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**It Violates the First Amendment for the NLRB to Compel Unwilling Employers to Bargain Over Forced Fee Requirements.**

In *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024), the Supreme Court reaffirmed the First Amendment prohibits the government from coercing one private party to infringe on the speech rights of another private party. This is exactly what the National Labor Relations Board does when it requires unwilling employers to bargain over forced fee requirements—the Board coerces one private party (an employer) to agree to compel other private parties (employees) to subsidize union speech. Given the NLRB would violate the First Amendment by directly compelling employees to subsidize union speech under *Janus v. AFSCME Council 31*, 585 U.S. 878 (2018) and *Harris v. Quinn*, 573 U.S. 616 (2014), it follows the NLRB cannot indirectly obtain the same wrongful result by making forced fee requirements a mandatory subject of bargaining.

Employers who respect their employees' right to decide whether to subsidize union speech can refuse to bargain with unions over forced fee requirements. If the NLRB attempts to compel bargaining over this subject at a union's behest, those employers and their employees have strong grounds for resisting the NLRB's attempt to infringe on employees' First Amendment rights. Taken together, the Supreme Court decisions in *Vullo, Janus*, and *Harris* support the proposition that the NLRB cannot coerce employers to agree to compel their employees to pay for union speech.

## ARGUMENT

Under *Vullo*, the government cannot do indirectly what the constitution prohibits the government from doing directly. As discussed below, the NLRB would violate the First Amendment if it directly required private-sector employees to pay union fees to keep their jobs. The NLRB therefore cannot pursue this unconstitutional end indirectly by coercing employers to agree to compel private-sector employees to pay union fees.

### A. The First Amendment prohibits the NLRB from compelling private-sector employees to subsidize union speech.

*Janus* held the government violates the First Amendment when it requires nonconsenting employees to pay money to a union. 585 U.S. at 930. The Court reasoned this requirement infringes on employees' right to not subsidize union speech, *id*. at 893–94, and is not the least restrictive means to satisfy a compelling state interest, *id*. at 895–916.

A few years before *Janus*, the Supreme Court held in *Harris* that the government violates the First Amendment by compelling certain private-sector employees to pay union fees. 573 U.S. at 620. *Harris* concerned Illinois personal care providers who are hired, managed, and otherwise employed by private persons with disabilities or their guardians. *Id*. at 621–22. The providers' only significant connection to the State of Illinois was they received their pay from joint state/federal Medicaid programs. *Id*. at 622–23. The Supreme Court recognized this was insufficient to make the providers public employees. *Id*. at 639–43. Indeed, other than for purposes of collective bargaining, Illinois itself "regards the personal assistants as private-sector employees." *Id*. at 639. The Supreme Court held it unconstitutional for Illinois to compel these private-sector employees to pay monies to a union as a condition of their employment. *Id*. at 656.

Under *Janus* and *Harris*, the NLRB and any other government agency would violate the First Amendment if it directly compelled nonconsenting private-sector employees to pay union fees. There are no meaningful distinctions between this action and the state actions held unconstitutional in those cases.

It is immaterial that the persons being forced to subsidize union speech are private-sector employees, as opposed to public employees. The First Amendment protects all individuals from being forced to subsidize speech with which they disagree, irrespective of their vocation. As the Supreme Court stated in *Harris* when holding certain private-sector employees cannot be subjected to this constitutional deprivation: it is a "bedrock principle that, except perhaps in the rarest of circumstances, *no person in this country* may be compelled to subsidize speech by a third party that he or she does not wish to support." 573 U.S. at 656 (emphasis added).

It is equally immaterial if employees are forced to subsidize the speech of private-sector unions as opposed to the speech of public-sector unions. This distinction often does not exist because many unions represent both private and public employees. For example, the union defendant in *Janus*, AFSCME Council 31, exclusively represents private-sector employees who work for private nursing homes.[1] The union defendant in *Harris*, SEIU-HCII, represents employees of private homecare companies and nursing homes.[2] If it was unconstitutional for the government to force public employees and personal care providers to pay fees

[1] See *AFSCME Council 31 (Hope Creek Nursing and Rehabilitation)*, NLRB Case No. 25-CB-368036, https://www.nlrb.gov/case/25-CB-368036.

[2] See *SEIU HCII (Help at Home),* NLRB Case 25-CB-375548, https://www.nlrb.gov/case/25-CB-375548; *SEIU HCII (Archer Heights Nursing Home),* NLRB Case 13-CB-356983, https://www.nlrb.gov/case/13-CB-356983.

to these two unions, it is equally unconstitutional for the government to force employees of these and other private companies to do the same.

This is because a union's core function is expressive in nature: to collectively bargain and otherwise engage in advocacy on behalf of employees subject to its representation. Whether bargaining with the government or with a private company, this is speech pure and simple.

The Supreme Court's finding in *Janus* that union bargaining with public employers involves matters of public concern does not change this analysis. 585 U.S. at 910-15. The Court did not hold it is unconstitutional for states to compel employees to subsidize union speech *because* that speech is political. Rather, the Court cited the political nature of a union bargaining with the government as one reason among many for why: (1) the rationale of its earlier decision in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) was wrong, *Janus*, 585 U.S. at 920; and (2) forced fee requirements for public-sector employees would fail the "*Pickering*" test if the test applied to those requirements, 585 U.S. at 910–15.[3] But the Court did not hold it only unconstitutional for states to compel employees to pay for types of union speech that are political in nature. The Court held all compulsory union fees to be unconstitutional, writing that "[n]either 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*. at 930 (emphasis added).

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[3] *Pickering v. Bd. of Educ*., 391 U.S. 563 (1968) concerns when the government can constitutionally discipline a public employee for engaging in expressive activities. In *Janus*, the Supreme Court held the *Pickering* test did not govern whether public employees can constitutionally be forced to pay union fees. *Id*. at 906-909. The Supreme Court further held that, even if the *Pickering* test applied, agency fee requirements would fail it. *Id*. at 910–15. The *Pickering* test has no application to the issue of whether the NLRB can force private-sector employees to subsidize union speech.

This holding is consistent with the fact that "speech need not be characterized as political before it receives First Amendment protection." *United States v. United Foods,* 533 U.S. 405, 410 (2001). In *United Foods*, the Court held it violated the First Amendment for the federal government to compel an unwilling private party to subsidize mundane speech—a marketing campaign for mushrooms. *Id.* A union's advocacy as an exclusive representative is at least as expressive. And it is definitely more controversial because private-sector employees often will "disagree with many of the union decisions." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[4]

*Janus* and *Harris* resolve whether the NLRB would violate the First Amendment if it directly compelled private-sector employees, or anyone else for that matter, to pay monies to a union without their consent. As discussed below, *Vullo* resolves whether the NLRB can achieve the same unconstitutional result by compelling employers to bargain over forced fee requirements.

### B. The First Amendment prohibits the NLRB from coercing employers to bargain with unions over forced fee clauses.

In *Vullo*, the Supreme Court reiterated the "principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." 602 U.S. at 190. The

[4] *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) (finding "[t]he complete satisfaction of all who are represented [by a union] is hardly to be expected" because "inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees."); *Humphrey v. Moore*, 375 U.S. 335, 349–50 (1964) (recognizing that "[c]onflict between employees represented by the same union is a recurring fact."); *Mulhall v. Unite Here Local 255*, 618 F.3d 1279, 1287–88 (11th Cir. 2010) (recognizing that employees may disagree with union activities and positions).

Court discussed the "analytical framework for claims that the government has coerced a third party to violate the First Amendment rights of another." *Id.* at 191. The Court held that "[t]o state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech." *Id.*

*Vullo* concerned conduct by a state official (Maria Vullo, the superintendent of New York's Department of Financial Services "DFS") to pressure certain private businesses (insurance companies) to cease doing business with an advocacy group (the National Rifle Association) to suppress that advocacy group's speech. *Id.* at 180–81. Applying the above framework, the Court found the NRA's complaint "plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress the NRA's gun-promotion advocacy." *Id.*

Under *Vullo*, the NLRB violates the First Amendment by compelling employers to bargain with unions over clauses that require the employers to fire employees who refuse to subsidize union speech. This end—compelled subsidization of union speech—is just as wrongful under the First Amendment as the end sought in *Vullo*. Censorship of speech and compelled subsidization of speech are two sides of the same coin. *See Janus*, 585 U.S. at 893.

An NLRB bargaining order is an "adverse government action" under *Vullo*, 602 U.S. at 191. It is an unfair labor practice for an employer to refuse to bargain with a union over a mandatory subject of bargaining. *See* 29 U.S.C. § 158(a)(5); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). The NLRB considers a forced fee clause to be a mandatory subject of bargaining because it is authorized by the NLRA. *See* 29 U.S.C. § 158(a)(3); *Cushman & Wakefield, Inc.,* 360 NLRB 42, 45 (2013). Employers that refuse to bargain with unions over forcing their employees to pay for union speech can be subjected to court-enforced NLRB bargaining orders that compel the employer to bargain over this requirement.

The NLRB also coerces employers to bargain with unions over forced fee clauses by prohibiting employers from modifying employment terms until they reach an agreement or an impasse on mandatory subjects of bargaining. *See Litton*, 501 U.S. at 198. This coercion has real-world consequences because it strips employers who refuse to bargain over forced fee clauses of their ability to update employment terms to keep up with changing conditions.

While the NLRB lacks authority to order employers to enter into forced fee clauses, *see* 29 U.S.C. § 158(d), such a direct order is not necessary to establish a First Amendment violation. *Vullo* did not turn on whether New York's DFS superintendent could require insurance companies not do business with the NRA. It was enough that DFS's superintendent pressured insurance companies to agree to this action through threats of investigation. 602 U.S. at 192–94.

A bargaining obligation is an especially pernicious form of coercion under the First Amendment because the obligation is itself compelled speech. When the NLRB issues a bargaining order against an employer, the federal agency is forcing that unwilling party to speak with an advocacy group against its will. The NLRB is using one wrong to achieve another wrong when it compels speech by an employer in order to compel employees to subsidize union speech.

Finally, it is impossible to accept that federal, state, and local governments could skirt the strictures of the U.S. Constitution by simply compelling parties to bargain with advocacy groups for policies that would be unconstitutional if directly required by the government. The Bill of Rights cannot be circumvented that easily. For example, Illinois would violate the First Amendment if it passed a law requiring private-sector employees to contribute to the Democratic Party to keep their jobs.[5] It would beggar the imagination to think Illinois could accomplish the same end by just compelling employers to bargain with the Democratic Party for a policy that makes political contributions a condition of employment. Given the close parallels between compelled contributions to political parties and to unions, *see Janus*, 585 U.S. at 926, the same principle applies here.

Or consider a hypothetical twist on the situation in *Vullo*. Imagine if New York state officials tried to pressure insurance companies to cease doing business with the NRA not with threats of investigation, but by forcing the companies to bargain with an antigun group, like Brady United, for an agreement requiring insurance companies to not do business with the NRA or any other group that advocates for Second Amendment freedoms. The result of the case would be the same.

Under *Vullo*, the NLRB violates the First Amendment by compelling unwilling employers to bargain with an advocacy group over a policy requiring the employers to fire individuals who refuse to contribute money to that advocacy group. The government cannot accomplish through mandatory bargaining—which is itself compelled speech—what the Constitution forbids the government from doing directly.

[5] *See Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980).

## Conclusion

The First Amendment prohibits the NLRB from making forced fee requirements a mandatory subject of bargaining. Principled employers who respect their employees' First Amendment rights can refuse to bargain with unions over forced fee requirements. If the NLRB attempts to compel an unwilling employer to speak with a union about forcing its employees to subsidize union speech, the employer and its employees have strong grounds for arguing this bargaining order will violate the First Amendment.