

PORAC FILES AMICUS BRIEF IN SUPREME COURT CASE ON FAIR SHARE FEES

On January 19, 2018, PORAC, leading a coalition of fourteen other public safety unions and associations (representing nearly a half million public safety employees nationwide, including the National Association of Police Organizations and local organizations from California to New York), filed an amicus brief in the United States Supreme Court in the case *Janus v. American Federation of State, County, and Municipal Employees, Council 31* in support of AFSCME. The lawyers at Messing Adam & Jasmine organized the effort and filed the PORAC brief along with co-counsel at the Stanford Law School Supreme Court Litigation Clinic.

The issue that *Janus* presents is a familiar one for readers of *PORAC Law Enforcement News*: whether public sector unions may charge “agency fees” (also known as “fair share fees”) to nonmember employees in order to cover the costs of negotiating for those employees, representing those employees in grievances, *etc.* The Supreme Court is scheduled to hear arguments on February 26, 2018, and a decision is expected later this year.

As our Brief on behalf of PORAC argues, if Mr. Janus succeeds, then public sector labor unions will face significant risks to their funding streams. The decision would kick off what has been described as a ‘death spiral’: union members would face a starker financial choice when deciding whether or not to remain a member, because the Supreme Court would be creating their right to pay nothing towards the cost of representation, which would cause fewer people to retain their membership. This would require unions to raise their rates (because they would still have the same responsibilities for everyone in the bargaining unit despite having less revenue), which would in turn make the financial choice starker still, and on and on.

The question of whether or not the Court should send public sector unions down these ‘death spirals’ was most recently up for review before the Court in 2016 in *Friedrichs v. California Teachers Association* (2016) 136 S.Ct. 1083. In that case, the Court split 4 – 4 after Justice Antonin Scalia’s death, leaving the *status quo*, which allows unions to collect agency fees from non-members, in effect by way of their nine-word decision: “The judgment is affirmed by an equally divided court.”

In the May 2016 edition of *PORAC Law Enforcement News*, we and others correctly predicted that this question would rise quickly through the federal courts on review, and here we stand not two years later.

The legal question has not changed. Specifically, the Court has granted review in order to decide whether or not to overrule its 40-year old precedent in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) permitting public sector unions to charge the ‘fair share’ fees.

PORAC’s brief demonstrated to the Court how valuable public sector unions are to efficient governance in a number of states. Among other benefits, associations like PORAC efficiently collect and analyze information, prioritize issues during negotiations, and identify overlooked dangers and inefficiencies in state and local service. The California Attorney General’s amicus brief—one of the many other amicus briefs filed in the case—also attested to

the benefit that public employers receive from having strong, exclusive representatives to deal with when addressing workplace issues.

Furthermore, we noted why this case was a bad “vehicle” to bring before the Court such a categorical question challenging so many different kinds of public sector unions in so many different states and circumstances. This case took a relatively awkward procedural path to land before the Court, and this has had the significant result of leaving the relevant facts in this case underdeveloped.

Mr. Janus rushed this litigation to the courthouse before the decision in *Friedrichs* came down, on the hope that *Friedrichs* would prevail enabling Mr. Janus to begin dismantling Illinois public unions as quickly as possible. The case record contains none of the complex factual findings that an appellate court would need to review before it could make as sweeping a one-size fits-all change to public sector unions that it is considering.

Although public safety unions have historically strong membership rates, the risk to these unions remains. Furthermore, the labor movement is founded on the principles of solidarity and the belief that we win our biggest victories when we stand united with strong partners. PORAC members will be worse off if this case comes out in Mr. Janus’s favor. A weakened national labor movement would significantly undermine the ability of public safety unions to stand for public safety workers’ rights when we need to marshal our allies.

Unfortunately, it is not looking like *Abood* will survive this Court a second time. As for the eight holdover justices: there is no indication that any of them have changed their minds about the underlying law, and there is no reason to believe the facts in *Janus* are significantly different than the facts were presented in *Friedrichs* in 2016. Our new justice, Justice Neil Gorsuch, has not yet weighed in on this specific issue, but there is every indication that his relatively conservative jurisprudence will lead him to join an opinion along with the four other justices who are ready to overturn *Abood*.

At this point, we will have to wait to see how the oral argument goes on February 26, 2018, and how broadly or narrowly the Court decides to draft its holding. Keep a lookout for our next article in *PORAC Law Enforcement News* as this case develops.

Gary Messing, Gregg Adam, and Yonatan Moskowitz of Messing Adam & Jasmine LLP are PORAC-LDF panel attorneys. In April 2015, after practicing at Carroll, Burdick & McDonough for many decades, Gary, Gregg, and panel attorney Jason Jasmine formed a new law firm predominately representing public safety unions and their members in their labor relations.