

Janus v. AFSCME: Supreme Court to decide if the financial impact of public sector collective bargaining is political speech

BY UE GENERAL COUNSEL IRENE THOMAS, ESQ.

UE General Counsel Irene Thomas attended the February 26 arguments of Janus v. AFSCME at the U.S. Supreme Court.

On February 26, 2018, the long-awaited face-off between the American Labor Movement and the national right-to-work committee took place at the United States Supreme Court. The case: *Janus v. AFSCME*. At issue is whether public employee unions can collect “fair share” or “agency shop” fees from objecting non-members to defray the cost of collective bargaining, contract administration and grievance adjustment. Regardless of whether the issue is one of free speech or freedom of association, a principled application of Supreme Court precedent means that plaintiff Mark Janus should pay up for the benefits he takes home on the backs of his dues-paying co-workers.

For at least four decades, the national right-to-work (RtW) committee and like-minded organizations have repeatedly whined that it is unconstitutional to force non-member public employees to pay a “fair share” fee to the union who is legally required to negotiate on their behalf. The most consistent argument asserted by the RtW committee is that public sector bargaining is “inherently political,” therefore, the argument goes, to require non-member public employees to pay a “fair share” fee is to require “ideological conformity” with the union’s political viewpoint and agenda. In *Abood v. Detroit Board of Education*, the United States Supreme Court rejected the claim that the requirement for non-members to pay fair share fees is unconstitutional on its face. Relying on cases decided under the Railway Labor Act, the Court also rejected the argument that public employee collective bargaining was “inherently political” such that a constitutional violation occurs when non-members are compelled to pay “fair share” fees. The right-to-work folks continued to argue that the political nature of public sector collective bargaining results in forced association with a political party or a political viewpoint contrary to the First Amendment.

In 1983 the employer-funded RtW committee’s legal foundation, in *Knight v. Minnesota Community College Faculty Ass’n*, challenged payment of agency fees asserting that they resulted in forced association with a political party contrary to the First Amendment. The lower court side-stepped the question pressed by the right-to-work group: that public employee unions, when engaged in collective bargaining and contract administration duties, are engaged in political activity. When faced with the

case on appeal, the Supreme Court sidestepped the issue too.

In 2012, the right-wing committee came back again in full effect. It pushed the case of *Knox v. SEIU* to the Supreme Court. At issue in *Knox* was whether the union was required to provide nonmembers notice before requiring the payment of a special assessment for political purposes. The Court questioned whether the Court had “given adequate recognition [in *Abood*] to the critical First Amendment rights at stake” due to the “powerful political and civil consequences” of collective bargaining in the public sector.

The right-to-work group saw an opening and pushed again. In *Harris v. Quinn*, a 2014 case, a majority of the United States Supreme Court openly questioned the continued validity of *Abood* as support for compelled fee payments by non-members to public sector unions. The Court stated that *Abood* failed to appreciate the difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends.

The next case advanced to the Supreme Court in 2016 by a conservative, anti-union group was *Friedrichs v. California Teachers Association*. The teachers in *Friedrichs* argued that, through compelled agency fee payments, they were being forced to participate in political lobbying activity (public sector collective bargaining) with which they disagreed. But, due to Justice Scalia’s death (many observers predicted that he would vote to overturn *Abood*), the court split four-to-four leaving the decision below intact – *Abood* was permitted to live until another day.

Now, *Abood* is squarely before the Supreme Court in *Janus v. AFSCME*.

The RtW committee argued that there is no constitutional justification for compelling nonmembers to support public sector unions because “Illinois public sector labor costs have imposed and will continue to impose a significant impact on the State’s financial condition, clearly demonstrating the degree to which Illinois state employee collective bargaining is an inherently political activity.” At the February 26 show-down, the RtW committee argued that all public sector activity, including collective bargaining, grievance adjustment and contract administration, is political lobbying. Therefore, the State of Illinois cannot force objecting nonmembers, who disagree with the union’s political viewpoint, to pay a “fair share” fee to the bargaining union.

Justice Kennedy, known as one of the Court’s conservative Justices, quizzed attorney David Franklin who argued

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on Illinois' behalf and in support of AFSCME's position: "[w]hat we're talking about here is compelled justification and compelled subsidization of a private party ... that expresses political views constantly." He suggested that activities surrounding collective bargaining are union political lobbying. In response Franklin explained that agency fees pay for collective bargaining and "workplace grievance resolution."

The conservative Justices focused on the outcome of collective bargaining activity, specifically, the fiscal results of negotiating a contract.

Refusing to give an inch, Justice Kennedy asked Mr. Franklin if public employee unions are partners in the state's political lobbying efforts for a greater size workforce, against privatization [and] for massive government. Franklin conceded that "many of the topics that come up at the bargaining table with public employee unions have serious fiscal and public policy implications."

Then Justice Kennedy asked AFSCME's counsel, "Well, do you think that this case affects the political influence of the unions?" Boom. There it is. The union as a political lobbying machine. First, Frederick responded, "No." But, after some waffling, Justice Kennedy directed the focus back to his question: "I'm asking you whether or not in your view, if you do not prevail in this case, the unions will have less political influence; yes or no?" Frederick feebly admitted, "Yes, they will have less political influence." Likely feeling victorious, and because this was his point all along, Justice Kennedy asked, "[i]sn't that the end of this case?"

To his credit, Frederick shot back that his answer was not the end of the case because "that is not the question." Frederick framed the issue as whether "states, as part of our sovereign system, have the authority and the prerogative to set up a collective bargaining system in which they mandate that the union is going to represent minority interests on pain of being subject to any [un]fair labor practice." Not to be outdone, Justice Kennedy, wryly asked, "And in which they mandate people that object to certain union policies to pay for the implementation of those policies against their First Amendment interests?"

The resolution in *Janus* will depend upon how the Supreme Court classifies union representation activity – as political, based upon the impact of collective bargaining and contract administration – or as employment-related speech affecting a group of workers. The answer lies with the Supreme Court's past decisions related to First Amendment speech and association interests.

The Court established a balancing test for the interests of the public employee versus the interests of the government as an employer. If the speech is on a matter of public concern, it is entitled to constitutional protection. If it is not, case closed. RtW committee attorney William Messenger was forced to admit that it is not a matter of "public concern" if an individual employee speaks to his or her employer about wages. He also admitted that

speech about employment-related issues is not entitled to First Amendment protection. Therefore, if the Supreme Court determines that the *subject* of the speech is the starting point for the constitutional analysis, the RtW committee's arguments must fail.

But, if the Court finds that the political *impact* of collective bargaining is the starting point for the analysis, public employee unions may be dealt a terrible blow. The Court will reject forced speech and association with public sector unions through compelled fee payments. The Court has always given the greatest constitutional protection for the exercise of political association and the right to not associate on political questions. But, to reach the conclusion that the political impact of employment-related speech is the controlling factor, the Supreme Court will be required to reconcile, overturn or ignore its current precedent holding that employment-related speech does not "attain the status" of a matter of public concern "because its subject matter could, in different circumstances, have been a topic of a communication to the public that might be of general interest."

The small silver lining, most commentators say, is that if all speech by public employee unions is "political," and workplace issues such as working conditions, pay, discipline, promotions, leave, vacations and discharge, among other things, become a matter of public concern, the Supreme Court will open an avalanche of lawsuits about employee grievances. States will be faced with the considerable costs of litigating employment-related civil rights claims.

Under settled Supreme Court precedent, *Janus*' arguments should fail. Speech and association about day-to-day employment-related issues is not constitutionally protected. This should be true whether one person does the talking or the union speaks for thousands. If the speech is not constitutionally protected, any association with the speech is also not protected. Under these circumstances, the State is only required to show a rational basis for requiring fair share payers to contribute to the benefits they take home. Orderly and sound collective bargaining procedures is one such basis.

Although political speech and association has a highly protected constitutional status, in this case, the argument against fair share fees fall short because it requires the Court to improperly find public sector unions' activity to be political speech not on the content of the speech itself, but on the alleged impact of the speech. Reaching this result requires the Court to trample on its own precedent. The Court should dismiss *Janus*' complaints and allow public sector unions the continued financing to attend to the business of protecting workers.



More resources for fighting *Janus* and "right-to-work" more generally are available at ueunion.org/rtw