

Testimony of
F. Vincent Vernuccio, Mackinac Center, Workers for Opportunity Project
House Bill 2354

Mr. Chairman and members of the committee: Thank you for the opportunity to testify here today.

My name is F. Vincent Vernuccio and I am a senior fellow with Workers for Opportunity, a national project of the Mackinac Center for Public Policy dedicated to freedom of choice for public employees.

House Bill 2354 ensures that public employees are informed about their First Amendment right to pay or not to pay a union and further allows them to exercise this right at any time. The bill also brings Kansas into compliance with the recent Supreme Court decision in *Janus v. AFSCME*, by guaranteeing public employers have timely evidence of affirmative consent to any deductions.

In 2018, the Supreme Court ruled in favor of the First Amendment in the case of *Janus v. AFSCME*.¹ The decision, written by Justice Samuel Alito, did two things. First, it affirmed the First Amendment rights of public employees across the country to choose to pay the union at their workplace or refrain from doing so. This decision essentially brought right-to-work to public employees across the country. This is a right that workers in Kansas have enjoyed since 1975 and is protected by the state constitution.²

The U.S. Supreme Court noted that everything public employee unions do is political, and because everything they do is political, it is a violation of public employees' First Amendment rights to be forced to financially support government unions against their will. This shows the choice not to pay is not just protected by the Kansas state constitution but by the U.S. Constitution as well.

Further, *Janus v. AFSCME* also affirmed that public employers need to receive "clear and compelling evidence" of "affirmative consent" from public employees before being able to collect dues from their paychecks.³ Justice Samuel Alito explains, "States and public-sector unions may no longer extract agency fees from nonconsenting employees," and "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay [...] . Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."⁴

Several Attorneys General have noted that, to be fully in compliance with *Janus*, public employers must inform public employees about their right to pay or not pay union fees, give them a periodic opportunity to confirm this decision, follow good book keeping practices by having public employees opt-in directly to their employer, and allow public employees to leave their union and stop paying union dues or fees at any time.

The Alaska Attorney General wrote in his opinion:

The Court announced in *Janus* that a public employer such as the State cannot deduct from an employee's wages 'any . . . payment to the union' unless it has 'clear and compelling evidence' that an employee has 'freely given' his or her consent to subsidize the union's speech. By ceding to the unions, themselves the process of eliciting public employee's consent to payroll deductions

¹ *Janus v. AFSCME* Council 31, 585 U.S., 2018 (June 27, 2018)

² <https://kslib.info/841/Article-15-Miscellaneous> Kan. Const. art. 15 §12; <https://kslib.info/841/Article-15-Miscellaneous> K.S.A. § 44-831.

³ *Janus v. AFSCME* p.48

⁴ *Ibid.*

of union dues and fees, and unquestioningly accepting union-procured consent forms, the State has no way of ascertaining — let alone by “clear and compelling evidence” — that those consents are knowing, intelligent, and voluntary. The State has thus put itself at risk of unwittingly burdening the First Amendment rights of its own employees.⁵

Clarkson then advised, “A course correction is required. To protect the First Amendment rights of its employees, the State must revamp its payroll deduction process for union dues and fees to ensure that it does not deduct funds from an employee’s paycheck unless it has ‘clear and compelling evidence’ of the employee’s consent.”⁶

In short, the Janus decision established that the choice to pay a union or not is a First Amendment right, and it protected that right by ensuring public employers have “clear and compelling evidence” that the employee wants to pay before any money is taken from them.

House Bill 2354 safeguards this right by ensuring that public employees are informed about their rights on a yearly basis and gives employees the opportunity to make a fresh choice on whether to pay the union annually. It codifies the process by which an employee may exercise their rights and safeguards by ensuring that public employees can choose to exercise these rights at any time. Finally, it guarantees employers have the required evidence of consent by having public employees tell their employers directly that they wish to pay union dues, instead of the employer taking the union’s word for it.

There is a need to make sure that the First Amendment rights of public employees are protected. Some unions and even some state legislatures have created arbitrary “windows” to limit when public employees may resign their union membership and stop paying dues. In some cases, these windows can be linked to the employee start date and may only be a few weeks long or less. This puts arbitrary and complicated restrictions of questionable constitutional legitimacy on public employees’ First Amendment rights.

Currently, some Kansas unions allow public employees to opt-out of their union at any time but still require payment of dues for up to a year after the employee exercises their right. This, too, poses a threat to the First Amendment rights of public employees.

Further, without protecting the process of dues authorization by having public employees make the request directly to their employer puts Kansas at risk of violating its public servants’ First Amendment rights.

Waivers of constitutional rights can expire and need to be renewed periodically. As General Clarkson’s opinion explained:⁷ “Because the right to be free from compelled speech is a ‘fixed star in our constitutional constellation,’ Janus’s requirement of clear and compelling evidence of a waiver thus demands some periodic inquiry into whether a public employee wishes to continue to waive — or reclaim — his or her First Amendment rights.”

Public employees’ First Amendment rights must be protected by giving them the information necessary to make an informed decision, making the ability to exercise that decision as easy and streamlined as possible, and ensuring public employers have the necessary timely evidence of consent to collect dues.

More than just protecting the constitutional rights of Kansas public employees, House Bill 2354 creates good bookkeeping practices, protecting both public employees’ rights and the state’s interest in not collecting and distributing dues from employees that do not want to pay.

⁵ 2019 Op. Alaska Att’y Gen. (Aug. 27) http://www.law.state.ak.us/pdf/opinions/opinions_2019/19-002_JANUS.pdf

⁶ *Ibid.*

⁷ *Ibid.*

Thank you for the opportunity to testify here today and I will welcome any questions.