# WORKERS AND LABOR UNIONS SUSTAINED MAJOR DEFEATS IN THE 2017-2018 SUPREME COURT TERM IN *EPIC SYSTEMS* AND *JANUS*. HOW BAD IS IT?

EDWARD J. SCHOEN*

## I. INTRODUCTION

During the 2017-2018 Supreme Court Term, five conservative U.S. Supreme Court justices coalesced to inflict serious legal damage on workers and labor unions in two major decisions: *Epic Systems Corp. v. Lewis*[1] and *Janus v. American Federation of State County and Municipal Employees, Council 31*.[2] In *Epic Systems*, the Court ruled that that arbitration agreements in which the employees waive the right to pursue collective action to recover overtime wages allegedly due under the Fair Labor Standards Act are enforceable under the Federal Arbitration Act.[3] This ruling overturns a prior decision of the National Labor Relations Board holding that the National Labor Relations Act of 1935 nullified arbitration agreements that prohibited employees of a home builder with operations in over twenty states from pursuing class actions to challenge their classification as exempt employees and pursue claims for overtime compensation.[4] In *Janus*, the Court ruled the

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* J.D., Professor of Management, Rohrer College of Business, Rowan University, Glassboro, New Jersey 08028.

[1] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018). Justice Gorsuch wrote the majority opinion in which Chief Justice Roberts and Justices Kennedy, Thomas and Alito joined. Justice Ginsburg wrote a dissenting opinion in which Justices Breyer, Sotomayor and Kagan joined.

[2] Janus v. American Federation of State County and Municipal Employees, Council 31, 138 S. Ct. 2446 (2018). This double defeat is reminiscent of labor union's losses in Ysursa v. Pocatello Education Association, 555 U.S. 353 (2009) (permitting local municipalities to refuse to provide payroll deductions for contributions by public employees to the union's political action committee by public employees), and Davenport v. Washington Education Association, 551 U.S. 177 (2007) (upholding a State of Washington statute requiring public sector labor unions to receive affirmative authorization from individuals who were not member of the union but on whose behalf the union negotiate a collective bargaining agreement before spending their agency fees for ideological or political purposes unrelated to the union's collective bargaining responsibilities). *See* Edward J. Schoen & Joseph S. Falchek, *Ysursa and Davenport: Putting a Dent in Union Access to Member Contributions*, XIX S.L.J 77 (2009), http://www.southernlawjournal.com/2009/06_Schoen-Falchek.pdf.

[3] *Epic Systems*, 138 S. Ct. at 1633.

[4] *Id*. at 1620-21. *See* D.R. Horton, Inc., 357 N.L.R.B. 2277, and D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 348 (5th Cir. 2013). This NLRB decision was subsequently endorsed by the

collection of agency fees from public employees who "choose not to join the union and strongly object to the positions the union takes in collective bargaining and related activities" violated the First Amendment rights of those employees not to be compelled to subsidize private speech on matters of public concern.[5] This decision severs the obligation of public sector employees to pay fees or dues to their unions, even if those unions collectively bargain on behalf of those employees, and will likely negatively impact not only union revenues but also union membership.[6]

The purpose of this article is to review *Epic Systems* and *Janus* to ascertain how workers and labor unions are affected by these decisions. Part II of this article will examine the U.S. Supreme Court decision in *Epic Systems*. Part III will examine the potential damage the *Epic Systems* decision inflicts on American workers. Part IV will examine the U.S. Supreme Court decision in *Janus*. Part V will examine the potential damage *Janus* inflicts on labor unions.

## II. *EPIC SYSTEMS CORP. V. LEWIS*

In *Epic Systems*, employees in three companies, Epic Systems Corp., Ernst & Young LLP, and Murphy Oil USA, Inc., signed employment agreements which required them to arbitrate any employment claim against the company, limited the claims arbitrated solely to individual claims, and prohibited the arbitration of class action claims. The U.S. Supreme Court noted that the three cases "differ in detail but not in substance" and utilized the facts in the Ernst and Young case as illustrative.[7] After his employment ended, Stephen Morris, an Ernst and Young junior accountant, claimed the firm misclassified its junior accountants as professional employees and violated the Fair Labor Standards Act (FSLA) by failing to pay them overtime compensation. Morris pursued a class action claim in federal district court on behalf of a nationwide class under the FLSA's collective action provision. In response, Ernst and Young filed a motion to compel arbitration. The district court granted the motion, but the Ninth Circuit reversed, reasoning that the FLSA's "savings clause" removes the

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Sixth, Seventh and Ninth Circuit Courts of Appeal, but rejected by the Fifth Circuit. *Epic Systems*, 138 S. Ct. at 1620. *See* NLRB v. Alternative Entertainment, Inc., 858 F.3d 393 (6th Cir. 2017); Lewis v. Epic Systems Corp, 823 F.3d 1147 (7th Cir. 2016) (case below in No. 16-285); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016) (case below in No. 16-300); and Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015) (case below in 16-307).

[5] *Janus*, 138 S. Ct. at 2460.

[6] Mark J. Stern, *Neil Gorsuch Just Demolished Labor Rights*, ATLANTIC (May 21, 2018), https://slate.com/news-and-politics/2018/05/neil-gorsuch-demolished-labor-rights-in-epic-systems-v-lewis.html.

[7] *Epic Systems*, 138 S. Ct. at 1620.

requirement of the Federal Arbitration Act that arbitration agreements be enforced as written.[8] More particularly, the savings clause permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[9] The Ninth Circuit decided that the Ernst and Young employment agreement prohibiting class action arbitration violated § 7 of the National Labor Relations Act, which provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,"[10] and hence fell within the "savings clause" and rendered the arbitration agreement unenforceable.

The U.S. Supreme Court determined that the Federal Arbitration Act permitted employers to exclude class action claims from its arbitration provisions, and reversed the Ninth Circuit's decision in *Ernst and Young* and the Seventh Circuit's decision in *Epic Systems* and affirmed the Fifth Circuit's decision in *Murphy Oil*.[11] In doing so, the U.S. Supreme Court addressed three major issues: (1) whether the savings clause of the Federal Arbitration Act rendered the prohibition against class action arbitration proceedings in the employment agreements unenforceable; (2) whether "concerted activities" provision of National Labor Relations Act overrides the savings clause of the Federal Arbitration Act; and (3) whether *Chevron* deference applied to the decision of the NLRB striking down prohibitions on class action arbitration proceedings.

Concerning the first issue, the Court noted that "the savings clause recognizes only defenses that apply to 'any' contract," *i.e*., the savings clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," but those defenses do not include "defenses that apply only to arbitration" or defenses that "derive their meaning from the fact that an agreement to arbitrate is at issue."[12] In other words, the Court explained, "the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.' "[13] Relying on its prior decision in *AT&T Mobility LLC v. Concepcion*,[14] the Court determined that the "concerted activities" provision in the National

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[8] *Id*.
[9] 9 U.S.C. § 2, Act Feb. 12, 1925, ch. 213, § 2, 43 Stat. 883. Epic Systems, 138 S. Ct. at 1622.
[10] 29 U.S.C. § 157, July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140. *Epic Systems*, 138 S. Ct. at 1620.
[11] *Epic Systems*, 138 S. Ct. at 1632.
[12] *Epic Systems*, 138 S. Ct. at 1622.
[13] *Id*.
[14] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

Labor Relations Act constituted a defense of legality which attempts to interfere with one of arbitration's fundamental attributes, rather than a generally applicable contract defense.[15]

In *Concepcion*, Vincent and Liza Concepcion, who purchased cellphones from AT&T Mobility and were required to pay sales tax on the retail value of the phones, pursued a class action lawsuit in U.S. District Court in the Southern District of California against AT&T Mobility for false advertising and fraud for promoting the sale of "free phones." The consumers' sales agreement contained an arbitration clause which restricted arbitration claims to individuals and prohibited any class action or representative arbitration proceeding.[16] When AT&T Mobility moved to compel arbitration under the terms of the sales agreement, the Conceptions opposed the motion on the grounds the arbitration agreement was unconscionable under California law, because it prohibited class action arbitration claims. Relying on the California Supreme Court decision in *Discover Bank v. Superior Court*,[17] the district court determined that the arbitration agreement was unconscionable because it prohibited class action arbitrations, and denied AT&T Mobility's motion. Also relying on *Discover Bank*, the Ninth Circuit affirmed.[18] The U.S. Supreme Court reversed, because, unless the arbitration agreement explicitly permits class action arbitration claims, the *Discover Bank* rule interferes with arbitration by imposing additional burdens on the arbitrator to "first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted."[19] Moreover, "class arbitration requires procedural formality," because, in order for the class action to be binding on absentees in the class, they must be adequately represented at all times, be afforded notice and an opportunity to be heard, and have a right to opt out of the

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[15] *Epic Systems*, 138 S. Ct. at 1622.

[16] *Concepcion*, 563 U.S. at 336.

[17] Discover Bank v. Superior Court, 36 Cal.4th 148 (2005). The California Supreme Court determined the waiver of class action arbitration proceedings in arbitration agreements was unconscionable.

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced. *Id*. at 162.

[18] *Concepcion*, 563 U.S. at 337-38.

[19] *Id*. at 348.

class.[20] Likewise, "arbitration is poorly suited to the higher stakes of class litigation."[21] Procedural safeguards are built into class action litigation, such as interlocutory appeal of the certification decision and a separate appeal from the final judgment; in contrast an arbitral award can be vacated by a court only when the award "was procured by corruption, fraud, or undue means," the arbitrators displayed evident partiality or corruption, the arbitrators wrongfully refused to postpone the hearing or to hear pertinent and material evidence, or the arbitrators exceeded or misused their powers or failed to make a "mutual, final, and definite award."[22] Further, while the parties may contractually agree to undertake class action arbitration, the court found "it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."[23] Hence, the Court concluded, because California's *Discover Bank* rule is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it was preempted by the Federal Arbitration Act.[24]

The U.S. Supreme Court in *Epic Systems* determined that *Concepcion* prevents the Court from allowing a "contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties consent." Quite simply, "[j]ust as judicial antagonism toward arbitration before the Arbitration Act's enactment manifested itself in a great variety of devices and formulas declaring arbitration to be against public policy," so too must courts "be alert to new devices and formulas that would achieve much the same result today. And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device."[25] The Court concluded:

> The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion.* At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.[26]

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[20] *Id*. at 349.
[21] *Id*. at 350.
[22] *Id*. (citing 9 U.S.C. § 10).
[23] *Id*. at 351.
[24] *Id*. at 352.
[25] *Epic Systems*, 138 S. Ct. at 1623.
[26] *Id.*

Concerning the second issue – whether the "concerted activities" language in Section 7 of the NLRA overrides the Federal Arbitration Act – the Court initially noted that the party seeking a determination that one statute displaces another has "a heavy burden" to demonstrate "a clearly expressed congressional intention that such a result should follow."[27] Section 7 of the NLRA guarantees workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[28] This language, the Court insisted, not only "does not express approval or disapproval of arbitration," but does not "mention class or collective action procedures" or "even hint at a wish to displace the Arbitration Act – let alone accomplish that much clearly and manifestly, as our precedents demand."[29] Further, the Court noted, "some forms of group litigation existed even in 1935." Hence "Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures." Likewise, when a general term follows specific terms in a list, "the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.' "[30] Thus the term "other concerted activities" should be construed as encompassing activities employees do for themselves in the course of exercising their free association rights in the workplace, rather than highly regulated and more convoluted courtroom activities involving class and joint litigation.[31] Similarly, the Court noted, "when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so," and when Congress wanted to override the Arbitration Act, it clearly explained what it was trying to accomplish.[32] Therefore, the "fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions."[33]

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[27] *Id*. at 1624.
[28] 29 U.S.C. § 157. *Epic Systems*, 138 S. Ct. at 1624.
[29] *Epic Systems*, 138 S. Ct. at 1624.
[30] *Id.* at 1625 (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001) ("the maxim *ejusdem generis* [is] the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words' ")).
[31] *Epic Systems*, 138 S. Ct. at 1625.
[32] *Id*. at 1626 ("by explaining, for example, that, '[n]otwithstanding any other provision of law, ... arbitration may be used ... only if' certain conditions are met, 15 U.S.C. § 1226(a)(2)"; or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5567(d)(2); or that requiring a party to arbitrate is 'unlawful' in other circumstances yet, 10 U.S.C. § 987(e)(3).").
[33] *Epic Systems*, 138 S. Ct. at 1626.

Furthermore, the Court noted that it "has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes" and "rejected every such effort to date . . . with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act."[34] In rejecting those efforts, the Court has made it clear that "even a statute's express provision for collective legal actions" does not necessarily preclude individual arbitration, and that "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." The Court then noted, that '[i]f all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today."

Concerning the third issue – whether *Chevron* deference applied to the decision of the NLRB striking down prohibitions on class action arbitration proceedings – the Court concluded "even under *Chevron*'s terms, no deference is due."[35] Quite simply, the Court noted, the NLRB in issuing its decision not only sought to interpret the NLRA in isolation, but also to limit a second statute, the Arbitration Act, which it does not administer, contrary to the *Chevron* mandate that the statutory ambiguity to be resolved appears in the statute the agency administers.[36] In effect, the Court noted, the NLRB was attempting to "advance its statutory mission" by diminishing the scope of second statute, about which the agency has no particular interest or expertise, thereby "bootstrapping itself into an area in which it has no jurisdiction" and threatening "to undo rather than honor legislative judgment."[37] Furthermore, the Court observed, *Chevron* deference is

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[34] *Id*. at 1627 (citing American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013) (upholding class-action waiver provision in mandatory arbitration clause to foreclose restaurant's attempt to pursue a class antitrust action); Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20 (1991) (age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012) (Credit Repair Organization Act (CROA) provisions requiring credit repair organizations to disclose to consumers their right to sue for violations of CROA and prohibiting waiver of any right under CROA did not preclude enforcement of an arbitration agreement); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (predispute agreement to arbitrate claims under the Securities Act was enforceable); and Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) (customer claims under § 10(b) of the Securities Exchange Act, including RICO claims against the broker, were arbitrable under predispute arbitration agreement)).

[35] *Epic Systems*, 138 S. Ct. at 1639.

[36] *Id*. at 1629.

[37] *Id*.

provided to assist Executive Branch officials, who are directly accountable to the people, make policy choices. Unfortunately, the Court stated, it is difficult to grant deference when the Executive Branch appears to be of "two minds," the NLRB and the Solicitor General having submitted briefs disputing the meaning of the NLRA. Hence, "whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable." Under these circumstances, the Court declared, "we will not defer."[38]

The Court concluded, "Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA – much less that it manifested a clear intention to displace the Arbitration Act." Rather, the Court said, "we can easily read Congress's statutes to work in harmony" and "that is where our duty lies."[39]

## III. *EPIC SYSTEMS'* IMPACT ON EMPLOYEES

The most significant damage inflicted by *Epic Systems* is identified by Justice Ginsburg in her dissenting opinion, namely the diminishment of employees' ability to "pursue joint, collective, and class suits related to the terms and conditions of their employment,"[40] despite numerous decisions of the NLRB permitting workers to pursue collective FSLA and terms and condition of employment civil actions.[41] Justice Ginsburg notes that "for decades, federal courts have endorsed the Board's view, comprehending that 'the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7.'"[42] The Court's decision that

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[38] *Id.* at 1630.
[39] *Id.* at 1632.
[40] *Id*. at 1637.
[41] *Id*. at 1637-38 (citing Spandsco Oil and Royalty Co., 42 N.L.R.B. 942, 948-49 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); Poultrymen's Service Corp., 41 N.L.R.B. 444, 460-63, and n. 28 (1942) (employee's filing of joint FLSA suit on behalf of himself and others similarly situated is concerted activity protected by the NLRA), enf'd, 138 F.2d 204 (3d Cir. 1943); Sarkes Tarzian, Inc., 149 N.L.R.B. 147, 149, 153 (1964) (employees' filing class libel suit was protected by the NLRA); United Parcel Service, Inc., 252 N.L.R.B. 1015, 1018 (1980) (employee's filing class action regarding break times is protected by the NLRA), enf'd, 677 F.2d 421 (6th Cir. 1982); and Harco Trucking, LLC, 344 N.L.R.B. 478, 478-79 (2005) (employee's maintaining class action regarding wages is protected by the NLRA)). Similarly, federal courts for several decades have endorsed the Board's view that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7."
[42] *Epic Systems*, 138 S. Ct. at 1638.

"collective proceedings do not fall within the scope of § 7" weakens a significant safeguard of employees' NLRA rights, because employers can now prevent class and collective actions merely by inserting the prohibition into the employment agreement. As Justice Ginsburg observes, "[f]orced to face their employers without company, employees ordinarily are no match for the enterprise that hires them,"[43] which "is the very reason the NLRA secures against employer interference employees right to act in concert for the 'mutual aid or protection.' "[44]

Moreover, Justice Ginsburg states, the "inevitable result of today's decision will be the under enforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[45] Chief among these are minimum wage and overtime law protections afforded workers. Noting that one study estimated low-wage workers lose almost $3 billion in legally owed wages in Chicago, Los Angeles and New York City alone and that another study claims that wage theft is costing workers hundreds of millions of dollars a year, Justice Ginsburg warns that federal and state government agencies and state attorneys general necessarily rely on private parties to play a leading role in enforcing wage and hour laws. The employees' ability to do so, however, is seriously thwarted if "employers can stave off collective

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[43] *Id*. at 1640.

[44] *Id*. (citing 29 U.S.C. §§ 151, 157, 158. This causes Justice Ginsburg to declare: "Because I would hold that employees' § 7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e*., "waivers," are unlawful.") *Id*. at 1641. The impact on nonunion employees will be enormous. As noted by Nina Totenberg:

> A study by the left-leaning Economic Policy Institute shows that 56 percent of nonunion private-sector employees are currently subject to mandatory individual arbitration procedures under the 1925 Federal Arbitration Act, which allows employers to bar collective legal actions by employees. The court's decision means that tens of millions of private nonunion employees will be barred from suing collectively over the terms of their employment. Nina Totenberg, *Supreme Court Decision Delivers Blow to Workers' Rights*, NAT'L PUB. RADIO (May 21, 2018), https://www.npr.org/2018/05/21/605012795/supreme-court-decision-delivers-blow-to-workers-rights.

This impact is confirmed by the *Los Angeles Times*:

> About 60 million nonunionized workers in the private sector are covered by arbitration agreements that bar them from going to court to sue over alleged violations of federal workplace laws, according to a survey by the Economic Policy Institute, a liberal group based in Washington. Among them, about 25 million are also required to arbitrate as individuals. Lawyers predicted Monday that number will rise quickly. David G. Savage, *Supreme Court upholds arbitration that bans workers from joining forces over lost wages*, L.A. TIMES (May 21, 2018), http://www.latimes.com/politics/la-na-pol-court-workers-20180521-story.html.

[45] *Epic Systems*, 138 S. Ct. at 1646.

employment litigation aimed at obtaining redress for wage and hours infractions" by simply restricting employee relief to individual claims.[46] Likewise, because the expense in pursuing individual claims outweigh the potential recovery, there is no incentive to seek redress and the "enforcement gap" will almost certainly widen.[47] Moreover, Justice Ginsburg cautions, "fear of retaliation may also deter potential claimants from seeking redress alone," individuals' pursuit of small value claims obtain slim injunctive relief, and "[e]mployers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations."[48] Finally, Justice Ginsburg warns, because arbitration outcomes can be kept confidential and lack precedential effect, "individual arbitration of employee complaints can give rise to anomalous results."[49] That means arbitrators can render incompatible awards in similar claims and inconsistent legal decisions, such as whether the employee's position is exempt from overtime laws. All of these negative consequences cause Justice Ginsburg to fear that "the result of take-it-or-leave-it labor contracts [harks] back to the type called 'yellow dog,'[50] and of

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[46] *Id*. at 1647. Inserting "these clauses make it easier for employers to maintain unfair and even unlawful employment structures and salary systems," and the "court's decision in *Epic Systems* will inevitably lead to an explosion of these imposed contracts." Garrett Epps, *An Epic Supreme Court Decision on Employment*, ATLANTIC (May 22, 2018), https://www.theatlantic.com/politics/archive/2018/05/an-epic-supreme-court-decision-on-employment/560963.

[47] *Epic Systems*, 138 S. Ct. at 1647.

[48] *Id*. at 1647-48. This conclusion is corroborated by an article in the *Los Angeles Times* which reports: "Labor law experts said the impact of the ruling in *Epic Systems vs. Lewis* will fall heaviest on tens of millions of low-wage workers who do not belong to unions. As a practical matter, they said, workers at convenience stores, restaurants, hotels or the like will find it expensive and risky to bring complaints if they must do so on their own." Epps, *supra* note 46. One commentator was even more blunt, stating: *Epic Systems* "effectively legalizes low-level wage theft; Juno Turner, a partner at the workers' rights firm Outten & Golden, told me that it 'gives a free pass for companies to break the law,' because "employers can now cheat workers with little risk that employees will enforce their rights." *Stern*, *supra* note 6.

[49] *Id.* at 1648.

[50] "Yellow Dog" contracts were employment agreements in which the worker, as a condition of employment, promised not to join a union or to resign from a union if he or she was already a member. *Yellow-dog contract*, ENCYCLOPAEDIA BRITANNICA, accessed on October 1, 2018 at https://www.britannica.com/topic/yellow-dog-contract. In the early stages of the *Lochner* era, the U.S. Supreme Court upheld the constitutionality of Yellow Dog contracts in Adair v. United States, 208 U.S. 161 (1908). In *Adair*, the Court ruled that the Fifth Amendment due process clause protected individual's right to make contracts for the purchase of the labor of others and the sale of one's own labor. As long as those terms were not injurious to public interests, the employer had the right to include terms which benefited the employer, and the employee had the right to insist on the terms upon which he would become an employee. *Id*. at 172-73. It was the employer's right to fire the employee because he was a member of a union, just as it was the right of employee to decline employment because his coworkers were not

the readiness of this Court to enforce those unbargained-for agreements" suppresses "the right of workers to take concerted action for their 'mutual aid and protection.' "[51]

## IV. *JANUS V. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES*

The American Federation of State, County and Municipal Employees, Council 31 (hereinafter "Council 31" or "the union"), is the exclusive bargaining agent for employees of the Illinois Department of Healthcare and Family Services (hereinafter "Family Services"). Mark Janus, a child support specialist employed by Family Services, refused to join the union. Janus opposed the positions Council 31 adopted in its collective bargaining activities, because the wage demands of the union would aggravate the fiscal crisis then confronting the State of Illinois. Janus also objected to making the mandatory agency fee payment of $44.58 per month to the union to cover his share of the "chargeable" expenditures of the union for collective bargaining, contract administration, and dispute resolution activities. Janus and two other state employees filed a petition to intervene in an action previously initiated in federal district court by the Governor of Illinois, who challenged the imposition of the agency fee under the Illinois Public Labor Relations Act.

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members of a union, "however unwise" those decisions might have been. *Id*. at 175. The Wagner Act of 1935, 29 U.S.C.A. § 151 et seq., effectively overruled *Adair*, when it gave employees the right to join unions and bargain collectively with their employees, and outlawed yellow dog contracts and other unfair labor practices.

[51] *Epic Systems*, 138 S. Ct. at 1648-49. As noted by one commentator:

> The Supreme Court . . . decision in *Epic Systems v. Lewis* [allows] employers to deprive their workers of their right to sue collectively. Its ruling . . . blasts a massive hole through post–New Deal labor law, hobbling employees' ability to recover in court when their employers underpay them. It is difficult to overstate how devastating *Epic Systems* is to labor rights in America . . . ." Stern, *supra* note 6.

Justice Ginsburg's "yellow dog" comment caught Justice Gorsuch's attention. He responded: "In [the dissent's] view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead 'yellow dog' contract. But like most apocalyptic warnings, this one proves a false alarm." *Id*. at 1630. In his dissenting opinion in Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923), one of the *Lochner* era opinions in which the U.S. Supreme Court declared a minimum wage law unconstitutional, Chief Justice Taft reminds us why workers must take concerted action for their mutual aid and protection:

> Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. *Id*. at 562-63.

The district court simultaneously granted Janus' petition to intervene in the action and dismissed the Governor's lawsuit, because, not having suffered a personal injury, the Governor lacked standing. Janus then filed his complaint in which he claimed the mandatory agency fee payments were "coerced political speech" contrary to the First Amendment, and the case proceeded on the basis of his complaint.[52]

The district court granted Council 31's motion to dismiss Janus's complaint, because Janus' claim was prohibited by a prior decision of the U.S. Supreme Court in *Abood v. Detroit Board of Education*.[53] In *Abood* the Court unanimously upheld a Michigan statute, which authorized union representation of state and municipal employees in an "agency shop" arrangement, and determined that the imposition of the agency fee on non-union members did not violate the First Amendment.[54] Janus appealed to the U.S. Supreme Court, asking the Court to overrule *Abood* and hold agency fees arrangements are unconstitutional. The U.S. Supreme Court granted certiorari.[55]

*Janus* is the fourth time since the *Abood* decision that Justice Alito has taken aim at mandatory agency fees. In *Knox v. Service Employees International Union, Local 1000*, public employees, who were represented by Local 1000 for collective bargaining in an agency shop arrangement, objected to a unilateral increase in union dues used to finance an opposition campaign to two proposed ballot propositions: Proposition 75, which would require unions to obtain the employees affirmative consent before charging them fees used for political purposes, and Proposition 76, which empowered the governor to reduce state appropriations for public employee compensation.[56] The district court agreed with the objecting union members, and ordered the union to send a new *Hudson* notice[57] to the union members

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[52] Janus v. American Federation of State County and Municipal Employees, 138 S. Ct. 2446, 2460-62, 2475 (2018).
[53] *Id.* at 2462.
[54] Abood v. Detroit Board of Education, 431 U.S. 209, 235-38 (1977).
[55] *Janu*s, 138 U.S. at 2462.
[56] Knox v. Service Employees International Union. Local 1000, 567 U.S. 298, 302-04 (2012).
[57] In Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), several workers represented by the union objected to the use of their dues for purposes not related to collective bargaining and challenged the procedure implemented by the union to handle their objections. *Id*. at 297. The U.S. Supreme Court ruled that the procedures enacted by the union to deal with nonmember objections were inadequate for three reasons. First, the union was permitted to use the objectors' dues temporarily for purposes to which they objected, rather than preliminarily obtaining their consent to finance activities unrelated to collective bargaining. Second, the procedures failed to provide nonmembers with sufficient information about the basis on which the proportionate share was calculated in advance of their raising an objection; instead, the union provided information about the calculation of the proportionate share after the objectors filed their objections. Further, the information ultimately provided to the objectors was inadequate, because it failed to disclose the expenditures for collective bargaining and

giving them 45 days to object and receive a full refund of that portion of their dues used for political purposes. A divided panel of the Ninth Circuit reversed, and the U.S. Supreme Court granted certiorari.[58] Justice Alito stated that the "free rider" justification for requiring union workers to pay the "chargeable" portion of their union dues "represents something of an anomaly – one that we found to be justified by the interest in furthering 'labor peace.' "[59] While he observed that permitting a union to collect fees from nonmembers using an opt-out system approaches, if not crosses, the limits of what the First Amendment tolerates under the Court's prior decisions, the "aggressive" fee collection process employed by Local 1000 "is indefensible."[60] To begin with, Local 1000 failed to give the nonmembers a fresh *Hudson* notice before levying the special assessment. Doing so would have permitted the nonmembers to elect not to support either or both of the propositions, rather than using their dues to oppose both propositions and then forcing them after the fact to wait for reimbursement.[61] Second, forcing union members to wait until the next annual *Hudson* notice was sent to oppose the propositions did "not fully recompense nonmembers."[62] Indeed even full recompense of the union dues used to oppose the propositions

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administration that benefited all members and nonmembers alike and for which a fee could be charged; the mere disclosure of a percentage of expenditures does not explain why they were required to pay dues. Third, the procedure failed to provide "a reasonably prompt decision by an impartial decision maker." *Id*. at 307. The Court noted that the nonunion employee "is entitled to have his objections addressed in expeditious, fair, and objective manner." *Id*. The procedure employed by the union did not meet this standard, because it permitted the union, an interested party, to control the process from the moment the process begins (collection of the dues), through the two-step appeal process (controlled by the union executive committee and union executive board), and through the final arbitration (decided by a union-selected arbitrator). *Id*. at 308. In sum, "the original Union procedure was inadequate, because it failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decision maker." *Id*. at 309. Notably, then, *Hudson* requires the union to make significant disclosures to employees so that they can make an informed decision to object to the expenditures of dues and fees for purposes not related to collective bargaining, contract administration, and grievance adjustment. More particularly, the union must inform the employees (1) how it calculated the proportion of expenditures for activities unrelated to collective bargaining, contract administration, and grievance adjustment, and (2) the nature of expenditures included under the category of collective bargaining and contract administration that benefited members and nonmembers alike. Further, the union's disclosure of this information must be made before the employee is given the opportunity to object to expenditure of dues and fees for purposes not related to collective bargaining and contract administration.

[58] *Knox*, 567 U.S. at 306.

[59] *Id*. at 311.

[60] *Id.* at 314.

[61] *Id*. at 315.

[62] *Id*. at 316.

would not satisfy the First Amendment, because it permits the union to "extract a loan from unwilling nonmembers" and payment of loan after the union's political objectives were achieved is "cold comfort" to objecting nonmembers.[63] Third, Local 1000 employed the prior year's audited chargeable percentage when it sent out its annual *Hudson* notice, and doing so "makes no sense," because it wrongfully assumes that the percentages of chargeable and nonchargeable expenses vary little from one year to the next.[64] Likewise, Local 1000 uses an impermissibly broad classification system in allocating chargeable and nonchargeable expenses, claiming for example that "all funds spent on 'lobbying . . . the electorate' are chargeable."[65] Fourth, Local 1000 procedures force nonmembers who wish to challenge the classification of expenses "to come up with the resources to mount the legal challenge in a timely fashion," placing a heavy burden on objecting nonmembers "simply to avoid having their money taken to subsidize speech with which they disagree."[66] Finally, extracting fees from nonmembers and using an opt-out procedure to reclaim the extracted fees when annual dues are billed, rather than employing opt-in procedure before extracting fees from nonmembers, "substantially impinge[s] upon the First Amendment rights of nonmembers."[67] Hence, the Court ruled, "when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent."[68]

In *Harris v. Quinn*, an opinion also authored by Justice Alito, the Court declined to extend *Abood* to personal assistants providing home health care to individuals who otherwise would require institutionalization.[69] By executive order, Illinois Governor Rod Blagojevich called for state recognition of a union to serve as the personal assistants' exclusive representative for the purpose of collective bargaining with the state. Several months later the Illinois legislature codified that order and declared those personal assistants to be employees of the State of Illinois "solely for the purposes of coverage under the Illinois Public Labor Relations Act." Following a vote of the personal assistants, SEIU Healthcare Illinois & Indiana (SEIU-HII) was designated to be the personal assistants' exclusive representative for collective bargaining purposes. The State and the union negotiated collective-bargaining agreements requiring the personal assistants who were not members of the union to pay agency fees and permitting those

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[63] *Id*. at 317.
[64] *Id*. at 318.
[65] *Id.* at 320.
[66] *Id*. at 319.
[67] *Id*. at 321.
[68] *Id*. at 322.
[69] Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014).

fees (more than $3.6 million) to be deducted from the personal assistants' Medicaid payments. Three personal assistants pursued a class action claim in federal district court in which they sought an injunction against enforcement of the agency fee provision and a determination that the mandatory payment of the agency fees violates the First Amendment.[70] The federal district court dismissed their claims. The Seventh Circuit decided "that Illinois and the customers who receive in-home care are 'joint employers' of the personal assistants," and "the State employs personal assistants within the meaning of *Abood*.'"[71] In his opinion reversing the Seventh Circuit, Justice Alito castigates *Abood*. Justice Alito states (1) *Abood* failed to appreciate that core issues such as wages, pensions, and benefits are important political issues in the public sector, but generally are not important political issues in the private sector;[72] (2) *Abood* failed to appreciate the difficulty in distinguishing core union speech related to collective bargaining and core union speech related to political ends, both of which are directed to the government; in contrast core union speech related to collective bargaining in the private sector is directed to the employer and lobbying and political advocacy are directed at the government;[73] (3) *Abood* failed to anticipate the enormous difficulty in classifying public-sector union expenditures as "chargeable" or "non-chargeable";[74] (4) *Abood* failed to anticipate significant litigation expense impose on union members who challenge the classification of expenditures;[75] and (5) *Abood* "rests on an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop."[76]

Finally, in *Friedrichs v. California Teachers Association*, the U.S. Supreme Court had its third crack at *Abood*. Upon the death of Justice Alito on February 13, 2016, however, the Court was evenly divided, and, on March 29, 2016, the Court issued a *per curiam* order affirming the judgment of the Ninth Circuit.[77]

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[70] *Id*. at 2626.
[71] *Id*. at 2627.
[72] *Id.* at 2632.
[73] *Id*.
[74] *Id.* at 2633.
[75] *Id*.
[76] *Id.* at 2634.
[77] Friedrichs v. California Teachers Association, 136 S. Ct. 1083 (2016) (citing *Abood*, the Ninth Circuit issued the following order: "The court has reviewed appellants' motion for summary affirmance and appellees' opposition thereto, the record, and the briefing filed in this appeal. Upon review, the court finds that the questions presented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent." Friedrichs v. California Teachers Association, 2014 WL 10076847 (9th Cir. 2014). The decision affirmed by the Ninth Circuit is Friedrichs v. California Teachers Ass'n, 2013 WL 9825479 (C.D. Cal. 2013). In *Friedrichs*, public

In his opinion in *Janus*, Justice Alito first examines the justifications for agency fees the court advanced in *Abood*: "labor peace" and the "risk of free riders." Justice Alito claims that "labor peace" is the "main defense of the agency-fee arrangement," *i.e*., "avoidance of the conflict and disruption that [*Abood*] envisioned would occur if the employees in a unit were represented by more than one union."[78] Justice Alito noted that *Abood* cited no evidence "that the pandemonium it imagined would result if agency fees were not allowed," incorrectly assumed designating the union as the exclusive bargaining agent and agency fees were inextricably linked, and declared "it is now clear that *Abood*'s fears were unfounded," as evidenced by the federal and state government employment: [79]

> Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U.S.C. §§ 7102, 7111(a), 7114(a). Nevertheless, nearly 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, 39 U.S.C. §§ 1203(a), 1209(c), and about 400,000 are union members. Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees.[80]

Justice Alito describes the "risk of free riders" as a contention that "agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs."[81] He notes that this

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school teachers, who resigned their union membership and objected to paying the nonchargeable portion of their agency fee each year, asked the federal district court to declare the "opt out" procedures employed by their union to enable the nonmember teachers avoid making financial contributions in support of nonchargeable union expenditures violated their First Amendment Rights. The district court granted judgment on the pleadings in favor of the defendant union, stating the "parties do not dispute that *Abood* and *Mitchell* foreclose Plaintiffs' claims, and the Court agrees that these decisions are controlling." *Id*. at 2.).

[78] *Janus*, 138 S. Ct. at 2465.

[79] *Id*.

[80] *Id*. at 2466.

[81] *Id*.

contention fails scrutiny: "Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible."[82] Nor does the fact that the unions are required to serve as the exclusive bargaining agent for all public employees (whether or not they are members of the union) justify the imposition of agency fees, because, Justice Alito notes, being designated as the exclusive representative confers many benefits. These benefits include giving the union a "privileged place in negotiation," conferring a "tremendous increase in the power of the unions," and granting the union "special privileges," such as access to information about the employees and having "dues and fees deducted directly from the employee wages." These benefits, the Court noted, greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers," *i.e.*, not acting "solely in the interests of [the union's] own members."[83] Similarly, Justice Alito states, representing nonmembers in grievance proceedings "furthers the union's interest in keeping control of the administration of the collective-bargaining agreement," because (1) the resolution of one employee's grievance can affect others," and (2) the union's control of the grievance process effectively subordinates "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit."[84] Hence, Justice Alito concludes, "agency fees cannot be upheld on free-rider grounds."[85]

The Court then considered and rejected the arguments advanced by the union that mandatory agency fees were constitutional under the First Amendment. In response to the union's argument that the First Amendment as originally enacted was not designed to provide any free speech protection to public employees,[86] the Court ruled that the union offered no basis for concluding *Abood* is supported by the original understanding of the First Amendment. In response to the union's argument that the union's activities were work related and therefore not considered protected speech under *Pickering*,[87] the Court ruled that there was "no good reason . . . to shoehorn

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[82] *Id*.
[83] *Id*. at 2467.
[84] *Id*. at 2468
[85] *Id*. at 2469.
[86] *Id*.
[87] Pickering v. Board of Education, 391 U.S. 563 (1968). In *Pickering* a high school teacher wrote a letter criticizing the school board's allocation of funds between academic and athletic programs. The letter was published in a local newspaper in the middle of a campaign by the school board to gain voter approval of a tax increase, and the school board fired Pickering in retaliation. *Id*. at 564. Noting that the government funding of education is a matter of public

*Abood* into the *Pickering* framework,"[88] and that, even if that attempt were made, "*Pickering* is a poor fit indeed."[89] In response to the union's argument that "union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti*,[90] *i.e*. as speech pursuant to an employer's official duties" which is not protected by the First Amendment, the Court determined that the "argument distorts collective bargaining and grievance adjustment beyond recognition" and that "if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion."[91] Having dispatched the First Amendment arguments advanced by the union, the Court concluded that "public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise."[92] The only remaining question, then, was whether the Court should overrule *Abood*.

The Court delineated the five most important factors in determining whether *Abood* should be overruled: "the quality of *Abood* 's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[93] Addressing the first factor, the Court states "*Abood* was poorly reasoned," because it incorrectly relied on *Hanson*[94] and *Street*[95] in

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concern and that teachers as members of the community have informed opinions on how school funds should be spent and should be able to speak freely on such questions without fear of retaliation, the U.S. Supreme Court decided that the teacher's letter was protected by the First Amendment, Further, because the teacher's letter did not disrupt the harmony of his workplace or affect the delivery of educational services, because Pickering did not have a close working relationship with either school board members or the superintendent at whom his criticisms were directed, and because Pickering's letter addressed and informed a matter of public concern best resolved through open debate, his dismissal from public employment violated the First Amendment. *Id*. at 571-72, 574-75.

[88] *Janus*, 138 S. Ct. at 2472.

[89] *Id*. at 2474.

[90] Garcetti v. Ceballos, 547 U.S. 410 (2006). In *Garcetti,* the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. In reaching this decision, the Court stated government speech trumps government employee speech whenever the employee's expression "owes its existence to [the] employee's professional responsibilities," *id*. at 421-22, and is created pursuant to "the duties the employee is actually expected to perform." *Id*. at 424-25.

[91] *Janus*, 138 S. Ct. at 2474.

[92] *Id*. at 2478.

[93] *Id*. at 2478-79.

[94] Railway Employes' Dept. v. Hanson, 351 U.S. 225 (1956). In *Hanson*, employees of the Union Pacific Railroad brought suit in Nebraska courts against the railroad and the labor organizations representing employees of the railroad to enjoin the enforcement of a union shop agreement, which required all employees of the railroad to become members of the union

validating the agency arrangement. Those decisions, the Court insisted, did not validate the payment of agency fees; rather, they simply determined that Congress authorized private sector union shops under the Railway Labor Act.[96] Furthermore, *Abood* incorrectly applied a deferential standard in determining the constitutionality of agency fees that is unsupported by free speech cases, failed to evaluate independently the strength of the government interests cited to support the imposition of agency fees, and did not assess whether agency fees actually promoted those interests.[97] If *Abood* had considered these interests properly, the Court insisted, it might not have made the serious mistake of assuming that "labor peace" was a substantial government interest and that the designation of the union as the exclusive

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within sixty days. *Id*. at 227. The plaintiff employees were not members of the union, did not want to become members of the union, and did not want to lose their jobs and employments benefits if they refused to join the union. The employees argued that the union shop arrangement authorized by the Railway Labor Act violated the "right to work" provision of the Nebraska constitution. *Id*. at 227-28. The U.S. Supreme Court upheld the union shop provisions of the Railway Labor Act as a valid exercise by Congress of its powers under the Commerce clause to "regulate labor relations in interstate commerce," "encourage the settlement of disputes," and achieve "[i]ndustrial peace along the arteries of commerce." *Id*. at 233. The U.S. Supreme Court also ruled the union shop arrangement did not violate the First Amendment rights of the union members, noting that "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar," that the record contained nothing to demonstrate that mandatory membership in the union impaired the union members' freedom of expression, and that the statutory restriction against any conditions upon membership in the union except for the payment of dues, initiation fees, and assessments safeguarded the union members freedom of expression. *Id*. at 238.

[95] International Association of Machinists v. Street, 367 U.S. 740 (1961). In *Street,* members of a group of labor organizations representing workers employed by the Southern Railway System in a union shop arrangement sought injunctive relief against the enforcement of the collective bargaining agreement, because the unions expended member dues to finance political campaigns of candidates for state and federal offices whom they opposed and to promote political ideologies with which they disagreed. The U.S. Supreme Court refrained from deciding the constitutionality of the Railway Labor Act which authorized the union shop arrangement. Rather, the Court construed the Railway Labor Act as prohibiting expenditures of union members' dues without their consent to assist candidates for public office or advance political causes and permitting unions to spend member sues to cover the expenses of collective bargaining and administration and disposition of grievances and disputes without the members' consent. *Id*. at 750, 763-64. The Court carefully reviewed the history of union security in the railway industry and the legislative history of the Railway Labor Act, and concluded: (1) "§ 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes," *id*. at 764; (2) Congress refrained from giving unions "unlimited power to spend exacted money," *id*. at 768; and (3) § 2, Eleventh, "is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id*. at 768-69.

[96] *Janus*, 138 S. Ct. at 2478-79.

[97] *Id*. at 2480.

bargaining agent is inextricably linked to the imposition of agency fees.[98] Nor did *Abood* properly consider the difference between public- and private-sector agency shops. More particularly, collective bargaining with a government employer, unlike collective bargaining in the private sector, inherently involved political speech. Hence, Justice Alito, concludes, "*Abood* was not well reasoned."[99]

Addressing the second factor – the workability of the rule it established – the Court notes that "*Abood* 's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision."[100] While the U.S. Supreme Court attempted to provide some precision in *Lehnert*,[101] in which the court adopted a three-part test to determine if expenses were chargeable, each of the three factors involves a substantial judgment call reducing the test to an amorphous standard that invited litigation.[102] Moreover, the Court observes, the union concedes *Abood*'s chargeable and nonchargeable categories suffer from vagueness and invites the Court to revisit *Abood* and draw a firmer line. This concession, the Court notes, "underscores the reality that *Abood* has proved unworkable."[103] Crucially, this lack of precision makes the task of challenging the union's classification of expenses "daunting and expensive," as evidenced by the *Hudson* notices under scrutiny in *Janus* and in the other cases that have come before the court which lack "sufficient information to gauge the propriety of the union's fee."[104]

Addressing the third factor – consistency with other related decisions – Justice Alito repeated his characterization of *Abood* as an "anomaly," as noted above in the discussion of *Harris*[105] and *Knox*.[106] Moreover, the Court

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[98] *Id*.
[99] *Id*. at 2481.
[100] *Id*.
[101] Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991). In *Lehnert*, faculty members employed by Ferris State College, a state-related public institution of higher education supported by the State of Michigan, objected to the expenditures of funds by the Ferris Faculty Association, the exclusive bargaining representative of the faculty in an agency shop arrangement. The objecting faculty members claimed that the expenditures in question were used for purposes other than negotiating and administering the collective bargaining agreement, thereby violating their First Amendment Rights. *Id*. at 511. The U.S. Supreme Court developed a three-part test to determine if the expenses were chargeable: "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id*. at 519.
[102] *Janus*, 138 S. Ct. at 2481.
[103] *Id*. at 2481-82.
[104] *Id.* at 2482.
[105] *Harris* is discussed *supra* at notes 69-75.
[106] *Knox* is discussed *supra* at notes 56 and 58-68. *Janus*, 138 S. Ct. 2483.

observed, subsequent decisions addressing compelled speech and association "employed exacting scrutiny, if not a more demanding standard" of review, which was lacking in *Abood*.[107] Likewise, as noted above in the discussion of *Knox* and *Harris*, the Court declined to extend *Abood* in other agency fee cases "beyond the circumstances where it directly controls."[108] Further, the Court notes that *Abood* "particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party."[109] "It is an odd feature of our First Amendment cases," the Court observes, "that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted."[110]

Addressing the fourth factor – developments since the decision was handed down – the Court declared "[d]evelopments since *Abood*, both factual and legal, have also 'eroded' the decision's 'underpinnings' and left it an outlier among our First Amendment cases."[111] To begin with, *Abood* is based on the unsupported assumption that the principle of exclusive representation in the public sector depends on either a union or an agency shop, an assumption belied by the above noted analysis of union membership in the public sector.[112] Second, an unanticipated increase in membership in public sector unions – public sector union memberships exceeds private sector union membership, even though there are nearly four times as many private sector employees as public sector employees – has triggered a parallel increase in public sector spending, and wages, benefits, and pensions have played a substantial role in that increase. These developments and the related political debate over public spending and debt have given public sector collective bargaining political power and influence that *Abood* did not anticipate.[113]

Addressing the fifth factor – reliance on the decision – the Court rejected the union's argument that collective-bargaining agreements

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[107] *Janus*, 138 S. Ct. at 2483.
[108] *Id*.
[109] *Id*. at 2484 (citing Elrod v. Burns, 427 U.S. 347 (1976) (dismissing noncivil, Cook County employees for their refusal to join the political party of the current sheriff violated the First Amendment); Branti v. Finkel, 445 U.S. 507 (1980) (continuing employment of county public defenders cannot be conditioned on their changing their party affiliation from Republican to Democratic); Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) (conditioning hiring decisions of low-level, public employees on the political beliefs and party affiliation violates the First Amendment); and O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996) (removal of towing company from city's list of approved towing service companies for refusal to support a political party violated the First Amendment)).
[110] *Janus*, 138 S. Ct. at 2484.
[111] *Id*. at 2482.
[112] *Id.* at 2483.
[113] *Id*.

presently in effect were negotiated with the expectation agency fees would continue, in exchange for which the union may have surrendered other benefits. "It would be unconscionable," the Court stated, "to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time."[114] Indeed, the Court stressed, "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*," as spelled out in *Knox*, *Harris*, and *Friedrichs*, discussed above.[115] Hence, "any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain."[116] This is particularly true, the Court insisted, with respect to the collective bargaining agreement in *Janus*. The original term of the agreement was July 1, 2012, to June 30, 2015, after which the agreement was automatically renewed annually, neither party having given notice it wanted to amend or terminate the agreement. This caused the Court to observe that "the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time."[117] Similarly, the Court noted, the collective-bargaining agreement contains a severability clause which keeps the remaining provisions of the contract in effect in the event any part of the agreement was invalidated. Any union believing that an agency-fee provision was essential to its bargain," the Court stated, "could have insisted on a provision giving [the agency-fee provision] greater protection."[118] While the Court recognized that "the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members," it declared that the "unconstitutional exactions cannot be allowed to continue indefinitely."[119]

The Court concluded: "All these reasons – that *Abood* 's proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings – provide the special justification[s] for overruling *Abood*."[120] The Court then held: (1) states and public-sector unions are prohibited from extracting agency fees from nonconsenting employees, (2) "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee

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[114] *Id*. at 2484.
[115] *Id*. at 2484-85. *Friedrichs* is discussed *supra* at note 77.
[116] *Id*. at 2485.
[117] *Id*.
[118] *Id*.
[119] *Id*. at 2486.
[120] *Id*.

affirmatively consents to pay," and (3) nonmembers who agree to pay waive their First Amendment rights, and, in order to be effective, that waiver must be freely given, evidenced by clear and compelling evidence, and obtained before any money is taken.[121] Finally, the Court stated, "*Abood* was wrongly decided and is now overruled."[122]

## V. *JANUS*'S IMPACT ON UNIONS

In her dissenting opinion, Justice Kagan identifies the immediate ramifications of *Janus*:

> [*Janus*] will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.[123]

Justice Kagan notes that over 22 states, the District of Columbia, and Puerto Rico have enacted statutes authorizing fair-share provisions, and two additional states have fair-share provisions for their police and firefighter unions.[124] Moreover, many of those states have multiple statutory provisions with variations of fair-share provisions for different categories of public employees.[125] The parties to these agreements will now be required to "revise (or redo) multiple contracts simultaneously," a chore made much more difficult because the parties will now have to "replace a term that [they] never expected to change."[126] This bargaining, she cautions, will likely be complicated and possibly contentious given the interests at stake.[127]

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[121] *Id*.
[122] *Id*.
[123] *Id*. at 2487.
[124] "Fair share" provisions require employees who are not members of the union but who are represented by the union for collective bargaining purposes to pay fees covering the cost of the union's collective bargaining activities. In contrast, 28 states are "right-to-work" states, which bar employers from including "fair share" requirements in employment contracts. Alana Semuels, *Is This the End of Public-Sector Unions in America?*, ATLANTIC (June 17, 2018), https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/.
[125] *Janus*, 138 S. Ct. at 2499.
[126] *Id*. at 2500.
[127] *Id*. Randi Weingarten, president of the American Federation of Teachers, claims *Janus* "will likely strain labor relations and push unions to take more radical actions like the statewide teacher strikes that rattled the country this spring." J. Brian Charles, *The Janus*

By cutting off the flow of agency fees to unions, *Janus* will cost unions, already under considerable political pressure, to lose tens of millions of dollars and to see their effectiveness diminished.[128] Benjamin Sachs, the Kestnbaum Professor of Labor and Industry at Harvard Law School, analogizes the problem *Janus* creates to a decision by the government to make taxes voluntary. Fewer people would pay taxes and the ability of government to provide services would erode. [129] Worse, unions representing public sector employees will likely experience a significant drop in membership and union members will experience a significant drop in wages. As noted in an article in *The Atlantic*:

> A study by Frank Manzo, the policy director of the Illinois Economic Policy Institute, and Robert Bruno, a labor professor at the University of Illinois at Urbana-Champaign, found that a decision in favor of Janus could reduce the union membership of state and local government employees by 8.2 percentage points, or 726,000 union members. This will lead to a loss of revenues for the unions, and with less money, unions will hire fewer representatives, take fewer cases to arbitration, and organize fewer members than they once did, Bruno told me. This will likely mean lower pay and benefits for public-sector employees: Manzo and Bruno estimate the wages of state and local government employees would drop by an average of 3.6 percent, and the salaries of public-school teachers would drop by an average of 5.4 percent.[130]

One projection indicates that "[m]ost public-sector unions in more than 20 states with agency fee laws will get smaller and poorer, with unions losing between a tenth and a third of their members.[131] Union membership in the

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*Ruling Is a Blow to Public Unions. It's Especially Bad for Black Women*, GOVERNING (July 9, 2018), http://www.governing.com/topics/workforce/gov-supreme-court-janus-unions-women-workers-lc.html.

[128] Adam Liptak, *Supreme Court Ruling Delivers a Sharp Blow to Labor Unions*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html.

[129] Sabri Ben-Achour and Daniel Shin, *What does the Supreme Court's Janus ruling mean for unions? It would be like the government no longer enforcing taxes*, MARKETPLACE INV. (June 28, 2018), https://www.marketplace.org/2018/06/28/economy/how-public-unions-could-move-forward-after-janus-v-afscme.

[130] Semuels, *supra* note 124.

[131] Noam Scheiber, *Labor Unions Will Be Smaller After Supreme Court Decision, but Maybe Not Weaker*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/business/economy/supreme-court-unions-future.html. Unions' resources will be stretched even thinner as they respond to multiple lawsuits initiated by conservative groups to get immediate and retroactive refunds of the agency fees. *Id. See*

United Domestic Workers of America (UDW), which represents home-care workers in California, declined dramatically from 68,000 to 48,000 immediately following the U.S. Supreme Court decision in *Harris*, which did for home-care worker what *Janus* had now done for all public-sector unions.[132] Likewise, in the five year period following Michigan's passing legislation ending mandatory union fees in 2012, membership in the Michigan Education Association dropped about 25%.[133] Similarly, the National Education Association (NEA), the nation's largest union, fears it will lose about 300,000 members over the next two years, or about 10% of its 3 million members.[134] Moreover, to the extent *Janus* weakens unions and negatively affects about 17 million public sector workers across the country, it will hurt black women in particular, because they are disproportionately represented in public sector jobs and make up 17.7 percent of public sector workers, or about 1.5 million workers.[135] Likewise, weakened labor unions will likely be unable to sustain their progress in narrowing the wage gap between men and women.[136]

In preparation for and response to *Janus*, unions have cut their budgets – the NEA is prepared to cut about $28 million from its budget and about 40 members of its staff[137] – and embarked on campaigns to convince union

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Julianna Feliciano Reyes, *Changing work scene after Janus decision*, PHILA. INQUIRER (Aug. 31, 2018), p. A11, http://digital.olivesoftware.com/Olive/ODN/PhiladelphiaInquirer/Default.aspx:

> Since the ruling, these groups, including one focused on Pennsylvania, have launched campaigns encouraging public-sector workers to stop paying fair-share fees. And there are more lawsuits: Teachers and other public-sector workers, often backed by the National Right to Work Foundation, the same anti-union group that coordinated and financed the *Janus* case, have sued their unions to get back fees – and even dues – they say they were illegally forced to pay to unions.

[132] Semuels, *supra* note 124. Notably, however, UDW membership in California has rebounded, and today it has 75,000 dues paying members, largely due to an effective recruiting campaign which proved UDW was providing valuable service not only to the union members but also to their clients. Moreover, because of aging population, the number of potential members has grown significantly as well. *Id.*

[133] Scheiber, *supra* note 131.

[134] Moriah Balingit & Danielle Douglas-Gabriel, *Unions brace for loss of members and fees in wake of Supreme Court ruling*, CHI. TRIB., June 28, 2018.

[135] Celine McNicholas & Janelle Jones, *Black women will be most affected by Janus*, ECON. POL'Y INST. (Feb. 13, 2018), https://www.epi.org/publication/black-women-will-be-most-affected-by-janus/.

[136] Charles, *supra* note 127 ("Labor unions . . . have helped women of all backgrounds close gaps in pay and career advancement, according to recent BLS data. When not represented by a union, black women typically earn 67 cents for every dollar earned by a white male, while white women make 80 cents for every dollar earned by a white male. But the gap closes for union employees, with black women earning 72 cents for every dollar earned by a white man, and white women earning 88 cents for every dollar made by a white male worker.").

[137] Balingit, *supra* note 134.

members to sign pledge cards confirming their commitment to the union.[138] The American Federation of Teachers (AFT) conducted one-on-one meetings with union members and potential members asking them to sign "recommit" cards in 10 states pledging to continue their membership in the AFT. This campaign generated 530,000 recommits among its 1.7 million members,[139] and recommitment rates up to 95 percent in some places.[140] Similarly, the National Education Association (NEA) has reached out to its members with a pledge to fight for racial justice and equal distribution of resources in addition to just salary wages.[141] That unions can demonstrate strong commitment by their members is crucially important, because *Janus* has created the perception that unions have less money, less support from politicians, and therefore less power at the bargaining table in terms of being able to put pressure on the employer.[142]

Although the U.S. Supreme Court in *Janus* emphasized the difference between public- and private-sector agency shops and noted that collective bargaining with a government employer, unlike collective bargaining in the private sector, inherently involves political speech,[143] some legal commentators believe *Janus* may ultimately be applied to private sector unions. Robert Bruno, labor professor at the University of Illinois at Urbana-Champaign, worries that the *Janus* may help right-to-work activists bring a constitutional challenge to mandatory fees in private sector unions.[144] Cesar Rosado, co-director of the Institute for Law and the Workplace at Chicago-Kent College of Law, believes there is no significant difference between the First Amendment issue in the public sector and the private sector.[145] He notes that private sector employees are governed by the National Labor Relations Act, which requires employers to bargain with the union employees have voted to represent them. Those unions impose mandatory dues and fees that support lobbying efforts and political campaigns for a wide variety of public causes, including public spending and minimum wage levels, which employers may oppose and which may impact government spending, thereby opening the door to *Janus* challenges.[146]

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[138] Reyes, *supra* note 131.
[139] Semuels, *supra* note 124.
[140] Balingit, *supra* note 134.
[141] Semuels, *supra* note 124.
[142] Reyes, *supra* note 131.
[143] *Janus*, 138 S. Ct. at 2481.
[144] Alexia Elejalde-Ruiz, *Supreme Court's Janus ruling could undercut private sector unions too*, CHI. TRIB. (July 11, 2018), http://www.chicagotribune.com/business/ct-biz-janus-private-sector-ramifications-20180709-story.html.
[145] *Id.*
[146] *Id*.

## VI. SUMMARY

Two decisions handed down during the 2017-2018 Supreme Court Term has inflicted substantial legal damage on workers and unions. In *Epic Systems*, the U.S. Supreme Court upheld arbitration agreements which prohibit collective actions to recover overtime pay owed under the Fair Labor Standards Act. This decision seriously weakens a significant employee safeguard under the National Labor Relations Act, and pits individual employees seeking to enforce their right to overtime compensation against the enterprise which hired them, a lopsided confrontation indeed, particularly for employees who fear retaliation. Moreover, the decision facilitates the under enforcement of the Fair Labor Standards Act by making it cost beneficial for employers to underpay workers. Because the expense in pursuing individual claims outweighs the potential recovery, there is no incentive to seek redress and the "enforcement gap" will widen. Hence the ongoing and substantial loss by low wage earners of billions of dollars of legally owed wages per year will likely continue unabated. Moreover, because arbitration decisions can be kept confidential and lack precedential effect, the individually pursued arbitrations will likely give rise to incompatible awards in similar claims and inconsistent legal decisions.

*Janus* has inflicted equally devastating results on public sector labor unions, which will likely get smaller and poorer. Public sector unions will experience a significant loss of a secure source of financial support which generated tens of millions of dollars in agency fees paid by nonmember public employees. Labor unions in twenty-two states, the District of Columbia and Puerto Rico must quickly and simultaneously renegotiate their public sector collective bargaining agreements in an atmosphere of strained labor relations and more radical union actions. Public sector employees may experience an average 3.6 percent drop in wages, and the salaries of public-school teachers may drop by an average of 5.4 percent. Public sector unions will likely lose between a tenth and a third of their members, and must combat the perception that public sector unions have less money, less support from politicians, and therefore less power at the bargaining table. Public sector labor unions have been forced to slash their budgets and reduce services to their members, at the same time as they undertake campaigns to convince members to confirm their commitment to the union. Finally, *Janus* has opened the door to First Amendment attacks on agency fee arrangements in private sector collective bargaining agreements.