ADVERTISING MATERIAL
THE SKO INSIDER
LEGAL NEWS AND INFORMATION YOU CAN USE
SKO 120 1897-2017

July 19, 2018

In Landmark Decision, U.S. Supreme Court Strikes Down Mandatory Union Fees

On June 27, the U.S. Supreme Court ruled in *Janus* v. AFSCME Council 31 that government employees represented by a union but who are not members cannot be compelled to pay "agency" fees to the union. The Court concluded that requiring nonmembers of the union to pay these fees violated the First Amendment free speech rights of those nonmembers by compelling them to subsidize private speech on matters of substantial public concern. The 5-4 decision overruled a 1977 decision, *Abood* v. Detroit Board of Education, which permitted unions to charge fees to nonmembers for collective-bargaining purposes, but not to fund unions' political and ideological projects. Justice Samuel Alito authored *Janus*'s majority opinion.

In *Janus*, the petitioner worked as a child support specialist for the Illinois Department of Healthcare and Family Services, which was unionized. Mr. *Janus* refused to join the union because he opposed many of its public policy positions, including its positions on collective bargaining. Mr. *Janus* later sued the union challenging the constitutionality of the union's nonmember fees (as facilitated by the State of Illinois); this challenge was dismissed by federal district and appellate courts before the Supreme Court granted review.

Overruling *Abood*, the *Janus* Court held that a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes positions during collective bargaining that have political and civic consequences. The *Janus* Court dismissed one of the main concerns in *Abood*, namely that without the ability to collect agency fees from nonmembers unions would be unable to act as a single, effective advocate [WDC1] for all employees within the workplace. Drawing on examples such as the 25 right-to-work states in which unions have continued to function despite purely voluntary union membership, the *Janus* Court determined that this was an unfounded concern.

Another concern the Court addressed was that of "free riders," referring to those employees who would benefit from the union's work, but would not be required to pay "agency" fees, let alone union dues. The Court determined that unions effectively represent all workers regardless of whether all workers pay "agency" fees or dues, noting that other private groups, such as the AARP, speak on behalf of entire populations without all such persons being dues-paying members.

Essentially, the Court determined that the fundamental free speech rights of the nonmember employees outweighed the less tangible interests of the union, and therefore any government-enforced obligation to make a payment to a union to which an employee has not agreed violates

the First Amendment. The default rule will no longer be that public employees are members of a union (or at least "financial core" members) until they opt out, but that public employees are not members, even "financial core" members, unless they opt in.

In dissent, Justice Kagan argued that for more than four decades *Abood* struck a reasonable balance between governmental interest and public employees' rights to free speech, and deserved respect as long settled law. The dissent also pointed out that the *Abood* ruling is deeply rooted in the laws of many states, and there are existing systems in place based on *Abood* that impact millions of workers across the country. The dissent predicted that the impact of the majority's holding would reverberate outside of just Illinois, and the 22 other states (including the District of Columbia) that allow unions to require funding from nonmembers to support collective bargaining would be greatly, and negatively, impacted.

Prior to *Janus*, the Supreme Court laid the foundation for its ruling that agency fees imposed upon non-members violate the First Amendment in three cases: Knox v. SEIU, Harris v. Quinn, and Friedrichs v. CTA. Writing for the Court in Knox, a 2012 decision, Justice Alito questioned the constitutionality of fair-share fees, as well as the "opt out" regime and recognized that such arrangements "represent an impingement on the First Amendment rights of non-members." Two years later in Harris, the Supreme Court held that the home health care workers in Illinois (and every other state that had a similar program) were only "partial" or "quasi" public employees and were therefore not covered under the *Abood* standard. Justice Alito, again writing for the Court, questioned the *Abood* analysis throughout the entire opinion, saying the analysis "seriously erred", "fundamentally misunderstood" First Amendment principles, and "did not foresee the practical problems" with its holding. Finally, in 2016 Friedrichs was brought before the Supreme Court, however; due to Justice Antonin Scalia's death, the Court was deadlocked at 4-4. Friedrichs' main issue was, again, whether requiring non-members of a union (teachers union) to pay fees violated the First Amendment.

Janus represents a landmark decision for public employees – who now benefit from the freedom to decide for themselves whether to financially support union causes – and a setback for public employee unions, which can no longer automatically assume paycheck-facilitated support from each and every represented employee. In the days following the *Janus* decision, employees have started filing lawsuits seeking the recoupment of union agency fees wrongfully withheld by unions and government entities, threatening still more financial troubles. *Janus*, moreover, continues a broader trend, reflected in Kentucky and Indiana's right-to-work laws, empowering individual employees' rights to choose whether to join, maintain membership, or support a union.

If you have questions or concerns about how the *Janus* ruling will impact you or your organization, members of Stoll Keenon Ogden PLLC's Labor, Employment and Employee Benefits Practice are available to assist and guide you through any potential issues.

SKO thanks summer associate Shannon Keene for her contributions to this article.

Contact a member of the Labor, Employment & Employee Benefits practice.