JANUS V. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES: AN UNPRECEDENTED DEPARTURE FROM PRECEDENT

I. INTRODUCTION

The integrity and workability of the United States legal system rests on well-reasoned judgments that are consistent with past decisions, legal principles, and the United States Constitution.[1] The doctrine of *stare decisis* is the foundation upon which the law is developed, used, and maintained.[2] Without a strong foundation, the law crumbles apart, which is why *stare decisis* prevents the Court from overturning precedent unless there are strong justifications for doing so.[3]

The recent United States Supreme Court decision in *Janus v. State, County, and Municipal Employees*[4] overturned *Abood v. Detroit Board of Education*,[5] a forty-year-old case that allowed the government to use agency-shop arrangements—charging public-sector employees who opted out of union membership a "fair share" of membership dues, or "agency fees."[6] The petitioners in *Janus*

1. *See* Payne v. Tennessee, 501 U.S. 808, 827-28 (1991).

2. *Stare decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[Latin 'to stand by things decided'] . . . [t]he doctrine of precedent, under which the court must follow earlier judicial decisions when the same points arise again in litigation.").

3. *See generally* United States v. Int'l Bus. Machines Corp., 517 U.S. 843 (1996).

4. *See generally* Janus v. Am. Fed'n of State, Cty., and Mun. Emp., Council 31, 138 S. Ct. 2448 (2018) [hereinafter *Janus v. AFSCME*].

5. *See generally* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

6. *See generally id.* The "fair share" equates to the cost of union activities incidental to collective bargaining. *See Janus*, 138 S. Ct. at 2488 (Kagan, J., dissenting).

sought to overturn *Abood* on the grounds that it violated nonmembers' First Amendment rights to freedom of speech and association.[7]

In determining whether to uphold the *Abood* precedent, the Court examined the consistency of its reasoning in *Abood* with well-established First Amendment standards, as well as its workability and consistency with subsequent decisions.[8] The decision turned on how strongly *stare decisis* required upholding *Abood*.[9] Despite convincing arguments to the contrary, the majority reasoned against *stare decisis* and overturned *Abood*, upsetting years of precedent and policy.[10] The Supreme Court held that agency fees as applied in this case were unconstitutional and *stare decisis* did not prevent the Court from overturning *Abood*.[11]

The impact this case could have on the treatment of precedent and the integrity of the judicial system is chilling. In an unprecedented departure from precedent, *Janus* created a startling precedent of its own—a precedent which could allow courts to "respect" *stare decisis* by not respecting it at all.

II. FACTS AND HOLDING

Petitioner Mark Janus, an employee of the Illinois Department of Health and Family Services, and two other state employees (Janus) intervened in a federal lawsuit originally brought by the Governor of Illinois against respondent American Federation of State, County and Municipal Employees, Council 31 (the Union), challenging the constitutionality of an Illinois statute authorizing the imposition of agency fees.[12] Janus claimed that all "nonmember fee deductions are coerced political speech" and a violation of nonmembers' First Amendment rights.[13]

The Union moved to dismiss the complaint on the grounds that Janus's claim was barred by the Supreme Court's decision in *Abood v. Detroit Board of Education*.[14] The district court granted the motion to dismiss and the Seventh Circuit Court of Appeals

7. *See generally* Janus v. AFSCME, 138 S. Ct. 2448 (2018).
8. *See id.* at 2481.
9. *See id.* at 2478.
10. *Id.* at 2486.
11. *See id.*
12. Janus v. AFSCME, 138 S. Ct. 2448, 2462 (2018).
13. *Id.* at 2462.
14. *Id.*

affirmed.[15] Janus appealed to the Supreme Court and asked it "to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional" because compelling nonmembers to subsidize the speech of third parties is an abridgement of their freedom of speech.[16] The Supreme Court granted certiorari to review the constitutionality of public-sector union agency fees.[17]

The Union was the sole representative of each employee of the Illinois Department of Health and Family Services, regardless of the employee's status as a union member.[18] Thus, Janus could not negotiate individually with his employer, but had to rely on the Union to protect his interests, even if he did not share the same beliefs or values as the Union.[19] In turn, the Union had to fairly represent "members and nonmembers alike" in its bargaining.[20] In this case, under Illinois law and *Abood*, nonmembers of the Union were required to pay a percentage of union dues to cover the costs of union services that they may benefit from, such as fair representation and collective bargaining.[21] However, Janus argued that this arrangement was an infringement on nonmembers' rights to freedom of speech and freedom of association.[22]

Janus sought to overrule *Abood*, which required the review of the Supreme Court.[23] Janus argued that *Abood*: (1) was wrongly decided, (2) conflicted with related decisions, (3) was unworkable, and (4) could not be justifiably maintained by reliance interests.[24] The Union argued that overruling *Abood* would be "inconsistent with the First Amendment's original meaning," inconsistent with the government's interests as an employer, and inconsistent with *stare decisis*.[25]

The Court reviewed *Abood* using an exacting scrutiny

15. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2462 (2018).
16. *Id.*
17. *Id.*
18. *Id.* at 2460.
19. *Id.*
20. Janus v. AFSCME, 138 S. Ct. 2448, 2460 (2018).
21. *Id.* at 2460-61.
22. *Id.* at 2462-63.
23. *Id.* at 2462.
24. *See* Brief for Petitioner at 9, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 WL 5952674 at*9
25. *See id.* at *14-16.

standard to analyze its consistency with First Amendment principles and its justification of agency fees in collective bargaining agreements.[26] Then the Court tackled *stare decisis* to determine the importance of following precedent by examining *Abood*'s reasoning, workability, and consistency, along with developments made since and reliance upon the decision.[27]

The Court found that *Abood* was wrongly decided and that *stare decisis* did not justify its affirmation.[28] It overruled *Abood* and held "that public-sector agency-shop arrangements violate[d] the First Amendment" by forcing nonconsenting employees to subsidize the speech of a third party.[29] As a result, the government "may no longer extract" any fee or payment from nonmembers' wages to a union without the nonmember's clear, affirmative consent.[30]

III. LEGAL BACKGROUND

The question presented in this case was whether a section[31] of the Illinois Public Labor Relations Act (IPLRA) violated public-sector employees' First Amendment rights.[32] Under the IPLRA, employees of the State are permitted to unionize, and "[i]f a majority of employees in a bargaining unit vote[d] to be represented by a union, [then] that union [was] designated as the exclusive representative of all employees."[33] Although state employees were not required to become members of the union, the IPLRA required the union to fairly represent and negotiate on behalf of members and nonmembers alike.[34] The nonmembers did not have to pay full union membership dues for the union's services, but the IPLRA required them to pay "agency fee[s]."[35] The agency fees amounted to the percentage of union expenses attributable to the union's collective bargaining activities.[36]

Janus sought review of *Abood*'s constitutionality under the

26. Janus v. AFSCME, 138 S. Ct. 2448, 2477 (2018).
27. *Id.* at 2477-78.
28. *Id.* at 2486.
29. *Id.* at 2478.
30. *See id.* at 2478.
31. 5 ILL. COMP. STAT. 315/6(a), (e), (g) (West 2019).
32. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2462 (2018).
33. *Id.* at 2462.
34. *See id.* at 2460.
35. *See id.*
36. *See id.*

First Amendment. *Abood* gave states the power to impose agency fees on the public sector through statutes such as the IPLRA.[37] The First Amendment forbids any legislation "abridging the freedom of speech" or freedom of association.[38] It "creates an 'open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference."[39] Thus, the government may not forbid the expression of ideas it disfavors, force the promotion of ideas it approves of,[40] or coerce the expression of another's beliefs or faith.[41] Although courts make every effort to uphold these principles, they have carved out several exceptions for public employees over the years. *Abood* is one such example.

A. *ABOOD*

Abood granted power to the states to impose agency fees on nonmembers of public-sector unions.[42] This allowed state governments to charge public employees who opted out of union membership "the portion of union dues attributable" to the union's duties as their collective bargaining representative.[43] The government could not, however, require nonmembers to fund the union's political or ideological agendas.[44]

Abood acknowledged the standard First Amendment principle that the government may not compel an individual to affirm certain ideological or political beliefs as a "condition of retaining public employment."[45] *Abood* held that using funds that nonconsenting members or nonmembers paid for ideological activities not germane to collective bargaining is a violation of those employees' First Amendment rights.[46] Consequently, unions could use agency fee funds only for activities "germane to its duties as collective bargaining representative."[47] A union activity that solely expressed or advanced political ideologies or beliefs had to

37. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).

38. U.S. CONST. amend. I.

39. Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 309 (2012) (citing N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

40. *Id.* (citing *Lopez Torres*, 552 U.S. at 208).

41. W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

42. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977).

43. Janus v. AFSCME, 138 S. Ct. 2448, 2460 (2018).

44. *Id.* at 2460-61.

45. *Abood*, 431 U.S. at 235.

46. *Id.*

47. *Id.*

be funded by fees paid freely by consenting employees who did not object to advancing those ideas.[48]

Despite restricting a union's use of agency fees to collective bargaining activities, *Abood* conceded that imposing those fees could still impact nonmembers' First Amendment freedoms.[49] For example, an employee could have "ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative," and requiring such an employee to help finance those collective bargaining activities may interfere with the freedom to associate, or not associate, for the advancement of ideas.[50] *Abood* determined this potential infringement outweighed the benefits that public-sector employees received from union status, as well as the government's interest in preventing free riders and promoting labor-peace within the workforce.[51]

Subsequent decisions sought to clarify aspects of *Abood*, such as the difficulties in drawing the line between collective bargaining activities and ideological activities.[52] The Supreme Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson* created the "*Hudson* notice," a doctrine which required unions to provide a detailed notice to all the employees in the unit before collecting agency fees.[53] In the interest of maintaining labor peace and minimizing the infringement on public employees' First Amendment rights, *Hudson* determined the constitutional requirements for a union's collection of agency fees. These included "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[54]

Abood built upon the restrictions and exceptions of First Amendment freedoms as applied to public-sector employees, but it

48. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977).

49. *Id.* at 222.

50. *Id.*

51. *Id.* at 224. Public employees can influence their public employer (through collective bargaining) to affect certain decisions of the government representatives because those government officials represent the public employers.

52. *Id.* at 236.

53. "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." Chi. Teachers Union, Local No.1 v. Hudson, 475 U.S. 292, 302 (1986) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 (1977)).

54. *Hudson*, 475 U.S. at 310.

was neither the first nor the last decision to restrict First Amendment freedoms in the public sector.

B. PUBLIC EMPLOYEES AND THEIR ABRIDGED FREEDOMS OF SPEECH

Public employees, as a condition of employment, do not completely relinquish the First Amendment rights they would otherwise enjoy as citizens.[55] However, the government, as an employer, still has an interest in regulating the speech of its employees in order to maintain an efficient workplace.[56] The government employer may restrict speech that is otherwise protected if its interests in efficient workplace operation substantially outweigh the interests that employees may have in protecting their freedoms of speech.[57] The goal is "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[58]

When a public employee speaks as a private citizen on matters of public concern, the speech is constitutionally protected from employer discipline or retaliation.[59] However, public employee speech is not constitutionally protected from employer retaliation if made pursuant to the duties as a public employee or speaking as a private citizen on matters of *private* concern.[60]

There is no bright-line rule to determine whether a public employee is speaking as an employee or as a citizen.[61] The general rule is that if the employee's speech was within the scope of the employee's duties and merely concerned those duties, then the speech is public employee speech and not constitutionally protected.[62] *Pickering v. Board of Education* supplied a three-part

55. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

56. *Id.*

57. Connick v. Myers, 461 U.S. 138, 150-51 (1983).

58. *Pickering*, 391 U.S. at 568.

59. *Id.*

60. Garcetti v. Ceballos, 547 U.S. 410, 418-21 (2006).

61. Ross v. Breslin, 693 F.3d 300, 306 (2d Cir. 2012). Courts can "examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two. Other contextual factors, such as whether the complaint was also conveyed to the public, may properly influence a court's decision." *Id.*

62. *Garcetti*, 547 U.S. at 418.

framework to help courts determine whether a public employee's speech is subject to limitations by their employer.[63]

First, the court must determine if the employee is speaking as a private citizen or a public employee.[64] The speech of public employees, when made within the scope of their employment, may be controlled by the employer.[65] Second, the court must determine if the speech is a matter of private or public concern.[66] Speech that is of public importance is not subject to limitations by public employers,[67] but speech of private concern is.[68] Third, the employer may nevertheless restrict speech that is of public concern if the employer's interests outweigh the interests of the employee.[69] Typically, the smooth operation of the workplace is reason enough to restrict employee speech.[70]

When people speak in their capacity as union members or union representatives, they speak as a private citizen.[71] However, because public-sector unions take positions in collective bargaining that may have powerful political and civic consequences, charging mandatory fees without giving proper notice could "constitute a form of compelled speech and association that imposes 'significant impingement on First Amendment rights.'"[72] To prevent agency fees from becoming a form of compelled speech and association, *Pickering* required unions to issue a new *Hudson* notice to nonmembers in a public-sector union when dues increase or when the union imposes a special assessment.[73]

Supreme Court precedents, such as *Pickering*, *Hudson*, and *Abood*, illustrate both the importance of protecting First Amendment rights for public-sector employees and the certain circumstances that justify restricting those rights. Several decisions since *Abood* have acknowledged its faults, but they have

63. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

64. *Id.*; *see also* Garcetti v. Ceballos, 547 U.S. 410, 421-22 (2006).

65. *Pickering*, 391 U.S. at 568.

66. *Id.* at 571-72.

67. "The public interest in having free speech and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." *Id.* at 573.

68. *Id.* at 572.

69. *Id.* at 568.

70. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

71. *See generally* Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2013).

72. Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310-11 (2012) (citing Ellis v. Bhd. of Ry. Clerks, 466 U.S. 435, 455 (1984)).

73. *Id.* at 322.

also respected its logic, choosing to define, clarify, and interpret its holding rather than abandon it.

C. *STARE DECISIS*

Stare decisis is "the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."[74] "[I]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[75] The Supreme Court often acknowledges the importance of following precedent,[76] yet it has also recognized circumstances where abandonment is acceptable or even necessary.[77]

Stare decisis applies with more force to statutory precedent and decisions involving property or contract rights where reliance interests are involved.[78] Congress has the power to correct statutory interpretation mistakes the judicial branch makes, so the legislature can remedy any significant harm arising from such mistaken decisions, while still respecting *stare decisis*.[79] A decision that mistakenly interprets a constitutional provision, however, can only be remedied through constitutional amendment or by overturning the flawed decision.[80] Thus, *stare decisis* is weakest when the Court revisits a decision involving only constitutional interpretation.[81] However, the Court still needs "strong grounds" for revisiting and overturning such a decision.[82]

The Court in *Kimble v. Marvel Entertainment, LLC* held that "[o]verruling precedent is never a small matter. *Stare decisis* means sticking to some wrong decisions . . . it is usually 'more important that the applicable rule of law be settled than that it be

74. *Stare decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

75. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

76. *See* United States v. Int'l Bus. Mach. Corp., 517 U.S. 843, 856 (1996) (courts cannot overturn a past decision unless there are strong grounds for doing so); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 408 (2010); Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

77. *Citizens United*, 558 U.S. at 408.

78. *Payne*, 501 U.S. at 828.

79. Agostini v. Felton, 521 U.S. 203, 235 (1997); Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015).

80. *See generally id.*

81. *See generally id.*

82. *See generally id.*

settled right.'"[83] If a court wishes to abandon precedent, it will need stronger justifications than a convincing argument that a prior decision was mistakenly decided or that the Court would decide a prior decision differently today.[84] "[I]t is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require . . . what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'"[85]

The Supreme Court examines multiple factors when determining whether it is appropriate to overrule precedent, including but not limited to: (1) whether the decision was well-reasoned, (2) the workability of its legal rule,[86] (3) expectations or reliance interests at stake, (4) new developments in the law that weaken the underlying rationales of a prior decision, and (5) the decision's consistency with related decisions.[87]

The Court has revisited prior interpretations of the Constitution that it found "unsound in principle and unworkable in practice."[88] When a court revisits a prior decision, it weighs "pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law," and seeks "to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability."[89]

Stare decisis is usually followed in "cases involving property or contract rights, where reliance interests are involved."[90] It also has special force when legislators or citizens "have acted in reliance

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83. Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015); *see* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932).

84. *Kimble*, 135 S. Ct. at 2409.

85. *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014)).

86. A prior decision has been deemed unworkable when it creates confusion or a lack of consistency in the law or if it "poses direct obstacles to the realization of important objectives embodied in other laws." Patterson v. McClean Credit Union, 491 U.S. 164, 173 (1989).

87. *See* Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Payne v. Tennessee, 501 U.S. 808, 827 (1991); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 411 (2010); Pearson v. Callahan, 555 U.S. 223, 233 (2009); *Patterson*, 491 U.S. at 172-73; Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887, 900 (2007).

88. Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

89. *Casey*, 505 U.S. at 854.

90. *Payne*, 501 U.S. at 828.

on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."[91]

Subsequent changes or developments in constitutional law can justify overruling a past decision.[92] The Court in *United States v. Gaudin*[93] held that *stare decisis* is not controlling when the decision is proved to be manifestly wrong and its underpinnings eroded by subsequent decisions of the Court.[94]

IV. THE COURT'S DECISION

The Court ultimately overruled *Abood* in *Janus*, holding that the extraction of agency fees from nonconsenting public-sector employee wages in order to subsidize a union is a violation of the First Amendment of the United States Constitution.[95] In arriving at this holding, the Court revisited its prior decision of *Abood* and analyzed: (1) its consistency with First Amendment principles, (2) its reasoning and justification for imposing agency fees in the public sector, (3) whether *Abood* upheld the decision in *Pickering*, and (4) whether *stare decisis* required *Abood* to be upheld.[96]

A. *ABOOD* WAS INCONSISTENT WITH FIRST AMENDMENT PRINCIPLES

The *Janus* opinion opened with a lesson on two well-established First Amendment principles: first, the government may not abridge an individual's freedom of speech, which includes restricting *and* compelling speech; and second, free speech "furthers the search for truth."[97] As such, compelling individuals to express support for beliefs they disagree with is a violation of their freedom of speech because it hinders the search for truth.[98] The Court extended this principle to the agency fee arrangement in *Abood*, stating that compelling a person to subsidize the speech of others raises similar concerns.[99] With those considerations, the

91. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 411 (2010).

92. Agostini v. Felton, 521 U.S. 203, 235-36 (1997).

93. United States v. Gaudin, 515 U.S. 506 (1995).

94. *Id.* at 521.

95. "[P]ublic-sector agency-shop arrangements violate the First Amendment . . ." Janus v. AFSCME, 138 S. Ct. 2448, 2478 (2018).

96. *Id.* at 2478-80.

97. *Id.* at 2464.

98. *Id.*

99. *Id.* at 2478 (citing Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 309 (2012)).

Court reasoned that *Abood* was not consistent with well-established First Amendment principles.[100]

B. *ABOOD* USED FLAWED REASONING TO JUSTIFY IMPOSING AGENCY FEES

The Court questioned *Abood*'s justifications for allowing public-sector agency-shop arrangements despite the issues it created.[101] Specifically, the Court criticized *Abood*'s conclusion that agency fees were necessary to maintain fairness and labor peace between members and nonmembers in a union.[102] The Court applied an exacting scrutiny standard of review to determine if compelled subsidies were unconstitutional.[103] In order for compelled subsidies to survive the exacting scrutiny standard of review, the fees had to "serve a compelling state interest that [could not] be achieved through means significantly less restrictive of associational freedoms."[104] Despite what the Court held in *Abood*, the *Janus* court found that agency fees were not the least restrictive means to serve a compelling state interest.[105]

1. AGENCY FEES ARE NOT INEXTRICABLY LINKED TO COLLECTIVE BARGAINING ARRANGEMENTS

When the majority of employees in a unit elect to form a union, the entire unit is designating the union as its exclusive bargaining agent, which significantly restricts the rights of individual employees to act without the union.[106] Only the union may negotiate directly with the employer, meaning that the union must represent the interests of *all* employees—those who pay membership fees as well as those who do not.[107] Recognizing the potential inequity in such a situation, *Abood* allowed public employers to charge nonmembers a "fair share" fee[108] for the benefits they reaped from the union acting on their behalf.[109] Additionally, in an effort to preserve First Amendment freedoms,

100. Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018).

101. *Id.*

102. *Id.* at 2467.

103. *Id.* at 2465 (exacting scrutiny is the standard the *Knox* Court applied to commercial speech).

104. *Id.*

105. Janus v. AFSCME, 138 S. Ct. 2448, 2466 (2018).

106. *Id.* at 2469.

107. *Id.*

108. Fair share fees are agency fees. *Id.* at 2478 (Kagan, J., dissenting).

109. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221-22 (1977).

Abood forbade the use of nonmember agency fees to further the union's political and ideological activities.[110]

The *Janus* Court noted, as *Abood* did then, the difficulty in differentiating between chargeable and non-chargeable expenses, and the possibility that ideological activities could also be classified as collective bargaining activities.[111] Whereas *Abood* saw that issue as secondary to the importance of promoting labor peace and preventing free riders in the union, the *Janus* Court did not.[112] It held that *Abood* unnecessarily relied on the presumption that agency fees are "inextricably linked" to collective bargaining arrangements.[113]

2. AGENCY FEES ARE NOT NECESSARY TO MAINTAIN LABOR PEACE AND PREVENT FREE RIDERS

The Court reasoned that *Abood*'s labor peace argument was insufficient to justify agency fees because it never discussed how labor peace would be affected without agency fees; the Court referred to the federal workforce as evidence that labor peace could exist without agency fees.[114] Additionally, the Court held that *Abood*'s free-rider argument was not sufficiently compelling to overcome First Amendment objections, pointing out how private groups often advocate for government action that would inevitably benefit nonmembers and how forcing those nonmembers to subsidize the group's speech would constitute a clear constitutional violation.[115] Again, the Court stressed the federal workforce's ability to maintain labor peace and prevent free riders without agency fees.[116]

3. FAIR REPRESENTATION CAN BE MAINTAINED WITHOUT REQUIRING AGENCY FEES

The Court rejected the argument that unions would be unwilling to represent nonmembers who did not pay their "fair

110. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

111. Janus v. AFSCME, 138 S. Ct. 2448, 2481 (2018).

112. *Id.* at 2466.

113. *Id.*

114. Agency fees are banned in federal employment. *Id.* at 2491 n.1.

115. *Id.* at 2466.

116. "[N]early a million federal employees—about 27% of the federal work force—are union members. The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee." Janus v. AFSCME, 138 S. Ct. 2448, 2466 (2018).

share" for union representation.[117] It reasoned that the union's status as the exclusive representative provides benefits that outweigh any burden of fair representation for members and nonmembers.[118] According to *Janus*, the burden of representing nonmembers is outweighed by the fact that the employer is required to listen to and bargain in good faith with *only* that union, and because exclusive representation grants special privileges such as obtaining employee information and having dues deducted directly from members wages.[119] Without a collective bargaining agreement (which requires fair representation), the employees would not have any of these benefits.

The Court also rejected the argument that it would be fundamentally unfair to require unions to provide fair representation for nonmembers who were not required to pay.[120] Fair representation includes representation in grievance proceedings and in disciplinary matters.[121] The Court reasoned that unions would still have an interest in representing grievances of nonmembers because the resolution of one employee's grievances could affect others.[122] Additionally, any unwanted burden from representing nonmembers in disciplinary matters "could be eliminated through means less restrictive than agency fees,"[123] such as requiring nonmembers to pay for that particular service or denying the employee union representation altogether.[124]

The Court also noted that unionization substantially restricts nonmembers' rights by forcing them to rely on the collective bargaining agent to represent their needs, so fair representation is necessary to ensure the protection of nonmembers' interests.[125] The duty of fair representation comes with the privilege of being the exclusive representative of all the employees in the unit, which outweighs any burden the duty of fair representation might place upon the union.[126] The Court held that because the union's services could be performed through less restrictive means than

117. Janus v. AFSCME, 138 S. Ct. 2448, 2467 (2018).
118. *Id.*
119. *Id.*
120. *Id.* at 467-68.
121. *Id.* at 2468.
122. Janus v. AFSCME, 138 S. Ct. 2448, 2468 (2018).
123. *Id.*
124. *Id.* at 2468-69.
125. *Id.* at 2468-69.
126. *Id.*

the imposition of agency fees, such fees could not be upheld based on *Abood*'s fair representation considerations.[127]

4. *ABOOD* DID NOT UPHOLD THE DECISION IN *PICKERING*

Under *Pickering*, "employee speech is largely unprotected if it is part of what the employee is paid to do . . . or if it involve[s] a matter of only private concern."[128] The *Janus* Court held that the usage of agency fees could not be justified by *Pickering* to satisfy the exacting scrutiny standard because *Abood* was not based on *Pickering*.

The Court tested its decision by applying the *Pickering* framework to *Abood*, which includes: (1) determining if the employee was speaking as a private citizen or a as a public employee, (2) determining whether union speech in collective bargaining is a matter of public or private concern, and (3) determining whether the State's interests as an employer justified the impingement that agency fees inflict on nonmembers' First Amendment rights.[129]

The first question the Court answered was whether the employee was speaking as a private citizen or as a public employee.[130] Under *Garcetti v. Ceballos*, when public employees are performing their job duties, their speech may be controlled by their employer.[131] The Court concluded that an employee's "job duty speech" is when the employee speaks for the employer, but a union's speech in collective bargaining is the union speaking for the employees.[132] For *Garcetti* to apply, the union would have to be speaking on behalf of the employer, which the Court concluded was not the case.[133]

The second question the Court considered was whether union speech in collective bargaining was a matter of private or public concern. It held that "the union speech at issue in this case [was] overwhelmingly of substantial public concern."[134] In reaching this conclusion, the Court cited: the level of state spending for employee

127. Janus v. AFSCME, 138 S. Ct. 2448, 2469 (2018).
128. *Id.* at 2471.
129. *Id.* at 2471.
130. *Id.* at 2474.
131. *See* Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).
132. *See generally id.*
133. *See generally id.* at 426.
134. Janus v. AFSCME, 138 S. Ct. 2448, 2477 (2018).

benefits;[135] union advocacy for wage and tax increases, health insurance benefits, overtime wages, and promotion policies; union speech expressing "views on . . . education, child welfare, healthcare, and minority rights"; speech on educational policy;[136] speech on political issues; and even the handling of grievances.[137] Because union speech is categorized as a matter of public concern, the employer (the government) must have interests in limiting the speech that outweigh the interests of the union.[138]

The final question under *Pickering* was whether the employer's interests outweighed the employees' interests.[139] According to *Abood*, the State's interests in restricting employees' freedom of speech through agency fees included maintaining labor peace and preventing free riders.[140] The Court found *Abood*'s labor peace and free-rider arguments insufficient to justify violating employees' First Amendment rights through the imposition of agency fees.[141] The Court rested its application on *Pickering* noting that just because an employer can restrict some speech, "nothing requires [this Court] to uphold every speech restriction the government imposes as an employer."[142]

5. THE COURT CONCLUDED THAT AGENCY FEES ARE UNCONSTITUTIONAL

The *Janus* Court determined that agency fees were unconstitutional because the majority of unions' political and ideological activities could also be categorized as collective bargaining activities. *Abood* allowed the government to charge public-sector employees agency fees to fund any union activity or expenditure in collective bargaining without the employees' consent.[143] Because of the difficulties in distinguishing between political activities and collective bargaining activities, the rule

135. Janus v. AFSCME, 138 S. Ct. 2448, 2474-75 (2018). Because Illinois suffers from severe budget problems, it told the Union that it would seek a resolution to the financial crisis through collective bargaining. *Id.*

136. *Id.* at 2475-76. This includes most union speech from the education workforce, which is the largest public-sector workforce. *Id.* at 2476.

137. *Id.* The union in this case filed a grievance seeking Illinois to appropriate $75 million for a 2% wage increase. *Id.* at 2476-77.

138. *Id.* at 2471.

139. *Id.* at 2477.

140. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2477 (2018).

141. *Id.* at 2458.

142. *Id.* at 2478.

143. *See id.* at 2464.

Abood created violated the public employees' First Amendment rights to freedom of speech and freedom of association.[144]

C. *STARE DECISIS* DID NOT REQUIRE THIS COURT TO UPHOLD *ABOOD*

The Court opened its analysis of *stare decisis* by quoting *Payne v. Tennessee,* stating that "[*s*]*tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[145] Acknowledging that the Court must have strong grounds for overturning a past decision, it examined five factors before deciding to overturn *Abood*, including: (1) the quality of the reasoning in *Abood*, (2) the workability of the rule of law *Abood* established, (3) *Abood*'s consistency with related decisions, (4) new developments in the law since *Abood* was decided, and (5) the reliance interests at stake.[146]

1. *ABOOD* WAS POORLY REASONED AND UNWORKABLE

The Court held that *Abood* was poorly reasoned for four reasons. First, it "failed to appreciate that a . . . different First Amendment question arises when a State *requires* its employees to pay agency fees."[147] Second, it failed to differentiate between agency fees in private-sector and public-sector collective bargaining.[148] Third, it mistakenly assumed agency fees were required to maintain fair representation.[149] Fourth, it failed to consider the issues in classifying union expenditures as chargeable or non-chargeable and the problems that nonmembers would face in challenging the chargeable expenditures.[150]

Next, the Court examined the workability of the rule of law in *Abood*, finding that it was unworkable because it was nearly impossible to draw a precise line between chargeable and non-

144. Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018).

145. *Id.* at 2478 (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

146. *Id.* at 2478-79.

147. *Id.* at 2479 (emphasis in original).

148. *Abood* decided that public employees did not have weightier First Amendment interests against compelled speech than private employees. This Court rejected that conclusion, pointing out that wages and benefits in the public sector are political issues, which is not so in the private sector. *Id.* at 2480.

149. Janus v. AFSCME, 138 S. Ct. 2448, 2480 (2018).

150. *Id.* at 2480-81.

chargeable expenses.[151] After acknowledging a test created by *Lehnert v. Ferris Faculty Association*[152] to help distinguish chargeable and non-chargeable expenditures, the Court decided it did little to help the workability of *Abood* because each part of the test required a "substantial judgment call."[153] Because of the unclear line, the union's nonmembers could be forced to pay for services that only benefit union members.[154] Additionally, the formula was broad enough to encompass just about anything that the union chose to do.[155] The vagueness of the line ultimately proved that *Abood* was unworkable.[156] Finally, the Court determined *Abood* was unworkable because it was too difficult for employees to challenge the chargeability of certain expenditures.[157] The *Hudson* notices were so vague that employees would need to hire accountants and attorneys to seriously challenge the chargeability of the expenses.[158]

2. *ABOOD* WAS INCONSISTENT WITH RELATED DECISIONS

The *Janus* Court reasoned that *Abood*'s holding was inconsistent with related decisions. First, *Abood* failed to use the appropriate standard of exacting scrutiny as used in related First Amendment jurisprudence.[159] Second, other decisions have held that employers could not require employees to support a political party, yet *Abood* allowed forced subsidization of union speech, which is largely used to advance political ideologies.[160] Third, *Abood* should not have used greater deference to decide the constitutionality of public-sector agency shop arrangements than it would for political patronage.[161] Because of the inconsistencies between *Abood* and other First Amendment decisions regarding

151. Janus v. AFSCME, 138 S. Ct. 2448, 2481 (2018).

152. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991). *Lehnert* adopted a test which required chargeable expenses to be: (1) germane to collective bargaining, (2) justified by the government's interest in labor peace and avoiding free riders, and (3) not significantly add to the burden on free speech. *See id*.

153. *Janus*, 138 S. Ct. at 2481.

154. *Id.*

155. *Id.*

156. *Id.* at 2481-82.

157. *Id.* at 2482.

158. Janus v. AFSCME, 138 S. Ct. 2448, 2482 (2018).

159. *Id.* (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 (1977)).

160. *Id.* at 2484.

161. *Id.* at 2481 (quoting *Abood*, 431 U.S. at 260 (Powell, J., concurrence)).

public employees, the Court opined that overturning *Abood* could bring greater clarity to First Amendment law.[162]

3. NEW DEVELOPMENTS IN THE LAW SINCE *ABOOD* HAVE RENDERED ITS RATIONALE OBSOLETE

The Court found that new legal and factual developments have eroded *Abood*'s underpinnings.[163] First, the increase in public-sector union membership has caused public spending to increase.[164] Second, unsustainable collective bargaining agreements have been blamed for multiple municipal bankruptcies.[165] Because *Abood* did not consider those issues in its decision, the Court determined that the lack of consideration demonstrated a vast difference between society today and when *Abood* was decided.[166]

4. RELIANCE AND EXPECTATION INTERESTS WERE NOT SUFFICIENT TO OUTWEIGH EMPLOYEE INTERESTS IN FULL CONSTITUTIONAL PROTECTION

Despite thirty years of agency shop arrangements, the Court rejected the argument that the reliance interests of affected parties required upholding *Abood*. The *Janus* Court held that the protection of free speech is more important than preserving a contract that will inevitably expire.[167] Quoting *Arizona v. Gant*,[168] the Court stated that just because a public-sector union feels entitled to receive agency fees, that expectation does not amount to a reliance interest that outweighs nonmembers' interests in their constitutional freedoms.[169] The Court held that public-sector unions did not have a significant reliance interest at stake because they had been "on notice" for years of the uncertain constitutionality of agency fees.[170]

Additionally, the Court stated that because collective

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162. Janus v. AFSCME, 138 S. Ct. 2448, 2484 (2018).

163. *Id.* at 2483.

164. *Id.*

165. *Id.*

166. *Id.*

167. Janus v. AFSCME, 138 S. Ct. 2448, 2484 (2018).

168. Arizona v. Gant, 556 U.S. 332 (2009).

169. *Janus*, 138 S. Ct. at 2484 (citing *Gant*, 556 U.S. at 349).

170. *Id.* at 2484-85. The Court cited the 2012 decision of *Knox* and 2016 decision of *Friedrichs*, both of which questioned *Abood*'s reasoning and sustainability (yet refused to overturn the precedent). Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310-11 (2012); Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016).

bargaining agreements were short-term, union reliance on agency fees was not reasonable.[171] There was no certainty that the provision would be renewed in the next agreement.[172] Furthermore, the Court reasoned that the Union's collective bargaining agreement would still be protected if the agency fee provision was invalidated because the agreement stated that the invalidation of one part of the agreement would not invalidate the remaining provisions.[173]

D. HOLDING

After reviewing the agency fee arrangement created by *Abood*, the Court found that public-sector agency shop arrangements amounted to compelled subsidization of political speech.[174] Additionally, union speech is not "employee speech" subject to certain limitations imposed by an interested employer.[175] Because the Court found that *Abood* was wrongly decided and considerations favoring *stare decisis* were absent, the Court ultimately overruled the case.[176] The Illinois law permitting unions to extract agency fees from nonmembers' wages without their consent was a violation of the First Amendment and was no longer permissible.[177] No payments or fees to a union may be deducted from a nonmember's wages unless the employee clearly and affirmatively consents before any money is taken.[178] Now, all public employees in a unit may reap the benefits of union membership without ever paying for the union's services.

V. ANALYSIS: A COURT MUST HAVE STRONG JUSTIFICATIONS FOR OVERTURNING PRECEDENT

In *Janus*, the Court failed to appreciate the doctrine of *stare decisis*; while it engaged in the traditional analysis, it failed to take seriously each consideration. The doctrine of *stare decisis* is the foundation of the common law legal system upon which successive judicial opinions build and expand. Subsequent decisions build on top of prior ones, each becoming more intertwined with one another as the law develops. *Stare decisis* ensures the consistent

171. Janus v. AFSCME, 138 S. Ct. 2448, 2485 (2018).
172. *Id.*
173. *Id.*
174. *Id.* at 2486.
175. *Id.*
176. Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018).
177. *Id.*
178. *Id.*

development of the law and contributes to the integrity of the judicial system.[179] The Supreme Court has long respected the doctrine and required strong grounds to justify departing from established precedent.

The 1851 Supreme Court decision of *The Genesee Chief* acknowledged the importance of reliance interests: "For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed."[180] Various decisions since have contributed to the justifications required to overturn precedent and have yielded to the high hurdle when sufficient justifications were not present.[181]

Janus analyzed the proper considerations for overturning *Abood*: (1) quality of reasoning, (2) workability, (3) consistency with related decisions, (4) new developments in the law, and (5) the reliance interests at stake.[182] The Court found that each consideration weighed against following *stare decisis*. What is more startling than the Court's conclusion is its reasoning behind each determination.

A. FLAWED REASONING

Janus held that *Abood* was poorly reasoned because it failed to consider important First Amendment questions and issues that its inevitable rule would create, such as classifying chargeable expenditures.[183] Even assuming that *Abood*'s reasoning was flawed, the *Janus* Court was the real maverick.

Janus—on the surface—based its decision on First Amendment grounds, and in doing so it essentially created a prophylactic rule to protect the First Amendment rights of public-

179. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

180. The Genesee Chief, 53 U.S. 443, 458 (1851) (discussing the Court's responsibility to follow controlling precedent if such precedent existed and departure from precedent would upset reliance interests).

181. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (refusing to overrule Runyon v. McCarty, 427 U.S. 160 (1976) because there were not strong enough reasons to abandon precedent); Pearson v. Callahan, 555 U.S. 223, 233 (2009) ("revisiting precedent is . . . appropriate where . . . a departure would not upset expectations"); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 408 (2010) ("if [*stare decisis*] is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine.").

182. Janus v. AFSCME, 138 S. Ct. 2448, 2478-79 (2018).

183. *Id.* at 2480.

sector employees that were never truly threatened. In *Abood*, the rule *Janus* revisited was not an additional constitutional protection,[184] but rather a *potential* limitation. There was no guarantee that the imposition of agency fees would coerce public-sector employees to endorse ideologies for which they did not believe. Therefore, in overruling *Abood*, *Janus* created an unnecessary prophylactic rule.

The court in *Montejo v. Louisiana*, however, stated that "[t]he value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost."[185] While *Janus* assessed what nonmembers would gain by removing public-sector agency fees—guaranteed constitutional protection under the First Amendment—it failed to fully assess what would be lost. *Janus* skirted around the questions of what the Union would lose, what the Union's members would lose, and what the bargaining unit as a whole would lose. In fact, the only potential "loss" the Court assessed was the Union's reliance on agency fees.[186] The Court noted that unions would lose the agency-fee provisions in their collective bargaining agreements, but it failed to consider the troubles unions would face as a result of the loss of those provisions.[187]

Janus should have carefully assessed its own decision by weighing the costs and benefits of overruling *Abood*. The Court noted *Abood*'s flawed reasoning as a factor in favor of abandoning the decision, yet in the same opinion the *Janus* Court engaged in flawed reasoning of its own.

B. WORKABILITY

The court in *Janus* found *Abood* was unworkable because it was difficult to draw a precise line between chargeable and non-chargeable expenses.[188] It rejected the efforts of subsequent decisions to clarify the rule's application, stating that *Lehnert*'s test required too many judgment calls and the *Hudson* notice was too

184. A prophylactic rule is designed to prevent something harmful from happening. In the constitutional context, it provides additional constitutional protection. *Prophylactic*, Black's Law Dictionary (10th ed. 2014).

185. Montejo v. Louisiana, 556 U.S. 778, 793 (quoting Minnick v. Mississippi, 498 U.S. 146, 161 (1990)).

186. Janus v. AFSCME, 138 S. Ct. 2448, 2485 (2018).

187. *See id.*

188. *Id.* at 2481.

vague.[189] The court in *Pearson* held that when a decision has been questioned by the same court in later decisions and has proved difficult to apply in lower courts, then those factors weighed in favor of revisiting the decision.[190]

Janus determined that *Abood* proved unworkable in subsequent decisions, and went on to explain what those courts did to improve the workability of *Abood*, including *Hudson* and *Lehnert*.[191] The Court said the *Hudson* notice was too vague to fix the problem.[192] However, that conclusion does more to illustrate the workability issues with *Hudson* than *Abood*. If the main reason *Abood* was unworkable was the difficulties in distinguishing chargeable expenses from non-chargeable expenses, then why not expand the *Hudson* notice to include more details on each expenditure? Or why not adjust the prongs on the *Lehnert* test? The Court did not bother to consider how the workability of *Abood* might improve if the *Lehnert* test or the *Hudson* notice were amended. If it had, it might have reached a different conclusion.

Abood was supposedly unworkable, yet it survived for forty years. The one workability issue the *Janus* Court cited—chargeability—was an issue that other decisions successfully remedied. Yes, the issue of chargeability of union expenditures appeared in several opinions authored by the Court. If every judicial decision was meant to provide a clear, bright-line rule capable of precluding any further questions on a particular matter, however, then there would be no need for judicial review and the appellate process at all. The judicial system remedies this lack of complete clarity with precedent. Precedent is meant to guide courts and help them clarify the law through consistent development of decisions.

Abood provided a rule but not the procedure needed to comply with it. The Court rightfully left that task up to the states and to subsequent Court decisions. *Abood* could not have predicted the exact challenges unions would face with a new rule. Like any new rule, it takes putting it to work to see exactly what else is required to perfect its application. Unfortunately, it took very little to persuade the *Janus* Court that the workability factor weighed

189. Janus v. AFSCME, 138 S. Ct. 2448, 2481-82 (2018).
190. Pearson v. Callahan, 555. U.S. 223, 236 (2009).
191. *See Janus*, 138 S. Ct. at 2481-82 (2018).
192. *See id.* at 2481-82.

against upholding *Abood*, and the analyses of the remaining factors followed that trend.

C. CONSISTENCY WITH RELATED DECISIONS

According to *Janus*, *Abood* was inconsistent with related decisions because it failed to use the appropriate level of scrutiny for First Amendment issues. The Court relied on a comparison to political patronage in arriving at this conclusion.[193]

On its face, forcing someone to fund political activities sounds equally abhorrent as forcing one to express support for a political party. This comparison paints *Abood* as a decision allowing state employers to force their employees to subsidize political agendas without their consent, which is completely false. For the comparison to pass muster, *Abood*'s holding must have been one that allowed states to force public employees to subsidize political activities. However, *Abood* explicitly stated that First Amendment principles "prohibit [a State] from requiring any of the [employees] to contribute to the support of an ideological cause [they] may oppose."[194]

Therefore, to compare *Abood*'s consistency with decisions dealing with political patronage requires neglect of *Abood*'s actual holding, and instead focuses on the decision's after-effects on the public sector. Consequently, it seems that the Court in *Janus* was implying that tangential effects of a decision now amount to a decision's core holding. If the Court focused on *Abood*'s true determination on compelled political subsidization—that states cannot force their employees to support beliefs with which they do not agree—then the majority of its consistency argument would fall apart.

D. NEW DEVELOPMENTS IN THE LAW

Stare decisis applies with less force where there has been a significant change or development in constitutional law.[195] *Janus* found that new developments in society eroded *Abood*'s underpinnings because increased membership and unsustainable collective bargaining agreements have imposed an extensive

193. Janus v. AFSCME, 138 S. Ct. 2448, 2484 (2018).

194. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

195. Agostini v. Felton, 521 U.S. 203, 235 (1997). *Citizens United* held that new developments in technology worked to undermine the basis for restricting political speech in *Austin* and weighed against upholding its decision. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010).

financial burden on the states.[196] The Court credited those changes and *Abood*'s failure to anticipate them as evidence that *Abood*'s underlying doctrine is no longer applicable to how the First Amendment applies to modern society.[197]

It is not enough that the Court would merely decide a past decision differently today; *stare decisis* requires the Court to follow previous decisions unless doing so would work a manifest injustice.[198] The *Janus* court reasoned that *Abood* would be decided differently today, but failed to supplement that determination with more significant justifications, such as new constitutional developments. To justify overturning *Abood*, the *Janus* court placed significant considerations in favor of the State but failed to consider the other critical party involved: the Union. How have agency fees helped unions? How have they helped public-sector employment? What hardships will unions face as a consequence of this decision? The Court said it hoped to bring clarity to First Amendment law, but the constitutional questions that were asked in *Janus* were also asked in *Abood* and both decisions concluded the same: the government may not force public employees to fund a union's political endeavors. *Janus* expanded on what satisfies the "new developments in fact and law" consideration of *stare decisis* by including "unexpected and undesirable results" as a justification for overturning precedent.

E. RELIANCE INTERESTS

Perhaps the most shocking part of the Court's *stare decisis* analysis was its dismissal of any reliance interest at stake. The Supreme Court has continuously noted that *stare decisis* applies with more force to statutory and legislative interpretations as opposed to constitutional interpretations.[199] The Court in *Janus* quickly acknowledged this distinction and ran with its argument that *Abood*'s flawed interpretation of the First Amendment justified departing from precedent. What the Court did not acknowledge was that, although *Abood* considered a constitutional

196. Janus v. AFSCME, 138 S. Ct. 2448, 2483 (2018).

197. *Supra* Section IV.C.

198. *Agnostini* overturned *Aguilar*, reasoning that if it were decided today it would be decided differently *and* that if it adhered to the decision it would undoubtedly work a manifest injustice. Agostini v. Felton, 521 U.S. 203, 235 (1997).

199. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 411 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)).

question, both the legislature and citizens alike nevertheless acted in reliance upon the rule of law *Abood* established.[200]

"*Stare decisis* has added force when the legislature . . . and citizens . . . have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."[201] The court dismissed this consideration, stating that protection of free speech is more important than preserving a contract that will invariably expire.[202] This reasoning was invariably flawed. First, the majority of contracts are temporary, especially employment contracts. If the impermanence of a contract prevents a sufficient reliance interest from forming, then this factor would not exist. The Court has recognized reliance interests relating to contract rights and legislation numerous times.[203] If those courts employed the same reasoning as *Janus*, then overturning precedent might be much more routine.

Second, the Court ignored the fact that Illinois had a statute in effect with a provision permitting agency fees. If the Court had addressed this issue, it likely would have determined that the agency-fee provision alone could have been eliminated, allowing the rest of the statute to remain intact. However, what about all the unions who were stripped of a major percentage of their funding? A union may very well demand a legislative response to remedy the situation. Additionally, because employees reap the benefits of collective bargaining regardless of membership status, what happens if the majority of employees in a unit vote to unionize, but then only a small fraction pay to become members?[204]

Janus rejected *Abood*'s free-rider and fair-representation arguments, countering that unions could prevent free-riding by requiring nonmembers to pay for representation during grievance proceedings or disciplinary matters, lest they be denied union representation altogether.[205] *Janus* mentioned how unionization substantially restricts nonmembers' rights in that they may not negotiate directly with their employer—only the union

200. *See* 5 ILL. COMP. STAT. 315/6(a), (e), (g) (West 2019).

201. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991).

202. Janus v. AFSCME, 138 S. Ct. 2448, 2484 (2018).

203. *See generally Hilton*, 502 U.S. at 197; Agostini v. Felton, 521 U.S. 203 (1997); Pearson v. Callahan, 555 U.S. 223, 233 (2009); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 411 (2010).

204. *Supra* Section II.

205. *Supra* Section IV.B.2.

representative may negotiate.[206] Denying nonmembers union representation could subject them to significant disadvantages and challenges. For example, if nonmembers pay for representation, what prevents the union from charging unfair fees? Will collective bargaining agreements start coming with a menu of à la carte services? If so, who will set the price? These are all possible issues that could require legislative action to resolve.

Perhaps the Court would come to the same conclusion after fully analyzing the consequences of banning agency fees in the public sector, but overruling *Abood* before giving all interested parties a full consideration did not properly uphold the legitimacy of *stare decisis*. The Court's reasoning begs the question of whether the Court was in favor of upholding constitutional protections or whether the Court was instead anti-union.

The *Janus* court made convincing arguments in favor of overturning *Abood*, yet those arguments lacked the strong justifications present in *stare decisis* precedent. The Court concluded that all five factors worked against *stare decisis*, but a closer look shows that the Court cleverly manipulated its best arguments to fit each mold: the *Hudson* notice is too vague, so *Abood* is unworkable; *Abood* comes to the same constitutional conclusion as *Janus* but uses the wrong level of scrutiny, so *Abood* is inconsistent; unions cost the State more money than expected, so new societal developments erode *Abood*'s underpinnings; contracts expire and agency fees have been questioned in the courts for years, so unions have no reliance interests at stake. It would be interesting to see what would happen if the Court analyzed *Janus* under the same *stare decisis* factors.

VI. CONCLUSION

Stare decisis is a fascinating policy. If a court decides to follow precedent, its decision adds to the steady development of the law and becomes precedent itself. If a court decides to abandon precedent, then that decision adds to the development of the law, but also chisels away a part of the foundation. Regardless of the justifications to overrule a case, that new decision is now precedent and subsequent decisions by that court must respect it, unless the court has strong grounds to do otherwise. *Janus* created a precedent that could have a chilling effect on how subsequent

206. *Supra* Section IV.B.2.

decisions treat existing precedent. This decision has fundamentally changed *stare decisis*.

The dissent may have said it best: "Today, the Court succeeds in its 6-year campaign to reverse *Abood*."[207] Where *stare decisis* once required strong justifications, courts can now reference *Janus* to use any justification it pleases. *Janus* did not explicitly hold that *stare decisis* no longer requires strong justifications to overturn precedent, but its reasoning demonstrates just that. By significantly stretching what qualifies under each established factor, *Janus* rendered those factors nearly obsolete.

Future courts will be able to manipulate the Court's analysis in the same way and point to *Janus*, saying, "this Court has not limited itself to the requirement that strong grounds are necessary to overturn precedent. *See Janus v. AFSCME*, 138 S. Ct. 2448 (2018)." This allows courts to abandon the relevant legal reasoning for following precedent and instead create their own. Thus, depending on the composition of the Court, precedent may be overruled or upheld based purely on the personal preferences of the justices. The threat *Janus* poses to the consistent, evenhanded development of the law is possibly imminent and likely severe.

Johannah C. Pizzini

207. Janus v. AFSCME, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).