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Dear Sir or Madam:

I am writing to follow up on your complaint about the voting process that has been set up under the settlement agreement reached between labor union plaintiffs and the state in the lawsuit challenging the constitutionality of the 2011 pension reform law. We have carefully considered the various issues raised by this process, and I wanted to apprise you of the results of our discussions, and our decision to participate, albeit in a limited way, if the case proceeds to a "fairness hearing" before the court.*

In brief, we have concluded that we are not in a position to take independent legal action or intervene directly in the pending litigation to challenge the voting process or errors arising in its implementation. However, we agree that, *as a matter of policy*, legitimate civil liberties concerns have been raised about the designated process, and that those concerns warrant our submitting testimony at the "fairness hearing" that will be held by the court later on in the proceedings. This letter summarizes the rationale behind our decisions and provides an opportunity for you to indicate whether you would like us to submit testimony at that fairness hearing on your behalf.

We have decided not to take any legal action in directly challenging the proposed settlement agreement for a number of reasons. Not only is the settlement agreement unique in a variety of respects, it is extremely complex and involves many issues of labor law that fall well beyond our organization's area of expertise in constitutional matters. Particularly in light of the short timeframe set out by the settlement agreement, we are not in a position to determine if there are any strong grounds, much less strong civil liberties grounds, for legally challenging the voting process. As I had recommended in my initial letter, if you are interested in litigating the proposed settlement agreement, you should consult with a private attorney.

Having said that, we are persuaded that at least some of the issues that have been raised by the complaints we have received, and the structure of the settlement agreement itself, take this matter beyond a typical labor dispute and warrant commentary from a civil liberties perspective at the court's fairness hearing.

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* This hearing will take place only if none of the designated "classes" of voters rejects the proposal during the two rounds of voting that will take place. At the hearing, the court will decide whether the proposed settlement agreement should be approved as fair and reasonable.

The voting process at issue is not one that has been determined solely by labor unions themselves; rather, it is embodied in, and a core part of, a settlement agreement that has been negotiated by, and entered into with, a variety of defendants representing the State of Rhode Island. Thus, the voting process is one that, at least in part, bears the involvement, approval and imprimatur of the State. In addition, another key component of the settlement agreement is that it is explicitly conditioned on action being taken by the General Assembly in amending the statutes that were the subject of the constitutional challenge in this case. In fact, both the plaintiffs and the state defendants are required by the agreement to "vigorously advocate" for the legislation's passage. Thus, the voting process and the votes cast (or not cast) by current union members and retirees have an express impact on whether the state legislature will be called upon to act on a law that has been contested as unconstitutional.

Under these circumstances, we have concluded that, from a policy standpoint, it is appropriate for us to examine the concerns raised about the voting process established by the settlement agreement.

In that light, we agree with those who have voiced objections to the fact that any ballot not returned for any reason is, by default, deemed a "yes" vote in favor of the settlement agreement. (In fact, the ballot only offers individuals the opportunity to vote "no.") From a civil liberties perspective, we believe that the issues raised by such an "opt-out" voting process in this context warrant consideration at the fairness hearing. Any testimony we submitted at the hearing would be along the following general lines:

* Although it has been pointed out that opt-out voting is a common practice in class-action litigation, such a procedure occurs after a class has been approved, not before. In this instance, the vote at issue precedes certification of the class.

* An opt-out process fails to give voters the opportunity to abstain or otherwise remain neutral. They must either return a "no" vote or else be counted in support of the settlement agreement. The opportunity to take no position on this agreement is one that current union members and retirees should have, and that a normal voting process would allow. Precisely because of the settlement agreement's complexity and the controversy surrounding it, affected individuals should be entitled to independently decide whether to have their vote count on one side or the other.

* There are many reasons why a person might end up not voting in this election. As various complainants have pointed out, and recent news stories have confirmed, there is a strong possibility that, due to a whole host of causes, some voting members may fail to receive or return a ballot. Ballots might go to a wrong address, individuals may be hospitalized or otherwise have difficulty voting, people having mail forwarded to them might not have enough time to return their ballot in order for it to count, and so on. In light of the vagaries associated with mail voting and the significant interests at stake for all putative voters, the non-receipt of a ballot should not automatically accrue as a "yes" vote.

* It remains unclear what steps have been taken to ensure the accuracy of the voting list. Individualized explanations for a dead voter receiving a ballot, for some voters receiving two ballots, and for others still waiting to receive theirs fail to shed light on how systemic

these errors may be. While we recognize that there must be some level of tolerance for errors in a voting process like this, those errors cannot be so easily discounted when, by default, they are counted as the casting of a "yes" vote. If certain people entitled to get a ballot fail to receive one or, for reasons not of their own making, fail to vote on time, that is unfortunate and troubling, but at least it is neutral in its application – some "yes" votes may not be cast and some "no" votes may not be cast. Under the process established by the settlement agreement, however, every such failure counts in only one direction. The inadvertent loss of a right to vote is worrisome enough, but the problem is compounded if the loss of that vote actually counts as a vote in one – and only one – particular way.

We recognize that individuals claiming eligibility to vote but failing to receive a ballot have been able to contact the company responsible for organizing the election in order to obtain one. But it is worth noting that the settlement agreement specifies that failure to include in the voting process people who are entitled to vote cannot serve as a basis to invalidate the vote; instead, the individual's only recourse is to be heard at the fairness hearing, which is a far cry from having a chance to have their vote counted, and counted as they wish.

* Media reports of at least a few people receiving two ballots further demonstrate the troublesome nature of an opt-out mail voting process. Our concern is not with potential fraud on the part of voters, but rather with the problematic position in which it places the recipients of such ballots. If a person receives two ballots and wishes to vote "no," it is impossible under an opt-out process for her vote to properly count. If she does nothing, she has inappropriately been counted as having voted twice in support of the agreement. If she opposes the agreement, she cannot simply send back one ballot because the second one will cancel out her "no" vote.

I want to emphasize that in raising these issues, we do not question the good faith of all the parties who have been involved in this intricate litigation. At the same time, for all the reasons expressed above, we agree that an opt-in process is the only fair way to conduct a vote like this. Because the voting procedures outlined in the settlement agreement do not use an opt-in process, we are prepared to make these concerns known to the court when a "fairness hearing" is held.

If you would like us to raise these concerns in your name, please fill out and return the enclosed form and we will do so. Thank you again for contacting us about this.

Sincerely,

Steven Brown
Executive Director

Enclosure