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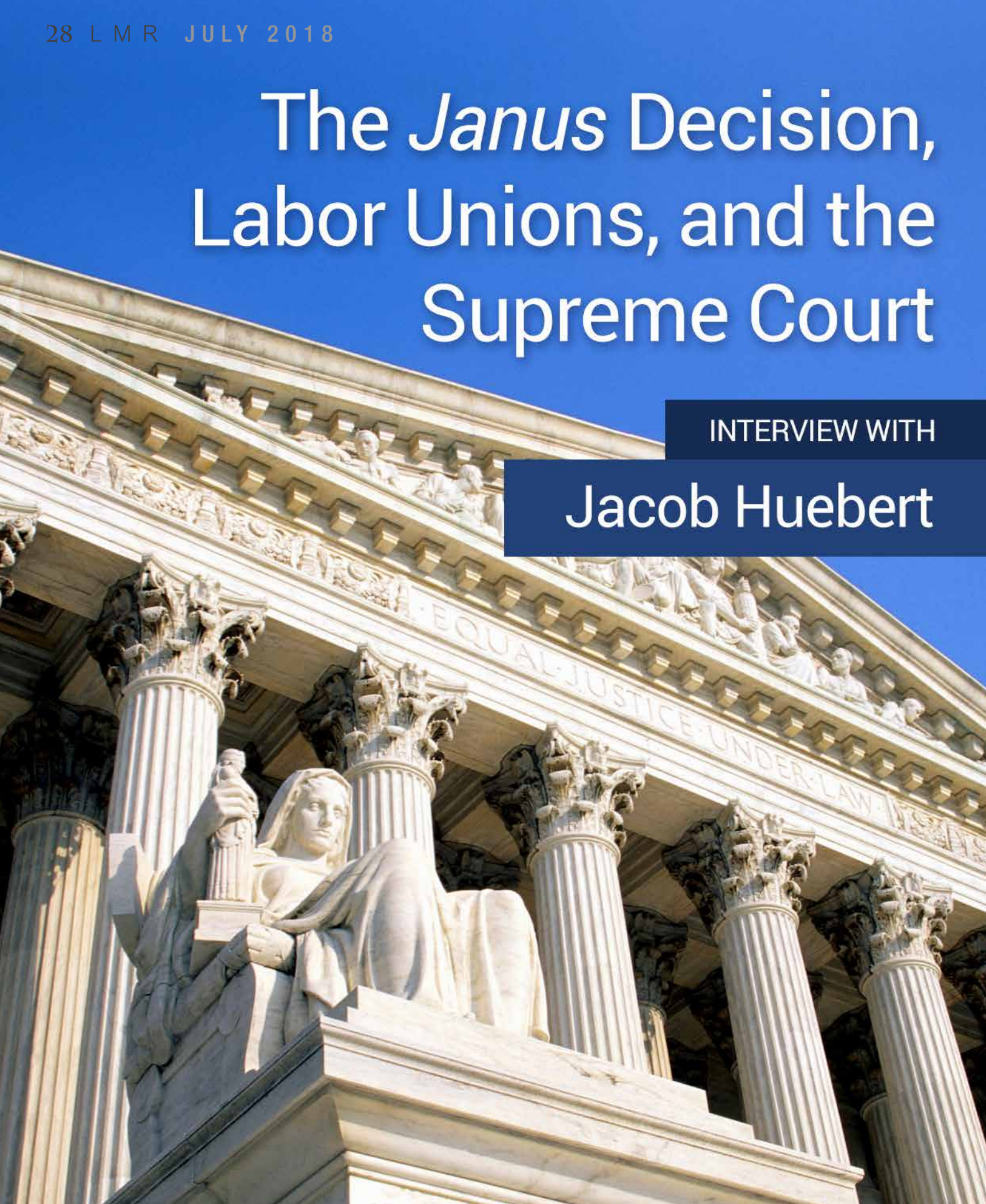

INTERVIEW WITH

Jacob Huebert

Jacob Huebert is Director of Litigation at the Liberty Justice Center, a free-market public-interest law firm in Chicago, where he litigates cases to protect economic liberty, free speech, and other constitutional rights. He is one of the attorneys who represented plaintiff Mark Janus in the recent Supreme Court case Janus v. AFSCME. He received his B.A. in economics from Grove City College and his J.D. from the University of Chicago Law School. After law school, Huebert clerked for a judge of the United States Court of Appeals for the Sixth Circuit. He is the author of a book, Libertarianism Today, and his writing has been published widely in scholarly, professional, and popular publications, including the Chicago Tribune and Wall Street Journal.

Editors' Note: Jacob Huebert was first interviewed by the LMR in June 2017. His first answer below has been reproduced from that initial interview; the remaining answers are new to the present issue.

Lara-Murphy Report: How did you become interested in Austrian economics?

Jacob Huebert: I became interested in libertarianism and free-market economics in high school, when someone introduced me to The Freeman magazine published by the Foundation for Economic Education (FEE). That, in turn, led me to attend Grove City College, where FEE's former president, Hans Senholz, had taught economics from an Austrian perspective for decades. One of my economics professors there was Jeffrey Herbener, who assigns works by Ludwig von Mises, Murray Rothbard, and other Austrian economists for his classes. And he introduced me to the Mises Institute, where I learned more about Austrian economics at the annual Mises University and through more reading. I was interested in economics in general, and Austrian economics in particular, because I wanted to understand how the world works, and because it showed how the libertarian policies I favored for moral reasons would lead to greater prosperity.

LMR: You are in the news because of your role in the recent 5-4 Supreme Court ruling that has been hailed by conservatives as a major blow against labor unions. Can you first summarize the "big picture" for our readers who may not be aware of the case and ruling?

JH: The case, *Janus v. AFSCME,* was about whether governments can require their employees to pay union fees as a condition of their employment. We argued that this practice violates the employees' First Amendment rights to free speech and freedom of association, and the Supreme Court agreed. It's a "major" decision in part because it affects a lot of people: until now, about five million government employees in the 22 states with mandatory public-sector union fees were forced to give part of every paycheck to a union whether they wanted to or not. Now all those people have a choice.

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To rule in our favor, the Court had to overturn a 1977 decision called *Abood v. Detroit Board of Education*. In that case, the Court said that governments couldn't force their employees to pay for certain union political activities—campaign contributions and other electioneering-type activities—but *could* make employees pay for their proportional share of the union's cost of bargaining on workers' behalf. The Court thought that struck an appropriate balance between respecting workers' First Amendment right not to pay for political speech they don't support, and preventing workers from "free riding" off unions' bargaining, receiving the (supposed) benefits without paying.

But there were problems with the *Abood* decision. One problem was that it didn't actually protect workers from paying for unions' political speech. One reason

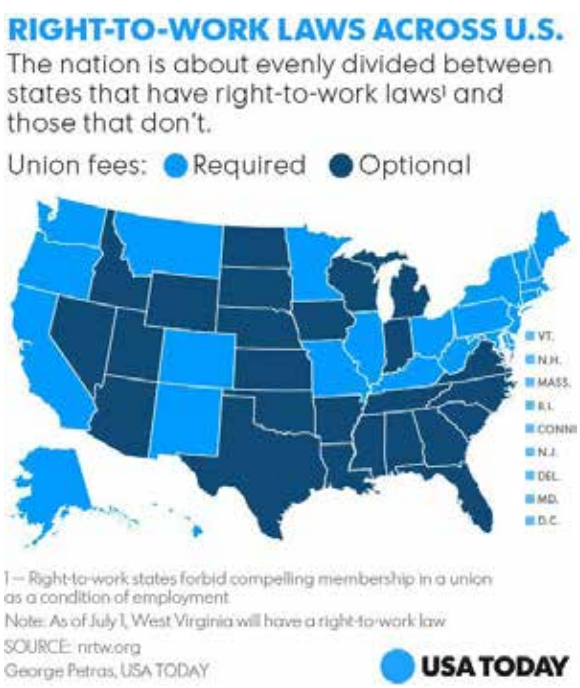
why is because *everything* a public-sector union does is political. When a union bargains with the government, it tells the government things like how much it should spend on salaries, what kind of pension benefits it should provide, and how it should run its programs. That's political speech: when anyone else talks to the government about those things, we call it lobbying. And it can be highly consequential political speech because unions typically advocate for increased government spending that everyone else has to pay for.

Another problem with the *Abood* decision is that preventing "free riding" can't justify violating people's First Amendment rights. As Justice Alito put it in the Court's opinion: "Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?" The obvious answer to Alito's rhetorical question is: of course not. And, besides, it's not really free riding if some workers, such as our client Mark Janus,

"But hurting unions wasn't the point of the case; the point of the case was that government shouldn't use government benefits, such as government jobs, to get people to surrender their constitutional rights."

don't want the union's representation and don't consider it a benefit. As Alito put it, Mark was "not a free rider on a bus headed for a destination that he wishe[d] to reach but [was] more like a person shanghaied for an unwanted voyage."

People call this decision a "major blow" to unions, as you put it, because public-sector unions' revenue is likely to drop—perhaps by a lot—now that they can't force people to give them money. And the unions lament that this will diminish their political influence. (They now openly lament that



the decision will hurt their ability to advocate for progressive causes even though, before the decision, they insisted that non-members' money was mostly just paying for stuff related to mundane, non-political workplace matters!) But hurting unions wasn't the point of the case; the point of the case was that government shouldn't use government benefits, such as government jobs, to get people to surrender their constitutional rights.

LMR: Now that you've summarized the case, can you explain your own role? At what point did you realize how big this was going to become?

JH: I was one of the attorneys who represented the plaintiff, Mark Janus, together with others at the Liberty Justice Center and the National Right to Work Legal Defense Foundation.

"We asked the district court to rule against us right away—after all, we had to lose at that level because of the binding Abood precedent. Then we went to the U.S. Court of Appeals for the Seventh Circuit and again admitted that we had to lose because only the Supreme Court could give us what we were seeking."

Over the past decade, the Supreme Court's conservative justices signaled a couple of times that they might be interested in overturning *Abood* if a case squarely presented the issue and gave them the opportunity. So we brought the Janus case in early 2015, hoping to give the Court that opportunity. But for a while it looked like the Court would overrule *Abood* without us. Shortly after we filed our case, the Supreme Court took a case presenting the same issue called *Friedrichs v. California Teachers Association*. When the Supreme Court announced that it would hear *Friedrichs*, the federal district court in Chi-

cago put our case on hold on the assumption that Friedrichs would dispose of the issue. But shortly after the Court heard arguments in Friedrichs, Justice Scalia died, and the case ended in a 4-4 tie vote, which kept the status quo in place.

Then our case was unfrozen, and we asked the district court to rule against us right away—after all, we had to lose at that level because of the binding *Abood* precedent. Then we went to the U.S. Court of Appeals for the Seventh Circuit and again admitted that we had to lose because only the Supreme Court could give us what we were seeking. The Seventh Circuit then rightly ruled against us, in a decision by Judge Richard Posner, and we asked the Supreme Court to take the case—just as a new ninth justice, Neil Gorsuch, was taking the bench. That was fortunate timing. Without a ninth justice, the Court would have had no reason to accept the case. The Supreme Court announced

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that it would take the case in September 2017, so that's when we knew we were likely to make history. And of course it became real in a whole new way when I sat in the courtroom on June 27 and heard Justice Alito start delivering the Court's decision, and when Mark Janus and I walked down the Supreme Court steps toward the waiting media and a crowd of supporters chanting: "Thank you, Mark! Thank you, Mark!"

LMR: Could you share your general perspective on U.S. labor law, from a libertarian perspective? For example, the "closed shop" has been illegal since the Taft-Hartley Act of 1947. So is it really correct to argue—as some right-wingers do—that the federal government is in bed with labor unions? Is the situation

actually more nuanced?

JH: There's nothing inherently unlibertarian about unions. If workers want to form a union to bargain more effectively with their employer, and the employer wants to deal with the union, that's fine.

The problem with federal labor law is that, if workers at a given business vote to unionize, the employer is forced to deal with the union whether it wants to or not. Also, collective bargaining agreements between unions and businesses often require workers to pay union fees as a condition of their employment even if

"I do think Gorsuch could end up being one of the best justices of my lifetime."

they aren't union members. (The *Janus* decision doesn't change this because it only applies to the public sector.) That would be okay from a libertarian perspective if the employer actually wanted to enter that kind of agreement with a union. But employers don't really freely enter these agreements because, again, federal law forces the employer to bargain with the union. Some states have tried to mit-

igate this unfairness by passing "Right to Work" laws, which prohibit employers from requiring their employees to support a union. From a libertarian perspective, that's not ideal because it bans a contractual arrangement that some employers might want to enter. But some libertarians think Right to Work laws are acceptable in light of the federal law that coerces employers into dealing with unions. From a libertarian perspective, I think the question whether Right to Work laws are an improvement over the default depends on whether you think that, in a free labor market, a lot of employers would want to make their employees support a union.

LMR: Finally, what are your thoughts on the President Trump's role in changing the members of the Supreme Court?

JH: I can only be happy about his swift appointment of Neil Gorsuch because it was essential to the Court taking our case! And I do think Gorsuch could end up being one of the best justices of my lifetime. He has a background in natural law; he wants to rein in the administrative state; and he seems to be more interested in vigorously enforcing constitutional rights, including Fourth Amendment rights, than some other conservative judges. I am concerned that Trump's current nominee, Brett Kavanaugh, will not be as protective of Fourth Amendment rights and will take an expansive view of presidential power. There were other judges on Trump's list of potential nominees I would have preferred, especially Fifth Circuit Judge Don Willett, who wrote an impressive opinion in favor of economic liberty when he was a member of the Texas Supreme Court. In general, though, Trump's judicial nominees at all levels have been outstanding relative to those of other modern presidents.

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Note: The economists and financial professionals interviewed in the LMR are given the freedom to express their views, without necessarily implying endorsement from the editors.