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Public Sector Union Fair Share Fees Ruled Unconstitutional: Supreme Court Hands Down Landmark Decision in *Janus v. AFSCME Council 31*

In a 5–4 decision on June 27, 2018, the U.S. Supreme Court in *Janus v. AFSCME Council 31* declared union “agency fees” unconstitutional. The decision overturns decades of labor law precedent and will likely deal a significant blow to union membership and funding in the 22 states, and District of Columbia, that previously permitted the collection of agency fees.

Since the Court’s decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), states have had the authority to pass legislation permitting unions to collect a percentage of total union membership dues from non-member employees. In the face of a First Amendment challenge to these agency fee statutes, the *Abood* Court held the statutes constitutional as long as the fees collected from non-member employees are proportionate to the actual benefit they receive from the union’s collective bargaining activities. Unions were prohibited from requiring non-member employees to pay the portion of union member dues used toward the advancement of political views or other ideological causes.

Mark Janus, a public employee in Illinois subject to the State’s statute authorizing agency fees, challenged the *Abood* decision. Janus argued that *Abood* must be overturned because unions are inherently political organizations and all union activities are, therefore, political in nature; including collective bargaining. Because unions negotiate collective bargaining agreements with government entities, collective-bargaining activities are akin to government lobbying. Thus, requiring non-member employees to pay any portion of union dues necessarily implicates the First Amendment.

The United States Supreme Court agreed, ruling 5–4 in favor of Janus. The Court held the extraction of agency fees from

nonconsenting public employees is unconstitutional and declared *Abood*'s holding inconsistent with the First Amendment.

Dismissing the argument that union speech associated with collective bargaining covers only matters of private concern, the Court stated collective bargaining actually touches on critically important public matters, such as the State's budget crisis, taxes, education policy, healthcare and even the controversial subjects of sexual orientation, gender identity and minority rights. Because union speech through collective bargaining addresses issues of "profound value and concern to the public," the Court held the governmental interests justifying agency fees must pass Constitutional strict scrutiny analysis.

Applying the strict scrutiny standard to *Abood*'s two stated justifications for agency fees, the Court found that neither justification passed Constitutional muster. The Court first rejected *Abood*'s contention that agency fees should be upheld because they promote an interest in "labor peace," stating that unions effectively serve as representatives of public employees in the federal government and the twenty-eight states that currently prohibit agency fees. Second, the Court held that avoiding the risk of "free riders" is not a compelling state interest. And, even if it were a compelling interest, avoiding free riders can be achieved through less restrictive means than the imposition of agency fees.

What You Need to Know

The Supreme Court's decision today renders the Ohio fair-share statute (Ohio Rev. Code § 4117.09(C)) unconstitutional, eliminating a large source of funding for unions and likely leading to a substantial drop in union membership. The combination of the loss of fair-share fees and member dues will deal a significant blow to union coffers. Although it is highly unlikely that this loss of revenue will render unions obsolete, it will likely greatly weaken the bargaining power and political influence of Ohio unions.

Frost Brown Todd's Government Services Practice Group has extensive experience dealing with public-sector unions and handling collective bargaining negotiations. As the ramifications of

this landmark decision continue to unfold, please feel free to contact [Joe Scholler](#), [Alex Ewing](#) or any other attorney in Frost Brown Todd's Government Services Practice Group.

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