

Statement of Terence J. Pell

President, Center for Individual Rights

State Legislative Response to *Janus v AFSCME*

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**Hearing Room No. 1 | North Office Building
State Capitol
Harrisburg, PA 17120**

Thank you for the opportunity to testify today about the need to make changes in Pennsylvania law to fully implement the Supreme Court's decision last summer in *Janus v. AFSCME*.

My name is Terence Pell and I am the President of the Center for Individual Rights, a nonprofit public interest law firm in Washington, DC that has challenged mandatory union agency fees in two national cases, most notably in *Friedrichs v. California Teachers Association* a case that directly preceded the *Janus* case.

The Supreme Court ruled last summer that forcing public employees to financially subsidize an organization with which they fundamentally disagree violates their First Amendment right against compelled speech.

Protecting the free speech rights of public school teachers is particularly important. One of the most contested political disputes in our country concerns how to best educate our children. Before the *Janus* decision, many teachers were forced to subsidize the union's view of such education reforms as parental choice, merit pay, seniority based school assignment, and promotion and layoff policies.

All of these issues go to the heart of education reform. And, almost across the board, unions oppose these reforms, whereas many teachers, especially younger teachers, support them. Up until *Janus*, teachers who disagreed with the union view were nonetheless forced to pay the union to speak on their behalf. Fortunately, that all changed with *Janus*.

What is needed now is clear legislation that settles once and for all fair and open procedures that let each employee exercise his or her right to support -- or not to support -- union sponsored speech. If the rules aren't settled now by legislation, they will be determined by aggressive tactics by unions to keep their members.

Union efforts to make it difficult and confusing to leave the union are well-known. The requirements are hard to find and difficult to follow. As a result, many employees simply give up and end up providing financial support for speech with which they disagree. If the legislature doesn't step in, the impediments to free choice by public employees will have to be litigated case by case through the courts at great expense to the state and to individual workers.

I want to talk about two sections of Senate Bill 1278 that that should be enacted if Pennsylvania is to make good on the promise of *Janus*.

Section Two of the Act adds several provisions to Pennsylvania law that require every public employer to annually notify each public employee of the right to leave the union. Section Two also requires affirmative consent before membership dues may be deducted. (The legislature may want to consider requiring that such consent be required annually.) And it prohibits the use of pressure tactics designed to coerce employees into signing a consent form, such as forced meetings, publication of employee decisions, contact at home, etc.

Then, most importantly, Section Two provides every public employee with a clear and definitive method to exercise their right to leave the union with a simple, postmarked letter that makes resignation effective thirty days after the postmark date.

Section Five of the Act goes on to make it unlawful to include so-called maintenance of membership provisions in collective bargaining agreements. These provisions typically require a member to remain in the union until the next contract anniversary at which time they must exercise their right to leave within a narrow time frame.

Often the anniversary occurs during the opening weeks of the school year when it is most difficult for employees to follow complicated procedures to opt out of another year of membership. The result resembles a magazine subscription that keeps renewing unless one goes to the trouble to find out how to end it.

The First Amendment does not allow the state to create burdens designed to make it difficult for the average person to exercise their free speech rights. Senate Bill 1278 is a sensible, comprehensive piece of legislation that addresses the common impediments that are arguably unconstitutional after the *Janus* decision. Senate Bill 1278 would prevent the need for endless, expensive litigation to establish procedures that protect the free speech rights of public employees.

Let me make one final point. The purpose of clear procedures set forth by statute is not to game the decision of individual workers one way or the other, either by favoring union membership or favoring the efforts of those who want to leave. The purpose is to provide clear, easy to understand, and fair procedures that allow each employee to make their own decision without fear or coercion.

Thank you for considering this legislation and inviting me to speak to you about the need for it. I am happy to answer any questions the committee might have.

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Conservative Leaders for Education

REMARKS OF DR. WILLIAM J. BENNETT, CHAIRMAN OF CONSERVATIVE LEADERS FOR EDUCATION
BEFORE THE PENNSYLVANIA SENATE MAJORITY POLICY COMMITTEE
OCTOBER 25, 2018

Chairman Argall, Members of the committee, thank you for having me here today. I want to thank Senator Eichelberger for his invitation and for his leadership on this important issue.

Senator John Eichelberger is a member of group of state policy leaders – mostly education committee chairs like John – that I am proud to serve as Chairman of -- Conservative Leaders for Education, or CL4E. I am so impressed with the dedication to service by our members, like John, and the hard work day-in and day-out they put in to improve our schools and educational system. They and all of you are not recognized nearly enough for this very difficult, very important work.

I will get to the important legislation the Senator has recently introduced shortly, and I know there are some very talented lawyers and experts here who will delve into the various details. But I wanted to start out with a bigger picture.

The *Janus* decision by the U.S. Supreme Court is certainly an important legal milestone, but to me it has the potential to be so much more. That is what leads me to think of the decision in terms of the three P's. The 3 P's are:

- The Premise
- The Prohibition; and
- The Promise.

The premise is the bedrock First Amendment principle that every individual should control their own speech. That premise is at its height involving speech on public policy and other important matters of the day.

The Prohibition is the fact that courts need to intervene to protect individuals when the premise is violated. In blunt terms, the prohibition is against coerced speech, a concept antithetical to all of our shared values.

The first amendment premise and ensuring the prohibition is honored are important aspects of everything we are here to talk about today, and aspects that many very capable groups and individuals are working hard on every day. However, my focus, and the focus of CL4E, is really on the third P – the Promise. The promise *Janus* holds, particularly for our schools and our teachers.

The promise is that *Janus* could be a critical turning point for our schools and the profession of teaching IF the right decisions are made going forward.

Our focus at CL4E is to highlight the incredible opportunity – The Promise -- we believe this moment holds for teachers and schools to rethink decades of entrenched thinking and practices. To rethink teacher professionalism and all the positive implications that could flow from that.

Our focus is to help state education leaders, like Sen. Eichelberger, and yourselves, to make solid policy choices at the state level, creating fair frameworks to encourage this rethinking and realize the promise.

At its core *Janus* is all about individual control and individual responsibility. Not coincidentally, those are also core concepts of professionalism.

- Individuals are given the freedom to take charge of their own development as a professional.
- All decision-making is focused on achieving the best possible results with every student, whatever form that takes. (That vision is in stark contrast to the far-too-often current focus on fighting over who gets the money for every student or how to “win” the next round of bargaining.)
- Individual responsibility for being the best possible professional and the results of individual work.
- And yes...being compensated fairly as a professional, and as with all professionals, based mostly upon excellence in practice and results.

This could be a moment when teacher professionalism is embraced, but that will require the right decisions at all levels.

Some have asked, “Why is an educational policy group focused on this Supreme Court decision?”

The answers are simple. Schools are the most impacted institutions by this decision. There are 500 directly impacted school districts and over 3,300 directly impacted individual public schools here in Pennsylvania. Teachers are, by far, the single most impacted group. More than 50% of public union members in Pennsylvania are teachers – we are talking about almost 180,000 individuals.

However, it is not just the numbers. The efforts of teachers’ unions – specially at the state and national leadership level – as you on this committee I am sure know extremely well, directly impact every education policy discussion and effort to improve.

At the state level, too often discussions that start about creating new educational options for students and families devolve into a fight about who gets the money.

At all levels, often common sense gets displaced by a “collective bargaining mentality.” Any idea, no matter how good, becomes a bargaining chip. The result is that there is no room to maneuver; no ability to put students’ needs at the center of the discussion and design a system that can flexibly respond to what students need and our best teachers can provide.

But most fundamentally—the conceptual basis of *Janus* COULD have a very positive impact at the individual teacher level. It could have an impact on teacher professionalism – how that is viewed both by teachers and everyone else involved with our schools.

The promise, as I have said, is not self-executing. What does all of this mean here and now for state policy leaders like yourselves? It means definition must be given to the broad strokes of the *Janus* decision.

Unreasonable forces will prefer to litigate this uncertainty and maintain vague or no guidance on what “affirmative consent” means in *Janus*, and what are reasonable, fair rules around the new “opt in” requirement.

Unreasonable forces will attempt to undermine the decision at the state level as they are attempting as we speak here in Pennsylvania. Legislation has already been introduced that takes away the right to a private vote and allows unions direct and ongoing access to the personal information of all employees whether they consent or not. Some states are attempting to place tight windows on when employees can make decisions.

If state legislatures do not clearly articulate and define the parameters of union membership in their state in the wake of this decision, then we will have years and years of litigation and “tests” on the system which will not be fair to school systems, teachers and the students they serve.

All participants affected by this decision should want reasonable and clear rules. Nobody disputes the right to organize or associate. *Janus* simply restored the proper balance between that right and individual’s rights to control their own speech.

The rules around how to become a union member, how to leave the union, where and when conversations about membership occur are important for both employers and employees, and these rules should be clear and predictable for all parties. That is exactly what Senator Eichelberger’s important piece of legislation does.

You will hear much more from the speakers after me about the important details of Sen. Eichelberger’s comprehensive proposal. The details are critical, but I also want to urge you to stay focused on the fundamental premise at stake: individual control and responsibility. Because that is now the law of the land and because this new environment holds the promise to liberate the bold thinkers currently held back in our education system.

The fair rules and procedures in the Eichelberger bill are a great start towards realizing the promise of *Janus*. Let me just talk a bit about the longer term, because in the longer term there is much more we can do.

State policy makers should work to create an environment for teachers where they receive professional support disassociated from any political agenda. All teachers deserve access to affordable professional insurance, fair decision-making processes, and reliable information about compensation and benefits, regardless of membership or not in any union. With this support structure and because of the *Janus* decision, we believe many, if not most teachers will choose a more professionalized course as opposed to the one-size fits all, bureaucratic, and too often hyper-political unions that create a confrontational dynamic with local and state policy-makers.

Everyone involved has an important role to play. *Janus* also places on state and local leaders a responsibility to create new and alternative systems that compensate and promote teachers in ways not possible within the existing toxic labor framework, driven by the collective bargaining mentality. We all recognize great teachers are the most important catalyst in improving student performance, so let's work together to find ways to reward them – just like the most effective and productive employees are awarded in every other profession.

Staying focused on the premise – individual control and individual responsibility -- will help unlock the promise.

A decade from now will we be able to look back and say this was a turning point for schools and the profession of teaching, or will we have to say it was just another lost opportunity to do better for our students, our teachers, the teaching profession, and our nation?

The Promise is not automatic. Everything depends on individual choices:

- The choices you as policy makers make now to implement this important decision.
- The choices judges will make on these issues if not made here.
- The choices school district leaders make.
- The choices teachers make about the fundamental nature of their profession, and what they aspire for it to be.

Thank you, Chairman Argall and Committee, thank you Sen. Eichelberger for your leadership. I would be glad to take any questions.

UNION RECERTIFICATION

Workplace democracy for less than the price of a cup of coffee

F. Vincent Vernuccio

UNION RECERTIFICATION – GIVING WORKERS A CHOICE

Most union members have never had a say in which union represents them in their workplace. This is because once a union is certified, it normally maintains that certification indefinitely. When new employees start on the job, they are simply given a union card and told which union is representing them – they have no voice in the matter.

Research from James Sherk, research fellow in labor economics at The Heritage Foundation, shows that the vast majority of union members have never voted for which union would represent them in the workplace. Only 7 percent of private sector union members were employed when their union was organized. The other 93 percent simply “inherited” their unions.

Even fewer public sector union members have had a say in which union represents them. Since most government unions organized in the 1960s and '70s, few, if any, of the public employees who voted for those unions are still on the job. In Florida and Michigan, for example, just 1 percent of teachers in the 10 largest school districts were employed when their union was organized.

In the Ann Arbor, Detroit and Grand Rapids school districts there are likely no current teachers who voted for the unions that operate there, since these unions were organized in 1965. Further, if the age distribution of teachers in these districts mirrors that of the state as a whole, nearly 75 percent of the teachers working in these districts would not have even been born when the union in their workplace was certified.

To improve workers' ability to choose the best representative at their workplace, unionized employees should be empowered to choose on a regular basis which union, if any, should be granted the privilege to represent them. This would require unions to hold annual or biennial certification elections.

Wisconsin recently enacted legislation to this effect: Many public sector employees get to vote for their union representation every year. According to John Wright, a labor policy researcher at the Show-Me Institute in Missouri, the cost of Wisconsin's annual recertification process averages just \$1.50 per voter. The cost is paid by the union via filing fees; it costs taxpayers nothing. For less than the price of a cup of coffee, Wisconsin has given union members a meaningful voice.

RECOMMENDATIONS:

- Give unionized workers (members and nonmembers) the right to regularly vote on which union will be their representative, either every year or every other year.
- Use a secret ballot or similarly private voting process to protect both workers' privacy and the integrity of the election.
- Require that unions win support from a majority of all the workers in the bargaining unit to remain the exclusive representative in the workplace, not simply a majority of those voting.

FREQUENTLY ASKED QUESTIONS

HOW WOULD THE PROCESS WORK?

Wisconsin provides a guide here. The following is an example of how recertification works in Wisconsin. The 2011 Budget Repair Bill laid the ground work for recertification, but much of the process was created by administrative regulations. However, the entire process could be codified into statute.

- Workers have the right to annually recertify their union.
- The process is contracted to the American Arbitration Association and overseen by the Wisconsin Employment Relations Commission.
- Voting takes place via telephone over a 20-day period.
- To win re-election the union must receive votes from a majority of the bargaining unit (not just those voting in the election). This includes all workers covered by the contract, not just union members.
- If the union fails to obtain votes from a majority of the unit, the commission decertifies the union and the same union or a “substantially similar collective bargaining unit” cannot try to organize the workers for another 12 months.

HOW MUCH WILL IT COST?

Workplace democracy costs less than the price of a cup of coffee and costs taxpayers nothing. In Wisconsin the cost is about \$1.50 per voter, which is paid for by unions. The cost varies depending on the size of the union – smaller unions pay less

per voter, because the state’s filing fee is based on a sliding scale. In the Show-Me Institute’s “The Low Cost of Labor Reform,” labor policy researcher John Wright provides recommendations that could reduce the cost to as little as 9 cents per vote.

WHY DO WORKERS IN RIGHT-TO-WORK STATES NEED REGULAR RECERTIFICATION ELECTIONS?

Workers in right-to-work states do not need to pay a union as a condition of employment. But because unions have a monopoly on worker representation, they speak for every employee, regardless of membership status in the union. This means workers who opt out of union membership are still forced to accept representation from a union they almost certainly did not elect.

Unionized employees should have the power to pick who gets the privilege of representing them. Requiring unions to hold regular certification elections provides all employees a voice in deciding who is best-suited to represent their interests.

DON'T UNION MEMBERS ALREADY ELECT THEIR UNION OFFICERS? ISN'T THAT ENOUGH DEMOCRATIC ACCOUNTABILITY?

Union members do vote for their officers, but in many cases, the election is a forgone conclusion by the time members actually vote. Take for example the “election” of UAW officers. No UAW president has been elected since 1970 who was not endorsed by the union’s powerful Reuther Caucus. In fact, TIME magazine describes UAW officials as being “picked” rather than elected.

Additionally, workers who have opted out of union membership are not allowed to vote in officer elections or for their contracts. These workers have no say in who is going to run the unions that they are required to accept representation from.

WHY CAN'T UNION MEMBERS VOTE OUT AN UNWANTED UNION?

This requires decertifying a union, and although it is possible, the deck is severely stacked against union members who want to pursue this option. In order to decertify a union, workers must get at least one-third of their coworkers to sign a petition to hold an election, and then the workers must receive a majority of the votes to decertify.

This process is not as easy as it sounds. Workers typically can only exercise this option during a narrow 30-day window after the union contract has expired or every three years, whichever comes first. The employer may not help the workers with this process at all, but unions can and often do spend large sums of money to squash the effort. The union brings years of organizing experience and legal resources to bolster their effort, creating a David versus Goliath affair. The union can even levy fines or bring other disciplinary actions against union members who attempt to decertify.

WILL UNIONS BENEFIT FROM RECERTIFICATION?

Yes, union recertification will force unions to compete and possibly enable less-established unions to gain new members.

Competition between firms yields better products and services for consumers. When unions compete, workers will be the beneficiaries of better representation and service. Union recertification will also help level the playing field for new or smaller unions that may be able to provide better representation, but rarely get the chance to organize a new workplace.

CAN UNION RECERTIFICATION APPLY TO BOTH PUBLIC AND PRIVATE SECTOR UNIONS?

Because of federal pre-emption, state Legislatures only have control over unionization policies in

the public sector. Right-to-work is an exception because federal law gives states the ability to establish that right for private sector employees. Therefore, state legislators can only give public employees the right to regular recertification elections. Congress would need to pass federal legislation, such as the Employee Rights Act, to provide the same right to private sector union members.



F. Vincent Vernuccio is labor policy director at the Mackinac Center for Public Policy. He is a graduate of the Ave Maria School of Law and has served as a special assistant in the U.S. Department of Labor. He has published op-eds in such newspapers as *The Wall Street Journal*, *Investor's Business Daily*, *National Review* and *The American Spectator*, and has appeared on state and national television news programs regarding labor issues.

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UNION RECERTIFICATION MODEL LEGISLATION

No existing **[collective bargaining representative/exclusive representative]** as defined in **[labor statute]** shall continue to represent **[public employees]** in a unit without the concurrence of a majority of all **[public employees]** in the unit.

1. The **[board/commission]** shall direct a secret ballot election to certify the existing **[collective bargaining representative/exclusive representative]** retains support of a majority of all **[public employees]** in the unit.

a. The **[board/commission]** shall promulgate rules to preserve the purity of elections and to preserve the secrecy of the ballot.

i. The **[board/commission]** shall determine whether elections shall be conducted in person, by mail, by telephone, by internet-based systems or by any other means determined by the **[board/commission]** to be fair, confidential and reliable. The board shall allow represented **[public employees]** to cast ballots for a period of **[seven days/time prescribed in labor statute.]**

ii. The **[board/commission]** may establish a fee schedule from **[collective bargaining representative/exclusive representative]** participating in elections conducted under this section for the purpose of funding the elections.

b. Should the existing **[collective bargaining representative/exclusive representative]** receive votes from a majority of all **[public employees]** in the unit, the pre-existing certification shall continue. If the existing

[collective bargaining representative/exclusive representative] fails to receive votes from a majority of all **[public employees]** in the unit, the **[board/commission]** shall decertify the **[collective bargaining representative/exclusive representative]** and the **[public employees]** shall be unrepresented.

c. In the event of a termination of certification, the terms of any pre-existing contract between the **[collective bargaining representative/exclusive representative]** and the **[public employer]** shall continue and remain in effect for the remaining contract term except for any provisions involving, in any manner, the **[collective bargaining representative/exclusive representative]**, including but not limited to, union security, dues and fees, and grievance and arbitration.

2. **[Public employees]** may certify a new **[collective bargaining representative/exclusive representative]** in accordance with **[labor statute]** so long as the **[public employees]** are not included with a substantially similar or affiliated **[labor organization or bargaining representative]** to the decertified **[labor organization or bargaining representative]** for 12 months from the date of decertification.

3. The **[board/commission]** shall start directing elections to certify majority support of existing **[collective bargaining representative/exclusive representative]** not less than two and not more than three years after the effective date of this act and every even numbered year thereafter; elections shall occur no earlier than August 1 and no later than December 1.



STUDY

Worker's Choice

Freeing unions and workers from forced representation

By F. Vincent Vernuccio, published on June 1, 2016



THE PROBLEM

Where there's a unionized workplace, there's forced representation. That's true regardless of whether a state is right-to-work or not. Even if a union can't get a worker fired for not paying dues, the worker is still bound by union representation.

Unions call these workers — trapped by collective bargaining agreements — "free riders." But unions have actually lobbied for this requirement and use it to claim the moral high ground. They say, "We are not given what is ours: the right to be paid for the work we are required to perform."

Building on this argument, unions have recently brought several court cases challenging right-to-work. Having to represent workers who don't pay them, they say, is a violation of constitutional takings clauses.

Depending on the makeup of the U.S. Supreme Court, unions could use this argument to overturn seven decades of precedent, killing right-to-work for the entire nation.

THE SOLUTION

Worker's Choice would end the issue of free or forced riders.* Worker's Choice would let workers who opt out of a union in a right-to-work state represent themselves before employers. It would also free unions from having to represent nonpaying workers.

Worker's Choice gives unionized employees the choice of two options:

1. Be a union member and accept the working conditions negotiated by the union;
2. Leave union membership behind, negotiate for compensation and working conditions independently, and provide your own representation in grievances and other dealings. That's what over 87 percent of workers — those without union representation — do already.

With Worker's Choice, each worker can stay in the union that is in the workplace. Alternately, they can negotiate for salary, benefits and working conditions independently.

With Worker's Choice, unions are freed from having to represent workers who are not paying them and workers are freed from accepting forced union representation.

SAFEGUARDS

- **One-or-none** — Worker's Choice does not change collective bargaining for unionized workers in any way. If there's a union presence in a workplace, it's one union that will still represent all the unionized employees there. The one-or-none provision safeguards against having multiple unions at a worksite.
- **It imposes no new duty to bargain on employers** — Workers who wish to exercise Worker's Choice are treated as nonunion and the employer is under no duty to negotiate with them, mirroring the job creators who employ over 87 percent of nonunion workers in the rest of the economy. An employer may, if he or she wishes, negotiate individually with these employees as a way to attract and retain top talent.
- **Unions cannot affect individual contracts** — Worker's Choice prevents unions from basing their contract off the independent employees' contracts. For example, unions cannot say that the highest paid independent employee must be paid lower than the lowest paid union employee.

BENEFITS OF WORKER'S CHOICE

1. **Addresses the main union objection to right-to-work:** Worker's Choice eliminates the free/forced rider issue, one of union's most powerful objections to right-to-work.
2. **Protects legal challenges to right-to-work:** Worker's Choice would negate the main legal argument for overturning right-to-work, the argument of violating the takings clause.
3. **Rewards employee productivity:** Under Worker's Choice, employers can reward higher performing employees without being limited to a collective bargaining agreement.
4. **Advances personal flexibility:** Worker's Choice lets workers represent themselves and negotiate their own contracts, which are driven by personal needs rather than collective ones.
5. **Makes unions more responsive:** Worker's Choice will require unions to be more responsive to the needs of their members or risk losing them.
6. **Provides the above benefits to employers without imposing new obligations:** Worker's Choice does not create any new burdens on employers; its one-or-none provision safeguards against multiple unions. The employer does not have any more increased obligation to employees exercising Worker's Choice than employers in a nonunionized worksite, i.e. no duty to bargain.

- * Congress can amend the National Labor Relations Act to enact Worker's Choice for private sector employees.
- States can amend their own labor laws to enact Worker's Choice for public sector employees.

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