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SCOTUS Deals Huge Blow to Government Unions

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In a 5-to-4 decision, the U.S. Supreme Court ruled that government employees who choose not to join a union cannot be forced to pay agency fees to the union. In so ruling, the Court overturns its 1977 ruling in *Abood v. Detroit Board of Education* which has permitted public sector unions to charge non-members a fee equivalent to union dues to cover the costs of collective bargaining, contract administration, and grievances. *Janus v. AFSCME*, 585 U.S. ____ (2018).

Free Speech Violated

Illinois state employee Mark Janus challenged paying agency fees to the union that represents the Illinois government employees. He alleged that he opposes many of the positions taken by the union, including positions advanced through collective bargaining. Janus argued that being forced to pay agency fees, which was authorized by Illinois law and consistent with *Abood*, violated his First Amendment right to free speech.

Five members of the high court agreed. In a decision written by Justice Alito, the majority ruled that “[t]he State’s extraction of agency fees from nonconsenting public-sector employees violates the First Amendment.” The Court overturned *Abood*, stating that neither of the two justifications for agency fees can survive First Amendment scrutiny.

First, the Court stated that the justification that agency fees promote labor peace does not pass muster. The majority pointed to the Federal Government and 28 states with laws that prohibit agency fees as evidence that conflict and disruption in represented government workforces is unfounded and “labor peace” can be achieved through less restrictive means than the assessment of agency fees.

Second, the majority dismissed the “free rider” argument that previously supported *Abood*. Specifically, unions argued, and the *Abood* Court agreed, employees who choose not to join the union without paying fees become “free riders” because as the exclusive representative for that group of employees, the union is required to represent even the non-members in collective bargaining and enforcing the terms of the collective bargaining agreement. In *Janus*, the Court stated that the “free rider” concern could not overcome the First Amendment issues. It again pointed to jurisdictions where agency fees are outlawed to state that unions continue to be willing to represent government employees there, despite the lack of agency fees being charged to non-members. The Court concluded that “*Abood* was wrongly decided and is now overruled.”

Strong Dissent

Justice Kagan wrote a strongly worded dissent, which was joined by

Justices Ginsburg, Breyer, and Sotomayor. She wrote that “judicial disruption does not get any greater than what the Court does today.” The dissenting Justices see no justification for reversing *Abood* and its 41 years of precedent, finding that it has proved workable and is relied upon in at least 20 states that have created statutory schemes built upon its holding. The dissent stated that *Abood* struck an appropriate balance between public employees' First Amendment rights and government entities' interests in operating their workplaces with public employees paying their fair share of the cost of their union negotiating over the terms of their employment.

Practical Effect of Janus Ruling

The Court held that states and public-sector unions may no longer charge agency fees to non-member employees. In addition, it ruled that “neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.” The Court stated that by agreeing to pay through an opt-in, nonmembers are waiving their First Amendment rights and “such a waiver cannot be presumed.” This is a big change in practical terms as it requires that employees who are union members must opt-in to having union fees deducted from their pay, instead of the previously acceptable opt-out option.

The loss of revenue from existing non-members and the potential loss of members who no longer want to pay is a huge blow to public-sector unions. By law, unions must provide fair representation to everyone in a bargaining unit, whether union members or not. Unions now will have to convince employees in their bargaining unit to pay union dues or agency fees voluntarily. The change is sure to affect the resources and viability of public-sector unions in this country.

Private Sector Unions Not Affected – Yet

Because free speech rights under the First Amendment exist to protect citizens from government actions, the *Janus* decision applies only to public-section unions and non-member employees. Unions representing employees in the private sector will not be subject to this ruling. That said, opponents of unions and mandatory agency fees will likely look for arguments to attack private sector unions in the future. The Court's positions may be used to promote enactment of right-to-work laws in those states that do not currently have such laws.