



to compliance with 49 U.S.C. § 5333(b) (“13(c)”). AFSCME asserted as such in its objections, and the DOL has repeatedly recognized, in letters sent to Florida public employers since the enactment of CS 256, that the law added several onerous prohibitions that cut at the heart of collective bargaining in conflict with federal requirements under Section 5333(b). Specifically, in its May 13, 2024, letter finding AFSCME’s objection here sufficient, the Department identified three such provisions: (1) prohibiting employee organizations from having dues deducted and collected by the employer; (2) requiring employee organizations to petition the Florida Public Employees Relations Commission (“PERC:”) for recertification; and (3) requiring the PERC to revoke the registration and certification of employee organizations in certain circumstances. And as an implicit concession that CS 256 violates 13(c) rights, the Florida legislature provided in the law a process by which a public employer like █████ may petition the PERC for a waiver.

Even so, █████ alleged in its June 13, 2024, response to AFSCME’s objection that CS 256 does not jeopardize collective bargaining rights in this instance, because, according to █████ (a) AFSCME negotiated away dues deduction provisions in its collective bargaining agreement as a reaction to CS 256, and (b) AFSCME has not been decertified (yet) as the collective bargaining representative.

The only existing impediment to resolving this issue through the PERC waiver process is █████ assertions that the August 17, 2023, Memorandum of Understanding (“MOU”) between AFSCME Local 3613 and JTA meets the requirements of 13(c) and serves as a mutual resolution between the parties. For the reasons stated below, the

MOU does not in any way remove the onerous provisions of CS 256 and their impact and cannot serve as a resolution to the conflict with 13(c).<sup>1</sup>

**II. THE PARTIES DID NOT DISCUSS THE WAIVER PROCESS OR ANY ASPECT OF SECTION 13(c) DURING THE NEGOTIATION OF THE MOU**

As a threshold matter of fact, the execution of the MOU was not and cannot be considered a mutually acceptable resolution because the parties did not discuss 13(c) or the PERC waiver process when executing that agreement. Mutuality requires the parties to have addressed the requirements of 13(c) and to have reached a meeting of the minds on an acceptable solution. The DOL has recognized this first principle of contract law in its decisions refusing to require interest arbitration provisions in collective bargaining agreements over the objections of unions when the employers do not agree. See, e.g., Letter from DOL dated March 7, 1986, concerning the Chattanooga Area Regional Transportation Authority (CARTA) (rejecting interest arbitration as a solution even though permitted by state law absent mutual agreement by both the union and the employer.)

Here, the MOU was negotiated and executed as an immediate response to the uncertainty caused by the enactment of CS 256 and well before the pending █████ transit grant referrals. At the time the MOU was negotiated, AFSCME was not aware of any pending █████ grants. Since the passage of CS 256, when AFSCME becomes aware of a pending grant or referral, it then requests that the employer petition PERC for a waiver, as noted in the Department's June 27, 2023, letter, "Changes in Florida State Law,

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<sup>1</sup> To be clear, notwithstanding █████ assertion to the contrary, AFSCME does not agree that the negotiations over the MOU executed August 17, 2023, involved in any way a discussion of 13(c) or in any way served as a mutual resolution in this matter.

applicability to Public Transit Employees.” Because no pending █████ grant objection existed at the time of the MOU, AFSCME did not have any notice from the DOL concerning █████ and 13(c), and the MOU was not entered into based on any 13(c) concerns.

Therefore, the MOU was not a privately negotiated protective arrangement concerning 13(c). When CS 256 became effective, counsel for █████ sent AFSCME Local 1363 the proposed dues deduction language and represented that the passage of CS 256 required it. The parties did not discuss, let alone agree upon that language serving as a satisfaction of any 13(c) requirements, or related protective arrangements. Neither the language of the MOU itself nor the email exchanges between AFSCME Local 1363 and █████ attorneys facilitating execution of the MOU reference 13(c), the PERC waiver process, or the PERC waiver proviso in CS 256.

Moreover, the MOU does not in any way purport to protect the continuation of any collective bargaining rights whatsoever; and it instead merely seeks to comply with CS 256’s impairment respecting dues deduction. The MOU eliminates the dues deduction provision AFSCME and █████ had bargained into their agreement repeatedly since the union’s certification over a decade ago; and nothing more.

In sum, any activity concerning the MOU could not have possibly been negotiations or discussions concerning 13(c) for the simple reason that those discussions did not occur; no grant referral was pending; and, the MOU did not address continuation of collective bargaining rights at all. And in any event, the impairment to collective bargaining rights was created and continues to exist because of CS 256, not because of any interactions between the union and the employer.

### **III. THE DURATION OF THE MOU DOES NOT ERASE THE OBLIGATION OF THE GRANTEE TO ABIDE BY ITS SECTION 13(C) OBLIGATIONS FOR THE DURATION OF THE GRANT**

The MOU, which expires in 2025, cannot be an acceptable protective arrangement under 13(c), because the parties, without a waiver, are prevented by CS 256 from engaging in collective bargaining over dues deduction now or post-expiration. As long as ■■■ continues to refuse to petition and obtain a PERC waiver-the prohibition on employees voluntarily paying dues via deductions from their paychecks prevents ■■■ from making bargained-for dues deductions long required by its collective bargaining agreements prior to CS 256, and the parties cannot negotiate over the same. Unless CS 256 is amended or appealed, or unless ■■■ obtains a waiver from PERC, this prohibition continues, both during and after the effective period of the MOU.

The temporal nature of the MOU conclusively demonstrates the 13(c) problem. The DOL explained in its communications connected to grant referral FL-2023-043 (County of Miami-Dade) dated July 19, 2023, and in a more detailed communication on August 4, 2023 regarding Broward County referrals FL-2023-027; FL-2023-029; and FL-2023-047, that as long as a grantee is using federal funds, it must continue the collective bargaining process. The DOL stated the following:

A time-limited waiver cannot fully resolve the conflict between CS 256 and the protective arrangements required by 49 U.S.C. § 5333(b), which apply for the duration of the federally funded project. The Grantee must continue to abide by the commitments made in the certified protective agreements 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. For the Department's process, while a collective bargaining agreement may expire, the Grantee's assurance to continue collective bargaining pursuant to 49 U.S.C. § 5333(b)(2)(b) does not. See *City of Macon v. Marshall*, 439 F. Supp. 1209 (1977) (upholding Department's refusal to certify where city failed to

continue collective bargaining rights after acquisition and expiration of the collective bargaining agreement). By executing its contract of assistance with the Federal Transit Administration (FTA), the Grantee accepts the ongoing obligations of the protections.

In this matter, as stated in the grant applications, the useful life of the vehicles covered by the grants are twelve years or 500,000 miles, a period well eclipsing the life of the MOU. Other examples include the useful life of the equipment covered under the grant ranging from three years (software) to five years (public address systems/computer technology) to ten years (elevated railings) to twenty years (generators). And while predicting whether any individual employee will stay employed after May of 2025 is impossible, presumably at least one or more employees engaged in maintenance and service work covered by the grants will do so. As the DOL noted in its August 4, 2023, communication, Section 13(c) does not have a sunset provision. See *Amalgamated Transit Union, AFL-CIO v. Donovan*, 767 F.2d 939, 957 (D.C. Cir. 1985) (Ginsburg, J., concurring) (“Congress did not provide for sunseting section 13(c) and said nothing in the text of the provision to suggest that the essential process entailed in ‘the continuation of collective bargaining rights’ should come to mean less as time goes by.”).

**IV. CS 256 PROHIBITS DUES DEDUCTIONS THEREBY PREVENTING AFSCME’S CONTINUED DESIRE TO EXERCISE ITS PRE-CS 256 RIGHT TO COLLECTIVELY BARGAIN OVER THAT SUBJECT**

CS 256 prohibits dues deduction by transit employees (“an employee organization . . . may not have its dues and uniform assessments deducted and collected by the employer”), even where dues deduction has been agreed upon and is required under a collective bargaining agreement, absent a waiver. Therefore, if AFSCME and the [REDACTED] desired now to enter into a MOU reinstating dues deductions—whether immediately, or

upon expiration of the MOU—CS 256 would bar implementing any such agreement unless and until ■■■■ obtains a waiver from PERC (for which ■■■■ has refused to petition). This prohibition is in place even though dues deduction had been a mandatory subject of bargaining between the parties under Florida law (as under the NLRA), and the parties had agreed to such deductions for over ten years prior to the enactment of CS 256.

Until CS 256, the Florida Public Employees Relations Act (“PERA”) afforded any public employee the right to pay dues to their union by means of a deduction from the employee’s paycheck, collected by the employer and transferred to the union. In fact, under PERA prior to CS 256, the subject of dues deduction was not only a mandatory subject of bargaining—as under the NLRA—but, employers were *required* to grant an employee organization’s request in bargaining for dues deduction. See amendments to Florida Statutes Sec. 447.303 (statute formerly providing “an employee organization which has been certified as a bargaining agent shall have the right to have its dues and uniform assessments deducted and collected by the employer.”)

And dues deduction is not just any right—prior to the enactment of CS 256, dues deduction has always been considered a mandatory subject of bargaining of critical importance to the exercise of collective bargaining rights by employees. See generally, Valley Hosp. Med. Ctr., Inc., 371 NLRB No. 160, 2022 WL 5179877 (Sept. 30, 2022); Florida Public Employees Council 79, AFSCME, AFL-CIO, 31 FPER 257, 2005 WL 6712050 (PERC 2005) (“An employer’s act of ceasing dues deduction or failing to remit dues to an employee organization has the practical effect of creating labor instability by allowing an employer to financially strangle the organization.”). Yet, in the absence of a



447.301, 305, 307. If a union fails to file a registration renewal (for all units, including those with 60% or higher membership with signed state authorization forms), a recertification petition (for units under the 60% threshold), or loses a required recertification election, its certification would be revoked—and its CBA prematurely cancelled as a result. In fact, any errors in the filings for a renewal of certification can result in the loss of certification. Loss of certification would extinguish the requirement of the employer to bargain with the union, thereby directly contradicting the continuation of collective bargaining rights and the existing rights, privileges, and benefits under the existing CBA. AFSCME faces this perpetual, existential threat on an annual basis and must continually devote extraordinary amounts of time, money, and other resources to comply with these draconian provisions of CS 256, including the burden to sign even existing union members to state-mandated membership authorization forms.

The DOL has consistently recognized this impediment in the Florida cases since the passage of CS 256 and in other states that have imposed draconian recertification requirements. See, e.g., communication to parties connected to grant referral IA-207-010 and IA-2017-011, dated June 19, 2017 (stating Iowa's law requiring a retention and recertification election be held one year before the expiration of a collective bargaining agreement and the potential immediate voiding of the collective bargaining agreement conflicted with 13(c)). As expressed by the DOL with respect to Iowa, this diminution in rights is triggered *ex ante* by the existence of these new requirements by statute, not—as ■■■ argues here—only once the union fails to comply.

The FTA mandates the continuation of collective bargaining rights as a condition for certification of an employee protection agreement. Amalgamated Transit Union

International v. Donovan, 767 F.2d 939 (D.C. Cir. 1985). CS 256 is a change in legal circumstances that materially diminishes AFSCME-represented transit employees' collective bargaining rights by subjecting them to these new requirements. The Department should not wait until a union has suffered decertification—and lost all collective bargaining rights entirely—to require a protective arrangement to preserve the legal collective bargaining rights that a union enjoyed prior to CS 256.

## **VI. CONCLUSION**

For the reasons stated above, the August 17, 2023, MOU does not materially alter the interference or eliminate it, and the parties did not mutually agree that the MOU would serve as a protective arrangement. Therefore, absent a waiver by PERC or some other change in the facts that removes the prohibitions on dues deduction and the annual recertification requirements, the conflict with 13(c) remains. AFSCME continues to be amenable to working with the Department and [REDACTED] to reach an arrangement that satisfies 49 U.S.C. Section 5333(b), including but not limited to providing all available support in [REDACTED] obtaining a waiver from the PERC, and respectfully asks that the Department so order.

July 19, 2024

