Janus v. American Federation of State, County and Municipal Employees, Council 31
585 U.S. ____ (June 27, 2018)

Forty-one years ago in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the U.S. Supreme Court held that it was permissible under the First Amendment to require that public employees, who chose not to join a union that served as their exclusive bargaining representative, pay an "agency fee" which was a percentage of union dues attributable to activities that were "germane to [the union's] duties as collective bargaining representative" (referred to as "chargeable" expenditures). However, union nonmembers could not be required to fund the union's political and ideological projects (referred to as "nonchargeable" expenditures).

In Janus, Justice Alito, with whom Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch joined, reversed Abood and held that an Illinois public employee law that provided for such agency fee payments violated the free speech rights of nonmember public employees by compelling them to subsidize speech on matters of substantial public concern. Thus, before an agency fee could be charged, a nonmember was required to give their affirmative consent.[1/] Justice Kagan, with whom Justices Ginsburg, Breyer and Sotomayor joined, dissented.

The Majority Opinion

Under Illinois Public Labor Relations Act, once a majority of the employees in a bargaining unit voted to be represented by a union, that union became the exclusive representative on matters related to wages, hours and other terms and conditions of employment for all employees in the bargaining unit. See Ill. Comp. Stat., ch. 5, §§ 315/3(s)(1), 315/6(a), (c), 315/9 (West 2016). Although an employee was not required to join the union, the union designated as the employee's exclusive representative which meant that the individual employee could not be represented by any other agent or negotiate directly with the employer. §§315/6(c)-(d), 315/10(a)(4). At the same time, the union was required to provide fair representation for all employees in the unit, both members and non-members. §315/6(d). Consistent with Abood, the Illinois law provided that employees who declined to join the union could be assessed their "proportionate share" - which was audited and certified to the employer, and deducted from the nonmembers' wages. § 315/6(e). Nonmembers were not asked before fees were deducted.

Petitioner Mark Janus was employed by the Illinois Department of Healthcare and Family Services as a child support specialist and refused to join Respondent American Federation of State, County, and Municipal Employees, Council 31 ("Union") because he disagreed with positions taken by the Union in collective bargaining. He was required to pay an agency fee of $44.58 per month, which amounted to $535 per year. Applying Abood, the District Court granted the Union's motion to dismiss Janus' lawsuit challenging his obligation to pay an agency fee, and the Seventh Circuit affirmed.[2/]

[1/] "The waiver must be freely given and shown by 'clear and compelling evidence.' Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967) (plurality opinion)." Slip Op. at 48.

[2/] SCOTUS initially resolved in Janus' favor a challenge to procedural intervention in the law suit brought by the Governor of Illinois.

The U.S. Supreme Court reversed finding that Abood was not consistent with the freedom of speech and association protected by the First Amendment, which included both the right to speak and associate, as well as the right to refrain from speaking or associating, by forcing individuals to financially support objectionable speech. Id. Slip Op. at 8. See West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943). The Court relied upon its two more recent holdings in Knox v. Service Employees, 567 U.S. 298, 310-311 (2012), that Abood was "something of an anomaly," and in Harris v. Quinn, 573 U.S. ____, (slip op . at17) (2014) that Abood's "analysis is questionable on several grounds." Slip Op. at 7. The Court reaffirmed the position articulated in Knox that a "'significant impingement on First Amendment rights' occurs when public employees are required to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.' Knox, [567 U.S.] at 310-311." Janus, Slip Op. at 9.

As in Knox, the Court applied the "exacting" scrutiny standard which required that a compelled subsidy must:

> …serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.

(Slip Op. at 10). The Court also affirmed its prior holding in Harris that the agency fee failed "exacting scrutiny" and found no need to determine whether "strict scrutiny" should apply because the agency fee "cannot survive under the more permissive standard applied in Knox and Harris." (Slip Op. at 11). The Court found that each of the underlying reasons/State's interests justifying agency fees in Abood failed exacting scrutiny.

The Court's decision relied on the fact that the passage of time had undermined the rationale relied upon in Abood that the agency fee was justified by the State's interest in "labor peace." In Janus, the Court looked at the experience of federal employees and public employees in 28 states who were allowed to unionize, but could not have agency fees. It concluded that:

> [w]hatever may have been the case 41 years ago when Abood was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency-fees. (citation omitted).

(Slip Op. at 13).

It also rejected "the risk of free riders" as a compelling interest based on its conclusion that the speech of many groups may result in benefits to non-members but "that does not alone empower the state to compel the speech to be paid for." Lehnert v. Ferris Faculty Assn., 500 U.S. 507, 556 (1991)(Scalia, J., concurring in judgment in part and dissenting in part). (Slip Op. at 13-14).

Moreover, the Court rejected the argument that the union's statutorily required status as the "exclusive representative" of employees provides a basis and support for the free-rider argument and a compelling interest that justifies agency fees. Again, the Court relied upon the

evidence and experience from the federal government and the 28 "right to work" states as well as the fact that unions continue to desire the power that derives from being the exclusive representative. Hence, on balance, the Court found that the benefits "greatly outweigh any extra burden imposed by the duty of providing fair representation to/for nonmembers." (Slip Op. at 15). The Court concluded:

> …whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated 'through alternative means significantly less restrictive of associational freedoms' than the imposition of agency fees. Harris, 573 U.S. at ___ (Slip Op. at 30) (internal quotations omitted). Individual nonmembers could be required to pay for that service or could be denied union representation altogether. Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

Janus (Slip Op. at 17). It also found that the duty of fair representation was concomitant with the authority of the union to be the exclusive representative and that:

> serious 'constitutional questions [would] arise' if the union were not subject to the duty to represent all employees fairly. Steele [v. Louisville & Nashville R. Co., 323 U.S. 192, 198 (1944)]. In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See Knox, 567 U.S., at 311, 321. We therefore hold that agency fees cannot be upheld on free-rider grounds.

Id. at 18.

The Court dismissed the arguments and justifications made by proponents of Abood that overturning Abood would also overturn Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968) and its progeny. It rejected as discordant the union's position that Abood must be maintained based on an originalist theory. The Court reasoned that if, as the unions argued, Pickering and free speech rights of public employees were eliminated, then "Abood itself would have to go if public employees have no free speech rights, since Abood holds that First amendment prohibits the exaction of agency fees for political or ideological purposes. 431 U.S., at 234-235." Id at 19.

The Court also rejected the argument that reversal of Abood would require a change in the general rule set forth in Pickering and Garcetti v. Ceballos, 547 U.S. 4110, 421-422 (2006), that employee speech is largely unprotected if it is part of what the employee is paid to do or is a matter of private and not public concern. Connick v. Myers, 461 U.S. 138, 146-149 (1983). Essentially, speech as a citizen is protected unless an interest of the state as employer outweighs the interest of the employee in commenting on a matter of public concern. It reiterated that Abood is not based on Pickering. See Harris, 573 U.S., at ___, and n. 26 (Slip Op. at 34 and n. 26). Slip Op. at 22. Hence, reliance on Pickering and Garcetti was not appropriate for a number of reasons, including the fact that speech during collective bargaining is not the same as speech carried out as part of an employee's job duties. This was true even though unions raise issues of public importance and public concern in their speech. Hence, in applying the "exacting scrutiny"

test applicable to commercial speech, the Supreme Court found that the agency fee failed the test that it had previously found in Harris and therefore overturned Abood.

The Court also rejected reliance on stare decisis in this situation. It acknowledged that "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). Slip Op. at 34. It also recognized that:

> [t]he doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." Agostini [v. Felton, 521 U.S. 203, 235 (1997).] And stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overruled decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." (citations omitted).

Janus at 34.

The Court reviewed whether to overrule Abood by looking at the applicable factors as follows:

- Quality of Abood's reasoning. The Court reaffirmed its earlier conclusion in Harris that Abood was poorly reasoned beginning with its reliance on Railway Employees v. Hanson, 351 U.S. 255 (1956) and Machinists v. Street, 367 U.S. 740 (1961), which were applicable to the private sector union shops under the Railway Labor Act, not to a situation where the state requires employees to pay agency fees, and did not give careful consideration to the First Amendment issue. See Harris, at ___(Slip Op. at 17). Janus at 35-38.
- Workability of the Rule. The Court found that the distinction between chargeable and nonchargeable union expenses was vague and impossible to determine, and that the information required by Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), failed to provide sufficient information to permit a nonmember to challenge union chargeability determinations. Janus at 38-41.
- Factual and Legal Erosion of Abood's Underpinnings. The Court reviewed the history of public sector unionism including that the growth of public sector union membership and increasing costs of collective bargaining agreements has resulted in "multiple municipal bankruptcies," and that, in the Court's view, Abood was an "anomaly" in its First Amendment jurisprudence as it had previously found in Harris and Knox. Id. at 43. "It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional while forced subsidization of union speech (which has no such pedigree) has been largely permitted….By overruling Abood, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law." Id. at 44.
- Reliance Upon Precedent. While acknowledging that reliance upon precedent has taken place, the Court noted that in light of the short-term durations of collective

> bargaining agreements, "it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time." Id. at 45. The Court also noted that unions had been on notice for years of the potential unconstitutionality of public sector agency fees as a result of the Court's prior decisions of Knox, Harris and Friedrichs v. California Teachers Assn., 578 U.S. ___ (2016) (per curiam). Further, the Court noted that the invalidity of agency fees would not (as suggested by the dissent) upset whole collective bargaining agreements.

Accordingly, the Court concluded that:

> States and public sector unions may no longer extract agency fees from nonconsenting employees."…Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see also Knox, 567 U.S., at 312-212. Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence. Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967) (plurality opinion); see also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Be., 527 U.S. 666, 680-682 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus at 48.

The Dissent

The Dissent defended the reasoning in Abood and made the case for retention of the balance between public employees' First Amendment rights and the important government's interests achieved in that case. In contrast to the Majority, the Dissent is based upon the Court's prior decisions holding that a government employer has substantial latitude to regulate the speech of its employees.

Impact and Effects of Janus v. AFSCME

Although 25 so-called "right to work" states had already prohibited agency fees, now in the remaining states Janus has had the immediate effect of voiding and/or making unenforceable any state laws, ordinances and/or contracts that require or allow the deduction and transmission of agency fees from government employees to the union unless the employee affirmatively and voluntarily consents to such payments.

There are lawsuits pending in a number of states seeking the "claw back" or refund of public employee "agency" or "fair share" fees. See e.g. Pellegrino and Van Ostrand v. New York State United Teachers, et al., 2:18-cv-C3439-JMA-GRS (filed June 13, 2018 in E.D.N.Y.). In addition, the U.S. Supreme Court in late June 2018 granted certiorari, vacated and remanded Riffey v. Rauner, 873 F.3d 558 (7th Cir. 2017) (affirming a denial of class certification for

Illinois home health care assistants seeking a refund of agency fees). Additional lawsuits are likely over whether public employee union dues deduction authorizations signed before Janus are legally valid, given that they were signed at a time when the employee only had the choice of agreeing to be a member or paying union dues without the choice of paying neither. Moreover, anti-union groups have begun to threaten litigation against state laws restricting an employee's ability to resign their union membership to brief (10 to 15 day) annual window periods.

In addition, several states, in anticipation of the U.S, Supreme Court's decision in Janus or in the months immediately thereafter, have enacted or are considering legislative action to cushion the blow to unions representing public employees by making it harder for employees to leave a union. For example,

- New York law allows deduction of membership dues to continue unless revoked in accordance with signed authorization; facilitates union enrollment of new members, allowing electronic signatures and union meetings with new employees at the worksite; allowing unions not to represent non-members in disciplinary cases where the individuals have the right to represent themselves or hire their own advocates, and makes clear the union's right to provide legal services or economic benefits or services outside of a collective bargaining agreement and the right to limit those benefits and services to members only. NY Sess. L. 2018, ch. 59.
- New Jersey passed a law similar to New York, which also provided that "a public employer shall not encourage negotiations unit members to resign or relinquish membership in an exclusive representative employee organization and shall not encourage negotiations unit members to revoke authorization of the deduction of fees to an exclusive representative employee organization." N.J. P.L. 2018, c. 15.
- Rhode Island passed two laws relieving municipal police and firefighter unions from any obligation to represent employees in grievance arbitrations if these employees were not members of the bargaining unit within 90 days prior to the events that caused the grievance. RI H7377; RI S2158.

It is likely that new legislation will be enacted and that additional litigation will occur. Stay tuned.