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Mandatory Agency Dues: Beneficial or a First Amendment Violation?

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Unions have long been recognized as a major cornerstone to American culture (<https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1228&context=mlr>) – they have helped ensure fair wages, hours, and benefits for American workers for over a century. However, the question has continuously come up in legal discourse of whether unions modernly maintain their importance and effectiveness as exclusive bargaining representatives (<https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1228&context=mlr>). This question raises an array of issues – one of those being whether public employees should be required to pay union dues when they are not members and do not support the union.

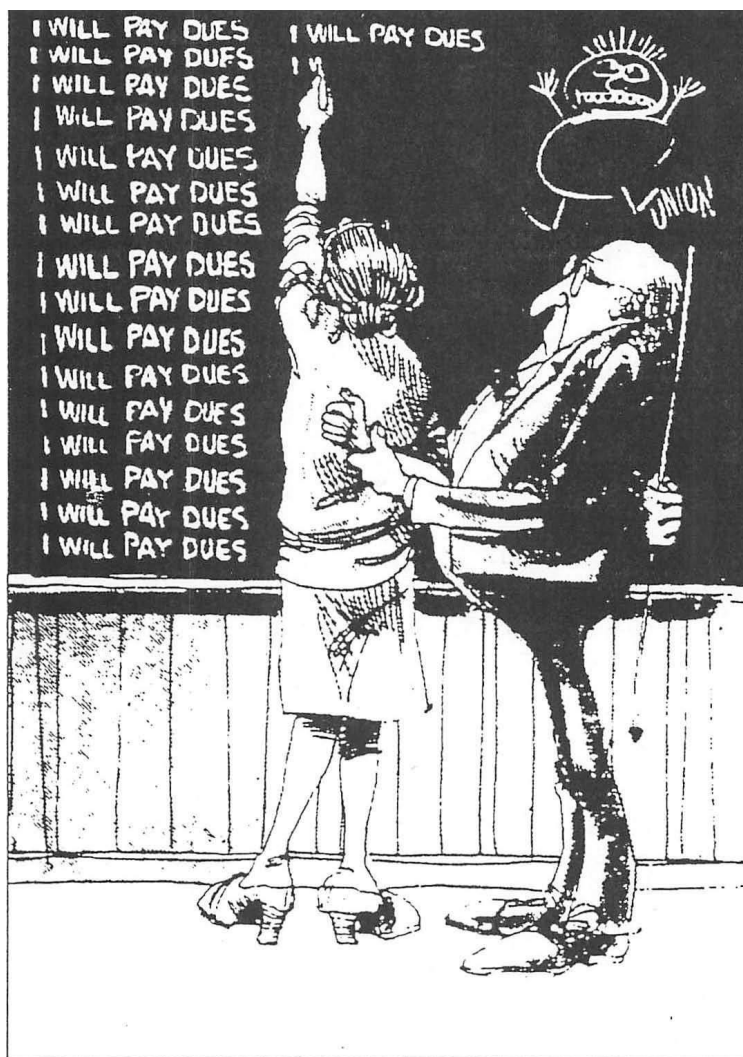
A case recently before the Supreme Court could end laws in 22 states (<http://www.scotusblog.com/2017/12/symposium-free-speech-right-public-employees-not-pay-union-dues/>) that requires public employees to pay “agency fees” to a union regardless of whether they are members of the union or wish to support it. The case (<http://www.scotusblog.com/2017/12/symposium-free-speech-right-public-employees-not-pay-union-dues/>) raised the question of whether unions are adequately and accurately representing the real interests of the public employees they are meant to represent.



Janus v. American Federation of State, County, and Municipal Employees (<http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf>) is an Illinois case that was affirmed by the United States Court of Appeals for the Seventh Circuit (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>). The specific question (<http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf>) before the Supreme Court was whether *Aboud v. Detroit Board of Education* should be overruled and public sector “agency shop” arrangements invalidated under the First Amendment. An “agency shop” (<https://www.dol.gov/general/aboutdol/history/glossary>) arrangement is a union security clause that requires all members of a bargaining unit, union members and non-members alike, to pay a service fee that is equivalent to union dues.

In *Aboud* (<https://supreme.justia.com/cases/federal/us/431/209/case.html>), a Michigan law was challenged under the First Amendment but the Supreme Court ultimately upheld the law. The Michigan law (<https://supreme.justia.com/cases/federal/us/431/209/case.html>) allowed a public employer whose employees were represented by a union, to require those of its employees who did not join the union to nevertheless pay fees to it because they benefited from the union’s collective bargaining agreement with the employer.

In *Aboud v. Detroit Board of Education*, the First Amendment challenge by plaintiffs (<https://supreme.justia.com/cases/federal/us/431/209/case.html>), (public school teachers in Detroit, Michigan) against defendants (the Detroit Board of Education and the exclusive union representative of public teachers in Detroit) was premised on the allegation that the union was engaged in various ideological activities of which plaintiffs did not approve and argued that the agency-shop clause was a deprivation of their freedom of association. Ultimately, the Supreme Court upheld the law (<https://supreme.justia.com/cases/federal/us/431/209/case.html>) but ruled that the fees could only be great enough to cover the cost of the union’s activities that benefited the non-members. Although the Court held that a public employer could enforce mandatory agency fees to non-members, the Court held (<https://supreme.justia.com/cases/federal/us/431/209/>) that such fees could not be expanded to enable the union to use a portion of them “for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union’s] duties as collective-bargaining representative.”



The [case](http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf) recently before the Supreme Court challenged Illinois's agency-fee law, claiming that it is unconstitutional under the First Amendment because it requires non-union members who disapprove of the union to nevertheless pay dues proportional to the costs of the activities that benefit them. *Janus* is now the [fourth case](http://www.scotusblog.com/2017/12/symposium-evidence-shows-unions-will-survive-without-agency-fees/#more-265204) since 2012 to challenge the Supreme Court's holding in *Abood*.

Similar to the Michigan law that was challenged in *Abood*, the [Illinois Public Labor Relations Act](http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0), 5 ILCS 315/1 et seq., is a law in which a union representing public employees is authorized to collect dues, not only from its members, but also from non-members. This [Act](http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=108&ChapterID=2) is a comprehensive statute designed to govern labor relations for a significant number of public employees; it establishes a duty for a public employer to bargain collectively with the exclusive representative of a unit of public employees and provides employers of public employees to require non-members to pay agency fees that equate to their "fair share."

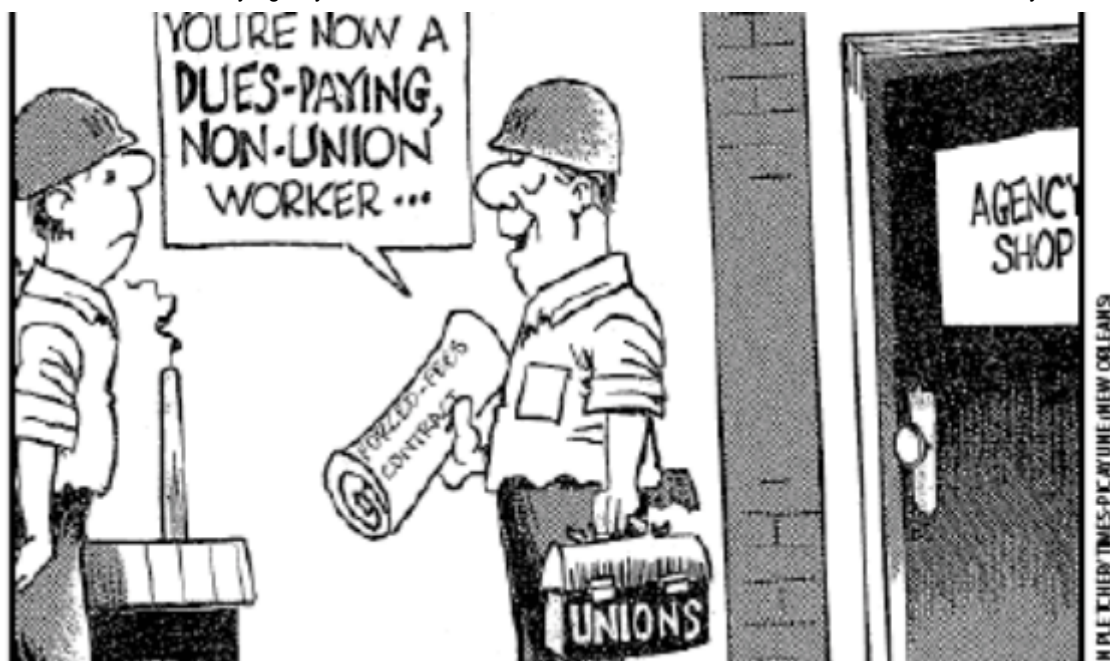
"Fair share" fees [are](http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0) a proportionate share of the costs of collective bargaining and contract administration for non-member employees, on whose behalf the union also negotiates. The [Act](http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=108&ChapterID=2) provides

that “[o]nly the exclusive representative may negotiate provisions in a collective bargaining agreement providing for the payroll deduction of labor organization dues, fair share payment, initiation fees and assessments” and allows for public employers to require non-member employees to pay their proportionate share of those costs.

In 2015 the governor of Illinois, Bruce Rauner (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>), filed suit in federal district court to halt the unions’ collecting these fees, his ground being that the statute violates the First Amendment by compelling employees who disapprove of the union to contribute money to it. The governor’s complaint was dismissed (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>) by the district court for lack of standing because the governor had nothing to gain from the relief sought (i.e. the elimination of the compulsory agency fees). However, two public employees – Mark Janus and Brian Trygg (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>) – had already moved to intervene as plaintiffs in the case. For the sake of judicial efficiency, the district court granted (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>) Janus and Trygg’s motion, ruling that there would be no material difference between intervening in the governor’s suit and bringing their own suit in the same court.

The district court nonetheless dismissed Janus’ and Trygg’s complaint – but on different grounds (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>). Plaintiff Brian Trygg (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>) was found to be precluded from litigating this claim in the present case due to previous litigation he was involved in that entailed the same set of facts and parties, and where he failed to raise the First Amendment issue in his appeal of that case. In contrast, Plaintiff Mark Janus (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>) has never before challenged the requirement that he pay the union “fair share” fees and he was thereby not precluded from litigating this issue in the present case.

However, as the plaintiffs acknowledged from the beginning, only the Supreme Court can overrule *Abood* and the case must first travel through the lower courts (i.e. the district court and court of appeals) before Supreme Court review can be sought. Thereby, Janus’ complaint was dismissed (<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D03-21/C:16-3638;J:Posner:aut:T:fnOp:N:1932800:S:0>) by the district court, and affirmed by the Seventh Circuit, on the grounds that he failed to state a valid claim.



On appeal to the Supreme Court, Janus argued (<http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf>) that the Illinois Statute unconstitutionally “empowers an exclusive representative not only to speak and contract for unconsenting employees in their relations with the government, but also to force those employees to pay for its advocacy.” Janus asserted that such a requirement is an infringement (<http://www.scotusblog.com/wp-content/uploads/2017/06/Janus-Cert-Petition-FINAL.pdf>) on an individual’s First Amendment rights because it deprives employees of his or her fundamental right to choose which speech is worthy of his or her support and wrongly requires non-member employees to “subsidize the union’s advocacy.”

Implications of Supreme Court’s Decision

There is a split in opinion on whether invalidating mandatory agency fees for nonmembers would be beneficial or detrimental. Those against mandatory agency fees (<http://www.scotusblog.com/2017/12/symposium-evidence-shows-unions-will-survive-without-agency-fees/#more-265204>), argue that unions can still adequately and effectively function as exclusive bargaining representatives without requiring those who do not support the union to pay fees and that unions “cannot claim that loss of those fees will compromise their viability.” Thereby, the First Amendment rights of millions of employees should be honored (<http://www.scotusblog.com/2017/12/symposium-evidence-shows-unions-will-survive-without-agency-fees/#more-265204>), and the “unconstitutional imposition of fees should not be allowed to persist.”

Those against mandatory agency fees argue (<http://www.scotusblog.com/2017/12/symposium-free-speech-right-public-employees-not-pay-union-dues/>) that because unions do not depend on compulsory dues to carry out their duties as exclusive bargaining agents, the states “do not have a compelling interest in suppressing the free speech rights of public employees who choose not to support the union.” Moreover, asserting that invalidating compulsory dues (<http://www.scotusblog.com/2017/12/symposium-free-speech-right-public-employees-not-pay-union->

dues/), would take the question of the value of collective bargaining away from the courts and the legislature and put it back in the hands of the “individuals best situated to discuss that question intelligently and arrive at their own, informed answer.”



On the other hand, those who want to keep mandatory agency fees argue (<http://www.scotusblog.com/2017/12/symposium-agency-fees-benefit-workplace-just-ask-states/#more-265194>.) that union representation is beneficial for all – including employers, employees, members and nonmembers alike. Those in favor (<http://www.scotusblog.com/2017/12/symposium-agency-fees-benefit-workplace-just-ask-states/#more-265194>.) of keeping mandatory agency fees argue that unions are effective voices for promoting the day-to-day concerns of employees in the bargaining unit, including wages, health and safety, paid sick days, and health-care benefits; and that agency fees are necessary and integral to the successful execution of this system which provides states with an important strategy for managing large and complex public workforces. In addition, proponents (<http://www.scotusblog.com/2017/12/symposium-not-just-workers-rights-case/>) have argued that agency fees are imperative to ensure and promote workplace equality and economic security for working women, people of color, LGBT workers and our nation as a whole.

Conclusion

The Supreme Court heard oral arguments on February 26, 2018. A decision to overturn *Abood* would create newly recognized First Amendment rights for employees in mandatory bargaining units. The Court’s decision on this issue will not only determine whether mandatory agency fees are constitutional, but may also elicit broad implications for employees in mandatory bargaining units if the Court does decide to overturn *Abood*.

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