Unions Lose Supreme Court Case

The [U.S.] Supreme Court held 5-4 in *Janus v. AFSCME* that state statutes allowing public sector employers and unions to agree that employees who don't join the union must still pay their "fair share" of collective bargaining costs violate the First Amendment. The Court also held that employees must "affirmatively consent" to join the union. More than 20 states authorize "fair share" for public sector employees.

In *Abood v. Detroit Board of Education* (1977) the Supreme Court held that the First Amendment does not prevent "agency shop" arrangements where public employees who do not join the union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration, and grievance-adjustment. In Janus, the Supreme Court overruled *Abood*.

The Supreme Court's decision isn't surprising. The five most conservative Justices had criticized *Abood* in 2014 in *Harris v. Quinn*. In 2016, right before Justice Scalia died, the Supreme Court heard oral argument in *Friedrichs v. California Teachers Association*, which raised the same question as *Janus*. The Court ultimately issued a 4-4 decision in that case which, practically speaking, kept *Abood* on the books.

Mark Janus, a child support specialist with the Illinois Department of Health Care and Family Services, challenged Illinois's agency fee statute applicable to public employees.

In an opinion written by Justice Alito the Court repudiated the two main justifications for "fair share" in *Abood*. The Court's main defense of agency fee in *Abood* is that it promotes "labor peace." The union acts as the exclusive representative of all employees in a bargaining unit so no rivals unions can cause conflict. In *Janus* the Court pointed out that labor peace exists in federal employment, where agency fee is disallowed, and states without agency fee. "The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true."

The second defense for agency fee in *Abood* was to avoid free riders who "enjoy[s] the benefits of union representation without shouldering the costs." But the Court pointed out Janus argues "he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage." More technically the Court concluded the "First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."

After dismissing AFCME's new arguments to defend Abood the Court looked at the five factors it typically weighs when deciding whether to overturn precedent: the quality of the Court's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. Only one factor, the Court concluded, weighed in favor of keeping *Abood*. But that factor—reliance—"does not carry decisive weight."

Prior to *Janus* unions could ask employees to "opt-in" or "opt-out" of paying dues. Unions prefer the opt-out arrangement where the union contacts employees each year at tells them will be a member of the union unless they contact the union and opt-out. The Court held that going forward only "opt-in" is permissible where employees must affirmatively tell the union they want to be a member.

In a strongly worded dissent, Justice Kagan, joined by the Court's other liberal justices, warned that the decision to overturn *Abood* will "have large scale consequences." She noted that many state and local governments "have found agency fees the best way to ensure a stable and productive relationship with an exclusive bargaining agent." She concluded her dissent by warning that the *Janus* decision had "chosen the winners" in the debate between states over the role of unions "by turning the First Amendment into a sword."

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