

May 6, 2021

The Honorable Connie M. Leyva
Member, California State Senate
1021 O Street, Suite 7610
Sacramento, CA 95814

The Honorable Anthony J. Portantino
Chair, California Senate Appropriations Committee
1021 O Street, Suite 7630
Sacramento, CA 95814

Re: Senate Bill 931 (as amended April 22, 2022)

COMMENTS

Dear Senator Leyva:

Freedom Foundation is widely recognized as one of the top organizations in the United States advocating for the First Amendment rights of public employees, specifically their right to refrain from union membership and union dues deductions. We are writing to provide our analysis of Senate Bill 931 (Leyva), to inform stakeholders and legislators of considerations we think may be valuable in forming their decisions on the Bill. In our view, SB 931 will make a bad situation worse. This bill will increase the barrier between public employees and information regarding their First Amendment rights, while simultaneously empowering unions with a direct pecuniary interest to exert pressure on public employers acting in good faith.

The First Amendment

The First Amendment contains some of the most vital individual liberties protected at the federal level.¹ Chief amongst these liberties is the freedom of speech,² and for the specific purposes of this comment, the freedom from compelled speech. When an individual's speech is compelled, including through the expenditure of that individual's lawfully earned wages without proper authorization, that person is "coerced into betraying their convictions," because their being forced to "endorse ideas they find objectionable is always demeaning."³ Hence, "involuntary affirmation" can be even more serious than commanding silence.⁴

¹ U.S. Const. am I.

² "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

³ *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

⁴ *Id.*

Prior to 2018, government unions like the American Federation of State, County and Municipal Employees, a primary sponsor of this proposed legislation, benefited from a First Amendment carve out allowing them to force public employees to subsidize its political speech under so called “agency fee” provisions.⁵ The primary logic behind this exception to the prohibition on compelled speech was an interest in maintaining peaceful labor relations and preventing “free riders.”⁶

However, as the Supreme Court’s recognized in *Janus v. AFSCME*, neither of these justifications was sufficiently compelling to overcome public employees’ First Amendment rights,⁷ and agency fee regimes were deemed unconstitutional.⁸ “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.”⁹

Since, by agreeing to pay, non-members are waiving their First Amendment rights, the waiver must comply with certain constitutional requirements, including being knowing, voluntary, and intelligent.¹⁰ This waiver cannot be presumed by unions or employers, but must instead be demonstrated by “clear and compelling” evidence.¹¹

Efforts to Blunt the *Janus* Decision

Prior to and directly after the *Janus* decision affirmed public employees First Amendment rights, efforts began to entrench union power at the cost of the Constitution. This occurred both at the legislative level and with changes to union strategy.

On the very day the Supreme Court decided *Janus*, the former governor of California, Jerry Brown, signed Senate Bill 866 into law (SB 866). This timing was not coincidental. SB 866, erected a communicative barrier between public employers and their employees preventing the exchange of information regarding the First Amendment rights of employees and employees’ deduction preferences.¹² SB 866 included Section 3550, the underlying basis for the instant proposed legislation. Going forward, and as demonstrated by the legislative analysis of the California Senate Judiciary Committee,¹³ Section 3505’s amorphous “deter or discourage” language has already been interpreted as encompassing the simple sharing of information with employees.

For their part, unions predicted the way the wind was shifting and in response to the *Janus* decision began requiring union represented employees to sign restrictive membership and dues’ authorization cards. Specifically, these cards contain “window period” language restricting the ability of employees to exercise their First Amendment rights to narrow annual opt-out windows. Additionally, and contrary to the Supreme Court’s clear intent for *all employees* to have the right to make their own decision about whether to contribute their money to fund union speech, the U.S.

⁵ *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. at 2486.

⁶ *Janus*, 138 S. Ct. at 2465-67.

⁷ *Id.* at 2486.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *See, e.g.*, Cal. Gov. Code § 3553(b) and § 1153.

¹³ https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB931

Court of Appeals for the Ninth Circuit later ruled that these union cards do not have to comply with the knowing, voluntary, and intelligent standard laid down in *Janus*, but that when such contracts exist, the constitutional issues are irrelevant.¹⁴

Resulting Harm to Public Employees

The result of these efforts to block the effect of *Janus* has been devastating to the First Amendment rights of public employees across California. Many clients the Freedom Foundation represent *pro bono* in currently pending litigation bear witness to this fact.

Camille Bourque is a longtime employee of the Los Angeles police department that never signed a union membership card, and thus neither contractually authorized nor affirmatively consented to her money being taken and spent on union political speech. *Bourque, et al., v. EAA, et al.*, 2:21-cv-04006 (C.D. Cal. filed May 12, 2021). But the city and union continued to take and spend her money anyway.

The same is true of Dr. Robert Espinoza. *Espinoza v. UAPD, et al.*, 8:21-cv-01898 (C.D. Cal. filed November 17, 2021). Except, Dr. Espinoza not only fulfilled the terms of the card he signed with the union, after which it continued to take and spend his lawfully earned wages without contract or consent, but the union also took money for its own political action fund and contributed money to politicians and political campaigns across the state.

Finally, Glenn Laird a long-time high school teacher and union member who, when being presented with new restrictive “window period” language in his union renewal card, modified the card and struck out the new clause. *Laird v. UTLA, et al.*, 2:21-cv-02313 (C.D. Cal. filed March 16, 2021). When Laird effectively ended his membership and dues’ authorization according to those terms, the school district and union simply ignored him.

The above cases barely scratch the surface of the current abuse of public employee’s First Amendment right across the state. In each, had the individual been informed of their rights, or signed cards complying with the *Janus* waiver standard, they would have suffered no constitutional injuries and not been required to take action in federal court.

How SB 931 will Further Harm Public Employees

SB 931, if enacted, will only serve to further deteriorate the ability of public employees to exercise their First Amendment rights.

First, the California Public Employee Relations Board (PERB) has already shown its willingness to interpret and enforce the necessarily broad “deter or discourage” language of Section 3550 to encompass simple communication with employees regarding the First Amendment and *Janus* case.¹⁵ With the new monetary penalty proposed by SB 931, \$1,000 per affected employee and up to \$100,000, employers will be even more reluctant to communicate with employees on unrelated topics concerning employment that may fall within the “deter or discourage” standard.

¹⁴ See *Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021).

¹⁵ *Supra* at n. 13.

Second, there will also be distortions regarding the incentives of complaining unions. Under SB 931, unions filing success unfair labor practice charges under Section 3550 may be award their costs and attorneys' fees by PERB. This one-way fee shifting provision will encourage unions to file complaints, even where the actions on the part of the employers alleged to violate Section 3550 may be weak or ambiguous. Even the specter of fines and fees may in some cases be sufficient to exert pressure on employers. After all, the unions have nothing to lose by weaponing Section 3550, with no penalties for frivolous actions and the potential for costs and fees.

Last, SB 931 will also distort the incentives of PERB. One of the hallmarks of due process protection is the ability to have one's cause, as plaintiff/complainant or defendant, heard before a neutral decisionmaker. Here, SB 931 would distort this bedrock principle by incentivizing PERB to continue and expand the scope of activities falling within Section 3550's "deter or discourage" standard, as the agency itself is deemed the beneficiary of penalties up to \$100,000 levied against allegedly offending public employers. PERB is taken from a supposedly neutral arbiter to a party with a direct pecuniary interest in the outcome of disputes.

Conclusion

SB 931 will only make a bad situation worse by strengthening the barrier between public employees and information about their First Amendment rights and empowering unions with a direct pecuniary interest to exert pressure on public employers acting in good faith. Thank you for taking the time to consider our views as you consider SB 931. If you have any questions regarding this analysis, please feel free to contact me at (619) 368-8237 or by email at tsnowball@freedomfoundation.com.

Sincerely,



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Cc:

Vice-Chair Patricia C. Bates
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California State Senate Republican Caucus