No. 19-3413

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES M. SWEENEY ET AL.,

Plaintiff-Appellants

v.

KWAME RAOUL ET AL.,

Defendant-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 18-cv-1362
The Hon. Sharon Johnson Coleman

BRIEF OF AMICI CURIAE NATIONAL AND ILLINOIS LABOR ORGANIZATIONS SUPPORTING AFFIRMANCE IN FAVOR OF DEFENDANT-APPELLEES

Jason Walta
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth Street, N.W., 8th Floor
Washington, D.C.
(202) 822-7035
jwalta@nea.org

Stephen A. Yokich
DOWD, BLOCH, BENNETT,
CERVONE, AUERBACH & YOKICH
8 S. Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361
syokich@laboradvocates.com

Counsel for Amici Curiae American Federation of State, County, and Municipal Employees; American Federation of Teachers, National Education Association; Service Employees International Union; Illinois Education Association; Illinois Federation of Teachers; AFSCME Council 31; and SEIU Local 73

RULE 26.1 DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and Circuit Rule 26.1, the undersigned counsel for Amici Curiae provide the following information:

1. The full name of the Amici that the attorney represents in the case:

    a. National Education Association of the United States ("NEA")
    b. American Federation of Teachers ("AFT")
    c. American Federation of State, County, and Municipal Employees ("AFSCME")
    d. Service Employees International Union ("SEIU")
    e. Illinois Education Association ("IEA")
    f. Illinois Federation of Teachers
    g. American Federation of State, County, and Municipal Employees Council 31
    h. Service Employees International Union Local 73

2. The names of all law firms whose partners or associates have appeared for Amici in the case or are expected to appear for Amici Curiae in this court:

    Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich

3. If an amicus is a corporation, (i) identify all its parent corporations, if any; and (ii) list any publicly held company that owns 10% or more of the amicus' stock:

    a. NEA is a federally chartered non-profit corporation. It has no parent corporations, and no publicly held company owns 10% or more of NEA's stock.
    b. Illinois Education Association is a non-profit corporation. It is an affiliate of NEA but has no parent corporations, and no publicly held company owns 10% or more of its stock.
    c. No other amicus is a corporation, and no publicly held company owns 10% or more of any of their stock.

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STATEMENT OF AMICI CURIAE'S INTEREST AND AUTHORITY TO FILE

Amici Curiae American Federation of State, County, and Municipal Employees ("AFSCME"), American Federation of Teachers ("AFT"), National Education Association ("NEA"), and Service Employees International Union ("SEIU") are all national labor organizations that represent public employees throughout the country, including more than 320,000 in Illinois. Amici Illinois Education Association, Illinois Federation of Teachers, AFSCME Council 31, and SEIU Local 73 are all intermediate and local labor organizations that represent public employees in Illinois. Although the State Defendant-Appellees consent to the filing of this brief, Plaintiff-Appellants do not. Accordingly, Amici submit this brief along with a motion for leave to file with this Court's permission.[1] *See* Fed. R. App. P. 29(a)(3).

Amici are all committed to the fundamental principles that have animated American labor law for nearly a century: that employees have a right to choose a union to serve as their representative for collective-bargaining with an employer; that meaningful collective bargaining

[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person—other than the Amici, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

requires an employer to recognize and bargain with that union as the exclusive representative for all the employees in a bargaining unit in the workplace; and that the union's status as an exclusive representative carries with it an obligation to fulfill its duties fairly and without discrimination toward all the members of that bargaining unit in collective-bargaining matters.

As a result, Amici have a deep and abiding interest in the outcome of this case. In the District Court below, Plaintiffs invoked the Supreme Court's recent decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), in support of their challenge to the fundamental precepts of American labor law described above. If Plaintiffs' claims were to prevail on appeal, the result could undermine longstanding collective bargaining arrangements and even chip away at the validity of public-sector collective bargaining itself. The District Court's rejection of these claims—and rejection of Plaintiffs' strained and erroneous reading of *Janus*—should therefore be affirmed.

Amici believe that the 5-to-4 ruling in *Janus* was wrongly decided. Be that as it may, Amici accept it as the current law of the land. But their interests are seriously jeopardized by a spate of recent efforts to exploit and mischaracterize *Janus* for the purpose of undermining the settled principles of labor law that have governed private- and public- sector labor relations

for more than a half-century. Most of these efforts have been ideological in nature, undertaken by avowedly anti-union groups seeking to weaken Amici and other public-sector unions. *See infra* at 12–13. A few, like this case, have been brought by unions in an attempt to turn *Janus* around to their perceived advantage. Whatever the source or aim of these claims might be, they are all without merit and should be rejected.

ARGUMENT: THE DISTRICT COURT PROPERLY REJECTED PLAINTIFFS' CONSTITUTIONAL CHALLENGE TO THE DUTY OF FAIR REPRESENTATION UNDER THE IPLRA

Plaintiffs' lawsuit challenges the constitutionality of key provisions of the Illinois Public Labor Relations Act ("IPLRA"), 5 ILCS 315/1, *et seq*. The IPLRA and its companion statute, the Illinois Educational Labor Relations Act, ("IELRA"), 115 ILCS 5/1, *et. seq*., codify and enforce, for all public-sector employment in Illinois, what is known in labor-law terminology as the "duty of fair representation." In broad terms, this duty provides that when a union is selected as the exclusive collective-bargaining representative for all of the employees in a public-sector workplace, it must exercise that bargaining authority fairly and without arbitrary discrimination—including toward employees who decline to become card-carrying union members.

As we explain in greater detail below, this arrangement—the selection of an exclusive representative bound by a duty of fair

representation—is the foundation of American labor law in both the private and public sectors. It benefits employers, unions, and employees alike. And its constitutionality in the public sector has been explicitly recognized by the Supreme Court and repeatedly reaffirmed in the lower courts. The recent decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), does nothing to change this; indeed, the Court's opinion in *Janus* takes pains to emphasize (as detailed *infra* at 10–11, 18–20) that the principle of exclusive representation supported by a duty of fair representation remains firmly intact.

Nevertheless, relying almost entirely on their strained reading of *Janus*, Plaintiffs claim that the IPLRA's duty of fair representation violates the First Amendment. As explained below, the District Court correctly recognized that Plaintiffs' claims amount, in both practical and legal terms, to a challenge to the very fundamentals of public-sector collective bargaining itself—something that *Janus* and prior decisions firmly reject. Moreover, Plaintiffs' claims misapprehend the nature of the duty of fair representation under the IPLRA, as well as the controlling First Amendment principles under which that duty is plainly constitutional. Accordingly, Amici submit that this Court should affirm the District Court's rejection of Plaintiffs' claims.

A. The Principle of Exclusive Representation Supported by a Duty of Fair Representation is the Central Premise of American Labor Law in Both the Private and Public Sectors

The IPLRA provides that when a majority of employees in a bargaining unit chooses a labor union to represent them, only that union can negotiate terms and conditions with the employer, and the agreement that the union negotiates then runs to the benefit of all employees. *See* 5 ILCS 315/6(c); *see also Janus*, 138 S. Ct. at 2460. Because the union's designation as the exclusive representative prevents individual employees from negotiating directly with their employer or being represented by another entity for purposes of collective bargaining, the IPLRA requires the union to provide fair representation for all employees in the unit, members and nonmembers alike. *See Janus*, 138 S. Ct. at 2460; 5 ILCS 315/6(d). The IPLRA makes this duty of fair representation enforceable against a union by designating intentional violations of the duty to be an "unfair labor practice." 5 ILCS 315/10(b)(1)(i); *see also* 5 ILCS 315/10(b) (providing that those found to have committed an unfair labor practice may be ordered to "cease and desist from the unfair labor practice, and to take such affirmative action . . . as will effectuate the policies" of the IPLRA).[2]

[2] The IELRA contains similar provisions for the enforcement of a union's duty of fair representation. *See* 115 ILCS 5/14(b)(1), 15.

This principle of exclusive representation supported by an enforceable duty of fair representation is the "central premise" of American labor law, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009), applicable to both the public and private sectors, *see Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 65 (1975) (describing private-sector labor law's "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests"); *see also Branch v. Commonwealth Employment Relations Bd.*, 120 N.E.3d 1163, 1172 (Mass. 2019) (describing the same principle as the "basic building block of labor law policy" in the public sector), *cert. denied*, 140 S. Ct. 858 (2020). Its pervasiveness is explained, not only by the fact that "[c]ollective bargaining on any other basis faces considerable practical difficulties," Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 Duq. L. Rev. 779, 780 (1992), but also by the significant benefits it generates for employers, unions, and represented employees alike.

For employers, the arrangement allows the parties to "effectively and efficiently negotiate collective bargaining agreements and thus promote peaceful and productive labor-management relations." *Branch*, 120 N.E.3d at 1172. In particular, it frees the employer from facing multiple and potentially conflicting demands from different representatives or individual employees, and it allows the employer to reach a single

agreement that binds all the employees in the workplace. *See Emporium Capwell*, 420 U.S. at 67. Beyond simple administrative efficiency, this confers an "obvious benefit" on employers because a labor force secure in the belief that the employer is treating its members fairly and in accordance with a single collective-bargaining agreement "is likely to be more productive." *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 72 (6th Cir. 1997).

For a union, the arrangement gives it "a privileged place in negotiations over wages, benefits, and working conditions." *Janus*, 138 S. Ct. at 2467. That is, the union has "the exclusive right to speak for all the employees in collective bargaining" while "the employer is required by state law to . . . to bargain in good faith with only that union," *id.*, which in turn enhances the authority and power of the union to improve the working conditions of the represented employees, *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (explaining the enhanced bargaining power that comes from employees' "pooling their economic strength and acting through a labor organization freely chosen by the majority").

And for the represented employees, the arrangement provides them with all of the benefits of the union's bargaining power and protects them from "divide-and-conquer tactics by employers." *Branch*, 120 N.E.3d at 1178. Moreover, whether employees chose to join as members of the union

or not, they enjoy the protection of an enforceable duty requiring the union "'to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Paxton-Buckley-Loda Educ. Ass'n v. Ill. Educ. Labor Relations Bd.*, 710 N.E.2d 538, 543 (Ill. App. 1999) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

B. Exclusive Representation is Constitutionally Permissible in the Public Sector, and the Duty of Fair Representation is Part and Parcel of Ensuring Its Constitutionality

There can be no serious doubt about the constitutional validity of this fundamental principle of exclusive representation supported by a duty of fair representation. It was upheld in public-sector employment more than 35 years ago in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). *Janus* itself reaffirms its validity. And every other effort to challenge its constitutionality—both before and after *Janus*—has been correctly rebuffed by the lower courts.

In *Knight*, a group of non-union member employees brought a First Amendment challenge to a Minnesota law giving a duly elected union the exclusive power to "meet and confer" with a public-university employer. 465 U.S. at 273. The Court rejected the challenge, explaining that this commonplace exclusive-representation arrangement "in no way restrained [the nonmembers'] freedom to speak . . . [or] to associate or not to associate

with whom they please, including the exclusive representative." *Id.* at 288. Noting that the nonmembers were free to form advocacy groups and were not required to join the union, the Court reasoned that any "pressure to join the exclusive representative . . . [was] no different from the pressure to join a majority party that persons in the minority always feel . . . [and did] not create an unconstitutional inhibition on associational freedom." *Id.* at 289–90 (footnotes omitted).

After *Knight*, and in the period leading up to the Supreme Court's decision in *Janus*, lower courts, including this one, adhered consistently to *Knight*'s holding. In particular, they repeatedly rejected constitutional challenges brought by nonmembers claiming that exclusive representation violated their constitutional rights. *See Hill v. SEIU*, 850 F.3d 861, 864 (7th Cir.) ("[U]nder *Knight*, the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm . . . ."), *cert. denied*, 138 S. Ct. 446 (2017); *see also Jarvis v. Cuomo*, 660 F. App'x 72, 74–75 (2d Cir. 2016), *cert denied*, 137 S. Ct. 1204 (2017); *D'Agostino v. Baker*, 812 F.3d 240, 243–45 (1st Cir.) (Souter, J., by designation), *cert. denied*, 136 S. Ct. 2473 (2016).

The arrival of *Janus* did not change matters, as the Court's decision did not undermine *Knight* or otherwise cast doubt on the constitutionality of exclusive representation supported by the duty of fair representation. The issue before the *Janus* Court was limited to the constitutional validity

of arrangements requiring members of a bargaining unit who declined to become dues-paying union members to pay an "agency fee" proportionate to their share of the union's costs of collective bargaining and contract administration. Although the Court held that the First Amendment prohibits these agency-fee arrangements in public-sector employment, *see* 138 S.Ct. at 2486, it also made clear that its decision did not extend to exclusive representation:

> It is . . . not disputed that the State may require that a union serve as exclusive bargaining agent for its employees . . . . We simply draw the line at allowing the government to go further still and require all employees to support the union [financially] irrespective of whether they share its views.

Id. at 2478.

Moreover, in addressing a concern raised by a dissenting opinion that the ruling would require states that had authorized agency fees to undertake an "extensive legislative response," *id*. at 2499 (Kagan, J., dissenting), the *Janus* majority pointedly assured that states would be able to "keep their labor-relations systems *exactly as they are*—only they cannot force nonmembers to subsidize public-sector unions," *id.* at 2485 n.27 (emphasis added). The majority opinion also emphasized that it was "not in any way questioning the foundations of modern labor law," *id.* at 2471 n.7—and certainly no principle is closer to the foundations of modern labor law than exclusive representation supported by a duty of fair

representation, *see 14 Penn Plaza*, 556 U.S. at 270 (acknowledging that principle as the "central premise" of American labor law); *Emporium Capwell*, 420 U.S. at 65 (noting labor law's "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests").

Of particular relevance here, *Janus* also made clear that exclusive representation and the duty of fair representation are intertwined, such that the constitutionality of the former is ensured by the presence of the latter. As *Janus* explained:

> [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. . . . Protection of [the nonmembers'] interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. . . . [*S*]*erious constitutional questions [would] arise if the union were not subject to the duty to represent all employees fairly*.

138 S.Ct. at 2469 (emphases added); *see also Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198–99 (1944) (analogizing a union's duty of fair representation to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."); *D'Agostino*, 812 F.3d at 244 (explaining that "it is not the presence but the absence of [the duty of fair representation's] prohibition on discrimination that could well ground a constitutional objection.").

Thus, in the wake of *Janus*, lower courts have recognized that *Knight* remains fully intact. In particular, they have uniformly rejected a barrage of First Amendment lawsuits brought by non-union members challenging a union's status as exclusive representative in a public-sector workplace. *See Reisman v. Associated Faculties of Univ. of Maine*, 939 F.3d 409, 414 (1st Cir. 2019), *petition for cert. filed*, No. 19-847 (U.S. Jan. 6, 2020); *Branch*, 120 N.E.3d at 1174–75; *Mentele v. Inslee*, 916 F.3d 783, 789–90 (9th Cir.), *cert. denied*, 140 S. Ct. 114 (2019); *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019); *Uradnik v. Inter Faculty Org.*, No. 18-1895, 2018 WL 4654751, at *2 (D. Minn. Sept. 27, 2018), *summarily aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019); *Bennett v. AFSCME Council 31*, No. 19-CV-04087, 2020 WL 1549603, at *5–6 (C.D. Ill. Mar. 31, 2020), *appeal docketed*, No. 20-1621 (7th Cir. Apr. 15, 2020); *Ocol v. Chi. Teachers Union*, No. 18-CV-8038, 2020 WL 1467404, at *2 (N.D. Ill. Mar. 26, 2020), *appeal docketed*, No. 20-1668 (7th Cir. Apr. 23, 2020); *Hendrickson v. AFSCME Council 18*, No. 18-cv-1119, 2020 WL 365041, at *9–10 (D.N.M. Jan. 22, 2020), *appeal docketed*, No. 20-2018 (10th Cir. Feb. 21, 2020); *Thompson v. Marietta Educ. Ass'n*, No. 2:18-CV-628, 2019 WL 6336825, at *8 (S.D. Ohio Nov. 26, 2019), *appeal docketed*, No. 19-4217 (6th Cir. Dec. 13, 2019); *Oliver v. SEIU Local 668*, 418 F. Supp. 3d 93, 99 (E.D. Pa. 2019), *appeal docketed*, No. 19-3876 (3d Cir. Dec. 17, 2019); *Grossman v. Hawaii Gov't Employees Ass'n*,

382 F. Supp. 3d 1088, 1090–91 (D. Haw. 2019), *appeal docketed*, No. 20-15356 (9th Cir. Mar. 3, 2020); *Babb v. Cal. Teachers Ass'n*, 378 F. Supp. 3d 857, 888 (C.D. Cal. 2019), *appeal docketed*, No. 20-55338 (9th Cir. Mar. 30, 2020); *Akers v. Md. State Educ. Ass'n*, 376 F. Supp. 3d 563, 573 (D. Md. 2019), *appeal docketed*, No. 19-1524 (4th Cir. May 16, 2019); *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996, 1009–10 (D. Alaska 2019), *appeal docketed*, No. 19-3529 (9th Cir. Apr. 12, 2019).

The caselaw from *Knight*, through *Janus*, and into today paints a long and unbroken line of precedent that confirms both the importance and constitutional validity of exclusive representation supported by a duty of fair representation. Employers, unions, and employees alike have ordered their affairs around this bedrock principle of labor relations in the public-sector. And various attempts to upset it have been uniformly rejected.

C. Plaintiffs' Challenge to the Constitutionality of the Duty of Fair Representation Threatens the Basic Principle of Exclusive Representation

Notwithstanding the wall of clear precedent discussed above, Plaintiffs have challenged the constitutionality of the provisions of the IPLRA that codify and enforce the duty of fair representation for public-sector employment in Illinois. In granting judgment to the State on these claims, the District Court correctly recognized that Plaintiffs' challenge is both practically and legally inseparable from a challenge to the system of

exclusive representation itself. After all, a union's duty of fair representation is "a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative," *Janus*, 138 S. Ct. at 2469, and the "absence" of such a duty would expose exclusive representation to a "constitutional objection," *D'Agostino*, 812 F.3d at 244; *see also Branch*, 120 N.E.3d at 1175 (describing the duty of fair representation and exclusive representation as "inextricably coupled"). The District Court was therefore correct in concluding that Plaintiffs' claims must fail because the Supreme Court has affirmed the constitutionality of exclusive representation supported by a duty of fair representation, *see Knight*, 465 U.S. 288–90, and because nothing in *Janus* disturbs that precedent, *see supra* at 10–11.

On appeal, Plaintiffs complain that the District Court misunderstood the scope of their claims. *See*, *e.g.*, Appellants' Opening Br. at 23–24. They say that, far from launching a broad attack on the fundamental precepts of labor law contained in the IPLRA, their First Amendment claims are merely an as-applied challenge to the duty of fair representation insofar as it prevents them from charging non-members for handling grievances.[3] *See*

[3] Plaintiffs also devote a sizeable portion of their brief to the argument that the duty of fair representation under the IPLRA does *not*, in fact, prohibit them from charging nonmembers for representation in disciplinary grievances. *See* Opening Br. at 17–23. It is doubtful that this (*continued . . .*)

id. at 24. The record, however, does not support Plaintiffs' belated attempt to recast their lawsuit in more modest terms.

Plaintiffs explicitly sought to have the District Court invalidate the IPLRA's duty-of-fair-representation provisions in their entirety, including as they apply to bargaining and contract administration. Indeed, the primary form of relief Plaintiffs prayed for in their complaint is a judgment declaring that these provisions "violate[] the First and Fourteenth Amendments to the U.S. Constitution *facially* by restricting Plaintiffs' association rights." Third Am. Compl., ECF No. 56 at 8 (emphasis added); *see also id*. at 9 (also requesting a declaration that the IPLRA's duty-of-fair-representation provisions "violate[] the First and Fourteenth Amendments to the U.S. Constitution both *facially* and as-applied by restricting Plaintiffs' free speech rights") (emphasis added). Facial challenges of this nature are

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Court can rule on such an argument given the current posture of this case. If the Plaintiffs are merely asking this Court to articulate a different ground for the judgment against them—*i.e.*, that the challenged statute is consistent with the First Amendment, not for the reasons given by the District Court, but because the statute already allows Plaintiffs to charge the fees they seek—this Court reviews "judgments, not opinions." *Rubel v. Pfizer Inc.*, 361 F.3d 1016, 1020 (7th Cir. 2004). To the extent Plaintiffs are asking this Court to make a binding declaration on the meaning of Illinois law, not only have they waived such a claim by failing to plead it in their complaint or argue it below, *see Russ v. United States*, 62 F.3d 201, 204 (7th Cir. 1995), but declaratory relief of this nature would be unavailable anyway because it is barred by the Eleventh Amendment, *see Benning v. Bd. of Regents of Regency Univ.*, 928 F.2d 775, 778 (7th Cir. 1991).

reserved for cases where there is "no set of circumstances" in which the challenged law can be lawfully applied, and for which the only appropriate remedy is the law's wholesale invalidation. *Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011) (citations and quotation marks omitted). To support their broad facial challenge, Plaintiffs argued at summary judgment that both "*collective bargaining and contract administration* are protected by the First Amendment" and that, "[t]o the extent Illinois law compels [Plaintiffs] and its members to represent nonmembers" in these activities, "the statutory duty of fair representation is unconstitutional." Pltfs' Summ. Judg. Br., ECF No. 71 at 8 (emphasis added). The District Court was therefore entirely correct about the far-reaching nature of Plaintiffs' claims.

But even if this Court accepts Plaintiffs' revisionist attempt to narrow their claims, the judgment below must still be affirmed. There is no logical or practical principle that would allow a court to invalidate the duty of fair representation on First Amendment grounds only as to nonmember grievances while still preserving it as to bargaining and other aspects of contract administration.[4] After all, under Plaintiffs' own theory, both an

[4] To be sure, a state could remove individual employee discipline from the bargaining process entirely and instead resolve those matters through other means, such as a statutory civil-service system. In that case, neither the union's exclusive-representative status nor its duty of fair representation would be implicated in such matters. But that is not the approach the legislature took in enacting the IPLRA, which requires an

(*continued . . .*)

exclusive representative's speech in support of a grievance and its speech in support of bargaining demands implicate matters of public concern. *See id.*; *see also Janus*, 138 S. Ct. at 2474–77. And Plaintiffs do not—indeed, cannot—offer a coherent account for why the First Amendment would invalidate the duty of fair representation as to one but not the other. The most that they are able to say is that, if the duty of fair representation under the IPLRA were invalidated, they still "fully intend[]" to "negotiat[e] contracts for its public sector units which apply equally to everyone." Appellants' Opening Br. at 17. But empty assurances do nothing to cabin or limit the practical reach of their challenge to the duty of fair representation.

At any rate, the distinction Plaintiffs attempt to draw between grievance handling and the negotiation of contracts is itself often illusory. A grievance "is not a procedure independent of collective bargaining, but rather is a component and extension of the collective bargaining process." *Bd. of Educ. of City of Chi. v. Ill. Educ. Labor Relations Bd.*, 14 N.E.3d 1092, 1098 (Ill. App. 2014) (citations and quotations omitted), *aff'd*, 69 N.E.3d 809 (Ill. 2015). As the Supreme Court has explained, the "processing of disputes through the grievance machinery is actually a vehicle by which meaning

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employer to bargain over the issue of employee discipline and discharge, and mandates a grievance procedure and arbitration for resolving contractual disputes unless otherwise mutually agreed to by the parties. *See* 5 ILCS 315/7–8.

and content are given to the collective bargaining agreement." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960); *see also Janus*, 138 S.Ct. at 2468 ("Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others.").

Plaintiffs' claims must therefore be understood for what they are: a broadside challenge to the duty of fair representation that is itself a "necessary concomitant" of the principle of exclusive representative that underlies, not only the IPLRA's statutory scheme, but all of American labor law. *Janus*, 138 S. Ct. at 2469.

D. The IPLRA's Duty of Fair Representation Is Valid Under the First Amendment, Both Facially and as Applied to Grievances on Behalf of Nonmembers

The District Court was entirely correct in rejecting Plaintiffs' challenge to IPLRA's provisions codifying the traditional duty of fair representation. These provisions are consistent with the First Amendment, both facially and as applied to grievances on behalf of nonmembers.

1. *Janus* itself resolves this case in the State's favor

Plaintiffs rely on *Janus* as virtually the only source of support for their First Amendment challenge to the duty of fair representation. But far from

supporting their claims, *Janus* plainly resolves the case against them. Two aspects of the decision in *Janus* are especially salient here.

First, *Janus* confirmed the importance of exclusive representation and emphasized that the duty of fair representation is not a constitutional *problem*, but rather a *necessary feature* in a system of exclusive representation. In particular, the *Janus* Court did not question that "the State may require that a union serve as exclusive bargaining agent for its employees," but merely "dr[e]w the line at allowing the government to go further still and require all employees to support the union [financially] irrespective of whether they share its views." *Id.* at 2478. Moreover, the Court pointedly explained that the union's duty of fair representation is "a necessary concomitant" of its status as exclusive representative and that "serious constitutional questions" would arise if such a duty did not exist. *Id.* at 2469 (citations and quotation marks omitted).

Second, the *Janus* Court made clear that its decision would not undermine fundamental aspects of public-sector labor relations or require states to make extensive changes to their laws. The Court was clearly aware of the existence of exclusive representation and the duty of fair representation, having discussed them both at length throughout the opinion. But the Court emphasized that it was "not in any way questioning the foundations of modern labor law." *Id.* at 2471 n.7. The Court also

assured states that, apart from retaining agency-fee requirements, they "can keep their labor-relations systems exactly as they are." *Id.* at 2485 n.27. Yet, if Plaintiffs' claims were to succeed, fundamental aspects of public-sector labor law—the duty of fair representation and, by extension, exclusive representation—would be called into question in Illinois and virtually every other state.

The duty of fair representation plays an indispensable role in the system of exclusive representation that, under *Knight* and its progeny, has been upheld as constitutionally valid in case after case. At the end of the day, Plaintiffs' lawsuit is little more than the mirror-image of those failed challenges. Their arguments rely on exactly the kind of misreading of *Janus* that characterizes all of the unsuccessful efforts by nonmembers challenging the constitutionality of the most basic principles of American labor law.[5] *See*, *e.g.*, *Bierman*, 900 F.3d at 574 (explaining that the holding of *Janus* is limited to agency-fee arrangements and "do[es] not supersede *Knight*"). Far from supporting Plaintiffs' claims here, *Janus* makes clear that the judgment against them should be affirmed.

[5] The challengers in at least one of these lawsuits has taken note that Plaintiffs' reading of *Janus* is virtually identical to their own. *See* Appellant's Br., *Hendrickson v. AFSCME Council 18*, No. 20-2018, 2020 WL 1983613, at *45–46 (10th Cir. Apr. 24, 2020) (citing Plaintiffs' position in this litigation to show that "Unions in other states agree with" a reading of *Janus* that would render exclusive representation unconstitutional).

2. The duty of fair representation does not unconstitutionally burden Plaintiffs' constitutional right of speech and association

Plaintiffs' claims were also properly rejected because the duty of fair representation under the IPLRA does not violate the First Amendment, either facially or as applied to processing grievances on behalf of nonmembers. On the contrary, the duty finds sound support in general First Amendment principles.

First, the duty of fair representation does not "compel" speech or association in the relevant sense. "No union is ever compelled to seek [the] designation" of exclusive representative. *Janus*, 138 S. Ct. 2467. Instead, when the union voluntarily assumes this privileged status, it accepts certain obligations that facilitate its fulfillment of that role. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 51 (1983) (explaining that a union that becomes an exclusive representative takes on "official responsibility in connection" with the workplace).

One of those is the obligation under the duty of fair representation to refrain from discrimination against nonmembers. *See Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014) ("The reason the Union must represent all employees is that the Union alone gets a seat at the negotiation table."). Another such obligation is the basic duty to bargain with the employer in good faith—both by agreeing to negotiate over working conditions that are considered mandatory subjects of bargaining and by refraining from

insisting on bargaining over non-mandatory subjects to the point of impasse. *See* 5 ILCS 315/7; *Teamsters Local 700 v. Ill. Labor Relations Bd.*, 73 N.E.3d 108, 121–22 (Ill. App. 2017). Another is the requirement that unions must include a binding grievance and arbitration procedure in any agreement they enter with an employer unless otherwise agreed, and foreswear strikes during the term of that agreement over issues covered by that grievance and arbitration procedure. *See* 5 ILCS 315/8. And, for unions representing bargaining units of security personnel, peace officers and firefighter, yet another is the duty to participate in mediation or even arbitration to facilitate the negotiation of an agreement. *See* 5 ILCS 315/14.

All of the duties described above are ones a union adopts in order to participate as the sole representative of a group of employees in the formalized system of collective bargaining with a government employer. From a constitutional perspective, they are no different than the kinds of speech-related conditions that are generally permissible if "confined within the scope" of a voluntary government program. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013).

Notwithstanding the fact that a union must accept certain duties as a condition of attaining exclusive-representative status, those duties—and, especially, the duty of fair representation—do not impose substantial restrictions on a union's core rights of expression and association. The duty

of fair representation does not require a union to take a contract grievance the union believes is legally or factually unsound, to espouse a position on a matter of public concern the union does not believe in, or to accept anyone into its membership ranks.

The duty may, on occasion, require a union to assist an individual whom it might otherwise prefer not to assist. But in that regard, the obligation is not meaningfully different, from a constitutional perspective, than the many other kinds of obligations that are imposed by statutory or common law under the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele*, 323 U.S. at 202. These include the duties that trustees owe to fiduciaries, the duties that attorneys owe to clients, and the duties that corporate directors owe to shareholders. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74–75 (1991) (likening a union's duty of fair representation to each of these relationships).

Accepting Plaintiffs' arguments that speech and association are unconstitutionally "compelled" in this context would needlessly call into question the validity of, not only other bedrock aspects of public-sector labor law (such as the duty to bargain in good faith), but also the duties owed under a host of fiduciary-type relationships that are integral to the

ordering of society as a whole. Nothing, either in *Janus* or First Amendment doctrine generally, calls for such a far-reaching result.

Second, Plaintiffs mischaracterize the degree to which grievance processing involves compelled representation of a nonmember. The duty of fair representation does not require the union to act at the direction or control of a nonmember who wishes to pursue a grievance. On the contrary, the union retains control over the substance and disposition of the grievance, subject only to the basic obligation to act without "hostility or discrimination toward any," including toward those who choose not to become union members. *Vaca*, 386 U.S. at 177. That is, a union need "not undertake [grievance] activity solely for the benefit of nonmembers." *Janus*, 138 S. Ct. at 2468. Instead, the representation of nonmembers in a grievance "furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others." *Id*. And, in resolving such a grievance, the union "may, as a practical matter, effectively subordinate the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Id*.

Understood in context, then, the IPLRA's duty of fair representation does not designate the Plaintiffs as nonmembers' representative, as they contend. Rather, these provisions merely make clear that "a union, once it

becomes the exclusive bargaining agent for a bargaining unit, must represent the *unit* of employees as an entity, and not only certain of the employees within it." *Reisman*, 939 F.3d at 413; *see also* 5 ILCS 315/6(d) (the union is "responsible for representing the interests of all public employees in the unit").

Third, the duty of fair representation does not infringe on a union's core associational functions of determining its own membership criteria, formulating its own polices (including bargaining priorities), and selecting its own leadership. A union may "select union officers and bargaining representatives" without input of nonmembers because "[n]on-union employees have no voice in the affairs of the union." *NLRB v. Fin. Inst. Employees*, 475 U.S. 192, 205 (1986). Such "internal union decisions" are "not circumscribed by the constraints" of the duty of fair representation. *Bass v. Int'l Bhd. of Boilermakers*, 630 F.2d 1058, 1063 (5th Cir. 1980); *see also* 5 ILCS 315/10(b)(1)(i) (providing that the duty of fair representation does not impair a union's right to "prescribe its own rules with respect to the acquisition or retention of membership"). Although an exclusive representative cannot discriminate against nonmembers in the provision of services to the bargaining unit, it also remains free to advocate and encourage membership in the organization and to criticize nonmembers who free-ride on resources contributed by dues-paying members.

Neither *Janus* nor general principles of First Amendment law support Plaintiffs' appeal. On the contrary, *Janus* confirms the central role the duty of fair representation plays in ensuring the constitutionality of exclusive representation. That duty is also consistent with broad principles of First Amendment doctrine. Any conclusion to the contrary would jeopardize—not only fundamental aspects of labor relations in the public sector—but a broad array of duties that are well recognized under the law.

E. *Janus* Only Permits—but Does not Require—Policies Allowing a Union to Charge for Grievance Representation of Nonmembers

As a final matter, to support their challenge to the duty of fair representation, Plaintiffs place great weight on *dicta* found in *Janus* suggesting that the "free rider" problem created by striking down agency-fee arrangements could be ameliorated in the context of disciplinary grievance processing if "[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether." 138 S. Ct. at 2468–69. But the Court's language and reasoning that accompany this *dicta* merely *permit*, but by no means *require*, such an arrangement. A state therefore does not violate the First Amendment by failing to provide unions with a fee-for-service option to charge nonmembers.

After all, when the Court raised the possibility of allowing unions to require fees from nonmembers for disciplinary grievances, it was only to rebut the assertion made by the state and union defendants in the case that

the additional expense to a union of bringing such grievances justified the imposition of agency fees. *See id*. at 2468. The Court explained that "whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated through means significantly less restrictive of associational freedoms than the imposition of agency fees." *Id.* (citations and quotation marks omitted). By pointing out that unions could be permitted to charge nonmembers for disciplinary grievances, the Court certainly did not suggest that such a measure was necessary to minimize an infringement of the *union's* rights—indeed, earlier in the opinion the Court declared that the benefits a union receives for voluntarily accepting the status of exclusive representative already "greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers." *Id*. at 2467. On the contrary, the Court presented the possibility of allowing such charges as a "more tailored alternative" to agency fees that would "prevent free ridership while imposing a lesser burden on First Amendment rights" of a *nonmember*. *Id*. at 2469 n.6.

In other words, a policy of charging nonmembers for disciplinary grievances is one that the First Amendment *permits* states to tolerate but it is not one that the First Amendment *compels* them to provide. Whether or not to adopt such a policy should therefore be a matter for legislatures and

public-sector labor boards—not the courts. *See generally Sampson v. Murray*, 415 U.S. 61, 83 (1974) (explaining the "well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs") (citation and quotation marks omitted).

Many unions, including Amici, oppose these kinds of fee-for-service arrangements on sound policy grounds. They believe that any efforts to prune back their duty of fair representation runs an unwelcome risk of diminishing or undermining their power and authority as the exclusive representative. They also believe that fee-for-service arrangements promote a detached, transactional view of the relationship between a union and the employees it represents, rather than the sense of solidarity and engagement within the workplace that is ultimately the most significant source of union's power.

To that end, Amici AFSCME, AFT, NEA and SEIU have issued a joint declaration opposing policies that would undermine exclusive representation and the duty of fair representation. *See* AFSCME et al., *Public Policy Priorities for Partner Unions* (2018) (reproduced in the Addendum to this brief at 1–3). Specifically, these four national unions, which are the largest public-sector unions in the country, oppose limiting an exclusive representative's duty to represent nonmembers in grievance

or arbitration procedures, creating fee-for-service arrangements for nonmembers, or otherwise limiting a union's duty of fair representation in administering a collective bargaining agreement. *Id.* As these unions have recognized, such proposals may seem appealing because "the idea of union members devoting significant resources to representing non-members seems unfair. However, initiatives that disrupt our legal obligation to fairly represent non-members inevitably erode our rights as exclusive representatives, in turn weakening our power at the bargaining table." *Id.*[6]

"By leaving nonmembers to process their own grievances, a union may . . . limit its ability to protect workers' collective interests." *See* Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 Cal. L. Rev. 1821, 1843 (2019). Charging nonmembers for grievance representation also undermines the union's role as exclusive representative because the duty to represent both members and nonmembers is tied to exclusive

[6] Several of the Amici have also enacted resolutions to oppose modifications to the duty of fair representation and other policies that undermine exclusive representation. *See* AFSCME Resolution No. 58 (2018) ("[R]efusing to represent non-members and/or charging non-members fees for services can undermine our exclusive representative status . . . AFSCME and its affiliates will oppose efforts that undermine the union's status as a democratic, member-run exclusive representative of bargaining units.") (reproduced in the Addendum to this brief at 4–5); NEA Resolution F-4 (amended July 2020) (NEA "unequivocally opposes attempts to dismantle or weaken the democratic exclusive representation of employees.") (reproduced in the Addendum to this brief at 7).

representation. "The basic concept of exclusive representation is expressed in the old union adage that 'an injury to one is an injury to all.' A grievance asserting one employee's right to fair treatment asserts the right to fair treatment for all employees." *Id.* at 1844. By contrast, "members-only grievance representation is inconsistent with the underlying values of exclusive representation." *Id.*

At bottom, Plaintiffs are asking this Court to make policy, not interpret the law. State legislatures and labor boards undoubtedly have some leeway to define the contours of the duty of fair representation—including to allow unions to charge fees to nonmembers for grievance processing—but the First Amendment does not require the result that Plaintiffs seek here. The District Court was correct to reject their claims.

CONCLUSION

For the reasons stated above, the Amici respectfully request that this Court affirm the judgment of the District Court.

Respectfully submitted,

/s/ Stephen A. Yokich
Stephen A. Yokich
DOWD, BLOCH, BENNETT,
CERVONE, AUERBACH & YOKICH
8 S. Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361
syokich@laboradvocates.com

Jason Walta
NATIONAL EDUCATION ASSOCIATION
1201 Sixteenth Street, N.W., 8th Floor
Washington, D.C.
(202) 822-7035
jwalta@nea.org

Counsel for Amici Curiae AFSCME, AFT, NEA, SEIU, Illinois Education Association, Illinois Federation of Teachers, AFSCME Council 31, and SEIU Local 73

July 1, 2020

CERTIFICATE OF COMPLIANCE

I, Stephen A. Yokich, counsel for Amici Curiae, certify pursuant to Federal Rule of Appellate Procedure 29(d) that the attached party brief is proportionally spaced, has a type face of 14 points or more, and contains 6,982 words.

/s/ Stephen A. Yokich
Stephen A. Yokich
DOWD, BLOCH, BENNETT,
CERVONE, AUERBACH & YOKICH
8 S. Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361
syokich@laboradvocates.com

Date: July 1, 2020

CERTIFICATE OF SERVICE

I certify that on July 1, 2020 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Stephen A. Yokich
Stephen A. Yokich
DOWD, BLOCH, BENNETT,
CERVONE, AUERBACH & YOKICH
8 S. Michigan Avenue, 19th Floor
Chicago, Illinois 60603

ADDENDUM TO THE BRIEF OF AMICI CURIAE NATIONAL AND ILLINOIS LABOR ORGANIZATIONS

ADDENDUM CONTENTS

Public Policy Priorities for Partner Unions

AFSCME, AFT, NEA and SEIU – collectively representing over 6 million working people who provide vital public services to American communities – have partnered to ensure that *Janus* and other right-wing attacks will not undermine the strength and voice of our members. Each union has developed strategies for its key industries and geographies. Wherever possible, we commit to coordinate and drive forward on our shared public policy priorities, and to avoid initiatives that would not advance our goals. We commit to advancing laws, regulations and executive actions that:

1.) **Provide early opportunities to sign up members**:
- Mandatory access to new employee orientations ("NEOs") for exclusive representative
- Notice of all NEOs
- Negotiation on NEOs

2.) **Guarantee good data on our membership**:
- Require delivery of new hire and bargaining unit lists to exclusive representative
- Protect public employee data from disclosure to other third parties

California AB 119 is a model for statewide legislation on NEOs and lists.

3.) **Backstop bargaining priorities on 21st Century union security:**
- Bolster employer obligation to enforce maintenance of dues check-off
- Ensure payroll deduction of dues, recognition of electronic signatures
- Protect against card audits, other administrative burdens on dues deduction

4.) **Enhance Opportunities for member engagement:**
- Enable member recruitment beyond NEOs - at employer trainings, in-services, etc.
- Deepen engagement through access to facilities and to employer email, websites, payroll system; protect union leave provisions
- Create public employer neutrality policies, including prohibition of supervisor and manager statements and actions discouraging union membership

COUNTER-PRODUCTIVE POLICY INITIATIVES

Our four unions are strongly opposed to state and local policy proposals that:
- Abandon or weaken the duty of fair representation attached to exclusive representation;
- Weaken the concept of exclusive representation in the workplace.

Now more than ever, we aspire to speak on behalf of all represented workers, and to build strong, inclusive organizations. Taking up proposals pushed by our opponents – including ALEC – would undermine our strength in exchange for unproven gains.

PRIORITY POLICY MAKERS

1) **Governors**: as policy makers, executives, employers
2) **Legislators**: to strengthen and address gaps in labor laws
3) **State Attorneys General and City/County Attorneys**: to interpret laws, bridge gaps, engage in litigation
4) **Comptrollers, Treasurers**: Payroll priorities, including dues deduction and card audits
5) **City, county and school system executives, boards**: as policy makers and administrators.

Countering Initiatives to Undermine the Duty of Fair Representation

To maintain and build our power in the workplace, our unions must remain organizations that unite and speak for all workers in a bargaining unit. To that end, our four unions have joined in opposition to state and local policy proposals that abandon or weaken the duty of fair representation, or in any other way undermine the bedrock principle of exclusive representation in the workplace. In meeting attacks on our members and our unions, including the *Janus v. AFSCME Council 31* challenge to fair-share fees pending in the Supreme Court, we stand together against proposals that would threaten our strength in exchange for unproven benefits.

Proposals to weaken or eliminate the duty of fair representation hold appeal because the idea of union members devoting significant resources to representing non-members seems unfair. However, initiatives that disrupt our legal obligation to fairly represent non-members inevitably erode our rights as exclusive representatives, in turn weakening our power at the bargaining table. Not coincidentally, proposals of this kind have been enthusiastically advocated by anti-union zealots, including ALEC, the NRTWF, and others.

Specifically, our four unions oppose policy proposals that modify existing laws regarding the duty of fair representation (DFR). Examples include, but may not be limited to:

- Creating "members only" contracts or bargaining units;
- Authorizing representation of bargaining unit employees by attorneys or other representatives not appointed by the union;
- Creating fee for service arrangements for non-members; and/or
- Limiting an exclusive representative union's duty to represent non-members in grievance and/or arbitration procedures or otherwise limiting the DFR in the administration of a Collective Bargaining Agreement.

We encourage you to contact our International unions with any questions, and to get additional resources on this important issue.

Guidance on Bargaining Priorities for Partner Unions

Every day, members of AFT, NEA, AFSCME, and SEIU provide quality public services to our communities. Their work is supported by collective bargaining agreements that ensure good jobs and strong unions. As we look ahead to the *Janus* case in the Supreme Court – a case intended to undermine our freedom to negotiate strong agreements – we must prioritize contract provisions that build and keep member voice and power.

As the leading unions in the public sector, we are uniting to establish bargaining standards that raise up the voices and influence of our members in their vital work. Each of our unions has developed very similar comprehensive guidance and sample contract language to guide bargaining teams. Further, at the national level, our four organizations have agreed to prioritize union-building contract provisions that promote member sign-up, unit stability, and member communications and participation.

Specifically, we urge bargaining teams to seek contract language ensuring:

1. **Union member engagement at new employee orientations**
    a. Union presentation and member sign-up at new employee orientations
    b. Immediate notification of new hires, and of scheduled orientations
    c. Right to distribute union materials, new hire packets

2. **Continued union access to members and represented workers**
    a. Union presentation and member sign-up opportunities at trainings, in-services
    b. Broad union access to facilities, and to employer email, websites, payroll systems
    c. Procedures for union release time and union leave banks

3. **Regular receipt of member and bargaining unit lists**
    a. Frequent receipt of electronic data listing members, unit employees, retirees
    b. Access to employee data restricted to exclusive representative
    c. Pre-disclosure notice of third-party requests for employee data

4. **Employer agreement to honor 21st-century union security practices**
    a. Recognition of electronic authorizations for dues and PAC deductions
    b. Employer agreement to enforce of maintenance of dues checkoff agreements
    c. Commitment to payroll deduction of dues, and to facilitate direct pay systems if needed

To access your union's comprehensive resources on bargaining language:

- AFSCME: afscmestaff.org
- AFT: http://me.rtp.aft.org/managing-data-and-alternative-dues/alternative-dues-resources
- NEA: http://www.neacollectivebargaining.org/
- SEIU: teach.seiu.org

43rd International Convention - Boston, MA (2018)

Preserving Exclusive Representation

RESOLUTION NO. 58
43RD INTERNATIONAL CONVENTION
BOSTON CONVENTION & EXHIBITION CENTER
JULY 16 - 20, 2018
BOSTON, MA

WHEREAS:

The U.S. Supreme Court dealt all workers and the public sector labor movement a serious blow in its decision in Janus vs. AFSCME Council 31; and

WHEREAS:

AFSCME has been preparing for an adverse ruling in Janus for many years and strengthened our union by reconnecting with our members, engaging in organizing campaigns, developing systems to recruit and maintain membership, and enlisting the support of political leaders and allies; and

WHEREAS:

Exclusive representation means the duly chosen union is the sole voice for all workers and source of worker power. It is the basis on which our union is organized and the way we bargain for meaningful change. Through the process of collective bargaining and exclusive representation, AFSCME members earn fair wages, safe and reasonable working conditions, job security, health benefits that cover us when we are sick, and retirement benefits that provide us with dignity as we age; and

WHEREAS:

Anti-union groups are seeking to seize on Janus by launching well-funded campaigns to persuade our members to quit their union. These groups seek to silence the voice of workers as they pursue their ultimate goal: the elimination of exclusive representation in the public sector; and

WHEREAS:

The Supreme Court has ruled over many decades, including most recently in Janus, that the right of exclusive representation comes with the obligation to represent all members covered by our contracts fairly and without discrimination. This obligation is known as the duty of fair representation; and

Anti-union advocates deceptively claim that unions should not be required to represent non-members but their motivation is not to be fair to dues paying union members. Their real intention is to erode the power of workers and undermine exclusive representation; and

WHEREAS:

Dividing the workforce into "us" versus "them," even on the vital question of union membership, will inevitably erode our strength and undermine our legitimacy as the EXCLUSIVE representative. AFSCME supports the duty of fair representation, which is important for worker solidarity, maintaining our power, and achieving our collective aspirations for ourselves and our communities. Accordingly, refusing to represent non-members and/or charging non-members fees for services can undermine our exclusive representative status and the power we need to realize our aspirations; and

WHEREAS:

The notorious anti-union group, the American Legislative Exchange Council (ALEC), has drafted a model bill to abolish the duty of fair representation and exclusive representation, and with Janus decision author Justice Alito's encouragement, union-busting lawyers have filed lawsuits seeking to achieve these ends; and

WHEREAS:

Although our union could not control the outcome of Janus, we can control our response to it.

THEREFORE BE IT RESOLVED:

That AFSCME and its affiliates will continue to support exclusive representation and the duty of fair representation. AFSCME and its affiliates will oppose efforts that undermine the union's status as a democratic, member-run exclusive representative of bargaining units; and

BE IT FURTHER RESOLVED:

That AFSCME and its affiliates shall not support or promote legislation, policies or changes to collective bargaining agreements which would allow members-only collective bargaining agreements or otherwise support the elimination of exclusive representation, nor shall AFSCME and its affiliates allow an employer to pay a union for the costs of representation, including direct subsidies to the union as a substitute for dues or fair-share fees; and

BE IT FINALLY RESOLVED:

That AFSCME and its affiliates shall provide information and education to members, allies and political leaders on the vital importance of maintaining exclusive representation and objecting to direct payments by employers to the union, and the union shall prioritize educating our membership on these issues.

SUBMITTED BY:
International Executive Board

NATIONAL EDUCATION ASSOCIATION

REPORT OF THE
2018–2019 NEA RESOLUTIONS COMMITTEE

NEA Representative Assembly

July 4–7, 2019

C-38. School Facilities: Design, Construction, and Function

The National Education Association believes that school facilities must be conducive to teaching and learning. The physical environment must allow for a variety of needs, including the number of students, physical characteristics of students, changes in teaching methods, **[**presentation of instruction**]** ***specialized resources for teaching and learning***, and an increased use of school facilities. The Association also believes that all school facilities must be well constructed, safe, energy-efficient, aesthetically pleasing, accessible, functional, **[**and**]** adaptable to persons with disabilities***, and adequately sized for instructional needs***.

The Association further believes that the community, parents/guardians, and education employees must be involved through site-based, shared decision making in designing these facilities. Construction designs should incorporate original art.

The Association believes that stable and sufficient funding must be provided for the design, construction, adequate and ongoing maintenance, and operation of the school facility. (1992, 2009)

New C. Opioid Addiction and Abuse

The National Education Association believes that local, state, and national governments should develop, establish, and implement policies to protect students and communities from opioid addiction and abuse. These policies should include voluntary training for educators to recognize and support individuals affected and, in emergency situations, administer opioid antagonist medications (such as Narcan) with civil and criminal immunity. (2019)

D-18. Professional Development in Behavior Management, Discipline, Order, and Safety

The National Education Association believes that behavior management, discipline, order, and safety in schools and school districts are essential to ensure student success. The Association also believes that all education employees must be provided professional development in ***trauma-informed practices,*** behavior management, ***progressive*** discipline, **[**conflict resolution**]** ***restorative practices***, safety plans and emergency procedures, emergency lifesaving techniques, and crisis management. (1994, 2000)

D-19. Neurological Disorder [Awareness] *Education*

The National Education Association believes in **[**the establishment of**]** ***establishing*** programs that **[**will increase education employee awareness of**]** ***foster educator understanding in response to*** neurological disorders and symptoms **[**that affect**]** ***affecting*** student learning. Qualified health professionals should be cooperatively involved in these programs. (1987, 1999)

F-4. Collective Bargaining Rights

The National Education Association believes that the attainment and exercise of collective bargaining rights are essential to the promotion of education employee and student needs in society. The Association demands that these rights be advocated where they are now abridged or denied and strengthened where they are now secured.

The Association also believes that the democratic selection of a collective bargaining representative to speak with one voice, representing all employees in the bargaining unit, is the foundation of effective collective bargaining. Democratic exclusive representation amplifies the voice of employees, promotes solidarity, and provides employees with the strongest footing for securing redress of their common concerns. Therefore, the Association unequivocally opposes attempts to dismantle or weaken the democratic exclusive representation of employees. (1980, 1993)

F-6. Strikes

The National Education Association denounces the practice of keeping schools open during a strike.

The Association believes that when a picket line is established by the authorized bargaining unit, crossing it, whether physically or electronically, is strikebreaking and jeopardizes the welfare of education employees and the educational process.

The Association also believes that the chances of reaching voluntary agreement in good faith are reduced when one party to the negotiation process possesses the power to use the courts unilaterally against the other party.

The Association recommends that several procedures be used in resolution of impasse—such as mediation, fact finding, binding arbitration, political action, and strike—if conditions make it impossible to provide quality education. In the event of a strike by education employees, extracurricular and cocurricular activities must cease.