



# THE SUPREME COURT SPLITS OVER FAIR SHARE FEES

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**L**AST JUNE, the Supreme Court issued a decision that fundamentally changed the relationship between public unions, the employees they represent, and the state government employers they negotiate with. The Court's decision, *Janus v. AFSCME*,<sup>1</sup> was limited to public unions and public employees, but the majority's rhetoric signals that there may be rough waters ahead for private sector unions as well. What is more, the case rewrites the playbook on *stare decisis* and what is needed before the Court can overrule its precedent.

In *Janus*, the Court held that state laws requiring public employees to pay agency fees, also known as fair-share fees, violate those employees' First Amendment rights.<sup>2</sup> But the decision, which came on the last day of the Court's 2018 term, addressed complex and consequential issues in overruling the Court's 41-year-old precedent in *Abood v. Detroit Board of Education*.<sup>3</sup> It was a narrowly decided opinion, 5 Justices in favor and 4 against.

An agency fee is a portion of the dues unions charge their members to cover representational activities that excludes the cost of union political and other nonrepresentational, ideological activities. Since the 1940s, when

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<sup>1</sup> 138 S. Ct. 2448 (2018).

<sup>2</sup> *Id.*

<sup>3</sup> 431 U.S. 209 (1977).

Congress outlawed agreements that condition employment on maintaining union membership,<sup>4</sup> unions have used fees in one form or another as a way to cover the cost of providing representation to nonmembers. Such representation includes, for example, bargaining on behalf of those employees for higher wages and benefits, administering and enforcing collectively bargained agreements, and representing employees in grievance arbitration.<sup>5</sup>

So why are agency fees so important that nearly half the states permitted and indeed required them in their public workforces? The answer, or at least the rationale for *an* answer, relates to unions' roles as exclusive bargaining representatives. Across the country, unions supported by a majority of employees have the right of exclusive representation for all workers in that bargaining unit. It has followed that unions with such exclusive representation also have a legal duty to bargain on behalf of all workers in the unit, including those who object to the union. For example, the Illinois law examined in *Janus* specifically requires that unions represent the interests of all employees in a bargaining unit.<sup>6</sup> The Court in *Abood* made two assumptions about this dynamic – assumptions that, since *Abood*, have continued to be recognized by a number of states, including the District of Columbia and Puerto Rico. First, exclusive representation in conjunction with agency fees promotes “labor peace,” and second, agency fees avoid the problem of “free riders,” or employees who reap the benefits of union representation but refuse to pay for those benefits.<sup>7</sup>

Acknowledging that compelling “employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests,”<sup>8</sup> the Court in *Abood* found this interference justified by the longstanding and “important contribution of [agency fees] to

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<sup>4</sup> The Labor Management Relations Act of 1947, also known as the Taft Hartley Act, outlawed closed shops which could require an employer to exclusively hire labor union members.

<sup>5</sup> While *Abood* defended states' rights to require agency fees, it limited the permissible reach of those fees to, essentially, only that representation that benefitted nonmembers. See *Abood*, at 235-36.

<sup>6</sup> *Janus*, at 2467 (citing Ill. Comp. Stat., ch. 5, § 315/6(d)).

<sup>7</sup> *Abood*, at 224.

<sup>8</sup> *Id.* at 222.

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the system of labor relations . . . .”<sup>9</sup> Inherent in the Court’s decision was also an appreciation for the history of labor policy in the U.S. and the choice states make to maintain stabilized labor-management relations.<sup>10</sup> Specifically, as the cases that the Court relied on underscored, labor unions have had a “pervasive acceptance in our political life”<sup>11</sup> and through this history, legislatures have made certain judgments about how to best preserve labor interests. As the Court in *Hanson* wrote: “The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary.”<sup>12</sup>

Four decades later, the Court in *Janus* concluded that these same reasons do *not* justify requiring nonmembers to pay agency fees, or as they recharacterize the issue, to “subsidize” union speech.<sup>13</sup> According to the Court, labor peace is not a compelling justification because the “pandemonium” predicted by *Abood* that would result from prohibiting agency fees has not come to fruition. The Court’s criticism here leaves something to be desired. After all, at the time of the Court’s decision in *Abood*, 20 states had already enacted right to work laws which prohibited the collection of agency fees, and the Court in *Abood* still held that agency fees were constitutional. Moreover, the Court has now stepped into the role that the *Hanson* Court warned should be reserved exclusively for the legislature. Rather than allowing states to determine the needs and vulnerabilities of their labor forces, the Court has assumed that all states have the same interests as those that have already prohibited agency fees. This assumption is dangerous and risks upending the balance that states with agency fees have sought to protect.

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<sup>9</sup> *Id.* at 222.

<sup>10</sup> *Abood*, at 223 (citing *Ry. Emp. Dep’t v. Hanson*, 351 U.S. 225 (1956) and *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961)).

<sup>11</sup> *Street*, 367 U.S. at 813.

<sup>12</sup> *Hanson*, 351 U.S. at 234.

<sup>13</sup> *Janus*, at 2466 (“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 Court’s evaluation of whether unions will be willing to represent nonmembers who do not pay for their services is likewise unsatisfying. Their conclusion? Yes; specifically because the benefits of serving as employees’ exclusive bargaining representative “greatly outweigh” the burden of providing nonmembers with equal representation. But the dissent highlights that this question may be the wrong one to ask and that instead the question should be whether unions will be “able to” carry on as an effective representative.<sup>14</sup> As the dissent explains:

Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers) – so they too quit the union.<sup>15</sup>

In other words, what use are unions to the employees they represent if they do not have the resources to effectively represent them? Indeed, in 2016, unions in states that prohibited agency fees filed fewer than one-third as many petitions for union elections than they did in agency fee states.<sup>16</sup> The majority does not satisfactorily address this problem, dismissing it as not genuine because unions still have membership – no matter how dwarfed – in states and workforces that prohibit agency fees. But it is not surprising that the majority does not find dwindling union membership compelling. According to the Court, “[f]orcing free and independent individuals to endorse ideas they find objectionable is *always* demeaning.”<sup>17</sup> This truism does not leave much room for compromise.

Indeed, the majority makes clear the degree to which it disdains agency fees. Writing for the court, Justice Alito does not pull many punches as he explains the break from precedent. The decision’s opening sentence is telling: “[P]ublic employees are forced to subsidize a union, even if they choose

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<sup>14</sup> *Id.* at 2491 (Kagan, J., dissenting).

<sup>15</sup> *Id.* at 2490-91 (Kagan, J., dissenting).

<sup>16</sup> Chris Opfer & Jasmine Ye Han, “Labor Organizing in Right-to-Work States Is Numbers Game” (Bloomberg BNA, Aug. 15, 2017), available at [www.bna.com/labor-organizing-righttowork-n73014463154/](http://www.bna.com/labor-organizing-righttowork-n73014463154/).

<sup>17</sup> *Janus*, at 2464 (emphasis added).

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not to join and strongly object to the positions the union takes . . . .”<sup>18</sup> According to the Court, “[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.”<sup>19</sup>

In reaching the conclusion that the governmental interests are insufficient to justify impinging on employee’s free speech rights, the majority distinguishes a line of cases that have generally held that public employee speech regarding terms and conditions of employment is *not* protected by the First Amendment.<sup>20</sup> The majority calls these cases a “poor fit,”<sup>21</sup> essentially boiling their rationale down to the fact that in the case of agency fees, the government compels, rather than restricts speech, for all employees, not just individuals, and union speech, unlike individual employee speech, is a matter of “great public concern.”<sup>22</sup> The dissent’s response is that these distinctions only highlight the degree to which “today’s majority has crafted a ‘unions only’ carve-out to our employee-speech law.”<sup>23</sup> The majority’s footwork seems better read as permitting restrictions on employee speech *until* that speech is magnified as part of a collective movement.<sup>24</sup>

All this leads the Court to overturn *Abood* in the face of *stare decisis*, which, the majority is careful to remind its readers, is “not an inexorable command.”<sup>25</sup> Now, for the first time since the Court’s 1977 decision in

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<sup>18</sup> *Id.* at 2459-60. Even Justice Powell’s dissent in *Abood* did not characterize agency fees in such a negative, polarizing light. See *Abood*, at 245 (Powell, J., dissenting) (under majority’s decision, “public employees can be compelled by the State to pay full union dues to a union with which they disagree”).

<sup>19</sup> *Janus*, at 2463.

<sup>20</sup> It is certainly true that any review of public employee free speech rights would be incomplete without considering *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and its predecessor *Pickering v. Board of Education*, 391 U.S. 563 (1968). See *Janus*, at 2493 (Kagan, J., dissenting): “In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in [*Pickering*].”

<sup>21</sup> *Abood*, at 2474.

<sup>22</sup> *Id.* at 2472-78.

<sup>23</sup> *Id.* at 2496 (Kagan, J., dissenting).

<sup>24</sup> See, e.g., *id.* at 2473 (“When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk.”).

<sup>25</sup> *Id.* at 2478 (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

*Abood*, states will no longer be permitted to allow unions to charge bargaining unit employees fair share fees for the cost of their representation. Though the decision therefore marks a significant change to the legal framework governing public labor relations, it has been no secret that the Court's more conservative justices have long had *Abood's* decision in their crosshairs.

The timeline here is compelling. In its 2012 decision in *Knox v. Service Employees*,<sup>26</sup> another case written by Justice Alito and decided 5 to 4, the Court fired a warning shot at agency fees, writing:

Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a "significant impingement on First Amendment rights. Our cases to date have tolerated this "impingement," and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.<sup>27</sup>

Four years later in *Harris v. Quinn*,<sup>28</sup> again penned by Justice Alito, the Court wrote: "Because of *Abood's* questionable foundations, and because the personal assistants are quite different from full-fledged public employees, we refuse to extend *Abood* to the new situation now before us." And then most recently in *Friedrichs v. California Teachers Association*,<sup>29</sup> a case that addressed the same question as in *Janus*, an evenly divided Court issued a *per curiam* decision affirming the lower court's decision. But for Justice Scalia's unanticipated death in February 2016, which left the Court with 8 Justices, there is a good chance that *Friedrichs* would have dealt the fatal blow to *Abood's* holding two years sooner. In other words, and as both the majority and dissent highlight in their opinions, this outcome has been a long time coming.<sup>30</sup>

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<sup>26</sup> 567 U.S. 298 (2012).

<sup>27</sup> *Id.* at 310-11 (citations omitted).

<sup>28</sup> 134 S. Ct. 2618, 2638 (2014).

<sup>29</sup> 136 S. Ct. 1083 (2016) (*per curiam*).

<sup>30</sup> *Id.* at 2485 ("During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain."); *id.* at 2498 (Kagan, J., dissenting) ("Dicta in [*Harris* and *Knox*] indeed began the assault on *Abood* that has culminated today.").

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The majority does not hide that *Knox* and *Harris* form the basis of its decision or, for that matter, the pleasure that it takes in overruling *Abood*. It writes that unions have benefitted from a “considerable windfall” since *Abood* and that “[i]t is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.”<sup>31</sup> That the windfall the Court discusses was spent to advance employee rights and benefits does not appear to temper the perceived injustice.

The dissent does not allow this sequence of events to go unnoticed and in fact warns that the Court’s reliance on these cases “subverts all known principles of *stare decisis*”<sup>32</sup> and sets a dangerous precedent. To rely on these cases as precedent, argues the dissent, “is bootstrapping – and mocking *stare decisis*. Don’t like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as ‘special justifications.’”<sup>33</sup> This admonishment should not be taken lightly and certainly raises the question of how susceptible bedrock decisions are to being overruled by this Court.

We will have to wait and see how the Court’s decision in *Janus* plays a part in the future of collective bargaining and employee rights in the public sector. The decision comes at a time when union support is actually in an upswing. A 2017 Gallop poll shows that union support is at 61%, higher than it has been since 2003.<sup>34</sup> Perhaps this support will guide future policy. In the meantime, courts have already begun citing to *Janus* for its view of free speech and *stare decisis*.<sup>35</sup> The case no doubt promises to inform many future decisions on these points.



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<sup>31</sup> *Janus*, at 2486.

<sup>32</sup> *Id.* at 2497 (Kagan, J., dissenting).

<sup>33</sup> *Id.* at 2498 (Kagan, J., dissenting).

<sup>34</sup> Art Swift, “Labor Union Approval Best Since 2003, at 61%” (Gallup, Aug. 30, 2017), available at [news.gallup.com/poll/217331/labor-union-approval-best-2003.aspx](https://news.gallup.com/poll/217331/labor-union-approval-best-2003.aspx).

<sup>35</sup> See, e.g., *Interpipe Contracting, Inc. v. Becerra*, No. 17-55248, 2018 WL 3613378, at \*12 (9th Cir. July 30, 2018) (citing to *Janus* for proposition that compelling the subsidization of speech raises free speech concerns); *In re Goodrich*, No. 17-10500, 2018 WL 3570125, at \*5 (Bankr. D. Vt. July 20, 2018) (citing to *Janus*’s opinion on *stare decisis*).