SUPREME COURT GRAPPLES WITH CONSTITU-TIONALITY OF "FAIR SHARE" UNION FEES

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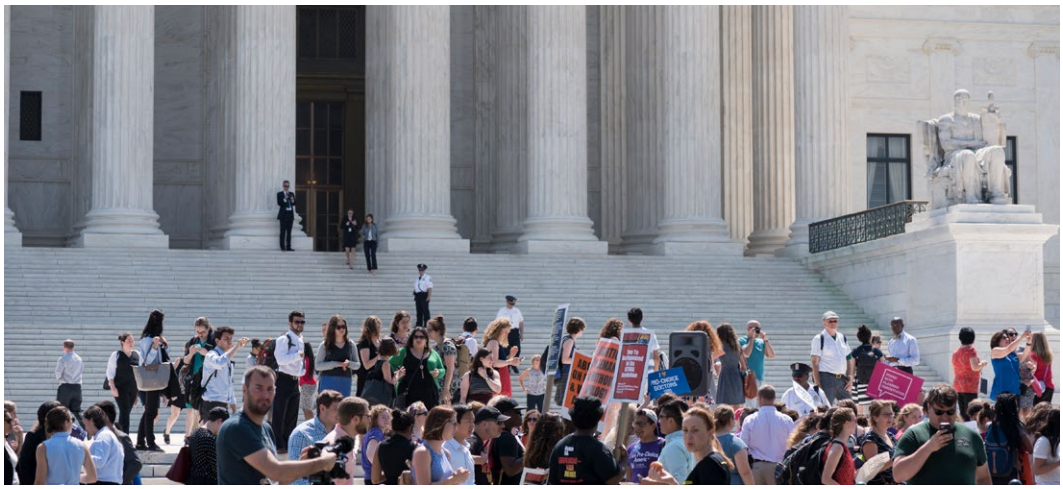

In *Janus v. AFSCME Council 31, et al.*, the Supreme Court heard oral argument recently on whether an Illinois law requiring non-union public employees to pay partial fees to unions that negotiate on their behalf violates their constitutional right to free speech. A decision against the unions would undo forty years of precedent and financially devastate organized labor in its last stronghold, the public sector.

In bringing this case, state employee Mark Janus has asked the Court to overrule the 1977 decision *Abood v. Detroit Board of Education*. Under *Abood*, non-members can opt out of paying for a public employee union's political activities but may be required to pay "fair share" fees to support services a union is statutorily required to provide all employees, such as negotiating collective bargaining agreements.

Mr. Janus argues that a union's bargaining against the government is not government speech expressed through employees but rather advocacy or political speech expressed through an independent interest group. As such, to require non-member employees to pay fees that subsidize the union's bargaining infringes the non-member employees' First Amendment rights to choose which political speech is worthy of their support.

This position appeared to resonate with conservative justices during the February 26 hearing. Justice Samuel Alito was particularly vocal, asking at one point: "When you compel somebody to speak, don't you infringe that person's dignity and conscience in a way that you do not when you restrict what the person says?"

Lawyers for the American Federation of State, County and Municipal Employees, known as AFSCME, countered by arguing that "fair share" fees are not allocated to the union's political advocacy. Negotiation of union contracts, they said, cannot be deemed "political speech" but rather speech about terms and conditions of employment which have never been afforded First Amendment protections. Justices Ruth Bader Ginsburg, Stephen Breyer, Sonya Sotomayor and Elena Kagan appeared to side with AFSCME. Justices Ginsburg and Sotomayor observed that if "fair share" fees are stripped, unions would be deprived of the resources to effectively negotiate and non-member employees would be "free riding" on the higher wages, benefits and grievance representation that unions secure in contracts with government employers.

Justice Kagan focused on the potential detrimental impact of overruling *Abood*, and stated: "I don't think we have ever overruled a case where reliance interests are remotely as strong as they are here. . . . Twenty-three states, the District of Columbia, Puerto Rico, all would have their statutes declared unconstitutional at once. Thousands of municipalities would have [public employee] contracts invalidated." Justice Kagan questioned, "When have we ever done something like that? What would be the justification for doing something like that?"

Amici curiae or "friends of the court" also presented argument. The Trump

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THE TRUMP ADMINISTRATION'S NEW SOLICITOR GENERAL ARGUED "FAIR SHARE" FEES ARE UNCONSTITUTIONAL, AND THE SOLICITOR GENERAL OF ILLINOIS COUNTERED WITH ARGUMENT IN SUPPORT OF AFSCME'S POSITION.

administration's new Solicitor General argued "fair share" fees are unconstitutional, and the Solicitor General of Illinois countered with argument in support of AFSCME's position. These divergent views emphasized the importance of this issue to the future financial health of public employee unions, the viability of existing union contracts, and the constitutionality of certain other states' laws that also allow broad fair share fees for public employees.

This is the second time this issue has come before the Court since *Abood*. In 2016, it was teed up in *Friedrichs v. California Teachers Association*, but the Court deadlocked at 4-4 because it lacked the deciding vote due to the vacancy left by Justice Anton Scalia's death. Justice Neil Gorsuch, who has since filled the vacancy, is an avowed conservative, strict constructionist. He is expected to side with the other conservative justices to cast the fifth vote to overrule *Abood*, yet Justice Gorsuch was uncharacteristically silent during the argument, leaving an open question as to his leanings. The Court is expected to issue its ruling in June.

Editor's Note: On January 19, 2018, Cohen Milstein attorneys Joseph M. Sellers and Miriam R. Nemeth filed an amicus curiae brief on behalf of Professor Benjamin I. Sachs that argued in support of AFSCME's position.

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