

Note

REDEFINING WORKPLACE SPEECH AFTER *JANUS*

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ABSTRACT—We have a First Amendment right to criticize the government. But this freedom does not translate into a right to criticize one’s boss even if, as for millions of Americans, one’s boss happens to be a government employer. Public employee speech doctrine has long established wide latitude for public employers to supervise their workers. Employees must show at the threshold that their speech was on a matter of public concern and not an internal workplace matter. The Supreme Court’s pronouncements over the last decade in a related doctrinal area, however, have unsettled the line demarcating workplace speech. In its agency fees cases, the Court has repeatedly stated that when a union speaks on matters of interest to the general public, even internal workplace matters, it triggers constitutional scrutiny. Taken at face value, the new definition of matters of public concern in a government workplace provides a basis for employees to claim expanded free speech protection. This Note is the first scholarly work to propose how public employees will claim expanded speech protection on the basis of the Court’s holding in *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)*. The expanded definition of matters of public concern is likely to destabilize public employee speech doctrine, causing uncertainty for employers as to how to supervise employees in compliance with the First Amendment.

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INTRODUCTION

Individuals have a First Amendment right to criticize the government, even if their speech is insulting, vulgar, racist, or untrue.¹ For government employees, however, this does not translate to freedom to criticize one’s boss. Over twenty million people work in the public sector, including teachers, police officers, firefighters, prison guards, and social workers, as well as workers in federal, state, and local governments and agencies.² The Supreme Court has recognized that the government requires wide latitude to adequately supervise these employees—including the power to regulate employee speech. Without this latitude, a public workplace could transform into a town hall meeting of employee grievances. Most employee speech constitutes internal workplace speech. Only when government workers speak as citizens on a matter of public concern can they receive First Amendment protection. Thus, the government’s ability to efficiently function depends on the contours of how the Court defines workplace speech.

¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (striking down a hate crime ordinance); *Cohen v. California*, 403 U.S. 15, 19–21 (1971) (holding that vulgar speech like “Fuck the Draft” expresses ideas protected by the First Amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (prohibiting defamation suits by government officials absent evidence of actual malice).

² ROBERT JESSE WILLHIDE, U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2013, at 1–2, 8 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/econ/g13-asep.pdf> [<https://perma.cc/9SJE-THNK>]. As of March 2013, there were 21.8 million people working in the public sector. *Id.* at 2.

Consider the following example. Donald Olendzki, a psychologist at a state prison, was concerned that conditions for him and his fellow employees were dangerous.³ As a member of the executive board of his union, he began to raise these complaints to management.⁴ In union meetings, he told them that mentally ill inmates were causing unsafe conditions and that a dangerous dental tool had gone missing.⁵ In his capacity as a union board member, he accompanied a coworker to her disciplinary hearing.⁶ He also persistently spoke about his belief that the terms of the collective bargaining agreement were not being followed.⁷ In his lawsuit, Olendzki alleged that his superiors eventually retaliated against him for his advocacy.⁸ The Seventh Circuit held that he had not raised any issues that constituted a matter of public concern, and therefore, his speech was not protected by the First Amendment.⁹

If Olendzki were to bring a case involving union-related speech today, it might turn out quite differently. Over the past decade, critics of unions have argued for a new definition of workplace speech in a closely-related doctrinal area: agency fees. A forty-year-old precedent established in *Abood v. Detroit Board of Education* had allowed unions to charge agency fees (colloquially known as “fair share dues”) to nonmembers to pay the costs of representing those employees who choose not to join the union.¹⁰ In a series of cases, opponents of agency fees argued that, when unions charge such fees to nonmembers, it violates the fee-payers’ First Amendment rights. These plaintiffs contended that, because collective bargaining affects government expenditures and public policy, agency fees “speak” on matters of public concern. Compelling nonmembers to pay agency fees thus amounted to unlawful forced speech.

In 2018, the Supreme Court agreed. In *Janus v. American Federation of State, County, and Municipal Employees (AFSCME)*, the Court overruled its precedent in *Abood* and held that agency fees are unconstitutional.¹¹ In its opinion, the Court held that the topics of collective bargaining “overwhelmingly” involve matters of “great public concern.”¹² This pronouncement was in sharp contrast to the well-established principle since *Pickering v. Board of Education* that, in the government workplace, matters

³ Olendzki v. Rossi, 765 F.3d 742, 744 (7th Cir. 2014).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 745.

⁷ *Id.*

⁸ *Id.* at 745–46.

⁹ *Id.* at 747–49.

¹⁰ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

¹¹ 138 S. Ct. 2448, 2463–86 (2018).

¹² *Id.* at 2475, 2477.

of public concern do not encompass all topics potentially interesting to the public.¹³ Now, with *Janus*, collective bargaining topics including wages, working conditions, and workplace operations appear to be back on the table as potentially “of public concern.” What had previously been considered an internal workplace matter about the prosaic operations of a government employer could turn into a constitutional case.

It is not clear how the Court will grapple with the impact that the newly expansive definition of matters of public concern will have on public employee speech doctrine. Some have observed that the Court’s holding has created an inconsistency in First Amendment jurisprudence and could form the basis of new protections for public employees.¹⁴ This Note is the first scholarly exposition of how and why *Janus* will allow government workers to claim new protections. Specifically, it proposes that public employees can now argue for First Amendment protection when they speak (1) on union-related topics, (2) as a union official, and (3) about workplace matters. And so long as they can demonstrate that their interest in speaking outweighs their employer’s interest in restricting their speech,¹⁵ public employees can win their cases.

This Note proceeds as follows. Part I provides an overview of when the government may impinge on its employees’ First Amendment rights, in both public employee speech doctrine and agency fees doctrine. Then, Part II argues the two doctrines are inextricably connected because they govern the same workers, the same employers, and the same topics of speech—and because they both are grounded in the recognition that the government operates with great latitude when it acts as an employer. Part II further argues

¹³ 391 U.S. 563, 563–64 (1968) (explaining that the employee’s speech was directed toward the public and was, therefore, a matter of public concern); *see also* *Connick v. Myers*, 461 U.S. 138, 149 (1983) (“To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.”).

¹⁴ *See, e.g., Janus*, 138 S. Ct. at 2496 (Kagan, J., dissenting) (“If all that speech really counted as ‘of public concern’ . . . the mass of public employees’ complaints (about pay and benefits and workplace policy and such) would become ‘federal constitutional issues.’” (quoting *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 391 (2011))); Brief for Amici Curiae Charles Fried & Robert C. Post in Support of Neither Party at 7, *Janus*, 138 S. Ct. 2448 (No. 16-1466); Catherine L. Fisk, *Janus: Weaponized First Amendment Shoots at Democracy*, ACSBLOG (July 2, 2018), <https://www.acslaw.org/acsblog/janus-weaponized-first-amendment-shoots-at-democracy> [<https://perma.cc/9U6P-L2AL>] (arguing “the Court needs to explain why employees can get fired for complaining about their work, but not for refusing to pay fair share fees”); Ann C. Hodges, *Beware the Unintended Consequences of Janus*, ACSBLOG (Feb. 20, 2018), <https://www.acslaw.org/acsblog/beware-the-unintended-consequences-of-janus> [<https://perma.cc/2CA4-W5K4>] (predicting that “[a] ruling in favor of the *Janus* plaintiffs could obliterate the distinction [between employee and citizen speech], requiring employers to tolerate much unwanted speech by their employees”).

¹⁵ *See Connick*, 461 U.S. at 150 (describing interest balancing in public employee speech doctrine).

that, when the Court ruled agency fees unconstitutional in *Janus*, it offered a new definition of matters of public concern, one that will collide with public employee speech doctrine. Finally, Part III evaluates the implications of the *Janus* Court’s holding that agency fees categorically speak on matters of public concern, arguing that it will create doctrinal uncertainty and offer a new basis for individual employees to claim First Amendment protection.

I. FIRST AMENDMENT RESTRICTIONS ON THE GOVERNMENT AS EMPLOYER

Public employees do not leave their constitutional rights at the door to the workplace. Nor do they have the same First Amendment freedoms as citizens in general. This Part explains how the First Amendment operates in a government workplace. In recognition of the government’s need to supervise its workforce and conduct labor relations without turning every matter into a constitutional case, the government receives significant latitude to regulate its employees’ speech. As Section I.A describes, when the government acts as employer, it must do so in a manner consistent with the First Amendment, which generally proscribes restrictions on the freedom of speech. Section I.B explains that public employee speech doctrine allows a government employer flexibility to supervise its employees’ speech except where employees express themselves as citizens on matters of public concern. Historically, as Section I.C delineates, agency fees doctrine drew a line around activities related to union representation and collective bargaining. Until the *Janus* decision, a government employer could permit a public sector union to impose an agency fee for expenses germane to collective bargaining—but not political lobbying.

A. First Amendment Protections Generally

The First Amendment limits the federal government’s power to restrict speech and likewise applies to the states through the Fourteenth Amendment. Although the text of the First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech,”¹⁶ the freedom of speech is not absolute. Scholars observe that the Court has categorically provided less protection under the First Amendment to some kinds of expression based on the content of the speech.¹⁷ Particularly harmful expression including

¹⁶ U.S. CONST. amend. I. As Justice Oliver Wendell Holmes, Jr. famously wrote, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹⁷ See, e.g., Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 625 (1990) (describing the Court’s exclusion of obscenity from First Amendment protection).

libel, obscenity, and incitement receives little or no First Amendment protection.¹⁸ Conversely, the Court affords speech that contributes to the marketplace of ideas or promotes self-governance the highest levels of protection.¹⁹ In addition to these content-based distinctions, the First Amendment also allows the government a freer hand to regulate speech in certain spaces, including schools, prisons, and spaces on government property not traditionally open to the public.²⁰ This extra operating room allows the government to efficiently run schools, penological institutions, and other government services. Thus, both the content and context of the speech matter when examining government regulations of speech.

B. *Public Employee Speech Doctrine*

Government employers at all levels are bound to supervise their employees in a manner consistent with the First Amendment.²¹ For example, although a private employee could be fired for speaking critically of the President at work, a public employee may claim First Amendment protection.²² Yet the rights of public employees are not absolute. The Court has recognized that, to efficiently provide public services, a government employer must have more latitude to supervise its employees than when it regulates its citizens.²³ If employees possessed an absolute right to freedom of expression, it is easy to imagine how workplaces could become unmanageable.

¹⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (libel); *Miller v. California*, 413 U.S. 15, 23–24 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement).

¹⁹ *See Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (noting that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection” (quoting *Connick*, 461 U.S. at 145)); *see also* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 47 (1990) (critiquing such content-based distinctions).

²⁰ *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (permitting regulation for legitimate penological purposes); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983) (applying rational basis scrutiny to regulations limiting access to teacher mailboxes); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 509 (1969) (permitting regulation of student speech if the targeted speech would materially and substantially disrupt the learning environment).

²¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 563, 574 (1968). In contrast, in the pre-*Pickering* era, then-Massachusetts Supreme Court Justice Holmes proclaimed, “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

²² *See Rankin v. McPherson*, 483 U.S. 378, 379–80 (1987) (holding a public employee had been improperly fired for criticizing the President and his policies). After the assassination attempt on President Ronald Reagan, McPherson had told a fellow employee, “If they go for him again, I hope they get him.” *Id.* at 380.

²³ *Pickering*, 391 U.S. at 565.

The Court categorically excluded speech “pursuant to [public employees’] official duties” from protection in *Garcetti v. Ceballos*.²⁴ For all other speech, public employees must satisfy a two-part test in order to claim First Amendment protection: (1) they must speak as citizens on matters of public concern (not merely internal workplace or personal matters), and (2) they must demonstrate that their interest in speaking outweighs the government interest in limiting the speech.²⁵ This two-step test emerged when the Court first recognized that public employees have free speech rights.²⁶ In *Pickering v. Board of Education*, teacher Marvin Pickering was fired after he wrote a letter to a local newspaper criticizing a proposed tax increase and the local board of education’s spending priorities.²⁷ In evaluating whether Pickering could claim constitutional protection, the Court grappled with the tension between the government’s interest acting as an employer and an individual’s interest in speaking. On the one hand, the Court recognized that public employees contribute to informed decision-making about government services.²⁸ At the same time, the Court recognized that a state has an interest in providing public services in an efficient manner through its employees.²⁹ Thus ensuring that public employers would retain significant latitude to supervise employees, the *Pickering* Court required that, at the outset, employees must show they are speaking on a matter of public concern before they can move to the second step, interest-balancing.³⁰

Fifteen years later, the Court clarified that employees must do more than show that the content of their speech could be important to the public. In *Connick v. Myers*, the Court held that an employee must demonstrate, with the content, form, and context of the statement, that she was speaking as a *citizen* on a matter of public concern, and not “as an *employee* upon matters

²⁴ 547 U.S. 410, 421 (2006) (refusing to protect a deputy district attorney disciplined for writing a memorandum recommending dismissal of a case based on government misconduct). If an employer can show that the speech was within an employee’s job description, then the First Amendment simply does not come into play. *Id.* The way the Court has defined workplace speech now prevents most cases from even triggering First Amendment analysis. See Edward J. Schoen, *Completing Government Speech’s Unfinished Business: Clipping Garcetti’s Wings and Addressing Scholarship and Teaching*, 43 HASTINGS CONST. L.Q. 537, 538 (2016).

²⁵ See *Pickering*, 391 U.S. at 574.

²⁶ *Id.*

²⁷ *Id.* at 566. Among Pickering’s complaints was the board’s decision to invest in a new athletic field. *Id.*

²⁸ *Id.* at 571–72. The Court observed that “free and open debate is vital to informed decision-making by the electorate. . . . Accordingly, it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal.” *Id.*

²⁹ *Id.* at 568.

³⁰ *Id.*

only of personal interest.”³¹ In *Connick*, an assistant district attorney alleged she had been dismissed because she circulated a questionnaire to her colleagues asking about office morale and whether employees felt pressured to work on political campaigns.³² Applying its multifactor test, the Court held that the employee’s questionnaire was not designed to inform public debate or bring wrongdoing to light—it was instead merely an extension of the attorney’s ongoing dispute about being transferred.³³ As the Court explained, “the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.”³⁴ Even if the content of the speech is potentially significant to the public, it will not be protected if the form and context show that that the employee was really making an internal complaint.

Thus, public employee speech doctrine has developed a restrictive definition of matters of public concern, permitting government employers wide latitude to supervise their employees. The *Pickering–Connick* framework’s public concern test takes certain speech out of the picture by categorizing it as outside constitutional protection. This classification allows a government employer to function more like a private one by providing a degree of predictability to government employers when they make internal, day-to-day, and supervisory decisions.³⁵ Although a public employee probably cannot be fired for criticizing the President, she still could be fired for criticizing her boss.³⁶

C. Agency Fees Speech Doctrine

The latitude the Court usually accords public employers stands in stark contrast to the Court’s recent holding in *Janus* that, in the agency fees context, virtually all speech by a public sector labor union on behalf of employees implicates the First Amendment.³⁷ As this Section describes, public sector agency fees jurisprudence was fairly stable for nearly four

³¹ 461 U.S. 138, 147–48 (1983) (emphasis added).

³² *Id.* at 141.

³³ *Id.* at 148.

³⁴ *Id.* at 149. Thus, an “employee grievance concerning internal office policy” is not entitled to protection. *Id.* at 154. The Court observed that “government offices could not function if every employment decision became a constitutional matter.” *Id.* at 143.

³⁵ *See id.* at 149 (describing the need for government employers to supervise employees without fearing the workplace will become a town hall meeting).

³⁶ *Compare* Rankin v. McPherson, 483 U.S. 378, 379–80 (1987) (employee wrongly dismissed for criticizing the President), *with Connick*, 461 U.S. at 141 (employee legally fired for criticizing supervisor).

³⁷ *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2472–77 (2018) (explaining that agency fees overwhelmingly speak to issues of public concern).

decades. First, in 1977, the Court established in *Abood* that government employers could permit unions to charge agency fees for representing nonmember employees so long as the fees were not used for political lobbying. Subsequent cases refined *Abood*'s application. Then in 2012, the Court indicated a willingness to reconsider the constitutionality of agency fees. Now, in the case of *Janus*, the Court has held that even speech about traditional topics of labor relations are a matter of public concern, and therefore agency fees are unconstitutional because they compel such speech.

1. Unions and Agency Fees

A brief description of labor unions and their funding mechanisms may first be helpful to understand the constitutional dimensions of agency fees. A labor union represents employees in collective bargaining, resolving grievances, and undertaking other forms of mutual aid.³⁸ Both in the private and public sectors, workers form unions to improve their bargaining power as they negotiate terms of employment with an employer.³⁹ Unions often ask an employer to negotiate a collective bargaining agreement, a contract that typically sets wages, benefits, and working conditions for all employees who share a common workplace or work unit.⁴⁰ Employers may voluntarily recognize a union as the representative of its employees or may be required do so by statute when a majority of employees vote in favor of forming a union.⁴¹ Government employers were not permitted to recognize unions until the 1950s, when states and the federal government passed statutes to authorize it.⁴² This decision reflected the policy judgment that unions could facilitate improved labor relations, make negotiations more efficient, and provide an employee voice in bargaining and conflict resolution.⁴³

Unions are funded by member dues, which are often deducted directly from paychecks.⁴⁴ Public employee union membership is voluntary because compulsory membership in such an organization would violate freedom of

³⁸ KENNETH G. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 251–53 (2009).

³⁹ *Id.* Before joining the Court, Justice Holmes wrote about the need for workers to negotiate collectively with employers: “Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.” *Vegeahn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896).

⁴⁰ DAU-SCHMIDT ET AL., *supra* note 38, at 540–41.

⁴¹ *Id.* at 280–81, 370.

⁴² *Id.* at 83–85. Despite this relatively late start, public sector unions now have both more members and higher rates of membership than their private counterparts. *Id.*

⁴³ *Id.* at 3–7 (discussing the role of unions in labor relations generally); *see also id.* at 82–86 (describing state and federal public labor relations acts, including Wisconsin’s groundbreaking statute in 1959, President Kennedy’s executive order in 1962, and the federal statute in 1978).

⁴⁴ *Id.* at 869; *see, e.g.*, 5 ILL. COMP. STAT. 315/6(f) (2005) (permitting union membership dues to be deducted directly from employees’ paychecks).

association.⁴⁵ Many state statutes require public sector unions to represent all workers in a workplace, regardless of membership.⁴⁶ These states also typically allow unions to charge nonmembers an agency fee (colloquially known as a “fair share fee”) to cover the costs of representation, and agency fee payers must receive the same wages and working conditions as a union member.⁴⁷ Allowing unions to charge agency fees avoided a potential free-rider problem in which workers could refuse to pay dues but still receive the benefits of bargaining collectively with employers.⁴⁸ Until the Court’s decision in *Janus*, most unions representing public sector workers were agency shops funded by a mix of both union-member dues and nonmember agency fees.⁴⁹

2. *Drawing the Line: Germane to Collective Bargaining*

Because unions speak on behalf of employees, agency fees that fund unions trigger potential free speech concerns. Spending money to express an idea is a form of protected speech recognized by the Court in the contexts of campaign spending⁵⁰ and compelled commercial speech.⁵¹ Because spending money can be expressive, requiring an individual to pay a fee can unlawfully

⁴⁵ N. PETER LAREAU, 2 LABOR AND EMPLOYMENT LAW § 25.08 (Matthew Bender & Co., Inc. rev. ed. 2018).

⁴⁶ DAU-SCHMIDT ET AL., *supra* note 38, at 892–94.

⁴⁷ *Id.* at 868. These agency fee provisions now all appear to be unconstitutional under *Janus*. See 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> [<https://perma.cc/HS4N-HQ4U>] (predicting the *Janus* decision will affect public sector unions nationally).

⁴⁸ DAU-SCHMIDT ET AL., *supra* note 38, at 867. The issue of “union security,” the question of whether a union must be the exclusive bargaining representative in order to operate, has been subject to much debate. See *id.* at 867–68. Professor Mancur Olson argued that, without compelled membership, no “rational worker . . . [would] voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union.” MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 88 (1971). On the other hand, others argue that the unions representing federal employees demonstrate that it is possible for unions to survive without agency fees. Compare *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2466 (2018) (concluding that federal employee unions show that agency fees are unnecessary for labor union survival), with Brief of Amici Curiae Economists and Professors of Law and Economics in Support of Respondents at 21–25, *Janus*, 138 S. Ct. 2448 (No. 16-1466) (arguing that agency fees are necessary for unions to operate effectively).

⁴⁹ See LAREAU, *supra* note 45, § 25.08.

⁵⁰ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (holding that expenditure limits on political candidates unconstitutionally restricted their speech).

⁵¹ *United States v. United Foods, Inc.*, 533 U.S. 405, 415–16 (2001) (holding unconstitutional a regulation that compelled producers to fund advertisements promoting the sale of mushrooms).

compel speech.⁵² Compelled speech can violate the First Amendment as surely as can a restraint on speech;⁵³ for example, a school may not require a student to salute a flag or to say the Pledge of Allegiance.⁵⁴ Thus, the Court's jurisprudence has established that public sector agency fees raise constitutional concerns.

In 1977, the Court first considered the constitutionality of agency fees for public sector employees. In *Abood v. Detroit Board of Education*, teachers challenged the state statute authorizing mandatory agency fees for employees who did not join the union.⁵⁵ The plaintiffs argued that requiring them to pay agency fees violated their First Amendment rights.⁵⁶ The plaintiffs objected not only to paying for both political and ideological activities to which they were opposed (including legislative lobbying and the support of political candidates) but also to paying for the act of collective bargaining itself.⁵⁷ As in *Pickering*, the Court recognized that, when the government acts as an employer, its interests in dealing with its workforce are weightier than when it regulates its citizens.⁵⁸ The Court held that the government has strong interests in the efficiency and simplicity of dealing with one exclusive representative, and in avoiding confusion and strife resulting from dealing with rival unions and multiple collective bargaining agreements.⁵⁹ It acknowledged that the teachers paying agency fees had First Amendment interests as well but dismissed them as being no weightier than those of their private sector counterparts, whose compelled agency fees it had already blessed in *Railway Employees' Department v. Hanson*.⁶⁰

The Court ultimately upheld the constitutionality of agency fees by distinguishing between expenses germane to collective bargaining and those

⁵² See *id.* at 411 (observing that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors").

⁵³ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."):

⁵⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (observing that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

⁵⁵ 431 U.S. 209, 209 (1977).

⁵⁶ *Id.* at 213. The objecting teachers alleged that the union was engaged in "activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice." *Id.*

⁵⁷ *Id.* at 212–13.

⁵⁸ See *id.* at 228–30.

⁵⁹ *Id.* at 220–21. The Court also observed that exclusive representation "prevents inter-union rivalries from creating dissension within the work force." *Id.*

⁶⁰ *Id.* at 229–30.

for unrelated political lobbying, speech on behalf of political candidates, or advancement of unrelated ideological causes.⁶¹ So long as the charges were for the costs of actually representing the fee-payer, agency fees did not violate the fee-payer's rights. The line drawn between activities germane to collective bargaining and political lobbying did not depend on the distinction between what is political and what is not, however. Quite the opposite: the Court acknowledged that unions engage in activities with political implications.⁶² It clarified that the "critical constitutional inquiry" was not whether the activities were "political."⁶³ The Court acknowledged that employees might view "the cause of unionism" itself as a political matter but found it significant that the collective bargaining agreement did not compel the employees to join the union, espouse its cause, or participate in any way.⁶⁴ Thus, the Court squarely considered and rejected the plaintiffs' key argument that public sector agency fees violate the First Amendment because collective bargaining is inherently political.⁶⁵

Subsequent litigation refined what expenses should be considered germane to collective bargaining. Beginning with *Chicago Teachers Union v. Hudson*, decided nine years after *Abood*, the Court held that unions must provide adequate information and procedural safeguards to agency fee payers to minimize the risk of infringing on free speech rights.⁶⁶ Unions complied by providing annual "*Hudson* notices" with itemized lists of expenses charged to fee-payers.⁶⁷ The *Hudson* Court also held that agency fees could only be used for payments to state and national union affiliates if the activities benefited the nonmembers.⁶⁸ The Court extended this holding in the 1991 case of *Lehnert v. Ferris Faculty Ass'n*, when it decided that unions could charge agency fee payers for activities that did not directly benefit the bargaining unit, but "[t]here must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union."⁶⁹ According to the Court, it would cross the

⁶¹ *Id.* at 235–36.

⁶² *Id.* at 231 (observing that "[t]here can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities—and the views of members who disagree with them—may be properly termed political").

⁶³ *Id.* at 232.

⁶⁴ *Id.* at 212.

⁶⁵ *Id.* at 227–29.

⁶⁶ 475 U.S. 292, 309 (1986).

⁶⁷ LAREAU, *supra* note 45, § 25.08.

⁶⁸ *Hudson*, 475 U.S. at 309.

⁶⁹ *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991) (holding that while the union "need not demonstrate a direct and tangible impact upon the dissenting employee's unit," the local union does not have "*carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit").

line to “charge objecting employees for a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally.”⁷⁰ Nor could the union charge nonmembers for its own public relations expenses or promoting workers’ rights generally.⁷¹

Until *Janus*, the law appeared fairly settled as to which expenses were chargeable for agency fees.⁷² Unions were permitted to charge for costs associated with (1) negotiating and administering the collective bargaining agreement, including processing grievances, (2) the union’s national convention, (3) the union’s social activities, (4) certain litigation expenses, and (5) union publications, so long as they reported on other chargeable activities.⁷³ In the last ten years, however, new plaintiffs called into question the underlying holding in *Abood*.

3. *An Invitation to Challenge Agency Fees*

Nearly four decades of agency fees jurisprudence had focused union critics’ battle on narrow questions of chargeability, notice, accounting, timing, and procedures for objecting.⁷⁴ Then, in a pair of cases, Justice Samuel Alito laid the foundation for reassessing *Abood*’s distinction between collective bargaining and political lobbying. The Court first suggested it was open to reconsidering its precedent in *Knox v. Service Employees International Union*.⁷⁵ In that case, the union had levied a temporary fee increase in order to oppose a ballot initiative in California that would have made it more difficult for unions to charge fees for political purposes.⁷⁶ The Court held that even a temporary fee increase that is subsequently refunded violated agency fee payers’ rights.⁷⁷ Justice Alito, who wrote for the majority, did not stop there. In dicta, he questioned whether collective bargaining was distinguishable from political lobbying for First Amendment

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² As Justice Elena Kagan observed in her dissent in *Janus*, only a handful of cases on chargeability reached the Court after *Abood*. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2498 (2018) (Kagan, J., dissenting); see also Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 861 (1989) (arguing that the chargeability test was not consistent with the narrow tailoring required of an infringement on a fundamental constitutional right).

⁷³ See Malin, *supra* note 72, at 861–62; see also Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1038 (2013) (explaining how to apply the three-part chargeability test).

⁷⁴ See Malin, *supra* note 72, at 861–63.

⁷⁵ 567 U.S. 298 (2012).

⁷⁶ *Id.* at 304–05. The ballot proposition would have required affirmative consent from employees before unions could charge fees for political purposes. *Id.* at 303–04. The fee increase was also used to attempt to elect a sympathetic governor and legislature. The union failed to provide an opportunity for employees to opt out of the fees, although they did offer a full refund. *Id.* at 305.

⁷⁷ *Id.* at 321.

purposes.⁷⁸ He pointedly observed that “a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences” and characterized agency fees as “a form of compelled speech and association that imposes a ‘significant impingement on First Amendment rights.’”⁷⁹ Although the Court did not officially revisit *Abood*, observers saw *Knox* as a signal that the Court was ready to reconsider its precedent.⁸⁰

Two years later, in *Harris v. Quinn*, the Court declined to extend *Abood* to allow mandatory fees in an unusual quasi-public union of home care workers.⁸¹ Writing again for the majority, Justice Alito opined that *Abood* had ignored the difficulty of distinguishing between collective bargaining and political lobbying.⁸² As he saw it, “in the public sector, both collective-bargaining and political advocacy and lobbying are directed at the government.”⁸³ According to Justice Alito, *Abood* failed to understand that, “[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.”⁸⁴ He thus characterized the proper agency fees inquiry as asking not whether the expense is germane to collective bargaining but rather whether the activity has *political* implications. Although the Court held the agency fee arrangement unconstitutional, it reserved the question of *Abood*’s constitutionality for another case.⁸⁵

4. *Redrawing the Contours of Workplace Speech*

A new wave of plaintiffs accepted the invitation Justice Alito extended in *Knox* and *Harris*.⁸⁶ In 2015, the Court granted certiorari in *Friedrichs v. California Teachers Ass’n* to directly reconsider the *Abood* precedent on the

⁷⁸ *See id.* at 321–22.

⁷⁹ *Id.* at 310–11 (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 455 (1984)); *see Fisk & Chemerinsky*, *supra* note 73, at 1070 (observing that the majority opinion in *Knox* “casts doubt on the location of the line between chargeable germane expenses and nonchargeable political expenses”).

⁸⁰ *See, e.g., Fisk & Chemerinsky*, *supra* note 73, at 1067 (observing that “the Court’s language and reasoning call[ed] into question the very existence of collective bargaining based on principles of exclusivity and majority rule”).

⁸¹ *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014).

⁸² *See id.* at 2632–34. Justice Alito’s lengthy dicta is particularly notable because the Court also expressly determined that *Abood* did not control the outcome of the case. *See id.* at 2639.

⁸³ *Id.* at 2632–33.

⁸⁴ *Id.* at 2632.

⁸⁵ *Id.* at 2644. The case involved an unusual union of “quasi-public” home healthcare workers hired by private clients but statutorily deemed employees for purposes of union membership only. *Id.* at 2634–35. The Court characterized its holding as a decision not to extend *Abood*. *See id.* at 2644.

⁸⁶ *See, e.g., Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 446 (2017); Complaint at 4, *Yohn v. Cal. Teachers Ass’n*, No. 8:17-cv-00202 (C.D. Cal. Feb. 6, 2017).

constitutionality of agency fees.⁸⁷ The Court deadlocked 4–4 after Justice Antonin Scalia’s death; thus, the lower court decision upholding *Abood* remained in place. Two years later, the Court granted certiorari on the same question in *Janus*.⁸⁸ The question in the case was whether to overrule *Abood* and declare public sector agency fees unconstitutional.⁸⁹

In *Janus*, the Court determined that agency fees are a far more egregious impingement on the First Amendment than the *Abood* Court had previously recognized.⁹⁰ Once again writing for the Court, Justice Alito explained that compelled speech is an even greater injury to free speech than a mere restraint on speech.⁹¹ He next undertook a wholesale reconsideration of the government interest in labor peace and the prevention of free riders.⁹² Contrary to the holding in *Abood*, Justice Alito concluded that agency fees are not essential to prevent employees from accepting the benefits of union representation without paying for it, and that agency fee funding is not necessary to ensure that unions can function as an exclusive representative of all employees.⁹³ According to the Court, it would not cost significantly more to represent non-paying employees in collective bargaining and grievances, and the benefit unions would derive outweighs the burden.⁹⁴ The Court applied the standard it announced in *Knox*, exacting scrutiny, to decide whether the government interest in agency fees is sufficient to justify the impingement on speech.⁹⁵ The Court found that the government employer lacks the requisite compelling interest in the fees because—as a factual matter—agency fees are not necessary to preserve labor peace.⁹⁶ Thus, agency fees cannot survive exacting scrutiny in the public sector.

Justice Alito further explained that *Abood* was not only wrong about the government interest in agency fees but was also incorrect about the nature of union speech. In his discussion of why stare decisis did not counsel against overruling *Abood*, Justice Alito explained that the line *Abood* attempted to draw between speech germane to collective bargaining and political

⁸⁷ *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016).

⁸⁸ Petition for Writ of Certiorari at (i), *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (No. 16-1466); Brief for Petitioner at 11, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

⁸⁹ *Supra* note 88.

⁹⁰ *Janus*, 138 S. Ct. at 2464–65 (2018).

⁹¹ *Id.* at 2464.

⁹² *Id.* at 2465–69.

⁹³ *Id.* at 2466–68. Justice Kagan sharply contested the Court’s conclusions here in dissent. *Id.* at 2489–91 (Kagan, J., dissenting).

⁹⁴ *Id.* at 2467–69 (majority opinion).

⁹⁵ *Id.* at 2464–66, 2469.

⁹⁶ *Id.* at 2465–66.

lobbying was fraught with conceptual difficulty.⁹⁷ As he explained, *Abood* was logically flawed because, in the context of public sector collective bargaining, wages, pensions, and benefits are “important political issues.”⁹⁸ Thus, the Court concluded that all union speech that is compelled through agency fees is on matters of public concern.⁹⁹

But Justice Alito did not end his analysis there. He continued on to evaluate whether agency fees could be alternatively upheld under public employee speech doctrine’s *Pickering* framework. Although he initially dismissed *Pickering* as a “poor fit,” he went on to conduct a formal public employee speech doctrine analysis, concluding that agency fees still would not be upheld because they speak to government expenditures and other matters of public concern.¹⁰⁰ First, he evaluated whether collective bargaining speaks on a matter of public concern.¹⁰¹ Justice Alito observed that the state of Illinois was in a budget crisis and that its expenditures on public employees and retirees were a large portion of its spending.¹⁰² As a result, the question of whether to reduce spending drove collective bargaining positions on both sides.¹⁰³ Thus, speech about state expenditures was a matter of public concern.¹⁰⁴

Second, Justice Alito considered whether union speech on noneconomic issues could also be of public concern. He observed that other topics are discussed in collective bargaining, such as “education, child welfare, healthcare, and minority rights.”¹⁰⁵ For example, he noted that, when educators are engaged in collective bargaining, the terms of employment also affect education policy, including seniority, merit pay, tenure, evaluation, and dismissal.¹⁰⁶ Justice Alito suggested that even grievances, in which

⁹⁷ *Id.* at 2480. One factor the Court considers in determining whether to overrule a prior case is the workability of the rule it had previously established. *Id.* at 2481–82.

⁹⁸ *Id.* at 2480–81.

⁹⁹ *Id.*; see also *id.* at 2460 (“We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”).

¹⁰⁰ *Id.* at 2472–77. Justice Alito initially argued that *Pickering* requires “shoehorn[ing]” a test intended for cases involving one employee and single supervisory decisions. *Id.* at 2472–73. Because a public sector union may represent thousands of employees, its demands are more likely to implicate matters of public concern. *Id.* Further, because union speech is mouthed by a private party, as opposed to the employee in the course of official duties, *Pickering*’s interest-balancing step would require an adjustment to ensure greater protection. *Id.* at 2473.

¹⁰¹ *Id.* at 2474. Here, he expanded on the seeds planted in *Harris*, where the Court had noted that Illinois’s state expenditures, particularly on employee benefits, are “a matter of great public concern.” *Id.* (quoting *Harris v. Quinn*, 134 S. Ct. 2618, 2642–43 (2014)).

¹⁰² *Id.* at 2474–75.

¹⁰³ *Id.* at 2475.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2475–76.

¹⁰⁶ *Id.*

unions enforce the legally binding, agreed-upon terms of an employment contract, “may be of substantial public importance and may be directed at the public square.”¹⁰⁷ While he left open the possibility that some union speech might be of only private interest, Justice Alito noted that on balance “the union speech at issue in this case is overwhelmingly of substantial public concern.”¹⁰⁸

When the Court delivered its answer as to the constitutionality of agency fees, it did not address the doctrinal repercussions on public employee speech more generally. Part II considers these repercussions and argues that, because the Court based its reasoning on the holding that unions and collective bargaining speak on matters of public concern, *Janus* will blur the previously stable lines in its sister doctrine.

II. THE INTERTWINED NATURE OF AGENCY FEES AND PUBLIC EMPLOYEE SPEECH

Two key holdings in *Janus* have implications for public employee speech doctrine. First, the Court’s declarations on matters of public concern will reverberate in public employee speech doctrine because the decision offered a new reading of *Pickering*, the core public employee speech case. Second, the Court’s reasoning as to why *Abood* was wrongly decided has repercussions for both agency fees and public employee speech because the two doctrines are interdependent. Thus, even if the Court had not offered a fresh interpretation of *Pickering*, its pronouncements about the inherently political nature of union speech in *Janus* and its other two recent agency fees decisions would disrupt public employee speech doctrine.

In this Part, Section II.A details how the *Janus* decision has redefined what constitutes a matter of public concern for public employees. Section II.B demonstrates that public employee speech doctrine and agency fees jurisprudence are not only parallel but also interdependent. Section II.C evaluates whether the holding in *Janus* can be confined to agency fees. It concludes that the Court has failed to provide a limiting principle to confine the *Janus* decision to agency fees speech, and therefore, the *Janus* decision will shift how to analyze workplace speech in the public sector.

¹⁰⁷ *Id.* at 2476–77 (internal quotation marks omitted). He cited an example of a union lawsuit to compel appropriations to pay for public employee wages, although he did not make clear whether it was the impact on expenditures or the public’s likely interest in the issue that made it of public concern. *Id.*

¹⁰⁸ *Id.* at 2477.

A. Redefining Matters of Public Concern

The Court in *Janus* offered a new reading of *Pickering* that expansively redefines matters of public concern. Writing for the majority, Justice Alito explained that, through collective bargaining and contract enforcement, public sector unions take positions on employee pay, benefits, evaluation, dismissal, grievances, and a variety of other workplace matters.¹⁰⁹ Justice Alito contended that these topics implicate fundamental policy decisions and questions of how to allocate government expenditures, issues the Court in *Harris* had already determined are of “great public concern.”¹¹⁰ He further explained that unions also express views in collective bargaining on important subjects like education policy, child welfare, and healthcare.¹¹¹ Taken as a whole, the Court predicted that if the *Pickering* public employee speech test were applied to union speech, it would “overwhelmingly” be of public concern.¹¹²

The Court’s new interpretation of *Pickering* thus eliminates a categorical presumption that “workplace speech” is outside the bounds of First Amendment protection. Beginning with *Connick*, cases interpreting *Pickering* had previously understood certain types of speech as categorically of only private interest.¹¹³ In some employee speech cases, individuals are disciplined for speech that is neither of public concern nor directed at the workplace. For example, the Court held that a police officer who produced sexually explicit videos off the job was neither speaking about his working conditions nor expressing a view on a topic of importance to the community.¹¹⁴ However, another significant subset of public employee expression has been “workplace speech,” matters that are focused on the employer–employee relationship or more generally on the internal operations of a government office.¹¹⁵ When employees have complained about internal office policy, criticized a supervisor, or raised other workplace grievances, they have been consistently denied protection because their

¹⁰⁹ See *supra* Section I.C.

¹¹⁰ See *supra* Section I.C.

¹¹¹ See *supra* Section I.C.

¹¹² See *supra* Section I.C.

¹¹³ See *supra* Section I.B.

¹¹⁴ *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (holding that a police officer did not speak on a matter of public concern when he made sexually explicit videos while wearing a police uniform).

¹¹⁵ Justice Kagan aptly described such expression as “core workplace speech” in her *Janus* dissent and as “internal workplace speech” in her *Harris* dissent. See *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2493 (2018) (Kagan, J., dissenting); *Harris v. Quinn*, 134 S. Ct. 2618, 2655 (2014) (Kagan, J., dissenting).

expression was employment-related, not of public concern.¹¹⁶ This left a great deal of speech outside the bounds of the First Amendment.¹¹⁷

Until *Janus*, the line had been fairly stable. While scholars have observed that *Pickering* and *Connick* provided little guidance as to the line between workplace speech and a matter of public concern,¹¹⁸ courts reached an equilibrium, routinely classifying most speech about traditional employee–management issues as internal to the workplace and therefore not protected.¹¹⁹ Thus, modern public employee speech doctrine has been organized around the principle that some things employees say are so clearly internal to the workplace that they do not trigger First Amendment protections.

While the *Pickering–Connick* public concern test focused on whether speech is directed at the workplace,¹²⁰ the Court’s new reading of *Pickering* asks instead whether speech is of importance to the public. In so doing, the *Janus* Court set aside the other two factors it had established in *Connick*, the form and the context of the speech, and focused almost exclusively on its content.¹²¹ The Court’s omission was no accident. There is little in either the form or context of collective bargaining and grievances to indicate that they are aimed at the public square—employment contract negotiations and enforcement actions take place behind closed doors. In a sharp rebuke of this divergence, Justice Elena Kagan observed that the inquiry in *Janus* is now “whether the public is, or should be, interested in a government employee’s speech” as opposed to “whether that speech is about and directed to the workplace—as contrasted with the broader public square.”¹²² *Janus* represents a significant shift in how to read *Pickering*: instead of asking whether the speech is about a workplace matter, the Court asks whether the speech is of interest to the public at large.

¹¹⁶ *Janus*, 138 S. Ct. at 2493; *Harris*, 134 S. Ct. at 2655.

¹¹⁷ The Court does not have a single, precise term for the converse of “matters of public concern” in the public employment context. It usually describes speech that does not trigger public concern as “private” or of “personal interest.” See, e.g., *Connick v. Myers*, 461 U.S. 138, 147 (1983). There is potential for confusion from describing speech in a public workplace as “private.”

¹¹⁸ Post, *supra* note 17, at 668 (“Although the ‘public concern’ test rests on a clean and superficially attractive rationale, the Court has offered virtually no analysis to develop its logic.”).

¹¹⁹ See RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 18:10 (rev. ed. 2018). Generally, courts have considered the topics of traditional employee–management relations about hours, duties, overtime pay, evaluation, and conflicts with supervisors outside of public concern.

¹²⁰ See *supra* Section I.B.

¹²¹ See *supra* Section I.C.

¹²² *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2495 (2018) (Kagan, J., dissenting). In contrast, Justice Kagan argued, the *Pickering–Connick* inquiry had “asked whether the speech was truly of the workplace—addressed to it, made in it, and (most of all) about it.” *Id.*

Janus not only broadens this definition but also makes it even less precise. Even before *Janus*, scholars have noted that *Pickering* and *Connick* provided little guidance as to the definition of a matter of public concern, and results have been unpredictable *ex ante*.¹²³ One scholar argues, for example, that the test is subjective and requires courts to make problematic judgments on the social utility of speech.¹²⁴ Now, *Janus* retreats from a long-established line that had excluded internal workplace speech from First Amendment protection. Accordingly, all matters are back on the table for public employees, so long as they are “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”¹²⁵ This makes protected speech in the government workplace closer to the protections that citizens claim in defamation law, which allows essentially any newsworthy expression to receive protection—certainly a broad category in the contemporary media environment.¹²⁶ In the context of defamation law, Professor Robert C. Post contends that, although the public concern test is superficially clean and attractive, the Court has offered virtually no analysis to guide judges how to apply it.¹²⁷ In this area of law, matters of public concern now encompass both topics relevant to democratic decision-making and those that the public actually discusses, like celebrity gossip.¹²⁸ The *Janus* decision has thus moved in the direction of a far more expansive view of matters of public concern in the government workplace.

B. *The Intertwined Nature of Agency Fees and Public Employee Speech*

As this Note argues, agency fees doctrine and public employee speech doctrine are interdependent because they govern precisely the same employees, the same employers, and largely the same topics of speech. Thus,

¹²³ See, e.g., Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1027 (2005); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 58 (2008).

¹²⁴ Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 27–28 (1987) (“[U]nder *Connick* the courts must assess the social utility of employee speech twice—first, in determining whether the speech falls within the amendment, and again in determining whether speech within the amendment can be restricted.”).

¹²⁵ *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (holding that a police officer did not speak on a matter of public concern when he made sexually explicit videos while wearing a police uniform).

¹²⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–81 (1964).

¹²⁷ Post, *supra* note 17, at 668–69 (“Indeed, as matters now stand, the test of ‘public concern’ ‘amounts to little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it.’” (quoting Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 259 (1987))).

¹²⁸ *Id.* at 668–74.

even if Justice Alito had not directly addressed *Pickering*, the core public employee speech case, the Court’s decision to overrule *Abood* would have had repercussions in its sister doctrine. *Janus* merely cements a view the Court expressed in two prior cases that the core topics of union speech are inherently political.

The Court recognizes that “the government as employer indeed has far broader powers than does the government as sovereign.”¹²⁹ These additional powers give a government employer greater latitude in relation to its employees in multiple dimensions of employee relations, including search and seizure, due process, and speech.¹³⁰ This is grounded in the recognition that the Court has “long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operation.’”¹³¹ In the context of public employee speech, the government may operate with wide latitude so long as an employee is not speaking as a citizen on a matter of public concern. What is more, both agency fees doctrine and public employee speech doctrine depended until now on delineating between speech on matters that are internal to the workplace (and thus unprotected) and speech on matters transcending the workplace (and thus protected). Any changes to this line are likely to affect both areas of law—they must cohere or risk creating inconsistencies.

Others recognize the overlap in approach to First Amendment line-drawing between the two doctrines. In Justice Kagan’s view, compelled agency fees are in fact a subset of “the government’s regulation of its workforce.”¹³² In her dissent in *Janus*, she observed that both *Pickering* and *Abood* drew a line of constitutional importance to separate expression related to the government’s managerial interests from those that are not.¹³³ Likewise, in their amicus brief in *Janus*, Professors Charles Fried and Robert C. Post argued that “[p]ublic-sector bargaining regimes involve the same state

¹²⁹ *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 598 (2008) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)).

¹³⁰ *See id.* at 598–600 (describing the Court’s holdings giving public employers latitude vis-à-vis warrant requirements, due process protections from discharge, and regulations of public employee speech).

¹³¹ *Id.* at 598 (alteration in original) (quoting *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961)) (holding that a class-of-one theory of equal protection is not cognizable in the public employment context).

¹³² *Harris v. Quinn*, 134 S. Ct. 2618, 2654 (2014) (Kagan, J., dissenting).

¹³³ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2492–93 (2018) (Kagan, J., dissenting).

managerial prerogatives to which the Court has expressed deference” in its public employee speech jurisprudence.¹³⁴

Because the two jurisprudential areas are so closely related, the Court’s recent pronouncements on the political nature of agency fees will alter how public employee speech doctrine classifies workplace expression. In its trio of agency fees cases in *Knox*, *Harris*, and *Janus*, the Court has repeatedly expressed the view that collective bargaining, or union speech generally, is inherently political and thus implicates the First Amendment. According to the Court, it is difficult to distinguish collective bargaining from political lobbying,¹³⁵ it has “powerful political and civic consequences,”¹³⁶ and it “involves inherently ‘political’ speech.”¹³⁷ Further, public employee “wages, pensions, and benefits,” the topics of collective bargaining, “are important political issues.”¹³⁸ These statements amount to a determination that when public employees speak about the traditional topics of collective bargaining, and when unions speak, this expression is categorically a matter of public concern. Unlike speech of merely private concern, these topics now trigger the potential for First Amendment protection.

C. *In Search of a Limiting Principle*

Janus fails to provide a limiting principle that would confine a newly expansive definition of matters of public concern from altering public employee speech doctrine. While Justice Alito explained why he believed *Pickering* does not apply to *Janus*,¹³⁹ he did not address the converse: Why would *Janus* not affect *Pickering*? Indeed, Justice Alito acknowledged that, under the right facts, employees who are reprimanded for agitating on

¹³⁴ Brief for Amici Curiae Charles Fried & Robert C. Post in Support of Neither Party, *supra* note 14, at 7.

¹³⁵ See *Harris*, 134 S. Ct. at 2632–34; *Knox v. SEIU, Local 1000*, 567 U.S. 298, 321 (2012).

¹³⁶ *Knox*, 567 U.S. at 310.

¹³⁷ *Janus*, 138 S. Ct. at 2480 (quoting *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 226 (1977)). The Court considered and rejected some of these arguments in *Abood* in 1977. Justice Powell, concurring in the judgment in *Abood*, failed to persuade the Court that “no principled distinction” existed between a public sector union and a political candidate or committee. *Abood*, 431 U.S. at 256 (Powell, J., concurring in the judgment). The majority in *Abood* observed that collective bargaining “may be properly termed political” because it constitutes an “attempt to influence governmental policymaking.” *Id.* at 231. Thus, the latitude the Court provided to accommodate the government interest in labor peace in *Abood* was no accident.

¹³⁸ *Janus*, 138 S. Ct. at 2480 (quoting *Harris*, 134 S. Ct. at 2632).

¹³⁹ *Id.* at 2472–74, 2477 n.23. The Court was well aware that many insist that the *Pickering* public employee speech framework, with its matter of public concern test, should apply to agency fees, or that the frameworks should at least cohere. The State of Illinois made this argument in *Harris*. 134 S. Ct. at 2641. Justice Kagan argued for it in her dissents in *Harris*, 134 S. Ct. at 2653–56 (Kagan, J., dissenting), and *Janus*, 138 S. Ct. at 2492–97 (Kagan, J., dissenting). Numerous briefs in *Friedrichs* and *Janus* discussed the issue. See *Janus*, 138 S. Ct. at 2469–71 (majority opinion).

workplace topics like merit pay or health benefits could have a First Amendment case.¹⁴⁰

Nonetheless, there might be sound reasons why public employee speech doctrine need not shift, despite the Court's declarations about the public concern test. First, it might be significant that agency fees affect public expenditures. Second, it could be important that agency fees aggregate speech through a labor union and thus make it more powerful than the same message from an individual speaker. As discussed below, however, neither of these features is exclusive to agency fees, and consequently, *Janus* cannot avoid generating serious problems for a government employer supervising its workforce.

First, agency fees could be special because they affect public expenditures. According to the Court, public sector unions helped achieve generous retirement packages, contributing to the State of Illinois's "\$160 billion in unfunded pension and retiree healthcare liabilities."¹⁴¹ For this reason, the Court declared that these expenditures are "matters . . . of great public concern."¹⁴² No threshold has been identified below which a public expenditure would be too small to satisfy the public concern test.¹⁴³ After all, *Janus* declared agency fees for collective bargaining are unconstitutional even for the tiniest of unions. In such a context, the dollar amounts are likely to be quite small, implying that the price tag of a proposal does not have constitutional significance. It also is unclear whether expenditures need have any policy implications beyond an impact on public finances before they trigger public concern.¹⁴⁴ Agency fees sometimes speak to very small public expenditures or ones that do not clearly implicate any policy consequences beyond government spending. Government workers, particularly if they are speaking as a group of two or more, could demonstrate that their expression takes positions with similar implications for public expenditures. Just as

¹⁴⁰ *Janus*, 138 S. Ct. at 2477 n.23.

¹⁴¹ *Id.* at 2474–75.

¹⁴² *Id.* at 2475.

¹⁴³ As Justice Kagan said in *Harris*, "[N]owhere has the Court ever suggested, as the majority does today, . . . that if a certain dollar amount is at stake (but how much, exactly?), the constitutional treatment of an employee's expression becomes any different." 134 S. Ct. at 2655 (Kagan, J., dissenting).

¹⁴⁴ Consider, for example, a hypothetical posed at oral argument in *Friedrichs* as to whether a mileage reimbursement policy negotiated in collective bargaining would satisfy the public concern test. Counsel for *Friedrichs* suggested that mileage reimbursement is a topic of public bargaining that does not present a policy question, presumably because it is so obviously uncontroversial or unimportant. Yet at least some Justices appeared to think even such a topic would be a matter of public concern. Chief Justice John Roberts insisted, "That's money. That's how much money is going to have to be paid to the teachers. . . . And the amount of money that's going to be allocated to public education as opposed to public housing, welfare benefits, that's always a public policy issue." See Transcript of Oral Argument at 46–47, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (No. 14-915).

unions discuss wages, benefits, and workplace matters with policy implications, so too can public employees outside of a union context. Thus, agency fees do not uniquely implicate public expenditures.

Nor should speech satisfy the public concern test solely on the basis that it implicates public expenditures. A few pennies or dollars should not by itself turn workplace speech into matters of public concern. Indeed, in *Borough of Duryea v. Guarnieri*, another First Amendment case, the Court held there was no matter of public concern implicated when a police chief demanded \$338 in overtime pay and criticized the operations of the borough council.¹⁴⁵ It seems a stretch to argue that such mileage reimbursement would categorically meet the Court's requirement, especially if the policy extended to a small number of employees or required only minimal expenditures.¹⁴⁶

Second, it might be significant that the speech is either aggregated or that it affects a large number of employees.¹⁴⁷ Agency fees are aggregated with union dues across an entire bargaining unit and combined with member dues to fund a union. Together, this could magnify the effect of the speech, whether it is about government expenditures or public policy issues. Although an agency fee payer might only contribute a few hundred dollars per year, the effect of the speech may be amplified beyond the nominal amount. For example, in *Harris*, the Court asserted that when a "powerful union" speaks on topics affecting public expenditures like Medicaid funding, such speech is different than cases like *Connick* where the expression was a "matter[] of only private concern" and dealt with "one employee's dissatisfaction."¹⁴⁸ As the Court noted in *Janus*, unions may have thousands of members, and thus, a demand for a 5% raise for many thousands of employees could have a serious impact on the state budget.¹⁴⁹

Aggregation, however, is not a workable line because then the relative size or strength of the union would have constitutional implications. Some bargaining units for large urban school districts have tens of thousands of

¹⁴⁵ 564 U.S. 379, 384, 398–99 (2011) (suggesting the police chief's demand was a "purely private concern" and remanding to the district court for findings).

¹⁴⁶ *City of San Diego v. Roe*, 543 U.S. 77, 83–85 (2004) (holding that a police officer did not speak on a matter of public concern when he made sexually explicit videos while wearing a police uniform).

¹⁴⁷ At oral argument in *Friedrichs*, Justice Kennedy suggested that the crucial difference from *Pickering* is that agency fees compel a *group* of people to speak, as opposed to restricting *individual* employee speech. Transcript of Oral Argument, *supra* note 144, at 56. Justice Kennedy contended, "[I]f you use *Pickering* in this case, you're committing error of composition. You're comparing a whole group of persons who have their views coerced or compelled against one person that . . . *Pickering* is just inapplicable on that . . . ground." *Id.*

¹⁴⁸ *Harris*, 134 S. Ct. at 2643.

¹⁴⁹ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2472 (2018).

members,¹⁵⁰ but state and federal statutes allow unions to form even in a tiny public workplace. For example, the Illinois Public Labor Relations Act allows just five employees to form a bargaining unit.¹⁵¹ Adjustments in wages and benefits for such a small group of workers seem unlikely to have a significant effect on the state, yet for First Amendment purposes, the fees spent to fund small unions are treated no differently than those funding a large union. The *Janus* decision does not prohibit agency fees for only large or influential unions. Furthermore, two or more public employees speaking as a group could demonstrate that their expression, like union speech, is just as aggregated and significant as that of a small bargaining unit.

A third and final feature of agency fees that could make it distinguishable from other forms of speech is that it is compelled speech. One of the *Janus* Court's central criticisms of *Abood* is that it failed to understand that, when agency fees compel speech, the effect is a greater impingement than restricted speech.¹⁵² However, this is a difference of degree, not kind. The distinction can explain the proper level of scrutiny (exacting) and the required weight of the government interest (compelling).¹⁵³ This difference would not make it easier to satisfy the threshold question of whether the expression was on a matter of public concern.¹⁵⁴

What now is left to protect the managerial interests of a government employer? First, public employee speech doctrine still appears to categorically exclude speech in furtherance of official duties from First Amendment protection.¹⁵⁵ Second, even if more speech can clear *Pickering*'s public concern test, the framework continues to protect managerial interests at its second step. One scholar observes that the *Pickering* test provides the

¹⁵⁰ For example, the Chicago Teachers Union represents nearly 25,000 members. *About Us*, CHICAGO TEACHERS UNION, <https://www.ctunet.com/about> [<https://perma.cc/4VAM-N7NL>].

¹⁵¹ Illinois Public Labor Relations Act, 5 ILL. COMP. STAT. 315 (2005). The statute reduced the minimum number of employees in a bargaining unit from thirty-five to five. *Id.*

¹⁵² *Janus*, 138 S. Ct. at 2473–74.

¹⁵³ *See id.* at 2464–65. The level of scrutiny for agency fees is somewhere between exacting and strict, and the government must show a compelling interest. *Id.* at 2477 (“The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech.”). *Janus* reserved the question of what level of scrutiny applies to agency fees. *Id.* at 2464–65.

¹⁵⁴ Similarly, in defamation law, the burden for proving libel is heightened when the plaintiff is a public figure, but the definition of matters of public concern remains the same. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (imposing an actual malice standard for libel of public officials).

¹⁵⁵ *See Janus*, 138 S. Ct. at 2474 (describing *Garcetti* as relevant when employees are “paid to write or speak for the purpose of furthering the interests of their employers”); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

government significant latitude at the second step.¹⁵⁶ She has argued for discarding the public concern test entirely on the grounds that the test is subjective and requires courts to make problematic judgments on the social utility of speech.¹⁵⁷ Even before *Janus*, the results of the public concern test have been unpredictable *ex ante*.¹⁵⁸ Unfortunately for the government employer, if they must rely on *Pickering*'s interest-balancing step to regulate speech, the results are likely to be even less predictable because balancing an employee's interest in her speech against the employer's interest in restricting it is a highly fact-intensive inquiry.¹⁵⁹ Thus, post-*Janus* employee speech claims are more likely to proceed further in litigation.¹⁶⁰

The Court itself has recognized a need for consistency within First Amendment doctrine. The majority in *Knox* expressed concern as to whether agency fees received anomalous treatment.¹⁶¹ The Court's insistence on greater uniformity in First Amendment jurisprudence demands a principled reason for limiting the inevitable impact of *Janus* on public employee speech doctrine. Although the Court has suggested that collective bargaining's impact on the public fisc or the powerful voice of a public union make agency fees different than other public employee speech, these distinctions provide neither a workable nor satisfying rationale for treating these two types of expression differently. Thus, it will not be possible to cabin *Janus*'s holdings to agency fees jurisprudence. As the Court recognized in *Connick*, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."¹⁶² The *Janus* decision has sown these seeds. In the next Part, this Note explores the doctrinal consequences of *Janus*, including

¹⁵⁶ See Massaro, *supra* note 124, at 28 ("[U]nder *Connick* the courts must assess the social utility of employee speech twice—first, in determining whether the speech falls within the amendment, and again in determining whether speech within the amendment can be restricted.").

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., Kozel, *supra* note 123; Rosenthal, *supra* note 123.

¹⁵⁹ See SMOLLA, *supra* note 119, § 18:26 (observing that currently courts often resolve employee speech claims as a matter of law at step one of *Pickering*).

¹⁶⁰ Fact-intensive claims are more likely to survive motions for summary judgment. See 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2712 (4th ed. 2018) (explaining that one purpose of the federal summary judgment rule is to preserve resources for cases with genuine factual disputes); see also Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) (arguing that shifts heightening the summary judgment standard have contributed to the reduction in the number of cases that go to trial).

¹⁶¹ *Knox v. SEIU, Local 1000* 567 U.S. 298, 311 (2012) ("Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering 'labor peace.' But it is an anomaly nevertheless." (citation omitted)).

¹⁶² *Connick v. Myers*, 461 U.S. 138, 149 (1982).

its pronouncements that matters involving unions, public expenditures, and public policy are inherently of concern to the public.

III. IMPLICATIONS FOR PUBLIC EMPLOYEE SPEECH DOCTRINE

This Note argues that the Court’s decision in *Janus* is likely to destabilize public employee speech doctrine. What had once been presumed internal disputes could become constitutional issues. This Part considers the implications that follow from this doctrinal shift in the definition of matters of public concern in a government workplace. A few scenarios emerge that would reach different results under *Janus*. The Court’s new reading of *Pickering*’s public concern test and its declaration that union speech is inherently political would allow three kinds of speech to more easily clear the first step of *Pickering*.¹⁶³ Public employees would have a strong basis for claiming protection for (1) speech on union-related topics, (2) speech as a union official, and (3) speech about workplace matters that could trigger public interest. Thus, the long-established line between public and workplace matters could erode, providing a new basis for public employees to claim constitutional protections for workplace speech.

A. Union-Related Speech

Courts have only rarely declared that certain topics are inherently matters of public concern—for example, public voting or reports of official misconduct.¹⁶⁴ For union-related speech, courts prior to *Janus* applied the multifactor *Connick* test, examining the content, form, and context of the speech.¹⁶⁵ While some circuits held that public employee speech about unions usually qualifies for free speech protections,¹⁶⁶ others conducted a more searching, fact-specific analysis.¹⁶⁷ Multiple courts declared that not all

¹⁶³ See *supra* Section I.B.

¹⁶⁴ See, e.g., *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008) (explaining the court’s cautious approach to deeming specific topics as inherently matters of public concern).

¹⁶⁵ See *SMOLLA*, *supra* note 119, § 18:12.50 (“There is no clear, clean answer, and courts have reached different results, depending on the context and content of the particular union-related speech.”); 5 EMPLOYMENT COORDINATOR § 1:19 (2018) (“There is no per se rule regarding whether union-related speech by a public employee is protected by the First Amendment; it may or may not address a matter of public concern.”).

¹⁶⁶ See, e.g., *Clue v. Johnson*, 179 F.3d 57, 61 (2d Cir. 1999) (noting that union activities that “necessarily entail a substantial criticism of management raise matters of public concern”).

¹⁶⁷ *Thomas v. Del. State Univ.*, 626 F. App’x 384, 388–89 (3d Cir. 2015) (“While it is true that union activities may sometimes touch on a matter of public concern, it is not the case that all union-related grievances do” (citation omitted)); *Torres v. Pueblo Bd. of Cty. Comm’rs*, No. 98-1412, 2000 WL 1346347, at *4 (10th Cir. Sept. 19, 2000) (stating the court is “unwilling to hold that an employee’s speech or activity touches on a matter of public concern merely because it is union-related”).

union-related speech is a matter of public concern.¹⁶⁸ For example, courts have held that employees at a jail had no right to post a memorandum urging their coworkers to invoke their rights to union representation in the midst of an investigation into prescription drug trafficking¹⁶⁹ and that a state prison psychologist's speech in his capacity as union representative was merely an employee grievance and not a matter of public concern.¹⁷⁰ However, because the *Janus* Court declared that union activity is inherently a matter of public concern, many of these union activity retaliation cases could turn out differently, with employee speech about union representation and collective bargaining agreements falling on the other side of the line.¹⁷¹

B. *Speaking as a Union Official*

The *Janus* Court's holding about union-related speech can help public employees satisfy another part of the public employee speech framework: speaking as a citizen. To be successful, an employee must show (1) she was not speaking merely as an employee (under *Connick* and *Pickering*) and (2) she was not speaking pursuant to her official duties (under *Garcetti*).¹⁷² This had not been an easy task in the doctrinal framework that existed prior to *Janus*. The *Janus* decision appears to have changed that. As the *Janus* Court noted, collective bargaining and contract enforcement are not related to an employee's official duties under *Garcetti*.¹⁷³ And the Court declared these activities to be "inherently political speech" of "great public concern."¹⁷⁴

If all speech by a union is inherently of public concern, then employees who also serve as union officials should be able to claim protection. A number of circuits already hold that when individuals speak in a union capacity, they speak as citizens, and not as employees.¹⁷⁵ Other circuits have

¹⁶⁸ See *Davignon*, 524 F.3d at 102 (noting that an individual employee persuading fellow employees to attend a union picket showed both elements of personal grievance and matters of public concern); *Boals v. Gray*, 775 F.2d 686, 693 (6th Cir. 1985) (noting that an employee did not speak on a matter of public concern when he requested a union representative and received an extra two days of suspension in retaliation).

¹⁶⁹ *Gillis v. Miller*, 845 F.3d 677, 687 (6th Cir. 2017).

¹⁷⁰ *Olendzki v. Rossi*, 765 F.3d 742, 749 (7th Cir. 2014).

¹⁷¹ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2480 (2018).

¹⁷² See *supra* Section I.B.

¹⁷³ *Janus*, 138 S. Ct. at 2474 (observing that, "when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer").

¹⁷⁴ See *id.* at 2480, *then id.* at 2475.

¹⁷⁵ See, e.g., *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) ("It is axiomatic that an employee's job responsibilities do not include acting in the capacity of a union member, leader, or official. . . . We therefore hold that speech in connection with union activities is speech 'as a citizen' for the purposes of the First Amendment."); *Hubbard v. Clayton Cty. Sch. Dist.*, 756 F.3d 1264, 1268 (11th Cir. 2014) (holding that a school employee who was "on-loan" to serve as president of educators' association was not acting in furtherance of official duties); *Ellins v. City of Sierra Madre*, 710 F.3d 1049,

been more reluctant. For example, when police officers engaged in ongoing, heated conversations with management to advocate for the department implementation of twelve-hour shifts, the Third Circuit flatly rejected the argument that “union activity is per se protected conduct” for purposes of *Garcetti* analysis.¹⁷⁶ Similarly, an assistant fire chief offering advice to fellow employees about the collective bargaining agreement was excluded from protection because the Eleventh Circuit held that his fellow employees sought him out due to his position as fire chief; thus, his speech was pursuant to his official role under *Garcetti*.¹⁷⁷ Likewise, when a deputy sheriff who served as union vice president approached a superior to raise public safety concerns about mandatory overtime and lack of breaks between shifts, the Seventh Circuit carefully parsed the conversations to determine whether the deputy was speaking in a union capacity or as “a disgruntled employee, not a citizen.”¹⁷⁸

Following *Janus*, the Court has now clarified that union activity is inherently of public concern. Thus, a public employee acting as a union official, or perhaps even as a union member, could satisfy the *Pickering–Connick–Garcetti* requirement of speaking as a citizen.

C. Workplace Speech on Everyday Employment Matters

While the Court in *Janus* declared that union speech is of great public concern because the topics of collective bargaining affect public expenditures and public policy, it provided no guidance as to when other speech affecting public expenditures and policy issues might also be constitutionally important. This has reopened the possibility of affording protection to a whole range of topics for public employees. An employee who objects to being assigned overtime work, criticizes a supervisor’s allocation of resources, or advocates for more compensation might have a constitutional case. For example, at oral argument in *Harris*, Justice Scalia

1060 (9th Cir. 2013) (holding that the inherent conflict of interest between an employer and a union is evidence that acting as a union representative is not speaking in furtherance of official duties); *Nagle v. Village of Calumet Park*, 554 F.3d 1106, 1123 (7th Cir. 2009) (holding that statements made in the context of being the union official were not made pursuant to official duties).

¹⁷⁶ *Killion v. Coffey*, 696 F. App’x. 76, 79 n.4 (3d Cir. 2017); see also *Thomas v. Del. State Univ.*, 626 F. App’x. 384, 388–89 (3d Cir. 2015) (“While it is true that union activities may sometimes touch on a matter of public concern, . . . it is not the case that all union-related grievances do . . . [Plaintiff’s] grievances related to ‘working conditions and other issues in union members’ employment,’ and [Plaintiff] offers nothing that would transform those personnel matters into issues of interest to the broader community.”).

¹⁷⁷ *Moss v. City of Pembroke Pines*, 782 F.3d 613, 619 (11th Cir. 2015).

¹⁷⁸ *Graber v. Clarke*, 763 F.3d 888, 897 (7th Cir. 2014). The court concluded that only where he invoked the collective bargaining agreement in the conversations and did not speak in an insubordinate and hostile manner was he speaking as a citizen. *Id.* at 898.

pressed the petitioner’s counsel as to whether an individual employee who discusses his own wages is speaking on a matter of public concern.¹⁷⁹ Likewise, Justice Kagan argued in *Janus* that, when employees agitate collectively around issues like merit pay or health benefits, they would be able to claim protection under the Court’s new view of public concern.¹⁸⁰ Indeed, Justice Alito acknowledged that, under the right facts, these employees could succeed.¹⁸¹

The Court stopped short of declaring that all union grievances are matters of public concern, but it indicated that some almost certainly are.¹⁸² This could allow some employee grievances to clear both the *Pickering–Connick* requirement of speaking as a citizen and the *Garcetti* limit on speech pursuant to official duties, leading to different results.¹⁸³ For example, when a teacher filed a grievance with the union “to complain about his supervisor’s failure to discipline a child in his classroom,” the Second Circuit held that he was “speaking pursuant to his official duties and thus not as a citizen.”¹⁸⁴ Accordingly, the teacher’s speech was not protected by the First Amendment, and the court did not address whether it was on a “matter of public concern.”¹⁸⁵ If this teacher could show his grievance complained not primarily about an individual decision by a supervisor but instead about the school’s disciplinary policy, then the employee could make a case that he had spoken chiefly about a matter of education policy. Likewise, a teacher facing retaliation for her complaints about outdated textbooks or inadequate resources might make an argument that her expression was centered on the impact on public expenditures or the public policy implications, as opposed to the private impact on her job duties.

Going forward, when courts apply this new reading, i.e., that matters of public concern are topics that are “important,” they will be forced to conclude that workplace speech is back on the table for step one of *Pickering*. So long as employees can demonstrate that such speech is of sufficient importance to the public, they should be able to demand protection for

¹⁷⁹ Transcript of Oral Argument at 7, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681). Posing a hypothetical scenario of an individual police officer complaining to the police commissioner about his wages, Justice Scalia said, “It seems to me it’s always a matter of public concern, whether you’re going to raise the salaries of policemen, whether it’s an individual policeman or . . . a combination of policemen or a union. It’s always a matter of public concern, isn’t it?” *Id.*

¹⁸⁰ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2496 (2018) (Kagan, J., dissenting).

¹⁸¹ *Id.* at 2477 n.23.

¹⁸² *See id.* at 2476–77 (explaining that grievances speak on a public policy issue when their goal is to force the state to allocate funds for contractually agreed-upon raises).

¹⁸³ *See supra* Section I.B.

¹⁸⁴ *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 201 (2d Cir. 2010).

¹⁸⁵ *Id.*

workplace-related speech. If employee speech qualifies as a matter of public concern in one of the three categories above, that is not the end of the matter. Once an employee demonstrates at the first step of *Pickering* that she was speaking on a matter of public concern, she faces a second hurdle—*Pickering*'s balancing test.¹⁸⁶ She must demonstrate that her interest in speaking outweighed the potential harm to her employer.

Without a line demarcating what constitutes a workplace matter, the problem of turning ordinary workplace disputes into constitutional cases reemerges. Public employees both make and implement decisions with implications for public expenditures and public policy. They undoubtedly have opinions on the allocation of public resources within their agency, office, or school. Compensation, merit pay, work duties, evaluation, promotion, and seniority can affect public expenditures and the provision of public services, and sometimes both.¹⁸⁷ Extending the First Amendment to all of these topics would stretch public employee protections to an unmanageable degree. It is also contrary to the Supreme Court's recognition that the government needs wide latitude when acting as an employer, as opposed to a sovereign.¹⁸⁸ As Justice William Brennan acknowledged in his dissent in *Connick v. Myers*, certain forms of employee expression are certainly speech, but they should not be subject to First Amendment protection if uttered by an employee.¹⁸⁹ If an employee is directed to perform a task related to his job, common sense dictates that, in most cases, saying "no" should remain a lawful reason to discipline or fire him.

CONCLUSION

The Court's decision to overrule *Abood* is predicted to dramatically curtail the resources and political strength of public sector unions, thus reducing public employee power and voice.¹⁹⁰ An accompanying shift in the line between workplace speech and matters of public concern, however, offers welcome footing for litigants to claim free speech protections for a wide range of union- and employment-related speech. When employees

¹⁸⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also supra* Section II.C.

¹⁸⁷ *Janus*, 138 S. Ct. at 2474–77.

¹⁸⁸ *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598–600 (2008) (describing the Court's holdings giving public employers latitude vis-à-vis warrant requirements, due process protections from discharge, and regulations of public employee speech).

¹⁸⁹ *Connick v. Myers*, 461 U.S. 138, 165 n.3 (1983) (Brennan, J., dissenting).

¹⁹⁰ *See Liptak, supra* note 47 (predicting that unions will lose millions of dollars in funding and become less effective). *See generally* Maria O'Brien Hylton, Friedrichs *and the Move Toward Private Ordering of Wages and Benefits in the Public Sector*, 23 CONN. INS. L.J. 177 (2016) (describing a devastating overall decline in public union membership and revenue following the end of statutorily authorized agency fees in Wisconsin).

agitate on the conditions of employment, particularly with fellow employees, they now have a stronger First Amendment basis to claim protection from retaliation. This may be cold comfort to those concerned about the vitality and ultimate survival of public unions, but it does point a new and potentially fruitful direction for those who continue to advocate for workers' rights.

For those who care about the efficient delivery of our public services, there is reason to be alarmed. The resulting doctrinal uncertainties threaten to cause significant confusion for government employers attempting to comport with the requirements of the First Amendment. The Court has repeatedly asserted its concern that an “[u]nrestrained application” of the First Amendment in government employment could interfere with the government’s ability to manage its internal operations.¹⁹¹ The scenario that every employment decision could become a constitutional matter seemed far from the realm of possibility so long as a line remained between internal workplace matters and matters of public concern. At least for the near future, this scenario now appears more likely.

¹⁹¹ *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 390–91 (2011).