February 6, 2020

Delegate Elizabeth R. Guzman
Pocahontas Building, Room E208
900 East Main Street
Richmond, Virginia 23219
DelEGuzman@house.virginia.gov

Re: Unconstitutional provision in HB 582

Dear Delegate Guzman:

I am a Senior Attorney at the Goldwater Institute and was one of the attorneys who represented Plaintiff Mark Janus before the United States Supreme Court in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). I am writing this letter to advise you that the provision of HB 582 that would give unions exclusive control of workers' payroll deduction authorizations violates the First Amendment under *Janus*.

In *Janus*, the Supreme Court ruled that the government may not deduct dues or any other payment to a union from a worker's paycheck "unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486. The Court stated that a union dues authorization is a waiver of a worker's First Amendment right *not* to support the union, and that waiver "must be freely given and shown by 'clear and compelling' evidence." *Id.*

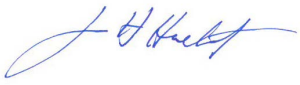
The payroll deduction provisions in § 40.1-57.9(B) of HB 582 do not comply with this requirement. The bill would give unions the exclusive responsibility to receive and maintain authorizations for union dues deductions from employees' paychecks as well as employees' requests to cancel or change their dues authorizations. The union would not normally be required to provide the public employer with copies, or any evidence at all, of employees' authorizations and requests. Instead, the public employer would simply take the union's word for it that a given worker authorized deductions "unless a dispute arises about the existence or terms of that authorization"—i.e., unless the worker specifically objects to a deduction, claiming that he or she did not authorize it.

That is insufficient to comply with *Janus*'s affirmative consent requirement. Under *Janus*, before deducting union dues from a worker's paycheck, the *government* must have clear and compelling evidence that the worker affirmatively consented to the deduction. *See Janus*, 138 S. Ct. at 2486. The mere say-so of a union is not such clear and compelling evidence. Further, the bill would place the burden on the worker to object to a dues deduction before the union would be required to produce any evidence of the worker's authorization to the government. Under *Janus*, a worker should *never* have to take affirmative steps to exercise his or her First Amendment right not to join or pay a union.

The Virginia General Assembly should therefore decline to pass HB 582 in its current form and should instead, at a minimum, revise the proposed § 40.1-57.9(B) to require that a public employer *not* deduct union dues from any worker's paychecks unless and until it receives clear and compelling evidence that the worker actually authorized the deduction.

If the General Assembly does not revise the bill in this way, HB 582 will be highly vulnerable to a First Amendment challenge.

Sincerely,



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