



## **Testimony on House Bill 6936 (an act clarifying the authorization process for employee payroll deductions)**

Submitted by Scott Shepard, Policy Director

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Good afternoon. My name is Scott Shepard. I am the Policy & Research Director for the Yankee Institute for Public Policy, Connecticut's free-market think tank. I submit this note in opposition to **House Bill 6936**.

This bill would work to deny government workers in Connecticut their constitutionally protected First Amendment civil rights while potentially exposing them to bullying and workplace harassment in their attempts to review, consider and exercise such rights. These violations of basic tenets of American justice are insupportable.

Section (1) of the proposed bill violates the *Janus* decision<sup>1</sup> insofar as it applies to “authorization[s]” for withdrawal of union dues that were made before the *Janus* decision. The decision requires that union dues not be taken from union employees until those employees give “affirmative consent” to the withdrawal of dues.<sup>2</sup> However, to be effective, affirmative consent must be informed. Consent given before the *Janus* decision, which clarified the constitutionally protected First Amendment civil rights of government workers, cannot possibly have been informed, because the informative information did not then exist. No such authorizations were made by employees in the knowledge that they could freely and without retaliation elect not to pay the union either dues or agency fees. They thus do not represent the affirmative consent required by *Janus* before dues are deducted, and cannot be valid.

Authorizations made *after* the *Janus* decision also require, by the terms of that decision, affirmative consent. That consent must likewise be informed. It must also be *freely* granted, without coercion, duress or threat. This requires a full, fair and objective explanation of each government worker's *Janus* rights and an opportunity for the worker to review and consider his or her options in a safe and neutral environment. There is no evidence that such requirements have been followed in getting employee authorization since *Janus*, and no obligations in this proposed legislation that they be followed in the future.

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<sup>1</sup> See *Janus v. AFSCME*, 585 U.S. \_\_\_\_ (2018).

<sup>2</sup> *Ibid.* at \*48 (“Neither 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. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.”).

In fact, every one of provisions (3)-(6) of this proposed legislation seems expressly designed – and at all events would surely work – to deny workers their free and uncoerced option. The union is the party, and the only party, that will benefit if workers fail to exercise their *Janus* rights not to join the union. Requiring them to exercise those rights *to*, and *only to*, that union, then, can be justified only as an attempt to curtail their free exercise of their *Janus* option, making it as hard and unpleasant as possible, while giving the union as much opportunity as possible to obstruct.

If this bill is legitimate, then so too would be a bill that required government employees to lodge grievances against their employers with, and only with, their employers, and to allow employers to withhold any information about the proceedings related to the grievance from the union unless a question arose about whether the grievance had ever existed in the first place. We all know how the union would react to such legislation, but it differs in no material detail from this legislation; the parties are just reversed.

It is fair that the union know how much it can expect in dues. It is neither just nor constitutional that the union have a monopoly on the *Janus* election process, on knowledge about who has elected not to join the union, and on how and when that election can be made and under what circumstances it is honored. This proposal is the very epitome of foxes watching hen houses.

It is unlikely that this legislation, if passed, would survive for very long. It should be amenable to facial challenge, which is to say from challenge by any public employee before it even goes into effect.<sup>3</sup> When it is challenged, it should not only be struck down as a violation of *Janus*, but could very likely give the Second Circuit and perhaps even the United States Supreme Court the opportunity to clarify and amplify *Janus* so as to eliminate unions entirely from the *Janus*-election process except as carefully monitored advocates of an objectively stated position, and from opportunities to limit or influence *Janus* elections at any reasonable time and in any non-discursive, arm's-length way.

Finally, the state of Connecticut will – if it enacts this proposal – pay the bill for these clarifications and extensions of *Janus*, as it will be liable for the plaintiffs' attorneys' fees.<sup>4</sup>

Because we do not wish to see state funds wasted in an unconstitutional and unjust attempt to open government workers to the violation of their federal civil rights, we of course oppose this legislation.

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<sup>3</sup> See, e.g., *Bauer v. Shepard*, 620 F.3d 704, 708 (7<sup>th</sup> Cir. 2010); *Saint Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8<sup>th</sup> Cir. 2006); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9<sup>th</sup> Cir. 2003).

<sup>4</sup> See 43 U.S.C. §§ 1983, 1988; *Blanchard v. Bergeron*, 489 U.S. 87, 89 n. 1 (1989). (“Notwithstanding that 42 U.S.C. § 1988(b) provides that the district court “may” award reasonable fees to a prevailing party “in its discretion,” the Supreme Court has ruled that attorneys' fees must be awarded thereunder to a successful plaintiff “unless special circumstances would render such an award unjust.”) The case for attorneys' fees would be especially strong in a case such as this one, in which the state has been clearly warned of the illegality of its actions, including by the highest legal authority of the state.