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Legal Sidebar

Supreme Court Invalidates Public-Sector Union Agency Fees: Considerations for Congress in the Wake of *Janus*

Victoria L. Killion
Legislative Attorney

July 20, 2018

On June 27, 2018, the Supreme Court held that "agency fee" arrangements between a union and a government employer necessarily violate the First Amendment, overruling its 1977 decision in *Abood v. Detroit Board of Education*. Agency fee arrangements (sometimes called "fair share" provisions) require employees to pay a fee to the union designated to represent their bargaining unit (i.e., an exclusive union representative) even if the employees are not members of that union. The *Abood* Court had held that these arrangements are constitutional insofar as the union uses the fees for "collective bargaining activities" and not "ideological activities unrelated to collective bargaining"—described in later cases as "chargeable" versus "nonchargeable" expenditures. But this term, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)*, a five-member majority of the Court reversed course, holding that *Abood* was "wrongly decided" and that public-sector agency fee arrangements "violate[] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." The case has potential implications not only for public-sector employers and workers, including those in more than twenty states that authorize public-sector agency fees, but also for other forms of compulsory fee arrangements required or authorized by Congress, the states, or other governmental entities.

The *Janus* Decision

Justice Alito wrote the majority opinion in *Janus* on behalf of himself, Chief Justice Roberts, and Justices Kennedy, Thomas, and Gorsuch. He began by evaluating whether *Abood*'s countenance of public-sector agency fee arrangements "is consistent with standard First Amendment principles," including the "cardinal constitutional command" that the government may not force individuals to express views with

Congressional Research Service
7-5700
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LSB10174

which they disagree. Justice Alito opined that compelled speech poses at least as great a threat under the First Amendment as governmental restrictions on speech, and perhaps more so because it "coerce[s] [individuals] into betraying their convictions." He reasoned that compelled subsidies raise "similar First Amendment concerns" to the extent individuals are forced to provide financial support for political and civic causes that they oppose.

Justice Alito's opinion next addressed the proper level of scrutiny to apply to agency fee arrangements. He rejected the lowest form of scrutiny—rational basis review—as "foreign to our free-speech jurisprudence," and considered whether strict scrutiny (the Court's most stringent test) or exacting scrutiny (a "less demanding test") should apply. Justice Alito noted that in a prior decision involving agency fees, the Court had expressed reservations about whether the exacting scrutiny standard, which derives from cases involving the compulsory subsidization of *commercial* speech, sufficiently protected the constitutional interests at stake in cases involving agency fees, which the Court viewed to implicate *noncommercial* speech. Justice Alito ultimately declined to resolve which of the two standards best fit the context of agency fee arrangements, holding that Illinois's public-sector agency fee arrangement "cannot survive under even the more permissive [exacting scrutiny] standard," under which a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."

Applying the exacting scrutiny standard, Justice Alito reasoned that neither of the governmental interests undergirding *Abood* justifies the significant impingement that agency fees work on non–union members' First Amendment rights. First, in the majority's view, while the government may have a compelling interest in preserving "labor peace" by preventing "rivalries" among multiple unions, it need not rely on agency fees to achieve this end, because a state can authorize exclusive representation (thus allowing the government employer to bargain collectively with only one entity) without also authorizing agency fees. Justice Alito cited the exclusive representation without agency fees of millions of public employees across the federal government and the twenty-eight states that generally prohibit agency fees as evidence that "'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees." Second, Justice Alito reasoned that avoiding a "free-rider" problem—where the union is forced to represent on fair terms employees who elect not to pay dues or fees to the union but who nonetheless benefit from union representation—does not constitute a compelling state interest. He noted, by way of analogy, that the government could not constitutionally compel seniors, veterans, or doctors to pay for the lobbying efforts of private groups that seek to benefit these populations. The majority also surmised that a union that seeks and secures the position of exclusive representative enjoys sufficient benefits and privileges to alleviate the free-rider concerns raised in *Abood*.

Much of the majority opinion was dedicated to rejecting several additional arguments advanced by AFSCME and the dissent for upholding agency fee arrangements that were not rooted in the *Abood* decision. The primary argument in this vein was that *Abood* is consistent with the Court's First Amendment framework for evaluating the constitutionality of government regulations of public employee speech set forth in *Pickering v. Board of Education*. Under *Pickering* and its progeny, if a public employee speaks "as a citizen on a matter of public concern," then the employee's speech is protected unless the government employer's interest in "promoting the efficiency of the public services it performs" outweighs the employee's interests in commenting on the public matter. Justice Alito reasoned that any attempt to "shoehorn *Abood*" into the *Pickering* framework would result in a "painful fit," because: (1) the *Pickering* line of cases involved discrete employment decisions relating to one employee's speech rather than a "blanket requirement that all employees subsidize speech with which they may not agree"; (2) *Pickering* applies in the context of speech restrictions rather than compelled speech or subsidies; and (3) applying *Pickering* would "substantially alter the *Abood* scheme" by potentially allowing public employers to compel their employees to subsidize union speech on political or ideological matters, which *Abood* currently forbids as a nonchargeable expenditure.

According to the majority, even if *Pickering* applied to agency fee arrangements, the Illinois agency fee arrangement at issue in *Janus* would not survive *Pickering*'s test because: (1) the union is speaking, not for the government employer whose interests are balanced against the employee's speech under *Pickering*, but for the employees themselves; and (2) union speech, particularly in collective bargaining, affects how money is spent and "addresses many other important matters" of public concern, such as "education, child welfare, healthcare, and minority rights." Moreover, Justice Alito reasoned, Illinois's asserted interest in "bargaining with an adequately funded exclusive bargaining agent" is insufficient to overcome the First Amendment rights of public employees under *Pickering*.

Justice Alito also rejected what the majority viewed as AFSCME's "most surprising" argument: an "originalist defense of *Abood*" based on assertions that the First Amendment, as originally understood, did not protect the free speech rights of public employees. Justice Alito found AFSCME's position inconsistent with its other defenses of *Abood* (which implicitly recognized at least some First Amendment protections for public workers) and reasoned that AFSCME had offered "no persuasive founding-era evidence that public employees were understood to lack free speech protections."

Finally, Justice Alito explained why, in the majority's view, the judicial doctrine of *stare decisis*—which generally counsels against overruling prior judicial decisions but "is at its weakest" when the Court interprets the Constitution—did not require the Court to stand by *Abood*. Building on several post-*Abood* decisions from the Roberts Court that may have presaged the end of public-sector agency fees (for more information on those cases, see CRS's original post on *Janus*), Justice Alito reasoned that none of the five factors that the Court typically evaluates in deciding whether to overrule a past decision counseled in favor of retaining *Abood*:

- **Quality of *Abood*'s reasoning:** Justice Alito reasoned that neither *Abood* nor the two cases on which it relied "gave careful consideration to the First Amendment."
- **Workability of *Abood*'s rule:** Justice Alito reasoned that "*Abood*'s line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision."
- **Consistency with other decisions:** Justice Alito described *Abood* as an "outlier" among the Court's First Amendment decisions, particularly in view of "later cases involving compelled speech and association [that have] employed exacting scrutiny, if not a more demanding standard" and "cases holding that public employees generally may not be required to support a political party," a rule handed down "despite a 'long tradition' of political patronage in government."
- **Developments since *Abood*:** Justice Alito reasoned that the "ascendance of public-sector unions" and "a parallel increase in public spending" have "given collective-bargaining issues a political valence that *Abood* did not fully appreciate."
- **Reliance interests:** Finally, while acknowledging that "reliance provides a strong reason for adhering to established law" in some cases, Justice Alito reasoned that no such interests justify retaining *Abood*. According to the majority, agency fees are embodied in contractual provisions of relatively short duration (i.e., a few years) and public-sector unions were on notice of the "uncertain status of *Abood*" because of recent criticism of *Abood* from the Court, during which time the unions likely entered into new collective bargaining agreements or renewed old ones. In addition, Justice Alito rejected the dissent's view that the need to rework state laws once *Abood* is overturned is a sufficient reliance interest, positing that "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions," in line with the federal government and twenty-eight other states.

Considerations for Congress

The *Janus* decision may have significant implications for the roughly 6.7 million state and local government employees who are represented by unions, many of whom reside in states that currently authorize the assessment of agency fees for at least some categories of public-sector employees. Supporters of agency fees have argued that such fees oftentimes are integral to a stable labor relations system. For example, a union organizing director has argued that without public-sector agency fees "many unions will abandon exclusive representation altogether," and government employers will lose a contract term "routinely traded for a no-strike clause in most union contracts." In contrast, some opponents of agency fee arrangements view the *Janus* decision as an important victory for the First Amendment rights of public-sector workers. Like the majority in *Janus*, they have argued that unions and states can adapt in ways that will not significantly undermine labor relations.

Regardless of the policy implications of *Janus,* the decision raises a number of important legal issues for the courts and policymakers to consider going forward. The *Janus* Court addressed two potential (albeit more limited) alternatives to agency fee arrangements that might be of interest to legislators seeking to allow public-sector unions to collect at least some form of payment from nonmembers. First, the Court recognized that, as with other constitutional rights, public employees can waive their First Amendment rights concerning agency fees. Accordingly, while public-sector employers and unions are no longer free to deduct agency fees from nonconsenting, non–union members, they may collect fees from nonmembers who have "clearly and affirmatively consent[ed] before any money is taken from them." Second, the Court suggested that the First Amendment may allow for more tailored approaches to charging nonmembers who avail themselves of a particular union service, such as union representation in grievance procedures. For example, "[i]ndividual nonmembers could be required to pay for that service or could be denied union representation altogether." One commentator has advanced another alternative to agency fee arrangements: state or local laws authorizing or requiring public-sector employers to "subsidize unions directly" to offset the costs of collective bargaining and mitigate any "free-rider" effects of prohibiting agency fees.

Although the holding in *Janus* is limited to public-sector agency fees, the case *could* bear on future analysis of First Amendment issues in the context of *other types of fees* charged by governmental entities, or even fees collected in the *private sector* depending on the level of governmental involvement. The dissenting Justices in *Janus* reiterated the concerns they had expressed in a prior decision about the effects of overruling *Abood* on other Court precedents "involving compelled speech subsidies outside the labor sphere." And while the Court has previously extended *Abood*'s rationale to diverse contexts like mandated state bar dues (in September, the Supreme Court is slated to consider whether to hear a First Amendment challenge to mandatory bar associations), public university student activity fees, and generic advertising assessments on fruit growers, it remains unclear whether such laws can be sustained on grounds other than *Abood*.

The implications of the *Janus* decision for the private sector are even less clear. A key reason the Court gave for overturning *Abood* was that the *Abood* Court "did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining." In the public sector, the Court reasoned, "core issues such as wages, pensions, and benefits are important political issues," whereas "that is generally not so in the private sector." However, the Court did not completely foreclose a private-sector, First Amendment challenge to agency fee arrangements, noting that there remains an open question as to whether a private-sector employee could advance a First Amendment claim based on the theory that a state or federal government's mere authorization of agency fees amounts to state action.

In view of these considerations, *Janus* appears to be a major First Amendment decision that is likely to have legal implications beyond the realm of public employee unions.