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Talk Should Be Cheap: The Supreme Court Has Spoken on Compelled Fees, but Universities Are Not Listening

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ABSTRACT

Taking money from a person to support political and ideological projects with which that person disagrees is, in the words of Thomas Jefferson, "sinful and tyrannical." Public universities are meddling with sin and tyranny by compelling some students to pay mandatory student activity fees in support of political and ideological activities with which those students disagree. This Article provides separate legal and historical backgrounds for both public union dues and fees and the more-recent public university student activity fees to ultimately propose a constitutional system congruent with Janus v. AFSCME, Council 31, *and its impact on* Board of Regents v. Southworth *by overruling* Abood v. Detroit Board of Education. *This Article contends that a compelled student fee system is not a limited public forum, debunks four approaches to resolving the constitutional issue, and then proposes a constitutional solution that reconciles* Southworth *with* Janus *and recommends a consistent standard for both union fees and student activity fees. That constitutional solution requires a knowing, voluntary, and intentional choice to pay the fees. Students must affirmatively waive their right not to speak and opt in to pay the fee. Public universities should not force students to support ideas and opinions that they would not otherwise support, simply through their enrollment at the university, with compelled student activity fees. Compelled speech in any form violates a student's First Amendment rights.*

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I. INTRODUCTION

From the very inception of the First Amendment, taking money from a person to support political and ideological projects with which that person disagrees is, in the words of Thomas Jefferson, "sinful and tyrannical."[1] If Jefferson is correct, public universities are meddling with sin and tyranny, at least insofar as they compel some students to pay mandatory fees in support of political and ideological activities with which those students disagree. Individual students and student groups should not have to continuously file lawsuits against large and powerful public universities to protect themselves from First Amendment violations: the United States

1. 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 393 (1950), *cited in* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 790 (1961); *see generally* U.S. CONST. amend. I.

Supreme Court should clarify once and for all that, under the First Amendment, compelled fees are compelled speech.

Unfortunately, compelled fees in the public sector are not new. Public unions had been compelling employees to fund political and ideological activities through mandatory agency fees for at least the last fifty years, since *Abood v. Detroit Board of Education*, until the Supreme Court ended this forced speech by affirming First Amendment principles in *Janus v. AFSCME, Council 31*.[2] The same compelled fee doctrine analysis applies in other contexts as well, like in the education industry, where public universities impose mandatory student activity fees.[3] This Article recognizes the fundamental differences that exist between both public unions and universities and private unions and universities, and as such, does not address those institutions in the private sector.[4]

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2. *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977) (affirming a 1967 agency shop arrangement for teachers, "whereby every employee represented by a union—even though not a union member—must pay to the union"), *overruled by* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018), *with Janus*, 138 S. Ct. at 2460 (holding that agency shop fees are compelled speech that violate the First Amendment).

3. Bd. of Regents v. Southworth, 529 U.S. 217 (2000); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990) (holding that the bar association "may not . . . fund activities of an ideological nature" not "germane" to "the State's interest in regulating the legal profession and improving the quality of legal services").

4. The fundamental difference between the public sector and the private sector is one of market competition. In the private sector, collective bargaining in the context of labor unions is adversarial; the interests of an employee (high wages) and the employer (high profit margins) are necessarily at odds. In the public sector, the union sits on both sides of the bargaining table. Falco A. Muscante II, Comment, *Police Brutality & Unions: Collective Bargaining is the Problem, Not Law Enforcement*, 13 U. MIA. RACE & SOC. JUST. L. REV. (forthcoming 2023), http://ssrn.com/abstract=4197316 ("[I]n the public sector, the employees, vis-à-vis their union, are negotiating with their employer, the government, for tax money collected from constituents."). Public unions contribute to political campaigns; the politicians they support negotiate with the union on behalf of the government, which is *always* the employer in the public sector. The first president of the American Federation of Labor and Congress of Industrial Organizations once said, "it is impossible to bargain collectively with the government." *The Problem With Police Unions*, WALL ST. J., June 11, 2020, at A16. United States presidents across the political and ideological spectrum, including Theodore Roosevelt, William Howard Taft, Franklin Delano Roosevelt, and Ronald Reagan, have distinguished private unions from public unions and offered some degree of criticism regarding the latter. *See, e.g.*, Paul Moreno, *The History of Public Sector Unionism*, HILLSDALE COLLEGE, https://www.hillsdale.edu/educational-outreach/free-market-forum/2011-archive/the-history-of-public-sector-unionism/ (last visited Sept. 14, 2022) ("Presidents Theodore Roosevelt and William Howard Taft recognized the danger of these federal employee organizations lobbying Congress and issued executive orders prohibiting federal employee membership in such organizations."); Franklin Delano Roosevelt, *97 The President Indorses Resolution of Federation of Federal Employees Against Strikes in Federal Service. August 16, 1937, in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 324, 325 (Samuel I. Rosenman ed., 1941) ("[T]he process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations . . . ."), *cited in* Brian Nichols, *218: How the Fairness Center Protects Public Sector Employees—with Nathan McGrath*, BRIAN NICHOLS SHOW, at 18:05–21:08 (Mar. 26, 2021), https://www.briannicholsshow.com/218-how-the-fairness-center-protects-public-sector-

Like public unions have done in the past, public universities are violating the First Amendment by compelling speech through fees.[5] Despite numerous documented examples of universities violating students' First Amendment rights through mandatory student activity fees, many of these cases settle before making it to trial.[6] The most recent Supreme Court case on the issue is *Board of Regents v. Southworth*, where a public university wanted to foster independent student groups, but also maintain total control over how the university allocated students' money that it collected separately from tuition.[7]

The Supreme Court established "viewpoint neutrality" as the standard for distributing proceeds from student activity fees *after* they are collected.[8] But the means of collecting those fees ought to be constitutional *before* they are collected. The Court in *Southworth*

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employees-with-nathan-mcgrath/; PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 629 (2010) (noting that President Reagan, who led the first strike as president of his private labor union, said that "we cannot compare labor . . . in the private sector with government."); *Abood*, 431 U.S. at 227–28 ("A public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market.").

5. *See, e.g.*, Joint Ex Parte Motion for Dismissal with Prejudice at 3, Apodaca and Students for Life at Cal. State Univ.—San Marcos v. White, No. 3:17-cv-01014-L-AHG (S.D.C.A. Jan. 31, 2020), ECF No. 101 (settling a dispute by revising the university policy regarding mandatory student association fees to reflect First Amendment constitutional principles); Plaintiffs' Notice of Voluntary Dismissal with Prejudice at 2, Students for Life at Ga. Tech v. Regents of the Univ. Sys. of Ga., No. 1:20-cv-01422-SDG (N.D. Ga. Sept. 10, 2020), ECF No. 33 (settling a dispute between Georgia Tech and Students for Life when the university agreed to revise its policy that initially allowed the student government to deny funding an event where Dr. Martin Luther King, Jr.'s niece was set to speak); Joint Stipulation for Dismissal at ¶¶ 1–2, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-1799-SEB-TAB (S.D Ind. Sept. 4, 2018), ECF No. 18 (settling a dispute regarding the university's distribution of mandatory student activity fees and denial of fees to the plaintiff by the university's agreement to eliminate and replace the current student activity fees guidelines); *see also infra* Part III(A).

Also, old habits die hard; public unions continue to ignore the First Amendment as articulated in *Janus*. *See, e.g.*, Complaint at ¶ 2, Yanoski v. Serv. Emps. Int'l Union, Healthcare Pa. et al., No. 1:21-cv-00414-JPW (M.D. Pa. Mar. 5, 2021), ECF No. 1; Complaint at ¶ 2, Bernard v. Pub. Emps. Fed'n, AFL-CIO et al., No. 1:21-cv-00058-LEK-DJS (N.D.N.Y. Jan. 15, 2021), ECF No. 1; Complaint—Class Action at ¶ 2, Fultz et al. v Am. Fed'n of State, Cnty. and Mun. Emps., Council 13 et al., No. 1:20-cv-02107-JEJ (M.D. Pa. Nov. 12, 2020), ECF No. 1, and one case was recently on petition for a writ of certiorari to the Supreme Court, Pet. for Writ of Cert., Troesch v. Chi. Tchrs. Union, et al., No. 20-1786 (U.S. June 23, 2021), ECF No. 1, *cert. denied* 142 S. Ct. 425 (2021). Although the Court did not grant certiorari in *Troesch*, any similar case would have implications in the public university context as well, as this article will discuss.

6. *See* sources cited *supra* note 5.

7. *See generally Southworth*, 529 U.S. at 217; *see also* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 200 (2018) (noting that the university might want to distance itself from controversial speakers invited by student groups).

8. *See generally* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

expressly relied on *Abood*, which upheld the constitutionality of compelled public union agency fees for activities "germane to" a public union's collective bargaining, but rejected any fees used for political or ideological activity, to effectively extend these principles from public unions to public universities.[9] The Court in *Janus* overruled *Abood*, prohibiting public unions from being able to force public employees to pay mandatory union dues and fees as a condition of employment without the employees' affirmative consent and waiver of their constitutional right not to pay.[10] But the Supreme Court has not yet revisited *Southworth* to similarly prohibit public universities from collecting mandatory fees from students.

This Article summarizes the relevant legal and historical background of both public unions and public universities to ultimately propose a constitutional system for student activity fees congruent with *Janus*, and its impact on *Southworth* by overruling *Abood*. Because *Janus* overturned *Abood*, and *Southworth* relied on the standard in *Abood*, this Article posits that *Southworth* is no longer good law. A constitutional solution requires a knowing, voluntary, and intentional choice to pay the fees.[11] Public universities should not force students to support ideas and opinions that they would not otherwise support, simply through their enrollment at the university, with compelled student activity fees; compelled speech in any form violates a student's First Amendment rights.

Part II of this Article provides separate legal and historical backgrounds for both public union dues and fees and the more-recent public university student activity fees, which had a similar legal foundation under *Abood* before the Court overruled that precedent.[12] Part III takes a deeper look at First Amendment jurisprudence, explains why a compelled student fee system is not a limited public forum, and discusses the impact of *Janus* on public university student activity fees. Part IV debunks four approaches to resolving the constitutional issue and then proposes a constitutional solution that both reconciles *Southworth* with *Janus* and recommends a consistent standard for both union fees and student activity fees. This solution ensures that the First Amendment rights of both public employees and public students are protected through an affirmative constitutional waiver and opt-in standard before the dues and fees are collected in the first place. Finally, Part V

9. *See generally Abood*, 431 U.S. at 209.
10. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018).
11. *See infra* Part II(A).
12. *See Janus*, 138 S. Ct. at 2460.

concludes with a summary of the arguments, the analysis, and the proposed solution.

II. LEGAL BACKGROUND OF COMPELLED FEES

A. Public Union Dues and Fees

The story of compelled fees and the First Amendment has its roots in the public labor movement. Public unions facilitate "members [working] together to negotiate and enforce a contract with management that guarantees [benefits] . . . like decent raises, affordable health care, job security, and a stable schedule,"[13] and are "in the business of protecting members' job security and winning members better salaries and benefits."[14] Understanding the historical and political context that gave rise to *private* unions is key to understanding public unions and the compelled fees they impose on employees within the bargaining unit.[15]

1. Public Union Agency Fees & Non-Chargeable Expenses

In 1926, Congress enacted the Railway Labor Act, the oldest federal legislation dealing with collective bargaining for private unions.[16] The Act was designed to prevent the disruption of rail service, establish procedures to settle labor disputes, and forbid discrimination for railway union members.[17] Later, in 1935, President Franklin D. Roosevelt championed the National Labor Relations (Wagner) Act of 1935, which sought to remedy the unequal bargaining power structure between private employers and employees and to institute collective bargaining between them.[18]

Collective bargaining is the process by which a union and an employer negotiate for wages, benefits, working conditions, and other

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13. *Unions Begin With You*, AFL-CIO, https://aflcio.org/what-unions-do (last visited Oct. 26, 2021).

14. Daniel DiSalvo, *The Trouble with Police Unions*, 45 NAT'L AFFAIRS (2020), https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions.

15. A bargaining unit is simply the group of all employees, regardless of union membership status, represented by the union for purposes of collective bargaining and negotiation with the employer. *Bargaining Unit*, PRAC. L. GLOSSARY, Item 1-504-3640, https://us.practicallaw.thomsonreuters.com/1-504-3640 (last accessed Mar. 20, 2022).

16. *Labor History Timeline: 1607–1999*, VA. COMMW. UNIV., https://socialwelfare.library.vcu.edu/organizations/labor/labor-history-timeline-1607-1999/ (last visited Oct. 26, 2021).

17. *Id.*

18. Moreno, *supra* note 4. Though a champion of private unions, President Roosevelt recognized the inherent difference between private unions and public unions. *See* Roosevelt, *supra* note 4.

employee workplace terms and conditions.[19] When a public union represents the employees of a public employer, that union is the exclusive bargaining agent of the employees under the union contract.[20] This means that the union is the only party that can negotiate with the employer; the employees cannot negotiate independently with their employer.

More than seventy years ago, a group of private-sector employees brought suit against their railroad union when the union entered into an agreement, pursuant to the Railway Labor Act, which required all employees to pay union dues and fees as a condition of their employment.[21] The employees alleged that the dues and fees were not only used to finance political campaigns they opposed, but also that they propagated "political and economic doctrines, concepts and ideologies with which [they] disagreed."[22] Justice William Brennan wrote for the majority in *International Association of Machinists v. Street* and held that public unions may not "use [an employee's] exacted funds to support political causes which he opposes."[23] Justice Hugo Black agreed with that portion of the majority opinion in his dissent, when he wrote, "compulsory contributions to an association of employers for use in political and economic programs" infringe the First Amendment rights of public-sector union employees.[24] In this case, compulsory union dues for political purposes violated the Railway Labor Act.[25]

In the 1950s, New York and Wisconsin were among the first states where public employees unionized.[26] President John F. Kennedy extended union rights to federal government employees in 1963 with Executive Order 10988.[27] President Richard Nixon strengthened those public union rights, and eventually, Congress statutorily enshrined those rights with the Civil Service Act of 1978.[28] Although public unions are not new,[29] they have regularly

19. *See generally* Muscante, *supra* note 4 (arguing that police unions should not bargain for matters affecting wages, hours, and terms and conditions of employment because those bargaining terms often lead to or promote police misconduct).
20. *Id.*
21. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 742–44 (1961).
22. *Id.* at 744.
23. *Id.* at 769.
24. *Id.* at 789–90 (Black, J., dissenting).
25. *Id.* at 769 (majority opinion).
26. *See generally* Moreno, *supra* note 4.
27. *Id.*
28. *Id.*
29. *See* sources cited *supra* note 4.

faced a political back-and-forth over their purpose, necessity—and most controversially—their funding.[30]

Throughout the years following *Street* and its progeny, the Court struggled to demarcate a line between chargeable expenses, which the union could initially force employees to pay vis-à-vis mandatory agency fees,[31] and fees directed toward political and ideological expenses, which were permissive fees that the public union could not force employees to pay.[32] The Court later cited *Street* in *Abood v. Detroit Board of Education* with regard to public sector unions and held that taking fees against the will of an employee for the specific purpose of funding ideological activities of which the nonconsenting employee did not approve was unconstitutional.[33]

In *Abood,* Michigan authorized an agency shop system for union representation of public employees where every employee, regardless of whether the employee was a union member, was required to pay a service fee equal in price to union dues as a condition of employment.[34] The Court recognized that compelling an employee to financially support the union impacts the employee's First Amendment rights,[35] but held that an employee was still required to pay for things that the Court found were "germane to the [the union's] duties," like collective bargaining.[36] The Court reasoned that the agency shop system "counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation."[37]

The Court also consciously failed to identify a standard for both ideological speech and speech "germane to" the duties of the union.[38] The majority noted and dismissed the employee's argument that all collective bargaining activities are political in some way.[39]

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30. Muscante, *supra* note 4 ("[I]n the public sector, the employees, vis-à-vis their union, are negotiating with their employer, the government, for tax money collected from constituents."); Moreno, *supra* note 4 ("Rather than voting for politicians who enact laws that enable unions to gain more private income, [public] unions simply elect their employers and bargain with them.").

31. Agency fees are fees charged against an employee as a condition of employment when the employee chooses not to join the public union representing her bargaining unit. Initially, these fees were equal to union dues. After *Street*, the fees were only equal to costs that were not associated with political and ideological speech. And since *Janus*, all agency fees are illegal when charged against an employee who chooses not to join (or chooses to leave) her public union.

32. *See, e.g.*, cases cited *infra* notes 41–46.

33. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).

34. *Id.* at 211.

35. *Id.* at 222.

36. *Id.* at 235.

37. *Id.* at 222.

38. *Id.* at 236.

39. *Id.* at 226.

But Justice William Rehnquist, in his concurrence, foreshadowed the eventual position the Court would adopt when he wrote: "the positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word 'political' be taken in its normal meaning."[40]

Following *Abood*, the Court began to carve out additional considerations. In *Chicago Teachers Union, Local Number 1 v. Hudson*, it held unions to a higher standard and required the union to bear the burden of affirmatively providing employees with information about the fees it imposed to minimize the risk that fees were used, even temporarily, for impermissible ideological activities.[41] Later, in *Knox v. SEIU, Local 1000*, the Court held that a public union must provide a "fresh *Hudson* notice" when the union increases or changes dues, and that it may not exact any funds from members without their affirmative consent.[42]

The Court in *Harris* further narrowed *Abood*'s application only to "*full-fledged* public employees," and held that personal assistants employed by individual "customers" but paid by the State are not included.[43] Any agency fee provision must serve a compelling state interest to pass "exacting First Amendment scrutiny."[44] And in *Harris*, the Court said that these agency fee provisions did not pass that scrutiny.[45] The Court's equivocacy in failing to establish a clear rule through this line of cases led to the "perpetua[l] give-it-a-try litigation," of which the late Justice Antonin Scalia warned,[46] at least until the Court announced its 2018 decision in *Janus v. AFSCME, Council 31*.[47]

2. Janus v. AFSCME, Council 31 & *Affirmative Waiver Requirement*

Janus is an important case in First Amendment compelled speech jurisprudence. Although Mark Janus, a public employee, decided not to join his union because of his fundamental opposition

40. *Id.* at 243 (Rehnquist, J., concurring) (emphasis added).
41. Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 305, 309–10 (1986) (citing *Abood*, 431 U.S. at 244 (Stevens, J., concurring).
42. Knox v. SEIU, Loc. 1000, 567 U.S. 298, 322 (2012).
43. Harris v. Quinn, 573 U.S. 620, 638–39, 646–47 (2014) (emphasis added).
44. *Id.* at 647–48.
45. *Id.*
46. Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 550–51 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part), *quoted in* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2481 (2018).
47. *Janus*, 138 S. Ct. at 2461.

to many of the positions the union held, the union forced Mr. Janus to pay agency fees that amounted to nearly 80% of full union dues.[48]

In an opinion authored by Justice Samuel Alito, the Court expressly overruled *Abood* and held that public employees have a First Amendment right not to subsidize union speech, and unless a public employee affirmatively consents, any payment deducted from an employee for union speech without that employee's consent violates the employee's rights.[49] Further, the Court eliminated the abstruse distinction between "chargeable expenses" and fees directed toward political speech and recognized instead that any forced contribution is forced speech; no public employee who resigns from a union can be forced to pay either agency fees for chargeable expenses or fees directed toward political or ideological projects.[50] Even during the years between the Court's opinions in *Street* and *Janus*, one thing had been abundantly clear: the First Amendment guarantees both the right to speak and the right to associate. Any seizure of payments from employees who provide notice that they are nonmembers and object to supporting the union, to the extent that those payments fund political or ideological projects, does not pass constitutional muster[51] "unless the employee affirmatively consents to pay [by] waiving their First Amendment rights."[52] The Court is clear, "such a waiver cannot be presumed"[53] but "must be freely given and shown by 'clear and compelling' evidence."[54]

Additionally, the Court held that unions are not only prohibited from exacting any funds from union members without their affirmative consent, but also, and more significantly, that unions have no constitutional entitlement to any monies from dissenting employees.[55] *Janus* reaffirmed that the First Amendment forbids unions

48. *Id.* at 2456.
49. *Id.* at 2486.
50. *Id.* at 2481–82, 2486.
51. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233–34 (1977) (noting that "[this Court's] decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments," and "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"); Knight v. Minn. Cmty. College Fac. Ass'n, 465 U.S. 271, 288 (1984) ("the First Amendment guarantees the right both to speak and to associate"); Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 309 (1986) (recognizing that procedural safeguards are necessary to protect employees' First Amendment rights); *Harris*, 573 U.S. at 647–48 (holding that agency-fee provisions impose a "'significant impingement on First Amendment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny'" (quoting Knox v. SEIU, Loc. 1000, 567 U.S. 298, 299–300) (2012)).
52. *Janus*, 138 S. Ct. at 2486.
53. *Id.* (citing *Knox*, 567 U.S. at 313–15).
54. *Id.* (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967) (plurality)).
55. *Id.* at 2464 (citing *Knox*, 567 U.S. at 313).

from compelling an employee to pay fees for political and ideological speech, and also extended the protection to prohibit public unions from seizing *any* payments from employees who provide notice they are nonmembers and object to supporting the union.[56] The First Amendment not only protects a right to speak, but also a right *not* to speak.[57]

The Court addressed the "risk of 'free riders'"[58] and held that "avoiding free riders is not a compelling state interest," and therefore does "[not] overcome First Amendment objections."[59] When a union is the exclusive bargaining representative for a group of public employees, individual employees cannot independently negotiate with their employer, even though they may "oppose positions the union takes in collective bargaining, or even 'unionism itself.'"[60] According to Mr. Janus, he was "not a free rider on a bus headed for a destination that he wishe[d] to reach but [was] more like a person shanghaied for an unwanted voyage."[61] Since *Janus*, and despite the predictions of those critical of the Court's decision,[62] the free-rider argument has largely proven impotent.

B. Public Universities and Student Activity Fees

In the context of the First Amendment, public union dues and student activity fees are analogous.[63] The Supreme Court has applied the same compelled fee doctrine established in the public union cases above to public universities, which exist primarily "to educate youth" by promoting a marketplace of ideas, and to the student activity fees that public universities charge.[64] When a public university compels students to pay student activity fees, the university collects those required charges separately from tuition; students who choose *not* to pay the fees often cannot graduate or receive their transcripts.[65]

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56. *Id.*
57. *See infra* Part III(A).
58. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).
59. *Janus*, 138 S. Ct. at 2466 (citing *Knox*, 567 U. S. at 311).
60. *Id.* at 2489.
61. *Id.* at 2466.
62. John K. Wilson, *The Problems with the Janus Decision on Union Dues*, Inside Higher Ed. (Aug. 16, 2018, 3:00 AM), https://www.insidehighered.com/views/2018/08/16/problems-janus-decision-union-dues-opinion (recognizing that *Janus* established an absolute right an employee has not to fund speech she dislikes but labeling the employee a "freeloader").
63. Baude & Volokh, *supra* note 7, at 198.
64. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 709 (2010); *see also* Jonathan Kaufman, *State of the Unions: The Impact of* Janus *on Public University Student Fees*, 54 GA. L. REV. (2020) 735, 737.
65. Brief for Respondents at 7, 30, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 20; *see also* Texas A&M University, *Billing &*

On average, the five largest public universities in the country collect $165 per student per year, or nearly $7 million per year in total fees.[66] Today, these fees are used to fund "[registered] student organizations for their programming,"[67] "services related to the physical and psychological health and well-being of students, social and cultural activities and programs, services related to campus life and campus community,"[68] and any operations of student recreation centers.[69] These organizations and services are quite often political

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Fee Explanations, Student Business Services, https://sbs.tamu.edu/billing-payments/billing-fee-explanations/index.html (last visited Sept. 30, 2021) ("Failure to pay amounts owed may result in cancellation of the student's registration and being barred from future enrollment and receiving official transcripts.").

66. These calculations are based on the total number of enrolled students in each of the five largest public universities in the country, multiplied by each respective university's posted student activity fee, and adjusted for a yearly rate. The average of those five individual calculations represents the numbers reported above. *See* Jasmine Johnson, *Texas A&M Reports First Day Enrollment Totals*, TEX. A&M (Aug. 31, 2021), https://today.tamu.edu/2021/08/31/texas-am-reports-first-day-enrollment-totals ("Enrollment for fall 2021 at Texas A&M University on the first day of classes totaled 72,982"); *Billing & Fee Explanations*, TEX. A&M, https://sbs.tamu.edu/billing-payments/billing-fee-explanations/index.html ("A $145 per semester fee ($72.50 per summer five-week term) required of all students for the purpose of operating, maintaining, improving and equipping the Student Recreation Center."); Institutional Knowledge Management, *Enrollment*, UNIV. CENT. FLA. (Sept. 8, 2021), https://ikm.ucf.edu/facts/interactive-facts/enrollment/ (listing enrollment as 70,730 students for fall 2021); Student Government, *Activity & Service Fee*, UNIV. CENT. FLA., https://studentgovernment.ucf.edu/funding/asf/ (last visited Oct. 27, 2021) (calculating the yearly activity fee cost based on an average of 30 credit hours per student per year and that "[e]ach student at UCF pays $11.67 per credit hour in A&SF fees, which accumulates to become the Activity and Service Fee Budget"); Chris Booker, *Ohio State Minority Enrollment Hits Record Highs*, OHIO ST. UNIV. (Sept. 16, 2021), https://news.osu.edu/ohio-state-minority-enrollment-hits-record-highs/ ("[The] total university enrollment is 67,772."); Office of Student Life, *Student Activity Fee FAQs*, OHIO ST. U., https://activities.osu.edu/about/student_activity_fee/ (last visited Oct. 27, 2021) ("For autumn and spring semesters, the fee ranges from $37.50 to $40."); *About UCLA: Fast Facts*, UCLA (June 1, 2021), https://newsroom.ucla.edu/ucla-fast-facts (listing enrollment as 46,000 students); Registrar's Office, *Annual and Term Student Fees*, UCLA, https://sa.ucla.edu/RO/Fees/Public/public-fees?year=2021-2022&term=Spring%20Quarter&degree=Undergraduate (last visited Oct. 27, 2021) (listing the "Student Services Fee," which "covers services that benefit the student and that are complementary to, but not part of, instructional programs," as $376); Office of the Registrar, *Enrollment Reports*, UNIV. MICH., https://ro.umich.edu/reports/enrollment (last visited Oct. 27, 2021) (listing enrollment as 41,227 students); Office of the Registrar, *Tuition & Fees*, UNIV. MICH., https://ro.umich.edu/tuition-residency/tuition-fees?academic_year=169&college_school=19&full_half_term=35&level_of_study=37 (last visited Oct. 27, 2021) (listing mandatory student fees as $164.19).

67. *Student Activity Fee–Brief History*, CORNELL U., https://assembly.cornell.edu/tools-tabs-resources/funding/student-activity-fee-brief-history (last visited Oct. 26, 2021); *see* Press Release, Frank Guadagnino, et al., University Critical of Upcoming Speakers for Repugnant and Denigrating Rhetoric, (Oct. 11, 2022), https://www.psu.edu/news/administration/story/university-critical-upcoming-speakers-repugnant-and-denigrating-rhetoric/.

68. *Fee Descriptions*, UCLA, https://registrar.ucla.edu/fees-residence/fee-descriptions (last visited Oct. 26, 2021).

69. *Billing and Fee Explanations*, TEX. A&M, https://sbs.tamu.edu/billing-payments/billing-fee-explanations/index.html#:~:text=A%20%24145%20per%20semester%20fee,equipping%20the%20Student%20Recreation%20Center (last visited Oct. 26, 2021).

and ideological, and may include: both the College Democrats and the College Republicans, Uncensored America, Turning Point USA, Wisconsin Public Interest Research Group, Progressive Student Network, International Socialist Organization, Gender Equity Center, LGBTQA Pride Center, Feminists for Action, Secular Student Alliance, SPECTRUM, and Students for Life.[70]

1. Student Activity Fees Are Relatively New

While early forms of student activity fees existed well before World War II, these fees were generally self-imposed by students to fund "activities and niceties not covered by tuition,"[71] including intramural sports, student newspapers, student organizations, and student unions.[72] At the University of Wisconsin, for example, the fees originally covered heating and lighting for public rooms, music, diplomas, admission to athletic events, concerts, and laboratory fees.[73] At the time, most of these organizations and the associated student activity fees were not for political activities, but for "educat[ing] the whole person" by creating a marketplace of ideas to allow students "to discover and develop the[ir] talents and interests."[74] Many universities established student activity fees shortly

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70. *See, e.g.*, College Democrats of America, https://democrats.org/cda/ (last visited Jan. 12, 2022); College Republican National Committee, https://www.crnc.org/ (last visited Jan. 12, 2022); Bill Chappell, *Penn State is About to Host the Proud Boys Founder, and Its Students Are Protesting*, NPR (Oct. 12, 2022, 3:20 PM EST), https://www.npr.org/2022/10/12/1128448747/proud-boys-founder-penn-state-speaker-protest; Complaint ¶¶ 5–10, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407 (W.D. Mich. Dec. 7, 2016); Brief for Respondents at 8–14, Bd. of Regents v. Southworth, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 20; Apodaca v. White, 401 F. Supp. 3d 1040, 1045 (S.D. Cal. 2019); Complaint ¶ 2, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-1799-SEB-TAB (S.D. Ind. Sept. 4, 2018); Complaint ¶¶ 230–33, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS (S.D.C.A. May 11, 2017), ECF No. 1.

71. Jordan Lorence, FIRE'S GUIDE TO STUDENT FEES, FUNDING, AND LEGAL EQUALITY ON CAMPUS 3 (Edwin Meese III et al. eds., 2003).

72. Alex Aichinger, *Student Activity Fees*, MIDDLE TENN. ST. UNIV.: THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1123/student-activity-fees (last visited Oct. 26, 2021).

73. Lorence, *supra* note 71 at 3; *see also* Stephen Richard Adams, The Historical Development of Student Activities and Student Centers at the University of Wisconsin—La Crosse From 1909–1973 at 17 (Apr. 11, 1977) (M.S. thesis, University of Wisconsin— La Crosse), https://minds.wisconsin.edu/bitstream/handle/1793/21858/Adams.pdf?sequence=1&isAllowed=y (quoting a 1925 student newspaper article which shared that student organizations were established to cultivate "interest[s] . . . beyond the classroom to school activities and community affairs" including "literary societies, dramatics, debate, oratory, athletics, musical organizations and lecture courses bringing the best of talent of miscellaneous types right to the school").

74. Adams, *supra* note 73, at 1, 69.

after World War II, but some universities imposed fees on their student bodies much later.[75]

The benign nature of these student activity fees gradually began to shift around the time of World War II, and likely as a direct result of the war.[76] The fees became more political, and certainly, more partisan.[77] By the 1960s and 1970s, the nature of the fees had fundamentally changed because of events like the civil rights movement, the Vietnam War, and the Berkely Free Speech Movement.[78] Student activists began to see the fees, which *initially* funded non-controversial activities, as a source of funding for political and ideological causes of special interest groups and isolated segments of the student body.[79] Public universities are now using the student activity fees that once promoted and encouraged non-political and non-ideological organizations, events, and activities, for conveying messages today that are sharply political and ideological.[80]

2. Board of Regents v. Southworth *& Viewpoint Neutrality*

There are two significant Supreme Court decisions that directly address compelled student activity fees. The first case, *Rosenberger*

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75. *Compare Student Activity Fee*, *supra* note 67 (identifying that the first student activity fee Cornell University established was in 1948), *with Student Fee Board Handbook* at 2, PENN STATE (May 11, 2020), https://www.studentfee.psu.edu/files/2020/06/PSU-SIF-Handbook-2020.pdf ("The Student Activity Fee first appeared on students' bills in the 1996 Fall semester.").

76. *See* Adams, *supra* note 73, at 49, 53.

77. Prior to World War II, the only organization that might be considered political on the University of Wisconsin campus was the Socialist Study Club, which was "[o]pen to students interested in *discussing the philosophy* of socialism." *See id.* at 23–24 (emphasis added). After the start of World War II, the University of Wisconsin created a separate subsection for "Political Groups," which included the "Young Democrats" and the "Young Republicans." *Id.* at 48–49. Even by their descriptions, they were based more on politics and ideology: open only to "students interested in" each respective party. *Id.* Whereas the pre-World War II Socialist Study Club was open to anyone interested in discussing the philosophy of socialism, the post-World War II political groups were open only to students "interested in" each respective club. *Id.* at 23–24, 48–49. The difference is subtle but marks the underlying shift away from student activities with the "primary purpose" of "provid[ing] intellectual growth and exposure," *id.* at 24, toward explicitly political and ideological organizations, *see id.* at 48–49.

78. *See, e.g.*, Aichinger, *supra* note 72; Adams, *supra* note 73, at 67; Karen Aichinger, *Berkeley Free Speech Movement*, MIDDLE TENN. ST. UNIV.: THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1042/berkeley-free-speech-movement (last visited Oct. 26, 2021) ("The Berkeley Free Speech Movement refers to a group of college students who, during the 1960s, challenged many campus regulations limiting their free-speech rights.").

79. Lorence, *supra* note 71, at 3–4.

80. *See* Brief in Opposition at 5–15, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026. Student activity fees are assessed to all students separately from tuition but are usually listed on the same invoice that includes tuition and other required charges. *See e.g.*, *infra* text accompanying note 65; Bursar's Office, *Tuition Rates*, UNIV. OF WIS., https://bursar.wisc.edu/tuition-and-fees/tuition-rates (last visited Feb. 1, 2022).

v. Rector & Visitors of the University of Virginia, applies to the *distribution* of the funds collected from mandatory student activity fees *after* those fees are collected.[81] The second case, *Board of Regents v. Southworth*, concerns the *collection* of student activity fees *before* they are allocated and distributed.[82]

In *Rosenberger*, the University of Virginia, although founded by Thomas Jefferson, meddled with sin and tyranny by collecting mandatory fees, separately from tuition, which it used to fund a mere 34% of the total student groups active at the university.[83] One of the groups they chose not to fund was a Christian publication because the publication "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[84] Although the university funded at least fifteen other student publications with the funds collected from the compelled student activity fees at the time of the case, it overtly chose *not* to fund the student publication based on the views espoused by the newspaper.[85]

The Supreme Court held that denying funding due to the content of a message amounts to viewpoint discrimination, and that, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[86] The Court noted that when a public university creates a limited public forum for promoting diverse student speech, as it did in this instance when it established a fund to cover the costs of student activities, it may not "discriminate against speech on the basis of viewpoint."[87] Importantly, the Court noted that the university itself had taken steps to make it explicitly known that the student groups were *not* conveying a message of the university as agents of the university, but instead were conveying their own messages vis-à-vis private speech.[88]

As the court in *Rosenberger* recognized, any limitations must not be based on particular viewpoints, but must be viewpoint neutral.[89] Viewpoint neutrality protects against viewpoint discrimination

81. Brief in Opposition at 16–17, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 1026.

82. *Id.*

83. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823–25 (1995); Lorence, *supra* note 71, at 31.

84. *Rosenberger*, 515 U.S. at 823.

85. *Id.* at 825.

86. *Id.* at 828.

87. *Id.* (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993)); *see infra* Part III(B).

88. *Id.* at 824, 833–35.

89. *Rosenberger*, 515 U.S. at 828; *see also* Leora Harpaz, *Public Forum Doctrine*, W. NEW ENGLAND UNIV. SCH. OF LAW, https://wneclaw.com/lawed/publicforums.html (last accessed Oct. 28, 2021).

whereby the government otherwise "uses its power to advance one person's opinion over another's in such matters as religion, politics, and belief."[90] When a university compels students to pay fees to fund private speech, the university must allocate those fees in a viewpoint-neutral fashion.[91]

In the second significant case regarding compelled student activity fees, *Southworth*, the Court distinguished *Rosenberger*:

> While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance.[92]

Whereas *Rosenberger* looked exclusively at the *distribution* of the student activity fees *after* they were collected, *Southworth* looked at the initial *collection* of student activity fees *before* they were allocated and distributed.[93]

In *Southworth*, a group of students from the University of Wisconsin challenged the university's $331.50 yearly compelled student fee as an infringement of the students' First Amendment rights.[94] The students did not challenge the portion of the fees that were used for "nonallocable" functions like student health services, sports, and facilities.[95] The university argued that the compelled fees contributed to the "educational mission" of the university, but the lower courts held to the contrary and invalidated the compelled fee system.[96]

The Supreme Court began its analysis by citing *Abood* and *Keller*, "recognizing that the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even

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90. Lorence, *supra* note 71, at 10.

91. Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000).

92. *Id.* at 233.

93. *Compare Rosenberger*, 515 U.S. at 840 (noting that the question before the Court is not about the First Amendment challenges to the means the fees are collected), *with Southworth*, 529 U.S. at 233 ("neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation *once the funds have been collected*") (emphasis added); *see also* Brief in Opposition at 17, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 1026.

94. *Southworth*, 529 U.S. at 221–22.

95. *Id.* at 223.

96. *Id.* at 221; *see also* Brief for Respondents at 38–41, *Southworth*, 529 U.S. 217 (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 20.

offensive."[97] The Court held that extending the "germane to" standard established in *Abood* and *Keller* to public universities would be "unworkable" and "[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."[98] The Court noted, "[i]f the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which she or he will or will not support."[99] In dicta, the Court further noted that universities are free to allow for an optional or refund system.[100] The Court ultimately chose not to impose a system like that because it could render the extracurricular student activities inoperative.[101] The Court upheld the viewpoint-neutrality standard established in *Rosenberger* and concluded that a university "may sustain the extracurricular dimensions of its programs by using compelled student fees with viewpoint neutrality as the operational principle."[102]

III. COMPELLED FEES ARE COMPELLED SPEECH

A. Free Speech Includes the Freedom Not to Speak

The First Amendment is a bedrock of our civil society, and it protects against both government impingement of speech and government coercion of speech. Indeed, the Supreme Court has repeatedly and uncontroversially held as much for decades.[103] As Justice William Brennan wrote, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."[104] When a person chooses to speak, she necessarily makes value judgments in what to say and what not to say. The Supreme Court has recognized this otherwise

97. *Southworth*, 529 U.S. at 230 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 209 (1977); Keller v. State Bar of Cal., 496 U.S. 1, 1 (1990)).

98. *Id.* at 231–32.

99. *Id.* at 232.

100. *Id.*

101. *Id.*

102. *Id.* at 233–34, *cited in* Apodaca v. White, 401 F. Supp. 3d 1040, 1051–53 (S.D. Cal. 2019) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

103. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that "the Bill of Rights denies those in power any legal opportunity to coerce" citizens to salute the flag), *cited in* Administrative Office of the U.S. Courts, *What Does Free Speech Mean?*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does (last visited Jan. 6, 2021) ("Freedom of speech includes the right[] [n]ot to speak."); Petition for Writ of Certiorari at 11, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (No. 16-1466) ("If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for citizens in their relations with the government.").

104. Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988).

commonsense notion, noting that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."[105] A specific application of this principle relates to compelled funding of public unions when the Court held that any compelled funding is compelled speech.[106]

Like public unions have done in the past, public universities attempt to circumvent students' constitutional right not to speak by compelling them to speak through mandatory student activity fees. Because student activity fees are analogous to union dues, a public university that compels a student to pay those fees violates that student's First Amendment rights.[107] The Supreme Court has spoken, both generally with regard to compelled speech and specifically with regard to public universities. But public universities continue to compel students to speak, often disregarding the viewpoint-neutrality standard set forth in *Rosenberger v. Rector & Visitors of the University of Virginia*. There is a synergy between the rights of all expressive groups on public university campuses.[108] The Court's defense of constitutional protections for religious groups in cases like *Rosenberger* is the same defense that protects the rights of LGBTQ groups and other expressive campus groups discussed in the proceeding cases.[109] Students in the cases that follow neither want to be forced to pay for the private speech of others, nor want to force others to pay for their private speech.[110]

Students from local chapters of a student-led, non-partisan national organization, Students for Life of America ("Students for Life"), have filed suit in recent years challenging the viewpoint discrimination they faced after being forced to pay fees to funds designated for student activities that they could not use for the local chapters of their own expressive student organizations.[111] Students

105. Hurley v. Irish-American Gay, 515 U.S. 557, 573 (1995).

106. *Janus*, 138 S. Ct. at 2460; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (holding, even prior to *Janus*, that compelling nonmembers to pay money for political speech violated their First Amendment rights).

107. *See* Baude & Volokh, *supra* note 7, at 198.

108. LUKE C. SHEAHAN, *Why Associations Matter: The Case for First Amendment Pluralism* 108 (2020) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995)).

109. *See id.*

110. *See infra* text accompanying notes 119, 127, 132.

111. *See, e.g.*, *Ball State Corrects Unconstitutional Policies That Harmed Pro-life Student Group, Alliance Defending Freedom*, Alliance Defending Freedom, https://adfmedia.org/press-release/ball-state-corrects-unconstitutional-policies-harmed-pro-life-student-group-0 (last visited Jan. 8, 2022).

for Life has a presence on more than 1,200 campuses across the country.[112]

In one of these Students for Life cases, when the group invited Martin Luther King, Jr.'s niece, Alveda King, to speak on Georgia Tech's campus, the university refused to fund the speaking event because Ms. King is "inherently religious."[113] Brian Cochran, Haley Theis, and other students of Georgia Tech who were members of the local chapter of Students for Life sued the university alleging viewpoint discrimination.[114] In their complaint, the students said that they were forced not only to contribute their money to other groups that espouse ideas with which the students disagree, but also, that the university denied them equal access to the same funding based on Ms. King's views.[115] The university funded numerous other groups with political and ideological positions—$2,760 from the collected student activity fees funded travel for Georgia Tech students to attend the Young Democratic Socialists of America Winter National Conference—but refused to provide funding to Students for Life for Ms. King's speech.[116] As one press release aptly put it, "[u]nder such a standard, [Martin Luther King, Jr.] himself would not be welcome on campus."[117]

The university eventually agreed to revise its policy and pay $50,000 in damages and attorneys' fees.[118] But for students like Brian and Haley, they would rather not contribute to the student activity fund at all rather than be compelled to pay, and then in this instance, be denied funding from the same fund to which they contributed.[119] Other students should not be forced to fund groups like Students for Life when they disagree with the views of the group.[120]

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112. *Students for Life of America*, https://studentsforlife.org/ (last visited Jan. 10, 2022) (noting that Students for Life of America has experienced rapid growth—from 100 to over 1,250 groups—throughout the last 15 years).

113. Complaint at ¶¶ 2, 172, 192, Students for Life at Ga. Tech v. Regents of the Univ. Sys. of Ga., No. 1:20-cv-01422-SDG (N.D. Ga. Apr. 1, 2020), ECF No. 1.

114. *Id.* ¶ 8.

115. *See generally id.*; *Georgia Tech Student Group's Lawsuit Prompts End to Discrimination Against MLK's Niece*, Alliance Defending Freedom, https://adfmedia.org/press-release/georgia-tech-student-groups-lawsuit-prompts-end-discrimination-against-mlks-niece (last visited Jan. 6, 2022).

116. Complaint ¶¶ 148–49, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG.

117. *Georgia Tech Student Group's Lawsuit*, *supra* note 115.

118. Plaintiff's Notice of Voluntary Dismissal with Prejudice ¶ 2, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG.

119. Complaint ¶¶ 260–61, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG.

120. Brief in Opposition at 17, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026 ("The students have not asked in this lawsuit that certain campus organizations be censored or silenced on campus, or that certain groups totally be cut off from funding from the mandatory fee."), *citing* Southworth v. Grebe, 151 F.3d 717, 721 (7th Cir. 1998) ("But the students do not ask that we restrict the speech of any

Georgia Tech's blatant viewpoint discrimination, even two years after *Janus v. AFSCME, Council 31*, is unfortunately not an isolated incident. In another legal battle that culminated in 2020, the largest four-year public university system in the country, California State University, agreed to pay $240,000 in damages and attorneys' fees and amend its policy across each of the twenty-three campuses of the university to comply with the constitution's viewpoint-neutrality standard.[121]

In this case, the university compelled students to pay a mandatory activity fee and then dispersed the proceeds of the fee to political and ideological organizations in a manner that was overtly *not* viewpoint neutral.[122] Prior to the settlement, the university had more than 100 recognized student groups, but allocated nearly $300,000—53% of the total student activity fees collected—to two groups on campus that draw sharp political and ideological controversy: the Gender Equity Center and the LGBTQA Pride Center.[123]

When one student, Nathan Apodaca, and the on-campus Students for Life organization requested $500 to bring in their own speaker, they were denied the funding because the university "limits all other student-run organizations to $500 per semester and they are not allowed to use the fees to pay speakers to advocate for their own viewpoints."[124] The students argued that the university treated Students for Life differently by denying mandatory student activity fees to the group even though it was "similarly situated to the Gender Equity Center and the LGBTQA Pride Center at the University" as a "student-led organization[] that engaged in expressive activity on campus to advocate for [its] own viewpoint[]."[125] Although Nathan and other members of the Students for Life group were compelled to pay into the student activity fee system to subsidize other groups that advocated for specific political and ideological positions, they were denied funding to advocate for their own viewpoints.[126] The students filed a lawsuit to vindicate their First

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student organization; they merely ask that they not be forced to financially subsidize speech with which they disagree.").

121. Joint Ex Parte Motion for Dismissal with Prejudice, Apodaca v. White, 401 F. Supp. 3d 1040 (S.D. Cal. 2019), No. 3:17-cv-01014-L-AHG; *see also Pro-life Student Group's Lawsuit Prompts Systemwide Policy Change at Nation's Largest University*, Alliance Defending Freedom, https://adfmedia.org/press-release/pro-life-student-groups-lawsuit-prompts-sytemwide-policy-change-nations-largest-0 (last visited Jan. 6, 2022).

122. Complaint ¶ 73, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS.

123. *Id.* ¶ 2; *see also Systemwide Policy Change*, *supra* note 121.

124. Complaint ¶ 2, *Apodaca*, No. 17-cv-1014-L-NLS.

125. *Id.* ¶¶ 230–33.

126. *Id.* ¶ 2.

Amendment rights that they should no longer be forced to pay for another person's private speech and expression against their will.[127]

Other students from the chapter of Students for Life at Ball State University, Julia Weis, Renee Harding, and Nora Hopf, sued their university when their group applied for $300 from the mandatory student activity fees "to share educational resources with pregnant and parenting students," but the university "denied the club's request because it advocates for pro-life views."[128] The university required all students to pay mandatory student activity fees, but refused funding to Students for Life because the group "engages in activities, advocacy, or speech in order to advance a particular political interest, religion, religious faith, or ideology."[129] The students in the Students for Life organization had collectively paid over $1,000 each year into the student activity fee fund, but were denied access to those funds for their organization.[130] The university ultimately changed their policies and agreed to pay over $12,000 in damages and attorneys' fees.[131]

Students like Brian, Haley, Nathan, Julia, Renee, Nora, and countless others do not want to silence those that deeply, genuinely, and sincerely hold different viewpoints; they simply do not want to be forced to pay for the private speech of other students.[132] Students who disagree with Brian, Nathan, Julia, and others should not be forced to pay for their speech either. One of the common goals that many universities share, promoting a marketplace of ideas, is only truly achieved when *all* students have the freedom to exercise their First Amendment rights to speak and not to speak.[133]

Of the three anecdotes above, the first two cases that were filed alleged that a public university created a public forum by maintaining a mandatory student activity fee system.[134] The Supreme Court

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127. *Id.* ¶¶ 20, 193, 221.

128. Complaint ¶¶ 1, 13, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-01799-SEB-TAB; *Ball State Corrects Unconstitutional Policies*, *supra* note 111.

129. Complaint ¶ 1, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB.

130. *Ball State Corrects Unconstitutional Policies*, *supra* note 111.

131. *Id.*

132. *See* Complaint ¶ 260, Students for Life at Georgia Tech v. Regents of the Univ. System of Georgia, No. 1:20-cv-01422-SDG; Complaint ¶¶ 2, 20, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS; *see generally* Complaint *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB; *see also* Brief in Opposition at 7, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026.

133. *See, e.g.*, Complaint ¶¶ 3, 147–53, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB; Complaint ¶ 1, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407.

134. Complaint ¶¶ 195–98, *Apodaca*, No. 17-cv-1014-L-NLS; Complaint ¶¶ 147–53, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB; *see also* Complaint ¶¶ 135–37, *Turning Point USA at Grand Valley State University*, No. 1:16-cv-01407.

released its decision in *Janus* on June 27, 2018, two weeks after Julia, Renee, and Nora filed their complaint against Ball State University.[135] That moment marked a significant change in the public forum doctrine as applied to student activity fee systems: a compelled student activity fee system is not a limited public forum.[136]

B. A Student Fee System is Not a Limited Public Forum

A student activity fee system is not a limited public forum when it is funded through compulsory fees. Prior to the Supreme Court's decision in *Janus,* compelled student activity fees arguably created a limited public forum, a type of designated public forum whereby the government opens public property for First Amendment expressive activities, but both defines the forum and imposes reasonable limitations based on speaker identity, subject matter, time, or some other means.[137] The government is under no obligation to create a limited public forum, and when it creates such a forum, it does so voluntarily.[138] The Court must address compelled speech and the public forum doctrine by looking first to the method by which the fees were compelled and collected, and only then can the Court turn to the means by which those fees were distributed. If the collection of the fees was unconstitutional, then there is no need—and no basis—for further analysis of the way in which that money is distributed.

In *Perry Education Association v. Perry Local Educators' Association,* a case regarding union access to certain means of communication, the Court plainly articulated First Amendment public forum doctrine.[139] Public forums are government-owned public property which are open to the public, "designed for and dedicated to expressive activities."[140] Justice Byron White identified three categories

135. *See generally* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

136. *See infra* Part III(B); *see generally* Complaint, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG (omitting any discussion of public forum doctrine because it is now inapplicable in the context of student activity fees).

137. Harpaz, *supra* note 89; Doug Linder, *Restricting Speech in the Limited Public Forum*, EXPLORING CONST. LAW (2021), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/designatedforum.htm; Bd. of Regents v. Southworth, 529 U.S. 217, 229–30 (2000) ("Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech."); *see also* Complaint ¶¶ 195–98, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS; Complaint ¶¶ 147–53, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB.

138. Linder, *supra* note 137.

139. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983), *cited in* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018); Aichinger, *supra* note 72.

140. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

of public forums: (1) traditional, or quintessential, public forums, whereby the "government may not prohibit all communicative activity"; (2) limited public forums, whereby the state is not required to leave the forum open, but as long as it does, "it is bound by the same standards as apply in a traditional public forum"; and (3) nonpublic forums, whereby the government may regulate speech "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[141]

In a limited public forum, the government must remain viewpoint neutral and may not discriminate based on a speaker's views.[142] Although the government may employ reasonable time, place, and manner restrictions, any content-based restriction must serve a compelling state interest.[143] A compelling interest to justify compelled speech must be ideologically neutral.[144] This viewpoint-neutrality standard protects a group or individual from being forced by the government to convey political and ideological ideas with which the group or individual disagrees.[145] If compelled student activity fees constitutionally create a limited public forum, then the viewpoint-neutrality standard would apply under current constitutional jurisprudence.[146]

One important distinction to draw here is that public forums are necessarily forums for *private* speech.[147] The compelling interest and viewpoint-neutrality standards apply in those contexts, but when the government itself is speaking, whether that be through taxes or tuition dollars, the standards do not apply and the government can speak in any way it chooses.[148] The Court in *Rosenberger* noted that the university itself had taken significant steps to make it explicitly known that the student groups were *not* conveying a message of the university as agents of the university, but instead were conveying their own messages vis-à-vis private speech.[149]

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141. *Perry*, 460 U.S. at 45–46; s*ee generally* Aichinger, *supra* note 72.

142. Legal Info. Inst., *Forums*, CORNELL L. SCH., https://www.law.cornell.edu/wex/forums (last accessed Jan. 12, 2021); *see also* Lorence, *supra* note 71, at 9–10.

143. *Perry*, 460 U.S. at 45.

144. Baude & Volokh, *supra* note 7, at 173 (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

145. *See, e.g.*, Lorence, *supra* note 71, at 9–10; Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995).

146. *See supra* text accompanying notes 141–43; Press Release, Frank Guadagnino, et al., *supra* note 67.

147. *See* Shurtleff v. City of Bos., 142 S. Ct. 1583, 1595 (2022).

148. Brief for Respondents at 60–61, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 20; *Southworth*, 529 U.S. at 241; *see also* Baude & Volokh, *supra* note 7, at 200.

149. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824, 832–35 (1995).

While a public university itself is a public forum, private speech through a compelled student activity fee scheme is not.[150] The means of collecting the fees is now unconstitutional.[151] Prior to *Janus*, compelled student activity fees were permissible under the public forum doctrine, so long as the university did not deny funding to any student group based on the group's views and expression.[152] However, the collection of fees must be constitutional *before* they can be used in a limited public forum. The Court in *Board of Regents v. Southworth* said that the fees could still be compelled in the interest of the legitimate purposes for which the forum was initially created, which in the case of public universities, is to promote the free-flowing marketplace of ideas.[153] Now that compelled financial contribution schemes are *prima facie* unconstitutional, compelled fees cannot create a limited public forum.[154]

C. Janus *Has Significant Implications for Public Universities*

Janus is explicit: "*Abood* is . . . overruled."[155] On its surface, the Court's holding in *Janus* means that nonmember public employees who no longer want to subsidize the speech of a union cannot be required to pay any amount of money to a public union.[156] But *Janus* applies to compelled speech more generally, and its holding extends well beyond public union contexts.[157] *Janus* renders all compelled financial contribution schemes unconstitutional, even mandatory student activity fees.[158]

A mandatory student activity fee system is a form of compelled financial contribution. The Court in *Southworth* relied almost exclusively on the reasoning in *Abood*, although instead of adopting *Abood*'s "germane to" test as a solution to the difficulty in

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150. *See, e.g.*, *Perry*, 4601999 U.S. S. Ct. Briefs LEXIS 155 U.S. 37, 45 (1983) (citing Widmar v. Vincent, 102 S. Ct. 263, 267 n.5 (1981) ("[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum.")).

151. *See infra* Part III(C).

152. *See, e.g.*, Lorence, *supra* note 71, at 9–10.

153. *See, e.g.*, Adams, *supra* note 73, at 17–19, 24; Complaint ¶ 3, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-01799-SEB-TAB; Complaint ¶ 1, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407.

154. *See infra* Part III(C).

155. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018).

156. *Id.* at 2486; *see also* Baude & Volokh, *supra* note 7, at 171 ("[R]equiring public employees to pay union agency fees is categorically unconstitutional . . . .").

157. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (noting that the Court has looked to public union law "when deciding cases involving compelled speech subsidies outside the labor sphere," including state bar fees, public university student fees, and commercial advertising assessments).

158. *See, e.g.*, *id.*; Kaufman, *supra* note 64, at 753; Wilson, *supra* note 62 ("Now that *Abood* is overturned, *Southworth* would logically follow it . . . .").

differentiating between chargeable and nonchargeable expenses, the Court in *Southworth* decided to uphold all the fees but require their distribution to be in a viewpoint-neutral manner.[159]

The Court in *Janus*, however, applied more inclusive First Amendment protections to ensure that a person's constitutional rights were not violated, even for a moment.[160] The Court essentially rejected the "germane to" standard and said that all compelled fees are compelled speech because, in part, "when such a line [between chargeable and nonchargeable expenses] is 'impossible to draw with precision,' the solution is to reject all such compulsory funding of speech, [and] not to allow all such compulsory funding."[161] By rejecting all compulsory funding, the Court recognized that any purported benefit conferred on a public employee did not outweigh the employee's constitutional guarantees.[162] Although those who choose not to contribute to a public union still must be represented by their bargaining unit's exclusive representative in collective bargaining and in disciplinary proceedings—what the dissent characterizes as a free-rider problem[163]—the Court found that First Amendment guarantees are more compelling.[164]

If, as *Janus* held, *Abood* is no longer good law even when a public employee receives tangible benefits without contributing to the union, then compelled student advocacy through mandatory fees where the student receives no tangible benefit is certainly unconstitutional.[165] In the public university context, the free-rider argument that the students who choose not to pay the activity fee will unfairly reap some form of benefit is even less compelling than it may have been in *Janus*. In *Janus*, the union argued that "free riders" still receive some purported benefit, but there is no such benefit in the public university context.[166] By not funding the private speech of other students, the only free ride a student receives

159. *Compare* Bd. of Regents v. Southworth, 529 U.S. 217, 231–34 (2000), *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977); *see also* Baude & Volokh, *supra* note 7, at 198.

160. *Janus*, 138 S. Ct. at 2464 (citing Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 305 (1986) ("[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose.").

161. *See id.* at 2481.

162. *Id.* at 2486 ("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.").

163. *Id.* at 2490 (Kagan, J., dissenting).

164. *Id.* at 2486 (majority opinion).

165. *See id.* at 2467.

166. Purported benefits in the public union context include things like collective bargaining and exclusive representation, among others. There is nothing analogous in the public university context.

is a ride away from the ideological activity that she opposes in the first place. Although cultivating a voluntary marketplace of ideas is noble and worthwhile, the purported benefits are not tangible in the same way that the union benefits are tangible for public employees who choose not to fund the union.[167] Furthermore, the varied and diverse student voices on the campus of a public university will still contribute to a broad marketplace of ideas by nature of the diverse students who choose to attend the university.[168]

Because *Janus* expressly overruled *Abood* on that basis, any standard that relied on *Abood* is unconstitutional.[169] Justice Elaina Kagan even acknowledged in her dissenting opinion that *Southworth,* among other cases, was based on *Abood.*[170] Compelling fees from public employees amounts to the same harm as compelling fees from public university students. In short, because *Janus* made the standard in *Abood* unconstitutional, and *Southworth* relied on *Abood,* the standard in *Southworth* is unconstitutional.[171]

The students' speech in *Rosenberger,* and later in *Southworth,* is private speech.[172] Because *Janus* overturned *Abood,* even speech "germane to," or in the interest of the legitimate purposes of the limited public forum (union, university, etc.) cannot be compelled absent a constitutional waiver. Because the student activity fees were used for private speech and not for government speech as the petitioner in *Rosenberger* conceded—and indeed preferred—this pulls the speech out of public forum analysis.

IV. PROPOSED CONSTITUTIONAL SYSTEM

The Supreme Court has spoken: one person cannot be forced to speak for another through compelled fees.[173] Unless a person affirmatively consents to financially contribute to private speech, any money taken by force is unconstitutional.[174] How then can public universities comply with these constitutional standards? There are at least five possible solutions: (1) eliminate the student activity fee

167. *See Unions Begin With You, supra* note 13.

168. *See infra* Part IV(B).

169. *See Janus,* 138 S. Ct. at 2481–82.

170. *Id.* at 2498 (Kagan, J., dissenting); *see also* Wilson, *supra* note 62 ("Now that *Abood* is overturned, *Southworth* would logically follow it . . . .").

171. Baude & Volokh, *supra* note 7, at 198.

172. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822 (1995) ("[T]he University has taken pains to disassociate itself from the private speech involved in this case."); Bd. of Regents v. Southworth, 529 U.S. 217, 220–21 (2000) (noting that the "constitutional questions arising from a program designed to facilitate extracurricular [involve] *student speech* at a public university" (emphasis added)).

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

174. *See, e.g., id.* at 2486; Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 789–90 (1961).

system altogether; (2) roll the separate activity fees into tuition; (3) require students to pay a set amount of activity fees, but allow them to allocate those fees as they see fit; (4) provide students with the opportunity to opt-out of paying activity fees; or (5) require students to furnish a constitutional waiver to opt in to paying the activity fees. The first four possible solutions have either constitutional or practical problems, or both. The fifth solution is the only appropriate solution that holds weight constitutionally and practically.

A. Other 'Solutions' Are Less Than Ideal

The simplest way for a public university to comply with the First Amendment regarding student activity fees is simple: eliminate the fees. Completely eliminating the mandatory student activity fees would, obviously, be consistent with the First Amendment right not to speak. But this option is neither preferable nor practical. Indeed, universities are meant to cultivate a marketplace of ideas, and none of the plaintiffs from any case cited in this article have seriously suggested totally defunding student groups.[175]

Rather, just like a supermarket—which offers a wide array of foods in the same store—where the operator of the market cannot force its patrons to spend their hard-earned money on any particular food item, a university cannot force its students to fund any particular group. Consistent with the Court's discussion in *Janus*, someone who is compelled to pay mandatory fees against her conscience is, as is worth repeating, "not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[176] In criminal law, the supermarket example would be theft and the bus example would be kidnapping. Students attending public universities should experience a wide array of ideas and opinions—just like in a supermarket—and learn how to critically engage with culture to ultimately discern what is noble, true, and worth pursuing.[177] But those students should not be "shanghaied" into supporting those ideas that they ultimately find to be objectionable or in conflict with their deeply held beliefs.

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175. Adams, *supra* note 73, at 17, 24; *see, e.g.*, Complaint ¶ 3, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-01799-SEB-TAB; Complaint ¶ 1, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407.

176. *Janus*, 138 S. Ct. at 2466.

177. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630, (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

Furthermore, student activity fees are deeply entrenched in the world of higher education, and it is unnecessary and likely impractical for universities to outright eliminate any system for directly supporting student groups.[178] To be clear, all compelled fees that are not part of tuition are unconstitutional, but if the statistics are comparable to the statistics for public employees who voluntarily agree to pay the fees, many students will voluntarily pay the fees as well.[179] Further, student activity fees began as a way to support student life in ways that did not invoke politics, ideology, and expression.[180] For the above reasons, this approach solves the constitutional problem by eliminating the fees, but not the practical problems that would arise.

Additionally, while rolling student activity fees into the cost of tuition seems like an amicable solution, it is also not adequate.[181] Combining the fees with tuition would rectify the constitutional issue by eliminating the scheme whereby *all* students fund the views of *some* students, but this approach allows for one speaker and one speaker alone: the public university.[182] Because the fees would become part of the university's budget, collected as part of tuition and voluntarily paid by students by nature of their enrollment at the university, the university would be free to use those fees in whichever way it chooses.[183] Even though it would become government speech and thus no longer a constitutional public forum issue,[184] this 'solution' is not ideal for at least five reasons: (1) tuition is already ballooning at an alarming rate, (2) some students are interested in a transactional college experience, (3) the marketplace of ideas becomes nonexistent, (4) universities are not keen on this approach, and (5) the change is not substantive.[185]

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178. *See* Kaufman, *supra* note 64, at 759.

179. *Compare* Daniel DiSalvo, *Public-Sector Unions After Janus: An Update*, MANHATTAN INST. (Feb. 14, 2019) https://www.manhattan-institute.org/public-sector-unions-after-janus (noting that even a year after *Janus*, union membership has not been affected, and may have actually increased) *with* Wilson, *supra* note 62 (writing a couple months after *Janus* was decided that "[o]nly an idiot thinks that the loss of fair share fees will have and economic cost to unions . . . which will completely disappear").

180. *See supra* Part II(B)(i) (explaining the history of student activity fees and their more recent trend toward politicization).

181. Kaufman, *supra* note 64, at 758.

182. Wilson, *supra* note 62 (noting that rolling the fees into tuition "would amplify one of the worst trends affecting higher education in recent decades: the growth in administrative power").

183. Baude & Volokh, *supra* note 7, at 200.

184. *Id.*; Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000).

185. *See infra* text accompanying notes 189–206.

First, the cost of higher education is already increasing at a near exponential rate.[186] This increased cost only makes the thought of earning a post-secondary degree more distant for potential students coming from lower socioeconomic backgrounds. Although some commentators suggest that students won't know the difference between paying $30,300 for tuition or $30,000 for tuition plus $300 for a compelled activity fee,[187] students are well aware of the increasing cost of tuition.[188] An additional $1,200 added to a four-year student loan will cost the student an additional $292 in interest over the life of the loan.[189]

Second, and somewhat related to the first point, in a country where some form of education after high school—whether trade school or a more traditional four-year college—is almost required, some students are looking for opportunities to get that additional training without all the fluff.[190] Especially for a nontraditional student who either delayed her college education or is returning to school for a second or third degree, paying compelled fees for any student group—let alone a political or ideological group—may be a waste of money in her eyes if she is attending school solely for a degree and not for the social and extracurricular activities.[191]

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186. *See, e.g.*, Camilo Maldonado, *Price of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018, 8:23 AM EDT), https://www.forbes.com/sites/camilomaldonado/2018/07/24/price-of-college-increasing-almost-8-times-faster-than-wages/?sh=a4ae1bf66c1d ("[T]he cost to attend a university increased nearly eight times faster than wages did."); Briana Boyington, Emma Kerr, & Sarah Wood, *20 Years of Tuition Growth at National Universities*, U.S. NEWS (Sept. 17, 2021, 9:30 AM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities ("Out-of-state tuition and fees at public National 6 Universities have risen 171%."); Emmie Martin, *Here's How Much More Expensive It Is For You To Go To College Than It Was For Your Parents*, CNBC, https://www.cnbc.com/2017/11/29/how-much-college-tuition-has-increased-from-1988-to-2018.html (last updated Nov. 29 2017, 9:57 AM EST) (noting that "the current cost [of education is] more than two-and-a-half times as much as it was in 1988—a markup of 163 percent.").

187. Baude & Volokh, *supra* note 7, at 200.

188. *See* sources cited *supra* note 186.

189. *See Student Loan Calculator*, Bankrate, https://www.bankrate.com/calculators/college-planning/loan-calculator.aspx (last visited Jan. 10, 2022) (comparing the interest for $121,200 with the interest for $120,000 over a 10 year loan term at 4.5%).

190. *See, e.g.*, Open Data Pa., Improve Access, Affordability, and Completion In Post-secondary Education and Training, COMMW. OF PA. ("[I]n the 21st century, most family-sustaining jobs will require some education or training beyond high school."); *see also* Wilson, *supra* note 62 ("But students who care nothing about extracurricular activities have no benefit from student fees and must purely suffer the 'harm' of forced money/speech.").

191. Wilson, *supra* note 62 ("But students who care nothing about extracurricular activities have no benefit from student fees and must purely suffer the 'harm' of forced money/speech.").

Third, many colleges in the country, especially public colleges, have a clear political and ideological character.[192] Eliminating student fees or rolling them into tuition will destroy any remaining vestige of a marketplace of ideas by allowing the university to internally censor the types of expressive activities that occur on campus.[193] The politics and ideologies of whoever is in the majority at a particular university will reign supreme. From the inception of our country to the present, many have cautioned against allowing a majority to exercise unfettered control in any context.[194] Commentators from either side of the political aisle have cautioned against eliminating the marketplace of ideas within schools especially.[195]

Fourth, many public universities do not want to roll student activity fees into tuition, and for good reason.[196] Universities are in existence by and for their students, and as such, they want to promote student groups and student speech.[197] In this time of rapid inflation, universities are competing to keep their costs low and would not want the additional fee wrapped into the sticker price they advertise, and eventually charge, prospective students.[198]

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192. Baude & Volokh, *supra* note 7, at 199 (noting that "there's little reason to think that all or even most universities will be politically balanced").

193. One university issued a press release in anticipation of a controversial event funded by student activity fees, which condemned the rhetoric of the speakers, but recognized that "we must continue to uphold the right to free speech—even speech we find abhorrent—because [the university] fully supports the fundamental right of free speech. To do otherwise not only violates the Constitution but would erode the basic freedom each of us shares to think and express ourselves as we wish." Press Release, Frank Guadagnino, et al., *supra* note 67.

194. THE FEDERALIST NO. 10 (James Madison) ("If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution."); THE FEDERALIST NO. 51 (James Madison) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure."); Malcolm Gladwell, *Young Leftists Should Go to the University of Austin*, OH, MG (Nov. 15, 2021), https://malcolmgladwell.bulletin.com/263138299110591 (writing about the need for students to attend a college where they will be in the minority, so as to learn "more from those whom [they] disagree with than from those [they] agree with").

195. Lauren Camera, *Republicans, Democrats Agree Campuses Should Embrace Controversial Speech*, U.S. NEWS (June 20, 2017, 4:59 PM), https://www.usnews.com/news/education-news/articles/2017-06-20/republicans-democrats-agree-campuses-should-embrace-controversial-speech; Isaac Willour, *What We Can Learn from the Campus Free-Speech War*, NAT'L REV. (Aug. 22, 2021, 6:30 AM), https://www.nationalreview.com/2021/08/what-we-can-learn-from-the-campus-free-speech-war/.

196. Baude & Volokh, *supra* note 7, at 200.

197. A cursory look at any college's website and admissions recruiting materials reveals that universities want students to know about all the student groups on campus.

198. *See* sources cited *supra* note 186.

Furthermore, they don't want to be the ones to shoulder the blame for controversial speakers.[199] Universities must make the choice whether they want diverse and independent student organizations or ubiquitous university-funded speech.[200] And they have already made that choice.[201] Universities separate student activity fees from tuition because they do not want student groups to become government actors, which would result in more liability for the university and more hassle in maintaining control and oversight of the hundreds of student organizations often present on a public university campus.[202] Furthermore, if student groups became government actors such that the private speech of the students was imputed to the government, there may also be potential constitutional violations under the Establishment Clause.[203] Universities make it clear that student organizations are "controlled and directed by students."[204]

And fifth, this change is a change only of accounting, not of substance.[205] Students would otherwise still pay the same amount of

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199. *See* Press Release, Frank Guadagnino, et al., *supra* note 67; Chappell, *supra* note 70 (describing how officials at one university refused to cancel controversial speakers, even when those officials described the speakers' rhetoric as "repugnant and denigrating," because all student groups have the right to invite speakers using student fees and the student activity fee committee's "task was to focus on the budget, not the speakers' content or ideology"); *see also* Baude & Volokh, *supra* note 7, at 200.

200. Baude & Volokh, *supra* note 7, at 200.

201. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833–35 (1995); Brief for Petitioners at 11–12, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 155 ("The [student activity fee] enables the University of Wisconsin-Madison to provide services that are *initiated and operated by students*" (emphasis added)); Press Release, Frank Guadagnino, et al., *supra* note 67 ("The University Park Allocation Committee, a student-led group that can provide funds assigned from student fees for events, makes its decisions independent of the University and remains viewpoint-neutral as an integral part of the allocation process.").

202. *See, e.g.*, *Student Organizations*, UNIV. MICH., https://campusinvolvement.umich.edu/managing-your-student-organization (last visited Jan. 22, 2022) ("[We have] 1,600 student organizations here at the University of Michigan."); *Find a Student Organization*, OHIO ST. U., https://activities.osu.edu/involvement/student_organizations/find_a_student_org/ (last visited Jan. 21, 2022) ("There are over 1,400 student organizations at Ohio State"); *Student Organization Resources and Event Planning Guidance*, TEX. A&M, https://studentactivities.tamu.edu/ (last visited Jan. 21, 2022) ("Texas A&M is home to more than 1000 student organizations"); *Campus Life*, UNIV. OF WIS., https://www.wisc.edu/campus-life/ (last visited Jan. 21, 2022) (showing that there are "nearly 900 student organizations" at the university of Wisconsin—Madison); *Rosenberger*, 515 U.S. at 833–35; Chappell, *supra* note 70; Press Release, Frank Guadagnino, et al., *supra* note 67.

203. *See Rosenberger*, 515 U.S. at 827–28 (noting that "[t]he court did not issue a definitive ruling on whether . . . [student activity fees] would or would not have violated the Establishment Clause"); *see generally* Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 777–79 (7th Cir. 2010) (citing U.S. CONST. amend. I).

204. *See e.g.*, *Rosenberger*, 515 U.S. at 833–35; Brief for Petitioners at 22, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 155; Press Release, Frank Guadagnino, et al., *supra* note 67.

205. *See* Baude & Volokh, *supra* note 7, at 200.

money as they would have paid under current mandatory fee schemes, and many students would still object to the expressive speech that the university would fund, even if that funding is technically constitutional.[206] Rolling the fees into tuition, again, solves the constitutional problem, but practical problems still persist.

Another possible solution would require students to pay a fixed amount toward the activity fund but allow them to allocate those funds as they see fit. One could imagine the university providing a checklist of all the student activities on campus, and then requiring the student to check a box next to a fixed number of those groups. Based on the number of students who select a certain group, that group would receive a percentage of the activity fees. As discussed later, this suggestion proves problematic as well.[207]

The Court outlined a potential iteration of this approach in *Board of Regents v. Southworth* when it wrote, "[i]f the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which he or she will or will not support," but the Court eventually rejected this.[208] The Court chose not to impose a system like that because it could render the extracurricular student activities inoperative, but the Court did note that universities are free to allow for an optional or refund system.[209]

While this approach is the most compelling discussed so far, at least in terms of practical application, it still does not quite pass constitutional muster as long as the students are forced to pay *something*. If all the groups listed are expressive or ideological groups, the nonconsenting student is still forced to pay for the private speech of others with which she may disagree. Further, if a student objected to supporting the system at all, she would still be compelled to contribute funding against her will. The Court squarely addresses this notion in *Janus*.[210]

Mr. Janus chose not to join his union because he opposed "many of the public policy positions that [his Union] advocates," he believed that the Union's "behavior in bargaining does not appreciate the current fiscal crisis[,]" and he believed that the collective bargaining structure "does not reflect his best interests or the interests

206. *See id.*; *Southworth*, 529 U.S. at 243 (Souter, J., concurring) ("No one disputes that some fraction of students' tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students.").

207. *See infra* text accompanying notes 214–21.

208. *Southworth*, 529 U.S. at 232; Baude & Volokh, supra note 7, at 198.

209. *Southworth*, 529 U.S. at 232.

210. *See generally* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2448 (2018).

of [other] citizens."[211] If he had the choice, Mr. Janus would not fund the union at all.[212] The Supreme Court held that he did have that choice when it wrote, "the First Amendment does not permit the government to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."[213] Similarly, requiring students in public universities to pay a fixed amount, even if they had the freedom to allocate the funds as they see fit, is unconstitutional if the student opposes the compelled fee system as a whole. Again, this approach solves the practical problem at the expense of the Constitution.

The final approach that is most convincing, but still inadequate, would provide students with the opportunity to opt-out of paying the student activity fee.[214] Under this approach, the cost of the student activity fee would, by default, be assessed against all students, but the students who decided they did not want to pay the student activity fee could opt-out. One potential benefit to this approach is that it is conceivable that a student group could receive *pro rata* funding based on the number of students who have opted out of paying the fee. In the case involving Nathan Apodaca, his group would not have been denied outright, but instead given funding consistent with the number of students who are members of the group.[215]

Many public unions, however, have implemented a similar approach after *Janus*, perpetuating even more egregious constitutional violations against public employees than had existed prior to *Janus*.[216] Many of these public unions have created an opt-out standard to lock employees into an agreement to pay union dues for an indefinite period of time.[217] The unions' opt-out standard conflicts with the *Janus* requirement that governments and unions must have clear and compelling evidence of a freely given,

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211. *Id.* at 2461 (quoting Petition for Writ of Certiorari app. A at 10a, 18a, *Janus*, 138 S. Ct. 2448 (No. 16-1466)); *see also* Kaufman, *supra* note 64, at 759.

212. *See supra* text accompanying notes 205–06.

213. *Janus*, 138 S. Ct. at 2467.

214. *See* Kaufman, *supra* note 64, at 759.

215. *See* Complaint ¶ 2, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS.

216. *See, e.g.*, Pet. for Writ of Cert. at 8–9, Troesch v. Chi. Tchrs. Union, et al., No. 20-1786 (U.S. June 23, 2021), ECF No. 1; Complaint ¶¶ 22–30, Biddiscombe v. Serv. Emps. Int'l Union, Loc. 668 et al., No. 4:20-cv-02462-MWB (M.D. Pa. Dec. 30, 2020), ECF No. 1; Complaint ¶¶ 22–30, Barlow v. Serv. Emps. Int'l Union, Loc. 668 et al., No. 1:20-cv-02459-JPW (M.D. Pa. Dec. 30, 2020), ECF No. 1; Complaint ¶¶ 23–30, Yanoski v. Serv. Emps. Int'l Union, Healthcare Pa. et al., No. 1:21-cv-00414-JPW (M.D. Pa. Mar. 5, 2021).

217. *See* sources cited *supra* note 216.

affirmative constitutional waiver in order to seize union dues from employees.[218]

By imposing contractual 15- or 20-day escape periods that roll around only once every 365 days, employees who attempt to both resign from their union and cease dues deductions, but miss their escape period—in some cases by less than a month—passively forfeit their First Amendment rights that they are actively trying to exercise.[219] Because public unions neither informed employees of their constitutional rights nor requested their affirmative waiver of those rights at the time the employees initially waived their right not to pay dues, these employees could not have knowingly, intelligently, and voluntarily waived their First Amendment rights.[220] Automatic renewals of the dues deductions do not allow for employees to affirmatively consent by knowingly, intelligently, and voluntarily waiving their right not to financially supporting the union and its speech.[221]

It is not far-fetched to conceive of public universities employing the same dangerous tactic against students. In fact, it would be worryingly simple: the university adds the student activity fee to the student's bill, the student has no actual knowledge of the charge until halfway through the semester, the student finds out about the charge and decides she does not want to pay the fee to fund the expressive groups, but the university already has the student's money in its possession.

The widely applicable First Amendment standard for a constitutional waiver is based on knowledge and consent. To waive a First Amendment right, a person must "knowingly, intelligently, and voluntarily" provide a waiver of a protected right.[222] The criminal law standard outlined in *Miranda* makes this standard explicit: "A valid waiver will not be presumed simply from . . . silence," and a waiver cannot be the product of the person being "tricked or cajoled into a waiver."[223] Simply signing a document, "which contained a typed-in clause stating that he had 'full knowledge' of his 'legal

218. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018).

219. *See* sources cited *supra* note 216.

220. *See* Curtis Publ'g, 388 U.S. at 143–45, *cited in* Pet. for Writ of Cert. at 18, *Troesch*, No. 20-1786; *see e.g.*, Ex. 7 at 3, Fultz et al. v Am. Fed'n of State, Cnty. and Mun. Emps., Council 13 et al., No. 1:20-cv-02107-JEJ (M.D. Pa. Nov. 12, 2020), ECF No. 1.

221. Pet. for Writ of Cert. at 10–11, *Troesch*, No. 20-1786.

222. D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185–86 (1972); Fuentes v. Shevin, 407 U.S. 67, 94–95 (1972); Edwards v. Arizona, 451 U.S. 477, 482–83 (1981); Pet. for Writ of Cert. at 16, *Troesch*, No. 20-1786).

223. Miranda v. Arizona, 384 U.S. 436, 475–76 (1966).

rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."[224]

While the proposed opt-out solution attempts to solve the practical problems associated with compelled student activity fees, it egregiously perpetuates the constitutional concerns. Each of the proposed solutions discussed in detail above fail for one reason or the other. Thankfully, the Supreme Court has already spoken and provided a standard that tracks with the Constitution.

B. Students Must "Opt In"

In order for a public university to collect student activity fees from a student for use by student groups that promote expressive speech, the student must furnish a knowing, intentional, and voluntary constitutional waiver of her First Amendment right not to speak and instead opt in to paying the student activity fees. The Supreme Court has already made it clear that public employees—and by extension public students—have the right and freedom to make their own decision whether they will provide financial support to expressive organizations.[225] The previous four 'solutions' all had some positive aspects to them, but they ultimately were not ideal for one reason or the other—either practical or constitutional. This opt-in solution is the only way a student fee system is no longer mandatory, but totally voluntary. This option synergizes *Southworth* with *Janus* and what ultimately emerges is a solution where practical meets constitutional. Unless students clearly and affirmatively consent before the student activity fees are taken from them, this "knowing, intentional, and voluntary" standard cannot be met.[226] In theory, this is the same standard that *Janus* established for public employees who choose not to be part of their union,[227] although public unions continue to attempt to limit their employees' First Amendment rights.[228]

The student's waiver must be knowing. She must be apprised of all the material facts before opting-in to the student activity fee scheme. The university should provide, along with the bill for tuition, an addendum that lists the expressive activities and groups,

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224. *Id.* at 492.

225. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018); *see also* Pet. for Writ of Cert. at 1–2, *Troesch*, No. 20-1786.

226. Wilson, *supra* note 62 ("[E]ven a refundable fee system would be prohibited; instead, universities would be required to get clear, advance consent to charge any student fees."); *see also D. H. Overmyer Co.*, 405 U.S. at 185–86; *Fuentes*, 407 U.S. at 94–95; *Edwards*, 451 U.S. at 482–83; Pet. for Writ of Cert. at 10–11, *Troesch*, No. 20-1786).

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

228. *See* sources cited *supra* notes 5, 216.

along with the amount of the requested student activity fee, and request that the student affirmatively consent to paying the fee, making it abundantly clear that the fee is voluntary. The student's waiver must be voluntary. There can be no coercion, and the student must not face any adverse action for choosing to express—or not express—her speech in a certain way. Mere participation in a student group is not an affirmative waiver if the student is not made aware of her First Amendment rights. She must intentionally choose to fund the private speech of others.

The university could, as discussed in one of the solutions above, permit the student to select certain student groups that she wants to fund *after* she provides a knowing, intentional, and voluntary waiver.[229] When the university acts as a middleperson between the students and the groups those students wish to fund, the money is still under some control by the university and must be distributed commensurate with the First Amendment viewpoint-neutrality standard.[230] The university would still have an obligation under *Rosenberger v. Rector & Visitors of the University of Virginia* and *Southworth* to distribute the collected voluntary funding in a viewpoint-neutral manner.[231] The difference in this instance would be that the fees were constitutionally collected pursuant to *Rosenberger*.[232]

Mandatory student fees are not essential, and in fact, are obstructive to vibrant student speech. Some who do not agree with the opt-in solution have expressed concern that student groups and student activities will go largely unfunded, but this concern is ill-advised.[233] As mentioned earlier in a comparison to public unions, there has not been a sharp decline in union participation as many predicted.[234] Students in a public university will still be able to share their ideas, they just will not be able to force other students to subsidize those ideas. Furthermore, there are countless ways for student groups to secure funding that do not require an unconstitutional coercion of other students' speech.[235]

And even since the shift toward expressive speech, student groups have flourished without any money from a student activity fund. For example, a majority of the student groups at the

229. *See supra* Part II(A)(ii).
230. *See supra* Part II(A)(ii).
231. See *supra* Part II(B)(ii).
232. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995).
233. *See* Kaufman, *supra* note 64, at 759.
234. *See e.g.*, DiSalvo, *Public-Sector Unions After Janus*, *supra* note 179; Wilson, *supra* note 62.
235. *See infra* text accompanying notes 238–39.

University of Wisconsin—71% when the Court heard *Southworth*—did not receive any funding from the existing student activity fund.[236] Student groups do and will continue to advance their ideas on their own, even if they have to raise their own money, accept subsidies from the national office of their organization, or more simply, receive voluntary funding from their members who have opted-in to supporting the group's speech through a voluntary activity fee system. Allowing students to fund and support any group they choose will allow a multitude of different ideas to thrive rather than only those that the university chooses to fund and endorse.[237]

Additionally, students have always been innovative in employing creative fundraising to garner the support they need to keep their club functioning, whether through bake sales, talent shows, contests, and alumni donations.[238] For a student group that is a local chapter of a national organization, the national organization is often willing, able, and eager to provide funding to support the local student chapter.[239] Moreover, most students will likely just check

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236. *See* Brief in Opposition at 8–9, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026.

237. Press Release, Frank Guadagnino, et al., *supra* note 67 (noting that although a university's officials opposed the rhetoric of the speakers chosen by the student group, they noted that "we are unalterably obligated under the U.S. Constitution's First Amendment to protect various expressive rights, even for those whose viewpoints offend our basic institutional values and our personal sensibilities").

238. *See, e.g.*, Juniata College, *100 Fundraising Ideas: Start Raising Money for a Good Cause Today*, https://www.juniata.edu/campus-life/activities/100-fundraising-ideas.php (last visited Jan. 12, 2022); Student Government Ass'n, *Ideas for Fundraising*, PENN STATE, https://wbsga.psu.edu/ideas-for-fundraising/ (last visited Jan. 22, 2022).

239. *Student Chapter Funding and Reimbursement*, AM. CONST. SOC'Y, https://www.acslaw.org/acs-chapters/student-chapters/student-resources/student-chapter-funding-and-reimbursement/ (last visited Jan. 22, 2022) (providing reimbursement for "approved Student Chapter events"); *AEI Executive Council Conferences and Summits*, AM. ENTER. INST., https://www.aei.org/executive-council-conferences-and-summits/ (last visited Jan. 22, 2022) (providing student group members with fully-funded opportunities to attend conferences); *Chapter Funding*, MED. STUDENTS FOR CHOICE, https://msfc.org/guide/chapter-funding/ (last visited Jan. 12, 2022) ("MSFC chapters . . . are entitled to up to $150 USD every 6 months."); *Initiative on Faith & Public Life*, AM. ENTER. INST., https://faithandpubliclife.com/ (last visited Jan. 22, 2022) ("provides . . . students with formational educational and professional opportunities . . . [by sponsoring] conferences, on-campus events, and other intensive programming that explore topics of politics, public policy, economics, business, and society from a perspective of faith."); *National Field Program*, TURNING POINT USA, https://www.tpusa.com/nfp (last visited Jan. 22, 2022) (providing funding to student groups for activism materials); *RSA Graduate Student Chapter Funding and Award Calendar, 2021-2022*, RHETORIC SOC'Y OF AM., https://rhetoricsociety.org/aws/RSA/pt/sp/student_chapters_funding (last visited Jan. 12, 2022) ("RSA will provide matching grants of $50 to qualified student chapters on an annual basis."); Student Chapter Project Grants, ANIMAL LEG. DEFENSE FUND, https://aldf.org/article/student-chapter-project-grants/ (last visited Jan. 12, 2022) ("Animal Legal Defense Fund's student chapters can apply for funding to support their animal law projects that advance our mission"); Students FAQ, Students for Life, https://studentsforlife.org/students/students-faq/ (last visited Jan. 21, 2022) ("Does it Cost Money to be a Students for Life Group? No—everything Students for Life of America provides

the box anyways and pay the fee.[240] But that does not matter, as long as those students who want to exercise their constitutional right to free speech maintain that right.

V. CONCLUSION

America has always been a beacon for free speech, and with that speech, a vast marketplace for a wide array of ideas.[241] The First Amendment protects both the right *to* speak and the right *not to* speak.[242] A public university—and indeed any educational institution—exists for the purpose of educating students.[243] The ability to share and experience a wide array of ideas is vital to education and critical thinking. However, public universities have begun compelling mandatory fees—not to support their own functions, but to fund the expressive and ideological speech of others—just as public unions had done through mandatory agency fees until the Supreme Court decided *Janus v. AFSCME, Council 31* in 2018.[244]

When a university wants to collect student activity fees that are separate from tuition, it should—indeed must—provide students with the opportunity to opt in to paying the fee by a knowing, voluntary, and intentional waiver of the student's First Amendment rights that is consistent with the standard set forth in *Janus*. When public students are forced to pay these fees against their will, there is no public forum, and students' First Amendment rights are impinged.[245] Although the Supreme Court has not yet revisited *Board of Regents v. Southworth* to expressly establish the same constitutional protections for public students' right not to speak, it has already made that decision through *Janus*.

James Madison, the original drafter of the First Amendment, cautioned, "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment

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to campus groups comes free of charge . . . include[ing] material pro-life resources, access to displays, pro-life training, and personal guidance from an SFLA Regional Coordinator.").

240. *See* Kaufman, *supra* note 64, at 759 n.161 (citing Elizabeth J. Akers & Matthew M. Chingos, *Are College Students Borrowing Blindly?*, BROOKINGS INST. (2014) ("[O]nly a bare majority of respondents (52 percent) at a selective public university were able to correctly identify . . . what they paid for their first year of college.")).

241. *See supra* Part III(A).

242. *Id.*

243. Adams, *supra* note 73, at 17–18, 24.

244. *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018) (holding that agency shop fees are compelled speech that violates the First Amendment); Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990).

245. *See supra* Part III(B).

in all cases whatsoever.[246] And more recently, the Supreme Court held that "[s]tates cannot put individuals to the choice of 'be[ing] compelled to affirm someone else's belief' or 'be[ing] forced to speak when [they] would prefer to remain silent.'"[247] Although the amounts of seized activity fees from students who object to supporting speech with which they disagree are calculable, no dollar amount can be placed on these fundamental rights that all American's have by way of the Constitution.[248]

246. Irving Brant, James Madison: The Nationalist, 1780–87, 351 (1948), *cited in* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 790 (1961).

247. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1745 (2018) (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 99 (1980)).

248. *See Janus*, 138 S. Ct. at 2464 (citing Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 305 (1986)); *see also* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (holding that even if a First Amendment injury is not quantifiable, "every violation [of a constitutional right] imports damage" (quoting Webb v. Portland Mfg. Co., 29 F. Cas. 506, 507 (1838))).