



Testimony of David R. Osborne
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Public Hearing on HB 2571; Panel 1
Before Pennsylvania House Labor & Industry Committee
The Honorable Robert Kauffman, Majority Chairman
The Honorable John Galloway, Democratic Chairman
September 5, 2018

Chairmen Kauffman and Galloway:

Good afternoon. Thanks to Chairmen Kauffman and Galloway, Representative Kate Klunk, and to the rest of the House Labor and Industry Committee for your attention to this issue.

My name is David Osborne; I am President & General Counsel of the Fairness Center, a public interest law firm that provides free legal services to those hurt by public sector union officials. The Fairness Center represents various public-sector employees, some of whom are members and some of whom are nonmembers, who would be impacted by this or other bills that have been introduced. I am here to represent those clients today.

On June 27, the United States Supreme Court decided a case called *Janus v. AFSCME, Council 31*, 585 U.S. ___, 138 S. Ct. 2448 (2018), involving a public employee from Illinois named Mark Janus. Mr. Janus claimed that Illinois law unconstitutionally permitted his Illinois union to extract agency (or “fair share”) fees as a condition of public employment. He argued that it was a violation of his First Amendment rights to be forced to subsidize the political speech of a private organization, particularly when he disagreed with that private organization.

The Supreme Court in *Janus* decided in Mr. Janus’s favor, holding that agency fees, authorized by Illinois law, violated the First Amendment. As Justice Samuel Alito wrote in the majority opinion:

The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights. . . . [P]rominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as “sinful and tyrannical,” and others expressed similar views.

Janus, slip op. at 21 (citation and footnotes omitted).

In reaching this conclusion, the Supreme Court overturned its own precedent, dating back to 1977, under which it had tried to draw a distinction between union political activities and core representation activities. Over the decades, that distinction proved arbitrary and unworkable for one simple reason: *everything public-sector unions do is political*.

The Supreme Court also addressed a question that Mark Janus did not actually ask: whether unions could nevertheless charge agency fees with nonmember employees' affirmative consent. And the answer to that question, according to the Supreme Court, is "yes." Provided the union secures a truly voluntary waiver of an employees' right not to pay agency fees, it can continue to deduct those fees going forward.

I advocate on behalf of my clients for three basic changes to Pennsylvania law in light of the Supreme Court's decision in *Janus*:

First, it is essential that Pennsylvania bring itself into alignment with *Janus* by repealing its fair share fee laws.¹ Pennsylvania's public-sector employees *should* have the right to stop paying their unions and can justifiably expect that their unions will honor that right.

But it is not automatic.

Eight of the Fairness Center's clients have pending cases that were affected by *Janus*, but the courts have yet to rule on how *Janus* impacts Pennsylvania law. *Janus* addressed the issue generally and Illinois law specifically, but Pennsylvania's fair share fee laws are still "on the books." That is not just a technical point; our fair share fee laws may be used against public employees unless the General Assembly repeals these laws. House Bill 2571 does that.

Second, the General Assembly should proactively oversee the union's efforts to secure nonmember fees moving forward. Again, *Janus* ruled that extraction of agency fees as a condition of employment is unconstitutional, but it does allow public-sector unions to take fees from nonmembers with their affirmative, voluntary consent.

For the moment, the process of obtaining such consent is completely unregulated. That raises a number of questions. For example: *Can public-sector unions repeatedly ask nonmembers for such consent? What form can a request for consent take, and at what times can such requests be made? What information must employees receive before consent is valid?* We do not yet have answers to those questions from the courts. And that is a potentially painful situation for public employees, their unions, and their employers.

The bill under consideration today at least begins to address these issues by ending payroll deductions and requiring a notice to nonmembers and new hires of their rights under *Janus*. I would, at the very least, extend the notice requirement to provide for similar, regular notice to all employees within the bargaining unit.

¹ See 71 P.S. § 575 (or "Act 84 of 1988," enacted at section 2215 of the Administrative Code and governing the Commonwealth and public school entities); 43 P.S. §§ 1102.1–1102.9 (or "Act 15 of 1993," entitled "the Public Employe Fair Share Fee Law" and governing cities, counties, boroughs, incorporated towns, townships, institution districts, or any other governmental unit).

Finally, the General Assembly should repeal its “maintenance of membership” law.² Pennsylvania’s maintenance of membership law purports to keep public employees from exercising their rights by limiting their opportunity to leave their union to a fifteen-day period prior to the expiration of a collective bargaining agreement. Pennsylvania is an outlier in imposing such a restriction on public employees; only California has an analogous provision in place. The bill under consideration today does not address maintenance of membership, but I believe other bills will.

These three, basic changes will secure and promote the rights of public employees as described by the Supreme Court in *Janus*.

For those on the committee who did not celebrate *Janus*, I think these measures are still worthy of your support. Pennsylvania has an opportunity to implement *Janus* in a way that will serve and preserve the rights of public employees at every level of government.

For those who celebrated the *Janus* ruling, I just want to emphasize, on behalf of my clients, that implementing that ruling here in Pennsylvania is *not automatic*. Public employees are counting on their legislators.

Thank you. I would be happy to address any questions you may have.

² See 43 P.S. § 1101.301(18) (defining “maintenance of membership”); 43 P.S. § 1101.401 (“[E]mployees shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.”).