Updates
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Supreme Court Shoots Down Forced Agency Fees for Public Sector Union Workers

The U.S. Supreme Court this week overruled longstanding precedent to hold that public-sector unions may no longer extract agency fees from nonconsenting employees who have opted not to join a union. *Janus v. AFSCME*, ___ U.S. ___ (2018). In an earlier decision, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), the Supreme Court had ruled that nonmembers could be charged for the portion of union dues attributable to activities that are germane to the union's duties as collective bargaining representatives, but nonmembers could not be required to fund the union's political and ideological projects. These charges are commonly referred to as "agency fees" or "fair share fees." The *Janus* court reversed the U.S. Court of Appeals for the Seventh Circuit and overruled *Abood*, concluding that agency fees violate the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern. The 5-4 decision was authored by Justice Alito, joined by Chief Justice Roberts and Justices Kennedy, Thomas and Gorsuch. Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, filed a dissenting opinion.

Background

Under the Illinois Public Labor Relations Act, employees of state and political subdivisions are permitted to unionize. Employees in a bargaining unit are not obligated to join the union, but the union, selected by a majority of employees in a bargaining unit to be their exclusive bargaining representative, is deemed their sole permitted representative. Employees who decline to join the union are not assessed full union dues but must instead pay what is called an "agency fee," which amounts to a percentage of the full union dues that members pay.

Mark Janus, a state of Illinois employee, refused to join the union because he opposed many of its positions, including those taken during collective bargaining. Janus challenged the constitutionality of the agency fees. The U.S. district court dismissed on the ground that the challenge was foreclosed by the Supreme Court's opinion in *Abood*, and the Seventh Circuit affirmed that dismissal.

Supreme Court Overrules *Abood*

The Supreme Court held that it would not be constrained by *Abood*, a decision deemed "inconsistent with standard First Amendment principles," "poorly reasoned," "lacking workability," and an "outlier among the Court's First Amendment cases."

The *Janus* Court began by considering the well-settled rule that forcing individuals to endorse ideas they find objectionable raises serious First Amendment concerns. This includes compelling an individual to subsidize the speech of other private speakers. Applying the "exacting scrutiny" standard, the Court considered whether the agency fees served a compelling state interest that could not be achieved through means significantly less restrictive of association freedoms.

A prior rationale under *Abood* was that agency fees are necessary to eliminate "free-riders," or those who stand to benefit from union representation but do not pay union dues.

The *Janus* Court found this and other prior rationales for agency fees under *Abood* uncompelling. It pointed to prior decisions that concluded that free-rider arguments were insufficient to overcome First Amendment

objections, and noted that, as is evident in non-agency fee jurisdictions (a/k/a "Right to Work" states), unions are willing to represent nonmembers in the absence of agency fees.

The upshot of *Janus* is that neither agency fees nor any other payment to a union may be deducted from a nonmember's wages unless the employee affirmatively consents to pay.

Impact of *Janus on* Public Sector Employers With Union-Represented Workers

Unions represent about 34 percent of government workers, compared with about 6 percent of private sector employees.

The highly anticipated *Janus* case is seen as one of the broadest threats to organized public labor in decades. The case may force some public-sector unions to cut back on political spending and focus on internal organizing—reaching out to workers they represent in order to get them more involved in the union to encourage membership and the payment of union dues.

The ruling will undoubtedly affect public union finances, and the expected pressure on unions may force new models for employee organizing. Another anticipated action from the decision is that states generally supportive of union organizing may enact legislation limiting how and when employees can withdraw from union membership. And for "Right to Work" states (those with laws that guarantee that no person can be compelled, as a condition of employment, to join or not join, or to pay dues to a labor union) public sector unions will be in the same position as private sector unions.

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