

— LEGISLATIVE —
TESTIMONY

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STEVE DELIE

Giving Missouri's Workers A Choice

Missouri House of Representatives
Economic Development Committee

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The following is testimony presented to the Missouri House of Representatives Economic Development Committee by the Mackinac Center's Steve Delie on April 1, 2021. This testimony and others can be read online at mackinac.org/testimony.

Giving Missouri's Workers A Choice



Good morning, and thank you very much for having me.

My name is Steve Delie, and I am the director of labor policy for the Mackinac Center, as well as the director for its Workers for Opportunity initiative. I am here today to testify in favor of House Bill 88, which helps to secure the First Amendment rights of Missouri's public employees.

HB 88 enacts protections that were recognized by the United States Supreme Court in its 2018 *Janus v. AFSCME* opinion.¹ In that case, the court recognized that every act of speech on behalf of a public sector union was an inherently political act, and clarified that an employee cannot be compelled to financially support that speech without certain First Amendment protections.

Specifically, the Supreme Court noted that an employee's waiver of his or her First Amendment rights must satisfy certain standards, and that such a waiver could not be presumed. To satisfy constitutional requirements, "employees [must] clearly and affirmatively consent before any money is taken from them."² This requires evidence that an employee's waiver is a "knowing, intelligent act ... done with sufficient awareness of the relevant circumstances and likely consequences."³ "An effective waiver

¹ 585 U.S. ___ (2018).

² *Id.*

³ *Brady v. United States*, 397 U.S. 742, 748 (1970).

must ... be one of a 'known privilege or right.'⁴ It must also be done with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."⁵ Therefore, before employees can consent to dues deductions, they must know both what their rights are and the consequences of waiving those rights.

This is precisely what HB 88 accomplishes. Simply put, this bill requires public employees be provided with a notice and description of their First Amendment rights, to ensure that any decision to waive those rights can be made in a knowing and voluntary manner. The language of this notice is, in our opinion, sufficient to satisfy the requirements for a valid waiver pursuant to *Janus*.

We also support those provisions of this bill that would require such notice be provided to employees annually, who must then opt in to continue their union membership. As stated in *Janus*, the waiver of First Amendment rights cannot be presumed, but must be demonstrated by clear and convincing evidence. And a long line of Supreme Court cases makes clear that the waiver of a constitutional right does not continue in perpetuity. In *Knox v. SEIU*, the court affirmed that the factors influencing a party's decision to support a union may change over time, and that a fresh opportunity to affirm support can be required.⁶ This is consistent with the court's jurisprudence on other constitutional rights, particularly *Miranda* rights, in which a one-time waiver has consistently been determined to not constitute a perpetual waiver.⁷

4 *Curtis Pub Co v. Butts*, 388 U.S. 130, 143 (1967) (citation omitted).

5 *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

6 567 U.S. ____ (2012).

7 See, e.g., *United States v. Garcia-Haro*, 2000 WL 1471750, *2 (9th Cir. 2000) (unpublished) (holding that "[r]epeat *Miranda* warnings are not required . . . unless an 'appreciable time' elapses between interrogations" (quoting *United States v. Nordling*, 804 F.2d 1466, 1471 (9th Cir. 1986))); *Nordling*, 804 F.2d at 1471 (inquiring into totality of circumstances and concluding additional *Miranda* warnings not required where "[n]o appreciable time" elapsed between interrogations); *State v. Ransom*, 207 P.3d 208, 217 (Kan. 2009) (explaining that whether waiver of *Miranda* rights has expired requires considering totality

Finally, we support this bill because it is simply good bookkeeping. When Missouri's public employers provide annual notices and receive annual waivers, they will be able to clearly demonstrate that they are doing what the First Amendment requires. And employees will be kept well informed of their rights, which helps to ensure that their decisions are made in a voluntary and fully informed manner.

If the committee has any questions at this time, I would be happy to answer them.



Steve Delie is the director of labor policy and Workers for Opportunity at the Mackinac Center for Public Policy. In this role, he is in charge of marketing efforts, media strategy, and overseeing policy campaigns and objectives.

of circumstances, including the passage of time); *Commonwealth v. Dixon*, 380 A.2d 765, 767-68 (Pa. 1977) (concluding that police were required to re-advise an individual of his rights because enough time had passed and circumstances had changed since suspect's waiver) (citation omitted); *State v. DuPont*, 659 So. 2d 405, 407-08 (Fla. Dist. Ct. App. 1995) (determining whether renewed warning required where polygraph exam conducted more than 12 hours after suspect first read *Miranda*); *United States v. Jones*, 147 F. Supp. 2d 752, 761-62 (E.D. Mich. 2001) (concluding that when circumstances changed over time, warnings became "stale" and the suspect was entitled to receive new warnings, and reconsider earlier decision to waive *Miranda* rights); *Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau, Alaska*, 356 F. Supp. 3d 831, 849 (D. Alaska 2018) (noting that constitutional rights may only be waived if clear and convincing evidence establishes that waiver was "voluntary, knowing, and intelligent" and finding no evidence that, despite allegations of waiver, plaintiffs in that case "voluntarily waived for all time in the future any possible constitutional or legal challenge" to city's assessment of fees.)

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