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**UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF LABOR – MANAGEMENT STANDARDS**

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In the Matter of:

PENDING FTA GRANT  
APPLICATIONS OF THE

[REDACTED]

Matter Nos :

[REDACTED]

**RESPONSE TO BRIEFING  
ORDER OF**

[REDACTED]

[REDACTED] through the undersigned counsel, submits this brief in response to the June 27, 2024, Briefing Order made in connection with above-referenced FTA Grant Applications. This brief concerns the possible impact of Florida Senate Bill 256 (“CS 256”) on the bargaining rights of JTA employees. As background, CS 256 prohibits public employers from deducting dues from employees’ paychecks under dues checkoff authorizations. It also states, among other things, that unions must recertify annually. Finally, CS 256 allows public employers with mass transit bargaining units to petition for a waiver of these provisions if the new law would jeopardize the employer’s eligibility to receive FTA funding.

As detailed below, that law, and [REDACTED] actions to comply with it without seeking a waiver, should not jeopardize any funding. Since the passage of CS 256 the [REDACTED] has negotiated in good faith with the American Federation of State County and

Municipal Employees Council 79 (“AFSCME”) over the law’s requirements. The results of those negotiations have not materially affected or diminished the previously existing collective bargaining rights of AFSCME represented employees. In fact, it resulted in exactly what the United States Department of Labor (“DOL”) seeks to promote: a negotiated agreement between the parties in response to CS 256’s enactment. The responses to the four questions set forth in the DOL’s Briefing Order are set forth below.

1. *During the MOU negotiations, did the parties discuss the possibility of seeking a waiver of CS 256’s provisions from PERC? If so, what were the positions of the parties at that time about seeking a waiver and the effect of the MOU on this possibility?*

As ██████ has explained in prior correspondence with the DOL, the parties recognized that CS 256 cast doubt on the legality of the dues checkoff provision of the parties’ collective bargaining agreement (“CBA”). As a result, they engaged in several discussions over a six-week period before agreeing on a written Memorandum of Understanding (“MOU”) on that issue. During the parties’ negotiations over the MOU, ██████ position was that the dues checkoff provision contained in the parties’ collective bargaining agreement violated state law. ██████ therefore sought to ensure compliance with the law by removing the dues checkoff provision. AFSCME did not raise the possibility of ██████ seeking a waiver, and ██████ did not unilaterally offer to seek a waiver as AFSCME readily agreed to the deletion of the dues check-off provisions. AFSCME’s larger concern at the time was making sure that union members did not have dues both deducted by ██████ and paid directly to AFSCME for

the same period. Thus, [REDACTED] agreed to paragraph 2 of the MOU regarding reimbursing [REDACTED] collected union dues.

AFSCME was amenable to removing the dues checkoff requirement so long as [REDACTED] agreed that the MOU would no longer apply if CS 256 no longer applied. Based on those discussions, the parties agreed on language that states that the MOU would expire on May 20, 2025, “or when CS 256 ... was no longer in effect and/or applicable to represented employees at [REDACTED], whichever is sooner.”

- 2. The MOU appears to be a temporary and limited agreement in that it states it “will expire at midnight May 20, 2025, or when Florida CS 256 and the resulting Florida statutory provisions are no longer in effect and/or applicable to represented employees at [REDACTED], whichever is sooner.” Explain how an agreement limited in this manner does or does not allow a Grantee to abide by its Section 13(c) obligations, which extend for the life of the project to which the Department’s certification applies, whether that is the period over which operating assistance is used to pay salaries or the useful life of a funded vehicle or facility.*

The MOU is not a temporary and limited agreement that diminishes the collective bargaining rights of employees primarily for three reasons. First, the question appears to misunderstand the purpose of the MOU. That MOU is an amendment to the parties’ CBA, which by its terms expires on May 20, 2025. Since CS 256 cast doubt on the lawfulness of the parties’ CBA, the parties determined that a mid-term modification on the subject of dues checkoff was warranted. But no other mid-term modifications were necessary. As a result, the parties drafted an MOU with an expiration date that aligns with the CBA’s expiration date. [REDACTED] plans to negotiate with AFSCME in the months before that expiration about not only the MOU but also about potential revisions to the CBA. As a practical matter, then, the expiration date has no actual impact because the sophisticated parties that negotiated the MOU

understand the need for further bargaining in the regular course of their relationship. In fact, the MOU is almost certain to not apply beyond May 20, 2025, because any agreement between the parties on this subject will be incorporated into the parties' succeeding CBA.

In sum, then, the MOU's limitations simply track the limitations contained in most CBAs under which public transit employees work. Those CBAs might contain dues checkoff provisions (or they might not) but they all provide for a date certain by which a CBA expires. Indeed, under the DOL's theory, most all dues checkoff provisions would likewise violate Section 13(c) just because they are contained in a CBA with an expiration date.

Second, the DOL's question is based on the faulty presumption that an agreement on dues checkoffs is no longer in effect once the agreement between the parties on that issue has expired. But the National Labor Relations Board, the federal agency that has jurisdiction over private sector labor relations and whose decisions are often cited as guidance in Florida public sector labor relations matters, has explained that is not the case. Rather, the Board has found that employers may not unilaterally stop union dues checkoffs after a CBA expires. *See Valley Hospital Medical Center, Inc.*, 371 NLRB No. 160 (2022). And since those provisions continue after a CBA's expiration date, it naturally follows that the MOU, which also reflects an understanding on dues checkoffs, would continue past any expiration date until replaced by a new MOU (or, more likely, until superseding language is incorporated into a new CBA).

Third, the DOL's question seems to presume that [REDACTED] "Section 13(c) obligations" include a duty to reach an agreement on dues checkoffs. Not so. As the Supreme Court has held, nothing in the National Labor Relations Act compels an employer to agree to a dues checkoff. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Indeed, the NLRB has held that an employer, having agreed to a dues checkoff, is under no obligation to continue it forever. *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990). In fact, an employer may lawfully propose the elimination of dues checkoff and, after bargaining to a valid impasse, implement its proposal. *American Thread Co.*, 274 NLRB 1112, 1112 (1985). As a result, the NLRB has expressly held that an employer may unilaterally discontinue dues checkoffs without undermining the union when it has a lawful basis for doing so. *See Metalcraft of Mayville, Inc.*, 367 NLRB No. 116 (2019).

That being the case under the NLRA, it would make no sense to read into the DOL's oversight of public-sector collective bargaining such a requirement. Section 13(c) requires no such thing. It does not speak at all on the issue of dues checkoffs. *See* 49 U.S.C. §5333(b). To read into the statute a requirement that dues checkoff agreements are somehow necessary to preserve collective bargaining rights when the NLRB has rejected such an argument would be both flat out wrong and an overreach of the DOL's authority. *See Loper Bright Enters. v. Raimondo*, 603 U.S. , S.Ct. , 2024 U.S. LEXIS 2882 (June 28, 2024).

3. *Provide a justification for how bargaining can or cannot continue regarding dues deductions in light of CS 256's restrictions.*

Again, this query appears to presume that bargaining over dues checkoffs cannot continue because CS 256 prohibits them. But the parties' own bargaining history shows that is not the case. Given the state law ban on such checkoffs, ██████ arguably could have unilaterally ceased checkoffs full stop, without any discussions over the issue. It did not. Instead, ██████ engaged in bargaining with AFSCME over how the parties should proceed in light of the new law. The MOU reflects that a blanket prohibition with no caveats was not the final result. Rather, the parties agreed that while there would be no dues checkoffs, that could change if the law that led to that restriction were no longer in effect.

And similar bargaining can continue. For example, the parties will need to negotiate over whether to include language like that contained in the MOU into any future CBA. On one end, the CBA could be silent on the question. On the other end, the parties could agree that the law forbade a dues checkoff provision while agreeing to one that would only apply conditionally if CS 256 were repealed, replaced, or otherwise invalidated. In between these two extremes are various permutations that the parties could negotiate over in good faith. To be certain, CS 256 restricts current dues checkoffs by employers. But that does not mean that sophisticated parties with long bargaining relationships, such the parties here, cannot have substantive discussions over the topic.

4. *Explain how CS 256's amendments to registration and recertification requirements do or do not interfere with Section 13(c)'s protection of collective bargaining rights.*

As the DOL is aware, Section 4 of CS 256 augments the registration and recertification requirements for unions that represent Florida public employees. Florida law already provided for registration and recertification annually, as do other jurisdictions. Such administrative tasks are plainly no more burdensome than the annual private sector union reporting requirements under the Labor Management Reporting and Disclosure Act. *See, e.g.*, 29 U.S.C. § 431. Thus, there is no arguable basis that an annual registration requirement would impact the protection of collective bargaining rights.

█ assumes, then, that the DOL's query is about CS 256's two main new requirements. First, a union must provide details on the number of represented employees with valid signed membership authorization forms and who are paying dues and, if fewer than 60 percent of the employees eligible for representation in the bargaining unit pay dues during the union's last registration period, then the union must petition for recertification as the exclusive representative of bargaining unit employees. Second, CS 256 also provides that if a union submits an inaccurate application or does not comply with the law then Florida's PERC ultimately may revoke the union's registration and certification.

These new requirements do not interfere with Section 13(c)'s protection of collective bargaining rights any more than the prior registration requirements. They do not undermine any presumption of continuing majority status. To the contrary,

the new registration requirements do the exact opposite by ensuring that public section unions can show continuing majority status annually. Moreover, the mere fact that the law provides for revocation of representation status for disregarding its provisions does not mean that 13(c) rights are implicated. Compliance with registration and other administrative requirements are regularly accepted as a part of doing business. For example, companies are regularly required to register with the state as a precondition to doing business. Failing to do so could eventually lead to a company's being unable to do business in that state. If public sector unions, which are, in fact, large businesses, wish to maintain operations in Florida then they too must comply with common-sense reporting requirements. The Union's threshold reporting requirement has no substantive effect on the process of collective bargaining once its certification is approved in a presumably perfunctory manner each year. "Section 13(c) does not perpetuate the substantive terms of pre-acquisition bargaining agreements, but rather protects the process of collective bargaining." *Transit Union v. Donovan*, 767 F.2d 939, 953 (D.C. Cir. 1985).

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In conclusion, the [REDACTED] and the AFSCME have already engaged in good faith bargaining to address the effect of CS 256 about dues checkoffs. As for the Union's unilateral reporting requirements, those have no impact on the parties' substantive bargaining so long as the Union complies with its obligations.

Respectfully submitted this 19th day of July 2024.

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