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Janus v. AFSCME – Mandatory Agency Fees Unconstitutional for Public Sector Unions

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On June 27, 2018, the Supreme Court of the United States issued what may be one of its most impactful decisions of the 2017/2018 term in *Janus v. American Federation of State County and Municipal Employees, Council 31*, Case No. 16–1466. In its opinion, found here, the Court held that laws requiring public sector workers who are not union members to pay union dues would be compelled speech in violation of the First Amendment. This decision reverses nearly forty years of federal precedent, and declares unconstitutional a host of state laws which allow such fee arrangements. It also has significant implications for the manner in which public sector unions collect their dues.

FACTUAL BACKGROUND

The story of *Janus* actually begins in 1977 with a case called *Abood v. Detroit Board of Education*. There, the Supreme Court unanimously upheld the legality of so-called "agency-shop agreements"—agreements by which public entities would allow only a single union to collectively bargain on behalf of workers, and then also require workers to pay dues to that union (an "agency-fee"), regardless of whether or not individual workers supported the union. However, the Court qualified its ruling by also holding that only those dues used to support collective bargaining could be compelled. Under *Abood*, requiring employees to pay dues that would ultimately be used to fund a union's political/lobbying activities would be impermissible as "compelled political speech" in violation of the First Amendment.

The political/non-political distinction created by *Abood* seemed clear at first but was difficult to manage. In practice, it was difficult for courts to distinguish between purely "political" speech and speech related solely to collective bargaining. Additionally, there may be many instances when speech related solely to collective bargaining is inherently political. Echoing these concerns, in a series of cases decided between 2014 and 2017, the Supreme Court hinted that it might be willing to overturn *Abood*.

In *Janus*, the Court was provided with that opportunity. The case was brought by Mark Janus, an employee of the Illinois Department of Healthcare and Family Services. Mr. Janus was represented by the American Federation of State County and Municipal Employees, Council 31 ("AFSCME") in an agency-shop agreement. Mr. Janus objected to this arrangement, however, citing the union's support of a wage increase during a time when Illinois was dealing with a budgetary crisis, and sued AFSCME in 2015. The district court ruled in Mr. Janus's favor, allowing the case to go forward, but the court of appeals rejected his argument under *Abood*, and the Supreme Court agreed to hear the case.

HOLDING AND RESULT

In a 5-4 decision, the Supreme Court ruled in favor of Mr. Janus, and held that agency shop agreements, in the context of public employers, were indeed unconstitutional, overturning *Abood*. Specifically, the Court held that just like the right to not speak, the right to not pay the agency fee was protected by the First Amendment: "States and public-sector unions may no longer extract agency fees from non-consenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public sector union; employees must choose to support the union before anything is taken from them." *Slip Op.*, pg. 5. Fundamentally, the Court found that there could be no distinction between political and non-political activities in the context of a public sector union. In a strenuous dissent, Justice Elena Kagan highlighted the risk that this decision will weaken the ability of public sector unions to protect their workers by creating free-riders who refuse to pay but still reap the benefits of union representation and would also upset the careful balance between political and non-political speech set forth in *Abood* .

KEY TAKEAWAYS

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1. Neither agency fees nor any other form of payment to a public sector union may be deducted from an employee's pay unless the employee affirmatively consents to the payment.
2. This decision applies only to public sector employment. While the Supreme Court has signaled some willingness to reconsider agency shop agreements in the private sector, protections against compelled speech for private employees has always been much weaker and this decision is unlikely to change that.
3. Public sector employers should seek the advice of legal counsel in addressing this issue with the unions that represent their employees.

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