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Janus v. American Federation of State, County and Municipal Employees

What's next?

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Janus v. AFSCME, 138 S.Ct. 2448 (June 27, 2018)

- Janus, a social worker for the Illinois Department of Health Care, challenged, under the First Amendment, Illinois' right to compel him to pay an agency or "fair share" fee to the Union.
- In a 5-4 decision, the Supreme Court (J. Alito) agreed with Janus, concluding that requiring non-union employees to pay an agency fee is a form of compelled speech.
- The government may not collect an agency fee unless the employee affirmatively consents to the payment.
- By agreeing to pay the agency fee, non-member employees are waiving their First Amendment rights.
- A waiver of First Amendment rights must be "freely given and shown by 'clear and compelling' evidence." *Slip Op. 48.*

What May be Next?

- Suits to recover agency fees paid in the past?

- Suits to collect past union dues?

Recovery of Past Agency Fees?

- Unions and local governments are likely to be sued for past agency fees (subject to applicable statute of limitations) under 42 U.S.C. § 1983; restitution; and unjust enrichment theories.
  - William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harvard Law Review, (2018 Forthcoming) (Recovery of past agency fees portion of this presentation is much indebted to this article).
- Supreme Court decisions state the true law as it has always been. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect . . . .")
- Unions collecting agency fees are acting under color of State law. *See, Lugar v. Edmonston Oil Co.*, 457 U.S. 922 (1982) (private debt collectors operates under color of State law when they "invoke[ed] the aid of state officials to take advantage of State-created attachment procedures"). *Id.,* at 942.
- Unlike a government, unions do not have qualified immunity. *See, Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992).

- On overruling *Abood v. Board of Education*, 431 U.S. 209 (1978), J. Alito noted that "reliance provides a strong reason for adhering to established law." *Slip Op.*, 44. Alito then points out that unions had been on notice for many years regarding the Court's misgivings about *Abood.*

- Although acknowledging that the loss of payments from non-members may cause the unions "to experience unpleasant transition costs in the short term", the Court stated "we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from non-members and transferred to public sector unions in violation of the First Amendment." *Slip Op.,* at 47.

Suits to Collect Past Union Dues?

- The language of the *Janus* opinion explicitly applies only to employees who are not members of the union. "Neither an agency fee, nor any other payment to the union may be deducted from a ***non-member's*** wages . . . unless the employee affirmatively consents to pay." *Slip Op.*, at 48.

- But the logic of the opinion could lead one to conclude that a local government must obtain affirmative consent from an employee before continuing to deduct ***any*** charge, including union dues.

- "Unless employees clearly and affirmatively consent [as shown by 'clear and compelling' evidence] before any money is taken from them, this standard cannot be met." *Slip Op.*, at 48.

- Is an employee who is faced with the choice between being compelled to pay an agency fee and paying a little more to become a full-fledged member of the union making a truly free and voluntary decision to become a member of the union?

Suits to Collect Past Union Dues?

- Should governments require its unions to provide copies of membership enrollment forms for current employees?
- Should governments require that its employees execute post-*Janus* consent forms permitting the continued deduction of union membership dues from the employees' wages? If so, how long should unions be given to provide these post-*Janus* consent forms?
- Should local governments require its new hires to execute a form approved by the local government that clearly informs the employee that the employee is not obligated to join a union or pay union dues as a condition of employment?