JANUS SHOULD NOT APPLY TO CHECKOFF PROGRAMS[1]

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I. Janus – A New Method of Attack

As it stands, checkoff promotions enjoy government speech classification, meaning that individuals can be compelled to pay assessments to the checkoffs. Opposition groups will likely continue to contest checkoff promotions' status as government speech. Considering the Supreme Court's current composition and the recent *Janus* decision, there is reason to believe that the Court may be more willing to revisit these issues. However, there is little reason to believe that *Janus* will apply to checkoff programs.

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, Mark Janus, an Illinois public employee, sued AFSCME, stating that compelled payment of agency fees was a violation of his First Amendment rights. *Janus v. Am. Fed'n of State, Cty, 7 Mun. Emps.*, 138 S.Ct. 2448, 2461–62 (2018). Agency fees are those fees assessed by unions to non-members associated with the Union's collective bargaining role alone. *Id.* at 2460. Agency fees do not include the portion of funding associated with a Union's "political and ideological projects." *Id.* at 2461. In a 5-4 decision, the Supreme Court agreed with Janus. It held: "States and public-sector unions may no longer extract agency fees from nonconsenting employees" and overruled contrary law under *Abood v. Detroit Board of Education*. *Id.* at 2486.

Opponents of checkoff programs may attempt to use *Janus* to try and defeat mandatory checkoff assessments. Some may point to surface-level similarities associated with the decision and checkoffs: mandatory payments, compelled speech under the First Amendment, representation of collective interests, free-riders, and the like. But many of these similarities fall apart on closer analysis.

Basically, the only similarity on which these criticisms arise is that both labor union "agency fees" and checkoff "fees" are mandatory payments to an organization. But that is where the similarities end between labor unions and checkoffs under *Janus* and *Johanns*. In fact, labor unions and checkoffs are very different. For example:

- Labor unions are private organizations, while checkoffs are NAFIs—non-appropriated fund instrumentalities that the Supreme Court has said produce government speech.
- The Secretary of Agriculture appoints checkoff board members, while the government does not play a role in appointing labor union leadership. In *Johanns*, the Court pointed out that because the Secretary appoints checkoff board members, those producers subject to checkoff fees have political means of changing the system: vote for or communicate with representatives to ensure that the President appoints a Secretary of Agriculture that represents you. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 563 (2005). Labor unions do not have analogous means of democratic change.
- Functionally, labor unions engage in collective bargaining while checkoffs create generic marketing campaigns and perform industry-wide research. "Collective bargaining is the process in which working people, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more." *Collective Bargaining*, AFL-CIO,

[1] This article is educational and not meant to be a reflection of the authors' legal advice or their clients' legal positions. The individual authors' views reflected in the article are not necessarily the views of the authors' law firm or its clients.

https://aflcio.org/what-unions-do/empower-workers/collective-bargaining (last visited July 3, 2019). Checkoff assessments do not have the same function, but attempt to benefit the industry as a whole by raising awareness of a commodity and finding ways for all producers to better serve consumers.

- Labor unions engage in lobbying, while checkoffs are generally prohibited from lobbying by statute. *See, e.g.*, 7 U.S.C. §§ 2904(10), 4504(j), 4808, 4906(g)(3), 7804(k) (2012) (prohibiting the Board from using checkoff Assessment funds to lobby, influence government, or act outside the scope of the statutory purposes).
- Prior to *Janus*, public union members had no ability to bypass agency fees. Many checkoff statutes include a referendum whereby producers of a commodity can vote whether or not to continue support for a given order. *See, e.g.*, 7 U.S.C. § 2107 (2012) (providing the process for referendum on Cotton Board orders); *id.* § 2706 (providing the same for Egg Board orders); *id.* § 4811 (providing the same for Pork Board Orders); *id.* § 4912 (providing the same for Watermelon Board orders).

The key reason that *Janus* cannot be used to challenge mandatory checkoff assessments or to justify overturning *Johanns* is the way in which both cases were decided. In *Johanns*, the checkoff assessments were allowed based on the "government speech" doctrine, while in *Janus*, there was no government speech at issue. *Johanns*, 544 U.S. at 562; *see generally Janus v. Am. Fed'n of State, Cty, 7 Mun. Emps*., 138 S. Ct. 2448 (2018) (discussing compelled subsidies in the public labor union context, but not the government speech context). Rather, the *Janus* court found that the agency fees were impermissible compelled fees paid to a private entity, and further, the justifications offered for the agency fees ("labor peace" and "free rider prevention") did not rise to the level of compelling interests sufficient to withstand First Amendment challenges. *Id.* at 2465–67. As such, the Court struck down the agency fees at issue. *Id.* at 2486. Such justifications are not at issue, nor are they subject to scrutiny, in the government speech context in the way that union agency fees are treated.

As a practical matter, constitutional law scholars Catherine L. Fisk and Erwin Chemerinsky responded to fears of *Janus* being used to shoot down all mandatory fees and noted that: "Apart from unions, and one case involving mandatory assessments on agricultural producers [which was later undone], the Court has rejected every First Amendment challenge to compulsory payments that subsidize speech, and the obvious hostility to public employee unions in *Janus* . . . suggests the field is not going to be a growth area." Catherine L. Fisk & Erwin Chemerinksky, *Exaggerating the Effects of* Janus*: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42 (2018), https://harvardlawreview.org/2018/11/exaggerating-the-effects-of-janus-a-reply-to-professors-baude-and-volokh. As such, it is important to remember that just because one mandatory fee was shot down in one context, it does not necessarily follow that another mandatory payment will be found unconstitutional in a completely separate context.

II. Checkoff Payors Are Like Taxpayers

It is worth pointing out that taxes and checkoff fees are somewhat analogous. They are both mandatory payments, made to government actors, through a congressionally approved regime, for government use.[2] Additionally, neither taxpayers nor producers subject to checkoff assessment have the right to dictate how their assessed funds are used once they are paid to the government actor.

In the taxpayer context, the Court has confirmed that taxpayers cannot selectively choose where their tax dollars go through the taxpayer standing doctrine. *See generally Massachusetts v. Mellon*, 262

[2] Congress uses taxes for government operations. Checkoff boards use the assessed fees for operations, research, and generic advertising.

U.S. 447 (1923). The Court originally stated that taxpayers did not have any standing to sue the government for use of taxpayer dollars. *Id.* Specifically, the *Frothingham* Court spoke of the implications of allowing taxpayer standing and stated:

> If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.

Id. at 487. The taxpayer standing doctrine later expanded, to allow taxpayer standing to those challenging a federal statute on Establishment Clause grounds. *Flast v. Cohen*, 392 U.S. 83, 102–06 (1968) (discussing the framework with which the Court analyzes taxpayer standing questions and applying it to the Establishment clause problem at issue in the case). However, even with the seemingly more permissive standard for taxpayer standing, the Court has only allowed the expansion in the Establishment Clause context. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing . . . ."). As it stands, taxpayers do not have standing to challenge general government taxing and spending powers. Individual taxpayers are not permitted to sue to limit how the government allocates tax funds. Allowing otherwise would create the potential for an endless stream of challenges to government appropriations. It would effectively open the door for taxpayers to challenge each government expenditure with which the taxpayers disagree.

These same concerns are present in the checkoff context. If checkoff payors were enabled to challenge every expenditure they disagreed with, the checkoff would eventually be unable to function, and the government speech doctrine would likely fall into peril. Allowing those who pay mandatory assessments to challenge every action, or instance of government speech, would likely lead to a seemingly endless stream of litigation challenging government action. This analogy should also speak to the non-applicability of *Janus* in the checkoff context.

III. Conclusion

Efforts to conflate the mandatory agency fees that were struck down in *Janus*, with checkoff assessments protected by *Johanns* and the government speech doctrine should be closely scrutinized and rejected.