Plenary 3:00 pm

"The Dog that Didn't Bark in the Night-Time":
***Janus v. AFSCME*: Retroactivity and**
Impact on Exclusive Representation.

New England Consortium of State Labor Relations Agencies
The Desmond Hotel and Conference Center
Albany, New York

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Chair, New York State
Public Employment Relations Board
June 21, 2019

I. NYS Legislative Responses to *Janus v. AFSCME*

A. 2018 Amendments to the Taylor Law

§ 208 Rights Accompanying Certification or Recognition

[Amended effective April 12, 2018; underlined material is new]

1. A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights:

(a) to represent the employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in the settlement of grievances; and

(b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees. A public employer shall commence making such deductions as soon as practicable, but in no case later than thirty days after receiving proof of a signed dues deduction authorization card; and such dues shall be transmitted to the certified or recognized employee organization within thirty days of the deduction. A public employer shall accept a signed authorization to deduct from the salary of a public employee an amount for the payment of his or her dues in any format permitted by article three of the state technology law. The right to such membership dues deduction shall remain in full force and effect until:

(i) an individual employee revokes membership in the employee organization in writing in accordance with the terms of the signed authorization; or

(ii) the individual employee is no longer employed by the public employer, provided that if such employee is, within a period of one year, employed by the same public employer in a position represented by the same employee organization, the right to such dues deduction shall be automatically reinstated.

(c) Should the individual employee who has signed a dues deduction authorization card either be removed from a public employer's payroll or otherwise placed on any type of involuntary or voluntary leave of absence, whether paid or unpaid, such public employee's membership in an employee organization shall be continued upon that public employee's return to the payroll or restoration to active duty from such a leave of absence.

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4.(a) Within thirty days of a public employee first being employed or reemployed by a

public employer, or within thirty days of being promoted or transferred to a new bargaining unit, the public employer shall notify the employee organization, if any, that represents that bargaining unit of the employee's name, address, job title, employing agency, department or other operating unit, and work location; and

(b) Within thirty days of providing the notice in paragraph a of this subdivision, a public employer shall allow a duly appointed representative of the employee organization that represents that bargaining unit to meet with such employee for a reasonable amount of time during his or her work time without charge to leave credits, unless otherwise specified within an agreement bargained collectively under article fourteen of the civil service law, provided however that arrangements for such meeting must be scheduled in consultation with a designated representative of the public employer.

5.(a) If any clause, sentence, paragraph, or subdivision of this section shall be adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or subdivision of this section directly involved in the controversy in which such judgment shall have been rendered.

(b) If any clause, sentence, paragraph, or part of a signed authorization shall be adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such determination shall not affect, impair or invalidate the remainder of such signed authorization but shall be confined in its operation to the clause, sentence, paragraph, or part of the signed authorization directly involved in the controversy in which such judgment shall have been rendered.

§ 209-a Improper Employer Practices; Improper Employee Organization Practices; Application

[Amended effective April 12, 2018; underlined material is new]

2. Improper employee organization practices. It shall be an improper practice for an employee organization or its agents deliberately

(a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so provided, however, that an employee organization does not interfere with, restrain or coerce public employees when it limits its services to and representation of non-members in accordance with this subdivision;

(b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer; or

(c) to breach its duty of fair representation to public employees under this article. Notwithstanding any law, rule or regulation to the contrary, an employee organization's duty of fair representation to a public employee it represents but who is not a member of the employee organization shall be limited to the negotiation or enforcement of the terms of an agreement with the public employer. No provision of this article shall be construed to require an employee organization to provide representation to a non-member

(i) during questioning by the employer,

(ii) in statutory or administrative proceedings or to enforce statutory or regulatory rights, or

(iii) in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate.

Nor shall any provision of this article prohibit an employee organization from providing legal, economic or job-related services or benefits beyond those provided in the agreement with a public employer only to its members.

B. 2019 Amendments to the Taylor Law

1. **L. 2019 Ch. 55, Part E—amends §§ 208 and 209-a.1.**

[Amended effective April 12, 2019; underlined material is new]

§ 208 (1) amended to provide a new subsection (d), reading:

(d) Unless otherwise specified by a collective bargaining agreement, upon the request of the employee organization, not more than quarterly, the employer shall provide the employee organization the name, address, job title, employing agency or department or other operating unit and work location of all employees of a bargaining unit.

§ 209-a.1 amended to add a new subsection (h), providing that it shall be an improper practice for an employer

(h) to disclose home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a public employee, as the term "public employee" is defined in subdivision seven of section two hundred one of this article, except

(i) where required pursuant to the provisions of this article, and

(ii) to the extent compelled to do so by lawful service of process, subpoena, court order, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment.[1]

2. **L. 2019 Ch 56, Part DD adds a new § 215**

[Amended effective April 12, 2019; underlined material is new]

§ 215. Agency shop fee deductions.

1. Notwithstanding any other law to the contrary, any public employer, any employee organization, the comptroller and the board, or any of their employees or agents, shall not be liable for, and shall have a complete defense to, any claims or actions under the laws of this state for requiring, deducting, receiving, or retaining agency shop fee deductions from public employees, and current or former public employees shall not have standing to pursue these claims or actions, if the fees were permitted or mandated at the time under the laws of this state then in force and paid, through payroll deduction or otherwise, prior to June twenty-seventh, two thousand eighteen.[2]

2. This section shall apply to claims and actions pending or filed on

or after June twenty-seventh, two thousand eighteen.

3. The enactment of this section shall not be interpreted to create the inference that any relief made unavailable by this section would otherwise be available.

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[1] This amendment codifies into law, and expands the applicability of, Executive order 183, signed by Governor Andrew M. Cuomo on June 27, 2018, The date of the U.S. Supreme Court decision in *Janus v. AFSCME*, 585 U.S. ___, 138 S. Ct. 2448, 201 L. Ed 2d 924 (2018).

[2] The date of the U.S. Supreme Court decision in *Janus v. AFSCME*, 585 U.S. ___, 138 S. Ct. 2448, 201 L. Ed 2d 924 (2018).

[Extracts from Sarah W. Cudahy, William A. Herbert & John F. Wirenius, "Total Eclipse of the Court? *Janus v. AFSCME Council 31* in Historical, Legal, and Public Policy Contexts," 36 *Hofstra Labor & Employment Law Journal* ___ (forthcoming, 2019)]

II. Retroactivity under the First Amendment

In addition to the loss of income from fee payers and likely some former union members, some unions are also contending with lawsuits.[3] Lawsuits have been filed in several states, including Illinois, Maryland, Minnesota, New Jersey, New York, Ohio, and Washington, in which employees are requesting disgorgement of past dues.[4]

Typically, such lawsuits would be unsuccessful given the long-standing dictum that, as Justice Scalia phrased it, "reliance upon a square, unabandoned holding of the Supreme Court is always justifiable reliance."[5] And "[a]t the time the fair share fees were deducted and paid they were lawful under four decades of Supreme Court authority."[6]

The Court does mention these payments, lamenting about how much money has "been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment," and finding that this "cannot be allowed to continue indefinitely."[7] Indeed, the first courts to have heard these cases have dismissed them on the basis of good faith reliance on Supreme Court precedent, including a suit filed by Janus.[8]

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3. Robert Iafolla, *Supreme Court Revives Lawsuit Seeking Union Agency Fee Refunds*, REUTERS (June 28, 2018, 8:16 PM), https://www.reuters.com/article/usa-employment-unions/supreme-court-revives-lawsuit-seeking-union-agency-fee-refunds-idUSL1N1TV00P.

4. Complaint, Pellegrino v. New York State United Teachers, No. 2:18-cv-C3439-JMA-GR8 (E.D.N.Y June 13, 2018); Iafolla, *supra* note 3.

5. Quill Corp. v. North Dakota By & Through Heitkamp, 504 U.S. 298, 319, 321 (1992) (Scalia, J., concurring) *overruled other grounds by* S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098-99 (2018); *but see* Rodriguez de Quijoas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 485 (1989).

6. Iafolla, *supra* note 3 (statement of Martin Malin).

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

8. *See, e.g.*, Lee v. Ohio Educ. Assoc., ___F.Supp.3d ___, 2019 WL 1323622 (N.D. Ohio Mar. 29, 2019); Janus v. AFSCME, 2019 WL 1239780, (N.D. Ill., Mar. 18, 2019); Crockett v. NEA-Alaska, ___ F.Supp.3d., 2019 WL 1212082 (D. Alaska

However, the final outcome of these suits is not so clear. The *Janus* majority's rebuke of the reliance interest in analyzing the issue of stare decisis hinges on the fact that after *Friedrichs* was issued on March 29, 2016, "any public sector union seeking an agency-fee provision in a collective bargaining agreement must have understood that the constitutionality of such a provision was uncertain."[9]

The United States Supreme Court recently granted a writ of certiorari in one such case, *Riffey v. Rauner*,[10] and sent it back to the Seventh Circuit Court of Appeals for reconsideration in light of *Janus*.[11] In *Riffey*, the Seventh Circuit had affirmed the denial of class certification of home health care assistants on the grounds that a highly individualized inquiry on the support of the union and injury occurred.[12] Additionally, some of the class actions consist of employees who claim that they only joined the union because they would have had to pay agency fees regardless.[13] However, in requiring employers to receive affirmative consent to deduct dues from employees' wages, the Court also implies that once the employee provides consent, they have waived their First Amendment rights in this regard.[14]

Mar. 14, 2019), Carey v. Inslee, ___F.Supp.3d___, 2019 WL 1115259 (W.D. Wa. Mar. 11, 2019).

9. *Janus*, 138 S. Ct. at 2485. Certainly, any argument regarding unjust enrichment could not be made prior to *Locke*, where the Court unanimously expanded the scope of chargeable agency fees. *See* Locke v. Karass, 555 U.S. 207, 210 (2008). Moreover, the statute of limitations applicable to personal injury actions in the state in which an action is venued would apply. Owens v. Okure, 488 U.S. 235, 249-50 (1989). In New York State, for example, that statute is three years. Pearl v. City of Long Beach, 296 F.3d 76, 79 (2d Cir. 2002); Ying Li v. City of New York, 246 F. Supp.3d 578, 600-01 (E.D.N.Y. 2017).

10. Riffey v. Rauner, 873 F.3d 558 (7th Cir. 2017) *vacated,* 138 S. Ct. 2708 (2018).

11. Riffey v. Rauner, 138 S. Ct 2708 (2018).

12. *Riffey*, 873 F.3d at 566.

13. *Id.* at 561-62.

14. *Janus*, 138 S. Ct. at 2486 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Curtis Publishing Co. v. Butts, 388 U.S.130, 145 (1967)).

In the majority opinion in *Janus*, the Court argues that unions do not have a reasonable reliance interest in adhering to *Abood*.[15] This contention could play a key role in how the Court answers claims to apply *Janus* retroactively, and its fundamental unsoundness is therefore all the more problematic. The argument is strikingly premised on prognostication of future action that *might* be taken by the Court, in that it casts upon the unions the burden of predicting whether the expressions of disagreement with the rationale of *Abood* will lead the Court to overrule it:

> [P]ublic-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood's* many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. During this period of time, any public sector union seeking an agency-fee provision in a collective bargaining agreement must have understood that the constitutionality of such a provision was uncertain.[16]

Leaving aside the fact that many of the unions affected by *Janus* did not negotiate agency fee provisions in their contracts, but operated in states in which state law mandated agency fees be deducted, the Court's delineation in *Janus* of what constitutes reasonable reliance interests both contravenes logic and invites chaos.[17] The *Janus* Court's analysis attributes to the "Court" dicta the majority expressed in an opinion that reflects a closely split bench, and requires the unions to predict future litigated outcomes. It does so while glossing over factors that would, in fact, be dispositive of that very issue, that is, the effect of the change in the Court's membership after *Knox* and *Harris*.[18] In sum, the Court's reliance argument requires a prediction, but one divorced from the realities that might make it a meaningfully accurate prediction.

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15. *Janus*, 138 S. Ct. at 2460, 2484.

16. 138 S. Ct. at 2484-85.

17. *Id.*

18. *Id.* at 2483.

As a threshold matter, while the Court did criticize the rationale of *Abood* in *Knox* and *Harris*, neither case purported to overrule *Abood*, but rather refused to extend it to analogous circumstances.[19] The assumption that the accompanying criticism of *Abood's* reasoning should have put unions on notice that *Abood* was clearly doomed, and that they were obligated to presume that result and take action by waiving agency fees (even if only where state law permits) flips the normal analysis.[20] As Chief Justice Roberts wrote in his dissent in *South Dakota v. Wayfair, Inc.*, "[w]hatever salience the adage 'third time's a charm' has in daily life, it is a poor guide to Supreme Court decisionmaking."[21]

The Chief Justice's logic applies with especial force to *Janus*, as both *Knox* and *Harris* were decided by the same 5-4 majority, and that majority was broken by the death of Justice Antonin Scalia on February 13, 2016.[22] As a result of Justice Scalia's death, the majority that had criticized, refused to extend, and might possibly have overruled *Abood*, ceased to exist. Subsequently, the Ninth Circuit decision following *Abood* was "affirmed by an equally divided Court" in *Friedrichs v. California Teachers Association*, decided on March 29, 2016.[23]

By that time, of course, D.C. Circuit Chief Judge Merrick Garland, had already been nominated to the Supreme Court, and Senate Majority Leader Mitch McConnell had announced his refusal to consider the nomination.[24] From that time through the expiration of Judge Garland's nomination, the confirmation of Justice Neil Gorsuch to the Court on April 7, 2018, and the oral argument in *Janus* (at which Justice Gorsuch

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19. *Id.*

20. *Janus*, 138 S. Ct. at 2484.

21. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2102 (2018).

22. Adam Liptak, *Justice Scalia, Who Led Court's Conservative Renaissance, Dies At 79*, N.Y. TIMES (Feb. 14, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html. According to Justice Scalia's obituary, he was found dead on the morning of February 13, 2016; whether he died that day or on February 12 is unclear. *Id.*

23. Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016).

24. Michael D. Shear, Julie Hirschfeld Davis and Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 17, 2016) https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html.

was entirely silent), no indication existed as to how either Judge Garland (had he been confirmed) or Justice Gorsuch would vote.[25]

Subsequent to the breaking of the *Knox-Harris* majority, the only factor upon which unions could have based any prediction of the outcome of Janus was the fact that Justice Gorsuch was appointed by a Republican President, Donald J. Trump.[26] However, unanimity among conservative scholars did not exist concerning the merits of Janus's First Amendment argument, as demonstrated by the amicus brief submitted by Professors Eugene Volokh and William Baude.[27] Moreover, requiring unions to base their predictions solely on party affiliation rejects the Court's long-held ethos, recently reasserted by Chief Justice Roberts, that "[w]e do not have Obama judges, Bush judges or Clinton judges." '". . . ."For the unions affected by the ultimate outcome in *Janus* to be required to assume the overruling of *Abood* after the death of Justice Scalia, would require a complete abandonment of faith in the judicial process and the legitimacy of judicial review itself. Nor should prescient complex political calculations based on unfolding, rapidly shifting facts be the prerequisite of demonstrating reasonable reliance on non-overruled, albeit controversial, precedent.

III. Exclusive representation

A non-frivolous reverse-*Janus* argument could be constructed, pursuant to which the Court's free association and free speech cases would require the application of strict scrutiny to justify any regime that mandated a union to provide advocacy services to non-members.[28] Similarly, the recognition in *Janus* that collective negotiations

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25. Adam Liptak, *Key Voice Is Silent in Supreme Court Case on Unions*, N.Y. TIMES (Feb. 27, 2018) https://www.nytimes.com/2018/02/26/us/politics/supreme-court-unions-gorsuch.html.

26. *Id.*

27. Janus v. AFSCME, Council 31, Brief of Professors Eugene Volokh and William Baude as Amici Curiae in Support of Respondents, http://www.supremecourt.gov/DocketPDF/16/16-1466/28495/20180119145640767_16-1466_Janus%20v.%20American%20Federation%20of%20State%20et.%20al..pdf.

28. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (explaining that forced inclusion of an unwanted person in a group infringes on the group's freedom of expressive association if presence of that person affects, in a significant way, the group's ability to advocate public or private viewpoints); Wandering Dago, Inc. v. Destito, 879 F.3d 20, 32 n. 4 (2d Cir. 2018) (noting continued validity of *Boy Scouts of Am. v. Dale*); State Emps. Bargaining Agent Coal. v. Rowland, 718 F.3d 126, 132 (2d Cir. 2013) (explaining that it is well-settled that, apart from applicable

constitutes political speech under the First Amendment can form the basis for an argument that prohibitions or restrictions on public sector collective bargaining are unconstitutional.[29]

With the Court's new recognition of public sector collective bargaining as inherently political speech, statutorily required advocacy on behalf of specific individuals who are inimical to the union would present questions of both compelled association and compelled speech, although the Court suggests that exclusivity is a sufficient "boon" to unions to warrant the imposition of the duty of fair representation to non-members.[30] The corollary then would be that if a successor case invalidates exclusivity, then the imposition of *any* duty of fair representation toward non-members would constitute compelled speech.[31] In a similar vein, a state's banning or the restriction of the political speech inherent in negotiations, as found in *Janus*, would logically constitute unlawful prior restraint.[32]

The Court itself suggested two forms of ameliorating the effect of *Janus* in forcing unions to shoulder the burden of providing individual representation to non-members in disciplinary and other individualized grievances, The Court stated that less restrictive measures than requiring all non-members to pay an agency fee were available. It gave as examples that "[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether."[33]

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statutory rights to union organization and membership, "[i]ncluded in th[e] [Constitutional] right to free association is the right of employees to associate in unions," and that it "cannot 'be questioned that the First Amendment's protection of speech and associational rights extends to labor union activities.'") (citing Thomas v. Collins, 323 U.S. 516, 534 (1945); Conn. State Fed'n of Teachers v. Bd. of Educ. Members, 538 F.2d 471, 478 (2d Cir.1976)).

29. *See Janus*, 138 S. Ct. at 2460, 2462.

30. *Id.* at 2467-68.

31. *See id.* at 2469 ("[The duty of fair representation] is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit.").

32. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 471 (1995).

33. *Janus*, 138 S. Ct. at 2468-69.

Janus's effective constitutionalization of "right to work" differs in a highly significant way from the legislatively enacted "right to work" regimes currently extant in the states that have adopted them.[34] In such states, the statutory regime presents the "existential collective action problem" described by Benjamin Sachs: the unions are both required to equally represent the interests of all employees in the defined bargaining units, whether they are members of the union or not, but are only permitted to receive voluntary dues from members, that is, employees who elect to join the union.[35] The construction in *Janus* of the First Amendment to prohibit mandatory agency fees imposes on every public sector workplace the first prong of a "right-to-work" regime.[36]

The second prong, the scope of the union's duty to represent all of the employees in a bargaining unit, is a creature of state law, and extension of that duty to non-members is neither explicitly compelled by the *Janus* ruling, nor inherent, or even supported, by its logic.[37]

In *Harris v. Quinn*,[38] a direct antecedent of *Janus*,[39] the Court found "unwarranted" what it called an "unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop."[40] To the contrary, the Court opined, "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked."[41] That being so, exclusivity, like the duty of fair representation, remains a matter of state law entirely separate from the "compelled speech" and "compelled association" found to be imposed by agency fee statutes and even collective bargaining agreements in *Janus*.[42] As a matter of history, virtually all state collective bargaining statutes have imposed the exclusive collective representation model to ensure harmonious labor relations, thereby

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34. *Janus*, 138 S. Ct. at 2499 (Kagan, J., dissenting).

35. Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 Harv. L. Rev. 1046, 1047 (2018).

36. *See Janus*, 138 S. Ct. at 2458, 2459.

37. *Id.* at 2467-68.

38. Harris v. Quinn, 134 S. Ct. 2618, 2634 (2014).

39. *Janus*, 138 S. Ct. at 2464-65.

40. *Harris*, 134 S. Ct. at 2634.

41. *Id.* at 2640.

42. *Janus*, 138 S. Ct. at 2465-66, 2468.

rejecting as unsound the earlier plural representation system that existed prior to collective bargaining.

Any reasonable reading of *Janus* suggests that the Court will be exacting in its scrutiny of legislative or state judicial response to the decision that goes beyond the scope of the duty of fair representation.[43] The heavy weight given by the majority opinion to the economic cost of public employee wages and benefits[44] suggests that Justice Kennedy's dismissal of the description of the State's interest in collective bargaining by the Solicitor General of Illinois may be reflective of the views of other members of the Court:

> MR. FRANKLIN: You know, the state's interest here, if I can spend just a few moments talking about that, is, first, we have an interest in dealing with a single spokesman for the—for the employees. Second, we have an interest in imposing on that spokesman a legal duty to represent everyone. But as regards [sic] agency fees, they are complementary to those first two interests. They serve our managerial interests in two ways. First, they allow us to avoid a situation where some employees bear the cost of representing others who contribute nothing. That kind of two-tiered workplace would be corrosive to our ability to cultivate collaboration, cohesion, good working relationships among our personnel. Second, independent of that, we have an interest at the end of the day in being able to work with a stable, responsible, independent counterparty that's well-resourced enough that it can be a partner with us in the process of not only contract negotiation—
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> JUSTICE KENNEDY: It can be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion, against – for teacher tenure, for higher wages, for massive

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43. *Id.* at 2464.

44. *Id.* at 2483 ("Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies.").

> government, for increasing bonded indebtedness, for increasing taxes? That's – that's the interest the state has?[45]

Against this backdrop, then, any legislative effort to ameliorate the effect of *Janus* would be much less susceptible to Supreme Court review to the extent that it modifies the scope of the duty of fair representation, and it would be more subject to constitutional challenge to the extent that it makes it more difficult for those employees who wish to not pay dues or other fees to the union.[46]

In the former area, *Janus* does nothing to suggest that states are not free to either permit member-only unions, allowing unions the freedom to refuse requests for representation from non-members, or, in the alternative, to charge non-members for union representation services provided to such non-members who require discrete individual representation, whether in individual (as opposed to group or unit-wide) grievances or statutory disciplinary procedures.[47]

Indeed, this last possibility finds support in *Janus* itself, in which the Court expressly stated that "[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether."[48] This finding of the Court appears to have originated in Justice Scalia's concurrence in *Lehnert*, in which he found that "[w]here the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the

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45. Transcript of Oral Argument, Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_i425.pdf.

46. *See Janus*, 138 S. Ct. at 2468-69 (noting that unions owe a duty of fair representation to all employees, members and non-members alike, and that unions may not intentionally discriminate against non-members based on their choice to not join the union).

47. *See* FLA. STAT. § 447.401 (2018) (a statutory exception which allows unions to refuse to process grievances of non-members); *Janus*, 138 S. Ct. at 2468-69 (stating that a union may require compensation from non-members should the union represent them, or that the union may deny to represent the non-member outright in a grievance).

48. *Janus*, 138 S. Ct. at 2468-69.

state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost."[49]

49. Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part).