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Attorneys for Plaintiff
PATRICIA GROSSMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PATRICIA GROSSMAN,

Plaintiff,

vs.

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION / AFSCME LOCAL 152;
DAVID LASSNER, IN HIS OFFICIAL
CAPACITY AS PRESIDENT OF THE

Civil No. _____

**COMPLAINT SEEKING
DECLARATORY RELIEF,
INJUNCTIVE RELIEF, AND
DAMAGES FOR DEPRIVATION OF
FIRST AMENDMENT RIGHTS**

UNIVERSITY OF HAWAII; AND
RUSSELL A. SUZUKI, IN HIS OFFICIAL
CAPACITY AS ATTORNEY GENERAL
OF HAWAII,

Defendants.

INTRODUCTION

1. Government employees have a First Amendment right not to be compelled by their employer to join a union or to pay any fees to that union unless an employee “affirmatively consents” to waive that right. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be “freely given and shown by ‘clear and compelling’ evidence.” *Id.*

2. In jurisdictions that required agency fees to be paid by non-union members before the Supreme Court’s decision in *Janus*, those union dues deduction agreements are no longer enforceable. Employees who signed such agreements could not have waived their rights freely because the Supreme Court had not recognized the existence of their right to do so. Such employees must be freely given the choice either to join the union or not to join the union without paying agency fees to subsidize union advocacy.

3. Plaintiff, Patricia Grossman, is an admissions officer employed by the University of Hawaii at Hilo. Prior to the Supreme Court’s decision in *Janus* on June 27, 2018, Mrs. Grossman was alleged by the union to be a member of Defendant

Hawaii Government Employees Association / AFSCME Local 152 (“HGEA”).

4. HGEA is violating Mrs. Grossman’s First Amendment rights to free speech and freedom of association by refusing to allow her to withdraw her membership and by continuing to charge her union dues.

5. Defendant David Lassner (“President Lassner”), in his official capacity as President of the University of Hawaii, is violating Mrs. Grossman’s First Amendment rights to free speech and freedom of association by continuing to withhold union dues from her paycheck, despite not having received freely given, affirmative consent from Mrs. Grossman to do so.

6. Defendant Russell A. Suzuki, in his official capacity as Attorney General of Hawaii (“Suzuki”), is violating Mrs. Grossman’s First Amendment rights to free speech and freedom of association by continuing to defend Hawaii law that prohibits Mrs. Grossman from ending the withholding of union dues from her paycheck until thirty days before the anniversary date of her joining the union. Haw. Rev. Stat. § 89-4(c).

7. Defendant Suzuki is violating Mrs. Grossman’s First Amendment rights to free speech and freedom of association by continuing to defend Hawaii law that requires the deduction of full union dues from her paycheck, even though she requested twice to become an agency fee payer, and she has no recollection of having signed a union authorization card in the first place. Haw. Rev. Stat. § 89-4(a).

8. Defendant Suzuki is violating Mrs. Grossman's First Amendment rights to free speech and freedom of association by continuing to defend Hawaii law that requires HGEA to be the "exclusive representative" of Mrs. Grossman, whether she is a union member or not. Haw. Rev. Stat. §§ 89-7(b) and 89-8(a).

9. Mrs. Grossman, therefore, brings this case under 42 U.S.C § 1983 and 28 U.S.C. § 2201(a), seeking declaratory and injunctive relief, as well as damages in the amount of the dues previously deducted from her paychecks.

PARTIES

10. Plaintiff, Patricia Grossman, is employed by the University of Hawaii at Hilo in instruction and student support in the admissions office. She resides in the County of Hawaii, State of Hawaii.

11. Defendant Hawaii Government Employees Association / AFSCME Local 152 is a labor union headquartered at 888 Mililani Street, Suite 401, Honolulu, Hawaii, 96813, in the City and County of Honolulu, State of Hawaii.

12. Defendant David Lassner is sued in his official capacity as President of the University of Hawaii, a public college and university system with three university campuses, located at Manoa, Hilo, and West Oahu (the "University"). He is charged with deducting union dues from the paychecks of employees of the University. The Office of the President of the University is located at 2444 Dole

Street, Bachman Hall 202, Honolulu, Hawaii 96822, in the City and County of Honolulu, State of Hawaii.

13. Defendant Attorney General Russell A. Suzuki is sued in his official capacity as the representative of the State of Hawaii charged with the enforcement of state laws, including the provisions challenged in this case. The Department of the Attorney General is located at 425 Queen Street, Honolulu, Hawaii, 96813, in the City and County of Honolulu, State of Hawaii.

JURISDICTION AND VENUE

14. This case raises claims under the First and Fourteenth Amendments of the U.S. Constitution, 42 U.S.C. § 1983, and 28 U.S.C. § 2201(a). The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

15. Venue is proper because Defendants are residents of the District of Hawaii and because a substantial portion of the events giving rise to the claims occurred in this District. 28 U.S.C. § 1391(b).

FACTS

16. Plaintiff, Patricia Grossman, has been employed by the University since 1984, and she currently serves as an admissions officer for the University of Hawaii at Hilo.

17. On information and belief, Unit 8 of HGEA has been certified as the exclusive representative for collective bargaining purposes for University employees like Mrs. Grossman.

18. On June 27, 2018, the Supreme Court issued its ruling in the *Janus* case.

19. On July 6, 2018, the University sent an e-mail announcement to employees explaining that, due to the decision in *Janus*, it was ceasing union payroll deductions for nonmember employees.

20. On July 7, 2018, Mrs. Grossman sent an e-mail to HGEA, asking the union to confirm she was not a member.

21. On July 8, 2018, Mrs. Grossman sent an e-mail to the University to inquire how to confirm she was not a union member, so that union dues would no longer be deducted from her paycheck.

22. On July 9, 2018, the University responded, telling Mrs. Grossman that the University deferred to HGEA to determine who was a union member and who should have union dues deducted from his paycheck.

23. On July 9, 2018, HGEA responded to Mrs. Grossman that its records indicated she had been a union member since 1995.

24. Mrs. Grossman has no recollection of ever having signed a union membership authorization. She responded to this message asking HGEA what document was used to verify her membership.

25. On July 10, 2018, HGEA replied to Mrs. Grossman that it “appears [she] became a member around 5/23/1995.”

26. To date, HGEA has not provided Mrs. Grossman a copy of any union authorization she allegedly signed.

27. Mrs. Grossman communicated directly to HGEA representatives on at least two occasions in the past that she did not want any of the money deducted by the union from her paycheck to be used for political or ideological activities. She made these communications once by telephone and once in person at the HGEA office in Hilo. She was assured by those representatives that her wishes had been noted and would be honored. On July 10, 2018, HGEA denied any knowledge of the interactions.

28. On July 10, 2018, Mrs. Grossman sent an e-mail to HGEA expressing her wish to withdraw from the union, if it considered her to be a member, and for the deduction of her dues to cease.

29. On July 10, 2018, HGEA responded that, pursuant to Hawaii Act 007, passed in April 2018 and now codified at Haw. Rev. Stat. § 89-4(c), it would not discontinue dues collection unless Mrs. Grossman submitted a written notice within thirty days before the anniversary of her union membership on 5/23/1995. HGEA went on to give Mrs. Grossman the incorrect withdrawal time window, calculated thirty days *after* her anniversary date: “5/23/19-6/23/19.” Were she to follow this

explicit advice from HGEA, she would miss her opportunity to withdraw from the union for yet another year.

30. On information and belief, the University has deducted dues from Mrs. Grossman's pay and remitted those dues to HGEA since she began her employment with the University. The dues now being deducted from Mrs. Grossman's paycheck amount to sixty-seven dollars and ten cents (\$67.10) per month. The University continues to deduct those dues, despite Mrs. Grossman's repeated requests that the practice be stopped.

31. Under Hawaii law, unions that wish to represent government employees can petition for a union election. A union that receives a simple majority of the relevant bargaining unit is certified as that unit's exclusive representative for collective bargaining purposes. Haw. Rev. Stat. § 89-7.

32. A certified union has the exclusive right to represent government employees in bargaining for "wages, hours, . . . health benefits . . . , and other terms and conditions of employment." Haw. Rev. Stat. § 89-9(a).

33. The union also has an express right to negotiate terms regarding "promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions." Haw. Rev. Stat. § 89-9(d).

34. A government employer must recognize a certified union as the exclusive representative of every government employee in the bargaining unit,

“without regard to employee organization membership.” Haw. Rev. Stat. § 89-8(a); *see also* Haw. Rev. Stat. § 89-7(b).

35. A government “employer shall deduct an amount equivalent to the regular [union] dues from the payroll of every nonmember employee” in a bargaining unit with a certified union and shall remit the amount to the union. Haw. Rev. Stat. § 89-4(a).

36. Effective April 24, 2018, a government employer shall continue to deduct union dues from the paycheck of a government employee “until the employee provides written notification within thirty days before the anniversary date of the employee’s execution of the written authorization” joining the union. Haw. Rev. Stat. § 89-4(c). Employers must rely on the union to determine which employees have authorized the deduction of dues and which have not. *Id.*

COUNT I

By refusing to allow Mrs. Grossman to withdraw from the union and continuing to deduct her dues, HGEA and President Lassner are violating her First Amendment rights to free speech and freedom of association and 42 U.S.C. § 1983.

37. The allegations contained in all preceding paragraphs are incorporated herein by reference.

38. Forcing a government employee to join a union or even to pay fees to a union violates that employee’s First Amendment rights to free speech and freedom

of association unless the employee “affirmatively consents” to waive the rights. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be “freely given and shown by ‘clear and compelling’ evidence.” *Id.*

39. The rights to free speech and freedom of association in the First Amendment have been incorporated to and made enforceable against the states through the Fourteenth Amendment guarantee of Due Process. *Id.* at 2463; *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gitlow v. New York*, 268 U.S. 652 (1925).

40. 42 U.S.C. § 1983 provides a cause of action for both damages and injunctive relief against any person who, under color of law of any state, subjects any person within the jurisdiction of the United States to a deprivation of any rights, privileges, or immunities secured by the Constitution.

41. 28 U.S.C. § 2201(a) allows a court of the United States, as a remedy, to declare the rights and other legal relations of interested parties.

42. Mrs. Grossman does not affirmatively consent to being considered a member of HGEA or to having her union dues withheld by President Lassner.

43. President Lassner is a state actor, who is deducting dues from Mrs. Grossman’s paycheck under color of state law.

44. Defendant Suzuki is a state actor, who is defending Hawaii laws allowing for the deduction of dues from Mrs. Grossman’s paycheck under color of state law.

45. HGEA is acting in concert with President Lassner to collect union dues from Mrs. Grossman's paycheck without her consent and refuses to withdraw her union membership. In doing so, HGEA is acting under color of state law. HGEA is acting pursuant to an exclusive collective bargaining agreement negotiated with a state entity, is following the laws of the State of Hawaii in doing so, and is utilizing the state payroll system to exact its dues.

46. HGEA, the University, and the State of Hawaii have limited withdrawal from the union to an arbitrary 30-day period per year and insist that Mrs. Grossman can only exercise her First Amendment rights at that time.

47. The actions of HGEA, President Lassner, and Defendant Suzuki constitute a violation of Mrs. Grossman's First Amendment rights to free speech and freedom of association not to join or financially support a union without her affirmative consent.

48. Because Mrs. Grossman was not given the option of paying nothing to the union as a non-member of the union, she could not have provided affirmative consent to join the union. Any consent that Mrs. Grossman may have given to dues collection was not "freely given" because it was given based on an unconstitutional choice between union membership or the payment of union agency fees without the benefit of union membership. *Janus*, 138 S. Ct. at 2486. If Mrs. Grossman's choice had been between paying union dues or paying nothing, she would have chosen to

pay nothing. Therefore, Mrs. Grossman's alleged consent, compelled by the false information and false dichotomy given to her, was not "freely given." *Id.*

49. Mrs. Grossman is entitled to an injunction under 42 U.S.C. § 1983 ordering HGEA immediately to withdraw her union membership.

50. Mrs. Grossman is entitled to an injunction under 42 U.S.C. § 1983 ordering President Lassner immediately to stop deducting union dues from her paycheck.

51. Mrs. Grossman is entitled to a declaration under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) that Haw. Rev. Stat. § 89-4(c) is unconstitutional as a violation of her First Amendment rights to free speech and freedom of association for allowing the withholding of union dues from her paycheck until thirty days before the anniversary date of her allegedly joining the union.

52. Mrs. Grossman is entitled to a declaration under 42 U.S.C. § 1983 and 28 U.S.C. § 2201(a) that Haw. Rev. Stat. § 89-4(a) is unconstitutional as a violation of her First Amendment rights to free speech and freedom of association for allowing the deduction of full union dues from her paycheck as a non-union member.

53. Mrs. Grossman is entitled under 42 U.S.C. § 1983 to damages in the amount of all dues deducted and remitted to HGEA during her employment by the University.

54. In the alternative, Mrs. Grossman is entitled under 42 U.S.C. § 1983 to

damages in the amount of all dues deducted and remitted to HGEA since the ruling in *Janus* on June 27, 2018.

COUNT II

The state law forcing Mrs. Grossman to continue to associate with HGEA without her affirmative consent violates Mrs. Grossman’s First Amendment rights to free speech and freedom of association and 42 U.S.C. § 1983.

55. The allegations contained in all preceding paragraphs are incorporated herein by reference.

56. “Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.” *Janus*, 138 S. Ct. at 2463.

57. For this reason, the Supreme Court has repeatedly affirmed that “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . a law commanding ‘involuntary affirmation’ of objected-to beliefs would require ‘even more immediate and urgent grounds’ than a law demanding silence.” *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943)).

58. Therefore, courts should scrutinize compelled associations strictly, because “mandatory associations are permissible only when they serve a compelling state interest that cannot be achieved through means significantly less restrictive of

associational freedoms." *Knox v. SEIU*, 567 U.S. 298, 310 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted).

59. In the context of public sector unions, the Supreme Court has likewise recognized that “[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer.” *Janus*, 138 S. Ct. at 2460.

60. Hawaii law grants HGEA the right to speak on Ms. Grossman’s behalf on matters of serious public concern, including the salaries and benefits received by public employees, how public universities should deal with financial challenges, and whether and when they should impose layoffs. Haw. Rev. Stat. § 89-9(a) and (d). These topics are inherently political questions in the context of public sector unions. *Janus*, 138 S. Ct. 2473.

61. Under color of state law, President Lassner has designated HGEA as Mrs. Grossman’s exclusive representative for bargaining purposes. Haw. Rev. Stat. §§ 89-7(b) and 89-8(a).

62. Under color of state law, HGEA has acted as Mrs. Grossman’s exclusive representative in negotiating the terms and conditions of her employment.

63. This designation compels Mrs. Grossman to associate with HGEA and,

through its representation of her, it compels her to petition the government with a certain viewpoint, despite that viewpoint being in opposition to Mrs. Grossman's own goals and priorities for the State of Hawaii.

64. The exclusive representation provisions of Haw. Rev. Stat. §§ 89-7(b) and 89-8(a) are, therefore, an unconstitutional abridgement of Mrs. Grossman's right not to be compelled to associate with speakers and organizations without her consent.

65. Mrs. Grossman is entitled to a declaration under 42 U.S.C. § 1983 and 28 U.S.C § 2201(a) that Haw. Rev. Stat. §§ 89-7(b) and 89-8(a) are unconstitutional as a violation of her First Amendment rights to free speech and freedom of association for requiring HGEA to serve as her exclusive representative for bargaining purposes.

PRAYER FOR RELIEF

Plaintiff, Mrs. Grossman, respectfully requests that this Court:

a. Declare that Mrs. Grossman never provided affirmative consent to join HGEA.

b. In the alternative, declare that limiting the ability of Mrs. Grossman to resign her union membership to a window of time is unconstitutional because she did not provide affirmative consent;

c. Declare that Mrs. Grossman's alleged signing of a union card could not have provided a basis for her affirmative consent to waive her First Amendment rights upheld in *Janus* because any such authorization would have been based on the unconstitutional choice between paying HGEA as a member or paying HGEA as a non-member;

d. Declare that the practice by President Lassner of withholding union dues from Mrs. Grossman's paycheck has been unconstitutional because Mrs. Grossman did not provide affirmative consent for him to do so;

e. Enjoin President Lassner from deducting dues from Mrs. Grossman's paycheck, unless she first provides freely given, affirmative consent;

f. Enjoin the Hawaii Government Employees Association / AFSCME Local 152 from collecting dues from Mrs. Grossman, unless she first provides freely given, affirmative consent;

g. Award damages against HGEA for all union dues collected from Mrs. Grossman during her employment by the University;

h. In the alternative, award damages against HGEA for all union dues collected from Mrs. Grossman since the *Janus* decision on June 27, 2018;

i. Enjoin Defendant Suzuki from enforcing Haw. Rev. Stat. § 89-4(a) and any other provisions of Hawaii law that are requiring Mrs. Grossman

to pay what amount to agency fees to HGEA because it has no record of her joining the union and because she affirmatively requested two times to become an agency fee payer;

j. Enjoin Defendant Suzuki from enforcing Haw. Rev. Stat. § 89-4(c) and all other provisions of Hawaii law that require Mrs. Grossman to wait until a specified window of time to stop the deduction of union dues from her paycheck;

k. Declare that Mrs. Grossman has a constitutional right not to be represented by HGEA as her exclusive representative without her affirmative consent;

l. Enjoin Defendant Suzuki from enforcing Haw. Rev. Stat. §§ 89-7(b) and 89-8(a) and all other provisions of Hawaii law that provide for exclusive representation of employees who do not affirmatively consent to union membership;

m. Enjoin HGEA from acting as the exclusive representative of Mrs. Grossman;

n. Award Mrs. Grossman her costs and attorneys' fees under 42 U.S.C. § 1988; and

o. Award Mrs. Grossman any further relief to which she may be entitled and such other and further relief as this court may deem just and

proper.

DATED: Honolulu, Hawaii, December 20, 2018.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Robert H. Thomas
ROBERT H. THOMAS

LIBERTY JUSTICE CENTER

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