

No. 20-1120

In The
Supreme Court of the United States

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MELISSA BELGAU, *et al.*,

Petitioners,

v.

JAY INSLEE,
Governor of Washington, *et al.*,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF AMICUS CURIAE
MACKINAC CENTER FOR PUBLIC POLICY
IN SUPPORT OF PETITIONERS**

—◆—
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TABLE OF CONTENTS

| | Page |
|---|------|
| TABLE OF AUTHORITIES..... | ii |
| INTEREST OF AMICUS CURIAE..... | 1 |
| SUMMARY OF ARGUMENT..... | 1 |
| ARGUMENT..... | 2 |
| I. <i>Janus</i> ended compelled financial support to public-sector unions and put the fiscal impact of that change on those unions..... | 2 |
| II. Data on state and local employee public-sector-union membership after <i>Janus</i> appears contrary to the experience of those same types of employees in Michigan after that state enacted an agency-fee ban for public employees..... | 6 |
| A. Dues authorizations and union security..... | 7 |
| B. Counting methods..... | 9 |
| C. The Michigan experience after a public-sector agency-fee ban..... | 13 |
| D. State and local employee union membership after <i>Janus</i> | 20 |
| CONCLUSION..... | 27 |
| RELIEF REQUESTED..... | 28 |

TABLE OF AUTHORITIES

| | Page |
|---|---------------|
| CASES | |
| <i>Abood v. Detroit Bd. of Educ.</i> , 431 U.S. 209 (1977)..... | 1, 2, 3, 7 |
| <i>Belgau v. Inslee</i> , 975 F.3d 940 (9th Cir. 2020) | 5, 6 |
| <i>Comm’n Workers of America v. Beck</i> , 487 U.S. 735 (1988) | 7 |
| <i>Friedrichs v. California Teachers Ass’n</i> , 136 S.Ct. 1083 (2016) | 9 |
| <i>Harris v. Quinn</i> , 573 U.S. 616 (2014) | 9 |
| <i>Janus v. AFSCME</i> , ___ U.S. ___, 138 S.Ct. 2448 (2018) | <i>passim</i> |
| <i>Knox v. SEIU Local 1000</i> , 567 U.S. 2277 (2012) | 9 |
| <i>Saginaw Educ. Ass’n v. Eady-Miskiewicz</i> , 902 N.W.2d 1 (Mich. App. 2017) | 15 |
| <i>Smigel v. Southgate Cmty. Sch. Dist.</i> , 202 N.W.2d 305 (Mich. 1972) | 13 |
| <i>Smith v. Arkansas State Emp., Local 1315</i> , 441 U.S. 463 (1979) | 4 |
| <i>UAW v. Green</i> , 870 N.W.2d 867 (Mich. 2015) | 14, 18 |
| CONSTITUTIONAL PROVISIONS | |
| Mich. Const. art. 11 § 5 | 14 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|------|
| STATUTES | |
| 29 U.S.C. § 402(j)..... | 12 |
| Mich. Comp. Laws § 423.210(4)(a) | 17 |
| Mich. Comp. Laws § 423.210(5)..... | 14 |
| Mich. Comp. Laws §§ 423.201-17 | 14 |
| RULES | |
| Mich. Civil Serv. Comm’n Rule 6-7.2 | 18 |
| TREATISES | |
| Robert A. Gorman and Matthew W. Finkin, Basic Text on Labor Law Unionization and Collective Bargaining (2nd Ed. Thomson West 2004) | 8 |
| OTHER AUTHORITIES | |
| https://olmsapps.dol.gov/query/getOrgQry.do | 11 |
| https://www.bloomberg.com/news/articles/2017-02-16/unions-are-losing-their-decades-long-right-to-work-fight | 26 |
| https://www.bls.gov/news.release/union2.nr0.htm | 10 |
| https://www.michigan.gov/documents/mdcs/WF_2013_2nd_Quarter_Complete_417855_7.pdf | 18 |
| https://www.michigan.gov/documents/mdcs/WF_2015_3rd_Quarter_Complete_496483_7.pdf | 18 |

TABLE OF AUTHORITIES – Continued

| | Page |
|---|----------|
| https://www.michigan.gov/documents/mdcs/WF_2020_3rd_Quarter_Complete_697389_7.pdf | 18 |
| https://www2.census.gov/programs-surveys/cps/techdocs/questionnaires/Labor%20Force.pdf | 11 |
| Patrick J. Wright, <i>Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey’s Public Sector Unionism Data Sufficiently Reliable?</i> 2017 U. Chi. Legal F. 563..... | 4, 5, 11 |

INTEREST OF AMICUS CURIAE¹

The Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

Michigan passed both private-sector and public-sector right-to-work legislation in December 2012. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory collective-bargaining laws, and its research regarding the impact of right-to-work laws on union membership was cited in this Court’s *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018) decision. *Id.* at 2466, n.3.

**SUMMARY OF ARGUMENT**

This Court’s *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018) decision eliminated forced subsidization of unions that an individual does not belong to. This was a reversal of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that had allowed nonmembers to be charged agency fees. In *Janus*, this Court indicated that there would be “unpleasant transition

¹ All parties received timely notice of the intention to file this brief and all have consented. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

costs” as the unions “make adjustments in order to attract and retain members,” but this would have to be borne by the unions as they have had a “considerable windfall . . . under *Abood*.” The key question here is whether dues authorizations signed by members before or after *Janus* that do not meet the requirements of a waiver of constitutional rights are a sufficient basis to require individuals who now wish to leave the union to continue providing financial support to it.

The lower courts have held that dues authorizations that were signed before *Janus* continue in effect and require these employees to financially support the unions. To provide the context on whether the expected impact from *Janus* has been realized, data from Michigan’s public-sector agency-fee ban is set forth and then compared to federal data sources post-*Janus*. What is shown is that in Michigan, union membership is down around 25%, while nationally, using the counting means available, union membership does not follow the same trend perhaps because of these dues-authorization rulings and other actions taken by state governments to aid public-sector unions.

◆

ARGUMENT

I. *Janus* ended compelled financial support to public-sector unions and put the fiscal impact of that change on those unions

In *Janus v. AFSCME*, ___ U.S. ___, 138 S.Ct. 2448 (2018), this Court held that it was a violation of First

Amendment speech rights where “public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities.” *Id.* at 2459-60. *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), wherein “a similar law” had been upheld. *Janus*, 138 S.Ct. at 2460.

This Court recognized that the anticipated financial impact of the change caused by *Janus* belonged on the public-sector unions, and indicated that public-sector unions would be forced to adjust in order to “attract and retain members”:

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

Id. at 2485-86.

The question presented in this application is the legal effect of “dues authorizations” on public-sector employees who were members up to the time of *Janus*, and who after that decision wanted to leave the union,

become nonmembers, and end financial support to public-sector unions.

Public-sector unions contend that these dues forms were unaffected by *Janus* largely based on a single sentence from the majority opinion. Justice Kagan argued in her dissent that *Janus* would “require an extensive legislative response” as “22 States, the District of Columbia, and Puerto Rico – plus another two States for police and firefighter unions” would now have to “come up with new ways – elaborated in new statutes – to structure relations between government employers and their workers.” *Id.* at 2499 (Kagan, J., dissenting). The majority refuted this:

Nor does our decision “require an extensive legislative response.” Post, at 2499. ***States can keep their labor-relations systems exactly as they are*** – only they cannot force nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the federal government and 28 other States.

Janus, 138 S.Ct. at 2485, n.27 (emphasis added).²

² To the extent the majority implied all 28 non-agency-fee states were the same, it erred. States do not have to permit mandatory collective bargaining of public-sector workers. *Smith v. Arkansas State Emp., Local 1315*, 441 U.S. 463, 465 (1979). At the time of *Janus*, eight states (Florida, Idaho, Iowa, Kansas, Nebraska, Nevada, North Dakota and South Dakota) did “follow the model of the federal government” by allowing exclusive representation, but not agency fees. Patrick J. Wright, *Finding Quality Evidence of Union Survivability in the Absence of Agency Fees: Is the Current Population Survey’s Public Sector Unionism Data*

Rather than take that language to mean that former agency-fee states could maintain an exclusive-bargaining-representative system, the public-sector unions contend it means that any dues authorizations entered into before *Janus* continue to operate. The unions use that single sentence to counter the language from *Janus* concerning the waiver of constitutional rights:

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S.Ct. at 2486 (citations omitted).

Citing the "labor-relations systems exactly as they are" language from *Janus*, the Ninth Circuit held for those "who affirmatively signed up to be union members" that "the world did not change." *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020). That court held that

Sufficiently Reliable? 2017 U. Chi. Legal F. 563, 582-83. The remainder of the 28 did not. See *id.* at 584-91.

signing of the dues authorizations was not attributable to the public employer and that under the state-action doctrine it therefore could not be further attributable to the public-sector union. *Id.* at 949. Thus, the dues authorizations are governed by state contract law and there is no federal constitutional claim.

II. Data on state and local public-sector-union membership nationwide after *Janus* appears contrary to the experience of those same types of employees in Michigan after the state enacted an agency-fee ban for public employees

To date, while some of the reasoning may differ, the lower courts have consistently held that: (1) dues authorizations act as an independent contractual basis for requiring union support; (2) no pre-*Janus* or post-*Janus* waiver of constitutional rights is necessary for those that were union members when *Janus* was decided; and (3) those who were union members when *Janus* issued and who now wish to leave must first figure out where their individual “window” to leave the union and/or end financial support to it is. The public-sector unions do not have an incentive to assist employees in this endeavor. Further, as noted in the Petition for a Writ of Certiorari at p. 5, a number of states have enacted statutes specifically designed to delay or prevent employees from exercising their constitutional rights recognized by *Janus*.

Through data analysis, this brief contains an attempt to provide some context to how impactful the impediments to *Janus*' implementation have been. A key portion of that analysis is comparing the public-sector union experience in Michigan when it enacted an agency-fee ban with what has happened in other states after *Janus*.

A. Dues authorizations and union security

After *Janus*, public-sector unions are still requiring financial support from individuals who do not want to affiliate with them. This section of the brief sets forth some union-security basics and introduces the concept of dues authorizations.

Various types of union security include the “closed shop,” *Communication Workers of America v. Beck*, 487 U.S. 735, 747 (1988), the “union shop,” *Abood*, 431 U.S. at 217 n.10, and the “agency shop,” at issue in *Abood* and *Janus*.³ Agency-fee provisions would typically be in a union-security clause in a collective-bargaining agreement that would require members to pay dues and nonmembers to pay agency fees. *Janus*, as a matter of constitutional law, made such agency-fee provisions in collective-bargaining agreements ineffective.

A lesser form of union security is the dues authorization, which is sometimes referred to as a “dues checkoff”:

³ Under federal labor law, the union shop basically has morphed into an agency shop. *Abood*, 431 U.S. at 217 n.10.

A dues checkoff provision in itself requires no one to join a union or retain membership in a union, but simply provides that the employer shall deduct from the earnings of those union members who authorize it the periodic membership dues (just as it would for taxes, insurance premiums or charitable contributions) and shall pay that amount directly to the union. The checkoff is commonly utilized in conjunction with some more effective union security provision. It relieves the union of the burden in time and expense of collecting membership dues.

Robert A. Gorman and Matthew W. Finkin, *Basic Text on Labor Law Unionization and Collective Bargaining* (2nd Ed. Thomson West 2004) at 901. A dues authorization exists outside the confines of a collective-bargaining agreement.

While in theory a dues checkoff “requires no one to join a union or retain membership in a union,” in practice, they are often combined with some sort of membership clause. See Appendix 81a, 83a. By merging the dues authorization with a membership clause, public-sector unions can contend (as here) that there is some sort of independent contractual basis not related to the union-security clause of a collective-bargaining agreement that requires individuals to provide financial support to the union.

B. Counting methods

The questions surrounding public-sector agency fees and the soundness of *Abood* have been discussed in a number of this Court’s recent decisions. See *Knox v. SEIU Local 1000*, 567 U.S. 2277 (2012); *Harris v. Quinn*, 573 U.S. 616 (2014); *Friedrichs v. California Teachers Ass’n*, 136 S.Ct. 1083 (2016); and *Janus*. One key question that arose over the course of these cases was whether a public-sector union’s status as an exclusive bargaining agent and the need for agency fees were “inextricably linked.”

In both *Friedrichs* and *Janus*, the Mackinac Center filed briefs at the amicus and merits stage. These four briefs looked at various methods of quantifying the union-membership percentage as a means of determining whether unions in a right-to-work environment could survive and function as an exclusive-collective-bargaining agent. This work was cited by this Court in *Janus*. *Janus*, 138 S.Ct. at 2466, n.3.

The briefs attempted to focus on the union-membership percentage, which is simply the number of union members covered by a collective-bargaining agreement divided by the total number of employees – both union members and nonmembers – covered by a collective-bargaining agreement. This figure provides a ratio of support per worker covered.

Thus, a source that gives both the number of employees covered by a collective-bargaining agreement and the number of these employees that are union members provides the best information. The unions

have this information, but understandably do not release it publicly over concerns that it could negatively impact their ability to obtain the best contract.

Thus, other sources had to be developed. Most of these other sources have various limitations. The methods include: (1) the Current Population Survey (CPS), a federal government survey that includes questions on union coverage (whether the individual's working relationship is governed by a collective-bargaining agreement) and union membership; (2) LM-2s, an annual form filed by a limited class of unions that include a section on membership; (3) state workforce reports; and (4) payroll data that indicates how many employees have either union dues or union fees withheld from their paychecks.

News reports on union membership and worker representation generally comes from the U.S. Bureau of Labor Statistics (BLS). As part of the CPS, the BLS releases an annual union membership survey every January for the prior year, which is based on three months of surveying. This year's release was January 21, 2021, and indicates "Union membership data are collected as part of the Current Population Survey (CPS), a monthly sample survey of about 60,000 eligible households that obtains information on employment and unemployment among the nation's civilian noninstitutional population age 16 and over."⁴ The questionnaire asks whether on their job, the individual is "a member of a labor union or of an employee

⁴ <https://www.bls.gov/news.release/union2.nr0.htm>.

association similar to a union” and whether that job is “covered by a union or employee association contract.”⁵ The BLS data set can be run through statistics programs to limit response to just public employees, state and local public employees, or state and local employees in a certain state. There is some question whether those surveyed understand the nuances of coverage under a collective-bargaining agreement and membership.

Another source of information is union LM-2s, which are annual financial reports some labor organizations must file with the Office of Labor Standards.⁶ But LM-2s are only required if the union or its subordinates have private-sector employees and the union is large enough. For example, the Michigan Education Association (MEA), Michigan largest teachers’ union, has some private employees, and must file an LM-2. So

⁵ <https://www2.census.gov/programs-surveys/cps/techdocs/questionnaires/Labor%20Force.pdf>. These questions have consistently been used since 1977. *Finding Quality Evidence*, 2017 U. Chi. Legal F. at 568 n.33.

The undersigned authored an article that questioned the reliability of some of the results from these CPS questions when compared to other data sources. *Id.* at 573-91. These same concerns were discussed in the amicus brief this Court cited in *Janus* at n.3. While that brief was cited, this Court also referred to CPS data in notes 1 and 2, thereby indicating that CPS data is of interest. *Janus*, 138 S.Ct. at 2466 n.1, 2.

⁶ These reports are accessible online. <https://olmsapps.dol.gov/query/getOrgQry.do>. The reports are easiest to find if one knows the file number being sought as each union is assigned its own number. When discussing any LM-2 in this brief, the file number will be provided in the footnotes.

too does its national parent organization, the National Education Association. But the California Teachers Association, which does not represent any private-sector employees and almost certainly has more members than the MEA, does not have to file one despite having the same parent union. See generally 29 U.S.C. § 402(j).

If a union has to file a LM-2, Schedule 13 lists members and fee payers,⁷ but does not specifically delineate how many of its members are covered by an active collective-bargaining agreement. Thus, the form is good for general membership trends, but cannot provide the denominator necessary to create a membership rate. Also, by statute, if a union has to file a LM-2, it has some private employees and here we are looking at the public-sector effects of *Janus*. Further, LM-2 reporting lags events on the ground as the fiscal reporting year must first end and then there is a couple of months before the forms are due.

Some states generate detailed reports on their employees. Relevant here, Michigan's Civil Service Commission puts out a quarterly report on its workforce titled "Annual Workforce Report" that helpfully lists the number of state employees covered under various unions' collective-bargaining agreements and also provides information on how many of those employees are members or nonmembers. Thus, this data allows the union-membership rate to be determined with

⁷ As will be seen below, post-*Janus*, most of the agency-fee numbers are either trending to or have already reached zero.

precision. Additionally, these reports are issued quarterly, thus the information therein does not lag. If each state had such reports, tracking public-sector union membership would be quite a bit easier.

The last potential source of data is payroll data. This is generated by asking a government entity how many employees are in a collective-bargaining unit and then how many are having union dues taken out of their paychecks. It essentially operates as a floor for union membership since some union members might be paying their dues by other means. Its benefits are that it allows focus on particularized units of government (say all school districts of a certain size) and that payroll information is current, so it provides more real-time data. While payroll data was discussed in the Mackinac Center's *Janus* briefs and in the undersigned's Chicago article, it is not being used here due in part to space limitations and the fact that many of the local governments where it has been sought have had difficulty differentiating between who was paying fees and who was paying dues.

C. The Michigan experience after a public-sector agency-fee ban

Between 1973 and 2012, Michigan allowed public-sector agency fees. See generally *Smigel v. Southgate Cmty. Sch. Dist.*, 202 N.W.2d 305 (Mich. 1972). On December 11, 2012, the Michigan Legislature passed 2012 PA 349, a public-sector right-to-work law. Looking at the experience in Michigan, which is now in its

eighth year of a post-agency-fee environment, may provide some guidance about what should be expected in the 22 states that have been transitioning after *Janus*.

A couple of factors may have slowed down Michigan's transition. First, the act that eliminated agency fees grandfathered in collective-bargaining agreements that had an agency-fee provision within them. Mich. Comp. Laws § 423.210(5).⁸ Second, there was some question whether state employees (aside from state police who were explicitly exempted) were affected. This is because Michigan's state employees⁹ are generally governed by the State Civil Service Commission. Mich. Const. art. 11 § 5. Thus, it was not until *UAW v. Green*, 870 N.W.2d 867 (Mich. 2015) was decided in July of 2015 that it was clear that Michigan's prohibition on agency fees applied to most state employees. Third, the MEA contended that its members could only leave during a one-month window – August – and that anyone that sought to leave earlier or later than that window would remain a member and continue to have a financial obligation to the MEA for at least another year. It was not until May 2017, that the Michigan Court of Appeals held members could leave at any time and that signing a MEA dues authorization was not

⁸ In these situations, the primary basis for creating a fiscal obligation to an employee was the union-security provision of the collective-bargaining agreement not an individual employee's dues authorizations.

⁹ In Michigan, for collective-bargaining purposes, university employees are considered to be local employees subject to Michigan's Public Employment Relations Act. Mich. Comp. Laws §§ 423.201-17.

“clearly, explicitly, and unambiguously waiv[ing] their right to discontinue their financial support of the union.” *Saginaw Educ. Ass’n v. Eady-Miskiewicz*, 902 N.W.2d 1, 17 (Mich. App. 2017). It thus makes sense to look at the local employee numbers and state employee numbers separately. But, as will be seen below, they eventually reach similar results.

When aggregated, local-employee numbers show that over 25% of membership left the Michigan unions since the agency-fee ban took effect. With the state-employee numbers, we have the coverage data that bolsters the membership data and allows for a membership rate. That data shows an aggregated 24.6% of state employees covered by a union contract are not members.

1. Michigan local unions and LM-2 data

The largest local employee union in Michigan is the Michigan Education Association (MEA). MEA has lost some membership and dues since right to work passed. Membership is down 29% of what it was in 2012, while dues are down 22% in nominal terms.¹⁰

| Year | teachers | support | total | fee | dues |
|------|----------|---------|---------|--------|--------------|
| | | staff | | payers | |
| 2010 | 89,599 | 36,462 | 126,061 | 669 | \$65,544,634 |
| 2011 | 86,135 | 34,210 | 120,345 | 587 | \$62,794,268 |
| 2012 | 84,031 | 33,234 | 117,265 | 606 | \$61,895,814 |

¹⁰ These data are taken from the MEA’s LM-2 filings. Its file number is 512-840.

| | | | | | |
|------|--------|--------|---------|-----|--------------|
| 2013 | 81,571 | 31,576 | 113,147 | 582 | \$64,381,493 |
| 2014 | 78,294 | 28,944 | 107,868 | 483 | \$56,691,409 |
| 2015 | 71,013 | 23,546 | 94,559 | 529 | \$56,712,016 |
| 2016 | 68,924 | 21,685 | 90,609 | 132 | \$49,675,963 |
| 2017 | 67,876 | 19,752 | 87,628 | 59 | \$47,982,763 |
| 2018 | 66,257 | 18,614 | 84,871 | 0 | \$48,774,172 |
| 2019 | 62,659 | 15,816 | 78,475 | 0 | \$48,913,807 |
| 2020 | 66,920 | 16,424 | 83,344 | 0 | \$48,297,822 |

Regardless of the precise number attributed to right to work as opposed to other factors, in 2012 there appears to have been some pent-up demand to leave the union that became realized over the next couple of years.¹¹

There are two other large local employee unions in Michigan. The American Federation of Teachers-Michigan LM-2s¹² showed a decrease from 23,388 members and 1,680 fee payers in 2012 to 18,021 members and no fee payers for 2020. Thus, looking at membership alone over that time period, AFT-Michigan is down 23%.

The second large local employee union in Michigan is AFSCME Local Council 25. This union showed a decline in membership from 46,074 and an additional 105 fee payers in 2012 to a membership of 29,622 with

¹¹ This table is the only one that includes dues. Its purpose here is to provide a sense of scale as to a union's incentive to retain membership.

¹² The file number for this union's LM-2s is 516-183.

no fee payers in 2019.¹³ Thus, looking at membership alone, AFSCME Local Council 25 is down 35.7%.

2. Michigan state employee unions from state reports

For State of Michigan employees that work in mandatory-collective-bargaining units, the Civil Service Commission puts out quarterly reports (titled “Annual Workforce Report”)¹⁴ that list the unions, their coverage (i.e., number of employees in bargaining unit) and the membership numbers. There are five relevant unions: (1) Michigan State Employees Association (MSEA); (2) UAW Local 6000; (3) Michigan Corrections Organization, SEIU Local 526M (MCO); (4) SEIU Local 517M;¹⁵ and (5) AFSCME Council 25.¹⁶

There are three relevant quarterly reports: (1) the report immediately before the law in which Michigan banned agency fees took effect (Fiscal 2012-13 Second

¹³ The file number for this union’s LM-2s is 512-610.

A small portion of this union’s membership is constituted of state employees, and those employees are discussed below.

¹⁴ Links to all of these reports can be found at this webpage: https://www.michigan.gov/mdcs/0,4614,7-147-6879_9329_48076---,00.html. The reports are formulaic. Each cited report contains the relevant data at table 5-1.

¹⁵ The report contains three branches of this union, which numbers will be combined here.

¹⁶ The Michigan State Police Troopers Association – a state employees’ union – is excluded here because Michigan’s agency-fee ban did not apply to police and fire employees. Mich. Comp. Laws § 423.210(4)(a).

Quarter – ending March 30, 2013);¹⁷ (2) the report immediately before *UAW v. Green* was decided (Fiscal 2014-15 Third Quarter – ending June 20, 2015);¹⁸ and (3) the report immediately before the CSC amended its rules to require that state employees annually opt-in to paying dues.¹⁹ (Fiscal 2019-20 Third Quarter – ending June 27, 2020).²⁰

These reports show that before Michigan’s agency-fee ban, MSEA represented 3,329 state employees with 3,079 being members and 250 being fee payers for a union membership rate of 92.5%. In June 2015, it represented 4,654 state employees with 3,363 being members and 1,291 being fee payers for a union membership rate of 72.3%. In June 2020, it represented 4,161 employees with 2,220 being members and 1,941 nonmembers for a membership rate of 53.4%.

UAW Local 6000 represented 17,147 state employees with 15,673 members and 1,474 fee payers for a union membership rate of 91.4% before Michigan’s agency fee ban. In June 2015, it represented 16,904 state employees and had 14,662 members and 2,242

¹⁷ This document is available at the following link: https://www.michigan.gov/documents/mdcs/WF_2013_2nd_Quarter_Complete_417855_7.pdf.

¹⁸ This document is available at the following link: https://www.michigan.gov/documents/mdcs/WF_2015_3rd_Quarter_Complete_496483_7.pdf.

¹⁹ Mich. Civil Serv. Comm’n Rule 6-7.2.

²⁰ This document is available at the following link: https://www.michigan.gov/documents/mdcs/WF_2020_3rd_Quarter_Complete_697389_7.pdf.

nonmembers for a membership rate of 86.7%. In June 2020, it represented 16,446 state employees and had 12,674 members and 3,772 nonmembers for a membership rate of 77.1%.

As of March 2013, MCO represented 6,890 state employees and had 6,598 members and had 292 fee payers for a membership rate of 95.8%. In June 2015, it represented 6,633 state employees and had 6,232 members and 401 nonmembers with a membership rate of 94.0%. In June 2020, it represented 5,863 state employees and had 5,368 members and 495 nonmembers for a membership rate of 91.6%.

SEIU Local 517 started this period by representing 3,679 state employees while having 3,532 members and 147 agency fee payers and a membership rate of 96.0%. By June 2015, it represented 3,764 state employees constituted of 3,259 members and 505 nonmembers for a membership rate of 86.6%. By June 2020, SEIU Local 517 represented 3,963 state employees constituted of 2,666 members and 1,297 nonmembers for a membership rate of 67.3%.

Before Michigan's agency-fee ban, AFSCME Council 25 represented 1,769 state employees constituted of 1,736 members and 33 agency-fee payers for a membership rate of 98.1%. By June 2015, it represented 1,357 state employees constituted of 1,282 members and 75 nonmembers for a membership rate of 94.5%. By June 2020, the union represented 1,650 state employees constituted of 1,318 members and 332 nonmembers for a membership rate of 79.9%.

Aggregating these state-employee-union numbers at the three signposts, shows 32,814 represented state employees constituted of 30,618 members and 2,196 nonmembers immediately prior to Michigan's agency-fee ban. This was a membership rate of 93.3%. By June 2015, those numbers had changed to 33,312 represented state employees constituted of 28,798 members and 4,514 nonmembers for a membership rate of 86.4%. In June 2020, the state employee unions represented 32,083 state employees constituted of 24,246 members and 7,837 members for a membership rate of 75.6%.

3. Summation of Michigan data

As noted above, for local unions, we only have LM-2 membership figures. Since 2012, MEA reported union membership is down 29.2%, AFT-Michigan is down 23%, and AFSCME Local Council 25 is down 35.7%. For the state employee unions, we have both membership and coverage numbers. These aggregated figures show that since 2012, the union membership rate has dropped from 93.3% to 75.6%.

D. State and local employee union membership after Janus

1. Current Population Survey data

Janus was decided on June 27, 2018. As noted above, the BLS releases an annual-union-membership report every January covering the prior year, which is based on three months of surveying responses. So, the

2020 report (i.e., report released in January 2021) and the 2019 report would be post-*Janus* and the 2018 report would be both pre- and post-*Janus*. The 2017 report would be the entirely pre-*Janus* (i.e., it would be released in January 2018, but would cover 2017 results) and could serve as a baseline. Here are the nationwide state and local employee numbers from 2010 to 2020 from all states (including both agency- fee and non-agency-fee states):

| Year | CBA Coverage | member | nonmember | nonmember rate ²¹ |
|------|--------------|-----------|-----------|------------------------------|
| 2010 | 7,243,707 | 6,631,488 | 612,219 | 8.5% |
| 2011 | 7,116,726 | 6,539,310 | 577,416 | 8.1% |
| 2012 | 6,937,490 | 6,353,774 | 583,716 | 8.4% |
| 2013 | 6,789,508 | 6,262,503 | 527,005 | 7.8% |
| 2014 | 6,837,659 | 6,268,567 | 569,092 | 8.3% |
| 2015 | 6,852,893 | 6,244,871 | 608,022 | 8.9% |
| 2016 | 6,674,702 | 6,099,739 | 574,963 | 8.6% |
| 2017 | 6,802,738 | 6,228,488 | 574,250 | 8.4% |
| 2018 | 6,723,955 | 6,177,215 | 546,740 | 8.1% |
| 2019 | 6,647,400 | 6,077,351 | 570,049 | 8.6% |
| 2020 | 6,741,164 | 6,147,695 | 593,469 | 8.8% |

Thus, in 2017, there were 6,802,738 state and local government workers nationwide covered by union contracts, and 574,250 people were covered nonmembers (i.e., fee payers). In 2020, there were slightly less state and local government employees covered by union contracts, 6,741,164 workers with 593,469 people who

²¹ This figure is the nonmember/covered employee percentage. Obviously, the opt-out rate and the membership rate add up to 100%.

opted out. The nonmember rate slightly increased from 8.4% to 8.8% over the period. However, up to 2017, this data contained both information from states that had exclusive representation but banned agency fees (e.g., Florida) and states that had both exclusive representation and agency fees (e.g., California).

Limiting the data set to state and local employees from the 22 agency-fee states existing at the time *Janus* was decided so that we can look at employees with a new opportunity to end financial support to a public-sector union, we get the following:

| Year | CBA | member | nonmember | |
|------|-----------|-----------|-----------|------|
| 2010 | 5,120,570 | 4,875,515 | 245,059 | 4.8% |
| 2011 | 4,997,700 | 4,769,688 | 228,009 | 4.6% |
| 2012 | 4,932,151 | 4,669,819 | 262,334 | 5.3% |
| 2013 | 4,822,230 | 4,601,809 | 220,421 | 4.6% |
| 2014 | 4,902,229 | 4,653,188 | 249,038 | 5.1% |
| 2015 | 4,822,375 | 4,562,645 | 259,730 | 5.4% |
| 2016 | 4,797,190 | 4,540,946 | 256,244 | 5.3% |
| 2017 | 4,929,040 | 4,676,010 | 253,030 | 5.1% |
| 2018 | 4,830,537 | 4,603,391 | 227,146 | 4.7% |
| 2019 | 4,771,132 | 4,502,557 | 268,575 | 5.6% |
| 2020 | 4,813,288 | 4,569,031 | 244,257 | 5.1% |

Thus, in 2017, there were 4,929,040 state and local employees covered by union contracts in those 22 states, and 253,030 people were covered nonmembers (i.e., fee payers). In 2020, there were fewer state and local employees covered by a union contract, 4,813,288 with 244,257 people who opted out. The opt-out percentage for both years was 5.1%.

Thus, according to the BLS numbers (again, these were cited with favor by this Court in *Janus*), the non-member-rate trend is not like in Michigan. The BLS numbers have remained fairly constant, while Michigan saw its opt-outs steadily increase over eight years (or, in the case of local employee unions, at least saw membership decrease).

2. National public-sector LM-2s

There are three larger national public-sector unions that almost exclusively represent public-sector workers. These are the American Federation of Teachers, the American Federation of State County and Municipal Employees, and the National Education Association. Combined, these three and their regional and local affiliates represent around 75% of state and local public-sector workers nationwide when comparing the membership figures from their LM-2s to the state and local BLS union-membership question (nationwide not limited to the 22 agency-fee states). As national unions, these numbers include employees who work in exclusive-representation states and those that work where there was either no exclusive representation or no agency fees (worker can join unions regardless of whether the state permits exclusive bargaining and/or permitted agency fees).

With those caveats addressed, the LM-2 for these national unions show the following:

NEA²²

| Year | membership | fee payers |
|------|------------|------------|
| 2014 | 2,559,447 | 90,255 |
| 2015 | 2,547,851 | 94,080 |
| 2016 | 2,561,041 | 87,134 |
| 2017 | 2,578,575 | 87,764 |
| 2018 | 2,591,602 | no entry |
| 2019 | 2,563,163 | 0 |
| 2020 | 2,560,178 | 0 |

Thus, the membership for the NEA from 2014 to 2020 is almost perfectly flat. It has decreased .7% in the period between 2017 (the last full year before *Janus* was decided) and 2020. Again, in Michigan, the NEA's state affiliate lost 29% of membership in the eight years following that state's agency-fee ban.

AFT²³

| Year | membership | fee payers |
|------|------------|-------------------|
| 2014 | 1,035,896 | no entry provided |
| 2015 | 965,562 | 88,835 |
| 2016 | 1,007,397 | 89,375 |
| 2017 | 1,022,207 | 93,844 |
| 2018 | 1,066,530 | 85,788 |
| 2019 | 1,068,792 | 3,075 |
| 2020 | 1,063,185 | 3,372 |

²² The NEA reporting year for their LM-2s run from September 1 to August 30. The membership numbers here include teachers ("active professional") and support staff ("active education support professional"). Its file number is 000-342.

²³ The AFT reporting year for their LM-2s run July 1 to June 30. The membership numbers here full per capita, half per capita, quarter per capita, eight per capita. The file number for this union is 000-012.

AFT's membership has actually increased 4% since 2017. Again, in Michigan, the AFT state union was down 23% in membership in the eight years following Michigan's agency-fee ban.

AFSCME²⁴

Prior to *Janus* being decided, AFSCME surveyed over 600,000 of its members in one-on-one interviews and found that up to 65% of its members would be willing to stop financially supporting the union:

Since 2013 staff members and activists from the 1.6 million-strong American Federation of State, County, and Municipal Employees have conducted 600,000 one-on-one conversations with workers covered by AFSCME contracts. AFSCME officials say they reached a sobering conclusion in 2015 about how the workers it represents might behave under right-to-work: While roughly 35 percent would likely pay dues no matter what, about half could be "on the fence." The remaining 15 percent or so would likely not pay dues under right-to-work. "We've found that at times we were treating all of our 1.6 million members as if they were activists, and they aren't," says AFSCME President Lee

²⁴ The AFSCME reporting year for its LM-2s run from January 1 to December 31. The membership numbers here included full-time, part-time, and half-time members. The file number is 000-289.

Saunders. “We were taking some things for granted.”

<https://www.bloomberg.com/news/articles/2017-02-16/unions-are-losing-their-decades-long-right-to-work-fight>.

With that backdrop, AFSCME’s LM-2s indicate the following:

| Year | membership | fee payers |
|------|------------|-------------------|
| 2014 | 1,142,550 | 125,255 |
| 2015 | 1,125,130 | 116,749 |
| 2016 | 1,158,258 | 110,836 |
| 2017 | 1,114,128 | 112,233 |
| 2018 | 1,153,225 | 2,215 |
| 2019 | 1,156,678 | 1,918 |
| 2020 | n/a | n/a ²⁵ |

Thus, AFSCME’s membership has gone up 3.8% between 2017 and 2019.²⁶ While its own survey

²⁵ AFSCME’s LM-2s are generally filed near the end of March. Thus, the 2020 numbers will come out soon after this brief.

On a different matter, even if one were to include agency-fee payers and retiree members in the membership count, at no point from 2013 to 2019 does AFSCME reach the 1.6-million figure referenced in the block quote.

²⁶ While the national numbers are the most relevant to examining the impact of *Janus*, the Respondent Washington Federation of State Employees, AFSCME, Council 28 is an AFSCME union and does file a LM-2. Its file number is 544-112. Unlike its parent, this union files on a July 1 to June 30 basis. Its numbers are:

indicated that nearly 65% of its membership would at least consider leaving the union if given the option, that has not occurred and a slight membership increase occurred instead. Again, in Michigan, AFSCME Local Council 25's membership is down 35.7%.

Thus, as to LM-2 membership numbers, none of the major public-sector unions appears to have mirrored Michigan's loss in membership. In fact, two of the three unions gained some members.

CONCLUSION

It has been over two- and one-half years since *Janus* was decided. The experience in Michigan and AFSCME's own 600,000-member survey both could lead to a strong expectation that union membership figures should have shown signs of decline by now. With the counting tools available to the general public and preferred by this Court, that has not been clearly shown to date. Now, it may be that public-sector unions took the AFSCME survey and the Michigan experience as warnings and have developed strategies to lure former nonmembers back to the union and to

| Year | membership | fee payers |
|------|------------|------------|
| 2014 | 32,614 | 6,725 |
| 2015 | 33,025 | 5,971 |
| 2016 | 33,694 | 5,932 |
| 2017 | 35,521 | 5,984 |
| 2018 | 36,293 | 6,997 |
| 2019 | 31,441 | 6 |
| 2020 | 32,649 | 9 |

retain current members. And, as has been stated, some state legislatures adopted union-friendly policies to blunt the impact of *Janus*. But, one strategy is foreclosed: This Court held that waivers are necessary to waive constitutional rights and that every person in the United States has the same right to not be forced to subsidize a public-sector union. Dues authorizations do not meet the constitutional-waiver standard. Thus, a strategy to continue to seek financial support from a former member based on a dues authorization is foreclosed by *Janus*. The above data suggests that the lower courts' approval of dues authorizations has prevented the likely impact of this Court's *Janus* decision from being fully realized.

◆

RELIEF REQUESTED

For the reasons stated above, this Court should grant certiorari in this matter.

Respectfully submitted,

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MACKINAC CENTER FOR PUBLIC POLICY