# The Roberts Court and Compulsory Collective Bargaining: Reading the Tea Leaves after *Janus*

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ABSTRACT

*The Roberts Court has become strident in its defense of the First Amendment. If litigants can manage to frame an issue as a government infringement on their right(s) to speech, expression, or free exercise of religion, they are likely to succeed in attracting the Court's scrutiny. As most first-year law students can tell you, the determination of the level of scrutiny the Court will place on the government will often determine whether the regulation in question will be permitted to stand. With that in mind, the way Justice Alito framed the issue of collective bargaining in his majority opinion in* Janus *bears watching for what it could mean for the future of compulsory collective bargaining.*

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## I. BACKGROUND AND HISTORY

Mark Janus was a state employee whose collective bargaining unit was represented by a public-sector union.[1] Mr. Janus refused to join the Union because he opposes many of its positions, including those taken in collective bargaining.[2] Under the Illinois law he challenged, if a majority of the employees in a bargaining unit voted to be represented by a union, that union was designated as the exclusive representative of all the employees, even those who did not join.[3] Only the union could engage in collective bargaining; individual employees could not be represented by another agent or negotiate directly with their employer.[4] Employees who did not join the union were still dependent on the union to negotiate the terms of their employment and were required to pay an "agency fee" to the union to cover their share of that service.[5]

1. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S.Ct. 2448, 2456 (2018).
2. *Id.*
3. *Id.* at 2455.
4. *Id.* at 2456.
5. *Id.*

The agency fees were supposed to cover union expenditures attributable to those activities related to the union's collective-bargaining activities but could not cover the union's political and ideological projects.[6] The union set the agency fee annually and then sent nonmembers a notice explaining the basis for the fee and the breakdown of expenditures.[7] In Janus's case, the agency fees were 78% of full dues.[8]

Janus challenged the constitutionality of the agency fees as "coerced political speech" under the First Amendment (applicable to the states through the Fourteenth Amendment).[9] Janus rejected many of the policy positions for which the union advocated.[10] Janus believed the union's bargaining did not appreciate the State of Illinois' fiscal crisis and did not reflect Janus's best interests or the interests of Illinois citizens.[11]

The Court first analyzed the justifications previously given in *Abood*.[12] The two justifications in *Abood* for agency fees were labor peace and avoiding the risk of free riders.[13] First, the Court found that the labor peace argument that had provided the foundation for the *Abood* holding had proven to be unfounded over time and was without merit.[14] Second, avoiding the risk of free riders was not a compelling state interest as is required to justify a breach of the First Amendment.[15]

In overruling the *Abood* decision, the Court highlighted the significance of compelled speech versus restriction of speech in violation of the First Amendment. The Court stated, in cases of compelled speech "[i]ndividuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . [and] a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds than a law demanding silence.'"[16]

In the alternative, the union argued that the agency fees were constitutional based on *Garcetti-Pickering*. Under that framework, the union argued: (1) union speech in collective bargaining should be treated as speech pursuant to an employee's official duties; (2) the fees were only a matter of private concern; and (3) the government's interests in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests.[17]

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6. *Janus*, 138 S. Ct. at 2456.
7. *Id.*
8. *Id.*
9. *Id.* at 2462.
10. *Id.*
11. *Id.* at 2461.
12. *See* Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).
13. *Janus*, 138 S. Ct. at 2457 (citing *Abood*, 431 U.S. at 224).
14. *Id.*
15. *Id.*
16. *Id.* at 2464.
17. *Id.* at 2472, 2474, 2477.

The Court stated that the *Garcetti-Pickering* framework did not apply to this scenario but analyzed it regardless.[18] In doing so, it rejected each of the union's arguments. First, the speech in *Garcetti* relates to actions by the employer, and unions are not the employers of public employees.[19] Even if the union was considered to be in that role, there are laws in place to protect employees from compelled speech.[20] Second, the amount of money spent on public employee salaries is enormously consequential, and it cannot be said that public employee salaries aren't of public concern.[21] Third, in its overruling of *Abood*, the Court had already found that the state's interests in compelling speech via agency fees were insufficient to outweigh nonmembers' First Amendment interests.[22]

While ruling against the union, the Court acknowledged that unions may "experience unpleasant transition costs in the short term," and that unions may need to "make adjustments in order to attract and retain members."[23] The Court continued in saying that unless an employee waives their First Amendment rights, payment to the union may no longer be deducted from an employee's earnings.[24] A waiver can only be obtained if the employee affirmatively consents to pay, and such a waiver cannot be presumed.[25]

## II. NEGOTIATION IS SPEECH

While the right to economic self-expression in employee negotiation may seem like common sense, applying First Amendment protections to employees' economic speech in the public sector is not a straightforward exercise. A bit of dicta from Justice Alito's majority opinion in *Janus* makes the connections between individual liberty and labor negotiation clear:

> Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer.[26]

The right to negotiate is closely intertwined with the right to contract.[27] If workers have the right to sell their time and skills to an employer, then they likewise have the right to bargain for the most favorable possible terms for that

18. *Id*. at 2473–74.
19. *Id*. at 2474 (citing Garcetti v. Ceballos, 547 U.S. 410 (2006)).
20. *Id*.
21. *Janus*, 138 S. Ct. at 2474.
22. *Id*. at 2477.
23. *Id*. at 2485–86.
24. *Id*. at 2486.
25. *Id*. (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
26. *Janus*, 138 S. Ct. at 2460.
27. *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

exchange. Roscoe Pound, the former Dean of Harvard Law School, railed against this idea:

> The currency in juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law- making to be the ideal.[28]

Historically, some liberals and union advocates have maintained that an individual right of contract weakened the power of labor unions, to the detriment of workers generally.[29] The U.S. Supreme Court, led in this case by Justice Alito, took a different view.[30] The Court seemed inclined to revive the doctrine of economic substantive due process associated with the Lochner era.[31] In *Allgeyer v. Louisiana*, the Court unanimously held that:

> [T]he right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[32]

The *Allgeyer* decision was based on reading the word "liberty" in the Due Process Clause of the Fourteenth Amendment to include a liberty of contract.[33] It is possible, but unlikely, that the Supreme Court will simply revive this way of thinking. There are significant divisions on the Court with respect to the very concept of substantive due process.[34] The same conservative Justices who are likely to be sympathetic to strengthening the individual right to contract have often been critical of their liberal colleagues using substantive due process to achieve their desired results.[35] Rather than risk charges of hypocrisy, it seems more likely that the Court's conservative majority will approach this issue as one implicating the First Amendment rather than the Fourteenth. The Supreme Court will also have to deal with its precedent from *Knight*, which the Sixth Circuit recently held

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28. *Id*. at 457.
29. *Id*. at 470.
30. *See Janus*, 138 S. Ct. at 2484.
31. *Id*. at 2479.
32. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).
33. *Id*.
34. *See* Sol Wachtler, *Dred Scott Raises Its Ugly Head Again*, N.Y. L.J. (Mar. 12, 2019), https://www.law.com/newyorklawjournal/2019/03/12/dred-scott-raises-its-ugly-head-again/?slreturn=20190421140942 [https://perma.cc/78MG-AVVE].
35. *Id*.; *see also* Gilad Edelman, *John Roberts Has a Point*, LIFE OF THE LAW (July 2, 2015), https://www.lifeofthelaw.org/2015/07/john-roberts-has-a-point/ [https://perma.cc/SJ7X-S2RJ].

in *Thomas* was directly controlling and interpreted to immunize exclusive-representation agreements from constitutional challenges.[36]

While there may be an inherent Due Process right to labor negotiation, it must be remembered that the *Janus* opinion— beyond Alito's dicta—does not rule on that novel question, but rather the issue of First Amendment protections.[37] Thus, if Justice Alito is to hold his coalition of five votes from *Janus* together and continue to chip away at compulsory collective bargaining, the Court will have to construct a more persuasive argument to explain how exclusive representation "substantially restricts the rights of individual employees" in the context of the Court's free speech precedents.[38]

We believe the Court will follow the *Janus* decision with a series of decisions that gradually limit the practice of compulsory collective bargaining in the name of a First Amendment right to negotiation. Given the complexities of this paradigm (which only applies to the narrow case of governmental employees, but could be understood more broadly as an affirmation of free speech rights for all public and private workers), what follows are a variety of principles—legal and rhetorical—the Court is likely to rely on for such an effort and some of their possible consequences for both the shaping of public workers' understanding of free speech and the nature of "labor peace" in the post-digital era of economic and political disruption.

## III. POST-JANUS DECISIONS SHOW AN EVOLUTION IN COMPELLED SPEECH DOCTRINE

The Roberts Court has made clear that it views the First Amendment expansively and anything that hints of compelled speech as suspect. In addition to the *Janus* precedent, the Supreme Court's ruling in *Masterpiece Cakeshop* has provided guidance as to its views on what constitutes compelled speech.[39] In similar fashion, previous rulings of state and federal courts have significant value in predicting what direction the Supreme Court is headed with the compelled speech doctrine.

### *A. Brush & Nib Studio, LC v. City of Phoenix*

The Arizona Supreme Court addressed the compelled speech arguments from *Janus* in *Brush & Nib Studio, LC v. City of Phoenix*.[40] Brush & Nib Studio creates custom wedding invitations for its clients, and the owners of Brush & Nib are dedicated to upholding their Christian values in their business.[41] As such, they

36. Thompson v. Marietta Educ. Ass'n, 972 F.3d 809, 811–12 (6th Cir. 2020) (citing Minn. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 299 (1984)).

37. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2480 (2018).

38. *Id.* at 2460.

39. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018).

40. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 905 (Ariz. Sup. Ct. 2019).

41. *Id.* at 897–98. Their Operating Agreement and Client Contract specify that Brush & Nib "reserves the right to deny any request for action or artwork that violates its artistic and religious beliefs." *Id.* at 897.

believe that creating a custom wedding invitation that conveys a message celebrating same-sex marriage, for any customer, regardless of sexual orientation, violates their sincerely held religious convictions.[42] When the City of Phoenix amended its Public Accommodations Ordinance in 2013, it prohibited public accommodations from discriminating against persons based on their status as a "protected" group, which included a person's sexual orientation.[43] The Plaintiffs were not notified that they violated the public accommodation ordinance; instead, they filed suit to enjoin the City from enforcing the ordinance against them in the future, as well as to obtain a declaration that the Ordinance violates their right to free speech under Article 2, Section 6 of the Arizona Constitution and their free exercise right under the Arizona Free Exercise of Religion Act.[44]

Citing *Janus*, the Arizona Supreme Court reiterated that the fundamental principle underlying compelled speech cases is that an individual has autonomy over his or her speech and thus may not be forced to speak.[45] The court explained that requiring Janus to pay the agency fees violated his free speech rights because it compelled him to subsidize the union's speech.[46] Quoting *Janus*, the Arizona Supreme Court stated that "[f]ree speech serves many ends," and "[w]henever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends."[47] Further, it quoted, "[w]hen speech is compelled . . . additional damage is done" because it "forc[es] free and independent individuals to endorse ideas they find objectionable[, which] is always demeaning," and coerces individuals "into betraying their convictions."[48]

To prevail on their compelled speech claim, the Plaintiffs needed to show that their custom wedding invitations were protected speech under the First Amendment as opposed to mere conduct that did not implicate speech.[49] The

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42. *Id.* at 898.

43. *Id.*; Phx. Ariz. City Code ("PCC") § 18-4(B).

44. *Brush & Nib*, 448 P.3d at 899 (referencing FERA § 41-1493.01). The court further said:

> [Brush & Nib] request an order allowing them to post a proposed statement (the "Statement") on Brush & Nib's website announcing their intention to refuse requests to create custom artwork for same-sex weddings. The Statement explains that Brush & Nib will not "create any artwork that violates our vision as defined by our religious and artistic beliefs and identity." It lists several examples of objectionable artwork, including artwork promoting businesses that "exploit women or sexually objectify the female body," exploits the environment, or "any custom artwork that demeans others, endorses racism, incites violence, contradicts our Christian faith, or promotes any marriage except marriage between one man and one woman," such as "wedding invitations[ ] for same-sex wedding ceremonies."

*Id.*

45. *Brush & Nib*, 448 P.3d at 905. The court also used the *Hurley* case as a primary example of the compelled speech doctrine. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 560 (1995).

46. *Id.* (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2466, 2486 (2018)).

47. *Brush & Nib*, 448 P.3d at 905 (quoting *Janus*, 138 S. Ct. at 2464).

48. *Brush & Nib*, 448 P.3d at 905.

49. *Brush & Nib*, 448 P.3d at 905 (quoting *Hurley*, 515 U.S. at 568–70).

First Amendment did not protect all of Plaintiffs' business activities or products simply because they operate Brush & Nib as an "art studio."[50] However, the court concluded the Plaintiffs' custom wedding invitations, and the process of creating them, were protected by the First Amendment as pure speech.[51] The court found that each custom invitation created by the owners contained their hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork.[52] Following *Hurley*, the court reasoned that the owners are "intimately connected" with the words and artwork contained in their invitations.[53] "For each invitation, [Brush & Nib] spend[s] many hours designing and painting custom designs, writing words and phrases, and drawing images and calligraphy."[54] Additionally, the court found that they "insist on retaining artistic control over the ideas and messages contained in the invitations to ensure they are consistent with their religious beliefs."[55]

After finding that Brush & Nib's invitations were categorized as pure speech, the court reasoned that the Ordinance as applied was a content-based law, and that it was therefore subject to strict scrutiny.[56] Finally, applying the strict scrutiny test, the court held that the state's interest in "assuring its citizens equal access to publicly available goods and services" is "not sufficiently overriding as to justify compelling Plaintiffs' speech by commandeering their creation of custom wedding invitations, each of which expresses a celebratory message, as the means of eradicating society of biases."[57]

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50. *Brush & Nib*, 448 P.3d at 908.

51. *Id.*

52. *Id.*

53. *Id.*; *see Hurley*, 515 U.S. at 576 (stating that protected speech involves communications that are "intimately connected" with the speaker).

54. *Brush & Nib*, 448 P.3d at 908.

55. *Id.*

56. *Id.* at 914. The court further said:

> Under the City's application of the Ordinance, Duka and Koski face the threat of criminal prosecution, jail, fines, or closure of their business if they refuse to create custom invitations celebrating same-sex weddings. Thus, based on its onerous penalties, the Ordinance coerces Plaintiffs into abandoning their convictions, and compels them to write celebratory messages with which they disagree, such as "come celebrate the wedding of Jim and Jim," or "share in the joy of the wedding of Sarah and Jane." *See Telescope Media*, 2019 WL 3979621 at *6 (holding that state public accommodations law operated as a content-based regulation of owners' wedding video business "[b]y treating the [owners'] choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages"). In short, like Hurley, the City's application of the Ordinance in this case essentially declares Plaintiffs' "speech itself to be the public accommodation." *Hurley*, 515 U.S. at 572–73. Accordingly, because the Ordinance "necessarily alters the content" of Plaintiffs' speech by forcing them to engage in speech they 'would not otherwise make,' it must survive strict scrutiny.

*Id.*

57. *Id.* at 914–15. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (holding that "the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.").

### *B. Telescope Media Group v. Lucero*

Federal courts have also adopted the compelled speech arguments from *Janus*. In *Telescope Media Group v. Lucero*, 936 F. 3d 740 (8th Cir., 2019), the Eighth Circuit ruled in favor of Minnesota filmmakers who challenged a state law that compelled them to promote messages with which they disagreed.[58] The Larsens, who own and operate Telescope Media Group, are videographers who create "compelling stories" in commercials, short films, and live-event productions.[59] The Larsens wanted to expand their business to produce wedding videos for the purpose of promoting marriage as a "sacrificial covenant between one man and one woman."[60] However, they realized that the Minnesota Human Rights Act ("MHRA") could prevent this addition to their services, so they sued Minnesota in federal district court seeking injunctive relief preventing Minnesota from enforcing the MHRA against them.[61] In response, the state claimed that a decision to produce *any* wedding video requires the Larsens to make them for everyone ("both opposite-sex and same-sex weddings") or no one at all.[62] Furthermore, the state argued that "[i]f the Larsens enter the wedding-video business, their

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58. Telescope Media Group v. Lucero, 936 F.3d 740, 758 (8th Cir. 2019).

59. *Id*. at 747–48. The court further said:

> They exercise creative control over the videos they produce and make "editorial judgments" about "what events to take on, what video content to use, what audio content to use, what text to use . . . the order in which to present content, [and] whether to use voiceovers." . . . The Larsens "gladly work with all people — regardless of their race, sexual orientation, sex, religious beliefs, or any other classification." But because they "are Christians who believe that God has called them to use their talents and their company to . . . honor God," the Larsens decline any requests for their services that conflict with their religious beliefs. This includes any that, in their view, "contradict biblical truth; promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman."

*Id*.

60. *Id*. at 748. The court further said:

> According to the Larsens, these videos will "capture the background stories of the couples' love leading to commitment, the [couples'] joy[,] . . . the sacredness of their sacrificial vows at the altar, and even the following chapters of the couples' lives. The Larsens believe that the videos, which they intend to post and share online, will allow them to reach "a broader audience to achieve maximum cultural impact" and "affect the cultural narrative regarding marriage."

*Id*.

61. *Id*. at 749. Telescope Media asserted that two provisions of MHRA could subject them to penalties:

> The first provision states: "It is an unfair discriminatory practice . . . to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sexual orientation." Minn. Stat. § 363A.11, subdiv. 1(a)(1). The second provides: "It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service . . . to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's . . . sexual orientation. . ., unless the alleged refusal or discrimination is because of a legitimate business purpose." *Id*. § 363A.17(3).

*Id*. at 747.

62. *Id*. at 748.

videos must depict same- and opposite-sex weddings in an equally 'positive' light."[63] If not, Telescope would be unlawfully discriminating against prospective customers "'because of' their sexual orientation."[64]

Heavily relying on *Janus*, the court held that the First Amendment "prevents the government from '[c]ompelling individuals to mouth support for views they find objectionable.'"[65] Quoting *Janus*, the majority wrote, "[t]he Supreme Court has 'held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all,'" and that, "the latter is perhaps the more sacred of the two rights."[66] Citing *Janus*, the court held that "[t]o apply the MHRA to the Larsens in the manner Minnesota threatens is at odds with the 'cardinal constitutional command' against compelled speech" and that "Minnesota cannot 'coerce [them] into betraying their convictions' and promoting 'ideas they find objectionable.'"[67] Rounding out their whole-cloth adoption of *Janus*, the court stated that "compelling speech in this manner... 'is always demeaning.'"[68] The Eighth Circuit found that this was "especially true [for Telescope], because Minnesota insisted that the Larsens *must* be willing to convey the same 'positive' message in their videos about same-sex marriage as they do for opposite-sex marriage."[69]

Finding that MHRA is a content-based restriction, the Eighth Circuit applied strict scrutiny review.[70] In describing the standard of review, the court compares *Hurley* to *Janus*, suggesting that "a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence."[71] It concluded that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be."[72]

### *C. Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metropolitan Government*

Likewise, in *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government*, the District Court for the Western District of Kentucky issued a preliminary injunction preventing the City of Louisville from enforcing its public

63. *Id.* at 748–49.

64. *Id.* at 749.

65. *Id.* at 750; Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018).

66. *Telescope*, 936 F.3d at 752 (quoting *Janus*, 138 S. Ct. at 2463–64).

67. *Telescope*, 936 F.3d at 752–53 (quoting *Janus*, 138 S. Ct. at 2463–64).

68. *Telescope*, 936 F.3d at 753 (quoting *Janus*, 138 S. Ct. at 2464).

69. *Telescope*, 936 F.3d at 753 (emphasis in original).

70. *Id.* at 754.

71. *Id.* (quoting *Janus*, 138 S. Ct. at 246 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (emphasis in original))); Gralike v. Cook, 191 F.3d 911, 919–20 (8th Cir. 1999) (applying strict scrutiny to a law forcing candidates to speak about term limits). In an as-applied challenge like this one, the focus of the strict-scrutiny test is on the actual speech being regulated, rather than how the law might affect others who are not before the court. *See* Phelps-Roper v. Ricketts, 867 F.3d 883, 896 (8th Cir. 2017).

72. *Telescope*, 936 F.3d at 755.

accommodations statute against a wedding photographer.[73] Chelsey Nelson brought a pre-enforcement challenge of the Fairness Ordinance on free speech and religious liberty grounds, alleging that it would compel her to photograph same-sex weddings against her conscience[74]: she wanted to "photograph and edit photographs of only opposite-sex weddings."[75] "She also wants to post messages on her website explaining her religious objections to photographing same-sex weddings" in order to put potential customers on notice.[76]

The court found that, as applied, the Fairness Ordinance is a viewpoint-based restriction.[77] Relying on *Janus*, the court states, "[w]orst of all is when the government compels citizens to express 'views they find objectionable.'"[78] Further quoting *Janus*, "[f]ree thought 'includes both the right to speak freely' and to say nothing at all."[79] Applying strict scrutiny, the court found that wedding photography is protected speech; no compelling interest requires speakers "to modify the content of their expression."[80]

### *D. 303 Creative LLC v. Elenis*

In *303 Creative LLC v. Elenis*, the Tenth Circuit came to the opposite conclusion of *Telescope*, causing a circuit split on the compelled speech doctrine and putting *Janus* right at the crux.[81] 303 Creative is a "graphic and website design company" that serves all customers.[82] However, its owner, Lorrie Smith, wants to begin offering wedding-related services in the future.[83] Consistent with her beliefs, Smith "intend[s] to offer wedding websites that celebrate opposite-sex marriages but intend[s] to refuse to create websites that celebrate same-sex marriages."[84] In addition, she "intend[s] to publish a statement explaining [her] religious objections."[85]

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73. Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 559–60 (W.D. Ky. 2020).

74. *Id*. at 548.

75. *Id*. at 550.

76. *Id*.

77. *Id*. at 554.

78. *Chelsey Nelson*, 479 F. Supp. 3d at 555 (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018) ("Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.")).

79. *Chelsey Nelson*, 479 F. Supp. 3d at 555 (quoting *Janus*, 138 S. Ct. at 2463).

80. *Chelsey Nelson*, 479 F. Supp. 3d at 559 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 578 (1995)).

81. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176 (10th Cir. 2021).

82. *Id*. at 1169.

83. *Id*.

84. *Id*.

85. *Id*. The proposed statement is this:

> These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage – the very story He is calling me to promote.

*Id*. at 1170.

Predicting that these actions ran afoul of Colorado's Anti-Discrimination Act ("CADA"), Ms. Smith brought a pre-enforcement challenge.[86]

The majority in *303 Creative* begins its analysis by reasoning that the "creation of wedding websites is pure speech," citing and agreeing with both *Telescope Media* and *Brush & Nib*.[87] It further contends that because CADA compels speech in this case, CADA works as a content-based restriction and therefore must satisfy strict scrutiny.[88] However, contrary to the prior cases, the court finds that CADA satisfies the strict scrutiny test.[89] The court first held that "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interest in accessing the commercial marketplace."[90] Next, it found that CADA is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'"[91] To support the assertion that the law is narrowly tailored, the court raises a novel argument that creators of custom wedding websites are monopolies unto themselves that "present unique anti-discrimination concerns."[92] In other words, if Colorado does not compel 303 Creative's speech, a "favored group" will have access to a wide range of custom services while a "disfavored group [will be] relegated to a narrower selection of generic services."[93] Accordingly, the court concludes that "enforcing CADA as to [303 Creative's] unique services is narrowly tailored to Colorado's interest in ensuring equal access to the commercial marketplace."[94]

Relying on *Janus*, the dissent takes the majority to task, stating, "[t]he Supreme Court has 'held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.'"[95] The dissent further emphasizes that compelled speech is deeply suspect because of the potential harms it presents, including that the "ability to choose what to say or not to say is central to a free and self-governing polity."[96] As Justice Alito noted in *Janus*:

> When speech is compelled . . . additional damages is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and

86. *Id*. This is the same statute that was at issue in *Masterpiece Cakeshop*. *See* 138 S. Ct. 1719, 1720 (2018).

87. *303 Creative LLC*, 6 F.4th at 1176.

88. *Id*. at 1178.

89. *Id*. at 1183. The court explained away *Masterpiece Cakeshop* because of the Court's reliance on the statements made by a Commissioner who "disparaged [the baker's religious] beliefs" when the Commission adjudicated that case. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

90. *303 Creative LLC*, 6 F.4th at 1178.

91. *Id*. at 1179 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984)).

92. *303 Creative LLC*, 6 F.4th at 1180.

93. *Id*. at 1181.

94. *Id*. at 1182.

95. *Id*. at 1194. (Tymkovich, C.J., dissenting) (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018)).

96. *Id*. at 1195.

> independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason . . . a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.[97]

The dissent is particularly concerned about the fact that the majority recognizes CADA to force artists to create individualized, expressive artwork that conveys a message betraying their beliefs.[98] Ms. Smith is therefore faced with a choice: agree to display messages accepting and celebrating same-sex marriage contrary to her religious beliefs or face financial penalties and remedial training under CADA.[99] "This is not a meaningful choice—nor is it one Colorado can or should force her to make."[100]

### *E. State v. Arlene's Flowers, Inc*

A comprehensive analysis of compelled speech would be remiss not to mention *State v. Arlene's Flowers, Inc*., 441 P.3d 1203 (Wash. 2019).[101] This case was remanded by the Supreme Court after the *Masterpiece Cakeshop* decision and notes that *Janus* was issued after the remand.[102] The Supreme Court denied the Petition for Certiorari on July 2, 2021.[103]

In *Arlene's Flowers*, a longtime customer of floral artist Barronelle Stutzman asked her to design and create custom floral arrangements for his same-sex ceremony.[104] Stutzman told him she could not participate in the ceremony because of her religious beliefs and instead referred him to other local florists.[105] The customer's partner later described the conversation with Stutzman on his Facebook page, prompting media outlets to begin reporting on the situation.[106] After seeing reports in the media, the Washington state Attorney General filed a lawsuit against Stutzman, asserting that state law required her to create custom floral art celebrating same-sex ceremonies or to give up her wedding business.[107] Shortly thereafter, the ACLU sued Stutzman on behalf of the couple.[108] In February 2017, the Washington Supreme Court concluded that designing floral arrangements is not speech but rather is a form of conduct, so the government may

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97. *Janus*, 138 S. Ct. at 2464.
98. *Id*. at 1197.
99. *Id*. at 1198.
100. *Id*. at 1199.
101. State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).
102. *See Arlene's Flowers*, 441 P.3d at 1217 n.5 ("For this reason, we also reject appellants' attempt to rely on *Janus v. American Federation of State, County, & Municipal Employees, Council 31* . . . and *National Institute of Family & Life Advocates v. Becerra* . . . . Both of those opinions were issued after the Supreme Court remanded this case, and therefore both are outside the scope of the remand.").
103. *Arlene's Flowers*, 441 P.3d at 1203, *cert denied* 141 S.Ct. 2884 (2021).
104. State v. Arlene's Flowers, Inc., 389 P.3d 543, 549 (Wash. 2017).
105. *Id*.
106. *Id*.
107. *Id*. at 550.
108. *Id*.

compel her to create artistic expression and participate in events with which she disagrees.[109]

While Stutzman's cert petition was pending at the Supreme Court, the Court issued its opinion *Masterpiece Cakeshop*; it held that Colorado showed impermissible hostility toward religion in its handling of a similar clash between First Amendment claims and an antidiscrimination statute.[110] Because Stutzman alleged that the Washington Attorney General, rather than an adjudicatory body, had acted with religious hostility, the court found *Masterpiece* irrelevant to her claim.[111] The court argued instead that Stutzman was essentially raising a selective enforcement claim by trying to show disparate treatment and religious hostility in the State's law enforcement.[112] The court then rejected Stutzman's other statutory and constitutional defenses for a second time, reproducing "major portions of [its] original (now vacated) opinion . . . verbatim."[113]

It is unclear how *Arlene's Flowers* would have been decided if *Janus* had been decided prior to *Arlene*'s remand to the Washington Supreme Court. The court disfavors this idea, stating, "[e]ven if we were to consider those cases, neither involves the type of public accommodations statute at issue here or in *Masterpiece Cakeshop*. As *Masterpiece Cakeshop* observes, '[t]he outcome of cases like this in other circumstances must await further elaboration in the courts.'"[114] Neither *Janus* nor *Becerra* provides further elaboration.[115] But the Supreme Court's precedents in *Lukumi*, *Trinity Lutheran*, and *Masterpiece* indicate that courts should still apply the Free Exercise Clause's requirement of religious neutrality to all government actors—whether in the adjudicatory context or not.[116] Now that the Supreme Court has granted cert in *303 Creative*, this

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109. *Id.* at 557–60.

110. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018).

111. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1218 (Wash. 2019).

112. *Id.* Because *Masterpiece* "says nothing about selective-enforcement claims," the court instead relied on U.S. Supreme Court cases addressing such claims under the Fourteenth Amendment, which have "emphasized that the standard for proving [selective-enforcement claims] is particularly demanding." *Id.* (alteration in original) (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999)). Finding that the "same demanding standard" should govern Stutzman's claim, the court denied her motion to supplement the record and refused to consider whether Attorney General Ferguson's actions indicated hostility toward her beliefs. *Id.* at 1218–19.

113. *Id.* at 1210 n.1; *State v. Arlene's Flowers, Inc.: Washington Supreme Court Limits Masterpiece Cakeshop to the Context of Adjudications*, 133 HARV. L. REV. 731, 735 (2019).

114. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

115. *Arlene's Flowers*, 441 P.3d at 1218.

116. *See State v. Arlene's Flowers, Inc.: Washington Supreme Court Limits Masterpiece Cakeshop to the Context of Adjudications*, 133 HARV. L. REV. 731, 736 (2019), arguing that:

> An examination of related case law further indicates that *Masterpiece* may appropriately be invoked outside the context of adjudications. In *Masterpiece*, the Court derived its strict religious neutrality requirement from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, *508 U.S. 520 (1993)*, a case involving city ordinances which had been "gerrymandered" to apply only to Santeria adherents and their religious practices. This gerrymandering had been accomplished by legislative and executive officials working in tandem outside of any adjudicatory context, yet the Court still prohibited these actors from "singl[ing] out [religious practice] for discriminatory

precedent may rest on shaky ground.[117]

## IV. FOUR PRINCIPLES OF NEGOTIATION

### *A. Principle One: Negotiation is Protected Expression*

Negotiation is a discussion aimed at reaching an agreement.[118] Both logically and in the public imagination, it is a form of inherently expressive conduct where a party advocates for its needs or interests. In a 2008 case from Seattle that struck down a rule aimed at limiting housing discrimination, the King County Superior Court described negotiation as a "valuable speech activit[y]" that *trumps other governmental interests*.[119] Forcing someone—through mandated collective bargaining—to acquiesce to a negotiating position she disagrees with (or to remain silent while someone purportedly advocating for her takes a position with which she disagrees) is, as the Court has long argued, constitutionally problematic. Additionally, as *Janus* makes clear, wage negotiations between a public worker's union and a governmental entity involve how much the public will be required to pay (via taxes), making these conversations inherently a matter of public political concern.[120]

For many Americans, particularly those of a libertarian bent, these principles seem straightforward: labor negotiations with governmental entities are an important form of economic speech, deserving of the same First Amendment protections as other political discourse. But in the context of government employees and public workers, First Amendment claims always trigger other complications. Although the First Amendment, extended to the states through the Fourteenth Amendment, prohibits the government from abridging the freedom of speech, private sector employees, by definition, have no First Amendment protections.[121] But while the federal government generally cannot prohibit an individual from expressing their beliefs, the Compelled Speech Doctrine, which prohibits the government from requiring a person or organization to engage in speech or expression they disagree with or find objectionable, permits government-

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treatment." And subsequently, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court allowed a religious school to invoke "the *Lukumi* line of cases" to establish antireligious discrimination even though the school was challenging a discretionary decision of a state's executive branch. The requisite evidence needed to sustain a religious hostility claim will vary by context, and the standard will likely be different when the allegations implicate the discretion of a state's chief prosecutor.

*Id*. (citations omitted).

117. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

118. *Negotiation*, OXFORD ADVANCED LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/english/negotiation?q=negotiation [https://perma.cc/5W3J-2UU4].

119. Yim v. City of Seattle, No. 17-2-05595-6 SEA, 2018 WL 10140201, at *5 (Wash. Super., King County Mar. 28, 2018) (emphasis added).

120. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2474 (2018)).

121. *See* U.S. CONST. amends. I, XIV.

compelled speech when such acts "are narrowly tailored to a compelling state purpose."[122]

In considering how—via *Janus*—future courts could attempt to extend free speech protection to negotiations, three legal and policy questions emerge: (1) what constitutes the outside parameters of "employee speech" (in a public workplace) that are deserving of First Amendment protections; (2) does negotiation (as a free speech right for governmental employees) always outweigh the compelling state interest in promoting labor peace; and (3) what is the connection between government employees' First Amendment rights and management's ability to maintain stable relations within its workforce?

Questions (1) and (2) are ultimately issues of communication with potentially far-reaching consequences for the management (and information management) of governmental workers. As Justice Kagan's dissent in *Janus* makes clear, "The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their work-places effectively."[123] What becomes complicated after *Janus* is that by equating Mr. Janus's withheld wages (via agency fees) with protected public speech, the distinction between government employees speaking "as citizen[s] on matters of public concern" (which was often protected) and employees speaking on issues of "merely private employment matters" (which was often unprotected) collapses.[124] Instead of examining the specific content of a government employee's speech, Kagan argues, the Court's pre-*Janus* focus was historically a rhetorical analysis of the communicative audience an employee was trying to reach: "whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) about it."[125] Anticipating the (potentially enormous) First Amendment complications that would arise from reading *Janus* as constitutionally equating all governmental employee speech about labor issues as political matters of "public concern," Kagan writes:

> But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggest, the mass of public employee's complaints (about pay and benefits and workplace policy and such) would become 'federal constitutional issue[s] . . . . And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do.[126]

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122. Andrew Jensen, *Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 13 DUKE J. CONST. L. & PUB. POL'Y 147, 150 (2018).

123. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

124. *Id.* at 2495 (citations omitted).

125. *Id.*

126. *Id.* at 2496.

While Supreme Court opinions are notoriously impenetrable for laypeople—and ignorance of the law is never an excuse—*Janus*'s "labor peace" standard opens up a unique legal (and rhetorical) relationship between workers' understanding of their free speech rights and First Amendment precedent.[127] Supreme Court cases do not—as decades of research in legal rhetoric have demonstrated—occur in a vacuum.[128] As the final, and most public and publicized, arbiter of rights, Supreme Court opinions do not merely control legal doctrine but also, rhetorically, create and shape the civic fabric of what citizens perceive to be their Constitutional rights[129] (creating what communication theorist Gerald Hauser calls the "vernacular" public understanding of Constitutional protections[130]). Already, in recent years, First Amendment rulings (even beyond public union cases) have woven a new regime—in the public imagination—of what constitutes one's free speech rights vis-à-vis their capital, taxes, and labor.[131] What has been underreported about the *Janus* decision, however, is that by equating a government employee's taxpayer-funded wages with free speech (i.e., equating money with ideological expression), the Court has eroded the firewall distinction between labor (e.g., what one "does" at work) and politics (e.g., how we debate and argue about what a governmental employee does, or does not do, at work).

While a seemingly esoteric point—and also, ironically, a fairly purebred Marxist interpretation of the symbolically political nature of all labor—the practical (i.e., management) consequences of collapsing the difference between what is a "workplace" issue and what is a "public concern" could have significant legal consequences for continuing to apply Janus's First Amendment standard to employee labor issues.[132] If, to meet the *Janus* test, the Court has to weigh the compelling state interest in promoting "peaceful" labor relations and "industrial" labor stability, what happens when everything a government employee does (or says) at work becomes a matter of protected political free speech?[133] In the 2006 *Garcetti* case, Justice Kennedy already predicted the practical consequences (for governmental managers and the courts) of extending *Janus*-esque First

127. *Id.*

128. For a literature overview, see Austin Sarat & Thomas R. Kearns, *Editorial Introduction*, *in* THE RHETORIC OF THE LAW 1–28 (Austin Sarat & Thomas R. Kearns eds., 1996).

129. GERALD HAUSER, VERNACULAR VOICES: THE RHETORIC OF PUBLICS AND PUBLIC SPHERE 57 (1999).

130. *Id.*

131. Case in point, in *Masterpiece Cakeshop*, the Court, while reversing the Colorado Supreme Court on narrow grounds, nonetheless recognized that requiring a devoutly Christian baker to design a cake for a same-sex wedding correctly triggered his claim that "using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs." Masterpiece Cakeshop, Ltd. v. Colo. C.R.s Comm'n, 138 S. Ct. 1719, 1721 (2018); *see also* Nat. Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368, 2378 (2018); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988).

132. *See Janus* v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2491 (2018) (Kagan, J., dissenting).

133. *Id.* at 2488 (Kagan, J., dissenting).

Amendment protections to public sector workers, arguing that it would "commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[134] Such a "displacement of managerial discretion by judicial supervision finds no support in our precedents."[135]

An absurd—but legally logical—hypothetical outlines the potential future contours of *Janus*'s free speech paradigm and its consequences for smooth labor relations: a worker, caught in the 2018–2019 government shutdown, could argue that his First Amendment rights were violated because he and his coworkers were not being paid.[136] Just as Mr. Janus's case ultimately rested on his pre-paycheck wages being legally funneled to AFSCME (which constitutes "political speech" because it involves the public debate over the distribution of tax dollars) our "Shutdown Worker's" pre-paycheck wages are withheld (entirely) because of a management decision to suspend the federal government for budgetary negotiation purposes.[137] In both cases, wages and labor are construed—practically via taxes, politically via their symbolic power—as ideological discourse meriting First Amendment protection.[138] If working and having some portion of your pay diverted (via agency fees) to a state-mandated union is an unlawful violation of free speech (because, according to *Janus*, the betrayal of your political viewpoint outweighs the state's interest in "peaceful labor relations" via particular management tactics), then working and having all of your pay diverted via a shutdown imposed by management in the Executive Branch or legislature as part of a political strategy of negotiation is a similarly unlawful violation.[139] Or maybe it only seems to be to a confused governmental employee looking for cues in *Janus* regarding their First Amendment rights. Ordinarily, how a worker might read a First Amendment case would not have a constitutional bearing, but *Janus*'s labor peace standard—which was the controlling standard in *Abood*—allows this sort of rhetorical speculation on what workers might do (and how disruptive it might be) to be relevant legal evidence.[140] Justice Alito's majority opinion made clear that in the Court's view, there was simply no evidence beyond speculation that supported the Court's reasoning in *Abood* that exclusive representation and agency fees were necessary to maintain labor peace.[141]

While an extreme case, our government shutdown example illustrates the more fundamental point: the political consequences of extending free speech rights to labor issues in government employment contexts are uncertain at best. And,

134. Garcetti v. Ceballos, 547 U.S. 410, 411 (2006).
135. *Id.* at 423.
136. *See Janus*, 138 S. Ct. at 2486.
137. *Id.* at 2462.
138. *Id.*
139. *Id.* at 2488.
140. *Id.* at 2477 n.23.
141. *Id.* at 2465.

because the *Janus* test continues to uphold stable labor relations as a compelling state interest, these political and economic predictions about governmental management strategy (and the political reaction to it) have potential legal consequences for the First Amendment.[142] In other words, after Alito opens up the "labor peace" Pandora's box by weighing in on what legislative policies (in the *Janus* case, agency fees) best allow for labor stability (by claiming that declining union power has not, empirically and as a matter of evidence, created economic "pandemonium"), any policy that could hypothetically disturb the economic "peace" now has hypothetical merit that has to be judicially considered. In the next Section, we see how the traditional critiques of unions could also be implicated, as legal arguments, in attempts to extend First Amendment protection to negotiation.

### *B. Principle Two: Compulsory Collective Bargaining Violates the Right to Freedom of Association*

The groups we belong to, whether civic, religious, or otherwise, espouse certain shared values. Members will join the group because they find those values appealing—or at least not objectionable. Non-members may choose not to join because they do not subscribe to those values. Members are free to leave should they no longer find themselves in accord with the group or what it stands for.

Individuals have the right to choose to associate (or not) with others. John Stuart Mill wrote of "the right to choose the society most acceptable to us," free from government interference.[143] The United Nations has recognized the interplay between expressive associations and the freedoms of speech and religion.[144]

The U.S. Supreme Court has recognized the right to freedom of association and assembly.[145] These freedoms have been described as a part of the First Amendment, but also as "an inseparable aspect of the 'liberty' that is protected by the due process clause of the Fourteenth Amendment."[146] An association "is protected by the First Amendment's expressive associational right" if the parties come together to "engage in some form of expression, whether it be public or private."[147] "Freedom of association . . . plainly presupposes a freedom not to associate."[148]

The goal of collective bargaining is obviously to increase the bargaining power of workers vis-a-vis employers in order to mitigate power imbalances that often

142. *Id*. at 2465.
143. JOHN STUART MILL, ON LIBERTY 96 (Andrews UK Limited, 2011) (1859).
144. G.A. Res. 217 (III) A, art. 18-19, Universal Declaration of Human Rights (Dec. 10, 1948).
145. NAACP v. Alabama, 357 U.S. 449 (1958).
146. *Id*. at 460.
147. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).
148. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984); *see also* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 12 (1986) (plurality opinion) ("[F]orced associations that burden protected speech are impermissible.").

exist. Asking an average employee of Standard Oil or Microsoft to negotiate the terms of his employment with John Rockefeller or Bill Gates and expecting a fair bargain would be absurd. By combining forces, workers can combine their power and bargain collectively in a way that will typically benefit the group.

But when collective bargaining becomes compulsory, the association becomes forced and creates a constitutional problem. Group membership and endorsement of the positions of the group in the course of a negotiation become conditions of employment. The rights of the individual are sacrificed for the perceived benefit of the group in terms of bargaining power. A part of the civic value of expressive organizations is their ability to challenge the government. That value is obviously diminished if the government can force individuals to associate against their will with individuals or groups for causes they object to. And if the benefit to each member of the group is so clear and apparent, then why is compulsion necessary? Individuals do not usually need to be forced to act in a manner that benefits them and from which they will profit.

### *C. Principle Three: Mandatory Collective Bargaining Creates a Principal-Agent Problem*

Mandatory collective bargaining requires a union to act as the exclusive bargaining agent for an entire class of employees.[149] Workers often generally benefit from collective bargaining, both in terms of salary or wages and employee benefits.[150] The portion of a worker's salary that goes to pay the union in the form of agency fees will often be a small percentage of that benefit.[151] If an employee receives a salary increase of $5000 a year but pays $1000 to the union as an agency fee, can she really claim to be damaged while netting a benefit of $4000?[152] Yet the analysis of whether an individual employee benefits from union representation is not that simple.

Collective bargaining gained favor and became a bargaining tactic based on the logic that—by uniting employees through their trade similarities versus their individual differences—it provided workers with more power and resulted in those workers receiving better working conditions and more in compensation.[153] But, as with political representation in a two-party system, the interests of a union and member and nonmember employees are often not aligned: the union's negotiating posture will necessarily have to favor certain employees at the expense of

149. Benjamin I. Sachs, *Agency Fees and the First Amendment,* 131 HARV. L. REV. 1046, 1047 (2018).

150. *See* AFL-CIO, *Collective Bargaining*, https://aflcio.org/what-unions-do/empower-workers/collective-bargaining [https://perma.cc/3RTP-EWW2].

151. Sachs, *supra* note 149, at 1068.

152. *Id.* (citing JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 493 (1894)).

153. *See* AFL-CIO, supra note 150.

others. This—in essence—was Mr. Janus's complaint, which he explained in *The Chicago Tribune* before filing his lawsuit:

> I don't see my union working totally for the good of Illinois government. For years it supported candidates who put Illinois into its current budget and pension crisis. Government unions have pushed for government spending that made the state's fiscal situation worse. How is that good for the people of the state? Or, for that matter, my fellow union members who face the threat of layoffs or their pension funds someday running dry? The union voice is not my voice. The union's fight is not my fight.[154]

In his opinion supporting Mr. Janus's First Amendment rights to political speech—while still upholding that "labor peace" was a compelling state interest—Justice Alito concluded that it was "now clear that *Abood*'s fears" about instability without collective bargaining were "unfounded."[155] He stated that there has been "no pandemonium" in our labor relations since that decision back in 1977 and that "it is now undeniable that 'labor peace' can be achieved 'through means significantly less restrictive[]' than the assessment of agency fees."[156] While Supreme Court decisions typically do not involve the evaluation of these sorts of policy questions, *Janus*—by following the long-standing "labor peace" standard (but forgoing deference to the legislature on it)—opens up a complicated and atypical economic question for judicial review: what state policies designed to create "labor" and "industrial" stability can warrant violations of the First Amendment? And what does this "stability" look like in practice after *Janus*?

As Justice Kagan foresaw in her *Janus* dissent:

> State and local government that thought [collective bargaining] provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.[157]

And as the post-*Janus* Court contemplates the extension of free speech protections to cover "negotiation" in the public sector (and thus eliminate collective bargaining), we turn our rhetorical analysis—ironically—to three traditional critiques of unions to help clarify (as matters of future management policy for governmental workers) why they were so preferred by some legislatures as to be a "compelling" state interest.[158] At the heart of each critique is the "Principle–Agent" problem.

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154. Mark Janus, *Why I Don't Want to Pay Union Dues*, CHI. TRIB. (Jan. 5, 2016), https://www.chicagotribune.com/opinion/commentary/ct-union-dues-supreme-court-afscme-perspec-0106-20160105-story.html [http://perma.cc/D2NR-MP8J].

155. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018).

156. *Id*. at 2457.

157. *Id*. at 2487 (Kagan, J., dissenting).

158. *See id*. at 2464–65.

### *D. Principle Four: Unions Are Less Attractive Options for Workers than They Once Were*

For a variety of reasons, union membership has dropped over the past several decades.[159] Federal and state laws have improved working conditions and enshrined worker protections into law.[160] Federal minimum wages have risen and many states have minimum wages that are higher than the federal mandate.[161] Employees have more rights and power than they have historically had.[162] The nature of work has changed with workers changing jobs more frequently.[163] The plethora of benefits that have become available from maternity and paternity care, health benefits, tuition reimbursement, retirement accounts, paid time off, etc., have made it more difficult for negotiators to represent the interests of large groups of employees.[164] As more workers perceive their interests to be different from those the union advocates, union membership has declined.[165]

#### 1. Individual Interests of Employees in a Workplace Are, By Definition, Irreconcilable

The "Principal–Agent" problem that is inherent in any political or economic representation helps us to see the future challenges of the post-*Janus* world.[166] Central to agency law is the principle that the interests of the principal and the agent must be aligned.[167] Yet some public-sector employees and their unions, necessarily, view the goals of negotiating very differently. For example, if the union pushes for higher pay for longer-tenured employees, that may come at the expense of workers who are more-qualified or higher-performing.[168] If the union pushes for better retirement benefits, that may come at the expense of health care benefits or higher pay.[169] For employees who disagree with the union's

159. Quoctrung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015, 11:04 AM), https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map [https://perma.cc/99YX-HF55].

160. Graham Boone, *Labor Law Highlights, 1915–2015*, U.S. BUREAU LABOR STATS., 1–4 (Oct. 2015), https://www.bls.gov/opub/mlr/2015/article/pdf/labor-law [https://perma.cc/3B7J-GRV3].

161. Office of Communications, Wage and Hour Division, *Changes in Basic Minimum Wages in Non-Farm Employment Under State Law: Selected Years 1968 to 2019*, U.S. DEP'T OF LABOR (January 2022), https://www.dol.gov/agencies/whd/state/minimum-wage/history [https://perma.cc/4NBT-QRFL].

162. *Today's labor unions give workers the power to improve their jobs and unrig the economy*, ECON. POL'Y INST. (Aug. 24, 2017), https://www.epi.org/press/todays-labor-unions-give-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/ [https://perma.cc/7ZL6-BGBH].

163. Jean Chatzky, *Job-hopping is on the rise. Should you consider switching roles to make more money?*, NBC (Apr. 24, 2018, 2:15 PM), https://www.nbcnews.com/better/business/job-hopping-rise-should-you-consider-switching-roles-make-more-ncna868641 [https://perma.cc/QS5S-WM5F].

164. FRANK BURCHILL, LABOUR RELATIONS 83 (4th ed. 2014).

165. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2491 (2018).

166. Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 685 (2019).

167. Pinar Akman, *Online Platforms, Agency, and Competition Law: Mind the Gap*, 43 FORDHAM INT'L L.J. 209, 230 (2019).

168. *See id.*

169. *See id.*

negotiating posture, forcing them to accept the union's representation and prohibiting them from negotiating for themselves creates a principal–agent problem. If an employee believes she can negotiate a better deal for herself than the union has, should she be allowed to negotiate for herself? To take the classic example: what if she does not intend to have children, so maternity benefits are worthless to her. Should she be permitted to try to negotiate a deal for herself that removes that benefit, to the extent allowable by law, and replaces it with increased compensation, vacation, or some other benefit?

For employees in this situation—like Mr. Janus—the appeal of making your personal economic negotiations part of protected First Amendment speech are obvious.[170] That said, the principle–agent problem is actually one of the reasons why Congress (and many states) prefer to use collective bargaining in the management of labor, and why it was constitutionally protected as a compelling state interest.

Unions, as representative bodies, are not neutral but instead controlled by one group of employees.[171] The common critique of unions is that mandatory representation is irreconcilable with the fair treatment of at least some and often a substantial number of employees.[172] Additionally, as is typically reasoned, "conflicts created by individuals' need for fair treatment at the hands of their union could be greatly reduced if exclusivity were abandoned and employees were allowed to be represented by their own individually chosen agents."[173] We agree. But the stated governmental interests in *Janus*, *Abood*, and the preceding agency fee cases all presumed both of these points.[174] While representative forms of government are always unfair to particular individuals, from a management perspective, Congress and state legislatures preferred dealing with one actor representing their labor force versus a phalanx of individualized and competing claims.[175] Extending *Janus* free speech protections may, indeed, empower individual rights. But it also—necessarily—moves the burden of managing "conflicts created by individuals' need for fair treatment" from unions to (similarly taxpayer funded) governmental managers.[176] Whether this empowerment of workers is desirable or not is an open question. But it certainly seems to trigger *Janus*'s standard for evaluating the effects of "internal" labor peace in a workplace.

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170. *See Janus*, 138 S. Ct. at 2461–62, 2468.

171. George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897, 902 (1975).

172. *Id*.

173. *Id*. at 903.

174. *Janus*, 138 S. Ct. at 2450–51, 2468; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221–22, 220 n.13 (1977).

175. *See* Josh Bivens et al., *How Today's Unions Help Working People*, ECON. POL'Y INST. 1–2 (Aug. 24, 2017), https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy [https://perma.cc/JW2G-58XH] (discussing the advantages of union in better representing individual voices collectively).

176. Schatzki, *supra* note 171, at 903.

### 2. The Changing Nature of the Workforce Makes Union Membership Less Attractive

An oddity of unionization is that once a workplace votes to unionize, the union becomes the exclusive representative for the employees in perpetuity.[177] In some states, the unionizing elections occurred so long ago that no current employees voted for the union that represents them.[178] And yet, the nature of the workforce has also changed substantially since the dawn of collective bargaining. While it once was not unusual for a worker to spend his entire career with one company, that is far less common today.[179] In January 2016, the Bureau of Labor Statistics found that the median number of years a worker had been with his current employer was 4.2, down from 4.6 just two years prior in January of 2014.[180] According to the Future Workplace "Multiple Generations @ Work" survey of 1,189 employers and 150 managers, 91 percent of millennials expect to stay in a job less than three years.[181] That means those workers would have 15–20 jobs over the course of their working lives.[182]

An employee with the expectation that she will only work at the company for a few years obviously has different compensation interests than someone who expects to be employed there for his entire career. The union representatives cannot zealously represent both groups, which have very different economic interests.[183] Moreover, the very concept of the "labor peace" standard has its roots in the notion—accepted by the Courts in *Abood*—that the "principle of exclusive union representation . . . is a central element in the congressional structuring of industrial relations."[184] In 2021, "industrial relations" hardly seems like the economic ecosystem in which we live and work.[185]

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177. Trey Kovacs, *House Committee Examines How to Modernize Labor Laws*, COMPETITIVE ENTER. INST. (Apr. 26, 2018), https://cei.org/blog/house-committee-examines-how-modernize-labor-laws [http://perma.cc/TUJ4-3VVG].

178. James Sherk, *Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives*, HERITAGE FOUND. (Aug. 27, 2012), https://www.heritage.org/jobs-and-labor/report/unelected-unions-why-workers-should-be-allowed-choose-their-representatives [http://perma.cc/K78A-FN34].

179. Jean Chatzky, *Job-Hopping Is on the Rise. Should You Consider Switching Roles to Make More Money?*, NBC NEWS (Apr. 24, 2018), https://www.nbcnews.com/better/business/job-hopping-rise-should-you-consider-switching-roles-make-more-ncna868641 [https://perma.cc/9NYM-HZM5].

180. Bureau of Labor Statistics, *Employee Tenure in 2018*, U.S. DEP'T LABOR (Sept. 20, 2018), https://www.bls.gov/news.release/tenure.nr0.htm [http://perma.cc/6TXH-8H6F]; Bureau of Labor Statistics, *Employee Tenure in 2014*, U.S. DEP'T LABOR (Sept. 18, 2014), https://www.bls.gov/news.release/archives/tenure_09182014.pdf [http://perma.cc/2EDB-2YN3].

181. Jeanne Meister, *The Future of Work: Job Hopping is the 'New Normal' for Millennials*, FORBES (Aug. 14, 2012), https://www.forbes.com/sites/Jeannemeister/2012/08/14/the-future-of-work-job-hopping-is-the-new-normal-for-millennials/#262df6ba13b8 [http://perma.cc/F44E-MM67].

182. *Id.*

183. *See* Adrienne L. Saldaña, *Conflicting Interests in Union Representation: Should Exclusivity be Abolished?*, 6 GEO. J. L. ETHICS 133, 133 (1992).

184. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

185. *Id.*

The challenges of the twenty-first century gig economy—and the new labor force's beliefs about what constitutes a living wage, fair work-life balance, and protections against discrimination in the workplace—are the economic-policy issues that will determine the next American century.[186] It is uncertain how extending First Amendment protections to the negotiations of government employees would affect this question. However—again, ironically—Marxist labor theory offers one prediction: the opening up of unions—across workplaces—to organize employees and independent contractors of similar trades.[187] If the Court finds compulsory collective bargaining to be unconstitutional, one solution is to permit employees the choice to form and join unions that collectively bargain or to negotiate directly with their employers, as they do in the private sector. The likely outcome is that workers with aligned interests may choose to collectively bargain, while others will choose to negotiate for themselves. A typical workforce will be comprised of a number of unions representing different constituencies and their interests, as well as a few employees who choose not to join any union. Such an arrangement will provide employees with the right to choose whether or not to bargain collectively. But it will also lead to precisely the instabilities in labor relations that *Abood* warned of: "'inter-union rivalries' [that] would foster 'dissension within the work force'"; employers facing "conflicting demands from different unions"; "confusion" as employers attempt to "enforce two or more agreements specifying different terms and conditions of employment"; and unions under attack from "'rival labor organization[s].'"[188]

### 3. Grievance Procedures Are Bureaucratic and Slow Moving

Whether and how employees will be afforded due process in the workplace is also subject to mandatory collective bargaining.[189] Placing a union in the role of exclusive bargaining agent affects how employee rights are defined, the types of employer behavior subject to the grievance process, and when, how, and whether the union will choose to assist an employee with a grievance. This arrangement

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186. Vice Chair's Staff of the Joint Economic Committee, *The Economic Consequences of Discrimination Based on Sexual Orientation and Gender Identity*, U.S. CONG. JOINT ECON. COMM., at 2–3 (Nov. 2013), https://www.jec.senate.gov/public/_cache/files/42dc59a0-6071-46d0-8ff2-9bd7a6b0077f/enda—final-11.5.13.pdf [https://perma.cc/UF5S-D9HJ]; *see Better Work-Life Balance Doesn't Just Help Employees; It Helps the Whole Economy*, ASPEN INST. (Mar. 15, 2016), https://www.aspeninstitute.org/videos/better-work-life-balance-doesnt-just-help-employees-it-helps-the-whole-economy/ [https://perma.cc/ZNG9-SESM]; John Frazer, *How the Gig Economy is Reshaping Careers for the Next Generation*, FORBES (Feb. 15, 2019), https://www.forbes.com/sites/johnfrazer1/2019/02/15/how-the-gig-economy-is-reshaping-careers-for-the-next-generation/#4bb321ab49ad [https://perma.cc/UQW8-5FKK]; Eric Ravenscraft, *What a 'Living Wage' Actually Means,* N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/smarter-living/what-a-living-wage-actually-means.html [https://perma.cc/MP68-96NF].

187. *See* George Fishman, *Capitalist Development and Class Capacities: Marxist Theory and Union Organization*, 15 LAB. STUD. J. 101, 101 (1990) (book review).

188. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018) (quoting *Abood*, 431 U.S. at 220–21).

189. *See* Richard Wallace, *Union Waiver of Public Employee's Due Process Rights*, 8 INDUS. REL. L.J. 583, 584 (1986).

obviously benefits some employees to the detriment of others as workers are often

> substantially boxed in between two massive institutions. On one side is a large corporation with employees numbering in the hundreds of thousands. On the other, a labor organization with a million members and an inevitably formidable organizational structure of officialdom and appeals. Relations between the two are governed by collective 'agreements' running into the hundreds of pages, looking more like complex statutory enactments than contracts, and containing a quasi-judicial enforcement machinery, access to which is denied the employee when the bargaining representative declines to act.[190]

It is not difficult to imagine a case where older, female, disabled, or minority employees may be more concerned about how issues related to sexual harassment or workplace discrimination are dealt with in a grievance process than other workers. Those employees may understandably believe that they have different interests than other employees, which the union as the sole bargaining agent does not do enough to protect. Unions have a duty of fair representation, but the tension between some employees and the union raises questions about how hard the union will fight for a grievance it doesn't believe in or support, or which the union may even view as contrary to its own interests.[191] The result—as is often the case in representative politics—is a tyranny of the majority, where a simple majority of those who vote within a workplace can certify a union, which is then the exclusive bargaining agent on behalf of that workforce.[192]

As our new economic paradigms create unprecedented challenges—and reconfigurations of what it means to be a fairly treated and compensated worker in the global economy—these issues must be carefully addressed. That said, the pre-*Janus* court was careful to reject "all attempts" at making a "federal constitutional issue out of basic 'employment matters, including working conditions, pay, discipline, promotion, leave, vacations, and terminations.'"[193] *Janus*—by collapsing the distinction between workplace and public issues—sets up a potentially unprecedented (and costly and possibly destabilizing) number of legal, economic, and management issues for government officials (versus union officials) to handle regarding workplace claims of discrimination on the basis of race, religion, gender, sexuality, and ability.[194]

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190. Kurt L. Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L. REV. 25, 31 (1959).

191. *See* Beth A. Levine, *Labor Law-Bargaining Orders Absent Showing of Majority Support for Union*, 47 TENN. L. REV. 418, 420 (1979).

192. *Id.*

193. *Janus*, 138 S. Ct. at 2495 (Kagan, J., dissenting) (quoting Borough of Duryea v. Guarnieri, 564 U.S. 379, 391 (2011)).

194. *See Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting).

## V. *JANUS* IS ALREADY AFFECTING ORGANIZATIONS THAT COMPEL MEMBERSHIP OR PARTICIPATION

The *Janus* decision will also hit close to home for many attorneys by affecting the operations of state mandatory bar associations. In *Fleck v. Wetch*, attorney Arnold Fleck filed suit to challenge a law that requires North Dakota attorneys not only to pass the state's bar exam, but also to join the state bar association and pay member dues, a portion of which support political activities.[195] Fleck had volunteered time and money to support a ballot measure to "establish a presumption that each parent is entitled to equal parental rights."[196] Fleck discovered that the North Dakota State Bar Association was using his compulsory fees to oppose that same ballot measure.[197] The Supreme Court in *Keller* had established minimum safeguards to prevent this sort of forced subsidy of political or ideological activities.[198] Fleck filed suit in 2015, claiming his First Amendment rights were being violated.[199] The Eighth Circuit held that a state bar association was permitted to charge dues to non-members as "a means of providing regulation in, and oversight of, the legal profession."[200] The U.S. Supreme Court disagreed and vacated that decision, remanding it to the Eighth Circuit for further consideration in light of *Janus*.[201] On remand, the Eighth Circuit once again affirmed the District Court for the District of North Dakota, ruling that the North Dakota Bar Association's structure does not violate the U.S. Constitution.[202] Similar litigation has been filed in *Gruber v. Oregon State Bar* against the Oregon State Bar.[203] The Oregon State Bar prevailed at the district court, and the case is currently pending before the Ninth Circuit.[204] Other lawsuits have also been filed in Oklahoma, Wisconsin, and Texas.[205] Questions lower courts are struggling with as these cases proceed through the courts include whether *Keller* is still sound precedent after *Janus* and,

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195. Fleck v. Wetch, 868 F.3d 652, 653 (8th Cir. 2017).

196. *Id.* at 652–53.

197. *Id.* at 653.

198. Keller v. State Bar of Cal., 496 U.S. 1, 16 (1990); Chicago Tchrs. Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); *see also* Josh Taylor, *Bar Association on Shaky Ground After Supreme Court's Summary Disposition*, SMOKEBALL (Dec. 4, 2018), https://www.smokeball.com/blog/bar-association-fees-on-shaky-ground-after-supreme-courts-summary-disposition/ [https://perma.cc/VP7C-XVSE].

199. *Fleck*, 868 F.3d at 653.

200. Noell Evans, *Courts weighing impact of Janus decision on state bar associations*, CENTER SQUARE (Dec. 11, 2018), https://www.thecentersquare.com/national/courts-weighing-impact-of-janus-decision-on-state-bar-associations/article_605974ec-fc9e-11e8-a3ca-f33c65b24d51.html [https://perma.cc/UV3R-4B7T].

201. Fleck v. Welch, 139 S. Ct. 590, 590 (2018).

202. Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2019).

203. Gruber v. Or. State Bar, 3:18-cv-1591-JR, 3:18-cv-2139-JR, 2019 WL 2251282, at *1 (D. Or. 2019).

204. Crowe v. Or. State Bar, 989 F.3d 714 (9th Cir. 2021).

205. Mark Pulliam, *Bar Wars: Extending Janus to Bar Associations*, MISRULE OF LAW (May 6, 2019), https://misruleoflaw.com/2019/05/06/bar-wars-extending-janus-to-bar-associations/ [https://perma.cc/6MY4-FSCA].

if so, whether and how *Keller*'s holdings have been altered by *Janus*.[206] In the absence of clear guidance from the U.S. Supreme Court on this question, these challenges to the structure of state bar associations have ultimately been failing. The Supreme Court has denied certiorari petitions to address the issues.

*Fleck* provides a preview of how the effects of *Janus* will go well beyond public unions and affect all manner of other professional organizations.[207] In any organization where members are forced to join, pay dues, contribute money, or in any way support the organization and where the organization participates in any form of political activity, *Janus* may force some changes.[208] Those organizations will need to figure out a way to create a sort of firewall between any degree of compulsion, whether to join, pay money, or participate in activities, and any type of activity that could arguably implicate the First Amendment rights of dissenting members. It seems clear that the U.S. Supreme Court will be closely scrutinizing those relationships and looking for anything that looks like compelled speech.[209] By focusing on how bar associations may respond to *Janus*, we provide a few pragmatic paths forward for organizations that could illuminate solutions for public-sector unions and the future of labor negotiations for government employees.

There is a wide division on a state-by-state basis as to how bar associations are organized.[210] The solution for bar associations may be as simple as dividing the traditional role of the state bar association into mandatory and voluntary functions. The Nebraska State Bar Association has adopted that sort of hybrid structure.[211] Members are required to pay a basic membership fee, currently $98.00, in order to practice law. Those fees are used to support the administration and enforcement of the regulation of the practice of law by the Court.[212] Members may also choose to pay additional voluntary dues "to analyze and disseminate to its members information on proposed or pending legislative proposals and any other nonregulatory activity intended to improve the quality of legal services to the public and promote the purposes of the Association."[213] This arrangement is intended to avoid requiring attorneys to support political activities they may disagree with as a condition of practicing law.[214] In light of the U.S. Supreme

206. Keller v. State Bar of Cal., 496 U.S. 1, 16 (1990) (citing *Hudson*, 475 U.S. 292, 310 (1986)) ("[T]he constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.").

207. Pulliam, *supra* note 205.

208. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

209. Pulliam, *supra* note 205.

210. *State Bar Associations*, LAWYER LEGION, https://www.lawyerlegion.com/associations/state-bar/ [https://perma.cc/UF37-5UQZ].

211. Margery A. Beck, *State bar sees drop in dues in wake of ruling*, LINCOLN J. STAR (Sept. 13, 2014), https://journalstar.com/news/state-and-regional/nebraska/state-bar-sees-drop-in-dues-in-wake-of-ruling/article_65077d74-7834-5c74-b8e4-8281e507b2e0.html [https://perma.cc/NB8Y-M83Z].

212. NEB. SUP. CT. R. 3-803(D).

213. NEB. SUP. CT. R. 3-803(H).

214. NEB. SUP. CT. R. 3-803(D).

Court's treatment of the *Fleck* appeal, any remaining state bar associations who have not organized themselves this way, separating mandatory membership from political activities, may be forced to do so.[215]

It is possible, but far less likely, that *Janus* could also affect private unions. Courts have routinely recognized the sovereign-like power of unions.[216] As the Supreme Court noted in *Steele v. Louisville & N.R. Co.*, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ."[217] This was not a new concept. In analyzing a previous case where minority employees felt they lacked fair representation, Chief Justice Harlan Stone wrote:

> For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.[218]

With these inherent powers authorized by the National Labor Relations Act, unions control the destiny of their employees, in similar fashion to the authority granted to state and federal legislatures to control the destinies of the citizens it represents.[219] By contracting with employers to force membership dues or agency fees on employees as a condition of employment, the union (as sovereign authority) is essentially taxing its employees for public services.[220] If an employee wishes not to be bound to union membership or its taxation, the employee must move to a state where unions have less legislative authority, much like a citizen must move to a different state if he or she does not want to be bound to the laws of his or her land. If those organizations then participate in political activity, that could implicate the First Amendment rights of members who disagree with the positions taken by the union.[221] As the case for private unions being state actors and thus implicating the First Amendment is a difficult one to make, the focus of this Article is on public unions.

Post-*Janus*, courts will be placing increasing scrutiny on bar associations and other similar organizations to ensure that mandatory dues are not being used for anything that could conceivably be considered a political activity.[222] This raises some interesting questions: Are there positions on issues so closely related to the

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215. *See* Fleck v. Welch, 139 S. Ct. 590, 590 (2018).
216. Steele v. Louisville & N.R. Co., 323 U.S. 192, 202 (1944).
217. *Id.*
218. *Id.* at 198 (citing Virginian R. Co. v. Sys. Fed., 300 U.S. 515, 545 (1937)).
219. *Id.* at 202.
220. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2495 (2018).
221. *Id.* at 2467.
222. *Id.* at 2486.

functioning of an organization that the organization should be permitted to advocate for those positions? For example, recently, families with children have been crossing into the United States from Mexico to seek asylum.[223] Some of those children are not being provided with counsel during court hearings related to their claims for asylum or immigration status generally.[224] If a state bar association in a border state wants to take the position that the government should ensure those children are provided with counsel to protect their interests, is that permitted under *Janus*? Would the bar association be advocating for due process, right to counsel, and other fundamental legal rights, or would they be wading into a political issue? If members of that bar association objected to their mandatory dues being used to support a position they disagree with, how would the U.S. Supreme Court view that dispute? There are countless conceivable examples where arguments can be made that the position is important or consequential (if not essential) to the goals, values, etc. of the profession itself, while an equally persuasive argument can be raised, on the other hand, that the dispute is political in nature and mandatory dues should not be spent taking sides on the issue.

Another option is for membership in state bar associations to be completely voluntary. Many bar associations, for example the New York State Bar Association, operate this way, essentially as trade organizations.[225] Making membership and the paying of dues completely voluntary eliminates the tension between compulsory dues being paid to the organization and the organization engaging in political advocacy that some members may object to.[226] But then the question becomes—as it was with *Janus*—whether a bar association (or our contemporary understanding of law as a profession) can survive, existentially, without compulsory fees? To comply with *Janus*, bar associations and other trade organizations may have to find a way to divorce any degree of compulsion to join or contribute to the organization from any political or ideological advocacy the group may engage in.[227]

Many of the principles implicated in these lawsuits involving attorneys who do not want to join or contribute to their state bar associations are the same as when public employees like Mr. Janus have no wish to be a member of or pay fees to a union.[228] If an individual is compelled to join or pay fees to an organization and thus subsidize speech she disagrees with, the Court in *Janus* made clear that that is a First Amendment violation.[229] An individual has a basic constitutional right

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223. Caitlin Dickerson, *Border at 'Breaking Point' as More Than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. TIMES (Mar. 5, 2019), https://nyti.ms/2SMMwHk [https://perma.cc/9U4K-XRWB].

224. *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, AM. IMMIGR. COUNCIL (June 26, 2015), https://www.americanimmigrationcouncil.org [https://perma.cc/NTN5-VV3R].

225. *State Bar Associations*, *supra* note 210.

226. Pulliam, *supra* note 205.

227. *Janus*, 138 S. Ct. at 2486.

228. *Id.*

229. *Id.*

to speak on or remain silent about an issue.[230] Forcing a person to endorse a position he disagrees with is just as much a violation as preventing him from voicing his views on an issue.[231] Just as agency fees represent compelled speech, so, by its very nature, does compulsory collective bargaining.[232]

Another example of *Janus*'s implications for free speech may be seen in the ongoing fight over the NCAA's definition of amateurism and restrictions on college athletes. In *Janus*, Illinois law mandated public employees to pay agency fees and the Supreme Court found that law violated Mark Janus's First Amendment rights against compelled speech. In Justice Alito's opinion, he stated that the Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[233] In *Janus*, Illinois violated the right to refrain from speaking through the dollar. If the First Amendment protects the right to abstain from funding speech we disagree with, what do we make of cases where our own ability to support speech we do agree with has been restricted by preventing money from ever coming into our possession and thereby remain in the hands of those whose interests are adversarial?

The NCAA notoriously prohibited its athletes from receiving compensation outside of what was required for tuition and room and board. Even education related benefits were limited until those limitations were struck down in a recent Supreme Court case.[234] Just recently, the NCAA allowed its athletes to make money from their name, image, and likeness. The NCAA still does not allow an athlete to be directly compensated by their respective school for competing. So, what are we to make of rules strictly prohibiting compensation that goes beyond education and living expenses?

The Court in *Alston* struck down the NCAA's rules restricting education related expenses under antitrust law. The NCAA is obviously a non-governmental institution and, in order to violate First Amendment rights, it would have to meet an exception that would establish it as a state actor. The NCAA's membership comprises many public colleges and universities as well as private colleges and universities which receive federal and state funds. Accordingly, a court may find the NCAA meets the public entwinement exception under *Brentwood Academy* and is a state actor.[235]

If an athlete would like to compete at the highest level, he or she has to enroll at a Division I college or university under the NCAA. Under the NCAA rules, it

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230. U.S. CONST. amend. I.

231. *Id.*

232. Valerie C. Brannon, *Bar Dues or Bar Don't? Compelled Fees and the First Amendment*, CONG. RES. SERV. (Dec. 19, 2018), https://fas.org/sgp/crs/misc/LSB10233.pdf [https://perma.cc/8EKB-PCRX].

233. *Janus*, 138 S. Ct. at 2463 (citing Wooley v. Maynard, 430 U.S. 705 (1977)).

234. NCAA v. Alston, 141 S. Ct. 2141, 2165–66 (2021).

235. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.").

is a necessary stipulation that compensation beyond living expenses and tuition be completely forgone. As a result of not being compensated, the athletes, by omission, are forced to monetarily support the speech of the NCAA, their respective educational institution, or both. Additionally, by having company town-like payment restrictions, the athletes are restricted from supporting whichever speech they do agree with.

In *Alston*, the NCAA gave two justifications for restricting payments to athletes. First, the NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams.[236] Second, the NCAA held that its rules restricting payments preserve amateurism, which makes amateur college sports a product which is distinct from professional sports.[237]

Both justifications the NCAA gave in *Alston* will most likely be treated like the labor peace argument in *Janus*: without merit. First, regarding creating a competitive balance, the Court in *Alston* found little evidence that the compensation rules had any direct connection to consumer demand.[238] Second, the Court also noted that the nature of amateurism is not defined anywhere.[239] Like labor peace, amateurism is a term concocted to steer the imagination without any substantive findings to support it.

At first blush, the NCAA restrictions on compensation appear to be much more egregious than those struck down in *Janus*. Mark Janus argued convincingly that his interests were not aligned with the union representing him. Current or prospective NCAA athletes have no such union representation and are instead forced to accept whatever terms the NCAA deigns to offer them through whichever of its members schools the athlete chooses. The agreements college athletes are compelled to sign can fairly be described as little more than contracts of adhesion. The NCAA would no doubt argue, as it did in *Alston*, that such a system is necessary to preserve the construct of amateurism and the playing field necessary for its product to flourish. We are skeptical that such an argument would be seen as persuasive. As the Supreme Court noted in *Alston*, "This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition."[240]

The Court further found that the NCAA's appeal to be free from antitrust law is not up to the Court, but to Congress.[241] How can Congress allow the NCAA to enforce such restrictions when they compel speech by omission? How can college athletes who wish to compete at the highest levels in their sport be forced to accept whatever minimal deal is offered? If public union employees should not be forced to accept whatever offer union representatives negotiate on their behalf,

236. *Alston*, 141 S. Ct. at 2152.
237. *Id.*
238. *Id.* at 2152.
239. *Id.*
240. *Id.* at 2159.
241. *Id.* at 2160.

how can college athletes be forced to accept whatever offer the NCAA and its member institutions make with no negotiation permitted at all?

As the Supreme Court continues to make clear that compulsory collective bargaining is compelled speech, the perceived gap between what workers want and what those purporting to represent them focus on in negotiating is going to be critical. To the extent that unions can reduce that gap, by providing more effective representation, they may be able to stay out of the Court's crosshairs.

Unions and trade organizations should also see the writing on the wall and realize that compulsory collective bargaining is under threat. They should find ways to more effectively represent the interests of their workers. One option would be to let workers express their employment interests and then divide them into smaller bargaining units based on shared interests. Younger employees who value a higher salary over retirement benefits could be represented by a union employee who pushes for higher pay, while older employees could choose to push instead for more generous pensions, better health care, etc. The NCAA has already started to loosen its rules in response to *Alston*, permitting college athletes to benefit by selling the rights to the names, images, and likenesses.[242] The focus will need to be on finding arrangements that better align the interests of the workers and their union representatives and at least reduce the principal-agent problem.

## VI. CONCLUSION

If an employee is required as a condition of employment to accept a deal he may not approve of and which is negotiated by person(s) he has not chosen or elected, then the *Janus* decision recognized that this arrangement substantially restricts that employee's rights.[243] Unions and trade associations that participate in collective bargaining should be working to increase the engagement of, the choices made available to, and the percentage of the organization's business that is voted on by the group's members.

Unions and other professional organizations will need to figure out ways to create a sort of Chinese wall between any degree of compulsion, whether to join, pay money, or participate in activities, and any type of activity that could arguably implicate the First Amendment rights of dissenting members. These organizations will likewise need to find ways to make the processes of choosing representatives and enacting policies more representative. Only by implementing such measures will unions and other trade organizations be able to withstand the heightened scrutiny they will increasingly face.

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242. Dan Murphy, *Everything you need to know about the NCAA's NIL debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/894E-LUBF].

243. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2495 (2018).