



Unions Brace for Impact as Illinois Challenge Heads to High Court

Tim Ryan

February 23, 2018

WASHINGTON (CN) – Experts are predicting that a union challenge out of Illinois heading Monday to the Supreme Court will follow through on groundwork that was laid down before the death of Justice Antonin Scalia.

As with other labor laws, the Illinois statute under attack here allows public employee unions to collect fees from nonmembers because all employees benefit from the union’s collective bargaining, regardless of their membership status.

Child-support specialist Mark Janus brought the underlying challenge because the American Federation of State, County and Municipal Employees takes a little more than \$45 from his paycheck every month, even though he declined membership.

Though the Supreme Court upheld this arrangement in *Abood v. Detroit Board of Education*, the 1977 ruling made clear that the union-collected fees could be used only to cover expenses considered “germane” to collective bargaining.

Collected fees cannot go toward any political activities, but Janus claims that any position a public union takes, from advocating for higher pay to lobbying for specific policy, is inherently political.

Ahead of Monday’s hearing, Ilya Shapiro with the Cato Institute, a libertarian think tank, supported this position in a friend of the court brief.

The senior fellow noted in an interview that separating a pile of money into two pots does not prevent Janus’ money from funding union activities with which he fundamentally disagrees.

“In the public sector, anything that the union does, including collective bargaining, has a public policy salience,” said Shapiro. “That is, if they’re asking for higher teacher pay rather than seniority protections, or vice versa, both of those are policy concerns.”

Janus argued in a brief with the Supreme Court that the agency-fee requirement infringes on his First Amendment rights and therefore must draw the harshest level of scrutiny from the justices. Janus compares the government requiring him to pay a union fee to it mandating his support of a

political-advocacy group, and argues there are less intrusive ways to ensure unions are viable representatives of public employees.

Meanwhile, the union argued that the First Amendment's protections on free speech do not extend to public employees when they are behaving as public employees. The group said the government has traditionally been able to regulate the speech of its employees without drawing harsh court scrutiny.

"Petitioner asks this court to upend the collective-bargaining systems of many states – in a jurisdictionally flawed case without any record – based on numerous unsupported and inaccurate factual assertions," the union's brief states. "For example, petitioner claims all collective bargaining is inherently political and employees choose not to join unions because they object to the union's collective bargaining positions. Those assertions are false – and unsupported by an evidentiary record."

The AFSCME also said *Janus* vastly overstated the degree to which public union bargaining is political. It warned that overturning *Abood* would bring unnecessary upheaval to the states that use the case as the underpinning of their labor laws. There are 24 states that allow at least some public employee unions to collect agency fees, according to the union's brief.

But the union is facing long odds as the Supreme Court seemed close to overturning *Abood* in a nearly identical case argued in January 2016. The conservative majority on the court at the time appeared prepared to overturn *Abood* based on that case, but Justice Antonin Scalia died before the court could announce a decision.

The court split 4-4, leaving *Abood* in place, but court watchers expect Justice Neil Gorsuch, who is often compared to Scalia, will be the vote that breaks the tie in favor of *Janus*. Shapiro said Gorsuch's vote might be even less in question than Scalia's was before the 2016 case.

"We'll see how argument goes, and I think all eyes will be on Gorsuch because of that expectation that the Scalia vote – now the Gorsuch vote – is the only one where we don't really know where exactly they might be," Shapiro said.

While *Janus* and his supporters argue unions will be able to survive the end of *Abood*, union advocates and labor law experts worry the ruling could substantially weaken the collective bargaining system.

Angela Cornell, the founding director of the Labor Law Clinic at Cornell Law School said the *Abood* decision was already a compromise between the rights of employees and the union's duty of representation and that losing funding entirely from nonmembers would be a major blow to unions.

"How can the union function if it has a legal obligation to represent everyone in the bargaining unit and they have a drop in dues by a substantial percentage?" Cornell asked. "Which is what we see in many of the cases."

Cornell said the case is the culmination of years of legal challenges to *Abood* from conservative interests looking to weaken unions.

“Unions are already weak, and so this could have even more consequence, it could be so much more detrimental, because unions are already weak, especially compared to the role of unions in other industrialized countries around the world,” Cornell said.

The union offers the court an option outside of completely scrapping *Abood*, noting in its brief that the justices could narrow the scope of what unions can and cannot charge to nonmembers in agency fees.

Charles Fried, who served as solicitor general under President Ronald Reagan, and Robert Post, a professor at Yale, filed a friend of the court brief in support of neither party, suggesting the court should take this path instead of overturning *Abood*.

Under the so-called statutory-duties test, which was proposed by Justices Sandra Day O’Connor, Anthony Kennedy, David Souter and Scalia in a 1991 case, a union can charge only for “the costs of performing the union’s statutory duties as exclusive bargaining agent,” instead of collecting agency fees based on expenses “germane” to its collective-bargaining efforts.