THE NATIONAL LAW JOURNAL

Dozens of Class Actions Build on Supreme Court's 'Janus' Union Ruling

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March 14, 2019

Anti-union organizations, building on last year's successful challenge to public-sector union fees, have returned to the U.S. Supreme Court with three new challenges to the operations of organized labor.

The new petitions are part of what lower courts have begun to call "clean-up proceedings" in the wake of the Supreme Court's 5-4 decision last term in Janus v. AFSCME. In Janus, the conservative majority, led by Justice Samuel Alito Jr., overruled a four-decade-old precedent that said unions could impose "fair share" fees on non-members for the cost of collective bargaining.

"At the time of this writing, there are at least 35 class action lawsuits pending in 18 federal district courts that seek to require unions to return just a small portion of those billions of dollars in unlawfully seized union fees," one of the petitioners told the justices.

Two of the petitions—filed by National Right to Work Legal Foundation and the Buckeye Institute—confront laws that require a union's exclusive representation of public sector employees. In the third, also brought by the National Right to Work Legal Foundation, non-union homecare workers seek refunds of about $32 million for fees paid to the union.

The refund challenges alone are "hugely important," said labor law scholar Charlotte Garden of Seattle University School of Law. "If unions have to refund dues for three years back or whatever the applicable statute of limitations may be, that is a potential existential threat," she said. "Those cases have been losing at the district and appellate court levels. They seem difficult to win and should be."

All three high court petitions rely on Janus as well as two prior rulings in which the court, again led by Alito, laid the groundwork for their First Amendment challenges. The key players this time also are familiar.

William Messenger of the National Right to Work Legal Foundation, who argued the Janus case at the Supreme Court last year, is counsel of record in one of the two exclusive representation challenges—Bierman v. Walz—and in the fee refund challenge, Riffey v. Pritzker.

BakerHostetler partner Andrew Grossman is counsel of record in the other exclusive representation challenge—Uradnik v. Inter Faculty Organization—which originated with the free-market policy think tank Buckeye Institute.

The Uradnik petition has drawn amicus support from former Janus supporters such as the Cato Institute, Competitive Enterprise Institute, Pacific Legal Foundation, Goldwater Institute, Freedom Foundation and the National Right to Work Legal Foundation. Also supporting the challenge is the National Association of Scholars, represented by Shearman & Sterling associate

William Haun, and a number of public policy research and advocacy groups with counsel of record Thomas McCarthy of Consovoy McCarthy Park.

The unions and states in the three petitions have not yet filed their answers in the high court.

Here is a brief look at what the petitions argue:

Uradnik v. Inter Faculty Organization

The U.S. Court of Appeals for the Eighth Circuit and lower courts are wrong that a 1984 high court decision—Minnesota State Board for Community Colleges v. Knight—approved of a state's appointment of a labor union as exclusive representative of public sector employees, argues the petition. "The result of those decisions is to broadly sanction compelled representation of unwilling public employees and subsidy recipients like home healthcare workers, irrespective of their speech and associational interests. That result cannot be squared with this Court's First Amendment jurisprudence."

The Eighth Circuit, which earlier had ruled in Bierman that Knight applied, affirmed the district court's denial of a preliminary injunction after finding no likelihood of success on the merits.

Riffey v. Pritzker

The Seventh Circuit erred in affirming a district court decision that the plaintiffs failed to meet the requirements for approval of a class seeking refunds of union fees, according to the petition. "Here, Illinois deducted agency fees for SEIU from the proposed class of personal assistants' wages without their affirmative consent," according to the petition. "Under Harris (v. Quinn) and Janus, each unauthorized fee seizure inflicted a First Amendment injury. The victim's subjective feelings about SEIU are immaterial to the First Amendment violation. The compensatory damages owed to each personal assistant in the putative class equals all fees seized from him or her, plus interest."

The Seventh Circuit panel, in an opinion by Judge Diane Wood, wrote: "The assistants spurned the opportunity to suggest a narrower class in favor of a 'go-for-broke' strategy. In doing so, however, they overlooked the substantial deference we give to the district court's decisions about predominance and manageability. The judge here came to a defensible— indeed, sensible—decision on these points."

Bierman v. Walz

"Regimes of exclusive representation, like other mandatory expressive associations, are subject to a limiting constitutional principle: exacting First Amendment scrutiny," Messenger wrote in the petition. "Whatever its merits in a public employment relationship, no compelling state interest justifies extending exclusive representation beyond that context to a citizen's relationship with government regulators."

The Eight Circuit panel, led by Judge Steven Colloton, said in its ruling in August: "There is no meaningful distinction between this case and Knight. The current version of [state law] similarly allows the homecare providers to form their own advocacy groups independent of the exclusive representative, and it does not require any provider to join the union. According to Knight, therefore, the State has 'in no way' impinged on the providers' right not to associate by recognizing an exclusive negotiating representative."