ARIZONA SUPREME COURT

Supreme Court No. CV-23-0130 PR
Court of Appeals Division One Case No. 1 CA-CV-22-0049
Maricopa County Superior Court Case NO. CV2019-009033

MARK GILMORE; and MARK HARDER,

Plaintiffs/Appellants,

v.

KATE GALLEGO, in her official capacity as Mayor of the City of Phoenix; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix; and CITY OF PHOENIX,

Defendants/Appellees

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), LOCAL 2384,

Intervenor/Defendant/Appellee.

BRIEF *AMICUS CURIAE* OF FREEDOM FOUNDATION IN SUPPORT OF APPELLANTS

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To the Honorable Supreme Court of Arizona:

The Freedom Foundation respectfully submits this *amicus curiae* brief in support of Plaintiffs/Appellants Mark Gilmore and Mark Harder.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Freedom Foundation ("Foundation") is one of the most active and well-known national nonprofits protecting public employees' First Amendment rights against overreach by public sector unions and their government collaborators. Founded in 1991, the Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government, through education, litigation, legislation, and community activation. The Foundation quickly recognized the significance and impact of the United States Supreme Court's two-fold decisions in *Harris v. Quinn*,[1] and *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018), which latter case affected a sea-change by restoring public employees' First Amendment free speech and association rights in the workplace *vis-à-vis* their unions and employers. In this new environment, the Foundation has quickly risen to become the most effective nonprofit organization educating public employees of their First Amendment right to choose to support or not support a union, enabling employees to push back against

[1] 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014)

union pressure, and litigating against violation of public employees' rights and union attempts to do so.

The Foundation is well-equipped to provide this Court with valuable insight and perspective in this case, being rooted as it is in the area of labor law and First Amendment rights, and to aid the Court in deciding the merits of the instant case. The Foundation regularly files *amicus curiae* briefs of this kind. *See, e.g.*, *Todd v. AFSCME Council 5*, 571 F. Supp. 3d 1019 (D. Minn. 2021), appeal filed 8th Cir. No. 21-3749 (Nov. 29, 2021); *Hoekman v. Educ. Minnesota*, 21-1366, 2022 WL 3754006 (8th Cir. Aug. 30, 2022); *Bennett v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 142 S.Ct. 424 (2021); *Friedrichs v. California Teachers Ass'n*, 578 U.S. 1; 136 S.Ct. 1083; 194 L.Ed.2d 255 (2016). Indeed, the Foundation submitted *amicus* briefing in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018).

Counsel for the Foundation has read the briefing below. Only the Foundation sponsors this brief, and it has no interest in the outcome of this controversy except that of its mission to advance individual liberty, free enterprise, and limited, accountable government. No other organization contributed financial resources for the filing of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Phoenix ("City") and the American Federation of State, County and Municipal Employees, Local 2384s' ("AFSCME 2384" or "the union") (collectively "City/Union" or "Appellees") grant of "release time" to AFSCME Local 2384, to enable it to engage in patently political and value-laden public issue speech, is unconstitutional—a violation of the First Amendment as articulated in *Janus*, and other ways.

First, the City/Union's agreement granting the Union "release time" to engage in partisan speech must be seen in the context of the recent seismic changes in labor law since 2018 in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018). Simply put: "release time" is just one more means by which, in response to losing their government-granted monopoly on 1-2% of employees' salaries, unions are, instead of increasing their value to employees, instead trying to compel employees to pay union dues. But compelling employees to pay dues, by any means, violates the First Amendment prohibition on compelled speech, as articulated in *Janus*. This Court must recognize what "release time" is: a circuitous means to 'legally' compel employees to pay for unions' expenses. But that violates *Janus*.

Second, even if, as argued by Appellees, the "release time" provisions in the agreement forced taxpayers, not employees, to fund union partisan speech and activity on their viewpoint on labor ideology, this compelled funding would not only

violate the Gift Clause under the Arizona State Constitution, as explained by Appellants, but *also* constitute impermissible viewpoint discrimination in violation of the First Amendment if such funds were not distributed to equally situated speakers. This issue may not be presented in this case now, but it cannot be ignored, since if the "release time" provisions are allowed, it would just be a matter of time until such a controversy is brought.

Finally, Appellees' argument that the City purchases "labor peace" by including the "release time" provision in the City/Union agreement is misplaced. The Supreme Court in *Janus* has already established that giving unions money or resources to advocate for their speech does not support labor peace. That is why compelled financial contributions to unions were abolished in the first place.

ARGUMENT

A. "Release time" is a 'Legal' means by which Public Sector Labor Unions Violate the Supreme Court's 2018 Decision in *Janus v. AFSCME*

Public sector unions are big business. In 2017, the year before the Supreme Court's decision in *Janus*, LM-2s[2] from the top-four national public sector unions, the National Education Association, American Federation of Teachers, AFSCME, and Service Employees International Union, showed an income of $370,146,666,[3] $196,786,018,[4] $185,595,142,[5] and $280,927,662,[6] respectively. Public employees generated these enormous sums. They paid (and many continue to pay), in the average case, approximately 1-2% of their salaries to union dues.

Prior to 2018, in about half the states, including three of the most heavily populated states of California, New York, and Pennsylvania, public employees had no choice but to pay.[7] Unions *compelled* employees' financial contributions to their speech as a condition of employment by way of statutory schemes created by friendly states or city governments. This arrangement, with a complicated procedure for paying a slightly reduced fees for objecting employees, was made possible by

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[2]Unions file annual LM-2 forms with the Office of Labor-Management Standards, detailing the union's membership status and finances.

[3] https://olmsapps.dol.gov/query/orgReport.do?rptId=658200&rptForm=LM2Form

[4] https://olmsapps.dol.gov/query/orgReport.do?rptId=684131&rptForm=LM2Form

[5] https://olmsapps.dol.gov/query/orgReport.do?rptId=669709&rptForm=LM2Form

[6] https://olmsapps.dol.gov/query/orgReport.do?rptId=670471&rptForm=LM2Form

[7] In the other half, "right to work" states such as Arizona, this kind of arrangement was forbidden and employee support of unions was voluntary.

the Supreme Court's decision in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). This unprecedented amount of compelled, free income effectively gave public sector unions a monopoly on the millions of employees and dollars in those states, giving public sector unions and their allies enormous power to effectuate their partisan social and political agendas, much of it untethered to even traditional collective bargaining goals. This was possible because of a false dichotomy, propped up in *Abood*, between collective bargaining related speech which was considered non-public issue speech on the one hand, and social issue speech on the other, which was conserved to be protected by the First Amendment.

But the Supreme Court reversed itself in 2018, abrogated *Abood*, and recognized that union speech cannot be so categorized. Instead, the Court recognized that <u>all</u> union speech and activity is social issue, value-laden, political speech on issues of great public concern—public concern speech and speech "occup[ying] the highest rung of the hierarchy of First Amendment values," *Janus*, 138 S. Ct. at 2476 (internal marks and citations omitted); indeed, this speech includes even speech in collective bargaining on wages, hours, working conditions and benefits. *Id.* at 2448 ("'[I]t is impossible to argue that the level of ... state spending for employee benefits ... is not a matter of great public concern,'") (citing *Harris v. Quinn*, 573 U.S. 616, 654 (2014)). Having so recognized, the Court took the next, essential step of declaring the corollary: that "[n]either an agency fee nor any other payment to the

union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486.

Without overstating the obvious: this ruling had an impact on the unions' bottom line. Now, instead of being able to force millions of employees to fund their ideological speech, unions would have to make themselves valuable to employees to justify dues—or, if not, try to cajole, trick, or otherwise compel by 'legal' means employees to pay union dues.

Unfortunately, the Foundation's several years of working in this environment has shown unions to have been sorely enticed by the latter choice. Union obfuscation and obstruction of employees' exercise of rights has been rampant. Union tactics to secure unwilling payments to union coffers typically range from failing to inform employees of their rights, misleading them about their rights, pressuring employees to sign up for union dues, preventing employees from resigning union membership by obfuscation or threats, or even, in extreme but unfortunately not rare cases, falsifying employee signatures.[8] Unions are highly-sophisticated actors, however,

[8] See, e.g., *Ochoa v. Public Consulting Group, Inc. 775*, 48 F.4th 1102 (9th Cir.2022), cert. denied, 143 S.Ct. 783; 215 L.Ed.2d 51 (2023); *Yates v. Washington Fed'n of State Employees, AFSCME Council 28, AFL-CIO*, 20-35879, 2023 WL 4417276(9th Cir. July 10, 2023), cert. denied sub nom. *Jarrett, Torey v. SEIU Local 503, ET AL.*, 23-372, 2023 WL 8531926 (U.S. Dec. 11, 2023); *Araujo v. SEIU 775*, Case No. 4:20-CV-5012 (E.D. Wa. 2020); *Gatdula v. SEIU 775*, Case No. 2:20-cv-

and of course use 'legal' means to effectuate these same goals, too, such as negotiating collective bargaining agreements ("CBA") with governments extending dues payment obligations without employees' actual knowledge, *see*, *e.g.*, *Kurk v. Los Rios Classified Emps. Ass'n*, No. 21-16257, 2022 WL 3645061 (9th Cir. Aug. 24, 2022), *cert. denied*, 143 S. Ct. 2431, 216 L. Ed. 2d 415 (2023), or simply burying years-long dues paying commitments in fine print to trap employees into paying for long periods of time. *See Belgau v. Inslee*, 975 F.3d 940 (9th Cir. 2020), cert. denied, 141 S. Ct. 2795 (2021). But all these schemes are, in the end, one variation on the same theme: different ways to compel employees to pay for unions' own socio-political speech and labor ideology, absent their consent, in violation of *Janus*.

The "release time" provisions at issue in this case are just one more variation on the theme, albeit of the 'legal' and apparently respectable kind: an agreement

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00476 (W.D. Wa. 2020); *Jimenez v. Serv. Employees Int'l Union Local 775*, 22-35238, 2023 WL 6971457 (9th Cir. Oct. 23, 2023); *Zielinski v. Serv. Employees Int'l Union Local 503*, 20-36076, 2022 WL 4298160 (9th Cir. Sept. 19, 2022); *Wright v. Serv. Employees Int'l Union Local 503*, 143 S.Ct. 749; 214 L.Ed.2d 451 (2023); *Jarrett v. Serv. Employees Int'l Union Local 503*, 21-35133, 2023 WL 4399242 (9th Cir. July 7, 2023), cert. denied sub nom. *Jarrett, Torey v. SEIU Local 503*, et al., 23-372, 2023 WL 8531926 (U.S. Dec. 11, 2023); *Hubbard v. Serv. Employees Int'l Union Local 2015*, 21-16408, 2023 WL 6971463 (9th Cir. Oct. 23, 2023); *Quezambra v. United Domestic Workers of Am., AFSCME Local 3930*, 20-55643, 2023 WL 4398498 (9th Cir. July 7, 2023), cert. denied sub nom. Jarrett, Torey v. SEIU Local 503, et al., 23-372, 2023 WL 8531926 (U.S. Dec. 11, 2023); *Trees v. Serv. Employees Int'l Union Local* 503, 574 F.Supp.3d 856, 860 (D. Or.2021) *Schiewe v. Serv. Employees Int'l Union Local 503*, 20-35882, 2023 WL 4417279 (9th Cir. July 10, 2023), *cert. denied sub nom. Jarrett, Torey v. SEIU Local 503, et al.*, 23-372, 2023 WL 8531926 (U.S. Dec. 11, 2023).

with a city to guarantee resources to the union in a CBA. But a rose by any other name is a rose; and so too, crabgrass. This Court must recognize the attempt, and refuse to entertain it. This is important because this particular technique seems to be a new direction that public sector unions appear to be developing.[9] For example, the National Education Association, the nation's largest public sector labor union, authored and distributed a pamphlet entitled "8 essentials to a strong union contract without fair-share fees,[10]" in which it recommends "release time," such as here, as a means to increasing union revenue. Another indicator of this developing trend is that Court is not the only one in the nation dealing with the issue. The Supreme Court of Texas, in *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, No. 03-21-00227-CV, 2022 WL 17096786 (Tex. App. Nov. 22, 2022), petition for review filed (Feb 06, 2023), is dealing with a similar issue. The issues in *Borgelt* are similar to those here, involving a near identical attempt by a union and city to compel employees to pay for union activities through vacation time provisions, resulting in a Gift Clause violation. The Foundation filed *amicus* briefing there to bring to the Texas Supreme Court's attention the fact that "release time" provisions also violate the First

[9] This is not to say that "release time" provisions are entirely new. Forms of "release time" have existed and still exist, for example, in the federal system. However, they are presumably receiving renewed attention by dues-hungry unions post-*Janus*—especially before these older, 'grandfathered in' provisions have gone unchallenged.
[10] https://www.freedomfoundation.com/wp-content/uploads/2018/03/NEA-8Essentials.pdf.

Amendment because they compel employees to expend their resources, in the form of vacation time, to union speech.[11]

A third example of this trend involves the Foundation directly, in an Ohio case in which Foundation attorneys won a settlement for Plaintiffs challenging "release time" provisions. In *Lascano v. AFSCME, Ohio Council 8*, No. 22-00102 (S.D. OH filed Feb. 24, 2022), like here, AFSCME Council 8 and the City of Cincinnati agreed to a CBA provision which required employees to contribute their own vacation time to a "release time bank" which funded union business related to "contract administration, representation of bargaining unit members, education seminars and trainings, and other forms of Union business." *Lascano v. AFSCME, Ohio Council 8*, No. 22-00102 (S.D. OH filed Feb. 24, 2022), Dkt. 1 (Complaint) at para. 4. The Foundation represented employees on the exact theory advanced by Appellants here: that the "release time" provisions violated the First Amendment, and *Janus*. Several months after filing the complaint, the union and city quickly agreed to settle, crediting to every non-union bargaining unit member the vacation time the

[11] *Borgelt* was filed in 2016. "[P]ublic-sector unions [were] on notice for years regarding [the Supreme] Court's misgivings about *Abood*. *Janus*, 138 S. Ct. at 2484. This was, in part, because after the 2014 *Harris* decision, the Supreme Court granted certiorari in *Friedrichs v. California Teachers Assn.,* 576 U.S. ——, 136 S.Ct. 2545, 195 L.Ed.2d 880 (2016). In *Friedrichs*, the Court engaged in "exhaustive briefing and argument on the question [of] whether *Abood* should be overruled," but ultimately "affirmed the decision below by an equally divided vote." *Janus*, 138 S. Ct., at 2485. The Court was "equally divided" because it had just lost one member, Justice Scalia.

defendants had compelled them to forfeit under the former "release time" provision, and removing the offending provision from the CBA.

The "release time" provision in this case is yet another effort by a union to compel employees to fund union viewpoints on matters of public concern. Though the means are different from those in *Janus* and in other post-*Janus* attempts to compel dues payments, the result is the same: a violation of the First Amendment.

B. Forcing Tax Payers to Pay for Pro-Union Partisan Speech is Just as Constitutionally Illicit as Forcing Public Employees to Pay for It

If, as the City/Union urge, the "release time" provisions here do not come out of employee time or their pool of available resources, then it is a Gift Clause violation under the Arizona Constitution. Ariz. Const. art. IX, § 7. But it is not only that: it is also contrary to the First Amendment, as a viewpoint discriminatory grant of speech-enabling resources to a private party for their partisan speech.

The government violates the First Amendment's prohibition on viewpoint discrimination when it favors one private party's speech over another. "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995) (internal citations omitted). Indeed, even facially neutral content-based discrimination is "subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v.*

Town of Gilbert, Ariz., 576 U.S. 155, 165, 135 S. Ct. 2218, 2228, 192 L. Ed. 2d 236 (2015) (internal citations omitted). As relevant in this context, regulations that offend the First Amendment may not be restricted to those directly touching on speech (such as a criminal law banning speech) or regulations involving a traditional forum (such as a public area), but may involve, as here, a selective grant of speech-enabling resources based upon the viewpoint or content of the speech. In *Rosenberger*, for example, the Supreme Court held that monetary grants used to fund expressive speech constituted a kind of metaphysical "forum," within which the government was not permitted to discriminate based on viewpoint. The Court found that a university in that case in fact engaged in viewpoint discrimination when it funded student publications, but then denied funding to one student organization because it published on religious viewpoints. *See Rosenberger*, 515 U.S. at 830–31.

Here, the release time provision is unconstitutional even if taxpayers (*i.e.* the government), rather than employees, are paying for AFSCME's partisan political speech. As pointed out by Appellants, employees on "release time" engage in political activities—both in the conventional sense, and as taught by *Janus*, including meeting and endorsing candidates for elected office and lobbying for and against policy proposals before the City Council, participating in meetings of the Union's Political Action Committee, as well as recruiting new members and conducting other activities that advance the Union's interests. Appellant's Opening

Brief at 1, 5-6 (citations to the record omitted). They also use release time to recruit new members, engage in collective bargaining, support labor organizations in other cities, and engage in other activities that advance the Union's interests. All of these topics and speech are on matters of great public concern occupying the highest rung of First Amendment values. *See Janus*, 138 S. Ct. at 2476, 2448. And the Union will, undoubtedly, speak on all of these topics from its singular ideology and viewpoint on labor. In other words, the government is funding one viewpoint on labor ideology.

This practice cannot withstand constitutional scrutiny. Could, for example, AFSCME Local 2384 and the City negotiate a CBA allocating funding to the Republican Party so it could engage in its preferred speech? The answer, at first, might be "yes"—albeit with one caveat: as soon as the other side of the debate, say, the Democrat Party, demanded an equal allotment from the City, the City would be obliged to grant it, to avoid engaging in viewpoint based discriminatory grant of speech-enabling resources. So in other words, a City cannot grant resources to *only* one side of a socio/political debate, for example the role of unions in the workplace.

That is exactly what is happening in the situation this Court is faced with, here. If here taxpayer, *i.e.* the government, is funding "release time," then this is tantamount to an admission that the government is giving speech-enabling resources to the Union, for the union to advance its particular viewpoint on topics in labor and related ideology. Thus, not only does the "release time" provision violate the Gift

Clause, but it also precipitates the City into viewpoint discrimination, because the moment a group of City employees who oppose big-unionism and AFSCME's ideology demand an equal allotment of release time to engage in *their* preferred views on the subject, the City would have to grant it—or be guilty of *selectively* granting speech-enabling resources, just like in *Rosenberger*. So, for this reason, too, the City's gift to the union is constitutionally infirm.

C. Giving Speech-Enabling Resources to Unions to Promote Their Views does not Promote "Labor Peace."

Appellees argue the City's grant of "release time" at public expense is justified to promote "labor peace", and that this is a kind of benefit conferred upon the public, under the Gift Clause. Intervening Defendant/Appellee's Supplemental Brief at 5, 10, 16; Defendants/Appellees' Supplemental Brief at 14. This argument is wrong, for two reasons: one in application to all labor law nationally, and one specific to this particular case.

First, although the government may retain a permissible interest in securing labor peace in general, an interest seriously eroded though it may be in the wake of *Janus*, government financial or other resource support for union speech does not serve that interest. That is exactly what the Supreme Court taught in *Janus*: that labor peace and government action to compel payment of union dues were *not* linked. *Janus*, 138 S. Ct. at 2465 ("The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency

fees are inextricably linked, but that is simply not true."), 2480 ("Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked.")(internal citations omitted).

Instead, the government is allowed to serve its interest in "labor peace" by the securing of exclusive representation to the union. Exclusive representation is the system by which employees are compelled to be represented by (but not support) a collective bargaining representative (union) in their contract negotiations and grievance proceedings. This is the legal structure by which government forces public employees to accept representation by exclusive bargaining representatives, *i.e.* unions. "[D]esignation as the exclusive representative confers many benefits [upon unions]…. [A] privileged place in negotiations over wages, benefits, and working conditions… exclusive right to speak for all the employees in collective bargaining… special privileges, such as obtaining information about employees… and having dues and fees deducted directly from employee wages…." *Janus*, 138 S. Ct. at 2467 (internal marks omitted). This, not money or resources, is the permissible limit of the government's infringement upon employees' First Amendment rights to support labor peace. For, as noted by *Janus*, exclusive representation continues to be a significant infringement upon First Amendment rights. *Janus*, 138 S. Ct. 2448,

2478, 201 L. Ed. 2d 924 (2018) (referring to exclusive bargaining representation as a "significant impingement on associational freedoms.").

Relatedly, it is important to remember that unions do not speak *for* government. The government may retain private organizations to relay its own messaging, *see Rust v. Sullivan*, 500 U.S. 173, 194, 111 S. Ct. 1759, 1773, 114 L. Ed. 2d 233 (1991), but this is not what anybody understands to be happening in collective bargaining, since "then the employer could dictate what the union says," and unions, "would[, we trust,] be appalled by such a suggestion." *Janus*, 138 S. Ct. 2448, 2474, 201 L. Ed. 2d 924 (2018).

Second, in their arguments about labor peace, Appellees refer to the "release time" provision as something the City bargained in return for reducing the risk of a labor strike. Intervening Defendant/Appellee's Supplemental Brief at 10, 14; Defendants/Appellees' Supplemental Brief at 13. But, in fact, City of Phoenix employees are prohibited from striking, anyway. City of Phoenix City Charter XXV, Sec. 14(B)[12] ("An employee of the City of Phoenix shall not in any manner participate in any strike against the City of Phoenix or any of its agencies."). So, the provision of "release time" can in no legal way contribute to labor peace in this particular case.

[12] https://phoenix.municipal.codes/Charter/XXV_Sec14.

Government has a legitimate interest in labor peace, but bankrolling unions' speech does not serve that interest. *Janus* has already taught as much.

CONCLUSION

For the foregoing reasons, the Court should rule in favor of the Plaintiffs/Appellants.

Dated: December 12, 2023

Respectfully Submitted,

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