

The U.S. Supreme Court held that Illinois' agency fee scheme violated the First Amendment free speech rights of non-union members by compelling them to subsidize private speech on matters of substantial public concern. The Court emphasized that Illinois' interest in

labor peace did not justify their agency fee scheme. Nor could it be justified on the grounds it was needed to prevent nonmembers from being "free riders." The Court ruled that the arrangement violated the First Amendment when public-sector unions charged nonmembers, such as Mr. Janus, for a proportionate share of union dues attributable to the union's activities.

With this in mind, we now turn to your questions.

ANALYSIS

1. The State of Indiana and its political subdivisions must provide their employees with notice of their First Amendment rights against compelled speech prior to deducting fees.

In *Janus*, 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 consents to pay." *Id*. at 2486. The Indiana General Assembly already rejected such compulsive arrangement by completely barring it from Indiana's public and private sectors. Both the U.S. Constitution and Indiana state statutes require that payment for union representation by an employee through wage deduction must be knowing and cannot be a condition of the employment arrangement.

"The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgement of the freedom of speech." 138 S. Ct. at 2463. "[F]reedom of speech includes the right to speak freely and the right to refrain from speaking at all and . . . to eschew association for expressive purposes." *Id*. (internal citations omitted). Forcing employees to utter support for views they find objectionable, or failing to notify employees that they may be ceding support of various views to a given labor organization, violates this basic principle. Id. A public employer has an affirmative duty to make public employees aware of their First Amendment rights related to automatic payroll deduction for union purposes. An employee has a fundamental right to elect to financially support a union, thereby affiliating and promoting a union's speech and platform, or an employee may retain his or her First Amendment right to not associate with a labor union.

"Free speech . . . is essential to our democratic form of government, and it furthers the search for truth." 138 S. Ct. at 2464 (internal citations omitted). Because free speech is essential, and compelled speech damaging, Indiana public employers must affirmatively disclose First Amendment rights to employees at the time each employee decides whether to allow for fee payments through automatic deduction from their wages.

2. The waiver of First Amendment rights by an employee must be freely given and shown by clear and compelling evidence.

The Court has applied an exacting scrutiny standard when reviewing agency fee requirements, though it has hinted that strict scrutiny might be more appropriate. Id. at 2464, 5. Given the exacting scrutiny such compelled speech is entitled to under a First Amendment analysis, the State of Indiana and its political subdivisions must sufficiently advise employees of this fundamental right and provide an opportunity to its employees to voluntarily waive this

protection. The State of Indiana and its political subdivisions must have "clear and compelling evidence" that the employee has freely waived his or her First Amendment rights against compelled speech. *Id*. at 2486.

In order to be valid, the waiver of a fundamental right must be voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 748 (1970). A waiver is voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). A public employee can only provide voluntary consent where he or she is adequately advised that paying union dues is not a condition of employment and that agreeing to pay dues is a waiver of one's First Amendment right. A waiver is knowing and intelligent if the individual has "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

It is not enough that some individuals might possess general awareness of the scope of their First Amendment rights and the types of speech a union may undertake utilizing their wages. Because the freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom," any purported waiver of this right is not effective "in circumstances which fall short of being clear and compelling." *Curtis Publishing v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion). In *Curtis Publishing*, the U.S. Supreme Court declined to find a waiver of First Amendment rights based on extra-record information about the "special legal knowledge" of particular individuals. *Id.* at 144. Unless a public employee clearly and affirmatively consents before any money is deducted from their wages, this standard cannot be met. *Janus* at 2486.

Texas Attorney General Ken Paxton recently issued an opinion on this topic. General Paxton found certain language legally sufficient for consent purposes under the *Janus* framework. I agree with General Paxton's analysis, and concur in the belief that such language is constitutionally sufficient to show a voluntary, knowing, and intelligent waiver of one's First Amendment rights:

> *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.*

See Opinion of Texas Attorney General Ken Paxton, Opinion No. KP-0310, issued May 31, 2020 (available at https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf).

3. A waiver of a public employee's First Amendment rights is subject to temporal constraints and must be renewed.

A waiver of one's First Amendment rights is not in perpetuity and, for there to be clear and compelling evidence of a knowing waiver, the State of Indiana and its political subdivisions must provide "opt-out" procedures and "opt-in" periods, during which time all employees will be permitted to decide whether they want to waive their First Amendment rights and authorize future deductions from their wages.

To be truly voluntary, an individual's consent to waive their rights must be reasonably contemporaneous. Circumstances change over time, and waivers of constitutional rights may eventually grow stale. Courts have recognized that timeliness is an important consideration in determining whether a waiver of fundamental rights is valid. The Supreme Court ruled that a public employee union could not levy a special assessment for election-related speech without giving nonmembers a new opportunity to opt out of subsidizing that effort. *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012). While acknowledging that nonmembers were given a choice once per year about whether to subsidize the union's political speech, the Court reasoned that nonmembers "cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent." *Id*. at 315. And because "the factors influencing a nonmember's choice may change" with the passage of time and changes in the content of the union's speech, the First Amendment requires that nonmembers not only be given an opportunity to opt-out, but also the option to opt-in, of subsidizing this speech. *Id*. at 317.

The Supreme Court has also recognized that the invocation or waiver of other constitutional rights have temporal limits. *Maryland v. Shatzer*, 559 U.S. 98 (2010). In *Shatzer*, a suspect invoked his right to have an attorney present during an investigatory interview, which the government honored and subsequently terminated the interview. The government later reinitiated the investigation, but this time, the suspect waived his *Miranda* rights and consented to a polygraph test, after which he made several inculpatory statements. *Id*. at 101-02. Upon being charged with the crime he confessed to, the defendant sought to exclude the statements, arguing that his original invocation of the right to counsel should have prevented investigators from later approaching him. The Court rejected the argument that the invocation of a constitutional right might exist in perpetuity despite any change in circumstances. Justice Scalia, writing for the Court, determined that a 14-day break in custody was sufficient for the defendant's prior invocation of his right to counsel to have expired. *Id*. at 110.

Also, in *Wyrick v. Fields*, the Supreme Court held that a defendant's waiver of his or her Sixth Amendment right to counsel is valid "unless the circumstances have changed so seriously that his answers no longer [are] voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights." 459 U.S. 42, 27 (1982); *see also Bivins v. State*, 642 N.E.2d 928 (Ind. 1995). Similarly, as the Supreme Court recognized in *Knox*, the circumstances that lead an individual to waive a fundamental right may change, as may an individual's beliefs or opinions, and cause the individual to rethink that waiver. Because the right to be free from compelled speech is a "fixed star in our constitutional constellation," *Janus's* requirement of clear and compelling evidence of a waiver demands some periodic inquiry into whether a public employee wishes to continue to waive – or reclaim – his or her First Amendment rights.

To ensure the deduction of union dues or fees from an employee comports with the *Janus* framework and does not occur without clear and compelling evidence that the employee freely consents to the deduction, the State and its political subdivisions must require that employees provide the necessary consent directly to them. To ensure an employee's consent is up-to-date, as required for it be a valid waiver of the employee's First Amendment rights, an employee must be provided a regular opportunity to opt-in and opt-out. *Knox*, 567 U.S. at 312.

The State or a political subdivision must provide the ability for an employee to opt-out of a union dues system whenever she chooses. Additionally, the State or a political subdivision must also provide for a regular opt-in period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages. To ensure constitutional validity, we think it is reasonable that such a waiver be obtained annually. Providing the option to employees will ensure that the State or a political subdivision is able to secure the clear and compelling evidence of a knowing and voluntary waiver in compliance with *Janus*.

CONCLUSION

While the State of Indiana is prohibited from engaging in collective bargaining with labor unions, state employees are allowed to be voluntary members of public sector employee organizations. The State of Indiana and its political subdivisions must ensure their employee payroll deduction processes for union dues, if any, comport with the U.S. Supreme Court's decision in *Janus*. Given the First Amendment implications, an employee must be provided adequate notice of his or her right to not engage in compelled speech. Furthermore, the State or political subdivision must be able to show by clear and compelling evidence that the employee's waiver of his or her First Amendment right was knowing and voluntary. Finally, the State or political subdivision must allow for an opt-out provision as well as provide an annual opt-in period for an employee to exercise his or her First Amendment right against compelled speech.

Sincerely,

Curtis T. Hill, Jr.
Attorney General

David P Johnson, Advisory Chief Counsel
William H. Anthony, Advisory Assistant Chief Counsel

Exhibit

B

STATE PERSONNEL DIRECTOR OFFICIAL COMMUNICATION

SPDOC No. 20-06

TO: ALL APPOINTING AUTHORITIES, HUMAN RESOURCES OFFICERS, AND RECOGNIZED EMPLOYEE ORGANIZATIONS

FROM: JANINE M. WINTERS, STATE PERSONNEL DIRECTOR

DATE: JUNE 5, 2020

SUBJECT: **PROPOSED AMENDMENTS TO RULE 6-7, *DUES AND SERVICE FEES***

THIS DOCUMENT IS AVAILABLE UPON REQUEST IN ALTERNATIVE FORMATS. FOR FURTHER INFORMATION CALL (517) 284-0115.

In 2015, the Michigan Supreme Court held in *UAW v Green* that the commission could not include agency-shop fee provisions under Michigan's Constitution. In response, the commission amended rule 6-7 to (1) strike provisions allowing union contracts to require payment of service fees and (2) require a current voluntary written authorization to allow deduction of dues or fees. Prior authorizations for dues deductions were treated as valid under both the amendments passed in 2015 and other reforms adopted in 2017.

In 2018, the Supreme Court of the United States held in *Janus v AFSCME*, *Council 31*, that agency-shop fees also raised First Amendment concerns by presuming waivers of those constitutional rights without clear and compelling evidence of a freely given waiver.

While the reforms adopted in 2017 and implemented in 2019—which centralized authorization of dues and fees and allowed employees to grant or withdraw authorization anytime—addressed many concerns raised by *Janus*, commissioners have asked staff to draft and circulate other related potential amendments for public comment.

Notice of Rights and Reauthorization of Dues and Fees:

The commission has accepted prior authorizations for payroll deduction of dues and fees, dating back to the introduction of collective bargaining. Some current authorizations were submitted decades ago when employees were unaware of later developments in *Green* and *Janus*. Most current service-fee payers submitted authorizations while legally compelled to pay either that fee or higher dues. The *Janus* court held that "nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed," that employees must "affirmatively consent," and that the waiver "must be freely given and shown by 'clear and compelling' evidence."

Ongoing deduction of fees based on old authorizations is problematic. To ensure both that employees know their rights and the validity of these authorizations, commissioners

have asked staff to draft rule amendments to require (1) ongoing provision of notice to employees of their rights and (2) reauthorization of both fees—as required by *Janus*—and dues—under the same logic given the large number of pre-*Green* and pre-*Janus* authorizations still in place. Commissioners have also requested draft rule amendments to ensure continuing, knowing, and voluntary consent to deductions of dues and fees by requiring annual reauthorization for these payroll deductions.

Discontinuing Service Fees:

Service fees were created when judicial decisions required an alternative to union dues so that employees were only required to pay costs necessary for a union to perform its duties as exclusive representative without being required to subsidize other unrelated costs, including political expenditures. Now that agency-fee arrangements are not permitted, there is no longer a need to offer such an alternative. Commissioners have asked staff to draft rule amendments sunsetting the collection of service fees at the end of current collective bargaining agreements.

Proposed Amendments:

6-7 Dues and Service Fees

6-7.1 Payroll Deduction

If agreed to in a collective bargaining agreement, the state may deduct the dues or service fee of a member of an exclusively represented bargaining unit through payroll deduction. An appointing authority cannot deduct membership dues or service fees unless the employee has made a voluntary authorization, which shall be retained while relied upon to authorize deductions. Effective January 1, 2022, the state shall not deduct service fees by payroll deduction.

6-7.2 Authorization and Notice

The director shall establish the exclusive process for employees to authorize or deauthorize deduction of dues or fees. Effective September 1, 2020, an authorization will expire if not authorized or reauthorized during the previous year. The director shall provide annual notice to all exclusively represented employees of the right to join or not join an exclusive representative without affecting employment status, the right not to maintain membership in an exclusive representative to retain employment, an exclusive representative's duty of fair representation to all bargaining-unit members, and the prohibition on union activities during actual-duty time.

Comments on the proposed amendments may be sent to MCSC-OGC@mi.gov or Office of the General Counsel, Michigan Civil Service Commission, P.O. Box 30002, Lansing, Michigan, 48909. Comments must be received by July 6, 2020.