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Janus v. American Federation of State, County, and Municipal Employees, Council 31

BRIEF

The governor of Illinois, under the reasoning that it violates the First Amendment, challenged a current Illinois law that says public employers can require their employees to pay union fees, even if they do not join the union. If the employee doesn't want to pay the fee, he can be fired. The district court dismissed the governor's complaint because the governor did not suffer injury from the law and could not sue, but two public employees took up the case to try to get the judicial precedents allowing the Illinois law overturned. (Oyez).

The Supreme Court previously ruled in *Abood v. Detroit Board of Education* (1977) that the First Amendment does not contradict a Michigan law (a law that is like the Illinois law), saying that since all employees benefited from the union's collective bargaining, the union can require fees to cover those costs, but not require fees that are unrelated to the collective bargaining effort. (Oyez). In *Janus*, if the Court rules in favor of Janus, it must overrule *Abood*.

In another case, *Friedrichs v. California Teachers Association* (2016), the petitioners said the union arrangement (called an "agency shop" arrangement, where employees don't have to join the union but still must pay the fees related to collective bargaining) and the fee (in this case, non-union members had to specifically opt out to not pay the total union fee) violated the First Amendment. The Court had eight justices after the death of Justice Scalia and the ruling was equally divided, so the circuit court's ruling was affirmed, upholding the agency shop arrangement and the collective bargaining fee under the *Abood* precedent. (Oyez).

Since the lower courts are bound to the *Abood* precedent, the district court dismissed *Janus*, the Seventh Circuit Court affirmed the dismissal, and the case makes its way up to the Supreme Court. (Oyez). *Janus* arises to address the same issue to possibly settle this question of supposed compelled speech. *Friedrichs* was decided on an evenly split court, so now that Justice Gorsuch has joined the Court, this legal conflict may be resolved.

Janus is shrouded in controversy. On the one hand, if the Court rules in favor of Janus, it could completely change how public unions operate at the detriment of the unions. If public employees do not have to pay fees to support collective bargaining, even when those employees must legally receive those benefits of collective bargaining, then employees could simply not pay the fees (becoming "free riders") and the union's operation falls apart. Some states have adopted the Illinois law in question to keep the fall of unions from happening. On the other hand, if the Court rules in favor of the AFSCME, employees' First Amendment right to not pay for something they don't agree with is at risk. Some other states have "right-to-work" laws that allow employees to not be compelled to pay union fees. The decision to this case can change the laws and the relationship between employers, unions, and employees.

There are also constitutional questions the Court will address in deciding *Janus*. Here are two specific questions. (Erica Goldberg, In A Crowded Theater). Is there a line that can be drawn between funding for a union's negotiations and funding for a union's political activities? Was *Abood* wrongly decided and should *stare decisis* be abandoned to overrule *Abood*? The main question the Court will answer, fundamentally, is the following: To what extent, if any, does the First Amendment protect from compelled monetary payment (which can be considered compelled speech because money is speech as *Buckley v. Valeo* (1976) explained) that may go to causes that the payer disagrees with? The answers to these questions have good legal arguments on both sides; the ruling, regardless of who the Court sides with, will cause a massive uproar.

There were some important issues brought up during the *Janus* oral arguments. Justice Breyer asked William Messenger, who appeared on behalf of Janus, why the Court should apply a modern framework to the case (Should the Court apply a modern framework all the way back to *Marbury v. Madison*?) and abandon *stare decisis* in overturning *Abood.* Messenger said that *Abood* was inconsistent with the cases that came both before and after it, so the Court would be simply applying the law as it was before *Abood*. (Amy Howe, SCOTUSblog & argument transcript). There was an intriguing exchange between David Frederick, who appeared on behalf of AFSCME, and Justice Kennedy, who asked if unions would "have less political influence" if they lose. Frederick answered "yes," to which Kennedy said, "Isn't that the end of this case?" (Amy Howe, SCOTUSblog & argument transcript). Frederick deflected, and the debate went on.

We can only speculate about what the Court will ultimately do, but during oral arguments, the eight justices who were split in *Friedrichs* showed no indication that they were going to change their minds. Justice Gorsuch didn't say anything at all; it's not too clear how he will vote, but we have enough information to make a fair prediction.

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I predict the Court will side with Janus. It's almost guaranteed the eight senior justices will vote the same way they did in *Friedrichs*. While we can't know for sure, Gorsuch "has voted consistently with the court's more conservative members and is likely to supply a fifth vote against the unions." (Adam Liptak, New York Times). Gorsuch is a proclaimed originalist, and there does seem to be an originalist argument against AFSCME: "As Thomas Jefferson once wrote, requiring 'a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical'—and unconstitutional." (The Editorial Board, Wall Street Journal).

I believe the Court will be right in ruling in favor of Janus.

The unions' collective bargaining effort is inherently political speech because it deals with government policies, like the budget of the government and how much government employees (like teachers) should be paid. (Erica Goldberg). The First Amendment says speech cannot be compelled (*West Virginia v. Barnette* (1943)), so employees cannot be compelled to pay for the collective bargaining. The union is negotiating with the government, after all, and those negotiations will determine government policy. For example, Janus objects to the union's position that there should not be merit-based pay, but he must still fund the union's negotiating activities, which is directly related to merit-based pay. Since collective bargaining is inherently political, Janus's compelled payments (his compelled speech) defies the First Amendment.

While there are arguments that compelled payments have always been constitutional, there is a clear difference between these certain payments. In prominent law professors Eugene Volokh and William Baude's amicus curiae brief, taxpayer money goes towards causes that the taxpayer might not support, like an environmentalist's money going towards an oil subsidy. (Dan Epps and Ian Samuel, First Mondays). This means that the First Amendment does not restrict compelled payment of money going towards certain political objectives if that money is going towards a compelling interest (in *Janus*, the compelling interest is "labor peace"). I would argue that there is a compelling interest for the government to compel taxation because the government must be able to function, but labor peace is not necessarily a compelling government interest and does not justify the First Amendment violation to individual liberty. There is some evidence to conclude that compelled union fees do not lead to more labor peace. In half the states with right-to-work laws, where employees are not compelled to the pay union fees for collective bargaining, but still receive the same benefits, there are much fewer and shorter strikes compared to states without right-to-work laws. (Maxford Nelsen, TheHill). This discrepancy is certainly significant and contradicts the argument that compelled union fees promote labor peace.

The idea that compelled payments for the unions' collective bargaining are not compelling interests and hence unconstitutional is not the only good reason to overrule *Abood*; *Abood* contradicts itself in its own reasoning. (Erica Goldberg). In *Abood*, the Court said compelled union fees are not stopping the employee from expressing his viewpoint, while at the same time said the union cannot compel fees to fund political activity (only funds for collective bargaining). But if compelled union fees are not limiting employees from expressing their views and are fine under the First Amendment, then compelled union fees for political activities would be constitutional, because those payments do not stop employees from expressing their views (but the Court said compelled union fees for political purposes are not constitutional). So, which one is it? Are union fees for political purposes (with public unions, all fees are political) constitutional or are they not? If one can have disagreement outside of work, then aren't political union fees constitutional? This contradiction seems like sufficient grounds to either better explain the *Abood* precedent or overturn it, and the reasoning to rid of *Abood* doesn't end there.

As Messenger explained in oral arguments, *Abood* has failed at both keeping precedent and being good precedent. Before *Abood*, in *Elrod v. Burns* (1976), the Court said firing employees because of political affiliation violated the First Amendment. This situation is exactly the situation here in *Abood* and *Janus*: if an employee does not comply with the compelled union fees that compels speech he does not agree with, he will be fired because the union requires his payment as a condition of his employment. The *Abood* ruling contradicts *Elrod*, and overruling *Abood* would simply be applying the law as it were before *Abood*. *Abood* also conflicts with cases after it. In *Knox v. Service Employees International Union* (2012), the Court held that a state cannot constitutionally require union fees for political purposes without giving a chance for employees not to pay it. *Abood* doesn't consider the idea that collective bargaining negotiations are inherently political, and I've explained that *Abood* is wrong in this judgement. *Knox*

determined the funds that are political (again, with public unions, all funds are political) cannot be collected unless the employee can opt out. Therefore, *Abood* is not consistent with *Knox* and should be overruled. In *Harris v. Quinn* (2014), the Court held that *Abood* was incorrect without explicitly overturn it, but *Janus* gives the Court an opportunity to rid of the flawed, inconsistent, and internally contradictory *Abood* precedent.

The counterargument is that these compelled payments are constitutional and don't infringe on First Amendment rights. To that I say, no, because, as explained above, the compelled union fees have an inherent speech element to them. The argument is where to draw the line. Are all compelled payments constitutional? Others, like David Frederick, say yes, because the government has an interest in creating a working collective bargaining system (as ruled in *Lehnert v. Ferris Faculty Association* (1991)) and people who disagree can still display their disagreement in other methods of speech. But I say, no, because, as explained above, the government does not have an interest in creating a collective bargaining system (not one that is a blatant violation of First Amendment rights, at the least, and that precedent should be overruled) and, as elaborated above, despite one's ability to have speech outside the workforce, compelled payments are still unconstitutional, because those payments going to the union have an inherent influence on government policy and are thus political activity.

Compelled monetary payments in the form of union fees violates the First Amendment, and the Court will be right in ruling in favor of Janus and overturning *Abood*. *Abood* is flawed within itself and inconsistent with rulings before and after it. Union fees are speech and forcing that payment is not at all a compelling interest of the government. The First Amendment protects one's right to not pay an organization with which they disagree, and I hope the Court will preserve individual liberty lest we submit to government coercion and tyranny; free speech is and always will be an essential principle of our free society.

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