

U.S. Supreme Court to Hear First Amendment Challenge to Union Agency Shop Laws

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The U.S. Supreme Court will hear oral argument later this month in a case that attacks on First Amendment grounds the agency shop structure that sustains public employee labor unions in California and many other states. The case, *Janus v. American Federation of State, County and Municipal Employees*, was brought by Illinois state employees who argue all union activity is political speech that employees can opt out of supporting with mandatory dues. A decision for the plaintiffs is likely because the newest associate justice, Neil Gorsuch, is believed to favor doing away with agency shop.

The agency shop arrangement common to public employee labor unions in California and elsewhere previously was upheld by the Supreme Court in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209. The *Abood* case allows employees to refuse to pay union dues used for political purposes but requires those employees to pay "fair share" dues to support all other labor union activities, such as representation in collective bargaining, grievances and discipline. Public employee unions must determine the fair share fee each year by deducting from regular union dues the amount spent on political activity not related to bargaining.

Plaintiffs Argue All Union Activity is Political Speech

The *Janus* plaintiffs want to do away with fair share dues and agency shop arrangements. They argue *all* union activity, including bargaining, is political speech because labor associations bargain with the same people over whom they usually are attempting to have political influence, and to the same purpose: improving wages, benefits and protections for union members. The plaintiffs argue they cannot be required to subsidize the political speech of a third party, especially when they disagree with that speech.

The Supreme Court has been moving for several years toward overruling *Abood's* distinction between collective bargaining and union political activity. In 2014, the Court decided *Harris v. Quinn*, a case that heavily criticized *Abood* but did not overrule it. In 2016, after the death of Justice Antonin Scalia, the Court split 4-4 in *Friedrichs v. California Teachers Association*, leaving a Ninth Circuit ruling upholding agency shop to stand.

These were decisions, however, on the *principle* behind fair share fee arrangements: the state cannot compel public employees to support true political speech, such as advocacy and lobbying, by a union. Collective bargaining, contract

grievances and employee discipline all were seen by the courts as services the union was obligated to provide and, therefore, represented employees could be obligated to fund. The *Janus* case asks the court to lump all union activities together under the label of political activity or political speech and prohibit states from compelling employees to pay for any of those activities.

Court Could Preserve Free Rider Principles

In *Abood* and other decisions, the Court has recognized that “free riders” who benefit from union services without paying for them create an undue burden on unions. The Court may decide in the *Janus* case to preserve the “free rider” concept by ruling that unions may charge for activities that are not directly tied to collective bargaining, such as legal defense, representation in grievances, and litigation on behalf of a member or members.

Saving Your Union in a Post-Janus World

A ruling for the *Janus* plaintiffs would mean employees could refuse to pay dues in California and 22 other states while labor unions still would be required to represent them. Labor unions will have to take a proactive approach to maintaining union membership by communicating with current members, actively recruiting new members, and providing representation plans that preserve the association’s financial stability. I will continue to report on the *Janus* case and will be able after the Court’s ruling to provide specific recommendations for responding to this latest threat to public employee labor unions in California.