

SCOTUS Reverses Course on Compulsory Union Dues for Public Employees

By JAMES B. TAYLOR

On June 27, 2018, the United States Supreme Court issued its landmark decision regarding state laws that require public employees to pay certain compulsory union dues. See *Janus v. Am. Fed'n of State, Cty., and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). The *Janus* decision represents an about-face in terms of Supreme Court precedent as it overrules a previous ruling by the Supreme Court in the case of *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). The *Abood* decision established a framework that would require all public sector employees in a bargaining unit to pay certain union dues, even where an individual employee disagreed with or did not support the union. The primary question before the Supreme Court in *Janus* was whether the *Abood* framework requiring compulsory union dues for public employees was proper under the US Constitution.

The *Abood* Precedent

Since 1935, the National Labor Relations Act (“NLRA”) has governed labor unions and their relationship with the workers they represent. However, the NLRA does not apply to employees working for federal, state, or local governments or to unions representing public employees. Instead, unions representing public employees are governed by the laws of the individual states. By the time that the *Abood* case came before the Supreme Court (1977), many states had laws allowing “agency shop” agreements with public sector unions that required that all employees in the bargaining unit pay compulsory union dues, even where an individual employee did not support the union or its political goals. The goal of such agreements, and the state laws which upheld them, was generally to avoid the “free rider” economic scenario which posits that, given a choice of whether to financially support a union or not, employees will choose to not contribute to the union while simultaneously reaping the benefits of the union’s efforts. It was also believed that agency shop requirements furthered the goal of “labor peace” between employees, employers, and unions. Thus, the purpose of requiring the payment of compulsory union dues in an agency shop agreement is to bypass the “free rider” problem and promote “labor peace” by requiring all employees in the bargaining unit to contribute to the union as a condition of employment.

While agency shop agreements uphold the collective interest in unionization by minimizing the “free rider” scenario and labor unrest, they do not do much to protect the individual member’s interest in free expression. All unions, including those in the public sector, are political beings and have distinct political stances and ideals. Public sector unions, in particular, are often quite politically active, using



their members’ contributions as a means to advocate for themselves and their members in various political fora. Invariably, however, there will be a public employee in the bargaining unit who disagrees with or does not support the union’s political goals. For this employee, the legal requirement that he or she must pay funds toward a political goal undertaken by the union that he or she disagrees with appears to violate the First Amendment of the US Constitution, which forbids the government from “abridging the (employee’s) freedom of speech” or infringing on the employee’s right to freely associate. By virtue of the agency shop agreement, the disagreeing employee is effectively compelled to support and associate themselves with political views that he or she may not support.

This crux between the collective benefits of compulsory union dues and the resulting individual detriment to free expression came before the US Supreme Court in the *Abood* decision. There, a Michigan public school teacher challenged a Michigan law that required the payment of union dues by all members of the bargaining unit to the public sector union. The teacher argued that the forced payment of union dues violated his First Amendment rights by requiring him to financially support political goals with which he disagreed.

In its opinion, the Supreme Court recognized the danger that agency shop agreements carried with respect to the infringement of the individual members’ rights, noting that “[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.” *Abood*, 431 U.S. at 222. In order to find a way to balance the individual members’ First Amendment rights with the collective interest in promoting “labor peace” and avoiding the “free rider” scenario, the *Abood* court drew a line between the “collective bargaining” efforts of a union and the “ideological activities” of the union. As a result, the court held that, via agency shop agreements, states could lawfully require the payment of union dues to fund collective bargaining, contract administration and grievance adjustment efforts from all members of the bargaining unit. With regard to funds for use in the pursuit of the union’s political or ideological goals, the court held that these funds could only be collected from those employees who were members of the union who had volunteered to contribute toward such goals.

As a result of the *Abood* decision, public sector union dues were split into two categories: those that are “chargeable” (funds used for collective bargaining efforts, to which all employees must contribute) and those that are “nonchargeable” (funds used for political or ideological efforts, which must be voluntarily collected from union members).

The Supreme Court Reverses *Abood* in the *Janus* Decision

Despite numerous challenges, the *Abood* decision remained Supreme Court precedent regarding public sector employees for 41 years. However, the *Abood* precedent was dramatically overruled in a 5-4 decision by the Supreme Court in *Janus v. Am. Fed'n of State, Cty., and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). The *Janus* case initially began as an effort by Illinois Governor, Bruce Rauner, to oppose agency shop agreements and related policies in Illinois. However, due to the Governor's lack of standing to bring the case, Mark Janus, an Illinois child support specialist, was substituted as the plaintiff. The plaintiff claimed that he did not support the union's political goals and contended that "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." See *Janus*, 138 S. Ct. at 2462.

In reviewing the plaintiff's argument, the Supreme Court in *Janus* examined the then-existing precedent in *Abood*. The *Janus* court found that the *Abood* framework was "questionable on several grounds." See *Id.* at 2463. The *Janus* court noted that the First Amendment to the US Constitution encompasses "both the right to speak freely and the right to refrain from speaking at all" and that "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." See *Id.* With regard to compulsory union dues, the Supreme Court specifically found that "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns." See *Id.*

In looking at the effectiveness of the agency shop agreement scenario permitted by the *Abood* decision, the *Janus* court focused on the fact that unions have continued to exist and freely operate in many states and contexts where compulsory union dues are not allowed. Thus, the Supreme Court found that the risks imposed upon employees' constitutional rights by

agency shop agreements are not outweighed by a resulting increase in union effectiveness or by a higher level of "labor peace." Further, the *Janus* court rejected the "free rider" argument in holding that a union member forced to contribute to political causes that he does not personally support is "not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage." See *Janus*, 138 S. Ct. at 2466. Viewed in this light, the *Janus* court found that the "free rider" argument in favor of the agency shop agreement framework was not a compelling basis to require that public employees pay compulsory union dues.

In sum, the majority decision in *Janus* concluded that agency shop agreements for public sector employees violate the individual members' constitutional rights and cannot be upheld. In reaching this conclusion, the *Janus* court specifically overruled *Abood* and its "chargeable"/"nonchargeable" union dues framework. While the *Janus* decision only affects employees and unions in the public sector context, it also serves as a milestone in what appears to be a trend of limiting the power of labor unions at the Supreme Court level. Certainly, the *Janus* decision and its rejection of agency shop agreements will impact the efforts of unions to establish and consolidate their presence in the public sector workforce in the United States.



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