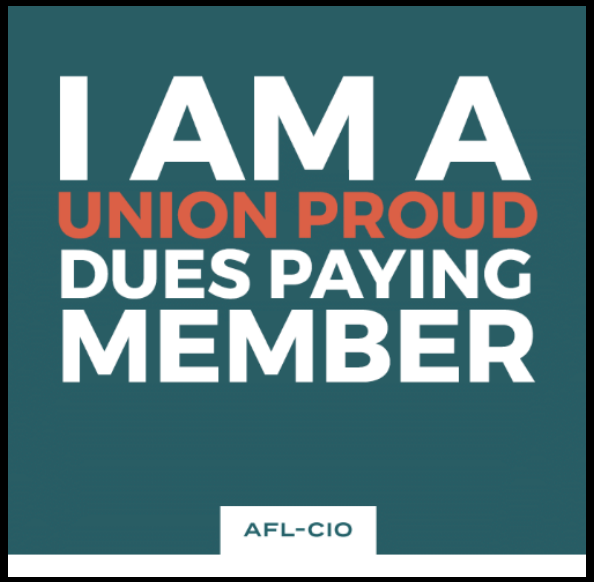

The Business of Union Business- The Janus Case and Its Aftermath

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- Allen Clendaniel – Sedor, Wendlandt, Evans, & Filippi, LLC
- Michael Wenstrup – NEA Alaska

A School District Lawyer and NEA-Alaska Uniserv representative together?

NEA-ALASKA
Reach. Teach. Inspire.

SEDOR WENDLANDT EVANS FILIPPI


UNDERSTANDING THE ROMAN GOD JANUS
AND HIS ROLE IN PUBLIC SECTOR EMPLOYMENT

“I’m your best friend, I’m your worst enemy,
I’m Janus, God of Doorways,
Beginnings, Endings, Choices.”

Janus to Annabeth in the Labyrinth

Analysis of Janus

SUPREME COURT OF THE UNITED STATES

No. 16–1466

MARK JANUS, PETITIONER *v.* AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 27, 2018]

JUSTICE ALITO delivered the opinion of the Court.

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.

We upheld a similar law in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations

What is an "Agency Fee"?

Opinion of the Court

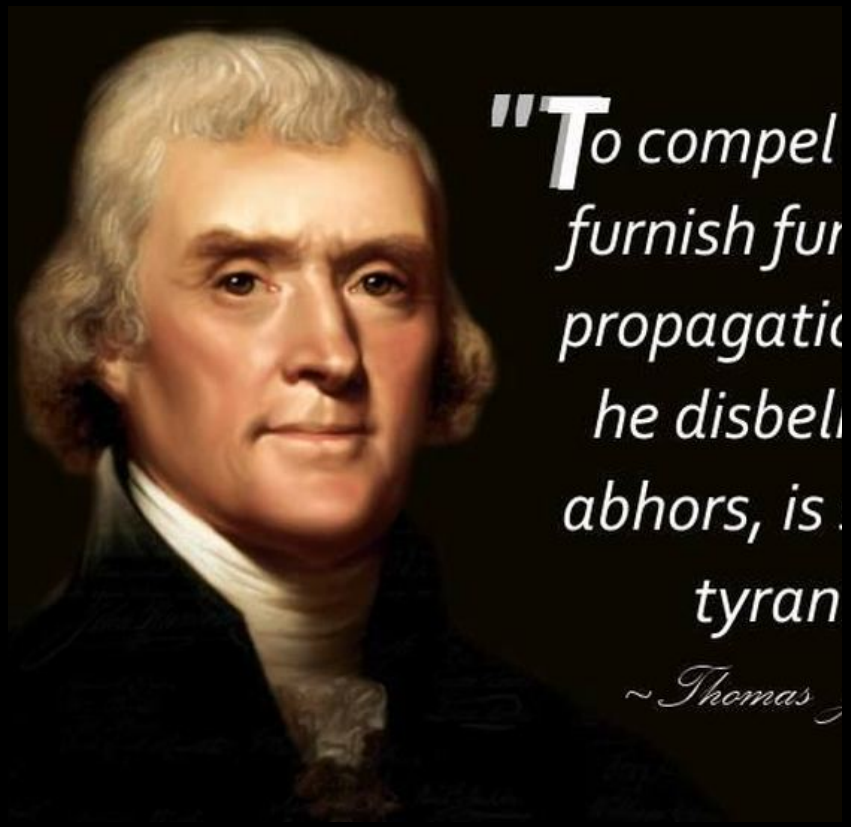
683–684 (1944). Protection of the [illegible] placed in the hands of the union, and before [illegible] is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. §315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund the union's political and ideological projects. 431 U. S., at 235; see *id.*, at 235–236. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours[,] and conditions of employment." §315/6(e); see also §315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." §315/3(g); see §315/6(e).

Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," §315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris* v. *Quinn*, 573 U. S. ___, ___–___ (2014) (slip op., at 19–20) (describing this process). Nonmembers need not be asked, and they are not required to consent before

freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977); see *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796–797 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–257 (1974); accord, *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec.*, *supra*, at 12 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed.* v. *Bar-*



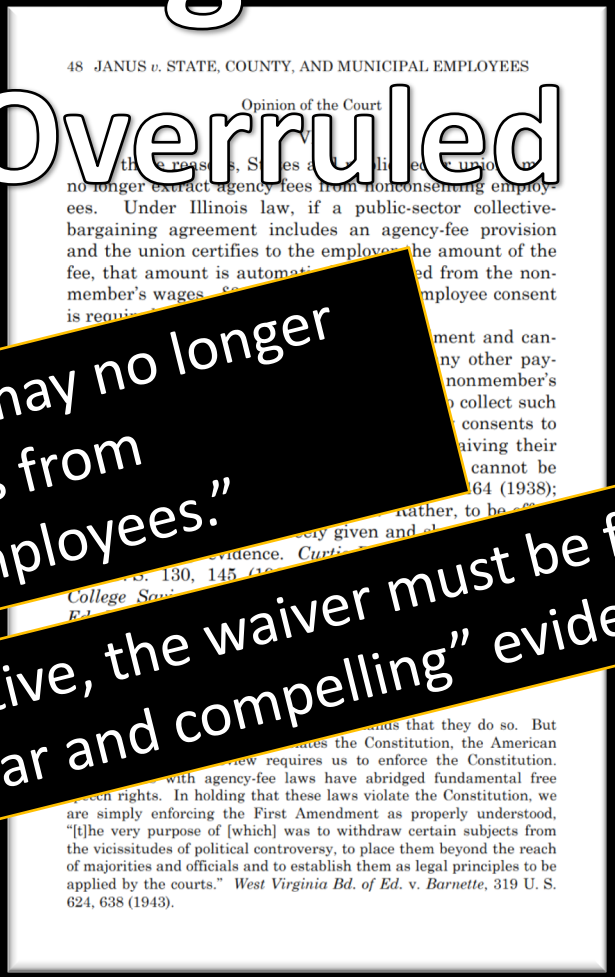
The Problem with Compelling Contributions

The Free Rider Problem

Holding:

Abood is Overruled

- NEITHER AN AGENCY FEE NOR ANY OTHER PAYMENT TO THE UNION MAY BE DEDUCTED FROM A NONMEMBER'S WAGER, NOR MAY ANY OTHER ATTEMPT BE MADE TO COLLECT SUCH A PAYMENT [illegible] THE EMPLOYEE AFFIRMAT[illegible] CONSENTS TO PAY.



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Opinion of the Court

[illegible] no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages [illegible] employee consent is required [illegible] ment and cannot be [illegible] ny other payment [illegible] nonmember's [illegible] collect such [illegible] consents to [illegible] aiving their [illegible] cannot be [illegible] 64 (1938); [illegible] Rather, to be [illegible] ely given and [illegible] vidence. *Curtis* [illegible] S. 130, 145 [illegible] *College Sq.* [illegible] *Ed.* [illegible] us that they do so. But [illegible] the Constitution, the American [illegible] requires us to enforce the Constitution. [illegible] with agency-fee laws have abridged fundamental free [illegible] ech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943).

Public Employers "may no longer extract agency fees from nonconsenting employees."

Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence.

State of Alaska v. Alaska State Employees Association

- The court issued a Temporary Restraining Order and Preliminary Injunction in favor of the union.
- Litigation continues

How has Janus affected school districts and unions?

Memorandum of Agreement to address deduction of union dues

New language for Negotiated Agreement

Union perspective

District perspective


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Q
&
A
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