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LEGAL ADVISORY: *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. ___ (June 27, 2018)

Supreme Court Decides Mandatory Union Agency Fees Violate Public Employees' First Amendment Free Speech Rights

I. Overview

In *Janus v. American Federation of State, County, and Municipal Employees*, the Supreme Court overturned the long-standing *Abood* decision and concluded that an Illinois law requiring public nonmember employees to pay agency fees to unions violates those employees' First Amendment rights to free speech. 585 U.S. ____ (2018) (Slip Op. June 27, 2018), *overturning Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

The decision is not a surprise. The case was decided 5-4 along party lines, with Justice Alito delivering the opinion of the Court. Justice Kagan wrote the dissent, in which Justices Ginsburg, Breyer, and Sotomayor joined. Justice Sotomayor also wrote a brief dissent explaining that although she joined the majority in a prior First Amendment case, she disagreed with how the Court has since interpreted and applied that decision.

Although the *Janus* case specifically addressed an Illinois agency fee law, because it struck down *Abood* and concluded that allowing unions to charge agency fees to nonmembers violates those nonmembers' First Amendment rights, the decision applies with equal force to Massachusetts laws and collective bargaining agreements permitting the collection of agency or service fees from public employees without their consent. *See* M.G.L. c. 150E, § 12. We expect the Massachusetts legislature and Department of Labor Relations will need to revise the law and implementation thereof. This decision may also affect collective bargaining, especially with respect to open contracts and contracts that do not have a severability clause.[1]

Further, because *Abood* has been the law of the land for over 40 years, it has been extensively cited in other labor and employment cases. Thus, the *Janus* decision may have

[1] A severability clause states, in effect, that if any portion of an agreement is found invalid or unenforceable, it does not invalidate the remaining provisions of the agreement.

implications beyond the agency fee questions. Important changes in the law should be monitored, and employers should consult their counsel regarding the effect of the *Janus* decision.

II. Factual and Procedural Background

This case arose out of a public employee's challenge of the requirement under Illinois law that he pay an agency fee if he did not wish to be a member of the union that was the exclusive representative of individuals in his bargaining unit. The employee, Mark Janus, declined to join the union because he opposed the public policy positions it took, including positions the union took in collective bargaining.

Following the long-standing *Abood* decision, Illinois law (like Massachusetts law) compelled public employees to compensate the union with agency fees for the costs incurred in collective bargaining, contract administration, and pursing matters affecting wages, hours, and conditions of employment.[2] In exchange, the public sector unions were the exclusive bargaining representatives and were required to provide fair representation to all members of the bargaining unit, including members and nonmembers of the union.

Janus argued that requiring him to pay an agency fee violated his First Amendment free speech rights, namely the right protecting him from compelled speech. The union moved to dismiss that claim and the District Court granted the union's motion on the grounds that Janus's claim was foreclosed by *Abood.* The Seventh Circuit affirmed and Janus appealed. The Court granted *certiorari* and in a move that has been foreshadowed for the past several years, explicitly overturned the *Abood* decision.

III. Majority Decision

The opening lines of the majority decision leave no question about Justice Alito's view of public sector unions and agency fees. The *Janus* decision begins: "Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." Slip Op. at 1. Recognizing this holding is contrary to the prior *Abood* decision, the Court then states in no uncertain terms that "*Abood* is therefore overruled." *Id.* at 2.

A. Free Speech Analysis

After addressing an esoteric jurisdictional question,[3] the Court began its substantive review of the dispute by focusing on the First Amendment rights to free speech. The Court cited long-standing cases to make the unremarkable point that "[c]ompelling individuals to mouth support for views they find objectionable violates the cardinal constitutional command, and in most

[2] Here, the Court found that the union charged nonmembers "not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities," with the result that nonmembers paid agency fees that were approximately 78% of full union dues. *Id*. at 4.

[3] The question involved whether the federal courts had jurisdiction to hear this case because of the way it was initiated and the way in which Janus became a party. The Court determined it had jurisdiction and then ruled on the merits of the case.

contexts, any such effort would be universally condemned." *Id.* at 8. The Court then elaborated that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Id.* at 9.

Framing the question in that way and citing recent cases undermining *Abood*, the Court applied the "exacting scrutiny" standard to analyze the First Amendment question. *Id.* at 10-11, *citing Knox v. Service Employees*, 567 U.S. 298 (2012); *Harris v. Quinn*, 573 U.S. ___ (2014); *Friedrichs v. California Teachers Assn.*, 578 U.S. _____ (2016). Under the "exacting scrutiny" standard, the agency fees would need to "'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id*. at 10, *quoting Knox*, 567 U.S. at 310.

The Court then applied that standard to the arguments in favor of agency fees, as adopted by the *Abood* court, and found that none of them survived "exacting scrutiny." With respect to the justification of "labor peace," the Court cited the federal workforce and workforces in so-called "right-to-work" states to show that the "pandemonium" envisioned by *Abood* did not come to pass without required agency fees. The Court opined 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." *Id.* at 12, *citing Harris*, Slip Op. at 30.

The next justification for agency fees the Court considered was the so-called "free rider" problem. Because unions must serve the interests of nonmembers and members alike, the argument is that agency fees are required to prevent nonmembers from enjoying the benefits of union representation without bearing any of the cost. The Court rejected that argument outright, again citing its recent *Knox* decision for the proposition that "'free-rider arguments … are generally insufficient to overcome First Amendment objections.'" *Id.* at 13, *citing Knox,* 567 U.S. at 311.

The Court then rejected the free-rider argument on its merits. Addressing the concern that unions would be unwilling to represent nonmembers without agency fees, the Court responded that unions already represent millions of public employees in locations without agency fees and that unions still seek to serve as their exclusive representative. The Court also concluded that "[e]ven without agency fees, designation as the exclusive representative confers many benefits" that "outweigh any extra burden imposed by the duty of providing fair representation for nonmembers." *Id*. at 15. The Court cited as examples of those "benefits" a privileged place in workplace negotiations and status, access to confidential employee information, and direct deductions of dues and fees. *Id.* Using similar logic, the Court also summarily dispatched with the argument that it would be unfair for unions to be required to bear the duty of representing nonmembers without receiving any compensation from nonmembers. *Id.* at 17-18.

B. *Pickering* and the First Amendment in the Workplace

After determining that agency fees do not meet the "exacting scrutiny" standard, the Court then addressed the dissent's position that *Abood* is in line with other First Amendment case law, most notably, the *Pickering* decision in which the Court held that a school district violated a teacher's First Amendment rights when it fired her for writing a letter criticizing the school administration. *Id.* at 22, *citing Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *Pickering* and its progeny have created a general framework, under which "employee speech is largely unprotected if it is part of what the employee is paid to do […] or if it involved a matter of only private concern." *Id.* (internal citation omitted). In contrast, "when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless 'the interest of the state, as an

employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the employee, as a citizen in commenting upon matters of public concern.'" *Id., quoting Harris,* Slip Op. at 35 (internal quotations and punctuation omitted).

The Court first dismissed arguments based on *Pickering* outright, classifying them as a post-hoc justification for the *Abood* decision, which decision did not explicitly rely on *Pickering,* having cited it only once. The Court then concluded that, even if it were to "shoehorn *Abood* into the *Pickering* framework," "the shoe would be a painful fit for at least three reasons." *Id.* at 23. First, *Pickering* was created to address one employee's individual speech. Since, by its very nature, collective bargaining amplifies the voice of individual members, unprotected speech involving a matter of private concern for an individual might become a matter of public concern as applied to an entire bargaining unit. Second, the Court reasoned that "the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties," here unions, since the rationale behind *Pickering* is that a public employee's speech may interfere with the effective operation of government. *Id.* at 24. Third, although *Pickering* and *Abood* both divide speech into two categories, those categories do not line up. *Pickering* focuses on public versus private speech, whereas *Abood* draws distinctions based on the relation to collective bargaining activities. As a result, the Court reasoned, a nonmember employee could be compelled to subsidize speech if it was related to collective bargaining, even if *Pickering* would only allow that practice if the employer's interests outweighed the employee's. Based on those three factors, the Court concluded that, "recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme." *Id.* at 26.

The Court then held that, even if it were to conduct some *Pickering* analysis, agency fees still would not pass constitutional muster. The Court noted that many public employees are paid to speak for the purposes of furthering their employers' interest. Thus, "in general, when public employees are performing their job duties, their speech may be controlled by their employer." *Id.* at 26. Applying that general principle to agency fees, the respondents argued that "the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech." *Id.* at 26-27. The Court rejected that argument, reasoning that in the course of collective bargaining, union officials speak on behalf of employees, not employers.

Turning to the next step in the *Pickering* framework, the Court considered whether the speech paid by agency fees was a matter of public or only private concern. The Court rejected the argument that the union's speech in collective bargaining, such as speech about wages and benefits, is a matter of private interest. Since public employee wages affect larger budgetary concerns and trigger more global policy considerations (such as whether public employees should receive tenure and whether they should be compensated based on seniority or merit), and since unions may speak on "controversial topics,"[4] the Court concluded the union speech at issue is of public concern.

The final prong of the *Pickering* analysis is whether the state's interests "justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests." *Id.* at 31. For the reasons discussed above, the Court rejected the state's assertion that public-sector unions would be crippled without agency fees. The Court also reasoned that that justification was not what was used in *Abood* and, therefore, should not be applied retroactively. Further, the Court ruled that, even if it would consider the state's interest in preventing unions from being crippled, that justification would not outweigh the nonmember employees' free speech rights.

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[4] According to Justice Alito, such "controversial topics" include "climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." *Id.* at 30.

It is noteworthy that although the Court rejected the idea that agency fees are permissible under *Pickering*, it did clarify a few points on the First Amendment issue. First, the Court affirmed the principle from *Pickering* that "'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.'" *Id.* at 33, *quoting Pickering,* 391 U.S. at 568. The Court elaborated that its analysis here is consistent with that principle. The Court was also explicit that "the State may require that a union serve as exclusive bargaining agent for its employees – itself a significant impingement on associational freedoms that would not be tolerated in other contexts" but that the Court "dr[e]w the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views." *Id.* at 33.

C. *Stare Decisis*

Having determined that agency-shop arrangements violate the First Amendment's free speech protections and that *Abood* was erroneous, the remaining issue was whether the Court should nonetheless refrain from overruling *Abood* on the grounds of *stare decisis.* Under the legal principle of *stare decisis,* the Court follows precedent and "will not overturn a past decision unless there are strong grounds for doing so." *Id.* at 34. In determining whether to overturn a past decision, Courts examine five main factors: (1) the quality of the prior decision's reasoning, (2) the workability of the rule it established, (3) its consistency with other related decisions, (4) developments since the decision was made, and (5) reliance on the decision. The Court held those factors weighed in favor of overturning *Abood.*

Citing *Harris* and other recent decisions, the Court found that the quality of the *Abood* decision was lacking and that it has become an anomaly in First Amendment jurisprudence. The Court likewise found *Abood* to be unworkable, since the line between chargeable and non-chargeable union expenditures "has proved impossible to draw with precision." *Id.* at 38. As noted above, the Court also noted that the "right-to-work" states' and federal government's prohibitions on agency fees for public employees did not cause pandemonium and that the Court has been signifying for several years that, given the opportunity, it would overturn *Abood,* suggesting that unions should have planned accordingly.

Thus, despite giving lip service to *stare decisis* and despite "recognize[ing] that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members," the Court "weigh[ed] those disadvantages against the considerable windfall that unions have received under *Abood* for 41 years" and decided to overturn that long-standing precedent. *Id.* at 47.

D. Obtaining Consent for Agency Fees

After overruling *Abood,* the Court was explicit that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" because doing so violates the First Amendment. *Id.* at 48. Accordingly, "[n]either 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." *Id.* Since agreeing to pay those fees is a waiver of an employee's First Amendment rights, the consent must be clear and affirmative and may not be presumed, *e.g.,* by an employee's silence or failure to "opt-out." *Id.*

The Court did not address whether affirmative consent would be required to deduct union dues from members. In fact, as noted above, the Court cites "having dues and fees deducted directly from employee wages" as one of the "special privileges" that provides unions with an incentive to become an exclusive representative of a bargaining unit, despite "free riders." *Id.* a 15. We nonetheless suggest that Districts consult with local counsel regarding their practices relative to deducting dues and other union fees for members and nonmembers.

IV. Justice Kagan's Dissent

Justice Kagan wrote a dissent, which was joined by Justices Ginsburg, Breyer, and Sotomayor.[5] In essence, Justice Kagan recognized that *Abood* "struck a balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper." Dissent at 1. She disagreed with the majority opinion that *Abood* was an anomaly in First Amendment jurisprudence and argued that the principle of *stare decisis* weighed against reversing *Abood.* She also noted that "the Court succeeds in its 6-year campaign to reverse *Abood*" and that the decision will have "large-scale consequences," including "predictable and wholly unexpected" changes to the relationships between public employers and employees. *Id.* at 2.

The dissent is 28 pages long and largely provides the counter-arguments to the majority's opinion. Since much of Justice Kagan's reasoning was directly rejected by the majority, it is not discussed in detail here. One dissent argument worth noting, however, is that the majority's decision may call into question well-settled law regarding free speech in the employment context. Under long-standing precedent, speech about the terms of employment, which the dissent characterized as topics at the heart of collective bargaining, "has no 'possibility of a First Amendment claim.'" *Id.* at 18, *citing Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006). The dissent argues that "[e]ither the majority is exposing government entities across the country to increased First Amendment liability … [o]r else … has crafted a 'unions only' carve-out to our employee-speech law." *Id.* This language and the shifting First Amendment landscape in general may lead to additional litigation or novel arguments about public employees' free speech rights.

After admonishing the majority for "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy," the dissent charged that "[t]he majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision." *Id.* at 26, 27. Justice Kagan then concluded the dissent by noting that "[s]peech is everywhere" and, therefore, "almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things." *Id.* at 27-28.

V. Comment

Although not unexpected and despite the majority's attempts to downplay the consequences here, the *Janus* decision is a blow to public sector unions. How exactly this plays out is still to come. In the short term, the decision may affect the negotiation and implementation

[5] Justice Sotomayor wrote a one-paragraph dissent noting that she agreed in full with Justice Kagan but wanted to emphasize her displeasure with the Supreme Court's recent decisions regarding the First Amendment.

of collective bargaining agreements, especially with respect to agency fees. Employers should consult with their counsel regarding the impact of the *Janus* decision.