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ESG, PUBLIC PENSIONS, AND COMPELLED SPEECH

*by: Mark R. Kubisch**

ABSTRACT

Investing based on Environmental, Social, and Governance ("ESG") principles has dramatically increased in recent years. Many institutional investors—including public pension funds funded by mandatory contributions from government employees—now incorporate ESG principles into their investment and engagement strategies even though certain aspects of ESG, such as investing to reduce carbon emissions, are politically controversial. Over this same period, courts have reaffirmed that the First Amendment protects individuals from being compelled to associate with or to subsidize the speech of third parties. Indeed, applying this compelled speech doctrine, the Supreme Court recently overruled a forty-year-old precedent that allowed states to force nonunion members to contribute to public unions engaged in collective bargaining on their behalf.

This Article provides the first in-depth discussion of how the Court's compelled speech doctrine might apply both in the wake of the Supreme Court's landmark decision in Janus v. AFSCME *and in light of the dramatic rise of ESG investing. In doing so, it explains how the Supreme Court's post-*Janus *compelled speech doctrine will likely render state mandates requiring employees to contribute to public pension funds that invest according to ESG principles unconstitutional. And this Article also identifies two potentially serious consequences of the unconstitutionality of such mandates that current scholarship does not address. First, application of the compelled speech doctrine to public pensions may cause state and local governments significant financial distress, given that state employees might be able to withdraw all contributions (not just future contributions) to the public pension funds even as many of those funds are substantially underfunded. Second, extending the compelled speech doctrine to ESG investing might further hamper efforts to increase retirement savings among those least likely to save for retirement by precluding auto-enrollment of employees in retirement programs that invest according to ESG principles. Finally, this Article sketches some possible approaches to addressing these issues before concluding.*

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I. INTRODUCTION

Investing based on Environmental, Social, and Governance ("ESG") principles has increased dramatically in recent years. Indeed, one financial services firm documented a nearly 50% increase in the number of ESG funds available to investors from 2019 to 2020 alone.[1] And that trend is likely to continue as Bloomberg Intelligence estimates that ESG assets are projected to exceed $50 trillion by 2025, representing more than a third of all projected global assets under management.[2]

This rise is not without controversy: While some ESG matters address prosaic structural questions of corporate governance, such as the independence of directors, other ESG matters, such as policies related

1. Aneesh Raghunandan & Shiva Rajgopal, *Do ESG Funds Make Stakeholder-Friendly Investments?*, 27 REV. ACCT. STUD. 822, 823 (2022), https://doi.org/10.1007/s11142-022-09693-1; *see* Keyur Patel, *ESG Investing Moves to the Mainstream*, 74 FIN. ANALYSTS J. 39, 39 (2018), https://doi.org/10.1007/s11142-022-09693-1 ("The number of companies worldwide that report environmental, social, and governance (ESG) data has grown exponentially over recent years, from fewer than 20 in the early 1990s to almost 9,000 in 2016.").

2. Press Release, Bloomberg, ESG Assets Rising to $50 Trillion Will Reshape $140.5 Trillion of Global AUM by 2025, Finds Bloomberg Intelligence (July 21, 2021), https://www.bloomberg.com/company/press/esg-assets-rising-to-50-trillion-will-reshape-140-5-trillion-of-global-aum-by-2025-finds-bloomberg-intelligence/ [https://perma.cc/ANG4-F8XC].

to climate change, are more controversial.[3] While some see ESG as a means for creating sustainable shareholder value,[4] others view ESG as a means for advancing contested values outside of the political process.[5] Even as this debate continues, public pensions funds—retirement systems run by state and local entities—have invested roughly $3 trillion according to ESG principles.[6]

At the same time that ESG investing has rapidly grown, recent Supreme Court and appellate court decisions have expanded the First Amendment's protection against compelled speech and association. Most prominently, in *Janus v. AFSCME*,[7] the Supreme Court overruled a four-decades-old precedent, *Abood v. Detroit Board of Education*,[8] and held that states could not require nonunion employees who opposed union speech and policies to contribute to public unions. In *Janus*, an Illinois state employee challenged a state statute that required him to pay an annual agency fee to AFSCME, the union for state employees, in lieu of membership dues.[9] The Supreme Court ultimately agreed with the employee that the statute was unconstitutional, reasoning that such a fee "violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[10]

Prior to *Janus*, some scholars raised concerns regarding the constitutionality of public pension funds under the First Amendment.[11] Yet

3. *See, e.g.*, *ESG Investing and Analysis*, CFA INST., https://www.cfainstitute.org/en/research/esg-investing#:~:text=ESG%20stands%20for%20Environmental%2C%20Social,material%20risks%20and%20growth%20opportunities [https://perma.cc/XQB8-Y38Z] ("ESG stands for Environmental, Social, and Governance. Investors are increasingly applying these non-financial factors as part of their analysis process to identify material risks and growth opportunities.").

4. *See, e.g.*, Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (Jan. 14, 2020), https://www.blackrock.com/corporate/investor-relations/2020-larry-finkceo-Letter [https://perma.cc/A965-ZLLP] ("[W]ith the impact of sustainability on investment returns increasing, we believe that sustainable investing is the strongest foundation for client portfolios going forward.").

5. *See, e.g.*, Benjamin Zycher, *Other People's Money: ESG Investing and the Conflicts of the Consultant Class*, AM. ENTER. INST. (Dec. 17, 2018), https://www.aei.org/articles/other-peoples-money-esg-investing-and-the-conflicts-of-the-consultant-class/ [https://perma.cc/U3M4-5XNP] ("ESG investment choices substitute an amorphous range of political goals in place of maximizing the funds' economic value . . . .").

6. Jean-Pierre Aubry et al., *ESG Investing and Public Pensions: An Update*, 74 CTR. FOR RET. RSCH., Oct. 27, 2020, at 3.

7. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

8. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1972).

9. *Janus*, 138 S. Ct. at 2461–62.

10. *Id.* at 2460.

11. Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 868 (2012) (arguing that "the state's use of mandatory employee contributions to purchase corporate securities raises the type of compelled speech and association concerns implicated in *Abood*," given "the requirement that public employees make contributions that could be used, against their objection, for the purchase of corporate securities and the financing of corporate

little scholarly attention has been paid to the possible ramifications to public pension funds of *Janus*'s significant expansion of compelled speech rights.[12] Indeed, no scholar has attempted an in-depth review of the constitutionality of ESG investing in funds where participation is mandatory in the wake of *Janus*.

This Article thus offers a note of caution: The Court's current compelled speech doctrine likely renders public pension funds (and other compelled investing) unconstitutional if invested according to ESG principles. Accordingly, recent developments in compelled speech doctrine could have significant implications for public pension funds, for the fiscal stability of state and local governments, and for broader

political speech"); Eric John Finseth, *Shareholder Activism by Public Pension Funds and the Rights of Dissenting Employees Under the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 289, 293 (2011) (arguing that *Abood* and related cases provide public employees with a First Amendment right to "opt out of having their pro rata portion of shares of publicly traded corporations held by public pension funds voted with respect to political or ideological matters in a manner with which the dissenting employees disagree").

12. David H. Webber, *The Other* Janus *and the Future of Labor's Capital*, 72 VAND. L. REV. 2087, 2089–90 (2019); Da Lin, Janus *and Public Pension Funds*, HARV. L. REV.: BLOG (Sept. 17, 2018), https://blog.harvardlawreview.org/janus-and-public-pension-funds/ [https://perma.cc/2LC3-NHC3]; *see also* Jennifer Mueller, *The Paycheck Problem*, 20 U. PA. J. CONST. L. 561, 569 (2018) (examining tensions in the treatment of taxes, union fees, and pension contributions under the First Amendment and offering a new limiting principle).

Of course, *Janus*'s premise that compelled payment is speech is itself contested. *See, e.g.*, William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171 (2018) ("The better view, we think, is that requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all."); Robert Post, *Compelled Subsidization of Speech:* Johanns v. Livestock Marketing Association, 2005 SUP. CT. REV. 195, 197, 228, https://doi.org/10.1086/655190 ("It is simply not true that First Amendment concerns are implicated whenever persons are required to subsidize speech with which they disagree."). This Article, however, takes *Janus* and related compelled speech cases on their face in assessing their potential implications.

Likewise, other scholars have expressed skepticism that *Janus* will be extended beyond unions to other mandatory fees. *See* Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of* Janus*: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42, 57 (2018) ("Apart from unions, and one case involving mandatory assessments on agricultural producers, the Court has rejected every First Amendment challenge to compulsory payments that subsidize speech, and the obvious hostility to public employee unions in *Janus*, *Harris*, and *Knox* suggests the field is not going to be a growth area."). For the reasons discussed in Part IV, *infra*, there are reasons to suspect, however, that the Court may view public pension funds differently.

Others have addressed the constitutionality of ESG-related disclosures proposed by the Securities and Exchange Commission Under the First Amendment. *See* Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876, 876–77 (2022) (arguing that the compelled commercial speech paradigm under the First Amendment requires the SEC to justify disclosure mandates as a form of investor protection—that is, for the protection of "the interests of *investors qua investors* rather than focusing on the idiosyncratic preferences of individuals or groups of investors"—and that certain disclosure mandates, such as the SEC's proposed climate disclosure rules, would fail heightened scrutiny).

efforts to encourage retirement savings, especially among this country's most vulnerable workers.

To demonstrate this, the rest of this Article proceeds in four Parts. Part II briefly describes the rise of ESG investing, including by public pension funds, the shift of ESG investing to more politically controversial spheres, and reasons why courts may consider recent forms of ESG investing to be political speech. Part III then explains three potential lines of reasoning under the First Amendment that may apply to public pension funds: *compelled association* with the public pension fund, *compelled subsidization* of the speech of the public pension fund, and *compelled subsidization* of the speech of investment managers and other entities connected to the fund. Part IV then illustrates how those lines of reasoning might apply to public pension funds in the context of ESG, using the largest pension fund in the United States, the California Public Employee's Retirement System (CalPERS), as an example, given its active promotion of certain ESG principles. It also discusses likely objections to those arguments and identifies reasons why a court may conclude those responses are unpersuasive.

Finally, Part V uncovers two serious potential ramifications from applying the compelled speech doctrine to public pension funds. First, the potential application of compelled speech doctrine *retrospectively* to past contributions may have serious consequences for state and local finances, particularly given that many state and local pension funds are presently underfunded. While *Janus* raised the possibility of retrospective liability for unions regarding collected agency fees, that possibility did not come to pass because unions were able to avoid paying damages using the defense of good faith—that is, the unions were able to argue that they did not owe damages because collecting fees was lawful at the time of collection. That argument may not be available to public pension funds, however, because employees will not be seeking damages for past wrongs, but instead return of current property. Many state employees have some form of property interest in their retirement contributions, meaning that state employees could potentially demand the return of all their contributed funds if the pension funds continued to engage in ESG investing. Consequently, state and local governments are ignoring developments in compelled speech doctrine at significant financial risk.

Second, *Janus*'s opt-in requirement will affect policymakers' efforts to promote retirement savings through the use of automatic enrollment into individual retirement accounts. At present, federal and state legislatures have enacted—or are considering enacting—automatic enrollment programs into individual retirement accounts to ensure that individuals least likely to have some form of retirement savings begin contributing to their long-term financial security. Many of these funds are, however, likely to be managed according to ESG principles,

including using proxy voting to advance ESG proposals. *Janus*'s requirement that individuals must be given the chance to opt in—rather than opt out—of associations that engage in political speech would clash with this auto-enrollment feature, thus inhibiting a significant tool in promoting retirement savings for those most at risk. Having identified these lurking issues, this Article then sketches some potential solutions before concluding.

II. ESG AND SPEECH

This Part provides a brief overview of the rise of ESG investing and the principles underlying ESG. In particular, it details how ESG incorporates nonfinancial information in assessing material risks and opportunities for investment and how ESG investors often engage with companies to address those nonfinancial risks and opportunities. As a result, although ESG investing may promote economic value (that remains disputed), it also often advances certain political or ideological values. Because of this, ESG has become increasingly controversial, and courts are likely to consider portions of ESG to be political or ideological in nature.

A. *The Rise of ESG*

ESG's origins lie with socially responsible investing ("SRI") practices that avoided investing in firms that made antisocial products, including alcohol and the slave trade.[13] The first socially responsible investing fund began in 1928; it was committed to the Christian values of its founder and emphasized avoiding investments perceived as morally questionable.[14] Later, in the late 1970s and early 1980s, socially responsible investing gained greater prominence as SRI investors used "negative screens" (also called exclusionary screens) to avoid supporting businesses that did business in South Africa during apartheid.[15] Some SRI funds also used positive screens—that is, identified companies with practices supported by the fund's guidelines—and engaged in shareholder advocacy, voting for corporate behaviors consistent with the fund's guidelines.[16]

Investor demand for socially responsible funds continued to increase in the 1990s and the 2000s.[17] Around this time, advocates for

13. Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 392–93 (2020); *see* Susan N. Gary, *Values and Value: University Endowments, Fiduciary Duties, and ESG Investing*, 42 J. COLL. & U. L. 247, 261 (2016), https://doi.org/10.2139/ssrn.2656640 ("Socially responsible investing (SRI) has roots in the anti-slavery efforts of Quakers in the 18th century.").

14. Schanzenbach & Sitkoff, *supra* note 13, at 392–93.

15. Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 737 (2019).

16. Gary, *supra* note 13, at 261–62.

17. Schanzenbach & Sitkoff, *supra* note 13, at 395.

SRI began shifting their investment strategies to explicitly consider corporate governance and to connect effective governance with their social mission. During this period, SRI was "rebrand[ed]" as "ESG."[18] This was in part due to a growing recognition in the 1990s and 2000s that corporate governance affected firm performance.[19] It also was due, in part, to the increasing association of SRI with the practice of barring investment in particular companies or industries, which many institutional investors found undesirable.[20] This shift toward ESG further progressed in 2006 when the United Nations formalized the link between long-term investment performance and ESG with the promulgation of the Principles for Responsible Investment, which provided a voluntary set of standards that asked investors to consider ESG factors as potentially material to the investment performance of a portfolio.[21]

While ESG investing remains an ambiguous concept even today,[22] it is often understood as taking a more holistic view toward investing, that is, considering how environmental, social, and governance issues might impact a company's long-term performance.[23] Hence, ESG looks beyond "traditional" financial data to consider nonfinancial disclosures made by the company to identify potential material risks and opportunities so that investors invest in a sustainable and responsible manner.[24] ESG, however, is not limited to the initial decision of whether to invest in a particular company; investors are further encouraged to engage with a company and its managers about the company's ESG exposures and opportunities.[25] This engagement includes

18. *See* Gary, *supra* note 13, at 261–72; Schanzenbach & Sitkoff, *supra* note 13, at 396; LAUREN CAPLAN ET AL., COMMONFUND INST., FROM SRI TO ESG: THE CHANGING WORLD OF RESPONSIBLE INVESTING 2 (2013) ("[W]hile not every institution will choose to engage in SRI or impact investing, fiduciaries of long-term institutional investors should seek to develop a well-reasoned view on their institution's approach to ESG investing.").

19. Schanzenbach & Sitkoff, *supra* note 13, at 396–97; *cf.* John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 632–33 (describing SRI's rebranding as an effort by "clever lawyers" to ensure "ESG investing was fully compatible with the trustee's fiduciary obligations").

20. CAPLAN ET AL., *supra* note 18, at 2.

21. *Id.* at 2–3; Elizabeth Pollman, *The Making and Meaning of ESG* 10–13 (U. Penn. Inst. for L. and Econ., Working Paper No. 659, 2022) https://ssrn.com/abstract=4219857 [https://perma.cc/ECB6-ASXF] (tracing the origins of "ESG" to U.N. initiatives in the early 2000s).

22. *See, e.g.*, Douglas M. Grim & Daniel B. Berkowitz, *ESG, SRI, and Impact Investing: A Primer for Decision Making*, 1 J. IMPACT & ESG INVESTING 1, 4 (2020), https://doi.org/10.3905/jesg.2020.1.1.047 (noting the "confusion" in terminology); Pollman, *supra* note 21, at 21–30 (describing the evolving and varied uses of the term).

23. CAPLAN ET AL., *supra* note 18, at 2.

24. Gary, *supra* note 13, at 263–64 ("An ESG investor seeks to identify material risks and opportunities related to investment performance that may not be reflected in traditional financial data.").

25. CAPLAN ET AL., *supra* note 18, at 3.

taking ESG issues into account when voting via proxy in the company's annual shareholder meeting and encouraging companies to disclose nonfinancial information so that investors and other stakeholders can assess the company's performance on various ESG issues.[26] Hence, ESG represents a sustained effort on the part of investors to encourage certain corporate behaviors and discourage others.

A wide range of corporate practices and issues fall under ESG's umbrella. While practices often touch on multiple ESG factors, generally speaking, the Governance factor includes board composition, executive compensation, lobbying efforts, and political contributions.[27] The Social factor includes efforts to promote gender and racial diversity in the corporation, especially its board, as well as human rights, labor standards, and data privacy.[28] And the Environmental factor includes climate change and carbon emissions, pollution, deforestation, and water scarcity.[29]

ESG's precise contours, however, remain unclear; "[t]here is no one exhaustive list of ESG issues," and there is a lack of consistency in ESG labels.[30] Corporate disclosures of nonfinancial data regarding ESG, moreover, lack universally accepted standards,[31] which has resulted at times in "greenwashing"—incomplete, inaccurate, or unsubstantiated claims about a corporation's actions.[32]

Given that ESG expressly considers nonfinancial factors and the lack of standardization, some have extended ESG to new—controversial—areas.[33] For example, in the wake of *Dobbs v. Jackson Women's Health Organization*,[34] there were calls for companies to disclose their efforts to ensure access to abortion coverage and their political spending related to that issue so that stakeholders and rating agencies could

26. *Id.* at 10.

27. *ESG Investing and Analysis*, *supra* note 3.

28. *Id.*

29. *Id.*

30. USMAN HAYAT ET AL., ENVIRONMENTAL, SOCIAL, AND GOVERNANCE ISSUES IN INVESTING: A GUIDE FOR INVESTMENT PROFESSIONALS 4–5 (2015).

31. Robert G. Eccles & Judith Stroehle, Exploring Social Origins in the Construction of ESG Measures 1 (July 12, 2018) (unpublished manuscript), https://ssrn.com/abstract=3212685 [https://perma.cc/4P2C-8Z58]. There are ongoing efforts to standardize ESG, however. *See, e.g.*, Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 285–86 (describing current ESG disclosure practices and identifying "the key challenges surrounding ESG disclosure reform").

32. Kyle Peterdy, *Greenwashing*, CORP. FIN. INST. (May 30, 2022), https://corporatefinanceinstitute.com/resources/knowledge/other/greenwashing/ [https://perma.cc/B37E-XCYZ].

33. *See* Schanzenbach & Sitkoff, *supra* note 13, at 433 (noting that "the fluidity of the ESG rubric means that assessment and application of ESG factors will be highly subjective"); *see also* Clara Hudson, *Investors Pursue Abortion Rights, Privacy Protection in Proxies*, BLOOMBERG L. (Feb. 27, 2023, 4:00 AM), https://news.bloomberglaw.com/esg/investors-push-for-abortion-rights-privacy-protection-in-proxies [https://perma.cc/FZE3-XZVR].

34. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

consider these issues in scoring companies on their ESG efforts.[35] These calls are grounded on arguments surrounding the importance of abortion access and other reproductive-related issues to a company's bottom line.[36] Likewise, rating agencies are now extending ESG indicators and rankings to determine the creditworthiness of state and local governments, based on their scores regarding, in part, "political unrest stemming from community and social issues" and "adverse publicity that results in reputation risk."[37]

Yet, even as the contours of ESG remain unclear, ESG investing has exploded in recent years. As of July 2023, over 5,000 asset managers have signed the Principles for Responsible Investing mentioned above.[38] Moreover, hundreds of ESG indices with ESG ratings of individual companies now exist—including an S&P 500 ESG index—and a recent survey of asset managers indicates that they expect nearly two-thirds of investment portfolios to contain ESG considerations within a decade.[39] Similarly, according to Deloitte, professionally managed assets that consider ESG issues in selecting investments are

35. *See, e.g.*, Shelley Alpern, *The Newest ESG Frontier: Reproductive Rights at the Corporate Level*, CONFLUENCE PHILANTHROPY: OWN WHAT YOU OWN (June 16, 2022), https://www.confluencephilanthropy.org/The-Newest-ESG-Frontier-Reproductive-Rights-At-The-Corporate-Level [https://perma.cc/T6N5-AC3N]; Emile Hallez, *Shareholder Votes on Abortion Access Likely to Increase*, ESG CLARITY (June 27, 2022), https://esgclarity.com/shareholder-votes-on-abortion-access-likely-to-increase/ [https://perma.cc/TE4P-PBRT] ("The US Supreme Court's decision to overturn *Roe v. Wade* will almost certainly lead to more pressure on corporations to provide access to reproductive health care, sources have told *ESG Clarity*. That could mean a cascade of shareholder engagement and proxy votes in the US next year focused on policies that help employees obtain access to abortions and aligning political spending with company's public stances on social issues."); Clara Hudson, *Abortion Looms as ESG Issue for Companies After Voiding of* Roe, BLOOMBERG L. (July 8, 2022, 4:00 AM), https://news.bloomberglaw.com/esg/abortion-looms-as-esg-issue-for-companies-after-voiding-of-roe [https://perma.cc/8BWA-XRKJ].

36. RHIA VENTURES, HIDDEN VALUE: THE BUSINESS CASE FOR REPRODUCTIVE HEALTH 6–7 (June 2022), https://rhiaventures.org/wp-content/uploads/2022/08/Hidden-Value-The-Business-Case-for-Reproductive-Health-2022.pdf [https://perma.cc/QG5Y-PW8A].

37. Marlo Oaks, *S&P Hits U.S. States with Politicized Credit Scores*, WALL ST. J. (May 8, 2022, 5:22 PM), https://www.wsj.com/articles/s-and-p-states-politicized-credit-scores-esg-rating-utah-oaks-carbon-environmental-energy-crisis-price-fracking-ukraine-russia-11652037089 [https://perma.cc/GGD6-83HW].

38. *Signatory Directory*, PRINCIPLES OF RESPONSIBLE INVEST. (May 12, 2023), https://www.unpri.org/signatories/signatory-resources/signatory-directory [https://perma.cc/R8FX-JQRN].

39. *Increasing Momentum and Dramatic Growth in ESG Investment Across Asset Classes Among Asset Managers; New Index Industry Association Global Survey*, BUS. WIRE (July 28, 2022, 8:03 AM), https://www.businesswire.com/news/home/20220728005051/en/Increasing-Momentum-and-Dramatic-Growth-in-ESG-Investment-Across-Asset-Classes-Among-Asset-Managers-New-Index-Industry-Association-Global-Survey [https://perma.cc/9LU9-QUW4]; *see* Schanzenbach & Sitkoff, *supra* note 13, at 387–88.

projected to represent "half of all professionally managed assets globally by 2024."[40]

Increased efforts at corporate engagement also reflect the rise of ESG investing.[41] The 2022 proxy season witnessed a record number of ESG shareholder proposals, and these proposals increasingly ask companies to hit specific goals instead of merely asking for targets or disclosures.[42] For instance, there were nine first-time votes calling on major U.S. banks and insurers to stop providing financing for fossil fuels.[43] Such engagement is likely to continue, especially as index funds escalate their ESG policies to attract the many millennial investors who are interested in having their investments reflect their social values.[44] Additionally, proxy advisors such as Institutional Shareholder Services and Glass Lewis continue to strengthen voting recommendations based on ESG principles.[45]

Public pension funds—which invest mandatory contributions made by state employees—have long engaged in socially responsible invest-

40. TANIA LYNN TAYLOR & SEAN COLLINS, INGRAINING SUSTAINABILITY IN THE NEXT ERA OF ESG INVESTING 4 (2022), https://www2.deloitte.com/us/en/insights/industry/financial-services/esg-investing-and-sustainability.html [https://perma.cc/5GKE-KMP9].

41. *See, e.g.*, *ESG Trends and Hot Topics* (Sullivan & Cromwell LLP, New York, N.Y.), May 31, 2022, at 8–9, https://www.sullcrom.com/esg-trends-and-hot-topics-may-2022 [https://perma.cc/J93K-ZL67] (noting that ESG activism continues to grow).

42. Dieter Holger, *Investors Balk at Tough Climate Proposals: 2022 Proxy Voting Roundup*, WALL ST. J. (June 22, 2022, 6:00 AM), https://www.wsj.com/articles/investors-balk-at-tough-climate-proposals-2022-proxy-voting-roundup-11655892000 [https://perma.cc/7HTD-YH7E]; Elizabeth Ising et al., *Gibson Dunn Discusses Shareholder Proposal Developments for the 2022 Proxy Season*, CLS BLUE SKY BLOG (July 29, 2022), https://clsbluesky.law.columbia.edu/2022/07/29/gibson-dunn-discusses-shareholder-proposal-developments-for-the-2022-proxy-season/ [https://perma.cc/79RM-GKSB] ("Environmental and civic engagement proposals increased notably, up 51% and 36%, respectively, from 2021. And social proposals continued to increase, up 20% since 2021 and constituting the largest category of proposals submitted in 2022.").

43. Holger, *supra* note 42. None, however, passed. *Id.*

44. Michal Barzuza et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1249–50 (2020).

45. *See, e.g.*, INSTITUTIONAL S'HOLDER SERVS., ISS BENCHMARK POLICY UPDATES: EXECUTIVE SUMMARY 7 (Dec. 7, 2021) (extending gender diversity requirements to companies not in the Russell 3000 and S&P 1500 indices, beginning to issue vote recommendations on the basis of a lack of board racial/ethnic diversity now that one-year grace period has passed, and "recommend[ing] against incumbent directors . . . in cases where the company does not have both minimum criteria of disclosure such as according to the Task Force on Climate-related Financial Disclosures (TCFD) and quantitative GHG emission reduction targets covering at least a significant portion of the company's direct emissions"); GLASS LEWIS, 2022 POLICY GUIDELINES 7 (November 15, 2021) ("Beginning in 2022, we will generally recommend voting against the chair of the nominating committee of a board with fewer than two gender diverse directors, or the entire nominating committee of a board with no gender diverse directors, at companies within the Russell 3000 index."). Of course, shareholder-initiated proposals are nonbinding, but those proposals can have an impact. *See* Luc Renneboog & Peter G. Szilagyi, *The Role of Shareholder Proposals in Corporate Governance*, 17 J. CORP. FIN. 167, 168–70 (2011).

ing, and they likewise have embraced ESG practices. Forty-four states have legislation that requires public employees to become members of the state's pension plan.[46] All of these states require employees to contribute a set percentage of their paycheck to their respective funds via a pre-tax deduction.[47] These contributions generally go to defined benefit plans, which trustees of the plan then invest.[48] In the early 1970s, several state pension funds screened out stocks connected to tobacco, alcohol, and gambling.[49] This practice broadened in the 1980s to end apartheid in South Africa, even as scholars debated whether such practices were consistent with the pension funds' fiduciary duties.[50] At present, public pension funds invest roughly $3 trillion according to ESG principles.[51] And, as illustrated below, these funds often engage with companies based on ESG principles, as well.[52]

In short, then, ESG investing—including by public pension funds—is likely to continue to grow even while the issues ESG addresses continue to expand.

B. *ESG as Political Speech*

As ESG investing continues to grow and expand, it has generated considerable controversy. For example, the governor of Florida has characterized ESG as a means for "the corporate elite [to] use their economic power to impose policies on the country that they could not achieve at the ballot box."[53] Florida prohibits consideration of ESG factors by its public pension fund—with other states following suit.[54] Indeed, Texas passed a law barring its state public pension fund from doing business with companies that its state comptroller identifies as "boycotting" fossil fuels.[55] West Virginia has enacted a similar law,

46. Sachs, *supra* note 11, at 867.

47. *Id.* at 867 n.322.

48. Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 455–58 (2004), https://doi.org/10.2307/4135691 (discussing the differences between defined contribution plans and defined benefit plans).

49. Aubry et al., *supra* note 6, at 1.

50. *Id.*; Schanzenbach & Sitkoff, *supra* note 13, at 393–94.

51. *See* Aubry et al., *supra* note 6, at 3.

52. *See infra* Part IV.

53. *Governor Ron DeSantis Announces Initiatives to Protect Floridians from ESG Financial Fraud,* FLGOV.COM (July 27, 2022), https://flgov.com/2022/07/27/governor-ron-desantis-announces-initiatives-to-protect-floridians-from-esg-financial-fraud/ [https://perma.cc/YKN5-96WP].

54. *People Before Corporate Power*, FLGOV.COM (July 2022), https://www.flgov.com/wp-content/uploads/2022/07/People-Before-Corporate-ESG-1.pdf [https://perma.cc/S6D2-C8VC]; Gabriella Hoffman, *States Push Back Against ESG Policies*, INSIDESOURCES (July 14, 2022), https://insidesources.com/states-push-back-against-esg-policies/ [https://perma.cc/54JB-HPAD].

55. Mario Alejandro Ariza & Mose Buchele, *Texas Stumbles in Its Effort to Punish Green Financial Firms*, NPR (Apr. 29, 2022, 5:01 AM), https://www.npr.org/2022/04/29/1095137650/texas-stumbles-in-its-effort-to-punish-green-financial-firms [https://perma.cc/S6AA-VJCF].

and other states, like Indiana, Louisiana, and Oklahoma, are considering taking a similar approach.[56] Some states, moreover, have withdrawn hundreds of millions of dollars invested with the major asset manager BlackRock due to its promotion of ESG investing.[57]

This backlash illustrates the growing perception in some circles that ESG advances political or ideological views, not simply financial interests.[58] This perception has merit. As Professor Sean Griffith has argued, ESG principles regarding climate change and diversity, for instance, contain premises that are contested, even if members of the financial elite may not dispute them.[59] Nor can these principles be viewed in isolation from the growing trend of companies increasingly becoming vehicles for social change in recent years[60] and from the growing recognition of public-private partnerships as a vehicle for accomplishing policy objectives that are politically infeasible.[61] Given the Supreme Court's concern with the cumulative effect individual actions can have on influencing public policy in *Janus*, it is not hard to envision the Supreme Court concluding that ESG inherently addresses matters of public concern.[62]

III. The Current Terrain of Compelled Expression

Having briefly discussed the rise of ESG and its political nature, this Part discusses recent developments regarding compelled speech arising from *Janus* and related cases. In doing so, it identifies three potential lines of reasoning under the First Amendment that may apply to

56. *See* Hoffman, *supra* note 54.

57. *See, e.g.*, Ross Kerber, *Florida Pulls $2 Bln from BlackRock in Largest Anti-ESG Divestment*, Reuters (Dec. 1, 2022, 9:39 PM), https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01 [https://perma.cc/FPD3-43TN] (noting that Florida withdrew $2 billion worth of assets from BlackRock); Sabrina Kharrazi, *ESG Fight Injects Fresh Risks Into Public Pension Portfolios*, Bloomberg (Nov. 23, 2022, 2:08 PM), https://www.bloomberg.com/news/articles/2022-11-23/esg-fight-injects-fresh-risks-into-public-pension-portfolios?leadSource=UVerify%20wall [https://perma.cc/D4ZE-A573] ("Republicans in Missouri, Louisiana and South Carolina pledged to pull a combined $1.5 billion of public pension and state treasury funding from BlackRock Inc. after the world's biggest asset manager became a prominent backer of ESG investing strategies.").

58. *See supra* note 5 and accompanying text.

59. Griffith, *supra* note 12, at 928–29.

60. Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. Rev. 1535, 1537–38, 1558–1573 (2018).

61. In considering this issue, courts may consider the rise of the "'new governance' regulatory approach," which seeks to "[h]arness [p]ublic [p]ension [f]unds as [s]urrogate [r]egulators." David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 Va. L. & Bus. Rev. 221, 223, 226, 235 (2007). More broadly, "[a]s the name suggests, when applied to corporations, new governance regulation focuses less on directly regulating corporate behavior . . . and more on influencing the governance of corporations." *Id.* at 232.

62. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476–77 (2018).

public pension funds: first, *compelled association* with the public pension fund; second, *compelled subsidization* of the speech of the public pension fund; and third, *compelled subsidization* of the speech of investment managers and other entities connected to the fund.

A. *Compelled Association*

The first potential issue under the First Amendment with public pension funds as they are currently constituted relates to their most basic aspect—namely, their requirement that state and/or local employees be members even as, in the eyes of others, those organizations express views on ideological or political topics by engaging in ESG investing.[63] To understand why that might be the case, it is instructive to consider recent decisions related to the required membership of attorneys in their respective state bars.

State bars are similar to public pensions in important ways. They are either "mandatory" or "voluntary" for attorneys practicing in their respective states—with the majority of state bar associations currently being mandatory.[64] Mandatory bars regulate the practice of law in their respective states, and they are often state agencies or public corporations associated with the judicial branch or state supreme court.[65] These bars compel attorneys to join and to pay dues "as a condition to practising law in a [s]tate."[66] As a result, mandatory state bar associations have faced various First Amendment challenges to their structure.

In *Lathrop v. Donohue*, which was decided in 1961, a member of the Wisconsin State Bar challenged the requirement that he pay bar dues to practice law in Wisconsin on First Amendment grounds.[67] Addressing only the "question of compelled financial support of group activities" and not "involuntary membership in any other aspect,"[68] a plurality of the Supreme Court determined that such dues for the State Bar were appropriate as a means of sharing the costs of regulat-

63. *See, e.g.*, *About OPERS*, OHIO PUB. EMPS. RET. SYS., https://www.opers.org/about/ [https://perma.cc/99K3-3ZK3] ("All employees who are paid in whole or in part by the state of Ohio, a county, municipality, or any other political subdivision of state or local government in Ohio must become members of OPERS unless they are covered by another state retirement system in Ohio or by the Cincinnati Retirement System."). Of course, not all state or local employees are members. *See infra* Section IV.A.

64. Leslie C. Levin, *The End of Mandatory State Bars?*, 109 GEO. L.J. ONLINE 1, 1, 5 (2020). Mandatory bars are also referred to as "integrated" bars. *See* Jarchow v. State Bar of Wis., 140 S. Ct. 1720 (2020) (Thomas, J., dissenting from the denial of certiorari).

65. *See, e.g.*, OR. REV. STAT. ANN. § 9.010(2) (West 2017); TEX. GOV'T CODE ANN. § 81.011(c) (West 2021).

66. Keller v. State Bar of Cal., 496 U.S. 1, 5 (1990).

67. Lathrop v. Donohue, 367 U.S. 820, 827–28 (1961).

68. *Id.* at 828.

ing the legal profession.[69] Because the member did not identify any particular State Bar proposals that he disagreed with, the Supreme Court then declined to decide whether an individual "may constitutionally be compelled to contribute his financial support to political activities which he opposes."[70]

Almost three decades later, in *Keller v. State Bar of California*, the Supreme Court took up the issue unaddressed in *Lathrop* by considering a challenge by State Bar of California members to the use of membership dues for the financing of certain ideological or political activities that the members opposed as a violation.[71] At that time, California was a mandatory bar.[72] While the California State Bar contended—and the California Supreme Court agreed—that spending the dues was "government speech" to which the First Amendment does not apply,[73] the Supreme Court disagreed as the California State Bar did not "participate in the general government of the State, but . . . provide[d] specialized professional advice," and its members were members due to their being lawyers—not on account of their citizenship.[74]

Therefore, a "substantial analogy" existed "between the relationship of the State Bar and its members" and "the relationship of employee unions and their members."[75] Accordingly, the Supreme Court applied *Abood*'s framework to conclude that the State Bar could "constitutionally fund activities germane" to "regulating the legal profession and improving the quality of legal services" but not "activities of an ideological nature which fall outside of those areas of activity."[76] The Court acknowledged that the appropriateness of an action would "not always be easy to discern," but determined that "the extreme ends of the spectrum are clear," as the use of dues to advocate for gun control and a nuclear weapons freeze initiative was impermissible.[77] Finally, the Supreme Court declined to consider the petitioners' broader associational claim—raised for the first time before the Court—that they could not "be compelled to associate with an organi-

69. *Id.* at 843.

70. *Id.* at 845–48. Two concurring justices did not see a distinction between the freedom of speech assertion and the associational claim. *Id.* at 850 (Harlan, J., concurring) ("I am wholly unable to follow the force of reasoning which, on the one hand, denies that compulsory dues-paying membership in an Integrated Bar infringes 'freedom of association,' and, on the other, in effect affirms that such membership, to the extent it entails the use of a dissident member's dues for legitimate Bar purposes, infringes 'freedom of speech.' This is a refinement between two aspects of what, in circumstances like these, is essentially but a single facet of the 'liberty' assured by the Fourteenth Amendment that is too subtle for me to grasp.") (citation omitted).

71. *Keller*, 496 U.S. at 5–6.

72. *Id.* at 4–5; Levin, *supra* note 64, at 1, 5.

73. *Keller*, 496 U.S. at 10–11.

74. *Id.* at 13.

75. *Id.* at 12.

76. *Id.* at 13–14.

77. *Id.* at 15–16.

zation that engage[d] in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood*."[78]

Since *Keller*, and in the wake of *Janus*, courts of appeals have considered—and recognized—this broader associational claim.[79] *McDonald v. Longley* illustrates this trend.[80] There, the Fifth Circuit recognized that the mandatory State Bar of Texas "engaged in non-germane activities," and so compelling membership in the bar violated the attorneys' First Amendment rights.[81] In reaching this conclusion, the Fifth Circuit noted that "the right to freedom of association is part of the freedom of speech" and that where groups engage in expressive association, there is a corresponding "freedom not to associate."[82] Thus, when a bar engaged in expressive activities, part of its expressive message necessarily was that its members supported its expression, and so "[t]he membership [was] part of the message."[83] While recognizing that the right not to associate was not "absolute," the Fifth Circuit concluded that "[c]ompelled membership in a bar association that engages in non-germane activities . . . fails exacting scrutiny" because the state did not have a compelling interest in licensed attorneys engaging as a group in certain activities not germane to the bar's purpose—such as lobbying for certain substantive changes to Texas family law—and could have furthered that interest through less restrictive means.[84] As such, Texas could not "continue mandating membership in the Bar as currently structured or engaging in its current activities."[85]

Hence, recent appellate decisions about state bar dues establish that state associations with mandatory membership requirements may not

78. *Id.* at 17.

79. Gruber v. Or. State Bar, No. 3:18-cv-1591-JR, 2022 WL 1538645, at *3 (D. Or. May 16, 2022) (collecting recent circuit court decisions); Crowe v. Or. State Bar, 989 F.3d 714, 720 (9th Cir. 2021) (recognizing compelled association as a viable claim, but remanding the case for the district court to determine what standard to apply); *see* Romero v. Colegio de Abogados de P.R., 204 F.3d 291, 301 (1st Cir. 2000) ("The very act of the state compelling an employee or an attorney to belong to or pay fees to a union or bar association implicates that person's First Amendment right not to associate."); *see also* Schell v. Chief Just. & Justs. of Okla. Sup. Ct., 11 F.4th 1178, 1194–95 (10th Cir. 2021) (concluding that *Lathrop* and *Keller* did not preclude a broader associational claim and indicating the "germane" standard should apply). Some courts have not reached this issue due to party concessions. *See* Taylor v. Buchanan, 4 F.4th 406, 409–10 (6th Cir. 2021) (finding associational claim foreclosed by Court precedent based on party concessions); *cf.* File v. Martin, 33 F.4th 385, 391 n.1 (7th Cir. 2022) (noting that plaintiff failed to raise a "germaneness" challenge).

80. McDonald v. Longley, 4 F.4th 229, 252 (5th Cir. 2021); *see Taylor*, 4 F.4th at 410 (Thapar, J., concurring) (noting that "[t]he association claim could go forward even if the bar association allowed lawyers to opt out of funding ideological activity").

81. *McDonald*, 4 F.4th at 252.

82. *Id.* at 245 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

83. *Id.* at 245–46.

84. *Id.* at 246.

85. *Id.* at 252.

mandate membership if the association engages in political or ideological activities not germane to the association's purpose.

B. *Direct Compelled Subsidization*

The second line of reasoning for potentially challenging the constitutionality of public pension funds concerns the issue of compelled subsidies for private speakers—in this framing, the pension funds themselves. For this line of reasoning, *Janus* is instructive.[86]

Janus involved a challenge to an Illinois law that permitted state employees to unionize and to designate that union by a majority vote as the employees' "exclusive representative."[87] Once designated, the union possessed broad authority to negotiate with the employer on various matters, including wages, the size of the workforce, privatization, promotion methods, and non-discrimination policies.[88] Employees could decline to join the union, but they were not allowed to negotiate directly with their employer if they did not join and an "agency fee"—the proportionate percentage of the union dues attributable as "germane" to the union's duties as the collective-bargaining representative—was automatically deducted by the state employer from the nonmember's wages without obtaining the nonmember's consent.[89] Because the union was the sole representative for all employees in the unit, it was "required by law to provide fair representation for all employees in the unit, members and nonmembers alike."[90]

While the Supreme Court had previously upheld a similar union shop arrangement in *Abood*, the Court recognized that *Abood* was "something of an anomaly" and so considered whether *Abood*'s holding was consistent with "standard First Amendment principles."[91] Those free speech principles include "the right to refrain from speaking at all" as well as "[t]he right to eschew association for expressive purposes."[92] Compelling "[f]ree and independent" individuals to mouth support for views they find objectionable "plainly violates the Constitution" and "is always demeaning."[93] Moreover, "[c]ompelling

86. Indeed, in the briefing for *Janus*, an amicus brief of corporate law scholars flagged the potential implications this decision might have on pension funds. Brief of Corporate Law Professors as Amici Curiae in Support of Neither Party at 5–7, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466). The National Association of Retirement Systems, moreover, filed a brief in support of the union. Brief of Amicus Curiae National Conference on Public Employee Retirement Systems in Support of Respondents, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466).

87. *Janus*, 138 S. Ct. at 2460.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2463.

92. *Id.*

93. *Id.* at 2464.

a person to subsidize the speech of other private speakers raises similar First Amendment concerns."[94]

Recognizing that an individual's compelled subsidization of private speech "seriously impinges" that individual's First Amendment rights, the Court then assumed application of "exacting scrutiny," which requires the challenged law "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."[95] The Court then held that neither of the proffered state interests of labor peace or preventing free-rider issues arising from nonmembers benefiting from the union's negotiations without paying union dues justified the assessment of agency fees.[96] Significantly, in rejecting the free-rider interest, the Court observed that the "First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."[97]

Having determined that the agency fees at issue did not survive exacting scrutiny, the Court considered whether *stare decisis* nevertheless counseled against overruling *Abood* and concluded that it did not.[98] This was due, in part, to the "impossible" nature of precisely drawing a line between chargeable and nonchargeable union expenditures, especially since requiring employees to challenge the chargeability of certain expenditures imposed significant time and monetary costs on them.[99]

Put simply, then, *Janus* instructs that, at a minimum, exacting scrutiny should apply to the compelled subsidization of the speech of a private entity, and it cautions against forcing the compelled party to bear the costs of identifying each particular problematic statement.

C. *Compelled Subsidization Where Funds Are Distributed*

The third line of reasoning that might be used to challenge pension funds on compelled speech grounds relates to the compelled subsidization of private speakers, that is the managers of the funds that pension funds invest in and the proxy advisors the funds rely on.

This line of reasoning focuses on the compelled subsidization of speech that is ostensibly viewpoint neutral, but is not.[100] The Supreme

94. *Id.* (emphasis omitted).
95. *Id.* at 2464–65.
96. *Id.* at 2465–66.
97. *Id.* at 2467.
98. *Id.* at 2478–79.
99. *Id.* at 2481–82.
100. *See* Sweeney v. Ill. Mun. Ret. Fund, No. 18 C 1410, 2019 WL 1254925, at *6 (N.D. Ill. Mar. 19, 2019) ("The requirement set by law that [municipal retirement fund] invest its excess funds prudently is an equally legitimate requirement. So long as that mandate is performed in a viewpoint neutral manner, under *Southworth*'s reasoning, it is allowed under the First Amendment.").

Court addressed this in *Board of Regents of the University of Wisconsin System v. Southworth*.[101] There, the University of Wisconsin, a public corporation, required students to pay a "nonrefundable activity fee" separate from tuition charges into a university fund, which the student government then allocated, in part, to support extracurricular activities pursued by the University's registered student organizations.[102] While the student government made most funding decisions, funding could also be allocated through student referendums.[103]

The Court determined that its "public forum cases [were] instructive" and that "objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support."[104] In reaching that conclusion, the Court relied on *Abood* and *Keller* to support "[t]he proposition that students who attend the University cannot be required to pay subsidies for the speech of other students without some First Amendment protection."[105] Though the "germaneness" requirement of *Abood* and *Keller* was unworkable in the context of a university program designed to facilitate a wide range of speech, the Court held that "the requirement of viewpoint neutrality in the allocation of funding" was the "principal standard of protection for objecting students."[106]

On remand, the students challenged the mandatory fee system as violating viewpoint neutrality on the basis that the system granted the student government unbridled discretion.[107] Relying on the Supreme Court's unbridled discretion cases in the licensing and permitting context, the Seventh Circuit agreed that "the prohibition on unbridled discretion is an element of viewpoint neutrality."[108] The Seventh Circuit then upheld, however, the fee system, due to the specific and detailed criteria applied to the system, coupled with an appeals process,

101. Bd. of Regents of Univ. of Wis. Sys. v. Southworth (Southworth I), 529 U.S. 217, 220–21 (2000).

102. *Id.* at 222–23, 225.

103. *Id.* at 225.

104. *Id.* at 229.

105. *Id.* at 231.

106. *Id.* at 233. The Court has subsequently read *Southworth I* as recognizing that public universities have a compelling interest in promoting student expression in a viewpoint neutral manner and that a partial exemption for such fees would be insurmountable. *See* Harris v. Quinn, 573 U.S. 616, 656 (2014).

107. Southworth v. Bd. of Regents of Univ. of Wis. Sys. (*Southworth II*), 307 F.3d 566, 574 (7th Cir. 2002) [hereinafter *Southworth II*].

108. *Id.* at 578. Other circuits have likewise concluded that the unbridled-discretion doctrine plays a role in the viewpoint-neutrality analysis applied to a limited public forum. *See* Child. First Found., Inc. v. Fiala, 790 F.3d 328, 343–44 (2d Cir. 2015); Freedom From Religion Found., Inc. v. Abbott, 955 F.3d 417, 428 (5th Cir. 2020); Kaahumanu v. Hawaii, 682 F.3d 789, 806 (9th Cir. 2012); Summum v. Callaghan, 130 F.3d 906, 919–20 (10th Cir. 1997); Sentinel Commc'ns Co. v. Watts, 936 F.2d 1189, 1199–205 (11th Cir. 1991); Preminger v. Sec'y of Veterans Affs., 517 F.3d 1299, 1314–16 (Fed. Cir. 2008); *see also* Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1068–69 (4th Cir. 2006).

with the exception of the funding of travel grants.[109] Importantly, the Seventh Circuit also determined that parts of the criteria used to assess funding decisions were related to the content and viewpoint of the applying student organization, and those parts of the criteria were not viewpoint-neutral.[110] Other courts have since taken a similar approach, concluding that certain criteria were impermissible because they violated viewpoint neutrality.[111]

Thus, under this argument, if a court concludes that a mandatory public association promotes another's speech, viewpoint neutrality principles apply, and the discretion of administrators must be bounded by a viewpoint-neutral criterion.[112]

To summarize, then, public pension funds are subject to, at a minimum, "exacting scrutiny"—they must demonstrate a compelling state interest that cannot be achieved through less restrictive means—if the funds require membership and engage in political or ideological speech using the funds themselves.[113] Likewise, if public pension funds are using employees' money to promote the political or ideological speech of others, viewpoint neutrality principles apply, and the funds must use a viewpoint-neutral criterion to select fund advisors and guide the funds' proxy voting decisions.

IV. Compelled Expression and Public Pensions

With the basic lines of reasoning from the Supreme Court's compelled speech jurisprudence sketched out, this Part now addresses how those lines of reasoning might apply to public pension funds, using the California Public Employees' Retirement System (CalPERS) as an example. While responses to each line of reasoning exist, there are reasons to suspect that the Supreme Court may find those responses unavailing.[114] As such, recent compelled speech developments raise significant doubts about the constitutionality of mandatory state employee contributions to public pension funds as currently structured.

109. *Southworth II*, 307 F.3d at 595.

110. *Id.*

111. Apodaca v. White, 401 F. Supp. 3d 1040, 1056 (S.D. Cal. 2019); *cf. Child Evangelism Fellowship of S.C.*, 470 F.3d at 1074 (rejecting new school guidelines for fee waiver because certain considerations under the guidelines institutionalized potential past viewpoint discrimination into the current system).

112. Viewpoint Neutrality Now! v. Regents of Univ. of Minn., 516 F. Supp. 3d 904, 927 (D. Minn. 2021) (noting that "the *Southworth [II]* framework applies only when the government promotes private speech").

113. McDonald v. Longley, 4 F.4th 229, 246 (5th Cir. 2021).

114. Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court: Its First Amendment Free Expression Jurisprudence: 2005–2021*, 87 Brook. L. Rev. 5, 9 (2021) (noting the Roberts Court's "ever-tending libertarian tilt of free speech law in the commercial speech and union fees arenas").

A. *Compelled Association*

Public pension funds are mandatory associations that express positions on political or ideological matters not germane to the public pension fund's purpose. Accordingly, state employees should not be required to associate with their respective funds.

1. CalPERS as an Association

CalPERS, the nation's largest pension fund, provides a good example of the overall structure of a public pension fund.[115] CalPERS has more than two million members in its retirement system,[116] and its total fund market value for fiscal year 2021 was $477.3 billion.[117] CalPERS is a unit of the Government Operations Agency,[118] and it oversees California's defined benefit plans, which provide pensions to employees by providing "an annual benefit equal to a percentage of the employee's final average salary, multiplied by the number of years of employment."[119] With a few exceptions,[120] state employees become members of CalPERS upon employment,[121] and employers are penalized if they fail to enroll an employee into membership when the employee is eligible.[122]

Once a member, state employees generally cannot withdraw from CalPERS unless they leave their position of public employment. Active membership in CalPERS ordinarily ends upon retirement.[123] Members may have their membership suspended if they are charged

115. CAL. PUB. EMPS. RET. SYS., ABOUT CALPERS: FACTS AT A GLANCE FOR FISCAL YEAR 2021–22 (2022) [hereinafter ABOUT CALPERS], https://www.calpers.ca.gov/docs/forms-publications/facts-about.pdf [https://perma.cc/X284-ZH4U]; *see* Finseth, *supra* note 11, at 316.

116. ABOUT CALPERS, *supra* note 115.

117. CAL. PUB. EMPS. RET. SYS., INVESTMENT & PENSION FUNDING: FACTS AT A GLANCE FOR FISCAL YEAR 2021–22 (2022), https://www.calpers.ca.gov/docs/forms-publications/facts-investment-pension-funding.pdf [https://perma.cc/2EZZ-YWJM].

118. CAL. GOV'T CODE § 20002 (West 2022).

119. *See* T. Leigh Anenson et al., *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1, 14 (2014).

120. Certain state officials appointed to their positions may opt to join CalPERS. GOV'T § 20320. Any member of CalPERS may resign while absent on military service. *Id.* § 20342. Public agencies—which include city, county, and district local authorities—may also contract to have their employees become members of the system. *Id.* §§ 20022, 20056. Certain individuals—such as individual contractors—are statutorily excluded from CalPERS. *Id.* § 20300.

121. *Id.* § 20281; *see also id.* § 31552.

122. *Id.* § 20283; *see* Metro. Water Dist. of S. Cal. v. Super. Ct. of L.A. Co., 84 P.3d 966, 968 (Cal. 2004) (concluding that the Public Employees' Retirement Law requires contracting public agencies to enroll in CalPERS all common law employees except those excluded under a statutory or contractual provision).

123. GOV'T § 20340; *see* Barnwell v. City Council of Beverly Hills, 183 P.2d 698, 700 (Cal. 1947) ("Giving that provision and the definitions of 'employee' and 'member' the construction to which they are entitled, it is clear that a person is a member of the retirement system only while he is an employee of the state or of a contracting city, and that he ceases to be a member of the system upon his retirement.").

with certain crimes—though, even while suspended, they remain entitled to withdraw their "accumulated contributions" from the system, which terminates their membership in the system.[124]

As members of CalPERS, state employees are required to make regular contributions to CalPERS at rates fixed by law or by contract.[125] Each contribution by the member is credited, "together with regular interest, to an individual account of the member for whom the contribution was made."[126]

In addition to making mandatory contributions, state employees also are involved in CalPERS' governance. They vote for positions on the Board of Administration, which oversees CalPERS, and seats are set aside specifically for "[t]wo members elected by the members of this system from the membership thereof" as well as a member elected by the active state members, a member from the active local members, and a member from the retired members of the system.[127]

Under the California Constitution, this Board has "plenary authority and fiduciary responsibility for investment of moneys and administration of the system."[128] The Board, moreover, has "sole and exclusive fiduciary responsibility over the assets" of CalPERS, and it must administer the system to assure "prompt delivery of benefits and related services to the participants and their beneficiaries."[129] To accomplish this, except as restricted by the California Constitution and state law, the Board may purchase, hold, or sell any investment, financial instrument, or financial purchase when the Board considers such action to be prudent.[130]

2. CalPERS as an Expressive Association

Having sketched the basic structure of public pension funds and why they are associations, this Section discusses how funds take posi-

124. GOV'T § 20341.

125. *Id.* § 20053.

126. *Id.* § 20775.

127. *Id.* § 20090. This reflects the typical structure of such boards. Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 800–01 (1993).

128. CAL. CONST. art. XVI, § 17; *see* GOV'T § 20190. While the California Constitution contemplates CalPERS holding stock, it should be noted that the state of California is expressly prohibited from owning stock, with the exception of municipal water companies. CAL. CONST. art. XVI, § 17.

129. CAL. CONST. art. XVI, § 17(a). The assets of the retirement system are "trust funds" to be held "for the *exclusive* purposes of providing benefits to participants in the [CalPERS] and their beneficiaries and defraying reasonable expenses of administering the system." *Id.* (emphasis added).

130. GOV'T § 20190. A majority of states subject funds to this "prudent person" fiduciary standard. Romano, *supra* note 127, at 800. The Board is instructed to diversify its investments, though the state legislature may "prohibit certain investments" by the Board, consistent with the Board's standards of fiduciary care and loyalty. CAL. CONST. art. XVI, § 17(d), (g).

tions on important political or ideological issues that are not germane to the purpose of the funds.

To begin, it is helpful to recall that public pension funds are not isolated from the political process. As Professor Roberta Romano has pointed out, public pension funds are subject to substantial political pressure in their investment activities and voting practices.[131] For instance, such funds often invest in local investment opportunities specific to their states due to political pressure.[132] And these local investments can often have disastrous financial consequences for the fund, given that the political pressure that drove them was not aimed at furthering investors' financial interests.[133]

With that insight in mind, one can see that CalPERS takes many positions that are not directly related to the purpose of the fund. To begin, CalPERS has issued public statements on its website on matters of an ideological or political nature that fall outside of ensuring the retirement security of CalPERS' members. For instance, when Ukraine was invaded, the President of the Board released a letter expressing "solidarity with the citizens and country of Ukraine" and noting CalPERS was "doing everything in our power and fiduciary duty to protect our members' assets, support the Ukrainian people, and join California's response to this assault on democracy."[134] Likewise, in a public letter from CalPERS' CEO to Fossil Free California, CalPERS noted the "longstanding depth and breadth of CalPERS' work on climate change" and emphasized its "leading role in many initiatives" to reduce carbon emissions.[135]

In addition to press releases, CalPERS' strategic documents further indicate that investment decisions will be based in part on its stances taken on controversial topics. CalPERS' five-year strategic plan "articulates a comprehensive outlook towards achieving [CalPERS'] mission" and "outline[s] goals and objectives" to provide "a clear

131. Romano, *supra* note 127, at 798 (describing the close connection between state political authorities and public pension funds, especially with regard to pressure exerted by those state authorities for the pension fund to invest or vote to the advantage of the state's economy); *see also* Paul G. Mahoney & Julia D. Mahoney, *The New Separation of Ownership and Control: Institutional Investors and ESG*, 2021 COLUM. BUS. L. REV. 840, 878 (2022), https://doi.org/10.52214/cblr.v2021i2.8639 ("Public pension funds exercise influence over corporate policies out of proportion to their ownership precisely because they are not as constrained by market forces as other investors.").

132. Romano, *supra* note 127, at 804–05.

133. *Id.*

134. Letter from Theresa Taylor, President, CalPERS Bd. Admin., to Hon. Gavin Newsom, Governor of State of California (Mar. 2, 2022), https://www.calpers.ca.gov/page/newsroom/for-the-record/2022/calpers-responds-to-governor-gavin-newsom [https://perma.cc/B792-768X].

135. Letter from Marcie Frost, Chief Exec. Officer, CalPERS Bd. Admin., to Sara Thesis, Fossil Free California (Sept. 13, 2020), https://www.calpers.ca.gov/page/newsroom/for-the-record/2020/calpers-responds-to-fossil-free-california-report [https://perma.cc/S35P-2Q7D].

direction for [CalPERS'] program areas" and to "guide[ ] [CalPERS'] essential business processes."[136] One objective of the plan is to "[e]ducate and engage stakeholders on system impacts including policy and program changes," while another objective is to "[i]ntegrate sustainable investment strategies," which is measured, in part, by the "[p]ercentage of [d]iverse [m]anagers" as well as a "[j]ust [t]ransition to [n]et [z]ero [carbon emissions] by 2050."[137]

CalPERS' Governance and Sustainability Principles (which serve as a "broader statement of [CalPERS'] views on best practices guiding [its] engagement with companies, advocacy agenda with policymakers, and expectations for both [its] internal and external managers across the total fund") further reveals CalPERS' specific position on controversial matters.[138] In the document, CalPERS stresses the importance of "effective regulation" and states that "[p]olicymakers should establish stable and clear carbon pricing policy that appropriately prices the externalized cost to the economy and society from greenhouse gas emissions."[139] The document further specifies that "carbon pricing should be set at a level, and with the regulatory certainty, that incentivizes the business practices, consumer behavior, and related investment decisions needed to drive the transition to a thriving, low-carbon global economy."[140] CalPERS further calls for "Capital Market Openness," which is undermined by "deterrents to free trade such as trade barriers and punitive tariffs," and "Political Stability," which includes political risk from "religion in politics."[141]

In addition to its own strategic documents, CalPERS has further signed significant public statements afield from its purpose of providing financial security for its members. For instance, CalPERS has signed onto a public letter from a cohort of institutional investors, stating that "it is essential that we deliver on the Paris Agreement [an international treaty with the goal of reducing carbon emissions]."[142]

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136. CAL. PUB. EMPS. RET. SYS., 2022–27 STRATEGIC PLAN 2 (2022) [hereinafter STRATEGIC PLAN].

137. *Id.* at 6, 8; RON PEYTON ET AL., CALPERS PEER BENCHMARK SURVEY: WOMEN AND MINORITY OWNED MANAGERS 10 (2014) ("CalPERS defines a diverse investment management business as: A for-profit enterprise, regardless of size, physically headquartered in the United States or its trust territories, which is owned and operated by women and/or ethnic minority group members. Ethnic Minority Group Members are defined as United States citizens and permanent residents who are African American, Asian American, Hispanic American or Native American based on 2010 US Census classifications.").

138. CAL. PUB. EMPS. RET. SYS., CALPERS' GOVERNANCE & SUSTAINABILITY PRINCIPLES 1 (2019) [hereinafter CALPERS' PRINCIPLES].

139. *Id.* at 34–35.

140. *Id.* at 35.

141. *Id.* at 34, 36.

142. Public Letter from the Institutional Investors Group on Climate Change (Dec. 19, 2018), https://www.iigcc.org/download/investor-letter-on-power-sector-decarbonisation/?wpdmdl=1832&refresh=62c79b8040c4f1657248640 [https://perma.cc/35Y5-UX2L]. Other public pension funds that signed this agreement included the

Likewise, CalPERS—along with other public pension funds—is a signatory of the Climate Action 100+ initiative, which seeks "to ensure the world's largest corporate greenhouse gas emitters take necessary action on climate change."[143] CalPERS has further sent a letter in support of the SEC's proposed climate disclosures rules even as the SEC received over 14,000 letters during the three-month comment period—including from public intellectuals, environmental activists, citizen advocacy groups, and elected officials—all of which indicated that "this is a major question of public policy, not a discrete topic of investor protection."[144]

Finally, CalPERS undertakes expressive conduct by engaging with businesses and advocating for specific approaches on controversial topics.[145] For example, after identifying companies in its portfolio that "lack elements of board diversity," CalPERS will write "letters to the board chair of each company requesting information on how diversity is considered in the context of board composition, refreshment, and nomination" and will "request each company to develop and publicly disclose its diversity policy and implementation plan for improving board diversity."[146] If companies are unresponsive to the initial letter, CalPERS repeatedly "attempts to engage before escalating the issue by filing shareowner proposals at those companies."[147] This is because CalPERS prefers to "engage[e] privately and confidentially"; though, there is always the underlying knowledge that CalPERS will "use[ ] its strength as a global investor"[148] by "us[ing] proxy voting and share-

New York State Common Retirement Fund and California State Teachers' Retirement System. *Id.*

143. *Investor Signatories*, CLIMATE ACTION 100+, https://www.climateaction100.org/whos-involved/investors/?investor_topic=united-states [https://perma.cc/64BE-AECE]. Other signatories include the California State Teachers' Retirement System, the Connecticut Retirement Plans, the Employees Retirement System of the State of Hawaii, the Los Angeles County Employees Retirement Association, the Illinois State Treasurer's Office, the Maryland State Retirement and Pension System, the Minnesota State Board of Investment, the New Jersey Division of Investment, the New York City Pension Funds, the New York State Common Retirement Fund, the New York State Teachers' Retirement System, the Oregon State Treasurer, the San Francisco Employees' Retirement System, the Seattle City Employees' Retirement System, the Vermont Pension Investment Committee, and the Washington State Investment Board. *Id.*

144. Lawrence A. Cunningham, *What the Volume and Diversity of Comment Letters to the SEC Say About Its Climate Proposal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 3, 2022), https://corpgov.law.harvard.edu/2022/07/03/__trashed-4/#more-147582 [https://perma.cc/9DVP-GYDZ].

145. *See* Sanford M. Jacoby, *Convergence by Design: The Case of CalPERS in Japan*, 55 AM. J. COMP. L. 239, 249 (2007) (discussing how CalPERS used a "behind-the-scenes approach" to get companies to change).

146. *Corporate Engagements*, CAL. PUB. EMPS. RET. SYS. (last updated Jan. 24, 2023), https://www.calpers.ca.gov/page/investments/corporate-governance/corporate-engagements [https://perma.cc/AAR3-VK2Z].

147. *Id.*

148. *Id.*; Marcie Frost, *Diversity, Equity, and Inclusion Drive CalPERS Commitment to Members*, CAL. PUB. EMPS. RET. SYS. (last updated Sept. 9, 2021), https://

owner campaigns as tools to bring change" if those engagements are unsuccessful.[149] Similarly, CalPERS engages businesses on climate-related issues, as it has instructed portfolio companies' boards and senior management to "[t]ake action to reduce greenhouse gas emissions across their value chain, consistent with the Paris Agreement's goal."[150]

These engagements have yielded results. Over the past five years, CalPERS has engaged over 800 companies requesting that they "improve diversity on their boards," and of those companies, roughly 78% (620) "have since added elements of board diversity that they did not have prior to [CalPERS'] engagement."[151] Likewise, seventeen of the twenty-two companies that CalPERS engaged with regarding climate change "have now set a net-zero by 2050 target."[152] In 2021, moreover, CalPERS was part of a successful effort to replace two of Exxon Mobil's directors with directors experienced in climate transition—a sign that inaction on climate change could cost directors their positions.[153]

Given that CalPERS' statements regarding climate change and board diversity are not directly connected to the CalPERS' purpose, they must survive, at minimum, exacting scrutiny to withstand First Amendment challenges.[154] They cannot: California can address climate change and board diversity through its legislative process—and is doing so.[155]

What is more, even if climate change and board diversity are germane to CalPERS' purpose, *Janus*'s unwillingness to enforce such line drawing when it comes to important matters of public concern raises significant doubts that the Supreme Court would enforce such a line here.[156]

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www.calpers.ca.gov/page/newsroom/for-the-record/2021/diversity-equity-inclusion-drive-calpers-commitment-to-members [https://perma.cc/4V7G-8X5E].

149. *See Corporate Engagements*, *supra* note 146.

150. *Id.*

151. *Id.*

152. SIMISO NZIMA, CAL. PUB. EMPS. RET. SYS., PROXY VOTING & CORPORATE ENGAGEMENTS UPDATE 3 (2022).

153. Amanda White, *How CalSTRS Took on Exxon*, TOP1000FUNDS.COM (May 27, 2021), https://www.top1000funds.com/2021/05/44700/ [https://perma.cc/9LM4-TY87].

154. *See* McDonald v. Longley, 4 F.4th 229, 244 (5th Cir. 2021).

155. *See infra* notes 190–97 and accompanying text; *see also The Future of Climate-Related Disclosures in California*, SIDLEY AUSTIN (Apr. 27, 2022), https://www.sidley.com/en/insights/newsupdates/2022/04/the-future-of-climate-related-disclosures-in-california [https://perma.cc/YA7U-BBF5] (describing legislation in California to require public and private businesses in California to disclose their greenhouse gas emissions). Whether efforts to promote board diversity are consistent with other federal or state constitutional provisions is beyond the scope of this article; the legality of such efforts is being litigated. *See* All. for Fair Bd. Recruitment v. Weber, No. 2:21-CV-01951-JAM-AC, 2023 WL 3481146, at *1 (E.D. Cal. May 15, 2023).

156. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2481–82 (2018).

B. *Compelled Subsidization of the Pension Fund's Speech*

Janus itself provides the second way to challenge the current structure of public pension funds: that is, by challenging a state employee's compelled subsidization of a private speaker—here, the pension fund. This is because members are required to subsidize the speech of the public pension funds by providing those funds with the capital necessary to be influential speakers—both through the decision of which stock to buy as well as through proxy voting.

1. Investment Decisions as Speech

Public pension funds generally decide where to invest their funds, and those investment decisions can be used to advance specific causes. Hence, while money is not speech, pension funds nevertheless use state employees' contributions "to make [CalPERS'] views known" on political or ideological matters.[157]

CalPERS, for example, does not provide investment support for certain politically sensitive areas of business. CalPERS' Board has prohibited its portfolios from having holdings in companies identified as "primary tobacco producers," that is, "companies whose primary business involves the production and sale of cigarettes."[158] The Board has also imposed a similar prohibition on investments in "companies identified as manufacturing assault-style weapons illegal for sale in California."[159] This is the case even though an economic analysis indicates that CalPERS could remove "all board-directed divestment restrictions" and still be acting consistent with its fiduciary obligations.[160] Indeed, the CalPERS Board has considered whether to end its divestment of tobacco stocks on several occasions—with several Board members voting to end the divestment policy in March 2021 on the basis that, in the words of one Board member, "This is a retirement fund, not a political fund, and that's what I want the goal to be."[161]

157. Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 421 (2013); *see* Baude & Volokh, *supra* note 12, at 189 ("Money is not speech, but restricting us from spending money to speak restricts our speech . . . .").

158. CAL. PUB. EMPS. RET. SYS. INV. COMM., FIVE-YEAR DIVESTMENT REVIEW 3 (2021).

159. *Id.*

160. *Id.* at 6.

161. Randy Diamond, *CalPERS Rejects Reinvesting in Tobacco Again*, CHIEF INV. OFFICER (Mar. 16, 2021), https://www.ai-cio.com/news/calpers-rejects-reinvesting-tobacco/ [https://perma.cc/9Q5V-LNT5]. Other pension funds have taken similar steps. For example, two New York City pension funds have also divested $4 billion from fossil fuel companies. *NYC Pension Funds to Divest $4 Billion from Fossil Fuels*, ASSOCIATED PRESS (Jan. 26, 2021), https://apnews.com/article/new-york-us-news-bill-de-blasio-new-york-city-scott-stringer-38866c4a149af462823a6733ff8d2138 [https://perma.cc/V65P-WMJZ].

Likewise, CalPERS expressly integrates controversial ESG factors into its investment decision-making and invests accordingly.[162] Its own Governance and Sustainability Principles instruct that "CalPERS expects all internal and external managers of CalPERS capital to integrate [its] Principles into investment decision making."[163] Accordingly, CalPERS has allocated over $500 million to an internally managed public stock environmental index fund that invests in securities that "derive a material portion of their revenues from environmentally friendly sectors."[164]

2. Proxy Voting as Speech

Public pension funds further use employee contributions to purchase stocks, and those stocks ordinarily carry with them voting rights in the corporation's annual proxy elections, as those voting rights are a core component of the rights connected to share ownership.[165] Public pension funds often exercise these rights.[166] And some—like CalPERS—will post their intended proxy votes in advance "to encourage shareowners to vote in accordance with" the pension fund.[167]

This is problematic because, as other scholars have observed, proxy voting can implicate political issues subject to First Amendment protections.[168] For instance, in 2022, investors filed "a record 215 climate-related shareholder resolutions," 78 of which asked companies to set greenhouse gas emissions targets or report on progress toward existing targets and 24 of which asked companies "to disclose how their climate lobbying and that of their trade associations align with the

162. *Sustainable Investments Program*, CAL. PUB. EMPS. RET. SYS. (last updated Jan. 23, 2023), https://www.calpers.ca.gov/page/investments/sustainable-investments-program [https://perma.cc/5EEY-AHZU].

163. CALPERS' PRINCIPLES, *supra* note 138, at 2.

164. CAL. PUB. EMPS. RET. SYS., THE IMPORTANCE OF CORPORATE ENGAGEMENT ON CLIMATE CHANGE 3 (2021), https://www.calpers.ca.gov/docs/corporate-engagement-climate-change.pdf [https://perma.cc/7HML-AXVP].

165. *See, e.g.*, Stephen M. Bainbridge, *The Scope of the SEC's Authority over Shareholder Voting Rights* 2 (UCLA Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, No. 07-16, 2007), *available at* http://ssrn.com/abstract=985707 ("Shares of common stock represent a bundle of ownership interests: a set of economic rights, such as the right to receive dividends declared by the board of directors; and a right to vote on certain corporate decisions.").

166. *See* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 371 (2015) ("The pension plan's board then selects the investments for the plan, and the human pension beneficiaries have no influence over that process.").

167. *Notable Proxy Votes*, CAL. PUB. EMPS. RET. SYS., https://www.calpers.ca.gov/page/investments/corporate-governance/proxy-voting/notable-proxy-votes [https://perma.cc/D9V6-AQLL].

168. *See* Finseth, *supra* note 11, at 357; Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163, 184–89 (1994).

goals of the Paris Agreement."[169] Indeed, BlackRock itself has recognized that many climate-related shareholder proposals have potentially become too prescriptive.[170] Likewise, other proxies in 2022 included resolutions about a company's political contributions to candidates perceived as not in line with the company's public statements about issues such as gun control, election integrity, racial justice, and LGBTQ rights.[171]

Most recently, certain shareholder proposals have been raised in the wake of *Dobbs*.[172] For instance, Lowe's 2022 Proxy Statement included a shareholder proposal requesting a "Report on Risks of State Policies Restricting Reproductive Health Care."[173] This report would have detailed "any known and any potential risks and costs to the Company caused by enacted or proposed state policies severely restricting reproductive health care" and would have detailed "any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks," including "decisions regarding closure or expansion of operations in states proposing or enacting restrictive laws and strategies such as any public policy advocacy by the company, related political contributions policies, and human resources or educational strategies."[174] Lowe's management recommended that shareholders vote against this proposal while CalPERS voted for it.[175] Ultimately, the proposal was unsuccessful.[176]

Whatever one's views of the merits of these various proxy votes, they touch on issues currently in dispute both in the political branches as well as in the general public. Accordingly, a court considering a pension fund's use of proxy voting could easily see that situation as similar to the one found in *Janus*. Like the union's use of agency fees to further its views on matters of public concern, a public pension

169. *As 2022 Proxy Season Begins, Record Numbers of Climate Resolutions and Agreements Bode Well for Action*, CLIMATE ACTION 100+ (Apr. 27, 2022), https://www.climateaction100.org/news/as-2022-proxy-season-begins-record-numbers-of-climate-resolutions-and-agreements-bode-well-for-action/ [https://perma.cc/7THK-F6TA].

170. BLACKROCK, 2022 CLIMATE-RELATED SHAREHOLDER PROPOSALS MORE PRESCRIPTIVE THAN 2021 1 (2022), https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf [https://perma.cc/E3JL-7ZM6].

171. Paul Hodgson, *Shareholder Resolutions in Review: Political Spending*, ISS INSIGHTS (June 23, 2022), https://insights.issgovernance.com/posts/shareholder-resolutions-in-review-political-spending/ [https://perma.cc/K4CT-4VYB].

172. Paul Verney, *Asset Managers Tight-Lipped on Reproductive Rights Proposals*, RESPONSIBLE INV. (May 20, 2022), https://www.responsible-investor.com/asset-managers-tight-lipped-on-reproductive-rights-proposals/ [https://perma.cc/XU5J-M9HX].

173. LOWE'S COS., INC., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS & PROXY STATEMENT 73 (2022).

174. *Id.*

175. *Global Proxy Voting Decisions*, CAL. PUB. EMPS. RET. SYS., https://viewpoint.glasslewis.net/GlassLewisWebDisclosure/webdisclosure/search.aspx?glpcustuserid=CAL095&WDFundGroupID=2774 [https://perma.cc/K9RT-V5B2].

176. Lowe's Cos., Inc., Annual Report (Form 8–K) 1 (May 27, 2022).

fund's use of proxy voting enabled by employees' mandatory contributions allows it to promote policies on matters of public concern that regulators may not even be able to achieve directly due to a lack of political will.[177]

Of course, public pension funds are required to vote their proxies in accordance with their fiduciary duties.[178] Yet, just as the Court found that the statutory requirement that public unions were required to negotiate for the benefit of all their members did not resolve the First Amendment concerns raised in *Janus*, a similar argument can be raised here that a pension fund's fiduciary duties do not obviate the First Amendment compelled speech issues.[179]

C. *Compelled Subsidization of a Third Party's Speech*

Public pension funds often select external equity managers to handle portions of the overall investment fund.[180] Given *Southworth*, one would expect that the selection of external managers would be viewpoint neutral, especially as public pensions are tasked with maximizing returns for the sake of their employees. Yet, manager selections—and the funding that comes with such selections—are not viewpoint neutral: rather, funding decisions are often based on whether the candidate managers promote ESG principles.[181]

CalPERS illustrates this. Approximately 30% of CalPERS assets are managed externally.[182] Because the selection of external managers is "a critical piece of the investment function" as they are "strategic partners," CalPERS provides "a standardized, equal-access submission point for all managers to submit investment proposals."[183] All

177. *See* Hess, *supra* note 61 and accompanying text.

178. *See, e.g.*, EMPS. RET. SYS. OF TEX., PROXY VOTING POL'Y 1 (2011), https://ers.texas.gov/About-ERS/ERS-Investments-overview/Proxy-Voting/Proxy-Voting-Policy.pdf [https://perma.cc/MD2U-YPAN].

179. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2468 (2018).

180. JEAN-PIERRE AUBRY & KEVIN WANDREI, CTR. RET. RSCH. BOS. COLL., INTERNAL VS. EXTERNAL MANAGEMENT FOR STATE AND LOCAL PENSION PLANS 1 (2020), https://crr.bc.edu/briefs-state-local-pensions/internal-vs-external-management-for-state-and-local-pension-plans/ [https://perma.cc/L7YE-WGKT].

181. N.Y. COMMON RET. FUND, ENVIRONMENTAL, SOCIAL & GOVERNANCE (ESG) STRATEGY 3 (2020), https://www.osc.state.ny.us/files/common-retirement-fund/2020/pdf/ESG-strategy-report-2020.pdf [https://perma.cc/KWU9-4HNC] ("In reviewing proposed investments and when monitoring existing asset managers, the [New York Common Retirement] Fund evaluates ESG policies, processes, resources, disclosure, and, where relevant, active ownership activities in order to assess the managers' approach and commitment to ESG Integration as it relates to achieving the best risk adjusted returns.").

182. CALPERS INV. OFF., INVESTMENT PROPOSAL SUBMISSION PORTAL 1 https://www.calpers.ca.gov/docs/forms-publications/fact-sheet-investment-proposal-submission-portal.pdf [https://perma.cc/B3CB-RYPT].

183. *Id.*

"external investment opportunities must be submitted through [this] portal in order for CalPERS to make an investment decision."[184]

Yet these investment proposals are not considered on a viewpoint-neutral basis. Rather, CalPERS "expects all . . . managers of CalPERS capital to integrate [CalPERS] Principles into investment decision making, including proxy voting."[185] As described above, those Principles expressly incorporate specific ESG goals, such as a targeted reduction in carbon emissions. And external managers are expressly "selected" in accordance with those Principles.[186] Accordingly, like the problematic criteria in *Southworth II*, pension funds that allocate funds in favor of managers working to advance ESG principles are forcing state employees to subsidize the speech of those external managers.

D. *Objections*

There are two likely objections that might be raised to the lines of reasoning identified above. This Section identifies and discusses each in turn.

1. ESG as Long-Term Value Investing

Of course, CalPERS and other public pension funds would respond to the charge that they are promoting certain political or ideological values by asserting that board diversity and climate change initiatives—as well as ESG investment principles generally—are simply for the long-term wealth maximization of their members.[187] For instance, given the likelihood that some form of carbon emission legislation will be enacted in the near future, companies need to be prepared for a carbon-constrained economy.[188] Likewise, there is some empirical evidence that ESG investments perform better than traditional investing.[189] Plus, one might argue that an expanded understanding of who is owed the public pension fund's fiduciary duties would *require* such ESG investing.[190] Furthermore, to the extent public pensions do ex-

184. *Id.*

185. CAL. PUB. EMPS. RET. SYS., CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT TOTAL FUND INVESTMENT POLICY 72 (2022) https://www.calpers.ca.gov/docs/total-fund-investment-policy.pdf [https://perma.cc/M7MZ-QJWJ].

186. *Id.* at 8.

187. *See* Cunningham, *supra* note 144 and accompanying text. *See generally* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020) (explaining how diversified investors would be rationally motivated to internalize intra-portfolio externalities).

188. *See* Cunningham, *supra* note 144 and accompanying text.

189. *See, e.g.*, Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 212 (2015), ("[W]e find that the business case for ESG investing is empirically well founded.").

190. Paul Rose, *Public Wealth Maximization: A New Framework for Fiduciary Duties in Public Funds*, 2018 U. ILL. L. Rev. 891, 894–95, http://dx.doi.org/10.2139/

press views on political or societal topics, those occasions are rare and "do not immediately impact the political process, unlike what the *Janus* majority believes happens when unions bargain with [their] government employers."[191]

To begin, whether ESG investing creates long-term shareholder value—rather than losing value or being value neutral—remains a contested point,[192] especially given the higher fees associated with certain ESG funds.[193] Even assuming that such ESG initiatives do generate long-term wealth maximization for the fund beneficiaries, that does not preclude such initiatives from expressing views on matters of public concern.[194] Both ESG's focus on climate initiatives and board diversity have been recognized as disputed political subjects. Indeed, in *Janus*, the Court observed that collective bargaining included union

ssrn.2805427 (arguing that "[a] shift to the proper recipient of fiduciary duties—current and future generations of citizens—requires fund managers to more fully consider the externalities accompanying their investments, which should serve to help them fully and accurately price their investments"). The recently finalized regulations under ERISA support such an argument. *See* Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73881 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550) ("The Department is particularly concerned that the current regulation created a perception that fiduciaries are at risk if they consider any ESG factors in the financial evaluation of plan investments[,] and that they may need to have special justifications for even ordinary exercises of shareholder rights.").

191. Lin, *supra* note 12. While some, including the Supreme Court in the 1970s, have suggested that the less exacting commercial speech doctrine should apply to securities regulation, see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61–62 (1973); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), that doctrine is a poor fit for proxy proposals. Butler & Ribstein, *supra* note 168, at 1814–89. Consider, for instance, that the SEC's staff allow shareholder proposals that "focus on sufficiently significant social policies." *See, e.g.*, Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 336–340, 345 (3d Cir. 2015) (describing this approach).

192. *See, e.g.*, WAYNE WINEGARDEN, PAC. RSCH. INST., ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING: AN EVALUATION OF THE EVIDENCE 5 (2019) ("Judged against past performance, ESG funds have not yet shown the ability to match the returns from simply investing in a broad-based index fund."); Jan-Carl Plagge & Douglas M. Grim, *Have Investors Paid a Performance Price? Examining the Behavior of ESG Equity Funds*, 46 J. PORTFOLIO MGMT. 1, 1–3 (2020), https://doi.org/10.3905/jpm.2020.46.3.123 (concluding that "the majority of funds in any of the tested ESG categories does not produce statistically significant positive or negative gross alpha"); Sanjai Bhagat, *An Inconvenient Truth About ESG Investing*, HARV. BUS. REV. (Mar. 31, 2022), https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing [https://perma.cc/AZ57-WXCP] ("The conclusion to be drawn from this evidence seems pretty clear: funds investing in companies that publicly embrace ESG sacrifice financial returns without gaining much, if anything, in terms of actually furthering ESG interests.").

193. *See* Andy Kessler, *The Many Reasons ESG Is a Loser*, WALL. ST. J. (July 10, 2022, 11:57 AM) (describing how certain ESG funds charge five times as much in fees compared to a similar index fund).

194. Finseth, *supra* note 11, at 350–51 ("As a general matter, it would be incorrect to conclude that commercial speech is immune from being political or ideological in nature. As the press demonstrates daily, some of the most intense political and ideological disputes often concern commercial matters."); Butler & Ribstein, *supra* note 168, at 172 ("[M]uch clearly political debate concerns purely economic decisions.").

speech about "climate change," which was a "sensitive political topic[ ]" that was "undoubtedly [a] matter[ ] of profound value and concern to the public."[195] That observation is reflected in public polling as, for instance, over 80% of Democrats view climate change as a "critical threat" and think that the United States should take a leading role in limiting it, while only 16% of Republicans view climate change as a "critical threat" and just 31% of Republicans support the United States' taking a leading role in limiting it.[196]

Nor, for instance, is mandating board diversity an apolitical and uncontested topic. California recently enacted laws requiring publicly traded companies to have women and racial and ethnic minorities on their boards or face financial penalties.[197] And these laws were not unanimous; indeed, both Democrats and Republicans voted against the 2018 gender diversity bill, and a majority of Republican state senators voted against the 2020 gender and ethnic diversity bill.[198] What is more, a majority of voters in California rejected efforts in 2020 to repeal an amendment prohibiting public institutions from discriminating against or granting preferential treatment to persons on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting.[199]

To be sure, many ESG measures—for instance, governance matters such as shareholder approval rights, director accountability, and board independence—may not be directly connected to the more contested ESG measures described above. That some speech is not of an ideological or political nature, however, does not change the fact that other speech is. Of course, the decision to purchase a single stock based on ESG principles or vote on a particular proxy may appear

195. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476 (2018).

196. DINA SMELTZ ET AL., CHI. COUNCIL ON GLOBAL AFFS., REPUBLICANS AND DEMOCRATS IN DIFFERENT WORLDS ON CLIMATE CHANGE 1 (2021).

197. Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, L.A. TIMES (Sept. 30, 2018, 4:00 PM), https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html [https://perma.cc/LAE5-DBJN]; Michael Volkov, *California Mandates Increased Diversity on Corporate Boards*, J.D. SUPRA (Dec. 17, 2020), https://www.jdsupra.com/legalnews/california-mandates-increased-diversity-18235/ [https://perma.cc/TA9Q-GFH3].

198. *Roll Call: CA SB826, 2017–2018, Regular Session*, LEGISCAN, https://legiscan.com/CA/rollcall/SB826/id/773460 [https://perma.cc/HST5-ZLB5] (listing a tally of 41 yea votes (all Democrats) with 26 nay votes (4 Democrats, 21 Republicans, and 1 Independent) for gender diversity requirement); *Roll Call: CA AB979, 2019–2020, Regular Session*, LEGISCAN, https://legiscan.com/CA/rollcall/AB979/id/977424 [https://perma.cc/M5Q4-HG9B] (listing a tally of 26 yea votes (25 Democrats and 1 Republican) with 8 nay votes (all Republicans) for gender and racial and ethnic diversity requirement).

199. *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020) [https://perma.cc/TRB9-Q556].

insignificant (just like an individual state employee's request for a raise), but the aggregation and consolidation of those purchasing decisions by pension funds can have a substantial impact in advancing the values driving those actions (just like a union's negotiations on behalf of all employees for a raise).[200] Indeed, drawing from the New Governance paradigm, collaborative private action may be *the* means for achieving particular policy ends, particularly if those ends appear politically infeasible—such as the reduction of greenhouse gas emissions.[201]

What is more, attempting to differentiate between "permissible" and "impermissible" ESG efforts is likely to generate line-drawing issues like those identified in *Janus*. As other scholars have observed, the difference between "ESG investing motivated by providing a benefit to a third party or . . . for moral or ethical reasons" and ESG investing "to improve risk-adjusted returns" is the investor's own motive.[202] Hence, just as "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends,"[203] courts may likewise be unwilling to identify a workable line surrounding permissible and impermissible investments geared toward sustainable long-term value. Instead, courts may turn to *Janus*'s express opt-in requirement as a means for avoiding such knotty issues.

200. *See Janus*, 138 S. Ct. at 2472–73 ("Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services.").

201. *See supra* Section II.B; *see also* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004) ("The new governance model supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals."); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691, 726 (2003), https://doi.org/10.1046/j.0023-9216.2003.03703001.x; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549–56 (2000); Wentong Zheng, *Corporations as Private Regulators*, 55 U. MICH. J.L. REFORM 649, 652 (2022), https://doi.org/10.36646/mjlr.55.3.corporations ("Indicating the nuanced nature of corporations' private regulatory power, many politicians decry corporations' economic power in general but are nonetheless comfortable encouraging corporations to exercise their regulatory power—which is predicated upon their economic power—to achieve desired political outcomes.").

202. Schanzenbach & Sitkoff, *supra* note 13, at 397.

203. Harris v. Quinn, 573 U.S. 616, 635–36 (2014).

2. Government Speech

A second response public pension funds will likely raise is that pension funds are engaged in government speech, and thus their speech does not implicate First Amendment concerns.[204] Yet that doctrine is a difficult fit for several reasons: (1) the government speech doctrine is not a defense to the forced association claim described above because such a claim is not a speech claim, (2) CalPERS may not be a government speaker for purposes of the government speech doctrine, thus that doctrine may not apply to CalPERS's speech, and (3) employees retain a property interest in their contributions, thus making it more difficult to argue that this speech is clearly government and not private speech.

Over the course of eight years, the Supreme Court considered three different cases involving compelled speech challenges to federal programs that developed the government speech doctrine. Those programs used targeted assessments of producers to finance generic advertising that promoted various agricultural products.[205] In the first two cases, the Court split on whether the assessments at issue violated the First Amendment rights of the plaintiffs while declining to address whether the speech at issue was government speech.[206] Finally, in *Johanns v. Livestock Marketing Association*, the Supreme Court considered whether generic advertising funded by an assessment on cattle sales and imported beef products and approved of by a "Beef Board" and the Secretary of Agriculture qualified as government speech "exempt from First Amendment scrutiny."[207] There, the Court held that "compelled funding of government speech [did] not alone raise First Amendment concerns" as, otherwise, taxpayers would be free to object to any particular programs with which they took issue.[208] In reaching this conclusion, the Court reasoned that "[t]he compelled-subsidy analysis [was] altogether unaffected by whether the funds for the promotions [were] raised by general taxes or through a targeted assessment," as "the injury of compelled funding (as opposed to the injury of compelled speech) [did] not stem from the Government's mode of

204. *See, e.g.*, Baude & Volokh, *supra* note 12, at 195–96; Chemerinsky & Fisk, *supra* note 12, at 57.

205. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

206. *Compare* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) (rejecting a First Amendment challenge to agricultural marketing orders that, as part of a larger regulatory marketing scheme, required producers of certain California tree fruit to pay assessments for product advertising), *with* United States v. United Foods, Inc., 533 U.S. 405, 408, 415 (2001) (striking down "a federal statute [that] mandate[d] assessments on handlers of fresh mushrooms to fund advertising for the product" where there was no "broader regulatory system in place"). Neither of the cases addressed whether the speech at issue was the government speech. *See United Foods*, 533 U.S. at 416–17; *Glickman*, 521 U.S. at 482 n.2 (Souter, J., dissenting).

207. *Johanns*, 544 U.S. at 553.

208. *Id.* at 559.

accounting."[209] Applying that reasoning to public pension funds, given that public pension funds generally are state agencies, the mandatory contributions made by employees could be viewed as a compulsory payment—similar to taxes or special assessments—that subsidizes government speech.[210]

Yet there are several reasons why the context-dependent government speech doctrine might be a poor fit here.[211] To begin, the government speech doctrine is not a defense to a compelled association claim because the claim is not about the speech in question, but rather the compelled association of an individual with a group that endorses the speech.[212] This is because "[t]he government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control."[213] Phrased another way, CalPERS attributes its speech to its members—and not taxpayers—when it acts on its members' behalf through, for instance, signing the Paris Climate Accord. An objection to being associated with the act of signing this document applies, regardless of whether CalPERS is engaged in government speech.

Second, like the California Bar in *Keller*, a public pension fund might not be a "government entity" for purposes of the government speech doctrine because the respective state government lacks substantial control over the administration of those funds. As Professor Eric Alden has explained, applying the government speech doctrine to public pension funds seems out of place, given the lack of practical control current government officials have over public pensions.[214] Whereas appointments to the Beef Board and all advertising decisions were approved by the Secretary of Agriculture in *Johanns*,[215] a majority of CalPERS' board, for instance, is elected, not appointed by the governor; the California legislature leaves investment decisions—with a few exceptions—to the Board's discretion; and no guidance is pro-

209. *Id.* at 562, 564 (emphasis omitted).

210. *See* Baude & Volokh, *supra* note 12, at 183; Chemerinsky & Fisk, *supra* note 12, at 57.

211. *See* Shurtleff v. City of Bos., 142 S. Ct. 1583, 1589 (2022) (noting that the government speech doctrine involves a "holistic inquiry" "driven by a case's context rather than the rote application of rigid factors"); *id.* at 1598 (Alito, J., concurring in judgment) (criticizing the court's analysis as not providing "a principled way of deciding cases").

212. *See supra* Section II.A. Of course, some have questioned this distinction. *See* Lathrop v. Donohue, 367 U.S. 820, 850 (1961) (Harlan, J., dissenting).

213. *Johanns*, 544 U.S. at 568 (Thomas, J., concurring).

214. Finseth, *supra* note 11, at 342; *see Shurtleff*, 142 S. Ct. at 1589–90 (noting that courts consider "the extent to which the government has actively shaped or controlled the expression" in determining whether an expression is government speech).

215. *Johanns*, 544 U.S. at 553–54.

vided regarding how CalPERS should vote in proxy contests.[216] Plus, retirees elect a board member even as they are not required to remain citizens of the state.[217] Thus, it is difficult to see how California controls the speech of CalPERS even as CalPERS may act to further policy objectives shared by the state.

Third, the government speech doctrine would be a "painful fit"[218] here because of the continued property interest that many state employees possess in their contributions.[219] When it comes to a state employee's interest in their contributions, "the modern trend among state supreme courts . . . is to protect pension rights on the theory that a state's promise of pension benefits represents an offer that can be accepted through the employee's performance—thus, a unilateral, implied-in-fact contract is created that is binding on the state."[220] Indeed, some states, such as Alaska, Illinois, and New York, even enshrine the right to pension benefits in their constitutions.[221] While some states find that these contractual rights vest upon retirement,[222] other states, including California, recognize either that these contractual protections vest upon employment[223] or, alternatively, that an interest is created prior to retirement, but after the start of employment, based on promissory estoppel or other quasi-contract doctrines.[224] What is more, jurisdictions often provide that state employees are en-

216. Finseth, *supra* note 11, at 342–43.

217. *Cf. Thinking About Moving Out of California in Retirement?*, CAL. PUB. EMPS. RET. SYS., https://news.calpers.ca.gov/thinking-about-moving-out-of-california-in-retirement/ [https://perma.cc/3333-ZEYK].

218. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2472 (2018).

219. *Cf.* New York v. United States, 505 U.S. 144, 166 (1992) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). Note that Arkansas, Indiana, and Texas still view pension benefits to some degree as "mere gratuit[ies]." Michael B. Kent, Jr., *Public Pension Reform and the Takings Clause*, 4 BELMONT L. REV. 1, 4–5 (2017).

220. Parker v. Wakelin, 123 F.3d 1, 6 (1st Cir. 1997); *see* Kent, *supra* note 219, at 8–10. As the Supreme Court has explained, "[c]ontract rights are a form of property." U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977).

221. *See, e.g.*, N.Y. CONST. art. V, § 7(a) ("After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."); ILL. CONST. art. XIII, § 5 ("Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."); ALASKA CONST. art. XII, § 7 ("Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.").

222. Anenson et al., *supra* note 119, at 26 (identifying Kentucky, Louisiana, Maine, Missouri, and Ohio as all taking this approach).

223. *Id.* at 22–23 (noting that Alaska, California, Colorado, Illinois, Nevada, and Massachusetts all follow this approach); Kent, *supra* note 219, at 6–7.

224. Anenson, *supra* note 119, at 27.

titled to their contributions if they leave their employment.[225] And this interest is further reflected by the fact that public pension funds are subject to fiduciary duties while investing.[226] Hence, many public employees retain some form of property interest in their contributions even as certain public pension funds rely on those very contributions to make investment decisions, engage with corporations, and vote in proxy contests.

That property interest significantly affects the government speech analysis. It can reinforce the attribution of an unwanted message to those particular individuals.[227] But, more importantly, unlike the payment of taxes or fees, state employees are forced to bear a government-imposed message on property in which they have an interest.[228] This intrusion stands in contrast to the Supreme Court's other govern-

225. *See, e.g.*, CAL. GOV'T CODE § 20735 (West 2023) ("If the state service or membership of a member is discontinued, he or she shall, upon his or her request, be paid his or her accumulated contributions, if, in the opinion of the board, he or she is permanently separated from state service or membership by reason of the discontinuance."); WASH. REV. CODE ANN. § 2.10.220 (West 2011) ("In the event that any such member should terminate judicial service prior to his or her entitlement to retirement benefits . . . he or she shall upon request therefor be repaid from the judicial retirement fund an amount equal to the amount of his or her employee's contributions to the Washington public employees' retirement system and interest plus interest thereon from the date of the transfer of such moneys."); WYO. STAT. ANN. § 15-5-204 (West 2022) ("Any fireman with less than ten (10) years of service upon terminating his employment for any reason shall receive in a lump sum a refund of all the money he has contributed to the firemen's pension account. Refund of such contributions extinguishes all rights to any benefits under this article."); *cf.* Lyons v. Workmen's Comp. Appeals Bd., 119 Cal. Rptr. 159, 167 (Cal. Ct. App. 1975) ("Each employee has a vested interest in his contributions which ultimately he will receive either by way of refund if he leaves city employment, by disability pension if he becomes disabled, or by retirement pension when he qualifies.").

226. *See* CAL. CON. art. XVI, § 17(a) ("The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. . . . The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.").

227. *Cf.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 564 n.7 (2005) ("As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and whether or not the reasonable viewer would identify the speech as the government's. If a viewer would identify the speech as *respondents*', however, the analysis would be different."); *id.* at 568 (Thomas, J., concurring) ("The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control.").

228. *Id.* at 568–69 (Thomas, J., concurring) ("The payment of taxes to the government for purposes of supporting government speech is not nearly as intrusive as being forced to 'utter what is not in [one's] mind,' or to carry an unwanted message on one's property.") (citation omitted).

ment speech cases.[229] And it provides a traceable link between the disputed speech and the compelled employee.[230]

The Supreme Court has warned that the government speech doctrine "is susceptible to dangerous misuse" as the government can "silence or muffle the expression of disfavored viewpoints" by "simply affixing a government seal of approval" on private speech.[231] Accordingly, given the pension funds' independence in making investment decisions and the use of individual contributions to further the fund's own speech, a court may conclude that applying the government speech doctrine here would be "a subterfuge for favoring certain private speakers over others based on viewpoint."[232]

Thus, while there are obstacles to the compelled speech rationales identified above, none appear insurmountable, particularly for a Court sympathetic toward a broader understanding of the First Amendment.[233] It is time, therefore, to consider the implications of extending First Amendment protections to employees forced to contribute to pension funds.

V. Implications

Having identified potential lines of reasoning for challenging the structure of employee retirement accounts as well as potential responses to those arguments, this Part now discusses two unanticipated, serious consequences of a ruling that compelled support for pension funds engaged in ESG violates the First Amendment.

Scholars who have considered the extension of the compelled speech rationale of *Janus* have determined that it is likely to have a minimal impact. For instance, Professor Da Lin has argued that "because states remain free to pay pensions directly or rely on voluntary participation," "*Janus* might require costly short-term structural adjustments"—such as the creation of auto-enrollment programs with opt-out options—"but its long-term effects on pension funds will be relatively muted."[234] Likewise, Professor David Webber has noted

229. *See, e.g.*, *id.*

230. *Cf.* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599 (2007) ("As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing.").

231. Matal v. Tam, 137 S. Ct. 1744, 1758 (2017) (stating that "great caution" must be exercised before extending government speech precedents).

232. Shurtleff v. City of Bos., 142 S. Ct. 1583, 1595 (2022) (Alito, J., concurring).

233. Mueller, *supra* note 12, at 565.

234. Lin, *supra* note 12 (explaining how New Zealand automatically enrolls both public and private workers in a savings program while providing them with the option to opt out and that nearly 80% of the eligible population under age 65 is a member); *see also* Webber, *supra* note 12, at 2089–90 (arguing that even assuming First Amendment concerns are implicated, they would require funds to create opt-out rights); *cf.* Sachs, *supra* note 11, at 802–03 (explaining the use of direct employer payments with regard to unions).

that it is not clear that current employees would gain economically from leaving public pension funds—and they potentially have much to lose by doing so.[235]

Nevertheless, in light of the potential doctrinal paths that might lead to restrictions on public pension funds, two significant implications come into focus. First, the potential application of the compelled speech doctrine *retrospectively* on the current contributions that public pension funds are holding and the serious fiscal consequences such an application would have on state and local finances. And second, the effect of *Janus*'s opt-in requirement on policymakers' efforts to promote retirement savings among those least likely to have any.

A. *Underfunded Public Pensions May Lose a Significant Amount of Capital*

To date, much of the analysis about *Janus*'s application to mandatory employee contributions to pension funds has been prospective—that is, focused on how to maintain a pension fund's revenue stream if employee contributions may no longer be required under the Constitution. To create an alternative funding mechanism with *Janus* in mind, some have suggested that a public pension fund might auto-enroll state employees into the fund with the opportunity for employees to opt out of contributing.[236] Alternatively, a state might establish an "employer payment model," wherein the state reduces an employee's salary by a set percentage and then contributes that same percentage to the state's pension fund.[237]

These suggestions, however, are unsatisfactory. As will be explained below, auto-enrollment in a retirement plan may be inconsistent with *Janus* itself, depending on if the public pension fund continues investing based on ESG principles.[238] As for the "employer payment model," that approach likely faces significant political obstacles. For one, state employees are unlikely to support significant cuts to their pay (plus, recruiting new employees would be challenging, given the upfront reduction in salary for those positions as compared to other

235. Webber, *supra* note 12, at 2098. Moreover, as Webber points out, critics of public pension funds have generally done so on the grounds that such pensions are "so exorbitant, so rich and unaffordable" that they unfairly benefit state employees at the expense of taxpayers. *Id.* Webber further raises concerns about unions' abilities to defend public pension plans post-*Janus* as he argues that they are the main protectors of such funds. *Id.*

236. Lin, *supra* note 12; *see also* Webber, *supra* note 12, at 2089.

237. Lin, *supra* note 12; *cf.* Daniel Hemel & David Louk, *Is* Abood *Irrelevant?*, 82 U. CHI. L. REV. DIALOGUE 227, 229–31 (2015) (describing why "government employers and unions in more than twenty states continue to choose agency shop arrangements over alternative mechanisms"); *see also* Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 175–76 (2016).

238. *See supra* Section IV.B.

states).[239] For another, taxpayers are unlikely to be sympathetic to directly allocating further funds for public pensions instead of having state employees contribute their "fair share" to retirement[240]—and that funding model might be more vulnerable to cost-cutting in times of fiscal difficulty.[241]

More importantly, this prospective focus on the public pension funds has diverted attention away from a second issue: the employees' past contributions to those funds. Those contributions are also relevant and must be considered.

In fairness, the present prospective focus is understandable, given that concerns about *Janus*'s retrospective application to unions with regard to previously paid agency fees were not realized. In the wake of *Janus*, some scholars warned that unions potentially faced "massive liability" for their collection of agency fees.[242] This was because public unions had collected millions of dollars in agency fees from nonmembers in the forty years following *Abood*.[243]

Yet that concern turned out to be unfounded. Multiple suits were brought challenging the agency fees that were previously paid by individual employees to public unions.[244] But those suits were generally unsuccessful as courts determined that unions had a good faith defense under § 1983 as to liability for payments collected before the *Janus* decision, as those agency fees were collected based on constitutional support from *Abood*.[245] Hence, because prior to *Janus*, the unions "had a legal right to receive and spend [agency] fees collected from nonmembers as long as [they] complied with state law and the *Abood* line of cases," the unions "did not demonstrate bad faith" when they followed those rules.[246]

239. *Cf.* Hemel & Louk, *supra* note 237, at 243 (describing "political salience" as "spring[ing] from the idea that voters focus on 'who appears to pay the tax rather than who actually bears the burden'").

240. *Id.* at 227.

241. *See* Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 CALIF. L. REV. 1821, 1852 (2019), https://doi.org/10.15779/Z38ZP3W12P (noting that a direct reimbursement model in the context of unions "leaves exclusive bargaining representatives' financial health vulnerable to changes in the political climate").

242. Baude & Volokh, *supra* note 12, at 172.

243. Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 942 F.3d 352, 368 (7th Cir. 2019) (Manion, J., concurring).

244. *See, e.g.*, Akers v. Md. State Educ. Ass'n, 990 F.3d 375, 379 (4th Cir. 2021) ("[E]very court of appeals to have addressed the question of whether public-sector unions are entitled to interpose the good-faith defense as a bar to the refund of representation fees . . . have held that the good-faith defense bars such claims."); *Janus*, 942 F.3d at 354 ("The question before us now is whether Mark Janus, an employee who paid fair-share fees under protest, is entitled to a refund of some or all of that money. We hold that he is not . . . .").

245. *Janus*, 942 F.3d at 363–64.

246. *Id.* at 366; *see* Brown v. Am. Fed'n of State, Cnty. & Mun. Emps., Council No. 5, 41 F.4th 963, 966 (8th Cir. 2022) (noting that seven other circuits "have recognized a good-faith defense for private parties who relied on a presumptively valid state statute when they allegedly deprived a plaintiff of constitutional rights").

A similar outcome here, by contrast, would be unlikely. To begin, "the Supreme Court has made clear that its default approach is full retroactivity,"[247] and courts have either assumed[248] or concluded that *Janus* is retroactive.[249] Accordingly, a ruling against pension funds on compelled speech grounds would likely be retroactive.

More importantly, as discussed above, many state employees retain some form of property interest in their prior contributions to state pension funds. In the post-*Janus* agency fees situation, the unions there already had collected the agency fees, thus severing the employee's property interest in the funds in dispute.[250] By contrast, any good faith defense or qualified immunity here would be subject to a challenge based on the *ongoing* nature of the compelled speech violation, given the employee's continuing property interest in their money. Thus, while a public pension fund may be able to raise a good faith defense or rely on qualified immunity as to the use of an employee's contribution prior to a court decision invalidating the collection of contributions, it would not be able to rely on those doctrines to justify the continued use of those same funds after the ruling.[251]

What is more, the employer contributions—which are considered distinct from the employee's income (for instance, a refund upon separation does not include the employer's contributions)[252]—would also

247. Lee v. Ohio Educ. Ass'n, 951 F.3d 386, 389 (6th Cir. 2020).

248. *See, e.g.*, *Akers*, 990 F.3d at 379.

249. Campos v. Fresno Deputy Sheriff's Ass'n, 535 F. Supp. 3d 913, 924 (E.D. Cal. 2021) ("[T]he failure of *Janus* to reserve the retroactivity question means that *Janus* is to be applied retroactively.").

250. *See Janus*, 942 F.3d at 365 ("At the time AFSCME received Mr. Janus's fair-share fees, he had no 'right to control' that money.").

251. Defined benefit plans track individual contributions as reflected by what happens to state employees who separate from a state pension plan outside of retirement. For instance, CalPERS provides an employee who separates from CalPERS' covered employment with the option to "[r]eceive a refund of [the employee's] member contributions" and interest either by check or by rolling the funds over into another eligible retirement plan or account. CAL. PUB. EMPS. RET. SYS., OPTIONS AT SEPARATION 1 (2022), https://www.calpers.ca.gov/docs/forms-publications/options-at-separation.pdf [https://perma.cc/8ZVD-UCYK].

Accordingly, employees would appear to have a basis for bringing an equitable claim of restitution, which cannot be defeated on the basis of a good faith defense or qualified immunity defense as those only protect a defendant from damages for liability. *See Akers*, 990 F.3d at 381 (rejecting equitable restitution of agency fees because "the property that the plaintiffs seek to recover cannot clearly be traced to specific funds in the possession of the union defendants"). *But see* Chemerinsky & Fisk, *supra* note 12, at 52–53 (noting that state law can eliminate state law claims, even retroactively, and citing cases where equitable claims were rejected after *Harris*).

252. *See, e.g.*, CAL. GOV'T CODE § 20735 (West 2023) ("If the state service or membership of a member is discontinued, he or she shall, upon his or her request, be paid his or her accumulated contributions, if, in the opinion of the board, he or she is permanently separated from state service or membership by reason of the discontinuance."); WASH. REV. CODE ANN. § 2.10.220 (West 2011) ("In the event that any such member should terminate judicial service prior to his or her entitlement to retirement benefits . . . he or she shall upon request therefor be repaid from the judicial retire-

likely be required to travel with the employee seeking to withdraw her contributions. This is because the Unconstitutional Conditions Doctrine would likely apply, as "even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."[253] Hence, state employees may be entitled to both refuse to make further contributions to a public pension plan as well as to withdraw both their contributions to the plan and the corresponding employer contributions.

Such actions could have significant consequences for public pension plans. Public pension funds have historically been underfunded[254]—which is not surprising, given that, as Professor Jack Beermann has observed, underfunding allows government officials to claim credit for current services while deferring payment until after their terms of office.[255] While the fiscal positions of some funds have improved due to recent economic growth,[256] many public pension funds still face severe shortfalls in the future, "indicating that plans are unlikely to simply grow their way out of their funding problems."[257] For example, as a percentage of state gross domestic product, unfunded benefit liabili-

ment fund an amount equal to the amount of his or her employee's contributions to the Washington public employees' retirement system and interest plus interest thereon from the date of the transfer of such moneys."); WYO. STAT. ANN. § 15-5-204 (West 2022) ("Any fireman with less than ten (10) years of service upon terminating his employment for any reason shall receive in a lump sum a refund of all the money he has contributed to the firemen's pension account. Refund of such contributions extinguishes all rights to any benefits under this article."); *cf.* Lyons v. Workmen's Comp. Appeals Bd., 119 Cal. Rptr. 159, 167 (Cal. Ct. App. 1975) ("Each employee has a vested interest in his contributions which ultimately he will receive either by way of refund if he leaves city employment, by disability pension if he becomes disabled, or by retirement pension when he qualifies.").

253. Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988); *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.").

254. *See generally* David Draine & Susan Banta, *Public Pension Plans' Long-Term Fiscal Health Varies Widely Across States*, PEW CHARITABLE TRUSTS (May 3, 2022), https://www.pewtrusts.org/en/research-and-analysis/articles/2022/03/30/public-pension-plans-long-term-fiscal-health-varies-widely-across-states [https://perma.cc/J3MB-RXPT] (providing state data on the fiscal health of public pension plans).

255. Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 27 (2013).

256. Draine & Banta, *supra* note 254.

257. ANDREW BIGGS ET AL., URBAN INST., ADDRESSING AND AVOIDING SEVERE FISCAL STRESS IN PUBLIC PENSION PLANS vii (2022), https://www.urban.org/sites/default/files/publication/105383/addressing-and-avoiding-severe-fiscal-stress-in-public-pension-plans.pdf [https://perma.cc/95RM-WHS9]; *see also* Elizabeth S. Goldman &

ties were at 46% for Illinois, 38% for Alaska, and 33% for California.[258]

As currently funded, public pension funds could thus face pressing, significant financial challenges because they would essentially be required to provide "lump sum" buyouts—which are capital intensive[259]—to all members who decide to withdraw from the fund.[260] CalPERS, by its own calculations, was funded at 72% for fiscal year 2021–22,[261] which is below the federal limitations on buyouts in the private sector as buyouts in the private sector are only allowed if the defined benefit plan is funded above 80%.[262] Nor is CalPERS alone—some estimate the 2022 funded ratio for state and local plans at 77.9%.[263] Of course, states could step in to safeguard a pension plan's solvency by providing it with the necessary capital to cover shortfalls, but such actions would require other spending priorities to be "crowd[ed]-out" or for taxes to be raised.[264]

Nor would this pressure be isolated to states. Local and municipal governments could face fiscal challenges related to their unfunded liability if employees sought payout of their contributions.[265] And these

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Stewart E. Sterk, *The Impact of Law on the State Pension Crisis*, 54 WAKE FOREST L. REV. 105, 106 (2019) ("Many state and municipal pension plans are in crisis.").

258. BIGGS ET AL., *supra* note 257, at 9.

259. Samuel H. Cox et al., *Pension Risk Management with Funding and Buyout Options*, 78 INS.: MATHEMATICS & ECON. 183, 183–88 (2018), https://doi.org/10.1016/j.insmatheco.2017.09.021 ("While buyouts are attractive in terms of value creation, they are capital intensive and relatively expensive.").

260. Paul M. Secunda & Brendan S. Maher, *Pension De-Risking*, 93 WASH. U. L. REV. 733, 36 (2016) ("[L]ump-sum de-risking refers to when the plan offers beneficiaries the right to receive, in lieu of their promised pension annuity, a lump sum that is equivalent to the net present value of their defined benefit.").

261. Marc Joffe, *California's Unfunded Pension Liabilities Grow and Costs Will Hit Local Governments*, ORANGE CNTY. REG. (July 23, 2022, 7:00 AM), https://www.ocregister.com/2022/07/23/californias-unfunded-pension-liabilities-grow-and-costs-will-hit-local-governments/ [https://perma.cc/8FSK-BS8J].

262. 26 U.S.C. § 436(c)(1).

263. EQUABLE INST., STATE OF PENSIONS 2022 4–5 (2022), https://equable.org/wp-content/uploads/2022/07/Equable-Institute_State-of-Pensions-2022_Final.pdf/ [https://perma.cc/VZ58-EGAL].

264. BIGGS ET AL., *supra* note 257, at 2.

265. *See, e.g.*, Brian J. Varela, *Oxnard Looks at Possible Bond to Address $323M Debt for City Pensions*, VENTURA CNTY. STAR (July 18, 2022, 6:00 AM), https://www.vcstar.com/story/news/2022/07/18/oxnard-eyes-bond-address-growing-pension-debt-calpers/9682553002/ [https://perma.cc/6SR3-45DH] (noting that the City of Oxnard needs about $1.12 billion to fund its retiree benefits even as it currently can cover $805 million in costs to CalPERS); MARK J. WARSHAWSKY & ROSS A. MARCHAND, MERCATUS CTR., THE EXTENT AND NATURE OF STATE AND LOCAL GOVERNMENT PENSION PROBLEMS AND A SOLUTION 3–13 (2016), http://bit.ly/2ESpecG [https://perma.cc/24J7-A77P] (describing the severe fiscal straits of contemporary state and local governments).

challenges would be exacerbated by the overlap of many municipal jurisdictions.[266]

Of course, scholars have expressed skepticism that members of public pension plans would choose to leave generous pension plans purely because of their disagreement regarding a particular ESG matter or two.[267]

Yet there are reasons why individuals would elect to take such a buyout, regardless of their views concerning ESG. For example, receiving a buyout would allow individuals access to their principal[268] and, potentially, provide them with a more substantial inheritance to pass on if they are in poor health.[269] Likewise, concerns about the long-term viability of the particular fund in question may drive individuals to accept the buyout, given that they would have no means to effectively enforce their benefits if the pension trust becomes depleted.[270] This might especially be the case for county and municipal employees, given that their benefits may be cut in the event of a bankruptcy akin to what happened in Detroit and Stockton.[271]

Evidence of buyouts in the private sector, moreover, provides support for the view that state employees might be willing to take buyouts here as well. In that area, researchers have identified the "annuity puzzle," which refers to plan participants frequently choosing a lump-sum payment over an annuity payment even though many participants would benefit from the annuity payment as a protection against longevity risk (the risk of running out of money before death).[272] Indeed, in the United States, "despite the fact that annuities are the default option and opting out requires a substantial amount of paperwork, 'between 50% and 75% of eligible [defined benefit] pen-

266. Aurelia Chaudhury et. al., *Junk Cities: Resolving Insolvency Crises in Overlapping Municipalities,* 107 CALIF. L. REV. 459, 469–81 (2019), https://doi.org/10.15779/Z38F18SF6W (describing this overlap and fiscal issues arising from it).

267. Webber, *supra* note 12, at 2098.

268. *Can I Cash Out My CalPERS Pension?*, CAL. PUB. EMPS. RET. SYS.: PERSPECTIVE (2021), https://news.calpers.ca.gov/can-i-cash-out-my-calpers-pension/ [https://perma.cc/Z2E2-SEPV].

269. John G. Kilgour, *"De-Risking" Private Sector Defined Benefit Pension Plans*, 46 COMP. & BENEFITS REV. 32, 32–33 (2014), https://doi.org/10.1177/0886368713500561.

270. Amy B. Monahan, *When a Promise Is Not a Promise: Chicago-Style Pensions*, 64 UCLA L. REV. 356, 372 (2017) ("Where a pension trust is depleted, a participant can have a legal right to her benefit but not be able to effectively enforce that right absent the cooperation of the legislature in agreeing to the necessary appropriation.").

271. In re City of Detroit, 504 B.R. 97, 149–54 (Bankr. E.D. Mich. 2013) (holding that even pension rights specifically protected in the state constitution could be modified in bankruptcy); *see also* In re City of Stockton, 526 B.R. 35, 60 (Bankr. E.D. Cal. 2015).

272. GARY R. MOTTOLA & STEPHEN P. UTKUS, VANGUARD CTR. FOR RET. RSCH., LUMP SUM OR ANNUITY? AN ANALYSIS OF CHOICE IN DB PENSION PAYOUTS 2 (2007), https://www.retirementplanblog.com/wp-content/uploads/sites/304/2007/12/CRRLSA.pdf [https://perma.cc/7Q5J-2KAT].

sion plans are taken as a lump sum.'"[273] And the rate of lump-sum distributions are highest when the plan does not restrict the ability to choose a lump-sum distribution.[274]

Of course, those rates can—and do—vary based on a number of factors, including participant status (with retired participants less likely to take the lump sum), the health of the participant, and whether the participant wants responsibility for managing the lump sum.[275] But even in situations where individuals were already retired, there are examples where a substantial number of retirees accepted lump-sum payments in lieu of ongoing pension benefits. For instance, 30% of eligible retirees in General Motors Co.'s defined benefit plan accepted a lump-sum payment instead of continued pension payments.[276]

In short, then, extension of the Court's compelled speech doctrine to public pension funds carries with it significant potential financial consequences for those funds' overall stability as well as the financial stability of state and local governments.

B. *Limitations on Future Efforts to Promote Retirement*

The second important consequence of extending compelled speech protections to retirement systems is the potential limitations it could impose on legislative efforts to "nudge" individuals into saving for retirement at both the federal and state level.[277] Specifically, current federal and state legislation seeks to "auto-enroll" individuals into individual retirement accounts so that they automatically contribute to those accounts. But auto-enrollment could be constitutionally problematic if the funds within those accounts are based on ESG principles or allow the programs overseeing the account to vote on proxies without the individual's consent.

First, some context. As defined benefit plans in the private sector have approached "extinction" over the past few decades,[278] reliance has increasingly been placed on defined contribution individual investment accounts, especially 401(k) plan accounts, to provide for re-

273. *See generally* John Beshears et al., *What Makes Annuitization More Appealing?*, 116 J. PUB. ECON. 2, 2–3 (2014) (summarizing research); *see also* MOTTOLA & UTKUS, *supra* note 272, at 3–4 (finding that in a Fortune 500 defined benefit plan that offered a traditional final-average-pay plan, 73% of participants chose the lump-sum distribution over an annuity).

274. SUDIPTO BANERJEE, EMP. BENEFIT RSCH. INST., ANNUITY AND LUMP-SUM DECISIONS IN DEFINED BENEFIT PLANS: THE ROLE OF PLAN RULES 2, 17 (2013).

275. Kilgour, *supra* note 269, at 38.

276. Phil Lebeau, *GM Retirees Take Lump Sum Buyout*, CNBC (Oct. 31, 2012, 1:32 PM), https://www.cnbc.com/2012/10/31/gm-retirees-take-lump-sum-buyout.html [https://perma.cc/Y7PZ-82SJ].

277. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (discussing policymaking that influences individuals' choices and decision making).

278. Kilgour, *supra* note 269, at 32–40; *see* Webber, *supra* note 12, at 2096.

tirement.[279] This shift toward defined contribution accounts places the investment risk on the employee, and smaller employers are less likely to offer 401(k) plans.[280]

While defined contribution plans by definition mandate employee participation, individual employees generally determine whether to make contributions into the qualified plan.[281] Employers can encourage employees to participate in the plan by offering matching contributions.[282] At present, roughly 68% of private sector workers have access to retirement benefits through their employer, and about 51% of those workers have chosen to participate in those plans.[283] This access, however, varies significantly depending on one's occupation, income, and part-time/full-time status—and racial and ethnic minorities are concentrated disproportionately in positions that are less likely to offer retirement plans.[284]

This broad trend toward defined contribution plans has not shored up retirement security. According to the Federal Reserve, more than a quarter of adult Americans do not have any retirement savings.[285] Even those who do have some form of retirement savings, moreover, are likely to come up short as the median retirement savings account for those approaching retirement (ages 55 to 64) is likely to provide only $1,000 per month over a 15-year retirement span.[286] More broadly, the National Retirement Risk Index estimates that about half

279. NARI RHEE, NAT'L INST. ON RET. SEC., THE RETIREMENT SAVINGS CRISIS: IS IT WORSE THAN WE THINK? 1 (2013), https://www.nirsonline.org/wp-content/uploads/2017/06/retirementsavingscrisis_final.pdf [https://perma.cc/77K2-LXDP].

280. Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 11 (2013).

281. Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 20–21 (2011); *see* Richard L. Kaplan, *Enron, Pension Policy, and Social Security Privatization*, 46 ARIZ. L. REV. 53, 66 (2004) ("Most 401(k) plans require affirmative enrollment by employees . . . .").

282. Moore, *supra* note 281, at 21.

283. *68 Percent of Private Industry Workers Had Access to Retirement Plans in 2021*, U.S. BUREAU OF LAB. STAT. (Nov. 1, 2021), https://tinyurl.com/5cusapv8 [https://perma.cc/49PE-84PU].

284. *A Financially Secure Future: Building a Stronger Retirement System for All Americans: Hearing Before U.S. Special Comm. on Aging*, 117th Cong. 4–5 (2021) (statement of Nari Rhee, Director of Retirement Security, Center for Labor Research and Education), https://www.aging.senate.gov/imo/media/doc/Testimony_Rhee%2010.28.21.pdf [https://perma.cc/D7K3-3SLE].

285. FED. RSRV. BD., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 47 (2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf [https://perma.cc/7MH6-QYKU].

286. PWC, RETIREMENT IN AMERICA: TIME TO RETHINK AND RETOOL 4 (2021) https://www.pwc.com/us/en/industries/asset-wealth-management/assets/pwc-retirement-in-america-rethink-retool.pdf [https://perma.cc/8AYL-E4BR].

of all Americans are at risk of being unable to sustain their pre-retirement standard of living in retirement.[287]

Racial and ethnic minorities as well as lower-educated workers are the most at risk. Accounting for the fact that Blacks and Hispanics are younger than whites, significant differences remain in retirement savings as those cohorts are more likely to have no retirement savings.[288] Likewise, individuals without a college degree have substantially less retirement savings than those with a college degree.[289]

To address this growing issue, in recent years, there has been a movement toward automatic enrollment of employees into defined contribution individual investment accounts. The "automatic 401(k)," for instance, changes default options in the plan so that employees are automatically contributing to their plans with those contributions often gradually increasing until they reach a set percentage of the employee's paycheck.[290] Those contributions are then automatically invested by the plan in either broad index funds or professionally managed funds.[291] And the account automatically rolls over if the individual changes jobs.[292] Employees may still decline to participate in the plan (that is, employees may opt out), but that requires a deliberate action on their part to override their enrollment, and the vast majority do not.[293]

This automatic enrollment approach has proven successful at encouraging saving for retirement, especially among lower-income and minority groups.[294] For instance, one study determined that automatic enrollment increased participation from 13% to 80% for workers with annual earnings of less than $20,000 and from 19% to 75% among Hispanics.[295] Likewise, another model found that the introduction of

287. ALICIA H. MUNNELL ET AL., CTR. FOR RET. RSCH., THE NATIONAL RETIREMENT RISK INDEX: AN UPDATE FROM THE 2019 SCF 1–2 (2021), https://crr.bc.edu/wp-content/uploads/2021/01/IB_21-2.pdf [https://perma.cc/NMU7-JNHQ].

288. FED. RSRV. BD., *supra* note 285, at 47.

289. *Id.* at 49.

290. *See* WILLIAM G. GALE ET. AL., RET. SEC. PROJECT, THE AUTOMATIC 401(K): A SIMPLE WAY TO STRENGTHEN RETIREMENT SAVINGS 1 (2005), https://www.brookings.edu/wp-content/uploads/2016/06/20050228_401k.pdf [https://perma.cc/MEH6-WBED].

291. *Id.* at 4.

292. *Id.* at 5.

293. Muir, *supra* note 280, at 12–13.

294. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1177–78 (2001), https://doi.org/10.1162/003355301753265543; *see generally* John Beshears et al., *The Importance of Default Options for Retirement Saving Outcomes: Evidence from the United States* (Nat'l Bureau of Econ. Rsch. Working Paper No. 12009, 2007), https://doi.org/10.3386/w12009 (summarizing empirical literature on the subject).

295. Madrian & Shea, *supra* note 294, at 1160.

automatic enrollment increased 401(k) plan participation from 66% of eligible workers to 92%.[296]

To be sure, automatic enrollment raises other issues. Given the financial illiteracy of many automatically enrolled participants, for instance, participants may not adjust default settings according to their specific financial needs—such as keeping their contribution rate too low or offsetting their high contribution rate by increasing their debt levels.[297] Those participants likewise may be taken advantage of by financial advisors seeking to convince participants to roll over their 401(k) plans into IRAs with higher fees.[298]

Yet automatic enrollment does provide, at least to some degree, a mechanism to encourage retirement savings, which led Congress to promote automatic enrollments through the Pension Protection Act of 2006 ("PPA").[299] That Act clarified that employers may auto-enroll employees' contributions in a qualified default investment alternative, which is defined as either being (1) "diversified so as to minimize the risk of large losses" while still being "designed to provide . . . a mix of equity and fixed income exposures based on the participant's age, target retirement date (such as normal retirement age under the plan) or life expectancy," or (2) "consistent with a target level of risk appropriate for participants of the plan as a whole."[300] Qualified default investment alternatives are often either traditional "target-date funds," which reduce stock exposure as the fund nears the target date of retirement for that particular fund, or "balanced" funds, which hold stocks and bonds in relatively fixed proportions.[301] Overall, PPA has led to an increase in automatic enrollment among employers, though gaps remain.[302]

Given PPA's success and the remaining gaps in employee retirement savings, there have been recent bipartisan efforts to promote automatic enrollment at the federal level through the Secures Act 2.0,

296. Sarah Holden & Jack VanDerhei, *The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement*, INV. CO. INST. PERSP., July 2005, at 4, http://www.ici.org/pdf/per11-02.pdf [https://perma.cc/M5NS-UD24].

297. Jill E. Fisch et al., *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 752–53 (2020) (noting that "[t]he overall effectiveness of auto-enrollment may have been overstated").

298. *Id.* at 775–76.

299. Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 821–33, 901–06, 120 Stat. 780, 782–83 (2006); *see* Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 51 (2015) (observing that "[t]he PPA's strategy was inspired by academic studies that showed huge increases in enrollment when companies switched to auto-enrolling employees, who could then choose to opt out, in 401(k) plans").

300. 29 C.F.R. § 2550.404c-5(e)(4)(i)–(ii) (2021).

301. Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1516 (2015).

302. Fisch et al., *supra* note 297, at 751–52.

which now requires new 401(k)—and 403(b)—plans to provide for automatic enrollment as well as automatic increases in contribution rates.[303] Likewise, more than thirty states also have either recently enacted or are considering laws requiring businesses to automatically enroll their employees into individual retirement accounts administered either by a state-sponsored retirement program or through a plan on the private market.[304]

A court may, however, find these automatic enrollment plans raise First Amendment issues similar to those identified above. That the current administration has finalized regulations permitting "express[ ] consider[ation] [of] climate change or other ESG factors" in qualified default investment alternatives makes such a ruling increasingly likely.[305] Hence, individuals may find themselves auto-enrolled in a fund that selects investments based on ESG factors or that votes on proxies based on ESG principles.

Assuming auto-enrollment into plans that used ESG investing principles, *Janus* would create a substantial barrier for those plans. This is because *Janus* held that no payment could be deducted from an individual's wages "unless the employee *affirmatively consents to pay*."[306] "[S]uch a waiver cannot be presumed" and "must be freely given and shown by 'clear and compelling' evidence."[307] Hence, "this standard cannot be met" "[u]nless employees clearly and affirmatively consent before any money is taken from them."[308] Because automatic enrollment plans are predicated on an *opt-out* model, rather than an *opt-in* model, the compelled speech rationales discussed above could hamper those models.

To be sure, such a constitutional obstacle may lead policymakers to adopt alternatives like an "active decision" model (that is, no defaults

303. Peter Daines & R. Sterling Perkinson, *Secure Act 2.0 – Summary of Key Provisions*, JD SUPRA (June 28, 2022), https://www.jdsupra.com/legalnews/secure-act-2-0-summary-of-key-provisions-2294934/ [https://perma.cc/MG66-D9HS]; Secure 2.0 Act of 2022, H.R. 2617, 117th Cong. § 414a, *available at* https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf.

304. *State Mandated Retirement Plans*, ADP.COM (2022), https://www.adp.com/resources/articles-and-insights/articles/s/state-mandated-retirement-plans.aspx [https://perma.cc/TU2P-FYSA].

305. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73843 (Dec. 1, 2022) (codified at 29 C.F.R. pt. 2550). Various states, including Texas and Florida, have challenged this Rule, arguing that the new regulation is "the first binding regulation from DOL that affirmatively embraces a broad view of the use of ESG and other non-economic factors by ERISA fiduciaries regarding plan assets and proxy voting." Complaint at 21, Utah v. Walsh, No. 2:23-cv-00016-Z (N.D. Tex. Jan. 26, 2023).

306. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (emphasis added).

307. *Id.*

308. *Id.*

and compulsory choice)[309] or "Quick Enrollment" (reducing the complexity of the decision to participate by preselecting a default contribution rate and asset allocation for employees).[310] Yet those approaches may place individuals in situations where they must make important choices with limited knowledge or understanding of their options at a time inconvenient for deliberate decision making.[311] And neither provide the same automatic participation that makes auto-enrollment such a compelling policy instrument. Hence, the Court's compelled speech doctrine would still deprive policymakers of an important tool for promoting near-universal participation in retirement savings, especially for those who are most at risk.

C. *Potential Options*

As the above discussion reveals, the extension of recent developments in the Supreme Court's compelled speech doctrine to public pensions raises knotty issues. This Section briefly considers some possible approaches for addressing those issues.

The first potential approach might be for public pension funds (and any other auto-enrollment funds) to disassociate from ESG investing. As mentioned above, some states have already enacted legislation that aims to require that pension funds do precisely that by requiring fiduciaries to consider only pecuniary factors.[312] Yet even the model legislation states rely on acknowledges that ESG factors may be relevant at times.[313] Given the theory for investing based on those factors rests in the eye of the beholder,[314] courts may consider such actions to be pretextual. And this may be especially true where public pension funds invest and vote in a manner that accords with ESG principles after already publicly supporting those principles in the past.[315] What

309. *See* Gabriel D. Carroll et al., *Optimal Defaults and Active Decisions*, 124 Q.J. ECON. 1639, 1639 (2009), https://doi.org/10.1162/qjec.2009.124.4.1639 (finding that "compelling new hires to make active decisions about 401(k) enrollment raises the initial fraction that enroll by 28 percentage points relative to a standard opt-in enrollment procedure").

310. James J. Choi et al., *Reducing the Complexity Costs of 401(k) Participation through Quick Enrollment*, *in* DEVELOPMENTS IN THE ECONOMICS OF AGING 57, 79 (David A. Wise ed., 2009).

311. Carroll et al., *supra* note 309, at 1641.

312. *See supra* note 54 and accompanying text.

313. *State Government Employee Retirement Protection Action*, AM. LEG. EXCH. COUNCIL (July 29, 2022), https://alec.org/model-policy/state-government-employee-retirement-protection-act/ [https://perma.cc/R7KC-HBB5].

314. Schanzenbach & Sitkoff, *supra* note 13, at 397.

315. *Cf.* Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1529 (11th Cir. 1993) ("These decisions, which treat the evaluation of governmental purpose in challenges under the First Amendment as identical to the inquiry under the Equal Protection Clause, suggest that action by any branch of government may be invalid if the challenger shows the action was partly motivated by purposes offensive to the Free Speech Clause and the defender cannot prove that illicit motivation was not in fact the cause of the action.").

is more, given the widespread rise of ESG, it is inevitable that funds will face proxy votes that concern ESG matters as well as inquiries from other stakeholders regarding where such institutional investors stand on particular issues. Such situations will place the funds in a bind, as voting in favor of or against prescriptive proxy proposals will express views on those issues—while refraining from voting may be in tension with their fiduciary duties.[316]

A second potential approach might be for the federal government to take legislative or regulatory action. For example, Congress could clarify that the SEC should not permit shareholder proposals to be included in proxy statements where they raise significant social policy issues.[317] Yet that approach raises line-drawing concerns similar to those discussed above. Likewise, Congress might prohibit public pension funds and their agents from voting in proxy contests.[318] This approach, however, may face an uphill climb, given the dramatic rise of ESG in the financial sector generally and the increasing polarization of decisions about ESG. This might be especially true at the state level, where the state's policymakers and the public pension fund might have shared policy objectives that they wish to use ESG to advance.

Finally, a third approach might be for each public pension fund to provide state employees with a menu of investment options to choose from within a plan. For instance, those employees might be able to select whether their contributions should be invested (and their pro rata portion of shares voted on) in accordance with ESG principles.[319] That approach would allow employees to express their views while retaining the overall structure of the public pension funds, as those who object, for instance, to efforts to address climate change could specify such views for their plan. Further, to promote predictability, states might design annual open enrollment periods, which would allow employees to designate their preferences prior to the annual proxy season.[320]

Yet that approach raises potential issues as well. To begin, public pension funds would need to avoid making public statements regard-

316. *See, e.g.*, Allison Herren Lee, *A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC*, U.S. SEC. & EXCH. COMM'N (Mar. 15, 2021), https://www.sec.gov/news/speech/lee-climate-change [https://perma.cc/A6DP-NLUR] (discussing fiduciary duties and proxy voting).

317. *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (permitting shareholder proposals that "raise significant social policy issues" to be included in corporate proxy statements and instructing that staff "will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal").

318. Mahoney & Mahoney, *supra* note 131, at 879.

319. Here, an analogy might be drawn to the requirement that religious objectors to fair share fees pay an equal sum to a nonprofit. *See* Fisk & Malin, *supra* note 241, at 1861–62 (describing this system).

320. *See id.* at 1858.

ing ESG akin to what was discussed above. Otherwise, state employees would still have a basis for refusing to be members of such a fund, even if their own contributions were invested according to their preferences. Next, such specifications may prove to be technologically and administratively unattainable at present, though there is some evidence that such an option may be viable soon. BlackRock, for instance, has begun to allow institutional investors to vote according to their respective shares—and it has taken steps to allow retail investors to engage in proxy voting.[321] Whether such an approach will work remains unclear—but at least such an approach may become available in the future,[322] even as it raises new potential issues.[323] In short, then, the problems identified above do not appear to have any ready-made solutions at present.

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321. SANDY BOSS ET. AL., BLACKROCK, IT'S ALL ABOUT CHOICE 1, 3 (2022), https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf [https://perma.cc/94MD-P6JU] ("We are now advancing toward our ambition of expanding choice to all investors, including individual investors in funds. We see an opportunity for asset managers to work together with fund boards to expand voting participation. . . . The application of technology to investing has democratized access for millions, offering lower cost and greater choice. Now it can do that for proxy voting too."); Gabe Alpert, *BlackRock Expands Proxy Voting to Retail Investors*, YAHOO FIN. (July 17, 2023), https://finance.yahoo.com/news/blackrock-expands-proxy-voting-retail-233736090.html?guccounter=1 [https://perma.cc/W3SW-4T4N] (describing move by BlackRock to allow retail investors in its largest ETF to have a choice in proxy voting by selecting one of fourteen different voting policies); *see* Finseth, *supra* note 11, at 318 ("With modern computer technology, a fund could fairly easily calculate the aggregate percentage of fund assets attributable to objecting employees who have requested that their portion of fund assets not be voted as envisaged by the administrators. This in turn, can be applied to the total percentage of the fund's shareholdings in any given public company to be voted in the discretion of the fund administrators.").

Congress is considering a similar proposal—the INDEX (INvestor Democracy Is EXpected) Act—which would mandate pass-through voting. INDEX Act., S. 4241, 117th Cong. § 2(b) (2022). For a discussion of how individual index investors might be enabled to participate in index fund decision making, see Caleb N. Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, 79 MD. L. REV. 954, 989–1007 (2020).

322. *See, e.g.*, Vivek Ramaswamy, *A Solution Is in Sight for the ESG Controversy*, WALL ST. J. (Jan. 16, 2023, 2:28 PM), https://www.wsj.com/articles/a-solution-is-in-sight-for-the-esg-controversy-blackrock-state-street-vanguard-big-three-money-in vesting-funds-11673882594 [https://perma.cc/4S7H-J8YW] (arguing that "[l]awmakers concerned about the use of ESG in capital markets need not ban it" as "[t]hey can simply require that capital owners be informed by their asset allocators whether their money is invested in an ESG-promoting fund and provide express consent to do so"). *But see Shareholder Proposals, Index Fund Voting, Proxy Advisors: Hearing on H.R. 4578-4600 Before H. Comm. on Fin. Servs.*, 118th Cong. 9 (2023) (testimony of Lawrence A. Cunningham, Special Counsel, Mayer Brown LLP) (arguing that pass-through voting is costly and undercuts the business model of index funds).

323. Ann Lipton, *Blackrock and Voting Choice*, BUS. L. PROF BLOG (Aug. 5, 2023), https://lawprofessors.typepad.com/business_law/2023/08/blackrock-and-voting-choice.html [https://perma.cc/9AGL-AYMY] (discussing potential issues arising from voting choice, including among fund investors).

VI. CONCLUSION

In her dissent in *Janus*, Justice Kagan observed that the decision would alter "the relationships of public employees and employers" across the country "in both predictable and wholly unexpected ways."[324] As this Article has shown, *Janus* and other compelled speech and forced association cases may lead to both predictable and wholly unexpected changes to public pension funds as well as government finances and efforts to promote retirement generally. As ESG investing continues to grow, and given the judicial trends toward greater compelled speech protections, the time has come to further consider (and prepare) for how those developments might intersect (and conflict) when it comes to public efforts to safeguard the retirement savings of public employees as well as the general populace. This Article begins that discussion.

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324. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).