

The Survival of *Abood v. Board of Education*, Part 4

Amundsen Davis Government Entities Alert
March 9, 2018

Just last week on February 26th, the United States Supreme Court heard arguments in *Janus v. AFSCME*, a case in the Court's 2017 term with a potential of adversely impacting the viability and influence of public sector unions. The case, originating in the seventh circuit with Judge Richard Posner, involves an appeal over the dismissal of a complaint that sought to invalidate agency fees and to reverse the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*.

Janus is the latest case to reach the Supreme Court challenging the 40 year precedent set in *Abood* which established that agency fees or "fair share" provisions in public sector union contracts could be imposed on non-union members for "collective bargaining, contract administration, and grievance adjustment purposes." Supporters maintain that agency fees are necessary to prevent "free riders" from benefitting from contracts negotiated by unions without bearing the expense of representation. Critics argue that such fees are tantamount to "compelled speech" that violate First Amendment rights.

Back in 2014, the Supreme Court reviewed agency fees in *Harris v. Quinn* and held that home health care workers in Illinois could not be compelled to financially support a union they did not want to join. The *Harris* ruling, however, was narrow because the home health care workers were not deemed "full-fledged public employees." In 2015, it was expected that the Court's conservative majority would overrule *Abood* in *Friedrichs v. California Teachers Association*, a ninth circuit case that upheld agency fees so long as dues were not used for other ideological or political purposes. However, the passing of Justice Antonin Scalia shortly after arguments resulted in a "no-decision" and the judgment of the ninth circuit was "affirmed by an equally divided Court."

The tenor of arguments in *Janus* last week leaves no doubt that the eight justices who heard *Friedrichs* remain "equally divided." As was the case in *Friedrichs*, Justice Elena Kagan continued to voice concerns that overruling *Abood* would adversely impact 23 state statutes that permit agency fees and would invalidate thousands of contracts covering millions of workers. Justice Anthony Kennedy, on the other side, forced David Frederick, AFSCME's attorney, to acknowledge that unions would have less political influence if *Abood* were to be overruled, and then quipped "isn't that the end of this case?" Justice Stephen Breyer, interested in maintaining the status quo, suggested a compromise, namely a statutory-duties test that would draw a line between chargeable (collective bargaining,

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contract administration) and non-chargeable (lobbying, politicking) expenses. Attorney William Messenger arguing for Janus, however, skeptically noted such a test would allow “the government to decide what is constitutionally chargeable [which would include] collective bargaining” and that such is “the core of political activity which individuals cannot be compelled to support” under the First Amendment.

It is clear that the decision in *Janus* hinges on Justice Neil Gorsuch, who many anticipate will cast a vote to finally reverse *Abood*. Somewhat uncharacteristically yet purposefully, Justice Gorsuch remained silent during arguments. A decision is expected in June.

Check out our previous articles on *Abood* and the challenges to public sector agency fees:

Part 1: Will *Abood v. Detroit Board of Education* Survive?

Part 2: *Abood v. Detroit Board of Education* Survives...for now?

Part 3: The Survival of *Abood v. Detroit Board of Education*, Part 3

The Survival of *Abood v.* Board of Education, Part 4