# Graduate Students for Academic Freedom

# v.

# UE and UE Local 1103 – Graduate Students United at the University of Chicago, N.D. Ill. 24-CV-6143

(First Amendment Challenge to Agency Fees for Graduate Student Worker Union)

George Luscombe
Dowd, Bloch, Bennett, Cervone,
Auerbach & Yokich LLP

# Summary of Case

- Plaintiff Graduate Students for Academic Freedom
- Alleges agency-fee arrangements under NLRA violate First Amendment – at least in the academic setting with a politically active union.
- Why Plaintiff Chose This Target?
  - Alleged Special First Amendment Concerns in Academic Setting
  - UE Allegedly a “Hyper-Ideological Group” – Campus Gaza War Protests
- What’s at Stake?
- Status
  - Defendants’ Motion to Dismiss / Plaintiff’s Summary Judgment Motion Pending

# Agency Fees Under NLRA

- NLRA Sections 8(a)(3) and 14(b)
    - Agency-fee arrangements not unlawful if otherwise permitted under state law.
- *Comm'ns Workers of America v. Beck*, 487 U.S. 735 (1988)
    - Unions may only require, over an employee's objection, an agency fee for expenses germane to collective bargaining and contract administration.

# First Amendment Claim – Two Components

- State Action
  - First Amendment only restricts governmental “state” action. Can the enforcement of an agency-fee arrangement in a CBA between a private-sector employer & union governed by the NLRA be considered state action?
- Merits
  - Assuming First Amendment applies, can the private-sector agency-fee arrangement survive First Amendment scrutiny?

# Didn’t the Supreme Court already decide that private-sector agency fees are constitutional?

- Yes
- RLA - *Railway Ees.’ Dep’t v. Hanson,* 351 U.S. 225, 238 (1956):
  - “[T]he requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.”
  - *See also Ellis v. Bhd. of Ry.*, 466 U.S. 435, 456 (1984) (“At a minimum, the union may constitutionally ‘expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.’” (quoting *Ry. Clerks* v. *Allen*, 373 U.S. 113, 122 (1963))

# What is the significance of *Janus?*

*Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018)

- Agency fee unconstitutional in the public sector
- What about private sector?
  - Suggests no state action in the private sector.
    - "No First Amendment issue could have properly arisen in those cases [*Hanson*, 351 U.S. 225, and *Int'l Ass'n of Machinists v. Street.*, 367 U.S. 740, 748 (1961)] unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today." *Janus*, 585 U.S. at 918 n.24
  - Merits – Distinguishes public & private sector.
    - "Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. 'In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.'" *Janus*, 585 U.S. at 920 (quoting *Harris*, 573 U.S. at 636).

# State Action

- Public Sector
  - No dispute regarding state action because there is a public employer enforcing the agency-fee arrangement.
- Private Sector – RLA, Section 2, Eleventh
  - *Railway Ees.' Dep't v. Hanson,* 351 U.S. 225 (1956)
  - "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Hanson*, 351 U.S. at 232 .
  - *Janus*, 585 U.S. at 918 n.24 – *Hanson's* state action rationale "questionable."
- Private Sector – NLRA, Sections 8(a)(3), 14(b)
  - No preemption of state right to work laws, distinguishes *Hanson*.
  - *Beck*, 487 U.S. at 761 ("We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action.").

# State Action NLRA – Courts of Appeals

- Seventh Circuit has not decided.
- Finding State Action
  - 1st Cir.: *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971)
  - 4th Cir.: *Beck v. Comm'ns. Workers of Am.*, 776 F.2d 1187 (4th Cir. 1985) (precedential value questionable, *Beck v. Comm'ns. Workers of Am.*, 800 F.2d 1280 (4th Cir. 1986) (*en banc, per curiam,* full court divided equally on state action question)
- Finding No State Action
  - 2d Cir.: *Price v. Int'l Union, United Auto., etc.*, 795 F.2d 1128 (2d Cir. 1986)
  - 3d Cir.: *White v. Comm'ns. Workers of Am., AFL-CIO, Local 13000,* 370 F.3d 346 (3d Cir. 2003) **(Alito, J.)**
  - 10th Cir.: *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971)
  - D.C. Cir.: *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983)

# State Action – *Lugar* Two-Step Test

- *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)

  - "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937.

  - "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937.

# State Action – *Lugar* Step 1

- Plaintiff's Argument
  - Agency fee is imposed by union via exclusive representation – the "exercise of some right or privilege created" by the NLRA.

- Response
  - Section 8(a)(3), itself is merely permissive. It only does not independently prohibit agency fee arrangements if they are otherwise permitted by State law.

  - With respect to exclusive representation, private action remains private, even when it may be facilitated by some government-created monopoly status. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974). Applied at *Lugar* Step 1 by *Price* (2d Cir.) and *Kolinske* (D.C. Cir.)

  - Union & Closed Shop Arrangements Long Predated NLRA

# State Action – *Lugar Step 2*

- Plaintiff's Argument
  - NLRA has sufficiently "encouraged" agency-fee arrangements to be deemed state action.
    - "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)
  - Combined Effect of Three Aspects of NLRA
    - Section 8(a)(3) Permitting Agency-Fee Arrangements & Legislative Purpose
    - Exclusive Representation
    - Employer Duty to Bargain over Agency Fee Arrangements
      - Employer cannot rely on 'philosophical" objections to agency-fee arrangements

# State Action – *Lugar* Step 2

- Response
  - These arguments were rejected by the courts of appeals in *Kolinske* (D.C. Cir.), *Price* (2d Cir.), *Reid* (10th Cir.), and *White* (3d Cir. (Alito, J.)
  - Section 8(a)(3) – Simply Does Not Independently Prohibit Agency-Fee Arrangements – Not Encouragement
    - *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 53 (1999) (where the legislature has merely decided "not to intervene" in a private contractual arrangement, there is no state action)
    - *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.")
    - *Flagg Bros.*, 436 U.S. 149, 164-65 (1978) ("These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.'")

# State Action – *Lugar* Step 2

- Response Continued
  - Exclusive Representation
    - With respect to exclusive representation, private action remains private, even when it may be facilitated by some government-created monopoly status. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974)
  - Duty to Bargain
    - Section 8(d): The duty to bargain "does not compel either party to agree to a proposal or require the making of a concession."
    - *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) ("[I]t is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.").
    - *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (holding NLRB had no authority to compel employer to agree to dues check-off)
    - "[T]he Supreme Court's decision in *Jackson* . . . forecloses the argument that a private party negotiating a contract must be viewed as a state actor if the state has furnished the party with more bargaining power than it would have otherwise possessed." *White*, 370 F.3d at 351 (Alito, J.).

# Merits of First Amendment Claim – Current Precedent

- RLA - *Railway Ees.' Dep't v. Hanson,* 351 U.S. 225, 238 (1956):
  - "[T]he requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments."
  - *See also Ellis v. Bhd. of Ry.*, 466 U.S. 435, 456 (1984) ("At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.'" (quoting *Ry. Clerks* v. *Allen*, 373 U.S. 113, 122 (1963))

- RLA- Street: *Int'l Ass'n of Machinists v. Street.*, 367 U.S. 740, 768-69 (1961)
  - No First Amendment concerns were implicated because Court construed RLA Section 2, Eleventh, as a statutory matter, "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."

# Merits of First Amendment Claim
# Current Precedent

- NLRA
  - *Comm'ns Workers of America v. Beck*, 487 U.S. 735 (1988)
    - "We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S., at 448))
    - Statutory Interpretation Decision – Did Not Reach State Action or Constitutional Questions.

# Merits of First Amendment Claim

- Plaintiff's Attempt to Distinguish *Hanson*
  - *Hanson* only a facial challenge – left open as applied challenges
  - Alleged Special First Amendment Concerns of Academic Workers – Research & Teaching
  - UE Allegedly a Uniquely "Hyper-Ideological Group" – Stance on War in Gaza

# Will Supreme Court Overrule *or* Distinguish *Hanson*?

- State Action – "questionable" *Janus*, 585 U.S. at 918 n.24

- Unlike Court's View of Public-Sector Bargaining, Bread & Butter Private Sector Bargaining Does Not Implicate First Amendment Concerns. *Janus,* 585 U.S. at 920

- Any State Interest to Justify First Amendment Infringement?
  - *Janus & Harris* Reject State Interest in Labor Peace
  - *Janus & Harris* Reject State Interest in Preventing Free Riders

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

GRADUATE STUDENTS FOR ACADEMIC FREEDOM, INC.,

*Plaintiff,*

*v.*

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA; and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA LOCAL 1103 – GRADUATE STUDENTS UNITED AT THE UNIVERSITY OF CHICAGO,

*Defendants.*

Case No. 1:24-cv-6143

**COMPLAINT**

## INTRODUCTION

1. Graduate students at the University of Chicago have been put to the choice of halting their academic pursuits, or funding antisemitism. That is unlawful.

2. In the Winter of 2023, graduate students at Chicago voted to unionize, and are now exclusively represented by GSU-UE—a local of United Electrical (UE).

3. That is a real problem. Among much else, UE has a *long* history of antisemitism. It is an outspoken proponent of the movement to "Boycott, Divest, and Sanction" Israel (BDS)—something so clearly antisemitic that both Joe Biden and Donald Trump have condemned it as such. Indeed, for years, the union has had a consuming fixation with the world's only Jewish state—a fixation peppered with all-too-common rhetoric. UE has charged Israel with "occupying" Palestine; has branded Israel an "apartheid regime"; and has accused Israel of committing "ethnic cleansing."

4. GSU-UE is cut from the same cloth. On campus, it has not only echoed its parent union's rhetoric, but has added to it. It took pains to publicly "reaffirm" its commitment to BDS just one week after the October 7 terrorist attacks. And it has joined the "UChicago United for Palestine Coalition," which gained notoriety for its protest encampment and hostile takeover of the Institute of Politics. Through it, GSU-UE has joined calls to "honor the martyrs"; fight against campus "Zionists"; resist "pigs" (*i.e.*, police); "liberate" Palestine from the "River to the Sea," and by "any means necessary"; and "bring the intifada home." Jimmy Hoffa's union this is not.

5. Nonetheless, under a recent collective bargaining agreement extracted by the GSU-UE, graduate students at the University must now either become dues-paying members of the union, or pay it an equivalent "agency fee," as a condition of continuing their work as teaching assistants, research assistants, or similar positions.

6. Constitutionally speaking, that is not kosher. The union's ability to obtain agency fees from nonconsenting students is the direct product of federal law—*i.e.*, it involves governmental action, subject to the First Amendment. But if GSU-UE wishes to wield such federally backed power, it must accept the responsibility that comes with it; it cannot use a government-backed cudgel, outside constitutional constraint. And if the First Amendment means anything, it means students cannot be compelled to fund a group they find abhorrent as the price of continuing their work.

7. The stories of Plaintiff's members lay bare the stakes that are at issue here. One member is an Israeli; another a proud Jew with family fighting in Israel; and some are graduate students simply horrified by the union's antisemitism—as

well as its other (to put it mildly) controversial political positions, which reach well beyond collective bargaining to virtually every hot-button subject (*e.g.*, abortion, affirmative action, policing, gender ideology, even the judiciary). Although members come from different backgrounds, none can stomach sending a penny to this union.

8. But that is the position they find themselves in—put to the choice of funding the union, or stopping their academic work. Some have chosen to opt-out entirely, and have quit pursuing RA work so long as it comes at the cost of their values. Others do not have the luxury. One student is here on a visa from Israel—something, of course, GSU-UE denounces under BDS—and cannot stop his work as a TA if he wants to stay in the country. Another depends on his RA work to help cover cost-of-living expenses, and cannot forgo that income if he wishes to stay at Chicago. Others are deeply torn—tortured as to how to weigh their consciences against their careers.

9. The First Amendment was adopted to prevent these sorts of choices. Forcing a person to associate with—let alone fund—a particular ideological organization is always a fraught First Amendment endeavor. But the constitutional infirmity *here* is exceptionally stark. Unlike a garden variety agency fee in the private sector, the agency fees here work as an academic toll on graduate students' ability to pursue expressive activities at the very heart of the First Amendment: Students cannot perform certain teaching or research activities without first paying a kick-back to the union. And to make an intolerable situation worse, that compulsion is *especially* problematic here, given GSU-UE's decision to adopt a divisive political identity, based on issues well outside the ambit of traditional collective bargaining.

10. What is happening at Chicago is thus as clear an example as it gets of an agency-fee scheme that violates the First Amendment, by the Supreme Court's own lights. An agency fee scheme cannot "force[] men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought." *Harris v. Quinn*, 573 U.S. 616, 631 (2014). But that is *exactly* this case. And for that reason, what is happening at Chicago is unlawful, and in violation of the First Amendment's most basic guarantees. It needs to be stopped.

**JURISDICTION AND VENUE**

11. This is a suit arising under the First Amendment.

12. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331. *See also Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 742 (1988) (First Amendment suit against compelled private-sector union fees may proceed directly in federal court).

13. Plaintiff has Article III standing. Its members have suffered injuries-in-fact as a direct result of Defendants' actions, and those injuries can be redressed by this Court; the First Amendment interests at stake are germane to Plaintiff's organizational purpose; and neither the asserted claim nor the requested relief requires Plaintiff's members to participate directly in this suit. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199-201 (2023); *see also Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 890-91 (2018) (individual has standing to bring constitutional challenge against union regarding agency fees). As for redress, this Court has authority to provide declaratory relief under the Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202), and

Federal Rule of Civil Procedure 57; injunctive relief under its inherent equitable powers (*Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)), and Federal Rule of Civil Procedure 65; and nominal damages under the same inherent authority (*Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 874 (9th Cir. 2017); *see also, e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 799-800 (2021)).

14. Venue is proper in this District, because a substantial part of the events or omissions giving rise to this action occurred in Chicago. *See* 28 U.S.C. § 1391(b)(2).

## PARTIES

15. Plaintiff Graduate Students for Academic Freedom, Inc. (GSAF) is a Virginia 501(c)(4) non-profit membership organization founded to promote academic freedom, and combat compelled speech and association across American campuses.

16. Defendant United Electrical, Radio and Machine Workers of America (UE) is a national union based in Pittsburgh, PA. It is the parent union of Graduate Students United (GSU), and signatory to the collective bargaining agreement at issue.

17. Defendant United Electrical, Radio and Machine Workers of America UE Local 1103 – GSU (GSU-UE) is a local affiliate of UE based in Chicago, IL. It is also a signatory to the collective bargaining agreement at issue—under which, it is the sole and exclusive bargaining agent of University of Chicago graduate students.

## FACTUAL ALLEGATIONS

### *The National Labor Relations Act*

18. "The NLRA governs federal labor-relations law." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255 (2009). Enacted in 1935, the Act was designed to facilitate

and encourage collective bargaining. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. 174*, 598 U.S. 771, 775 (2023); *see* 29 U.S.C. § 151. And it does so by "creat[ing] a regulatory framework governing collective bargaining agreements that differs significantly from the system that would otherwise exist." David Topel, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1146 (1992).

19. Three parts of this governing framework—all discussed later too—are helpful to understanding what happened at the University, and this challenge to it.

20. *First*, Section 9(a) says a union "designated or selected for the purposes of collective bargaining by the *majority* of the employees . . . shall be the *exclusive* representative[] of *all* the employees in such unit." 29 U.S.C. § 159 (emphases added).

21. "As the employees' exclusive bargaining representative, the [u]nion enjoys broad authority in the negotiation and administration of the collective bargaining contract." *14 Penn Plaza*, 556 U.S. at 255-56. Most of all, the union is empowered to set the "terms and conditions of employment" for *all* workers, and "b[i]nd" them to one agreement. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring) ("While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress.").

22. *Second*, Section 8(a) of the NLRA specifically authorizes "union-security" clauses. 29 U.S.C. § 158(a)(3). A union-security clause is a provision that requires a worker—as a condition of employment—to financially contribute to the union, either by becoming a dues-paying member, or by paying what is called an "agency fee." *See*

*Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 38 (1998). An agency fee is "a fee on employees who are not union members but who are nevertheless represented by the union in collective bargaining." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181 (2007). It is by law limited to those costs germane to collective bargaining. *Wegscheid v. Loc. 2911, Int'l Union*, 117 F.3d 986, 987 (7th Cir. 1997) (Posner, J.).

23. Section 8(a) bars an employer from making an employment decision that may "encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). But Congress carved from this any decision to include a union-security clause within a collective bargaining agreement. *Wegscheid*, 117 F.3d at 987. It thus "empowers the union to coerce the members of the bargaining unit" to either become a dues-paying union member, or pay the union an "agency fee." *Id.* at 987-88.

24. *Third*, the Act significantly encourages and facilitates the inclusion of union-security clauses within collective bargaining agreements. Sections 8(d) and 8(a)(5) of the NLRA make union-security clauses a mandatory subject of bargaining, and thus impose an obligation on employers to negotiate over such clauses in "good faith." *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 738, 744-45 (1963); *see also* 29 U.S.C. §§ 158(d), 158(a)(5). Meaning, employers commit an unfair labor practice—subject to sanction by the National Labor Relations Board—unless they exhibit a "serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960); *see also NLRB v. Overnite Transp. Co.*, 938 F.2d 815, 821 (7th Cir. 1991). The NLRB has explained that this requires an employer to present a "legitimate business purpose" for rejecting the

inclusion of a union-security clause. *CJC Holdings, Inc.*, 320 N.L.R.B. 1041, 1046 (1996). And as discussed later, this is a cabined ground: For instance, a "philosophical" objection to an agency fee, however fundamental, is not sufficient. The upshot is that under the federal labor laws, something like the agency-fee arrangement here is the strong default, and can only be displaced by the employer in defined circumstances.

*Unionization at the University of Chicago*

25. The University of Chicago was founded in 1890. It now boasts over 7,500 undergraduates, and over 10,000 graduate students, spread across a host of programs.

26. Since its first days, a defining trait of the University has been its zealous commitment to academic freedom. Its first President, William Rainey Harper, proclaimed "complete freedom of speech on all subjects" is "fundamental" to the University. And its current President, Paul Alivisatos, has echoed that, remarking how the University is "built upon principles of academic freedom and free expression."

27. This commitment is perhaps best captured by the University's adoption of the Kalven Report—the canonical 1967 report authored by the Kalven Committee (led by Professor Harry Kalven Jr.), offering "a statement on the University's role in political and social action." The Report underscores that a university must preserve "freedom of inquiry" and safeguard "independence from political fashions, passions, and pressures." And it recognized that dragooning faculty or students into "collective action" will necessarily come "at the price of censuring any minority who do[es] not

agree with the view adopted." In a word, universities ought to be committed to "neutrality" as an animating principle—be it within the classroom, or on the campus.[1]

28. Nonetheless, in 2007, a collection of graduate students took the first step toward creating a union—and later compelling all graduate students to support it.

29. In 2007, Graduate Students United (GSU) was founded at Chicago to advocate for graduate student workers (*e.g.*, teaching and research assistants).

30. From 2007 to 2016, GSU campaigned on a number of issues related to graduate student work—from wages, to healthcare, to fees, and the like. But GSU did not engage in any effort to unionize; it was a voluntary association of students.

31. In Summer 2016, however, GSU decided to go a step further, and made its first attempt at formally unionizing. A majority of graduate students (about 70%) voted to unionize—but at the time, the University opposed the effort. GSU eventually withdrew its unionization petition from the NLRB. And in 2019, GSU ultimately tabled its effort to unionize graduate students—following a three-day strike.

32. In Spring 2022, GSU began preparing a new unionization campaign. As part of this, GSU voted to formally affiliate with United Electrical, Radio and Machine Workers of America (UE). According to GSU's website, it only made this

[1] For the full Kalven Report, *see* https://perma.cc/N387-KGNN, attached as Exhibit 8.

decision after "thorough research" into UE's history. And it stressed it was drawn to UE's "issue-oriented" work—something that, as explained soon, is no small remark.[2]

33. In Winter 2023, GSU began organizing graduate students. At first, the "bargaining unit" that GSU sought to represent did not include every graduate school—most notable, it did not include the Law School. That February, a majority of the covered graduate students (*i.e.*, those who were within the defined bargaining unit, and voted) decided to unionize. The NLRB soon certified the results of that election; and the University said that it would agree to recognize the graduate union.

34. Given GSU's decision to affiliate with UE, this union was named the "United Electrical, Radio and Machine Workers of America UE Local 1103 – GSU" (GSU-UE). UE is the "parent union" of GSU; and GSU-UE is a local chapter of UE.

35. Over the next year, GSU-UE and the University bargained. And on March 6, 2024, the parties reached a tentative collective bargaining agreement.

36. Around this same time, GSU-UE was recruiting research assistants at the Law School to join the bargaining unit. GSU-UE quickly announced a vote for that March, which caught many law students by surprise. And while a number of law students strongly opposed this effort, they had little time and even fewer resources to coalesce a meaningful response. On March 19, the law students voted 59-29 to join GSU-UE. For reference, the Law School has about 600 JD students.

[2] About GSU-UE Local 1103: FAQs, GSU-UE, https://perma.cc/WDK9-JLGM, attached as Exhibit 9.

37. On March 28, the GSU-UE's membership voted to ratify the collective bargaining agreement. It took effect April 1, and is effective through March 31, 2027.

*The Collective Bargaining Agreement*

38. The parties to the agreement are the University, UE, and GSU-UE.[3]

39. Article 2 of the agreement recognizes GSU-UE as the "sole and exclusive bargaining agent" for graduate student workers at the school—defined to include *all* TAs, RAs, etc. But the agreement does not cover undergraduates, or "graduate students who are not employed to provide instructional or research services."

40. As previewed above, Article 2 follows directly from the NLRA. 29 U.S.C. § 159(a). Once a majority chooses a union, "only [that] union may contract the employee's terms and conditions of employment. . . . The employee may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180; *see also, e.g.*, *Steele*, 323 U.S. at 198-99 (observing that the "representative is clothed with power not unlike that of a legislature" and "the authority to act for [workers] is derived not from their action or consent but wholly from the command of [Congress]").

41. More, under the terms of this agreement, GSU-UE does not simply have the power to represent all graduate students—it also has the power to tax their work.

42. Article 3 provides that all graduate students covered by the contract must "as a condition of employment (i.e., assignment) . . . become and remain

[3] For the full collective bargaining agreement, *see* https://perma.cc/J64T-QCBB, attached as Exhibit 10.

members of the Union in good standing insofar as the payment of periodic dues and initiation fees, . . . or in lieu of such membership, pay to the Union an agency fee."

43. In other words, to remain a TA or RA (or some similar role), a graduate student must either become a dues-paying member of the union, or pay an agency fee (which is set to the same amount) drawn from a percentage of their regular earnings.

44. This provision too follows from the NLRA. 29 U.S.C. § 158(a)(3); *see also Int'l Union of Operating Engineers Loc. 399 v. Vill. of Lincolnshire*, 905 F.3d 995, 1001 (7th Cir. 2018) (noting union-security clauses are mandatory subjects of bargaining).

45. Article 3 also states the "amount of such agency fee shall be established by the Union in accordance with applicable law, but in no event shall such fee exceed full union dues." As a statutory matter, the "applicable law" is that the NLRA only allows a union to charge an agency fee "necessary to finance collective-bargaining activities." *Beck*, 487 U.S. at 759. The NLRA does not permit a union to "expend compelled agency fees on political causes." *Id.* at 745. (But the line between such "chargeable" and "nonchargeable" has proven fuzzy at best. *Janus*, 585 U.S. at 922.)

46. Importantly, Article 3 makes clear that collecting dues and fees is the prerogative of the union, and the union alone. The agreement allows graduate students to consent to have their dues or fees deducted directly from their paycheck (and transferred); or students can pay the union directly. But either way, what is plain—under both the agreement, and federal law—is the payments are made from the students to the union, to satisfy an obligation running from the students to the union (so long as they wish to work). 29 U.S.C. § 186(a)(2) (making it "unlawful for

any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization"); Article 3, Section 4 ("The University assumes no obligation, financial or otherwise, as a result of complying with the terms of this Article. . . . Once the funds are transmitted to the Union, their disposition will be the sole and exclusive obligation and responsibility of the Union.").

47. GSU-UE announced on May 30, 2024, that it will start to calculate dues and fees on July 1—with actual funds collected starting by the end of the month.[4]

*The GSU-UE Constitution*

48. On May 10, GSU-UE's membership ratified the union's constitution.[5]

49. Article 3 of the constitution states GSU "shall be affiliated with" UE.

50. Article 7 details how GSU-UE—as an affiliate and local chapter of UE—is supposed to forward UE regular payments, including from dues and initiation fees.

51. Article 7 also sets the amount of the agency fee to be charged by the union. According to Section VIII, "[a]gency fees shall be set to an amount equivalent to union dues." This is so even though federal law requires that agency fees constitute only a *portion* of member dues—those germane to collective bargaining, and no more.

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[4] While not expressly provided, GSU-UE and the University have represented that there is an exception to this dues-or-fees arrangement for religious objectors, who hold general "religious objections to joining or financially supporting a union." Office of the Provost, Graduate Student Unionization, U. CHI. (May 16, 2024), https://perma.cc/EA5V-9VFW, attached as Exhibit 11.

[5] For its full constitution, *see* About GSU-UE Local 1103: GSU-UE Constitution and Officers, GSU-UE, https://perma.cc/E72U-HHL9 (providing link to the constitution), attached as Exhibit 12.

*The GSU-UE's Antisemitism Problem*

52. When they are not negotiating collective bargaining agreements, UE—and following its lead, GSU-UE—spend an awful lot of time talking about Israel.

53. In 2015, UE became the first national union to join the "Boycott, Divest, and Sanction" movement.[6] And it has repeatedly "reaffirmed" its commitment since.[7]

54. Indeed, UE publishes a regular "policy book," collecting local chapters' "fundamental agreement" on a host of political issues. Chief among these "policies" is a diatribe on Israel, and a call for the "union at all levels to become engaged in BDS."[8]

55. UE is very proud of its support of BDS. But it shouldn't be. BDS is a "campaign aimed at delegitimizing and pressuring Israel, through the diplomatic, financial, professional, academic and cultural isolation of Israel, Israeli individuals, Israeli institutions, and, increasingly, Jews who support Israel's right to exist." It is, in a word, "antisemitic"—geared to the "eradication of the world's only Jewish state."[9]

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[6] Press Release, UE Endorses BDS Movement for Peace and Justice in Israel and Palestine, UE (Sept. 1, 2015), https://perma.cc/7AZR-S8XM, attached as Exhibit 13.

[7] *See, e.g.*, UE Condemns Attacks on Palestinian People, Demands Biden Pursue Peace, UE (May 15, 2021), https://perma.cc/J6BD-AY65, attached as Exhibit 14.

[8] UE Policy, UE, https://perma.cc/6HQX-BKND (providing link to the UE Policy Book), attached as Exhibit 15.

[9] The Boycott, Divestment and Sanctions Campaign (BDS), ADL (May 24, 2022), https://perma.cc/FT5F-99NX, attached as Exhibit 16.

56. BDS is so obviously antisemitic that both Joe Biden and Donald Trump have condemned it as such;[10] so too J-Street and AIPAC (perhaps an even broader gap to bridge).[11] Thirty-eight U.S. states (including Illinois) have adopted laws, executive orders, or resolutions castigating BDS as antisemitic.[12] Foreign countries, too, have issued statements or taken acts denouncing BDS as bigoted toward Jews.[13]

57. But not GSU-UE. In fact, GSU-UE is *so* committed to BDS that it made a point of publicly reaffirming (again) its support on October 16, 2023—when the slaughtered were still being pulled from the site of the Nova Musical Festival in Israel.

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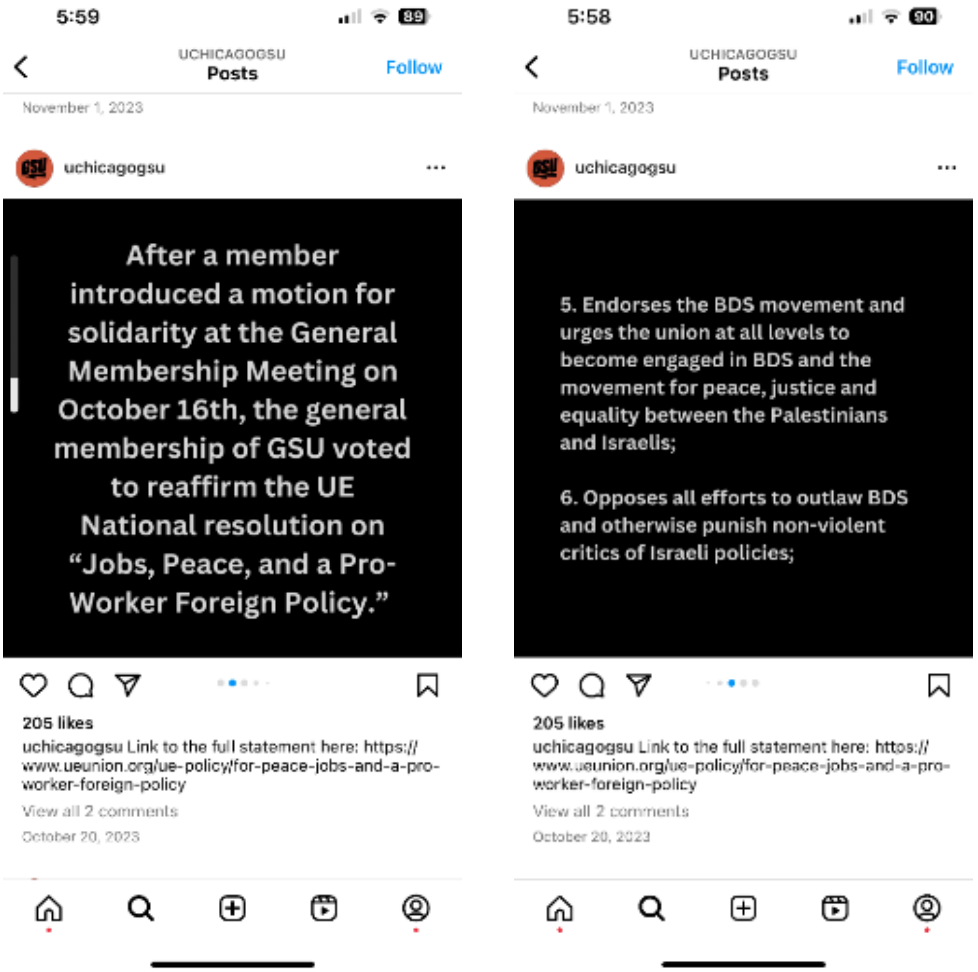
[10] Biden draws ire of Palestinian activists for shunning BDS efforts, AL JAZEERA (May 21, 2020), https://perma.cc/W8XA-VU7H, attached as Exhibit 17; BDS Israel boycott group is anti-Semitic, says US, BBC (Nov. 19, 2020), https://perma.cc/N36K-E4AA, attached as Exhibit 18.

[11] J Street policy principles on the Global BDS Movement and boycotts, divestment and sanctions efforts, J STREET, https://perma.cc/QH8M-2LEG, attached as Exhibit 19; The BDS Campaign Against Israel, AM. ISRAEL PUB. AFFS. COMM. (May 5, 2019), https://www.aipac.org/resources/bds-campaign-against-israel-lxsyw-78xry-bn97z, attached as Exhibit 20.

[12] Anti-Semitism: State Anti-BDS Legislation, AM.-ISRAELI COOP. ENTER., https://perma.cc/33LH-LA6K, attached as Exhibit 21.

[13] *See, e.g.*, Germany labels Israel boycott movement BDS anti-Semitic, BBC (May 17, 2019), https://perma.cc/CZC7-PV8R, attached as Exhibit 22.




58. It might not be surprising that the union's commentary on Israel does not end there. The union has long accused Israel of running an "occupation";[14] has branded it an "apartheid regime";[15] and has charged it with "ethnic cleansing."[16] All

[14] UE Receives "Thank You" from Over 3,000 People for Palestine Resolution, UE (Sept. 25, 2015), https://perma.cc/TH8N-SKUX, attached as Exhibit 23.

[15] Carol Lambiase, Connecticut Unionists Visit Palestine To See Sources of Conflict, Build Solidarity, UE (Nov. 20, 2015), https://perma.cc/6LQ5-CEFG, attached as Exhibit 24.

[16] UE, *supra* n.7.

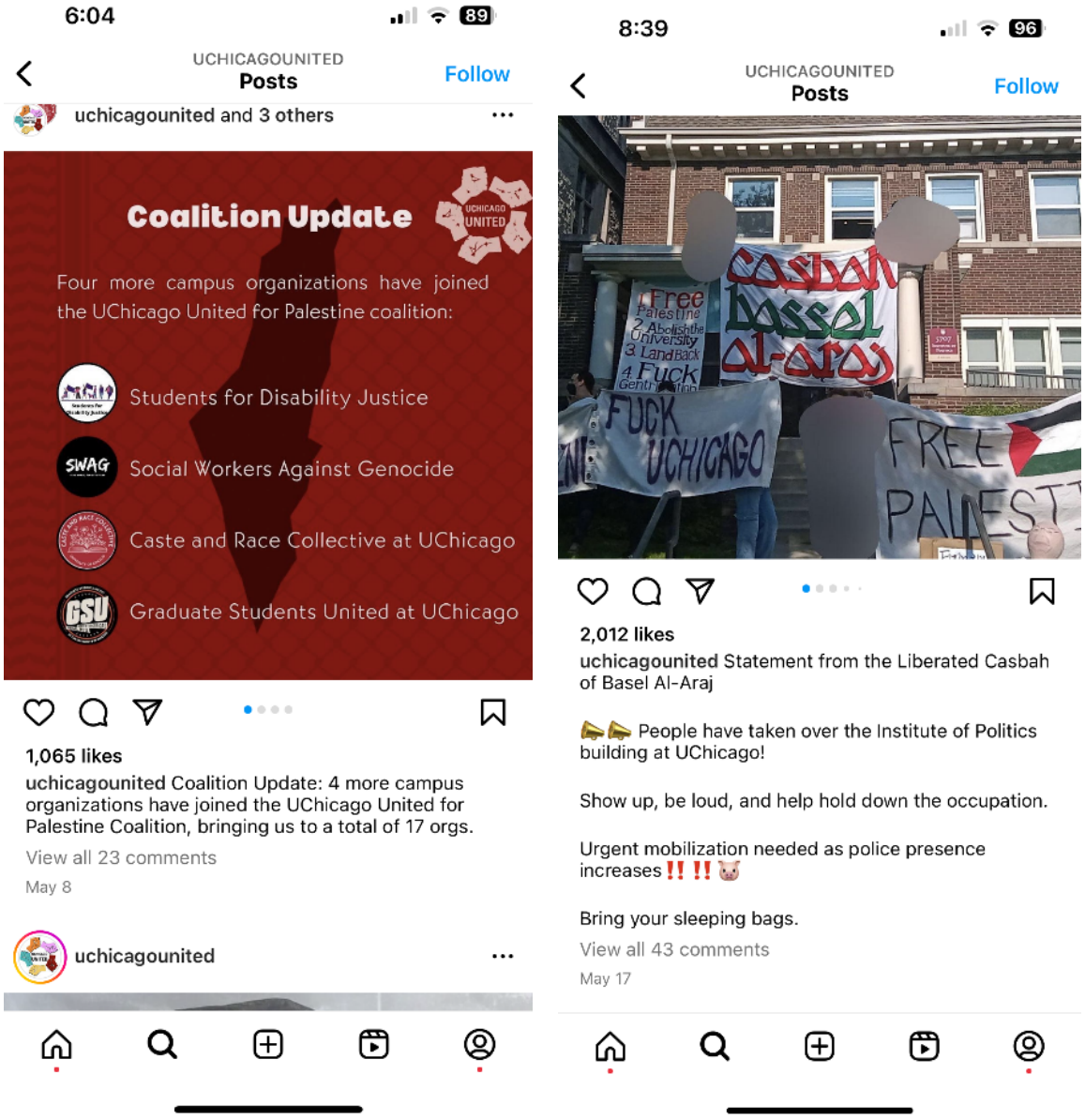
of this, for what it is worth, was *years* before October 7; the union has loathed Israel well before campus protest encampments were even a flicker in a radical eye.

59. But speaking of which, GSU-UE was involved in those too. Right after the October 7 terrorist attacks, UE called for an immediate ceasefire and complete cessation of military aid to Israel—calls it was quick to make again and again (and again).[17] On campus, GSU-UE joined those calls, and mirrored its parent union's rather charged rhetoric about Israel—*e.g.*, "genocide," "apartheid," and "occupation."

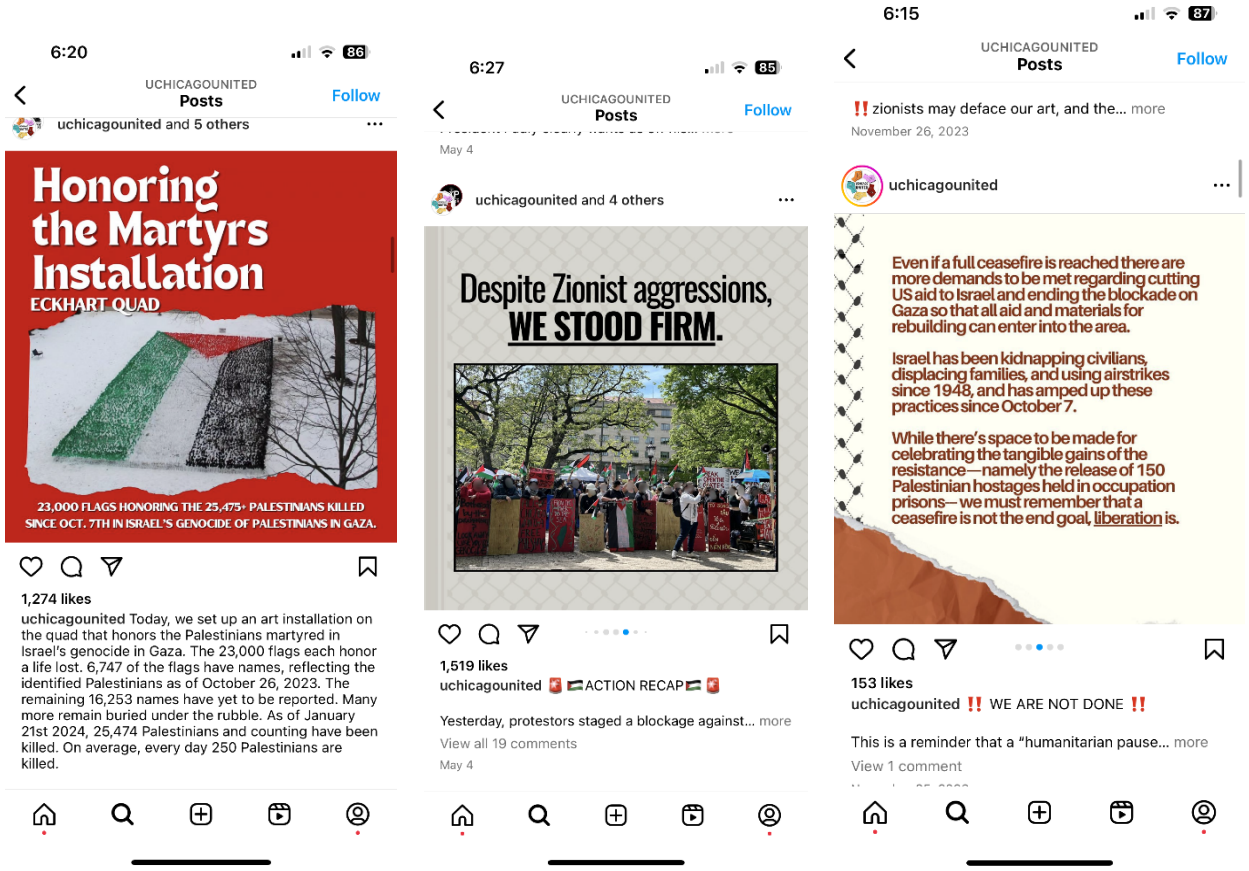

[17] Labor Calls for Ceasefire in Israel and Palestine Grow, UE (Nov. 21, 2023), https://perma.cc/U6CV-MXHZ, attached as Exhibit 25; UE Members Take Action for Palestine Ceasefire, UE (Dec. 15, 2023), https://perma.cc/5LGD-HWVK, attached as Exhibit 26; UE, Six Other National Unions Launch Ceasefire Effort, UE (Feb. 16, 2024), https://perma.cc/D8UW-GRG5, attached as Exhibit 27.



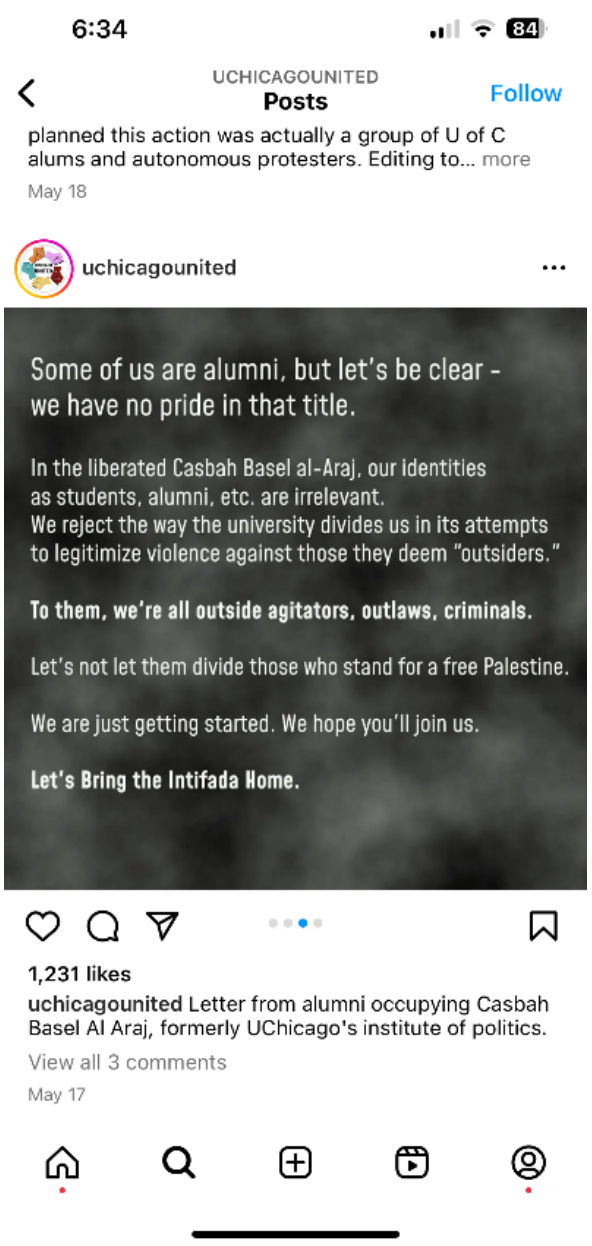
60. GSU-UE went further, and decided to join the "UChicago United for Palestine Coalition"—the same Coalition that lead the protest encampment on campus (something GSU-UE student leadership was already involved in), and the same Coalition that also occupied (or in its words, "liberated") the Institute of Politics.




61. As noted in the left photo, GSU-UE's partnership with the Coalition was announced on May 8, 2024. And that is as revealing as anything—because the Coalition had built up quite the track record to this point. It had occupied the admissions office; installed a "memorial" on the quad for the "Palestinian martyrs killed by Israel"; branded all those opposed to their antics as secret "Zionists" among them; and urged a "ceasefire is not the end goal"—but instead, that "liberation is."




62. Days after GSU-UE publicly joined the Coalition, the Coalition continued its behavior of the previous months. It continued to run the encampment on campus, and continued with violent rhetoric. To take one example: "We will keep fighting and heading the call to rise up for a Free Palestine *by any means necessary*. From the River to the Sea, until liberation." (Emphasis added.) And then practicing what it preached, the Coalition seized the Institute of Politics, where it made calls to "Bring the Intifada Home"; labeled a known terrorist to be a "martyr" (and purported to rename the building after him); and also repeatedly labeled police officers who (naturally) had been called to respond to the hostile takeover as "pigs." GSU-UE never disassociated from any of this; it remains a Coalition member in good standing.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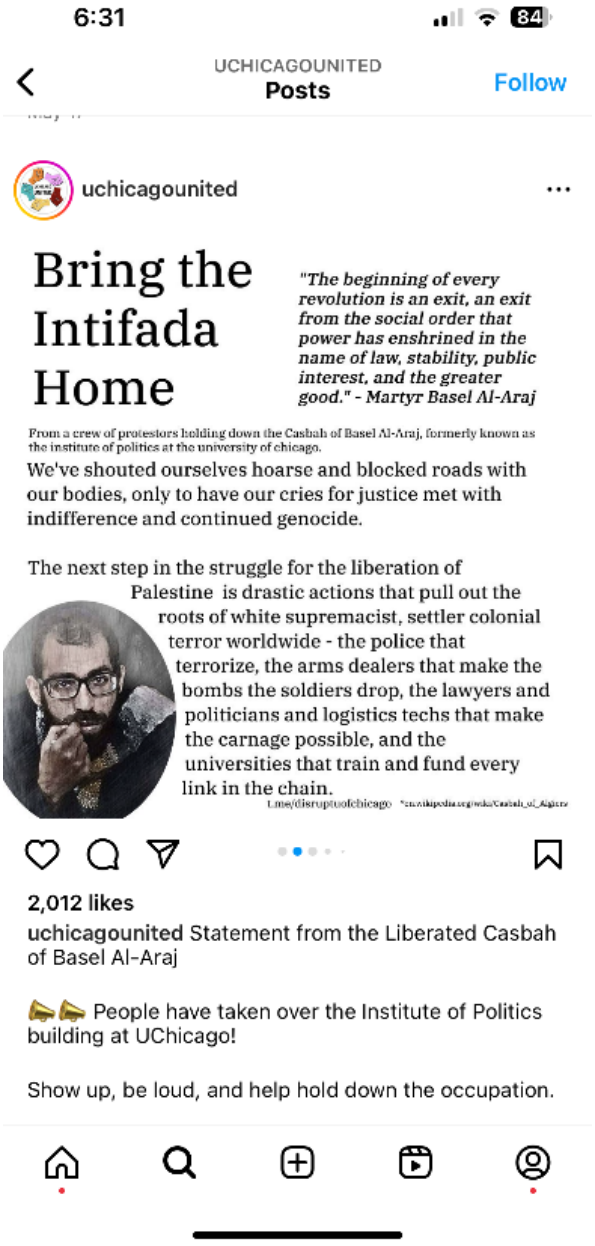
planned this action was actually a group of U of C alums and autonomous protesters. Editing to... more
May 18
uchicagounited
Some of us are alumni, but let's be clear - we have no pride in that title.
In the liberated Casbah Basel al-Araj, our identities as students, alumni, etc. are irrelevant.
We reject the way the university divides us in its attempts to legitimize violence against those they deem "outsiders."
To them, we're all outside agitators, outlaws, criminals.
Let's not let them divide those who stand for a free Palestine.
We are just getting started. We hope you'll join us.
Let's Bring the Intifada Home.
1,231 likes
uchicagounited Letter from alumni occupying Casbah Basel Al Araj, formerly UChicago's institute of politics.
View all 3 comments
May 17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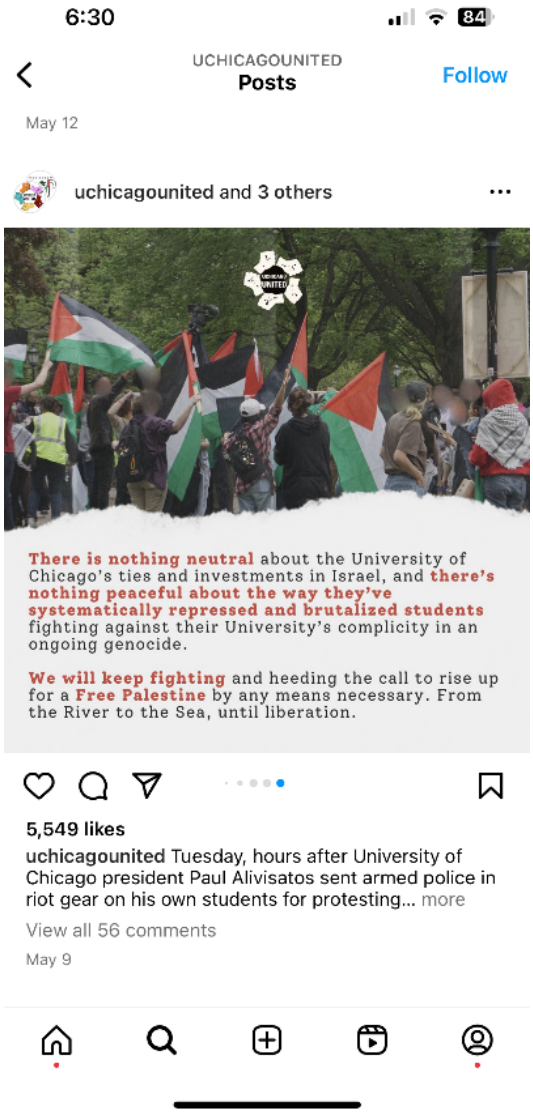
Bring the Intifada Home
"The beginning of every revolution is an exit, an exit from the social order that power has enshrined in the name of law, stability, public interest, and the greater good." - Martyr Basel Al-Araj
From a crew of protestors holding down the Casbah of Basel Al-Araj, formerly known as the institute of politics at the university of chicago.
We've shouted ourselves hoarse and blocked roads with our bodies, only to have our cries for justice met with indifference and continued genocide.
The next step in the struggle for the liberation of Palestine is drastic actions that pull out the roots of white supremacist, settler colonial terror worldwide - the police that terrorize, the arms dealers that make the bombs the soldiers drop, the lawyers and politicians and logistics techs that make the carnage possible, and the universities that train and fund every link in the chain.
2,012 likes
uchicagounited Statement from the Liberated Casbah of Basel Al-Araj
People have taken over the Institute of Politics building at UChicago!
Show up, be loud, and help hold down the occupation.




63. In fact, GSU-UE did not merely stand silent in the face of all this—but *embraced* it. For instance, around June, the President of GSU-UE—again, now the sole "representative" of all graduate students—signed onto an open letter, calling for a "Free Palestine . . . from the river to the sea"; condemning "Zionism"; charging Israel with "murdering" Palestinians; and reaffirming a strong commitment to BDS.[18]

[18] Petition in Support of USG's Statement on Palestine (cross-referencing other statements), https://perma.cc/4CVL-9KZR, attached as Exhibit 28.

64. All this is well past the bounds of reasonable debate. "Intifada" is not Arabic for "two-state solution." It is violent and hateful rhetoric. And it is part of a pattern and practice of speech and behavior that reeks of one thing—antisemitism.

65. It bears some emphasis too that the many other political positions adopted by the union are not exactly paradigms of moderation. As noted, UE publishes a comprehensive book of policy positions "set by rank-and-file delegates to [their] biennial national convention in the form of resolutions that are discussed and debated on the convention floor," and where local affiliates are expected to "live up" to those agreed policy positions in the field. These issues stretch far beyond wages, hours, and working conditions—and touch on virtually every controversial issue of our time (*e.g.*, abortion, affirmative action, gender ideology, policing, the judiciary).[19]

66. As some insight, it is "UE Policy" that cops engage in the "murder of countless people of color"; the "Republican Party now mainstreams racism directly" to the country; and "religious liberty" laws are cloaks of bigotry. The list goes on.

*Graduate Students for Academic Freedom*

67. Many graduate students are understandably devastated at the prospect of being forced to send GSU-UE money. For them, GSU-UE is rotted root-to-branch, and committed to disgusting (if not simply violent) positions. But under the collective bargaining agreement, these students must regularly fork over cash to GSU-UE as the price of continuing their academic pursuits—as an RA, TA, or some similar role.

[19] UE Policy, UE, *supra* n.8.

68. GSAF was created in 2024 to fight back against this sort of compulsion. The organization is dedicated to promoting academic freedom, and combatting compelled speech and association on campuses. GSAF's members include a number of graduate students at the University of Chicago subject to the union's agency fees.

69. One such member is Or Goldreich—a second-year PhD student in the Statistics Department, who currently serves as a TA (and thus, will need to pay the union a regular portion of his annual stipend). Or is Israeli. And he is "distraught" he must pay this union money. Goldreich Decl. ¶ 11. He finds the union's support of BDS deplorable—in no small part because it would have stopped him, due to his nationality, from ever attending the University. *Id.* ¶ 12. He also finds the union's "outspoken and longstanding positions on Israel abhorrent—for instance, accusing the country of perpetrating 'apartheid' and 'genocide.'" *Id.* ¶ 11. So too their behavior on campus: "[B]oth the union and its leadership have loudly expressed sympathy (if not outright support) for terrorists and terrorism, in the aftermath of the October 7 attacks." *Id.* ¶ 11. Yet he has no other option but to fund it: Or is here on a student visa, which he will lose if he stops work as a TA; but he cannot continue his work as a TA without cutting a regular check to the union that he sees as revolting. *Id.* ¶ 10.[20]

70. Another member is Student B. Student B is a law student who wants to serve as an RA during its final year at the school. Student B Decl. ¶ 13. At the same time, B is a "proud Jewish Zionist" whose grandfather fought in the Israeli War

[20] Or's full declaration is attached as Exhibit 1.

of Independence, and who has family currently serving in the Israeli Defense Force. *Id.* ¶¶ 7, 10. B is "*disgusted* by how the union and its leaders have branded [their] service as part of some 'colonial' project, or as perpetuating 'genocide,' 'ethnic cleansing,' or 'apartheid.'" *Id.* ¶ 10. B also knew victims of the October 7 attacks, and is horrified at how "GSU-UE has tripled-down" on its support for BDS right after the worst massacre of Jews since the Holocaust. *Id.* ¶ 11. Student B cannot bring itself to send a penny to GSU-UE—so even though Student B has worked as an RA before, B has opted-out of applying for further RA work, because doing so would violate its conscience. "It breaks my heart that I have been put in this position. I would love to be an RA this year, . . . [but] I will not contribute to antisemitism." *Id.* ¶ 13.[21]

71. Student A, also a law student, is in a similar position—A has concrete plans to start new RA work at the start of the Autumn Quarter, but is agonized at the prospect of having to contribute some of his wages to the union. A's family was forced to flee A's country of birth when A was two. And Student A sees in GSU-UE's rhetoric the very radicalism that forced that flight: "The same ideology that caused my family to flee for our lives is the one that animates [GSU-UE's] hateful beliefs. For me, the language of 'martyrdom' and 'intifada' are not empty words; it is the rhetoric of a theology that drove my family from our home, and still rings in our ears every day as we look over our shoulder." Student A Decl.¶ 14. A also has a partner whose extended family was killed in the Holocaust; A "cannot imagine being

[21] Student B's declaration is attached as Exhibit 4.

associated with a group that promotes a form of hate that jeopardizes our family and our future." *Id.* ¶ 15. But Student A has no other choice. "My family has contributed all they could to help pay for my education, and I am responsible for covering a good amount of my cost-of-living expenses." *Id.* ¶ 7. Student A depends on regular RA work (often maxing-out hours) to pay for those expenses—and cannot afford to stop.[22]

72. As the other declarations make plain, these are not outlier accounts. Many graduate students have fundamental objections to GSU-UE—be it the union's antisemitism, or its other political positions—but are nonetheless being "put to the choice of continuing [their] academic pursuits and studies, and contributing money to a group [they] find odious." Student C Decl. ¶ 11; *see also, e.g.*, Student D Decl. ¶ 14 ("Accordingly, come the Autumn Quarter, I expect to have to violate my conscience, as the price of continuing my work as an RA"). Each of these graduate students feels "put to the choice of weighing my career versus my conscience." Shia Decl. ¶ 17. None would have *anything* to do with this union—absent compulsion.[23]

**CLAIM FOR RELIEF**

73. Wielding their powers under the NLRA, UE and GSU-UE have extracted a levy on graduate students at the University of Chicago: In order to carry on with their pursuits as an TA or RA, they must send a portion of their earnings to

[22] Student A's declaration is attached as Exhibit 3.

[23] Spencer Shia's declaration is attached as Exhibit 2; Student C's declaration is attached as Exhibit 5; and Student D's declaration is attached as Exhibit 6. This Complaint incorporates all attached declarations and exhibits, as if included herein.

the union. That compulsion is unlawful. The First Amendment bars a union like GSU-UE from forcing students to pay it an fee as the price of continuing their work.

*First Amendment – Governmental Action*

74. Purely private conduct cannot violate the First Amendment. But the fact a union may be a private entity "does not end the matter . . . because the conduct of private actors, in some cases, can constitute [governmental] action." *Hallinan v. Fraternal Order of Police of Chicago Lodge 7*, 570 F.3d 811, 815 (7th Cir. 2009).

75. The governmental action doctrine is designed to safeguard "individual liberty." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019). Defined too broad—where everyone is a governmental actor—too much private conduct will be restrained by constitutional limitations that ought to apply only to the state. But defined too narrow, nominally private parties will be able to wield state-sanctioned power, all while unshackled by the legal limits that otherwise cabin such authority.

76. The test for *when* conduct crosses from private to governmental has two-parts: "[T]he deprivation of constitutional rights must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . and the party charged with the deprivation must be a person who may fairly be said to be a State actor." *Hallinan*, 570 F.3d at 815 (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)).

77. For all its adjectives and adverbs, though, the question is this: Whether there is a sufficiently "'close nexus between the [government] and the challenged

action' [such] that the challenged action 'may be fairly treated as that of the state itself.'" *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823 (7th Cir. 2009).

78. Finally, the governmental action inquiry is a *conduct-specific* inquiry. The fact a private actor is heavily regulated, granted some monopoly, or otherwise boosted by the state does not make everything it does governmental action. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351-52 (1974). The analysis instead turns on whether the "very activity" is "supported by state action." *Hallinan*, 570 F.3d at 818.

79. The "activity" at issue here is UE and GSU-UE (for present purposes, the "union" or just "GSU-UE") compelling graduate students to pay the union a portion of their earnings as an agency fee, as a condition of continuing their academic work. The union's ability to do so is the direct product of federal law. In other words, it is governmental action, and thus subject to the strictures of the First Amendment.[24]

Step One

80. Step one asks: "Whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). And the answer here is yes: GSU-UE's extraction of fees is the product of its legal power to bind all workers to a single collective bargaining agreement, as their sole and exclusive representative.

[24] In *Janus*—plus *Harris* and *Knox*—the issue of governmental action was not present, because those cases involved public-sector unions, where the government was a signatory to the contract (satisfying the governmental-action requirement).

81. The Supreme Court has said as much: The "collection of fees from nonmembers is authorized by an act of legislative grace—one that we have termed 'unusual' and 'extraordinary.'" *Knox v. SEIU, Local 1000*, 567 U.S. 298, 313-14 (2012).

82. Rightly so. The NLRA "[c]reate[d] a regulatory framework governing collective bargaining agreements that differs significantly from the system that would otherwise exist." Topel, *supra*, at 1146. Rather than allow individual workers to negotiate directly—or for that matter, allow multiple unions to negotiate on behalf of different workers—the NLRA empowers a "majority" of workers within a given bargaining unit to designate a single union, at which point that one union "shall be the exclusive representative[] of all the employees in such unit." 29 U.S.C. § 159(a).

83. The NLRA thus "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Allis-Chalmers*, 388 U.S. at 180; *see Janus*, 585 U.S. at 887 ("rights of individual employees" are "restrict[ed]"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (this was "very purpose" of the NLRA).

84. As part of that "created power," the NLRA enables a union to bind all workers, regardless of whether they have consented. *See Allis-Chalmers*, 388 U.S. at 180; *see also* Archibald Cox et al., *Labor Law: Cases and Materials* 362 (11th ed. 1992) (Congress "replaced a bargaining structure based on volunteerism and economic force with one based on legal compulsion."); Topel, *supra*, at 1152 (describing the same).

85. This all satisfies step one of the governmental-action inquiry. The NLRA is the "source" of "authority" that has empowered the union to visit the

constitutional deprivation at issue. *Edmonson*, 500 U.S. at 620. Only with the NLRA does GSU-UE have the authority to both represent *all* graduate workers (whether or not they consent), as well as *bind* those workers to one contract. And here, GSU-UE used that power to extract a union-security clause, which compels graduate students to pay it an agency fee (or join the union) as a condition of continuing their work.

Step Two

86. The second governmental action step asks: "Whether the private party charged with the deprivation could be described in all fairness as a state actor." *Id.*

87. Here too, yes. The line from private to governmental action is crossed "when the involvement of governmental authority aggravates or contributes to the unlawful conduct." *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1149 (7th Cir. 1995). And that is the case here. The NLRA has "significantly encouraged" the "very activity" at issue, *Driscoll v. IUOE, Local 139*, 484 F.2d 682, 690 (7th Cir. 1973). That creates the "close nexus" needed for step two. *Hallinan*, 570 F.3d at 816.

88. To start, recall the three features of the NLRA above: (1) The Act gives the union "broad authority" as exclusive representative to decide workers' conditions of employment, *Beck*, 487 U.S. at 739; (2) the Act then specifically authorizes unions to obtain union-security clauses, and thus "empowers the union to coerce the members of the bargaining unit" to either join the union, or pay a fee, *Wegscheid*, 117 F.3d at 987-88; and (3) the Act creates an effective presumption in favor of such fees.[25]

[25] In analyzing governmental action here, some federal circuit courts have found (1) and (2) alone sufficient. *E.g.*, *Beck v. CWA*, 776 F.2d 1187, 1208 (4th Cir. 1985) ("It is true, the actor is a union, but the union acts only under the warrant of

89. The final point here bears emphasis. By making union-security clauses a mandatory subject of bargaining, the NLRA is not agnostic as to whether a collective bargaining agreement includes one. Instead, the Act effectively makes such clauses the default—and subjects an employer's decision to *reject* one to a searching "good faith" review. *See Lincolnshire*, 905 F.3d at 1001. That means that an employer must exhibit a "serious intent to adjust differences and to reach an acceptable common ground." *Ins. Agents' Int'l Union*, 361 U.S. at 485. Or said another way: An employer must show a "real" or "sincere" desire to reach agreement. *Overnite Transp. Co.*, 938 F.2d at 821; *see Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94, 98 (2d Cir. 1979). An employer cannot reject a union-security clause out of hand; or for philosophical reasons; or unilaterally adopt another proposal to break a deadlock. *See Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 998 (7th Cir. 2000). Only a "legitimate business purpose" is sufficient. *CJC Holdings, Inc.*, 320 N.L.R.B. at 1046.

90. That is not always easy. For decades, the NLRB has rejected efforts by employers to resist agency fees in collective bargaining agreements—and the federal courts have regularly affirmed, applying a highly deferential standard of review.[26]

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federal authority. The union wears the cloak of the government; in making its demands it acts under authority vested in it by the federal government."); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16 & n.2 (1st Cir. 1971) (this provision "constitutes governmental endorsement in an area in which Congress makes the rules").

[26] NLRB: *See, e.g.*, *Dist. Hosp. Partners, L.P.*, 373 N.L.R.B. No. 55, 2024 WL 2110452, at *10-11 (May 8, 2024) (rejecting employer's philosophical objections to agency fees, its claim that agency fees hindered recruiting, and its claim that employees opposed the imposition of such fees); *S & F Market St. Healthcare LLC*, 2012 WL 1309214 (Apr. 16, 2012) ("In particular, it is well established that an employer's refusal to consider a union security clause solely on 'philosophical' grounds

91. Taken together, these parts of the NLRA—the exclusive representation provision (29 U.S.C. § 159(a)), the Act's express carve-out and allowance for agency fee clauses (*id.* § 158(a)(3)), and its making of union-security clauses the subject of mandatory bargaining (*id.* §§ 158(a)(5); 158(d))—have put the Government's "thumb on the scales" in favor of fees. *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

92. And the consequence is predictable: Union-security clauses like the one here are the overwhelming norm, not the exception. Intuitively, the "practical" effect of the above has long been that employers are "require[d]" to "incorporate terms in [their] collective agreements which require employees to pay dues or fees to the union on penalty of employment termination." Hugh L. Reilly, *The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-Bargaining Purposes*, 32 MERCER L. REV. 561, 563 (1981); *see also* Thomas R. Haggard, *Union Checkoff Arrangements under the National Labor Relations Act*, 39 DEPAUL L. REV. 567, 575

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is evidence of intent not to reach agreement."); *Chester Cnty Hosp.*, 320 N.L.R.B. 604, 622 (1995) ("Where, as here, the employer adamantly opposes union security and checkoff on vague or generalized 'philosophical' grounds or questionable assertions of policy, the inference is warranted that the Employer entered negotiations with a fixed intention not to consider or agree to any form of union security or checkoff, and thereby violated the Act."); *Preterm, Inc.*, 240 N.L.R.B. 654, 673 (1979) (rejecting family planning clinic's objection to agency fees, because core commitment to "principle of woman's right to choose" was not sufficient).

Courts: *See, e.g.*, *Golden Eagle Spotting Co. v. Brewery Drivers & Helpers*, 93 F.3d 468, 471 (8th Cir. 1996) (substantial evidence supported conclusion that "union security was part of a pattern to frustrate bargaining"); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 410 (9th Cir. 1977) (faulting employer for not exhibiting "a sincere purpose to find a basis of agreement"); *Sweeney & Co. v. NLRB*, 437 F.2d 1127, 1134-35 (5th Cir. 1971) (similar, because union had made clear that having a "dues checkoff" was an "essential item" for it).

(1990) ("It is not surprising, therefore, that the checkoff is included in ninety-six percent of all collective bargaining agreements in manufacturing industries.").

93. Really, look no further than this case to see the full weight of federal law. The *defining trait* of the University of Chicago is its commitment to academic freedom and institutional neutrality. But that sort of "philosophical" commitment is not a basis for rejecting an agency fee under the Act; in turn, "a university that itself adheres to the principles of the Kalven Report [has presently] agree[d] to a contract that mandates that its students join or support an organization that does not."[27]

94. This is all enough to create a "close nexus" between the government and the "very activity" at issue—the compulsion of agency fees—thereby satisfying step two of the governmental action test. Indeed, the federal courts have consistently found step two met where the government has "created the legal framework governing the challenged conduct," and has "in a significant way involved itself" in that activity. *Edmonson*, 500 U.S. at 624. So too where a federal law specifically empowers a *private* party to accomplish a specific *public* policy. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[T]he choice must in law be deemed to be that of the State."); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (governmental action if conduct is "entwined with governmental policies").

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[27] William Baude (@WilliamBaude), X (Mar. 25, 2024, 5:20 PM), https://perma.cc/956X-7BJ5, attached as Exhibit 29; Graduate Students United at UChicago (@uchicagogsu), INSTAGRAM (Oct. 11, 2023) (identifying fees as one of final "sticking points"), https://www.instagram.com/p/CyREHMpr6oq/?img_index=5, attached as Exhibit 30.

95. And *that* is this case in spades. Through the NLRA, the government has "put[ ] [its] weight . . . behind the private decision" at issue—the compulsion of agency fees from nonmembers, like the graduate students here. *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992). Again, not only does the Act give a union tremendous power as the exclusive representative; and not only does the Act specifically allow the union to use its leverage to obtain agency fees; but it also specifically *encourages* such fees by making them mandatory subjects of bargaining, where an employer may only reject a union-security clause for delineated reasons (and always at risk of lawsuit).

96. Just take Congress's word for it: Congress *itself* has made pellucid that it intended to empower unions to extract union-security clauses. Congress's singular "purpose" in enacting the above provisions, the Supreme Court has distilled, was "eliminating free riders"—*i.e.*, nonmembers of the union who might benefit from its representation, without kicking back something for the privilege. *Beck*, 487 U.S. at 748-49, 762; *see also id.* at 766-67 n.5 (detailing legislative history). And to that end, Congress specifically gave unions the power to command union-security clauses—and intended that unions use that power in predictable ways. *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416, 420 (1976) (Congress adopted policy that "favors" union-security clauses, so "no employees who are getting the benefits of union representation [will do so] without paying for them."); *see also Allis-Chalmers*, 388 U.S. at 180 (describing this effort as the "[n]ational labor policy" of the NLRA).

97. "But power is never without responsibility." *Douds*, 339 U.S. at 401. The union cannot wield a government-fashioned cudgel to obtain agency fees,

unbound by the constitutional constraints on governmental action. Because there is a sufficiently "close nexus" between the government and the union's power here, the union must exercise that power consistent with the demands of the First Amendment.

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98. One last point on governmental action bears mention: While the Supreme Court has not weighed in on this issue, it has previously tipped its hand.[28]

99. To start, the Court has already held a substantively identical provision of the Railway Labor Act (RLA)—authorizing private-sector unions to obtain agency fees from nonmembers—involved governmental action. *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225, 231-32 (1956). And *Hanson*'s author thought that the logic of that decision clearly carried over to the NLRA: "When Congress authorizes an employer and union to enter into union shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it had imposed them by statute." *Buckley v. Am. Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1095 (1974) (Douglas, J., dissenting from the denial of certiorari).

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[28] The courts of appeals have split on this question. *Compare Beck*, 776. F.2d at 1207 (governmental action); *Linscott*, 440 F.2d at 16 & n.2 (same); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1003-04 (9th Cir. 1970) (same), *with White v. Commc'ns Workers of Am.*, 370 F.3d 346, 350 (3d Cir. 2004) (no governmental action); *Price v. Int'l Union, United Auto.*, 795 F.2d 1128, 1133 (2d Cir. 1986) (same); *Kolinske v. Lubbers*, 712 F.2d 471, 477-78 (D.C. Cir. 1983) (same); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410-11 (10th Cir. 1971) (same). Of the courts that have found *no* governmental action, none grappled with the NLRA's mandatory bargaining provisions. The Seventh Circuit has not yet weighed in here. *See, e.g.*, *Nielson v. Int'l Ass'n of Machinists*, 94 F.3d 1107, 1113 (7th Cir. 1996).

100. But even putting the RLA to the side, the Court has also warned about the consequences that would follow from *not* subjecting this sort of conduct to any constitutional limitation. In particular, when the Court encountered a labor union that wished to discriminate against workers on account of their race, it shuddered at the notion the Constitution would have nothing to say about such behavior. Instead, the Court stressed (before avoiding the constitutional issue on statutory grounds) that "the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination." *Vaca*, 386 U.S. at 182; *see Steele*, 323 U.S. at 198-99. The same is true for compelling association and speech.

*First Amendment – Merits*

101. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.).

102. GSU-UE is defying the First Amendment. If the freedoms of association and speech mean anything, they mean that a student cannot be forced to fund a group he finds abhorrent, as the price of continuing work in the academy. But the union is using its state-backed power to compel just that. Such compulsion is unconstitutional.

The First Amendment Infringement

103. GSU-UE's agency fee scheme infringes upon the First Amendment. But it is critical to understand *why* that is so—and in turn, what this suit is (and is not).

104. Nothing here suggests private-sector agency fees are *always* suspect, or *always* infringe on workers' First Amendment rights in a meaningful way. *See Janus*, 585 U.S. at 920 (noting "distinction[s]" between public- and private-sector contexts).[29] After all, in *Hanson*—which, again, involved private-sector agency fees authorized under the near-identical terms of the RLA—the Court held that such fees are not *facially* unconstitutional (*i.e.*, unlawful in *every* instance). *See* 351 U.S. at 236-38.

105. But as the Court has since made clear, *Hanson* only held that the "bare authorization" of agency fees was constitutional. *Harris*, 573 U.S. at 636. *When* such fees would be constitutionally permissible is a distinct question. "In other words," the Court has made clear agency fees are thus "susceptible to as-applied challenges." *Rizzo-Rupon v. Int'l Ass'n of Machinists*, 822 F. App'x 49, 49-50 (3d Cir. 2020).

106. And there is no better example of where an as-applied challenge is needed. As the Supreme Court has also explained, the deficiency in *Hanson* was that "the record contained no evidence that the union had actually engaged in political or ideological activities"—so there was no evidence that compelling a person to send money to that union would present any First Amendment problem. *Harris*, 573 U.S.

[29] The *Janus* Court held that any agency fee to any public sector union violated the First Amendment, because all speech by such unions is "inherently political" (given it involves negotiations with the state). 585 U.S. at 920. GSAF is not raising such a claim; this suit is confined to its academic context, and this union's conduct.

at 629. By contrast, the Court has since emphasized that there *would* be a First Amendment infringement where an agency-fee arrangement "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought." *Id.* at 631. *That* is this very case.

107. Indeed, the "individual interests at stake" are especially serious—and the constitutional burden especially heavy—for two reasons. *Janus*, 585 U.S. at 920.

108. *First*, this case takes place within the walls of the academy. Both the Supreme Court and Seventh Circuit have long held that the First Amendment has a special solicitude for academic freedom and the freedoms of association and speech on campuses. *See Keyishian v. Bd. of Regents of University of State of N.Y.*, 385 U.S. 589, 603 (1967) ("academic freedom" is of "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy" over the academy); *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 716 (7th Cir. 2016) ("[A]cademic freedom in a university is 'a special concern of the First Amendment' because of the university's unique role in participating in and fostering a marketplace of ideas."); *see also, e.g.*, *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 681 (1980) (noting that "principles developed for use in the industrial setting cannot be imposed blindly on the academic world").

109. But the agency fees here contravene that core freedom. As it stands now, graduate students must associate with—and indeed fund—an ideological group that they abhor, as the price of continuing with their research and teaching. That sort of levy on the ability to pursue a student's work is anathema to academic freedom.

110. It also highlights how this case is distinct from a garden variety private-sector agency fee. Ordinarily, a fee is not a precondition to engaging in expressive activity, because those fees concern non-expressive endeavors (*e.g.*, building a car). By contrast, this case involves a levy—placed more on students' consciences, than their wallets—on the exercise of academic activity at the core of the First Amendment. Graduate students cannot do certain *teaching* or *research* activity without first *paying* the union a fee. That prior restraint creates a distinct First Amendment infirmity.

111. *Second*, GSU-UE has chosen to "engage[] in political [and] ideological activities" that extend well beyond the traditional subjects of collective bargaining, and (to say the least) has fashioned a controversial political identity around many of the most hot-button issues of the day. *Harris*, 573 U.S. at 629. None of this is to say, of course, that the union *cannot* speak as such—the First Amendment shields its ability to say what it wants, however revolting. But at the same time, the constitutional analysis is naturally different, where a worker is forced to subsidize a traditional union, versus where a worker is forced to fund a hyper-ideological group.

112. The Supreme Court has already recognized this common sense point in its commercial speech cases, distinguishing disclosures (*i.e.*, compelled speech) where the subject-matter is "controversial" versus "uncontroversial." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018). The same intuition governs here. There is a marked difference between forcing a worker to pay an agency fee to the Teamsters, even if he happens to disagree with their approach to a labor issue, and

forcing an Israeli (or anyone, for that matter) to fund a group engaged in antisemitism, or cheering on the "intifada." The First Amendment accounts for these disparities.

113. It is no answer that, as a statutory matter, the NLRA does not authorize GSU-UE to expend agency fees on political causes (even though, again, the union has set fees the same as dues). *See Sweeney v. Pence*, 767 F.3d 654, 661 (7th Cir. 2014). The *constitutional* infirmity arises here once a graduate student is compelled to give any money to GSU-UE, against the dictates of his conscience. After all, "a union's money is fungible, so even if the [agency] fee were spent entirely for nonpolitical activities, it would free up other funds to be spent for political purposes." *Knox*, 567 U.S. at 317 n.6; *see Retail Clerks Int'l Ass'n, Loc. 1625 v. Schermerhorn*, 373 U.S. 746, 753 (1963) (fee earmarks are "of bookkeeping significance only rather than a matter of real substance."). It would be cold comfort for Jews to have to subsidize Hamas, even if their funds were just set aside for social services; so too its sympathizers.

Exacting Scrutiny

114. GSU-UE's agency fee scheme thus "imposes a significant impingement on First Amendment rights, and [] cannot be tolerated unless it passes exacting First Amendment scrutiny." *Harris*, 573 U.S. at 647-48; *see also Knox*, 567 U.S. at 302-03; *Hallinan*, 570 F.3d at 819-20; *see generally Morrisey v. W. Va. AFL-CIO*, 842 S.E.2d 455, 478 (W. Va. 2020) ("Workers in the private sector have no less of a right than public sector employees to be free from forced association with a labor organization.").

115. But following *Janus*, there is nothing for the union to place on the other side of the constitutional ledger to justify its fees. Indeed, in *Abood* itself, the Court

held the same two "interests" justified agency fees in the public and private sectors: (1) preserving "labor peace" (*i.e.*, avoiding the conflict that might occur if multiple unions represented the same unit of workers); and (2) eliminating "free riders." 431 U.S. 209, 221-22, 224 (1977); *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 517 (1991).

116. In *Janus*, however, the Court overruled *Abood*—and in so doing, explained neither interest was constitutionally sufficient, in any sector. As for "labor peace," the Court specifically relied on the experience of the private sector—namely, that of the "28 States" with right-to-work legislation—to hold it is "now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." 585 U.S. at 896. And as for "free riders," the Court held that such an interest was illegitimate, under established precedent. *Id.* at 897 ("[A]voiding free riders is not a compelling interest").

117. The agency fees here thus violate the First Amendment. Because these fees involve compelled association and speech, they are subject to exacting scrutiny. And the union cannot muster a cognizable interest to justify that severe compulsion.

## PRAYER FOR RELIEF

Plaintiff is thus entitled to relief against Defendants, and prays this Court:

A. Enter a judgment declaring that the extraction of agency fees by Defendants from nonconsenting graduate students violates the First Amendment;

B. Enter a preliminary and permanent injunction barring Defendants from compelling agency fees from Plaintiff's members, and other nonconsenting students;

C. Enter an order awarding each of Plaintiff's members who have paid an agency fee $1 in nominal damages as compensation for the agency fees that they have been forced to contribute to the Defendants; and

D. Grant Plaintiff any other relief that this Court deems just and proper, including an award of reasonable attorneys' fees and the costs of this action.

Dated: July 22, 2024

Respectfully submitted,

*/s/ Jonathan M. Linas*

Jonathan M. Linas
(ILARDC 6290055)
JONES DAY
110 North Wacker Drive
Suite 4800
Chicago, IL 60606
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
jlinas@jonesday.com

Brett A. Shumate*
Harry S. Graver*
Riley W. Walters*
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
bshumate@jonesday.com
hgraver@jonesday.com
rwalters@jonesday.com

* Pro hac vice applications forthcoming

*Counsel for Plaintiff*

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| GRADUATE STUDENTS FOR ACADEMIC FREEDOM, INC.,<br><br>Plaintiff,<br><br>v.<br><br>UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA; and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA LOCAL 1103 – GRADUATE STUDENTS UNITED AT THE UNIVERSITY OF CHICAGO,<br><br>Defendants. | Case No. 1:24-cv-6143<br><br>Hon. Judge John F. Kness<br><br>Hon. Magistrate Judge M. David Weisman |

**MEMORANDUM OF LAW IN SUPPORT OF**
**DEFENDANTS' MOTION TO DISMISS**

Dated: September 9, 2024

Margot A. Nikitas
General Counsel
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA
4 Smithfield Street, 9th Floor
Pittsburgh, PA 15222
(412) 471-8919 (Tel.)
Email: margot.nikitas@ueunion.org

George A. Luscombe III
Barry M. Bennett
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH LLP
8 South Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361 – Telephone
(312) 372-6599 – Facsimile
Email: gluscombe@laboradvocates.com

Attorneys for Defendants United Electrical, Radio and Machine Workers of America; and United Electrical, Radio and Machine Workers of America Local 1103 – Graduate Students United at the University of Chicago

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Defendants United Electrical, Radio and Machine Workers of America ("UE") and United Electrical, Radio and Machine Workers of America Local 1103 – Graduate Students United at the University of Chicago ("GSU" or "GSU-UE") (UE and GSU together referred to as the "Union") respectfully move the Court to dismiss plaintiff's complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff's First Amendment claim against the defendants (private, non-governmental actors) should be dismissed for three reasons.

First, where a private-sector employer and union agree to an agency fee clause in a collective bargaining agreement ("CBA") governed by the National Labor Relations Act ("NLRA") there is no state action to support a constitutional claim, as the Courts of Appeal for the Second, Third, Tenth, and D.C. Circuits have all held, and the Supreme Court has strongly implied. *See Janus v. AFSCME, Council 31*, 585 U.S. 878, 918 n.24 (2018).

Second, even if the First Amendment applied here at all, the Supreme Court has held that in the private sector, "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Railway Ees.' Dep't v. Hanson,* 351 U.S. 225, 238 (1956). *See also Janus,* 585 U.S. at 920 (distinguishing agency-fee arrangements in the public sector from those in the private sector).

Third, as a matter of law, unions cannot charge a non-member for the cost of the types of political communications and activities alleged in the complaint, if the employee has previously objected to contributing for such activities. The complaint here, however, does not allege that any of plaintiff's members was charged, over their previously submitted objection, an agency fee that improperly included expenses for political actions or communications unrelated to collective bargaining and contract administration.

## ALLEGATIONS OF PLAINTIFF'S COMPLAINT[1]

The UE is a national labor organization and GSU is one of its local affiliates. Compl. ¶¶ 16-17. In February 2023, a majority of the bargaining unit of graduate student employees at the University of Chicago ("University"), voting in an election conducted by the National Labor Relations Board ("NLRB"), voted in favor of representation by the GSU, and the NLRB certified the GSU as the exclusive bargaining representative. *Id.*, at ¶¶ 31-33.

The University recognized the Union, and the parties commenced bargaining for nearly a year, reaching a tentative agreement on March 6, 2024 that the GSU membership voted to ratify on March 28, 2024. The CBA became effective on April 1, 2024, with a term through March 31, 2027. Compl. ¶¶ 33, 35, 37. The agreement covers "all graduate students enrolled in University of Chicago degree programs who are employed to provide instructional or research services," including such job titles as "Teaching Assistants" and "Research Assistants." Compl. Ex. 10 (art. 2). The agreement expressly excludes, among others, "undergraduate students" and "graduate students who are not employed to provide instructional or research services" *Id.*

Article 3, § 1 of the CBA provides that all employees in the bargaining unit must either "become and remain members of the Union in good standing insofar as the payment of periodic dues and initiation fees, uniformly required" or "in lieu of such membership, pay to the Union an agency fee." Compl. Ex. 10 (art. 3, § 1). "The amount of such agency fee shall be established by the Union in accordance with applicable law," Compl. Ex. 10 (art 3, § 1), which, if the employee were to object to paying the full agency fee, limits the amount of the fee that the Union may assess the employee to the portion of Union dues attributable to bargaining and representation

[1] The Union recognizes the well-pleaded factual allegations of the complaint must be taken as true for purposes of this motion, but the Union vigorously disputes the accuracy of many of those allegations.

activities, Compl. ¶ 45. The Union announced on May 30, 2024, that it would start to calculate dues and fees on July 1, and would start collecting such dues and fees by the end of the month. Compl. ¶ 47.

The Union has taken positions in opposition to certain actions of the State of Israel, United States support for Israel, and activities by the University that are deemed to support Israel. The Union has also taken positions on other significant political issues. Compl. ¶¶ 52-66.

Plaintiff Graduate Students for Academic Freedom, Inc. ("GSAF"), is a Virginia "Nonstock Corporation" established on July 11, 2024, eleven days before filing its complaint in this action.[2] Compl. ¶ 64. It alleges that its purpose is "promoting academic freedom, and combatting compelled speech and association on campuses." Compl. ¶ 68. It claims that its members include at least six graduate student employees or prospective graduate student employees at the University, two of whom are identified by name and four of whom remain anonymous. Each alleged member is opposed to the political activities and positions of the Union with respect to Israel in particular, which they view as being antisemitic. At least some of the alleged members have similarly strong feelings against the political activities and positions of the Union regarding other issues. Each alleged member asserts he or she is being forced to choose between their jobs and their consciences by being subject to the agency fee provision of the CBA. Compl. ¶¶ 67-72.

[2] *See* Commonwealth of Va., State Corp. Comm'n Clerk's Info. Sys., entry for "Graduate Students for Academic Freedom, Inc.", available at https://cis.scc.virginia.gov/EntitySearch/BusinessInformation?businessId=11719629&source=FromEntityResult&isSeries%20=%20false (last visited Sept. 9, 2024). The Court may take judicial notice of such a public record on a motion to dismiss. *See, e.g., Ronald D. Fosnight & Paraklese Techs., LLC v. Jones*, 41 F.4th 916, 922 (7th Cir. 2022).

## ARGUMENT

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), plaintiff's "complaint must 'contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Kaminski v. Elite Staffing, Inc.,* 23 F.4th 774, 776 (7th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court "must consider not only 'the complaint itself,' but also 'documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice.'" *Phillips v. Prud. Ins. Co. of Am.*, 714 F.3d 1017, 1019-20 (7th Cir. 2013) (quoting *Geinosky v. City of Chi.*, 675 F.3d 743, 745 n.1 (7th Cir. 2012)).

### I. Union Enforcement of an Agency-Fee Arrangement in a CBA Subject to the NLRA Is Not State Action Implicating the First Amendment.

Plaintiff's sole claim alleges that the Union would violate the First Amendment by "compelling graduate students to pay the union a portion of their earnings as an agency fee as a condition of continuing their academic work." Compl. ¶ 79. As plaintiff acknowledges, because the First Amendment limits only governmental conduct, to state a claim against the Union, the plaintiff must establish that the Union's conduct may be deemed governmental or state action. Compl. ¶ 74. *See, e.g., Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 924 (1982); *Hallinan v. F.O.P.*, 570 F.3d 811, 815 (7th Cir. 2007).

Yet, "[u]nions are not state actors; they are private actors." *Hallinan*, 570 F.3d at 815. Only if the specific "conduct of the Union" at issue "can be characterized as state" action is it subject to the First Amendment. *Id.* Where a complaint fails to adequately plead state action, a First Amendment claim should be dismissed under Rule 12(b)(6). *Id.*, at 820-21.

#### A. Agency-fee arrangements under Section 8(a)(3) of the NLRA.

An agency fee clause in a CBA, "permits a union, obliged to act on behalf of all

employees in the bargaining unit, to charge nonunion workers their fair share of the costs of the representation." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 868 (1998). The agency-fee provision in the private-sector contract here is expressly exempt from the prohibitions in Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). *See Marquez v. Screen Actors Guild*, 525 U.S. 33, 37 (1998).

Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). This would outlaw an agency-fee clause in a CBA—which makes employees subject to termination if they do not pay the required agency fee—except for the Section 8(a)(3) proviso:

> *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ..

29 U.S.C. § 158(a)(3).

"[A]lthough § 8(a)(3) states that unions may negotiate a clause requiring 'membership' in the union, an employee can satisfy the membership condition merely by paying to the union an amount equal to the union's initiation fees and dues." *Marquez*, 525 U.S. at 37. "In other words, the membership that may be required 'as a condition of employment is whittled down to its financial core.'" *Id.* (quoting *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963)). Employees

who choose not to join the union, but instead to pay the "financial core" of membership—*i.e.*, an agency fee in an amount equivalent to full dues and initiation fees—are sometimes referred to as "financial core payors." *Penrod v. NLRB*, 203 F.3d 41, 44 (D.C. Cir. 2000). In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Court further held that, over the objection of the non-member fee-payor, Section 8(a)(3) "does not permit unions to exact dues or fees from employees for activities that are not germane to collective bargaining, grievance adjustment, or contract administration." *Marquez*, 525 U.S. at 38. *See also Beck*, 487 U.S. at 745, 762-63. Those employees who have objected to paying for union expenses not germane to the union's collective bargaining responsibilities (such as political expenses), and thus required to pay only a reduced agency fee, are commonly referred to as "*Beck* objectors." *Penrod*, 203 F.3d at 44.

Importantly, Section 14(b) of the NLRA expressly provides that the NLRA does *not* permit agency-fee arrangements if they are prohibited by state law. 29 U.S.C § 164(b) ("Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.").

### B. The Supreme Court has strongly implied that agency-fee agreements between employers and unions governed by the NLRA do not involve state action.

While the Supreme Court has not decided the question whether agency-fee agreements between employers and unions governed by the NLRA involve state action, the Court has strongly implied that they do not. *See Janus*, 585 U.S. at 918 n.24; *Beck*, 487 U.S. at 761.

In contrast, the Supreme Court has held that agency-fee agreements in CBAs between employers and unions governed by the Railway Labor Act ("RLA") do involve state action. *See Railway Ees.' Dep't v. Hanson,* 351 U.S. 225, 232 (1956). Unlike Section 8(a)(3) of the NLRA, Section 2, Eleventh of the RLA, 45 U.S.C. § 152, permits covered unions and employers to

negotiate agency-fee clauses *and preempts* any state law that would otherwise prohibit them. *See Hanson*, 351 U.S. at 228-29. It is only because of this preemption power granted by the RLA for private agency-fee agreements to supersede state law that *Hanson* found state action under the RLA. *See Hanson*, 351 U.S. at 232 ("If private rights are being invaded, it is by force of an agreement made pursuant to federal law *which expressly declares that state law is superseded*." (emphasis added)); *Beck*, 487 U.S. at 761 ("[W]e ruled in [*Hanson*] that because the RLA pre-empts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves 'governmental action' and is therefore subject to constitutional limitations."). *See also White v. Comm'ns. Workers of Am., AFL-CIO, Local 13000,* 370 F.3d 346, 352 (3d Cir. 2003) (discussing *Hanson*).

Because the NLRA *does not preempt state laws* barring agency-fee agreements, the critical basis for *Hanson*'s state action holding under the RLA is absent here under NLRA Section 8(a)(3). *See White*, 370 F.3d at 353 ("Thus, the rationale for finding that an act done pursuant to a collective bargaining agreement governed by the RLA is state action is not applicable to an act authorized by an agreement controlled by the NLRA."); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971) ("Whatever the wisdom of this reasoning for the Railway Labor Act, it has no applicability to the National Labor Relations Act.").

The Supreme Court in *Beck*, considering agency-fee agreements between unions and employers governed by the NLRA, took note of this critical distinction from the RLA, but did not find it necessary to decide the question of whether such agency-fee agreements under the NLRA involved state action. *Beck*, 487 U.S. at 761 ("We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action."). The Court nonetheless suggested that they did not, by citing cases finding union action under the NLRA

could not be considered state action. *Id.* (citing *Steelworkers v. Sadlowski*, 457 U.S. 102, 121, n.16 (1982), and *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979)). *Steelworkers v. Weber*, 443 U.S. at 200, for example, held that an affirmative action provision in a CBA between an employer and union governed by the NLRA could not be challenged under the Equal Protection Clause because no state action was involved.

More recently, the Supreme Court in *Janus* even more strongly implied that there was no state action involved in private-sector agency fee agreements, even describing the state action holding under the RLA in *Hanson* as "questionable." *See Janus*, 585 U.S. at 918 n.24 ("No First Amendment issue could have properly arisen in those cases [*Hanson*, 351 U.S. 225, and *Int'l Ass'n of Machinists v. Street.*, 367 U.S. 740, 748 (1961)] unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today."). *See also Baisley v. Int'l Ass'n of Machinists & Aero. Workers,* 983 F.3d 809, 810 (5th Cir. 2020) (noting *Janus* questioned whether the First Amendment even applied to private-sector agency fees), *cert. denied*, 142 S. Ct. 90 (2021).

### C. The majority of courts of appeals that have decided the question hold that enforcement of an agency-fee agreement subject to the NLRA is not state action.

The Seventh Circuit has not decided the question of whether union enforcement of an agency-fee clause in a private-sector CBA between parties governed by the NLRA constitutes state action. *See Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 2569*, 94 F.3d 1107, 1113 (7th Cir. 1995). The majority of courts of appeal that have decided the question, however, have held that it does not.

The Second, Third, Tenth, and D.C. Circuits have all squarely held that union enforcement of agency-fee arrangements subject to the NLRA is not state action,

notwithstanding Section 8(a)(3)'s exemption of agency-fee clauses from its prohibition against discrimination and the bargaining rights granted unions under the NLRA. *See White v. Comm'ns. Workers of Am., AFL-CIO, Local 13000,* 370 F.3d 346 (3d Cir. 2003) (Alito, J.); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); *Price v. Int'l Union, United Auto., etc.*, 795 F.2d 1128 (2d Cir. 1986), vacated on other grounds by 108 S. Ct. 2890 (1988), state action holding reaffirmed on remand by, 927 F.2d 88 (2d Cir. 1991); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971). *See also Abrams v. Comm'ns. Workers of Am*., 702 F. Supp. 920, 921-23 (D.D.C. 1988), affd. 884 F.2d 628 (D.C. Cir. 1989). Indeed, the Third Circuit's decision in *White*, 370 F.3d 346, finding no state action, was authored by then-Judge Alito, also the author of all the Supreme Court's recent decisions regarding public-sector agency-fee clauses, including *Janus*; *Harris v. Quinn*, 573 U.S. 616 (2014); and *Knox v. Service Employees*, 567 U.S. 298 (2012).

It is true that divided panels in the First and Fourth Circuits have found state action in these circumstances. *See Beck v. Comm'ns. Workers of Am.*, 776 F.2d 1187 (4th Cir. 1985); *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971).[3] This is very much the minority view. Even the Fourth Circuit has since noted "the trend under the NLRA, however, has been to find no state action." *Kidwell v. Transp. Comm'ns. Int'l Union*, 946 F.2d 283, 298 (4th Cir. 1991). More importantly, the reasoning of these cases is unpersuasive and undermined by later Supreme Court state-action decisions, as explained by then-Judge Alito in *White*, 370 F.3d at 353-54; *see also Price*, 795 F.2d at 1133; *Kolinske*, 712 F.2d at 480 n.9.

[3] The precedential value of the Fourth Circuit panel's decision in *Beck* is questionable, because the full court granted *en banc* review and then divided evenly on the state action question. *See Beck v. Comm'ns. Workers of Am.*, 800 F.2d 1280 (4th Cir. 1986) (*en banc, per curiam*); *see also id.*, at 1283 (Murnaghan, J. concurring (noting that "grant of rehearing *en banc*, of course, eliminated the panel level decisions as grounds for disposing of the case" and explaining that *en banc* court divided evenly on state action question)).

### D. Because the NLRA does no more than not prohibit agency-fee arrangements when privately agreed to by a union and employer, and does not preempt state law prohibiting such arrangements, there is no state action.

For the reasons discussed in *White, Price, Kolinske,* and *Reid* there is no state action here. The agency-fee clause in the CBA between the Union and the University was agreed to by two private parties. The NLRA does no more than not prohibit such private agency-fee agreements, and it does not preempt state laws that do so. That is not state action. *See White*, 370 F.3d at 352-53. Plaintiff provides no persuasive reason why this Court should buck the strong, majority view that enforcement of agency-fee agreements in contracts between parties governed by the NLRA does not constitute state action.

"At its most basic level, the state action doctrine requires that a court find such a 'close nexus between the State and the challenged action' that the challenged action 'may be fairly treated as that of the State itself.'" *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823 (7th Cir. 2009) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). The Supreme Court set forth a two-part test for determining when "conduct allegedly causing the deprivation of a federal right" may "be fairly attributable to the State." *Lugar*, 457 U.S. at 937. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937.

#### 1. *Lugar* Step 1: The requirement to pay an agency fee is not caused by a right or privilege created by, nor is it imposed by, the NLRA.

Plaintiff's claim fails at *Lugar's* first step. The harm allegedly created by the Union's enforcement of the agency-fee clause in its private agreement is not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State." *Lugar*,

457 U.S. at 937. As discussed above, Section 8(a)(3) does not impose agency-fee agreements on anyone. *Kolinske*, 712 F.2d at 477 ("In no sense is the agency shop clause compelled by federal law."). All the statute does is *not prohibit* agency-fee agreements, if the parties agree to them and they are otherwise permitted under state law. *See* 29 U.S.C. §§ 158(a)(3) & 164(b); *Price*, 795 F.2d at 1133 ("By authorizing the inclusion of union shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA."). *See also Driscoll v. Int'l Union of Operating Eng'rs*, 484 F.2d 682, 691 (7th Cir. 1973) (finding no state action where the "enactment of § 401(e) [of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401(e), concerning nomination for, and eligibility of, candidates for union office] has neither enhanced the union's power over candidacy qualifications nor diminished plaintiff's right" under preexisting law). Notably, union-shop and closed-shop agreements between unions and employers long predated the NLRA in those states that permitted them and were illegal in those states that did not. *See Algoma Plywood & Veneer Co. v. Wisconsin Empl. Rels. Bd.,* 336 U.S. 301, 307-12 (1949).

Plaintiff alleges that *Lugar's* first step is satisfied because the Union's "extraction of fees is the product of its legal power to bind all workers to a single collective bargaining agreement, as their sole and exclusive representative." Compl. ¶ 80. *Price* rejected that same argument that "unions would not have the power to act as the exclusive bargaining representative of employees without the authorization of the federal labor statutes." *Price*, 795 F.2d at 1133. The court, following *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351-52 (1974), explained that "the naked fact that a private entity is accorded monopoly status is insufficient alone to denominate that entity's action as government action." *Price*, 795 F.2d at 1133; *Kolinske*, 712 F.2d at 478 ("Similarly, the NLRA grants unions something of an exclusive franchise through majority

representation. Nevertheless, the Court in *Jackson* found no state action in the fact that the utility operated pursuant to a government franchise, a conclusion that we also reach in this case.").

In *Jackson*, a customer sued a private-utility company for cutting off her electricity due to non-payment of fees pursuant to the company's general tariff filed with the state. *Jackson*, 419 U.S. at 346. The plaintiff alleged the company violated her constitutional right to due process, arguing that turning off her electricity was state action because the company was able to impose its rules on her only by means of its monopoly status granted by state law. *Id.*, at 351. The Supreme Court explicitly rejected the plaintiff's argument that state action could be inferred from a private entity's government-created "monopoly status." *Id.*, at 352.

The plaintiff here essentially alleges that, if not for the Union's monopoly over authority to bargain terms and conditions of employment, created by its exclusive representative status under the NLRA, it could not impose its agency-fee agreement on employees. That argument is indistinguishable from the argument the Court rejected in *Jackson*. The Union's monopoly status as exclusive representative does not turn all of its actions as exclusive representative into state action subject to constitutional review. *See Kolinske*, 712 F.2d at 482 ("[N]otwithstanding the institutional importance of labor unions, it would be unwise to elevate all union activities to constitutional significance. . . . a finding of governmental action in these circumstances would mean that unions must necessarily be treated as local governmental units or agencies in nearly all their activities.").

Nor does the employer's duty to bargain over an agency-fee clause under Sections 7 and 8(d) of the NLRA, 29 U.S.C. §§ 157 & 158(d), mean that when the employer agrees to such a clause it was "imposed," *Lugar*, 457 U.S. at 937, by the government. In the absence of a state law prohibiting them, an employer has the duty to bargain in good faith over a union proposal for

an agency-fee clause, *Gen. Motors Corp.*, 373 U.S. at 745, but "the NLRA is neutral with respect to the content of particular agreements," *Kolinske,* 712 F.2d at 478. The NLRA duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Neither the NLRB nor the courts has the authority under the NLRA to force an employer to agree to any term in a contract, including an agency-fee agreement. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) ("While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (footnote omitted)).

**2. *Lugar* Step 2: The Union cannot "fairly be said to be a state actor."**

Plaintiff's claim fails at *Lugar*'s second step as well, because the Union cannot "fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. The Supreme Court has articulated a variety of tests applicable to different facts and circumstances to evaluate whether there is state action under *Lugar*'s second step. *See, e.g., Rodriguez*, 577 F.3d at 823-24. Plaintiff alleges that the Union's action here can be deemed state action on the theory that "'involvement of governmental authority aggravates or contributes to the unlawful conduct.'" Compl. ¶ 30 (citing *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1149 (7th Cir. 1995)). Plaintiff also argues that the "NLRA has 'significantly encouraged' the 'very activity' at issue." *Id.* (quoting *Driscoll*, 484 F.2d at 690). In short, plaintiff alleges that the Union's enforcement of the agency-fee clause is sufficiently encouraged by the NLRA through three steps: (1) the Union has the authority to negotiate the agency fee clause and impose it on dissenting employees as the certified exclusive representative under Section 9(a) of the NLRA, 29 U.S.C. § 159(a); (2) the agency-fee clause is permitted by Section 8(a)(3), 29 U.S.C. § 158(a)(3); and (3) the employer's duty to bargain

under Sections 7 and 8(d), 29 U.S.C. §§ 157 & 8(d), allegedly "creates an effective presumption in favor of" agency fees. Compl. ¶ 88. Plaintiff's argument is unpersuasive and contrary to Supreme Court law and the strong majority view of the Courts of Appeal.

Under such an "encouragement" theory, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Agency-fee arrangements under the NLRA do not meet that test. As the Supreme Court has recognized, the purpose and effect of Section 8(a)(3) is to neither prohibit nor encourage agency-fee agreements when the parties agree to them and they are otherwise permitted by state law. *See Gen. Motors Corp.*, 373 U.S. at 740 ("the Court, in commenting on petitioner's contention that the proviso of § 8(3) affirmatively protected arrangements within its scope, said of its purpose: 'The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop *or other forms of union-security agreement*.'" (internal citation omitted, quoting *Algoma Plywood & Veneer Co.*, 336 U.S. at 307 (emphasis by Court, internal citation omitted)); *Reid,* 443 F.2d at 410-11 ("By contrast, the policy with respect to union security agreements expressed in the NLRA is more neutral and permissive than the policy of the RLA.").[4]

Beginning with Section 8(a)(3), that section only exempts agency-fee clauses from its

[4] Contrary to plaintiff's misleading selective quote, the Court in *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 420 (1976), did not say that "Congress adopted policy that 'favors' union-security clauses." Compl. ¶ 96. The Court recognized only that, "Federal policy favors *permitting* such agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws." *Oil Chem. & Atomic Workers*, 426 U.S. at 420 (emphasis added). Similarly contrary to plaintiff's suggestion, *NLRB v. Allis-Chalmers*, 388 U.S. 175, 180 (1967), did not describe any "effort" in favor of agency-fee clauses as "'[n]ational labor policy.'" Compl. ¶ 96. The "[n]ational labor policy" recognized by *Allis-Chalmers* was exclusive representation "through a labor organization freely chosen by the majority." *Allis-Chalmers*, 388 U.S. at 180.

prohibition on discrimination when agreed to by the parties and not otherwise prohibited by state law. The Supreme Court, as noted, has "rejected the argument that a legislature's express permission of a practice is sufficient to make the act of engaging in that practice state action." *White*, 370 F.3d at 352, at 353-54 (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40 (1999)). *See also Blum*, 457 U.S. at 1004-05 ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives."); *Flagg Bros.*, 436 U.S. 149, 164-65 (1978) ("These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.'").

As then-Judge Alito explained, the Court in *Sullivan* "did 'not doubt that the State's decision to provide insurers the option of deferring payment for unnecessary and unreasonable treatment pending review can in some sense be seen as encouraging them to do just that.'" *White*, 370 F.3d at 354 (quoting *Sullivan*, 526 U.S. at 53). "However, the Court viewed 'this kind of subtle encouragement' as 'no more significant than that which inheres in the State's creation or modification of any legal remedy.'" *Id.* (quoting *Sullivan*, 526 U.S. at 53). *See Sullivan*, 526 U.S. at 53 ("The State's decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary."). *See also Flagg Bros.*, 436 U.S. at 165 ("If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner."); *Price*, 795 F.2d at 1133

(finding no state action under *Lugar* step two, "[w]hen a private party makes the ultimate choice within a range of options offered by the government, state action generally is not implicated"); *Kolinske*, 712 F.2d at 479 ("the authorization provided the agency shop clause by federal law is an insufficient reason for finding state action").

Moreover, as discussed above, because the NLRA simply exempts agency-fee agreements from what would otherwise be prohibited by Section 8(a)(3), and does not preempt state laws that would nonetheless make agency-fee arrangements illegal, this case is distinguishable from the *Hanson* holding under the RLA, and there is no basis to find state action here. *See White*, 370 F.3d at 353-54; *Price*, 795 F.2d at 1132-33; *Kolinske*, 712 F.2d at 476-77 & 480 n.9; *Reid*, 443 F.2d at 410.

Plaintiff does not rely on Section 8(a)(3) alone, but also points to the Union's alleged ability to use its NLRA granted status as exclusive representative to impose the agency-fee agreement on dissenting members. Compl. ¶ 87. As discussed above, *White* and *Kolinske* persuasively explained that *Jackson*, 419 U.S. 345, foreclosed the argument that the power a private entity receives through its government-granted monopoly status converts the private entity's actions into state actions. *White*, 370 F.3d at 346 ("It may well be that the CWA would not have been able to induce Bell to include an agency-shop provision in the collective bargaining agreement between Bell and the CWA absent the CWA's 'exclusive franchise.' However, under *Jackson*, the CWA's statutorily enhanced bargaining power is insufficient to warrant a finding of state action."); *Kolinske*, 712 F.2d at 478 ("Similarly, the NLRA grants unions something of an exclusive franchise through majority representation. Nevertheless, the Court in *Jackson* found no state action in the fact that the utility operated pursuant to a government franchise, a conclusion that we also reach in this case.").

If a private utility company imposing terms to cut off the electricity on an objecting homeowner by means of its government-granted monopoly power is not state action, *Jackson*, 419 U.S. at 352, then a union enforcing an agency-fee clause on a dissenting employee by means of its government-granted exclusive-representative status—and through private negotiations with an employer—also cannot be state action.

Plaintiff attempts to get out from under the persuasive holdings of *White, Price, Kolinske,* and *Reid*, by arguing that they did not take into account the impact of the employer's duty to bargain over agency-fee agreements. *See* Compl. ¶¶ 89-96 & 98 n.28. Plaintiff insists that this duty to bargain has "put the Government's 'thumb on the scales' in favor of fees." Compl. ¶ 91 (quoting *Am. Comm'ns. Ass'n v. Douds*, 339 U.S. 382, 401 (1950)). Plaintiff is wrong again.

Without mentioning the duty to bargain by name, then-Judge Alito in *White* specifically rejected the argument that "[b]ut for the additional leverage that the NLRA affords unions . . . unions would never be able to extract concessions like agency-shop clauses from employers at the bargaining table." *White*, 370 F.3d at 351 (also noting that argument was premised on the same quote from *Am. Comm'ns. Ass'n*, 339 U.S. at 401,"When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."). As Judge Alito explained, "the Supreme Court's decision in *Jackson* . . . forecloses the argument that a private party negotiating a contract must be viewed as a state actor if the state has furnished the party with more bargaining power than it would have otherwise possessed." *White*, 370 F.3d at 351. *See also Kolinske*, 712 F.2d at 478 ("The NLRA does not mandate the existence or content of, for example, seniority clauses, work rules, staffing requirements, or union security provisions like agency shop clauses or mandatory payroll deductions for union dues.").

Moreover, as noted above, plaintiff wrongly ignores the fact that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) ("[I]t is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."). *See H.K. Porter,* 397 U.S. at 102, 107-08 (holding NLRB had no authority to compel employer to agree to dues check-off).

The plaintiff also greatly overstates the level of scrutiny the NLRB and courts place on an employer's steadfast—even philosophical—objection to a union-security clause. *See* Compl. ¶¶ 89-90. An employer's refusal to even discuss a union-security clause because of its "philosophical" objection "may constitute evidence of bad faith bargaining," *Phelps Dodge Specialty Copper Prods. Co.*, 337 NLRB 455, 456 (2002). And an employer's failure to offer a "legitimate business purpose" for its refusal may be further evidence of bad faith. *See CJC Holdings*, 320 NLRB 1041, 1046 (1996). But the NLRB and the courts will not find that an employer violated its duty to bargain on those bases alone. *See Phelps Dodge Specialty Copper Prods. Co.,* 337 NLRB at 456 (no violation of duty to bargain despite fact that employer "refused to bargain about union security and dues checkoff"). For a finding of bad-faith bargaining in violation of the NLRA, such a refusal must be part of an overall pattern of bad-faith conduct by the employer under a totality of circumstances review. *See id.* ("Nevertheless, those cases typically involved other unlawful conduct in which the opposition to a union security or checkoff provision was a significantly smaller part of the whole."); *CJC Holdings*, 320 NLRB at 1046-47 (employer's failure to offer "legitimate business purpose" for its objection to dues checkoff one factor in "totality of the circumstances" review). The NLRB and courts have repeatedly found employers not to have violated their duty to bargain, despite their unwavering refusals to agree to

union-security clauses. *See New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 287 (3d Cir. 2024); *Phelps Dodge Specialty Copper Prods. Co.*, 337 NLRB at 456-57; *A.M.F. Bowling Co., Inc.*, 314 NLRB 969, 974 (1994); *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990); *Cook Bros. Enter., Inc.*, 288 NLRB 387, 388 (1988).

The University here did not agree to the agency-fee clause because the government forced it to do so. Whether because the University was not as opposed to the provision as plaintiff speculatively suggests, or because the University got something it valued in exchange (like a no-strike clause or a concession in the Union's economic demands), or because it feared a strike or other pressure from the Union, that was the University's decision alone. That is private action, not state action. With no state action, there can be no First Amendment claim, and plaintiff's complaint must be dismissed.

## II. Even If There Were State Action, Plaintiff's First Amendment Claim is Foreclosed by Binding Supreme Court Precedent.

Even if there were state action, plaintiff's First Amendment challenge to the agency-fee arrangement here would still fail. Binding Supreme Court precedent holds that, in the private sector, "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Hanson*, 351 U.S. at 238. The Court's decision in *Hanson* was based on the agency-fee language in Section 2, Eleventh of the Railway Labor Act—not Section 8(a)(3) of the NLRA. *Id.* However, as the Supreme Court has also recognized, the two statutes are, in this respect, materially identical in language and in the obligations that they permit employers and unions to place upon employees, including employees who object to paying an agency fee. *See Beck*, 487 U.S. at 762-63. Because an agency-fee arrangement in the private sector under the language of RLA Section 2, Eleventh is

consistent with the First Amendment, an agency fee under the equivalent language in Section 8(a)(3) must be as well. [5]

Plaintiff acknowledges that the *Hanson* ruling applies to the agency-fee clause here, but argues that *Hanson* left open "as applied" challenges as plaintiff characterizes its claim. *See* Compl. ¶¶ 104-06. Plaintiff misreads the *Hanson* court's limitation on its holding. *Hanson* in no way left open as applied challenges based on the character of the employer, employees, or the union—the claim plaintiff attempts here. *See* Compl. ¶¶ 108-111.

Rather, *Hanson*'s holding was only limited by the fact that the record in the case included no evidence that the agency fee was actually being used for purposes other than collective bargaining expenses. *See Hanson*, 351 U.S. at 238 ("It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record."). *See Street.*, 367 U.S. at 748 (explaining that "the action in *Hanson* was brought" without any showing that "the unions were actually engaged in furthering political causes with which they [plaintiffs] disagreed and that their money would be used to support such activities"). Thus, *Hanson* merely left the door open for challenges by plaintiffs who could show that they were in fact being required to pay an agency fee which was actually being spent for "political purposes" to which the plaintiffs objected. *Street*, 367 U.S. at 747.

The specific challenge left open by *Hanson* was then addressed by the Court in *Street*, 367 U.S. 740. *See id.*, at 749 ("The record in this case is adequate squarely to present the

[5] *Hanson* reached the First Amendment question under the RLA because, as discussed above, the Court found state action based on the RLA's preemption of any state law that would otherwise prohibit agency-fee clauses. *Hanson*, 351 U.S. at 231-32. As also discussed above, Sections 8(a)(3) & 14(b) of the NLRA differ in this respect, only permitting agency-fee clauses where otherwise permitted by state law. *See also Beck*, 487 U.S. at 761-62. Finding it unnecessary to resolve the state action question, the Court in *Beck* construed the agency-fee language in Section 8(a)(3) to have the equivalent meaning of Section 2, Eleventh of the RLA based on their equivalent language and purposes without relying on principles of constitutional avoidance. *Beck*, 487 U.S. at 761-62.

constitutional questions reserved in *Hanson*."). *Street* concluded that no First Amendment concerns were implicated because it construed Railway Labor Act Section 2, Eleventh, as a statutory matter, "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Street*, 367 U.S. at 768-69. Following *Street*, RLA Section 2, Eleventh only permits a union to "charge[]" an agency fee, over an employee's objection, for expenses "'germane to collective bargaining.'" *Ellis v. Bhd. of Ry.*, 466 U.S. 435, 447 (1984) (quoting *Railway Clerks v. Allen*, 373 U.S. 113 (1963)). *See also Baisley*, 983 F.3d at 810 ("The Supreme Court has previously upheld the challenged statute, Section 2, Eleventh of the RLA, against facial and as-applied challenges." (citing *Hanson* and *Street*)).

In *Beck*, the Court then read this same limitation into Section 8(a)(3) of the NLRA: "We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S., at 448)).

The Court has further approved CBA language that tracks the statutory Section 8(a)(3) language as consistent with the statute, as interpreted by the Court, as well as with unions' duty of fair representation. *See Marquez*, 525 U.S. at 46. The agency-fee agreement in the CBA here goes even further toward making clear to employees their right to pay an "agency fee" in "lieu" of joining the union and that the agency fee shall be established "in accordance with applicable law." Compl. Ex. 10 (art. 3, § 1).

Thus, the agency-fee arrangement here is consistent with *Beck* and with the First Amendment under the binding precedent of *Hanson* and *Street*. Indeed, the relief plaintiff is

seeking in this case, enjoining the collection of any agency fee, is exactly what the Supreme Court rejected in those cases. *See Hanson*, 351 U.S. at 227, 238; *Street*, 367 U.S. at 772-75; *Allen*, 373 U.S. at 119-120.

The Supreme Court's decisions in *Janus*, 585 U.S. 878, and *Harris v. Quinn*, 573 U.S. 616, do not save plaintiff's claim. Both cases turned on the different First Amendment concerns that the Court found in public-sector agency-fee arrangements, not implicated in the private sector. *See Janus,* 585 U.S. at 920 ("Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. 'In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.'" (quoting *Harris*, 573 U.S. at 636)). This difference led the Court in *Janus* to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had found agency-fee agreements in the public sector to be constitutional. *Janus*, 585 U.S. at 886, 891. Neither case considered, let alone limited or overruled, *Hanson*'s, *Street's,* or *Beck's* application to agency-fee arrangements in the private sector. *See Baisley*, 983 F.3d at 810-11 (holding that *Hanson* and *Street* remain binding precedent following *Janus*, *Harris,* and *Knox*); *Rizzo-Rupon v. Int'l Ass'n & Aero. Workers, AFL-CIO Dist. 141*, 822 Fed. Appx. 49, 50 (3d Cir 2020) ("Appellants contend instead, based on a trio of recent Supreme Court opinions, that *Hanson* has been overruled. A review of those cases, however, makes apparent that it has not."), *cert. denied*, 142 S. Ct. 72 (2021).

In any event, plaintiff's alleged reasons for distinguishing *Hanson* are unpersuasive. Plaintiff argues that this case is different because it "takes place within the walls of the academy," Compl. ¶ 108, and that plaintiff's members should be considered differently from employees "building a car", Compl. ¶ 110. Not so. Any individual's obligations under the CBA

here arise only from their employment relationship with the University, just like any other employee. *See* Compl. Ex. 10 (art 2) (covering only graduate students "who are employed to provide instructional or research services" and excluding "graduate students who are not employed to provide instructional or research services"). *See also Trs. of Columbia Univ.*, 364 NLRB 1080, 1081 (2016) (holding that only students "who have a common-law employment relationship with their university are statutory employees under" the NLRA).

Plaintiff also argues that the Union here should be treated differently than other unions as a "hyper-ideological group." Compl. ¶ 111. But that would wrongly put the Court in the position of differentiating the defendants here from other unions based on the content of their First Amendment protected speech. *See Street*, 367 U.S. at 773 (recognizing that restraint on union "expression of political ideas . . . might be offensive to the First Amendment"). Moreover as discussed, under *Beck* it is already the law that the Union here (as with any union) cannot require an employee, over the employee's objection, to pay for political or ideological speech not germane to collective bargaining. *See Beck*, 487 U.S. at 745, 762-63. Therefore, the content of the Union's "hyper-ideological" political speech is immaterial as none of the plaintiff's members can ever be required to pay for it over their objection.

## III. As a Matter of Law, the Union Cannot Charge Non-Members an Agency Fee, Over Their Objection, for the Costs of Political Activities Like Those Alleged in the Complaint, and the Plaintiff Does Not Allege the Union's Procedures Violate Current Law.

Plaintiff alleges graduate student employees are being forced to support ideological activity through operation of the agency-fee arrangement. But that is impossible as a matter of law. Plaintiff does not allege that the Union is violating that law, *i.e.*, that the Union has failed to give required notice of the right to object to paying for political expenses not related to collective bargaining or contract administration, or that the Union is not honoring any such objections.

Indeed, it is not at all clear that— in addition to its wholesale challenge to its members being required to pay anything at all to the Union under the agency-fee arrangement, a challenge foreclosed by *Hanson, Street,* and *Beck*—plaintiff even intends to allege that the Union's agency-fee violates *Beck* and the duty of fair representation by requiring objecting employees to pay an agency fee including political expenses not "germane" to collective bargaining. Such a claim would fail on the allegations here in any event.[6]

The Supreme Court has repeatedly held that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee" before the employee is entitled to a reduction in an agency fee to exclude expenses, such as political expenses, not germane to collective bargaining. *Street*, 367 U.S. at 774. *See also Allen,* 373 U.S. at 118-19 (explaining remedies available under *Street*); *Beck*, 487 U.S. at 751-52 (applying *Street* analysis to NLRA); *Baisley,* 983 F.3d at 810 (rejecting challenge to union's "opt-out" procedures for paying reduced agency-fee under Railway Labor Act) *See also Penrod*, 203 F.3d at 44 ("Unlike full union members and financial core payors, employees who object to funding nonrepresentational activities, called 'Beck objectors,' pay reduced dues."). Here, plaintiff does not allege that any of its members had previously made their *Beck* objections known to the Union and that thereafter the Union required them to pay an unreduced agency fee.

The NLRB and courts have detailed specific procedures and safeguards for unions to comply with *Beck*, such as (1) providing notice to employees of their *Beck* objection rights and a reasonable opportunity to object before the union seeks to enforce an agency-fee clause on the

[6] There would also be no state action for any such First Amendment claim. Following *Beck*, 487 U.S. at 762-63, the federal duty of fair representation and Section 8(a)(3) prohibit a union from charging such an unreduced agency fee to an objecting employee. A private action prohibited by law cannot be state action. *See Lugar*, 457 U.S. at 941 ("private misuse of a state statute does not describe conduct that can be attributed to the State").

employee; (2) following an employee's objection, a reduction in the agency fee to a percentage of dues reflecting only expenses germane to collective bargaining and contract administration, and (3) an opportunity to challenge the amount of the reduction before an impartial decisionmaker. *See Cal. Saw & Knife Works,* 320 NLRB 224, 233, 235-36 (1995). *See also, e.g., Int'l Ass'n of Machinists & Aero. Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998). Plaintiff does not allege that the Union's procedures are deficient or have not been followed.

## CONCLUSION

For these reasons, defendants respectfully request the Court to dismiss plaintiff's complaint with prejudice.

Dated: September 9, 2024

Respectfully submitted,

/s/ George A. Luscombe III

George A. Luscombe III
Barry M. Bennett
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH LLP
8 South Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361 (Tel.) / (312) 372-6599 (Fax.)
Email: gluscombe@laboradvocates.com

*Attorneys for Defendants United Electrical, Radio and Machine Workers of America; and United Electrical, Radio and Machine Workers of America Local 1103 – Graduate Students United at the University of Chicago*

Margot A. Nikitas
General Counsel
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA
4 Smithfield Street, 9th Floor
Pittsburgh, PA 15222
(412) 471-8919 (Tel.)
Email: margot.nikitas@ueunion.org

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

GRADUATE STUDENTS FOR ACADEMIC FREEDOM, INC., on behalf of its members,

*Plaintiff,*

*v.*

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA LOCAL 1103 – GRADUATE STUDENTS UNITED AT THE UNIVERSITY OF CHICAGO,

*Defendants.*

Case No. 1:24-cv-6143

Judge John F. Kness

**PLAINTIFF'S CONSOLIDATED RESPONSE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

At the University of Chicago today, graduate students face a choice: Send some of their wages to GSU-UE, or quit working as a teaching or research assistant. That poses a terrible dilemma for many, who believe that this union has wrapped itself in antisemitism—such as with its zeal for the Boycott, Divest, and Sanction movement.

The union agrees that is how things work. And it admits graduate students have to fork over some of their wages if they want to continue their academic pursuits, even if it comes at the price of their conscience. GSU-UE's sole response is simply that there is nothing this Court can do about it. That is deeply wrong at every turn.

The union starts by saying the First Amendment does not apply here at all. But GSU-UE's ability to extract this agency-fee scheme was the direct and intended product of the NLRA; and when the state throws its weight behind specific conduct, that is textbook governmental action. As for the First Amendment, the union barely proffers a defense. And that is because it cannot say anything more. Among much else, this agency-fee arrangement functions as a prior restraint on students' capacity to engage in core expression (*e.g.*, teaching, research). That is as unlawful as it gets.

Finally, the union urges delay—that the Court should stall summary judgment in light of (mostly unspecified) fact-disputes. But the union's asserted "disputes" are neither genuine, nor material; the uncontroverted record merits final judgment now.

In truth, the Court has all it needs to decide this pure legal claim. And in doing so, the intuitive answer is the right one: The union cannot use its government-backed power to force students to fund it—against their will—and as the price of their work.

## ARGUMENT

### I. GSU-UE'S COMPULSION OF AGENCY FEES IS UNCONSTITUTIONAL.

#### A. GSU-UE's Compulsion of Agency Fees is Governmental Action.

The union's guiding refrain is that the collective bargaining agreement at issue is nothing more than a private agreement reached by private parties—and the union's power to extract agency fees from nonconsenting graduate students is the product of that private contract, not any governmental support or encouragement. *See* MTD 10.

But that would be news to Congress. One of the central purposes of the National Labor Relations Act (NLRA) was to enable unions to obtain agency fees from nonmembers. And Congress accomplished that goal through a careful statutory scheme: On the front-end, the NLRA gives unions massive bargaining power as the exclusive representative, and statutory authority to pursue agency fees; on the back-end, the NLRA superintends those negotiations, creating a clear presumption in favor of such agency fees—one that can only be displaced by a sufficiently compelling business justification on the part of the employer (as reviewed by the NLRB). PI 10.

The union is of course right that this collective bargaining agreement was reached among technically private parties; and it is right too that the NLRA does not federally mandate agency-fee provisions in every such agreement. But the union is wrong to declare the analysis ends there. And it blinks reality to contend that the contract here is just the result of two private parties reaching some arm's-length deal.

Instead, atop the bargaining table rested a heavy cudgel that the Government provided the union for the very purpose of securing agency fees. But the union may

not use that cudgel unbound by constitutional constraint. When a private party seeks to benefit from the "Government's thumb on the scales," it cannot wield that "power … without responsibility." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950). That is precisely why the governmental action doctrine exists—to ensure that those Americans on the receiving end of state-supported power are still shielded by basic constitutional protections. And that is why that doctrine applies here in full measure.

**1. Step One.** The first step of the governmental action test asks whether "the claimed constitutional deprivation"—here, the compulsion of agency fees from nonconsenting graduate students—"resulted from the exercise of a right or privilege having its source in state authority." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991) (citing *Lugar v. Edmondson Oil*, 457 U.S. 922, 939-41 (1982)).

The answer is plainly yes: A union's "collection of fees from nonmembers is authorized by an act of legislative grace—one that we have termed 'unusual' and 'extraordinary.'" *Knox v. SEIU, Loc. 1000*, 567 U.S. 298, 313-14 (2012). That suffices.

To recap: The NLRA allows a majority of workers to designate a union as the exclusive representative for all workers in a bargaining unit. The Act in turn "creates a power vested in [that] chosen representative" to "order the relations of employees with their employer"—*i.e.*, the power to "b[i]nd" members and nonmembers alike to a single contract. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967). And the Act specifically provides for those agreements to include an agency-fee provision, which requires nonmembers to pay a union as a condition of employment—something even GSU-UE acknowledges would otherwise be an "unfair labor practice." MTD 5.

Accordingly, when a union—acting as exclusive representative—binds all workers to the terms of a single collective bargaining agreement, it is wielding power "having its source" in federal law. *Edmonson*, 500 U.S. at 620. Indeed, this power was a pure creation of federal law, and an overhaul of the legal status quo. *Compare Allis-Chalmers*, 388 U.S. at 180 (explaining the NLRA "extinguishes the individual employee's power to order his own relations with his employer" and "clothe[s] the [union] with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents"), *with Texas & N.O.R. Co. v. Bhd of Ry. & S.S. Clerks*, 281 U.S. 548, 571 (1930) (noting the "normal" rule is for people to have the "right" to "representatives of their own choosing").[1] And here, GSU-UE used that power to visit the constitutional deprivation at issue: On behalf of all workers, it agreed to an agency-fee provision—and thus bound them to that obligation.

GSU-UE barely engages with any of this. It instead responds with strawmen and nonsequiturs, resting almost entirely on the Supreme Court's decision in *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974). But *Jackson* offers the union no help at all.

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[1] *See also, e.g.*, Archibald Cox et al., LABOR LAW: CASES AND MATERIALS 362 (11th ed. 1991) ("Congress has to a considerable degree replaced a bargaining structure based on volunteerism and economic force with one based on legal compulsion."); David Topel, *Union Shops, State Action, and the National Labor Relations Act*, 101 YALE L.J. 1135, 1446 (1992) (the federal labor laws "create a regulatory framework governing collective bargaining agreements that differs significantly from the system that would otherwise exist"); Minier Sargent, *Majority Rule in Collective Bargaining Under Section 7(a)*, 29 ILL. L. REV. 275, 278 (1934) ("The only principle of majority rule known prior to the statute was the principle of rule by a majority within an organization voluntarily chosen by the employee, from which organization the employee was free to withdraw without losing his employment").

GSU-UE repeatedly emphasizes that a union's "monopoly status as exclusive representative does not turn all of its actions as exclusive representative into state action." MTD 12 (citing *Jackson*, 419 U.S. at 351-52). But everyone agrees on that: "The fact a private actor is heavily regulated, granted some monopoly, or otherwise boosted by the state does not make everything it does governmental action." Compl. ¶ 78 (citing *Jackson*, 419 U.S. at 351-52). As GSAF underscored, this is a "conduct-specific inquiry," *id.*—one turning on the nature of the *action*, not status of the *actor*.

The big problem with the union's response is that it conflates two things: It takes the fact monopoly-status is not *dispositive* as to the full governmental action inquiry, as support for it being *irrelevant* to any part. But that is wrong—as *Jackson* itself explains. 419 U.S. at 351 (acts of monopoly "more readily" governmental acts).

To be sure, there are a number of circumstances where a union's status as the exclusive representative has little bearing on the action at issue. A good example is with regards to how a union structures its internal affairs, which directly concern only voluntary members, not others. *See United Steelworkers v. Sadlowksi*, 457 U.S. 102, 121 n.16 (1982) (holding no state action for local rule governing union elections).

But this is simply not one of those circumstances. Here, the union's power as exclusive representative is the precise "source [of] state authority" that enables the constitutional deprivation at issue. *Edmonson*, 500 U.S. at 620. Again, as a feature of this status, the NLRA "empowers the union to coerce the members of the bargaining unit" to either become dues-paying members, or pay the union an "agency fee." *Wegscheid v. Loc. 2911, Int'l Union*, 117 F.3d 986, 988 (7th Cir. 1997) (Posner);

*see also Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring) ("While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress."). Graduate student workers at Chicago may vehemently "disagree with [that] decision"; but they are "bound by [it]." *Allis-Chalmers*, 388 U.S. at 180. That satisfies step one.

A related problem for the union is that it blurs steps one and two of the analysis. The union also argues here that the NLRA does not "compel" the inclusion of agency-fee provisions—and thus governmental action is lacking. MTD 13. But that is really a step two argument, at best (as discussed next). What the union fails to appreciate is that whether a private party "exercises a right having its source in state authority" is a more basic inquiry, but one that only satisfies the "first requirement" of the test; it alone does not establish a "state actor." *Dunham v. Frank's Nursey & Crafts, Inc.*, 919 F.2d 1281, 1284 (7th Cir. 1990). There must be "something more" to ensure the *specific* act at issue can be fairly attributed to the state—and on *that* issue, the extent of Government support (*e.g.*, compulsion, encouragement) is the deciding factor. *Id.*[2]

[2] In this sense, *Jackson*—which was decided before *Lugar*, and accordingly did not expressly use its two-step framework—was really not a step one case at all. That is how the Seventh Circuit reads the decision. *Dunham*, 919 F.2d at 1284. So too the union's favorite case. *White v. Comm'ns Workers of Am., AFL-CIO, Loc. 13000*, 370 F.3d 346, 351-52 (3d Cir. 2004) (Alito). And for good reason. There was little doubt that the challenged act in *Jackson*—kicking someone off their electricity—had its source in state-authority, given the utility's monopoly-status. The whole point of *Jackson* was that something more was still required. And the case thus came down to whether there was a "sufficiently close nexus between the State and the challenged action," so that the act could be "fairly treated as that of the State itself." *Id.* at 351.

But that "something more" inquiry is reserved for step two, not step one. Again, the analysis here turns on a more preliminary point: Does the challenged action have its source in state authority? And on that specific point, the answer is yes: The NLRA has empowered GSU-UE to act as the exclusive representative for graduate students at the University of Chicago; it has extinguished the ability of those students to negotiate with the University directly over the terms of their employment; and it has enabled GSU-UE to bind all graduate student workers to a single collective bargaining agreement—and in particular, one that includes an agency-fee provision. That readily satisfies step one of the analysis; the union offers no persuasive response.

**2. Step Two.** Even if an action has its source in state authority, that does not mean it is "fairly attributable to the state." *Lugar*, 457 U.S. at 937. Once again, "something more" is required. As relevant, that "something more" is present when the Government has "significantly encourage[d]" the "very activity" at issue. *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 818 (7th Cir. 2009). When the state "puts [its] weight … behind [a] private decision," that support amounts to governmental action. *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992).

At this turn too, the union primarily jousts with a strawman. Nobody is saying that step two is satisfied because of the union's exclusive representative status alone. And nobody is saying that everything a union decides to put in a collective bargaining agreement is imbued with governmental sanction. The reason step two is satisfied *here* is because the NLRA consciously facilitates agency fees *in particular*. And that deliberate and meaningful support is what crosses the line into governmental action.

The union's response is this: The NLRA neither compels nor prohibits agency-fee provisions—and merely permitting some practice is not enough for governmental action. MTD 14. But as the union itself concedes, compulsion is not the standard for governmental action; instead, significant encouragement is sufficient. *Id.* And while the union is right that mere permission is not enough for governmental action, *Am Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999), it is quite wrong to insist that is all the NLRA does: The Act does not simply tolerate agency fees, and walk away.

In arguing otherwise, the union's approach suffers from a basic infirmity: It tries to divide-and-conquer, going provision-by-provision in the Act to say why each is insufficient in isolation. To be clear, even those points are lacking (as detailed later on). But the more fundamental issue is that more than "three decades of cases" have instructed courts "to examine[] the totality of the circumstances in making a state-action determination." *Tarpley v. Keistler*, 188 F.3d 788, 793 (7th Cir. 1999); *see also, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). And nowhere does the union even attempt to perform that sort of holistic review.

That is a problem. As GSAF explained, step two is satisfied here in light of the *combined effect* of three separate parts of the NLRA. *See* Compl. ¶¶ 19-24 (detailing provisions). On one side of the bargaining table, the Act turbo-charges unions' ability to *obtain* agency fees: It gives them tremendous bargaining power as the exclusive representative for all workers; it specifically carves out agency-fee provisions from the Act's general bar on encouraging or discouraging union membership; and it makes agency-fee provisions a mandatory subject of bargaining. On the other side of the

table, the Act markedly cabins employers' ability to *reject* such agency-fee provisions: As detailed later, the Act creates an effective presumption in favor of such clauses—one an employer can only displace with a sufficiently compelling business rationale.

Taken together, Congress enacted a statutory scheme that "gave unions the power" to readily obtain agency fees. *Radio Officers' Union of Com. Telegraphers v. NLRB*, 347 U.S. 17, 41 (1954). And this was no accident—it was a deliberate policy decision. Congress "designed" the NLRA to promote collective bargaining, and it saw agency fees as essential to that project: If workers could free ride, the idea went, then few would pay the union, rendering it permanently weak. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 753 (1988); *see Wegscheid*, 117 F.3d at 987. (But as the Court later explained in *Janus*, this prediction did not pan out in practice. *Infra* at 21.) The Act was thus far from agnostic when it came to agency fees; Congress specifically fashioned a scheme to ensure that unions could regularly and easily obtain them. *Cf. Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 789 n. 13 (1961) (Black, J., dissenting) ("Even though [this statutory text] is permissive in form, Congress was fully aware when enacting it that the almost certain result would be the establishment of union shops"). As one of the NLRA's principal authors put it: The "effect" of the NLRA is that every "employee has to pay the union dues." 93 Cong. Rec. 3837 (1947) (Taft).[3]

[3] The Supreme Court has recognized this policy decision elsewhere, contrary to what the union suggests (at MTD 14 n.4). For instance, in *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, the Court explained that the federal labor laws captured a policy that "favors [union-security agreements] unless a State" preempts them—*i.e.*, it places a thumb on the scale in favor of such agreements in states that allow them. 426 U.S. 407, 420 (1976). And in *Allis-Chalmers*, the Court observed that a driving purpose of the NLRA was to enable effective collective bargaining by an exclusive

GSU-UE offers no meaningful response. It never explains why this statutory scheme—taken as a whole—does not amount to the Government throwing its "weight" behind agency fees. *Apostol*, 957 F.2d at 343. And it does not dispute—nor could it—the NLRA has worked as intended, with agency-fee clauses being the overwhelming norm, rather than the exception. *See* Compl. ¶ 92. At most, the union quibbles about the effect of isolated provisions within the NLRA. But even these latter points falter.

*First*, the union focuses on its status as exclusive representative. It begins by returning to *Jackson* to defeat an "argument" that nobody raised—that monopoly-status transforms every single thing the monopolist does into governmental action. MTD 16. After that, the union presses the broader point that increased bargaining leverage—standing alone—is also not enough for governmental action. *Id.* at 17-18.

But even if that is right, that is not this case. The Act does not just give unions generic leverage as the exclusive representative for an entire bargaining unit. It also channels—indeed, increases—that leverage with respect to agency fees in particular. The NLRA specifically authorizes agency-fee provisions; makes them the subject of mandatory bargaining; and (as discussed next) creates a presumption in their favor. The result, as noted, is that unions have a greater ability to *obtain* such fees, while employers have a cabined ability to *reject* them. The Act does not just make unions generally more powerful at the bargaining table—it trains that power on agency fees.

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representative, 388 U.S. at 180—something, as noted, Congress feared may not be possible if workers could free-ride, *Beck*, 487 U.S. at 749-50 & n.4 (legislative history).

*Second*, the union tries to downplay the consequence of making agency fees a subject of mandatory bargaining. MTD 18-19. Notably, the union does not dispute that the NLRA creates an effective presumption in favor of agency-fee provisions, by making them a mandatory subject of bargaining that an employer must displace; it just disagrees about the extent to which the NLRA does so. MTD 18. So much for its argument that the Act does nothing more than "not prohibit agency-fee agreements." *Id.* at 11. Regardless, the union's attempt at minimization fails on its own terms.

For starters, the union gets the law wrong. As one of its cases makes plain: "In order to satisfy the good-faith requirement, any opposition to such a provision *must reflect* a legitimate business purpose." *CJC Holdings*, 320 NLRB 1041, 1046 (1996) (emphasis added) (cited at MTD 18). Said otherwise, when an employer fails to put forward a "legitimate business reason" for rejecting a provision that is subject to mandatory bargaining, it "does not satisfy the statutory obligation to bargain in good faith." *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872, 877 (11th Cir. 1984).[4]

The union (unsurprisingly) also appears to accept that this is no small showing. Its only response is that philosophical objections can sometimes pass muster. But

[4] *See also, e.g.*, *Dist. Hosp. Partners, L.P.*, 373 NLRB No. 55, 2024 WL 2110452, at *11 (May 8, 2024) ("[W]e adopt the judge's finding that the Respondent failed to advance a legitimate business justification for its proposed elimination of the union-security clause, and thus its bargaining conduct regarding union security independently reflects the Respondent's unlawful intent to frustrate the bargaining process."); *Universal Fuel, Inc. & Int'l Ass'n of Machinists & Aerospace Workers*, 358 NLRB 1504, 1504 (2012) (objection must advance a "legitimate business justification"); *El Paso Disposal, L.P. and Int'l Union of Operating Eng'rs*, 2009 WL 1174171 (Apr. 27, 2009) ("[A]n employer is required to bargain in good faith … and any opposition must reflect a legitimate business purpose." (internal marks omitted)).

even that is overstated. The NLRB has consistently held that a "purely philosophical" objection is not a "legitimate business justification." *Universal Fuel, Inc. & Int'l Ass'n of Machinists & Aerospace Workers*, 358 NLRB 1504, 1504 (2012). And it has seriously kept to that commitment. *See, e.g.*, *Preterm, Inc.*, 240 NLRB 654, 673 (1979) (rejecting family planning clinic's objection to agency fees, because definitional commitment to "principle of woman's right to choose" was not adequate justification).[5]

Perhaps as important, the union totally ignores the practical costs that come with the NLRB superintending every rejection of an agency-fee provision. To be sure, sometimes employers prevail. But as the union's cases show, that is typically after years on years of litigation. *See, e.g.*, *New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 277-79 (3d Cir. 2024) (resolving decade-long dispute). Rejecting an agency-fee provision thus comes with a price-tag: It hazards years of lawyers' fees and litigation burdens, even if the employer ultimately wins out. That too presses down on the scales, and amounts to another external pressure on employers, courtesy of the NLRA.

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[5] *See also, e.g.*, *Trinity Health Grand Haven Hosp. Resps. & SEIU Healthcare Michigan Charging Party*, 2024 WL 4103443 (Sept. 6, 2024) ("[T]he assertion of 'philosophical' objections does not satisfy the statutory obligation to bargain in good faith."); *Dist. Hosp. Partners*, 373 NLRB No. 55, 2024 WL 2110452, at *10 (same); *Kalthia Grp. Hotels, Inc. and Mana Hospitality*, 366 NLRB No. 118, 2018 WL 3135480 (June 25, 2018) ("[P]hilosophical objections to union security clause do not satisfy the obligation to bargain in good faith."); *S & F Mkt. St. Healthcare, LLC*, 2012 WL 1309214 (Apr. 16, 2012) ("[I]t is well established that an employer's refusal to consider a union security clause solely on 'philosophical' grounds is evidence of intent not to reach agreement."); *El Paso Disposal*, 2009 WL 1174171 (Apr. 27, 2009) (same).

The upshot is this: Through a carefully calibrated scheme, Congress used the NLRA to specifically facilitate agency fees—*i.e.*, it threw its "support[]" behind the "very activity" at issue. *Hallinan*, 570 F.3d at 818. True enough, Congress decided not to require agency-fee clauses in each collective bargaining agreement. Instead, it created a presumption in their favor, which select businesses could displace when the circumstances demanded—all while empowering unions to seize such provisions in the mine-run of cases. Or in plainer terms: The Government placed its heavy "thumb on the scales" in favor of agency fees. *Douds*, 339 U.S. at 401. That is enough for governmental action. *See Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1149 (7th Cir. 1995) ("[S]tate action is present when the involvement of governmental authority aggravates or contributes to the unlawful conduct."). The union cannot benefit from the weighty support of the state, without enduring any of its strictures.

**3. Supreme Court.** Elsewhere, the union argues the Supreme Court has "implied" that private sector agency-fee arrangements do not involve governmental action. MTD 6. But there is little need to parse implications: The Court already *held* that parallel provisions of the Railway Labor Act (RLA)—those that gave unions the power to act as exclusive representative and specifically obtain agency fees, and are "in all material respects identical" to the NLRA, *Beck*, 487 U.S. at 745—involved governmental action. *Ry. Emps. v. Hanson*, 351 U.S. 225, 232 (1956). While the union hints this holding is out of step with doctrine today (it isn't), the "Supreme Court alone has the prerogative of overruling its own decisions." MSJ Opp. 11 n.1.

The union's sole basis for distinguishing *Hanson* is the RLA preempts state laws barring agency-fee arrangements, while the NLRA does not. But that cannot be right, because it proves too much. Preemption simply clears the field; it does not affirmatively empower anyone to do anything. If preemption alone were enough, then "all private action taken under the authority of federal legislation that occupies a field … [would become] governmental action." Harry H. Wellington, *The Constitution, The Labor Union, and "Governmental Action",* 70 YALE L.J. 345, 357 (1961).

Instead, *Hanson* rested on what every other governmental action case rests on: The state-backed *power* that the private actor wields—which, again, under the RLA was a railroad union's power to act as the exclusive representative and pursue agency fees. *Linscott v. Millers Fall Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971). When that union agreed to an agency fee for *all* workers, "the federal statute [wa]s the source of the power and authority by which any private rights [we]re lost or sacrificed." *Hanson*, 351 U.S. at 232. So too here—which is exactly why *Hanson*'s author thought the case extended to the NLRA, preemption or not: "When Congress authorizes an employer and union to enter into union shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it had imposed them by statute." *Buckley v. Am. Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1095 (1974) (Douglas, J., dissenting from denial of certiorari).

Indeed, little else makes sense. In a state where agency fees are not prohibited, a railroad workers' union is wielding the *exact same powers* under the RLA as a

private sector union is under the NLRA. It cannot be that those same actions, backed by the very same authority, are governmental acts in one instance, and private acts the next. *Linscott*, 440 F.2d at 16. And even if preemption was some "plus factor" to help tip the scales, the NLRA has a bigger one: Again, the Act makes agency fees a mandatory subject of bargaining; and creates an effective presumption in their favor.

In short, if *Hanson*'s governmental action holding is to be taken seriously, this is a straightforward case: The RLA and NLRA are "statutory equivalents" here. *Beck*, 487 U.S. at 746; *see* MTD 19 (recognizing the statutes are "materially identical," but for preemption). If there is governmental action with one, then there is with the other.

The union raises a couple of other cases, but neither do much. It is true that in *Janus v. American Federation of State, County & Municipal Employees, Council 31*, the Court labeled *Hanson*'s governmental-action holding "questionable" in a footnote. 585 U.S. 878, 918 n.24 (2018). But none of the advocates in *Janus* had any incentive to suggest the NLRA beget governmental action; and anyway, *Hanson* still binds the lower courts. It is also true that in *Beck*, the Court cited two cases holding union action under the NLRA was not governmental action. But as noted, those cases involved a union's internal affairs—precisely where governmental action is lacking.

By contrast, the union wholly ignores where the Supreme Court has offered insights cutting in the other direction. Namely, in *Vaca v. Sipes*, the Court found it intolerable to conclude that a union—after receiving extensive state-backing under the NLRA—could then use those powers to discriminate on the basis of race, without the Constitution having anything to say about it. 386 U.S. 171, 182 (1967) ("[T]he

congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination."). But on the union's theory of labor law, it would present no constitutional problem for a union to pick its favorite race, religion, or gender, and discriminate away. GSU-UE does not deny this.

**4. Circuit Courts.** The union agrees that the Seventh Circuit has not yet addressed the governmental action question presented here. But it emphasizes that a majority of the circuits to reach the issue have come out the union's way. MTD 8.

That holds little water, however, because none of those circuits considered the full picture. Each reasoned that governmental action was lacking, because it was not enough the NLRA (i) made the union the exclusive representative, and (ii) specifically authorized agency-fee arrangements. *See, e.g.*, *White v. Commc'ns Workers of Am., AFL-CIO, Loc. 13000*, 370 F.3d 346, 350 (3d Cir. 2004) (Alito); *Price v. UAW*, 795 F.2d 1128, 1133 (2d Cir. 1986); *Kolinske v. Lubbers*, 712 F.2d 471, 477 (D.C. Cir. 1983); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410-11 (10th Cir. 1971). To be sure, that holding is very hard to square with *Hanson*—as just explained. *See also Beck v. Commc'ns Workers of Am.*, 776 F.2d 1187, 1206-07 (4th Cir. 1985). But in all events, it ignores a key part of the analysis: That the Act *also* makes agency-fee provisions a subject of mandatory bargaining and creates an effective presumption in their favor.[6]

[6] The union says Judge Alito considered this argument "implicitly." MTD 17. Not so. By its terms, *White*'s analysis is limited to "addressing" certain "arguments that White ha[d] advanced." 370 F.3d at 350. Nowhere did Judge Alito grapple with

This omission matters, because it addresses the precise thing that these courts said was missing. The D.C. Circuit, for instance, reasoned that "the NLRA is neutral with respect to the content of particular agreements." *Kolinske*, 712 F.2d at 478. But that is just not so with agency fees; it creates a presumption in their favor. Likewise, the Third Circuit held a private party is not a "state actor" simply because it has been "furnished … with more bargaining power than it would have otherwise possessed." *White*, 370 F.3d at 351. But even if *generalized* leverage is insufficient, the analysis is different when the statute *specifically channels* that leverage toward certain ends. And the NLRA does exactly that, by mandating that agency-fee provisions be placed on the bargaining table, and that employers acquiesce to those provisions unless they are able to put forward a sufficiently weighty business justification for their exclusion.

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Again, the union is of course right that the Government did not come down to Chicago and "force" the University to agree to an agency fee. MTD 19. But there is no grounded argument that this agreement was purely "private." *Id.* By intent and design, the NLRA empowered GSU-UE to extract for itself an agency-fee provision; and through that Act, the Government put its sizable weight behind that campaign.

That specific, targeted, and significant assistance gives rise to governmental action. The union thus cannot use its state-backed power to violate the Constitution, or wield it to the detriment of the First Amendment rights of these graduate students.

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the argument that GSAF presses now—let alone reject it, in any way. *See id.* at 351 (citing Appellant Br. 19, which relies on the union's exclusive representative status).

### B. GSU-UE's Compulsion of Agency Fees Violates the First Amendment.

If the union is subject to the First Amendment, it is violating it here. GSU-UE is forcing graduate students at Chicago to subsidize the union's work—and in turn, scar their consciences—as the price of continuing their academic pursuits. It is near impossible to envision something more offensive to basic constitutional principles of free speech and association. And the union barely offers any defense to the contrary.

**1. *Hanson*.** After spending pages distinguishing *Hanson*, a section later GSU-UE comes to fully embrace the decision—resting its principal merits argument entirely on that case. MTD 19-20. But just as the union underreads *Hanson*'s governmental action holding, it dramatically overreads its First Amendment holding.

The union says *Hanson* broadly blesses private sector agency fees. In particular, it takes *Hanson* for the proposition the First Amendment allows all agency fees so long as they are not "used for purposes other than collective bargaining." *Id.*

But the union's maximalist reading of *Hanson* runs into a problem: The Court has expressly rejected it. In *Harris v. Quinn*, the Court stated that *Hanson*'s holding is "really quite narrow," and that it would be a mistake to read its "single" sentence of First Amendment analysis for more than it's worth. 573 U.S. 616, 635-36 (2014). The *Hanson* Court did nothing more than hold that the "*bare authorization*" of agency fees was constitutional—*i.e.*, that it was tolerable in at least some circumstances. *Id.* at 631. But in rejecting that "facial First Amendment challenge," the Court said nothing as to *when* such fees would satisfy the Constitution. *Janus*, 585 U.S. at 919. And it never "suggest[ed]" an agency fee would be permissible if it were to "force[]

men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought." *Harris*, 573 U.S. at 631.

The union does not even *mention* these parts of *Harris* or *Janus*. And that is because its reading of *Hanson* is irreconcilable with them. In no sense is categorically blessing all private sector agency fees a "narrow" holding. *Id.* at 631. And even if the union's reading of *Hanson*'s single-sentence of First Amendment analysis was tenable before these cases—and that's quite a stretch—it is untenable now. As the Court has since affirmed, *Hanson* did nothing more than reject a "facial challenge" to agency fees; it never grappled with the constitutional question here. *Janus*, 585 U.S. at 919.

**2. *Street*, etc.** The union goes on to say that the Supreme Court—in *Street* and its progeny—held the First Amendment tolerates any agency fees "for expenses germane to collective bargaining." MTD 21. But here too, the union runs headlong into precedent: As the Court recently confirmed, those cases were not "constitutional decision[s] at all," and thus could not—and did not—answer the constitutional question here. *Harris*, 573 U.S. at 635; *see Janus*, 585 U.S. at 919 ("*Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue.").

Starting in *Street*, the Court dealt with a number of cases where workers brought *partial* challenges to an agency-fee scheme—arguing not that the fee was unlawful in full, but that part of it was unlawfully going to "political candidates and causes with which they disagreed." *Harris*, 573 U.S. at 631. The Court then resolved those cases on *statutory* grounds, reasoning that neither the RLA nor NLRA permit unions to extract fees for those purposes. *Id.* at 632. This distinction—between

"chargeable" expenses (*i.e.*, those germane to bargaining) and "nonchargeable" ones (*i.e.*, those related to politics)—beget a series of cases where the Court fashioned fine distinctions about how to draw this statutory line. *Janus*, 585 U.S. at 921. But none of these cases involved a constitutional challenge to an *entire* agency-fee arrangement; all involved challenges to particular expenditures—and the Court took those cases on their terms. *See, e.g.*, *Beck*, 487 U.S. at 739-40 (employees brought suit "challenging [the union's] use of their agency fees for purposes other than collective bargaining").

From this statutory distinction, the union tries to conjure a constitutional holding—that an agency fee poses no First Amendment burden so long as it is not spent on politics. MSJ Opp. 11. But the Court has said the opposite: Any compelled agency fee constitutes "a significant impingement on First Amendment rights." *Ellis v. Ry. Clerks*, 466 U.S. 435, 455 (1984); *see Janus*, 585 U.S. at 894 ("[T]he compelled subsidization of private speech seriously impinges on First Amendment rights"). Of course, sometimes those burdens can be justified as serving compelling governmental interests; but that does not eliminate the existence of the burden in the first place.[7]

**3. *Harris* and *Janus*.** The union next urges this Court to shield its eyes from *Harris* and *Janus*, since they involved public-sector unions. But that too does

[7] In *Ellis*, the Court did review whether a handful of expenditures (*e.g.*, money for publications, conventions) comported with the First Amendment. 466 U.S. at 456. But in upholding those requirements, the Court relied exclusively on *Abood* to hold the constitutional burdens in *Ellis* were no greater than those the Court had "already accepted." *Id.* Like *Abood* itself, that derivative holding is no longer good law. Regardless, this case presents distinct First Amendment burdens not presented in *Ellis*, and demands a distinct constitutional analysis not done there. *Infra* at 22-24.

not work. While *Harris* and *Janus* do not resolve the full constitutional question presented, both cases are highly relevant to answering it. Two points merit mention.

*First*, the union stresses that neither case "overruled" *Hanson* (or any other case involving "agency-fee arrangements in the private sector"). MTD 22. But nobody is saying that. GSAF has no problem with *Hanson*, properly read; its issue is with the union's attempt to rewrite it. And as for *that* dispute, both *Harris* and *Janus* are right on-point, because they are express about what *Hanson* held (and what it didn't).

*Second*, the union says that neither case offers relevant First Amendment analysis because neither "implicated" the private sector. MTD 22. But this repeats a now familiar mistake: Just because *Harris* and *Janus* are not *conclusive*, does not mean that they are not *relevant*. Namely, *Janus*'s exacting scrutiny analysis remains critical here. As GSAF explained, *Janus* held that neither of the purported governmental interests justified the First Amendment burden in that case. 585 U.S. at 896-901; *see* Compl. ¶¶ 114-17; PI 14. It held that eliminating "free riders" was unjustified in practice and, more important, was illegitimate as a matter of law. 585 U.S. at 897 ("[A]voiding free riders is not a compelling interest"). And it held that preserving "labor peace"—*i.e.*, avoiding the conflict that may follow multiple unions representing the same workers—never materialized, as proven by the *private sector*. *Id.* at 896 ("[It's] now undeniable that 'labor peace' can readily be achieved 'through means less restrictive of associational freedoms' than the assessment of agency fees."). As such, even if *Harris* and *Janus* did not resolve the first part of the constitutional analysis here (the burden side), they bear heavily on the second part (the benefit side).

That said, it is also no doubt important to be precise about where *Janus* does not apply. A key part of *Janus* was its holding that every cent of every fee that goes to a public-sector union is *necessarily* political—because all matters of public sector employment are matters of public policy—and thus any compelled fee presented an especially serious First Amendment burden. *Id.* at 920. That does not apply here: GSAF has been clear that this case is *not* a broadside against all private-sector agency fees; nor does GSAF suggest every forced payment to a private-sector union presents an unjustifiable constitutional burden (as so in the public sector). Compl. ¶¶ 103-04.

Instead, GSAF's suit is premised on an agency-fee arrangement in *this* context, paid to *this* union. As discussed next, the "individual interests at stake [] differ" here from a garden variety private-sector agency-fee arrangement. *Janus*, 585 U.S. at 920. And for that reason, *this* agency-fee arrangement contravenes the First Amendment.

**4. The Merits.** Outside of its argument that GSAF's challenge is somehow foreclosed by precedent, the union offers little on the merits. Most telling, the union does not identify a *single* compelling interest to satisfy exacting scrutiny; it does not even try. And its passing replies to GSAF's merits arguments do not say much more.

*First*, the union points out that the agency-fee arrangement here only applies to graduate students as "employees." MTD 22-23. So what? Employees or not, the point is that graduate student workers—unlike certain other fields—are engaged in core expressive activity under the First Amendment (*e.g.*, teaching, research, writing). And in turn, the agency-fee arrangement here functions as a prior restraint on such protected activity, because these graduate students cannot continue those academic

pursuits (even as "employees") without first paying the union against their will. *That* is what creates a particularly severe First Amendment burden—greater than the already "significant impingement" a typical agency fee causes. *Ellis*, 466 U.S. at 455.[8]

*Second*, the union challenges the notion that the content of its speech should have any role to play in the constitutional analysis—and floats that doing so would risk a First Amendment problem of its own. MTD 23. But nobody is suggesting any "restraint" on the union's expression. *Id.* The union is free to say whatever it wants. The point instead is that what the union *chooses* to say naturally affects its ability to *compel* the association of others. Again, any agency fee—any compelled subsidy of an organization—constitutes a real burden on the compelled's "associational freedoms." *Janus*, 585 U.S. at 894. It cannot be right that those burdens are all the same, across contexts; they vary depending on *what* one is being dragooned into associating with. Acknowledging this reality would not force courts into saying what ideas are right or wrong. All it would involve is saying that when a union's expression extends beyond traditional subjects of collective bargaining—and into "controversial subjects"—then the associative burdens posed by agency fees are greater than usual. *Id.* at 913-14.

And again, it is no answer that the union sequesters the agency fees of *Beck* objectors from political expenditures. To start, "money is fungible, so even if the

[8] To the extent the union is hinting there is no First Amendment issue, because graduate students voluntarily *choose* to work as teaching and research assistants, the Supreme Court has rejected that argument time and again. *FEC v. Cruz*, 596 U.S. 289, 297 (2022) ("[W]e have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred.").

[agency] fee were spent entirely for nonpolitical activities, it would free up other funds to be spent for political purposes." *Knox*, 567 U.S. at 317 n.6. More fundamental, there is a First Amendment burden *whenever* one is forced to subsidize—and thus associate with—an entity (even if, in other cases, that relative burden can be justified by offsetting compelling interests). *Janus*, 585 U.S. at 891-94; *Ellis*, 466 U.S. at 455. The First Amendment protects people's freedom to have *nothing* to do with a group. The Constitution would not allow the Government to force Democrats to help fund the RNC—even if those funds are earmarked for staff healthcare. And here, it does not allow a governmental actor to force graduate students to fund an entity that they deem antisemitic—even if those funds do not go straight to promoting antisemitism.[9]

## II. SUMMARY JUDGMENT IS WARRANTED.

If the Court agrees with the above, it should not only deny the union's motion to dismiss, but it should also award summary judgment to GSAF. This case presents a pure legal challenge to GSU-UE's agency-fee arrangement. And GSAF "is entitled to a judgment as a matter of law." *Stingley v. Laci Transport Inc.*, 2024 WL 1363627, at *3 (N.D. Ill. 2024) (Kness). The union urges delay on two grounds; neither work.

[9] To be clear, GSAF is not bringing a statutory *Beck* claim as to the *amount* of agency fees its members are forced to pay. MTD 23. GSAF objects to any agency fee in any form: Its members want nothing to do with this union. Related, per this Court's procedures, GSAF believes that GSU-UE's motion to dismiss turns on purely legal issues—and thus any identified deficiencies would not be curable by amendment.

### A. GSAF Has Established Article III Standing.

The union agrees that to establish associational standing, all GSAF needs is "one" member who has "standing to sue in their own right." MSJ Opp. 11; *see also, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992). But the union contends none of GSAF's members—graduate students at the University of Chicago, all bound to this contract, against their will—clear this bar. That is not a very good argument.

GSU-UE's principal point is that none of GSAF's members are required to pay agency fees that go to political activities—and thus none have suffered (or will suffer) a First Amendment violation. MSJ Opp. 11-12. But this confuses standing with the merits. For Article III purposes, a federal court accepts the plaintiff's legal theory as true, and then assesses whether he would be entitled to relief. *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011) ("[S]tanding does not depend on the merits of a claim."). That is why in all of the cases the union raises above—where employees challenged an agency-fee arrangement as impermissibly collecting nonchargeable expenses—the Supreme Court rejected their claims on the merits; it did not hold that they lacked *Article III standing*, once rejecting their statutory claim on its terms. MSJ Opp. 6-7.

So too here. GSAF members obviously have standing to challenge the contract that binds them. As subjects of the agency-fee provision, they either must pay a fee in violation of their conscience—both a quintessential pocketbook and constitutional injury—or forgo certain teaching, research, or related opportunities—another First Amendment harm. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) ("monetary harms" are "obvious" Article III injuries); *Ellis*, 466 U.S. at 455 (any compelled fee is

a "significant impingement on First Amendment rights"); *Bell v. Keating*, 697 F.3d 445, 453 (7th Cir. 2012) ("Chilled speech is, unquestionably, an injury supporting standing."). Those injuries are directly caused by the agency-fee arrangement; and they would be redressed by a judicial decision holding it unlawful (and unenforceable).

True enough, the union disputes what it is doing is ultimately unlawful—*i.e.*, it disagrees its agency-fee arrangement actually violates the First Amendment. But that is purely a *merits* point; it has zero to do with *standing*. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing 'in no way depends on the merits of the petitioner's contention that particular conduct is illegal.'").

The union raises a couple other points in passing, but those fare no better.

*First*, the union suggests GSAF lacks standing for each form of relief it seeks. MSJ Opp. 12-13. Not so. It is true GSAF also requested relief for nonmembers (*i.e.*, "other nonconsenting students"). But that flows right from bedrock First Amendment doctrine. *Janus*, 585 U.S. at 930. It is black-letter law that while a litigant *ordinarily* lacks the ability to vindicate the rights of third parties, the First Amendment is an exception: When a law facially violates the First Amendment—*i.e.*, when it's unlawful in virtually all applications—a plaintiff may seek to "vindicate the rights of the silenced," and have the provision invalidated in full. *United States v. Hansen*, 599 U.S. 762, 770 (2023). There is no reason why the rationale for facial challenges would extend to statutes, but not other binding legal instruments that visit the same harms (*e.g.*, a contract). (And even if this Court disagrees here, this is purely a legal matter.)

The union also notes that GSAF sought nominal damages, which may involve individualized proof. MSJ Opp. 13. But that has become a moot point. GSU-UE has agreed not to enforce its agency-fee scheme against GSAF's members for the duration of this litigation (and to not seek back fees), ECF 23, at 2; and GSU-UE agrees that the only member to have paid any fees so far has been Or Goldreich, MSJ Opp. 11. Nothing more is needed: Or is the only person who is eligible for nominal damages.

*Second*, the union disputes GSAF's standing on the ground that each member must affirmatively opt-out of agency fees—and that this lawsuit thus requires their individual participation. MSJ Opp. 12-13. But this gets the law wrong at every turn.

Foremost, the union's premise is mistaken. It is true that to raise a *Beck* claim under the NLRA, a worker must affirmatively opt-out; but the remedy is the precise *opposite* for a constitutional claim like this one. As the Court held in *Janus*, a waiver of First Amendment rights "cannot be presumed." 585 U.S. at 930. And accordingly, the Constitution compels an *opt-in* remedy: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.*; *see Knox*, 567 U.S. at 312-13 (distinguishing opt-in and opt-out).

Notably, the Court explained this "procedure" was required in light of the First Amendment stakes posed by an unlawful agency-fee arrangement. *Janus*, 585 U.S. at 930. "An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Knox*, 567 U.S. at 312. And given this risk, the "default rule" must be different. *Id.* Thus

in *Janus*, the Court held that workers must "clearly and affirmatively consent before any money is taken from them"—they need not opt-out, or confirm that like Mr. Janus they objected to the union's political positions or activities. 585 U.S. at 930. That they chose not to associate with the union was sufficient. *See Knox*, 567 U.S. at 313.

There is no reason this case would be any different. As explained, *this* agency-fee arrangement levies a particularly severe constitutional toll—it amounts to a prior restraint on expressive activity, and an especially heavy associational burden. Given those hazards, consent cannot be presumed; the required First Amendment remedy is instead to require *affirmative* consent for every worker. And until then, the union "may no longer extract agency fees from nonconsenting employees." 585 U.S. at 929.

Even putting that aside, the union conflates what is required for an association to obtain a remedy on behalf of its members, with what is required for those members to benefit from that remedy in the real world. Every time that an association wins a prospective remedy for its members, those members will need to make some personal showing on the back-end to actually benefit from the relief—*e.g.*, a business will need to show that it is in fact a member of the Chamber of Commerce, and that it is subject to the challenged regulation. That inevitability is obviously insufficient to defeat associational standing. *Mo. Pet Breeders Ass'n v. Cnty. of Cook*, 106 F. Supp. 3d 908, 915 (N.D. Ill. 2015) ("When an 'association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)); *see, e.g.*, *Am. Coll. of*

*Emergency Phys. v. Blue Cross & Blue Shield of Ga.*, 833 F. App'x 235, 241 n.8 (11th Cir. 2020) ("[F]or prospective relief, organizational plaintiffs 'need not name names'").

And in all events, *even if* some individual participation were needed, the union is wrong to suggest that such participation would defeat associational standing. The Seventh Circuit has squarely rejected the argument that "representational standing" is destroyed whenever it is "necessary to take any evidence from individual members of an association." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601-02 (7th Cir. 1993). Rather, there is only a problem when "individual participation of *each* injured party [is] indispensable to proper resolution of the cause." *Id.*; *see also Hospital Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (Alito).

In short, the union's *legal* arguments regarding GSAF's standing are meritless. And its *factual* arguments are just as baseless—as explained next. Together, this is a textbook example of where associational standing is proper: Uncontroverted record evidence makes plain that GSAF's members have standing to challenge the agency-fee arrangement that binds them; and GSAF has standing to sue on their behalf. The union marshals no basis for departing from that straightforward Article III analysis.

**B. There Are No Genuine Disputes of Material Fact.**

GSU-UE tries to delay the demise of its unlawful agency-fee arrangement (for at least a bit longer) by claiming there are "multiple disputed facts" that are "essential" to the Court resolving the challenge before it. MSJ Opp. 13-14. But its supposed fact-disputes are either not genuine, or immaterial. This Court has before it everything it needs to render summary judgment. The union's arguments otherwise are wrong.

*First*, the union's primary argument is that it needs discovery in order to explore whether any GSAF member has filed a "*Beck* objection" or has been forced to pay an agency fee. *Id.* But neither point is material; both are irrelevant. And in turn, the union has failed to carry its burden of identifying specific material needed still to resolve this case. *See Alicea v. Cook Cnty.*, 88 F.4th 1209, 1219 (7th Cir. 2023).

Once again, GSAF is not pressing a *Beck* claim. Its members object to paying *any* agency fee to this union. They are not looking to shave a few cents off the dollar.

Likewise, it makes no difference whether GSAF's other members have in fact paid agency fees in the past. The union agrees that teaching and research assistants are covered by their agency-fee scheme. And the union agrees that absent judicial relief, GSAF's members will have to pay such agency fees—indeed, that is why the union had to *waive such fees* as part of its agreement with GSAF to avoid preliminary injunction proceedings (and also why GSU-UE agreed there remained a "live case or controversy" here). ECF 23, at 2. For GSAF's members other than Or Goldreich, this is thus a classic pre-enforcement challenge, where GSAF's members are seeking relief *before* their consciences are scarred, and First Amendment rights permanently violated. *Sweeney v. Madigan*, 359 F. Supp. 3d 585, 590 (N.D. Ill. 2019); *see Cntr. for Ind. Freedom v. Madigan*, 697 F.3d 464, 473-74 (7th Cir. 2012) (describing doctrine).

*Second*, the union contends that it needs discovery—maybe even depositions—to "inquire" into GSAF members' "extraordinary position" that their "free speech rights are somehow infringed" here. MSJ Opp. 14. But this too is obviously not right.

To start, the union's objection is a legal one, not a factual one. The union does not assert that any GSAF declarant—of any stripe—is lying, or insincere about their objections to the union. Instead, its sole argument is that these objections do not give rise to a First Amendment claim, under "decades of Supreme Court precedent to the contrary." *Id.* Merits aside, that is the subject of briefing—not student depositions.

Equally so, the union's assertion that it needs to confirm *why* every GSAF member wants to disassociate from GSU-UE is foreclosed by *Janus* (and *Knox*). As discussed above (at 27-28), when an agency-fee scheme hazards severe constitutional burdens that outstrip its benefits—and therefore fails exacting scrutiny—the remedy is to require an *opt-in* system for *all* workers. *Janus*, 585 U.S. at 930; *see Knox*, 567 U.S. at 312-13 (explaining rationale for prophylactic rule). Workers need not justify or establish their "dissent[]" to the union's satisfaction. *Knox*, 567 U.S. at 313. The First Amendment instead requires affirmative *consent* for such an agency-fee scheme.

Anyway, it is impossible to see what the union needs to "inquire" about. There is nothing "extraordinary" about an Israeli-student like Or Goldreich not wanting to send money to a group that has joined the Boycott, Divest, and Sanction movement—*i.e.*, a movement that would make Or ineligible "for the graduate program that [he] is now a part of, because [he's] an Israeli national." ECF 25-10, Goldreich Decl. ¶ 12. Nor is there anything "extraordinary" about graduate students not wanting to send money to a union they find antisemitic—or espouses other views they find abhorrent.

Put together, even though the union gestures toward Rule 56(d) throughout its Local Rule 56.1(b)(2) response, GSU-UE has failed to offer a single sound "reason[]"

for why discovery is warranted, or identify any outstanding "facts" that are "essential to justify its opposition." Fed. R. Civ. P. 56(d); *see, e.g.*, *F.C. Bloxom Co. v. Tom Lange Co. Int'l*, 109 F.4th 925, 936 (7th Cir. 2024) ("A Rule 56(d) affidavit must do more than express 'a fond hope' that additional discovery would uncover useful evidence. . . . It must instead identify with specificity the information that additional discovery is expected to uncover. Even more, it must explain how that information would allow the non-movant to proceed to trial on the legal theory articulated by its adversary.").

*Third*, while the union does not press the point in its brief, it elsewhere insists that everything it cannot personally verify in the declarations is "disputed"—such as the existence of GSAF members' beliefs—and that discovery is therefore needed. MSJ Opp. 14; ECF 29-1, Luscombe Decl. ¶ 6; Deft. 56.1(b)(2) Response ¶¶ 31-57. But this mirrors a mistaken tack, oft-rejected. *See, e.g.*, *Spierer v. Rossman*, 2014 WL 4908023, at *4 (S.D. Ind. 2014) ("Simply claiming that a party has not had the opportunity to conduct discovery is not enough to defeat a motion for summary judgment").[10]

A signed-and-sworn declaration is competent evidence at summary judgment. *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267-68 (7th Cir. 1994). And that is not made contingent on the opposing party confirming for itself that every line does not harbor

[10] The union's invocation of Rule 56(d) is odder still, because it did not file any accompanying motion to delay its summary judgment opposition. The point of Rule 56(d) is to provide relief, where the non-moving party is unable to put together an opposition to summary judgment, without further information. *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 706 (7th Cir. 2006). But it must obtain that relief through a "properly filed motion." *Rossman*, 2014 WL 4908023, at *6. That the union never filed this motion—and in fact, filed a thorough opposition brief—only further confirms its discovery claims ring hollow, and that no more is needed for this Court's review.

perjury. *See Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 604-05 (7th Cir. 2000). A party cannot rely on Rule 56(d)—or any rule, for that matter—to discount a sworn declaration merely because that party does not yet believe its contents, or has not yet had an opportunity to attack its credibility. *Heredia v. City of Las Cruces*, 2021 WL 411444, at *8 (D.N.M. 2021) (collecting cases rejecting discovery requests under Rule 56(d) that all "essentially hinge[d] on the hope that one or all of [the declarants] will suddenly change their story under the heat of cross-examination"); *see, e.g.*, *Perdue v. Indiana Bd. of Law Exam'rs*, 2010 WL 5418882, at *2 (S.D. Ind. 2010) (rejecting such a request, which sought "to do little more than verify the substance of the affidavits").

Simply put, a party cannot "characterize undisputed facts as disputed merely because he disagrees (without evidentiary support) that they exist, or has no knowledge to admit or deny them." *Sansone v. Kormex Metal Craft, Inc.*, 2016 WL 1529900, at *1 n.2 (N.D. Ill. 2016); *see Grynberg v. Total S.A.*, 538 F.3d 1336, 1345 (10th Cir. 2008) ("A fact is 'disputed' in a summary-judgment proceeding only if there is contrary evidence or other sufficient reason to disbelieve it; a simple denial, much less an assertion of ignorance, does not suffice."). A party cannot "generally deny[]" everything it cannot personally confirm; it must offer some "specific" reason why an assertion is disputed. *Collins v. Citibank, N.A.*, 2022 WL 683661, at *2 (N.D. Ill. 2022) (Kness); *see FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1997) ("Once the [plaintiff] has made a prima facie case for summary judgment, the defendant cannot rely on general denials"). Especially so here, where GSU-UE's disputes almost exclusively concern subjective beliefs that are entirely within the declarants'

"personal knowledge." *Nance v. DOJ*, 2021 WL 2329375, at *3 n.2 (N.D. Ill. 2021). And all the more so where the declarants' assertions track all available material. *E.g.*, Deft. 56.1(b)(2) Response ¶¶ 33-34, 38-39 (confirming Goldreich and Shia are covered by contract); ECF 29-4, Srivastava Decl. Ex. A, at 1-3 (Goldreich nonmember card).

*Fourth*, the union insists that, at minimum, GSAF's anonymous declarations must be ignored, because they are "not competent evidence" as a matter of law. MSJ Opp. 5. But that has to be wrong. (And even if not, it would not stave off summary judgment.) The federal courts often award summary judgment to organizations representing pseudonymous members—something that would be impossible, if the union were right. *See, e.g.*, *NAACP v. Trump*, 298 F. Supp. 3d 209, 225 n.10 (D.D.C. 2018) (awarding partial summary judgment to NAACP even when it refused to "name [its] members"); *see also Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 592-94 (D.C. Cir. 2022) (holding on "summary judgment" standard that Teamsters had standing even though court did "not know the names of [the injured] individuals").

Rather, it is the union's categorical rule as to anonymous declarations that has no basis in law. Here as elsewhere, what matters is whether there is some actual ground to "dispute the veracity of those declarations." *Chamber of Commerce v. CFPB*, 691 F. Supp. 3d 730, 739 (E.D. Tex. 2023). There is no total bar on such declarations serving as competent evidence on summary judgment. *See, e.g.*, *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) (explaining on summary judgment posture that an association need not "name the members on whose behalf suit is brought"). Rather, anonymous declarations follow directly from the First Amendment, and its

fundamental protections for those who seek to vindicate their basic rights without enduring the risk of public sanction or retribution. *See, e.g.*, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 606 n.48 (S.D.N.Y. 2019) ("[T]o hold that Article III requires an organization to name those of its members who would have standing would be in tension with one of the fundamental purposes of the associational standing doctrine—namely, protecting individuals who might prefer to remain anonymous."), *aff'd in part, rev'd in part on other grounds, and remanded sub. nom*, 588 U.S. 752 (2019) (relying on *NAACP v. Alabama*, 357 U.S. 449, 458-60 (1958)).[11]

Nevertheless, even if anonymous declarations harbored some evidentiary problem, it does not matter: There are more than sufficient uncontroverted facts to support summary judgment, regardless. *See* Fed. R. Civ. P. 56(e)(3) ("If a party fails to properly support an assertion of fact . . . as required by Rule 56(c), the court may[] grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it"). GSAF has named two of its members, both of whom clearly have standing. The union agrees that both Or Goldreich and Spencer Shia are covered by its agency-fee arrangement. Deft. 56.1(b)(2) Response ¶¶ 33-34, 38-39. And for both, paying this union a penny would

[11] On its side of the ledger, the only support that the union unearths is a *partial* quote from a Second Circuit opinion. But what the Second Circuit rejected was an attempt by *one* unnamed person to describe the experience of *other* unnamed people—as the full quote shows. *Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 223 (2d Cir. 2004) ("Rule 56(e) … is not satisfied by an affiant whose identity is not disclosed purporting to describe the treatment of another person whose identity also is not disclosed"). That anonymity-squared problem doesn't exist with these declarations.

irreparably violate their consciences. ECF 25-10, Goldreich Decl. ¶ 13; ECF 25-11, Shia Decl. ¶¶ 12, 17; *see FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 387 (2024) (conscience injuries are Article III injuries). All told, since GSAF only needs to have one member with standing—and since there are sufficient facts in the record to support summary judgment from the named declarants alone—this issue is academic.

*Finally*, the union raises a single actual challenge of fact—whether it has ever been part of UChicago United's "Coalition for Palestine." MSJ Opp. 5-6, 9-10. The union now says no, and that the Coalition simply listed them as a member for months without their permission. Deft. 56.1(b)(3) Statement ¶ 30; *see, e.g.*, Bock-Hughes Decl. ¶ 26 ("I do not know what 'uchicagounited' is."). In full candor, the union's "Coalition, who?" response is hard to square with the public record: the union was an outspoken supporter of the encampment; called efforts to discipline its participants "political repression against those who speak up against the ongoing genocide in Gaza"; promoted how GSU-UE members were part of the protests; donated "buckets and sticks" for the encampment's drum circles; and years prior, partnered with "UChicago United" (the same group) as part of a self-described initiative to fight the University of Chicago Police Department's efforts at being a "colonial force in the South Side."[12]

[12] Deft. 56.1(b)(2) Response ¶ 24 (affirming social media posts, included at Compl. ¶ 59); *Live Updates: Pro-Palestine Encampment Enters Its Second Day on Quad*, The Chicago Maroon (Apr. 30, 2024), https://perma.cc/97AA-VW4Y; *UE Grad Worker Locals Fighting for Peace, Free Speech*, UE (May 11, 2024), https://perma.cc/HBR8-BB5Y; Kelly Hui, *Dispatches from the First Week of SJP's Occupation of the Quad*, The Chicago Maroon (Nov. 29, 2023), https://perma.cc/XU2D-KGAV; *Mutual Aid: In the Past*, UChicago United, https://perma.cc/6PMQ-BWAN.

But far more important, the union's affiliation with the Coalition is immaterial. The union's support for the Coalition was cream cheese on a bagel already schmeared. Had GSU not affiliated with the Coalition, but just affiliated with UE—and its controversial stances regarding Israel, plus other hot-button issues—it would have been enough. Had GSU not affiliated with the UE, but just accused Israel of "genocide" and "apartheid," it would have been enough. Had GSU-UE not accused Israel of "genocide" and "apartheid," but just recommitted to Boycott, Divest, and Sanction the week after October 7, it would have been enough. The uncontroverted record reveals many independent reasons for GSAF members to want to have nothing to do with this union. The union's formal membership in the Coalition is immaterial.

***

There is no genuine dispute about the facts material to this First Amendment challenge to the union's agency-fee scheme. Summary judgment is appropriate now.

The union accepts, after all, every important fact regarding how its agency-fee arrangement works: It agrees that it binds teaching and research assistants at the University of Chicago; that it is in full effect now; and that under it, in particular, bargaining unit members must pay the union some measure of an agency fee, even if doing so violates their conscience. Deft. 56.1(b)(2) Response ¶¶ 1-19 (accepting that all of the collective bargaining agreement's material terms work as GSAF described).

The union also agrees that it has taken the political positions that GSAF's members find abhorrent—including those regarding Israel. *Id.* ¶¶ 20-22. The union

agrees too that GSU-UE has endorsed many of the same positions on its own—such as with Boycott, Divest, and Sanction. *Id.* ¶¶ 23-24 (affirming social media posts).

As explained, the union's sole basis for opposing summary judgment seems to rest on a categorical denial as to everything GSAF-specific in the various declarations. But as explained, that does not make a "genuine" dispute of fact. The uncontroverted record evidence thus establishes that GSAF's members are (i) a collection of graduate students at the University of Chicago, (ii) covered by the agency-fee arrangement, whose (iii) consciences would be violated if they had to pay a dime to the union. *See* GSAF 56.1(a) Statement ¶¶ 28-57 (collecting cites from relevant GSAF declarations).

Nothing more is needed for this Court to resolve this pure First Amendment challenge, and to put a prompt end to GSU-UE's unconstitutional agency-fee scheme.

## CONCLUSION

This Court should deny the motion to dismiss, and award summary judgment.

Dated: September 30, 2024

Respectfully submitted,

*/s/ Harry S. Graver*

Jonathan M. Linas
JONES DAY
110 North Wacker Drive
Suite 4800
Chicago, IL 60606
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
jlinas@jonesday.com

Brett A. Shumate*
Harry S. Graver*
Riley W. Walters*
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
bshumate@jonesday.com
hgraver@jonesday.com
rwalters@jonesday.com

*Pro Hac Vice

*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2024, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing via email to counsel of record.

Dated: September 30, 2024

*/s/ Harry S. Graver*
Harry S. Graver

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| GRADUATE STUDENTS FOR ACADEMIC FREEDOM, INC.,<br><br>Plaintiff,<br><br>v.<br><br>UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA; and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA LOCAL 1103 – GRADUATE STUDENTS UNITED AT THE UNIVERSITY OF CHICAGO,<br><br>Defendants. | Case No. 1:24-cv-6143<br><br>Hon. Judge John F. Kness<br><br>Hon. Magistrate Judge M. David Weisman |

**DEFENDANTS' REPLY IN SUPPORT OF THEIR**
**MOTION TO DISMISS**

Dated: October 14, 2024

Margot A. Nikitas
General Counsel
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA
4 Smithfield Street, 9th Floor
Pittsburgh, PA 15222
(412) 471-8919 (Tel.)
Email: margot.nikitas@ueunion.org

George A. Luscombe III
Barry M. Bennett
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH LLP
8 South Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361 – Telephone
(312) 372-6599 – Facsimile
Email: gluscombe@laboradvocates.com

Attorneys for Defendants United Electrical, Radio and Machine Workers of America; and United Electrical, Radio and Machine Workers of America Local 1103 – Graduate Students United at the University of Chicago

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Defendants respectfully submit this reply in support of their motion to dismiss (ECF No. 26) plaintiff's complaint (ECF No. 1). In their Memorandum of Law (ECF No. 27, "D. Mem."), defendants established that plaintiff's First Amendment claim should be dismissed for at least two reasons. First, there is no state action where a private-sector employer and union, governed by the NLRA[1], agree to an agency-fee clause in a CBA. D. Mem. 6-19. Second, even if the First Amendment applied, plaintiff's claim is foreclosed by Supreme Court precedent holding that, in the private sector, "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate either the First or the Fifth Amendments." *Railway Ees.' Dep't v. Hanson,* 351 U.S. 225, 238 (1956). D. Mem. 19-23. Plaintiff's response, while long on rhetoric, is meritless.

## ARGUMENT

### I. Union Enforcement of an Agency-Fee Arrangement in a CBA Subject to the NLRA Is Not State Action Implicating the First Amendment.

Defendants explained in their opening brief that the NLRA is simply permissive with respect to agency-fee arrangements negotiated between a private-sector employer and union. The statute does no more than exempt agency-fee arrangements from the NLRA Section 8(a)(3), 29 U.S.C. § 158(a)(3), prohibition on discrimination based on union activity, when such agency-fee arrangements are not otherwise prohibited by state law, 29 U.S.C. § 164(b). *See* D. Mem. 4-6. The Supreme Court has repeatedly held that where, as here, the legislature has merely decided "not to intervene" in a private contractual arrangement, there is no state action to make the private contract subject to constitutional scrutiny. *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 53 (1999). *See also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) ("If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for

[1] Capitalized terms not otherwise defined here have the meaning given in ECF No. 27.

those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.").

For these reasons, the majority of Courts of Appeals that have decided the question hold that enforcement of agency-fee agreements in CBAs between employers and unions subject to the NLRA is not state action. *See White v. Comm'ns. Workers of Am., AFL-CIO, Local 13000,* 370 F.3d 346 (3d Cir. 2004); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983); *Price v. Int'l Union, United Auto., etc.*, 795 F.2d 1128 (2d Cir. 1986), vacated on other grounds by 487 U.S. 1229 (1988), state action holding reaffirmed on remand by, 927 F.2d 88 (2d Cir. 1991); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971).

The Supreme Court instructs that the state action doctrine "require[s] the courts to respect the limits of their own power as directed against . . . private interests." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982). Plaintiff may oppose the agency-fee arrangement here, but not every dispute is a constitutional case; and plaintiff offers no persuasive reason why this Court should diverge from the majority view of the circuit courts.

**A. The NLRA does not preempt state laws prohibiting agency-fee arrangements, distinguishing this case from *Hanson*'s state action rationale.**

To clear one issue out of the way at the outset, plaintiff wrongly argues that there is state action in this case for the same reasons that the Supreme Court found state action with respect to the enforcement of agency-fee arrangements under the RLA in *Hanson*. P. Resp. 13-16. Plaintiff insists that "*Hanson* rested on what every other governmental action case rests on: The state-backed *power* that the private actor wields—which, again, under the RLA was a railroad union's power to act as the exclusive representative and pursue agency fees." P. Resp. 14.

That is just plain wrong. *Hanson* found state action under the RLA solely because the RLA, unlike the NLRA, gave agency-fee arrangements in CBAs covered by the RLA insulation

from state law that would otherwise prohibit them. *See Hanson*, 351 U.S. at 232 ("If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded."). *See also* D. Mem. 6-7, 20 n.5.

Plaintiff may not find *Hanson*'s preemption rationale persuasive and may wish *Hanson* were decided on other grounds (P. Resp. 14-15), but federal preemption of state law was indisputably the critical factor in the Court's state action finding. Indeed, the Supreme Court has said exactly that. *See Comm'ns Workers of Am. v. Beck*, 487 U.S. 735, 761 (1988) ("[W]e ruled in [*Hanson*] that *because the RLA pre-empts all state laws banning union-security agreements*, the negotiation and enforcement of such provisions in railroad industry contracts involves 'governmental action' and is therefore subject to constitutional limitations." (emphasis added)). Courts have repeatedly recognized that the RLA's preemption of state laws prohibiting agency-fee agreements was the necessary factor in the *Hanson* state action analysis, and that the absence of such preemption distinguishes agency-fee arrangements under the NLRA. *See White,* 370 F.3d at 352-53; *Price,* 795 F.2d at 1133; *Kolinske*, 712 F.2d at 476; *Reid*, 443 F.2d at 410.

Plaintiff's reliance on *Beck's* recognition that NLRA Section 8(a)(3) and RLA Section 2, Eleventh, 45 U.S.C. § 152, are "in all material respects identical" for purposes of the different, statutory issues decided in *Beck* is misplaced. P. Resp. 13 (quoting *Beck*, 487 U.S. at 745). Plaintiff misleadingly ignores the footnote in *Beck* immediately following the sentence it quotes which expressly acknowledges the substantive difference between the two statutes with respect to preemption. *Beck*, 487 U.S. at 745 n.3. *Beck* further explained that this distinction meant that the *Hanson* state action holding did not control the question of whether state action existed with respect to the enforcement of agency-fee clauses under the NLRA. *Beck*, 487 U.S. at 761.

Even *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971), relied on by plaintiff,

acknowledges that it "may go a little further" than *Hanson*. *Id.*, at 16. Indeed, for the reasons explained by later circuit court decisions, *Linscott* went a lot further than *Hanson* and is inconsistent with later Supreme Court state action decisions. *See White*, 370 F.3d at 353-54; *Price*, 795 F.2d at 1132-33; *Kolinske*, 712 F.2d at 480 & 480 n.9; *Linscott*, 440 F.2d at 19-20 (Coffin, C.J., concurring) (distinguishing *Hanson* and finding no state action under NLRA).

Thus, *Hanson*'s state-action rationale is inapplicable here. This Court should heed the Supreme Court's warning that *Hanson*'s state action decision was "questionable" even as to the RLA and not grant plaintiff's misguided request to extend it to the NLRA. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 918 n.24 (2018).[2]

**B. Plaintiff's claim fails to establish state action under *Lugar* step one.**

Turning to the *Lugar* test for state action, *Kolinske, Price*, and *White* all applied that test to the enforcement of private-sector, agency-fee agreements between employers and unions governed by the NLRA and held that the test was not met. *Kolinske*, 712 F.2d at 477-80; *Price*, 795 F.2d at 1133; *White*, 370 F.3d at 350-54. Under *Lugar* step one, for state action to exist, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. Plaintiff's arguments here fail at step one. *See* D. Mem. 10-13.

Plaintiff concedes, as it must, that the agency-fee agreement here between two private parties governed by the NLRA is not "imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. *See* P. Resp. 6. *See also Kolinske*, 712 F.2d at 477 ("In no sense is the agency shop clause compelled by federal law."). Instead, plaintiff argues only that

[2] Plaintiff's reliance on *Vaca v. Sipes*, 386 U.S. 171 (1967), provides it no help either. P. Resp. 15-16. *Vaca* neither considered the state action question, nor was it a constitutional case. Even if *Vaca* was, in part, motivated by constitutional concerns, it cannot be read to imply that those constitutional concerns, neither considered nor decided, are valid. *See Clark v. Suarez Martinez*, 543 U.S. 371, 381-82 (2005).

the enforcement of the agency-fee agreement here "'resulted from the exercise of a right or privilege having its source in state authority.'" P. Resp. 3 (quoting *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991)). Plaintiff is wrong again. *See Kolinske*, 712 F.2d at 477 ("We are left with the question whether the authorization provided the agency shop clause by section 8(a)(3) of the NLRA makes the clause an exercise of a right or privilege created by the state or one for whom the state is responsible. We conclude that it does not.").

In no sense is the enforcement of an agency-fee clause the exercise of a right or privilege created by the NLRA, because the NLRA does no more than continue to permit private-sector employers and unions to do what they could do before the enactment of the NLRA. *See Price*, 795 F.2d at 1133 ("By authorizing the inclusion of union shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA."). As pointed out by defendants (and not disputed by the plaintiff), closed-shop and union-shop agreements long predated the NLRA and its statutory grant of exclusive representation. *See* D. Mem. 11 (citing *Algoma Plywood & Veneer Co. v. Wisc. Empl. Rels. Bd.,* 336 U.S. 301, 307-12 (1949)).

*Knox v. Service Employees*, 567 U.S. 298, 313-14 (2012), is inapposite. *See* P. Resp. 3. *Knox* was a public-sector case. The "legislative grace," *Knox*, 567 U.S. at 313, that permitted the agency-fee agreement there, unlike here, was the state statute that created the authorization for *public* employers to agree to and enforce an agency-fee clause on public-sector employees. In the private sector, by contrast, the NLRA does no more than not independently make agency-fee arrangements unlawful if they are otherwise permitted by state law.

Plaintiff also badly misrepresents both the law and defendants' position by writing that the NLRA "specifically provides for those agreements to include an agency-fee provision, which

requires nonmembers to pay a union as a condition of employment—something even GSU-UE acknowledges would otherwise be an 'unfair labor practice.'" P. Resp. 3 (citing D. Mem. 5). Nothing in the NLRA "provides for" CBAs "to include an agency-fee provision." Again, it is perfectly clear that the NLRA does no more than exempt agency-fee agreements from its statutory prohibition on employer discrimination based on union activity. D. Mem. 5. If not otherwise prohibited by state law, it is entirely up to the private employer and private union whether or not to include such a clause in their CBA. Either way, the CBA is lawful under the NLRA. The statute is entirely agnostic as to the content of CBAs, including with respect to union-security provisions. *See* 29 U.S.C. § 158(d); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

Plaintiff argues nonetheless that the union's use of its exclusive representative status under the NLRA to negotiate the agency-fee clause here satisfies *Lugar's* first step. That is exactly the argument specifically rejected by *Kolinske* and *Price* at *Lugar* step one. Both cases correctly held that plaintiff's argument was inconsistent with the holding of *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351-52 (1974). The fact that a private entity takes an action using its government-granted monopoly power does not turn that private act into state action for constitutional purposes. *See Kolinske*, 712 F.2d at 478; *Price*, 795 F.2d at 1133.

Plaintiff attempts to respond that *Jackson* held only that a private entity's government-granted monopoly status could still be relevant to state action analysis, even if it is not dispositive. P. Resp. 5. Plaintiff then argues that the Union's exclusive-representative status here is sufficient because it is the purported source of authority that enables the alleged constitutional deprivation. *Id.* In *Jackson*, the customer similarly argued that the private-utility company's government-granted monopoly status was the source of the company's authority to cancel her

electrical service without due process of law, the alleged constitutional deprivation. *Jackson*, 419 U.S. at 347-48. The Court rejected the argument that this was sufficient to create state action, an argument indistinguishable from plaintiff's argument here. *Id.*, at 352. It is, of course, true that *Jackson* did not discuss its holding in terms of *Lugar's* step one, given *Jackson* was decided before *Lugar*. P. Resp. 6 n.2. As noted, however, both *Kolinske* and *Price* properly considered *Jackson*'s analysis as applicable to *Lugar's* first step. *Kolinske*, 712 F.2d at 478; *Price*, 795 F.2d at 1133. *White* found it unnecessary to address *Lugar's* first step, because it held that enforcement of agency-fee agreements in CBAs between employers and unions subject to the NLRA did not meet *Lugar's* second step. *White*, 370 F.3d at 350. *White*, nonetheless, similarly relied on *Jackson* to reject the same argument plaintiff makes here under *Lugar* step two. *Id.*, at 351-52. Whether rejected at step one, step two, or both, plaintiff's state action arguments fail.[3]

**C. Plaintiff's claim fails to establish state action under *Lugar* step two.**

Defendants also established that the Union cannot "fairly be said to be a state actor" under *Lugar's* second step. *Lugar*, 457 U.S. at 937. D. Mem. 13-19. Plaintiff argues in response that the "combined effect" (P. Resp. 8) of (1) Section 8(a)(3)'s proviso not prohibiting agency-fee clauses, (2) the union's exclusive representative status, and (3) employers' duty to bargain over agency-fee clauses sufficiently encourages agency-fee clauses to make the enforcement of such clauses by private-sector employers and unions equivalent to action by the federal government itself. That is wrong, as persuasively held by *Kolinske*, 712 F.2d at 478-80; *Price*, 795 F.2d at 1133; and *White*, 370 F.3d at 350-54. Defendants addressed each of these elements, whether considered separately or combined, in their brief. D. Mem. 13-19.

First, plaintiff's repeated refrain that through Section 8(a)(3) Congress intended the

[3] Notably, the Supreme Court in *Janus* specifically cited *Jackson* and *Sullivan* as calling into substantial question *Hanson's* state action holding under the RLA. *Janus*, 585 U.S. at 918 n.24.

NLRA to promote agency-fee agreements is simply false. Plaintiff ignores the Supreme Court authority, directly on point, holding that the NLRA "'merely disclaims a national policy hostile to the closed shop *or other forms of union-security agreement*.'" *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 740 (1963) (quoting *Algoma Plywood & Veneer Co.*, 336 U.S. at 307 (emphasis by Court)). To support its argument, plaintiff doubles-down on its misleading alteration of a quote in *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 420 (1976), falsely claiming the Court said that "federal labor laws captured a policy that 'favors [union-security agreements] unless a State' preempts them." P. Resp. 9 n.3. The quote from the case actually reads: "Federal policy favors *permitting* such agreements unless a State" prohibits them. *Oil, Chem. & Atomic Workers*, 426 U.S. at 420 (emphasis added). Defendants already pointed out this repeated misrepresentation by plaintiff. D. Mem. 14 n.4. There is a difference between a policy favoring union-security clauses and a policy favoring "permitting" union-security clauses if the private parties agree to them and they are not otherwise prohibited by the states. And plaintiff itself admits that "mere permission is not enough for governmental action." P. Resp. 8 (citing *Sullivan*, 526 U.S. at 52).

As *Beck* observed, Congress in enacting the Section 8(a)(3) proviso recognized as legitimate unions' concerns with employees free riding on the benefits won by union efforts paid for by the union dues of other employees. *Beck*, 487 U.S. at 749. Nonetheless, the "legislative solution embodied in § 8(a)(3)" only "allows employers to enter into" union-security agreements. *Id.* Allowing employers and unions to enter into such agreements is no more than a decision not to "intervene" in the private contract between two private parties, which is not state action. *Sullivan,* 526 U.S. at 53; *White*, 370 F.3d at 353-54.

If Congress intended the NLRA to strong-arm employers into agreeing to agency-fee

arrangements it picked a strange way of doing so. It could have, but did not, require agency-fee agreements. It could have, but did not, preempt state laws prohibiting agency-fee agreements, just as Congress did under the RLA. Instead, Congress chose merely not to independently stand in the way of agency-fee arrangements if private-sector employers and unions could otherwise lawfully agree to them under state law.

The next layer of plaintiff's "combined effect" argument is unions' use of their exclusive representative status granted by the NLRA to cover even non-consenting employees by an agency-fee agreement. P. Resp. 8-9. As discussed above, that argument has been repeatedly rejected by courts following *Jackson*, 419 U.S. 345. *See White*, 370 F.3d at 352 ("It may well be that the CWA would not have been able to induce Bell to include an agency-shop provision in the collective bargaining agreement between Bell and the CWA absent the CWA's 'exclusive franchise.' However, under *Jackson*, the CWA's statutorily enhanced bargaining power is insufficient to warrant a finding of state action."). *See also* D. Mem. 16-17.

Plaintiff effectively concedes that the Union's exclusive representative status alone would not be enough for a finding of state action. P. Resp. 10. So plaintiff turns to the third layer of its argument that the NLRA "channels—indeed, increases—that leverage with respect to agency fees in particular." P. Resp. 10. Plaintiff appears to argue that it does so by not prohibiting agency-fee agreements (a mistaken argument discussed above) and by making agency-fee arrangements a mandatory subject of bargaining. P. Resp. 10-11.

Indeed, plaintiff relies on the fact that agency-fee agreements are a mandatory subject of bargaining as its sole means for attempting to distinguish the reasoning in *Kolinske, Price, Reid, and White*. P. Resp. 16-17. As noted in defendants' opening brief, plaintiff even has that wrong. In *White*, then-Judge Alito considered an argument, like plaintiff's here, that "[b]ut for the

additional leverage that the NLRA affords unions . . . , unions would never be able to extract concessions like agency-shop clauses from employers at the bargaining table." *White*, 370 F.3d at 351. The plaintiff in *White*, like the plaintiff here, insisted that the government put its "thumb on the scales" to give unions the power to impose agency-fee agreements on employers. *Compare White*, 370 F.3d at 351 (quoting *Am. Comm'ns Ass'n. v. Douds*, 339 U.S. 382, 401 (1950)) *with* P. Resp. 3 & 13 (quoting *Douds*). Plaintiff's mandatory subject of bargaining argument here, at bottom, insists that the NLRA "has furnished" unions "with more bargaining power" than they otherwise would have to force employers to agree to agency-fee clauses. *White*, 370 F.3d at 351. That is the exact argument rejected by then-Judge Alito in *White. Id.*

Moreover, the plaintiff is fundamentally wrong regarding NLRA bargaining law. *See* P. Resp. 11. Plaintiff's assertion that the NLRA's duty to bargain—or any other aspect of the NLRA—creates "an effective presumption in favor of agency-fee provisions" (P. Resp. 11) is contrary to black-letter labor law and a gross misrepresentation of defendants' position. Plaintiff ignores the law cited by defendants establishing that there is no such presumption in favor (or against) agency-fee clauses. The NLRA is agnostic as to the content of CBAs generally, including with respect to agency-fee clauses. *See* D. Mem. 18. 29 U.S.C § 158(d) (the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"); *Am. Nat'l Ins. Co.*, 343 U.S. at 404 ("[I]t is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."); *H.K. Porter,* 397 U.S. at 102, 107-08 (NLRB has no authority to compel employer to agree to dues check-off).

Plaintiff's reliance on *CJC Holdings,* 320 NLRB 1041, 1046 (1996), provides it no help. P. Resp. 11. Plaintiff ignores the more recent NLRB authority cited by defendants, *Phelps Dodge*

*Specialty Copper Prods. Co.*, 337 NLRB 455 (2002). In that case, the NLRB made clear that an employer's steadfast "refus[al] to bargain about union security and dues checkoff provisions in the absence of any other bargaining misconduct" did not constitute a violation of the NLRA. *Phelps Dodge Specialty Copper Prods. Co.*, 337 NLRB at 456. The NLRB explained that *CJC Holdings* and similar cases stand only for the proposition that an employer's failure to offer a legitimate business justification for a refusal to bargain over union-security provisions could be evidence of bad-faith bargaining by the employer in a totality of circumstances review. *See Phelps Dodge Specialty Copper Prods. Co.*, 337 NLRB at 456. But a steadfast, philosophical refusal to agree to a union-security provision on its own is not an unfair labor practice. *Id. See also New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 287 (3d Cir. 2024) ("The Board majority conceded that an employer's philosophical opposition [to union shop and dues check off] does not, by itself, constitute bad-faith bargaining." (cleaned up)).[4]

Plaintiff's fallback argument that, regardless of the outcome, an employer risks years of litigation prompted by the union if it refuses to agree to an agency-fee clause is particularly unpersuasive. P. Resp. 12. The state action requirement would not mean much if it could be satisfied whenever a private party could be subject to lengthy, yet ultimately unsuccessful litigation under a federal statute. *See Lugar*, 457 U.S. at 941 ("private misuse of a state statute does not describe conduct that can be attributed to the State").

[4] Plaintiff's other cases are not to the contrary. *See* P. Resp. 11-12 & n.4, 5. In each, the employer's *refusal to agree* to a union-security provision was not unlawful. The employer's *refusal to bargain* at all regarding a union-security provision was only some evidence of an overall pattern of bad-faith conduct that the NLRB found unlawful under a totality of circumstances review. *See, e.g., Dist. Hosp. Partners*, 373 NLRB No. 55, at *1, 3-9 (May 8, 2024); *Univ. Fuel, Inc.*, 358 NLRB 1504, 1504 (2012) (declining to hold that "any of the individual acts just described was unlawful in and of itself" only the employer's "conduct, as a whole" supports a finding of failure to bargain in good faith); *Preterm, Inc.*, 240 NLRB 654, 670 (1979) ("Although Respondent's bargaining positions and proposals individually considered might not be unlawful, the totality of its dealings with the Union" support finding of bad faith).

Moreover, agency-fee agreements have no special status under the NLRA compared to other mandatory subjects of bargaining. *See Kolinske*, 712 F.2d at 478 ("The NLRA does not mandate the existence or content of, for example, seniority clauses, work rules, staffing requirements, or union security provisions like agency shop clauses or mandatory payroll deductions for union dues."). Thus, plaintiff's *ipse dixit* insistence that "the NLRA consciously facilitates agency fees *in particular*" is baseless. P. Resp. 7 (emphasis by plaintiff). For example, CBA provisions to counter discrimination, such as the CBA affirmative action program at issue in *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979), are mandatory subjects of bargaining. *See Colo. Symphony Ass'n.*, 366 NLRB No. 60, at *6 (2018). Yet *Weber* held that a CBA affirmative action plan could not be challenged under the Equal Protection Clause because there was no state action. *Weber*, 443 U.S. at 200.

The NLRA permits employers and unions to agree to all of these mandatory subjects of bargaining, just like agency-fee clauses. Unions use their exclusive representative status for bargaining leverage and to cover even employees who oppose the union's position on all those terms. If plaintiff's arguments were accepted, all the terms of CBAs between private employers and unions under the NLRA would become subject to constitutional scrutiny. That is not the law, and for good reason. Collective bargaining in the private sector would cease to be a matter of private contract and would instead become another battleground of constitutional litigation in the federal courts. "There is little to recommend such a result." *Kolinske*, 712 F.2d at 482.

In sum, plaintiff's First Amendment claim should be dismissed for lack of state action.

## II. Even If There Were State Action, Plaintiff's First Amendment Claim is Foreclosed by Binding Supreme Court Precedent.

Even if the First Amendment applied here at all, plaintiff's claim would still fail under controlling Supreme Court precedent. D. Mem. 19-23. Considering Section 2, Eleventh of the

RLA, *Hanson* held that, in the private sector, in the absence of evidence that a union is using fees collected pursuant to an agency-fee arrangement for political purposes over an employee's objection, agency-fee agreements are consistent with the First Amendment. *Hanson*, 351 U.S. at 238. *See also Ellis v. Bhd. of Ry*., 466 U.S. 435, 456 (1984) ("At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.'" (quoting *Ry. Clerks* v. *Allen*, 373 U.S. 113, 122 (1963))). If the First Amendment were to apply at all to agency-fee arrangements under the NLRA, there is no reason that *Hanson's* First Amendment holding under the RLA would not apply with equal force here. Plaintiff certainly offers no reason.

Next, in order to avoid the First Amendment issues that *might* be raised by permitting unions to collect fees for political or ideological purposes over the objection of dissenting employees, the Court in *Street* interpreted Section 2, Eleventh of the RLA "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Int'l Ass'n of Machinists v. Street.*, 367 U.S. 740, 768-69 (1961). Finally, the Court in *Beck* similarly interpreted the comparable language of NLRA Section 8(a)(3) to permit unions to collect, over the objection of an employee, "only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448). In other words, the Court in *Street* and *Beck*, as a matter of statutory construction, limited a union's power to collect agency fees from objecting employees to only those fees used for purposes that *Hanson* had found constitutional – for collective bargaining and contract administration.[5] There is no allegation here that the Union does not scrupulously follow their

[5] *Street and Beck* were both decided on statutory grounds. *Street*, however, interpretated RLA Section 2, Eleventh to avoid any constitutional concerns. *Street*, 367 U.S. at 749-50. The necessary

obligations under *Beck*. D. Mem. 23-25.

The upshot for the present case is this: Plaintiff does not claim that the Union here requires any employee to pay fees that would exceed those permitted under *Beck*. P. Resp. 24 n. 9 ("GSAF is not bringing a statutory *Beck* claim . . .. GSAF objects to any agency fee in any form."). Thus, plaintiff's claim is that the Union's use of fees collected from plaintiff's members over their objection would violate the First Amendment, even where, as here, those fees are used only for collective bargaining and contract administration—the only fees the Union can lawfully collect from them under *Beck*. 487 U.S. at 762-63. This is so because plaintiff's "members want nothing to do with this union." P. Resp. 24 n.9.

Plaintiff's argument fails because *Hanson* made clear that where "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining" there is no First Amendment violation. *Hanson*, 351 U.S. at 235, 238. *See also Ellis*, 466 U.S. at 456 ("At a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.'" (quoting *Allen*, 373 U.S. at 122)). It does not matter that the Union might use dues from other, consenting employees to support political causes to which plaintiff's members object, but for which they are not required to pay. *Hanson*, 351 U.S. at 235 ("No more precise allocation of union overhead to individual members seems to us to be necessary.").

Plaintiff admits that *Hanson* remains the law after the Supreme Court's decisions in *Harris v. Quinn*, 573 U.S. 616 (2014), and *Janus*, 585 U.S. 878. P. Resp. 21. Both *Harris* and *Janus* took pains to distinguish private-sector agency fees used for collective bargaining and

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implication, then, is that the interpretation adopted by *Street* and extended to NLRA Section 8(a)(3) by *Beck* is "valid" and any constitutional "questions are avoided." *U.S. ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909).

contract administration from public-sector agency fees. The critical distinction, the Court held, was that in the public sector even bread-and-butter collective bargaining issues—such as public employee wages and benefits—"are important political issues" implicating First Amendment concerns. *See Janus*, 585 U.S. at 920 (quoting *Harris*, 573 U.S. at 636). The Court explained "that is generally not so in the private sector." *Id.* The wages, benefits, and other conditions of employment of private-sector graduate student employees are no more "political issues" than the wages and benefits of an autoworker. D. Mem. 22-23. Those are the only purposes for which the fees collected from objecting fee-payors are used. Plaintiff's members otherwise remain free to teach, research, or speak about whatever they want. Agency fees are, therefore, not in any sense a "prior restraint." P. Resp. 22.

The only agency fees that the Union here is empowered to collect from any of plaintiff's members over their objection are fees used exclusively for collective bargaining and contract administration. So long as *Hanson* remains the law, that agency-fee arrangement does not violate the First Amendment, *even if* there were state action here. *Janus* and *Harris* recognized this. If plaintiff believes the law should be changed, that is only for the Supreme Court to decide. This Court must follow the current precedent of the Supreme Court and dismiss plaintiff's complaint.

## CONCLUSION

For these reasons, defendants respectfully request the Court to dismiss plaintiff's complaint with prejudice.

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Respectfully submitted,

/s/ George A. Luscombe III

George A. Luscombe III
Barry M. Bennett
DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH LLP
8 South Michigan Avenue, 19th Floor
Chicago, Illinois 60603

Margot A. Nikitas
General Counsel
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA
4 Smithfield Street, 9th Floor
Pittsburgh, PA 15222

(412) 471-8919 (Tel.)
Email: margot.nikitas@ueunion.org

(312) 372-1361 (Tel.) / (312) 372-6599 (Fax.)
Email: gluscombe@laboradvocates.com

*Attorneys for Defendants United Electrical, Radio and Machine Workers of America; and United Electrical, Radio and Machine Workers of America Local 1103 – Graduate Students United at the University of Chicago*