MiARA Newsletter

Michigan Alliance for Retired Americans®

July 2018

July MiARA General Meeting Set for Tuesday, July 24th in East Lansing

The next meeting of the Michigan Alliance for Retired Americans (MiARA) will take place on **Tuesday, July 24, 2018, at 11:00 am to 2:00 pm.** The meeting will take place in East Lansing at the Michigan Education Association Headquarters located at 1216 Kendale Blvd., East Lansing, Michigan 48823.

Highlighting the meeting will be information about the August 6th, primary election. Members will not want to miss this important discussion.

Our keynote speaker is Mark Gaffney who can always get his audience excited. Several candidates running in the August primary and other union officials are expected to join us.

MiARA Meeting Mark Your Calendar

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MiARA Endorses Candidates in August 7th Primary Election

The MiARA executive board voted to endorse the following list of primary candidates at its mid-June meeting. Michigan Democrats, Republicans, and other parties will have primaries on August 7, 2018 to set the ballot for the November 6, 2018 General Election.

Governor
- Gretchen Whitmer

Secretary of State
- Jocelyn Benson

Michigan Supreme Court:
- Samuel Bagenstos
- Megan Kathleen Cavanagh

11th Congressional District
- Tim Greimel

9th Congressional District MiARA*
- Andy Levin
- Ellen Lipton

*(dual endorsement)

35th District Michigan House of Representatives
- Vincent Gregory

Oakland County Commissioner
- David S. Bowman

Janus: An Attack on Labor

The following article is by Joseph Slater, Eugene N. Balk Professor of Law and Values and Distinguished University Professor at University of Toledo College of Law.

In *Janus v. AFSCME,* the Supreme Court, in a 5-4 decision, overturned a 41-year old precedent and held that all union security clauses in public-sector labor contracts violate the First Amendment. A union security clause is provision in a contract between a union and an employer that obliges members of the union bargaining unit to pay at least that portion of their dues that goes to "activities related to collective bargaining." *Janus* will significantly damage unions economically. That is because "duty of fair representation" ("DFR") rules require unions to represent employees whether or not they pay dues. It will thus hurt the ability of unions to represent workers, and it will hurt the Democratic Party institutionally.

Union security clauses and the DFR arose out of the U.S model of "exclusive majority" representation. Under this model, if a majority of a group of workers show they support unionization, a union becomes the exclusive bargaining representative for all the workers in that unit. The DFR rule states that because unions have this power, they must represent employees fairly. Crucially, the DFR includes the duty to represent bargaining unit members in both contract negotiations and grievance/arbitration cases regardless of whether they pay dues.

Thus, so-called "right to work" laws – laws barring union security agreements, the rule *Janus* now imposes as a matter of Constitutional law – create significant "free rider" problems for unions. Under this rule, some employees will receive the benefits of union membership without paying for them. Some employees are happy to be in a union but not pay dues. A brief in *Janus* showed that unions have been recertified by a majority vote of employees, even though a majority had opted out of paying any dues.

In 1977, *Abood v. Detroit Board of Education* balanced the state's interest in collective bargaining as a tool to help manage public employees and preserve labor peace against the First Amendment interests of dissenting employees. It created the following compromise: union security clauses could require payment of that portion of union dues that went to activities "related to collective bargaining" but not that portion that went to activities not related to collective bargaining. The main activities related to collective bargaining were contract negotiation and grievance/arbitration cases; the main activity not related was politics. Thus, under *Abood*, if a union spent 90% of its dues income on contract negotiation and administration and 10% on politics, a union security clause could not require objecting bargaining unit members to pay 10% of their dues.

In H*arris v. Quinn*, a 2014 case, a five-member majority of the court, while reaching a limited decision on the facts, indicated a willingness to consider overturning *Abood*. Many thought *Friedrichs v. California Teachers Ass'n* in 2016 would overturn or alter *Abood*, but Justice Scalia's death left the Court deadlocked 4-4, preserving *Abood*.

Janus overturned *Abood* entirely. The majority opinion by Justice Alito, joined by Thomas, Gorsuch, Kennedy, and Roberts, argued *Abood*'s balancing was incorrect because it undervalued plaintiffs' First Amendment interests and overvalued the state's interest in union security clauses. Regarding the former, the majority rejected a comparison to the line of cases (*Connick*, *Pickering*, and *Garcetti*) in which the Court allowed the government significant discretion in limiting the free speech rights of individual public employees because of the government's rights in its role as an employer.

Those cases include the rule that normal workplace grievances are not a matter of "public concern" and therefore cannot implicate the First

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Amendment. In contrast, *Janus* essentially held that *everything* a public-sector union does is a matter of public concern.

As to the state's interest, the majority argued there is now more data about public-sector collective bargaining than there was at the time of *Abood*. This was odd, given that *Janus* had no factual record. The majority rejected the "free rider" argument, noting that unions in "right to work" jurisdictions still seek to become exclusive representatives, and so they must see a benefit for themselves in that status. Intriguingly, the majority implied that states could alter DFR rules to allow unions to charge employees they represent who do not pay dues for the costs of arbitrations. Still, the majority warned that major distinctions between union members and those who do not pay dues (*e.g.*, in contract negotiations) were likely unconstitutional.

Justice Kagan's dissent, joined by Breyer, Ginsburg, and Sotomayor, argued that *Abood* worked well in practice, matched the Court's approach to the First Amendment rights of public employees generally, and is deeply entrenched in law and reality. Employers receive significant benefits from bargaining with an exclusive representative (*e.g.*, not having to deal with multiple unions). This system requires unions to have adequate funding to avoid being decimated by free riders. The issue is whether unions will be *able* to be effective negotiating partners, not whether they want to be.

The dissent rejected the "special rule" for union speech, stressing that government employers have substantial latitude to regulate employee speech, including the rule that the First Amendment does not protect speech by individual employees about conditions of employment. The dissent raised challenging hypos involving groups of non-union employees agitating for better benefits. It is now unclear whether such groups would be engaged in protected speech. Finally, the dissent maintained that even if union speech is a matter of public concern, under the balancing test, the employer's interests should prevail.

The dissent concluded: "the majority has chosen the winners by turning the First Amendment into a sword and using it against workaday economic and regulatory policy."

Janus will significantly diminish union resources. Estimates of membership loss range from 8.5% -30%. While *Janus* only applies to public employees, because they constitute nearly half of all U.S. union members, it will hurt the entire labor movement and its ability to represent members. It will also hurt the Democratic Party. Where "right to work" rules have been adopted, the share of Democratic votes drops 3.5%. Blue states may adjust some DFR rules, and unions have promised to redouble efforts at internal organizing. But this decision is a frontal and unnecessary attack on labor.

Unions Urge Senate to Reject Supreme Court Nominee Brett Kavanaugh

Working families and retirees deserve a Supreme Court justice who will respect their rights and who will enforce decades of legal precedent that protect them in the workplace and in retirement. After a thorough review of the record of Trump's pick to replace retiring Justice Anthony Kennedy, the AFL-CIO and many of its affiliated unions have called on the Senate to reject the nomination of Brett Kavanaugh.

The American Federation of Teachers (AFT) issued a statement that Judge Kavanaugh's rulings raise very serious concerns about where he stands on key issues like employees' right to organize, workplace discrimination, voting rights, marriage equality, access to reproductive healthcare and corporate responsibility.

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Equally important, according to AFT, Judge Kavanaugh has written that a president should not be subject to subpoena or indictment, writings that, given the current Mueller investigation, should have been disqualifying.

Below is a summary by AFL-CIO senior web writer and labor law blogger Kenneth Quinnell of many troubling opinions held by Judge Kavanaugh.

Kavanaugh routinely rules against workers and their families:

- In American Federation of Government Employees, AFL-CIO v. Gates, a partial dissent argued that Kavanaugh's majority opinion would allow the secretary of defense to abolish collective bargaining at the Department of Defense.
- In Agri Processor Co. Inc. v. National Labor Relations Board, he argued that a company didn't have to bargain with an employee union because the employees were ineligible to vote in the union's election because they were undocumented immigrants.
- In SeaWorld of Florida LLC v. Perez, he argued that a safety citation issued against SeaWorld after a killer whale killed a trainer was too paternalistic.
- In Venetian Casino Resort LLC v. NLRB, he sided with a casino after an NLRB decision that the hotel engaged in unfair labor practices by requesting that police officers issue criminal citations against legal protesters.

Kavanaugh regularly sides with employers in denying working people relief against discrimination in the workplace:

- In Miller v. Clinton, he argued that the U.S. State Department could fire an employee because he turned 65.
- In Howard v. Office of the Chief Administrative Officer, he argued that a black woman couldn't pursue a race discrimination suit after being fired as the deputy budget director at the U.S. House of Representatives, claiming that the firing was protected under the Speech or Debate Clause of the Constitution.

Kavanaugh rejects the right of employees to receive employer-provided health care:

- In Seven-Sky v. Holder, he argued in a dissent that a president could declare the Affordable Care Act unconstitutional and not enforce it, despite it being passed by Congress.

Kavanaugh promotes overturning U.S. Supreme Court precedent:

He appears eager to overturn the well-established U.S. Supreme Court precedent of Chevron USA Inc. v. Natural Resources Defense Council Inc., which held that unelected judges must defer to executive agencies' construction of a statute when Congress has given an agency primary responsibility for interpreting its mandates, so long as the agency does not act contrary to Congress' clear intent.

- In United States Telecom Association v. Federal Communications Commission, Kavanaugh argued that the court shouldn't defer to executive agencies when it comes to what he thinks are "major rules."

Kavanaugh regularly sides with the privileged, including corporations, over the less powerful:

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- He wrote two dissents contending that a large corporation, in these cases Exxon Mobil Corp., should not be held responsible for its overseas misconduct. After Indonesian villagers alleged they were tortured and killed by soldiers working for Exxon, Kavanaugh argued that allowing the villagers to sue Exxon would interfere with the U.S. government's ability to conduct foreign relations.

- In United States v. Anthem, he sided with the merger of insurance companies Anthem and Cigna, which would have reduced competition for consumers in 14 states. The majority criticized Kavanaugh's application of "the law as he wishes it were, not as it currently is."

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