PIONEER LEGAL

After *Janus*, Public Employers Must Obtain Informed Consent Before Collecting Union Dues or Agency Fees

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On June 27, 2018, the U.S. Supreme Court issued its long-awaited decision in *Janus v. AFSCME*, which addressed whether government may require a public employee to pay an "agency" fee to a union that he or she has not agreed to join. Overturning a 1977 precedent, the Court held, by a 5-4 margin, that agency fees violate such employees' First Amendment rights by compelling them to subsidize speech with which the employees may disagree on matters of substantial public concern.

Under *Janus,* state and local governments may not collect agency fees on behalf of public-employee unions from employees who have not a*ffirmatively* consented to join the union or pay the fee. No theory of "implied consent" is acceptable.

This paper addresses what the affirmative consent requirement means in this context. In most cases, affirmative consent must be established by a written waiver form, signed by an employee who first has been informed (in the waiver form or elsewhere) that he or she has a First Amendment right not to pay union or agency fees. Moreover, governments must take care that employees for whom a paper waiver may not be sufficient—for example, employees who have trouble reading or lack fluency in English—actually understand that they have a constitutional right not to pay union or agency fees without their affirmative consent. Any agreement to pay pre-dating *Janus* is not good enough; a new waiver of the right recognized in *Janus* is necessary.

In his analysis, Attorney Martin posed the question: Governments—which are responsible for implementing agency fees by withholding them from public-sector employee paychecks—face an important question in the post-Janus world: What type of waiver is necessary before they can collect union dues or agency fees from an employee without violating his or her First Amendment rights?

Janus involved a challenge to an Illinois statute that authorized public-sector unions to collect "agency fees" from all public employees, even those who are not members of the union. That fee then would be deducted by the government from employees' paychecks. Agency fees are charges for activities germane to a union's duties as collective-bargaining representative, as opposed to the union's political and ideological activities. The Supreme Court held four decades ago, in *Abood v. Detroit Board of Education* (1977), that mandatory payment of agency fees to a public-employee union does not violate the free speech rights of public employees who choose not to join the union. According to the *Abood* court, mandatory agency fees passed constitutional muster for two reasons: first, requiring all public sector workers to financially support a single recognized union buys "labor peace;" and second, it avoids the "free rider" problem of employees benefiting from union collective bargaining activities for which they do not pay.

Abood had long been the subject of criticism. In *Knox v. Service Employees International Union, Local 1000* (2012), Justice Alito, writing for the majority, stated that the *Abood* court had failed to engage in "any focused analysis" of the constitutional differences between public sector agency fees and similar private sector arrangements. Two years later, in *Harris v. Quinn* (2014), Justice Alito, again writing for the majority, concluded that *Abood* did not apply to home care personal assistants who were jointly employed by Illinois and by individuals with disabilities. In holding that personal assistants who declined to join a union could not be required to pay agency fees, the majority wrote that "even the best argument for the 'extraordinary power' that *Abood* allows a union to wield is a poor fit" for these circumstances. The Court added that *Abood* rested on "questionable foundations." In light of the language in *Knox* and *Harris*, many observers came to suspect that *Abood* would soon be overruled.

In 2015, the Supreme Court granted certiorari in *Friedrichs v. California Teachers Association*, a case squarely presenting the question of whether *Abood* remains good law. It was widely expected that the Court would use *Friedrichs* to overrule *Abood*. Justice Scalia, however, passed away in February 2016, shortly after *Friedrichs* was argued, and the remaining eight members of the Court deadlocked 4-4, leaving *Abood* in place. It is almost certain that if Justice Scalia had been replaced by the President Obama-nominated Judge Merrick Garland, *Abood* would still be the law of the land, as a Justice Garland presumably would have provided a fifth vote to uphold. But, of course, the Senate did not act on Judge Garland's nomination, and Justice Scalia ultimately was replaced by now-Justice Neil Gorsuch, nominated by President Trump.

With the *Friedrichs* case already decided, a new vehicle was needed to overrule *Abood*. Enter the *Janus* litigation. The plaintiff in that case, Mark Janus, was a public employee in the Illinois Department of Healthcare and Family Services who was not a member of the recognized public-sector union. Nonetheless, under Illinois law, Mr. Janus was forced to have an agency fee payable to the union withheld from his paycheck. Mr. Janus sued the union, seeking a declaration that requiring him to pay an agency fee amounts to coerced political speech and therefore violates the First Amendment. For example,

Mr. Janus objected to being required to subsidize the union's "behavior in bargaining," which he believed "does not reflect the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens."

The union moved to dismiss the complaint on the ground that Mr. Janus's argument was foreclosed by *Abood*. The district court agreed that *Abood* disposed of Mr. Janus's claim and dismissed the complaint, and the court of appeals affirmed.

The Supreme Court reversed, and in doing so overruled *Abood*. The Court held that public-sector employees have a First Amendment right not to pay agency fees subsidizing union speech without their consent, and that the challenged Illinois law therefore violated the Constitution. The Court's opinion—written by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch—began by explaining that the First Amendment protects against an individual being compelled to subsidize the speech of others, particularly on matters of political or civic interest. For this reason, the Court had recognized in past cases that requiring public employees like Mr. Janus to financially support a union that takes politically significant positions during collective bargaining implicates those employees' First Amendment rights. Whether an agency-fee requirement actually violates the First Amendment then turns on whether the requirement serves a "compelling state interest" that cannot be achieved through means "significantly less restrictive of associational freedoms."

The Court applied this standard to the challenged Illinois law, and held that neither of the two interests identified by the *Abood* court—labor peace and avoiding free-riders—justified a state-mandated agency fee for public employees. The interest in labor peace does not justify mandatory agency fees paid to a single recognized union, the Court explained, because even in jurisdictions that do not require agency fees there is no lack of "labor peace." The Court observed, for example, that the federal government does not allow the imposition of mandatory agency fees on non-union members, yet a single union normally serves as the exclusive bargaining representative for particular bargaining units of federal employees. Similarly, the Court noted, 28 states have laws generally prohibiting agency fees, but government workers in those states also are represented by unions that serve as the exclusive representatives for all state employees.

The Court also rejected *Abood's* explanation that mandatory agency fees are necessary to avoid the risk of free riding by non-union members. The Court noted that even without an agency free requirement, about 27 percent of the federal work force has elected to become union members, as have millions of public employees in the 28 states that forbid mandatory agency fees. The Court also took issue with the very concept that free-ridership concerns could trump First Amendment protections. "Private speech often furthers the interests of nonspeakers," the Court explained, "but that alone does not empower the state to compel the speech to be paid for."

Next, the Court addressed an argument that the First Amendment does not apply with any force to agency fees so long as the fees are used to pay only for collective bargaining and other "private" matters, as opposed to "matters of public concern." The Court rejected this argument, observing that even during collective bargaining unions express views on numerous matters of public concern, including education, child welfare, healthcare, minority rights, climate change, sexual orientation and gender identity, evolution, and religion.

Relying upon the holding of the United States Supreme Court in *Janus v. AFSCME*, Attorney Martin reasoned that "public employers should immediately stop collecting agency fees from employees who are not members of a union until those employees effectuate a valid waiver of their First Amendment rights. A waiver will be valid only if the employee is first informed of his or her First Amendment right not to pay agency fees."

Ultimately, the Court concluded that *Abood* had been wrongly decided. "States and public-sector unions," the Court held, "may no longer extract agency fees from nonconsenting employees." To do so violates the employees' free speech rights by compelling them to subsidize private speech on matters of substantial public concern. The Court explained that this does not mean a public employer *may* never collect agency fees from an employee; rather, a public employer may collect agency fees *only* from an employee who "affirmative consent[s] to pay" the fees, thereby "waiving [his or her] First Amendment rights."

Applying this rule to the facts of the case before it, the Court held that the Illinois statute, which allowed government employers to automatically deduct agency fees from nonmembers' wages without any waiver, was unconstitutional.

Governments—which are responsible for implementing agency fees by withholding them from public-sector employee paychecks—face an important question in the post-*Janus* world:

What type of waiver is necessary before they can collect union dues or agency fees from an employee without violating his or her First Amendment rights? Fortunately, Justice Alito provided firm guidance on this question, at the end of his decision for the Court. The waiver of a constitutional right, to be valid, "must be freely given," must be "clear[] and affirmative[]," and must be "shown by 'clear and compelling' evidence." And he cited three cases in support of this holding: *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.,* 527 U.S. 666 (1999). These cases, in turn, provide valuable direction on the *Janus* decision's discussion of waiver, or, as some have called it, Janus's "opt-in requirement."

In *Johnson v. Zerbst*, the Supreme Court held (in the context of a criminal defendant's Sixth Amendment right to counsel) that a valid waiver must be "an intentional relinquishment or abandonment of a *known* right or privilege." The Court also stated that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," and that the "determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

Curtis Publishing Co. v. Butts, the second case cited in *Janus*, involved a defamation claim brought by a football coach against a newspaper. One of the issues in the case was whether the newspaper had waived its right to assert a First Amendment defense by failing to raise the defense before trial, when the very existence of the defense was uncertain as a matter of precedent. The Court acknowledged that a party may waive objections—even constitutional objections—by failing to raise them at a certain time. But the Court held that a party may not waive a constitutional objection unless, as previously stated in *Johnson v. Zerbst*, the waiver is of a "*known* right or privilege." "The mere failure to interpose [a] defense prior to the announcement of a decision which might support it," the Court held, "cannot prevent a litigant from later invoking such a ground." After all, prior to the decision, the litigant would not have known the constitutional defense was a viable one. The Court went on to reject the argument that the defendant in *Curtis Publishing* should have "seen the handwriting on the wall" with respect to the particular constitutional defense now raised. The Court added that the constitutional protection that was alleged to have been waived—freedom of speech and the press—"safeguards a freedom which is the matrix, the indispensable condition, of nearly every other form of freedom," and therefore "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances short of being clear and compelling."

Finally, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.,* the Court tackled the question whether the state of Florida had waived its sovereign immunity and agreed to be sued by the plaintiff bank. The bank argued that Florida had *constructively* waived its immunity from suit by entering a field—for-profit educational investment vehicles—subject to congressional regulation. The Court rejected this argument, and in doing so, stated that constructive waiver is "simply unheard of in the context of other constitutionally protected privileges" and "is not a doctrine commonly associated with the surrender of constitutional rights." Again citing *Johnson v. Zerbst,* the Court held that the "classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege."

His comprehensive analysis turned upon the Court's reasoning, and included the conclusion that union members "have a First Amendment right to not be required to subsidize speech on a matter of public concern. And while they may well be willing to waive that right, *Janus* teaches that waiver may not be presumed and that there is no such thing as constructive waiver."

By citing these three decisions—*Johnson, Curtis Publishing, and College Savings Bank*—the Supreme Court indicated that the same rules concerning waiver that applied in those cases also would apply to the First Amendment right to be free from forced speech in the context of agency fees. Those rules are, to summarize: (1) waiver of a constitutional right must be knowing, intelligent, and intentional; (2) waiver must be unequivocal and certain; (3) waiver is determined on a case-by-case basis, by considering the particular facts and circumstances of the individual in question; (4) there is a presumption against waiver of a constitutional right; (5) waiver must be shown by clear and compelling evidence; and (6) there is no such thing as a constructive waiver.

The question becomes, what do those rules mean in practice and, more specifically, what should public employers in Massachusetts do to make sure they are complying with the Supreme Court's decision in *Janus*? For starters, public employers should immediately stop collecting agency fees from employees who are not members of a union until those employees effectuate a valid waiver of their First Amendment rights. A waiver will be valid only if the employee is first informed of his or her First

Amendment right not to pay agency fees. A written disclosure may well be enough in most cases to inform an employee of that right. Because, however, waiver must be determined on a case-by-case basis (under *Johnson*), a written disclosure will likely not be enough in all circumstances for all employees. Public employers should take into account particular circumstances that might make such a disclosure insufficient in a given case, such as an employee's illiteracy or reading disability, inability to understand English, or inability to process difficult concepts. Public employers also should ensure, in all cases, that the atmosphere is such that the employee does not feel coerced or pressured to sign the waiver.

Although *Janus* dealt explicitly with agency fees assessed against employees who were not members of the union, its reasoning applies equally to employees who are union members. They, like their non-union-member counterparts, have a First Amendment right to not be required to subsidize speech on a matter of public concern. And while they may well be willing to waive that right, *Janus* teaches that waiver may not be presumed and that there is no such thing as constructive waiver. This point holds special force here, where, prior to the Court's decision in *Janus,* the Supreme Court's decision in *Abood* had established that there was no First Amendment right to be free of agency fees. As a result, it cannot be said that union members were "knowingly" waiving any right to be free of those fees. Employers should therefore take steps to inform *all employees*—not just non-union members—of their constitutional right not to pay agency fees, and ensure that union members, just like non-union members, are paying union dues or fees only after a knowing and intelligent waiver of their First Amendment rights.

About the Author

Kevin P. Martin is co-chair of the Appellate Litigation group at Goodwin Procter LLP. Mr. Martin has argued and briefed numerous cases in federal and state appellate courts around the country, and also has extensive experience in both trial matters and internal and government investigations. Prior to joining Goodwin, Mr. Martin clerked for Justice Antonin Scalia on the United States Supreme Court and Judge Laurence Silberman on the U.S. Court of Appeals for the DC Circuit. He served as a special assistant district attorney for Middlesex County (MA) from 2004–2005, and has been named a "Lawyer of the Year" by *Massachusetts Lawyers Weekly* for his work before the Massachusetts Supreme Judicial Court. He is a graduate of Georgetown University's School of Foreign Service, and Columbia Law School.

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