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Are Marketing Orders and Checkoffs in Legal Trouble Again?

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A recent Supreme Court ruling against fees collected by public-employee unions from non-union members may lead to litigation of commodity checkoff program assessments. Marketing boards that considered this issue settled long ago should look closely at the similarities between this case and decades-old cases involving generic advertising.

On June 27, 2018, the U.S. Supreme Court handed down a decision on the constitutionality of compelled union dues. In a 5-4 opinion in *Janus v. AFSCME* [585 U.S. ____ (2018)] (see reference on page 4), the Court found that public employee unions could not compel non-union members to pay assessments called “agency fees” to support the union; something public employee unions across the country have regularly been doing for nearly half a century.

The controversy is not new, and in 1977, a very similar case against these compelled dues also made it to the Supreme Court. In *Abood v. Detroit Board of Education* [431 U.S.

209 (1977)], the Court had held that because collective bargaining by the teachers’ union benefited non-union members and because Congress and the state of Michigan had determined that collective bargaining was important for labor relations, public unions could compel non-union members to support the part of the union’s activities related to collective bargaining. Hence, non-union public employees find part of their paycheck going to support union activities.

Agricultural boards and commissions representing farmers in dozens of industries spend nearly \$1 billion per year on generic advertising.

The *Janus* case was very similar to the *Abood* case (both were brought by non-union public employees who objected to the compelled support of union activities with which they disagreed); in fact, so similar that a lower court ruled against the plaintiffs citing the *Abood* ruling. Nevertheless, the plaintiffs in *Janus* appealed and, on June 27, 2018, the Court overturned this long-standing *Abood* ruling. The Court held that the 1977 *Abood* decision was

flawed, and negated it in their *Janus* decision. Non-union public employees may no longer be compelled to support the union’s activities even if those activities benefit them.

The Court cited the First Amendment of the U.S. Constitution, which has long been held not only to protect a citizen’s freedoms of speech and association, but freedom from compelled speech and compelled association. Since a union was using the non-union employees’ fees to promote collective bargaining, the Court ruled that they were compelling those employees to send a message with which the employee might not agree and the First Amendment strictly forbids this.

Marketing Boards Should Take Heed

Generic advertising and promotion is marketing that does not promote a particular brand of a good, but instead promotes the entire industry. “Got Milk?” is likely the most famous of the generic campaigns. The collection of dues to pay for generic marketing has always been controversial and became especially litigious in the farming community in the 1990s and early

Figure 1. Timeline: United States Supreme Court Decisions

1977 – ●	<i>Abood</i> . Held that compelled assessments from non-union members was legal if the assessments supported a greater regulatory need.
1997 – ●	<i>Glickman</i> . Used <i>Abood</i> as basis for compelled assessments in agricultural marketing orders.
2001 – ●	<i>United Foods</i> . Limited <i>Glickman</i> to cases where regulatory need was broader than promotion alone.
2005 – ●	<i>Johanns</i> . Turned promotion from checkoff into government speech thus shielding checkoffs from free-speech attacks. <i>Johanns</i> would seem to make <i>United Foods</i> moot.
2005-2018 – ●	Generic promotion supported in courts by either applying <i>Glickman</i> , <i>Johanns</i> , or both.
2018 – ●	<i>Janus</i> . Throws out <i>Abood</i> and by implication <i>Glickman</i> . Uses <i>United Foods</i> as support in ways that call into question whether <i>Johanns</i> is now implicated.

2000s. In an earlier *ARE Update* (2015), I, along with co-authors Saitone and Sexton, summarized the three most recent court cases concerning generic advertising or “checkoff” assessments and concluded that future litigation on the constitutionality of generic advertising is not likely or, at least, not imminent. Today, I am not so sure.

Agricultural boards and commissions representing farmers in dozens of industries spend nearly \$1 billion per year on generic advertising. In 2005, the U.S. Supreme Court ruled in *Johanns v. Livestock Marketing Association* [544 U.S. 550] that generic advertising was different from other forms of advertising and not compelled speech. Its assessments were more like taxes collected by the government to put forward a government-backed message. Thus, as government speech, it was not the same as other types of compelled advertising.

Since that 2005 *Johanns* decision, I have believed and often stated that litigating over the First Amendment issues of marketing orders was moot. It was a settled issue in my opinion. Checkoffs for advertising and promotion are government speech, and hence not part of a First Amendment issue. I am not a lawyer, but this recent *Janus* decision has me reconsidering the conclusiveness of *Johanns*.

The 2018 *Janus* decision raises five important legal questions pertaining to the agricultural checkoff programs. The starting point for these five questions is understanding that to date, the roughly two-dozen federal agricultural marketing orders that can undertake advertising and promotion, along with the various state orders and stand-alone checkoff programs (like those for beef and pork), have been justified either on the basis of the 1977 *Glickman v. Wileman Brothers & Elliott, Inc.* [521 US 457] decision, the 2005 *Johanns* decision, or both.

The 2018 Supreme Court did not casually reverse Abood in the Janus decision; they very forcibly reversed that earlier opinion. This Court took great care to explicitly say the earlier Court was greatly in error.

Question 1. Does legal longevity mean anything for the programs?

The biggest question that *Janus* raises for me when considering its impact on agricultural marketing orders and checkoffs is why the Court took up the *Janus* case at all. The *Abood* decision in 1977 made agency fees the law of the land ... until it didn't. Few expected *Abood* to be overturned, and it has been used regularly in lower court decisions in similar cases for

nearly half a century, and agency fees had existed prior to 1977. Thus, the policy upheld in *Abood* has been part of American labor law for a very long time.

Agricultural checkoffs have likewise been around for a very long time. The point here is that just because a ruling has been around for a long time does not make it safe. In the case of *Janus*, the Court is saying very clearly not to tinker with the First Amendment, and a very strong governmental reason is needed for putting constraints on the Constitution. That argument has been raised by plaintiffs in all of the commodity promotion cases to date as well.

Question 2. Can programs stand on one leg?

The *Glickman* case that made the generic promotion of peaches, plums, and nectarines legal is now most likely gone because *Abood* provided the basis for *Glickman*. The 2018 Supreme Court did not casually reverse *Abood* in the *Janus* decision; they very forcibly reversed that earlier opinion. This Court took great care to say explicitly the earlier Court was greatly in error.

Abood made compelled speech and assessments legal if a state had an important regulatory need like good labor relations. *Abood* figured heavily in the *Glickman* decision that said tree-fruit assessments to pay for generic promotion and advertising were constitutional because the marketing order was, likewise, satisfying a larger regulatory need of Congress for orderly commodity markets.

The majority in the *Janus* opinion never mentions *Glickman*. However, they most certainly knew about it, as Justice Kagan's dissent mentions *Glickman* twice while arguing *Abood* is a well-established law that has been used to back several other cases and that now all of those cases are going

to be tossed because of the *Janus* decision. If Justice Kagan is correct, then *Glickman* is now out. Many marketing programs had two legs to stand on; *Glickman* is used along with *Johanns* to justify the universal assessments. Now, one of those supporting legs is gone.

Question 3. Generic marketing is predicated in part on the fear of free ridership; is the current Court open to that argument?

The idea makes sense. If one farmer's grapes are indistinguishable from another farmer's grapes, then neither farmer will undertake grape advertising knowing the other farmer will free ride. Generic advertising compels all farmers to pay for advertising because it benefits everyone in the industry.

The free ridership rationale was brought up in the *Janus* labor union case, too, but the majority did not seem very impressed by this very old argument. The majority opinion raises the question and then dismisses it by saying the erroneous *Abood* decision "pinned its result on the *unsupported empirical assumption* [that] 'the principle of exclusive representation in the public sector is dependent on a union or agency shop.' ... But, as already noted, experience has shown otherwise." (*Janus*, p. 42, italics mine). The majority cites studies showing public employee membership has increased relative to private union membership, and the public sector seems to have no problem getting members even in right-to-work states.

Marketing orders and checkoffs also get majority farmer support. Can their boards demonstrate that their advertising programs would succumb to the free-rider effect were some farmers to object to paying?

Another issue with free riders relates to when the agricultural programs were begun (1940s, 50s, and 60s in

many cases). Decades ago, farm products were more easily considered commodities than today when more and more farms and cooperatives brand their products or seek other means to differentiate them from rivals' production. These brands may not wish to pay into a generic program that also helps their non-branded competitors. Product differentiation was a key theme in both *Glickman* and four years later in another generic advertising case: *United States v. United Foods, Inc.* [533 U.S. 405 (2001)]. In both cases, plaintiffs argued their products were different from the wider commodity.

The Janus v. AFSCME decision has definitely implicated two earlier agricultural commodity cases (Glickman and United Foods); it seems to me only a matter of time before there is a challenge to the remaining generic advertising case: Johanns.

As more and more companies seek to brand and differentiate their products, the free rider rationale becomes less and less of an issue. The majority rejected free rider rationales in unions. They may also find such rationales that often go back to Depression-era legislation anachronistic.

Question 4. How does the United Foods opinion fit in?

In between *Glickman* in 1997 and *Johanns* in 2005, came the 2001 *United Foods* decision. *United Foods* was a case involving the generic marketing of mushrooms. That program was deemed unconstitutional. The Court majority held that in the particular case of mushrooms, the checkoff only existed for the purpose of promotion and, as such, it lacked the larger regulatory heft of the *Glickman* case. Since the compelled speech was not part of a broader regulatory structure (like efficient fruit markets in *Glickman* or labor relations in *Abood*), then compelled

assessments to support generic marketing of mushrooms violated the First Amendment.

What happened next is that from 2001 to 2005, marketing boards scrambled to present themselves as being part of a broader regulatory scheme to shelter under the *Abood/Glickman* umbrella. The majority in *Janus* never cited *Glickman*, but did cite *United Foods*. What is interesting about *United Foods* is how they cited it. *United Foods* was seen at the time as a very narrow ruling against generic marketing and lower courts seemed to nearly always give deference to Congress that other commodity programs were broader in regulatory scope than the very narrowly tailored mushroom program. And because of that, the *United Foods* decision did not get a lot of traction (except in an important case concerning the beef checkoff, which I shall turn to next). Lower courts from 2001 to 2005 mostly applied *Glickman* in challenges to generic promotion programs. This 2018 Court majority cites *United Foods* positively no less than three times in the *Janus* opinion (and never cites *Glickman*) in order to overturn a case that was similar to *Glickman*.

Here is a particularly interesting quote where the Court majority writes of the First Amendment implications of the *Janus* decision for commercial speech:

"Even though commercial speech has been thought to enjoy a lesser degree of protection, ... prior precedent in that area, specifically *United Foods*, supra, had applied what we characterized as 'exacting' scrutiny, ... a less demanding test than the 'strict' scrutiny that might be thought to apply outside the commercial sphere. Under 'exacting' scrutiny, we noted, a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" (*Janus*, p. 10)

In other words, the Court's earlier decision in *United Foods* is completely pertinent to their opinion in *Janus*. There needs to be a compelling state interest in the speech that cannot be achieved any other way, even for something that up until now has been considered by other courts as a broader regulatory interest. Hence, that compelling interest would seem today to be much higher than labor relations through collective bargaining. Is agricultural marketing a more compelling interest?

Question 5. Why is nobody talking about *Johanns*?

From 2001 to 2005, as lawyers argued whether *Glickman* or *United Foods* was the correct test of a mandatory marketing program, eventually two appeals courts reached conflicting decisions. The case that was raised to the Supreme Court in 2005 from this conflict was, of course, the challenge to the beef checkoff in *Johanns*. Until *Johanns*, lower courts facing a challenge to a checkoff mostly cited *Glickman* (and *Abood*) and upheld the checkoff program.

The late Justice Antonin Scalia, cut the Gordian's knot. Scalia made both *Glickman* and *United Foods* of less importance to the argument over generic marketing assessments when, writing the majority opinion, he accepted and expounded upon an argument put forward by the government in *Johanns* that the beef checkoff did *not* violate the First Amendment because a checkoff-funded advertisement is not farmers speaking—it is the government speaking.

The checkoff assessment is merely a type of tax and the fact that Congress wants to collect it through the marketing boards does not change that. Ranchers can no more argue that the “Beef! It's what's for dinner” commercial violates their First Amendment rights than an oil company can argue

against the government using gasoline taxes to tell people to conserve energy. That ruling would seem to be the end of the argument concerning generic advertising, and I have made that argument myself.

In *Janus*, the dissent cites *Glickman*. The majority cites *United Foods*. But, nobody mentions *Johanns*. It is as if *Johanns* doesn't exist; there is not even a footnote to suggest, “*Johanns* is different.” Reading the opinion in *Janus* and Justice Kagan's dissent, the arguments for constitutionality all go back to the original free-speech arguments—not the government speech argument. Why would the majority, who bring up *United Foods*, not say, “By the way, we do not include generic advertising, which is government speech and a settled opinion” and why would the minority, who bring up *Glickman*, not write, “Surely the majority does not mean to include cases of government speech?”

Courts like to tidy things up when they can. Leaving the *Johanns* ruling out altogether might have been an oversight (not likely), or perhaps they could not agree on whether it was pertinent and in what way, or perhaps, the entire Court was signaling they were not really satisfied with how easily free speech issues got tidied up in *Johanns*.

Justices Breyer, Kennedy, Thomas, and Ginsburg were all around for *Johanns*. Justice Kennedy (now departing) was a dissenter to it, while the other three concurred with Scalia. Today in *Janus*, the dissenters are Kagan, Sotomayer, Breyer, and Ginsburg (Breyer and Ginsburg were in the majority in *Johanns* while Kagan and Sotomayer arrived on the Court long after). Kennedy was already against *Johanns*, and there is a good chance so will be his replacement. If Thomas reconsiders and Kennedy's replacement has the same opinion as his predecessor, the Court could also overturn *Johanns*.

These five questions need good answers. The *Janus v. AFSCME* decision has definitely implicated two earlier agricultural commodity cases (*Glickman* and *United Foods*); it seems to me only a matter of time before there is a challenge to the remaining generic advertising case: *Johanns*. Since *Johanns* is the only case that is now keeping generic commodity promotions around, I would be surprised if marketing boards, like labor unions, do not find themselves in court over an issue they once believed settled.

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For additional information, the author recommends:

Janus v. AFSCME 585 U.S. ____ (2018) https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

Crespi, J.M., T.L. Saitone, and R.J. Sexton. “The Supreme Court's Decision in the ‘Raisin Case’: What Does it Mean for Mandatory Marketing Programs?” *ARE Update* 18(6), July / August 2015.