JANUS'S SOLUTION FOR TITLE VII RELIGIOUS OBJECTORS

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Many collective-bargaining agreements require employees to fund a union to keep their job. The problem for a small minority is that they cannot do so without compromising their religious beliefs. The common solution under Title VII is that these employees must *pay union fees to charity. But this is* not *a reasonable accommodation. This requirement punishes individuals for following their faith, contrary to Title VII. And there is no reason for it after* Janus v. AFSCME, Council 31.

In Janus*, the Supreme Court repudiated the free-rider and labor-peace rationales that support forced payment to charity. The Court showed that nonmembers need not pay fees to compensate the union or to prevent labor unrest. These rationales fail even more so under Title VII. Unlike fees paid to a union, charitable donations do not compensate the union, nor do they eliminate the claimed discord between employees who fund the union and those who do not. And so neither rationale supports forced payment to charity. Simply put, payment to charity punishes religious objectors.*

Thus, forced payment to charity violates Title VII. Unions and employers under Title VII must accommodate and avoid adverse treatment based on religion. Forced payment to charity fails both rules. Accommodation merely requires unions and employers to exempt individuals from funding a union contrary to their religious beliefs. In contrast, payment to charity is *a penalty added solely to harm religious objectors. A penalty is not a reasonable accommodation. What's more, it discriminates against religion because the penalty applies based on employees' religious beliefs.* Janus *shows the proper solution: religious objectors need not pay any forced union fees.*

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INTRODUCTION

Kenneth Yott's employer fired him because he refused to compromise his religious beliefs.[1] Yott asked for religious accommodation, and he even offered solutions to keep his faith and his job. But his employer refused them all.[2]

Why? Yott's employer and union mandated that he pay forced fees to the union—or to charity—to keep his job.[3] But Yott could not because of his religious beliefs.[4] His church taught that individuals should not join or support a union, and he believed that charitable giving must be voluntary.[5] Yott's union and employer, though, demanded that he financially support the union or pay forced fees to a union-approved charity.[6] In effect, they required him to violate his religious beliefs to save his job.

In the first case of its kind, Yott challenged forced union fees under Title VII of the Civil Rights Act of 1964.[7] The Ninth Circuit, however, ruled against him. The court agreed that Title VII required Yott's union and employer to accommodate his religious beliefs.[8] But the court held that forced payment to charity was a reasonable accommodation under the free-rider and labor-peace rationales.[9] Forced fees are warranted under the free-rider rationale to prevent free riders—employees who supposedly benefit from union representation without paying for it.[10] And under the labor-peace

[1] Yott v. N. Am. Rockwell Corp. (*Yott IV*), 602 F.2d 904, 905 (9th Cir. 1979). This article refers to the first district court decision as *Yott I*, the first appellate decision as *Yott II*, the second district court decision as *Yott III*, and the final appellate decision as *Yott IV*. Because *Yott I* is unavailable, this article relies on *Yott v. North American Rockwell Corp.* (*Yott II*), 501 F.2d 398 (9th Cir. 1974), for information about the first district court ruling.

[2] *Yott IV*, 602 F.2d at 905, 907.

[3] *Id.* at 907.

[4] *See id.* at 906.

[5] *Id.*

[6] *Id.* at 907.

[7] *Id.* at 906.

[8] *Id.* at 907.

[9] *Id.* at 908–09.

[10] Harris v. Quinn, 573 U.S. 616, 634 (2014).

rationale, forced fees are needed to prevent discord between employees who pay for union representation and employees who do not.[11] Because Yott could not pay forced fees to charity, the Ninth Circuit found that accommodation was impossible.[12]

Payment to charity arose as a voluntary, religious idea. The Seventh-day Adventist Church proposed that its members pay money to charity as a substitute for paying money to a labor union. Because the church taught that its members should not support a labor union, the church tried to solve the forced-fee problem based on its alternative-service strategy, which it used to address compelled military service.[13] And so payments to charity became a legal concept because initial cases, excluding *Yott*, all involved Adventists who faithfully requested the Adventist Charity Option.[14]

But unions hijacked the Adventist model. Once courts settled that Adventists could *voluntarily* redirect their union fees to charity, unions twisted the Adventist Charity Option into a constraint: all religious objectors *must* pay union fees to charity or else suffer employment capital punishment for their faith.[15] *Yott* is the only case that considered whether a union may *require* nonmembers to pay union fees to charity. In every other case to date, religious objectors (individuals with religious beliefs that prohibit union support) have *asked* to redirect their union fees to charity. Based on this practice, *forced* payment to charity is generally accepted, without thought, as Title VII's solution.[16] This article shows there is no basis for it.

In *Janus v. AFSCME, Council 31*, the Supreme Court rejected the rationales for forced payment to charity.[17] The Court ruled in its landmark decision that the First Amendment bars unions and employers from compelling nonmembers to pay union fees.[18] The Court held that the rationales for forced fees are inadequate to override nonmembers' rights, and it showed they are untrue.[19] Forced fees are unneeded to compensate unions

[11] Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 233 (1956).

[12] *Yott IV*, 602 F.2d at 907–08.

[13] *See infra* Section I.B.2.

[14] *See infra* Section I.B.2.a.

[15] *See infra* Section I.B.3.

[16] *E.g.*, *Union Dues*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/union-dues (last visited Feb. 9, 2023).

[17] 138 S. Ct. 2448, 2465–69 (2018).

[18] *Id.* at 2460.

[19] *Id.* at 2466–69.

and prevent unrest. So the Court ruled that nonmembers need not pay *any* forced union fees.[20]

After *Janus*, there is no basis for forced payment to charity. The forced-fee rationales—which failed in *Janus*—are even weaker as a justification for payment to charity. Unlike payment to the union, payment to charity does not compensate the union. So it does not eliminate free riders or avoid conflict over free riders. In short, payment to charity serves neither rationale. It simply punishes individuals for following their faith.

As a result, *forced* payment to charity violates Title VII. It does not serve any valid purpose, and it discriminates against religious objectors. *Janus* shows the proper solution: nonpayment. Post-*Janus*, religious objectors need not pay *any* forced union fees.

In Part I, this Article examines the decision in *Yott* and the rationales that ostensibly support forced charity payments under Title VII. In Part II, this Article shows how the Supreme Court in *Janus* refuted the rationales for forced payment to charity. Finally, in Part III, this Article applies *Janus*'s reasoning to Title VII and shows that the forced-fee rationales make even less sense applied to payment to charity. It concludes that forced charity payments lack any basis and violate Title VII. Thus, courts should end forced payment to charity.

PART I: THE RATIONALES THAT SUPPORT FORCED CHARITY PAYMENTS

Federal labor law enables forced union representation and forced union fees.[21] Congress, and later the Supreme Court, gave two justifications for forced union fees: the free-rider and labor-peace rationales.[22]

A. Labor law permits forced union fees.

Congress gave unions power under the National Labor Relations Act ("NLRA") and the Railway Labor Act ("RLA") to represent nonmembers—against their will—and require them to pay forced union fees.[23] Under the NLRA and RLA, if a simple majority (of those who vote) chooses a union to

[20] *Id.* at 2486.

[21] National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1974); National Labor Relations Act, 29 U.S.C. § 159(a) (1959).

[22] *Yott II*, 501 F.2d 398, 400 (9th Cir. 1974).

[23] 29 U.S.C. § 158(a)(3); 29 U.S.C. § 159(a); 45 U.S.C. § 152, Fourth, Eleventh.

serve as its representative, the union becomes the *exclusive* representative for *all* employees in that unit.[24] Nonmembers who oppose the union cannot say no or represent themselves.[25] In other words, federal labor law empowers unions to make an "offer" that nonmembers cannot refuse. As the exclusive representative, a union has the sole right to negotiate with the employer.[26] Employees may not negotiate on their own or choose their own representative.[27]

Once a union becomes the unit's exclusive representative, the NLRA and RLA permit unions and employers to negotiate so-called "union security" or "union shop" agreements.[28] These agreements require employees to pay union dues or fees to keep their job.[29] In *Yott*, the union and employer had a union shop agreement that required Yott to fund the union to keep his job.[30]

1. Forced fees depend on the free-rider and labor-peace rationales.

Congress authorized forced union fees for two reasons: to prevent "free riders" and to "promote [labor] stability."[31] In *Yott*, for example, the Ninth

[24] 29 U.S.C. § 159(a); 45 U.S.C. § 152, Fourth.

[25] 29 U.S.C. § 159(a).

[26] *Id.*

[27] 29 U.S.C. § 158(a)(5), (d) (requiring employers to negotiate with the union and restricting individual bargaining). *See also* Ord. of R.R. Tels. v. Ry. Express Agency, 321 U.S. 342, 346–47 (1944) (affirming that employers under RLA may not individually negotiate with employees who are represented by a union); J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944) (same under the NLRA).

[28] 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152, Eleventh.

[29] NLRB v. Gen. Motors Corp., 373 U.S. 734, 742 (1963). The Court points out that a union shop, by definition, requires employees to join the union after thirty days. But the Supreme Court "whittled down" union-shop membership to its "financial core." Thus, employees need only pay initiation fees and dues to satisfy the membership requirement. A true union shop is illegal. The Court also asserts that after *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), an "agency fee"—for union bargaining and contract administration—is the maximum that a union may compel a nonmember to pay. The term "union shop" is used here to refer to compulsory union fees.

[30] *Yott II*, 501 F.2d 398, 399 (9th Cir. 1974).

[31] *Id.* at 400 (quoting S. REP. NO. 80-105, at 7 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 413 (1985)). Congress's Joint Committee on Labor-Management Relations expressed the same view: "In permitting a limited form of compulsory membership, Congress recognized that the 'free rider' argument had some validity. The argument is that since all employees enjoy a wage increase or other benefits obtained by the union, all should be required to pay their share of the expense of obtaining such by joining the union." S. REP. NO. 80-986, at 52 (1948); *see also* Radio Officers' Union v. NLRB, 347 U.S. 17, 40–42 (1954) (affirming that Congress permitted forced fees under the free-rider rationale).

Circuit quoted a Senate report from the NLRA's legislative history to show Congress's intent.[32] The report found that union shop agreements may "promote stability by eliminating 'free riders.'"[33] Thus, Congress allowed unions and employers to impose forced union fees. The legislative history of the NLRA and RLA is filled with more examples.[34]

The Supreme Court also permitted forced fees based on these rationales in three cases. First, in *Railway Employee Department v. Hanson*, the Supreme Court upheld union shop agreements based on the labor-peace rationale.[35] *Hanson* reasoned that Congress has power under the Commerce Clause to "adopt all appropriate measures" to encourage labor agreements and to deter labor disputes that threaten interstate commerce.[36] The Court argued that Congress has "great latitude in choosing the methods" that further this legitimate interest in labor peace.[37] With that in mind, *Hanson* held that Congress may authorize union shop agreements "as a stabilizing force."[38]

Second, the Supreme Court upheld forced fees based on the free-rider rationale in *International Ass'n of Machinists v. Street*.[39] *Street* examined the RLA's legislative history and affirmed that the free-rider rationale is "[t]he principal argument" for forced fees.[40] Under this rationale, forced fees are permitted for two reasons: (1) exclusive representation requires unions to fairly represent nonmembers, which costs resources; and (2) union

[32] *Yott II*, 501 F.2d at 400.

[33] *Id.*

[34] *See* cases cited *infra* notes 35–51 and accompanying text. Senator Robert Taft, who sponsored the union shop provision, credited the free-rider rationale for forced fees under the NLRA: "[T]he argument made for the union shop . . . is [that] those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself. Under [what is now Section 8(a)(3)], we pretty well take care of that argument." 93 CONG. REC. S4887 (daily ed. May 9, 1947) (statement of Sen. Robert Taft); *see also* 93 CONG. REC. S3837 (daily ed. May 9, 1947) (statement of Sen. Robert Taft) ("[W]hat we do [in the NLRA's union shop provision], in effect, is to say that no one can get a free ride.").

[35] Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 233–35 (1956).

[36] *Id.* at 233.

[37] *Id.*

[38] *Id.*

[39] 367 U.S. 740, 761–64, 767 (1961).

[40] *Id.* at 761. *See also* Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 311 (2012) (stating that the free-rider rationale is "[t]he primary purpose" for forced fees); Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954) (affirming that the free-rider rationale is the reason Congress authorized union shop agreements).

representation benefits nonmembers.[41] Forced fees resolve these points and spread the costs among those who benefit from union representation.[42] According to *Street*, Congress considered this rationale "decisive" and relied on it "as the justification for the union shop."[43] The concurrent limit, according to *Street*, is that unions lack power beyond the free-rider rationale.[44] So they cannot force employees to fund union politics.[45]

Third, the Supreme Court in *Abood v. Detroit Board of Education* upheld forced fees in the public sector under the free-rider and labor-peace rationales.[46] *Abood* expressed the labor-peace rationale as a justification for exclusive representation.[47] Forced fees, the argument goes, are required for exclusive representation, and exclusive representation is necessary for labor peace.[48] Despite this twist, *Abood* otherwise relied on *Hanson* and *Street*.[49] The Court claimed that these cases sanctioned forced fees and therefore resolved all forced-fee challenges.[50] Although *Hanson* and *Street* explored the private sector, *Abood* reasoned that "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller."[51] In essence, all forced union fees depend on the same policy rationales.

[41] *Street*, 367 U.S. at 755–64 (recounting the RLA's legislative history and the arguments for forced union fees).

[42] *Id.* at 761.

[43] *Id.* at 762, 763 n.14.

[44] *See id.* at 768.

[45] *Id.* at 770.

[46] 431 U.S. 209, 220–22 (1977), *overruled by* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018). *See also* Harris v. Quinn, 573 U.S. 616, 616–17 (2014) ("The *Abood* Court treated the First Amendment issue as largely settled by *Hanson* and *Street* and understood those cases to have upheld agency fees based on the desirability of 'labor peace' and the problem of 'free riders[hip].'" (alteration in original)).

[47] *Abood*, 431 U.S. at 218–21.

[48] *Id.*

[49] *Id.* at 222.

[50] *Id.* ("[T]he judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.").

[51] *Id.* at 224.

2. Appeals courts held that the rationales for forced fees trump the right to freely exercise religion.

Based on *Hanson* and *Street*, four federal courts—including the Ninth Circuit in *Yott*—and at least one state court rejected claims that union shop agreements violate the Free Exercise Clause.[52] These courts considered the free-rider and labor-peace rationales compelling interests that outweigh the constitutional right to exercise religion.[53] Courts applied the compelling state interest test from *Sherbert v. Verner*, which requires a compelling state interest to justify "any incidental" government burden on a person's religious exercise.[54]

These courts considered religious objectors' free exercise challenges equivalent to nonmembers' association challenges in *Hanson* and *Street*.[55] The First Circuit explained that *Sherbert*'s compelling interest test came "from freedom of association cases."[56] So "*Hanson*'s balancing, and thus its conclusion should be the same . . . since the government's interest, and the plaintiff's burden (loss of a union-shop employer) are apparently the same."[57] The courts weighed what they perceived as religious objectors' narrow interests in preserving their job against the broad "public and private interests in collective bargaining and industrial peace" from *Hanson* and *Street*.[58] They viewed exemption as an "affront . . . to the congressionally supported principle of the union shop."[59] Thus, they concluded that "it is [the] plaintiff who must suffer."[60]

[52] *Yott II*, 501 F.2d 398, 403 (9th Cir. 1974); Hammond v. United Papermakers & Paperworkers Union, 462 F.2d 174, 175 (6th Cir. 1972); Linscott v. Millers Falls Co., 440 F.2d 14, 18 (1st Cir. 1971); Gray v. Gulf, Mobile & Ohio R.R. Co., 429 F.2d 1064, 1072 (5th Cir. 1970); Wondzell v. Alaska Wood Prods., Inc., No. 74-422, 1975 WL 3217, at *5 (Alaska Super. Ct. Oct. 15, 1975), *rev'd*, 601 P.2d 584 (Alaska 1979). *See also* Wondzell v. Alaska Wood Prods., Inc., 583 P.2d 860, 862, 866 (Alaska 1978), *rev'd on reh'g*, 601 P.2d 584 (Alaska 1979) (treating separate Title VII and free exercise claims as one and upholding forced union fees).

[53] *Yott II*, 501 F.2d at 403; *Linscott*, 440 F.2d at 17; *Gray*, 429 F.2d at 1072; *Wondzell*, 1975 WL 3217, at *5.

[54] 374 U.S. 398, 403 (1963).

[55] *Linscott*, 440 F.2d at 17–18.

[56] *Id.* at 17.

[57] *Id.*

[58] *Yott II*, 501 F.2d at 404 (quoting *Linscott*, 440 F.2d at 18). *See also Wondzell*, 1975 WL 3217, at *6 (concluding union shop agreements only deprive religious objectors of work "who choose to live in areas where no non-union employment is available").

[59] *Yott II*, 501 F.2d at 404 (quoting *Linscott*, 440 F.2d at 18).

[60] *Id.*

B. Title VII's charity payment compromise.

Despite these labor law precedents, religious objectors succeeded under Title VII—even though they lost under the First Amendment. And so religious objectors rely mainly on Title VII.

1. Title VII requires unions and employers to accommodate employees' religious beliefs.

Title VII bars unions and employers from discriminating against religion.[61] Its substantive provision, Section 703, makes it unlawful "for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion."[62] The same section also makes it unlawful for a union "to discriminate against, any individual because of his . . . religion."[63] In short, Title VII prohibits religious discrimination.

Title VII further requires religious accommodation. Less than ten years after passing Title VII, Congress amended the statute to clarify that failure to provide religious accommodation is also discrimination.[64] In its amendment, Congress added that religion includes "all aspects of religious observance and practice, as well as belief."[65] And it required unions and employers to reasonably accommodate employees' religion when possible "without undue hardship on the . . . employer's business."[66]

Thus, when an employer and union refuse to accommodate, they discriminate because of religion.[67] As the Supreme Court later explained, refusal to accommodate is disparate treatment because religion under Title

[61] 42 U.S.C. § 2000e(j).

[62] *Id.* § 2000e-2(a)(1).

[63] *Id.* § 2000e-2(c)(1).

[64] Congress added Section 2000e(j) because courts refused to protect religious practice and only required facial (formal) neutrality. Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 362–71 (1997) (discussing Section 701(j) and the reasons behind it).

[65] 42 U.S.C. § 2000e(j).

[66] *Id.*

[67] Bruce N. Cameron & Blaine L. Hutchison, *Thinking Slow About* Abercrombie & Fitch*: Straightening Out the Judicial Confusion in the Lower Courts*, 46 PEPP. L. REV. 471, 482 (2019) (explaining that Section 2000e(j) folds religious belief and practice in Section 2000e-2); *see also* Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107, 116–17 (2015) (explaining that 2000e(j) collapsed the conduct-status distinction).

VII includes belief *and* behavior.[68] In other words, unions and employers may not forbid or punish religious behavior when they can accommodate it.

2. Courts accepted voluntary charity payments as a compromise between labor law and Title VII.

The charity idea came from the Seventh-day Adventist Church.[69] Because the Adventist Church instructed its members not to join or support a labor union, it sought a compromise with organized labor. And so the church used a strategy that served it well in the past. To resolve a conflict during the draft between church teachings on pacifism and compulsory military service, the church endorsed charitable medical service.[70]

The Adventist Church taught that its members could support the military if they served in noncombat roles like the medical corps.[71] During World War I, the church created the War Service Commission and the Institute for War-Time Nursing to train Adventists to serve as medics.[72] This option allowed Adventists to follow their religion and serve their country.

When compulsory unionism became a prominent labor law feature, Adventists applied the same alternative service strategy. They created the Council on Industrial Relations to prevent Adventists from being fired for their faith.[73] The council proposed that Adventists pay to a sick benefit fund or workers benefit fund rather than the union.[74] A few unions agreed, but these agreements in the end failed. Many unions rejected the proposal because charity payments do not fund the union.[75] Adventist efforts also failed, at first, in courts.

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[68] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771–72 (2015) (holding that failure to accommodate is disparate treatment).

[69] Carlyle B. Haynes, *Seventh-day Adventists and Labor Unions*, THE MINISTRY, Nov. 1945, at 36–37; *see also* J.L. McElhany & E.D. Dick, *A Request*, THE MINISTRY, Nov. 1945, at 37–38.

[70] Haynes, *supra* note 69, at 29–30.

[71] Sabrina Riley, *Medical Cadet Corps*, ENCYCLOPEDIA OF SEVENTH-DAY ADVENTISTS (Jan. 29, 2020), https://encyclopedia.adventist.org/article?id=B9RU; *see also* Gary Land, HIST. DICTIONARY OF THE SEVENTH-DAY ADVENTISTS 229 (2d ed. 2015) (describing Adventist response to conscription).

[72] Riley, *supra* note 71.

[73] Haynes, *supra* note 69, at 36.

[74] McElhany & Dick, *supra* note 69, at 38.

[75] *See* text accompanying notes 76–85.

a. Trial courts rejected voluntary charity payments.

The litigation in *Yott* followed the pattern in early religious objector cases.[76] Religious objectors, like *Yott*, requested accommodation from union security agreements, but unions refused. Rather than accommodate, unions demanded that employers fire religious objectors who could not support their union because of their religious beliefs.[77] So religious objectors filed lawsuits under Title VII.[78] Notably, every case, except *Yott*, involved Adventists who asked to redirect their fees to charity.[79]

Religious objectors first lost every district court case.[80] The district courts considered federal labor law controlling, and so they rejected any change under Title VII.[81] They held that accommodation is impossible given Congress's authorization and the rationales behind forced fees.[82]

In particular, trial courts reasoned under the free-rider rationale that charity payments, no matter the objector's sincerity, "cannot compensate the union for [its] efforts."[83] Religious objectors benefit from union

[76] *Compare Yott II*, 501 F.2d 398, 400 (9th Cir. 1974) (reviewing the district court decision rejecting accommodation and sanctioning Yott's termination), *with* Anderson v. Gen. Dynamics Convair Aerospace Div., 430 F. Supp. 418, 419, 422 (S.D. Cal. 1977) (sanctioning objector's termination and rejecting accommodation), *rev'd*, 589 F.2d 397 (9th Cir. 1978), *and* McDaniel v. Essex Int'l, Inc., No. K74-288, 1976 WL 13380, at *1–2 (W.D. Mich. Jan. 13, 1976) (same), *rev'd*, 571 F.2d 338 (6th Cir. 1978), *and* Burns v. S. Pac. Transp. Co., No. 74-35 Tuc. (JAW), 1976 WL 13221, at *3–6 (D. Ariz. Jan. 8, 1976) (rejecting accommodation), *rev'd*, 589 F.2d 403 (9th Cir. 1978), *and* Cooper v. Gen. Dynamics, 378 F. Supp. 1258, 1262 (N.D. Tex. 1974) (same), *rev'd*, 533 F.2d 163 (5th Cir. 1976), *and* Me. Hum. Rts. Comm'n *ex rel.* Michaud v. UPIU Loc. 1361, No. 75-83, 1975 WL 22202, at *1 (Me. Super. Ct. Dec. 3, 1975) (rejecting accommodation under a parallel state law), *and* Wondzell v. Alaska Wood Prods., Inc., No. 74-422, 1975 WL 3217, at *6 (Alaska Super. Ct. Oct. 15, 1975), *rev'd*, 601 P.2d 584 (Alaska 1979) (sanctioning objector's termination).

[77] One union even threatened to strike if the employer refused to fire the religious objector. *Wondzell*, 1975 WL 3217, at *1.

[78] *See* cases cited *supra* note 76.

[79] *Anderson*, 430 F. Supp. at 421; *McDaniel*, 1976 WL 13380, at *1; *Burns*, 1976 WL 13221, at *2; *Michaud*, 1975 WL 22202, at *1; *Wondzell*, 1975 WL 3217, at *1.

[80] *Anderson*, 430 F. Supp. at 422; *McDaniel*, 1976 WL 13380, at *3; *Burns*, 1976 WL 13221, at *6; *Cooper*, 378 F. Supp. at 1262; *Wondzell*, 1975 WL 3217, at *6; *cf. Michaud*, 1975 WL 22202, at *1 (rejecting charity payment but enjoining termination for thirty days to determine whether transfer is possible).

[81] *E.g.*, *Burns*, 1976 WL 13221, at *5.

[82] *See* cases cited *supra* note 76.

[83] *Michaud*, 1975 WL 22202, at *1; *see also Anderson*, 430 F. Supp. at 422 ("The willingness of plaintiff to pay money directly to a charity does not eliminate 'free riders.'"); *McDaniel*, 1976 WL 13380, at *2 (calling forced fees a "necessary 'business purpose'" and citing the free-rider

representation, and so they have "no right to avoid [paying their] share."[84] These courts concluded that "anything less" than full payment to the union would diminish the union's bargaining capacity and thus "cause an undue hardship."[85]

Trial courts likewise rejected charity payments under the labor-peace rationale. They reasoned that forced fees "keep peace and harmony between union members and [nonmembers]."[86] A religious objector's failure "to pay his fair share of the collective bargaining costs would cause significant employee hostility, dissension, and lack of communication, resulting in undue hardship."[87] Appellate courts turned the tables.

b. Appeals courts accepted voluntary charity payments.

Appellate courts rejected these rulings and accepted voluntary charity payments in part based on the free-rider and labor-peace rationales.[88] Three conclusions are noteworthy.

First, these courts rejected the view that labor law preempts Title VII and establishes an overriding forced-fee policy.[89] They reasoned that Title VII, not labor law, addresses employees' religious needs and regulates religious

rationale); *Burns*, 1976 WL 13221, at *3 (citing concerns that accommodation would attract other religious free riders); *Cooper*, 378 F. Supp. at 1262 (stating that objectors "have merely been requested to pay their share of the cost of the collective bargaining which [benefits them]").

[84] *Wondzell*, 1975 WL 3217, at *6.

[85] *Id.*

[86] *Burns*, 1976 WL 13221, at *4; *see also McDaniel*, 1976 WL 13380, at *2 (calling forced fees a "necessary 'business purpose'" and citing industrial peace); *Cooper*, 378 F. Supp. at 1262 n.2 (rejecting the objector's religious belief in part because "the union security agreement promotes industrial harmony").

[87] *Burns*, 1976 WL 13221, at *4.

[88] Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 402 (9th Cir. 1978); Burns v. S. Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978); McDaniel v. Essex Int'l, Inc., 571 F.2d 338, 344 (6th Cir. 1978); Cooper v. Gen. Dynamics, 533 F.2d 163, 166–70 (5th Cir. 1976); Wondzell v. Alaska Wood Prods., Inc., 601 P.2d 584, 586 (Alaska 1979); *see also* Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 450–53 (7th Cir. 1981) (affirming that the district court which relied on earlier appellate decisions requiring religious accommodation and affirming voluntary payment to charity); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1242–44 (9th Cir. 1981) (same).

[89] *E.g.*, *Anderson*, 589 F.2d at 400–01 (concluding "[t]he balance has been struck [between Title VII and the NLRA], in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices"); *Cooper*, 533 F.2d at 169–70 (noting a statutory hierarchy "is foreign to our governmental scheme" and showing Title VII does not impede the NLRA).

accommodation.[90] Although labor law *allows* forced union fees, it does not establish an overriding forced-fee policy.[91] For one, the NLRA itself exempts unwilling states and employers.[92]

These courts also recognized that Title VII does not undermine the NLRA. It is possible to harmonize these statutes. As the Fifth Circuit explained, unions and employers may still enact and enforce union shop agreements "in all except the unusual [case] where compliance would run counter to a particular employee's religious conviction."[93] But given a conflict, Title VII controls. The Sixth and Seventh Circuits noted that no labor policy is more important than eliminating employment discrimination.[94] For these reasons, appeals courts held that "Title VII creates an exception to the NLRA's sanction of union security clauses."[95]

Second, these courts accepted *voluntary* charity payments. They held that unions and employers violated Title VII when they refused Adventist requests to redirect forced union fees to charity.[96] Every circuit agreed that payment to charity poses no undue hardship.[97] They rejected the argument that costs to unions and coworkers in lost and increased fees entail more than *de minimis* cost.[98] Even though accommodation may require coworkers to pay more than their "fair share," and unions must forgo religious objectors' fees, courts held that these costs are *de minimis.*[99] So too, the possibility that

[90] *E.g.*, *McDaniel*, 571 F.2d at 341–43 (concluding after extensively examining the statutory text and forced fee's legislative history and statutory purpose that the NLRA does not balance employees' religious needs); *Nottelson*, 643 F.2d at 450 (agreeing with the Sixth Circuit in *McDaniel*).

[91] *Nottelson*, 643 F.2d at 450.

[92] *Id.* at 450–51.

[93] *Cooper*, 533 F.2d at 170.

[94] *Nottelson*, 643 F.2d at 451; *McDaniel*, 571 F.2d at 343. *See also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964.").

[95] *Nottelson*, 643 F.2d at 450.

[96] *See* cases cited *supra* note 89.

[97] *E.g.*, McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 38 (6th Cir. 1982) (rejecting CBA conflict and litigation for violating the CBA as undue hardships); Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243–44 (9th Cir. 1981); *Nottelson*, 643 F.2d at 452; Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978).

[98] *Burns*, 589 F.2d at 407.

[99] *Id.*

many employees may request religious accommodation is *not* an undue hardship.[100]

Third, appellate courts upheld charity payments based on the free-rider and labor-peace rationales.[101] Courts denied that payment to charity would create free riders because religious objectors are not "seeking something for nothing."[102] Religious objectors who pay to charity bear the same financial burden as other employees, so they are not free riders. [103] For that reason, appellate courts held that payment to charity is not improper preferential treatment, nor does it violate the Establishment Clause.[104] Even if coworkers must pay more than their fair share, religious objectors pay the same amount to charity. So there is little reason for discord between union members and religious objectors. Charity payments, therefore, further labor peace.[105]

c. Congress accepted charity payments.

Congress codified the charity alternative in 1980 when it amended Section 19 of the NLRA based on a deal between organized labor and the Seventh-day Adventist Church.[106] The church promised to stop promoting Right to Work Laws, and in return organized labor agreed that it would support an amendment that allowed objectors to pay forced fees to charity.[107] The deal, and ultimately Section 19, excluded any union defenses, but in essence, it *only* protected Adventists.[108] For that reason, Section 19 violates

[100] *Id.*; *Tooley*, 648 F.2d at 1243–44.

[101] Professor Engle agrees union dues cases allowed charity payments under an equal-burden approach—what she calls a separationist or sex discrimination approach—rather than an accommodationist approach required by Title VII. Engle, *supra* note 64, at 360, 398.

[102] *Nottelson*, 643 F.2d at 451; *see also* Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 401–02 (9th Cir. 1978); *Burns*, 589 F.2d at 406.

[103] *See* cases *supra* note 103.

[104] *Tooley*, 648 F.2d at 1243, 1245; *Nottelson*, 643 F.2d at 454–55; *Burns*, 589 F.2d at 406.

[105] *Nottelson*, 643 F.2d at 452; *Burns*, 589 F.2d at 406.

[106] 29 U.S.C. § 169.

[107] Bruce N. Cameron, *Two-Faced with Janus*, FULCRUM 7 (July 6, 2018), https://www.fulcrum7.com/blog/2018/7/6/two-faced-with-janus.

[108] *Id.* As Section 19 states:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer

the Establishment Clause, as the Sixth Circuit held.[109] When it applied, courts determined that it is separate from Title VII. So it does not affect Title VII relief.[110]

The amendment shows, if anything, that Congress did not intend labor law to override religious freedom. Because Section 19 is unlawful, Title VII remains the prime protection for religious objectors.

3. Unions require religious objectors to pay to charity.

After unions lost these battles over accommodation, they changed their position. Once courts held that unions must allow religious objectors to redirect their fees to charity, unions mandated charitable payments.[111] Under this regime, religious objectors *must* pay to charity to keep their job.[112] If they object, unions compel their employers to fire them.[113] This strategy allows unions to inflict financial harm and compel religious objectors to pay union fees. Given the battle to achieve *any* accommodation, religious objectors have accepted union demands to pay to charity.[114] As a result, Yott is the *only* religious objector who litigated forced charity payments.[115]

C. Yott *required forced charity payments based on the free-rider and labor-peace rationales.*

In *Yott*, the Ninth Circuit held that Yott's union and employer did not unlawfully discriminate against him because labor law permits

> and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund . . . .

29 U.S.C. § 169.

[109] Wilson v. NLRB, 920 F.2d 1282, 1290 (6th Cir. 1990); Katter v. Ohio Emp. Rels. Bd., 492 F. Supp. 2d 851, 864 (S.D. Ohio 2007).

[110] *E.g.*, Int'l Ass'n of Machinists, Lodge 751 v. Boeing Co., 833 F.2d 165, 170 (9th Cir. 1987) ("[The employee] is free to pursue her remedies under Title VII [or the NLRA] . . . .").

[111] *See, e.g.*, Reed v. UAW, 569 F.3d 576, 578 (6th Cir. 2009) (analyzing union requirement that religious objectors not only pay to charity but also pay the full dues amount—even though secular objectors pay a reduced (agency) amount); Madsen v. Associated Chino Tchrs., 317 F. Supp. 2d 1175, 1178–79 (C.D. Cal. 2004) (same); O'Brien v. City of Springfield, 319 F. Supp. 2d 90, 93–97 (D. Mass. 2003) (same).

[112] *E.g.*, *Union Dues*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/union-dues (last visited Feb. 5, 2023).

[113] *See id.*

[114] *O'Brien*, 319 F. Supp. 2d at 93–97 (illustrating immense difficulty to even pay to charity).

[115] *See* cases cited *supra* note 76.

discrimination for failure to pay union fees.[116] But the panel held that Title VII requires accommodation, and so it reversed on that ground.[117] The panel viewed discrimination and accommodation as distinct claims.[118]

Despite its ruling that Title VII requires accommodation, the panel questioned whether accommodation was possible given forced fees' approval and purpose. The panel wrote that union shop agreements "insure that all who receive the benefits of the collective bargaining agreement pay their fair share," and they promote stability "by reducing potential labor strife."[119]

On remand, the district court determined that accommodation was indeed impossible under Title VII based on labor law.[120] The district court called nonpayment an "exemption" and oddly asserted that exemption is not accommodation even though the terms are used interchangeably.[121] It reasoned that nonpayment conflicts with the union's "authority to provide for a 'union shop'" and union shop agreements' "constitutional validity and congressional purpose."[122] The district court held that "[i]t is sufficient to say that [the Ninth Circuit's discussion about forced fees' validity and purpose] disposes of plaintiff's offered accommodation of exemption."[123]

The district court did not explain why labor law rationales dictated the Title VII result. Nor did it determine that exemption would cause an undue hardship. It simply held that exemption is unreasonable because it deviates from labor law.[124]

On appeal for the second time, the Ninth Circuit affirmed the district court also based on labor law.[125] The panel reasoned that exemption "requires such a substantial alteration in the relationship between the parties and significant erosion of the congressional purpose in permitting union security clauses that it goes beyond reasonable accommodation."[126]

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[116] *Yott II*, 501 F.2d 398, 404 (9th Cir. 1974).

[117] *Id.* at 403.

[118] *Id.* at 399.

[119] *Id.* at 402 n.6.

[120] *Yott III*, 428 F. Supp. 763, 769–70 (C.D. Cal. 1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979).

[121] *Id.* at 769 ("Exemption is not accommodation.").

[122] *Id.*

[123] *Id.*

[124] *See id.* at 769–70.

[125] *Yott IV*, 602 F.2d 904, 909 (9th Cir. 1979).

[126] *Id.*

Thus, the panel permitted Yott's union and employer to compel him to pay forced fees either to a charity or the union.[127] The panel considered this a good-faith effort to accommodate—even though both options conflicted with Yott's religious beliefs.[128] The panel cited other cases that approved *voluntary* charity payments. It did not appreciate the difference between mandatory and voluntary payments.[129] Nor did it realize that the other cases involved Adventists who requested their church's solution. Yott not only embraced *different* religious beliefs but also believed that the Adventist model contradicted his religious principles.

Even so, the Ninth Circuit found that the free-rider and labor-peace rationales justified forced charity payments.[130] The panel reasoned that these payments would satisfy union members' "substantial animosity" toward free riders.[131] The panel assumed that religious objectors who pay to charity are not free riders.

The Ninth Circuit also argued that religious objectors' payment to charity would prevent unrest otherwise caused by exemption.[132] Union organizing cost Yott's employer over a million dollars and occurred every five years until a union succeeded and obtained a compulsory fee agreement. The Ninth Circuit speculated that "exempting Yott could lead to further exemptions" triggering costly union "organizational activities."[133] In effect, "exemptions are more likely to cause unrest."[134] So the Ninth Circuit held that an exemption would inflict undue hardship on the employer and union. Thus, it upheld forced charity payments under the free-rider and labor-peace rationales.[135]

[127] *Id.* at 906–07, 909.

[128] *Id.* at 909.

[129] *Id.* at 907–08 (citing Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978); Burns v. S. Pac. Transp. Co., 589 F.2d 403, 405 (9th Cir. 1978))

[130] *Id.* at 909.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

PART II: *JANUS* REJECTS THE RATIONALES THAT JUSTIFY FORCED CHARITY PAYMENTS

The Supreme Court in *Janus* rejected the rationales for forced fees and, by implication, for forced payments to charity. As explained in Part I, all forced union fees depend on the free-rider and labor-peace rationales.

A. Forced fees infringe nonmembers' rights and require justification.

In *Janus*, a public employee challenged a law requiring public employees to subsidize a union to keep their job.[136] The Supreme Court held that the First Amendment prohibits public employers and unions from forcing employees to subsidize a union.[137] The Court reasoned that the First Amendment does not allow the government to compel nonmembers to fund union speech and express views that they reject.[138]

After the Supreme Court determined that forced union fees conflict with the First Amendment, the Court applied "exacting scrutiny"—a commercial speech test.[139] Exacting scrutiny requires "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[140] The Court applied that standard to the free-rider and labor-peace rationales, which *Abood* credited when it upheld forced fees in the public sector.[141] *Janus* examined and rejected these rationales.

B. The free-rider rationale does not justify forced fees.

Janus recognized the conceptual problems with the free-rider theory: nonmembers *forced* to accept union representation are not free riders—they are forced riders.[142] The petitioner in *Janus* explained that he was "not a free rider on a bus headed for a destination that he wishes to reach."[143] Rather, he is "more like a person shanghaied for an unwanted voyage."[144] The Supreme Court agreed with the petitioner that exclusive (forced) representation is "a

[136] 138 S. Ct. 2448, 2460, 2462 (2018).

[137] *Id.* at 2460.

[138] *Id.* at 2463–64.

[139] *Id.* at 2463–64, 2477.

[140] *Id.* at 2465.

[141] *Id.* at 2466, 2469.

[142] *Id.* at 2466.

[143] *Id.*

[144] *Id.*

significant impingement on associational freedoms that would not be tolerated in other contexts."[145] Simply put, union representation infringes nonmembers' rights.

The Court, moreover, refuted the premise that without forced fees unions represent nonmembers for free.[146] Exclusive representation—which requires unions to represent nonmembers—gives unions "tremendous" power.[147] It empowers unions to speak for all employees and silence the ones who disagree. It also enables unions to compel employers "to listen to and to bargain in good faith with only that union."[148] And it confers benefits, like access to employee information and automatic deductions for union dues and fees from employees' wages.[149] The Supreme Court determined that "[t]hese benefits greatly outweigh any extra burden."[150] Thus, the free-rider rationale is untrue: unions receive ample compensation without forced fees.

Even if the free-rider rationale were valid, *Janus* held that it does not justify forced fees. The Court reasoned that "[f]ree-rider 'arguments . . . are generally insufficient to overcome First Amendment objections.'"[151] For one thing, "avoiding free riders is not a compelling interest."[152] And likely it is not a substantial or important interest either. The Court gave the rationale little, if any, weight. It discussed a compelling governmental interest because it applied exacting scrutiny. But the Court held that the rationale would also fail under "more permissive" standards.[153] So the Court declared that the precise scrutiny level was unimportant.[154]

The Court reasoned that unions are not entitled to nonmembers' money even if they provide a benefit. The Court applied the basic rule that exchange

[145] *Id.* at 2478; *see*, *e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (stating that agency law requires a principal's consent and control over a representative to form a principal-agent relationship and discussing forced representation of a person who can consent, which contradicts agency law).

[146] *Janus*, 138 S. Ct. at 2466.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* at 2466 (second alteration in original) (quoting Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 311 (2012)).

[152] *Id.*

[153] *Id.* at 2465.

[154] *Id.*

requires consent.[155] A seller that unilaterally confers a benefit on a potential buyer ordinarily has no claim against that potential buyer.[156] The Court explained that advocacy groups often benefit nonmembers, but that is no justification to force nonmembers to subsidize the group.[157]

Moreover, forced fees demean and coerce individuals to betray their convictions. At bottom, they compel "free and independent individuals to endorse [organizations and] ideas they find objectionable."[158] For that reason, the Court held that forced fees raise the same concerns as compelled speech. The Court thus called forced fees "sinful and tyrannical" quoting Thomas Jefferson. Jefferson wrote: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."[159] And so the Court found that the free-rider rationale does not justify forced union fees' "significant impingement" on individual rights.[160]

C. The labor-peace argument does not justify forced fees.

Abood cited the labor-peace rationale as a justification for exclusive union representation.[161] It assumed that exclusive representation and forced fees are linked.[162] Yet *Janus* showed this is untrue. Even if labor peace requires exclusive representation, it does not follow that exclusive representation

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[155] *Id.* at 2466–67; *see also* Oren Bar-Gill & Lucian Arye Bebchuk, *Consent and Exchange*, 39 J. LEGAL STUD. 375, 375–76 (2010) (explaining that "[e]xchanges–transfers of value from a 'seller' to a 'buyer' for a consideration—commonly require the mutual consent of both sides to the exchange. So common and familiar is the use of this mutual consent rule that economists take it for granted."); RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981) (stating that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

[156] Bar-Gill & Bebchuk, *supra* note 155, at 376.

[157] *Janus*, 138 S. Ct. at 2466–67.

[158] *Id.* at 2464 (alteration in original).

[159] *Id.* (quoting *A Bill for Establishing Religious Freedom*, *in* 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed. 1950)); *see also* 2 THE WRITINGS OF JAMES MADISON 186 (G. Hunt ed. 1901) ("Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?").

[160] *Janus*, 138 S. Ct. at 2464 (citing Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 310–11 (2012)); *see also id.* at 2469 (citing *Knox*, 567 U.S. at 311).

[161] *Id.* at 2465; Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977), *overruled by Janus*, 138 S. Ct. at 2486.

[162] *Janus*, 138 S. Ct. at 2465.

requires forced fees. The reason is simple: unions can act as exclusive representatives without forced fees.

Indeed, *Janus* showed unions can wield exclusive representation power without forcing nonmembers to pay for that privilege. This is especially true given the "tremendous" benefits that power confers, as noted above.[163] Exclusive representation merely defines *who* represents the bargaining unit. So exclusive representation does not logically require compelled fees.

The Supreme Court also showed that *Abood*'s labor-peace argument fails in practice. Unions exclusively represent millions of employees without compelled fees.[164] For example, unions represent federal employees even though federal law prohibits forced union fees. In fact, unions regularly compete for that privilege.[165] The same is true in the private sector. When the Court decided *Janus*, twenty-eight states had Right to Work laws prohibiting forced union fees.[166] Yet unions represented—and continue to represent—employees in Right to Work states. Forced fees are therefore unneeded for exclusive representation.

Janus likewise rejected the argument that forced fees are needed to avoid discord between union members who pay for representation and nonmembers who do not. Millions of employees in Right to Work states and in the federal government have no duty to fund their union—and many do not. Yet these workplaces are not embroiled in labor conflict.[167]

So too the Court noted that "*Abood* cited no evidence" for "the pandemonium it imagined would result if agency fees were not allowed."[168] Nor did unions provide any such evidence in *Janus*.[169] In the end, *Janus* revealed that the rationale is little more than baseless speculation that union members will misbehave if nonmembers do not pay up. After reviewing the evidence, the Court determined "it is now clear that *Abood*'s fears were unfounded."[170]

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[163] *Id.* at 2467.

[164] *Id.* at 2466.

[165] *See id.*; *see also* Harris v. Quinn, 573 U.S. 616, 649 (2014) (noting federal employees may elect a union, but federal law prohibits forced union fees).

[166] 138 S. Ct. at 2466.

[167] *See id.* (describing the federal employment experience and the associated "labor peace").

[168] *Id.* at 2465.

[169] *See id.* at 2465–66, 2469 ("Implicitly acknowledging the weakness of *Abood*'s own reasoning, proponents of agency fees have come forward with alternative justifications for the decision . . . .").

[170] *Id.* at 2465.

In fact, the rationale never made much sense. Despite the supposedly critical labor-peace interest that forced fees serve, no federal law mandates forced fees—or collective bargaining for that matter.[171] Federal law, in contrast, exempts employers who do not agree to forced fees and states, under the NLRA, that prohibit them.[172] When they are permitted, forced fees are left to employers and unions to negotiate—if employees elect a union to represent them.[173] Thus, forced fees depend on preferences and agreements that have little if any connection to labor peace.

For these reasons, the Supreme Court in *Janus* overruled *Abood* and held that public sector employees need not pay forced union fees.[174] Despite the dissent's warning that the ruling would "have large-scale consequences," it has not caused discord or unrest; nor has *Janus* undermined collective bargaining.[175] All in all, *Janus* freed roughly seven million employees without incident.[176] After *Janus*, there is no sound argument that compelled union fees are required for labor peace. In short, free-rider and labor-peace concerns are no longer viable policy rationales for forced fees.

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[171] *See id.* at 2466 (noting federal and state carveouts undermine the labor-peace rationale); Harris v. Quinn, 573 U.S. 616, 649–50 (2014) (stating that the Illinois scheme undermines the labor-peace rationale).

[172] 29 U.S.C. § 164(b).

[173] *Id.* § 158(a)(3).

[174] *Janus*, 138 S. Ct. at 2486 ("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.").

[175] *Id.* at 2487 (Kagan, J., dissenting).

[176] Charles Lane, Opinion, *That Time Alito Overturned a Long-Standing Precedent and – Crickets*, WASH. POST (May 11, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/05/11/alito-supreme-court-decision-abortion-union-dues/ (noting "research suggests the pre-*Janus* status quo remains remarkably unchanged"); DANIEL DISALVO, BY THE NUMBERS: PUBLIC UNIONS' MONEY AND MEMBERS SINCE *JANUS V. AFSCME 2* (Apr. 2022), https://media4.manhattan-institute.org/sites/default/files/disalvo-public-unions-money-members-since-janus-v-afscme.pdf ("[T]he *Janus* decision has so far had a limited impact on public-union membership and money and has not led to large-scale consequences."); Ian Kullgren & Aaron Kessler, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, BLOOMBERG L. (June 26, 2020, 6:15 AM), https://news.bloomberglaw.com/daily-labor-report/unions-fend-off-membership-exodus-in-2-years-since-janus-ruling (finding five out of eight major unions experienced net gains in members and fee payers two years after *Janus*); Rebecca Rainey & Ian Kullgren, *1 Year After Janus, Unions Are Flush*, POLITICO (May 17, 2019, 12:00 PM), https://www.politico.com/story/2019/05/17/janus-unions-employment-1447266 (noting public sector unions ended up "with more money and in most cases with more members" one year after *Janus*).

PART III: FORCED CHARITY PAYMENTS LACK JUSTIFICATION

Janus repudiated the free-rider and labor-peace rationales, which support forced charity payments. The Ninth Circuit in *Yott* relied on these rationales from *Hanson* and *Street*—and later *Abood*.[177] If the Ninth Circuit replaced the reasoning from these cases with the reasoning from *Janus*, it would have reached the opposite result: Yott need not pay *any* forced union fees.

A. Janus*'s reasoning applies to forced fees under Title VII.*

Unions and employers who refuse to accommodate religious objectors violate Title VII.[178] The reason is that compelled fee requirements discriminate against employees with religious beliefs that forbid union support. And so Title VII requires unions and employers to accommodate these employees or show why they cannot.[179] Forced payment to charity is *not* a reasonable accommodation post-*Janus*.

1. *Janus* applies because forced charity payments are based on labor law.

Janus and its reasoning apply for three reasons. First, precedent dictates that *Janus* applies. Courts must apply *Janus* just as they applied labor law rationales and cases to justify forced charity payments.

Yott applied the free-rider and labor-peace rationales from *Hanson*, *Street*, and *Abood* to require forced charity payments.[180] And, as in *Yott*, courts upheld voluntary charity payments under the same rationales.[181] In other words, courts relied on labor law rationales—interpreted by constitutional, labor law cases—to allow or require payment to charity. While some courts reached different conclusions, these courts all applied the same rationales under then-accepted labor law precedents.[182]

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[177] *See generally Yott IV*, 602 F.2d 904, 909 (9th Cir. 1979) (referencing the "free-rider" rationale); Ry. Emps.' Dep't v. Hanson, 351 U.S. 225, 234 (1956) (discussing "industrial peace" as an objective of commerce); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 761 (1961) (examining the "free rider" rationale).

[178] Title VII § 701(j), 42 U.S.C. § 2000e(j).

[179] *Id.*

[180] *See supra* Sections I.A.1, I.C.

[181] *See supra* Section I.B.2.

[182] *See supra* Sections I.B.2, I.C.

Janus applies in the same way: it evaluates the forced fee rationales for payment to charity. In fact, courts cannot rely on the free-rider and labor-peace rationales without applying *Janus*. The rationales for forced fees do not exist in a vacuum. Their existence—and particularly their validity—depends on constitutional, labor law precedents.[183] *Janus* simply updates labor law's input in these cases; it does not alter labor law's involvement.

Though some might argue that *Janus* is inapplicable because it is a constitutional decision, that argument contradicts precedent.[184] Religious objector cases have accepted that labor law rationales, and thus labor law precedents, supply the justification for payment to charity.[185] There is no way around it.

Precedent, therefore, requires courts to apply *Janus*'s reasoning and reject the rationales for payment to charity. Even if courts refuse, the result is the same: no justification exists for payment to charity. Because charity payments depend on labor law, courts cannot reject labor law precedents, or disregard labor law, without eliminating the precedents and rationales for payment to charity. In sum, *Janus*'s reasoning applies based on precedent; courts cannot reject or ignore *Janus* without also undermining forced payment to charity.

2. *Janus* applies because forced payments to charity involve parallel facts and arguments.

Janus's reasoning equally applies to religious objectors. To be sure, *Janus* applied constitutional scrutiny to the rationales for forced fees and held the rationales fail under the First Amendment. But the Court's arguments are just as true under Title VII.

The Court rejected the rationales for forced fees for two *factual* reasons. First, *Janus* found that unions *do* receive compensation for representing nonmembers, so unions do not represent nonmembers for free.[186] And second, the Court found that unions represent employees who do not pay forced fees without labor unrest. So forced fees are unneeded for labor peace.[187] The facts are the same under Title VII. They do not depend on the legal theory.

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[183] *See supra* Section I.A.2.

[184] *See supra* Sections I.B.2, I.C.

[185] *See supra* Sections I.B.2, I.C.

[186] 138 S. Ct. 2448, 2467 (2018).

[187] *Id.* at 2466.

Janus held that these facts refute the free-rider and labor-peace rationales. At a minimum, this holding is relevant and persuasive authority for a court considering whether there is any basis for forced union fees. Take the parallel between criminal and civil law for example. While criminal and civil law have different rules and burdens, factual findings in a criminal case are also relevant in a related civil case. In fact, a court may consider them conclusive.[188] The Court's findings in *Janus* apply the same way.

Janus's legal arguments also generally apply to religious objectors. The Court gave two. The Court showed, first, that nonmembers need not pay for union benefits under standard legal principles.[189] The Court applied the standard contract rule that exchange requires mutual consent.[190] While the Court focused on speech, at bottom, it rejected forced economic exchange. Speech aside, sellers cannot force individuals to buy goods and services. This is no less true under Title VII.

Janus also rejected the free-rider rationale based on compelled speech concerns.[191] Even so, these concerns parallel Title VII. The Court in *Janus* explained that compelled speech coerces individuals to betray their convictions and "endorse ideas they find objectionable."[192] While forced union fees coerce all nonmembers, religious objectors experience acute coercion. Union fees not only inflict temporal costs but also inflict eternal and spiritual costs for religious objectors. So, if anything, the coercion for religious objectors is greater. Congress passed—and amended—Title VII to prevent such coercion.[193] As the Fifth and Seventh Circuits observed: "At the risk of belaboring the obvious, Title VII aimed to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices."[194]

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[188] *E.g.*, Bowen *ex rel.* Doe v. Arnold, 502 S.W.3d 102, 116 (Tenn. 2016).

[189] *Janus*, 138 S. Ct. at 2466–67.

[190] RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). 17 C.J.S. *Contracts* § 5, Westlaw CJS CONTRACTS § 5 (database updated Mar. 2023) ("The fundamental tenet of modern contract law is freedom of contract.").

[191] 138 S. Ct. at 2466–67.

[192] *Id.* at 2464.

[193] Congress considered religion a characteristic that is at least "core to an individual's sense of self." Kaminer, *supra* note 67, at 116–17. It amended Title VII with that view in mind to prevent unions and employers from compelling individuals to change or compromise their religion. *Id.*; *see also* Engle, *supra* note 64, at 369–72, 388 (agreeing Congress intended to prevent religious coercion).

[194] Sambrano v. United Airlines, Inc., 19 F.4th 839, 842 (5th Cir. 2021) (Ho, J., dissenting) (quoting Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 456 (7th Cir. 2013)).

Courts should therefore prevent union coercion under Title VII, just as *Janus* did under the First Amendment. Simply put, concerns about coercion equally apply to religious objectors.

In sum, *Janus*'s reasons for rejecting the free-rider and labor-peace rationales also apply to religious objectors. Further, *Janus* is the chief precedent that evaluates the rationales for forced fees and weighs them against individual rights. *Janus* illustrates that union interests do not outweigh all individual rights. And, in fact, union interests do not require forced fees at all.

3. *Janus* applies because Title VII provides equal or greater protection than the First Amendment.

Title VII protects religion to an equal or greater extent than the First Amendment protects speech and association. Title VII enforces constitutional rights.[195] As the Supreme Court recognized, Congress passed and amended Title VII under its power from the Fourteenth Amendment to enforce constitutional rights.[196] Congress expressed when it amended Title VII that the statute embodies constitutional principles and fulfills Congress's duty to enforce constitutional rights.[197]

In particular, Title VII enforces the Constitution's Equal Protection Clause.[198] The Equal Protection Clause prohibits government employers

[195] Fitzpatrick v. Bitzer, 427 U.S. 445, 447–48 (1976) ("Congress, acting under § 5 of the Fourteenth Amendment" passed Title VII under its power to enforce constitutional rights); Okruhlik v. Univ. of Ark. *ex rel.* May, 255 F.3d 615, 622 (8th Cir. 2001) (same and citing other circuits).

[196] City of Rome v. United States, 446 U.S. 156, 179 (1980) (agreeing with *Fitzpatrick*'s holding that "Title VII was an appropriate method of enforcing the Fourteenth Amendment"); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 367 (1978) (Brennan, J., concurring in part, dissenting in part) (same). *But see* Johnson v. Transp. Agency, 480 U.S. 616, 632 (1987) (stating that Title VII could provide more protection for affirmative action); United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 & n.6 (1979) (same).

[197] Hammon v. Barry, 826 F.2d 73, 83 (D.C. Cir. 1987) (Silberman, J., concurring).

[198] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (affirming that Congress enacted Title VII to achieve Fourteenth Amendment equal opportunity objectives); Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979) ("Title VII is unquestionably appropriate legislation to enforce the equal protection clause."); *In re* Emp. Discrimination Litig. Against Ala., 198 F.3d 1305, 1324 (11th Cir. 1999) (same). *But see* Washington v. Davis, 426 U.S. 229, 239 (1976) (explaining that Title VII protects more than Equal Protection Clause objectives, such as prohibiting disparate impact); Wilcox v. Lyons, 970 F.3d 452, 463–64 (4th Cir. 2020) (stating that Title VII protects Equal Protection Clause objectives while also prohibiting retaliation).

from discriminating against religion.[199] Title VII extends this rule to unions and private employers.[200] As a result, Title VII disparate treatment claims often apply the same framework as equal protection claims under Section 1983.[201] The Sixth Circuit, for instance, wrote that "[t]he elements for establishing an Equal Protection claim under § 1983 and . . . Title VII disparate treatment claim are the same."[202] Thus, there is little difference in scope between Title VII and the Equal Protection Clause for public workplace discrimination.

Title VII also enforces the Free Exercise Clause.[203] As the Sixth Circuit, for example, wrote: Title VII's accommodation requirement extends constitutional protections to private employees.[204] The Fifth Circuit has repeatedly said the same.[205] In essence, Title VII furthers the free exercise of

[199] *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (listing religion as a "suspect distinction" under the Equal Protection Clause).

[200] Title VII § 703(a)–(c), 42 U.S.C. § 2000e-2(a)–(c).

[201] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 n.1 (1993) (affirming that the same elements apply to disparate treatment claims under Section 1983 and Title VII); *see also* Deleon v. Kalamazoo Cnty. Rd. Comm'n, 739 F.3d 914, 917–18 (6th Cir. 2014) (same); Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008) (same); Feingold v. New York, 366 F.3d 138, 159 (2d Cir. 2004) (same); Helland v. S. Bend Cmty. Sch. Corp., 93 F.3d 327, 329 (7th Cir. 1996) (same).

[202] *Deleon*, 739 F.3d at 917–18.

[203] Holmes v. Marion Cnty. Off. of Fam. & Child., 184 F. Supp. 2d 828, 838 (S.D. Ind. 2002), *vacated*, 334 F.3d 618 (7th Cir. 2003) ("Congress validly exercised its authority under § 5 of the Fourteenth Amendment [because] Title VII's religious accommodation requirement is congruent and proportional to the Free Exercise Clause . . . ."); *see also* Sughrim v. New York, 503 F. Supp. 3d 68, 94 (S.D.N.Y. 2020) (accepting Title VII's religious accommodation provision is a valid exercise of Congress's authority to enforce constitutional rights and rejecting the vacated panel's conclusion in *Holmes*).

[204] EEOC v. Univ. of Detroit, 904 F.2d 331, 334 (6th Cir. 1990); *see also* Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1021 (E.D. Wis. 2002) ("[T]he amendment was intended to make the Title VII religious discrimination analysis the same as the analysis of claims under the Free Exercise Clause, thereby providing private and public employees with the same rights to be free from religious discrimination."); Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1289 (D. Vt. 1974) (same).

[205] Cooper v. Gen. Dynamics, 533 F.2d 163, 168 n.9 (5th Cir. 1976) (quoting Riley v. Bendix Corp., 464 F.2d 1113, 1116–17 (5th Cir. 1972)).

religion in the private sector.[206] As the Second Circuit put it, Title VII protects religion from "the same forms of discrimination" as the Constitution.[207]

In a recent opinion, the Fifth Circuit affirmed the relationship between Title VII and the First Amendment.[208] In *Sambrano*, the Fifth Circuit held that plaintiffs suffered irreparable injury on the premise that Title VII "protect[s] the same rights . . . as the Constitution."[209] The plaintiffs sought relief from their employer's vaccine mandate that required them to choose between their religious convictions and employment benefits.[210] The court applied a familiar rule: First Amendment deprivations—like prohibiting the right to freely exercise religion—are an irreparable injury.[211] Because the employer coerced the plaintiffs to violate their religious convictions, the court held that they suffered irreparable harm under Title VII.[212] The Fifth Circuit did not agree that Title VII changes the First Amendment rule.[213]

These findings reflect Congress's intent. Senator Jennings Randolph, who sponsored Title VII's accommodation amendment, stated that religious freedom is a fundamental right.[214] Although Congress "intended [Title VII] to protect the same rights in private employment as the Constitution protects," courts failed to require religious accommodation.[215] So Senator Randolph proposed an amendment to clarify that the term religion under Title VII incorporates "the same concepts as are included in the first amendment."[216] Congress agreed and almost unanimously adopted his amendment, Section 701(j).[217]

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[206] Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 455 (7th Cir. 1981); McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055, 1063 (W.D. Mich. 1981), *aff'd*, 696 F.2d 34 (6th Cir. 1982); Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027, 1029 (D. Or. 1979), *aff'd*, 648 F.2d 1239 (9th Cir. 1981).

[207] Genas v. N.Y. Dep't of Corr. Servs., 75 F.3d 825, 832 (2d Cir. 1996).

[208] Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610 (5th Cir. Feb. 17, 2022).

[209] *Id.* at *8 (quoting *Riley*, 464 F.2d at 1116).

[210] *Id.* at *2.

[211] *Id.* at *8.

[212] *Id.* at *8–9.

[213] *Id.* at *8.

[214] 118 CONG. REC. S2515, S705 (daily ed. Jan. 21, 1972) (statement of Sen. Jennings Randolph).

[215] *Id.*

[216] *Id.*

[217] *Id.*

This evidence matches the conceptual link between Title VII and the Free Exercise Clause. Like Title VII, the Free Exercise Clause (at least) protects believers from unequal treatment.[218] It requires, by extension, a compelling reason when government officials can but refuse to accommodate religion.[219] And it requires a compelling reason when officials grant other accommodation requests but deny religious ones.[220] The reason is that discretion requires individual value judgments. When officials refuse to accommodate—and in effect devalue religion—the Constitution requires the government to give an account.[221] So if the government has an individualized exemption system, it cannot deny religious exemptions "without compelling reason."[222] Discretion, in other words, requires government officials to accommodate religion or give a compelling reason for their refusal.

So too Title VII prohibits religious discrimination and requires accommodation.[223] Just as government officials who *can* accommodate must under the Free Exercise Clause, Title VII requires unions and employers to accommodate religion when they can "without undue hardship on the conduct of the employer's business."[224] If a decision maker refuses to accommodate, both the Free Exercise Clause and Title VII require justification.[225] A government official who refuses must have a compelling reason;[226] a union or employer must show that it could not accommodate

[218] *See* Emp. Div. v. Smith, 494 U.S. 872, 877 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), codified at 42 U.S.C. § 2000bb. *Cf.* Blaine L. Hutchison, *Revisiting* Employment Division v. Smith, 91 U. CIN. L. REV. 396, 398-99 (2022) (arguing that the Free Exercise Clause prohibits more than unequal treatment). The conceptual link is even stronger if the Court overturns *Smith* and directly requires free exercise exemptions.

[219] *Smith*, 494 U.S. at 884; *see also* Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021) (holding that a system that permits officials to grant individual exemptions and consider individual circumstances triggers strict scrutiny); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537, 546 (1993) (affirming that strict scrutiny is required when officials evaluate the reasons for conduct).

[220] *Smith*, 494 U.S. at 884; *see, e.g.*, *Lukumi*, 508 U.S. at 532, 535–37, 546 (holding that ordinances failed strict scrutiny because they allowed secular, but not religious animal killing).

[221] *See Fulton*, 141 S. Ct. at 1877.

[222] *Id.* (quoting *Smith*, 494 U.S. at 884).

[223] Title VII § 701(j), 42 U.S.C. § 2000e(j).

[224] *Id.*

[225] *See, e.g.*, Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979) ("Title VII is unquestionably appropriate legislation to enforce the equal protection clause.").

[226] *Fulton*, 141 S. Ct. at 1877.

without undue hardship.[227] The difference is that Title VII recognizes that unions and employers always have discretion and power to accommodate. So Title VII simply requires accommodation; it does not make defendants first show that a union or employer exercised discretion. Title VII merely treats unions and employers as government officials who can accommodate religion.

Based on this connection, two religious objector cases directly applied the Free Exercise Clause under Title VII.[228] A federal district court and state trial court dismissed religious objector's Title VII claims based on free exercise precedent.[229] They reasoned that *Hanson* and *Street* rejected (or ignored) free speech and association concerns.[230] Because the Free Speech and the Free Exercise Clauses apply the same standard, both courts held that *Hanson* and *Street* equally discarded free exercise concerns.[231] They concluded that Title VII claims fail by parity of reasoning because Title VII applies the same free exercise standard. [232]

Though some might argue that the Free Exercise Clause requires neutral treatment under *Employment Division v. Smith* while Title VII requires favored treatment, both require accommodation under antidiscrimination rules.[233] Both recognize that refusal to accommodate often discriminates against religion.[234] While some policies appear neutral, Title VII and the Free Exercise Clause recognize they are not. A law that, in effect, only prohibits

[227] Title VII § 701(j), 42 U.S.C. § 2000e(j).

[228] McDaniel v. Essex Int'l, Inc., No. K74-288, 1976 WL 13380, at *2 (W.D. Mich. Jan. 13, 1976), *rev'd*, 571 F.2d 338 (6th Cir. 1978) (stating the accommodation required by Title VII "is the same as that required under the First Amendment."); Wondzell v. Alaska Wood Prods., Inc., No. 74-422, 1975 WL 3217, at *6 (Alaska Super. Ct. Oct. 15, 1975), *rev'd*, 601 P.2d 584 (Alaska 1979) (dismissing a Title VII equivalent state law claim by applying *Hanson* and *Street* and relying on free exercise cases in which religious claimants lost under strict scrutiny). *See also* Wondzell v. Alaska Wood Prods., Inc., 583 P.2d 860, 862 (Alaska 1978), *rev'd on reh'g*, 601 P.2d 584 (Alaska 1979) (treating separate Title VII and free exercise claims as one and upholding forced union fees).

[229] *See McDaniel*, 1976 WL 13380, at *1–3; *Wondzell,* 1975 WL 3217, at *6.

[230] *McDaniel*, 1976 WL 13380, at *2.

[231] *Id.*

[232] *Id.*; *Wondzell*, 1975 WL 3217, at *6.

[233] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771 (2015) (explaining that failure to accommodate is disparate treatment under Title VII); *see also* Cameron & Hutchison, *supra* note 67, at 482 (same); Emp. Div. v. Smith, 494 U.S. 872, 877, 884 (1990) (forbidding religious discrimination and requiring accommodation from rules that are not neutral or generally applicable).

[234] *E.g.*, *Abercrombie*, 575 U.S. at 770 (refusing to hire a Muslim applicant because she wore a religious headscarf).

Santeria followers from killing chickens is not neutral.[235] Nor is a rule that only allows religious beliefs that permit union support. For that reason, accommodation claims fall under disparate treatment in Title VII—like free exercise claims post-*Smith*.

Even after *Smith*, Title VII cases often apply free exercise precedents.[236] Courts have accepted that the term religion is the same under Title VII and the Free Exercise Clause.[237] And so Title VII cases apply free exercise precedents to define religion and evaluate sincerity.[238] Thus, courts have accepted, at a minimum, that Title VII and the First Amendment are analogous.

What is more, Title VII may provide greater protection in some cases than the First Amendment. First, strict scrutiny only protects First Amendment rights with a balancing test that the government may pass.[239] Title VII, on the other hand, does not allow balancing in non-accommodation cases involving religious discrimination.[240] Second, courts have accommodated religious objectors under Title VII but refused to do the same under the Free Exercise Clause.[241] Appeals courts all rejected free exercise claims even when religious objectors asked to pay to charity.[242] They held that the free-rider and labor-peace rationales are compelling state interests that outweigh the constitutional right to exercise religion freely.[243] Yet the same courts held

[235] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535–36 (1993).

[236] *E.g.*, Reed v. Great Lakes Cos., 330 F.3d 931, 933–34 (7th Cir. 2003) (holding that Title VII prohibits antipathy toward atheists based on "analogy to cases under the free-exercise clause").

[237] Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481–82 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986) ("[T]he standard for sincerity under Title VII [i]s that used in free exercise cases."); *see also* EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1116–18 (10th Cir. 2013), *rev'd on other grounds*, 575 U.S. 768 (2015) (same); EEOC v. Unión Independiente De La Autoridad De Acueductos y Alcantarillados de P.R., 279 F.3d 49, 55–56 (1st Cir. 2002) (same); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (same).

[238] EEOC v. United Health Programs of Am., Inc., 213 F. Supp. 3d 377, 393–94 (E.D.N.Y. 2016) ("Delineating the meaning of 'religion' for purposes of Title VII often requires resort to First Amendment cases . . . ." (footnote omitted)).

[239] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10 (1990) (noting many cases in which religion lost under strict scrutiny).

[240] Title VII does not permit discrimination: it does not weigh reasons for discriminatory conduct. Rather, defenses show that an employer did not discriminate. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

[241] *See supra* Section III.A.3.

[242] *See supra* Section I.A.2.

[243] Harris v. Quinn, 573 U.S. 616, 634 (2014).

that these compelling state interests were insufficient under Title VII, and so unions must accommodate religious objectors.[244]

In short, there is sufficient evidence to conclude that Title VII enforces constitutional rights and provides at least the same protection to religious objectors as the First Amendment.

B. The free-rider rationale does not justify forced charity.

The Supreme Court in *Janus* showed that the free-rider rationale does not justify forced union fees.[245] *Yott* emphasizes the rationale's absurdity. Union representation did not benefit Yott—the union forced Yott's employer to fire him for his faith.[246] Yott considered the union and union bargaining sinful.[247] Religious objectors, like Yott, do not want a sinful organization to represent them.[248] And given the cruel choice, many would rather face employment capital punishment than support such an organization.

What is more, the rationale makes even less sense applied to forced charity payments. The free-rider rationale is based on compensating the union for the benefits it supposedly provides and the costs it incurs.[249] Unions, however, receive no compensation from payments to charity.[250] As unions and trial courts first pointed out, charity payments do not go to the union, nor do they compensate the union for its work.[251] Put differently, religious objectors who make payments to charity are free riders.[252] Thus, the free-rider rationale is a non sequitur: it does not support forced payment to charity.

Even if it did, the rationale conflicts with Title VII. The statute requires religious accommodation and permits only one exception: undue hardship on

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[244] *See supra* Section I.B.2.

[245] *See supra* Part II.

[246] *Yott IV*, 602 F.2d 904, 906 (9th Cir. 1979).

[247] *Id.*

[248] By definition religious objectors have religious conflicts with union membership and support. *See, e.g.*, *id.*

[249] Harris v. Quinn, 573 U.S. 616, 634 (2014).

[250] Anderson v. Gen. Dynamics Convair Aerospace Div., 430 F. Supp. 418, 422 (S.D. Cal. 1977), *rev'd*, 589 F.2d 397 (9th Cir. 1978).

[251] *See supra* Section I.B.2. *E.g.*, *Anderson*, 430 F. Supp. at 422 (Payment to charity "deprives the Union of money needed in order to negotiate on behalf of employees and to which it is entitled for services rendered." It "does not eliminate 'free riders.'").

[252] *Anderson*, 430 F. Supp. at 422.

the employer's business.[253] There is no union or free-rider exception to Title VII. So there is no basis to import that labor rationale. Courts have no power to "add words to the law to produce what is thought to be a desirable result."[254] The free-rider charge—that religious objectors receive something for nothing—is irrelevant. It does not show undue hardship.

Indeed, Title VII does not condition civil rights on payment, nor does it require union support. To the contrary, Title VII prohibits civil rights fees.[255] A fee charging only immigrants or African Americans is illegal—even if it covers losses because a business does not discriminate.[256] The statute forbids adverse action based on protected class.[257] Thus, unions and employers may not impose fees based on employees' religious beliefs. There is no free-rider discrimination defense under Title VII.

C. The labor-peace rationale does not justify forced charity.

After *Janus*, the labor-peace rationale cannot justify forced payments to charity. *Janus* established that employees who do not pay union fees do not cause labor unrest.[258] There is no reason why religious objectors *alone* produce unrest and must pay to charity. And there is even less reason why a *single* religious objector, like Yott, must pay after *Janus* exempted *all* public employees.

Moreover, the labor-peace rationale is even weaker as a justification for payment to charity. If labor peace does not require employees to pay forced fees directly to a union, as *Janus* and other Title VII cases held,[259] then it cannot require employees to pay forced fees to a third-party charity. Payment to charity does not compensate the union so it does not support exclusive representation.[260] Nor does it resolve the supposed tension between those who fund the union and those who do not. The union must theoretically charge coworkers *more* to cover the cost of representing religious objectors

[253] Title VII § 701(j), 42 U.S.C. § 2000e(j).

[254] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 774 (2015).

[255] *See* Title VII § 703, 42 U.S.C. § 2000e-2.

[256] *Id.*

[257] *Id.*

[258] *See supra* Section II.C.

[259] *See supra* Sections I.B.2, II.C.

[260] *E.g.*, Me. Hum. Rts. Comm'n *ex rel.* Michaud v. UPIU Loc. 1361, No. 75-83, 1975 WL 22202, at *1 (Me. Super. Ct. Dec. 3, 1975) (explaining that payment to charity "cannot compensate the union for [its] efforts in bargaining for the unit"). *See also* cases cited *supra* notes 76–87 (rejecting payment to charity because it does not pay for union collective-bargaining work).

and recoup the fees paid to charity. Or the union must forgo these fees, which it could otherwise use to further its work.[261] Either way, the labor-peace rationale does not support payment to charity.

At bottom, nonpayment does not affect the union or coworkers because religious objectors do not fund the union.[262] It does not affect union representation, revenue, or bargaining. Nor does it affect coworkers' compensation, schedule, or work.[263] Nonpayment does not cost *a cent*. At most, it takes away the satisfaction that union militants derive from knowing that religious objectors pay for their beliefs. But for everyone else—except the objector—there is no difference between charity payment and nonpayment. Payment to charity simply has nothing to do with labor peace.

The labor-peace rationale fails all the more because it contradicts Title VII. Title VII protects employees from those who prefer discrimination.[264] So it often protects (unpopular) minorities from the majority. The labor-peace rationale, in contrast, sanctions the majority's urge to punish minorities. Under Title VII, it considers whether the majority prefers to retaliate or accommodate religious objectors who do not support the union.[265] Or put another way, it asks whether the majority tolerates religious beliefs that forbid union support. In *Yott*, the Ninth Circuit credited "substantial animosity" toward religious objectors, like Yott, as a valid reason to fire Yott for following his faith.[266]

In essence, the labor-peace rationale creates a heckler's veto. It counts coworkers' unwillingness to accept and accommodate religious employees as a defense rather than a defect. And it means that religious objectors' civil

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[261] *E.g.*, Wondzell v. Alaska Wood Prods., Inc., 583 P.2d 860, 866 (Alaska 1978), *rev'd on reh'g*, 601 P.2d 584 (Alaska 1979) (Payment to charity does "not benefit the union"; it "would decrease the union's revenues to service a bargaining unit unchanged in size.").

[262] McDaniel v. Essex Int'l, Inc., 696 F.2d 34, 37–38 (6th Cir. 1982) ("There was no evidence that any other employee would be adversely affected if Ms. McDaniel had been permitted to retain her job without joining the union or paying union dues.").

[263] *Id.*; *see also* cases cited *supra* Section I.B.2 and accompanying text (noting that courts rejected the argument that costs to unions and coworkers in lost and increased fees entail more than *de minimis* cost).

[264] That is the point. Government protection is unneeded when workplaces favor nondiscrimination and protect minorities. Congress required accommodation under Title VII because workplaces (and courts) disfavored accommodation. 118 CONG. REC. S2515, S705 (daily ed. Jan. 21, 1972) (statement of Sen. Jennings Randolph). *See also* Engle, *supra* note 64, at 362–71 (discussing the reasons behind Section 701(j)).

[265] *See, e.g.*, *Yott IV*, 602 F.2d 904, 909 (9th Cir. 1979).

[266] *Id.*

rights hinge on coworker approval. Title VII does the opposite. It prohibits discrimination even if workplaces favor it. In fact, Title VII exists *because* some workplaces favor discrimination.[267] The statute is otherwise unneeded. In effect, the labor-peace rationale undermines Title VII. A hostile work environment is not a defense.[268]

D. Forced charity payments violate Title VII.

Because the free-rider and labor-peace rationales do not support payment to charity, there is no legitimate basis for forced charity payments. This conclusion is sound even more so because the Supreme Court agreed that payment to charity does not serve any valid union interest.

In *Lehnert v. Ferris Faculty Ass'n*, the Supreme Court affirmed that unions may not charge nonmembers for charitable donations.[269] The Court in *Lehnert* examined which expenses a union may lawfully charge to nonmembers.[270] The Court summed up its precedent with two pertinent rules: "chargeable activities must (1) be 'germane' to collective-bargaining activity; [and] (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders.'"[271] Based on these rules, the Court held that a local union may charge nonmembers for payments made to a parent union.[272] But contributions to a parent union that exceed the local's obligation are *not* chargeable.[273] The Court explained that "a *charitable donation* [is] *not* . . . chargeable."[274] To be germane to collective bargaining, charges must relate to services that benefit the bargaining unit.[275] Charitable

[267] Congress amended Title VII and required accommodation *because* some employers fired and refused to hire religious individuals. 118 CONG. REC. S2515, S705 (daily ed. Jan. 21, 1972) (statement of Sen. Jennings Randolph).

[268] Title VII Section 703 prohibits harassment and covers environmental claims. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998). Thus, a hostile or abusive environment violates Title VII. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). This prohibition includes coworker harassment. *E.g.*, Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 332 (6th Cir. 2008).

[269] 500 U.S. 507, 524 (1991).

[270] *Id.* at 511–13.

[271] *Id.* at 519.

[272] *Id.* at 524.

[273] *Id.*

[274] *Id.*

[275] *Id.* at 535.

donations do not. Thus, the Court stated that unions may *not* force nonmembers to pay for charity.[276]

Simply put, payment to charity does not serve any valid purpose. Payment to charity simply *punishes* religious objectors—contrary to Title VII. The practice inflicts (financial) harm to deter others and prevent favorable treatment. Neither motive permits discrimination under Title VII.

Title VII forbids adverse action based on protected class.[277] Unions and employers may not create policies to harm a protected class—such as employees who have religious beliefs that prevent union support.[278] Deterrence is no defense. Deterrence is a reason *for* punishment.[279] It is no response that an employer punished a protected class to avoid more protected class members. If anything, that is worse. Employers may not punish women to avoid more women. Nor does Title VII allow unions and employers to punish religious objectors to avoid more religious objectors. Title VII forbids protected class punishment.[280]

On that basis, the Supreme Court also affirmed that unions and employers may not discriminate when they offer religious accommodation.[281] Title VII not only prohibits adverse action based on protected class, but it also requires *reasonable* accommodation.[282] The Court explained that an accommodation that discriminates against religious beliefs or practices "is the antithesis of reasonableness."[283] In effect, it is no accommodation. Thus, it is no defense that payment to charity resolves objectors' religious conflict. A discriminatory accommodation violates Title VII.[284]

Consider payment to charity: what basis is there other than discrimination? Take its two parts: first, a union and employer must excuse a religious objector's contractual obligation to fund his or her union. Second, they must *create* a charity requirement. What basis is there to *add* any

[276] *Id.*

[277] Title VII § 703, 42 U.S.C. § 2000e-2.

[278] *Id.*

[279] "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." Hall v. Florida, 572 U.S. 701, 708 (2014) (alteration in original) (quoting Kennedy v. Louisiana, 554 U.S. 407, 420 (2008)).

[280] Title VII § 703, 42 U.S.C. § 2000e-2.

[281] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986).

[282] Title VII § 701(j), 42 U.S.C. § 2000e(j).

[283] *Philbrook*, 479 U.S. at 71.

[284] *Id.*

requirement? The requirement discriminates against religious objectors because it punishes them for exercising their faith.

Payment to charity is all the more discriminatory compared to other protected classes. The Americans with Disabilities Act, for example, requires employers to accommodate disabled employees—sometimes at significant cost.[285] Yet disabled individuals do not pay for accommodation, nor do they pay an accommodation penalty.[286] Indeed, no other protected class pays a civil rights fee.[287] A religious fee discriminates against religion and violates Title VII.

There is no Title VII exception to achieve so-called equal outcomes. Rather, the Supreme Court stated that Title VII requires "*favored treatment*" for religion.[288] In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court ruled that an employer violated Title VII because it refused to accommodate a Muslim applicant.[289] The company argued that it did not discriminate because it merely enforced a neutral no-headwear policy.[290] But the Court disagreed.[291] It judged that "Title VII does not demand mere neutrality" for "religious practices—that they be treated no worse than other practices."[292] Title VII "gives them favored treatment."[293] The Court explained that Title VII requires unions and employers to adjust otherwise neutral rules to accommodate employees' religion.[294]

Payment to charity contradicts *Abercrombie*. It is not favored treatment. Indeed, forced payment to charity is *adverse* treatment: it punishes religious objectors for following their faith. There is no other reason for it. Forced payment to charity is not otherwise neutral, like the no-headwear policy in

[285] 42 U.S.C. § 12112(b)(5)(A).

[286] *See generally* 42 U.S.C. § 12112(a)–(b) (providing that individuals with disabilities do not pay for accommodation).

[287] *See generally* 42 U.S.C. § 2000e-2; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise" when employers make employment and personnel decisions.).

[288] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015) (emphasis added) (explaining that accommodation requires more than religion-blindness; in essence, it contradicts *formal* neutrality); *see also* Engle, *supra* note 64, at 365 (explaining that accommodation is a deviation from formal neutrality).

[289] 575 U.S. at 770.

[290] *Id.* at 775.

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.*

Abercrombie. Payment to charity is a discriminatory practice *solely* intended to punish religious objectors.

By analogy, payment to charity is like a headwear tax on Muslim employees who believe they must cover their heads. Title VII, of course, forbids a Muslim tax—even if other employees who do not share the same religious beliefs may not wear headwear.[295] A faith tax gets accommodation backward.

Indeed, Congress amended Title VII to prevent employers from firing religious employees just as the statute protects other employees from discrimination.[296] Religious employees simply have different needs. The reason is that religion at its core involves belief *and* conduct in a way that other protected classes do not.[297] Put another way: no accommodation means that religious employees, like Yott, must choose between their job and their God. Accommodation simply allows these employees the same opportunity to earn a living as other employees who do not share the same religious beliefs.[298] For this reason, the Supreme Court elsewhere called accommodation "nothing more than . . . neutrality in the face of religious differences."[299]

Payment to charity contradicts accommodation. Accommodation does not align religious and nonreligious activity.[300] To the contrary, accommodation removes *religious* burdens that prevent individuals from practicing their faith—and keeping their job.[301] Accommodation does not

[295] *See* Title VII § 703, 42 U.S.C. § 2000e-2.

[296] 118 CONG. REC. S2515, S705 (daily ed. Jan. 21, 1972) (statement of Sen. Jennings Randolph). *See also* Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 456 (7th Cir. 2013) ("Title VII aimed to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices."); Kaminer, *supra* note 67, at 116–17 (same).

[297] Engle, *supra* note 64, at 357–59; Kaminer, *supra* note 67, at 116–17; *see also* Hutchison, *supra* note 218, at 414–15, 418–19 (comparing religion to other rights and showing how formal neutrality harms religion).

[298] As the United States expressed, accommodation simply "removes an artificial barrier to equal employment opportunity." Brief for the United States as Amicus Curiae at 21, Patterson v. Walgreen Co., 140 S. Ct. 685 (2020) (No. 18-349).

[299] Sherbert v. Verner, 374 U.S. 398, 409, 418 (1963).

[300] *E.g.*, Engle, *supra* note 64, at 358 ("Accommodation refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's . . . religion."); Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992) ("[Accommodation] merely removes obstacles to the exercise of a religious conviction . . . .").

[301] McConnell, *supra* note 300, at 686.

remove other burdens—much less *impose* religious burdens to attain supposedly equal outcomes. Simply put, there is no basis under accommodation to require payment to charity.

To be sure, Title VII does not always require a cost-free alternative. The Supreme Court, for example, agreed that unpaid leave is *sometimes* a reasonable accommodation.[302] But it clarified that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones."[303] In the same way, payment to charity is unreasonable because it punishes and discriminates against religious objectors. Payment to charity is like unpaid leave if employers and unions required religious objectors to take unpaid leave to offset unpaid fees. Payment to charity is an *added* penalty unrelated to accommodation.

In sum, forced payment to charity violates Title VII. Unions and employers may not punish religious objectors for their religious beliefs that prevent union support.

CONCLUSION

Religious objectors need not pay to charity. In *Janus*, the Supreme Court repudiated the free-rider and labor-peace rationales that support forced charity payments. Thus, there is no longer any basis to compel religious objectors to pay fees to charity.

At bottom, the forced fee rationales never supported forced charity or fit under Title VII. Charity payments do not compensate the union, so the free-rider rationale is inapt. And the labor-peace rationale is misguided for the same reason: donations to a third-party charity do not impact coworkers. So there is no valid reason to require payment to charity, nor is there any possible undue hardship that could result from nonpayment. Forced charity payments simply punish religious objectors for their faith and discriminate against religion—contrary to Title VII.

Janus shows the proper solution: nonpayment. Employees with religious beliefs that forbid union support face a cruel choice: they must either surrender their job or their faith. Nonpayment simply lifts these burdens that other employees do not face.

[302] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70–71 (1986).

[303] *Id.* at 71.

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Post-*Janus*, roughly ninety-six percent of workers can choose whether to fund a union.[304] Exempting religious objectors follows the standard policy for most employees and the normal remedy when the law forbids forced union fees. Most employees do not pay forced union fees. After *Janus*, religious objectors need not either. This is *Janus*'s solution for Title VII religious objectors.

[304] In the private sector, six percent of private-sector employees are unionized. This means that less than six percent of employees work under contracts that compel union fees since no public sector employees work under such contracts. That figure is even smaller because most states prohibit forced union fees. A realistic estimate is that less than four percent of all private-sector employees face compulsory union fees. News Release, Bureau of Lab. Stat., Union Members 2022 (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf.