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Supreme Court Can Strike a Victory for Worker Freedom in *Janus* Case Case Offers Chance to Protect Free Speech, End Forced Union Dues from Public Employees

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Mark Janus is a state child support specialist in Illinois. He works to ensure that children receive all the financial support available to them. He tries to make the process of divorce as smooth as possible for children caught in situations they cannot control. Janus got into this line of work because he wants to serve his community and cares about the welfare of kids going through tough times. But to pursue his passion to help children in need, he must pay fees to a union he does not support and did not vote for. “The union voice is not my voice,” he has remarked. “The union’s fight is not my fight.”¹

Janus is not alone. There are millions of other public sector workers, who, in order to keep their jobs, are required to pay fees to a union they do not want to represent them. Fortunately, they may soon be freed from compulsory union dues payments. With the announcement that the United States Supreme Court will hear *Janus v AFSCME Council 31*, government employee unions could lose the power to extract forced union dues payments, or so-called agency fees from workers who are not union members. This landmark case could finally end the injustice of the law compelling individuals to fund an organization with which they disagree.

Janus essentially revisits a 2016 Supreme Court case, *Friedrichs v California Teachers Association*, which resulted in a 4-4 split decision due to the untimely death of Justice Antonin Scalia.² As in that case, the lawsuit challenges the validity of agency fees, the requirement that public employees who are not members of a union pay fees to cover the costs of union representation.

The plaintiffs, led by Mark Janus, are asking the Court to overturn precedent that allows unions to compel non-members in the public sector to pay a union for representation. In his suit, Janus argue that compulsory dues payments constitute forced speech, which violates public employees’ First Amendment rights. A ruling in favor of Janus would provide millions of state and local employees with the same rights as federal employees to refrain from paying for union representation they do not want.

Empowering unions to collect forced union dues is misguided policy for several reasons.

First, public sector unions are inherently political. By bargaining with government bodies over such matters as work conditions, staffing levels, pay, and benefits, government

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employee unions directly influence matters of policy that are normally the province of elected officials. Furthermore, agency fees paid to public-sector unions routinely fund union political activity, despite efforts to restrict the practice.

Second, forced union dues do not help ensure labor peace. Data show that labor peace is disrupted more often by strikes in states that allow unions to collect compulsory agency fees than in states that do not.

Third, reducing the supposed “free-rider” problem is not an important policy goal. Union officials often claim that agency fees are a way of ensuring that all who benefit from union representation pay for it. But a better legislative solution to address the so-called “free-rider” problem is to allow workers who do not want to pay for union representation to opt out of the union contract altogether.

For these reasons, the Supreme Court should abolish mandatory payment of agency fees in the public sector.

Legal Background: *Abood*. The 1977 Supreme Court case *Abood v. Detroit Board of Education* upheld the validity of “agency shops” in public workplaces—in which a union, as the employees’ monopoly bargaining representative, is allowed to collect compulsory fees to pay for that representation. A group of Detroit public school teachers who objected to having their mandatory dues payments used for purposes of which they did not approve, such as union activities and programs that were “economic, political, professional, scientific and religious in nature,” had challenged agency shops under the First Amendment.³ Currently, forced union dues are permitted to finance various components of union representation like collective bargaining, grievance procedures, and contract administration, but not political activity, salaries of union officials for time dedicated to politics, and activity exclusively benefitting members.

In *Janus*, the plaintiffs are challenging a provision in the Illinois Public Labor Relations Act that grants unions, once they successfully organize a group of workers, the status of exclusive representative of all employees in a bargaining unit, not just those who choose to join the union—even those who may strongly object to it. Upon certification as an exclusive representative, the union is given the authority to bargain and speak for all workers in negotiations with the state over policies affecting them.

Certification also grants unions the power to collect agency fees from non-members. Courts and lawmakers have justified forced union dues on the theory that they stabilize labor-management relations and because exclusive representatives are obligated to represent members and non-members fairly and without discrimination, under a doctrine known as the “duty of fair representation.” Without agency fees, it is argued, public employees could “free-ride” on the benefits of unionization. As of 2016, similar legislation is on the books in 21 states.⁴

In the recent past, the legal precedent established in *Abood* has faced heightened judicial scrutiny. Supreme Court decisions involving forced union dues have tended to agree with

Mark Janus's view. In the 2012 Supreme Court decision in *Knox v. SEIU*, Justice Samuel Alito called *Abood* "something of an anomaly."⁵ As stated in the opinion, Alito found it unusual that the Supreme Court would tolerate the "impingement" of First Amendment rights merely to further "labor peace," based on the Courts' "[a]cceptance of the free-rider argument." Agency shop arrangements necessarily force public employee agency-fee payers to finance union political activity they may disagree with.

Alito also remarked in his opinion in the 2014 Supreme Court case *Harris v. Quinn* that "preventing nonmembers from free-riding on the union's efforts" is a rationale "generally insufficient to overcome First Amendment objections."⁶ Alito went on: "Agency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees."⁷ It is a "bedrock principle," he concluded, "that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."⁸

Public-Sector Unions are Inherently Political and Different from their Private-Sector Counterparts. The *Abood* decision incorrectly relied on precedent from private-sector labor relations cases to sanction unions' forced collection of agency fees.⁹ Yet, there are significant differences between collective bargaining and unions in the private sector compared to the public sector.

Private-sector collective bargaining is steered by the profit motive. If a private employer agrees to higher union-negotiated wages and costly work rules, then the price of its product or service will rise and drive consumers elsewhere. That puts pressure on unions to negotiate reasonable collective bargaining agreements or risk the employer going out of business.

In contrast, government employers are not guided by the profit motive, and face little stress to keep costs down. Tax revenue is collected regardless of the cost of public services or any failure to deliver them. In some instances, the government provides essential services that are not available from another source. Furthermore, taxpayers lack the consumer choice that exists in the private sector, short of moving to another jurisdiction.

The most salient difference is that, unlike in the private sector, any decision made by management—the government—including those made through collective bargaining, is political. Private-sector collective bargaining is limited to economic considerations and does not influence public policy.

In the public sector, compulsory collection of agency fees forces workers to finance collective bargaining negotiations, which can impact a wide range of policy issues, which should be determined by elected officials, such as tenure, class size, pension benefits, and wages, among numerous others.

Due to the political nature of public-sector collective bargaining, it has not always been an accepted practice. Prior to the proliferation of state laws permitting public-sector collective bargaining in the 1960s and 1970s, several courts issued decisions holding that collective bargaining in government is an improper delegation of power to a private entity.¹⁰ Even

progressive stalwart President Franklin Delano Roosevelt and prominent union icon George Meany raised strong objections to collective bargaining in the public sector.¹¹

The effects of public-sector collective bargaining extend beyond workplace conditions. Public employee compensation accounts for a significant portion of state and local budgets.¹² Overly generous collective bargaining agreements can inflate the cost of government and put financial strain on government budgets. This may result in spending cuts elsewhere, such as infrastructure or human services, or lead to higher taxes.

Public-sector unions are well-funded, powerful special interest groups. They often use their funds and influence to elect officials who have a favorable predisposition toward unions. Government unions spend an enormous amount in campaign contributions and, of likely greater influence, deploy their millions of members to knock on doors and make phone calls on behalf of their preferred candidates. Research on California school board elections by Terry Moe of Stanford University's Hoover Institution, illustrates the significant impact of unions in politics. The probability of a school board candidate winning is greatly improved by having the backing of a teachers' union. Moe's estimates find union support for a candidate may outweigh advantages held by incumbents.¹³ This influence is then used to lobby elected officials and collectively bargain for higher wages and staffing levels, which result in more dues-paying workers.

Government employee unions are inherently political organizations with immense political influence that can greatly affect the decision making of public officials through the collective bargaining process. Public employees who object to union representation should not be forced to subsidize this political activity.

Agency Fees Fund Union Political Activity. In *Abood*, the court attempted to strike a balance between public employees' First Amendment rights and unions' need to collect dues. The decision prohibited unions from spending agency fees from non-members on activity beyond the scope of collective bargaining. But, in practice, this has not stopped government unions from funneling non-member payments to their political efforts.

Despite the restrictions, agency fees directly fund government unions' political agendas. The respondent in *Janus*, American Federation of State, County and Municipal Employees (AFSCME) Council 31, like most public-sector unions, holds conventions that are, at least in part, political in nature. Unions are permitted to treat conventions as a chargeable expense to non-members. AFSCME Council 31 uses agency-fees to cover a portion of its convention expenses, which amounted to \$268,855 in 2016.¹⁴

For example, the 2016 AFSCME convention held in Las Vegas included a session titled "AFSCME for Hillary." Union officials called on members to become engaged in the union's effort to "take back the U.S. Senate and flip control of Congress." Hillary Clinton, who spoke at the convention, asked members to knock on doors on behalf of her presidential campaign. Breakout sessions were conducted to sharpen members' political advocacy skills. In addition, a litany of resolutions were adopted on political stances that are not germane to collective bargaining, including support for gun control legislation,

statehood for the District of Columbia, marijuana legalization, and opposition to voter-identification laws.¹⁵

AFSCME is not alone. The American Federation of Teachers (AFT) also charges non-members for these expenses. At the most recent AFT national convention, the union endorsed positions including a constitutional amendment to overturn the Supreme Court's decision in the First Amendment case *Citizens United v. FEC*, support for public funding of Planned Parenthood, and opposition to the Trans-Pacific Partnership trade agreement.¹⁶

Restrictions on agency fees funding union political activity exist, but in practice they have proved illusory.

Forced Union Dues Are Not Crucial for Labor Peace. A key objective in private and public-sector labor law is to set up a statutory framework that stabilizes labor-management relations and prevents work disruptions. Congress determined in the National Labor Relations Act, and the Supreme Court endorsed in a series of cases, that forcing workers to pay their “fair share” of the cost of collective bargaining, contract administration, and grievance processing provided by an exclusive representative promotes labor peace.

In part, *Abood* upheld agency fee payments on that basis. As the Court stated in *Abood*:

Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost.¹⁷

However, there is no empirical evidence that permitting forced union dues payments lessens the likelihood of public-sector unions calling strikes or causing other work disruptions. In *Harris v. Quinn*, a case involving agency fees, the Supreme Court's decision remarked that the “*Abood* Court's critical ‘labor peace’ analysis rests on the unsupported empirical assumption that exclusive representation in the public sector depends on the right to collect an agency fee from nonmembers.”¹⁸

Since the Supreme Court ruled in *Abood*, empirical evidence has become available contradicting the notion that agency fees promote labor peace. A comprehensive examination by the Washington State-based Freedom Foundation of public-sector strike rates shows that governments that allow compulsory collection of agency fees are more likely to have unions engage in strikes. Right-to-work states, which prohibit forced union dues payments, experience fewer strikes.¹⁹

Furthermore, a recent analysis of state public-sector labor laws published by the Pennsylvania-based Commonwealth Foundation found that 29 of 50 states prohibit all government employees from striking.²⁰ Of the remaining states, many prohibit specific classes of public employees from striking. Yet, there have been cases of unions illegally calling strikes in states that permit agency fees.

For example, as the City of Chicago's 2012 request for a temporary restraining order against a strike by Chicago Teachers Union (CTU) stated, the Illinois Educational Labor Relations Act "expressly prohibits the CTU from striking over disputes concerning noneconomic subjects ... such as layoff and recall rights, class size, and length of the school day and school year."²¹ This did not stop the CTU from going on a seven-day strike in 2012. The union even admitted the strike was over non-economic conditions and other subjects prohibited under state law.²² In 2016, the CTU called another illegal one-day strike.²³

Illegal strikes are not confined to Illinois. In Washington State, no public employees are legally allowed to strike, but due to the lack of any penalties for illegal strikes, they occur nonetheless. Recently, in 2015, the Washington Education Association called for teachers to go on strike in at least 10 different school districts.²⁴

The Union "Free-Rider" Argument Wrongly Assumes Compulsory Fees Are Necessary to Cover the Costs of Bargaining. Another justification for compulsory collection of agency fees in the public sector relies on the concept of "free riders." In *Abood*, the majority opinion stated:

A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.²⁵

Non-members do not greatly benefit from having to negotiate with their employer through an exclusive bargaining representative, as it forces them to relinquish their right to negotiate for work conditions that meet their individual needs. Exclusive representation relies on the premise that all workers are alike and interchangeable.

Whatever burdens representing non-members may impose, public-sector unions eagerly seem to accept the cost. In Michigan and Kansas, for example, state legislators introduced bills to eliminate the free-rider problem by instituting a system in which unions represent only dues-paying members. Government employee unions in both states came out vehemently against this legislation, calling it an assault on collective bargaining rights.²⁶

Furthermore, many public-sector collective bargaining agreements reward unions for their status as exclusive representatives.

The contract at issue in *Janus*, for instance, provides AFSCME tangible benefits that are common among state and local collective bargaining agreements. As an exclusive representative, the union controls all negotiations in the bargaining unit "pertaining to wages and salaries, hours, working conditions and other conditions of employment for employees."²⁷

The employer agrees to only negotiate with the exclusive representative, which shields the union from competition; other unions are prohibited from organizing workers in the same bargaining unit.

The government employer agrees to pay union dues and political contributions to the union, deducting them directly from employees' paychecks.

As an exclusive representative, AFSCME members receive paid time off from their public duties to investigate and process grievances during working hours.²⁸ AFSCME is also granted public meeting space and use of government equipment, free of charge.

Public employees receive paid time off during working hours for other private union business including to "attend grievance hearings, labor/management meetings, negotiations of their own agency and/or facility supplemental agreements, meetings covering modifications of supplemental agreements, committee meetings."²⁹ This paid time off, which occurs in most states, can cost taxpayers millions of dollars annually.³⁰

In the *Janus* contract, AFSCME officials are granted access to state premises to administer the union's contract.

They are also allowed to:

- Use the state's email system to solicit the private email addresses of bargaining unit members;³¹
- Post union literature on the public employer's bulletin board;³²
- Conduct union meetings on state premises;
- Conduct union orientation and recruitment for new members during work hours without loss of pay.³³

An End to Forced Union Dues May Lead to Members-Only Unions. Despite union claims, such as AFSCME President Lee Saunders calling the *Janus* case "another example of corporate interests using their power and influence to launch a political attack on working people and rig the rules of the economy in their own favor," an end to forced union dues could improve services unions provide.³⁴

Without relying on coercive power to compel agency fee payments, unions will be held accountable to membership and more receptive to their needs. They will need to attract members by providing services that workers want or risk losing dues money.

Despite the potential benefits from banning forced union dues, neither workers nor unions likely will be completely satisfied with the new arrangement. Non-members will still work under a union-negotiated agreement they may not want, and unions must represent employees who do not pay dues.

A policy of members-only unions would resolve the above issues. Under such a policy, a union would only represent, negotiate on behalf of, and collect dues from members of the labor organization. Non-members can exercise their newfound freedom to negotiate a contract with the public employer tailored to their needs.

Very little change to state labor relations law is necessary to implement such a policy. Union members would continue to work under a collective bargaining agreement; state laws related to most aspects of public sector labor relations would remain unchanged. The only individuals affected by this “Workers Choice” approach are non-members who would be afforded the ability to negotiate their own work conditions. Individuals have unique interests and needs at the workplace. With Workers Choice, individual workers can agree to a contract that works for them, not what union officials decide.³⁵

It also eliminates unions’ main objection to the elimination of agency fees. Organized labor would no longer be forced to represent so-called “free riders.” Only members who pay dues would receive union services and work under collective bargaining agreements.

A system of individual choice is not unprecedented. In 2000, New Zealand enacted the Employment Relations Act, which states that all membership in a union is voluntary and an employer cannot give any preference in hiring or obtaining work to union or non-union workers.³⁶ Closer to home, a Workers Choice proposal was recently introduced in Michigan.³⁷

Another common criticism of banning agency fees is that it makes it harder for workers to unionize and collectively bargain.³⁸ Research, however, does not support that notion.

Data from the Organization for Economic Cooperation and Development shows that New Zealand’s union density, the rate of the number of employees who are union members to all employees in the country, has remained relatively stable in New Zealand since 2000, ranging from 22.4 and 18.7 percent from 2000 to 2014.³⁹ However, a significant portion of decline can be attributed the retirement of older union members and unions failing to attract younger workers to replace them.⁴⁰

As in New Zealand, prohibiting forced union dues has not necessarily led to a decline in union membership in the United States. States with right-to-work laws, which prohibit agency fees, have generally seen union membership grow in both the private and public sectors. According to the Bureau of Labor Statistics, between 2005 and 2015, “union membership grew in right-to-work states by about 1.3 percent, but fell around 9 percent in non-right-to-work states.”⁴¹

For example, in Indiana, which enacted right-to-work in 2012, union membership in Indiana increased by 58,000 between 2012 and 2016. In contrast, neighboring Illinois, which lacks a right-to-work law, only saw 11,000 more union members during the same time period.⁴² These numbers are even more staggering when considering how much larger Illinois’ economy is than Indiana’s.

Conclusion. Determining one’s work terms should be a private choice. Workers benefit by making the choice that is right for them instead of being forced into a one-size-fits-all contract covering all workers in a bargaining unit. Overturning the precedent set in *Abood* also would have the corollary benefit of giving states the incentive to experiment with labor relations policy and to enact Worker’s Choice.

At the heart of the *Janus* case is worker freedom. Workers should not have to fund an organization with which they disagree in order to keep their job, especially organizations like public-employee unions, which are inherently political. Millions of public employees are subjected to forced union dues payments; they represent the largest compelled speech scheme in America, and it is past time to end the practice.

Notes

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² *Friedrichs v. California Teachers Association*, 578 U.S. (2016), <https://supreme.justia.com/cases/federal/us/578/14-915/>.

³ *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977), <https://supreme.justia.com/cases/federal/us/431/209/case.html>.

⁴ Paige Halper, “Workers Choose or Forced Dues?,” Center for Worker Freedom, February 2, 2016, <http://workerfreedom.org/workers-choose-or-forced-dues>.

⁵ *Knox v. Serv. Employees Intl. Union, Local 1000*, 132 S. Ct. 2277, 2296 (2012), <https://www.supremecourt.gov/opinions/11pdf/10-1121c4d6.pdf>.

⁶ *Harris v Quinn*, 134 S Ct 2618 (2014), https://www.supremecourt.gov/opinions/13pdf/11-681_j426.pdf.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Machinists v. Street*, 367 U.S. 740, 784-85 (1961), *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, at 232 (1956).

¹⁰ *Mugford v. Mayor and City Council of Baltimore*, *Nutter v. City of Santa Monica*, and *City of Springfield v. Clouse*.

¹¹ Don Bellante, David Denholm, and Ivan Osorio, “Vallejo Con Dios: Why Public Sector Unionism Is a Bad Deal for Taxpayers and Representative Government,” *Policy Analysis* No. 645, Cato Institute, September 28, 2009, <https://www.cato.org/publications/policy-analysis/vallejo-con-dios-why-public-sector-unionism-is-bad-deal-taxpayers-representative-government>.

¹² Chris Edwards, “Employee Compensation in State and Local Governments,” *Tax & Budget Bulletin* No. 59, Cato Institute, January 2010, <https://object.cato.org/sites/cato.org/files/pubs/pdf/tbb-59.pdf>.

¹³ Terry Moe, “Political Control and the Power of the Agent,” *Journal of Law, Economics, and Organization*, 2005, https://files-politicalscience-stanford-edu.s3.amazonaws.com/s3fs-public/polcontrol74_pdf.pdf.

¹⁴ Brief for the Competitive Enterprise Institute as Amicus Curiae, *Janus v. AFSCME, Council 31*, (2017), <https://cei.org/sites/default/files/CEI%20Janus%20Cert%20Amicus%20%281%29.pdf>

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Aboud v. Detroit Board of Education*.

¹⁸ *Harris v Quinn*.

¹⁹ Maxford Nelson, “Does Union Security Promote Labor Peace in Public Employment Relations?” Freedom Foundation, December 28, 2015, <https://www.freedomfoundation.com/labor/union-security-promote-labor-peace-public-employment-relations/>. The study found: “The BLS [Bureau of Labor Statistics] database indicates government workers in states that allow union security provisions [agency fees] go on strike at more than 26 times the rate of public employees in right-to-work states. The larger FMCS [Federal Mediation and Conciliation Service] database confirms these findings, indicating that, while average strike size was essentially the same, public employees in union security states went on strike nearly 17 times more often and for twice as long as government workers in RTW states.”

²⁰ Priya M. Abraham, *Transforming Labor: A Comprehensive, Nationwide Comparison and Grading of Public Sector Labor Laws*, Commonwealth Foundation, October 2016, https://www.commonwealthfoundation.org/docLib/20161027_TransformingLaborPolicyReport.pdf.

²¹ “Full text of request for injunction to end teachers strike,” *Chicago Tribune*, September 17, 2012, <http://www.chicagotribune.com/news/nationworld/chi-full-text-of-request-for-injunction-to-end-teachers-strike-20120917-htmlstory.html>.

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- ²⁸ Ibid., Article V Grievance Procedures, Section 6 Time Off, Meeting Space and Equipment Use.
- ²⁹ Ibid., Article VI Union Rights, Section 1. Union Activity During Working Hours.
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- ³¹ Agreement between Department of Central Management Services and AFSCME, Council 31, Article VI Union Rights, Section 2. Access to State Premises by Union Representatives.
- ³² Ibid., Article VI Union Rights, Section 4. Union Bulletin Boards.
- ³³ Ibid., Article VI Union Rights, Section 10. Union Orientation.
- ³⁴ "Supreme Court to Take up Anti-Union Janus Case This Term," AFSCME NOW, September 28, 2017, <https://www.afscme.org/now/supreme-court-to-take-up-anti-union-janus-case-this-term>.
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- ³⁷ 2016 HB 5829, <http://www.legislature.mi.gov/documents/2015-2016/billintroduced/House/pdf/2016-HIB-5829.pdf>. The bill was introduced and referred to the Government Operations Committee during the 2015-2016 legislative session, but did not receive a vote. It has yet to be reintroduced in the 2017-2018 session.
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