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# An Argument for AFSCME

The case of *Mark Janus vs. the American Federation of State, County and Municipal Employee*s is one that is heavily nuanced and vastly complex. In short, the Supreme Court must decide if *Abood v. Detroit Board of Education* should be overruled, and therefore public sector agency fee arrangements declared unconstitutional under the First Amendment. Mark Janus, the petitioner, has entered the Supreme Court on the account of his compulsory union fees being representative of an unconstitutional violation of his First Amendment rights. He is calling for an overrule of *Abood v. Detroit Board of Education* in favor of declaring public sector union fees unconstitutional. However, AFSCME does not consider Janus' claims to be ground for overrule. The respondent believes that *Abood*'s repeated affirmation within the court and its deep entrenchment within the nation's union law gives it enough resiliency to withstand Janus' claims. AFSCME argues that *Abood* functions too highly as the basis of agency-shop arrangements across the country and that its overrule would do more harm than good. Ultimately, the case is built upon difficult technicalities and it demands to be considered at great lengths. Yet, when coming to a decision, it is evident that the Supreme Court should rule in favor of the respondent, AFSCME, to preserve the grounds of our nation's union law in the face of the petitioner's argument.

*Abood v. Detroit Board of Education* seems to be the center around which many points of this case orbit. This precedent allowed for agency fees under subsidized third party speech. It

ruled that in the public sector, the government can require employees to pay an exclusive representative for collective bargaining with the government, but not for anything considered to be political or ideological (i.e. lobbying). These funds are to be used at the discretion of the union, even if some nonmembers disagree with some of the union's spending. While these payments may appear to be infringing on the employee's First Amendment interests, any discrepancies are outweighed by the governments interests as an employer (ACS). The *Abood* Court anticipated some difficulty in drawing a line between collective bargaining and lobbying, so they imposed strict First Amendment scrutiny to issues outside of agency fees; such as compelled speech and association. However, even with this level of scrutiny, there have been instances of discontent among nonmember employees, some of which have brought *Abood* under question in the court. In 2016, the case of *Friedrichs v. California Teachers Association* sought to overturn *Abood,* resulting in a 4-4 deadlock after the death of Justice Scalia. As a result of this tie, the Court decided to uphold *Abood,* however it was not long before the issue returned to the court.

Preceding *Janus vs. AFSCME,* Illinois' State Governor, Bruce Rauner, approached the Court with a "declaratory judgement action in federal court against the State's public-sector unions seeking to have the State's statutory provisions authorizing agency fees declared un-constitutional." (AFSCME 12). While the motion to dismiss Governor Rauner's case was pending, Mark Janus and two other nonmember, state employees sought intervention in the case. Initially, the Attorney General denied their involvement and Governor Rauner's case was later dismissed on the account that it lacked standing and did not raise a federal question. Despite this loss, Janus and his cohorts were granted their motion to intervene, even though "technically there

was nothing for them to intervene in." (AFSCME 13). Ultimately, Janus continued to pursue this case, despite its dismissal in the State Court, resulting in its Supreme Court standing.

As the case presented stands, Janus seeks to overrule *Abood v. Detroit Board of Education* on the account that the collection of compulsory agency fees is an unconstitutional infringement upon his First Amendment rights. He seeks to defy Illinois' agency fee requirement and rejects his exclusive representation by AFSCME on the premise that in the context of collective bargaining, he is being unwillingly represented by the union in the public sector. In hopes of providing sufficient reason for overruling *Abood*, Janus presents a number of supporting justifications for his case; the strongest of which being the difficulty in distinguishing between collective bargaining and lobbying in the public sector. The crux of this argument rests upon the understanding that when the government serves as the employer, both bargaining and lobbying are considered to be acts of political speech. In addition, Janus claims that "bargaining subjects, such as wages, pensions, and benefits are important political issues." (Janus 11), thus contributing to the challenges in drawing a line between bargaining and lobbying. Therefore, Janus believes that when the union serves as an exclusive representative for public sector employees, it is speaking politically on the behalf of all workers. This issue is then escalated by the presence of mandatory agency fees for both members and nonmembers, as the collection of fees is representative of an employee's involvement and support of the union, even if they disagree with the union's spending. Without a way of regulating the union's bargaining, Janus indicates that the collection of funds is a violation of his freedom of speech, as it implies that he is in favor of the union's spending.

On this premise, Janus is arguing that *Abood* is unworkable. He states that the practical administration problems with this ruling stem from its conceptual flaw; that "it is difficult to

distinguish chargeable from nonchargeable expenses under the *Abood* framework." (Janus 26). Janus believes that *Abood* causes a lot of problems for public sector employees, as the union, AFSCME, is allowed to charge mandatory fees of all workers, even those who do not want to be associated with the union. In addition to fees being mandatory, AFSCME can even collect an umbrella "activities" fee, where they can claim funds for virtually anything they want without disclosing their spending to employees. As a result, the employees have no way of knowing if they have been overcharged or where their money is going because the union does not have to supply a list of expenses to nonmembers. This further infringes upon the employee's exercise of their First Amendment rights, as their money is being used in direct conjunction with the government as their employer without full disclosure of spending. Janus believes that *Abood* is only beneficial to the exclusive representatives, not the employees, as it allows for the charging of mandatory fees without clear distinction between collective bargaining and lobbying, therefore further limiting the employee's right to voluntary participation within the union. This, he claims, makes *Abood* unworkable.

Yet, the argument Janus presents is not entirely sound. In fact, it is questionable whether or not it should even be considered within the Supreme Court, as Governor Rauner's case has already been dismissed for lacking subject-matter jurisdiction. Despite Janus being allowed to proceed with an intervention in the lower court, the Supreme Court has always abided by the ruling of *United States ex rel. Texas Portland Cement Co. v. McCord*, of which states that "intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action," (AFSCME 16). This leaves Janus with very little ground to support his intervention, as Rauner's lawsuit has already been dismissed. Therefore, Janus would have to seek overrule of *McCord* to preserve the legitimacy of this case, of which he fails to do.

In addition, AFSCME argues that Janus lacks standing because overruling *Abood* would in fact be inconsistent with the original meaning of the First Amendment. Janus may claim that his First Amendment rights are being limited by the exclusive representative, but what he fails to understand is that employees have "no right to object to [the] conditions placed upon the terms of employment – including those [of] which restrict the exercise of constitutional rights" (AFSCME 17). This means that any employer has the right to regulate an employee's exercise of their First Amendment rights if it is in within the parameters of the workplace's terms and conditions. This is consistent in all workplaces where employment decisions may regulate speech. Under this precedent, the government is not excluded. When the government acts as an employer, it is also granted the same liberties in regulating its terms of employment, some of which may infringe upon an employee's constitutional rights (AFSMCE 18). In fact, overruling *Abood* would deny the government's prerogative as the employer, as strict scrutiny has never applied to public sector employees. It is never applicable to a person who speaks as a government employee. This is true of the collection of agency fees too, as employees become subject to mandatory union fees when they agree to work for the government. Therefore, AFSCME argues that *Abood* should be upheld because essentially, none of what Janus opposes is uncalled for. AFSCME instead suggests amending First Amendment scrutiny in the public sector, in place of complete upheaval of *Abood*'s ruling.

AFSCME also reasons that *Abood* should remain in place due to the risk of "free-riders" in the union. A "free-rider" is the result of a nonmember who is not charged the mandatory agency fees, yet still benefits from the actions of the union. These employees are "free riders whom the law requires the union to carry...even at the expense of its other interests," (AFSCME 34). Therefore, the union argues that the reasoning for charging fees is justified in not wanting

free-riders and in supporting labor peace. AFSCME says that by eliminating mandatory fees and allowing workers the option to independently vote for and fund the union, there will be little incentive to pay fees even if the employee is in favor of representation. Ultimately, "the incentive of '[a] rational worker' – even one who supports every position taken by the union – is 'not [to] voluntarily contribute' to the union, because the union's activities (and thus the worker's benefits) will not be affected by that individual action alone." (AFSCME 35). This concern is currently being managed by the ruling of *Abood*, and its overrule has the potential to severely detriment unions and their funding by allowing an influx of free riders. If this were to happen, and unions were to lose a portion of their funding, they would struggle to employ "lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel." (AFSCME 34). This would sacrifice the overall performance and functioning of the union, therefore cutting down on the quality of representation given to employees.

AFSCME clearly makes a strong argument for upholding *Abood* with their justifications for compulsory agency fees. Yet, that is not the only logic that rules in favor of the respondent. AFSMCE also argues that *Abood* should not be overruled because it would be inconsistent with stare decisis. Stare decisis is a doctrine of precedent. In other words, it refers to standing by a ruling that was made in a previous case. According to the Supreme Court, stare decisis is in place because it promotes consistency in the court and fosters integrity in the legal system. In this case, AFSCME argues that the court should maintain stare decisis and uphold the precedent because Janus fails to present reasons that equate to the conflict that will arise from overturning *Abood*. *Abood* was enacted over 40 years ago, and has been reaffirmed five times in this period. It has repeatedly confirmed that "the State's interest in maintaining orderly relations with its employees outweighs non-member employees' diminished First Amendment interest in withholding fair-

share fees." (AFSCME 48). Currently, *Abood* stands as the basis for union law across 24 states and thousands of local governments. AFSCME argues that it is far too deeply entrenched within our country to simply be overturned. In addition, the court says that to make an exception to stare decisis, one must provide sufficient justification, such as a ruling being unworkable. While Janus argues that *Abood* is indeed unworkable, AFSCME counters by stating that line-drawing difficulties are not strong enough reasons for complete overrule of a such long-standing decision; especially because "*Abood* itself recognized that the line between collective-bargaining and ideological activities would be "somewhat hazier" in the public-employee context." (AFSCME 51). Thus, it is evident that due to Janus' inability to present special justification for *Abood*'s overrule, in accordance with stare decisis the court should maintain the precedent and uphold the ruling.

In conjunction with stare decisis, further reasoning to support AFSCME's argument is the issue of reliance interests. Janus argues that an overrule of *Abood* will have insignificant effects on other state and local governments, as he simply claims that it will benefit employees over the exclusive representatives. However, what he fails to acknowledge is how *Abood* is deeply implemented within our country's union law. By overturning this ruling, the court would be revoking the laws of at least 24 states and countless public sector contracts. This disruption would be far from insignificant, as it would call "millions of public employees and affecting scores of critical services, including police, fire, emergency response, hospitals, and, of course, education." (AFSCME 50), into question. This would not be in the interest of reliance as it would require extensive, unnecessary legislative revisions to our current union law. Therefore, in this case AFSCME continues to seek the upholding of stare decisis, and in turn *Abood*, as the results of this overrule would be far more complicated than the petitioner seems to think.

On a less technical note, AFSCME also presents some sub-points of interest in their case. For example, Janus' claim can be weakened by the fact that the union held several public meetings where members and nonmembers could speak in discontent about the union's agenda. Janus never attended a single one of those hearings, therefore suggesting his lack of action in the workplace. In addition, Janus fails to present any evidence that indicates that he opposes any of AFSCME's views or decisions. He simply argues in opposition to the union fees without providing any reasoning for why he may not want to pay the fee beyond claims that it is "unconstitutional". This does not establish legitimacy in the petitioner, as "typically, when th[e] Court decides that a person's constitutional rights have been violated, the alleged violation stems from something concrete." (AFSCME 55).

After a thorough analysis of the case, *Mark Janus vs. the American Federation of State, County and Municipal Employees,* it is clear that AFSCME has presented an argument that is substantially elevated from that of the petitioner. The respondent provided a more nuanced case that was grounded heavily in the logistics of the law. Janus simply failed to address some of the difficulties that would arise from overruling *Abood* and did not supplement his case with adequate justification for that kind of overturn. It is not typical to overrule such a deeply entrenched law, and Janus could not provide the court with sound enough reasoning to make an exception. This is not to say that all court rulings should stand on precedent and the terms of stare decisis. Instead, it indicates that in this case, the solution was not to be found in a complete overrule of *Abood*. Instead, we must continue to consider this issue complexly to find a solution that will better accommodate the American people, rather than Mark Janus alone.

Works Cited

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