**Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466, 585 U.S. \_\_\_ (2018).**

**Analyses from SCOTUSblog**

**Amy Howe, *Opinion analysis:* *Court strikes down public-sector union fees (Updated),* SCOTUSblog, (June 27, 2018, 1:56 AM),** [**http://www.scotusblog.com/2018/06/opinion-analysis-court-strikes-down-public-sector-union-fees/**](http://www.scotusblog.com/2018/06/opinion-analysis-court-strikes-down-public-sector-union-fees/)**.**

This morning the Supreme Court announced that government employees who are represented by a union but do not belong to that union cannot be required to pay a fee to cover the union’s costs to negotiate a contract that applies to all employees. The 5-4 decision overturned an earlier ruling, dating back to 1977, that allowed the unions to charge such fees, which are often known as “fair share” or “agency” fees. Opponents of the fees hailed today’s ruling as a major victory for the First Amendment, while Justice Elena Kagan, who wrote the main dissent in the case, warned that the ruling could disrupt “thousands of ongoing contracts involving millions of employees.”



Justice Alito announces opinion in Janus v. AFSCME (Art Lien)

The decision came in the case of Mark Janus, who works as a child-support specialist for the Illinois Department of Healthcare and Family Services. Janus – who is not a union member – challenged the $45 per month that is deducted from his paycheck to go to the local branch of the American Federation of State, County, and Municipal Employees, the union that represents him. He argued that requiring him to pay even a limited fee to cover the cost of collective bargaining violates the First Amendment, because it finances speech by the union intended to influence the government on issues like salaries, pensions and benefits for government employees. And that, he said, is no different than requiring him to subsidize a group that lobbies the government.

Janus’ case is the third time in recent years that the justices have been asked to weigh in on the constitutionality of “fair share” or “agency” fees. In 2014, in [another case from Illinois](http://www.scotusblog.com/case-files/cases/harris-v-quinn/), the justices never reached the question, holding instead that the employees in that case – home health aides, who are paid by the state but generally take care of family members – were not actually government employees. Two years later, the justices heard oral argument in a challenge by a group of California public-school teachers, but Justice Antonin Scalia died before the court could release its opinion, leaving the eight-member court deadlocked.

In an opinion by Justice Samuel Alito, the court concluded today that the fees violate the First Amendment. No one would doubt, Alito wrote, that the First Amendment bars a state from requiring its residents to “sign a document expressing support for a particular set of positions on controversial public issues.” Requiring someone to pay for speech by someone else also raises First Amendment concerns, Alito noted. And whether the constitutionality of agency fees is reviewed using the most stringent test (known as “strict scrutiny”) or a more permissive test, Alito concluded, the union fees are unconstitutional.

In [*Abood v. Detroit Board of Education*](https://www.oyez.org/cases/1976/75-1153), the 1977 decision upholding agency fees, Alito explained, the Supreme Court pointed to the state’s interest in “labor peace” and in avoiding the problem of “free riders” – people who reap the benefits of union representation without paying for them. But any worries about “conflict and disruption” in the absence of union fees have been proven wrong in the 41 years since *Abood*, Alito suggested. Alito observed that the federal government does not allow the kind of fees at issue in this case, but “about 27% of the federal work force” belong to unions. And in the 28 states that do not allow these fees, he continued, there are “millions of public employees” who are represented by a union – without any evidence of the “pandemonium” that the *Abood* court “imagined would result if agency fees were not allowed.”

Nor is the possibility of a “free rider” problem enough to justify the fees, Alito continued: “Many private groups speak out with the objective of obtaining government action that will have the effect of benefitting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?” For example, he posited, could the government require all senior citizens to subsidize the AARP, because it lobbies on their behalf? “It has never been thought,” Alito wrote, “that this is permissible.” He concluded: “In simple terms, the First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.”

Having concluded that the fees violate the First Amendment, Alito turned to the next question: Whether the court should overrule the *Abood* decision. Alito acknowledged “the importance of following precedent unless there are strong reasons for not doing so” –a legal doctrine known as stare decisis. Stare decisis is “at its weakest,” Alito reminded his readers, in cases involving the interpretation of the Constitution, “because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.” Moreover, he added, the doctrine “applies with perhaps least force of all to decisions that wrongly denied First Amendment rights.” Because “[f]undamental free speech rights are at stake,” Alito concluded, there are “very strong reasons” to overrule *Abood*.

Alito pointed to several factors that led the majority to reach that conclusion. First, he asserted, the *Abood* decision was “poorly reasoned, because, among other things, it relied on cases involving a “very different First Amendment question” than the one before it, and it used a standard that was too permissive to review the constitutionality of the union fees.

Second, the *Abood* ruling has proven “unworkable,” because (as even the unions themselves conceded in this case) it is so hard to distinguish between the expenses that nonmembers can be required to shoulder and those that they cannot. In this case, for example, public employees who do not belong to the union must pay for “unspecified” lobbying expenses and other services that may benefit them. “That formulation,” Alito noted, “is broad enough to encompass just about anything that the union might choose to do.” And even if a nonmember wanted to challenge a fee, Alito continued, it would be a “laborious and difficult” task given the dearth of information provided by the union to explain the fees.

Third, the court decided *Abood* in a very different legal and economic environment; since the ruling 41 years ago, public spending – including the “mounting costs of public-employee wages, benefits, and pensions” – has skyrocketed, giving collective bargaining a political significance that it might not have had at the time of the *Abood* ruling.

Finally, the prospect that the unions and public employers may have relied on the constitutionality of the agency fees (for example, in negotiating the collective bargaining agreements now in effect), is not, in Alito’s view, a reason to keep *Abood*. It “would be unconscionable,” Alito wrote, “to permit free speech rights to be abridged in perpetuity” when the contracts currently in force will only last a few more years, Alito stressed, and in any event the unions and public employers have known for several years that the *Abood* ruling could be in jeopardy.

Alito acknowledged that today’s decision “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.” But those side effects are outweighed, he suggested, by the “many billions of dollars” that “have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment.” From now on, Alito instructed, the nonmembers cannot be charged the fees at issue unless they affirmatively agree to pay them.



Justice Kagan dissents in *Janus v. AFSCME*(Art Lien)

Justice Elena Kagan wrote the main dissent in the case, which was joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor. Kagan emphasized that, for over four decades, the *Abood* decision “struck a stable balance between public employees’ First Amendment rights and government entities’ interests in running their workforces as they thought proper.” Kagan complained that there “are no special justifications for reversing *Abood*”: ” To the contrary,” she argued, “all that is ‘special’ in this case—especially the massive reliance interests at stake—demands retaining *Abood*.”  Kagan stressed that the *Abood* ruling “is deeply entrenched,” as over “20 States have statutory schemes built on the decision” that “underpin thousands of ongoing contracts involving millions of employees.” Kagan criticized the majority for acting, in her view, “with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.”

As the Kagan dissent suggests, the justices’ decision could have repercussions beyond Illinois in the 22 other states (along with the District of Columbia) that also currently allow public-sector unions to collect fees from nonmembers to cover the cost of collective bargaining. One [study](https://illinoisepi.files.wordpress.com/2018/05/ilepi-pmcr-after-janus-final.pdf) released in May predicted that, if Janus prevailed, public-sector unions could lose over 700,000 members, and wages for public employees could drop by several percentage points. [Another study of teachers’ unions agreed](http://educationnext.org/after-janus-new-era-teachers-union-activism-agency-fees/) that an adverse decision could leave the unions “permanently crippled”: “They will lose membership, which will result in steep declines in revenues, which in turn may curtail their ability to affect the policy process.” But that same study also suggested that the ruling could leave teachers unions leaner and meaner, by serving as “the impetus for teachers unions to return to their roots and become a way for teachers to voice their dissatisfaction with public education today.” Whatever happens, we can be sure that groups on both sides of this case will be watching closely.

**Alice O’Brien, *Symposium: Janus’ radical rewrite of the First Amendment*, SCOTUSblog (June 27, 2018, 9:58 PM),** [**http://www.scotusblog.com/2018/06/symposium-janus-radical-rewrite-of-the-first-amendment/**](http://www.scotusblog.com/2018/06/symposium-janus-radical-rewrite-of-the-first-amendment/)**.**

***Alice O’Brien is general counsel for the National Education Association, which filed an amicus brief in support of the union in Janus v. AFSCME.***

The Supreme Court’s ruling in [*Janus v. American Federation of State, County, and Municipal Employees*](http://www.scotusblog.com/case-files/cases/janus-v-american-federation-state-county-municipal-employees-council-31/)is politics, not law.

Today, the Supreme Court cast aside the interests of working people and their families, as well as the management concerns of 21 states, the District of Columbia, leaders of major cities, towns and school districts, and the views of constitutional scholars from across the political spectrum, to overrule [*Abood v. Detroit Board of Education*](https://www.oyez.org/cases/1976/75-1153). *Abood,*which has stood since 1977 for over forty years, formed the bedrock of much First Amendment law, and provided the foundation for strong and effective public-sector collective bargaining. The court’s ruling will harm working people and is doctrinally indefensible.

The *Janus* majority ruled that public employees have a fundamental First Amendment interest in not being compelled to support public-sector labor-management systems that states choose to erect. This is nonsense. The very same justices who struck down *Abood*today wrote the precedents declining to provide public employees any First Amendment protection at all when they are speaking at work as part of their jobs, in part on the ground that states as sovereigns have expansive powers to regulate their workplaces. As Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, wrote in 2006 in [*Garcetti v. Ceballos*](https://www.oyez.org/cases/2005/04-473), there is a difference of constitutional significance between an employee’s speech made as a citizen, which is protected by the First Amendment, and speech made as a public employee, which “the Constitution does not insulate … from employer discipline.”

The lower courts have largely taken *Garcetti,*and its predecessor precedent, 1968’s [*Pickering v. Board of Education*](https://www.oyez.org/cases/1967/510),to mean that when educators speak out about employment matters at work, they (like all public employees) can be disciplined or fired. This is true no matter how valuable or meritorious their speech is. Whether speaking out against a lack of funding, supplies, books, classroom size, systemic discrimination or more, their free speech interests yield to what the court has viewed to be the public employer’s paramount interest in regulating its workplace.

Today’s decision sloughs off all those precedents as applicable only in one-off cases, when an individual employee asserts a First Amendment objection to being compelled to do her job. But as the majority itself admits, the*Garcetti/* *Pickering* rules have been routinely applied, even by the court itself, to cases involving speech restrictions impacting many employees. Indeed, even though the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office,” as the court held in 2014 in [*McCutcheon v. Federal Election Commission*](http://www.scotusblog.com/case-files/cases/mccutcheon-v-federal-election-commission/), the court has upheld broad restrictions on public employees’ political activities. See [*United Public Workers v. Mitchell*](https://www.oyez.org/cases/1940-1955/330us75); [*Civil Service Commission v. Letter Carriers*](https://www.oyez.org/cases/1972/72-634). The *Janus* majority’s suggestion that in those cases the court actually applied something resembling the “exacting scrutiny” the court trains on fair-share fees does not withstand a moment’s scrutiny. See *Mitchell* (upholding the Hatch Act’s complete ban on public employee participation in political campaigns).

Rather than precedent or principle, what appears to drive the *Janus* majority is barely concealed animus toward public sector unions and their advocacy. Thus, the *Janus* majority writes that the growth of the public sector since 1977 raises the “political valence” of the fair-share fee issue, and it decries the fact that unions discuss such “sensitive political topics” as “climate change, the Confederacy, sexual orientation and gender identity, evolution and minority religions.” Why union speech on such issues has anything to do with what states choose to allow unions to bargain for in public employment, much less what states choose that feepayers can be charged for that bargaining, is never made clear, nor could it be.

The fact is that the *Janus* majority opinion is not about expanding the speech rights of public employees at all. It is about five justices constitutionalizing their disdain for the right of working people to come together to speak with a unified and strong voice. State choices about fair-share fees get no deference under *Janus* because they are viewed as artifacts of union power, not legitimate employer choices by government decisionmakers. Yet every other suppression of public-employee speech in the workplace gets the highest deference.

One searches in vain for a silver lining in today’s decision, some notion that the new union objector exception to *Garcetti* and *Pickering* will provide union supporters with additional protection as well. But on that score, Justice Elena Kagan’s dissent may well prove prescient:

Suppose a government entity disciplines a group of (non-unionized) employees for agitating for a better health plan at various inopportune times and places… . [W]hen actual cases of this kind come around, we will discover that today’s majority has crafted a “unions only” carve-out to our employee-speech law.

At bottom, *Janus*is yet another example of a court that has lost its way. This court searches for specks of religious discrimination buried in a bureaucracy when deciding whether LGBTQ people have the right to purchase wedding services ([*Masterpiece Cakeshop v. Colorado Civil Rights Commission*](http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/)), but buries its head in the sand when the president of the United States proudly boasts of his religious animus ([*Trump v. Hawaii*](http://www.scotusblog.com/case-files/cases/trump-v-hawaii-3/)). The court finds speech rights in flooding our political system with corporate and foreign money ([*Citizens United v. Federal Election Commission*](http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/)), but looks away from racially discriminatory voting systems. And today’s *Janus* decision sends the shocking message that even when a governmental action is deeply rooted in decades of reasonable legislative and governmental judgments, the justices may still upend it based on their own ideological views about the value of the underlying speech and association.

Our political system is straining to the breaking point. The court should be driving to the middle to stabilize and maintain our democracy and the court’s institutional integrity. Instead, thanks to the unprecedented Republican obstructionism that prevented President Barack Obama from appointing Chief Judge Merrick Garland to the U.S. Supreme Court, the court has veered right, taking down decades of legislative and judicial precedents. As all eyes turn to the U.S. Senate and its consideration of the vacancy that will be left by Kennedy’s retirement, *Janus* thus stands as an object lesson as to how very high the stakes of that battle will be.

**Matthew Forys, *Symposium: Free speech for public employees restored — Justice Alito plays the long game.*, SCOTUSblog (June 28, 2018, 10:48 AM),** [**http://www.scotusblog.com/2018/06/symposium-free-speech-for-public-employees-restored-justice-alito-plays-the-long-game/**](http://www.scotusblog.com/2018/06/symposium-free-speech-for-public-employees-restored-justice-alito-plays-the-long-game/) **.**

***Matthew Forys is the chief of staff at Landmark Legal Foundation, which filed an***[***amicus brief***](https://www.supremecourt.gov/DocketPDF/16/16-1466/22738/20171206115713545_35383%20pdf%20Landmark.pdf)***in support of Mark Janus in*Janus v. AFSCME*.***

The Supreme Court upheld the free speech rights of state and local public-sector workers in [*Janus v. American Federation of State, County, and Municipal Employees*](http://www.scotusblog.com/case-files/cases/janus-v-american-federation-state-county-municipal-employees-council-31/) and overruled an anomaly in its First Amendment jurisprudence: 1977’s [*Abood v. Detroit Board of Educ*](https://www.law.cornell.edu/supremecourt/text/431/209)*ation*. At issue in *Janus* was whether state government workers who don’t want to join the union representing them could nevertheless be forced to pay fees to support the union under a union security agreement. These objecting workers, known as “agency-fee payers,” were thus compelled to subsidize a group whose ideas they oppose as a condition of employment. Under *Abood*, the First Amendment rights of agency-fee payers were only impinged to the extent that the fees were used by the union for political or ideological activities not germane to collective bargaining. Today, the Court overruled *Abood* and held that compelling nonmembers to subsidize private speech on matters of substantial public concern violates their free speech rights. This ruling is not a surprise after Justice Samuel Alito’s sharp criticism of *Abood* in [*Knox v. SEIU*](https://www.law.cornell.edu/supremecourt/text/10-1121) (2012) and [*Harris v. Quinn*](https://www.law.cornell.edu/supremecourt/text/11-681) (2014).

The issues in *Abood* and *Janus* stem from the congressional response to tumultuous labor disputes occurring in the late 19th and early 20th centuries. Strikes shook the country with shocking levels of violence. The Great Railway Strike of 1921 involved 400,000 workers and resulted in multiple deaths, sabotage and kidnapping. It also helped spur passage of the [Railway Labor Act of 1926](http://legisworks.org/sal/44/stats/STATUTE-44-Pg577.pdf). The RLA granted collective-bargaining rights to railroad workers to prevent disruption of interstate commerce caused by labor disputes. It was later amended to address the issue of “free riders” – nonunion workers who received the benefits of union representation but didn’t want to pay for them. The solution was to allow “union shop” security agreements that require union membership as a condition of employment.

After more labor strife in the depths of the Depression, Congress passed the [National Labor Relations Act](https://www.nlrb.gov/resources/national-labor-relations-act-nlra) in 1935 to promote labor peace and to equalize bargaining power between workers and employers. The NLRA granted collective-bargaining rights to most private-sector, but not government, workers. The [Taft-Hartley Act](https://www.nlrb.gov/who-we-are/our-history/1947-taft-hartley-substantive-provisions) amended the NRLA in 1947. It implicitly allowed “agency shop” clauses that require payment of fees from all employees, but not union membership. It also allowed states to pass “right-to-work” laws that ban union security agreements. Sixteen states did so within 10 years, and there are 28 now. States did not begin granting collective-bargaining rights to public sector workers, however, until 1959. Many states used the NLRA as a model, but there is significant variance in their scope. In right-to-work states, unions may be the exclusive representatives of workers, but can’t compel financial support from objectors. Thus, a regulatory patchwork over union security agreements developed in the states.

Union security agreements were challenged in two major RLA cases. In [*Railway Employees Department v. Hanson*](https://www.law.cornell.edu/supremecourt/text/351/225), the Supreme Court in 1956 upheld union shop agreements, stating: “Industrial peace along the arteries of commerce is a legitimate objective.” No First Amendment violation was found because the only conditions were payment of dues, fees and assessments, but “assessments … not germane to collective bargaining” would present “a different problem.” Five years later, in [*International Association of Machinists v. Street*](https://www.law.cornell.edu/supremecourt/text/367/740), the court held that the RLA did not allow unions to use objecting workers’ money on political activity that they opposed. Unfortunately, the boundaries of what is germane or political were difficult to draw and plagued the Supreme Court for years.

The*Abood* court relied on these cases to uphold an agency-shop arrangement arising from Michigan state law, stating that “the desirability of labor peace is no less important in the public sector, nor is the risk of ‘free riders’ any smaller.” Justice Potter Stewart’s opinion in *Abood* failed to subject the infringement of the objecting teachers’ First Amendment rights to strict scrutiny. The *Abood* court applied private sector RLA precedents to the public-sector union context and, at least with regard to the collection of fees, did so “[without any focused analysis.](https://www.law.cornell.edu/supremecourt/text/10-1121)” The court failed to appreciate the distinctions between private-sector and public-sector unions, such as the inherently political nature of collective bargaining with the government. The personal interests at stake are different when discussing wages, pensions and benefits in the public and private-sector contexts.

Contrary to Justice Elena Kagan’s claim, Alito’s opinion does not “weaponize” the First Amendment. It strengthens it by protecting the free speech rights of a political minority. The NLRA was justified by the need to equalize the bargaining power between labor and employer. Even the ultraconservative Chief Justice Howard Taft wrote: “Union was essential to give laborers opportunity to deal on equality with their employer.” But the objecting schoolteacher has had greatly unequal bargaining power with the union over the payment of fees. Under [*Chicago Teachers Union v. Hudson*](https://supreme.justia.com/cases/federal/us/475/292/case.html), unions must determine agency fees based on an audit of their prior year’s expenditures and give the nonmembers a financial notice explaining how the fee was calculated. The example given in Illinois shows how objectors are left in the dark about the final numbers.

The national consensus is breaking down on many policy issues, so one can expect more challenges to compelled speech in which *Janus* will be cited, even though it arises out of the public-sector context. The free speech implications of [*Masterpiece Cakeshop v. Colorado Civil Rights Commission*](https://www.supremecourt.gov/opinions/17pdf/16-111_j4el.pdf)remain to be fully fleshed out and there are florists, bakers and dressmakers on the left and the right who don’t want to be compelled to support ideas they dislike. At the time of this writing, a petition for certiorari is pending before the court, [*Fleck v. Wetch*](https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-886.html), that challenges the compelled speech of mandatory bar dues. This issue was raised and immediately dismissed by Justice William Douglas in *Hanson* but looks different today. *Janus* will certainly be a check on mandatory bar associations interested in staking out policy positions too removed from the regulation of the legal profession.

The practical effect of *Janus* on public-sector unions will be significant. According to the [Mackinac Center](http://www.scotusblog.com/2017/12/symposium-evidence-shows-unions-will-survive-without-agency-fees/), they may lose three million union members and agency-fee payers and perhaps hundreds of millions of dollars in dues or fees. Several union-friendly states anticipated a loss in *Janus* and have already crafted measures to ameliorate the damage. [New York](https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-rights-new-yorks-working-men-and-women), [New Jersey](http://www.nj.com/politics/index.ssf/2018/05/murphy_signs_law_expanding_public_worker_union_rig.html) and [Washington](http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6229.SL.pdf#page=1) have made union recruiting easier. Unions will have access to new employees’ personal contact information in New York and New Jersey and union representatives will be allowed to meet new hires for recruitment pitches during work hours in all three states. [Maryland](http://www.baltimoresun.com/news/opinion/editorial/bs-ed-0403-hogan-vetoes-20180402-story.html) may soon follow suit. New York also enacted a [state tax deduction](https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-allowing-full-union-dues-be-deducted-new-york-state-taxes) for union dues. Before *Janus* was issued, some suggested a more radical approach: devising a way to have [the government reimburse the costs](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12160&context=journal_articles) of union representation.

The more interesting question is how labor will address the statutory right of exclusive representation now that agency fees have been struck down. It is clear that Alito thinks in the long term and today he hinted that exclusive representation is an avenue for future challenge: “Designating a union as the employees’ exclusive representative substantially restricts the rights of individual employees.” Unions have argued that the right to speak on behalf of all workers in a bargaining unit, not just union members, is an expensive burden that justifies compelling free riders to contribute funds. This right brings a corresponding duty of fair representation, requiring unions to represent the interests of all employees, even nonmembers, without discrimination. Now that one leg of this stool has been removed, unions will re-evaluate whether to keep working on behalf of objectors during collective bargaining and the grievance process or let them fend for themselves.

There will be disruption in the workplace in the short term. There may be multiple unions in a public-sector office. Some unions may try to bring back the right to strike to be effective and gain support. Alito’s opinion requires clear and affirmative consent before money can be taken from nonmembers but is short on details for how that works for existing agreements and what happens next. In the long term, though, unions will be forced to compete for support and all workers’ freedom of speech will be protected. Today’s opinion upholds the Jeffersonian ideal that it is “sinful and tyrannical” to compel someone “to furnish contributions of money for the propagation of opinions which he disbelieves and abhors.”